Stephen J. Morewitz
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Handbook of Forensic Sociology and Psychology

Springer

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ISBN 978-1-4614-7177-6 ISBN 978-1-4614-7178-3 (eBook)
DOI 10.1007/978-1-4614-7178-3
Springer New York Heidelberg Dordrecht London

Library of Congress Control Number: 2013942387

Preface

Over the past few decades, the role of forensic sociology and forensic psychology has expanded in the US court system. This is the first handbook that will analyze the principles, theories, and methods of both forensic sociology and psychology and their use in the justice system.

The *Handbook of Forensic Sociology and Psychology* examines the roles of sociologists and psychologists as expert witnesses and consultants in different civil, criminal, and immigration cases. It will show how forensic sociology and forensic psychology principles, theories, and methods can be used in a variety of areas such as personal injury, child custody, and employment. In addition, forensic sociologists and psychologists testify as expert witnesses and provide technical consultations on diverse issues ranging from personal injury and premises liability to political asylum and environmental disasters.

Based on their research and training in specialized areas of sociology and psychology as well as in quantitative and qualitative research methods, sociologists and psychologists assist attorneys and law firms by offering expert testimony about different aspects of litigation. Social and behavioral scientists can assist organizations and policy makers in developing appropriate organizational, individual, family, and other settings.

As consultants, they can help attorneys and law firms by conducting experiments, constructing juror questionnaires and interview protocols for the *voir dire*, designing case-specific juror profiles, conducting mock trials, assisting in preparing strategies and research for depositions, and observing trials and providing feedback during trials.

- Chapter 1: Dr. Daniel B. Kennedy describes forensic criminology as the application of criminological knowledge to issues before the courts. Forensic criminology includes the scientific study of the making of law, the breaking of law, and societal reactions to the breaking of law.
- Chapter 2: Dr. Craig J. Forsyth describes the use of sociology as mitigation in criminal cases. He also addresses the different styles of mitigation and theories he has used. The subculture of violence as an example of theory is used as an example of his recent testimony in the sentencing of a murder case. The author has worked in over 300 violent crime cases since 1988, most of which were capital murder, but also include second-degree murder, manslaughter, armed robbery, and rape.

- Chapter 3: Dr. Valerie McClain, Dr. Elliot Atkins, and Professor Michael L. Perlman analyze the role of the forensic psychologist in the mitigation phase of a death penalty trial. The authors assess the development of Supreme Court case law in this area and analyze the structure of constitutionally acceptable statutes, focusing on the roles of aggravators and mitigators. The authors evaluate the role of the forensic expert in presenting mitigation evidence, the meaning of mitigation, how mitigation evidence may be gathered (with special attention being paid to issues of neuroscience evidence), report writing, and the preparation of mitigation testimony. They analyze some of the special issues related to mitigation, including adequacy of counsel, prohibitions against executing defendants with severe mental impairments, the dilemma of "death qualified" juries, and the use of forensic witnesses by the prosecution. Finally, the authors provide some modest suggestions for enhancing this area of forensic area.
- Chapter 4: Dr. Richard A. Leo and Dr. Deborah Davis analyze the problem of interrogation-induced false confession, focusing on the sources of failure in prevention and detection. The authors evaluate why do false confessions occur, and what can be done to prevent them? In addition, Drs. Leo and Davis analyze why these false confessions remain undetected once elicited, and what can be done to more successfully identify them when they do occur? In addressing each question, the authors focus on the role of failures of relevant knowledge and understanding among those who elicit and misjudge false confessions.
- Chapter 5: Dr. James T. Richardson evaluates the meanings attached to the concept of brainwashing, critiques those uses of the term, assesses the concept from the perspective of rules of evidence, and offers alternative explanations about how and why young people in America and other societies have chosen to participate in new religions.

Other chapters analyze additional forensic areas, including the use of sociological testimony in litigation involving human factor issues, abuse, partner violence, suicides, alcohol and other drugs, medical malpractice, product liability, and toxic tort and the role of psychological testimony in competency evaluations, child custody, parental alienation, and child abuse cases.

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Acknowledgments

Stephen would like to thank Mrs. Myra Kalkin Morewitz and Dr. Harry A. Morewitz for their advice and support.

Mark would like to thank his wife, Lisa, for her support, understanding, encouragement, and love. He would also like to thank his children, Ashley and Jonathan, who provide healthy role models.

We would also like to thank Sharon Panulla, Psychology Executive Editor at Springer, who has been supportive as well as thorough and thoughtful.

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Evolving Practice Parameters of Forensic Criminology

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Daniel B. Kennedy

As is probably true for many of us in the workplace, my career has not turned out quite as I envisioned it would some 40 years ago. More specifically, as a beginning graduate student in sociology, I had no idea I would eventually practice forensic criminology or be in a position to write about what follows. In fact, I had never heard of forensic criminology (FC) until years later and, I believe, neither had my academic colleagues. It was only after I began to practice as a forensic criminologist and to identify myself as one that the parameters of this fascinating area of expertise began to reveal themselves more fully to me.

In the early 1980s I was serving as an assistant professor of criminal justice at the University of Detroit. While listening to the radio en route to work one day, I heard a news story about a suicide in the Wayne County Jail. Given my "publish or perish" mode at the time, I decided to study this inmate's suicide and learned, much to my surprise, that a custody suicide can be quite difficult to predict or prevent. After developing a rudimentary theory to explain certain custody suicides, I published an article in a widely read police journal (Kennedy, 1984a) then continued about my standard academic business. Not long after the article was published, an attorney involved in litigation generated by a student's death in a university police department's lockup contacted me. I consulted on that case and then another. Meanwhile, a colleague at Michigan State University who had written about police pursuit collisions was also contacted by various attorneys. Eventually, both of us fielded inquiries about crimes committed on business premises, at educational institutions, in apartment complexes, and at a variety of other property types. I was able to field these inquiries because I had developed a course sequence in private security in order to attract students to replace those lost when the federal LEEP program ceased paying for the tuition of police and correction officers. As time went on, I immersed myself further in the security literature and the publications of the American Society for Industrial Security. The knowledge thus accumulated was to prove extremely helpful in my newfound forensic career.

In a most serendipitous fashion, then, I had stumbled into the litigation explosion (Olson, 1991). The victims' rights movement and a number of appellate court cases, such as *Kline v. 1500 Massachusetts Avenue* (1970) and *Monell v. Department of Social Services* (1978), enabled the types of litigation to be described throughout this chapter to go forward (Carrington & Rapp, 1991; Homant & Kennedy, 1995; Kaminsky, 2008; Ross & Chan, 2006). As I was eventually to learn, there was and is a central role for criminological knowledge to play in this consumerist expansion of legal liability generated by crime and the actions or inactions of formal and informal agents of social control (Horwitz, 1990). In essence, security

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_1,

"place managers" (Eck, 2003; Felson, 1995), police officials, corrections officials, and their employers could be held responsible for negligent action or inaction. Just as importantly, however, they were to be exonerated when appropriate.

None of this chronology should be taken to imply that I "discovered" the practice of FC. True pioneers in this field would include Hans Gross at the turn of the twentieth century (Turvey, 2008) and the early contemporary contributions of Marvin Wolfgang (1974). More current FC scholarship may also be found in the work of Kennedy (1984b, 1990, 1993), Anderson and Winfree (1987), Sherman (1989), Voigt and Thornton (1996), Jacobs (2004, 2005), Winfree and Anderson (1985) and, most recently, Petherick, Turvey, and Ferguson (2010).

What I chronicle here in a broader sense is the entry of the social sciences into the courtroom. Ever since a young Louis Brandeis pleaded the now famous "Brandeis Brief" discussing the sociological impact of females in the labor pool, more and more of the human sciences now help clarify issues before judge and jury (Monahan & Walker, 2006; Smith, 2004). There is, of course, a well-established and strong forensic psychology (Bartol & Bartol, 2008; Wrightsman & Fulero, 2005). Also present in the courts are such disciplines as forensic social work (Marchi, Bradley, & Ward 2009), forensic anthropology (Cattaneo, 2006; Rosen, 1977) and, of course, a growing forensic sociology (FS) (Hart & Secunda, 2009; Jenkins & Kroll-Smith, 1996; Mulkey, 2009; Richardson, Swain, Codega, & Bazzell, 1987; Thoresen, 1993). Given that much of American criminology is deeply rooted in sociology, discussions of FS and FC are sometimes somewhat fungible in nature.

Definitions and Domains

When most people encounter the words "forensic criminologist," an image of CSI's Gill Grissom probably springs to mind. On many occasions, I have been treated to comments about blood splatter, ballistics, trace evidence, and the wonders of DNA when conversation partners learn that I am a forensic criminologist. Although I believe a forensic criminologist should know about these things as well as several other issues to be determined at a crime scene, criminology is not criminalistics. Nor is it what most people think of when they think about forensic science.

The word "forensic" is derived from the Latin word "forum," which was a place where public issues were debated (Siegel, 2009). Gradually, the word came to be applied to the courts so that a "forensic" issue meant an issue before the criminal or civil courts. Forensic means "having to do with the law." Science, including behavioral science, when applied to legal problems is forensic science (Gaensslen, Harris, & Lee, 2008). Forensic science would then refer to scientific findings of interest to the court in rendering its decision. Less "scientific" analysis such as pattern evidence analysis would still be described as forensic in nature. If blood-related evidence is to be important in a case, then the term forensic serology is appropriate. If the findings of a psychologist are helpful to a court in resolving a legal issue, we would then be talking about forensic psychology. As will become evident throughout this chapter, forensic psychology and FC overlap in many ways (Canter, 2010). Several of the topics central to forensic psychology are of great interest to forensic criminologists as well (e.g., false confessions, criminal profiling, psychopathic criminals, suicide in custody, police behavior). On the other hand, while criminologists do not generally administer personality tests or evaluate a subject's capacity to form "*mens rea*," psychologists do not normally compute crime rates or assess the criminogenic nature of urban neighborhoods.

FC is the application of criminological knowledge to issues before the courts. It includes within its scope the scientific study of the making of law, the breaking of law, and societal reactions to the breaking of law (Sutherland & Cressey, 1978). These issues may also be explored on various theoretical levels as in academic criminology or on a more practical level which may become an applied criminology. If presented in court or at deposition, we are now putting forth a FC. For the purposes of this chapter, then, criminology is

the scientific study of the etiology, patterns, and control of crime and criminals. Whenever this type of information becomes useful to judicial or jury decision making, we are then describing FC.

As a multidisciplinary field of study as well as a professional practice, FC is pertinent to both criminal and civil courts. Owing to differences between criminal and civil law, insofar as parties, proofs, and penalties are concerned (Abadinsky, 1995; Siegel, 2004), the efforts of a forensic criminologist may be differentially constrained by evidentiary and procedural matters depending on the type of case. Although the nature and quality of criminological analysis should not vary, the scope of the opinions a forensic criminologist is eventually allowed to express will depend not only on the pertinent law but also on the trial judge's interpretation of this law (Buchman, 2007). The criminologist's role is to present evidence relevant to his or her expertise in a dispassionate and objective manner and not to advocate for a given verdict. Forensic criminologists must fully understand they are but guests at a trial. While criminologists may dominate a classroom, the courtroom is run by the judge and the lawyers arguing therein.

Forensic criminologists can make numerous contributions to criminal matters before the court. They can prepare presentence investigations to balance those prepared by state-employed probation officers (Kulis, 1983). They can participate in capital punishment mitigation proceedings (Andrews, 1991; Forsyth, 1998; Hughes, 2009) or opine on gang-involved criminality pertinent to gang enhancement penalties (Yablonsky, 2008). Some criminologists offer criminal profiles which differ from those offered by state-employed current or retired investigators presented by prosecutors (Keppel, 2006; Turvey, 2008; Youngs, 2009). Other forensic criminologists testify as to the validity of confessions (Leo, 2008; Ofshe, 1989), while still others may assist investigators seeking search warrants by attesting to the manner in which certain criminal types gather and hoard contraband. Social scientists have also been able to shed much light on the dynamics of historical child abuse and violence against women (Connolly, Price, & Read, 2006; Portwood & Heany, 2007). These topics constitute simply a small sampling rather than the universe of criminological knowledge available to the courts in their efforts to render criminal justice. Fuller elaboration of the parameters of criminal FC must await another chapter. Given the nature of my forensic involvement over the past 25 years, however, I shall delve more deeply into civil FC for the remainder of this chapter.

Whereas crime and guilt are the foci of criminal FC, tort and liability are the foci of civil forensic criminology (Kennedy & Sakis, 2008). Basically, a tort is a civil wrong, a noncontractual civil liability. One may injure another or do a wrong to another by failing to act reasonably when there is a duty to do so or by acting unreasonably when one should not. While these are certainly not formal legal definitions of negligent or intentional torts (Keeton, Dobbs, Keeton, & Owen, 1984), the idea behind both is that when an individual or a government acts negligently so as to cause unjust harm, this harm must be compensated for, generally in the form of monetary damages. Because issues in tort litigation may involve the failure of a landholder or employer to protect against criminal behavior or may involve the actions of police, corrections, and security personnel, the insights provided by FC in the form of expert reports and testimony can be of crucial assistance to judicial and jury decision making. For example, an apartment complex may be sued because a woman who was assaulted in her unit believes the premises were inadequately secured (Kennedy & Hupp, 1998). Or an employer may be sued under certain conditions for acts of violence in the workplace (Perline & Goldschmidt, 2004; Schell & Lanteigue, 2000). A young man's family may sue the police over what they consider to be the use of excessive force against him (Kennedy & Hupp, 1998), or a prisoner's family may sue corrections officers over an alleged failure to prevent his suicide in custody (Kennedy, 1994; Kennedy & Homant, 1988). More recently, law enforcement investigators and even prosecutors face litigation over allegations arising from miscarriages of justice involving wrongful conviction (Forst, 2004). Because prosecutors, juries, and judges cannot be

sued, various "Innocence Projects" have resulted in increased litigation against police agencies which have participated in an erroneous conviction. The above examples are merely illustrative and only begin to describe the wide-ranging legal causes of action involving premises liability for negligent security (Ellis, 2006; Kuhlman, 1989) and the actions or inactions of criminal justice system personnel (Kappeler, 2006; Ross, 2009). Each year, tens of thousands of lawsuits are filed against private landholders, and security, police, and correctional personnel. FC knowledge is integral in varying degrees to virtually all of these cases.

FC in Premises Security Litigation

Legal Backdrop

Although most forensic criminologists are not lawyers, it would behoove them to know something about civil law in order to maximize their contributions and minimize their confusion. While a thorough discussion of legal precepts is beyond both the scope of this chapter and the expertise of this author, there are a few fundamentals with which I believe forensic criminologists should be familiar.

Basically, forensic criminologists are utilized as liability experts rather than damages experts, even though they may be quite familiar with the directly related field of victimology (Karmen, 2010; Stark & Goldstein, 1985). As liability experts, forensic criminologists may be expected to opine on questions of crime foreseeability, and security, police, and corrections standards of care in light of this foreseeability. The causal relationship between any alleged breach of standards and the damages suffered by a plaintiff may also be addressed by the forensic criminologist. These three areas of input correspond directly to three of the four basic elements of a tort: duty (of which foreseeability is an integral element), breach of duty (failure to act reasonably or to follow a recognized standard of care), and causation (whether proximate cause or cause-in-fact). Highly readable discussions of the origins of security-related law may be found in texts written primarily for attorneys (Page, 1988; Tarantino & Dombroff, 1990) and legal tracts written more specifically for the private security sector (Bilek, Klotter & Federal, 1981; Hannon, 1992; Inbau, Aspen & Spiotto, 1983; Pastor, 2007). Bottom (1985) authored what may be the first comprehensive textbook to address security malpractice issues and illustrates his analyses through the presentation of several case studies. Other excellent compendia of security-related premises security liability cases are also available (Ellis, 2006).

On another note, it is important for the forensic criminologist to remember that each of the fifty states may have statutory and case law which bears upon security issues. Federal courts will also draw from statutory and case law as well as evidentiary issues pertinent to cases within their jurisdiction. Established precedent may include definitions and tests of foreseeability, observations on the reasonableness of security measures in specific situations, and controlling opinions on causation. Although there is general consistency across the country, new cases in each state may arise from time to time, and these cases may have an impact on the litigation in which the forensic criminologist is consulting. Obviously, the retaining attorney should be queried as to these matters. In the sections which follow, I present typical forensic scenarios and the legal frameworks within which FC expertise has been applied.

Predatory Attacks

By way of example, a common scenario leading to litigation involves the robbery or abduction of a female from a large, retail store parking lot or parking garage. Although it may seem that the number of incidents in parking areas is disturbingly high, criminologists must also be prepared to point out that at least 350 million pedestrian trips through parking facilities are made each day (Smith, 1996). Whenever possible, the number of criminal incidents at a given property should be evaluated in the context of the number of persons at risk within the same time period.

Some parking areas will be more dangerous than others, depending on location, history, characteristics of facility users, and the real or perceived efficacy of security measures. Forensic criminologists asked to explain the level of crime in certain facilities have pointed to the notion of "critical intensity" to explain victimization in large, retail center parking lots and the concepts of prospect, refuge, and escape to explain crime in parking structures. Critical intensity is that tipping point where there are enough potential victims in a parking lot to attract predators but not enough potential victims or witnesses to deter these predators. Prospect refers to the limited surveillance capacity available to a pedestrian in a parking garage. There are also multiple criminal hiding places (refuge) in a garage and fewer escape routes feasibly open to a potential victim (Kennedy, 1993).

Regardless of the type of parking facility which is the focus of premises liability litigation, plaintiff and defense forensic security experts and forensic criminologists will be expected to address three basic issues. First, foreseeability will be addressed generally from a prior, similar acts perspective or from a totality of the circumstances perspective. Second, based on the level of foreseeability, or its absence, experts must establish the reasonableness of then extant security measures to determine whether appropriate standards of care were breached.

Finally, experts may sometimes opine as to whether any such breach of duty was a proximate cause and cause in fact of injuries suffered by the plaintiff (Kennedy, 2006). Thus, if a female shopper is attacked in a parking lot which has seen several prior muggings, there may be a duty to warn her or to remedy the problem through appropriate security measures. While plaintiff attorneys will often attribute the attack to a dearth of security patrols, poor lighting, or the absence of CCTV, defense attorneys can point to a substantial body of accumulating research which questions the presumed effectiveness of these measures in deterring violent crimes (Welsh & Farrington, 2003, 2009). Inconsistent findings in the general crime prevention literature can only be resolved in a case at bar through a close examination of the unique circumstances of a specific property, its particular history, and other issues special to the site. Certainly, the dynamics of the criminal event itself must be considered as well.

Unfortunately, other land uses are sometimes associated with predatory attacks. Because millions of citizens, many of these women, reside in large apartment complexes, sexual assaults associated with burglaries are not infrequent. Home invasions for the purposes of robbery are also occurring around the country. An early premises liability case, *Kline v.1500 Massachusetts Avenue Apartment Corporation* (1970), established a duty on the part of landholders to provide reasonable security for the common areas of a multioccupancy property. Thus, property owners and their management companies are regularly named as defendants in premises liability lawsuits alleging negligent security measures (Kennedy & Hupp, 1998).

Once again, the question of foreseeability arises immediately. Section 8 properties, public housing, and market rental complexes in lower income neighborhoods often suffer unfortunate patterns of interpersonal violence and property crimes (Suresh & Vito, 2009; Wenzel, Tucker, Hambarsoomian, & Elliott, 2006). Although a certain amount of this violence is of a domestic nature and not reasonably attributable to management practices, forensic criminologists have argued that improved tenant selection practices and aggressive lease enforcement can significantly improve the security of a property (Clarke & Bichler-Robertson, 1998; Sampson, 2001). Questions of physical security such as the trimming of foliage, illumination levels, key control, and the efficacy of fencing and gating frequently arise. Where sexual assault is the crime which originally generated the lawsuit, rapist typologies are often introduced into legal discussions by forensic criminologists and psychologists (Fradella & Brown, 2007). Essentially, there is a causal argument which suggests that rapists will be differentially deterrable based on their classification as anger rapists or power rapists, for example, or whether they could be characterized as disorganized or organized perpetrators (Crabbe, Decoene, & Vertommen, 2008; Hazelwood &

Burgess, 1999; Keppel & Walter, 1999). Again, while much in the psychological and criminological literature can be helpful to a jury as "social framework" evidence (Monahan & Walker, 1988; Monahan, Walker & Mitchell, 2008), each case must be judged on its own merits with an understanding that properties, victims, and criminals are unique in their own ways.

Interpersonal Disputes

With the proliferation of mass private properties have come endless opportunities for interpersonal altercations which can often lead to serious injuries or even death. As commercial landlords develop huge business, entertainment, and retail properties (Shearing & Stenning, 1983), millions of people each year find themselves in the proximity of strangers representing all walks of life and a multitude of age and ethnic groups. From time to time, conflict is inevitable. A regional shopping mall, for example, can draw over ten million shoppers each year, including many young people who are more interested in socializing than shopping. Food courts can become the venue for group fights, arcades the hunting ground for pedophiles, and parking lots the place for a parade of flashers.

As criminologists have predicted, when motivated offenders and suitable targets come together in space and time, in the absence of capable guardians, crime is a foreseeable occurrence (Cohen & Felson, 1979; Felson & Boba, 2010). Because this crime may take place on a large commercial property owned by a "deep pockets" commercial landlord, the possibility of liability immediately presents itself. In earlier days, smaller merchants sold their wares from much smaller properties; and visitors to shopping areas spent much of their time on public streets, leaving no identifiable landlord to sue for failing to protect one prospective invitee from another or from a criminal trespasser. In this day and age, however, some private entity often owns or manages the property on which much leisure time is spent, thus allowing for third-party lawsuits for tortious injuries. It is the role of the forensic criminologist to determine whether a pattern of prior disturbances or crimes existed which should have put the commercial landholder on notice that business invitees were in need of protection. The existence of a sufficient number of employees and/or effective security measures to protect these invitees or warn them of the dangers must then be assessed. Whether the injuries sustained during interpersonal violence were causally related to the condition of the property must also be determined, ultimately by a jury, of course, but often armed by one opinion or another from a civil forensic criminologist at trial. Even if a civil suit settles before a trial, which is a far more likely outcome, forensic criminologists and forensic security experts have often helped to shape much of the settlement discourse between plaintiff and defense attorneys.

Of course, interpersonal disputes can take place on the premises of businesses which long preceded the advent of mass private property. For example, drinking establishments such as bars and nightclubs have generated a great deal of litigation sparked by alcohol-fueled violence. Criminologists and other social and behavioral scientists have generated a substantial literature on the relationship between alcohol and violence (Felson & Staff, 2010; Graham & Homel, 2008; Greenfield, 1998; Hughes, Anderson, Merleo, & Bellis, 2008; Saitz & Naimi, 2010). The past few decades have also seen solid research on methods of preventing barroom violence. Responsible alcohol service training programs, bartender and doorman training, and an understanding of the pejorative influences of toxic environments (heat, noise, smoke, and crowding) have all been helpful in reducing violence among bar patrons (Graham, Bernards, Osgood, & Wells, 2006; Roberts, 2007). A number of ethnographies and manuals for bar employees charged with "keeping the peace" have also contributed to the abilities of innkeepers and publicans to offer safer establishments for young revelers (Graham, 1999; McManus & O'Toole, 2004; Rigakos, 2008; Scott & Dedel, 2006).

Criminological research has illustrated the nature of inter-male aggression as involving challenges to and defenses of "face." In many such

disputes, there is a discernible escalation of violence potential as each disputant repudiates the other's insults until violence becomes the next alternative (Felson, 1982; Luckenbill, 1977). It is during this escalation that bar security must intervene and divert the attention of potential pugilists from each other. Failure to detect readily audible or visual signs of a developing altercation can lead to liability on the part of a liquor or gaming establishment. In other words, if bar or casino security personnel were or should have been in a position to detect signs of an escalation of threats and yet failed to intervene, they were on imminent notice of a danger to patrons and failed to take reasonable action to prevent injury. Obviously, if an establishment is so overcrowded that monitoring is difficult and getting to the scene of a dispute even more so, then a liability argument exists. Even if security is able to intervene in a dispute in a timely fashion, the standard of care has evolved from the days when a bartender could simply declare, "Take it outside." It is now more appropriate for security personnel to separate combatants, isolate them from each other, and evict them through different doors at different times. The idea, of course, is to take reasonable steps to discourage the fight from reigniting outside yet still on the premises of the business. A landholder's obligation to an invitee does not end when he walks out the door but generally when he leaves the property altogether. In some cases, however, a landholder may be expected to provide reasonable security where many guests are known to park even if such parking area is not owned by the principal landholder. Note the importance of the word "reasonable" in all the above scenarios, as no landholder is expected to guarantee the safety of an invitee or licensee.

Workplace Violence

The problem of workplace violence (WV) first took its place in the American psyche in a very dramatic fashion. One day in August of 1986, a US Postal Service employee by the name of Patrick Sherrill came to work with two .45 caliber pistols and murdered 14 of his coworkers. He also wounded six others before finally killing himself. Since that fateful day, numerous mass shootings have taken place at workplaces, restaurants, schools, shopping centers, and other venues. A significant literature has evolved to describe and explain these rampage shootings. While some professional thinking on the subject focuses on the shooter's workplace as a violence-generating organization (Denenberg & Braverman, 1999; Homant & Kennedy, 2003; Kennedy, Homant & Homant, 2004), other approaches focus more on the personal characteristics of the individual as central to the explanation of multicide (Dietz, 1986; Fox & Levin, 2007; Holmes & Holmes, 2000; Meloy, 1997). The workplace killer is often motivated by a narcissistic injury which he takes as the final insult in a long series of injustices foisted upon him by an organization and the people within it which he believes have betrayed him (Baumeister, 2001; Cale & Lillienfeld, 2006; Cartwright, 2002). Forensic criminologists are often called upon to consider whether such an extreme reaction on the part of the shooter was foreseeable and whether it could have been prevented. Over the past 25 years, however, criminologists have realized that WV is far too complex to be analyzed as a homogeneous topic. In reality, WV across the USA is more quotidian in nature and is comprised basically of four types of mundane crimes (Loveless, 2001).

Type I WV involves robbery of a workplace and leads more often to worker death than other forms of WV. For example, in 2008, 526 workplace homicides occurred, most of which involved retail clerks or other workers serving the public where cash was involved. Notably, the number of workplace murders was down from about 900 work-related homicides occurring between 1993 and 1999. During this same period, 1.7 million violent assaults were also perpetrated against persons twelve or older who were at work or on duty (Duhart, 2001). Overall, about 85 % of all workplace murders occur during robberies.

Type II WV involves attacks by customers, patients, passengers, students, or others who vent their anger on workers attempting to provide them a service or care for them in some way.

About 3 % of workplace homicides are so classified.

Type III WV involves worker-on-worker attacks, some of which result in death but most of which are far less serious in nature. About 7 % of workplace murders stem from worker-on-worker violence.

Type IV WV is a form of domestic violence wherein a former intimate comes to the workplace and assaults a worker on the job. The workplace is often chosen as the site of the attack because the estranged attacker knows where his victim will be and when she will be there (there are, of course, not an insignificant number of instances when a male will be the target). About 5 % of work-related murders may be placed in this category.

Given the four types of WV introduced above, it is obvious that the role of forensic criminologists in case analysis will vary depending on the nature of the events in question. It is also important to note that workers' compensation laws across the USA limit the ability of workers to bring lawsuits against their employer for injuries sustained while at work. The injured employee will generally have to prove gross negligence on the employer's part or, perhaps, link the injury to some form of gender discrimination. Although more and more exceptions to workers' compensation as an exclusive remedy are appearing on the legal landscape (Sakis & Kennedy, 2002), statutory roadblocks to employee litigation remain formidable. Nevertheless, WV generates a considerable amount of litigation as will be explained below.

As a forensic criminologist in practice for over 25 years, I have been involved in litigation generated by WV on frequent occasions. When retail clerks are murdered on the job, it is not unusual for their grieving families to blame store management for their deaths. Convenience store robberies have been the subject of much research as has the efficacy of robbery prevention measures (Altizio & York, 2007; Erickson, 1998; Hunter, 1999; Loomis, Marshall, Wolf, Runyan, & Butts, 2002). Unless plaintiff experts can establish that a robbery or injury was virtually certain to occur, and wholly inadequate preventive measures were nonetheless in place, a negligent security lawsuit is likely to fail due to worker compensation exclusions.

In an attempt to escape limitations on liability imposed by workers' compensation laws, worker victims have often sued other entities in some way connected to the security or other operations of their workplace. Thus, bank tellers have successfully sued a camera installation company and office workers have sued office cleaning companies or other vendors. It is becoming increasingly common for victims of Types I–IV WV to sue contract security companies for somehow failing to prevent an irate patient or armed student from entering the premises. Security officers at manufacturing facilities have been accused of failing to prevent armed workers from entering a plant and shooting ex-lovers and former supervisors. While the actual connection of these third-party defendants to the violence which precipitated the litigation is often tenuous, what is known as the "sympathy factor" can never be discounted. It has been my experience that some jurors will award damages to plaintiffs for whom they feel sorry even where foreseeability, violation of a standard of care, and causation seem quite difficult to establish. Likewise, cases have been lost because jurors find a defendant more to their liking than a particular plaintiff. Such examples of "jury nullification" are to be found as readily in civil litigation as in criminal prosecution or perhaps even more so (Smith, 2004; Wrightsman, 2001).

Finally, no discussion of WV liability can be complete without mention of violence by employees directed at their customers, patients, students, coworkers, or others with whom they come into contact. Unless a defendant employer can establish that certain interactions are clearly "beyond the scope of employment," I have seen employers sued when their employees attacked a fast-food customer, sexually assaulted a student, patient, or guest, misrepresented security levels at a property, and when workers have murdered coworkers. Employers have also been sued for the actions or inactions of independent contractor employees such as housekeeping personnel and security personnel under the notion of "nondelegable duty."

Personnel Issues

Forensic criminologists are generally not lawyers and are not retained for legal opinions. Even so, their efforts can be utilized more efficiently if they have a working knowledge of the legal context in which their criminological expertise is sought. For example, although a store detective who makes a false arrest without protection of "merchant's privilege" can expose his employer to vicarious liability through the doctrine of *respondeat superior*, an employer may also be found to be directly negligent based on his own negligent actions rather than because of his servants' actions. An employer can be held liable for administrative negligence if it can be shown through a preponderance of the evidence that the employer negligently hired, trained, supervised, assigned, entrusted, or retained an errant servant. Negligent "failure to direct" is yet another example of administrative negligence (Pastor, 2007; Schmidt, 1976).

It has been my experience over the years that sociology and criminology can shed much light on various issues of administrative negligence. With regard to the question of negligent hiring, it is axiomatic that more sensitive jobs granting access to valuables or vulnerable individuals require more screening. On the other hand, it is against public policy and even the law in some states to automatically exclude an individual from employment consideration because of a prior conviction unrelated to the type of job sought. Variables such as age at conviction, years since conviction, and more current accomplishments should be considered. Current research on criminal redemption, for example, demonstrates that an individual with a certain type of prior conviction poses no greater risk than another potential employee once a specific number of crime-free years have passed (Blumstein & Nakamura, 2009). A knowledge of criminal desistance based on life events such as military service, marriage, and the assumption of other responsibilities should also inform employment decisions (Kazemian, 2007; Sampson & Laub, 1995; Warr, 1998).

Negligent training can be argued in cases of false arrest, use of force, and a variety of additional job failures with liability potential. Functional task analysis can generally identify the specific job responsibilities and skill sets required to perform employee responsibilities. With regard to security personnel, for example, forensic criminologists can readily access a significant literature on training for police roles and identify those skills which are particularly relevant to the job of a security officer. Just as importantly, task analysis can also identify those parts of a security officer's job which are not expected to parallel police actions.

Early sociologist Max Weber established many of the principles of bureaucratic management which apply with equal force today. Along with Henri Fayol, Weber taught the value of clear definitions of authority and responsibility. The importance of chain of command, unity of command, span of control, written records, and formalized policies, procedures, and rules can be readily explained where these questions and their answers can inform a civil jury on ultimate issues (Leonard & More, 2000; Souryal, 1981).

Negligent assignment and negligent entrustment are related issues. Assigning a security officer who is hard of hearing to a night watchman's role, or assigning a security officer with a limited command of English to a call taker and dispatcher position could have unfortunate consequences. Entrusting the master keys to an apartment building's residential units to a new employee who has not been vetted for such a responsibility is highly inappropriate. Likewise, providing a company vehicle to an employee with multiple drunk-driving convictions can lead to employer liability in the case of an accident.

Negligent retention occurs when an existing employee behaves badly on the job and is inadequately disciplined, thus encouraging more bad behavior, or is not fired even though the gravity of his act clearly called for his termination. A somewhat parallel situation occurs where a landlord becomes aware that a tenant in his apartment building poses a threat to other tenants, and no action to investigate or evict is taken by the

landlord. In both instances, a crime victim can argue that the employer (or landlord) was on specific notice of a dangerous situation which only he had special knowledge of and the particular power to rectify. The crucial analytical task for the forensic criminologist here would be to assess whether the employee's or the tenant's bad behavior should have foreshadowed a subsequent criminal attack. Of course, such an analysis must avoid the hindsight bias known as "omen formation" or retrospective presifting (Azarian, Miller, Mckinsey, Skriptchenko-Gregorian, & Bilyeu, 1999; Terr, 1983).

Negligent failure to direct involves the failure of management to establish and promulgate clear policies and procedures to guide the actions of its employees. Although security personnel must be allowed to exercise discretion in the performance of their duties, unbridled discretion can lead to disaster (Davis, 1969). Where possible, appropriate responses to likely scenarios must be anticipated and communicated to line personnel. Although some line personnel may resent management incursion into their day-to-day decision making, an organization's need for fairness and consistency in dealing with its constituency is paramount. This is particularly so in the administration of both private and public systems of justice.

The above seven examples of administrative negligence are not meant to be static and all inclusive. As society evolves, so too will the public and organizational behavior which is considered "reasonable under the circumstances." Thus, new forms of negligence are likely to arise, and forensic criminologists must be cognitively flexible in order to assess these possibilities. For example, some jurisdictions have entertained the notion of "negligent referral," where management provides an employee with a good character reference in order to rid itself of him even though the employee may be dangerous to others (Ashby, 2004; Belknap, 2001). This has happened in cases of pedophilic school teachers and violent corporate administrators. The consequences of such questionable actions in terms of both human suffering and legal liability can be severe.

FC in Police and Corrections Litigation

Legal Backdrop

Over the past four decades, there has been a substantial increase in the number of lawsuits filed against municipal police departments and county sheriffs' offices. Although many government jurisdictions have countenanced a weakening of their sovereign immunity defenses and courts have been quite receptive to civil rights violation claims under Title 42, Section 1983, of the US Code, suing individual police officers and their departments still remains a formidable task. However, state court liability caps and the prospect of guaranteed attorney fees in civil rights cases have encouraged a certain amount of this federal litigation (Stafford, 1986).

Plaintiffs sue in federal court primarily for Fourth, Eighth, and Fourteenth Amendment violations and in state courts for tortious actions. While the Prison Litigation Reform Act of 1996 made frivolous litigation by prison inmates more difficult, conditions of confinement and other civil rights cases continued to be filed on a regular basis. Although forensic criminologists are retained to address policy and practices of police and corrections personnel, an understanding of the legal issues to be prosecuted or defended should inform their participation without impacting on their opinions (Kappeler, 2006; Ross, 2009; Silver, 1995). As a forensic criminologist rather than a lawyer, it is my intention to focus herein on agency policy and the behavior of police and corrections personnel rather than on the legal implications. Still, the importance to a forensic criminologist of understanding the legal environment in which he or she may be working is not to be discounted.

Lawsuits against police officers are inevitable for two major reasons: criminals do not wish to be interfered with, and they do not want to be in jail. Hence, conflict with police and corrections officers will ensue, and conflict is at the heart of litigation. I do note, however, that law enforcement

officers (LEOs) are often enough sued by law-abiding citizens who have a profoundly different opinion about the propriety of police actions than the officers themselves may have.

Twelve high-risk, critical police tasks are frequently linked to litigation against police departments and sheriffs' offices. Police pursuits, use of force, care of prisoners, searches and seizures, off-duty conduct, and sexual misconduct by officers have all been the cause of litigation. Special operations such as high-risk warrant service and dealing with mentally ill citizens have also been the source of lawsuits (Ryan, 2009b; Schultz, 2010). It has been my experience that virtually every one of these causes of action will also include a failure to train argument. In recent years, I have also seen an increase in lawsuits against police involving investigative, interrogation, and eyewitness identification practices generated by instances of wrongful conviction. Faulty "scientific" evidence claims are increasingly associated with such miscarriages of justice (Forst, 2004; Moriarty, 2010; Pyrek, 2007; Scheck, Neufeld, & Dwyer, 2000).

Corrections officers and their employers, whether county sheriffs or state prison systems, also face a set of recurring legal issues. Custody suicides and other deaths allegedly resulting from faulty medical care remain salient sources of litigation. So, too, are classification problems and failure to prevent assault on inmates. Use of force in custody settings can also lead to litigation as do policies pertaining to strip and cavity searches, nutrition, mail, and religious worship (Ryan, 2009a).

Certainly no forensic criminologist is expected to master the technical aspects of all the above police and corrections practices. In fact, for a number of lawsuits, forensic criminology may not be particularly relevant. Whether a particular type of handcuff or caliber of ammunition should have been used or issues concerning inmate food quality will have less to do with criminology and more to do with technology and food science. Nevertheless, wherever there are behavioral antecedents or consequences pertinent to police and corrections technology, there may be an opportunity for social science input. Ultimately, forensic criminology is more directly involved in evaluating the impact of criminal justice policy on behavior and the impact of behavior on criminal justice policy. Forensic criminologists are, first and foremost, social and behavioral scientists whose true clients are the courts and not the agencies or attorneys who have retained their services.

A Sampling of Causes of Action Against Law Enforcement Officers

FC is by no means a static enterprise. The nature of litigation against police agencies tends to shift as a result of controlling court decisions. When I first started my practice, it seemed that lawsuits were filed on a regular basis against police agencies whose officers had pursued eluding vehicles; and these vehicles caused death or injury to innocent motorists and pedestrians. Some very intriguing research by Alpert and Dunham (1990) had pointed out that 33 % of pursuits resulted in accidents and that a number of these pursuits were not felony related, at least initially. As national research proved a broader understanding of the nature of police pursuit policies (Kennedy, Homant, & Kennedy, 1992), there was an increasingly intense national debate about the wisdom of police pursuits. Some scholars pointed out that many felons had been apprehended in what started out as mere traffic stops and others pointed out that restricting certain pursuit practices would only increase the ultimate risk to the public. For example, any policy limiting police pursuit speeds to, say, 85 mph would only encourage eluders to go 100 mph. Forbidding police from following an eluder down a one-way street the wrong way would encourage eluders to look for one-way streets. Much of this debate seemed to end, however, when the US Supreme Court decided in *County of Sacramento v. Lewis* (1998) to limit a police agency's liability largely to cases where the officer's car strikes a victim rather than the eluder's car striking a victim. As a result, rarely do I receive a call from either a plaintiff's attorney or a defense attorney on matters pertaining to police pursuits.

On the other hand, there seems to be a noticeable increase in lawsuits claiming police officers suffocated an arrestee by placing too much weight on his back in their attempt to control him. These claims pertained to "positional asphyxia" or "compression asphyxia" and were enabled by early research into the phenomenon (Reay, Fligner, Stilwell, & Arnold, 1992). More recent research seems to call into question the whole notion of positional asphyxia and suggests instead that many arrest-related deaths are the result of a cocaine-induced "excited delirium" (Chan, Vilke, Neuman & Clausen, 1997; DiMaio & DiMaio, 2006; Ross & Chan, 2006). Because death by asphyxia and death by heart arrhythmia are difficult to distinguish at autopsy, the whole question of medical examiner competency and prejudices now comes into play. Not surprisingly, where medical professionals are granted great discretion in deciding manner of death (homicide by police, accidental overdose, a suicide by overdose, or even a natural death), there will be ample opportunities for attorneys to argue otherwise (Timmermans, 2007). While forensic criminologists may contribute little in court to the resolution of these debates, they can certainly forewarn client attorneys about what arguments may likely ensue (Robison & Hunt, 2005). Related to these death and use of force cases are questions about the police handling of persons with mental illness (PMI) or emotionally disturbed persons (EDP). Due to the deinstitutionalization of the mentally ill after *O'Connor v. Donaldson* (1975), police will often encounter disturbed individuals in a variety of circumstances calling for some sort of intervention. Where death or injury occurs during this intervention, ensuing litigation may argue that police tactics were iatrogenic and inappropriate for the situation. Forensic criminologists can assess these tactics in light of what is known about the violence potential of the acutely mentally ill. Given the complexities of this subject, further discussion is deferred to more specialized treatises (Cordner 2006; Miller, 2006; Teplin, 2000).

In recent years, the phenomenon of "suicide by cop" has attracted the attention of criminological researchers (Kennedy, Homant, & Hupp, 1998; Lord, 2004; Violanti & Drylie, 2008). There are some individuals who wish to die but do not have the means or the fortitude to pull the trigger. By purposefully maneuvering a police officer into a situation where he thinks his life is in danger, a suicidal individual can force an officer to kill him. There is certainly a defense to a charge of extensive force inherent in this scenario (Flynn & Homant, 2000).

Although some causes of action will tend to come and go, generic use-of-force issues are likely to remain a common cause of action because the use of force is so central to the police role (Bittner, 1970). Criminologists have contributed much to the academic study of police use of force (Alpert & Fridell, 1992; Fyfe, 1988; Geller & Toch, 1995) and are also able to make a forensic contribution as well. Police are expected to overcome unlawful resistance to their legitimate actions but must do so within the boundaries of reasonableness. As a measure of what is reasonable, criminologists utilize various versions of a "use-of-force continuum" wherein legitimate police responses to subjects' levels of resistance are graphically detailed in many publications (Gillespie, Hart, & Boren, 1998; Hemmens & Atherton, 1999; Kinnaird, 2003; Patrick & Hall, 2005). Guidance in when to use what level of force is provided by these continua although the placement of intermediate levels of force can vary from one tactical expert to another. Criminologists are not necessarily expected to detail the precise mechanics of force, as there are defense and control tactics experts who will do that. Rather, the criminologist can search for agency patterns, or their absence, and can provide comparative and historical perspective on the force-related policies and practices of the department or agency involved in litigation.

A Sampling of Causes of Actions Against Corrections Officers

As is true with litigation pertaining to police and law enforcement, the corrections function tends to generate lawsuits which may vary in nature

over succeeding years. Until the demise of the "hands off" doctrine, the courts were reluctant to peer behind the walls of our jails and prisons. Particularly since *Estelle v. Gamble* (1976), however, forensic criminologists and penologists have been called upon to investigate the quality of jail and prison health care throughout the USA (Kerle, Stojkovic, Kiekbusch, & Rowan, 1999; Vaughn, 2001; Vaughn & Carroll, 1998; Vaughn & Smith, 1999). The Eighth Amendment's provision against cruel and unusual punishment extends not only to health care but to psychiatric care as well. Thus, should an inmate die because he was not provided reasonable medical attention, the decedent's estate can sue for a constitutional violation in federal court and for gross negligence in a state court. Should an inmate die by his own hand, litigation arguing that his or her mental health needs were not met is likely to ensue. From 2000 to 2007, 8,097 jail inmates died in custody. Of this number, 2,361 died due to suicide (Noonan, 2010). Given the importance to a free society of custody death accountability, there is a growing legal and criminological literature addressing death in custody.

Custody suicide is a statistically rare event given that about 500 prisoners may die each year out of an eligible population of 2.2 million state and county prisoners and over 14 million arrestees each year (Glaze, 2010; Mumola, 2005). However, courts have found repeatedly that officials must respond to the mental health care needs of individuals determined to be suicidal or, at the very least, take steps to prevent them from completing the act. Early research by Hayes (1983) called national attention to the problem and was followed by several attempts at further delineating characteristics of the suicidal inmate (Kennedy & Homant, 1988; Knoll, 2010; Lester & Danto, 1993). More recent scholarship has clearly established the parameters of the problem and, due to the focused attention of our nation's criminal justice professionals, the rate of jail suicide across the country has declined significantly. Nevertheless, several problems remain which continue to make carceral suicides and their attendant litigation an ongoing area of practice for forensic criminologists.

One of the biggest reasons for the continued tragedy of custody suicide is that suicide is not possible to predict (Large, 2010; Murphy, 1984; Pokorny, 1983). Notwithstanding booking and screening interviews designed to identify suicide potential, some newly admitted prisoners who had denied suicidality will kill themselves. Others with significant psychiatric histories pass their time in custody without incident. Because suicide watch is in itself quite stressful and possibly iatrogenic, mental health workers may eventually take an inmate off suicide precautions. In fact, many inmates tire of the boredom, lack of activity, and constant surveillance and will plead to be returned to general population. Some eventually kill themselves there and, even though the decision to return them to a normalized routine may have been right at the time, their ultimate death could still lead to litigation. Unfortunately, custody suicide remains an issue within any corrections system even though much study and effort have been expended to deal with this problem.

Because of limited income or lifestyle choices, many inmates come into custody in very poor health. Alcohol withdrawal syndrome may be masked by other symptoms, traumatic organ failure may be misread as acute intoxication, and psychiatric decompensation with subsequent general health ramifications may go unrecognized. Forensic criminologists are not medical personnel but may be called upon to assess the extent to which corrections staff carried out those custody instructions reasonably directed by medical personnel. The adequacy of a sheriff's or warden's policies and procedures with regard to the provision of inmate access to competent medical care will thus be subject to review. Guiding but not determining evaluation efforts by forensic criminologists will be standards-related publications of the American Jail Association, the American Correctional Association, the National Commission on Correctional Health Care and the Commission on Accreditation for Law Enforcement Agencies, to name but a few.

Rape and sexual abuse remain a problem in some custody settings. Forensic criminologists will encounter from time to time instances where

a female arrestee had "voluntarily" engaged in a sex act with a lockup police officer or jail corrections officer. An agency may be liable for such reprehensible acts to the extent its policies and staffing created an environment in which such abuses were foreseeable or due to negligent personnel practices. Recently, the Michigan Department of Corrections paid $100 million to 500 female prisoners to settle a class action lawsuit dealing with systemic sexual abuse. Rape in male prisons remains an issue with sometimes devastating consequences, as first recognized judicially in *Farmer v. Brennan* (1994). The problem became so alarming that in 2003, the US Congress passed the Prison Rape Elimination Act to respond to prison sexual violence in correctional facilities (Neal & Clements, 2010). While prison rape may constitute a legitimate cause of inmate legal action, other legal theories, particularly "creative" theories of administrative wrongdoing, have been denied inmate plaintiffs in recent years. The Prison Litigation Reform Act of 1996 shrunk the number of new federal filings by inmates by over 40 %. Lawsuits must now be more focused and seek more narrowly drawn relief, and prisoners must exhaust all institutional administrative remedies before a federal lawsuit will be entertained (Schlanger, 2003).

As I have suggested consistently throughout this chapter, causes of action against private security, police, and corrections officers continue to evolve. Some litigation is curtailed by new higher court decisions while other litigation becomes possible either due to judicial propensities or changing social and political conditions. Depending on whether we are discussing lock-ups, jails, or prisons, strip searches may be improper for arrestees but not for inmates. Body cavity searches would seem appropriate for only high security units. Yet, cases arguing Fourth Amendment violations continue to be filed as correction agencies continue to do what seems to be in the best interests of institutional security sometimes in spite of judicial leanings (Collins, 2004).

In addition to conventional conditions of confinement cases, forensic criminologists should anticipate new causes of action or at least evolving nuances of old causes. Given the global concern over Islamist terrorism and revelations concerning prison conversions to radical strains, will corrections officials attempt to suppress "prislam" in order to combat future terrorism (Hamm, 2008; Kennedy, 2009)? Will this result in increasing numbers of First Amendment lawsuits arguing improper restrictions on inmates' abilities to practice their religion? Will courts eventually be required to distinguish between the tenets of a religion which are essentially spiritual in nature as opposed to those tenets which are really just political? Will institutions increasingly tolerant of homosexuality resist demands for same-sex marriage between inmates or provide for cohabitation of wedded convicts? I offer these questions not because I have an answer but because I wish to illustrate the evolving nature of correctional litigation. Needless to say, I have only touched on a few of the many correctional liability issues either presently undergoing litigation or certain to do so in the future.

Concluding Remarks on the Role of the Forensic Criminologist

Looking back over the past 25 or more years of my involvement in FC, I can say it has been somewhat of a lonesome experience. Few academic criminologists seem to fully realize the amount and variety of litigation to which the applied version of their multidisciplinary field of study can contribute. Many of those who do appreciate the magnitude of the enterprise simply wish to avoid courtrooms and are somewhat apprehensive of the judges and attorneys who run them. This hesitation is based on a fear of the unknown combined with a vague realization that, while the academic criminologist may be central to the classroom, he or she is but another witness in a courtroom controlled by powerful others. It is my hope this chapter can dissipate some of these concerns by illustrating the value and quantity of substantive knowledge a forensic criminologist can offer judge, jury, and attorneys as well. In my opinion, this knowledge can help judge and jury render their decisions more efficiently and can also help lawyers craft their arguments more tightly, secure

in the knowledge there is foundation in the social sciences for many of their arguments. In order to render such a service, however, the forensic criminologist would do well to better understand his or her role in the civil litigation process and the major case law which controls it.

A forensic criminologist may serve as a consulting expert whose main purpose is to act as a resource for plaintiff or defense attorneys, but the identity of a consulting expert need not be disclosed to opposing counsel. Some experts may be appointed by a judge to advise the court, but this practice is found more often in Europe than the USA. Such an expert can advise as to liability issues, standards of care, and causation and can help plan the discovery process. Consulting experts can also provide background on opposing experts and their likely arguments. Testifying experts do all of the above but are also expected to provide written reports, give deposition testimony, and testify at trial. Testifying experts should be aware of case law guiding admissibility of their testimony as found in *Frye v. United States* (1923), *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), and *Kumho Tire Co. v. Carmichael* (1999). Every courtroom criminologist should also come to a clear understanding of the distinction between an advocate and expert. He or she is the latter and not the former. Forensic experts should also become familiar with Federal Rules of Evidence-Rule 26, which lays out the criteria for expert reports.

Any criminologist starting off in the forensic arena should also review his earlier coursework in substantive and procedural criminal law in order to be comfortable with the investigative and prosecutorial history of the criminal act generating the litigation and the disposition of the offender. A reading of scholarly articles such as those authored by Bates and Frank (2010), Wise (2005), Mosteller (1989), and Saks and Faigman (2005) can reassure the testifying forensic criminologist that he or she is capable of providing the quality of opinions the courts find both relevant and reliable. As a practical matter, forensic criminologists would also benefit from reading about the courtroom experience of their close disciplinary cousins, the forensic psychologists (Brodsky, 1991, 2004) who have been frequent courtroom participants for many years now. Finally, although forensic work can be quite stressful due to shifting time demands, tight schedules, and sometimes contentious cross examinations, there is a satisfaction to be gained from an actual application of the criminological knowledge we have been for so long amassing. Most of my academic criminology colleagues prefer to remain on campus, and sometimes I wish I had stayed there as well. While I can only hope that my years of experience in the classroom have helped me in the courtroom, I know that my years of experience in the courtroom have helped me enormously in the classroom. And that has been, for me, the greatest reward.

Biography

Daniel B. Kennedy (Ph.D., Wayne State University) is a university professor and practicing forensic criminologist. Dr. Kennedy is Board Certified in Security Management and practices this specialty in three ways: academic publication, participation in litigation as an expert, and teaching. He is widely published in such journals as *Journal of Police Science and Administration, Journal of Criminal Justice, Justice Quarterly, Crime and Delinquency, Professional Psychology, Criminal Justice and Behavior, Security Journal*, *Security Management, Journal of Security Administration, Journal of Homeland Security and Emergency Management, and American Jails*. In addition, Dr. Kennedy frequently is called to court to testify in cases involving state police agencies, municipal police departments, and county sheriffs' departments. His testimony generally involves explaining to jurors the appropriate standards of care for the use of deadly force, vehicle pursuits, emergency psychiatric evaluations, prisoner health care, prevention of prisoner suicide, positional asphyxia/excited delirium, and "suicide by cop." Also, Dr. Kennedy evaluates numerous lawsuits concerning premises liability for negligent security in the private sector involving properties both in the USA and overseas. He specializes in crime foreseeability

issues, appropriate standards of care in the security industry, and analyses of the behavioral aspects of proximate causation. Although Dr. Kennedy taught forensic criminology at the University of Detroit Mercy for several years, he is currently teaching as an adjunct at Oakland University in Rochester, Michigan. He offers courses in profile and threat assessment and in homeland security through the university's criminal justice program.

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The Work of the Sociologist as Mitigation Expert in Cases of Violent Crime

2

Craig J. Forsyth

The Utility of Sociology

Sociology has immense potential utility for criminal defense (Rose, 1967). The foundation of the sociological contribution to the explanation of crime stands upon a subtle principle of law, that is, "by happenstance"—criminal penalties cannot be inflicted upon a person for being in a condition that the individual is powerless to change. The legal basis for mitigation is that there are aspects of the defendant's life which demonstrate that he/she are not deserving of the maximum penalty for a crime; hence he should receive a shorter sentence. Such mitigation can also be used to negotiate a plea so that a trial never takes place. The sociologist's report can be filed in the record to be used at later hearings to reduce the sentence of the client. Finally, a sociologist's data can be used on appeal to convince the reviewing court that legal errors have more worth because of an inappropriate or disproportionate sentence (Dayan, 1991; Forsyth, 1997).

This paper examines the role a sociologist in the sentencing phase of a conviction of manslaughter. This was originally a capital murder case involving a defendant and victim who were both black. The author of this paper testified in the sentencing phase of this specific case and has worked as a sociologist in over 300 violent crime cases, most of which were capital murder cases (Forsyth, 1995, 1996, 1997, 2007; Forsyth & Bankston, 1997; Forsyth & Forsyth, 2007). The chapter will describe the research findings for this particular client, which served as the basis for his testimony during the sentencing hearing.

The trial of a capital murder case is divided into two phases. The first phase is to determine the guilt or innocence of the defendant. If the defendant is found not guilty or guilty of a lesser offense, the trial ends. If a defendant is found guilty of capital murder, the jury must decide on a punishment, life or death. This represents the second phase and involves another trial, but with the same actors in the same settings. The importance of this phase is that the ultimate punishment of death is possible (Forsyth, 1995, 1996, 1997; Forsyth & Bankston, 1997).

Any matter the judge regards as relevant to sentencing may be offered as evidence and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present arguments on whether or not the death penalty should be used (Lewis & Peoples, 1978). The jury weighs aggravating and mitigating circumstances before imposing sentences of death or life in prison without parole. The position is an imposing one because these twelve individuals have just found beyond a reasonable doubt that the defendant committed first degree murder. However, now the defense is asking that the defendant not be sentenced to death because

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_2,

of the defendant's admirable qualities or due to a life which predisposed him or her to the crime.

The most consequential ingredients for the defense are mitigating factors. Mitigating circumstances are facts that do not justify or excuse an action but can lower the amount of moral blame, and thus lower the criminal penalty for the action. The prosecution offers aggravating circumstances. Generally, aggravation includes actions or occurrences that lead to an increase in the seriousness of a crime but are not part of the legal definition of that crime (Oran, 1983).

In essence, arguments focus on two adversarial positions: the circumstances of the crime versus the social psychological qualities of the client (Brodsky, 1991; Dayan, 1991; Forsyth, 1995, 1996, 1997; Forsyth & Bankston, 1997; Najmi, 1992; Thoresen, 1993). Sociology is relevant to the questions of sentencing in capital murder cases. Sociology expands and explains the boundaries of mitigating factors. The expert/sociologist will attempt the more difficult job of explaining why structural, cultural, and familial factors are at least partially to blame for the circumstances of the crime. Any violent crime conviction has a sentencing phase or hearing. A manslaughter conviction brings a sentence of 0–40 years. The sentencing hearing is less dramatic than that of first-degree murder because the stakes are not as high, it can take place months after the trial rather than the next day, and there is no jury.[1]

A Case of Murder

In June 2010, Sam (a pseudonym) was convicted of manslaughter. The original charge was first-degree murder, which was later reduced to second-degree murder. The defendant asked for a bench trial (no jury). The judge found him guilty of manslaughter. My original role was to testify at the penalty phase if there was one. My new role was to testify at the sentencing hearing and to file a report containing basically the same, albeit more detailed information.

My testimony began with comments regarding punishment. Manslaughter has a punishment of 0–40 years. Before the law was changed in the 1990s the maximum sentence was 21 years; with good time most men only served a 7-year sentence. The same crime under the present law would have a sentence of 34 years.[2] This change represents the most drastic increase for any degree of homicide. But the legislature created a very plastic sentence with the new law; indeed they had the prudence to foresee a great variation of circumstances within this crime. They contemplated a circumstance in which there would be a sentence of 0 years: indeed a probative sentence. The statute speaks for itself. Some statutes indicate a minimum sentence, manslaughter does not. The question is what category of manslaughter fits a sentence of zero years. It is my hope that the following mitigation offered in Sam's behalf will convince you to give him no prison time.

In March 2010, after a fistfight between Sam and Keith (a pseudonym), Sam shot Keith. It is my opinion, given the cultural context in which these two young men lived and the circumstances of their confrontation, that the shooting nearly descends to the level of justifiable homicide. The shooting was **neither planned nor intentional**. This crime is the least culpable form of manslaughter and deserves a sentence of zero years.

[1] The states have tussled with the problem of how to impose the penalty of death on those convicted of capital murder without running afoul of the constitution. The United States Supreme Court in *Furman v. Georgia* in 1972 has straightforwardly repudiated mandatory death sentences for capital crimes. Individualized sentencing is required for meeting the requirements of due process. In response, the individual states have adopted statutes that provide for bifurcated trials in capital cases (Hall & Brace, 1994). It is the same jury, same judge, but perhaps a different prosecutor, and usually a different defense attorney. The same two defense attorneys both work on the case, but one attorney is usually in charge of the guilt phase of the trial and the other, the lead, most experienced attorney, is in charge of jury selection and the penalty phase. This designation changes according to the factors of each case. There are opening and closing arguments by both sides again, etc. The sentencing or penalty phase of the trial cannot begin sooner than 12 h after the guilt phase. The judge can allow a longer period of time. Only a jury can impose a death sentence; a judge cannot.

[2] At the present time violent offenders serve 85 % of their sentence. This will be reduced in the near future as states handle budget cuts. Various bills have circulated through the legislature in last including reducing the percentage violent offenders have to serve and allowing first time violent offenders to have the same good time as nonviolent offenders. The good time for nonviolent offenders has already been increased to 35 days for every 30 days served.

Circumstances of the Crime

Keith has two children with Susan (a pseudonym); they no longer live together. Susan has had several protective orders to keep Keith away from her residence. Susan now lives with Sam. This is the basis of Keith's humiliation and his anger and jealously toward Sam. Sam is involved in a series of events in which Keith is threatening him. The mother of Keith's children is living with Sam; each of their meetings is emotionally charged for Keith.

Previous to the crime/incident Keith and Sam had several confrontations. Each of these confrontations was initiated by Keith. On several of these occasions Keith pulled a gun from his truck and displayed it as a threat to Sam. The message was clear. This was a volatile situation. Indeed, witnesses during the trial testified that they avoid what they termed "women trouble." They stay away from situations like this because they have seen the end result. Sam did not react to the insults and callouts of Keith in spite of the humiliation. He thought that Keith would eventually tire of threatening him and the call outs would stop. They did not. The fight that night was another call out, he had to go to the fight or face humiliation again. Many members of the community knew Keith wanted to fight him in the park and that Sam had continually backed down from Keith's threats. Sam realized that his continuing to back down from Keith was not going to work. Sam felt that if he fought him that would be the end of it. There were informal rules set up that there would be no weapons. Keith brought two men with him to the fight and Keith brought three.

Sam brings a gun to the fight; because he expects Keith to have a gun. Keith has displayed the gun/threat on several occasions. The question is not if Keith had a gun but why would he not have a gun. One would assume that Keith was carrying a gun because he always has a gun. There is no reason to assume otherwise. As one witness in court said you always bring a gun to a fight.

On the night of the incident Sam gives up his gun by giving it to one of his friends to hold during the fight. Keith begins fighting with brass knuckles, violating a precondition. The fight breaks up when Keith bites a piece of flesh from Sam's face. When the fight breaks up Keith runs to the passenger side of his truck. Sam assumes he is going for his gun. He had produced the gun in the past from the glove box located on the passenger side of the truck. The question which begs for an answer is: For what other reason would he be running to the passenger door of his truck? Sam hollers "give me my gun." Sam shots Keith twice before he can get into his truck; there were no shots fired at Sam. Sam's friends testified that they also thought that Keith was going to get his gun. Keith's friends testified that Keith did not have a gun that night. But one of these friends testified that you always bring a gun to a fight. (This same friend said he did not have a gun that night).

There was no gun found at the crime scene. I testified that Keith's gun could have been removed from the scene for a number of reasons. It is quite common for witnesses to "pick the crime scene clean" in these circumstances. This occurs for a number of reasons:

1. Leaving the crime scene as is helps the police—police rarely help people in this area. Why help them?
2. A gun has value; easily tuned into cash; would you expect to find a roll of money to remain at a crime scene in these circumstances.
3. Witnesses think it will help their "buddy" to remove the gun.

My further testimony involved explaining the culture that surrounds this incident.[3]

[3] I have used the subculture of violence explanation before, but never had it fit so well. On one of those occasions it was in the penalty phase of a death penalty trial in which a black youth had shot a police officer for no apparent reason. Katz (1988, pp. 24–27) talks about the killing of police officers (an extreme application of the subculture of violence thesis) in what he calls a "righteous slaughter." It is the killer's impassioned attempt to restore dignity by obliterating the source of the humiliation, the victim. It is an effort to reclaim respect and dignity. Many killers claim they had to do it. Although this represents an exaggeration of most societal standards, the killer feels he has little choice (Katz, 1988). He cannot live with the humiliation. He murders because it reconstructs his dignity regardless of the consequences.

> Righteousness is not the product of rage; it is the essential stepping stone from humiliation to rage… The experience of public degradation carries the fear of bearing the disgrace eternally…humiliation and rage are both experienced as aggressive powers reaching into the soul (Katz, 1988, pp. 23–27).

The Subculture of Violence

One of the best theories yet advanced to account for variations in the prevalence and incidence of violence was developed by Marvin Wolfgang and Franco Ferracuti (1967) in their book *Subcultures of Violence*.[4] This theory relied somewhat on Wolfgang's earlier research of homicide in Philadelphia. Wolfgang had found that a significant number of the homicides that occurred among lower class people seemed to result from very trivial events that took on great importance because of mutually held expectations about how people would behave. Wolfgang interpreted these events in theoretical terms taken from Sutherland's (1939) Theory. An illustration from Wolfgang's (1958: 188–189) study of Philadelphia homicides shows the subcultural meanings, values, and expectations among different groups:

> …the significance of a slightly derogatory remark, or the appearance of a weapon in the hands of an adversary are stimuli differentially perceived and interpreted by Negroes and whites, males and females. Social expectations of responses in particular types of social interaction result in differential "definitions of the situation." A male is usually expected to defend the name and honor of his mother, the virtue of womanhood…and to accept no derogation about his race (even from a member of his own race), his age, or his masculinity. Quick resort to physical combat as a measure of daring, courage, or defense of status appears to be a cultural expectation, especially for lower socioeconomic class males of both races. When such a cultural norm response is elicited from an individual engaged in social interplay with others who harbor the same response mechanism, physical assaults, altercations, and violent domestic quarrels that result in homicide are likely to be common.

Their theory has been the seedbed for other studies on criminal violence which have developed into a theory that is designed to explain one type of homicide, the passion crimes **that were neither planned intentional killings** nor manifestations of extreme mental illness. The theory argues that the immediate causes of these passion homicides are ideas—values, norms, and expectations of behavior.

Both Keith and Sam are involved in what is called a subculture of violence. In this subculture "getting over on someone" gives that someone a feminine attribute, in a culture which forces "manliness." In a subculture of violence, which preys upon weakness, it is a label which must be either avoided or countered. This cultural trait combined with a "brittle defensiveness" many times leads to heated standoffs in situations that others would find trivial. Some individuals have good verbal skills and may handle these confrontations without resorting to physical force. Others, however, lack verbal skills and resort to physical violence. This results in a high number of murders and assaults among friends and in families. These families were once close friends. Sam's father had coached both of these men on youth baseball teams for several years (Curtis, 1975).

The existence of a subculture of violence means that violence will have predictable features. Far from being senseless and random, aggression will be patterned and quite rational when viewed in light of the subcultural values, norms, and expectations governing its use. All subcultures contain cognitive and behavioral elements that together provide meaning, legitimation, and justification and help stabilize group life. Actions that may appear senseless to outsiders are not so to members, and it is precisely because they are predictable that they endure over time. **This is exactly why a witness at trial said he stayed away from situations like this; what he referred to as women problems; because it is predictable**.

People in the subculture of violence tend to value honor more highly than people in the dominant culture. On the other hand, they tend to value human life less highly. There are also normative conflicts between the subculture of violence and the dominant culture. Those refer to "rules" about what behaviors are expected in response to the trivial jostles or remarks that were the cause of so many homicides. Those norms are backed up with social rewards and punishments: people who do not follow the norms are criticized or ridiculed by other people in the subculture, and

[4] Although recurring concepts to social scientists, the terms culture and subculture may not be familiar to judges and jurors or if they are well known the meanings usually do not rise to the level of explanatory. The expert should have an explanation prepared.

those who follow them are admired and respected. These norms take on a certain life of their own, independent of whether they are approved by the individuals who follow them, since the failure to follow the norms may result in the person becoming a victim of the violence. Encounters which involve bullying, however slight, represent a threat to one's manliness. There is no option of not responding to continued threat; that option is not available. To walk away in this culture is to surrender your masculinity and be characterized as weak; becoming prey (Bartol, 1991; Vold & Bernard, 1986; Wolfgang & Ferracuti, 1967).

Subcultures of violence are made up of groups whose values sanction the use of violence and who are quick to use force in interpersonal relations. The result is a quick responsive culture in which there is either a lot of fighting or a lot of killing depending on the nature of interaction. Members of violent subcultures see violence as a significant element of their lives, and integral part of their way of life, and they make judgments regarding its proper use in interpersonal relations.

A subculture of violence is not something to which we can point to or see, as we would a courthouse or university; rather, its presence is inferred by the existence of certain attitudes, behaviors, and conditions common to a group of people. In America, a subculture or violence might be inferred to exist if we found the following:

1. Relatively high rates of violence—homicide, assault, child and spouse abuse, sexual violence.
2. Common use or threats of violence in everyday disputes among friends and intimates.
3. Weapons carrying and other behaviors indicating anticipation of violence.
4. Relatively high rates of violence among the young, whose socialization exposes them to the subculture during the formative years.
5. Relatively high rates of victim precipitation—if violence is a dominant theme in life, people are likely to be "keyed up" for it and ready to provoke one another.
6. Criminal records and other personal histories indicating the repetition of violent crime.
7. The persistence of the above characteristics over time: subcultures do not develop overnight, nor do they disappear at the drop of a hat.

We know that lower class, inner-city black males are found disproportionately in homicide statistics. We also know that the typical homicide involves people who know each other, who are young rather than old, and who are of the same race. When such a culture norm response is elicited from an individual engaged in social interplay with others who harbor the same response mechanism, physical assaults, altercations, and violent domestic quarrels that result in homicide are likely to be common.

Research in Houston led to the conclusion that the basic ecological process of urban segregation centralizes people of like kind, throws them together at common institutions, occasions their association on levels of intimacy, and thereby paves the way for conflicts out of which homicides occur. Violence is a common outcome of the life circumstances and social interaction of these groups. This is the subculture-of-violence thesis (Bullock, 1955).

Evidence on this point also comes from St. Louis. A series of investigations of the proposition that blacks commonly carry weapons and that the arrest rates for weapons offenses are much higher among blacks than whites. Fifty black offenders convicted of possession of dangerous weapons were interviewed. These violators offered a number of reasons for carrying guns: Some did so to commit crimes; others did so to force payment of debts owed them. However, 70 % declared that they carried weapons because they anticipated attack from others in their environment; carrying a weapon was a defensive act. This group voiced a chronic concern about being attacked and the need for self-defense and assumed automatically that others in their environment were also carrying weapons, or if not actually carrying weapons, acted as if they were (Schultz, 1962).

What happened between Keith and Sam was not a crime, but a tragedy. Like the performance of the tragedy-play it is repeated many times each day. There are many versions. In both performance and real life one must understand the context of the story in order to grasp its significance. In both performance and real life the tragedy is perceived senseless by the audience.

Conclusions

This chapter has offered a description and interpretation of the contextual influences on a criminal act (Forsyth & Bankston, 1997). It will be noted that the mitigating factors in this case differ somewhat from cultural defenses of violations of the law. Cultural defenses usually consist of maintaining that norms and beliefs of particular cultural groups may lead their members to commit acts that are not crimes in their own eyes, although they are crimes in the eyes of the larger society. In this case, the mitigating factor is the interaction of those ideas. Like many crimes of violence it is also an accumulation of social–psychological experiences. Cultural and subcultural theories also focus on the role of ideas in causing criminal behaviors. These theories, such as Sutherland (1939), Cloward & Ohlin (1960), Cohen (1955), and Miller (1958), may explore the sources of those ideas in general social conditions, but they are characterized by the argument that it is the ideas themselves, rather than the social conditions, that directly cause criminal behavior (Erlanger, 1974, 1976).[5] These motivations along with situations of close contact heighten the potential for violent incidents and go far toward accounting for high rates of homicide among lower class citizens. This argument makes it unnecessary to invoke personality pathology to account for homicide. Sam received a sentence of 8 years.

The increasing diversity of America's population means that judges and juries will need more insight into varying motivations and cultural backgrounds of defendants. Culture is the least understood factor in the calculus of crime. Culture captivates the criminal justice system; a system that appears to have little tolerance for such explanations.

[5] That question was not vital to their theory, since the cause of the violent behaviors was said to be the ideas themselves rather than the social conditions that had generated those ideas in the past. Essentially they argued that the subculture had arisen in the past for specific historical reasons, but that it was transmitted from generation to generation as a set of ideas after those original social conditions had disappeared. Each individual independently encounters these social environments, and to a degree his behavior is a response to the social environment. But each individual also learns ideas and interpretations of these conditions from others who face similar conditions, and to a certain degree his behavior is a reply to those interpretations. The basic ecological process of segregation aggregates people of like kind and thereby fosters the way for conflicts from which occurs homicide. In these communities are concentrations of peoples whose values and lifestyles are especially likely to produce violent behavior. Thus any policy recommendations supported by this literature did not require dealing with general social conditions, but only required doing something to break up the patterns of ideas that constituted the subculture of violence. For example, one of their major policy recommendations was to disperse the subculture by scattering low-income housing projects throughout the city rather than concentrating them in inner-city areas. Once the subculture was dispersed, individuals would gradually be assimilated into the dominant culture and the violent behaviors would cease to occur.

Biography

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"Oh, Stop That Cursed Jury": The Role of the Forensic Psychologist in the Mitigation Phase of the Death Penalty Trial

3

Valerie McClain, Elliot Atkins, and Michael L. Perlin

Ever since the United States Supreme Court reinstated the death penalty in 1976, the work of lawyers representing defendants facing capital punishment has been inextricably intertwined with the work of expert witnesses (including, importantly, forensic psychologists) in presenting mitigation evidence to the fact finder. In the past 35 years, the Supreme Court has decided multiple cases that deal with this issue, and there is no question whatsoever that, for the foreseeable future, this will remain one of the most critical aspects of any death penalty trial.

In this chapter, we (two forensic psychologists [VMcC & EA] who have testified extensively in mitigation hearings and one lawyer [MLP] who has consulted frequently on death penalty matters, who has served as an expert witness in death penalty cases on the question of counsel inadequacy, and who has "second sat" a US Supreme Court death penalty case, (*Strickland v. Washington*, 1983)), seek to provide a "road map" to this challenging and difficult area of the law. We will proceed this way: In the first section, we set out the development of Supreme Court case law in this area. In the second section, we briefly describe the structure of constitutionally acceptable statutes, focusing on the roles of aggravators and mitigators. In the third section, we discuss the role of the forensic expert in presenting mitigation evidence, the meaning of mitigation, how mitigation evidence may be gathered (with special attention being paid to issues of neuroscience evidence), report writing, and the preparation of mitigation testimony. In the fourth section, we consider some of the special issues related to mitigation, including adequacy of counsel, prohibitions against executing defendants with severe mental impairments, the dilemma of "death qualified" juries, and the use of forensic witnesses by the prosecution. In Part V, we conclude, offering some modest suggestions.

Our title comes, in part, from Bob Dylan's song, *Drifter's Escape* (http://www.bobdylan.com/songs/drifters-escape), a song that combines revengeful elements of the Old Testament with "a taste of Old West frontier justice" (Trager, 2004, p. 164). Near the end, Dylan sings:

> "Oh, stop that cursed jury"…
> "The trial was bad enough
> But this is ten times worse"

The connection to the topic of this chapter should be clear to all. To a great extent, these lyrics are a

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_3,

perfect reflection of the death penalty trial and are the reason why the mitigation stage is, often, literally the difference between life and death.

The Development of U.S. Supreme Court Case Law

In 1972, in the landmark case of *Furman v. Georgia* (1972), the U.S. Supreme Court held unconstitutional all state death penalty statutes. In *Furman*, the defendants had challenged the death penalty based upon Eighth Amendment grounds of cruel and unusual punishment. Specifically, the defendants argued that the Eighth and Fourteenth Amendments' ban on "cruel and unusual punishment" was violated by the lack of guidance provided for the jury in making its life-or-death decision. In a short *per curium* order, the Court held that the imposition and carrying out of the death penalty in these cases did constitute cruel and unusual punishment in violation of those amendments, because it was not applied in a fair, uniform, and nonarbitrary manner. Consequently, *Furman* invalidated the death penalty statutes in 40 states along with the sentences of the 600 inmates on death row at that time (see generally, Meltsner, 1973).

Immediately following the *Furman* decision, approximately 35 states initiated the process of passing new death penalty statutes (Poulous, 1986, p. 145). *Furman* had been decided at a time when it had appeared that death penalty support was dwindling (see Vann, 2011, p. 1255: "The 1972 landmark ruling in *Furman v. Georgia* appeared to be the end of the arbitrary imposition of the death penalty in the United States."). By way of example, in a 1968 case involving jury exclusion, the Court had contended that supporters of the death penalty were a "distinct and dwindling minority" *Witherspoon v. Illinois*, 1968).[1] But the legislative fervor following the *Furman* decision revealed that capital punishment had *not* been rejected by the elected representation of the people. In other words, while many legal scholars expected *Furman* to end the death penalty, it had the opposite effect, instead revitalizing that punishment.

Thus, in 1976, the Court heard a set of five cases that tested the constitutionality of these newly devised schemes (Gregg *v. Georgia,* 1976; *Jurek v. Texas, 428 U.S. 262* 1976; *Proffitt v. Florida*, 1976; *Roberts v. Louisiana, 428 U.S. 325* 1976; *Woodson v. North Carolina, 428 U.S. 280* 1976). Through these five decisions, the Court reinstated the death penalty, establishing limits on states' statutory death penalty schemes, and thus set in motion an "historic" change in American death penalty jurisprudence (Galliher & Galliher, 2001/2002, p. 308). Essentially, these decisions attempted to establish a foundation for a fair and uniform application of this punishment. In addition, these cases—often characterized as the "July 2" decisions—held that the death penalty is constitutional only when the sentencing authority is provided adequate individualized information, and is guided by clear and objective standards (4 Perlin (2002), § 12–3.2, p. 491).

Of this set of five cases, three—*Gregg, Jurek, and Proffitt*—upheld the new death penalty statutes devised by the states (see Haas, 2008, discussing the reasons these statutes passed constitutional muster while the ones in *Woodson* and *Roberts* did not). These statutes shared several factors that, in the Court's eyes, made the death penalty more fairly imposed, essentially creating a system of guided discretion. Specifically, statutory features such as bifurcated trials, the specification of aggravating factors to be found by the jury in order to impose the death penalty, and automatic appellate review in the states' courts were adopted. However, commentators agree that these cases failed to provide much direction concerning what the source of standards should be, and that, "[consequently, lawmakers and jurists face[d] a series of confounding questions." (Liebman & Shepard, 1978, p. 778).

Following these decisions, the Court's attention turned more and more to questions of mitigation. In *Eddings v. Oklahoma (455 U.S. 104 (*1982*)* and *Lockett v. Ohio* (1978), the Court also found

[1] In *Witherspoon*, and, later, in *Wainwright v. Witt* (1985), the Court had held that a prospective juror may be seated in a capital case, despite general objections to the death penalty, if he can demonstrate that his personal views will not prevent him from following the law; see *Witt*, p. 424 (standard for determining when a prospective juror may be excluded for cause because of his views on capital punishments is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"').

that the judge or jury must be allowed to consider "any claim raised by the defendant in mitigation" (see Showalter & Bonnie, 1984, p. 161). Those schemes that were rejected included automatic death sentencing schemes in which the death penalty was mandatory for certain crimes. In addition, schemes that limited the consideration of mitigating evidence were also found to be unacceptable. Several years after *Eddings* and *Lockett*, the Court returned to this question in *Penry v. Lynaugh* (492 U.S. 302, 322 (1989)) and held that a defendant's mitigating evidence of mental retardation and childhood abuse had "relevance to his moral culpability beyond the scope of the special issues." It has supplemented this decision several times, holding in *Tennard v. Dretke* (2004) that it contemplated an "expansive" concept of relevant mitigating evidence (p. 288–289).

Current Structures

Cunningham and Goldstein (2003) provide a description of the current structure of capital trials. In each of the 34 states that have death penalty statutes, as well as military and federal jurisdictions, there is a list of special circumstances or aggravating factors that if established by the judgment of the trier of fact (judge or jury) may be used to determine if the defendant may be sentenced to death.

Contemporaneous death penalty statutes require findings of what are called "mitigating" and "aggravating" factors. This is done to insure (ostensibly) that the death penalty is reserved for only the vilest of crimes—ones for which there is no reasonable excuse or justification. By way of example, in Pennsylvania, for instance, "aggravators" include, but are not limited to, such circumstances as the commission of a murder of a prosecution witness, of a murder in the perpetration of a felony, the knowing creation of a "grave risk of death to another person in addition to the victim of the offense," the use of torture, a prior murder conviction, or a murder for hire (42 Pa.C.S.A. § 9711(d)). In the same statutory scheme, mitigators' involved age, lack of significant criminal history, acting under "extreme duress" (42 Pa. C.S.A. §9711 (e)), and two others were especially significant to this chapter:

> "… (2) The defendant was under the influence of extreme mental or emotional disturbance (42 Pa. C.S.A. §9711 (e) (2)) [and]
>
> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (42 Pa. C.S.A. §9711 (e) (3).).

Aggravating factors in Pennsylvania must be proven beyond a reasonable doubt, and whereas the mitigating circumstances must be proven by the defendant by a preponderance of the evidence (42 Pa. C.S.A. §9711 (c) (1) (iii)). In the same sentencing scheme, the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which "outweigh" any mitigating circumstances (42 Pa. C.S.A. §9711 (c)(4)). The verdict must be a sentence of life imprisonment in all other cases. On this point, the New Jersey Supreme Court has spoken clearly: "We can think of no judgment of any jury in this state in any case that has as strong a claim to the requirement of certainty as does this one" (*State v. Biegenwald*, 1987, pp. 155–56).[2]

The death penalty trial is bifurcated into two trials, known as the guilt phase and the sentencing phase (Cunningham & Goldstein, 2003). The sentencing phase only occurs if the defendant pleads guilty or is found guilty of a capital offense. The sentencing trial may continue before the guilt phase jury or be heard by the trial judge or a panel of judges who determine whether the defendant is sentenced to death or a life prison term. At the sentencing phase, the defense introduces mitigation evidence, frequently by expert testimony, to establish that one or more mitigating circumstances exist. The prosecutor provides evidence that one or more aggravating factors exist and may provide rebuttal experts to address

[2] See *State v.* ***Biegenwald***, 1987, pp. 155–156. At the time that the *Biegenwald* case was decided, New Jersey's death penalty statute (see N.J. Stat. Ann. § 2C:11-3 et seq.) was substantially similar to the Pennsylvania law. That penalty was abolished in New Jersey in 2007. See *State v. Kenney,* 2010, p. *8.

the expert defense testimony. In a jury trial, the jurists are instructed to weight the aggravating against the mitigating factors, utilizing a system that varies across jurisdictions.

In 2002, the U.S. Supreme Court ruled in *Ring v. Arizona* (536 US 584, 2002) that juries, not judges, make the decision as to whether or not an individual may be sentenced to death, unless the defendant chooses to waive the jury at this stage. The decision underscores the importance of a "penalty phase trial" as opposed to a "sentencing hearing." A death sentence imposed by a judge violates the Constitutional right to a trial by jury according to *Ring*.

Mitigation: The Role of the Forensic Psychologist[3]

The ABA Guidelines

In 2003, the American Bar Association (ABA) significantly elevated the standard of representation in death penalty cases. Its revised "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (*Guidelines*) provided the basis for the 2003 Supreme Court decision in *Wiggins v. Smith* (2003), which established the requirement for a thorough and comprehensive mitigation review. *Wiggins* found that the defendant's attorney failed to conduct a comprehensive social history of his client, thus violating his Sixth Amendment rights. Specifically, the Court set forth the requirement that mitigation investigations include efforts to discover "all reasonably available" mitigating evidence, as well as evidence to rebut any aggravating evidence that may be introduced by the prosecutor (p. 525). *Wiggins* incorporated the *Guidelines*, the objective of which was to "set forth a national standard of practice for the defense of capital cases in order to insure high-quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction" (*Guidelines,* 1.1(A)).

Included among the *Guidelines*' recommendations is the need for at least one member of the defense team to be "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." The *Guidelines* address this issue in this manner:

> Creating a competent and reliable mental health evaluation consistent with prevailing standards of practices is a time consuming and expensive process. Counsel must compile extensive historical data, as well as obtaining a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary. (*Guidelines* 2003, p. 959)

The *Guidelines* also recommend the inclusion of a mitigation specialist, a mental health professional who possesses:

> clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and ability to elicit sensitive, embarrassing and often humiliating evidence that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. (*Ibid*)

The goal of mitigation, in the short term, is to humanize the defendant to the jury; in the long term, the goal is to save the defendant's life. The process of obtaining the information necessary to achieve these goals requires:

> Overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer (Commentary to Guideline 10.7, 2003, p. 82).

The Meaning of "Mitigation"

An important imperative in the process of preparing for the penalty phase in a capital proceeding is that a defense attorney has the duty to conduct

[3] Other mental health professionals, sociologists, and criminologists also have a role to play in the mitigation process. Our focus here on forensic psychologists should not suggest that we believe that these are the only potential witnesses at this stage.

a reasonable investigation of possible mitigating evidence. Such evidence does not provide a justification or excuse for an offense, but may be considered as extenuating or reducing the degree of moral culpability of the offender (Fla. St. 921.141).

It should be made clear that mitigation is not the same thing as sympathy. "Mitigating circumstances do not constitute a justification or excuse of the offense in question, but in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability" (Black's Law Dictionary, 1979, p. 903, quoting, Glueck, 1924, p. 955, and quoted in, e.g., State v. Bartholomew, 1984, p. 1088). It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that the individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence. (See *California v. Brown*, 1987, pp. 545–546, O'Connor, J., concurring). A mitigating circumstance for purposes of sentencing in capital cases is any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death (*Campbell v. State*, 1990). There are situations, however, where a mitigating circumstance may be found to be supported by the records, but given no weight by the jury (*Trease v. State*, 2000).

The jury, in considering mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence (*Bonifay v. State*, 1996). A jury is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase (*Chesire v. State*, 1990). Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed (*Wickham v. State*, 1991). A jury must expressly follow the Court's written order to evaluate each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence (*Campbell v. State*, 1990). While the jury can determine the weight to be given to a particular mitigator, the jury must find as a mitigating circumstance any proposed factor established by the greater weight of the evidence (*Campbell v. State*, 1990). A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. However, a jury may reject a proposed mitigator if it finds there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with the other evidence in the case. Essentially, the task of the jury is twofold: to decide if a circumstance is mitigating and then to determine the weight to be assigned.

Lenamon (2010) provides a comprehensive overview of state death penalty mitigation statutes.[4] There is considerable overlap among the states regarding the circumstances which are admissible as potential mitigators. Commonalities across the states include:

1. The defendant presents with no significant history of prior criminal activity.
2. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance and the defendant's ability to conform his conduct to the requirements of the law was substantially impaired.
3. The victim was a participant in the defendant's conduct or consented to it.

[4] For an earlier statement of a test to determine the extent to which mitigation based on mental disorder would be appropriate in a capital case, see Liebman & Shepard, 1978, p. 818 (discussed in 4 Perlin, 2002, § 12-3.2, pp. 492–493):

1. Whether the offender's suffering evidences expiation or inspires compassion.
2. Whether the offender's cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society's need for revenge.
3. Whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deterrent threat of capital punishment at the time he committed the crime.
4. Whether the exemplary value of capitally punishing the offender, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender.

4. The defendant was an accomplice in the capital offense committed by another person and his participation was minor.
5. The defendant acted under extreme duress or under the substantial domination of another person.
6. The defendant is a person with borderline mental retardation, but does not meet the *Atkins v. Virginia* (2002) criteria for barring execution of persons with mental retardation.
7. The age and mental maturity of the defendant at the time of the crime as set out in *Roper v. Simmons* (2005).
8. Whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification for his conduct.
9. The defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney.
10. The defendant's background includes a history of being the victim of extreme emotional or physical abuse.
11. Other nonstatutory mitigating circumstances in the defendant's character, history or potential (*Lockett v. Ohio*, 1978; *Skipper v. South Carolina*, 1986).

For the mental condition of the defendant to be considered a mitigator, the emotional disturbance of the defendant must be greater than that of the average person and interfere with, but not necessarily preclude, his or her knowledge of right and wrong. The defendant may be legally answerable for his or her actions and legally sane, yet still be entitled to some mitigation of sentence because of his or her mental condition (*Perri v. State*, 1983). Emotional immaturity coupled with chronological young age can also be considered for mitigation. In those cases where age has been considered as a basis of mitigation, it has generally been accompanied by minimal involvement with the legal system. Some courts have required an even greater showing which included the support of friends and family.

Nonstatutory mitigators include any aspects of the defendant's personal history and character not specifically identified in that state's statute. One of the greatest sources of potential mitigation comes from the defendant's personal history and the history of his or her family. This can include a dysfunctional family background, a history of physical or sexual abuse, addiction to alcohol or drugs, difficulty in adjusting to life after being released from prison for a prior offense, the existence of other family members for whom the defendant cares or who care for the defendant, past success in military service, and employment and other such matters.

A defendant's own character may provide potential mitigation in terms of positive personal characteristics and actions. This can include the defendant's expressions of remorse, cooperation with law enforcement, willingness to plead guilty or otherwise accept responsibility, past good deeds, good behavior in jail or prison awaiting trial, ability to adjust to prison life if given a life sentence, lack of potential harm to prison personnel or other inmates, and the like. Mitigation can also be found in the future potential of the defendant to help others and make positive contributions to society should the defendant be sentenced to life imprisonment.

Mitigation efforts are best initiated at the inception of the defense process in order to allow a sufficient amount of time to gather information that could ultimately play a crucial role during the sentencing phase of the trial. As stated above, the *Wiggins* decision and the ABA Guidelines established the essential need for a mental health professional to be a part of the defense team. The establishment of a defense team at the onset of case planning allows the forensic mental health professional to make suggestions regarding how to work with the client and what the most efficacious procedure would be for gathering information relevant to the client's mental health history. Defense counsel may also consult with the forensic mental health professional regarding the role the defendant's mental health history may have played in the commission of the offense.

During the development of a defense strategy, determination will be made as to whether the defendant's mental health history should be presented during the guilt phase of the trial. The use of an affirmative defense will allow the forensic psychologist to present to the jury any relevant

psychosocial factors that may have influenced the defendant's thinking and decision making at the time of the offense. A complete forensic psychological evaluation that addresses the defendant's state of mind would be essential when presenting such an affirmative defense. Within the scope of such testimony, the defendant's mental health history, including diagnoses and treatment, as well as academic achievement history, including learning disabilities or special education placements, will be placed in front of the jury early in the trial process. Cognitive, emotional, and behavioral deficits that affect decision making should also be presented in a manner that links the deficits with the offense-related behaviors.

Atkins, Podboy, Larson, and Schenker (2006) provide detailed guidelines for conducting mitigation evaluations with the goal of humanizing the client in the face of his (often) horrifying deeds. The process includes:

1. A clinical evaluation which includes interviewing, psychological testing, and review of academic, occupational, mental health, and placement records. Exploration of psychological syndromes, neurological impairment, psychosocial/familial issues, and substance abuse history is essential.
2. An exploration of social and cultural factors that may have affected the defendant's development and may have contributed to his involvement in the offense. These factors may include, but are not limited to, socioeconomic status (SES), institutionalization, child services placement, race, age, religion, foreign culture, military experience, gang involvement, and sexual identity.
3. An exploration of the defendant's past and current prison experience. Factors that should be explored include the defendant's ability to adaptation to prison life, his/her relationships with corrections officers and prison staff, his/her assistance to other inmates, educational program involvement, and any other accomplishments during incarceration.
4. An exploration of the factors related to the offense, which includes the defendant's intention at the time of the crime, moral justification, and role in the offense. The forensic mental health professional should also address the role that social and cultural factors may have influenced the defendant's motivations for committing the crime.[5]
5. An exploration of the defendant's character including a lack of criminal history, cooperation with authorities, remorse, and rehabilitation.
6. An exploration of victim-related variables including provocation and/or the extent to which the victim was a participant in the offense. The victim's family's wishes should also be addressed if family members support a life sentence.

Attorneys may also benefit from mental health consultation regarding their client's concerns related to the presentation of personal, often embarrassing, information. These concerns are often the product of such mental health symptoms as paranoia, distrust, and depression. Enlisting the help of family members may bolster the cooperation of the defendant.

Gathering Information for Mitigation

The process of gathering mitigation-related information is long and tedious. It is essential for the forensic mental health professional to be organized and creative in order to optimize mitigation efforts. To begin with, the evaluator should take a detailed life history of the defendant, specifically focusing on the following areas (Atkins et al., 2006):

1. Biological factors: prenatal (genetic, malnutrition, teratogens, chronic stress), perinatal (premature births, low birth weight, delivery complications), postnatal (chronic nutritional deficiencies, head trauma and loss of consciousness, serious accidents), and mental health (psychological, psychiatric, neurological, behavioral, and substance abuse).
2. Familial factors: family history of mental illness and substance abuse, criminality on the part of parents, parental substance abuse,

[5] See ABA Supplemental Guideline 5.1, requiring cultural competency and knowledge of mental health signs and symptoms (see Stetler, 2007–2008).

breaks in caregiving during formative years, child abuse, marital separation and conflict, parental absence, rejection or neglect, attachment issues, and maternal depression.

3. Environmental factors:
   (a) Home: inadequate or lack of proper adult modeling, parental dependence on illicit substances for coping, parental modeling of violence to resolve conflict, economic difficulties, exposure to toxins, over involvement in entertainment violence, low SES, interaction with child services, and homelessness.
   (b) School: adjustment difficulties, separation anxiety, being bullied and teased, low IQ and learning disabilities, special education placement, peer rejection, childhood aggression, and behavioral problems.
   (c) Community: racial differences, gang association, high level of crime, accessibility of drugs, violence, poverty, and homelessness.

Any missing details or lapses in the defendant's memory can be filled in with collateral interviews of family members, friends and associates. Their observations of the defendant around the time of the offense may also provide essential information about the defendant's state of mind at that time.

Based upon the clinical interview, the forensic mental health professional should acquire the defendant's medical, mental health, substance abuse, and school records. In addition, a review of the defendant's prior criminal history, employment, prison (both current and past), and military records should also be undertaken by the evaluator. These records may also provide insight and additional details of the defendant's development and life history.

A review of the discovery material will likely provide accounts of the defendant's behavior around the time of the offense, especially if the defendant was arrested immediately following the commission of the offense. In these cases, a videotaped interrogation may provide the evaluator with insight into the defendant's state of mind as well as possible psychological influences that may have impacted the defendant's behavior. Finally, a review of a presentence investigation reports and memoranda will allow the expert to appreciate the strengths of the prosecutor's presentation of aggravating factors.

Due to the severity of the punishment, the forensic psychologist must address the motivation of the defendant to malingerer symptoms, exaggerate historical claims, and "forget" damaging information (Goldstein & Bursztajn, 2011). The veracity of the defendant's claims can be clarified through record reviews, collateral interviews, and objective psychological testing (e.g., the Structured Interview of Reported Symptoms (SIRS), the Structured Inventory of Malingered Symptoms (SIMS), and the Minnesota Multiphasic Personality Inventory, Second Edition [MMPI-2]). Although these instruments will not produce a guaranteed determination of the truthfulness of the defendant's claims, they will provide the evaluator with a profile of the defendant's tendencies, both conscious and subconscious, to answer questions and present information in an honest fashion. Due to both the severity of the crime and the sentence (death or life without parole), the amount of time between the commission of the crime and the trial is likely to be protracted. Thus, psychometric assessment of the defendant's current psychological and cognitive functioning should address the defendant's competency as well as issues related to the presentation of mitigation at the penalty phase.

One sub-issue that must be confronted in many cases is the need to explore the link between criminal behavior and neurological impairment. This link between criminal behavior and neuropsychological impairment is a crucial aspect in criminal defense. More than one-third of capital defendants have a history of neurological damage (Fabian, 2009). Establishing a functional link between the deficits and event in question has important implications with regard to both the guilt (mental state at the time) and sentencing (mitigation) phases of the trial process. Appropriate evaluation and testing for neuropsychological deficits are an important aspect of mitigation. In *Tennard v. Dretke* (2004), the Court construed *Atkins* to find that there does not have to be a causal relationship between the defendant's

IQ and the causation of his crime, specifying, "Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered," *Ibid*, p. 287. Similarly, any cognitive and neuropsychological impairment may be mitigating even if it does not have a direct causal relationship with the crime.

In *Roper v. Simmons* (2005), the differences between adults with mental retardation and juveniles were recognized by the Court. Most importantly, research including MRI studies on adolescent brain functioning indicated that brain areas continue to develop through young adulthood that influence decision making. Similarly, characteristics of adolescents and the relationship to aggression and violence were considered including impulsivity, risk taking, peer affiliation, and less mature decision making.

Violent behaviors due to brain impairment may be caused by many factors, including acute emotional state, repeated head trauma, toxic conditions caused by drugs, alcohol, medication, and some heavy metals, seizure disorder, and degenerative conditions such as Alzheimer's disease or dementia. Areas of the brain typically implicated in violent behaviors include those found in the ascending inhibitory component: the reticular activating system; limbic system, including structures such as the amygdala, hippocampus, and septum; the dorsomedial and anterior thalamic nuclei; ventromedial hypothalamus; and basoorbital and posteriomedial frontal lobe.

Frontal lobe impairment is the primary focus when linking neuropsychological deficits and criminal behavior. This is because this brain area mediates between intellect and emotions. The ability to modulate and control aggression and anger emanating from the limbic system is frequently interrupted and impaired when brain damage occurs. Bilateral damage to the premotor areas of the frontal lobes causes a syndrome characterized by apathy, irritability, shallow affect, and cognitive changes such as perseveration with decreased ability to shift cognitive strategies and response sets. Verbal fluency and sustained attention are also affected. In other words, the frontal lobes are a regulatory system controlling elements of planning, organization, and intentional behavior. Individuals with frontal lobe deficits due to neurological trauma may frequently resemble someone with psychopathic behaviors if the history is not carefully reviewed.

Mitigation Report Writing

As with all forensic psychological reports, the author needs to present clear and precise opinions and conclusions. The death penalty mitigation report is often prepared in advance of the trial as it can be utilized by the defense team in the negotiation of reduced charges or the withdrawal of the death penalty (Goldstein & Bursztajn, 2011).

Prior to report writing, the forensic mental health professional should consult with the attorney as to the overall sentencing strategy as well as to what impact his/her preliminary findings and conclusions may have on that strategy. Mitigation should be similarly discussed and couched within the relevant statutory and nonstatutory circumstances to facilitate understanding and optimize the outcome for the defendant.

During the penalty phase, the prosecutor will likely use the defendant's mental health history, specifically in regard to future dangerousness, in rebuttal to the defense's mitigation presentation. In view of this, the report should include information that will preemptively take any such vulnerabilities into consideration while, at the same time, serving to lessen the impact of the prosecutor's presentation of aggravating factors on the jury. For example, situations in which there were failed treatment attempts (or no effort to obtain treatment) should be placed into a context that reflects the reality of the defendant's circumstances during the relevant periods of time.

Testimony Preparation for the Penalty Phase

Due to the fact that the mitigation report is turned over to the Court prior to the start of the trial, unless the defense is using a mental status affirmative

defense, the defendant's culpability will not have been addressed. By the time of the penalty phase, however, the expert will be able to present, through testimony, the defendant's mental health history relative to the defendant's actions during the commission of the offense. Consultation with the defense attorney and the mitigation team is essential prior to such testimony. The penalty phase process, itself, should be addressed, as well as projections regarding the sequence of witnesses, the length of direct and cross-examination, and various rules regarding permissible vs. impermissible communication between the psychologist and the attorney during the hearing. This consultation process should also anticipate the impact that the presented information will have on the court and jury, as well as strategies regarding methods to optimize the impact of the testimony.

The defense team must be cognizant that testimony regarding mitigation will be heard by the jury within the context of a mind-set that may have already concluded that the defendant must die. Foglia and Schenker (2001) discuss the issue of juries' (particular death-qualified juries') tendency toward premature decision making. In reference to the power of first impressions, the authors observed:

> Bifurcating the trial, presenting evidence of mitigation during the sentencing phase, and jury instructions aimed at guiding discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the evidence they are supposed to consider or receive instructions on how they are supposed to make the decision whether the defendant should live or die. (p. 30).

Special Issues

Introduction

In addition to the issues discussed previously, it is also necessary to consider what we call "special issues," other matters of great significance to the consulting forensic psychologist, all of which have a significant impact on both the process and outcome of death penalty cases: issues related to the effectiveness of counsel, the prohibitions against executing defendants with certain mental disabilities, the dilemma of the "death-qualified" jury, and the issues that relate to forensic psychologists who testify for the state in *support* of execution. Each will be addressed separately.

Effectiveness of Counsel[6]

The Role of Counsel

There is an undeniable truth that must be confronted: in an amazingly high number of cases, the most critical issue in determining whether a defendant lives or dies is the quality of counsel (See *State v. Morton*, 1998, p. 277 (Handler, J., dissenting in part), quoting this language from Perlin, 1996, p. 202). As suggested by one veteran death penalty litigator, "[t]he death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer" (Bright, 1990, p. 695).

The responsibilities of lawyers in death penalty cases are legion. The attorney must develop a meaningful relationship with a client who is likely the target of public and media animosity, and whose unpopularity may taint the quality of that relationship; thus, she must find a way to "humanize" her client. She must investigate for mitigating evidence, obtain expert defense witnesses, investigate to rebut aggravating evidence, and attempt to negotiate a plea bargain where appropriate. If a guilty verdict is rendered, she must be prepared to make informed strategic decisions about the penalty phase (White, 1993). No one has seriously contradicted Professor Welsh White that "[t]he *single* greatest problem with our system of capital punishment is the quality of representation afforded capital defendants" (*Ibid*, at 376, emphasis added), nor has anyone seriously questioned the accuracy of Justice Ruth Bader Ginsburg's observation: "I have yet to see a death case among the dozens

[6]This section is generally adapted from Perlin (2013).

coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial." (http://legis.wisconsin.gov/lrb/pubs/rb/06rb02.pdf.). A *Harvard Law Review* survey article is blunt: "[t]he utter inadequacy of trial and appellate lawyers for capital defendants has been widely recognized as the single most spectacular failure in the administration of capital punishment" (Note, 1994, p. 1923).

Why is this? Many reasons have been offered, but one starting point is Douglas Vick's analysis, one that has lost none of its resonance over the 17 years since it was written:

> The literature is replete with impressionistic, anecdotal, and empirical evidence that indigent capital defendants are routinely denied assistance of counsel adequate to put into practice the protections that on paper make the death penalty constitutional. This crisis in capital representation is caused by funding systems that discourage experienced and competent criminal attorneys from taking appointments in death penalty cases and prevent even the most talented attorneys from preparing an adequate defense, particularly for the penalty phase (Vick, 1995, pp. 397–98).

And the situation is worse—far worse—for defendants with mental disabilities. Nearly 35 years ago, when surveying the availability of counsel to mentally disabled litigants, President Carter's Commission on Mental Health noted the frequently substandard level of representation made available to mentally disabled criminal defendants (President's Commission on Mental Health, 1978, p. 62, discussed in Perlin, 1989–1990, p. 654). Nothing that has happened in the intervening decades has been a palliative for this problem; if anything, it is confounded by the myth that adequate counsel is available to represent both criminal defendants in general and mentally disabled litigants in particular. (See, e.g., Martin, 1993, discussing ethical issues facing counsel in cases involving mentally disabled criminal defendants.)

And, as the importance of the construction of "mitigating" and "aggravating" evidence grows, so does the need for counsel to be able to understand and utilize this mental disability evidence. As Mental Health America (formerly, the National Mental Health Association) has observed, "The process of determining guilt and imposing sentence is necessarily more complex for individuals with mental health conditions. A high standard of care is essential with regard to legal representation as well as psychological and psychiatric evaluation for individuals with mental health conditions involved in death penalty cases" (http://www.nmha.org/go/position-statements/54.). Thus, the *Commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 2003) requires the use of mitigation experts who have "the clinical skills to recognize … congenital, mental and neurological conditions, to understand how these conditions may have affected the defendant's development and behavior" (*Commentary to Guidelines,* 4.1, 2003, p. 959).

Writing about this issue, Prof. Laura Jochnowitz recently underscored the dilemma, in the context of *juror* misconceptions. The phrase "defense counsel" could be substituted for the word "juror" each time in the following excerpt:

> Death row inmates are often afflicted with severe psychological problems and/or below average intelligence, as well as with some related disabling factors like head injuries, drug and childhood abuse histories. Yet claims by capital defendants of extenuating mental impairments may sometimes be investigated poorly or strategically omitted, and even when the claims are presented, they are not well understood by jurors. Defendants' history of mental impairments may be perceived by jurors as stigmatizing, threatening, or not believable. Jurors respond differently and more punitively to some types of mental illness and addiction, than to cognitive impairments. Their personal attributes and criminal justice attitudes may affect their receptivity. Jurors' exposure to mental health and other issues early in the case, at *voir dire* or the guilt phase of a bifurcated capital trial may affect whether they prejudge its significance at the penalty phase. Yet, jurors' exposure to long guilt phase prosecution evidence and bloody crime scene photos, without evidence foreshadowing diminished capacity or reduced culpability may desensitize jurors, before they hear penalty phase evidence (Jochnowitz, 2011, p. 840).

Consider some of the specific "added" abilities counsel need in cases involving the representation of defendants with serious disabilities

facing the death penalty. The *Commentary Guidelines* focus on the special problems related to the issue of trust in the representation of the defendant with a mental disability or from a different cultural background than the lawyer:

> Many capital defendants are … severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired." There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client (*Commentary Guidelines,* 2003, pp. 1007–08).[7]

Consider again, by way of example, the question of neuroimaging in this context. In a recent thoughtful and comprehensive article, Blume and Paavola (2011) discuss the need for defense counsel to be competent in the use (and nonuse) of neuroimaging in capital cases.[8] To what extent will occasionally appointed, underfunded counsel "get" the significance of this potential evidence? (See Perlin, 2009).

Also, another question is: What about the use (and misuse) of antipsychotic medication on death penalty-eligible defendants? One of the authors (MLP) wrote the following eighteen years ago, and there is no evidence available that suggests the dilemma has gone away, nor there is any evidence to suggest that occasionally appointed counsel understands these issues any better than do random jurors:

> Jurors miscomprehend the impact of antipsychotic medication on defendants. Medication side-effects often lead them to attribute negative personality traits such as apathy or lack of remorse—exactly those traits that make it more likely that a death penalty verdict will be returned—to such defendants (Perlin, 1994, p. 278).

We believe that the advice offered by John Blume and Pamela Blume Leonard resonates here:

> To address mental health issues competently and effectively, defense counsel must understand the wide range of mental health issues relevant to criminal cases, recognize and identify the multitude of symptoms that may be exhibited by our clients, and be familiar with how mental health experts arrive at diagnoses and determine how the client's mental illness influenced his behavior at the time of the offense. Without this knowledge, it is impossible to advocate effectively for a mentally ill client or to overcome jurors' cynicism about mental health issues. We believe juror skepticism often reflects inadequate development and ineffective presentation rather than a biased refusal to appreciate the tragic consequences of mental illness (Blume & Leonard, 2000, p. 63).

Prohibitions to Imposition of the Death Penalty

Three Supreme Court decisions have served to limit the types of defendants for which the death penalty may be considered. First, in 1986, the execution of the "mentally insane" was banned in *Ford v. Wainwright*, a decision subsequently clarified and somewhat expanded in *Panetti v. Quarterman* (2007). In *Ford,* the Court found that the Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane, which was defined as a person who lacks the mental capacity to understand the fact of the impending execution and the reason for it. Psychiatric examination is required to

[7] On the use of experts, see Clarke (1995), p. 1374:

> It is not easy for lawyers, who may lack insight into the process, to see how use of mental health experts can, without testifying to insanity, place the crime, which may otherwise appear to be inexplicable, in a mitigating context that allows the jury to see the accused as a flawed person rather than as a less than human monster.

[8] On how neuroimaging may play a role (or not) in determinations of whether a defendant is competent to be executed, see Perlin (2010).

determine whether the individual sentenced to death understands the nature and effect of the death penalty and why it is to be imposed upon him or her. In other words, is the individual "competent" to be executed?

In 2002, the *Atkins v. Virginia* Court held that regardless of the presence or absence of aggravating or mitigating circumstances, a sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined that the defendant has mental retardation. The Court, however, left it up to the states to define the clinical diagnosis of mental retardation. The term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning" generally refers to the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. Various state agencies that aid developmentally disabled individuals have established rules to specify the standardized intelligence tests and adaptive measures which are appropriate for use in evaluating mental retardation.

Third, in the landmark decision in *Roper v. Simmons* in 2003, the Supreme Court further excluded juveniles (defined as those offenders who were under the age of 18 when their crimes were committed) from the death penalty. Despite these disqualifiers, forensic mental health experts must conduct a comprehensive and thorough examination of the defendant's levels of intellectual and maturational levels, as these factors may or may not be found to rise to the level required by either *Atkins* or *Roper*.

Death-Qualified Juries

> [Just as] a State may not entrust the determination of whether or not a man is innocent or guilty to a tribunal organized to convict, … so it may not entrust the determination of whether a man should live or die to a tribunal that is organized to return a verdict of death (*Witherspoon v. Illinois,* 1968, p. 521).

In preparing for the penalty phase of capital proceedings, attorneys and mental health professionals need to be aware of the problems inherent in the decision-making process of a death-qualified jury. To begin with, the qualification process, itself, leads to the selection of conviction-prone juries. Research has demonstrated that the death-qualification process produces a bias in favor of the prosecution (Haney, 1984). Of particular relevance to the forensic psychologist is the finding that the death-qualification process also creates a more death-prone jury. Compounding this biasing effect is the fact that, in many states, death-qualified juries often operate with incorrect assumptions regarding the early release of those defendants not sentenced to death. The jury's mistaken belief regarding the likelihood of parole increases the likelihood of a vote for death, as they believe that the alternative to a finding of death is something less than life in prison.

In their article addressing the constitutional problems associated with capital jurors' decision making, Foglia and Schenker (2001) addressed their concerns that death-qualified juries often have difficulty understanding the jury instructions that were intended to guide their discretion:

> Capital jury instructions are complicated. They create categories as to what may be considered, they employ varying standards of proof, and they set differing standards as to the requirements for a unanimous decision. States have adopted different types of death penalty statutes, thus, instructions vary from state to state. Most states with the death penalty have a statutory list of aggravating factors that limit what the jury is supposed to consider when deciding whether to impose the death penalty. In contrast, the US Supreme Court requires that jurors be allowed to consider any mitigating factors they think argue against death (*Lockett v. Ohio).* As the prosecution has the burden of proof, aggravators must be proved beyond a reasonable doubt, whereas the proscription against shifting the burden to the defense requires that mitigators only be proven by a preponderance of the evidence. Similarly, findings of aggravators must be unanimous, but there is no unanimity requirement for findings of mitigators. (p. 31)

The authors also speak of the potential for the jurors to be confused by the "balancing" statutes that require jurors to determine the extent to which aggravating factors may outweigh the

mitigating factors. The authors cited research demonstrating the fact that a substantial number of jurors either do not understand, or do not appropriately apply, the instructions regarding these issues. The authors observe:

> We obviously are not guiding discretion effectively when substantial numbers of capital jurors think they were allowed to consider whatever they personally believed made the defendant more deserving of death and do not realize that all had to agree that an aggravating circumstance was proven beyond a reasonable doubt before it could influence their decision. With respect to mitigation, apparently many jurors also do not understand the US Supreme Court's mandate that they should be able to consider anything that makes the defendant less deserving of death. (p. 31)

The authors conclude that the death qualification process "stacks the jury with jurors that are biased against the defendant" (p. 31) and fails to eliminate those jurors who see death "as the only acceptable punishment" (p. 31) for the crime. It is with this in mind that the forensic mental health practitioner must remain cognizant of the possibility, or the likelihood, that their findings will be heard by such a jury. Consequently, their reports and testimony must be prepared in a manner that will attempt to open, rather than further close, the minds of those with pre-hardened hearts.

Use of a Forensic Psychologist by the Prosecution

Although the focus of this chapter is the use of a forensic mental health professional as part of the defense team, it is nonetheless important to note the roles that the psychologist can play for the prosecution team. During the penalty phase, the prosecution will have to prove the presence of at least one "aggravating circumstance" and that the aggravating factor(s) outweigh the mitigating factors presented by the defense (Coyne & Entzeroth, 2006). Typically, the forensic psychologist will be used by the prosecution to be a rebuttal witness responding to the defense's presentation of mitigating factors, including the defendant's culpability, future dangerousness, and amenability to treatment. Although the defendant's mental health is typically not permitted to be presented as an aggravating factor, in *People v. Smith* (2005), the California Supreme Court allowed a psychologist to use psychological factors as a component of "profiling evidence" as an aggravating factor.

Conclusion

Although this chapter focused on the role played by the forensic psychologist in the mitigation phase of a death penalty trial, both practically and conceptually, this chapter applies equally to any forensic mental health practitioner. Hopefully, this chapter has provided some clarity about the *lack* of clarity inherent in death penalty jurisprudence. Ultimately, the forensic mental health practitioner will be endowed with the task of opening the minds of jurors, who, by the time of the penalty phase in a capital murder trial, have likely arrived at the conclusion that this world would be a better place without the defendant.

In conjunction with the attorney, the forensic psychologist will participate in the development of a mitigation strategy, investigate the factors in support of that strategy, prepare a report regarding his findings, and, ultimately, communicate these findings to the jury. Despite the concerns outlined above regarding the inherent bias of a death-qualified jury, the forensic expert must approach his or her mission armed with the belief that the jury is still capable of rendering an impartial verdict—a verdict based upon the mitigation evidence proffered by that expert.

Most pressing among the concepts addressed in this chapter is the issue of the defendant's mental health. The forensic mental health professional's primary role is to educate the jury regarding these mental health issues. Through this testimony, the jury must be made aware of the extent to which the defendant's mental health issues impacted the defendant's thoughts, emotions, and behaviors, not only at the time of the crime but throughout the course of his/her life. Will this information be sufficient to disavow

jurors of their belief (perhaps their conviction?) that the defendant is so evil that a sentence of life without the possibility of parole is perceived to be inadequate punishment for the crime committed?[9] In order to overcome such perceptions, the forensic practitioner must present the jury with evidence-based mitigating factors—factors that are the product of a thorough and objective evaluation of both the defendant and the mitigation being presented. Opinions presented that are not the product of a methodologically-reliable evaluation will be assailable, particularly during cross-examination. It is in this effort to humanize the defendant that the forensic mental health practitioner is charged with the responsibility of conveying the mitigation evidence that will make the difference between life and death.

In *Drifter's Escape,* the judge says to the defendant,

> "You fail to understand," he said
> "Why must you even try?" (http://www.bobdylan.com/songs/drifters-escape).

Jurors, in many death penalty cases, do *not* understand and, often, do not even try. The role of the mitigation expert—working hand in glove with defense counsel—is to try to lead them to understand.[10] The case law demands it, and ethical practice demands it. It is time to put these demands into practice.

Biography

Valerie R. McClain, Psy.D., is a licensed psychologist who graduated from Florida Tech in Melbourne, Florida. She practices in both forensic and neuropsychology in Tampa, Florida. She is presently working in a neurology firm which specializes in personal injury and in private practice in the area of criminal law. She frequently evaluates and testifies in capital cases.

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[9] On the specific relationship perceived by the public on the relationship between mental illness and evil, see Perlin (2001–2002), p. 239 n. 30.

[10] Although Dylan sings in referring to the judge, that "a tear came to his eye," (*Ibid),* the evidence is less than sparse that this is replicated in any of the cases discussed in this paper.

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The Problem of Interrogation-Induced False Confession: Sources of Failure in Prevention and Detection

4

Deborah Davis and Richard A. Leo

In October of 1988, 20-year-old Nancy DePriest was tied up, raped, and murdered at the Pizza Hut where she worked in Austin, Texas. Two weeks later, 22-year-old Christopher Ochoa, who worked at another Pizza Hut, and his friend, 18-year-old Richard Danziger, ordered a beer at the Pizza Hut where DePriest had been murdered. They spoke to the security guard about the killing, asked where DePriest's body had been found, and said they had come to drink a beer in her memory. Suspicious employees then called the police. Two days later, police picked up Ochoa, a former high school honor student with no criminal record, and Danziger for questioning.

For over 2 days, Austin police detectives interrogated Ochoa offtape. As later events proved, he was not actually involved in the crime. In Ochoa's recounting, the detectives yelled at, harassed, and threatened him for hours; denied his requests for an attorney; told him, falsely, that he failed three separate polygraph tests; claimed that a codefendant was in the next room and about to implicate him; threatened to throw the book at him if he did not cooperate; threw a chair that missed him; threatened him with more violence if he continued to deny their accusations; threatened to put him in a jail cell where he was likely to be homosexually raped by jail inmates; and threatened, repeatedly, that he would be sent to death row and "given the needle" if he did not confess. Over the course of these 2 days of intense interrogation, Ochoa agreed to make three statements, each more incriminating than the last. Eventually, Ochoa signed a five-page, single-spaced wholly false confession that described in great detail how he and Danziger had robbed the Pizza Hut, and tied up, raped, and murdered DePriest.

To avoid the death penalty—and on the advice of his attorneys—Ochoa eventually pled guilty to first-degree murder, thus confessing falsely to DePriest's rape and murder a second time. As a condition of the plea agreement, Ochoa was forced to testify against Danziger at Danziger's trial, in effect repeating his false confession to the rape and murder of DePriest a third time. Ochoa avoided the death penalty—seemingly his primary motive for confessing falsely—and was sentenced to life imprisonment. Eleven years later Ochoa was exonerated when DNA evidence that excluded him and identified the true perpetrator of DePriest's rape-murder, Achim Marino. Marino confessed accurately and in detail to the crimes, provided police with unique, nonpublic crime scene details, and correctly instructed police where to locate the fruits of the crime (Leo, 2008; Ochoa, 2005). Two innocent men (Ochoa and his innocent alleged co-perpetrator Danziger) spent years of their lives in prison for Marino's crime,

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_4,

as the result of Ochoa's interrogation-induced false confessions.

Cases such as that of Ochoa are neither unique nor rare. Documented cases of interrogation-induced false confessions in the USA date back at least to the Salem witch trials of 1692, in which some 50 women confessed falsely to witchcraft. It was not until 1908, however, when Hugo Munsterberg published his classic work, *On the Witness Stand* (Munsterberg, 1908), that psychologists began to take note of the problem of false confession and to address potential causes. Munsterberg provided accounts of false confessions ranging from the Salem witch trials to contemporary cases in American cities, and addressed a variety of potential causes of the problem. In the century since Munsterberg's initial documentation and investigation of the phenomenon, there has been a steady increase in public interest in the issue of false confession, in identifying and documenting proven cases of false confessions, and in investigating their causes.

Among the many results of these efforts is a rising tide of cases, documented by media, social scientists, and attorneys, in which persons who were prosecuted, and often convicted, on the basis of false incriminating statements or full false confessions have later been proven innocent. While early accounts tended to be anecdotal and unsystematic case histories, these patterns were changed by a landmark study by Hugo Bedau and Michael Radelet, "*Miscarriage of Justice in Potentially Capital Cases*," published in the *Stanford Law Review.* The authors collected 350 cases of wrongful conviction, and provided a careful systematic analysis of their causes, the reasons they were discovered, and the number of innocents who had been executed. As in other systematic studies to come, they provided data as to the percent of cases in which particular forms of evidence had played a role in the conviction, showing that 14 % of the wrongfully convicted in their sample had falsely confessed.

In the decades since Bedau and Radelet's landmark study, numerous additional case histories have been identified and documented. Moreover, scholars have continued in the tradition of Bedau and Radelet by assembling sets of such cases and providing further analyses of the causes of wrongful conviction. The advent of DNA testing has provided a steady stream of exonerations of the wrongfully convicted that have been analyzed at various points in time by legal scholars and social scientists. The first such analysis was published by Connors, Lundregan, Miller, and McEwen (1996), showing that 18 % of 28 convictions of persons exonerated by DNA were attributable at least in part to false confessions. Subsequent analyses of DNA exonerations catalogued by various scholars and by the Innocence Project (innocenceproject.org) have found the percentage of documented wrongful convictions involving false confessions to range from 14 to 60 % (Garrett, 2011; Leo & Ofshe, 1998, 2001; Scheck, Neufield, & Dwyer, 2000; Warden, 2003).

Along with the many documented individual case histories involving false confessions, these analyses of collections of wrongful convictions reveal interrogation-induced false confessions to be a systemic feature of American criminal justice. Despite procedural safeguards such as legal rights under *Miranda v. Arizona (1966)* to refuse interrogation altogether or to have an attorney present during questioning, and a constitutional prohibition against legally coercive interrogation techniques, American law enforcement continues to elicit false confessions. Moreover, these false confessions continue to go unrecognized by police, prosecutors, judges, and juries, and to play a significant role in convicting the innocent. The many cases in which a false confession was first elicited unknowingly by law enforcement and then proceeded through prosecution, trial, and post-appellate appeal undetected raise two crucial questions (1) Why do false confessions occur, and what can be done to prevent them? (2) Why do they remain undetected once elicited, and what can be done to more successfully identify them when they do occur? We address each of these questions, with particular emphasis on the role of failures of relevant knowledge and understanding among those who elicit and misjudge false confessions.

American Police Interrogation: A Search for Truth or for Consequences?

The answer to the question of why interrogation-induced false confessions occur, though complicated, lies largely in the most basic *goal* of interrogation, that of ensuring conviction. The justice system relies heavily upon confessions for obtaining convictions. Absent a confession, many cases lack sufficient evidence to convict, and most others would be much more costly to investigate and to develop sufficient evidence for conviction. Indeed, Fred Inbau, perhaps the most prominent developer of modern interrogation methods, offered this observation as one of three central points to support the necessity of interrogation: "Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects" (Inbau, 1961, p. 1404). This situation places considerable pressure upon police to reliably elicit confessions from their suspects. As a result, the most fundamental goal of interrogation is, and always has been, to ensure conviction of the suspect. To this end, the interrogator aims to elicit, on the record, a definitively incriminating account of the crime from the suspect—one that can withstand any later challenge to its authenticity as the case proceeds through charging, prosecution, trial, and post-conviction appeal (Leo, 2008).

Many, if not most, interrogators intend to elicit the "truth" from their suspects, not simply to elicit any confession, however false. However, it is the confounding and confusion of the intention to elicit the truth with the goal of conviction that has led to the development and use of interrogation techniques that are physically or psychologically coercive (or both). In short, throughout history, interrogation techniques have developed to incorporate highly effective means to elicit compliance from a target, but in doing so, have also incorporated a number of specific practices antithetical to elicitation of the truth. In the following sections, we briefly review the history of police interrogation in America, noting how the simultaneous pursuit of the investigative goal of truthful accounts and the legal consequence of conviction inevitably both corrupts the search for truth, compromises the validity of the information it elicits, and compromises the ability to recognize the difference between the truths and falsehoods in suspects' accounts.

The Evolution of Interrogation in American: From Physical Intimidation to Psychological Trickery

The interrogator, whether intending to gather intelligence from a hostile combatant or from a criminal suspect, is faced with the difficult task of trying to elicit accurate information from a potentially hostile target. As one might expect, this task is quite different than that of an interviewer with a fully cooperative witness who wants to disclose as much accurate information as possible. In the latter case, the skilled interviewer seeks to question the witness in the most non-suggestive manner to avoid influencing or distorting witness memories or responses. Given these goals, considerable research has addressed the many forms of unintentional suggestion by an interviewer that may shape the responses of respondents, and specific protocols have been developed for the specific purpose of avoiding all forms of suggestion (e.g., Fisher & Schreiber, 2007).

In contrast, when faced with a target motivated to withhold relevant information, an interrogator must incorporate strategies for overcoming the target's resistance. This poses a substantial challenge of how to best overcome this resistance to get the relevant and truthful information without simultaneously raising the risk of eliciting false information—in other words, how to maximize the *quantity* of relevant information obtained from suspects while maintaining its *quality* or validity. This challenge has never been fully met, and unfortunately, police interrogators throughout history have chosen strategies to overcome this resistance that (1) are the absolute antithesis

of those developed to avoid suggestion and coercion, (2) are highly likely to increase the overall quantity of information, but to simultaneously decrease the proportion of accurate information elicited, and (3) reflect little awareness of or attempt to avoid the potential of these methods to corrupt the information they elicit.

For interrogators throughout the world and throughout history, a primary choice for overcoming the resistance of a reluctant target has been physical intimidation and coercion. American police have been no exception. Yet, such practices have become more controversial over the history of American jurisprudence, as they posed problems of violation of constitutional rights to avoid self-incrimination, as well as of the validity of information elicited. Thus, in the next section we review the progression from initial reliance on physical coercion through the evolution over time to progressively restrict—though not yet completely eliminate—such practices, and replace them with highly sophisticated psychological weapons of persuasion and trickery. In this context, we also address the extent to which problems of coercion and validity remain, notwithstanding this evolution.

American Police and the "Third Degree"

The deliberate infliction of physical and psychological distress upon criminal suspects—colloquially referred to as the "third degree"—was rampant in American police interrogation during the late nineteenth century, and at least into the first three decades of the twentieth century. Police of the time generally lacked formal training, including training in interrogation technique, and therefore it is perhaps not surprising that without understanding of how to cajole their suspects into confessing voluntarily they would turn to efforts to coerce the information from them instead. The brutality of the tactics they chose for this purpose was virtually unlimited, entailing both physical and psychological abuse restricted only by the imaginations of the interrogators. Suspects were beaten, burned with fire or acid, tear gassed, water-boarded, received painful electric shocks, stripped and subjected to extreme cold, and generally tortured, sometimes to the point of hospitalization or even death. They were isolated in solitary confinement for days or weeks (sometimes in small dark cells fed by fires that produced scorching heat and fouls odors), deprived of sleep, toilet facilities and food, and threatened with further abuse, death, harm to their families, and other incentives. Some were given "truth-serum" drugs to induce compliance. For others, terror was induced by such practices as hanging them out of windows threatening to drop them or holding them at gunpoint threatening to shoot. Others were threatened with more remote consequences such as prosecution for additional, possibly more serious, crimes, long-term imprisonment, and others (see Leo, 2004, 2008 for review). Not surprisingly, these practices were very effective in eliciting confessions from suspects. As long-time observer of police practices, Emanuel Lavine estimated, roughly 70 % of criminal cases were "solved" by confessions coerced through third degree abuse (Lavine, 1930, 1936).

Inevitably, reports of such practices routinely leaked into the press, and third degree tactics were well known by the citizenry. But it was not until 1910, triggered by two widely publicized cases of physical abuse, that third degree practices became the focus of a Senate committee appointed to investigate custodial abuses by federal law enforcement (*Journal of American Institute of Criminal Law and Criminology*, 1912). Based in part on the denials of then Attorney General George Wickersham, who testified that he did not believe third degree practices existed among federal law enforcement personnel, the committee issued an essentially toothless report citing in part to the inability to find evidence of third degree tactics, given the lack of witnesses (other than presumably incredible suspects). Police, in turn, reacted by both condemning and denying the existence of third degree practices (Lavine, 1930, 1936).

The public was less easily diverted, however, with significantly heightened media attention during the first three decades of the twentieth

century fueling awareness of the problem. The resulting public outrage led 27 states to enact their own statues against the third degree during the period between 1908 and 1931 (Keedy, 1937; Wickersham Report, 1931). Like the Senate committee investigation, however, these statutes were again largely toothless, very rarely leading to the conviction of any officer or detective alleged to practice illegal third degree tactics. But the 1930s witnessed a sharp escalation in widespread investigation and condemnation of these practices, in media, in US Supreme Court decisions, and in a government commission that provided an extensive and detailed report (from President Herbert Hoover's National Commission of Law Observance and Law Enforcement) of the widespread use of third degree practices: the "Report on Lawlessness in Law Enforcement," popularly known as the "Wickersham Report" after former attorney general and chair of the committee, George Wickersham. The Wickersham report and subsequent lurid depictions of the horrific brutality of third degree methods in the media created a national scandal providing considerable impetus to the nascent movement toward interrogation reform.

From Third Degree to Psychological Trickery

Initially, police reactions to the Wickersham report were defensive, largely criticism or denial, including the quite contradictory claims either that the third degree was simply sensationalism in the media and not actually ever used, or that it was indispensable and police could not do their work without it (Walker, 1977). Nevertheless, many police leaders and trainers had begun to question the ethics and effectiveness of third degree practices and to recognize that the extent of lawlessness and brutality revealed in the Wickersham report (and the subsequent widespread publicity of the findings) posed a significant threat to the credibility of law enforcement. Thereafter, third degree practices steadily declined until the 1960s, when the worst of the third degree methods became virtually nonexistent (President's Commission on Criminal Justice and the Administration of Justice, 1967), and the newly taught interrogation strategies became almost entirely psychological in nature (Smith, 1986).

This decline was precipitated in part by the revision of interrogation methods and training across American police and federal law enforcement. In 1940, the first interrogation manual published in America soundly condemned third degree practices as "vicious and useless," pointing to (what should have always been) the obvious truth that under sufficient torture a target will say anything he thinks his torturers want to hear (Kidd, 1940, pp. 45–46). During the next several decades, a number of additional interrogation training manuals appeared, all emphasizing avoidance of third degree practices, and purporting to offer more "scientific" interrogation methods incorporating sophisticated psychological techniques of lie detection and interrogation (e.g., Auther & Caputo, 1959; Inbau, 1942, 1948; Inbau & Reid, 1953, 1962, 1967; Inbau, Reid, & Buckley, 1986; Mulbar, 1951; O'Hara, 1956).

As they evolved from the 1940s forward, these and other interrogation training materials and practices sought to solve three central problems created by the previous use of the third degree. First was the problem of public relations. The new methods sought to remove incompetence, inefficiency, corruption, and brutality from police practices, replace them with clear professional standards, and, in doing so, to repair the severe damage done to police credibility in the preceding decades. The new focus on "scientific" (presumably professional and legitimate) methods was directed in part toward this goal to increase the legitimacy of police and their methods in the eyes of the public.

Second, the new methods sought to avoid the legal problems created by the third degree—prominently, the fact that confessions obtained through third degree tactics were often ruled involuntary and inadmissible as evidence in trial, thus impairing the ability to achieve convictions. The law had steadily evolved during the twentieth century toward increased protection of due process and of defendants' constitutional rights to avoid self-incrimination. Hence, many manuals

sought to educate police about the law regulating interrogation and the admission of confessions into trial evidence, and to suggest practices specifically directed toward maintaining the admissibility of any statements obtained from suspects. Prior to 1966, when the Supreme Court issued its ruling in *Miranda v. Arizona,* the manuals focused on the Supreme Court's standards for assessing the "voluntariness" of suspect's statements. After *Miranda*, the manuals also addressed the law of pre-interrogation warnings and practices recommended for acquiring a valid waiver of the suspect's *Miranda* rights to remain silent and to have an attorney present at the interrogation (Kamisar, 1980; White, 1998).

Third, the new methods purported to increase the quality of the results. Claiming to evolve from an "art" to create a "science" of interrogation, the manuals presented the new methods as a structured, tested, and empirically supported techniques that, if done according to protocol, would reliably yield valid results. That is, the methods were alleged to clearly distinguish between guilty and innocent suspects prior to interrogation (i.e., to reliably diagnose guilt through scientific lie detection procedures), and to then use less coercive interrogation methods on the (presumed) guilty to obtain true confessions at a high rate, while avoiding false confessions altogether. Based upon the assumption that guilt could be successfully diagnosed prior to interrogation, interrogation manuals and trainers made two claims still prevalent today (1) that they do not interrogate innocent suspects and (2) that even if an innocent person were to somehow be mistakenly interrogated, the methods taught in the manuals could not, and would not, induce an innocent person to falsely confess (e.g., Inbau, Reid, Buckley, & Jayne, 2001). Essentially, the manuals claim that their methods are not coercive, and therefore, there is no mechanism through which they would cause an innocent person to falsely confess. They had allegedly solved problems of both the quantity and quality of the information elicited, while avoiding impermissible problems of coercion.

As we review in the next section, however, much of the thrust of modern interrogation scholarship has been to dispute these very claims, showing that problems of quality and of coercion remain. In particular, the methods of lie detection taught to distinguish between guilty and innocent suspects, although presented as scientific and reliable, are, in fact, without scientific support (and in some cases soundly contradicted by science). Moreover, the methods of interrogation, while represented as noncoercive and not capable of inducing innocents to falsely confess, incorporate strong pressures and incentives that can, and demonstrably have, led innocents to falsely confess. Modern American police interrogation is *NOT* a diagnostic tool that can reliably elicit truthful information from suspects. Instead, it is a highly developed sophisticated and deceptive armament of weapons of social influence designed to induce the target to comply with the interrogator's demands to provide a self-incriminating account of the crime in question. As such, if deployed upon an innocent suspect, such powerful forces of influence may induce the suspect to comply with these demands, notwithstanding his innocence, and to provide false incriminating admissions or a fully developed false confession.

Modern interrogation methods developed in part on the basis of the imminently reasonable assumption that one could avoid the elicitation of false confessions if one avoided interrogation of innocent suspects. The best way to avoid interrogation of innocents is, of course, to have significant probable cause suggesting guilt before subjecting the suspect to a powerfully persuasive interrogation that may elicit both true and false confessions. Ideally, this would entail having substantial evidence linking the suspect to the crime. This may not always be possible, as investigation can require time, permitting the suspect to flee, or there may be little evidence available to collect—such as when only a witness account or police suspicions link the suspect to the crime. Given this situation, interrogators turned to efforts to classify suspects as guilty or innocent before the interrogation, through use of various lie detection methods. If one could reliably detect who was lying and who was telling the truth, the burden of

investigation would be reduced or lifted, and one need to only interrogate the guilty to elicit the confessions that would facilitate their conviction. Toward this end, even as the era of the third degree began its decline in the 1930s, the "science" of lie detection began to develop rapidly and to play a central role in the new methods of interrogation. As we shortly show, however, such methods were highly "sciencey"—that is, having the appearance of science without the substance (Goldacre, 2010)—but, in fact, were untested pseudoscience.

Pseudoscience, Lie Detection, and the Misclassification of Innocents

Documented efforts to develop methods to reliably detect lies are essentially as old as the recorded history of man. Successful day-to-day lie detection is a necessary skill to negotiate the world of social interaction and the many would-be deceivers who would cheat, steal, and harm through their deceptions. Therefore, we all strive to be human lie detectors, whose well-being and even survival can depend upon the success of our efforts. Systems of justice throughout history have also demanded such methods, requiring reliable methods of distinguishing the guilty from the innocent in order to meet out justice.

Early efforts to formally distinguish the guilty from the innocent shared much of the violence of the third degree. In addition to torture (always a favorite), early societies conducted trials by "ordeal" based upon such magical or religious premises as the ideas that an innocent will be stronger in combat, the truthful person will be able to withstand such travails as submersing his arm in boiling water for longer (aided by the God who knows he is innocent, of course!), that the bleeding from a cut will stop more quickly for the innocent man, and others (Lykken, 1998). However, primitive, such methods share with even the most modern methods of lie detection a common but discredited assumption that specific behaviors or outcomes are unique to truth versus deception, and therefore reliably distinguish one from the other.

As the technology of lie detection developed into the twentieth century and purported to become more scientific, it focused upon two primary strategies: identification of physical measurements associated with deception (as, for example, with the polygraph or voice stress analyzer), and identification of overt behavioral indicators of deception (such as nonverbal responses or features of verbal statements). While the former required specific apparatus to test for deception, the latter could be carried out during social interactions with the target, either in formal interviews or other contexts.

The two classes of methods developed largely contemporaneously among law enforcement, with the polygraph becoming the predominant physical measurement technique, and some version of behavioral analysis (Inbau et al., 2001; Reid & Arther, 1953) becoming the predominant behavioral technique. Notwithstanding the primacy of the "Behavior Analysis Interview" (BAI) for contemporary American police interrogators, the variety of behavioral techniques developed during the last century has far exceeded that of the physical techniques, and includes those such as "neurolinguistic programming" (in which eye movements are central to diagnosis of deceit), "Statement Validity Assessment" (in which transcribed verbal statements are analyzed according to 19 criteria indicating truth or deception), "Reality Monitoring" (based upon assumed differences in characteristics of actually experienced memories versus imagined events), and "Scientific Content Analysis" ("SCAN": in which 12 criteria are applied to the content of statements). Like the BAI, SCAN is currently used worldwide by law enforcement and military agencies (see Vrij, 2008 for review of the nature and effectiveness of these techniques).

Unfortunately, none of the physical or behavioral methods of lie detection have identified indicators that are pathognomic (definitive indicators) of deception. For example, many of these physical and behavioral assessments are assumed to reflect the anxiety and nervousness considered to be more common among liars. However, the assumption that such nervousness occurs only among the deceptive is inherently flawed, as many have pointed out in criticizing the behavior

analysis techniques (Kassin & Fong, 1999; Leo, 2008; Vrij, Mann, & Fisher, 2006), polygraph, voice stress analyzer, and others based on similar logic. Particularly among those being interviewed about their own involvement in criminal activity, nervousness is likely to be pervasive, and given such ceiling effects, indicators of nervousness are unlikely to be related to virtually any assessment, including that of deception.

Related to this is the point that the classic physical and behavioral lie detection techniques rely on differences in the target's physical or behavioral responses during "control" questions versus "test" questions of various sorts, or between responses during presumably low stakes small talk or non-accusatory sections of the interrogation and high stakes crime relevant discussions. Presumably, the same target will show greater difference in indicators of stress and nervousness between the two situations when lying in the high stakes discussions. This assumption is flawed, however, in that both guilty and innocent suspects tend to experience more anxiety when responding to significant crime-related questions (Vrij, Fisher, Mann, & Leal, 2010).

Therefore, it is not surprising that many alleged indicators of deception are not related to deception at all. At best, some indicators are probabilistically associated with truth or deception—sometimes differentially so for individuals in specific social categories, as is the case for the polygraph (National Research Council of the National Academies, 2003). A number of scholars have noted, for example, that defendants belonging to social categories stigmatized by stereotypes linking them to criminal behavior may experience "identity threat" when interviewed about criminal activity—leading them to display more anxiety and arousal, as well as increased cognitive load due to efforts to manage the thoughts and emotions provoked by the threat that the stereotype may be applied to them. This was first discussed in a National Academy evaluation of the polygraph in 2003 (National Research Council of the National Academies, 2003), and the implications of this problem for both physical and behavioral methods of lie detection in interrogation, as well as the end result of false confession, have since been more fully developed by ourselves and others (Davis & Leo, 2012a, 2012c; Najdowki, 2011).

Though indicators such as those of arousal may be probabilistically associated with deception, many others are associated in exactly the opposite way as commonly believed or taught in the interrogation manuals (Lykken, 1998; National Research Council of the National Academies, 2003; Vrij, 2008). Aldert Vrij, for example (Vrij, 2008), has provided detailed tables showing the difference between what is commonly believed to indicate deception as compared to what research has shown to actually relate to deception. Of 24 verbal and nonverbal cues, only for six did the perceptions and actuality correspond. Eight cues believed to indicate deception are actually unrelated, three that do indicate deception were unrecognized as such, and for two, what was believed was the opposite of the actual relationship (p. 124). Importantly, for not one of the cues involving gaze, eye blinks, or various movements did perceived indicators correspond to actual indicators. The only agreement was the fact that frequency of smiles is not diagnostic.

Yet this class of indicators is the one most commonly included in prominent interrogation training manuals (Gordon & Fleisher, 2002; Inbau et al., 2001; Macdonald & Michaud, 1992; Rabon, 1992; Yeschke, 1997; Zulawski & Wicklander, 2002). Corresponding to lay beliefs, for example, all training manuals emphasize that gaze aversion indicates deception, whereas no actual relationship exists (Vrij, 2008, p. 128). They further describe a variety of movements of the trunk, head, hands, legs, and feet as indicating deception that are actually unrelated to deception or that decrease when deceptive (e.g., gestures, hand, leg, and foot movements) when deceptive.

Vrij and his colleagues (Vrij, 2008; Vrij, Fisher, et al., 2010; Vrij, Granhag, & Porter, 2010) reviewed substantial evidence that lie detection is a very difficult task, highly prone to error. They pointed to seven common errors among would-be lie detectors, particularly police: (1) examining the wrong cues, (2) undue emphasis on nonverbal cues, (3) overinterpretation of

signs of nervousness as indicating deception, (4) use of simplistic rules of thumb, (5) neglect of inter- and intrapersonal differences, (6) strategies advocated in interrogation manuals actually impair detection of deception, and (7) the overconfidence of professionals in their own ability to detect deceit. Generally, the first five cause the sixth, but the apparently professional "sciencey" nature of the training contributes to the seventh.

We would add to these the significant subjectivity in assessment of the various alleged indicators. As David Lykken noted with respect to the polygraph: "Whatever format examiners use—and whichever instrument they employ for recording the subject's reaction—they may arrive at their final judgment either through clinical evaluation or through objective numerical scoring of the polygraph (or voice analyzer) records alone. Examiners who use clinical evaluation allow themselves to be influenced not only by the instrumental findings but also by the respondent's demeanor and behavior symptoms, the case facts and other sources of intuitive insight" (Lykken, 1998, p. 44).

The many alleged behavioral indicators of deception taught by interrogation trainers are likewise not assessed objectively, by uninvolved scorers blind to any evidence of truth beyond the suspect's behaviors. They are most commonly assessed by the same detective who has investigated the case, perhaps witnessed horrific aftermath of the crime, and who has targeted the suspect for investigation for any of a variety of reasons, and who may experience intense emotions of anger or disgust toward the suspect. Thus, he is likely to possess a significant presumption of guilt even as he allegedly engages in an unbiased assessment designed in theory to filter out and prevent interrogation of the innocent. And, even within the prescribed indicators, there is no quality control to ensure that all are allotted equal attention and weight, or that greater attention and weight is given to stronger indicators (should they exist). The assessments are conducted rapidly, online, during the interview, rather than carefully coded from recordings. Thus, a given detective may focus only on a small subset of indicators, arriving at rapid heuristic judgments in the context of preexisting expectations of deception.

Given these various considerations, it is not surprising that substantial evidence exists to support the conclusion that police training and experience does not result in superior lie detection abilities. Indeed, in reviewing this evidence, Vrij and his colleagues noted that no lie detection tool based on analysis of verbal or nonverbal behavior is accurate (Vrij, Granhag, et al., 2010). Rather, such tools impair accuracy relative to untrained controls, while simultaneously increasing confidence in judgments (DePaulo & Pfeifer, 1986; Garrido, Masip, & Herrero, 2004; Kassin, 2005; Meissner & Kassin, 2002; Porter, Woodworth, & Birt, 2000). Moreover, Porter et al. (2000) found that while professional experience with lie detection is associated with increased overconfidence in judgments, it is not associated with increased accuracy.

Perhaps as the result of their misleading training, the absolute level of accuracy in lie detection among police is poor. In his review of 28 lie detection studies with police and parole officers, Vrij (2008) found that on average police accurately classified only 56 % of statements as truthful or deceptive, not a significant improvement over a simple coin toss! Finally, specific investigations of the effects of training in the "Behavior Analysis Interview" developed and promoted by Inbau, Reid, and colleagues in their manuals and training materials and seminars have shown that the training decreases accuracy relative to untrained controls (Kassin & Fong, 1999).

This situation has thoroughly thwarted the original goal of interrogation reform to provide an accurate and validated scientific method to screen out the innocent and to subject only the guilty to interrogation. Instead, the misguided assumption and inflated confidence of interrogators that they can accurately diagnose guilt prior to interrogation and subject only the guilty to interrogation has furthered the long-standing guilt-presumptive nature of interrogation, and therefore has encouraged the coercive features of the interrogation proper.

As shown by Kassin and his colleagues, for example (Kassin & Fong, 1999; Kassin, Goldstein, & Savitsky, 2003; Meissner & Kassin, 2002;

Narchet, Meissner, & Russano, 2011), police and students trained in the BAI are less accurate than untrained controls, and police are biased toward finding deception. Yet police are more confident in their judgments, and even when interrogating an innocent suspect, fail to recognize that innocence, and subject these innocent suspects to more forceful interrogation. This, in turn, leads the innocent suspect to appear more deceptive to uninvolved observers. The confident misclassification of innocents as guilty, in effect, leads the officer to try harder to get the innocent to admit guilt, and in doing so increases the suspect's anxiety, defensiveness, and appearance of guilt.

Though such processes can unfold for any criminal suspect, this may be particularly likely for suspects suffering identity threat during interrogation (Davis & Leo, 2012a, 2012c). As noted earlier, stereotypes linking members of one's social group to crime in general (such as race) or to specific crimes (such as stepfathers accused of molesting stepchildren) can lead the person to feel increased arousal and anxiety during interrogation. In turn, this can lead to enhanced risk of being perceived as deceptive, and therefore of being subjected to a coercive interrogation in which the detective cannot detect the suspect's innocence and persists in deploying ever more tactics to elicit a confession (Davis & Leo, 2012a, 2012c; Najdowki, 2011).

It is also important to note that misclassification of innocents as deceptive may occur as the simple result of cultural differences in nonverbal behavior (such as the tendency of blacks to look away when speaking), which can be a significant problem when white police interrogate black suspects (Najdowki, 2011). Similar problems can occur when the suspect's English is poor. The increased difficulty and cognitive load imposed by efforts to communicate can lead to increased anxiety and the appearance of deception (Berk-Seligson, 2009). The use of interpreters presents another layer of issues that have been largely unaddressed in either science or practice. These and other cultural issues can go unrecognized and feed misperceptions of deceptiveness.

Clearly, behavioral detection of deception is unreliable at best, misleading at worst, and shown as such by a large body of science. Ironically, the polygraph can sometimes detect deception at marginally better than chance levels (Lykken, 1998; National Research Council of the National Academies, 2003), and better than behavioral methods such as the BAI. Yet, it has been sufficiently criticized as to render it inadmissible as evidence in most circumstances. In contrast, interrogators are free to testify to their subjective assessments of guilt based on the BAI or other behavioral assessment techniques. But as we have shown in this section, these techniques can first lead to a misclassification of an innocent as guilty, and subsequently to a coercive interrogation that may produce a false confession that is later bolstered in trial by the detective's testimony that the defendant's demeanor clearly indicated guilt by valid scientific standards of assessment.

The "Misclassification Error" and the Path to False Confession

Leo (Leo, 2008; Leo & Davis, 2010; Leo & Drizin, 2010) has argued that the error of misclassification of innocents as likely suspects is the fundamental error on the path to interrogation-induced false confession and wrongful conviction. This misclassification occurs for a variety of reasons. Intuitive profiles or stereotypes associating a specific class of persons with specific crimes may lead police to suspect an innocent in the absence of any evidence linking him to the crime—as when a husband may be automatically suspected of his wife's death (Davis & Follette, 2002, 2003). The source of suspicion may also be circumstantial, such as motive or opportunity; or may be the result of association with other suspicious suspects. Apparently strong evidence, such as mistaken witness identifications or the presence of forensic match evidence, may also put an innocent under suspicion.

But by the time the detective has decided to interview the suspect, there is typically a presumption of guilt, however strong, that tends to promote his continuing classification of the suspect as deceptive, notwithstanding objective performance in the BAI or other assessments of

deception. Thus, regardless of the innocence of the suspect being questioned, there is significant risk that he will be judged as deceptive and subjected to interrogation. Once this judgment is made, the interrogator's purpose is no longer one of diagnosis of guilt. Rather, it is the intent to elicit evidence of guilt in the form of explicit incriminating admissions and narrative confessions sufficient to ensure conviction. Toward this end, the tools of interrogation are powerful weapons of influence designed to induce the suspect to comply with the interrogator's demands to confess. In effect, the first error of "misclassification" justifies the second error of "coercion" that Leo and colleagues have identified as crucial on the path from police interrogation to wrongful conviction. Though interrogation manuals and trainers deny the coercive nature of modern interrogation, as we show in the next section, they incorporate less physically brutal but nevertheless very powerful incentives demonstrably capable of eliciting false, as well as true, confessions. Further, though the methods as they are contained in the manuals and incorporated in training are almost entirely psychological, interrogators can and do cross the line, often with impunity. As illustrated by Ochoa's case with which we began the chapter and many like it, modern interrogators sometimes still employ a mix of third degree physical confrontation and explicit threats with modern psychological methods.

For the most part, however, modern interrogators do eschew forbidden tactics of physical coercion and explicit threats and promises in favor of the new methods of persuasion and psychological trickery. Thus, the powerful forces of modern interrogation have transformed from the obvious brutal coercion of the third degree to more sophisticated and subtle forces of influence invisible to the untrained eye—likely to remain unrecognized, unchallenged, and misjudged by those who must later assess the validity of the accounts they elicit. And, although the lie detection methods we have reviewed in this section are both "sciencey" and yet actually unscientific pseudoscience, the methods of the interrogation proper fully incorporate a large set of the most powerful and thoroughly empirically supported strategies of social influence identified and tested by science. As such, they are very effective in inducing suspects to confess, with the unintended consequence that some such confessions are necessarily going to be false. But how, exactly, is this done?

Lies and Damned Lies: Modern Interrogation Is Inherently Misleading

Recall that the goal of the interrogator, once he begins the interrogation itself, is to induce the suspect to confess. The detective's weapons of influence are deployed for the express purpose of inducing the suspect to provide incriminating statements sufficient to ensure his conviction. Further, the detective typically has a well-developed idea of *what* happened, as well as at least hypotheses about how and why it happened. He therefore has the even more specific goal to induce the suspect to provide an account consistent with what the detective currently knows and believes about the commission of the crime.

Suspects are known to confess (truly or falsely) primarily for two reasons: distress intolerance and the need to escape the aversive interrogation notwithstanding the consequences, and/or the mistaken belief that confession is either entirely without negative consequences or that it will achieve the best available legal (or other) outcomes (Kassin, 1997; Ofshe & Leo, 1997a, 1997b). The challenge for modern interrogators, then, has been to avoid legally impermissible infliction of physical or emotional distress, while nevertheless more subtly promoting anxiety, distress, and the need to escape: and simultaneously, to avoid the impermissible use of explicit threats and promises contingent on confession, while nevertheless promoting the perception that confession is the best way to achieve the most desirable legal outcomes. Unavoidably, these constraints render the resulting strategies deceptive, both for suspects and for those who judge the confessions they provide. The nature of interrogation-related coercion has gone "underground" (so to speak), so that it is more subtle and likely to remain unrecognized by those who judge, but felt very strongly and thus very

effective among those who experience it. The process unfolds largely as follows [as taught in the Reid and similar methods (e.g., Inbau et al., 2001; Zulawski & Wicklander, 2002)].

To facilitate the impulse to confess to escape the interrogation, the interrogator is directed to encourage anxiety and discomfort for the suspect throughout the interrogation through use of a physically uncomfortable interrogation room (uncomfortable seating and temperature) and through encouraging emotions such as guilt and anxiety during the interrogation. Further, the interrogator is free to (and often will) continue the interrogation as long as the suspect fails to demand that it stop or to invoke his *Miranda* rights. Inevitably, the need to escape progressively increases as the interrogation continues, and the suspect becomes more fatigued or distressed. It remains to convince him that confession is the best way to escape, ideally while also convincing him that confession will be benign or beneficial.

If done according to the recommended methods, the interrogator will not explicitly state that the suspect cannot escape the interrogation unless he confesses, that what he will be charged with, what plea bargains he will be offered, what sentence he will receive or any other legal outcome will depend upon whether or not he confesses. Such explicit bargaining is grounds for exclusion of the confession from trial evidence. Although interrogators often cross this line, and nevertheless the confession is admitted at trial, in most cases the exact same messages are implied rather than explicitly stated by the interrogator, conveyed indirectly through the process of pragmatic implication (see Davis & Leo, 2012b for review).

To successfully accomplish such deceptions, the interrogator attempts to cast himself as a benevolent ally, rather than malevolent enemy. He is trained to establish rapport with the suspect, flatter him, and explicitly state his desire to help the suspect (invoking the influence principles of liking and reciprocity). In this context, he will engage in a number of tactics specifically designed to convey the messages that (a) there are choices to be made concerning whether and with what the suspect will or will not be charged, and (b) the interrogator can influence these choices. In doing so, he will deploy the RASCLS [an acronym provided by Air Force Col. Steven Kleinman for Cialdini's (2008) six basic principles of influence]: reciprocity, authority, scarcity, consistency, liking, and social proof, among others.

This first occurs (according to protocol) toward the end of the BAI, before the suspect is explicitly accused of the crime, as part of the process of "establishing the perceived flexibility of consequences"—explicitly identified by interrogation manuals as an important precursor to the tactics designed to convince the suspect that confession will achieve the best of these potential consequences. At this point, the interrogator is to ask the suspect what he thinks should happen to the person who committed the crime. Should he just go to jail, perhaps receive counseling, or be given a second chance. Why ask such a question, after all, if there are no options? As the interrogators intend, our research has shown that the use of this question increases the perceived options of the detective in choosing whether and what charges can be filed, whether the suspect can receive counseling and jail, and so on (i.e., his authority: Davis, Leo, & Follette, 2010).

The detective next proceeds to the first stage of the interrogation proper, in which he confidently states that the evidence clearly shows that the suspect committed the crime in question. He may also cite various forms of evidence against the suspect at this point and throughout the interrogation. This can include true (e.g., an actual eyewitness ID), false (falsely informing the suspect that he failed the polygraph), and nonexistent (references to DNA not collected) evidence—all legally permissible. The intent of this process is to instill a sense of hopelessness in the suspect, convincing him that there is no way that anyone will believe in his innocence, that he is hopelessly caught, and that the only question is what will happen as a result (Ofshe & Leo, 1997a, 1997b). In this way, the suspect's attention will be turned to the issue of how to minimize the consequences of his involvement in the crime. This "evidence

ploy" has been strongly implicated in real life true and false confessions (Drizin & Leo, 2004), and has been shown effective in a number of laboratory studies of interrogation tactics (Russano et al., 2005). The practice of lying about evidence has been strongly implicated as a cause of real life false confessions and the conviction of the innocent (see Kassin et al., 2010b; Leo, 2008).

Recognizing that if the suspect is so thoroughly incriminated by the evidence there is no apparent need to continue the interrogation, the interrogator is taught to next provide a "pretext" (Inbau et al., 2001) for the remainder of the interrogation. Thus, the interrogator will tell the suspect that the purpose of the interrogation is not to discover whether the suspect did the crime, but rather to discover why the crime occurred and what kind of person the suspect is, which are "important to know" (as if these issues mattered for legal outcomes). The suspect is encouraged to "help himself" by "explaining" what happened, how it happened, and why. All such messages promote the illusion that there are choices of how to deal with the suspect, and that what happens *during the interrogation,* whether he "explains" himself (and how) will affect those choices. Further, this strategy incorporates the influence principle of "arguing against self-interest," by implying that the interrogator's interests will not be benefitted by continuing the interrogation, and instead that he will be spending unnecessary time for the benefit of the suspect (thereby also invoking reciprocity).

Making use of the influence principles of scarcity, reciprocity, authority, and liking, the interrogator typically then reiterates his earlier sympathy and flattery, reminding the suspect that he likes and wants to help him, but he can only "help" if the suspect tells the truth during the interrogation, stating or implying that those to come (the DA, judges, and juries) will no longer be listening. We have dubbed this tactic the "sympathetic detective with the time-limited offer," and have shown in our experimental studies that it successfully conveys the messages that the detective likes and wants to help the suspect, as well as strengthens the perception that he has the authority to do so (Davis et al., 2010).

The interrogator then turns to the process of "theme development," (Inbau et al., 2001), in which he suggests "explanations" of how and why the crime was committed that appear noncriminal (such as self-defense), or less serious than other potential versions (e.g., accident versus intent; initiated by the victim or others rather than by the suspect; for noble motives such as protecting or helping others versus for personal gain, and many more). These scenarios are tailored to the type of crime as well as to the interrogator's view of the suspect, and interrogation manuals provide a large number of examples for specific crimes (for examples, see Inbau et al., 2001; Jayne & Buckley, 1999; Senese, 2005). As shown in laboratory tests of their impact, the use of such themes is highly effective in eliciting both true and false confessions, but the diagnosticity of the confession (the probability of guilt given the confession) is reduced by their use (for review see Kassin & Gudjonsson, 2004; Kassin et al., 2010b). The more powerful the tactics of influence the more effectively they will elicit false confessions as well as true.

While the process of theme development is designed to minimize the perceived seriousness of the crime, if any, and thereby lower the perceived costs of confession, it may be supplemented with tactics of "maximization," whereby the perceived costs of failing to confess are raised. The interrogator may suggest that the suspect will be implicated in a more serious role if he fails to confess: for example, when he refuses to "explain" himself, and therefore the claims of others about him must be believed (e.g., he was the shooter rather than the get-away driver). He may raise the issue of how the judge or jury will react to someone who insists on lying rather than taking responsibility for what he has done. And he may allude to the potential of the death penalty (which we have seen in many cases, despite prohibitions against it).

When the interrogator feels the time is right, he is taught to try to prompt the first admission from the suspect through the use of the "contrast" principle of influence incorporated in the tactic known as the "alternative question" (Inbau et al., 2001). The interrogator offers two versions of the

crime, one more apparently legally serious than the other (such as self-defense versus unprovoked attack), and asks the suspect which of the two was what happened. This can be very effective in prompting a first admission, as the suspect who is convinced that no one will believe he is completely innocent may view the version of the incident suggested by the less serious scenario to be noncriminal and without consequences (e.g., self-defense). Therefore, it appears wise to him to admit to this minimally culpable scenario as a mechanism to achieve innocuous consequences.

Unfortunately for the suspect, this is only the beginning of what Inbau et al. (2001) refer to as the "stepping stone" approach to eliciting a more incriminating account (otherwise known as the "foot-in-the door" or "low balling" strategies of influence). The interrogator will express appreciation that the suspect is finally being honest, but indicate that he knows this is not the fully correct story. He may confront the suspect with evidence inconsistent with the minimized account, and suggest a somewhat more serious version of the incident. The process then repeats, as the interrogator moves the suspect closer and closer to the account he believes is correct. Once he elicits what he believes is the most accurate account, or one that he believes is the best he will get from the suspect, he then begins the process of getting a full narrative confession (described in the next section).

During this process, the interrogator is admonished to prevent suspects from voicing their innocence or evidence supporting it, to interrupt with his own statements and themes, to maintain the attention of the suspect through invasion of personal space if necessary, and to generally control the interaction completely. It is not until the interrogator becomes convinced that the suspect is approaching readiness to provide admissions that he allows the suspect to talk more freely. These intrusive behaviors add to the aversiveness and stress of the situation, and contribute to the suspect's conviction that he will not be believed.

These tactics are extremely effective, eliciting confessions from approximately 42–76 % of suspects in American and English field studies involving actual criminal acts (Gudjonsson, 2003; Thomas, 1996) and in as many as 100 % in laboratory studies involving non-criminal acts (e.g., Kassin & Kiechel, 1996). Unfortunately, however, the quality of the information is suspect. Many details of the confession are likely to be inaccurate, even if the suspect did commit the crime. The body of the interrogation consists of suggestion in many forms. The interrogator may provide fully developed suggestions of what occurred as part of the process of theme development. Eventually, the suspect will be encouraged to admit to the lesser version of the crime depicted in the "alternative question." Though the interrogator will shape these themes in part to accounts offered by the suspect, they are largely his creation.

In addition to providing initial suggestions, the interrogator may discuss evidence, recount the statements and claims of witnesses or co-perpetrators, and use them along with logic and other evidence to repeatedly challenge the denials or specific admissions of the suspect. He is likely to reinforce the suspect when he provides statements the interrogator believes and accuse the suspect of lying when he offers denials or less believed accounts, thus selectively shaping and reinforcing the interrogator's preferred account of the crime and the suspect's role in it. He may also insist that the suspect provide details such as how many times he committed an offense (such as the instances in which he touched a child's privates) in order to support more counts in the charges to come. But the initial numbers are likely to be challenged, as are the suspect's initially stated motives and intentions, among many other details. All the while, the interrogator will remind the suspect that he cannot "help" him if he fails to tell the "truth." But what this means is if the suspect fails to tell the truth *as the interrogator perceives it,* the accusations, implied threats, and promises continue until the suspect provides an account the interrogator approves of or assumes is the best he can get. This process can produce many versions of the suspect's story, and renders it very difficult to evaluate the validity of the details of the confession, in addition to its general validity, as we discuss more fully in the next section.

Taking the Confession and Making It Stick

A confession taken by a skilled interrogator is a very carefully constructed attempt to ensure the conviction of the suspect, not an uncontaminated item of evidence. The goal is to ensure that no effort to contest the validity of the admissions will be effective with those who must judge them. Thus, as Leo (2008) describes in detail, detectives attempt to ensure at least the following five elements are incorporated into the confession "(1) a coherent, believable story line, (2) motives and explanations, (3) crime knowledge (both general and specific), (4) expressions of emotion, and (5) acknowledgments of voluntariness." (p. 168). These elements produce a very credible and compelling story of the crime that can include detailed descriptions of how and why the crime was committed, intense emotional expressions of anger, shame, or remorse, apologies to the victims or their families, and sometimes very detailed physical reenactments of the crime. The suspect may also include detailed explanations of why he is confessing that emphasize reasons such as guilt or remorse and the apparently voluntary decision to confess. These features make even false confessions very compelling.

In addition to recommendations for what should be included in a narrative confession, interrogation manuals also include additional recommendations to enhance the appearance of validity and voluntariness: such as having the suspect write the confession in his own handwriting, making deliberate mistakes in typed confessions that the suspect must correct in his own hand, having women in the room to undermine claims that physical coercion prompted the confession, and others.

This detailed compelling confession, developed to incorporate the precise features that will make it credible and uncontestable, is the embodiment of what Leo and colleagues (Leo & Davis, 2010; Leo & Drizin, 2010) have specified as the third error leading from interrogation to wrongful conviction—that of contamination. That is, the confession, as it moves forward through the justice system, will include a variety of features that misrepresent its validity: misguiding those who judge it, and virtually assuring the conviction of both innocent and guilty confessors.

This situation is most damaging when there is no recording of the interrogation preceding the interrogation. Although less common today, this was the situation for much of the history of American interrogation (see our review of this below). Without this record, only the accounts of the suspect and the interrogator exist to inform those who must judge the confession of the context in which it occurred. Unfortunately, the essential elements of the interrogation that seem so compelling are heavily shaped by the interrogator—who has in mind both the credibility and persuasiveness of the confession and the legal charges it will support. To elicit the desired information and emotional expressions, the interrogator will ask about all the elements, sometimes suggesting specific answers. If the suspect first offers a version acknowledging less intent, fewer instances (such as "counts" of sexual abuse), less responsibility or other less serious or persuasive versions, the interrogator may allude to how the DA, judge, or jury will be harder on someone denying culpability and other incentives to tell a more desirable story. The suspect's version of the confession may change many times before he arrives at the final version the interrogator considers sufficient. This, in many cases, is when the recorder goes on.

A related issue concerns the "misleading specialized knowledge" (MSK) included in the confessions of many innocents—referring to crime knowledge that should only be possessed by the true perpetrator (such as the murder weapon, the nature of wounds, aspects of the crime scene, and many others). The confessions of the proven wrongfully convicted have widely included such apparently incriminating knowledge, raising the issue of how it crept into their confessions. Although in some cases it came from media or other sources, most came from police who fed the suspect the information in the context of the interrogation. By suggesting how the crime occurred as part of theme development, by challenging and correcting the incorrect accounts of

the confessor who did not actually know what he was talking about, by showing him crime photos of the victim and scene, and other mechanisms the detectives conveyed this knowledge to suspects who later incorporated it into their final confessions.

Brandon Garrett recently analyzed the records and trial transcripts of false confessors who had been wrongfully convicted and later exonerated, showing that whereas police in 27 of 38 cases testified on the witness stand that they had NOT fed such MSK to the suspects, it was nevertheless incorporated into their confessions (Garrett, 2010, 2011). Clearly police did convey the incriminating knowledge to the innocent suspects, but either could not accurately remember doing so or deliberately lied. In the absence of recording, the testimony of police and suspects will be an imperfect representation of who first mentioned any crime details during the course of potentially very long and exhausting interrogations. Even honest attempts to recreate the source and order of information conveyed in such a long event will be subject to the many vagaries of memory for conversation, and particularly for order (see Davis & Friedman, 2007 for review).

The Challenge of Assessment

Once a suspect has provided a confession, it must be repeatedly assessed as it moves forward through the legal system—first by the police who elicited it, and later by prosecutors, defense attorneys, judges, juries, and appellate courts. The issue of whether the confession was voluntary and therefore admissible as evidence in trial is often litigated before trial and is also sometimes subsequently raised in post-conviction appeals. The issue of validity is faced at all levels; by attorneys who must decide whether to prosecute or how to defend the case, as well as by jurors and appellate courts. Both judgments are more difficult and error prone than many recognize, accounting in part for failures to discover false confessions when they occur (see Davis & Leo, 2012d for review). In the following sections, we raise the many issues relevant to judgments of voluntariness and validity and consider evidence of whether those who must make these judgments possess the knowledge necessary to do so accurately. Specifically, we address three broad problems compromising such judgments, including (1) selectivity and distortion in available evidence, (2) failures of relevant knowledge, and (3) the impact of expectations and emotions among those who must judge.

Selectivity and Distortion in Available Evidence: The Problem of Hidden Context

In order to reasonably judge either the validity or the voluntariness of information obtained through interrogation, the observer must have available and understand the implications of the relevant context for evaluation of the confession, including the personal context of the suspect during interrogation, the interrogation itself, and the remainder of relevant evidence of guilt. Much such relevant information is uncollected, unavailable to those who must judge the confession, or misunderstood by them.

Relevant Evidence of Guilt

From the beginning of police investigation for any given case, a progressive and inevitable constriction in the availability of relevant evidence occurs as the case moves forward through the justice system to trial, and possibly post-conviction appeal. This occurs immediately, when police selectively notice, attend to, or follow up on specific evidence while neglecting other evidence that may also be relevant. Part and parcel of this is the result that evidence pointing to other suspects can be unnoticed and uninvestigated. In some cases additional suspects may eventually be recognized, such as when DNA thought to be the suspect's is later linked to another. But often, the failure to investigate immediately can render exculpatory evidence or evidence pointing to other suspects forever inaccessible to all parties. Moreover, even if police do initially have other

suspects or theories of the crime that are investigated, these are often not presented or considered at all by the time the case reaches trial, where the suspect and evidence related to his guilt are the focus.

Sometimes the suspect will be targeted soon after the crime has been committed, and long before significant investigation has taken place. This can occur, for example, when family members are immediately suspected, and possibly immediately interrogated, for the murder of a wife, husband, or child. In such cases, a confession may be obtained from the suspect prior to any further investigation. Eighteen-year-old Peter Reilly, for example, returned home to find his mother murdered. He contacted police, only to have them immediately take him to the police station and subject him to a long and grueling interrogation that, after more than 18 hours, led Reilly to offer a detailed false confession of killing his own mother (Connery, 1977).

As in Reilly's case, once the confession is in, the investigation tends to either stop, or to become restricted to gathering evidence supporting the guilt of the confessor. Exculpatory evidence, if it does arise, tends to be discounted or misinterpreted to sustain the perception of the confessor's guilt. This constriction in evidence resulting from the selective focus of the police investigation is continued as the case moves forward, when prosecutors and defense attorneys selectively present and emphasize evidence to one another, and in hearings and trial. In addition, of course, evidence is filtered through the memories of the police and other witnesses who later testify in court.

Any restriction in available evidence can be severely damaging to the case of the false confessor attempting to establish innocence despite his confession. The jury will necessarily base its verdict on their evaluation of the interrogation and confession in the context of other relevant evidence of guilt. Moreover, most interrogation scholars recommend that in order to assess the validity of the confession, it should be compared to the actual evidence (Leo, 2008; Leo & Davis, 2010). A false confessor who did not actually commit the crime is likely to make more errors in describing what happened. The more complete the evidence and the more detailed the confession, the more useful such a comparison may be (although recall our discussion of contamination of the confession).

Though the nature of the evidence supporting guilt versus innocence is vitally important, it perhaps pales in comparison to full understanding of the context in which the confession was obtained. Unfortunately, this can vary between no available context at all (as when only the confession itself is recorded) and full context: including full records of the events preceding the confession, the condition of the confessor preceding and during the interrogation, the events of the interrogation itself, and external influences that might affect the motive to confess (such as threats by other parties, desire to protect others, etc.).

The Personal Context of the Confessor

A wide range of personal contextual information for the suspect is relevant for understanding why his will may have been overborne by the interrogation, and/or why he may have falsely confessed. This includes factors preceding the interrogation that may affect his acute mental and physical condition, as well as chronic vulnerabilities due to personality, intelligence, mental or physical health, or others. Much of this relevant information may be hidden, not assessed, or unrecorded.

Relevant pre-interrogation factors, for example, may not be assessed or recorded, but nevertheless vital to understanding the vulnerability of the suspect to interrogative influence. If the suspect is interrogated shortly after the crime, he may be suffering significant stress due to the nature and consequences of the crime—such as when the crime entails the death of a loved one. He may be severely sleep-deprived, still intoxicated, hung over, suffering withdrawal, physically injured, or otherwise mentally or physically compromised. Such information may or may not be recorded, and may or may not later be presented to judges and juries who judge the confession.

In addition to acute vulnerabilities induced by pre-interrogation physical or psychological stressors, the suspect may suffer chronic vulnerabilities affecting his ability to resist the pressures of the interrogation. These include mental or physical characteristics affecting the ability to tolerate distress, to think clearly and to rationally evaluate the interrogator's claims and arguments, or to resist compliance to the demands of an authority. A number of such vulnerabilities have been identified by interrogation scholars, including youth, low intelligence, mental illness, disorders entailing impulsivity, personality traits associated with compliance, difficult life histories, and others (Follette, Davis, & Leo, 2007; Gudjonsson, 2003, 2010; Kassin et al., 2010a).

Such personal vulnerabilities tend to be those considered most important by the judiciary and by many experts called in support of motions for suppression of the confession, or to testify to the jury about causes of false confession (Kamisar, 1980; Watson, Weiss, & Pouncey, 2010; White, 1998). They may or may not be raised for individual defendants, however, depending upon whether the defendant's counsel recognizes the defendant's vulnerability, tries to establish it and introduce it into evidence, and is able to obtain financing to hire an appropriate expert to do the necessary evaluations and present them to the court. The court may also refuse to allow expert testimony on how the suspect's enhanced vulnerability may have compromised the voluntariness or validity of the confession, although this appears to be rarer than refusal to hear testimony regarding the coercive nature of interrogation tactics themselves (Fulero, 2010a; Watson et al., 2010).

These issues, if presented to the judge or jury, must of necessity be evaluated in light of the full nature of the interrogation. Unfortunately, while vital, this information is often hidden—seemingly deliberately so for most of the history of American police interrogation. We review this issue in some detail, as (1) awareness of the full nature of the interrogation is crucial to judging the voluntariness and validity of the statements obtained, (2) the recording and preservation of this evidence is fully under the control of law enforcement, and yet (3) such recordings have been completely absent or selective and misleading for all but the most recent history of police interrogation in America.

The Invisible Interrogation

Police custodial interrogations have always been "invisible or 'back room' events" taking place in the presence of only the suspect and his interrogators, isolated from the view of attorneys (mostly), family or other members of the public, and, until recent decades, unpreserved other than in the memories of the detectives and suspect (Leo, 2004, 2008). This has created a situation where the primary evidence of what occurred in the interrogation was the word of the suspect versus that of his interrogator(s), which is, of course, subject to problems of both memory and honesty.

During the era of the third degree, although police routinely inflicted severe physical harm and psychological distress upon their suspects, and although reports of these third degree tactics routinely appeared in the press, the response of the police was to deny the existence of such practices altogether, attributing the reports to sensationalistic journalism, shyster defense attorneys, private detectives, and dishonest suspects (Leo, 2004). As third degree tactics became less common, the events of the interrogation room were nevertheless still subject to misrepresentation or denial, both intentional and unintentional.

In earlier years, the very existence of the confession could be subject to dispute, in that the only record was in the form of the claims of the interrogator and defendant as to whether any confession actually occurred, as well as to its specific contents. This is still the case in a minority of criminal prosecutions, where the only record of a confession may be the detective's written report of suspects' statements. For the most part, however, as would naturally be the case, law enforcement has recognized the advantage of having the confession clearly on the record, in a form that could be undeniably attributed to the suspect—such as in his own writing, or on audio or videotape. Thus, for the bulk of the twentieth century, a common practice was to record, in some

form, the suspect's confession, but to leave unrecorded the interrogation that elicited it (Sullivan, 2010).

This, of course, is the most damaging of practices for the suspect who must try to explain why he had falsely confessed on the record, in such detail, to sometimes horrific acts, incorporating the misleading specialized knowledge that should only be known to the perpetrator, and including the apologies, motives, emotions, and other elements discussed earlier that make the confession so compelling. This became particularly dire with the advent of videotape, where the confessor's accounts could seem much more compelling. An article in *Time* magazine in June of 1983, for example, described the then new practice of videotaping suspects' confessions, noting that videotaping had "resulted in a guilty-plea rate of 85 % and a conviction rate of almost 100 % ("Smile, You're On," p. 61)." Since that time, many a proven false-confessor has been shown on videotape offering fully developed detailed false confessions, often complete with physical demonstrations of the commission of the crime, with no available record of the interrogation preceding it (Leo, 2008).

This practice is slowly being replaced by that of fully recording all interviews, interrogations, and suspect confessions in felony cases, as recently reviewed by attorney Thomas Sullivan (2010). Perhaps surprisingly, recording was first mandated by the Alaska Supreme Court in 1985, when it required that for custodial confessions to be admitted into evidence, the entire interview must be recorded (*Stephan v. State*, 1985). Though the Minnesota Supreme Court offered a similar mandate in 1994 (*State v. Scales*, 1994), other state courts addressed the issue and supported, but did not mandate, recording in the interim. The next requirement for recording came from the state of Illinois in 2003, when the Illinois senate enacted legislation sponsored by now US President, Barack Obama, requiring that custodial interviews be recorded. Since then, at least ten states have enacted similar statutes, and at least three state Courts have issued opinions supporting recording. Some other jurisdictions record voluntarily.

Support for required recording of suspect interviews has also been widespread among interrogation scholars, legal scholars, and legal organizations in America as well as abroad (see Sullivan, 2010 for review), and the practice is steadily growing among police departments. Thus, unless interrogated by the FBI (where there is a policy against recording interviews or interrogations), for perhaps most modern criminal suspects, the complete interviews preceding any incriminating statements or confessions they make, and the confessions themselves, are now available as context for those who judge them.

Unfortunately, however, the purportedly full context of the interrogation is still generally only partial. As demonstrated in a long line of research by Daniel Lassiter and his colleagues, video recorded interrogations tend to be positioned such that only the suspect is in view (or such that the suspect's face is in view but only the back of the interrogator's head). This minimizes the availability and perceptual salience of the interrogator's expressions and physical behaviors, and leads reliably to a bias toward perceiving the confessions as voluntary and valid (see Lassiter, Ware, Lindberg, & Ratcliff, 2010 for review).

The Problem of Observer Knowledge

The Problem of Denial

Clearly, to avoid false confessions in the first place, or to successfully detect them when they occur, one must first believe that false confessions do occur, with some frequency, even for the most terrible of crimes, and under conditions representative of those documented to produce them. But, lack of relevant knowledge concerning false confessions is common among those who generate and judge them, and either outright denial of their existence or severe underestimation of their likelihood is pervasive.

Police receive poor and misleading training about the risks of interrogation-induced false confessions. The widely cited Inbau and Reid

manual, for example, did not discuss the problem of police-induced false confessions until its fourth edition in 2001, when a chapter on the subject was added. Still, the authors continue to insist that the methods it advocates are not "apt to lead an innocent person to confess" (Inbau et al., 2001: xvi). Some erroneous beliefs about what behaviors reflect deception lead police to inaccurately classify anxiety as deception—and therefore to misinterpret innocent behavior as reflecting guilt (Kassin & Gudjonsson, 2004; Vrij, 2008). Others, such as denial that prominent interrogation methods can induce false confessions, lead them to use the techniques without concern, and to believe in the accuracy of the confessions they produce. For example, some forms of "minimization," (called "theme development") which is one of the cornerstones of the Reid technique (Inbau et al., 2001), have clearly been shown to convey expectations of leniency, and to be implicated as causes of false confession in both real-world case studies and laboratory experiments (see Leo, 2008; Kassin & Gudjonsson, 2004 for reviews). Yet, the Inbau manual continues to deny that "theme development" either conveys promises of leniency or would lead an innocent person to confess. Such erroneous beliefs may lead police to fail to question the validity of the confessions they obtain, or to fail to follow up with further investigation or careful comparison of the details of the suspect's post-admission narrative to the evidence.

But, Even if It Does Happen, It Takes a Moron…(NOT)

Although many recognize in theory that a normal person can falsely confess, in practice judgments tend to reflect the idea that even if some do falsely confess, it is only the retarded or insane. This is reflected, for example, in the tendency of judges to suppress a confession—or to allow expert testimony regarding causes of false confession—primarily in cases involving a mentally compromised defendant (Watson et al., 2010). Nevertheless, in clear contradiction to this assumption, the published data indicate that most false confessions are given by mentally normal, not insane or cognitively impaired, adults (Drizin & Leo, 2004; Kassin & Gudjonsson, 2004; Leo & Ofshe, 1998). Indeed, some false confessors are mentally gifted, such as Derek Tice (of the Norfolk Four), whose IQ was estimated between 148 and 164 points (at or higher than that of Einstein).

The failure to recognize the potential of normal and gifted persons to falsely confess is partly a function of the subtle and unrecognized coercive forces of the interrogation, and the sources of acute vulnerability of suspects to failures of impulse control and rational decision-making under stress. Failing to understand how easily a suspect's ability to suppress acute impulses and think rationally can be undermined, and failing to understand the many weapons of influence incorporated in interrogation practices, observers are likely to focus on the behavior of confessing itself and to view it as voluntary.

But How Do I Defend This?!

Misleading or absent knowledge also appears to be pervasive among criminal defense attorneys, many (and perhaps most) of whom have never read an interrogation manual, attended an interrogation course, been exposed to important reviews of the scientific literature on interrogation and confession, or received training or instruction on how to defend a false confession case. Of course, similar problems of knowledge occur among trial and appellate judges, and arguably most pervasively among jurors (Blandon-Gitlin, Sperry, & Leo, 2011; Chojnacki, Cicchini, & White, 2008; Costanzo, Shaked-Schroer, & Vinson, 2010; Henkel, Coffman, & Dailey, 2008; Leo & Liu, 2009). Thus, expert testimony can offer an important mechanism of education for attorneys, judges, and fact finders (Costanzo & Leo, 2007; Kassin et al., 2010a) but is often not sought by defense attorneys or admitted as evidence by judges—who may view it as unnecessary, prejudicial, or as not supported by sufficient science (Fulero, 2010b).

The Problem of Mistaken Cues of Deception and Guilt

One of the most important failures of relevant knowledge is that of how to read deception, as discussed in the earlier section on lie detection. Many of the same mistakes in assumptions regarding how to detect deception taught in police manuals are also prevalent among attorneys, judges, and jurors. Moreover, all concerned have been shown to possess theories about the display of emotion that mislead their judgments: such that displays of too little or too much emotion can be each taken as indicators of guilt.

Reflecting such problems, studies of detection of deception have shown attorneys, judges, and jurors to perform equivalently, at roughly chance, but to believe themselves able to perform much better (see Vrij, 2008 for review). Thus, the many misleading cues of arousal and anxiety discussed earlier can lead all who judge the confessor to view him as deceptive and guilty for the wrong reason; and several studies have specifically shown that observers cannot differentiate true from false confessions (see Kassin & Gudjonsson, 2004; Vrij, 2008 for reviews).

The Complicating Role of the Content of the Confession

Observers deploy their general beliefs about how to read deception in the context of other damaging misleading beliefs concerning the nature of what could and could not be included in a confession if it were false. Earlier we discussed the way police elicit confession narratives that include motives, detailed crime knowledge, emotional expressions, apologies, and sometimes elaborate videotaped reenactments of the crime, along with acknowledgments of voluntariness that would, on their face, seem unlikely or impossible if the person did not commit the crime. In the absence of preexisting knowledge of how the process of interrogation can implant this contaminating material into the confession—and in the absence of expert testimony to explain—most observers' judgments will be overwhelmed and almost completely guided by it.

The Problem of Assessing Voluntariness: Individual Vulnerability and Situational Power

> "*The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases in which it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused*"
>
> Haynes v. Washington, 1963

It is important to note that judgments of the voluntariness of the confession pose unique and difficult problems for the judges who must decide whether the confession should be admissible evidence at trial. Judgments of the validity and the voluntariness of a confession are clearly overlapping, but yet distinct. A confession can be involuntary, even beaten out of the suspect, and yet still be true. On the other hand, it can be completely false, yet given entirely voluntarily, for reasons of the suspect's own, with or without any interrogation. Nevertheless, a confession is admissible into evidence at trial only if it was given "voluntarily." If the suspect suffers defects of personality or capacity that might undermine his ability to resist pressures toward self-incrimination, and/or if the nature of the interrogative pressures may have been sufficient to override the suspect's will, the defense may challenge the voluntariness of the confession and seek to have it excluded from trial. The trial judge will then conduct a hearing to determine whether the pressures of the interrogation were sufficient to override the will of the suspect in question, given his physical and mental status at the time. This determination, however, is in many respects more difficult and complicated than that of whether the confession is false.

In part, this difficulty is the result of the vague and nonspecific nature of legal standards for what may be considered voluntary. The current standard for determination of voluntariness is a "totality of the circumstances" test, in which the judge may consider all evidence he or she considers relevant to whether the suspect's will was overborne. Although the use of explicit

threats and promises of leniency contingent on confession are explicitly forbidden, and although failure to obtain a knowing and intelligent waiver of *Miranda* rights is sufficient grounds for suppression of the confession, the remaining specific issues to be assessed are not fully listed or defined, thus leaving the judge considerable latitude to subjectively assess what factors are relevant, what impact they may have, and how much weight to give each in arriving at his or her determination of voluntariness. These ill-defined considerations may be relevant to determination of whether a valid waiver of rights was obtained as well as whether any admissions subsequently obtained were or were not voluntary.

The very nature of the concept of "voluntary" is quite different from that familiar to social scientists, who must abide by the standards set by the Nuremberg Code developed in response to WW II experimental atrocities, which defines it in this way:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, purpose, and duration of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Interrogation, in virtually every respect, violates these principles. It is deceptive in most every respect, including the effects on the suspect should he choose to confess. What, then, does it mean to, in legal terms, have one's "will overborne?" Trickery and deceit are acceptable under the Supreme Court's ruling in *Frazier v. Cupp* (1969), arguably rendering the issue of a "knowing and intelligent" waiver of one's *Miranda* rights an apparent oxymoron. The interrogation consists of misleading and deceiving the suspect to believe confession is in his best interests, thereby constituting fraud and negating the "free power of choice" as defined above. The law gives little guidance as to what voluntary means and concentrates on the prohibition of physical abuse, explicit threats and promises, the vulnerability of the suspect, and the vague concept of whether or not, all things considered, the will was or was not overborne (Wrightsman, 2010). This ambiguity in the standard makes it difficult to understand where the line of voluntariness is drawn, and whether it was or was not crossed.

Given these difficulties, it is not surprising that judicial consideration of the issue has largely defaulted to the chronic personality and mental status of the suspect, tending to suppress confessions most often on these grounds and to more frequently allow expert testimony on issues of individual vulnerability than on the coercive forces of the interrogation (Fulero, 2010b; Watson et al., 2010). Though in part the result of the vague standards of voluntariness, this is also in part the result of failures of the judiciary to appreciate the impact and ability of pre-interrogation and interrogation-related stressors to undermine the capacities of the suspect to resist immediate impulses to confess in order to terminate the interrogation and to rationally understand and evaluate his options and resist the deceptive arguments of the interrogator.

We have recently reviewed in detail the importance of physical and mental stamina for self-regulation of thoughts, emotions, and behavior, the surprising ease with which self-regulation can be compromised, and the sources and implications of self-regulation failures in interrogation (Davis & Leo, 2012a, 2012c; Follette et al., 2007). Many features of interrogation have been empirically associated with decline in self-control of impulses and of cognitive performance, including memory, rational thinking, resistance to persuasion, and effective decision-making. These include fatigue, sleep deprivation, glucose depletion, emotional distress, frustration, efforts to manage threats to identity or self-esteem, difficult verbal interactions, and many others. The sheer exertion

of self-regulatory capacity undermines further self-regulation, and thus the longer the interrogation lasts and the more self-regulatory capacity is depleted the more vulnerable to interrogative influence the person becomes. These influences operate on normal persons, though the catastrophic drop-off in self-regulatory control can occur sooner or more readily in those already compromised by poor mental abilities or health. But even in normal persons, significant decrements in thinking and control of impulses occur in laboratory studies, within short order and in response to relatively minor and insignificant prior depletions of self-regulatory resources. Much greater effects will occur in response to the many stressors preceding and during police interrogation. This potential of interrogations to substantially undermine self-regulatory capacity (i.e., the knowingly and intelligent exertion of will) remains unrecognized and underappreciated in the judicial system, whether among judges, juries or attorneys—resulting in the continuing admission into evidence of confessions extracted from highly emotionally distressed suspects through many hours or days of aversive interrogation.

The End Result: Wrongful Conviction and Failures of Post-conviction Relief

As former U.S. Supreme Court Justice William Brennan observed, "no other class of evidence is so profoundly prejudicial" as a confession (*Colorado v. Connelly*, 1986: 182). Once a suspect has given a false confession, "the confession operates as a kind of evidentiary bombshell which shatters the defense" (California Supreme Court; *State of California v. Cahill*, 1993: 497). The many forces identified in the previous sections tend to obscure, contaminate, divert attention from, and overwhelm evidence of coercion and innocence; to promote and maintain perceptions that the confession was voluntary and true; and to result in harsher legal outcomes at all levels as the case proceeds through the justice system.

Confession evidence defines and becomes the centerpiece of the case against the defendant, usually overriding any contradictory information or evidence of innocence (Leo & Ofshe, 1998). When false confessors subsequently retract their confessions, they are highly unlikely to be believed, and their retractions are often perceived as further evidence of their deceptiveness and thus guilt (Ofshe & Leo, 1997a). Each part of the system is subsequently stacked against the confessor (Leo, 1996), and as the case against a false confessor moves from one stage to the next in the criminal justice system, it gathers more force and the error becomes increasingly difficult to reverse.

This process typically starts with the police. Once they obtain a confession, they typically close their investigation, deem the case solved, and make no effort to pursue any exculpatory evidence or other possible leads—even if the confession is internally inconsistent, contradicted by external evidence, or the result of coercive interrogation (Leo, 1996; Ofshe & Leo, 1997a, 1997b). Even if other case evidence emerges suggesting or even demonstrating that the confession is false, police tend to disregard or misinterpret evidence of innocence and to continue to believe his confession valid (Drizin & Leo, 2004; Leo & Ofshe, 1998). Moreover, the presence of a confession creates its own set of confirmatory and cross-contaminating biases (Findley & Scott, 2006; Kassin, 2012; Kassin, Dror, & Kukucka, 2013), leading police, and later others, to interpret all other case information in the worst possible light for the defendant. For example, a weak and ambiguous eyewitness identification that might have been quickly dismissed in the absence of a confession will instead be treated as corroboration of the confession's validity (Hasel & Kassin, 2009). As the many documented cases of false confessions have demonstrated, even exculpatory DNA evidence is sometimes disregarded or reinterpreted as consistent with other forms of involvement in the crime (such as conspiracy to commit rape rather than as the rapist).

The presumption of guilt and the tendency to treat those who confess more harshly extend to prosecutors, who rarely consider the possibility that an innocent suspect has falsely confessed: therefore tending to charge him with the highest

number and types of offenses; to oppose his pretrial release more strongly; and to pursue higher bail. They are far less likely to initiate or accept a plea bargain to a reduced charge, and in many cases persist in pursuing the prosecution even when exculpatory evidence has unequivocally established the defendant's innocence (Cassell & Hayman, 1996; Kassin & Gudjonsson, 2004; Leo & Ofshe, 1998).

Even the defendant's attorney is likely to believe the confession as true, an assumption that short-circuits or undermines the vigorous pursuit of claims of innocence. But if the attorney does believe such claims, he or she will nevertheless often pressure confessors to accept a guilty plea to a lesser charge in order to avoid the higher sentence that will inevitably follow from a jury conviction (Leo, 2008; Nardulli, Eisenstein, & Fleming, 1988; Wells & Leo, 2008). As documented by the previously reviewed studies of the wrongfully incarcerated, many false confessors have taken this advice, and pled guilty rather than risk trial (see Garrett, 2011; Redlich, 2010 for review).

If the case proceeds to trial and involves a claim that the confession is coerced, judges rarely suppress the confession, even if highly questionable and involving coercive tactics or a severely compromised suspect (Givelber, 2000). Many wrongfully convicted false confessors attempted, but failed, to have clearly coerced confessions suppressed: for example, those lasting for many hours or across days, involving repeated threats of harsh punishment, and/or involving juveniles or mentally retarded suspects (Drizin & Leo, 2004; Garrett, 2011).

Given this situation, when the cases of false confessors go to trial, the jury is highly likely to learn of the confession, and, even in the absence of other inculpatory evidence, and even if the confession is elicited through a clearly coercive interrogation, the defendant is highly likely to be wrongfully convicted. Studies of proven false confessors have shown that jury trials resulted in conviction in 73–81 % of cases—each a story of police, prosecutors, judges, and juries who failed to recognize the coercion of the interrogation and the invalidity of the confession (Drizin & Colgan, 2004; Leo & Ofshe, 1998, 2001). This rate of wrongful conviction becomes even larger when incorporating the number of false confessors who plead guilty rather than take their cases to trial (78 and 85 %, for the two studies, respectively). Most Americans simply accept confession evidence at face value. Randall McFarlane, for example, the jury foreman in the trial of Derek Tice—who, along with three others, falsely confessed to the murder and rape of the young wife of a Navy colleague—subsequently explained that Tice's confession "just washed everything else away…That was the supernova circumstance of the entire trial. It overwhelmed everything else" (Wells & Leo, 2008: 228).

Laboratory studies of the impact of confession evidence have likewise demonstrated the power of confession evidence to overwhelm judgment. Mock jurors find confession evidence more incriminating than eyewitness identification, for example, which also tends to overwhelming result in conviction (Hasel & Kassin, 2009; Kassin & Neumann, 1997; Miller & Boster, 1977)—and fail to appropriately discount a false confession, even when the defendant's confession was elicited by coercive methods and the other case evidence strongly supports his innocence. In one such study, for example, Kassin and Sukel (1997) found confessions to greatly increase the conviction rate even when mock jurors viewed them as coerced.

False confessors continue to experience more negative outcomes at all points subsequent to conviction. Confessors who dispute their confessions tend to receive harsher sentences, as trial judges may punish defendants with harsher sentences for their claims of innocence, for the consequent costs to the state in time, effort, and resources, and for failing to express remorse or to apologize (Leo, 2008). Confessions likewise compromise efforts at post-conviction relief, in that the system provides no regular mechanisms for reviewing the substantive basis of convictions, *officially* presumes the defendant's guilt after he is convicted, treats the jury's verdict with deference, and interprets any new evidence in the light most favorable

to the prosecution—rendering the correction of any mistaken conviction unlikely (Gudjonsson, 2003; Leo, 2008; Medwed, 2004). Appellate courts overwhelmingly uphold the conviction, often citing to the convincing nature of a confession and the incorporation of details apparently unknowable to any but the perpetrator. Despite the exponential rise in exonerations of innocent prisoners and the increasing number of documented proven wrongful convictions in the last two decades, criminal justice officials and courts still tend to presume the validity of confession-based convictions.

Conclusions

Police interrogation in America remains a procedure with considerable risk to elicit false confessions from the innocent. The reforms that characterized the progression from third degree tactics in the 1930s and beyond retained two problematic features that facilitate the elicitation of false confessions (1) an assumption of guilt that promotes the misclassification of innocent suspects as likely guilty, and (2) the still-coercive nature of interrogation tactics that include strong incentives promoting confession as the mechanism to achieve the best legal outcomes, and that contaminate the content of the confessions they elicit. At the same time, the appearance of coercion has been lessened by the elimination of third degree tactics, while the actual nature and power of the new strategies to promote confession have become more subtle and less recognizable to observers. Thus, the risks of coercion and false confessions remain, but the challenge of recognizing them is greater.

Although reforms have been enacted in Europe, and are beginning in other countries such as Canada, the USA seems entrenched in the practice and acceptance of Reid and Reid-like interrogation methods. It remains to be seen whether the flood of documented false confessions and wrongful convictions can overcome the widespread preeminence of concerns for crime control over those for due process and further the evolution of our still-coercive interrogation practices toward the more evidence-gathering strategies adopted in European reforms.

Biography

Dr. Deborah Davis, Ph.D., is Professor of Psychology at the University of Nevada, Reno. Dr. Davis has conducted social psychological research published and served as an expert witness in the areas of memory, police interrogation practices and coerced confessions, and issues related to sexual consent. She has also has served as a jury consultant for over 20 years, and published articles and chapters on jury selection and persuasion.

Richard A. Leo, Ph.D., J.D., is a professor of law and Dean's Circle Research Scholar at the University of San Francisco and formerly a professor of psychology and criminology at University of California, Irvine. Dr. Leo is internationally known for his pioneering empirical research on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and wrongful convictions. Dr. Leo has authored more than 80 articles in leading scientific and legal journals as well as several books, including the multiple award-winning *Police Interrogation and American Justice* (Harvard University Press, 2008); *The Wrong Guys: Murder, False Confessions and the Norfolk Four* (The New Press, 2008) with Tom Wells; and, most recently, *Confessions of Guilt: From Torture to Miranda and Beyond* (Oxford University Press, 2012) with George C. Thomas III. Dr. Leo has won individual and career achievement awards for research excellence and distinction from many organizations, and has been the recipient of Soros and Guggenheim fellowships. Dr. Leo has been featured and/or quoted in hundreds of stories in the national print and electronic media, and his research has been cited by numerous appellate courts, including the US Supreme Court on multiple occasions. The work Dr. Leo did to help free four innocent prisoners in Virginia (known as the "Norfolk 4") was the subject of a story in *The New Yorker* magazine in 2009 and a PBS Frontline documentary in 2010.

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'Brainwashing' as Forensic Evidence

5

James T. Richardson

Introduction

The pseudoscientific concept of brainwashing has had a significant impact on public policy development and within the legal systems of a number of nations, including particularly the USA. It is fascinating to consider that a term first published in the 1950s by a person being paid by the Central Intelligence Agency (CIA) to write critically about the Chinese communist takeover in China has become commonplace, and is now a part of everyday parlance (see Hunter, 1951, and Anthony's, 1990, assessment of Hunter's work). Indeed, the term that was first developed as an ideological weapon to use against the Chinese communists has now been widely adopted around the world, and even appears in various forms in governmental reports and legislation (Richardson & Introvigne, 2001). The concept has appeared as well in major court decisions, including in the European Court of Human Rights (Richardson 1995b, 1996a), in other European courts (Anthony and Robbins, 2004), in the court systems in the USA (Anthony, 1990; Anthony & Robbins, 1992; Fort, 1985; Reichert, Richardson, & Thomas, 2012; Richardson, 1991, 1993b), and in Japan to justify efforts to exert social control over newer religions (Richardson & Edelman, 2004). Ironically, the concept has even been used by the Chinese government to "explain" how and why people participate in the Falun Gong (Edelman & Richardson, 2005).

"Brainwashing" has been the focus of major legal battles over the past several decades in America (Anthony, 1990; Anthony & Robbins, 1992, Bromley & Richardson, 1983; Richardson, 1991, 1993b), and has played a significant role in legal conflicts concerning academic freedom and use of social and behavioral science in courtrooms in America (Richardson, 1996b, 1998). The brainwashing term was used with impunity and to great effect in a number of cases involving new religious groups, starting in the 1970s and continuing for two decades. Some of those cases resulted in multimillion dollar damage awards to former participants in the groups. Eventually, however, some major decisions within the federal court system led to severe limitations on use of the term in cases involving new religions in America (see below). Those decisions did not, however, result in changing the near-hegemonic acceptance of the term in American culture (see Bromley & Breschel, 1992; Richardson, 1992b), and its spread to other societies around the globe. Also, the term has spread within the legal system, and is now found in a number of other types of cases, including family court cases where the concept is used to undergird a questionable syndrome, parental alienation syndrome (PAS) (Reichert et al., 2012).

This chapter will review the meanings attached to the concept, critique those uses of the term,

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_5, © Springer Science+Business Media New York 2014

assess the concept from the perspective of rules of evidence, and offer alternative explanations about how and why young people in America and other societies have chosen to participate in new religions.

The Meaning and Assessment of "Brainwashing"

"Brainwashing" refers in popular contemporary parlance to almost magical psychological techniques whereby the will of individuals is overcome, and they are forced to do what they are told by some all-powerful person. The term came into widespread use after the widely publicized Patty Hearst trial in the 1970s, as "brainwashing" was used, unsuccessfully, by her defense team in the trial that occurred as a result of her assisting her captors in robbing a bank (Fort, 1985). The term has a relatively short history, as noted above, because it derived from efforts to explain what happened when individuals appeared to change their beliefs dramatically under pressures from communist regimes in China and Russia (Anthony & Robbins, 1992, 2004; Richardson & Kilbourne, 1983; Solomon, 1983). Films such as "Manchurian Candidate" helped convince the general public that brainwashing was possible, and that people could be turned in automatons who would even murder a president if "programmed" properly.

The idea of brainwashing undergirds a relatively new but dubious psychological syndrome, "destructive cultism," which was proposed by a psychiatrist, Eli Shapiro, whose son had joined the Hare Krishna. Richardson (1992a) discusses of this troubling situation, which involved Shapiro having his son incarcerated in a mental institution as part of an unsuccessful effort to "deprogram" him from the Hare Krishna. Shapiro (1977) wrote what appeared to be a straightforward analysis of a new syndrome he had discovered, but never mentioned that he was motivated by the fact that his son had joined one of the new religions (Shapiro, 1977). Shapiro's efforts were aided by a psychiatrist, John Clark, who had interviewed Shapiro's only for about 15 minutes, but then offered an affidavit for a court hearing that resulted in the incarceration of the son in a mental hospital. Clark later offered testimony in a conservatorship hearing based on his short interview and his strong belief that the son had been thoroughly brainwashed by the Hare Krishna. Clark was later reprimanded by Massachusetts medical authorities for his involvement in this disturbing case.

Richardson and Stewart (2004) analyzed the circumstances whereby participation in new religions came to be defined as deviant behavior, and efforts made by Shapiro and others (see Clark, 1979; Singer, 1979) to "medicalize" participation (see Conrad & Schneider, 1980), thus supposedly needing intervention to "rescue" participants through deprogramming. The Conrad and Schneider model applied by Richardson and Stewart includes steps that: (1) define participation as deviant; (2) "prospecting" to "discover" the new medical condition associated with participation; (3) "claims-making" by interested parties such as those who would treat the newly found condition, or parents unhappy with their son or daughter's decision to join a new religious movement (NRM); (4) "securing medical turf" by getting the new disease accepted in key forums such as the Diagnostic and Statistical Manual (DSM); and (5) institutionalization and widespread acceptance of the new medical designation. Richardson and Stewart conclude that the efforts made by those promoting the new syndrome were largely successful, but countered somewhat by scholars whose research discounted a brainwashing-based definition of participation in NRMs.

The key step in the Conrad and Schneider model of "securing medical turf" was examined more thoroughly by Richardson (1993a) who examined the circumstances whereby concepts such a "brainwashing" were included in the DSM. He described the political campaigning that went on to get the term brainwashing included in some of the definitions within the DSM, and also discussed how the concept was being misapplied even with syndromes where it was not included in the description, such as when post traumatic stress disorder was claimed in legal cases involving NRM participation (see Richardson, 1991 for one such example).

"Mind control" is a closely related term that also has been used in discussion of why well-educated young people would succumb to the entreaties of leaders of new religions (commonly referred to as "cults") and start participating in the groups. Another similar term that has been used, especially in the European context, is "mental manipulation," by which is meant that someone takes advantage of alleged psychological weakness or vulnerability of someone to convince them to participate in a group (Anthony & Robbins, 2004). "Stockholm syndrome" is yet another sometimes related term which refers to the possible identification of a hostage with his or her captors. This term came from a famous bank robbery in Sweden in 1973 during which several hostages became sympathetic to their captors and even refused to testify against them at the subsequent trial.

Needless to say, the scientific basis of destructive cultism and of concepts such as brainwashing, mind control, and mental manipulation is very weak if not nonexistent. These concepts, like a number of other psychological syndromes, are quite problematic when used within the legal system (see below and Faigman, 1995; Freckelton, 1994; Richardson, Ginsburg, Gatowski, & Dobbin, 1995 for a general assessment of syndromes under usual rules of evidence).

Note that the Patty Hearst situation and the bank robbery in Sweden, as well as some developments in Communist China and Russia and with POWs in Korea, all involved severe physical coercion and even threats of death. Such pressures can lead to behavioral changes, but also can over time result in temporary changes of attitudes or belief. However, as several scholars have noted (Anthony, 1990, Anthony & Robbins, 2004; Richardson, 1991, 1993b), it is a huge inferential step to assume such situations exist in new religious movements which are voluntaristic organizations that require a volitional act for someone to participate. Some proponents of brainwashing as an explanation for such participation have referred to this as "second-order brainwashing" (Singer, 1979), and have claimed that psychological pressures are more effective than were the physically coercive techniques used in some of the situations described above. However, this claim has been debunked, as will be explained in the following section.

Critique of "Brainwashing" Concept

Richardson (1993b) offered a systematic critique of the use of brainwashing-based testimony, and the ideas contained therein will be summarized (also see critique of Anthony and Robbins, 1992). First, the classical earlier work by Edgar Schein, Schneir, and Barker (1961) and by Robert Lifton (1963), when examined closely, reveals that so-called "brainwashing" was not effective in changing the minds of subjects; the best that could be accomplished was temporary behavioral compliance. Modern proponents of brainwashing as an explanation of recruitment to newer religions assume a much more deterministic view of the technique than did Schein and Lifton, both of whom have lamented the misuse of their ideas in the modern "cult wars" (Richardson, 1993b, pp. 78–79).

Ideological biases of brainwashing theories were also noted, as those using such concepts to oppose new religious movements seem concerned about the collectivistic nature of the groups, many of which were communal. Also, some of the NRMs were led by foreigners, including some from eastern societies, suggesting that some of the opposition (and use of "brainwashing") might have derived from racial and cultural concerns. (Note that several of the more controversial NRMs were led by foreigners of eastern origin.)

The very limited research base of the classical literature by Lifton and by Schein was also noted. Lifton only dealt with 40 subjects in all, and presented detailed information only on 11 of those. Schein based much of his work on coercive persuasion on a sample of 15 American civilians who returned to the USA after being imprisoned for a time in communist China. He also studied a small sample of Korean War POWS who eventually returned to the USA after initially deciding to stay in Korea. Thus, the research results, even though misconstrued by some contemporary readers, were themselves derived from a very

narrow data base. This narrow research basis from the classical works from whence the idea of brainwashing came is sharply contrasted to a large and growing literature on participation in NRMS, virtually all of which demonstrates the volitional nature of participation.

Brainwashing theories also ignore predisposing characteristics that might have contributed to the apparent acceptance, even if temporary, of beliefs and behaviors associated with NRMs. A large body of research on NRM participation revealed that volition played a major role in decisions to participate, even if for a short time. Young people were looking for alternatives to the dominant cultural values of American society, as well as ways to act out their idealism (Barker, 1984; Kilbourne, 1986), and the NRMs offered what seemed to be viable alternatives. Those promoting brainwashing as an explanation for participation had difficulty believing that anyone would voluntarily leave American culture and chose another set of values and beliefs, but indeed, that is what considerable research has demonstrated (Barker, 1984; Kilbourne & Richardson, 1984; Lofland, 1977; Richardson, 1985a; Richardson & Kilbourne, 1983; Straus, 1976, 1979). The young people who did so decide, most of whom were from the most educated generation in American history, were not tricked, or subjected to some powerful psychotechnology over which they had no control. Instead, they chose to join, even if temporarily.

Another major critique of brainwashing as an explanation concerned the refusal by proponents to acknowledge the therapeutic effects of participation in NRMs. A number of researchers examined data demonstrating those positive effects of being in NRMS (Kilbourne & Richardson, 1984; McGuire, 1988; Richardson, 1985b, 1995a, 1995b; Robbins & Anthony, 1982). A prominent psychiatrist, Marc Galanter, even published an article (Galanter & Diamond, 1981) discussing the "relief effect," by which he meant the positive outcomes of participation in newer religions. Galanter, who had published other research on controversial NRMs in the *American Journal of Psychiatry* (see Galanter, 1980 for one example), thought that his profession might learn from what the movements were doing to reduce psychiatric symptoms, since so much research by himself and others clearly showed ameliorative effects of participation.

Perhaps the most telling criticism of brainwashing theories as an explanation of participation in NRMS is the lack of success of the new movements. Most were very small, and had trouble retaining members. Attrition rates were very high, and it is accurate to describe the groups as "flow-through" organization that took in about as many members as were leaving (Beckford, 1978; Richardson, van der Lans, & Derks, 1986; Wright, 1987). Membership was a temporary thing for nearly all participants, but that fact was a well-kept secret for a time, as it was not in the interest of the groups or their opponents to point out the lack of success in recruitment and keeping members. But, eventually, it became clear that whatever "brainwashing" was, it lacked effectiveness.

One last comment or critique of the idea of brainwashing is that it becomes its own explanation. When people are "deprogrammed" an effort is made to convince them that they were brainwashed into joining the group (Bromley & Richardson, 1983, Lewis, 1986; Lewis & Bromley, 1987; Solomon, 1981). A "successful" deprogramming means that the target of the deprogramming comes to accept the views of the deprogrammer, and that means they may come to believe they were brainwashed. This is understandable because if the person decides to leave the group and rejoin his or her friends and family, they must together negotiate an "account" of what happened to the person that caused them to join the strange group (Richardson, van der Lans, & Derks, 1986). The account that serves all the parties needs best is that some all-powerful techniques against which the person had no defense were used to force them to join in the first place. Whether the negotiated "account" has any resemblance to reality is, however, sometimes quite questionable.

Therefore the pseudoscientific concept of brainwashing serves a useful function for the individual wishing to "return home," and for the parents and friends who need an explanation of why they left in the first place. The concept also serves as a justification for societal leaders who need a reason for efforts of social control that might be

directed at the new religions. The pseudoscientific status of the concept notwithstanding, the term has become commonly used as a weapon to discredit any sort of effort to resocialize or educate with which people disagree.

Brainwashing and the Rules of Evidence

Several times herein I have referred to the brainwashing concept as "pseudoscience," by which I mean that the concept does not have a scientific basis and does not meet usual standards for a scientific claim. It is more of an ideological weapon that can be used against those with whom someone disagrees about recruiting or selling techniques (Richardson & Stewart, 2004; Robbins & Anthony 1987, 1982). However, as court cases in the USA have shown, particularly early in history of making such claims, use of this quite negatively connoted term was often effective with judges and juries, and resulted in sizable damages being assessed against allegedly brainwashing group or persons (see Anthony & Robbins, 1992; Richardson, 1993b). This occurred even though the scientific basis of the concept was not accepted by most scholars (Ginsburg & Richardson, 1998). Only after those scholars noticed how the concept was being used in court cases, and decisions were made to attempt to counter the use of the pseudoscientific term, was there any serious effort to educate judges in cases where the concept was being applied (Anthony, 1990; Richardson, 1996b, 1998). The ultimate outcome of those efforts was partially successful, but not before many legal battles were fought, including those scholars opposing brainwashing claims in scholarly circles and in court being sued twice for large amounts by two individuals who were promoting brainwashing claims as expert witnesses (and doing very well at it) (see Richardson, 1996b, 1998 for a detailed account of these legal battles).

The early battles over such testimony were fought in the USA, under a rule of evidence known as the *Frye* rule, which derived from a 1923 case involving an early precursor of the lie detector (*Frye v. United States*, 293 F. 1013; 54 App. D.C. 46 [D.C. Cir. 1923]). That much-cited case established the "general acceptance" test, by which was meant that novel scientific evidence could not be admitted in as evidence unless the methods and principles under which it was found were generally accepted within the relevant discipline(s). Scholars who did research on new religions and their recruitment processes did not support the admission of "brainwashing" testimony, as they did not agree that there was anything magical or sinister about the decision of many young people to join and NRM. Instead, they had found that those who joined did so for many reasons, but all were volitional choices, as demonstrated by the relatively small number of recruits and the high attrition rates for the NRMs. People decided to join, and most of them then later decided to leave, and move on to something else. These scholars eventually were able to point out to judges through testimony and amicus briefs that the evidence supporting brainwashing claims was questionable, and certainly not generally acceptable (Anthony, 1990; Richardson, 1993a; Ginsburg & Richardson, 1998). Thus brainwashing-based testimony failed the *Frye* test when judges seriously considered what was being claimed and allowed counter testimony, or attended to amicus briefs that had been submitted in the cases. However, for a number of years and many cases, the *Frye* rule was ignored, and such claims were made with impunity until eventually some rulings precluded them being made in most courts in America.

The key case of note was a federal court case from California involving a former Scientologist, Fishman, who was criminally charged with embezzlement. His defense claimed diminished capacity and insanity, basing the defenses on an assertion that he was brainwashed by Scientology into committing the crimes for which he was charged (see Anthony & Robbins, 1992 for a full discussion of this case). The two major proponents of brainwashing theories in legal cases were slated to testify on his behalf, but Federal Judge Lowell Jensen ruled that their testimony did not meet federal standards (the *Frye* general

acceptance test) and disallowed their testimony concerning brainwashing or thought reform. Thus an important precedent was established in a federal court, which gave the decision significant precedential value.

This value was demonstrated almost immediately in a ruling in civil case in Federal Appeal Court, District of Columbia. In *Green and Ryan v. Maharishi Mahesh Yogi et al.* (U.S.D.C. No. 87-0015 and 0016 [1991]), one of the proffered experts from *Fishman* has testified earlier in this action, and the testimony was disallowed by the trial judge. On appeal, the Circuit Court affirmed the inadmissibility of the evidence, even under a relaxed standard of "sufficient acceptance," and cited Judge Jensen's opinion in *Fishman* extensively. Thus there were now important federal court opinions in both criminal and civil cases that brainwashing-based testimony did not pass muster under even a relaxed version of the *Frye* rule.

The *Frye* rule lasted 70 years, until the famous *Daubert* decision of 1993 (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* 113 S. Ct. 2786 [1993]). That decision laid out several non-exhaustive guidelines or criteria that judges should apply in assessing expert and scientific evidence. Those guidelines include (1) falsifiability or testability, (2) establishing the known or potential error rate, (3) whether the findings had been subjected to peer review and publication in a scientific forum, and (4) general acceptance, the old *Frye* criterion. Considerable scholarly commentary has developed concerning the application of those guidelines to social and behavioral science evidence (Dahir, Richardson, Ginsburg, Gatowski, & Dobbin, 2005; Richardson et al., 1995), but strong arguments can be made that *Daubert* does apply to such evidence (Faigman, 1995; Richardson, 1994). There also is controversy over whether judges understand the guidelines and can apply them properly (Gatowski et al., 2001). However, *Daubert* is now the "law of the land," and thus is applicable to claims such as those related to brainwashing.

I have established that brainwashing claims did not pass the general acceptance criterion of *Frye*, but it should be noted that such testimony does not meet the other three *Daubert* criteria as well (Ginsburg & Richardson, 1998). The lack of clarity about what brainwashing is makes it impossible to design research that could falsify or truly test a claim that someone was brainwashed. Likewise it is impossible to establish an error rate since the indicators of brainwashing are not known, unless one is willing to claim that just because someone joins a new religion this means they have been brainwashed. Brainwashing also fails the peer review and publication guideline if the test involves major journals in the social and behavioral sciences. The bulk of scholarship in major books and journals discounts brainwashing claims, and offers alternative explanations based on social psychological theories that do not contain any "black boxes" such as brainwashing or mind control. We will summarize briefly some of these alternative explanations in the following section.

Ordinary Explanations of Participation

Research on a large number of newer religions and other kinds of movement groups has revealed what should have been obvious all along: people participate in voluntaristic movements and groups because they want to, not because they are tricked or "brainwashed" by nefarious gurus or movement leaders, or kept captive through "mind control" or "mental manipulation." Brainwashing explanations assume that people are passive and easily taken advantage of by others, or that somehow their "free will" is overcome by psychological forces over which they have no control. This view is widely accepted by the general public and some political leaders, as demonstrated by considerable public opinion research (Bromley & Breschel, 1992; Richardson, 1992b), and the idea has almost become hegemonic within American culture, even if not supported by relevant scholarship.

The alternative explanation arrived at by most of those doing research on political and religious movements is much more agency oriented, and assumes that individuals are not passive objects (Barker, 1984; Dawson, 1990; Lofland, 1977; Richardson, 1985a). Instead the assumption,

supported by considerable research, is that these individuals are active agents seeking meaning in their lives and an ethic to guide their behavior, a perspective that recognizes that those participating in political or religious movements have at the same time rejected the values and even institutions of the their host society (Dawson, 2006; Skolnick, 1969).

The agency-oriented view is difficult to accept for many, including many parents of participants, as well as political and other institutional leaders. Thus they are susceptible to simplistic explanations that involve ideas such as brainwashing and mind control. The "accounts" developed to explain participation incorporate such ideas, and those accounts are promoted by individuals and institutions whose interests are served by acceptance of such interpretations (Richardson et al., 1986; Scott & Lyman, 1968).

Agency-oriented explanations of why people participate in movements are not as dramatic as those promoted by brainwashing advocates, but they explain much more of what actually happens (Richardson, 1985a; Straus, 1976, 1979). Shupe and Bromley (1979) offer a role theory interpretation that focuses on individuals *deciding* to occupy a role for a time to "check it out" and see what happens, and whether remaining in the role is something the person wants to consider. Richardson (1993b) summarizes social psychological theories such as those of Moreland and Levine (1985) and Levine and Russo (1988) that focus on the *negotiation* that takes place between a potential participant and those attempting to recruit the person into a movement or group. The clear implication of this line of theorizing is that negotiation involves two agents, both of whom have agency and can walk away without acceding to the other's demands. Given the small size of most NRMs it is clear that many potential recruits do in fact "vote with their feet" and leave, either after an initial contact or within a short time of deciding to try out a group or movement for a time (see Barker, 1984, and Galanter, 1980, for examples of the high attrition rates in one of the more notorious NRM, the Unification Church).

Conclusions

Brainwashing is an idea that was developed for purposes of propaganda in the conflict between the USA and China after the Communists took over China in the early 1950s. In the 1970s the term gained considerable attention because of claims made in the then "trial of the century" involving Patty Hearst. It has since become a common term used against unpopular groups or movements that gain participation and a following, especially newer religions. The term has also come to be applied in the legal arena to describe any process of influence that is viewed negatively, such as that alleged to occur with PAS.

Simplistic claims that many of the "brightest and best" of America's youth joined NRMs because of being brainwashed gained considerable traction in the mass media and among members of the general public. Brainwashing explanations were much favored over the idea that these youth were rejecting American society and its cultural values in favor of strange ideas and practices from outside the cultural ambit of America. Brainwashing-based claims surfaced in a number of civil suits against NRMs by former members, and they were effective for a time until a few major state and federal court decisions undercut such claims. It is now clear that the vast preponderance of the social and behavioral evidence about participation in various movements does not support brainwashing claims, and that such claims do not meet the standards of rules of evidence in the USA and most other Western nations. Instead more mundane explanations that involve time-honored theories from sociology and social psychology are quite adequate to explain why people choose to participate in newer religious and social movements. It is also clear, however, that the brainwashing concept is still alive and well within Western (and even Eastern) cultures, and that it is still being used in various ways within the legal system, the strong arguments outlined above to the contrary notwithstanding.

Biography

James T. Richardson, J.D., Ph.D., is Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he is director of the Grant Sawyer Center for Justice Studies and the Judicial Studies graduate degree program for trial judges, offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges, both of which are headquartered at the university campus. He does research on new religious movements and religion and law. His most recent books include Regulating Religion: Case Studies from around the Globe (Springer, 2004) and (with Stuart Wright) Saints under Siege: The Texas State Raid on the Fundamentalist Latter Day Saints (New York University Press, 2011).

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Target Selection by Criminal Groups and Gangs

6

Rosemary J. Erickson and Sandra J. Erickson

Introduction

A primary difference between forensic psychology and forensic sociology can be seen in the emphasis on the perpetrator and the victim in psychology, whereas, in sociology, it is on the perpetrator, the victim, *and* the location. As a forensic sociologist, I apply my background, training, education, and experience to the study of crime and have spent most of my career conducting research of criminal behavior and how criminals select their targets. The most important determination is often whether the perpetrator is targeting the individual or the location in which the crime occurs. A criminal group herein is defined as any group with more than two individuals engaged in committing a crime, and a gang is a more formal unit engaged in crime. As a forensic sociologist, I provide training and program design to corporations and government agencies in violent crime prevention, and I serve as an expert witness in civil cases for security and premises liability which involve a criminal act, which will be discussed in this chapter.

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Types of Workplace Violence

Almost all civil cases in premises security result from a criminal act that occurs in the *workplace*. The California Occupational Safety and Health Administration (Cal-OSHA) developed a workplace typology in the early 1990s (Cal-OSHA, 1995). It has subsequently been expanded and adopted by the Federal Occupational Safety and Health Administration (OSHA), the Federal Bureau of Investigation (FBI), the National Institute of Occupational Safety and Health (NIOSH), and others. The four types of workplace violence are shown below in Fig. 6.1, with the estimated percentages of each type of violence that occurs.

The Civil Cases

If a woman is raped in a hotel, she might choose to sue the hotel for not providing a safe environment. The attorneys for both the plaintiff (victim) and defense (the hotel) typically use expert witnesses in the case to provide information on whether the security was adequate. The adequacy, according to the law, is based on (1) foreseeability, (2) standard of care, and (3) causation. Sometimes, however, people are the intended target, and the business or agency is just coincidental. A common example of that is an ex-spouse coming to his wife's workplace, and shooting and

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_6, © Springer Science+Business Media New York 2014

Type 1—External—Assault or threat by outside third parties, usually criminals. No legitimate relationship with the affected workplace, which is commonly a retail establishment. (75%) Examples: Robbers, Rapists, Murderers
Type II—Service-related—Assault or threat by someone who is the recipient of a service provider by the affected workplace, such as health care providers and the public sector, i.e., police, parole, welfare. (15%) Examples: Patients, Clientele, Customers, Students
Type III—Internal—Assault or threat by an individual who has an employment-related involvement with the affected workplace. (5%) Examples: disgruntled employees, troubled employees, management problems, co-worker problems
Type IV—Internal—Personal relationships. Assault or threat by an individual who has a personal relationship with an employee in the affected workplace. (5%) Examples: domestic problems, acquaintance problems

Fig. 6.1 Types of workplace violence

killing her there. Other times, it can be an ex-spouse coming to his wife's workplace and shooting and killing her, but also killing others around her.

Typically in most jurisdictions, to establish liability, the plaintiff must establish (1) that the defendant owed the plaintiff a legal duty, (2) that the defendant breached that duty, and (3) that the breach was a proximate or legal cause of the injury suffered by the plaintiff (Erickson, 1995). The issues at hand in the determination include foreseeability, standard of care, and causation, discussed below.

Foreseeability

Whether doing research, planning a violence prevention program, or doing litigation, for plaintiff or defense, I judge foreseeability by some or all of the following factors, as appropriate:

1. Crime in society
2. Crime in the area
3. Crime at the location
4. Crime at similar locations nearby
5. Crime at other parts of the chain
6. Neighborhood characteristics
7. The perpetrator
8. The victim
9. The crime

Crime in society addresses trends that are occurring, which may impact the crime in question, and I typically use Federal Bureau of Investigation (FBI) statistics, Bureau of Justice Statistics (BJS), and other academic articles to determine that.

> Example: In the early 1990s, crime began to go down, so that by the late 1990s, people were complacent about crime and security. We predicted that with the crime committing age group of 18–25 years of age increasing as a percent of the total population that crime would increase again by the year 2000, which it did.

Crime in the area can be determined by acquiring police grids for the surrounding area within 1–3 miles, or using a computerized model, such as the CAP Index. I regularly rely upon the CAP Index because it compares the site to the nation, to the state, and to the county. If a score on the CAP is 100, it is deemed to be average for crime vulnerability; if it is lower, it is less vulnerable, or less at risk, and if it is higher, it is at greater risk for crime. The CAP also includes other social variables that impact upon crime, such as factors of social disorganization. The factors include population and housing data, population mobility, economic data and educational data.

> Example: One measure of social disorganization that leads to crime is a large group of unemployed, young males (not students) living in a particular area.

Crime at the location is usually measured by gathering police calls and police reports for the address. OSHA in their late night guidelines for retailers recommends looking at crimes for 2–3 years prior to the event (OSHA, 1998). If the location keeps internal incident reports, that is another way of measuring crime at a location. The crimes reported by the police can then be correlated with the crimes reported internally.

> Example: An apartment reports no crimes internally for three years, but the police calls number in the hundreds for the prior three years.

Crime at similar locations nearby can be acquired from the police and can provide a picture of what is going on in similarly situated locations, such as an intersection with two to four service stations on the corners.

> Example: A service station has not had a robbery, but if there is an increase in robberies at neighboring stations, they may need to be more vigilant because of it.

Crime at other parts of the chain includes requesting data on other locations of the chain to determine what they might have been aware of because it is happening elsewhere in the company.

> Example: A hotel chain may report no rapes at a particular location but is aware that it has happened at other of their locations and may need to upgrade security at all of their locations based on that experience.

Neighborhood characteristics are measured by the CAP index but can also be ascertained by a site survey of the area, and the National Institute of Occupational Safety and Health (NIOSH) has used that approach in their research (Hendricks, Landsittel, Amandus, Malcan, & Bell, 1999).

> Example: NIOSH looks at graffiti in the area, businesses closed, littering, and loitering, among other variables, in order to rate neighborhoods for their crime vulnerability.

The perpetrator is central to the analysis regarding what role the perpetrator plays, and if he knows the victim and whether he was a rational or irrational actor at the time of the crime.

> Example: In a double homicide at a video store, the crime was related to stealing the store's money; whereas in a stabbing of a girl in a department store parking lot, she was the target.

The victim is crucial in many ways, including assessing what damage has been done to the individual and also whether the victim knew the perpetrator.

> Example: In a bar fight, one often has to determine who was the aggressor, or if they were mutual combatants initially, and then one or some of them ended up being the victim.

The crime itself can be judged according to whether it is typical or atypical and therefore may or may not be foreseeable at a particular time at a particular location, or at a certain time of day.

> Example: Shoplifting in a department store may be expected, but not the assault of a salesperson by a stranger, or a bar fight is more likely to occur late at night, after a lot of drinking, than it is in the morning.

Standard of Care

A business is judged by whether it has met the expected standard of care, which can be determined by some or all of the following factors (Erickson, 1995):

1. Regulations
2. Industry standards
3. Association guidelines
4. Company policy

Regulations are usually fairly straightforward as a determinant of the standard of care and frequently include OSHA regulations, though sometimes there can also be city, county, state, or Federal laws or regulations dictating certain aspects of a business operation, by which they can be judged.

> Example: The guidelines issued by the Federal Government in 1998 lay out recommendations for late night retailers, and another of their manuals does the same for health workers (OSHA, 1998).

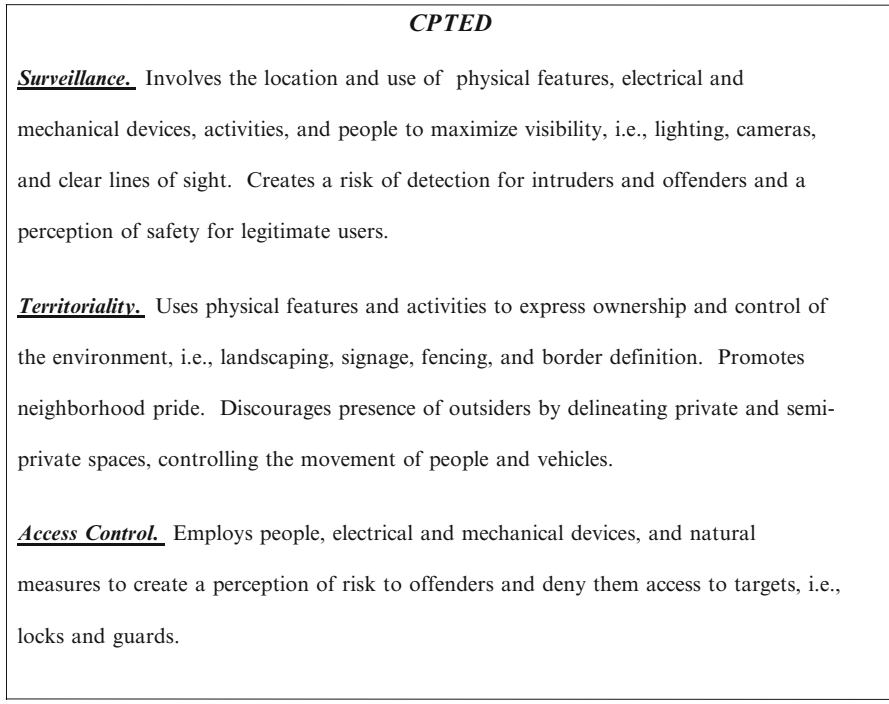

Fig. 6.2 Components of crime prevention through environmental design

Industry standards as actual standards are fairly rare, but there are sometimes guidelines or recommendations which can be presented as a possible measure of standard of care.

> Example: The hospital industry has standards through a private nonprofit commission called The Joint Commission (TJC), which does certifications and evaluations through regular site analysis and visits to the locations to determine compliance.

Association guidelines are useful for showing what is suggested, but they rarely reach the level of standards, and most industries and associations resist having written standards.

> Example: Associations, such as the National Association of Convenience Stores, set an informal standard of care by issuing training programs for their members for robbery and violence prevention.

Company policies can be damaging because if the company sets the policy itself, it is expected that the company should follow it.

> Example: A condominium security officer's duty may be to screen and log in visitors, but they fail to do so, and a young woman is raped in her condominium by a stranger who gained entrance to the building.

Typically, some or all of the factors above are used in litigation to determine the standard of care and help the jury make their determination of liability. An organizing framework for analyzing standard of care and planning security which is widely used is Crime Prevention through Environmental Design (CPTED), shown in Fig. 6.2.

In the early 1970s, as part of the Western Behavioral Sciences Institute (WBSI) team, I tested what would become known as the CPTED concepts (Crow & Bull, 1975). The successful WBSI experiment was carried out in 7-Eleven convenience stores, and it resulted in a 30 % drop in robbery. It was then implemented nationally by 7-Eleven. In 1987, the National Association of Convenience Stores (NACS) adopted it for its members nationwide. Robberies in convenience stores have dropped by 65 % overall nationwide, since the 1970s. In 1998, OSHA issued *the Late Night Retailer Guidelines*, using the program as a

basis for what they recommended. UCLA further tested the measures in convenience stores and other locations and found that robbery was reduced (Peek-Asa, Casteel, Mineschian, Erickson, & Kraus, 2004). The WBSI program is often considered the best example of CPTED, a term coined by C. Ray Jeffery of Florida State University in 1971. In 1992, C. Ray Jeffery, along with Ronald D. Hunter, proclaimed the WBSI work the most sustained CPTED effort based on the pioneering effort of our early research (Hunter & Jeffery, 1992).

Causation

For causation, the plaintiff must prove that he or she suffered injury or loss that was a direct result of the defendant's breach, so it is essentially a cause and effect relationship. It varies by state whether an expert can testify to the issue of causation.

Research

The example of how research has led to a recognized standard of care comes from my research with the convenience store industry discussed above. Subsequent to the research at WBSI, we conducted additional research on how criminals select their targets for robbery and violence by surveying prisoners. These studies were carried out in 1985, 1995, and 2001 (Crow, Erickson, & Scott, 1987; Erickson, 2003; Erickson & Stenseth, 1996, 2004). The study of teenage robbers is discussed in the next section.

Teenage Robber Study

The *Teenage Robbery* report can be found in full, with the tables, on our website at http://www.athenaresearch.com. The research is based on a survey of teenage robbers, nearly half (46 %) of whom self-identified themselves as gang members. Interviewers conducted face-to-face surveys with 178 juvenile robbers, aged 13–18, incarcerated in Texas prisons in August of 2001. We had an 85 % participation rate. We asked them the same questions we had asked 310 adult prisoners in 1995 in three states—Texas, Washington, and Maryland. Our prior study of 187 adult prisoners was in 1985 in five states—Louisiana, California, Texas, New Jersey, and Illinois. The findings are discussed below.

Findings

Characteristics of Robberies

In spite of their young age, the juveniles had committed almost as many robberies as the adults. The adults were only slightly more likely to have committed over five robberies than were the juveniles, with one-third of the adults and one-fourth of the juveniles committing more than five robberies. A third of both samples say they had committed only one robbery. Two-thirds had committed multiple (more than one) robberies.

Partners and Other People

We have known from our prior surveys of adult prisoners that robbers do not particularly care who is on duty because they are not targeting people, so they do not care if they are male or female. The same is true of the juveniles, with two-thirds saying they do not care if it is a male or female. Similar to the adults, the juveniles do not care if other people or customers are present, with nearly two-thirds saying it does not matter if others are present. The reason has at least somewhat to do with the response which shows that juveniles rarely rob alone. One-third of the adults say they always rob alone, but only 12 % of the juveniles rob alone. In short, 88 % of the teenagers rob with someone else. They are brazen, but they appear to get their bravery from their partners.

Violence

When asked if anyone was hurt or killed during the robbery, a greater percentage of juveniles said that someone was hurt or killed (40 %) than adult robbers (22 %). We hypothesized that a gun in the hands of a teenager is more dangerous than in the hands of the adults, and this appears to be the case because guns were the weapon of choice, followed by knives.

The juveniles reported that 14 people were killed in the robberies in which they were involved, and 68 people were injured. Over half the time a gun was used for the injury. Eight of the 14 deaths were with a gun (57 %). Of the 68 people that were injured, a gun was used to injure them, either by shooting or pistol whipping, in 41 of the cases (60 %).

Disguises

We find that adults and juveniles are similar to the extent that they wear disguises. The juveniles wore them more often (43 %) than the adults (32 %). Over half of both groups do *not* wear disguises. The juveniles report that their most common disguise was "wearing dark clothes." For both adults and juveniles, other disguises included masks, bandannas, sunglasses, and hoods. An adult robber said he just took his teeth out.

Drugs

The adults and juveniles are also similar on reporting whether they were high on drugs or alcohol. Over half of both groups say they were high on drugs or alcohol at the time of the robbery. The juveniles were more likely to be high on marijuana (44 %) followed by alcohol (17 %).

Distances

Juveniles were more likely to live less than 2 miles from their robbery site than were adults. Fifty-nine percent lived within 2 miles of where they robbed, most likely because they were not old enough to drive or did not have cars. Forty percent of the adults lived less than 2 miles away. More specifically, 19 % of the adults lived less than 1 mile from the location they robbed and one-third (35 %) of the juveniles lived less than a mile away from the location they robbed. In short, the juveniles were old enough to rob but not old enough to drive.

Amateurs or Professionals

The majority of adult and juvenile robbers consider themselves amateur, with 71 % of the adults and 66 % of the juveniles saying so.

Guns, Partners, and Control

The bravado of these robbers has a lot to do with having a partner, and it also has to do with having a gun. Adults and juveniles were virtually identical in their responses, when asked "In robbing alone, and with a gun, how many people would you take on?" Thirty three percent said they would take on five or more people. By adding a partner, that number rose from one-third to two-thirds who said they would take on five or more people.

Getting Caught and Doing Time

Amazingly, 90 % of the juvenile robbers and 83 % of the adult robbers did not think they would be caught for their crimes. In fact, only about 25 % of robberies are solved, so they are not too wrong about their odds of being caught for robbery. They also did not know what their sentences would be, with another remarkable similarity between adults and juveniles. Eighty percent of adults and 89 % of juveniles did not know what their sentences would be, and 45 % of the adults and 49 % of the juveniles thought it was longer than they expected. This was all in spite of the fact that approximately half of both groups had been in prison, not just jail, before.

Willingness to Rob and Expected Take

The robbers were asked, from a list of 15 places, which places they would consider robbing. The first choice for juveniles is convenience stores, followed by liquor stores, whereas the first choice on the list for adults is bank teller, followed by armored cars. The adults' ranks correlate more closely with the amount of take, i.e., the more money there is, the more likely they are to consider robbing it, but the juveniles use a different criterion, such as proximity, opportunity, and familiarity.

They were asked: "If you were to rob one of the following places, how much money do you think you would get?" This included cash only, not merchandise. The highest amounts expected were from armored cars, bank tellers, and supermarkets. The juveniles thought they would get more money than the adults thought they would get from a particular location.

Factors	Adult Robbers Rank Order	Juvenile Robbers Rank Order
1. Escape Route	1	1
2. Amount of Money	2	2
3. Active Police Patrols	5	3
4. Anonymity	3	4
5. Armed Guards	4	5
6. Armed Clerks	6	6
7. Number of Clerks	9	7
8. Interference	7	8
9. Bullet Resistant Barriers	8	9
10. Alarm System	10	10
11. Number of Customers	11	11
12. Camera System	12	12
13. Video Recording	13	13
14. Unarmed Guards	14	14

Fig. 6.3 Target attractiveness, rank ordered what would be important to you if you were to rob a convenience store? Comparison of samples

Amount of Money

Nearly half of both the juveniles and adults would rob for $200.00, and the rest would rob for over $200.00. The recommendation for convenience stores is to have $50.00 or less in their register, and only 20 % of adults and only 11 % of juveniles would rob for that amount, if they *knew* it was that amount. But adults thought they would get $200.00 from conveniences stores, and juveniles thought they would get $500.00, so they will rob it anyway, expecting to get that amount. Overall, the juveniles need more money before they are willing to rob, and unfortunately, they think they are going to get more.

Target Attractiveness and Deterrence Measures

In Fig. 6.3, the adults and juveniles were asked "What would be important to you if you were to rob a convenience store?" It is rank ordered by the juveniles, but both the juveniles and the adults agree on the first two items, ranking escape route first and amount of money second. The juveniles rank active police patrols third and anonymity fourth, whereas the adults rank anonymity third and armed guards fourth. Armed guards are fifth on the juveniles' list. The juveniles and adults are identical on their ranking at the bottom of the list, with alarm system, number of customers, camera system, video recording, and unarmed guards at the bottom of the list in that order.

Figure 6.4 reflects target attractiveness at *any location*, and the results are different from those at convenience stores. For this question, additional and different items were included, such as revolving doors, metal detectors, fences, longer sentences, good visibility, good lighting, and robbing before closing. When considering robbing *any location*, the number one ranked deterrence for both adults and juveniles was bullet-resistant barriers, followed by armed guards. Eighty-two percent of the juvenile robbers said they would be deterred by bullet-resistant barriers, and 76 % of the adults said they would be deterred by bullet-resistant barriers.

Deterrence Factors	Adult Robbers Percent Deterred	Juvenile Robbers Percent Deterred
1. Bullet resistant barrier	76	82
2. Armed guard on duty	69	76
3. Frequent Police Patrol	63	71
4. Revolving doors	64	62
5. Armed clerk	60	61
6. Alarm system	52	65
7. Metal detector	55	51
8. Fences blocking escape	51	54
9. Longer sentences	45	53
10. Good visibility	40	54
11. Good lighting	33	44
12. Camera covering area	39	29
13. Rob before closing	28	37
14. Video camera in use	39	26

Fig. 6.4 Deterrence factors, at any location, comparison of samples

Slightly over half (58 %) said they did *not* spend time planning their robbery. Most of them that planned said they spent a week or less planning the robbery.

Weapon Use

The juvenile robbers were asked whether in those robberies in which someone was hurt or killed they had planned to use the weapon in advance. Over half said they did plan to use it *before* they went in to do the robbery. Conversely, one-half did not plan to use the weapon, but apparently ended up using it after all. However, over half did not injure or kill anyone during the robbery. The juvenile robbers were also asked where they got their weapon. Almost half (44 %) claim they bought it, 12 % got it from home, and 19 % said they stole it, with the rest saying they got it "off the street."

Robbery Advice

Both the adults and juveniles were asked questions about their advice regarding robbery. The very important information about why people get hurt that came from both adults and juveniles is that people resist or try to be heroes. Seventy-one percent of the adults give this explanation, and even more (81 %) of the juveniles say that people get hurt because they resist or try to be heroes. The remainder indicated that sudden movements or the robber being high or nervous can lead to injury.

DO:	DON'T:
▪ Cooperate	▪ Resist
▪ Give up the money	▪ Talk
▪ Obey the robber's commands	▪ Plead
▪ Keep your hands in sight	▪ Stare
	▪ Make any sudden movements
	▪ Be a hero
	▪ Chase or follow

Fig. 6.5 Advice from robbers to victims to keep from getting hurt

The robbers' advice to robbery victims to keep from getting hurt is to cooperate and give up the money. Eighty-two percent of the adults and fully 90 % of the juveniles said this. We know from case studies that the teenagers are edgier and more nervous during the robbery, and thus likely to be quicker on the trigger if things don't go according to their plan.

The specific advice given to victims included what is shown in Fig. 6.5.

Robbery Motivation

The robbers were asked why they robbed, and the majority of both adults (46 %) and juveniles (45 %) said it was for the money, and another 32 % and 20 % respectively said it was for drugs, either getting money for the drugs or being high on drugs, and a number had other reasons. These other reasons for the juveniles included acceptance and being cool (11 %), being angry (7 %), or bored (7 %).

When the robbers were asked what has ever kept them from committing a particular robbery, they gave both personal and target-related reasons. The personal reasons included friends, family,

religion, drugs, and poor timing. The target-related reasons were police, people, guards, and escape routes. Sometimes their reasons were that they were afraid, either afraid of getting caught, having bad vibes, or being nervous. One-fourth of the juveniles, more than the adults, said "nothing" has kept them from it. It is heartening, however, that almost a third of both groups say that something at the site has kept them from committing the robbery.

When asked how they got caught, a third of both groups said they had been snitched on or ratted on, framed, or set up. When they were ratted on, it was likely to be by ex-girlfriends. Fewer of both groups said they were careless or made mistakes, such as traffic stops. Other reasons for getting caught included Crime Stoppers, good citizens, or turning themselves in.

Peer Issues

The juvenile robbers were asked about their involvement with friends. First, they were asked if they had friends who do robberies or violent crimes, and 80 % said that they did. When asked why they thought their friends did robberies and violent acts, nearly half (46 %) said it was for money, which was the same reason they gave for doing it. About one-fourth (26 %) said their friends did it for the thrill or rush, which was another reason that they personally did it. When they were asked if they talked to friends about their own crimes, not quite half said they did (45 %), but when asked if their friends talked to them about their crimes, over half (65 %) said they did. In other words, these robbers said that their friends were more likely to tell about their crimes than these robbers were to tell them about theirs.

Almost half of the robbers were gang members (*46 %*), *but 88% said they did not commit the crime because they were a gang member*. This question would have provided the opportunity to say that they committed their crime because of their gang membership, but only 12 % said that was the reason. It is clear that the reason they rob is for the money. When they were asked, in a follow-up question, how they use their money, 69 % said they use it for drugs or alcohol, and another 27 % said it was for material goods, including tennis shoes. Only 7 % said they used it for supporting family.

Family Issues

Forty-five percent of the robbers said that they talked to their friends about their crimes, but only 19 % talked to their families. Further 73 % said that their parents did not think they were involved in crime. This is no doubt the reason that you see reported in the media when a young male is arrested, the parents saying: "But he's a good boy."

Experiencing Violence

Sixty percent of the juveniles said that they *experienced* violence when they were young. To further understand that response, we asked where they experienced violence. When asked if they experienced violence in the neighborhood, three-fourths (76 %) said that they did. Not quite half (45 %) reported that they experienced violence in the home.

Learning to Be Violent

When the juveniles were asked if they were taught violence by either family members or friends, almost half (48 %) said that they were. When the juveniles were asked where they *learned* to be violent, the most frequent response was that they learned it from friends (73 %). The next most frequent response was movies (36 %), and then family (33 %). Additionally, 29 % said television taught them to be violent, another one-fourth said music made them violent, and 19 % said videos. Two of the videos they specifically mentioned as influencing them to be violent were *Boyz N the Hood* and *Menace II Society*.

Twenty-two percent said the street taught them to be violent. In short, the neighborhood (76 %)

and friends (73 %) were the most likely to be where they experienced violence and learned violence, more so than family. We did however ask them a little more about their family. When they were asked which family member taught them to be violent, the family members they mentioned most frequently were their fathers, step-fathers, uncles, or brothers, but some said their mothers, sisters, and even their grandmothers.

Thirty-three percent said their families taught them to be violent. We asked the juvenile robbers whether they had family members in prison. The results were that 29 % said their father was in prison, 5 % had a mother in prison, and 7 % had both. Thirty-two percent had a brother in prison, 3 % a sister, and 3 % both, so the results were that 41 % had a parent in prison, and 39 % had a sibling in prison. This comports with the fact that about 40 % experienced violence at home.

Religion and Other Influences

When the juveniles *only* were asked about their religious upbringing, three-fourths of them said that their families were religious. In comparing this to the USA population as a whole, 70 % of the population reports having church/synagogue membership.

Half of the juvenile robbers reported that they attended church/synagogue, when they grew up, which is slightly *more* than the 43 % of the general population attending church or synagogue.

Of the juvenile robbers who are religious, 62 % were Protestant, 31 % Catholic, and the rest were other religions. The breakdown nationally is 55 % Protestant, 28 % Catholic, 2 % Jewish, 6 % other, and 8 % nonreligious (U.S. Census Bureau, 2000). This is also similar to the juvenile robbers.

Sixty-three percent of the juvenile robbers said that they still consider themselves to be religious. The self-reporting of juveniles about their involvement with religion, and the type of religion, is not much different than that of the general U.S. population, but their religious upbringing apparently did not keep them from committing these crimes.

Two-thirds said they also had the DARE program in school, and one-fourth had Scared Straight, neither of which they felt did them any good.

Summary of Teenage Robber Study

Juveniles do not plan their robberies for very long, and they tend to live very close to the site they rob. They pick the place for the amount of money they *think* it has. The most important finding about the robbery site itself is that juveniles and adults look for virtually the same things when they are considering robbing a site. We also found from this study that the variables and security measures are essentially the same whether the juveniles are considering robbing a convenience store or any other location.

The primary considerations for both the adults and juveniles when they are planning a robbery are the escape route and the amount of money available. Living as near the robbery site as they do, they are obviously aware of the escape possibilities. The problem with the amount of money available is that both adults and robbers consistently think there is more money available than there really is, and as long as they think there is more money available, they will go ahead with the robbery. As long as there are locations of a similar type that do indeed carry more cash, it gives a "bad name" to all of the similar locations. For example, if a large chain convenience store has reduced its cash, but a "Mom & Pop" store has not, then the robbers may not differentiate and expect the same from both.

At the bottom of the list for both juvenile and adult robbers when they consider robbing are video cameras and unarmed guards. This is not to say that there may not be other benefits for cameras and even unarmed guards, such as for shoplifting, loitering, crowd control, or employee theft, but robbers do not consider video cameras as a deterrent. One of the reasons they give is that half of them wear disguises anyway.

From other research, there are both validated measures and non-validated measures that have emerged for robbery prevention (Erickson, 1996, 1999). These include the basic components of the

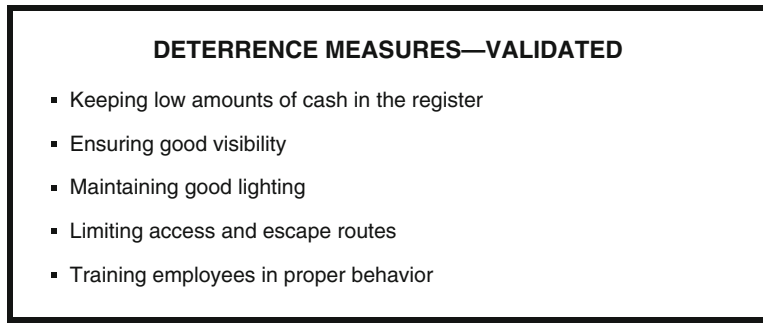

Fig. 6.6 Basic robbery and violence

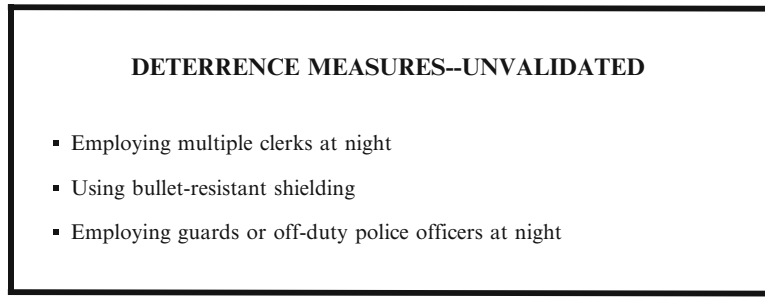

Fig. 6.7 Robbery and violence

original WBSI research conducted in the 1970s, which include cash control, visibility, lighting, escape routes, and training. These measures are confirmed by the juvenile robbers, and adult robbers, in this study, when they placed escape routes and amount of money first and second in what they look for. They also want to be anonymous, and the advice they give to victims in how to keep from getting hurt is what the employee training recommends, based on our earlier research, as shown in Fig. 6.6.

The non-validated measures are shown in Fig. 6.7 and include multiple clerks, bullet-resistant shielding, and guards. The two-clerk issue has essentially been put to rest and is not considered to be an effective measure for robbery and violence deterrence (Erickson, 2000). Bullet-resistant barriers showed promise in a NIOSH study (Hendricks et al., 1999), but the numbers were small and thus need further study. Guards have not been sufficiently studied as a deterrent for robbery and that needs further investigation as well. In this study, the juvenile robbers and adult robbers both place *unarmed* guards and videos at the bottom of the list. Two clerks and bullet-resistant barriers were at the middle of the list, but *armed* guards ranked higher than either.

Cameras and video systems are not shown in either of the charts because they have not been determined to be effective as a robbery deterrent. They do aid in identification and enjoy widespread usage. As the technology has improved, cameras and video systems have grown in popularity. They have essentially become state of the art in the industry, even though robbers place them nearly at the bottom of the list of their considerations.

Why They Rob

We engaged in this research to find out what could be done at the site to deter juvenile robbers, which was discussed in the previous section. We

also wanted to know what led them to it, what motivated them, and what influenced their behavior. An overall impression of these 178 juvenile robbers was that they were neither particularly reflective nor introspective. They appeared not to have thought much about why they did what they did, as compared to the adult robbers who had several more years (in prison) to think about it.

The juveniles express more bravado than the adults about their robberies, and they expect more money at each location. They seemed more brazen, less caring, and more unfeeling in their descriptions of events than were the adults. There was very little showing of remorse or regret articulated by the juveniles.

The juveniles, as with the adults, rob for the money. Robbery is a different type of crime than the other violent crimes of homicide, rape, or assault because it is economically motivated, and utilitarian in nature. The purpose is to obtain money and not usually to do physical harm.

When asked what led them to crime, the juveniles said that the neighborhood and their friends were the biggest influence, with three-fourths saying that they experienced violence and learned violence from the neighborhood. About the same number said their friends were engaged in violent crimes, that they were influenced by their friends, and that they learned violence from their friends. Their major influence is the group they run with, and in that, they may have little choice because of the neighborhoods in which they are raised.

Less important as a negative influence, but nevertheless an influence, was that about half of the juveniles said they experienced violence in the home and that their parents taught them to be violent. They named the person that taught them, whether father, stepfather, uncle, or grandmother. Almost half also had parents or siblings in prison. This study appears to confirm the intergenerational tendency toward violence.

Another frequently named influence was the entertainment industry—videos, movies, music, and television—as a source of teaching violence. They even named the specific ones that influenced them. It has been suggested that it is the "sociopathic" juvenile that is affected by violent media adversely—not the "normal" adolescent. If true, that has important implications for the influence of the media on criminal violent behavior. We have case studies which appear to demonstrate the effects of particular movies on individual behavior. Sociologist Lonny Athens' theory of violence, discussed in a book by journalist Richard Rhodes (1999), was tested in this study. The theory is that a juvenile needs to (1) see violence, (2) experience violence, and (3) be coached in violence in order to become a violent criminal.

The juveniles had the DARE program in school, and some had the Scared Straight program in school, but both programs, they said, had little influence on them. Most of the juveniles were religious in their upbringing and their current beliefs, but that too apparently had little positive influence in keeping them from robbing.

A key finding here is that nearly half say they rob for the money. When asked how they used the money they obtained, 40 % said they use the money for drugs or alcohol; in other words, committing one crime to support another. Twenty-two percent robbed to obtain material goods or to improve their lifestyle. There were few noble reasons given for the robbery, with only 4 % saying they robbed to support their family. These robbers were not "Robin Hoods." The robberies do appear to be utilitarian in nature; that is, the robbers are robbing for the money. The low injury rate indicates that they usually are not in it to hurt anyone, though that can and does happen.

Another key finding is that they do not think they are going to be caught. Eighty three percent of the adults and 90 % of the juveniles did not think they would be caught. This means that measures such as hard time or a long time in prison will not serve as a deterrent because they do not think they are going to be caught. Further, half say they did not know what the sentence would be anyway, even if they were caught.

The juveniles in this survey seem to pick easy, convenient targets that are close to where they live. They commit the more violent type of robberies, including street muggings, car jackings, and home invasions. The crime scenes have a familiarity to them, and they are relatively easy targets for these predators to prey upon.

Overall, the juveniles in this survey, for the most part, are too young to work, too young to

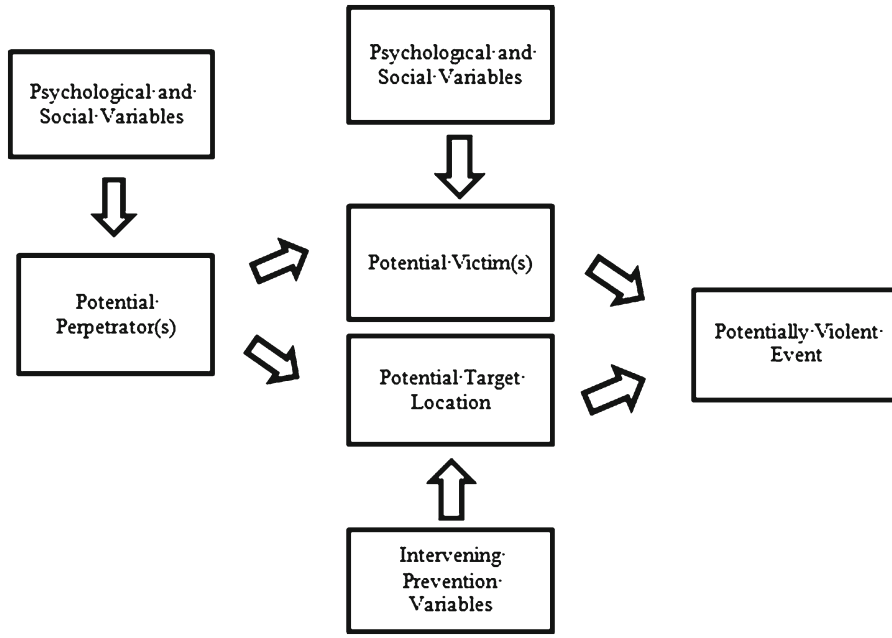

Fig. 6.8 Evolution of a violent event

drive, too young to own a car, and too young to drink, but they are not too young to rob. Some started robbing as early as 12 years of age, and most have done *multiple* robberies, while they are still teenagers. On the whole, they appear to have turned to robbery for the money and to buy drugs or alcohol with the money they steal. Some commit robberies because they want the thrill, or they are just bored. They also say they do it because they are exposed to material things that they want. They are influenced negatively by their neighborhoods, their friends, the media, and their own families. When someone says that "It's up to the families," just look at the families and then consider that in fact it is really going to be up to everyone else.

Evolution of a Violent Event

My research on criminals and my experience with legal cases involving criminal events have led me to the development of a model of the Evolution of a Violent Event, shown above in Fig. 6.8, and derived from an earlier version of the model (Erickson & Crow, 1980).

In that version, we had the victim and perpetrator intersecting at a location. My subsequent experience and research have shown that the perpetrator is actually targeting *either* the person or the location. In some cases, the person may be incidental; in others the location may be incidental. In other instances, the victim may become the perpetrator, or the perpetrator may become the victim.

The psychological and social variables that affect the perpetrator are numerous, as discussed previously. The victim sometimes comes from the same kind of environment as the perpetrator, and the victim's actions or reaction (such as resistance) can alter the event. The target or location is judged by what prevention measures are taken, and all of that leads to the violent event. In the examples below, we see how the criminal groups or gangs select their targets, based on cases that have occurred, using the model of the Evolution of a Violent Event.

Case 1: Fast Food Restaurant Customer Homicide

On this particular night, while Gang A and Gang B were sitting at separate tables in the restaurant,

they got into a verbal dispute. Gang member A pulled a gun and shot at Gang member B, missing him. The bullet instead went through the restaurant, through the open window of the drive-up window, through the open window of the car waiting for the order, hitting and killing the female passenger, who was holding her young son.

This is a case where gangs had essentially taken over a fast-food restaurant. They were frequently loitering in the parking lot, selling drugs out of the dumpster area, and appeared to have their own people working on the inside so that they got their food for free. The intended victim went unscathed, and the real victim was an unintended victim. The location may be seen as contributing to the environment that was conducive to the homicide, but the business was not the target.

The family of the victim who was killed sued the restaurant.

Case 2: Convenience Store Shoplifting and Shooting

Three young men were "chilling out" at a low-rent motel and decided to make a "food run" to a nearby convenience store. Their definition of a "food run" was to steal food, which they did. During their escape, both an armed guard and an unarmed guard came from the back office, where they were watching the surveillance camera monitor and pursued the thieves. Thinking one of the three was going to kill the unarmed guard by running over him with a car, the armed guard shot and injured the perpetrator.

In this case, the *perpetrator* became the *victim*, even though the store itself was the intended victim (for shoplifting). The preventive measures at the store included cameras and guards, but the use of guards, while intended to prevent shoplifting, led to the injury.

The original perpetrator, who was the shoplifter, and who became a paraplegic because of the shooting, sued the store, the guard, and the guard company.

Case 3: Club Shooting

Two rival gangs were at the same club near closing time when an argument ensued between them. When they went to the parking lot, each group went to their cars for their guns. During the subsequent shooting, a bullet intended for a rival gang member went a block and a half away and struck an innocent victim sitting at a bus stop, rendering him paraplegic.

In this case, the targeted victim(s) went unscathed, and an innocent person was injured. The club had taken measures to pat people down for guns, but once the gang members returned to the parking lot, their guns were kept in the cars, and the shooting broke out.

The paralyzed victim sued the nightclub.

Case 4: Rape and Robbery of a Couple in a Motel

A middle-aged couple was opening their motel room door with an electronic key when three young men "pushed and shoved" their way in. The three had been lying in wait to rob the next likely victims. Once inside, they robbed and pistol-whipped the man, and they raped and robbed his wife. I interviewed one of the rapists in prison. He was serving 40 years and he said the rape was not planned—only the robbery. The rape, he said, only happened because "she was there."

The couple sued the motel.

Case 5: Homicide of a Clerk in a Convenience Store

An 18-year-old clerk was closing the store at 11 P.M., and her female friend was with her. Three of their acquaintances from high school (two males and one female) came into the store. They robbed the store, and then shot the clerk, killing her. They also shot her friend, leaving her for dead, but she survived. In this case, the target was the store's cash, but they chose the store because they knew the clerk. Since she could identify them, it may have been a foregone conclusion for them that they would have to kill her.

The murdered girl's family, and the surviving injured girl, sued the store.

Case 6: Homicide of a Clerk in a Convenience Store

A middle-aged Asian clerk was working late at night in a convenience store, when a young male walked in and shot and killed him, with no attempt

to rob the store. The murder was captured on the store surveillance camera, and the perpetrator was identified from photos shown by the media.

The perpetrator said he had watched the movie, *Menace II Society*, over 40 times. In the movie, a gang member kills an Asian clerk in a convenience store. The gang movie, according to its introduction, was trying to send a different message, of staying out of gangs, but that is not the message that got through to this individual.

In this case, both the clerk and the convenience store were the targets in order to meet the perpetrator's dual requirements. In other words, he didn't shoot an Asian on the street, or a non-Asian clerk in a convenience store. He single-mindedly shot and killed an Asian clerk in a convenience store.

Commonality of the Cases

The cases above were all crimes perpetrated by gangs or groups, not by single individuals, with the exception of the lone individual shooting an Asian clerk, but he took his idea from a gang movie, and he was affiliated with a gang. They all carried guns. In my analysis of the case, I first try to determine what the intended target was. Knowing the target—the person or the location—does not necessarily absolve the location of responsibility, but it can play an important role in understanding the dynamics of the case. It is also essential to know whether:

- The ultimate victim was the perpetrator to begin with
- The ultimate victim was an unintended victim (collateral damage)
- The victim was a stranger or was known to the individual
- They were mutual combatants
- The location was the intended target

Conclusions

Target selection is seemingly no different for gang members and groups than for other criminals, but gang members, like other young people, gain their identity and power from being with others, which is why they are almost always found together and carry out their crimes together. These are not lone wolves, and these are not serial killers, who typically carry out crimes on their own. These individuals also gain their power from guns, which have become more prevalent and powerful over time. What we have found through our research, training, and litigation is that the selection of targets is essentially the same for young and old criminals, the same across the races, the same across geography, and it is amazingly consistent over time. There may be new types of crimes in the cyber age, and additional technology, but most rapes, robberies, homicides, and other crimes of violence are still carried out by the common street criminal—a thug with a gun.

Biography

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Athena Research Corporation has focused on the sociological study of crime for over 30 years. Athena conducts research and trains both government and industry in crime prevention methods and security. Rosemary J. Erickson, Ph.D., a Forensic Sociologist and President of Athena Research Corporation, testifies nationwide for plaintiff or defense regarding foreseeability and security measures in high profile, high exposure premises liability civil cases, which result from criminal acts involving homicide, rape, or aggravated assault. Dr. Erickson has taught at both San Diego State University and American University.

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Gangs in the Workplace

7

Michael J. Witkowski

Today's security managers are concerned with the turbulent environments in which they must operate. Among items battling for security professionals' attention are terrorism (domestic and foreign), computer crime, fraud, theft (internal and external), workplace violence, drug sales and usage, etc. One additional concern, related to all of the aforementioned issues, is the growth of gangs—both nationally and internationally—and their impact on the work environment. Gang members have loyalty, in many cases, to their gang more so than to their employers. They have learned the methods and rationalizations for crime in the intimate setting of the peer group in what was deemed "differential association" by criminologist Edwin Sutherland (Sutherland & Cressey, 1970).

According to recent reports by the Department of Justice (June 2011) gangs are active in every state in the USA. There are some 28,100 known gangs with an estimated 731,000 members. This number is likely a low-end estimate when one considers the number of gang affiliates and supporters in our society. The National Gang Crime Research Center's Director, Dr. George Knox, cautions: "Those are government numbers, and include the issue of gang denial, so if you want to use a definition of gang member that is not limited to 'juvenile' or 'youth' and therefore include racist extremists and groups like outlaw motorcycle gangs, then the gang member population in America is closer to 1.5 million." (NGCRC; http://www.NGCRC.com). Many gangs have an impressive longevity, for instance, the Vice Lords in Chicago have been in existence since the late 1950s and still exert considerable influence as gang members have raised new generations of so-called "gangbangers" over the last 50 years. Many Hispanic gangs have even greater history with some dating back to the 1920s in the Los Angeles area.

According to the FBI, 12 % of all "Index Crimes" are committed by gang members and 75 % of those in gangs have police records. The rate of violent offenses for gang members is three times as high as those for non-gang members. What may be a surprise to the security manager is the fact that adults are involved in 46 % of gang incidents. Many gang members now work in legitimate companies, attend college, police our communities, or serve in our armed services.

Some gang members undoubtedly "age out" of gang activity and assimilate into the American workforce and lifestyle. Intervention programs such as Jesuit priest Fr. Greg Boyle's "Homeboy Industries" in Los Angeles are a testament to some gang members who are seeking positive change in their lives through holding jobs. But other gang members have entered the workplace with no intention of leaving the gang "life" behind them. A business can be the victim of internal theft, fraud, computer crime, and large-scale drug dealing. There is the increased likelihood of violence on the job as research has shown gang

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_7,

members to be more prone to have access to weapons and more likely to use them in the commission of a crime. They are more likely to have access to explosives and use those as well. Gang members are also far more likely to sell drugs while in a legitimate job (NGCRC; http://www.NGCRC.com).

Members can further target legitimate businesses for robbery, arson, extortion, and simply as a place to "hang out," thereby drawing potential violence from their rivals to a location. Serving as a litigation expert the author has encountered numerous cases of gang loitering and subsequent violence at venues such as taverns, bowling alleys, schools, dance clubs, concerts, housing complexes, entertainment centers, and a variety of fast-food restaurants.[1] Premises liability law allows those injured by gangs on your property to sue for damages in civil court. Juries are increasingly finding that businesses have an affirmative duty to protect employees and patrons from foreseeable gang-related violence. Marcus Felson (2002) has described "routine activities theory" which fits much of opportunistic gang crime (Felson, 2002). The lack of capable guardians (untrained staff, absent management, no security personnel, etc.) when teamed with motivated offenders (gang members seeking to exact revenge on rivals, "representing" on a premises—through graffiti, gang signs, or crime—simply robbery for instance) in the presence of suitable victims (rivals, outmanned staff, or young people not affiliated with a gang), intersect in space and time making crime possible.

Many security professionals are unaware of what gangs are really about and the many crimes they commit. Gangs exist globally and have been around for centuries. Today's gangs are much more likely to engage in violent behavior to obtain their objectives. There are several so-called "super-gangs" that have been the topic of movies and music in recent years. These gangs are the well-known Crips and Bloods and the two major gang alliances: People and Folk ("nation" gangs created in the Illinois prison system during the 1970s). Crips and Bloods are best known as west coast gangs but they have now migrated throughout America. The People and Folk comprise several groups (for example the Gangster Disciples are the largest gang in the Folk nation and comprise some 30,000 members primarily in the Chicago area and the Midwest). The Latin Kings, an extremely violent Hispanic gang, are affiliated with the People nation (also referred to as the Almighty Brothers). The illustration below depicts some of the warning signs of these super-gangs (note: gang "colors" are less important today than just a few years ago as gangs seek to blend in to their surroundings and draw less law enforcement attention).

Bloods and People Nation
Red **colors (primary)**
Clothes to the left **(representing)**
Graffiti**: Five pointed stars and crowns and pitch fork pointed** down

Crips and Folk Nation
Blue **colors (primary)**
Clothes to the right **(representing)**
Graffiti**: Three or** six **pointed crowns or stars and pitch fork pointed up**

It is crucial not to underestimate the many gangs that lack the major reputation of those in the "super" category. According to the FBI, gangs exist in over 700 American cities. Gang members engage in senseless acts of violence daily in America. Drive-by shootings and gunplay capture the headlines but many gang crimes are going unnoticed. The *Chicago Sun Times* reported that some Chicago-based drug gangs pass out business cards to prospective customers and launder Fortune 500 level cash through cell phone stores, nightclubs, barber shops, apartment buildings, recording companies, restaurants, limousine services, car washes, and currency exchanges (Main & Sadovi, 2002a).

[1] In one courtroom verdict a major fast-food chain was penalized over $7 million dollars because of gang activity at a suburban Illinois restaurant that resulted in the shooting of a young man and his subsequent life confinement to a wheelchair.

According to the ATF, "gangs are reaching out to prestigious corporations and using these companies as tools for furthering criminal enterprises" (Personal interview with Agent Richard Marianos—May 2004).

In one case, gang members penetrated the phone company to "provide information to the gang leader's drug house enabling him to change his drug spots and they even changed his phone numbers to keep them from being traced." In another investigation he "found the gang was paying off United Parcel Service employees, up to $100 per package, to steal boxes with labels being shipped from various gun dealers and manufacturers." Gangs also "communicate through legitimate recording labels to spread the gang message such as the Ghetto Boys rap CD, 'Resurrection,' which contains telephone recordings with inmate Gangster Disciple leader Larry Hoover" (Personal interview with Agent Richard Marianos).

Security managers are more likely to be aware of the more traditional forms of organized crime and the growing number of international criminal organizations such as the Columbian and Mexican drug cartels, Russian Mafiya, Chinese Triads, Japanese Yakuza, Hells Angels, and the emergent Jamaican Yardies. Some of these international criminal enterprises have successfully used intimidation and extortion against businesses run by specific ethnic groups in the USA. The Russian Mafiya, for example, received international attention for the attempted extortion of National Hockey League players who were from the former Soviet Republics. However, street gang infiltration and misuse of the workplace are often not part of the security manager's perception and can be undetected until a major problem exists.

Gang members seeking cash contributions may even boldly approach American businesses for donations. Over the last several decades, millions of tax dollars and private grants have been awarded to street gangs and their leaders under the guise of reforming the gangs into positive social groups in their respective communities. Most gang experts would agree, unfortunately, there is little to show for this expenditure. According to the ATF, "the Gangster Disciples have tried to masquerade as do-gooders hiding behind a name change to 'Growth and Development' but they are simply using political activities to mask criminal intent" (Personal interview with Agent Richard Marianos).

Some gangs have even cloaked themselves in religious trappings to foster a more positive public image. For instance, the El Rukns of Chicago (formerly the Blackstone Rangers and later Black P Stones) use many symbols of the Muslim religion and refer to their facilities as temples or mosques (Knox, 2000). The NGCRC's Dr. Knox adds: "There are a number of radical Islamic gangs in the USA today, most of which operate as Security Threat Groups (STG's) in our prisons, and because their ideology is a hatred of the American 'power structure' they provide a fertile source of recruitment of domestic terrorists."

Chubb Insurance and the American Electronics Association have tried to institute awareness of the threat of gangs to legitimate businesses. Some corporations, like Cyrix, a Dallas-based microprocessor manufacturer, increased their physical security after being victimized by heavily armed robbers who stole an estimated $380,000 in computer chips. The computer components are attractive targets for gangs who can sell them cleanly at a nice profit and avoid much of the hassle and violence associated with drug trafficking (A&E videotape). Sun Micro-Systems of Silicon Valley is another high technology firm victimized by Asian gangs who had infiltrated their company for purposes of theft. The company now relies on an improved screening system to help identify potential gang members when hiring.

Police departments have also been infiltrated by gangs seeking access to sensitive information regarding investigations. When "Operation Headache" was launched against the Gangster Disciples leadership in 1997, leading to indictments of 39 of the organization's top leadership, it became apparent that some gang members were working for the police (Main & Sadovi, 2002b). The Chicago press had proclaimed the now incarcerated leader of the Gangster Disciples, Larry "King" Hoover, to be comparable to famous gangsters Al Capone and John Gotti. The *Chicago Tribune* reported that Hoover's nationwide drug ring was estimated to be worth over $100 million dollars per year (Zeleny, 1997).

An A&E television special reported that members of the Gangster Disciples have also been apprehended after joining the military to procure weapons and ordnance for the gang (A&E videotape: *Investigative Reports: The New Face of Crime)*. There have been dozens of examples of infiltration of all branches of the American armed services by gangs over the last 25 years. Some military installations now brief new arrivals and their family members on the dangers of gangs and even conduct tattoo inspections or publish local addresses near military installations of known gang hangouts that are considered "off-limits" to military personnel.

Most gang members claim strict allegiance to their gang; therefore, loyalty to the workplace is, at best, a secondary concern. With apprehension over terrorism clouding our everyday lives it is imperative to investigate and remain knowledgeable about gang activity.

It must be remembered that an estimated 17–20 % of all inmates, including many gang members, have also adopted Muslim beliefs. Those adhering to more radical fundamentalist beliefs may therefore pose a potential risk of supporting terrorists upon their release from confinement. This further strengthens the security manager's position in arguing for comprehensive background checking of candidates, even for positions that were once considered menial. It should be noted here that some large gangs have become very adept at the art of document fraud. The *Chicago Tribune* reported in 1999 that members of the Latin Kings were heavily involved in the selling of high-quality birth certificates, social security cards, driver's licenses, and green cards to illegal aliens (Marx & Puente, 1999). This again demonstrates the importance of the need for careful verification of a potential employee's job-related documentation. Gang members have been known to use fellow gang member's addresses if they are new in town giving the impression that they have been living in the local community for years when, in fact, they have come from other cities and have criminal records.

Another caution involves not overlooking female gang members. Many of them are working in skilled occupations that involve computer access or cash handling positions. My experience shows me that female gang members are increasingly likely to engage in violence and this is supported as national statistics indicate their numbers in our correctional system are growing. A few examples from my case files include a female gang affiliate in a supervisory position allowed gang members to eat and drink for free at a popular fast-food restaurant and refused to call police when a teen customer was confronted by her "homies" who subsequently stabbed the young man. Another female gang member initiated a fight between two rival gangs in a similar setting resulting in a tragic shooting in the restaurant after normal business hours. In still another case two female gang members followed a woman to her car in the parking lot of a Chicago McDonalds restaurant and then knifed her to death in front of her horrified family just a few days before Christmas. These same girls had caused trouble in the restaurant earlier that day and were banned from the premises. Unfortunately nobody told the afternoon shift employees. Females are no longer just adjuncts to their male gang counterparts.

In summary, the issues of gang infiltration and gang crime in the workplace have not been given adequate attention by most security professionals. Often the first hint of a problem arrives after something "gang related" happens. We need to protect our organizations against gangs through comprehensive awareness and careful hiring. Many gang members now work in legitimate jobs with access to precious assets and sensitive information. Some dress in three-piece suits or even army fatigues and police uniforms. Too often innocent customers, employees, or public servants are caught in gang cross fire. Security professionals have to take an interest if not the lead on this issue and educate their fellow employees or they may wake up to find their workplace has become the "hood" for a very intriguing opponent.

What Can Businesses Do?

1. Institute organization wide awareness (do employees recognize gang activity when it occurs? Do they have a safe way to report suspicious activity?).
2. Train workers who deal with the public to recognize signs of gang activity.
3. Ask for help from your police department (most maintain information on gang activity and larger departments have units dedicated to gang investigation and prosecution) or seek assistance from federal agencies like the FBI or ATF.
4. Institute thorough background checking of job applicants (work closely with your HR professionals and watch for gaps in employment).
5. Revisit your procedures and practices regarding hiring of temporary workers supplied by agencies (insist on rigorous screening by all suppliers).
6. Firm up your weaknesses (revisit basic access control to your facility and institute needed changes using security equipment and personnel—e.g.,—utilize monitored CCTV of areas that offer attractive targets like shipping and receiving).
7. Ensure that you have no-loitering policies (to keep gangs from claiming your premises as their turf).
8. Publicize a *zero-tolerance* policy for gang activity (including tattoos, graffiti cleanup, representing,[2] and verbal threats).
9. Treat any graffiti violations as destruction of property offenses with prompt discipline for offenders.
10. Cover or remove any graffiti immediately (deny the "artist" an audience).

Ways Gangs Pose a Threat for Legitimate Businesses

1. Infiltration to commit a wide array of crimes (e.g.,—property thefts and computer crime)
2. Patron intimidation and loitering
3. Drug use and sales
4. Access to weapons and propensity to use them
5. Robberies[3]
6. Credit card fraud
7. Cellular phone fraud
8. Violent outbreaks that injure innocent bystanders
9. Defacement of property (graffiti)
10. Creation of a climate of fear in the workplace
11. Arson
12. Links to terrorism

Personal Interview: BATF Agent Richard Marianos (Winter, 2004).

Biography

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[2] Representing refers to the use of gang signs and modes of dress that indicate gang affiliation. It is frequently a source of retaliatory violence by rival gangs who feel disrespected or "*dissed*."

[3] Some gang initiations require recruits to commit robberies to raise cash for the gang's coffers. In one highly publicized case young gang members in Memphis Tennessee were forced to shoplift thousands of dollars of clothing from a local mall for their leader. The gang members, fleeing in a stolen rental car, struck and killed a Memphis police officer on October 12, 1999.

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NGCRC – Project GANGMILL data. For more information contact the National Gang Crime Research Center. http://www.NGCRC.com

One recommended source of information for the harried security professional is the A&E videotape: Investigative reports: The new face of crime. This video highlights the infiltration of a gang member in the U.S. Army to purchase weapons for the Gangster Disciples and the targeting of California-based Sun Microsystems by an Asian gang for large-scale theft and hijackings.

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The Role of a Gang Expert in Court

8

Lisa Taylor-Austin

The role of a gang expert in criminal court is crucial and often misunderstood. An expert witness is an impartial party and expert on the subject matter who renders their opinion based on the facts presented to them in a legal case. It is not the role of the expert to investigate the case or to speculate about any presented issues or matters in the case. Therefore, the role of the expert is to remain neutral, review the facts presented by the prosecution and defense, and render their expert opinion based on those facts. Due to the neutrality of the expert role, the gang expert does not "work for" either the prosecution or the defense, but renders an unbiased opinion based on their education, knowledge, skill, experience, and understanding of scholarly resources. Only the Court can qualify an individual as an expert in a particular case, after review of the professional's credentials and after hearing arguments by both attorneys. For this reason, only a person with the highest credentials and experience should be presented as a gang expert in a criminal case. The role of a gang expert is one that should be taken seriously by all parties involved in the matter, as quite often the outcome of the case is serious for the defendant and the prosecution. Often the outcome could result in the death penalty or life in prison without parole. The responsibility of the gang expert is a serious one and only professionals who fully understand and appreciate this responsibility should be hired.

Everyone deserves a fair trial. The gang expert can assist in this Constitutional right.

Criminal street gangs are fluid and ever changing. There are also regional differences to consider. For example, a Blood in Los Angeles and a Blood in New York have vast differences in their gang knowledge base, orientation to the Blood ideology, cultural behavior, type of gang they belong to, and their belief systems. A gang expert must understand this difference, in addition to understanding the nuances of these differences, and must be able to articulate them to the jury.

The role of a gang expert in criminal court is paramount because the issue of gangs is very complex, despite what the media may want the public to believe. At present, there is no agreement of what a gang actually is. A gang must have "some permanence and a degree of organization" (Howell, 2009).

Spergel (1989) defined juvenile delinquents as "juvenile and young adults associating together for serious, especially violent, criminal behavior with special concerns for 'turf.' Turf can signify the control of a physical territory, a criminal enterprise, or both."

Walter Miller, former Director of the National Youth Gang Center Project of the Office of Juvenile Justice and Delinquency Prevention—U.S. Department of Justice (1975), defines a gang as "a group of recurrently associating individuals with identifiable leadership and internal organization, identifying with or claiming control

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_8,

over territory in the community, and engaging either individually or collectively in violent or other forms of illegal behavior" (Flowers, 1990).

Julie Gardner defines a gang as "an organization of young people usually between their early teens and early twenties, which has a group name, claims a territory or neighborhood as its own, meets with its members on a regular basis, and has a recognizable leadership" (http://www.streetgangs.com/laws/definition_gang.html).

The California Office of Criminal Justice Planning defines a gang as "A group of associating individuals which has an identifiable leadership and organizational structure, either claims a territory in the community, or exercises control over an illegal enterprise; and engages collectively or as individuals in acts of violence or serious criminal behavior" (http://www.streetgangs.com/laws/definition_gang.html).

Each state may have their own legal definition of a criminal street gang, while other states do not have any definition of a gang, gang member, or street gang. Some states have extensive laws about carjacking committed by gang members, graffiti vandalism committed by gang members, and witness intimidation by gang members, yet they have no legal definition of what a gang or gang member actually is. It may be the expert witness' role to then define what a gang is or is not to the jury. For states that do have legal definitions, it is imperative to understand that being a gang member is not illegal. Only the criminal actions of a gang member can be described as illegal.

In a criminal case I worked on in New York State, a young man was accused of committing a gang-related shooting, which happened to occur across the street from a police station. The young man was an accomplished student, star athlete, and had A's in school. His attorney did not believe this young man was capable of such a crime. The evidence was compelling in the young man's favor and the attorney asked me to interview the young man. One small comment he made led me to believe that he may have committed the crime. I told the young man if he had anything to tell his lawyer to do it quickly and I left the room. The next day the young man confessed to his attorney and he plead guilty. This experience assisted the attorney in realizing there is no "profile of a gang member." One has to scrutinize the illegal act and have an expertise in gangs to ascertain the whole of the situation.

Federal cases are more cumbersome to work on, as the volume of evidence can be overwhelming. However, there are federal definitions of a gang and gang-related activity, which make focusing on the criminal act or acts more clear.

Currently, federal law defines the term "gang" as "an ongoing group, club, organization, or association of five or more persons: (A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce" 18 USC § 521(a). (nationalgangcenter.gov, July 25, 2011).

Also, current federal law describes the term "gang member" as "a person who:

(1) Participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses described in subsection (c).
(2) Intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang.
(3) Has been convicted within the past 5 years for:
    (A) An offense described in subsection (c).
    (B) A state offense:
        (i) Involving a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 USC § 802)) for which the maximum penalty is not less than 5 years imprisonment.
        (ii) That is a felony crime of violence that has as an element the use or attempted use of physical force against the person of another.
    (C) Any federal or state felony offense that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.
    (D) A conspiracy to commit an offense described in subparagraph (A), (B), or (C)." 18 USC § 521(d) (nationalgangcenter.gov, July 25, 2011).

One has to read the remainder of the federal law to refer to the sections mentioned.

Conviction under federal law brings an enhanced sentence to the defendant. In other words, if the defendant committed a robbery as an individual his sentence would be *X* years but if he committed that same robbery as a gang member or as part of a gang-related crime his sentence could be *X* plus 20 years. If he committed the same crime and is charged under federal law his sentence could be longer.

With a working definition of both a gang and a gang member, it becomes more clear if the defendant meets these criteria. It is often the gang expert's appointment to determine if, indeed, the criteria have been met.

Going one step further, federal prosecutors will sometimes charge a gang or alleged gang using the Racketeer Influenced and Corruption Act (RICO). If convicted under the RICO Act, a defendant faces advanced penalties and additional time added to the sentence. The RICO Act focuses specifically on racketeering and leaders of a gang can be tried for crimes they ordered or had others assist them in committing. Initially this law was used to prosecute the (Italian) Mafia, but currently its application to criminal street gangs is becoming more widespread. The focus of the case shifts from, "Is this a gang?" to "Is this racketeering and is there an enterprise?" These types of cases are usually appointed to the most experienced gang experts, as sifting through the evidence and focus on the correct aspects of the evidence is paramount.

One case that I worked on was prosecuted in the Midwest. Federal funds were remaining from the prosecution, trial and eventual sentencing of noted serial. These funds were used to prosecute a local group of young men, using the RICO Act. One defendant faced the death penalty. While working with the attorneys my focus was on the alleged racketeering charges and formulating an expert opinion about whether an enterprise existed. Countless hours were spent on this trial, which included numerous co-defendants. Some of the defendants were severed from the others and as a result there became additional separate trials. This happens frequently when there are numerous co-defendants.

Case Example

John Doe (name has been changed for confidentiality) was a defendant. His case, and those of his co-defendants, was tried in the Midwest; however, federal law was used in this case because the charges were brought under The Racketeer Influenced and Corrupt Organizations Act, or what is more commonly known as RICO (a federal act). Mr. Doe was charged in an indictment with a RICO pattern of racketeering activity, 18 U.S.C. §1962(c); RICO conspiracy, 18 U.S.C. §1962(d); violent act in aid of racketeering (VICAR) murder, 18 U.S.C. §1959(a) (1); felon in possession of ammunition, 18 U.S.C. §922(g) (1) and §924(a) (2). The indictment stated that the defendant, and others known and unknown, being persons employed by and associated with the Crips, an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, did unlawfully and knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise, through a pattern of racketeering activity and through the commission of racketeering acts. The alleged pattern of racketeering activity of defendant Doe, as defined in 18 U.S.C. §§ 1961(1) and 1961(5), consisted of the following two alleged predicate acts: arson and murder. Mr. Doe was a teenager at the time of the alleged crimes.

In working on this case, it was first important to define the "Crips." Often charges are brought against individuals, or a group of individuals and broad gang names are used: Crips, Bloods, and Pirus. Although these names signify an umbrella term that gangs may belong to or align with, these names are not specific enough in court proceedings. These broad umbrella terms are not names of gangs or sets. Gang names or set names are much more specific. For example, Gangster Crips 43, Hoover 107, Tonga Crips Gang 102, Fruit Town Pirus, and Crenshaw Mafia Gangsters are specific gang/set names. A jury needs a full explanation about an alleged gang, using specifics, to fully understand how the crime(s) may have occurred or not occurred. All Crip sets do not operate in the same manner and it is important to be specific about which set is being tried.

For example, some Crip gangs originate from Los Angeles and have existed for decades. Other Crip gangs are what are termed hybrid gangs and have no affiliation with Los Angeles and may have only existed for one or two years. Hybrid gangs usually consist of people from different racial/ethnic groups, and individuals participating in multiple gangs. Such gangs have unclear codes of conduct, and symbolic association with more than one gang. Hybrid gangs modify traditional gang culture and often will mix together culture and knowledge from several different gangs.

When working as a gang expert in a trial, it is important to specify what type of gang you are working with, as the culture, structure, hierarchy (or lack thereof) varies depending on the type of gang. In the case of Mr. Doe, an extensive review of his alleged gang was completed by me. People with a history and knowledge of the gang were interviewed, police reports were reviewed, an extensive review of testimony from the grand jury was conducted, newspaper articles were reviewed and the defendant's arrest records were reviewed, along with all other discovery offered by the prosecution. It was my conclusion that Mr. Doe did not belong to a criminal street gang or the Crips. Mr. Doe was a member of a bicycle club, comprised of adolescents who grew up together. My testimony of the history of the bicycle club, how Mr. Doe came to join such a club, and why the club was not affiliated with a criminal street gang was crucial to the outcome of the case. Mr. Doe was found not guilty of all RICO charges and murder.

All groups and gangs are not criminal street gangs. Some gangs are neighborhood cliques which merely exist for social reasons. Mr. Doe was the member of a bicycle club which existed for social camaraderie and bicycle competitions. His club did not meet the standard of a criminal street gang.

A gang expert must be able to work cooperatively with attorneys and have a basic understanding of the legal process. Each state has different laws and processes from the next, and the federal system is also unique. An expert must understand or learn these processes quickly to know how to approach a gang case and also to know what will be expected while testifying in court. In addition to having excellent speaking and presentation skills, the expert must also be a good writer. The expert must be able to explain his or her position to a jury and be viewed by the jury as approachable, with a calm demeanor.

The societal issue of criminal street gangs is multi-systemic and complex. Criminal trials at the state and federal level can benefit from employing a gang expert at trial to explain the many nuances to the jury and judge.

Biography

Ms. Taylor-Austin is a national forensic gang expert and has testified in criminal cases involving Crips, Bloods, Latin Kings, Black Gangster Disciples, and others. She has worked on death penalty, assault, RICO, gang injunction, and murder cases in both state and federal courts. She also maintains a private practice where she counsels youth and adults. Ms. Taylor-Austin has been a counselor since 1988. She began her career working with gang members of some of the most notorious gangs in California: Santa Monicas, V13, Culver City Boyz, Helms Street, Venice Shoreline Crips, and Fruit Town Pirus. Ms. Taylor-Austin was able to establish a trusting professional rapport with her clients and assist them with attaining their personal goals. She was instrumental in calming tension after gang-related stabbings and assisted gang members to squelch their need for revenge. Ms. Taylor-Austin has been featured on the Tavis Smiley Show, MSNBC, and the New York Post and has achieved worldwide acclaim in the hip-hop magazine, Backspin.

Ms. Taylor-Austin holds a Masters degree in Counseling (plus over 25 additional graduate credits), a Bachelor's degree in Developmental and Behavioral Disabilities and a minor in African-American Studies. She is a Certified Forensic Mental Health Evaluator (National Board Certified Diplomat) a Licensed Professional Counselor in Connecticut, a Licensed Mental Health Counselor in New York, and a Nationally Certified Counselor. Ms. Taylor-Austin is also a certified school counselor in Connecticut and New York and a certified

Community College Counselor in California. After working in Los Angeles, the University of Southern California and Stanford University, Ms. Taylor-Austin returned to the east coast where she works today. She has taught for Yale University and continues to work on various gang projects, including criminal trials across the United States, legal consultation, television consultation, and training workshops.

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Competence to Proceed and Juvenile Courts

9

Daniel L. Davis and Terrance J. Kukor

Introduction

The construct of competence is a central element in law. One must be, and is presumed, competent in both the civil and criminal law. In civil court, one must be competent to enter into contracts, to make a will, to make medical decisions, as examples. In criminal court, the defendant must be competent to testify, stand trial, enter pleas, and be punished. In criminal court, the most frequently adjudicated forensic question is competency to stand trial. Paradoxically, competence is one of the least understood concepts by non-forensic practitioners as well as the general public. Far more adults are evaluated by forensic clinicians for competence than are evaluated for mental state at the time of the offense. While the general public's attention is more often turned to cases of insanity defenses, the number of competency assessments far exceeds those of sanity cases in adult courts. Although data are sparse, it is estimated (Melton, Petrila, Poythress, & Slobogin, 2007; Silver, Circincione, & Steadman, 1994) that <1 % of cases invoke the insanity defense and of those cases that did enter an insanity plea, three quarters of them were unsuccessful. In fact, the majority of insanity defenses result from plea bargains or other arrangements (Goldstein, Morse, & Shapiro, 2003; Melton et al., 2007). In marked contrast, the number of adults assessed for competency is estimated to be between 2 and 8 %, which would be about 60,000 or more per year (Zapf & Roesch, 2009).

The distinctions for juveniles are even more complex. While for adults, even though there is no constitutional guarantee for an insanity defense, all but three states (Idaho, Utah and Kansas) have the option for an insanity plea by adults. However, the use of the insanity defense is very infrequent in juvenile court, disallowed by the majority of states (*Golden v. Arkansas*, *21S.W.3d801* [*ArkSup.Ct.2000*]; *Commonwealth v. Chatman Virginia* [*2000*]), allowed by others and found to be a constitutional right by others (*State In Interest Of Causey 363 So.2d 472* [*1978*]). As a result, very few insanity cases are seen in juvenile courts.

However, in the case of competency, far more states allow for assessment of competence in juveniles. While once all juveniles were presumed competent, now about half of the states guarantee competency tests before trial (*Golden v. Arkansas op cit*, *In re Carey 241 Mich App 222* [*2000*]) with new states being added every year. Typically, the courts require that competence be considered in the specific context of the juvenile's capacities. The youth must be considered in terms of how other prototypically similar youth function-not as adults would. As such, courts will often require that juveniles be assessed using "juvenile norms" (*Ohio v. Settles*, *1998 WL. 667635 Ohio App 3 Dist. 1998*) even though

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_9,

such norms exist in the professional literature only to a very limited degree.

The basis for competency tests in juvenile courts comes from two Supreme Court decisions. In the first, *In re Gault* (*387 U.S. 541*, *16L. Ed. 2d 527*, *87S. Ct. 1428* [*1967*]), the US Supreme Court extended to juveniles many of the same rights afforded to adult defendants. In this case, the Supreme Court found against the previous Arizona Court rulings and determined that juveniles were entitled to due process under the constitution, concluding that the 14th Amendment and the Bill of Rights were not "for adults alone." The second case, *Kent* (*Kent v. United States 383 U.S. 541* [*1966*]), the US Supreme Court held that a juvenile must be afforded due process rights. In the majority opinion, Associate Justice Abe Fortas wrote, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

Since the basis of competency to proceed in juveniles is based on the rights afforded to adults, we will first turn to a brief discussion of competence as it relates to adults. Competency to stand trial has its roots in English common law. It is thought by others that during the seventeenth century, when defendants would stand mute before the Bar that the British jurors would then be forced to determine if the person was mute by "malice" or "by visitation of God." Originally aimed to address the deaf and mute defendant competency later was expanded to include the "lunatic." American jurisprudence, in its heavy reliance upon English Law has used the concept of competency since the very beginning of the nation. In 1835, a man accused of attempting to murder President Andrew Jackson was declared unfit to stand trial. In both English and American common law, competence has three objectives:

1. That the trial will result in accurate results.
2. To assure the proceedings will be dignified.
3. That imposition of punishment will be morally justified.

The legal standard for adjudicative competence in adults and juveniles is *Dusky v. U.S.* (*362 U.S. 402*, *4L. Ed. 2d 824*, *80S. Ct. 788* [*1960*]). This test for a defendant's competency to proceed to trial is whether (the defendant) has sufficient present ability to consult with (a) lawyer with a reasonable degree of rational understanding—and (b) whether (the defendant) has a rational as well as factual understanding of the proceedings. In *Dusky*, the court stated, it is not enough for the district judge to find that "the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."

Competence can be understood as encompassing the following dimensions (Kruh & Grisso, 2009). Competence is *Functional*—that is to say that the importance of any clinical condition is not the state itself but rather how does that psychological state directly impact the youth's functional ability to proceed in a legal matter. Thus, a youth may have considerable difficulty paying attention due to a disorder of executive functioning. However, if he or she is sufficiently able to focus and attend to the legal proceedings, then there is no impact on functional legal capacities. As another illustration, although psychotic symptoms are rarer in adolescents than adults, if a youth does experience auditory hallucinations, but still is able to attend, comprehend, and appropriately respond to the proceedings, then no impairment in functional capacities impairment could be established.

Second, a *Causal Connection* must exist. The alleged deficit in functioning must directly result from the clinical condition for that condition to be relevant. Returning to the issue of attention as an illustration, some youth may be unable to attend as a result of appropriately diagnosed executive functioning issues. Other youth may simply refuse to attend to the proceedings but have been otherwise shown to have the capacity to pay attention. In the first example, there is a direct causal connection and in the second, no such connection exists.

Competence must be understood, as well, in terms of the *Context*. Youth in the courts face a variety of demands and circumstances. Some require a greater degree of psychological abilities than others. Participating, for example, in an informal diversion hearing carries less consequences and likely less psychological demand that a

Bindover or Waiver hearing in which the juvenile's case may be transferred to an adult court.

Competence is also *Temporal*. Competence to proceed is a present state. It does not address the youth's functioning or mental state in the past such as during the time of the alleged act. While the examination is predictive in that an opinion is made as to how a youth will likely perform in a hearing in the near future, all competence examinations must be tempered by the inherent dynamism of youth. Accordingly, competence examinations have a limited "shelf life," one that is determined not so much by the length of time from the examination but rather by the pace of development and evolving psychological capacities of the youth. Because psychopathology in youth can markedly change across time and circumstance, a young person found psychologically stable at the time of examination might not be so at some later point in time. As well, unique to juveniles, developmental immaturity is recognized both in the literature and by the courts as a basis for incompetence. As a youth matures, capacities not seen in a previous evaluation may be clearly ascertained in the present state of the youth.

Kruh and Grisso (2009) further analyze *Dusky* by clarifying that sufficient and reasonable understandings do not require complete and unimpaired functional abilities. The youth must have the psychological resources to respond appropriately to the task of competence. It may be the case that in the case of the youth with Attention-Deficit/Hyperactivity Disorder (ADHD), the demands of the situation are such that although he/she has trouble focusing, he/she is able to do so sufficiently to participate in his hearing. In this regard, competence should be understood in terms of the contextual adaptive capacity of the youth. That is to say that if a youth has sufficient abilities to marshal his or her psychological resources to the task, then no functional impairment exists.

Developmental Capacities

It has long been understood that youth are not little adults. Research from a neurodevelopment standpoint using longitudinal MRI studies, Giedd et al. (1999) demonstrates that the human brain continues development into early adulthood. More importantly, the last brain areas to develop are those that involve executive functional abilities (e.g., planning, working memory, attention, problem solving, verbal reasoning, inhibition, mental flexibility, multitasking, initiation and monitoring of actions). Thus, the demands of adjudication, especially those required in more complex or serious cases, may be beyond the neurodevelopmental capacities of younger defendants.

From a psychological developmental perspective (Steinberg & Scott, 2003), it is has been well established that reasoning capacities increase through childhood into adolescence and into adulthood with executive functioning abilities reaching their peak in the late 20s (De Luca & Leventer, 2008). Specifically, capacities of basic information processing skills, attention, short- and long-term memory, and organization improve with temporal development. As well, the maturation of the pre-frontal cortex improves the ability for future orientation, impulse regulation, and reduction of susceptibility to peer pressure. Said a different way, adolescents, as compared to adults, are far more influenced by peers than older persons such as attorneys or parents, less future oriented, less risk adverse, and much less able to regulate their emotions and behaviors.

Again, turning to neuroscience, using imaging of oxygen flow, adolescents show reduced recruitment of motivational but not consummatory components of reward-directed behavior (Bjork et al., 2001). Neuroimaging found extra oxygen flow after a signal indicating that the adolescents could win cash and in young adults the ventral striatum was robustly activated but in adolescents, the ventral striatum showed less activation. However, the brain activity in response to learning that money had been won, however, did not differ between the two age groups.

The critical implication of these findings in regard to competence in youth is that juveniles may likely have diminished decision-making capacity when compared with adults. These differences are likely the result of both psychosocial capacities as well as biological differences.

Carrying this point further, in the research of Steinberg & Scott, (2003), the fundamental aspects of judgment and reasoning are not present until about the age of 16.

Cooper (1997) examined the factual understanding about trial of 112 youth ages 11–16. The majority did not have adequate knowledge. When exposed to some basic training, their general knowledge level did increase but not to the degree required for actual competency to stand trial. In this group, as in others, special care was warranted for both youth under 13 and those of limited intellectual abilities.

In a sample of 136 juveniles (age 9–16 years) referred for pretrial competency evaluations, Cowden and McKee (1995) report that the evaluators opined 72 % of the 16-year-olds, 84 % of the 15-year-olds, 63.3 % of the 13–14 year-olds, and only about 25 % of the 11–12 year-olds to be competent. Only 28 % of the juveniles having a severe mental illness and only 46 % who had a history of special education placements were competent. In McKee & Shea, (1999) sample of 112 juveniles (age 12–16 years, with mean age of 14.2) referred for pretrial competency evaluations, 14 % were considered by the evaluators to be incompetent. Moreover, roughly 50 % of the juveniles found to be competent nonetheless had at least one serious deficit in competence-related abilities.

In most cases, incompetence in juveniles is due to some mix of youth, immaturity, lack of knowledge, mental disorder, or intellectual disability. McKee (1998) found that most juveniles younger than 13 could not describe the charges against them or the nature of the adversarial process, could not report facts relevant to their defense, and did not understand plea-bargaining or the confidential nature of the attorney–client relationship. Young adolescents often incorrectly believe that their attorney will reveal confidential information to the magistrate or police and have difficulty calibrating their decisions about whether to plead guilty based on the likelihood of being found guilty. Older adolescents generally have a sufficient understanding of the nature of the proceedings, but many do not fully understand the advocacy role of the defense attorney and the concept of legal rights, perceiving such rights (e.g., to remain silent) as conditional or revocable by adults (Grisso, 1997).

In addition, many juveniles have impaired judgment relative to adults in the areas of responses to peer and parental pressure, time perspective, attitudes toward risk, temperance, reactions to stress, and responsibility. For example, adolescents tend to focus on short-term consequences, to weigh more strongly the possible benefits of a decision and to discount possible risks, and to be susceptible to pressure from peers and parents.

In perhaps the most definitive study of juvenile competency to date, Grisso et al. (2003) found in a sample of 927 detained youth and 466 community youth that youths aged 15 and younger performed more poorly than young adults, with a greater proportion manifesting a level of impairment consistent with that of persons found incompetent to stand trial. In specific comparison, one-third of all youth aged 11–13 were found to demonstrate a level of impairment similar to adults who have been found incompetent to stand trial and 20 % of youth aged 14–15 were also probably not competent. When measures of intelligence and emotional disturbance were utilized, it was found that lower levels of intelligence and higher levels of emotional disturbance produced much higher percentages of similarities to adults found incompetent. As such, the younger the youth, the lower the intelligence and the greater the emotional disturbance, the greater the likelihood of similarities to persons found incompetent. In this study, the 927 youth abilities were compared to 466 young adults who were either incarcerated or in the community. The investigators found that youth aged 15 and younger performed overall much more poorly than young adults. A greater proportion of these youth manifested a level of impairment that was similar to adults found incompetent. Importantly, as well, adolescents tended more often than young adults to make choices that reflected compliance with authority as well as choices influenced by psychosocial immaturity. This last point is underscored by recent research by Cox, Goldstein, Dolores, Zelechoski, and Messenheimer (2012) that found that age and

maturity play major roles juvenile court judges' determinations of competency.

Child and Adolescent Psychopathology and Competence

Just as developmentally youth and adolescents are not diminutive versions of adults, psychopathology of children and adolescents is generally quite different than that seen in adults. Although the prevalence of seriously mentally ill youth in the juvenile justice system is greater than that found in the community (Cocozza & Skowyra, 2000; Davis, Bean, Stringer, & Schumacher, 1991), most of those youth did not evidence symptoms of psychosis as disorders such as schizophrenia, which typically do not manifest themselves overtly until late adolescence. Mood disorders, as well, present differently in children and adolescents (Danner et al., 2009) with younger persons with Bipolar Disorder frequently showing rapidly cycling moods and irritability that can be mistaken for purely behavioral problems.

In addition, disorders not typically associated with adult incompetency can cause substantial deficits in juveniles (Kruh & Grisso, 2009). Disruptive Behavioral Disorders may cause substantial impairment. What may seem to be a volitional behavior in an adult may in a youth be the result of a mental disorder. For such youth, it is often not that he or she "won't" participate, but due to a disorder simply "can't." For example, youth with ADHD may be unable to sufficiently attend to the proceedings, may be unable to manage their behavior, and may make impulsive choices. A youth with Oppositional Defiant Disorder (ODD) may not be able to appropriately relate to counsel and may not be able to manage his or her behavior in court. Youth with Pervasive Developmental Disorders PDDs) such as Asperger's Syndrome (AS) may show excellent knowledge of competency constructs—the "cognitive component." However, because this disorder substantially interferes with social functioning, the youth may be unable to appropriately assist his counsel. A forensic clinician unfamiliar with adolescent psychopathology would be much more likely to misperceive the actual functional abilities of a youth with AS. Similarly, youth involved in the juvenile justice system have a higher prevalence of learning disabilities. Receptive or expressive language disorders can substantially interfere with a youth's functional adjudicative capacities. Finally, adolescent psychopathology is complicated by the very nature of adolescent development. Mental and behavioral disorders in youth can take on very different forms as the youth matures. As an example, youth with traumatic stress reactions, especially boys, may not show the same symptoms as an adult. Such youth may evidence much more behavioral acting out and less of the "classic" symptoms typically associated with adults such as "flashbacks" or avoidance.

Developmental Characteristics

Critical to this discussion is the impact of normal development on adjudicative competence. Youth may be incompetent without a mental illness and solely for developmental reasons (Kruh & Grisso, 2009). Development occurs in various domains: cognitive, social, motoric or behavioral, and emotional (Davis, 1999), as an illustration. Such development is often uneven. Developmental capacities are not attained at the same rate and physical development precedes cognitive, social, and emotional development.

A youth who has physically developed may "look" competent but still lack the cognitive capacities necessary for competence (one of the authors has termed this the "Lennie Syndrome" from *Of Mice and Men* (Steinbeck, 1937) in which physically developed youth can be wrongly assumed to have greater capacities than they actually possess). Adolescence is, of course, a period of inherent dynamism. Youth are in terms of assessing functional capacities, "moving targets." They change from year to year, experiencing spurts, delays, and regressions in development. Youth change also relative to their social contexts. Initially, adolescents are quite socially dependent but may become less so as they mature to young adulthood. In addition, the

expression of attained maturity may vary substantially from context to context. A youth in one context may display remarkably mature behavior but quite another in a different context. Similarly, development may vary in expression simply due to temporal variation. It is not simply that an attained capacity "sticks." Rather, a youth might appear to have a capacity one day but the next day seemingly has "lost" that ability. For all of these reasons, it is probably not at all helpful to refer to a youth as being "mature" or "immature" without greater specification of the targeted ability and the specific context.

In regard to the concept of immaturity, it is vital to see this term as a relative rather than concrete descriptor. In assessing and describing developmental immaturity or delays, it is important to describe them in terms of cognitive, emotional, or behavioral anchors. To illustrate, when a youth is described as having delays in social reciprocity (difficulties in the social give and take), the examiner should reference these issues in comparison to a specific reference point. The question is really "Immature compared to what? Adults? Same Age Peers? The "typical" adolescent? Maturation, as well, is not an all or nothing construct. Within social development, there are numerous capacities: reading social cues, knowing when to say what, knowing how to differentially respond to various persons in specific contexts. In this regard it is important to be able to identify the specific abilities or characteristics in question.

Essentially, age is not synonymous with developmental level. One can never presume a level of maturity based upon age alone. Grisso (2005) points out that psychosocial maturity are those factors that have to do with taking social perspective especially when problem solving. In that regard, one must consider the autonomy of the youth, the ability to perceive risk, time perspective, and the ability to think abstractly. Youth become more autonomous as they age. As they mature, they become less dependent upon adults and more able to direct their lives. Identity formation is a critical developmental task for adolescents, who generally accomplish this without great disturbances. The *sturm und drang* of adolescence is a myth (Offer, Offer, & Ostrov, 2004). As the youth matures, the sense of identity becomes more lasting and meaningful. As identity forms, the influence of peers diminishes after increasing in early adolescences and decreasing gradually thereafter. But, in youth, especially those delayed in maturity, the lack of autonomy can be manifested as appearing inattentive, passive or in easily giving in to (acquiescing) to either adults or peers. In this way, a youth can be easily influenced in important decisions related to their legal situation by peers or simply by giving in and wanting to please adults in actual or perceived authority. Similarly, youth may forsake their own well being in order to please or live up to perceived expectations of peers.

Youth differ significantly from adults in terms of risk perception. Each of us probably can look back upon a choice or decision we made as a rash adolescent. Fortunately, most of those circumstances did not result in long-lasting consequences. But, of course, in the legal setting, certain such rash decisions can have lifelong and possibly unforeseen consequences. Youth typically underestimate the likelihood or severity of risk. They tend to be more impulsive in risky situations and much less likely to delay gratification. They also tend to weigh risks differently than adults. Referring back to the earlier cited study of consummatory activation, it is clear that youth will be more likely to think in terms of immediate gains and may be more willing to risk negative consequences, which they often underestimate. Think for example of the youth held in a detention center on a sex offense. He is given the option of being able to go home but will have to plead guilty with the consequence of sex offender registration. He is much more at risk to take that option without thinking through the long-term consequences associated with being designated as a sex offender. For example, even if the case remains only in juvenile court, colleges have learned to ask if an applicant has ever been convicted or *adjudicated* of a sexually related offense. The implications are obvious to a forensic clinician, but generally not to a youth locked up in detention and wanting to go home.

Youth also differ substantially from adults in terms of time perspective. Six months can seem like a lifetime to a teen. Because they are incomplete in identity formation, the cognitive task of picturing oneself many years older is extremely difficult for teenagers. Youth, as noted, focus on short-term consequences. Because of their immature time perspective, they are not able to balance long-term losses with short-term gains (returning again to the pull of entering a plea in order to meet the short-term objective of leaving the detention center).

Adolescents think in ways that are not only quantitatively different (factual knowledge) but also qualitatively different than adults. They are much less capable of abstract reasoning as a result of their immature neurobiological development. They may be able to understand some concepts but typically are unable to grasp the abstract nuances. Think, for example, of the difficulty in explaining a "white lie" to a 13-year-old boy recently disciplined for not being totally truthful about his homework. Because of their social immaturity and continued egocentricity, young adolescents have great difficulty recognizing the motives of others and may mistakenly believe that the person is acting in a way that he or she might. Because youth remain concrete in their thinking and limited in social perspective taking, they have difficulty understanding consequences not yet experienced. Just because a youth is told that something will likely happen as a result of his or her actions, the youth will likely have great difficulty even believing or appreciating the impact upon them directly.

Current Formulations of Competency

Returning now to the fundamentals of competency we are reminded that *Dusky v. United States*, 362 U.S. 402 (1960) establishes the current definition of competency that is generally applied to both adults and adolescents. The Supreme Court held that "the test must be whether he (the defendant) has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him."

Note that the focus is upon the present condition of the defendant rather than a retrospective analysis of his condition at the time of the alleged offense. Second, the issue is upon the capacity of the person to cooperate with counsel rather than the person's willingness. Last, a reasonable degree of understanding is required rather than a total or complete understanding. Thus, the threshold for competency is not high.

We suggest that a full evaluation of competency include the five basic elements (Davis, 1995):

1. *Knowledge and appreciation of the present charge*
   The youth should be aware of the charge(s) made against him or her. This does not require, of course that the youth are able to cite the exact legal code. However, the youth should have a general and correct understanding of what he or she is accused of having done. Additionally, the ability to "appreciate" can be construed as being able to grasp significance or rationally apply one's factual knowledge to one's legal situation.
2. *Knowledge and appreciation of the possible consequences*
   The youth should be aware of what could possibly happen if convicted. This, of course, must include the possibility of transfer to the adult criminal justice system. Knowledge is more than mere rote recitation of the possible outcomes. Again, the concept of appreciation requires being able to apply that knowledge to the unique, personal situation of the youth.
3. *Ability to have an appropriate relationship with an attorney*
   Beyond the rare issues of significant psychopathology such as paranoid delusions that might prevent effective relations with counsel, the examiner must be aware of the social and emotional development of the youth. Some youth, especially traumatized youth, may experience significant difficulty trusting anyone. Other youth, especially those from differing cultures, may be unable to effectively

relate with the attorney. To illustrate, a youth from a differing country may have markedly different reactions to an adult authority figure. Some youth may be so overwhelmed that they will simply do what an attorney tells them to do. While this may be advantageous in certain cases, attorneys who represent youth will want to be assured that the youth can make informed decisions. Note that this requirement speaks to ability rather than willingness to relate. The determination of this difference requires considerable understanding of adolescent psychology.

4. *Knowledge of courtroom procedures*
   It is, of course, not required that the youth have as much knowledge as the attorney does. The object is not for the youth to know enough to pass the bar. Rather, the youth must have a basic familiarity with the adversarial nature of court (especially due to recent trends in the criminalization of juvenile court). The youth must also be aware of those types of behaviors that might be self-defeating.
5. *The capacity to integrate and efficiently utilize knowledge and abilities in either a hearing or plea bargaining situation.*
   Although much of the assessment of competency has traditionally focused upon the potential hearing, the reality of the justice system is far different. Some sort of plea arrangement prior to any trial or hearing resolves most cases. The youth must be able to make informed and rational choices in such matters. The choices are often made quickly and under pressure. Adolescents who have limited problem solving and reasoning capacities may attempt to look as if they understand the situation when they, in fact, do not. The examiner who focuses only on the "high school civics" aspect of competency and neglects the reality of the court processes may then ignore the essential qualities required for competency in the unique circumstances faced by the youth. Specifically, a youth who can just recite the "who does what" but cannot then apply that to his or her own circumstances might have the requisite knowledge but not the application or appreciation. A good illustration of that circumstance might be a youth with AS who has excellent rote knowledge of court personnel but as a result of his difficulties in understanding social interchanges may not be able to relate at all with counsel.

Differences Between Adult and Juvenile Competency Evaluations

By now, it should be clear that while there are common aspects to adult and juvenile competency evaluations, there are clear and substantial differences. These differences are of such magnitude and the potential dire consequences of a poorly done evaluation so great that we hold that it is improper if not unethical, for a person untrained and not experienced with child and adolescent psychology as well as forensic psychology to attempt such an evaluation. Juvenile forensic examinations must have a developmental focus that requires specialized training and experience on the part of the examiner. Because youth function differently in disparate settings, data must be gathered from a variety of sources. While in the adult evaluation, an examination performed in a jail setting with limited available data may be acceptable (and sometimes all that is possible); this practice is not acceptable for youth except in the most atypical of circumstances. Forensic practitioners in the juvenile court setting must, as a matter of regular practice, seek to obtain as many outside sources of relevant data as possible. Data should be obtained from parents, schools, involved adults, medical practitioners, mental health providers, and the youth's attorney whenever possible. Data should not only be sought that address current functioning but data should also be obtained from earlier periods in the child's life in order to meaningfully understand the kinds and rates of developmental change. When such data cannot be obtained, the practitioner must inform the court of these limitations and the potential impact upon any opinions or recommendations.

In addition to gaining a longitudinal developmental perspective of the youth, special considerations

are required when assessing the youth's functional adjudicative capacities. The examiner must assess the youth's ability to learn, retain, and recall information and then apply that knowledge correctly to his or her unique situation. This is especially important with younger examinees as these youth typically have limited exposure to many of the "basics" of courtroom procedure and personnel. The youth must be able to "appreciate" rather than just know what goes on in court. At a concrete, rote level, the youth might be able to define a term but may not fully understand how that particular concept applies to his or her unique legal situation. The youth may not be able to fully understand or rationally think about the implications of his or her choice, which exemplifies the difference between knowing and appreciating. This distinction forms the basis of the *Dusky* decision. It is the "rational" understanding aspect of the case, and because of the developmental differences in youth's thinking, may be a critical area of developmentally related functional impairment relative to competence.

Components of the Evaluation

We recommend that there are fundamental and essential components to evaluations of a juvenile's competence to proceed. While these data are generally similar to those obtained in nonforensic evaluation, the critical differential is that they should be sought and interpreted in light of the possible inferences such data can suggest about the youth's current functional abilities relative to the adaptive demands of competence.

They are listed below:

- Consultation with defense counsel.
- Interview(s) with family members or involved adults.
- Obtaining and reviewing relevant third-party information about the youth including but not limited to educational, treatment, and prior court records.
- A clinical interview.
- Psychological testing when indicated.
- A Forensic Assessment Instrument (FAI).

Consultation with Defense Counsel

The defense attorney is an invaluable source of information. The examiner should, at a minimum, attempt contact by writing (and if unsuccessful should document that effort in the report). The attorney should be asked about his or her specific questions or concerns about the youth. The examiner should ask the attorney about his or her perceptions of the youth's factual and rational understanding of court processes. Detailed inquiry should be made as to the attorney's concerns about the youth's capacity to assist in his or her defense. Specifically, the examiner should inquire as to any possible confusion, detachment, attention difficulties, communication difficulties, memory problems, odd or peculiar behaviors, immaturity as well as hostility or oppositional defiance. The examiner should ask as to availability of pertinent records that will allow for the examiner to place the interview behavior of the youth in the developmental context and to interpret those data accordingly. The examiner should, as well, clarify with the attorney the appropriate scope and limitations of the competency evaluation. Often because of financial or budgetary reasons, attorneys are unable to secure psychological evaluations of their clients. While this motivation is understandable and perhaps even laudable, the competency evaluation is limited in scope and ethically can only respond to the legal issue mandated by the court's order (Melton et al., 2007).

Interview with Family Members/ Involved Adults

Examiners should consult with involved adults in order to obtain a pertinent history that addresses issues of development, educational history, mental health history, alcohol and drug history, and any prior legal involvement. Examiners must do so in a culturally informed manner and seek consultation when needed. The examiner must also ask questions pertinent to the youth's adaptive functioning. Questions should address the youth's abilities to meet life demands typical of same-aged

peers, communication abilities, self-care skills, home life, interpersonal skills, and use of community resources, self-directive abilities, academic skills and performance, as well as health and safety issues. Such questions are especially important if there is a question of incompetency due to cognitive disabilities or mental retardation.

Third-Party Sources of Information

Examiners should attempt to obtain background data from those persons or parties that can provide a comprehensive view of the youth's overall functioning. Records should be sought from educational settings, medical practitioners, mental health providers, juvenile justice, and social services agencies as well as, when appropriate, agencies providing mental health, or developmental disabilities services. Whenever possible, results of previous psychological assessments should be obtained. If a youth is incarcerated in a detention center, the staff can provide a unique portrayal of the youth's day-to-day functioning. While such data can provide critical insights into the youth's background as well as current functional capacities, because of the inherent change processes of youth it is also important to remember that psychological data are perishable.

The Evaluative Process

Notification and Informed Assent

The youth must be informed of the nature and objectives of the evaluation. This notification of purpose must take place before the interview with the youth begins. In that the youth has in most cases been court ordered and by definition would be below the age of majority, consent is not possible. Rather, the youth and all others interviewed must be notified of the purpose of the examination, the limits of confidentiality as well as any legal rights that they may have by statute. Such notifications must be given using age appropriate terms and concepts. The examiner must inquire of the youth as to the youth's actual level of understanding of the circumstances and scope of the examination after each has been explained. This is best accomplished by breaking the notifications into segments and after each, asking the youth open-ended questions about what was said and asking the youth to restate back what was told to him or her. The examiner should then document in the final report the notifications given and the youth's level of understanding. This, of course can provide an important source of information as to the youth's relative functioning in reference to legal information. The notification is, therefore, both an ethical requirement and an essential naturalistic observation. That being said, if the youth clearly does not understand the nature and objectives of the examination despite repeated attempts by the examiner to explain, the examiner should terminate the interview and consult with the youth's attorney before proceeding if the case is from a private attorney. In the case of a court-appointed evaluation from a clinic or forensic center, the examiner should carefully document these limitations in a letter to the court.

Clinical Interview

Personal History

Although the examiner will have obtained as much historical data as possible before seeing the youth, it is, of course, important to also obtain from the youth his or her own version of their history and development. It is not unusual for the youth to have a different version of historical matters (particularly with respect to drug and alcohol use), and such inconsistencies should be noted. One should pursue a structured personal and social history, paying particular attention to key factors in the youth's life as well as development. General areas that should be included are the youth's perceptions of his or her parents, his relationship with them, relationships with siblings and peers and any extended family members who have been important. The examiner should inquire as to how many times the youth has moved in his or her life as frequent transitions can be highly disruptive to establishing social ties as well as academic functioning. Any significant medical,

neurological, or developmental problems should be explored as well as any history of abuse, neglect, animal cruelty, or fire setting. The examiner should pay special attention to peers and the youth's degree of influence by peers as well as they type of peers with whom the youth associates. Inquiries should be made as to substance abuse and mental health history as well as any child welfare system and out of home placements. Of course, any prior juvenile court involvement is essential to discuss. Educational functioning and history is also critical as well as the youth's view of future educational and vocational life choices. When data obtained from the youth conflict with that obtained earlier, the examiner should explore those with the youth. We have found that sometimes the youth can be a more accurate source of information about parental and family issues than the parents themselves.

Clinical Interview: Mental Status Examination

While a mental status interview can provide valuable clinical insights, again, the intent of the interview is to provide data that form the basis of hypotheses specific to the youth's functioning relative to the competence question. This admonition echoes that of *Dusky* in which the court specifically pointed out that the defendant's psychological functioning is important only as it relates to the defendant's trial capacities. Beyond the prototypical elements of mental status examination addressing various possible symptoms and psychological states, a mental status interview can provide important information as to the youth's developmental status. Importantly, a mental status interview also provides the examiner with a wealth of observations as to how the youth relates to an adult in some official capacity. The examiner should observe the give and take in the conversation: how does the youth respond? What is the degree of social reciprocity? Is the youth oppositional? Passive? Acquiescent? Such observations can provide important inferences as to how the youth might relate to counsel and other court figures.

The examiner should also attend to issues of possible impulsivity, attention, focus, and distraction. As well, the evaluation should explore whether or not the youth has self-defeating motivation, is unrealistic as to his or her situation or does not fully grasp the significance of the examination. It is also critical to explore and observe the degree of regulation of expressed affect, the coherence of the youth's self disclosure as well as the relative cognitive sophistication of the youth (for example, the difference between pleading guilty and feeling guilty). The examiner should explore both in personal history and with hypothetical how the youth problem solves, paying particular attention to any difficulties with impulsive thinking, unrealistic strategies, as well as lack of independence and motivation. The examiner should, in this regard, also explore problem-solving skills with a particular emphasis upon reasoning abilities as well as the capacity for abstract reasoning.

Psychological Testing

When appropriate, standardized psychological tests can provide important data concerning a youth's functioning relative to known normative populations. The use of testing is not always indicated and routine batteries of tests are not recommended nor likely appropriate. However, testing may provide valuable insights into cognitive and adaptive functioning as well as psychopathology. Instruments such as the Wechsler Intelligence Scale for Children, The Woodcock-Johnson, or the Wechsler Individual Achievement Test can be very helpful. However, before using these lengthy instruments, the examiner should attempt to obtain and review school records to determine if any such testing has been done in the past, making such testing not required in the present examination, if such testing was done relatively recently, and if the youth's clinical functioning appears to be similar in the interview. Examiners may wish to administer brief measures of cognitive abilities such as the Kaufman Brief Test of Intelligence or the Wechsler Abbreviated Scale of Intelligence as well as the Wide Range Achievement Test. Such

instruments can provide important data. However, if subaverage functioning is found and there are no other records of previous testing, these abbreviated instruments should typically not form the basis for a diagnosis of intellectual or learning disability and if used in that regard, the examiner should carefully document the limitations of the instruments. If circumstances do not permit follow-up testing with more comprehensive instruments, then it is incumbent upon the examiner to explain to the court the limitations of brief measures.

Similarly, the examiner should explore adaptive functioning when interview or historical data suggests possible adaptive impairments. Informant-based instruments such as the Vineland or Adaptive Behavior Scale can provide critical information as to the youth's overall functioning. Individually administered instruments such as the Street Survival Skills Questionnaire can also be given so that the examiner can form inferential hypotheses about the youth's overall level of adaptive functioning.

Personality and Psychopathological Measures

It is recommended that examiners obtain standardized measures of personality functioning whenever possible. Two sources of data: observer/parent reports and self report instruments can prove helpful. When possible to obtain, observer ratings using parents, teachers, and/or residential treatment staff can provide valuable objective information concerning the functioning of the youth. Typical instruments utilized in this context include the BASC, the Connors Comprehensive Behavior Rating Scale, and the Devereux Scales of Mental Disorders. Instruments such as the newly revised Connors can be especially helpful in that they contain validity scales and the scoring program allows for comparison between raters as well as comparison between observer forms and the self-report form.

The Minnesota Multiphasic Personality Inventory-A (MMPI-A) is frequently used in juvenile court assessments (Archer, 2005; Ben-Porath & Davis, 1996) and can provide an invaluable means of understanding the youth's psychological functioning based upon what is likely the most widely researched psychological instrument to date. Other means of assessing personality should be carefully researched as to *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, Inc., 113S.Ct. 2786* [*1993*]) standards (Rogers, Salekin, & Sewell, 1999). Given such considerations, projective instruments are typically not appropriate in a forensic context. A specific concern in the use of instruments such as the MMPI-A is the use of computer-generated reports. Ethical standards dictate (Heilbrun, Grisso, & Goldstein, 2009) that the examiner holds responsibility for the use of such reports and scores and test interpretations taken from a computer-generated program are not an appropriate substitution for the examiner's knowledge and appropriate use of the instrument. While some have advocated for the use of Computer-Based Test Interpretation (CBTI) (Butcher, 2003), users must remember that both APA *Ethical Standards* and *Forensic Specialty Guidelines* mandate that the examiner is responsible for the content of any interpretive statements. As such, an examiner who uses a CBTI in a forensic setting would be well advised to know the research base for every interpretive statement used in the CBTI, and we would suggest that the limitations of CBTI's for that reason outweigh the potential benefits.

Competency Instruments

Forensic assessment instruments (FAI's) are measures developed specifically for the forensic context and address-specific forensic questions. All forensic assessments must be focused on the referring legal question and use of FAI's with well-established reliability and validity will play a significant role in the use of empirically based assessments. Heilbrun et al. (2009) indicate that a best practice standard for Forensic Mental Health Assessment should include the use of FAI's when

appropriate and applicable. However, as also noted by Heilbrun et al. (2009), such instruments can be misused and should be interpreted only as they were designed to be used, in the appropriate context and with the appropriate examinee population as defined by the normative population of the instrument.

They can be understood in two primary categories: standardized measures and structured professional judgment (SPJ) models. Standardized methods rely upon typical psychometric developmental principals. Early psychometric FAI's for competence used both models: the *Georgia Court Competency Test* (Wildman et al., 1978) adapted for use with juveniles (Cooper, 1997) as an example of a psychometric instrument and the *Interdisciplinary Fitness Interview* (Golding, Roesch, & Schreiber, 1984). Subsequent efforts for adults have been developed using improved psychometric techniques (Heilbrun et al., 2009) and include *The Competence Assessment for Standing Trial for Defendants with Mental Retardation-CAST-MR* (Everington & Luckasson, 1992), *McArthur Competence Assessment Tool-Criminal Adjudication* (Poythress et al., 1999), *Evaluation of Competence to Stand Trial-Revised* (Rogers, Tillbrook, & Sewell, 2003), and *Fitness Interview Test-Revised* (Roesch, Zapf, Eaves, & Webster, 1998).

Although one study describes the use of the FIT R with juveniles, no norms have been published (Kruh & Grisso, 2009). Similarly, the McArthur instrument was utilized in a large study (Grisso et al., 2003) with juveniles, as earlier noted. However, the content of the instrument using examples drawn from adult criminal justice situations may be somewhat inappropriate for use with juveniles. Similarly, while the CAST-MR has been used with juveniles, it is normed on an *adult* population. As such, interpretation of the scores with juveniles would seem questionable. If it is used, we urge that the examiner point out the normative population and the psychometric limitations inherent in using the instrument with juveniles. In such a situation, the FAI may be better understood and used as idiographic rather than nomothetic.

Juvenile Adjudicative Competency Interview

The *Juvenile Adjudicative Competency Interview* (JACI) (Grisso, 2005) is a structured set of questions addressing assessment of the youth's Understanding, Appreciation, and Reasoning in decisions concerning rights waiver, within content areas that pertain directly to the legal standard for competence to stand trial. It is based primarily upon the MacArthur Research Network on Adolescent Development and Juvenile Justice. Importantly, this instrument does not provide a "score" and is not to be considered a norm-based assessment or test, but rather an interview guide or a structured professional (SPJ model). The JACI uniquely assesses functional abilities relevant to juvenile court and should be considered currently the "gold standard" for use in assessing juvenile's competence to proceed.

The JACI assesses relevant functional abilities: what the defendant knows, understands, believes as well as the youth's capacities specific to competency. It accomplishes this by direct questions in specific content areas and also assesses the ability of the youth to learn or remediate deficits with instruction. In cases where the youth gives an incorrect answer, the examiner points out incorrect responses, "teaches" the correct answer, and then, at the end of the interview, goes back and verifies that the youth has in fact remediated the deficit. The JACI addresses specific *abilities* such as the factual knowledge of the proceedings by assessing not only what the youth knows but also what the youth can learn. It also addresses the youth's rational knowledge of the proceedings by addressing how the youth can appropriately apply and use that information. The instrument further assesses if the youth has beliefs that might distort information (as an example if the youth believes that a defense attorney is there to "help" but does so only if he or she believes the youth is actually innocent). The JACI also assesses the youth's specific ability to assist counsel and to make rational and appropriate decisions such as making reasonable and rational decisions about pleadings).

Assessed as well in the JACI are the youth's *Rational and Factual Understanding of Court Processes*. Inquiry is made by the examiner as to the youth's accurate understanding of nature of the trial process, available plea options, potential consequences if adjudicated, and the roles and functions of trial participants. The JACI addresses the youth's *Capacity to Assist Counsel* by assessing if the youth is able to comprehend the inquiries of counsel, respond to counsel's inquiries appropriately, process information given to him or her, and also manage the demands of the trial process such as managing stress, behaving appropriately, and testifying relevantly. *Reasoning and Decisional Making Abilities* are assessed to understand the degree to which the youth is able to make decisions based upon rational reasons and accurate perceptions. As well, the youth's processing skills are assessed with a focus upon the ability to take in, process, and weigh information. Overall, the JACI provides the examiner with the ability to assess not only the youth's factual knowledge but also the youth's appreciation as well as reasoning and decision-making skills relative to competence to proceed. Ultimately, reports based on the JACI will result in data pertinent to distinct but related questions:

- **Functional**—Are there deficits?
- **Causal**—What are the causes of the identified deficits?
- **Contextual and conclusionary**—Are the deficits significant?
- **Remedial**—Can the deficits be remediated?

To illustrate, as documented in the JACI manual, how content and apparent inferences can be seen in questioning a youth about his or her actual level of appreciation rather than simple factual knowledge.

- **Understanding**—What is the name of the offense they charged you with? "*They call it assault-they say that I hit a teacher*."
- **Appreciation**—Would people consider that to be a serious or not so serious offense? "*Not so serious- it happens all the time. Kids get into fights. My friends fight all the time*."

In this case, the youth clearly knows the charges but applies a socially based benchmark in appreciation of the relative seriousness of the charge. How might we understand this result? Three hypotheses about the youth come to mind:

1. He has antisocial traits and may qualify for a diagnosis of conduct disorder.
2. He has a low level of cognitive development that is both simplistic and concrete.
3. Both #1 and #2.

Causal Analysis: Formulating and Testing Competence Hypotheses

As the result of the evaluation, the examiner will now be able to formulate and test various hypotheses about the youth specific to competence. The examiner should attend to *how* the youth makes responses. Does he or she make impulsive choices? Does he or she think in very concrete terms? In addition, when deficits are observed, the examiner should formulate hypotheses about possible *causes* of the deficits using the data derived from the clinical/developmental history and status as well as clinical observations and psychometric findings. In addition, the examiner should formulate ideas about the potential *impact or effect* of the deficits on competence-related functional abilities. The examiner should consider any mental disorders (such as depression, inattention, and impulsiveness related to ADHD) as well as any possible cognitive deficits such as mental retardation. It is important to note that the mere presence of a disorder does not equate automatically to incompetence. Rather, the central question is whether or not the identified disability or disorder functionally impairs the youth to a sufficient degree to interfere with competency functioning. Simply put, a youth may have a mental disorder but that does not automatically mean that the youth is incompetent. Rather, the question is how those symptoms impact the youth specific to the required functional demands of court.

Similarly, the examiner should identify any developmental reasons for poor capacity such as developmental immaturity or specific developmental delays. Identification of such delays should not be subjective but should use specific developmental maturity concepts and criteria earlier identified in the examination.

There are, as well, other potential "nonclinical" causes for poor performance in the competency examination. The youth may be feigning or malingering symptoms. In this regard, when possible, the MMPI-A validity scales may be helpful (Archer, 2005). As well, the examiner may need to assess the youth for malingering using techniques specific to adolescents (McCann, 1998). The youth may have put forth suboptimal effort due to disinvestment, anxiety, and avoidance or a deliberate attempt to perform under actual capacities. The youth may simply be fatigued or may have visual and or auditory deficits. Last, it is clearly possible that the deficits may not be the result of any psychopathology or delay but simply the result of lack of experience and acquired knowledge.

Context and Opinion

If genuine deficits are identified, then the examiner must determine if the deficits are substantial and important enough to result in functional impairment. To answer that question, the examiner needs to make this determination in terms of the probable course and demands of the adjudicative process. Not all hearings are alike. Some hearings require much more of the youth than others. To illustrate, the functional demands on a youth in a hearing that may result in potential Bindover or Waiver to the adult system are inherently greater than a diversion hearing on an unruly charge. Thus, impairment must always be understood within the context of the adjudicative process. Within that context there are other variables. Some youth have support systems such as parents or other involved adults who may be able to support and assist the youth. Sometimes the courts can make reasonable accommodations, such as shorter hearings, providing an advocate or mentor. As well, the examiner should determine if a finding of incompetence is necessary. If the youth does have the requisite capacity but simply is unfamiliar with court processes then the situation may be appropriately managed by careful explanations by the attorney or other court personnel. In Ohio, for example, the new a 2011 law contains a provision for a "reasonable accommodation" to support competence, which could include short breaks, checks to make certain to the youth does understand, and other interventions. Last, the examiner must determine if the degree of deficit sufficient to constitute incompetence? This is best answered in terms of the youth's capacity relative to the demands of the youth's legal situation. Put another way, just how much ability is enough in this particular situation?

Ultimate Issue Testimony and Mandated Components of Reports

Mental health professionals testifying in court are venturing into a world that operates under very different guidelines and rules than typical mental health practice. The question of offering an ultimate opinion is perhaps one of the most salient examples of the uneasy alliance between mental health and the law. Often in forensic mental health testimony, examiners are asked questions that can be best defined as ultimate opinions: such as whether or not the defendant is "competent." Increasingly, forensic authorities have recommended against that practice (Melton et al., 2007) and offer the recommendation that forensic mental health practitioners refrain from offering such opinions. The basis for this recommendation, which we support, is that a determination of competence is a legal rather than a clinical question and calls for the court's interpretation of a legal matter and is thus outside the scope of the forensic practitioner's expertise. Rather, the expert should provide a functional description of the defendant and allow the court to make the judgment as to whether or not the defendant's impairment is of such severity that the trial or hearing should not proceed in order to protect the constitutional rights of the defendant. Many jurisdictions, including federal law, bar mental health professionals from offering ultimate opinions, but some others, such as Texas, require this opinion (AAPL, 2007). Others, such as Ohio, provide specific instructions on the language that the examiner should use, directing examiners to, in a sense, approach the line but not walk over by stating whether or not the defendant suffers from a mental illness or mental retardation and as a result of that condition is unable to appreciate the

nature and objectives of the proceedings and whether or not the defendant can assist counsel (Ohio Revised Code Ann. 2945.38(G) (3)).

Specific to juveniles, certain jurisdictions add additional requirements for the report presented to the court. As an illustration, the Ohio Revised Code (Ohio Revised Code Ann. 2152.55, 2152.56) makes specific requirements that must be contained in the final report. This recent (2011) revision to the law requires the examiner to provide a report that addresses the youth's capacity to do all of the following:

- *Comprehend and appreciate the charges or allegations against the child.*
- *Understand the adversarial nature of the proceedings, including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witnesses.*
- *Assist in the child's defense and communicate with counsel.*
- *Comprehend and appreciate the consequences that may be imposed or result from the proceedings.*

This particular law also requires that if the examiner believes that the youth is impaired by one or more of the criteria but that the child could be enabled to understand the proceedings and assist counsel, then specific recommendations must be made as to accommodations that the court might make. If the examiner believes that accommodations are not sufficient, then the examiner is asked to proffer an opinion as to the likelihood of competency attainment within specific periods allowed for by the statute and the locus of the most appropriate treatment for attainment services, depending upon the needs of the child and the safety of the community.

Remediation

In adult courts, the defendant is presumed competent until shown by the evidence to be otherwise. Then, if the defendant is found incompetent, he or she is ordered into treatment to *restore* the defendant to competency. This conceptualization essentially postulates that the defendant "had" competency but somehow "lost" it (although the distinction for mentally retarded defendants would be less clear). However, not all juveniles, especially younger ones, should be presumed to be competent. Thus, if there are deficits, this determination does not mean that a capacity has been lost and can be restored. Rather, this formulation suggests that the capacity did not exist but can be gained. For that reason, jurisdictions and researchers speak of *attainment* rather than restoration in juveniles.

If there are deficits identified, many jurisdictions then require the examiner to provide an opinion as to the best course of action to remediate the deficits so that the youth can attain competence. While few programs have been described for adults (Davis, 1985), even less are documented for juveniles and there are fewer still data as to what programs have empirical support (Viljoen & Grisso, 2007). In the program described by Davis (op. cit.) for adults, certain components are outlined that we believe are relevant to youth's attainment as well. We suggest that treatment planning for juveniles should focus upon the following critical areas:

- Knowledge and appreciation of the charge
- Knowledge and appreciation of the possible consequences
- Ability to communicate rationally and effectively with counsel
- Knowledge of courtroom procedures
- The capacity to integrate and effectively use the knowledge and abilities at age-appropriate levels in either a hearing or plea arrangement
- Management of symptoms and problems associated with clinical diagnoses

It is important to note that in any remediation program the goal must be to assist the juvenile in attaining functional capacities that would be expected of the typical youth of that age. The focus of the treatment plan must be on those deficits that resulted in the finding of incompetency. Attainment of competency must be the first priority of assessment and treatment planning (Davis, 1985). Problems should be addressed only as they directly affect the youth's competence-related deficits. While programs may identify treatment needs (for example substance abuse or educational) it is only appropriate to address those needs as they specifically address the

functional abilities of the youth to be competent. Specifically, remediation programs should focus only upon the deficits required to restore help the youth attain competency. While other treatment needs may be clear, an attainment program should set as the discharge criteria the attainment of competency. For many youth-serving programs, such a focused orientation may represent uncharted and difficult waters. But competence attainment or restoration, especially involuntary treatment carries unique constitutional protections (*Jackson v Indiana*, 406, U.S. 715 [1972]) that make competency attainment treatment very different from typical youth services.

We suggest that treatment must be individualized, must be provided in the least restrictive treatment setting consistent with the needs of the youth and community safety, and be multifaceted in nature but also specific to the reason for referral by the courts: competence. We also recommend that the multifaceted treatment focus upon all aspects directly related to competence deficits identified and that not all components may be required for each youth. We suggest that treatment address both cognitive (knowledge and appreciation) as well as psychological (anxiety reduction, impulsiveness) and do so in programs that utilize both didactic as well as experiential (such as mock trials) interventions. Such interventions should be tailored to address specific problems with skill (e.g., not interrupting when others are speaking) and attitude (e.g., an oppositionality that leads the youth to reject reasonable advice) that represent core competency problems. Youth in such programs must be periodically reassessed as to their competency functioning and their status reported to the court in accordance with both statutory and clinical requirements.

An Example Competency Examination

Identification

John Doe is a 14.3-year-old (at the time of examination) (09.04.XX), male referred for forensic psychological examination by the Honorable Judge Learned Hand and the Honorable Clarence Darrow, Magistrates of the Court of Common Pleas, Any County Ohio, Juvenile Division. This evaluation is performed pursuant to ORC 2152.51(A): examination of the youth's ability to understand the nature and objective of the proceedings against him and to assist his attorney in his defense. He is charged with Disorderly Conduct, in violation of ORC 2917.XX a misdemeanor of the fourth degree if committed by an adult as well as a Probation Violation. He is presently in the custody of Any County Children's Services and is held at the Any County Juvenile Detention Center while he awaits further court proceedings. Murphy Smith, Esq. of the Any County Office of the Public Defender, represents him before the court.

Confidentiality Limitations and Notification of Purpose

Prior to the evaluation, this youth was informed as to the nature and objectives of the evaluation and the specific lack of confidentiality in that the findings of the examination would be presented in a report to the court. He indicated his understanding and agreed to participate. He was informed that the court had requested an opinion about examination of him as to his ability to understand the nature and objectives of the proceedings against him and to assist his attorney in his defense. He was informed that he did not have to answer any questions for which he thought his answer might prejudice the case and was told that based upon the evaluation that a report to the court would be prepared and that this report would form the basis of testimony if the examiner were to testify in his case. He was told that information that he provided in this examination could be used in disposition of his case. He also understood that with the permission of the court, copies of the report would be given to the prosecutor and to his defense attorney. He was informed that he had the right to speak with his attorney to assist if he should choose to withhold any information during this examination. He further indicated his understanding of these specific circumstances by correctly repeating back in his own words what was told to him, agreed to

proceed and signed the specific documentation to this effect. The first author also reviewed his rights, as described in our agency's Client's Rights Policy, with him. He also restated these in his own words and signed this documentation and agreed to participate in the evaluation.

Evaluation Procedure

The first author evaluated this examinee on 12.15.XX for the period of about 2.0 hours and on 12.19.XX for about 2.0 hours in an office at the Any County Juvenile Detention Center. In all aspects, the circumstances of evaluation were adequate and there were no interruptions or distractions.

The following sources of information were utilized in the preparation of this report:

1. Referral Materials, including Journal Entry and a copy of the complaint from the Any County Juvenile Court.
2. Records of the Probation Office of the Any County Juvenile Court.
3. Motion to Exercise Continuing Jurisdiction dated XX.14.XX, Any County Juvenile Court.
4. Undated letter allegedly written by youth to female staff.
5. Undated story allegedly written by the youth.
6. National Youth Agency Program Assessment Summary completed by Psychologist, dated 03.31.XX.
7. Report of Psychologist, dated 01.XX.XX.
8. Telephone conversation with Caseworker, Any County Children's Services.
9. Pre-Sentence Investigation: Any County Juvenile Court Case 10JU-16439
10. Records of Anytown Crisis Center.
11. Records of the residential treatment center.
12. Records of the children's home.
13. Records of foster care network.
14. Records of Anycity Children's Hospital.
15. Records of the Any County Prosecutors Office.
16. Records of Another County Juvenile Court.

Relevant Background Information

This youth told the first author that he is 14 years of age (09.04.9X) and has a 6-month-old child who resides with the child's mother. He told me that he is in the ninth grade and has career goals of being a professional football player, a lawyer, or a barber. He described his childhood as "bad" and said that he has never gotten along with his father's family very well noting that much of his life has been in foster or out of home care. His mother was shot and killed when he was young and he has resided, when not in care with his paternal grandmother and father as well as his siblings (his then 8-year-old sister being the victim of his original commitment offense). This youth told me that he has been in various treatment facilities and in foster care and "nothing has helped-I already know what I need to do." This youth said that he is in the ninth grade and told me that he has had an IEP and been in the resource room for reading. He said that he was once suspended for gang related drawings but denied ever being expelled.

This youth said that he has never used alcohol but did begin smoking marijuana at the age of 8 and continued until he was 13, quitting because he became active in sports and also because of being in placements. He denied the use of other illicit drugs. He said that he has been, as noted, in multiple out of home placements, naming the residential center and the residential village. He described the residential village as "Annoying-it was all boys" and that he "got kicked out," citing behavioral issues and noting to me, as well, that he believed that he was "done" with treatment. He said that he was also "kicked out" of the residential center due to a fight with a youth whom he had previously known "on the street." He told the first author that he has also been in outpatient counseling but could not recall the name and said that he has never been psychiatrically hospitalized. He denied any history of suicide or self-injurious behaviors.

This youth told the first author that an older brother who forced him to perform oral sex and sexually victimized him. He denied any history of physical abuse victimization. He told me that his family and he have been involved for a long time with child welfare and he could name his caseworker. He told me that he has been in the Detention Center "4 or 5 times" and cited his

primary offenses as "attempted rape and PV's." He said that he has never been placed in the Ohio Department of Youth Services. At present, he said that he is on Level 1 (the lowest level) at the Detention Center. He denied any history of fire setting or animal cruelty.

He told the first author that he is taking medication at present but couldn't tell me their names other than they are used to help him be calm and to sleep. He said that his most serious medical issues in the past have been a broken foot at the age of 14 suffered when playing basketball and also fevers. He said that he has never been medically hospitalized and denied any history of head trauma, seizure, or other neurological involvement.

Collateral Information

A pre-sentence investigation in case 10JU12XCC details this youth's history and notes a family history of substance abuse, physical and sexual abuse, mental health issues, and criminal behavior. It is noted that the youth and siblings were found dependent and neglected in 2003 as a result of physical abuse by the parents as well as the parents' substance abuse. As a result, this youth was placed in various foster homes and relative placements between the ages of 5 and 10. In 2006, his mother was shot and killed while in the process of committing robbery. He was placed with his paternal grandmother and father at the time and following this incident, he was removed to child welfare custody and placed. In the foster homes, he has a history of behavioral issues that are also seen in the school. He has a lengthy history of mental health treatment and has been placed in residential treatment, day treatment, and treatment foster care. He has been diagnosed in the past with ADHD, Oppositional Defiant Disorder (ODD), and a Mood Disorder with Posttraumatic Stress Disorder (PTSD) as also a diagnostic consideration.

A residential treatment center completed an assessment when the youth was 5 and noted that he was born exposed to prenatal crack cocaine, had expressive language issues, a history of neglect and encopresis and enuresis. While in foster care, he was seen by Dr. Mohammed Freud and diagnosed with ADHD, ODD, and Adjustment Disorder.

An assessment at Anycity Children's Hospital took place in 2006 after a younger brother reported seeing this youth perform oral sex on an older brother but this youth denied involvement. Assessed at a crisis center in 2006 due to physical and sexual acting out in foster care, he was placed in a foster home. He was seen again at the crisis center in 2006 due to increased behavioral issues as well as threatening behavior. He was subsequently followed by a psychiatrist, who placed him on a variety of psychostimulant and major tranquilizers as well as medication for enuresis. He was admitted to the day treatment program of the residential center and given diagnoses of ADHD, ODD, and a mood disorder. While in this program, he was arrested for the committing alleged offense.

Subsequently, he was placed at the Foster Network. While there, these diagnoses were continued with the addition of a rule out of PTSD. Placement there was terminated after he allegedly kicked out two cottage windows and in another incident allegedly exposed himself to his teacher and began to masturbate (records also contain notes and a short story that he wrote that contain sexualized and rape scenarios). He was then placed at the Residential center but was dismissed after a short stay due to his substantial behavioral issues including attempting to run away and physically acting out to the degree that staff was injured.

A juvenile sex offender risk assessment completed on 03.30.XX by a certified counselor who noted the above history and using the J-SOAP identified a level of risk requiring residential treatment intervention.

Seen on 01.XX.XX by a psychologist for both competence assessment and sexual offender risk assessment, he was assessed as having an appropriate degree of understanding of the nature and objectives of the legal proceedings and ability to assist counsel. He was also assessed as having multiple behavioral issues and describing the sexual offending behavior as a "lesser aspect of the behavioral reality."

The first author spoke as well, on the telephone with his caseworker; she told me that this youth and his family have an extensive history of

involvement with child welfare. She told me that he has not shown favorable responses to treatment interventions and has been unsuccessfully discharged from the Foster Network and the Residential center, citing behavioral issues, especially concerning sexually inappropriate behaviors and physical aggression.

Current Behavioral Status

Upon interview, this youth was dressed in standard detention-issued clothing. His hygiene and grooming were adequate (disturbances in either can be associated with serious mental illnesses or developmental issues). He displayed no unusual mannerisms and maintained marginally direct eye contact throughout the examination. His speech was normal in tone, rhythm, volume, and pacing. His approach to the evaluation was neither resistive nor oppositional. He did not require frequent redirection, prompting, and refocusing to complete the assessment and was generally very polite and cooperative. He did not become easily frustrated and he did not seem to give up easily on tasks that seemed to be difficult for him.

Overall, his flow of conversation and thought was not remarkable without any noticeable abnormalities. His verbalizations were goal directed and responsive to the examiner's questions. His speech was not pressured, slow, or rapid in pacing. He did not exhibit disturbances of thought typically associated with serious mental illnesses such as rambling, circumstantial ideation, fragmented ideation, flight of ideas, poverty of speech, or perseveration. There were no disturbances in the form of his thinking; that is to say he did not have loose associations or tangential thinking and his cognitions appeared to be overall well organized. As such there appear to be no abnormalities in the form of thought typically associated with serious mental illness.

This youth's affect (emotional presentation) was appropriate and reactive to a stated generally "OK" emotional state. His emotional presentation was appropriate to his stated emotional state and also controlled (a symptom of serious emotional illness can be an inappropriate match between presentation and reported state).

He denied and gave no behavioral evidence of visual, gustatory, olfactory, or tactile hallucinations (abnormalities of perception sometimes associated with serious mental illness). He further gave no behavioral evidence of hearing or responding to hallucinations during any of the examinations. (If he did, in fact, have active symptoms of psychosis, it would be likely that they would have been observed during the interviews, which they were not). As such, there were, in my interviews, no observable indications of the types of perceptual abnormalities typically associated with psychosis.

He denied and gave no evidence of specific delusional thinking. He gave no evidence of systematic paranoid delusions or grandiosity. Accordingly, there appears to be no evidence in the disturbed content of thought as would be typically seen with seriously mentally ill persons.

This youth denied symptoms typically associated with depression such as limited appetite, hopelessness, loss of interest or pleasure, loss of sexual interest, or poor concentration but did complain of poor sleep and increased irritability, which are often symptoms associated with depression. Also upon specific inquiry, he denied active suicidal ideation, intent, or plan. He, as well, denied homicidal ideation. Upon specific inquiry, he denied any history of bipolar disorder or manic episodes such as marked agitation, extreme loss of the need for sleep, racing thoughts, or rapid mood swings. He denied any specific phobias as well as any intrusive obsessive thinking or compulsive behavior. He denied any history of "flashbacks" intrusive thoughts or other psychological consequences of trauma exposure.

This youth was alert and responsive to his environment and there were no problems observed with his attention or concentration. He was not distractible. He was oriented to time, place, person, and situation (that is to say he knew the date, who he was, where he was, and why he was being seen). His fund of general information suggested at least average intellectual functioning. Specifically, he knew the name of the current president and the one preceding, as well as the name of The Ohio State University

Football team and the coach as well as the name and colors of the football team. He knew the direction in which the sun rose.

His concentration was adequate as evidenced by his attention and focus in the conversation with the examiner. His immediate recall was adequate as demonstrated by his ability to recall four digits forward and three in reverse order. His short-term recall was also adequate as demonstrated by his ability to recall three items from memory after a 10-minute distraction as well as simple mental calculations. Adequate concentration was also demonstrated in his ability to mentally perform simple serial subtractions. He showed as well the capacity for basic verbal abstract reasoning as demonstrated in his ability to state conceptual similarities between related objects and concepts, but was somewhat concrete in that he had difficulty with more complex abstractions. This was also demonstrated in his ability to interpret commonly used proverbs. His insight and judgment did appear to be limited as determined by both his history and his responses to situational questions.

Instruments Utilized
Kaufman Brief Test of Intelligence
Second Edition (K-BIT 2)
Slosson Oral Reading Test-Third Edition (SORT)
Minnesota Multiphasic Personality Inventory-Adolescent Edition (MMPI-A)
Juvenile Adjudicative Competence Interview (JACI)

Data Limitations

It should be noted that all psychological test data, including the following results, are hypotheses about a person's functioning that should be considered together with other sources of information about the examinee's functioning. Any test results, including these, represent a statistical measure of the person's psychological presentation at the time of the examination. As such, all statistical measures have a band of error that attempts to estimate the degree of mathematic precision of the results. None of the test data are without this band of error so that some variations may be due simply to statistical chance. All of the data that will be reported will have that band of error, or confidence interval, so that the reader may properly understand the meaning of the measure. A confidence interval is range of test scores within which one can be certain, with a specified level of confidence (say, with 68 %, 95 %, or 99 % certainty) where a person's "true score" falls. (The true score is the average test score that a given test-taker would receive if he/she took the same test an infinite number of times.) As well, test data are compared to a reference group, a statistical sample used to estimate the general (or in some cases, the clinical) reference population. The test data are only as useful as is the similarity of the examinee to the normative group to which they are compared. Last, another important limitation is that psychological test results can be influenced by factors outside of the test, such as degree of emotional upset, reading or cognitive limitations, variations in the environment in which the test was administered and, as well, the degree of cooperativeness of the person being tested. The following test findings must be reviewed with these considerations in mind.

Findings

Cognitive

His cognitive functioning was assessed using the Kaufman (K BIT-2), a brief screen of intellectual functioning. In this instrument, he earned a Vocabulary Standard score of 102 with a 90 % confidence interval (that is to say there is a 90 % probability that his true score falls within this range) of 95–109 at the 55th percentile, which is within the *average* range on this instrument. He earned a Nonverbal standard score of 104 with a 90 % confidence interval of 96–102 at the 61st percentile that is in the *average* range. There was not a significant difference between his verbal and nonverbal abilities at either the .01 level of confidence (that is that the difference is due to chance 1 or 5 out of 100 times). His overall Composite IQ standard score was 104 with a 90 % confidence interval of 97-XX1 at the 61st percentile (a way of visualizing his score would be if 100 people were lined up in the order of their scores, 39 would stand in front of him),

which is in the *average* range of general intellectual functioning on this brief screening instrument. These findings appear to be considerably different than those obtained from the psychologist, beyond a level that would be due to statistical chance or differences between the instruments, but may reflect either variation in effort and motivation or test administration variances.

He was also given the Slosson Oral Reading Test using the Third Edition norms. This instrument is a measure of word recognition and pronunciation that correlates highly with measures of reading comprehension and diagnostic psychoeducational instruments. His score indicated that he reads at the 6th grade level.

Personality and Behavioral Functioning

This youth completed the MMPI-A, a standardized self-report measure of personality functioning. The MMPI-A is the adolescent version of this most widely researched psychological test. It was administered to this youth in one setting. Because his measured reading level was below the level of the test publishers recommendation for a reading administration, the test was given using the online oral administration version supplied by the test publisher. The resulting data were scored utilizing the software provided by the test publisher, Pearson Assessments, and then interpreted using standard MMPI-A references.

The MMPI-A contains validity scales. In this administration, the MMPI-A profile produced by this youth suggests the profile is most likely valid and is a good indication of his current psychological functioning. It appears that he was open and cooperative and did not respond randomly, nor did he tend to over-endorse items in either direction or exaggerate or minimize his problems.

This youth's profile (9′+4-813/6725:0 K/FL) suggests a similarity to youth who tend to be overactive and who may have unrealistic plans and agitated behavior. They may be disorganized and have little patience for details. Often, such youth may appear to be overly self-confident and can be easily frustrated, irritable, and moody. They may become easily bored and act out impulsively. They may show poor judgment and behave in ways that create difficulties for him and for others. Such youth are often risk takers. They have a preference for action rather than thought and reflection and may be talkative and energetic. They have a greater likelihood of conduct problems and may be emotionally labile (volatile) and in certain instances may show symptoms such as flight of ideas, euphoric mood, and a grandiose self-perception.

The two highest scales (4-Pd and 9-Ma) are clearly elevated over the other clinical scales and are also the two most frequently elevated scales in adolescent clinical settings. Over 10 % of adolescent males in treatment settings have this clearly defined profile elevation pattern, although this pattern is also seen in the normative population at a rate of 2 %; but the elevations are usually lower in the normative sample than in clinical populations.

Youth with this profile configuration display behaviors strikingly similar to adults with this profile and almost always have a disregard for social standards and are likely to have difficulties in terms of acting out and impulsiveness. They are often described as egocentric, narcissistic, self-indulgent, and are often unwilling to accept responsibility for their behaviors. They are seen as high sensation seekers and often have a markedly low tolerance for frustration. In social situations, they may make an initially positive first impression but also typically have difficulties in establishing and maintaining close interpersonal relationships. Typically, they are often highly manipulative and shallow. Classic features of an antisocial personality are seen in adults with this profile as well as conduct disorder in adolescents. Youth with similar profiles have a higher risk for behaviors such as aggression, theft, lying, school behavioral problems, running away, and substance abuse (though less so of opiates or hallucinogens). Therapists typically describe such youth as resentful of authority, socially extroverted, narcissistic, self-centered, and demanding. They tend to be hedonistic and behaviorally under-controlled. They tend to do poorly in

insight-oriented treatment and benefit more from a structured behavioral program that focuses upon thinking errors and personal responsibility. It should be noted that youth with similar profiles do tend to have better results in treatment than adults with similar profiles and the personality structure suggested by this profile is less firmly entrenched in adolescents than in adults.

Analysis of the scales derived from the content of the items (as differentiated from the earlier cited statistically derived clinical or basic scales) suggests a moderate level of elevation and that he may have trouble controlling his anger at times and may become overly aggressive. He may have a great deal of interest in violence and aggression.

The MMPI-A also contains scales based upon a factor analytic statistical model of personality, the Psy 5 Scales. These suggest that he has a pattern of disinhibition that can be manifested through high risk taking, impulsiveness, and irresponsibility. He appears to be less bound by moral restraints than other people and shows a callous disregard for others.

Interpersonally, he may have strained relationships due to his poor judgment and acting out. He may need considerable interpersonal stimulation and may become easily bored with others. He also reports several family problems and may be experiencing conflict or discord with parents or other family members. He may be impatient with others and have difficulties in anger control in interpersonal situations.

Behaviorally, adolescents with this profile are often emotionally labile and may have high moods for no apparent reason and downswings that are in marked contrast. Diagnostically, adolescents with this profile should be evaluated for a mood disorder as well as problems with authority and impulsivity. His profile also suggests that he is at risk for substance abuse problems and may have increasing involvement as well as a belief that substances facilitate his ability to interact with others and is a coping strategy. He did endorse items that suggested a desire to succeed in life, which can be an asset upon which to build.

Competency Evaluation

Using a semistructured competency assessment interview, it is found that this youth was able to correctly define the charges against him "PV-Parole Violation" as well as the relative seriousness. He was able to identify the basic plea options available to him, saying that guilty means "you did it–admit to it," not guilty means "you didn't do it–don't admit" as well as a basic statement of no contest "You don't have anything to say." He understood the meaning of the term, "maximum sentence" and said that a plea bargain is "Your attorney and the prosecutor make a bargain for less time."

He correctly stated the role of the judge or magistrate as the person who determines sentences as well as guilt or innocence and "is in charge of the court." He correctly stated that the defense attorney role was to "defend me–help me get out." He identified the adversarial role of the prosecutor as being that of attempting to "make me stay in" and that witnesses "testify for or against you." He correctly described appropriate courtroom behavior as "being calm" and correctly defined perjury as, "You get in trouble for lying." He stated that he trusted his attorney and showed appropriate understanding of the assistance of his attorney by saying that he should not talk to the police without counsel.

He did exhibit not behavior that would suggest that he would be unmanageable in the court as a result of any mental illness or mental retardation. He can, if he so chooses, relate to an attorney as evidenced by his ability to relate to the examiner. He was able to describe the attorney–client relationship but did not fully understand the confidentiality of that relationship. He, as well, can participate in the planning of legal strategy so long as concepts are presented to him in a basic, nonabstract manner. He presently appears to have a realistic appraisal of his circumstances, stating who could be identified as potential witnesses against him and that he could be incarcerated in the Ohio Department of Youth Services if convicted. He has the capacity to disclose to counsel his version of the alleged offense, recalling in some detail his version. He can testify relevantly

and challenge witnesses. He appears to be realistically self-serving, in the legal sense. Overall, in this semistructured interview, he showed a generally good overall understanding of concepts basic to competency. When gaps in his knowledge were identified, they were easily corrected and upon subsequent inquiry, he demonstrated appropriate retention and recall of the information given to him.

When seen on 12.19.XX, he was interviewed using the Juvenile Adjudicative Competence Interview (Grisso, 2005). The JACI is a structured set of questions addressing assessment of the youth's Understanding, Appreciation, and Reasoning in decisions concerning rights waiver, within content areas that pertain directly to the legal standard for competence to stand trial. Based primarily upon the MacArthur Research Network on Adolescent Development and Juvenile Justice, the instrument does not provide a "score" and is not to be considered a norm-based assessment or test but is an interview guide.

Experience and Legal Context of Examination

This youth said that he knows that he has an attorney, stated her name correctly, and said that he felt that he trusted her, and got along well with her. He been arrested before and has prior experience with the court, noting to me that his brother has been involved with the juvenile court but that he did not know much about that. He correctly said the charges against him and could provide an understandable and internally consistent view of the alleged instant offense.

Understanding and Appreciation of Charges, Penalties and Pleas. This youth was able to tell the examiner that he was charged with "Parole Violation" as well as the original committing offenses. He was able to adequately appreciate the seriousness of the charge. He was able to describe a charge that was less serious (e.g., "Stealing cards"), and could tell me a charge that was more serious (e.g., "Rape–Robbery").

Nature and Purpose of the Juvenile Court Trial. When asked what the nature and purpose of a hearing was in juvenile court, he correctly stated the purpose of a trial or hearing "See if I go to DYS…See if I did it or not....See what is best for me…" and could correctly differentiate between the relative seriousness of having to go to a principal's office or to court "You get a charge and could go to jail."

Possible Pleas. He correctly stated that guilty (in juvenile court, admit) meant that "you admit did it" and not guilty (in juvenile court, deny) means "you didn't do it." However, he evidenced adequate appreciation of the plea options as when asked what would happen if he entered a plea of not guilty, he said that he would have to go "to trial see if you did it." He was also able to appreciate the difference between the act and a legal assertion of not guilty, stating that if one actually did the act charged, saying that one could initially deny the charge in order to "give you a defense."

Guilt and Punishment Penalties. He demonstrated an appropriate understanding of what might happen if found guilty and the consequences by stating that he might "have to go to DYS or Placement." When asked what the worst consequence he could have, he replied, "Put me in DYS" and said that this would be the most negative outcome because "DYS is worse."

Role of Courtroom Personnel. He was able to correctly state the adversarial role of the prosecutor stating that "go against me" and that the prosecutor would advocate for the report of the police. He correctly stated the role of his attorney by stating "She protects me" and "To defend me…help me get out…not go to DYS." He understood the role of counsel as an advocate and stated that he could assist counsel by "giving her all the information."

He was also accurate in his perception of the role of the probation officer, stating that the probation officer "makes sure I stay above the law" and named his probation officer. He also was able

to differentiate between his attorney and a probation officer by saying that the probation officer "can send me to jail."

Inquired as to the role of the judge or magistrate, he said, "The judge makes the decisions… what will happen like DYS." He correctly said that the judge would not have a predetermined view of his guilt or innocence because "He has to hear the evidence." When asked if he had to tell the judge if he did the thing charged, he replied that he knew that he had "the right not to speak" and correctly recited his right against self incrimination.

Ability to Assist Counsel. This youth correctly named his attorney and said that he "should listen to her." He did understand the importance of communicating with his attorney, saying that otherwise, counsel "She wouldn't know how to help" if he did not communicate with her.

Ability to Make Decisions. He correctly defined the meaning of the term "Plea Bargain by saying "You make a deal…If the judge says so, then you get a deal for fewer years." He also was able to identify the difference between taking a plea and going to trial in terms of relative risk by saying that if he chose to turn down the plea arrangement and go to trial that he might "Get more years."

His decision-making skills were adequate when given scenarios about choices a youth could make about whether or not to have an attorney, how to assist his counsel, deciding how to plead, and deciding about a plea agreement. In all of his responses, he was able to state adequately why he decided the way that he did, and in doing so evidenced age appropriate autonomy, time perspective, and perception of risk.

Opinions

Section 2152.53 (A) 2 of the Ohio Revised Code first requires an assessment of whether the juvenile has a mental illness, intellectual disability, developmental disability, or a lack of mental capacity. It then requires an assessment of the juvenile defendant's capacity to (1) comprehend and appreciate the charges against him, (2) to understand the adversarial nature of the proceeding including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witness, (3) assist in his own defense and communicating with counsel, and (4) comprehend and appreciate the consequences that may be imposed or result from the proceedings. Each of these is addressed below:

Mental Illness, Intellectual Disability, Developmental Disability, Lack of Mental Capacity

Overall, the data from this examination indicate that this youth is a person who has a history of significant behavioral problems that have resulted in considerable academic difficulties. At the present time, the most appropriate diagnostic classifications for him would appear to be Conduct Disorder-Unspecified, Mood Disorder Not Otherwise Specified, and PTSD as well as ADHD, by history.

In DSM-IV-TR, the essential feature of Conduct Disorder is a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated. Problem behaviors typically fall into four main groupings: aggressive conduct, non aggressive conduct that causes property loss or damage, deceitfulness or theft, and serious violations of rules. Youth who evidence antisocial behavior at earlier ages are seen as being at greater risk for continued antisocial and delinquent behavior.

The essential feature of a Mood Disorder NOS is a disturbance in mood that does not meet diagnostic criteria for any specific mood disorder and in which it is difficult to choose between Depressive Disorder NOS and Bipolar Disorder NOS.[1] This youth presents in his history and in psychological testing as having mood swings and emotional dyscontrol. He has been consistently seen in the past by other clinicians as evidencing symptoms of a mood disorder.

[1]For the Court's information, the diagnostic specifier "NOS" is used in situations where the clinical presentation conforms to the general guidelines for a mental disorder in a specific diagnostic class, but the symptomatic picture does not meet criteria for any of the specific diagnoses.

Last, the essential feature of PTSD is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's personal integrity, or witnessing an event that involves death, injury, or threat to the physical integrity of another person, or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate. The individual's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior). Characteristic symptoms include persistent re-experiencing of the traumatic event (often via flashbacks), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, and persistent symptoms of increased arousal (e.g., hyper vigilance, exaggerated startle response). For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. In the case of this youth, he has been exposed to multiple traumas and losses that appear to have substantially negatively impacted his psychological development and current psychological functioning.

The essential feature of ADHD is a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequently displayed and is more severe than is typically observed in individuals at a comparable level of development. Youth with ADHD are at greater risk for impulsiveness, behavioral problems as well as academic problems.

In summary, he is a youth who has consistently been seen as (and remains in my opinion) significantly in need of intensive mental health treatment. He has been unable to successfully respond to treatment on an outpatient, day treatment, or open/nonsecure residential treatment setting. Typically, youth with similar clinical presentations such as him require intensive, secure, long-term residential care that utilizes evidence-based cognitive behavioral interventions that address thinking errors, behavioral control, impulse control, antisocial and sexualized thinking and behavior as well as trauma informed interventions in addition to specialized educational programs.

Capacity to Comprehend and Appreciate the Charges Against Him

This youth is able to state the name of the charge against him, and can explain what it means. He appreciates that it is a serious charge and that he must return to a court of law to resolve it. He was capable of appreciating the significance of the charge against him. He is clearly aware of the possible consequences and is able to voice both his preferred outcome and the most negative outcome that the court could give him.

Capacity to Understand the Adversarial Nature of the Proceeding, Including the Role of the Judge, Defense Counsel, Prosecuting Attorney, Guardian ad litem or Special Assistant, and Witness

This youth has prior experience with Juvenile Court proceedings and exhibited a reasonably accurate understanding of the delinquency proceedings against him. That is, he understood the purpose of the legal proceedings, which he appreciated as adversarial in nature. He exhibited only one significant gap in his knowledge about court procedures and personnel but was able to learn, retain, and recall the correct information. Specifically, when provided with an explanation about his right of attorney client confidentiality, he was later correctly able to tell me the nature of attorney client confidentiality.

He understands the roles and functions of the key courtroom personnel, including the judge/magistrate, defense counsel, prosecuting attorney, and witness. He also understands his role. As well, this youth also has an accurate understanding of what is involved in testimony and appreciates the nature of both direct and cross examination. Furthermore, he is familiar with his plea options and understands and appreciates their potential consequences. He comprehends the concept of evidence and how it may be used in a legal proceeding.

Capacity to Comprehend and Appreciate the Consequences that May Be Imposed: This Youth Comprehends the Range of Possible Consequences He Faces

That is, he understands and appreciates that he may be found not guilty or guilty (or in the case of juvenile court-adjudicated) and comprehends that the court may invoke a variety of sentencing options should he be found guilty. He was able to state his preferred outcome but was also well aware that he could be sent to ODYS. He also understands the process of plea bargaining, and appreciates how this process may be applicable in his situation. In this regard, he comprehends the rights he would give up if he accepts a plea bargain that is offered and appreciates the risks he would accept in turning down any plea bargain that might be offered.

Capacity to Assist in His Own Defense and Communicating with Counsel

This youth expressed an appreciation for the need to tell his lawyer the truth and based upon the behaviors exhibited during this evaluation, in my opinion he is capable of providing his lawyer with a rational, relevant, and coherent account of details related to the alleged offense. He did not express any paranoid distrust about his attorney. He demonstrated a willingness to ask for clarification when he does not understand a concept. He has the capacity to evaluate legal advice. He is aware of proper behavioral decorum for the courtroom.

Because he has a mood disorder as well as a disruptive behavioral disorder, he may exhibit a negativistic and/or oppositional attitude in working with counsel or make impulsive decisions. However, in my interview with him, he was able to listen to alternative views and identify appropriate behavior as well as perspective in decision making. Clearly, given his emotional disturbances, he may require support and redirection by involved adults.

As noted above, his reasoning and decision-making skills are intact. That is, he does not appear to be unduly vulnerable to acquiescence, and his reasoning about legal strategy, including possible plea-bargains was sound. He has a developmentally appropriate time perspective/future orientation, such that he can think about and apply time considerations when evaluating possible dispositions. He is capable of attending to, understanding, and challenging prosecution witnesses. He is also capable of testifying with coherence and relevance and recognizes the importance of accepting counsel's advice about whether it is in his best interests to testify or not. There was no evidence for any self-defeating motivation, and he is motivated for a favorable outcome. He is capable of managing stress in the courtroom, such that his capacity to exhibit proper decorum in the courtroom is intact.

Accommodations Necessary to Support Competence

This youth has a reasonably accurate understanding of roles and functions of key courtroom personnel, comprehends the charges against him, and comprehends and appreciates the consequences that may be imposed. Although he is capable of assisting in his own defense and communicating with counsel, it is likely that he may exhibit a certain degree of oppositionality or impulsiveness with respect to decision-making about his case and that the stress of a hearing may exacerbate these conditions. As such, at this point, I saw no evidence of need for any specific accommodation to support his competence (if the Trier of Fact does agree with these findings). That being said, he is a seriously emotionally and behaviorally disturbed youth who is at risk of impulsive behavior as well as mood and behavioral dyscontrol. If court or his counsel observes him responding in such a manner, intervention by a supportive adult will most likely allow him to calm and regroup appropriately. Clearly, though, if that is not possible, then the court would be advised to have him re-examined.

Forensic Conclusions

1. Pursuant to Section 2152.53 (A) 2 of the Ohio Revised Code, it is my opinion, that this youth does have a serious mental illness, specifically, Conduct Disorder, Unspecified; Mood

Disorder Unspecified, Posttraumatic Stress Disorder, and Attention Deficit Hyperactivity Disorder, by history.
2. He is not intellectually disabled.
3. It is also my opinion that he is presently capable of comprehending and appreciating the charges against him, understanding the adversarial nature of the proceeding (including the role of the judge, defense counsel, prosecuting attorney, probation officer, and witness), assisting in his own defense and communicating with counsel, and comprehending and appreciating the consequences that may be imposed or result from the proceedings.

Biography

Daniel L. Davis, Ph.D., A.B.P.P. (Forensic), is a psychologist in practice in Columbus Ohio. His practice includes assessment and treatment of emotional and behavioral problems in older children, adolescents and adults, marriage and family counseling, and forensic psychology. He is associated with Netcare Forensic Center as a senior forensic psychologist and is in private practice in Columbus Ohio. Dr. Davis is board certified by the American Board of Professional Psychology in Forensic Psychology. He is the author of two books and coauthor of one and has published numerous articles in peer-reviewed journals. Dr. Davis has held academic appointments at The Ohio State University and Otterbein University. He has provided workshops in both the USA and in Canada and has testified on behalf of the Ohio Psychological Association before the Ohio General Assembly on matters pertaining to psychological services.

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Competency Evaluations for Adult Defendants

10

Daisy Switzer

Adjudicative Competence

The idea that an individual must be mentally competent in order to resolve legal charges is generally thought to be rooted in English common law (Pirelli, Gottdiener, & Zapf, 2011). The standard took hold in nineteenth Century America (*US v Lawrence*, 1899) and since then competence to stand trial has been recognized as both a constitutional guarantee and as essential to the integrity of the criminal justice system (*Drope v Missouri*, 1975). The term "adjudicative competence" encompasses not only those most prevalent issues of a defendant's ability to consult rationally with counsel and to rationally and factually understand the proceedings (*Dusky v US*, 1960) but also functional abilities related to trial competence. The defendant must understand the consequences of decisions made within the legal system, the options available, the legal process, strategies for case plea or resolution, expectations for behavior within a court setting, evidence, rights with regard to calling and cross examining witnesses, waivers, and consequences of incompetence with regard to involuntary treatment (Mumley, Tillbrook, & Grisso, 2004).

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In the USA, legal detention facilities have become de facto care providers for many mentally ill patients. The number of mentally ill defendants in jail settings has increased so much that some facilities such as LA County Jail and Riker's Island now house more mentally ill people than can be found in any psychiatric hospital (Finkle, Kurth, Cadle, & Mullan, 2009). Across cases, about 20 % of defendants are determined to be incompetent (Roesch, Zapf, Golding, & Skeem, 1999).

The issue of competency is both legally and ethically important. If an incompetent defendant stands trial, due process rights are violated. If a competent defendant is hospitalized, civil rights are violated. Further, if a cunning individual manipulates an undeserved incompetency hold, the cost to both society and to those unfortunate individuals who find themselves in the defendant's environment can be deadly (ABC, 2011; *LA Times*, 2008).

The Question of Competence

The question of competence is presented after a defendant is arraigned and prior to trial. If the defendant is found incompetent, the proceedings stop until such time as competence is restored (*Youtsey v. U.S*, 1899). Some defendants will not be restored to competence in spite of intervention and may become wards of the civil courts or resolve their cases in some other way. For those who are found incompetent, the case of *Cooper v.*

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_10,

Oklahoma (1996) established the current low threshold for incompetence. Simple "preponderance" is required for a finding of incompetency because it is suspected that the damage to an incompetent person forced to trial is greater than that done to a competent person forced into treatment.

Findings are critical because when an expert is appointed to help the Court determine whether a defendant is competent to proceed, courts often comply with report findings (Hart & Hare, 1992; Zapf, Hubbard, Galloway, Cox, & Ronan, 2004).

Research suggests that individual differences between alienists influence their decisions with regard to how often they find defendants competent. In past decades, research attributed high findings of incompetence with a misunderstanding among alienists wherein psychotic disorders were automatically presumed to equate incompetence. Among psychiatrists, variation in findings of incompetency ranged between 7 and 62.5 %, while social workers as a group gave the highest percentage of total incompetency findings (Warren et al., 2006). Such high numbers may occur in part because the reports were done by individuals who were not forensic specialists (Murrie, Boccaccini, Zapf, Warren, & Henderson, 2008). Later studies suggest that this problem has at least partially began to resolve (Roesch & Golding, 1980), either due to better education on the subject of incompetency, better testing by experts, or more specialists within the field of forensics. When studied, most contemporary competency findings are determined to be generally accurate (Mossman et al., 2010).

Clinical Judgment

Even after testing and specialization became widespread, statistics suggest that some biases continue to influence incompetency findings. For example, defendants with psychotic symptoms are more likely to be found incompetent than those without such symptoms, jobless defendants are twice as likely to be found incompetent as those with jobs, and defendants with a prior psychiatric hospital hold are twice as likely to be found incompetent as those without a prior hospital hold (Pirelli et al., 2011). These may seem to be logical demographics, but they are also well known. Some defendants may provide inaccurate data in order to secure a particular finding. Checking a defendant's claims with records and collateral sources will help assure that inaccurate demographics do not influence findings.

While most clinicians believe themselves to be accurate in their clinical abilities, research consistently contradicts this. With regard to risk assessment, clinicians are wrong almost twice as often as they are right (Meehl, 1954). This landmark finding holds up across replication and as recently as 1986, Dr. Meehl indicated that "less than 5 % of those findings would require retraction today." Clinicians tend to be unaware of factors that influence their findings (Gauron & Dickenson, 1966), quick to form and slow to change their initial impressions (Ross, Lepper, Strack, & Steinmetz, 1977), and unaware of their own biases (Arkes, 1981; Snyder, 1981). Some are so confident in their findings that they present them to the court as fact, without any backup information. Others take pains to create the most cumbersome reports, and while doing so increases judicial confidence in findings, it has not been shown to increase accuracy (Oskamp, 1965).

The use of actuarial tolls, consideration of alternative diagnosis, and use of peer review can assist clinicians in improving their work. Knowing biases does not alleviate them (Koriat, Lichtenstein, & Fischhoff, 1980), but care in procedure can assure that the highest report validity is pursued.

The Forensic Interview

Setting

A court order is required for an evaluator to conduct a competency to stand trial evaluation. These orders may be sealed (if the defense is requesting the report as part of trial strategy) or they may be open orders, where any of several different

players may have raised the question of competency. In the case of a sealed order, the evaluation is only disclosed to the defense attorney. In other cases, disclosure to the judge, attorney for the defendant, and prosecution is routine (in some cases, there may also be an order for distribution to other parties, such as probation).

Fisher (2008) notes that defense attorneys occasionally attempt to sit in during competency interviews. This is ill advised because having the attorney there suggests to the defendant that the evaluator is not to be trusted. If an attorney attempts this, it is permissible to refuse the interview. If the attorney indicates a concern about the evaluator's processes, the interview can be recorded. When recording interviews, it is important to protect test materials. Determine that the camera is not specifically focused on materials so that test information is not improperly disclosed. If an interview is being recorded, it is essential to disclose that fact to the defendant even if the presence of cameras or tape recorders seems to make it obvious. The intended distribution of those recordings should be made a part of informed consent.

Interviews generally take place in correctional settings or hospitals. Occasionally, an attorney may ask for an evaluation of a defendant who is free in the community. Given that the defendant may be seriously ill and potentially unstable, it is advisable to meet in an office where others are present, such as the defense counsel's office. In correctional settings, a room with slotted glass is usually available for visits, so that materials can be shared. Although nearly every meeting goes smoothly, there are some defendants who are volatile and safety precautions should be taken.

Informed Consent

It is a matter of common sense to secure informed consent before conducting an evaluation. A defendant has a right to understand the procedure before choosing whether or not to participate (APA, 1981). Getting such consent in writing is practical and protective as many ethical complaints against psychologists are due to failure to maintain confidentiality (Bennett, Bryant, Vanderbos, & Greenwood, 1990). In a Court-ordered competency evaluation, confidentiality has limitations because the information is gathered for determination of abilities, the evaluation will be used by the Court in making a ruling about those abilities, and the defendant may not agree with the findings. Media may be present in Court in some cases, leading to notoriety of the offense and public disclosure of the defendant's competency findings. A person may be involuntarily hospitalized or incarcerated. There are serious repercussions from evaluation and the defendant has a right to know them prior to choosing whether or not to participate in the interview.

If the defendant chooses not to participate, secure a signed refusal whenever possible. If not, a witness to the refusal or notation of the defendant's stated refusal should be made, along with the circumstance of refusal. Sometimes a defendant refuses to sign the Informed Consent form, but expresses a desire to participate in the interview. In such cases it is best to discuss the elements of informed consent with the person so that an informed choice to participate can be made. In that case, a notation of the events and "informed assent" is implied. In other cases, the report will have to be done from other sources, as the defendant is not willing to participate.

There are specific guidelines with regard to assessment (APA, 2002) that note confidentiality as an ethical obligation of psychologists. Informed Consent, in writing, assures that the parameters of the evaluation are disclosed to the defendant. Elements disclosed in the informed consent include the evaluator's identity and role, the parameters of evaluation, how the evaluation will be used, what is being evaluated, how the information will be distributed, special issues that warrant mandated reporting (grave disability, danger to self, danger to others), and the possibility that the evaluator will testify (Fisher, 2008).

The informed consent's focus on legality protects the psychologist, while the psychologist's focus on ethics protects the defendant.

When presenting the informed consent, ask if the defendant can read, and if so, give the form to the defendant to read. If the defendant cannot read the form, read it for the defendant. Ask if the defendant understands it and clarify any questions the defendant has about informed consent. Ask if the defendant wishes to sign the form and note the defendant's decision. Once a defendant expresses a desire to participate and signs the informed consent, it can be interpreted as either proactive agreement or at least as acknowledgment of the exceptions to confidentiality outlined in the informed consent form (Pipes, Blevins, & Kluch, 2008).

Interview

Some defendants will decline the interview. If this occurs, it is desirable to document the refusal, either through signature or through a witness (such as jail staff). If possible, ask the defendant the reason for refusal. Some will not even come to the interview room, but many will offer reasons such as a belief that another evaluator would give them a better evaluation, a dislike of men or women (whichever the evaluator happens to be), a paranoid or delusional belief, or a simple situation such as fatigue or illness. In knowing the reason, sometimes allowances can be made and the interview can be reset. Occasionally, an aggressive defendant may present with behavior or verbal threats toward the evaluator. Ask the defendant to stop, and if the behavior does not stop, end the interview. If other evidence suggests that such behavior is abnormal for the defendant, a decision might be considered to try the interview again at another time.

After securing informed consent or informed assent as described above, the interview should commence with a mental status examination. While formal formats to assess mental status are commercially available, they are not required. An individual's orientation to self, place, time, intention, and recent events can be determined. Questions relating to tasks of judgment (such as what to wear in bad weather, why not to eat raw meat, what to do if one witnesses a fire or crime) can give information about a person's task solutions. Attention can be determined not only by the individual's ability to interact within the interview but also by tasks such as counting serial numbers, doing mathematic tasks, spelling simple words forward or backward, and repeating telephone numbers correctly.

Memory can be assessed through knowledge of historical events relevant to the defendant's demographic characteristics (e.g., age, nationality, location) and through the drawing simple objects or recalling words after a delay.

During the course of interview, a general history is usually gathered (not only for information but also to compare with prior records). This includes information such as developmental milestones, family dynamics, school achievement, drug and alcohol experimentation, prior criminal history, social and romantic life, occupational and residential history, involvement with mental health services, physical ailments, special concerns with regard to the pending case, medication needs, sources of support, and elements of trial competency. If the person has prior court experience, ask how past charges were resolved. Some individuals have extensive legal or mental health experience. Gather details in those cases and consider asking the defendant to sign a Release of Information so that collateral information can be compared to interview statements.

Procedures

Collateral Information

Sometimes a defendant will suggest that a third party be contacted to give information. Other times, a third party may be present during the interview. This can be a facility guard to assure safety or a translator. Even if a translator is present, it is advisable to secure a copy of the informed consent in the language spoken by the defendant whenever doing so is possible.

Depending what facility the interview is conducted at, interviews with staff or attorneys can be conducted. Collateral records such as notes

provided by the attorneys or other court staff, jail records, or hospital notes often add substance to an evaluation.

Procedures Are Specific to Context

The issue of competency is context specific (Ryba, Cooper, & Zapf, 2003). An individual may present in a strange or impaired manner, or suffer from a mental illness, without being incompetent.

Testing may be an important consideration of competency to stand trial. Campbell (1999) found that reliance on clinical judgment led to poor inter-rater agreement on diagnoses.

Contemporary practice encourages the use of assessment measures specifically designed to assess competency (listed in Appendix) and, when applicable, traditional testing (such as any of the Wechsler Adult Intelligence Scale [WAIS] scales, Minnesota Multiphasic Personality Inventory [MMPI] tests, or Rorschach) to assist with diagnostics. Test selection varies depending on factors such as the defendant's behavior during the interview, availability of collateral records, the defendant's history, and circumstances of the offense.

During the interview, the evaluator may suspect that the defendant is exaggerating about symptoms or even fabricating them. When this is done intentionally it is diagnosed as Malingering. The diagnosis of Malingering can be made "by the book," following the guidelines of the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV-TR) but it is essential to back up the diagnosis with collateral information.

Malingering

Malingered symptoms tend to be time limited and environmentally opportunistic (Sierles, 1984). Given the potential desire for avoidance of prosecution and related obligations (such as sex offender registration), or perceived rewards from a particular finding, the motive to exaggerate is often present in criminal cases and needs to be considered.

Associated malingering with defendants who showed a "jailhouse lawyer" fixation on case law, failed to exhibit any subtle symptoms of a claimed diagnosis, had spotty employment and a history of financial dependence on others, or who had a history of impulsivity and dishonesty in other areas of their lives.

The most commonly malingered clinical symptoms are psychotic, especially auditory or visual hallucinations or paranoid delusions (Cornell & Hawk, 1989) although, less frequently, claims of amnesia or intellectual impairment are made. Malingerers tend to draw more attention to their symptoms than mentally ill patients do (Ritson & Forest, 1970), tend to reply "I don't know" to routine questions (Nies & Sweet, 1994), show symptom inconsistency, describe rare symptom constellations, and have symptoms that fluctuate between settings (Gothard, 2001). There is also a tendency to be more concerned with how their symptoms impair their competency than with how treatment can be found. When asked how they cope with hallucinations, many exaggerators fail to outline coping strategies (Falloon & Talbot, 1981), though most mentally ill defendants will have coping methods.

Rogers (1997) found malingering in 17.4 % of cases but cautioned that the diagnosis of malingering does not preclude additional diagnoses.

Test Selection

The case of *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) established guidelines for test admissibility in court. Adopted by all Federal Courts and most States, *Daubert* gave the trial judge the task of ensuring that the expert's testimony rests on a reliable foundation and is relevant to the legal question. The trial judge must ensure that the expert's testimony is (1) based on a scientific theory or technique that can or has been tested for accuracy; (2) the

theory or technique must be subject to peer review; (3) the theory or technique must have a known error rate; (4) the theory or technique must be generally accepted by the field; and (5) must be valid.

It is good practice to ask the defendant if any preparation has been done with regard to testing (Kastl & Podboy, 2008). This can elicit information, such as coaching or a history with test taking. In some cases, sophisticated defendants may become adept at malingering and records review becomes imperative (Robertson & Yaren, 2000; Youngjohn, Lees-Haley, & Binder, 1999). Research shows that coaching can lead to higher likelihood that a person's malingering will go undetected (Rogers, Bagby, & Chakraborty, 1993).

The MMPI-2 or MMPI-2-RF, Rorschach (using the comprehensive system), WAIS intelligence tests, and others are acceptable in forensic assessment. The SIRS, SIMS, M-FAST, and TOMM are used to assess malingering. Competency assessment instruments such as those listed in Appendix are also usually admitted. The PCL-R may be routinely applied in forensic cases as the issue of psychopathy is essential in the diagnosis and placement of criminal offenders.

MMPI-2 and MMPI-2-RF

The MMPI, MMPI-2, and MMPI-2-RF are all versions of the same test. The biggest advantage of the modern version (MMPI-2-RF) is a streamlined format. The advantage of the MMPI-2 is the size of the research body supporting it. The original MMPI is no longer generally used in forensic settings. The MMPI-2 is the most widely used personality assessment tool in forensic settings (Pope, Butcher, & Seelen, 2006). This popularity is, in part, due to validity scales that assess the defendant's test taking attitude, which can be an exaggerated report of symptoms or a superfluous self-presentation or pious profile inconsistent with any criminal behavior (Dalby, 1988).

The validity scales of the MMPI-2 and MMPI-2-RF have been extensively studied. The "F" (Fake) scale alone was found to correctly classify malingerers in 80.8 % of cases (Kucharski, Johnsen, & Procell, 2004). Although the scale has been criticized, replications in research continue to support use of the F scale in detection of possible malingering (Boersma, Mogy, & Schazer, 1993; Lewis, Simcox, & Berry, 2002). Elevated *F* scores might be expected in forensic settings simply due to the stress of incarceration but even then do not generally meet the threshold for malingering. When determining whether an elevated *F* score is due to careful, intentional replies or impulsive, disorganized test style, the MMPI-2 VRIN Scale can assess response consistency, and the TRIN scale can elevate if a defendant is careless in replies (Lewak & Hogan, 2001).

In addition to validity scales, the MMPI-2-RF contains clinical scales and subscales useful in diagnoses. Particularly when a defendant is being truthful, those scales can be useful in treatment planning.

Sex differences have been studied extensively, and findings indicate that female defendants often had *F* scores higher than those found in male defendants (Aderibigbe & Watson, 1996). Even so, their scales were not as high as those found in defendants who were known to be malingering.

The Comprehensive System for the Rorschach

The Rorschach is admissible to Court as part of a diagnostic battery under the standards of Daubert only when the comprehensive system of interpretation (Exner, 1974) is used (McCann & Evans, 2008; Preston & Liebert, 1990).

It is possible to malinger a Rorschach profile. A common method employed by malingerers with regard to the Rorschach is to reject cards, refuse the test, or reply with flat or implausible answers.

Intelligence Scales

The Wechsler Adult Intelligence Scales exist in brief and extended forms. Some version is

commonly used as part of a comprehensive forensic instrument when intellectual functioning is a consideration. There are several subscales to determine the type of disability that exists, if one is present.

A brief screening version is available for cases where intellectual impairment is not a primary concern.

Ravens Progressive Matrices (Raven & Court, 2003) can be used as a screen of basic fluid intelligence in populations for whom the WAIS instruments are inappropriate (such as those who cannot read).

Malingering Screens

While some care must be taken to assure that an incorrect diagnosis of malingering is not made, this is rarely the case in studies (Kurcharski & Duncan, 2006). Those researchers found that a failure to detect malingering is a more likely outcome in the tests than is the misidentification of a seriously ill person as malingering. Successful malingerers more often had higher education and outpatient exposure to mental health treatment (but not inpatient holds). Those possibly misidentified as malingerers tended to have lower education and prior inpatient holds. Vitacco, Rogers, Gabel, and Monizza (2007) caution that even when malingering is a clinical finding, defendants may malinger for various reasons which may or may not be related to the competency issue.

The Structured Inventory of Reported Symptoms, "SIRS," was developed by Rogers, Bagby, and Dickens (1992) to increase diagnostic accuracy in the determination of malingering. This empirical test would help alleviate the concern that simply using the diagnostic criteria of malingering in the DSM IV TR might lead to too many "false positive" findings in cases where malingering was not actually present. Researchers Lally (2003) and Gothard, Viglione, Meloy, and Sherman (2007) have found the SIRS to be an extensively validated and reliable tool for the detection of malingering. Data suggest that reliability is maintained even when defendants are "coached" in malingering (Rogers, Bagby, Gillis, & Monteiro, 1991). Although the Structured Inventory of Malingered Symptomatology (SIMS) is not without flaw, it remains one of the most widely used tests for the measure of malingering in criminal cases.

The SIMS (Widows & Smith, 2005) is a streamlined screening instrument for detection of malingered symptoms. Compared to the *F* and *F*(b) scales of the MMPI-2, the SIMS total score is valid and useful in the detection of malingering (Lewis et al., 2002). While the instrument has subscales, these are less often supported in research as the total number of questions is low. The total score is considered the best indicator of possible malingering.

The Miller Forensic Assessment of Symptoms Test (M-FAST) (Miller, 1995) shares some of the same factors as the SIMS, in that it is a short test and requires limited time to administer. It also contains subscales, but due to the low number of total items these are less supported by research than the total score. Vitacco et al. (2007) suggest that the M-FAST total score can be valid in detection of malingering in forensic samples.

Tests for detection of malingering of intellectual impairment or memory deficits may be needed if symptoms appear in the interview or records. Keep in mind that in organic memory impairment, it is more common to recall past events and to have impairment in short-term memory or recent recollections (Hart, Kwentus, Taylor, & Harkins, 1987). Even with organic amnesia, a defendant will generally be able to give some elements of personal history, especially early life history (Wiggins & Brandt, 1988). Using the interview to gather biographical information, and testing recall as part of mental status (perhaps suggesting three items in the room which the defendant can recall at the end of the interview) can help identify memory problems.

Neurological testing such as dot counting (counting different numbers of dots shown on a series of cards) has been validated as a means of differentiating individuals with mental retardation from controls (Hurley & Deal, 2006).

In cases when a defendant suggests he or she cannot recall the crime due to memory impairments, the Test of Memory Malingering

(Tombaugh, 1996) is useful (Gothard, 2001). This is a visual recognition test with reliable indicators and ability to discriminate between defendant, psychiatric, and intellectually impaired subjects.

Psychopathy

Psychopathy is such an essential construct in criminal conduct and diagnosis that it should be considered in any forensic evaluation. Psychopathy alone accounts for more variability in terms of dangerousness than any other single factor (Meloy, 2010).

Forensic psychology is a relatively new specialization (recognized as such by the American Psychological Association in 2001). Specialization is essential, as the legal consequences of diagnosis may be more severe than could be the case in a treatment setting. Particularly with regard to personality disorders, psychiatrists fall short of expected standards of diagnostic agreement (Drake & Vaillant, 1985). Careful attention to context, history, testing, and research might improve agreement. Psychopathic defendants tend to particularly skilled at swaying the opinions of evaluators.

Psychopathic defendants offer excuses for their behavior, such as alcoholism or outside influences. Often there is some attempt to plausibly justify their behavior. Although primarily an Axis II pathology, some individuals will be psychopathic and also organically mentally ill. In those cases, treating the Axis I disorder can produce a better organized psychopath with increasingly successful predatory behavior, and treatment professionals should be cautioned accordingly.

The Hare Psychopathy Checklist (Hare, 1990), either the Screening Version or the Revised Second Edition, is a psychometrically robust, widely employed instrument. As with other tests, training in the use of the instrument is essential. Without training, raters may inadvertently allow their own bias to contaminate the test scores.

While psychopathy is somewhat rare (only about 20 % of prison inmates in the USA meet the threshold for a finding of psychopathy), it is an extremely important consideration. Psychopathic individuals are more aggressive in treatment settings and are often noncompliant with treatment (Edens, 2009). Psychopaths do not respond well to treatment (Hare et al., 2000) and are more likely to reoffend following treatment (Reid & Gacono, 2002). A psychopathic criminal misclassified as mentally ill will not only sabotage treatment for him or herself but also sabotage the treatment of others in the environment and will prey upon others in the environment.

Psychopathic factors include a lack of empathy and lack of object relations. There is an absence of guilt, although they may express guilt for secondary gain. Though they can be especially witty and charming, the charm is exploitative (Neuman, 1988). Their anger, in particular, tends to be explosive. Often there is antisocial behavior, poor judgment, and failure to learn from experience, uninviting behavior, suicide "gestures" for attention or goal, trivial sex life, poorly integrated personality, and failure to follow a life plan.

Dr. Robert Hare began his work in the diagnostics of psychopathy in 1991, clarifying "psychopathy" and "fledgling psychopath" to describe specific, rather than global, issues of behavior and experience. The Hare Psychopathy Checklist (Screening Version or Revised) are psychometrically robust with over 100 studies each year, publish in world research and used as standard on which other studies are tested. The Hare Psychopathy Checklist-Revised ferrets out the most severe criminals even among criminal populations and the most dangerous defendants. Occasionally, however, a defendant is a psychopath without features of Antisocial Personality Disorder (which is why psychopathy is a different construct). Many factors of psychopathy influence a defendant's competency, but these do not preclude the defendant from competency. Professionals in the defendant's environment should be warned about the presence of psychopathy and placement should be considered with care.

Although features of psychopathy can be reliably and validly detected by small samples of

behavior, a review of records can assure the best diagnosis (Fowler, Lilienfeld, & Patrick, 2009).

Records

An advantage of the Hare Psychopathy Checklist is that it can be scored from records, when records are available. This is particularly important when a defendant refuses the interview.

Even if a defendant complies with the interview and testing, comparison of findings with what is known in the defendant's history can give insight into the defendant's life functioning, typical pattern of behavior, and potential treatment needs. In cases where a defendant has a history of substance abuse or suspected toxic exposure, records can provide clarification of the source of symptoms and indications as to whether these symptoms have resolved in the past.

As noted in the section on Malingering, some defendants cannibalize symptoms they witness in hospital settings. Record review can alert the evaluator to this possibility. In cases where malingering is a primary concern, records are often the best support for the finding.

Circumstances of the Offense

Consider the charges a defendant is facing. How serious are the charges? How much time might this defendant face, and in what setting, if he or she is found competent? What repercussions would a hospital hold have on the person's life? Are there careers to be lost? Families to consider? Victims? Although by no means comprehensive, a well-calculated crime that culminates a long criminal career with no prior mental health treatment may suggest that this individual is more likely than not to have motive to attempt to fabricate incompetency. Comparatively, it is more likely that a first offender with a bizarre, disorganized criminal offense may be experiencing symptoms of serious mental illness that make him or her incompetent.

The Report

Diagnosis

A consideration of incompetency is whether incompetency, when it is present, is due to a mental illness. Thus diagnoses are often given as part of a competency evaluation. A defendant with a serious mental illness may nonetheless be competent. In considering diagnostics, an explanation about how the defendant functions and the extent to which the diagnosis does or does not interfere with competency should be examined.

If the symptoms of a defendant's diagnosis impair competency, but are substantially likely to resolve with treatment, a Court may choose to order involuntary medication. Medications carry risks and diagnosis in a situation where a defendant can be forcibly medicated must be made with the upmost care. When severely ill defendants are properly diagnosed and treated, many of them can be restored to competency (Hebel & Stelmach, 2007). Paranoid and delusional defendants may have irrational fears of the treatment process. In those cases explaining to the Court that the defendant is delusional and unable to make rational decisions about medication is essential to case resolution. Great care should be exercised in explaining what particular symptoms impair the ability to make decisions, and peer review can be used. Such review might take the form of a second opinion.

Within the paranoid spectrum, some defendants do not require medication in order to become competent (Noonan, 1999). In paranoid personality disorder, some concession with the defendant's paranoid ideas and explaining to the defendant the effect of those ideas on competency may have an effect. A defendant may remain paranoid, but still be able to understand that if the paranoia prevents rational defense, involuntary treatment may be pursued. In those cases the fear of lost autonomy in treatment may override the paranoia that formerly impaired competency.

Symptoms of substance intoxication or withdrawal can impair competence, but most of these will resolve with sobriety within the jail setting. If intoxication is suspected it may be prudent to leave the interview and return later to assess whether the symptoms resolve.

If malingering is present, it does not rule out additional diagnoses. Malingering in a forensic setting may be a coping mechanism for stress (Gerson, 2002). The specific symptoms, and how they impair competency, should be addressed in detail so that if a secondary diagnosis is present it does not go ignored.

Writing

A competency evaluation submitted for court consideration should reply to the question of competency while giving sufficient information about the defendant to allow those who read it to draw the same conclusions. A general format might include:

1. An introductory paragraph about the circumstances of evaluation (such as "Per order of the Court, the defendant was interviewed at the jail in order to determine his competency to face charges of Grand Theft Auto, a Felony").
2. A section regarding efforts to secure informed consent ("The defendant was offered an Informed Consent to read and sign. He read the form and indicated he would participate in the evaluation. Through his participation, and his signed consent, Informed Consent was obtained").
3. A section about the defendant's mental status at the time of the evaluation (presentation, personality, psychological and physical symptoms, affect, orientation, and abilities).
4. A section summarizing the defendant's personal and legal history (gathered from the defendant and from available records). Where discrepancies between the defendant's self report and the record exist, they should be explored. In some cases, defendants have poor recollection. In others, records may be in error.
5. A statement about the pending legal charge(s) and a summary of events (as told by official reports and compared to the events as told by the defendant). This introduces the issue of competency by demonstrating the defendant's stated understanding of the charges.
6. Testing section, outlining findings from tests used in the evaluation of the defendant.
7. Diagnosis of the defendant, using the five Axis system of the Diagnostic and Statistical Manual for Mental Disorders (whatever version exists at the time of writing). At present, that system is:

Axis I:	Organic mental illness Substance issues Malingering (or other clinical issues)
Axis II:	Personality disorders Mental retardation
Axis III:	Physical health issues
Axis IV:	Environmental factors (such as pending legislation)
Axis V:	Global assessment of functioning score 0–100 (this can in some cases be compared to historical scores, such as "50; highest past year = 85, per hospital records of recent date," or "0 = unknown")

8. The final section replies to questions of competency:
   (a) Does the defendant have a mental illness?
   (b) Does the defendant understand the charges?
   (c) Can the defendant consult rationally with counsel?

In some jurisdictions, the court may ask for additional information on adjudicative competency, such as whether the defendant has the ability to make a rational decision regarding treatment, behave in court, or safely be released into the community.

Once the report is done, it is signed, dated, and submitted either to the defense attorney alone or to the court, defense attorney, district attorney, and any other parties as ordered. At that juncture the evaluator's work is usually complete.

Testimony

In some cases, a defendant or attorney will challenge or promote the evaluation findings and a court hearing ensues. The evaluator is sent a subpoena asking for a court appearance and often for copies of records used in making the report.

Records are submitted prior to the hearing whenever they are requested (if they are not requested, bring them to court). Often trials do not proceed beyond gathering records. Call the requesting attorney and ask what kind of questions to expect at trial. This will help ensure the best preparation and testimony.

Just prior to the trial, the evaluator should call and make sure it is going forward. Most trials do not.

It is important to know the culture of a court in which one is called to appear. To dress overly conservatively in a rural community can be just as damaging as dressing too casually in an urban setting. The expert should dress appropriately for the court culture.

The evaluator should bring enough copies of her or his curriculum vitae (CV) for the Court, DA, and defense attorney. The evaluator should keep one copy. Testimony usually begins with questions about the expert's CV.

The evaluator should have a copy of her or his report, with supporting documentation for each section (records, test data, and research that the expert may have depended on when making a decision). The expert should be prepared to reply to questions about the report. Some evaluators experience this as a difficult task. It is important to remember that the evaluator is not the defendant. The evaluator is there to reply to questions that the court or attorneys have about the work. When these questions are answered, the court will excuse the expert and at that point the expert's work in the case is generally finished. In rare cases, a second trial may occur, or the expert may be called for a different issue. In all cases, the evaluator should keep organized records in order to assure that testimony goes as smoothly as possible and the best decision can be made in the case.

Billing

Unless an evaluator volunteered to assist the court pro bono, the evaluator should be paid either by the court or by the party that asked for the report (in some cases the district attorney).

Often, courts suggest a maximum fee for evaluations. If a report has exceeded the allotment for a good reason (such as additional research efforts in a life confinement case) it is permissible to ask for the correct total and to offer the court an explanation. The court may or may not honor the request for fees in excess of those ordered, but if it is in the interest of the case to do the additional work there is no reason not to.

If the bill is properly submitted and unpaid after a reasonable time (such as 30 days), it is permissible to begin inquiring into the status of payment. In rare cases, certain attorneys may leave bills unpaid when findings are not in accordance with their own biases. It may become necessary to document unpaid bills and to eventually (perhaps in 60–90 days) ask the appointing judge to order payment without the attorney's approval.

If an evaluator is called to testify, a new bill may be submitted for preparation and testimony, along with travel feels and costs necessary for testimony as allowed by the court. The same rules for payment apply to that situation as to payment for evaluations.

Biography

Dr. Switzer, Ph.D., lives in Northern California, where she specializes in criminal forensic evaluations.

Appendix

Some Examples of Tests Specific to the Issue of Competence

The MacArthur Competency Assessment Tool—Criminal Adjudication
The Mosey Forensic Competency Scale

The Evaluation of Competency to Stand Trial—Revised
The Test of Malingered Incompetence
The Competency Screening Test
The Competency to Stand Trial Assessment Instrument
The Georgia Court Competency Test
The Interdisciplinary Fitness Interview
The Interdisciplinary Fitness Test
The Fitness Interview Test
The Computer-Assisted Determination of Competency to Proceed
The Competence Assessment for Standing Trial for Defendants with Mental Retardation
The Metropolitan Toronto Forensic Service Fitness Questionnaire

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Forensic Neuropsychological Evaluation of Hispanics

11

Inés Monguió

Introduction

According to the US census of 2010 (United States Census, 2012a, 2012b), Hispanics are now 16.3 % of the total population of the USA. Because of their high birth rate, it is expected that the Hispanic population will continue being one of the fastest growing segments in the total of the US population (United States Census, 2012a, 2012b). In the last data collection from the Bureau of Justice Statistics (Unites States Bureau of Justice, 2006), there were 344,400 Hispanic males and females under state and federal jurisdiction or 15 % of the incarcerated population. At the end of 2009, 35.5 % of sentenced prisoners under state jurisdiction for violent crimes were of Hispanic origin. It appears that by sheer numbers alone forensic psychologists in the USA may be asked to evaluate a Hispanic for forensic purposes within the criminal area of forensic psychology. Because of numbers alone there is a high probability that forensic psychologists will get referrals to evaluate a Hispanic defendant for any number of reasons, such as competence to waive Miranda rights, competence to stand trial, mental state at the time of the crime, or mitigation at sentencing hearings. Within civil law matters the neuropsychologist may be called to assess cognitive sequelae of injury, competence to handle affairs or family law matters.

The available statistics about incarcerated Hispanics (Hispanic prisoners in the United States, 2003) do not include how many of them are monolingual for Spanish or with preference to Spanish, and therefore it is speculative but likely, that there is a significant proportion of these individuals who will need to be evaluated in Spanish. In the civil arena as well, a Hispanic with little or rudimentary knowledge of the English language may need to be evaluated by a forensic psychologist. Regardless of preferred language, the assessment of an individual from another culture should be assessed with cultural sensitivity. Awareness of customs about interpersonal dynamics, communication styles, acceptable demeanor and expression, and sociocultural issues would be necessary qualities of the evaluator for a thorough and pertinent conclusive opinion. In addition, for cognitive and intellectual assessment, the neuropsychologist needs to select appropriate testing instruments for the individual being assessed.

In the civil arena such as personal injury, competence in any of various areas, and child custody a forensic psychologist may be called for an assessment of damages or competence. Because of the cultural value of "famislismo" among Hispanics, issues related to child custody and competence among the elderly may not be as prevalent in the Hispanic community as among other ethnic backgrounds. However the possibility exists, and the issues related to this area of forensic psychology will be briefly addressed in this chapter.

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_11,

The ethical principles (APA, 2002) and professional guidelines (APA, 2003) for delivery of psychological services address the need for competence in the necessary areas to deliver the service, including services to minorities. However the ethical principles (APA, 2002) do not give specific guidelines, and there is no standard method of assessment (Rivera Mindt et al., 2008). Although some have called for specific definition of standard of care (Heilbrun, DeMatteo, Marczyk, & Goldstein, 2008), in neuropsychology, including the forensic evaluation of minorities, we follow the standard of practice as best we can, using the information and tools available. But we must *do the best we can* rather than do what one usually does. In cross-cultural evaluations, the neuropsychologist who confidently conducts the assessment as he or she has competently done with nonminorities is not following standard of practice. Familiarity with the culture and the language spoken (Harris, Echemendia, Ardila, & Rosselli, 2001) by the one who receives the service are competencies required of the neuropsychologist for optimal delivery of services (Perlin & McClain, 2009). If these competences are lacking, referral to a suitable colleague is a preferred option. However, there will be situations in which circumstances will require non-Spanish speakers to conduct a forensic neuropsychological evaluation.

This chapter aims to provide a survey of issues related to cross-cultural evaluations in general, and specifically neuropsychological assessment of Hispanics (Manly, 2008). The issues are many, and I am aware that there will be some areas completely omitted, and some visited only lightly. I hope that the interested reader will pursue further reading and training or to add his/her own knowledge to this area if this chapter is found wanting.

General Issues

Ethnicity and Language

Hispanics constitute a heterogeneous group of people that makes any stereotype challenging (Vilar-López & Puente, 2010). It is important to note that the term Hispanic does not refer to a race but to a self-declared ethnicity. Hispanics may have racial characteristics from Black to Caucasian through Amerindian and everything in between. According to the definition by the 2010 US Census, Hispanic origin may refer to "heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States" (United States Census, 2012a, 2012b). Race does not characterize a Hispanic. However ethnocultural values and language do hold a fairly stable threat through the Hispanic community (Pontón, 2001). In spite of variations in accents and vocabulary among the Hispanics, standard Spanish serves as a reference for all the variations. The author, a native of Spain, has been asked a number of times in court if there had been problems in communication with a defendant from Latino America. The examining attorney questioned the author's ability to understand or be understood by the examinee because of "different dialects." The answer is, "No, there were no problems in communication." Variations in accent due to regional speech patterns that vary from the "neutral" official language standard do not make the "dialect" unintelligible. The standard language serves as the basis for communication between regions, regardless of the accent. There are as many variations in accent and usage among various regions in Spain (González Bueno, 1993) as are among various states and areas in Hispano America (NavarroTomás, 2004). Spanish-speaking individuals have as much or as little problems understanding each other than in the USA residents of Tennessee may have communicating to someone from Brooklin (Pontón, 2001).

In addition to the language, the Hispanic culture share common values that affect social and personal behavior, including emotions and their expression. The neuropsychological evaluation must consider and appreciate those cultural and ethnic values that may be crucial in understanding and therefore describing the person the psychologist is evaluating.

Cultural Values

There is a variety of well-entrenched cultural values in the Hispanic community that may be of interest to the neuropsychologist engaging in cross-cultural evaluation. In this section only "familismo" and "honor y respeto" will be addressed because in this author's experience, these two characteristic cultural values most often have relevance in forensic cases. The reader interested in a fuller treatment of these characteristics is encouraged to peruse the references in this section for further information.

Familismo, one of the most important characteristics of the Hispanic culture, emphasizes collaboration and interdependence (Sabogal, Marin, Otero-Sabogal, Marin, & Perez-Stable, 1987; Santisteban, Szapocznik, & Triandis, 1972). This cultural value stresses attachments rather than individuation, reciprocity rather than autonomy, and loyalty to family members beyond the boundaries of the nuclear family (La Roche, 2002). Separation from the "familia" is stressful to the Hispanic person and seems to be predictive of worsening depression and suicide (Chang, Sanna, Hirsch, & Jeglic, 2010). The forensic psychologist must consider this variable when understanding and reporting developmental history, certain behavior pertaining to a crime, and also when interviewing family members. It is known that individual differences such as traits and personality interact with stressful or negative life events to produce pathology (Bernal, Cumba-Avilés, & Saez-Santiago, 2006). For an individual raised within the hallowed tradition of "familismo," being isolated from the extended social and emotional support can be devastating. The value of "familismo" may also obscure the degree of functional impairment in congenital or acquired diminished intelligence. The evaluating psychologist needs to be aware that a borderline or mildly retarded individual may appear to function within normal limits because of the support and protection of the extended family.

"Honor y respeto" (Honor and Dignity) refer to the value given to preserving the honor and dignity of others as of oneself. In cultures that value individualism, such as in the USA, assertiveness is taught, encouraged, and rewarded. In contrast, Hispanics value a communication style that preserves the harmony, so that in tense or emotionally laden interactions, the Hispanic will back down, use humor or indirect remarks, and avoid strife in any manner possible (Falicov, 2001). The concept of "assertiveness" does not even have an equivalent in the Spanish language (although the neologisms, "asertividad" and "asertivo," are creeping in the language). The results of this cultural value may be misinterpreted as passivity or obsequiousness. It may also lead to missed opportunities for gathering important information about the person's emotional state, processing of information, or even rapport because the examinee chooses a communication style that preserved the dignity and honor of the professional and of himself.

Acculturation

The development of cultural identity is transactional, evolving in the context of interactions between personal variables and the external environment (Cuellar & Gonzalez, 2000; Skinner, 2002). Among immigrants, the interactions with the culture, social, economic, and physical characteristics of the host culture may result in partial acceptance or denial of one's original culture and the dominant culture (Roysircar-Sodowsky & Maestas, 2000). Assessing degree of acculturation is necessary in any cross-cultural evaluation.

When evaluating a Hispanic person, the neuropsychologist needs to assess the degree of integration into or acceptance of the host culture (Negy & Woods, 1992). The length of time of residence in the USA may not be a completely accurate measure of acculturation, since many Hispanics choose to live and work in environments that support little need to speak or listen to English (Schwartz, Pantin, Summer Sullivan, Prado, & Szapocznik, 2006) or integrate mainstream values into their lives. There are a number of measures to use when assessing the degree of acculturation, and it is strongly recommended that the evaluating psychologist become familiar

with the measures (Zea, Asner-Self, Birman, & Buki, 2003). The use of instruments to assess acculturation levels helps clarify cultural identity and it is useful for this selection of psychological tests at the time of evaluation (Dana, 1996, 2000) and at the time of interpreting the results (Cuellar, 2000). Information about how examinee identifies with the host culture may be crucial for understanding values, behaviors and customs, and even cognitive styles (Bernal and Knight, 1993; Carbonell, 2000). The Hispanic who is low in acculturation may interact with the neuropsychologist in such a deferential manner that the possibility of refusing to sign a consent form, refuse the evaluation, or ask questions would not be considered (Falicov, 2001).

The variable of acculturation can be crucial as well when choosing what language would yield the most reliable data (Pontón & Ardila, 1999). Pontón (2001) has suggested decision tree for assessing bilingual Hispanics that include assessment of the individual's English language proficiency, which, if poor, may require the use of a qualified interpreter or referral to another neuropsychologist. If the language is adequate for testing, acculturation should be evaluated anyhow (Boone, Victor, Wen, & Pontón, 2007).

Issues in Assessment

Minorities in general (Ponterotto et al., 1995; Maton et al., 2006) and Hispanics in particular are underrepresented in psychology at the doctoral level (Castaño, Biever, González, & Anderson, 2007) although not as bad as it was a few years back when only 0.4 % of doctoral level psychologists were Spanish speaking or had Spanish surname (Gottfredson & Dyer, 1978). The specialty of neuropsychology is chosen by only a few, and of those few only fewer will work in forensic settings. According to some counts, there are from 60 to 100 fully licensed, fully bilingual, and multicultural neuropsychologists in the USA who can do forensic work (Judd, 2012, Personal communication). Therefore, it is likely that English-only neuropsychologist will be asked to assess Hispanics in forensic settings, often with little information regarding cross-cultural issues that are relevant at the time of a thorough evaluation and pertinent conclusions. Although the data is somewhat old, a national survey of neuropsychologists found that 83 % of respondents did not feel adequate working with Hispanic patients and 32 % reported that their training was "totally inadequate" (Echemendia, Harris, Congett, Diaz, & Puente, 1997).

Yet, the Hispanic population must be served by neuropsychology, including in the forensic arena. Defense attorneys seem to be influenced by the language that their client speaks, so that a defendant that speaks Spanish only is perceived as less mentally ill, and therefore referred less often for assessment of competence (Varela, Boccaccini, Gonzalez, Gharagozloo, & Johnson, 2011). Attorneys who consider it difficult to locate an evaluator in their community are less to refer the defendant for a competence evaluation (Varela et al., 2011).

Ideally, proficiency in the English language in the defendant or client should be formally assessed (Acevedo et al., 2003). It is not uncommon that if the Hispanic is bilingual or seems to be able to understand and communicate with the attorney, that the cultural issues will be ignored, and an English-only neuropsychologist will be selected for the evaluation. If that is the case, the neuropsychologist must at least ask the defendant or plaintiff about his or her preferred language. Ideally, a decision tree for the selection of language and tests includes availability of instrument and cultural orientation (Dana, 2000). If the tests to be administered include reading, then reading proficiency in English needs to be assessed (Fernandez, Boccaccini, & Noland, 2007).

The neuropsychologist asked to evaluate a Hispanic may have a casual understanding of the language, leading to believing that he or she is prepared to assess a Spanish-speaking individual for cognitive and behavioral problems. This is not recommended (Judd & Beggs, 2005). It would be much more effective to hire a qualified interpreter even though this option has it owns problems, such as confidentiality, building rapport, discomfort of the examinee with a third person being present, and fatigue. The use of interpreters in psychological and neuropsychological evaluations has been criticized for a number of years (Artiola i Fortuny & Mullaney, 1998; Judd et al., 2009;

Sabin, 1985). Nevertheless, since the reality is that there is not enough Spanish-speaking forensic neuropsychologists in the USA to serve all of the population in need, the use of interpreters will have to be accepted in some cases as the least of available "evils."

When an interpreter must be used, there are steps that can be taken to minimize problems (Judd et al., 2009).

Interpreters

In general clinical psychology, the presence of the interpreter may interfere with the process and dynamics in a number of ways (Biever et al., 2002; BPS, 2008; Castaño et al., 2007). In neuropsychology the use of interpreters is particularly controversial because so much of the data that the neuropsychologist collects depend on the behavioral responses of the examinee. Signs of cognitive problems that are present in the verbal output of the examinee may be obscured by the craft of the interpreter who may not know the important nature of the information he or she is reorganizing. Erroneous assumptions about the functioning of the individual may be based on the translation of interpreters who do not understand the importance of faithfully relaying oddities in language (Judd et al., 2009). When that verbal behavior is heard and then restated, the evaluator who does not speak the language will never know whether he/she is measuring the functions of the subject or the skill of the interpreter (Artiola i Fortuny & Mullaney, 1998; Melendez, 2001).

The use of interpreters in psychometric testing has its own set of problems. If the test has instructions that are published in Spanish from the test manufacturer, these may be read verbatim by the interpreter. However, translated instructions from written English to verbal Spanish are not standard and must be reported as a deviation of standard administration. As always, any deviation from the standardized manner weakens one's conclusions. Most inappropriate is the translation of the content of the test itself. The results of scoring a nonstandardized translation of a cognitive test are not interpretable (Fernandez et al., 2007). Still, interpreters may be more readily accessible than appropriate published tests (Acevedo-Polakovich et al., 2007), and with sufficient interest, time, training, effort, and care, the result of the evaluation may provide important and reliable information.

In some tests or subtests (e.g., WAIS, Instrument for Assessing Understanding and Appreciation of Miranda Warning, Grisso, 1998), the administrator is required or allowed inquiries after the subject's response. These inquiries are usually strictly limited in wording, timing, and number of times an inquiry can be given. This puts the evaluating neuropsychologist in a difficult position. The interpreter cannot be expected to know how to administer tests, thus the neuropsychologist must be especially watchful test results not be further jeopardized by inappropriate inquiries from the interpreter.

In addition to the factors delineated above, fatigue of the examinee will have to be considered as a potential factor in performance. The back-and-forth communication between the neuropsychologist and the interpreter will likely increase the time of administration, and erode sustained attention. This introduces a variable whose effects will be difficult to assess, much less separate from those relevant to the functioning of the individual being evaluated.

One way to minimize the problems in using interpreters when evaluating Hispanics is to use a certified interpreter. Useful Internet sites to find an interpreter are http://www.atanet.org, which is the site for the American Translator's Association, and http://www.najit.org, the Web site for the National Associating of Judiciary Interpreters. Once an interpreter is located, it might be useful to go through some of the points delineated by Sara Koopman (2009) to assess whether the interpreter would suit the needs of the forensic psychologist. For those neuropsychologists not familiar with the uses of trained interpreters in the evaluation, there are tips available on line at http://www.calendow.org reference library (click on publications and then on cultural competence).

In addition to ascertaining training and familiarity with the Spanish language, as well as experience and competence in assisting with psychological evaluations, the gender and nationality of the interpreter and the person

being evaluated may also be useful to consider. For example, within Hispanics, certain nationalities (Spanish, Argentine) may be considered of higher status than individuals originating from Centro America (La Calle, 2010, Personal communication). Even if the interpreter does not subscribe to this status consciousness, the person being evaluated may respond to the perceived inequality. It would be important to the neuropsychologist to be aware of the possibility so that interventions and/or corrections can be placed during the evaluation. It is often useful, even when the interpreter is deemed suitable, that the neuropsychologist meet with the interpreter prior to the evaluation to clarify expectations, set guidelines, and convey the need to be faithful in the interpretation to the examinee's language pattern, grammar, and vocabulary. The interpreter may also be very useful as a source of information for the neuropsychologist about values and issues in the culture of the examinee. The neuropsychologist may ask the interpreter if a specific observation or verbal response fits within the expected "normal" in the culture, or if it would be notable in the original culture.

Occasionally, the Hispanic individual being assessed may have learned Spanish as a second language, be only partly fluent in Spanish, or not speak Spanish at all. Resources for pre-Spanish indigenous languages may be found at http://mayanetwork.org/.

Clinical Interview

The areas in which the neuropsychologist must find information are similar to those that he or she would assess with any individual. For Hispanics, particularly those born in and raised in countries other than the USA, the evaluating neuropsychologist must consider cultural traditions and values in order to do a thorough evaluation. For example, the individual may report one or both parents as being "strict." Too often this word refers to sometimes extreme corporal punishment. Factors in development that the evaluator must consider include overcrowded living conditions, limited schooling, and few opportunities to play, since in some cultures children as young as 6 are expected to work as adults.

Within the Hispanic culture, it is not unusual that individuals born and raised in countries south of the border will not relate autobiographical information in terms of dates and may be hard-put to identify the year or their own age at the time of certain markers or events (Pontón, 2001). This should not be interpreted as pathognomic or suggesting disorientation, but rather it is a culturally sanctioned disregard for that type of information in the life of an individual.

When available, corollary interviews can be the most useful source of information for developmental data. It must be noted though that particularly in forensic criminal cases, the family would likely describe the defendant as "normal" in the years growing up. This may be due to lack of sophistication, but it also may be due to a mistaken impression that they must protect the defendant from providing information that may suggest he was "crazy" and, therefore, capable of doing the crimes for which he has been accused. Specific but open-ended questions about how the child or teenager played, how he or she handled anger, disagreement, traumas, disappointment should be followed by sufficient silence from the examiner to allow the respondent to provide sufficient information. The author recalls a specific interview in Mexico with the mother of a defendant in the USA who had been evaluated and observed for many, many hours and days by a skilled bilingual investigator who had been given specific areas for the investigator to get information on. A few weeks before the trial was to start, it was decided that the author would travel to Mexico with the investigator to interview the family of the defendant. Within a couple of hours and through the judicious use of silence it became amply clear that the defendant had been a very passive child and teenager, prone to crying fits, suffering from insomnia and stomachaches, and never known for initiating activities including games.

For Hispanics born and raised elsewhere than the USA, medical records are often nonexistent, unavailable, or incomplete. The absence of medical records is not surprising in certain impoverished communities, but the neuropsychologist

must enquire deeply about the history so that potential sources of acquired organic deficits can be ruled out. Prenatal care is rare, and malnutrition is common. Domestic violence, if present, may have included beatings of the pregnant mother that could have affected the healthy development of the fetus. Complicated deliveries may result in loss of oxygen to the baby, with potential damage to the brain. Other potential sources of brain injury such as falling from trees or horses, being kicked on the head by animals, or being hit on the head by an adult, need to be explored. Of note is that the standard question "Have you ever been in an accident?" may be understood as referring exclusively to a motor vehicle accident, and therefore the neuropsychologist should spend time asking about concrete and specific sources of traumatic brain injury.

In the gathering of medical information it will be important for the evaluator to assess the presence of unexplainable fevers that may indicate organic causes of brain injury such as infections with parasites that may result in acquired brain injuries. It will also be important to assess the exposure to pesticides. It is not unusual in rural communities in the Hispanic countries to have children using the spraying equipment for crops because it is "light work." Rarely would they have been given protective equipment, and it is not uncommon to hear that, as children, they sprayed each other with the pesticides in taunting and playing. In addition to this potential exposure to pesticides, pollution with dangerous substances may have been present in the sources of water, as well as in the soil in the hamlets, villages, and towns where the examinee grew. The evaluator must assess these areas specifically so that poor memory or lack of awareness about its importance on the part of the person being evaluated does not affect the quality of the data collected by the evaluator.

It will be highly unusual to have any mental health records when the subject of the evaluation was born and raised in a country other than the USA. Enquiring about the mental health history of the family will require creative and sophisticated questions from the evaluator, whether of the person being evaluated, or through corollary interviews (Andrés-Hyman, Ortiz, Añez, Manuel Paris, & Larry Davidson, 2006). Even in the USA, Hispanics tend to not utilize mental health services except on acute basis (U.S. Department of Health and Human Services [DHHS], 2001). In general, they are more likely to use the services of a general practitioner for mental health problems. One likely reason is the cultural tendency to somatize psychological distress (Pole, Best, Metzler, & Marmar, 2005), but there is also the rejection of nonphysical maladies as bona fide causes for disability and illness. The author has been successful at getting information relevant to this area from defendants and plaintiffs and from their family by asking about the presence of somatic symptoms and behaviors associated with mental diagnoses (e.g., headaches, stomach aches, bed wetting, trembling, swooning, nightmares, insomnia, digestive problems, shortness of breath, and so on). If any of those are reported as present in more rare occasions, then the psychosocial circumstances can be explored in depth.

Neuropsychological Evaluation

This author started evaluating Hispanics in 1989. At that time the only published test of intelligence was the Escala de Inteligencia Wechsler para Adultos (EIWA), which had been normed on Puerto Rico subjects in 1955. For years, the neuropsychologist working with Spanish-speaking individuals had to improvise, often collecting local norms, and sharing the findings with colleagues informally at conventions and symposia. Some worked their own translations of English tests and hoped that the cognitive and neuropsychological constructs were universal and not culture specific. A group of Hispanic neuropsychologists took the then extant WAIS-R and met to translate the items through consensus and their own extensive experience (Melendez, 2001).

Some neuropsychologists evaluated "by the seat of their pants," assuming (and hoping) that tests and subtests that were not language based, or

for which langue was "incidental" such as digit span or oral word reading would be "culture free." Research has found otherwise (Acevedo et al., 2000; Arguelles, Loewenstein, & Arguelles, 2001; Boone, Victor, Wen, Razani, & Pontón, 2007; Burin, Jorge, Arizaga, & Paulsen, 2000). The differences are important enough that scores and norms do not readily translate or transfer from one language to another (Ethical Standards 9.02, American Psychological Association, 2002).

Bilinguals appear to be at a disadvantage in verbal cognitive measures (Rivera Mindt et al., 2008), but there have been group differences found in processing speed in bilinguals when asked to perform nonlanguage-based tests in English and in Spanish (Buré-Reyes et al., 2011; Roselli & Ardila, 2003). In the past 20 years or so there has been a significant increase in research with Hispanics either alone or in comparison groups. Findings are accumulating, and it will become easier to find and use appropriate and relevant norms. However, given that the stakes can be very high in forensic neuropsychological evaluations, it is best if we use only published tests with relevant norms. When relevant and appropriate norm, or correction to the published norms are not available, the neuropsychologist evaluating a Hispanic is left with few options (Reynolds, 2000). In this writer's opinion, it is best to administer the available test, report any deviations of standard administration (e.g., changing an item in subtests of general knowledge to one related the country of origin of the examinee), explain the limits of the tests measures in the report, and obtain multiple sources of convergent data.

The main four factors that have been identified in Non-Hispanic Caucasians (verbal memory, language, visual spacial including memory for designs, and processing speed) have also held when neuropsychological batteries were administered to Hispanics (Siedlecki et al., 2010). Research continues on designing and validating tests for Hispanics (de la Plata, 2005). However, for forensic psychologists, unless that test is published by one of the standard publishing houses or tests manufacturers, using a research project no matter how well designed and normed might not be acceptable in court.

The scope of this chapter does not allow writing a compendium of areas and functions to evaluate in neuropsychology (Lezak, Howieson, & Loring, 2004). The areas of functioning covered below are those in which standardized tests exist for use in the USA.

Motivation and Malingering

None of the widely used forced-choice tests of malingering for cognitive functions available in the USA has been normed on Hispanics. Research indicates that in Spain the test of Memory Malingering (TOMM) and the Victoria Symptom Validity Test (VSVT) function much like they do when used on US population (Vilar-Lopez et al., 2007). However, there have been found significant differences in neuropsychological tests between Spanish speakers in Spain and in Mexico (Artiola i Fortuny, Heaton, & Hermosillo, 1998), and the norms found in Spain cannot be assumed to be relevant elsewhere among Hispanics. On principle, test performance below chance level should be taken as suggestive of poor motivation, regardless of the test or of the subject. The problem is when specific performance is given as a "cut-off" score below which the test result is consistent with malingering. The recommendation is that definitive conclusions for performance above chance levels be withheld until we get empirical data about the non-Spaniard Hispanics (Vilar-Lopez & Aliaga, 2010; War-López et al., 2008).

The Computerized Assessment of Response Bias (CARB) has a Spanish version of the test instructions. However, the norms are USA rather than Latin American countries. The word memory test as well (WMT) has a Spanish version. In my opinion the words and word pairs used in the Word Memory Test do not reflect cultural variables. For example, one of the words used in an easy association is "stereofonico" (stereophonic). This word has little meaning for people born and raised in the hamlets of Guatemala or Honduras, many with unreliable or no availability to electricity, and no discretionary income to spend on luxuries such as double speakers for listening to music.

There is a recently published Spanish version of the SIRS. As in the English version some of the questions and the overall rhythm of the structured interview are awkward. However, in the Spanish version the problems are more than the awkwardness of the rhythm of the questioning. The manual of the SIRS-II (Rogers, Sewell, & Gillard, 2010) in Spanish clarifies how the items were translated. Apparently bilingual colleagues were asked to translate certain words in the structured interview. It appears no linguist was involved in the project and no certified interpreters. As a result the word "sleepy" was translated as "somnoliento." In terms of usage in Spanish those two words are not equivalent at all. I very much doubt that there is one single mother in the Spanish-speaking world who asks her baby if he is feeling somnolent. A much needed assessment instrument in this area seems to have been rendered merely adequate. A closer examination of the behavior of the translated test when used on Hispanics could have resulted in elimination or change of items that did not produce the expected result (Mungas, Reed, Marshall, & Gonzalez, 2000). Also of concern is that the grammar in certain sections is so awkward as to render the question unintelligible. Given the paucity of published tests in the Spanish language in the USA, the translation of the SIRS-II seems to this author a regrettable waste of resources (Artiola i Fortuny & Mullaney, 1997).

The Structured Inventory of Malingered Symptomatology (SIMS) (Widows & Smith, 2005) has come up with a translation into European Spanish, with norms collected mostly in Spain. There is not much research on the norms when used with uneducated Hispanics. In the clinical and forensic experience of this writer, I have found a significant difference between non-Hispanic Caucasians and Hispanics regarding items that make the Low Intelligence (LI) scale. Hispanics consistently miss items related to cardinal directions and "general knowledge." Because the best discriminator for good motivation is a sum of all scales below 14, a depressed Hispanic with somatic symptoms may score above 14 because of an overinflated LI scale.

Intellectual Functions

The most often used assessment instruments for intellectual functioning are the Wechsler Adult Intelligent Scales. In the USA there is a Spanish version published by Psychology Assessment Resources (PAR), which unfortunately was only normed on the Puerto Rican population. It is not known how the scale functions when administered to non-Puerto Rican Hispanics, but considering that residents of Puerto Rico, US protectorate, and commonwealth member tend to be more highly educated than Hispanic citizens from Latino-American countries, it is likely that the Puerto Rican normed WAIS-III will underestimate IQ when administered to most non-Puerto Rican Hispanics.

There is a Spanish version of the Wechsler Adult Intelligence Scale-III, which is published in Spain by TEA Ediciones. That instrument is known to underestimate intellectual functions when applied to Mexican, Central, and most of South American individuals. However, there are published adjustments that are useful at the time of estimating the intellectual functioning of Hispanics (Choca, Krueger, de la Torre, Corral, & Garside, 2009; Renteria, Li, & Pliskin, 2008). In addition, there is a Spanish version of the WAIS-III published in Mexico (site) with Heaton in charge of the statistical analysis. However, the confidence intervals tend to be rather large. For some standard scores, the confidence level is so wide as to include moderate deficits to normal functioning.

Some neuropsychologists administer only nonverbal tests of the published intelligence scales in English, and prorate the full-scale score. I do not recommend this approach. First, because there are differences in the performance of Hispanics on nonverbal tasks when compared to non-Hispanics (Roselli & Ardila, 2003), and thus the estimation of intelligence may be as flawed with nonverbal as with verbal tests. More pertinent to forensic neuropsychology is that prorating full scale IQ from a few tests leaves the results and conclusions vulnerable to attack in court.

Whenever possible it is best to administer a full IQ test, reporting any nonstandard administration, explain problems in the application of published norms to the specific individual, and supplement the IQ score with as many well-normed tests as possible to collect convergent data on intellectual functioning.

The Reynolds Intellectual Assessment Scales (RIAS) has a version that was translated and normed mainly in Spain (Reynolds & Kamphaus, 2003). There were a few Latino-American subjects in the normalization sample. Thus far it is not known how accurately the test measures broad intellectual functions in non-European Hispanics. The RIAS has an index for memory that could be useful if accurate when assessing this population.

Although psychoeducational batteries are not favored by neuropsychologists, the Spanish versions of the Woodcock Johnson Cognitive Ability Scales, Woodcock-Munoz Batería-III (Woodcock & Munoz-Sandoval, 2005), can be very useful to supplement the standard score obtained with available versions of the WAIS-III. The latest version is the Batería-III. In this author's opinion the Batería III is quite useful and informative. In addition to scores on a variety of areas, it provides an index of general functioning that is quite consistent with the intellectual quotients and it could supplement the statistics found through either the Mexican version of the WAIS-III or the Spanish version of the WAIS-III.

There is a published volume of tests and norms for Spanish-speaking individuals (Pontón & Ardila, 1999). The subjects of this research however were aged 62 and above, and therefore the norms are probably not appropriate for individuals younger than the normative sample in the civil area of forensic psychology, particularly when the neuropsychologist is asked to evaluate competency in the elderly, the results of the investigation of Pontón and Ardila (1999) may be useful to assess general functioning.

The Ravens's Standard Progressive Matrices has been used to assess reasoning and intellectual abilities in various cultures. The test results are similar across ethnic groups in societies that use and teach reading. Over time the scores have increased over time, but the changes differ across ethnic groups (Raven, 2000). There are norms specifically for Hispanics stratified by years of education in the Neuropsychological Screening Battery for Hispanics (NeSBHIS) (Pontón, 2001; Pontón et al., 1996).

The tests listed above are some of the available options for use with Hispanics, but it is by no means exhaustive. The Web site for the Hispanic Neuropsychological Society (http://www.HNS.org) includes a list of published tests in Spanish which is updated frequently.

Memory

There is no published scale in Spanish specifically for memory available in the USA except for the Bateria Neuropsicológica en Español (Artiola i Fortuny, 2003, Personal communication). The BNE has norms for Mexican Hispanics living in the border with the USA for memory, verbal learning, digit span, Stroop test, visual learning and memory, and Wisconsin Card Sorting test. The BNE has been criticized for being overly ambitious so that some of the cells are small and the statistical conclusions are suspect. The researchers (Artiola i Fortuny et al., 1998) stratified the samples in terms of age and education, which indeed rendered some cells quite small, but stratification on those criteria has been recommended as the best approach to reduce Type I errors (Gasquoine, 2001). Barring the kind of resources available to large test publishers, the BNE is the best that we have available in the USA at the moment to assess memory in the Hispanic population. The manual is in Spanish. Dr. Artiola was asked after its publication why she had chosen to not include English in the manual even though it is published in the USA. Her reasoning was that if the test purchaser could not read the manual in Spanish, then he/she was not qualified to assess a patient in Spanish (Artiola i Fortuny, 2003, Personal communication).

The Spanish and English neuropsychological assessment scales (SENAS) (Mungas, Widaman, Reed, & Tomaszewski Farias, 2011) is a relatively

new test that is showing good promise in assessing individuals in five cognitive dimensions such as episodic memory, semantic memory/language, spatial ability, attention/working memory, and verbal fluency. Although the norms for this test are for individuals 60 years old and older, there are plenty of situations in civil and criminal forensic evaluations that will be appropriate to consider the SENAS as an alternative to measuring cognitive functions in Hispanics. Also, for the older Hispanic population, there is a published volume with extensive norms for Hispanics that include measures of learning and memory (Ardila, Rosselli, & Puente, 1994). It is encouraging that other instruments are being normed on Mexicans (Cherner et al., 2007), and that the big test publishing houses are adding more tests in Spanish every year.

Language

The Escala de Afasia Multingüe is the Spanish version of the Multilingual Aphasia Scale. The norms are old, but again, it is the only standardized published scale available in the USA for assessment of expressive and receptive language. The use of the Boston Vocabulary Test and Peabody Picture Vocabulary test has been proposed by neuropsychologists who work with Hispanics some, but those tests have not been standardized in the translations, and their use in forensic settings is discouraged.

Attention

Color Trails is normed for Hispanics and it remains one of the most often used instruments to assess simple and alternate attention in this population. There is no published instrument for visual attention tasks and any use of instruments such as cancelation tests or the test of variables of attention (TOVA) need to be interpreted with a caveat that we really do not know how those instruments measure the relevant functions in populations in which it was not normed.

Visual Spatial

There are available norms for the Rey-Osterreich Complex Figure (Ponton et al., 1996).

Executive Functions

There are norms for the Wisconsin Card Sorting test for Hispanics in the Bateria Neuropsicológica en Español (Artiola i Fortuny, 2003, Personal communication). Recently Psychological Assessment Resources has included a version of the WCST with Spanish norms. There is a test of executive functions known as the Test of Verbal Conceptualization and Fluency (TVCF) that is proving to be useful in multicultural populations (Reynolds & Horton, 2006).

Competence

The assessment of competence, whether it be for criminal or civil matters, needs to be geared towards the circumscribed areas of functioning that are pertinent to the competence area assessed (Monguió, 2010). As of this writing there are no standardized published instruments in Spanish to assess competence in any of the criminal areas that usually call for evaluation, such as competence to stand trial or competence to wave Miranda warning (Frumkin & Garcia, 2003). However, the need is so dire, and the consequences of the assessment potentially so life-changing, that it is worth expanding on this even though there are no translated tests available. The assessment in these areas, as is the case with competence in civil areas, must be done by careful identification of the tasks that must be done for competent functioning, and neuropsychological assessment of the cognitive and behavioral functions needed to complete those tasks (Grisso, 2003).

A note of caution regarding Miranda warnings: It appears that there is a great variability among states and even jurisdictions in the quality of the translation of the Miranda Rights that is

read to the defendant prior to the investigative interviews. In some cases the translation of the Miranda Rights is not standardized but is rather left to the "qualified" police officer initiating the interrogation. It must also be considered that most of the Hispanic countries south of the US border have a legal system that is based on the Napoleonic concept of law. For these individuals "telling the truth to the judge" is an assumption that bodes well for them. They do not understand an adversarial system such as the one in the USA, and they may perceive telling their story to the police officers as their best option. All of these must be considered at the time of drawing a conclusion about the examinee's ability to "freely and intelligently" having waved his rights in interrogation.

When addressing issues of competence in the civil arena, cultural values and expectations must be taken into consideration. The concept of famislismo makes it likely that family members will feel responsible for managing the affairs of the elderly or impaired. Human nature being what it is, some family members may have the wellbeing of the elderly or impaired person foremost in their minds, whereas others may maliciously or honestly consider the needs of the family to be above the needs of the individual (Sabogal et al., 1987). The neuropsychologist must be aware of over-pathologizing culturally sanctioned behaviors. For example, elderly Hispanics may not have used banks consistently because of mistrust or unfamiliarity, so that he or she may not be familiar with tasks such as such as balancing a checkbook and writing checks. When the issue of competence to manage his or her own affairs is raised, some of the responses to standard questions by the neuropsychologist in these evaluations may give the wrong impression about the true capacity of the elderly or impaired to understand and manage financial matters.

If a test instrument cannot be found that has been validated on the specific Hispanic language and culture, the neuropsychologist may have to use a test normed in other populations. If that is the case, it has been suggested that the neuropsychologist or psychologist take corrective steps such as reporting the unknown validity for the Hispanic subgroup, seek records or interviews about the individual's previous performance, so that incongruence between assessment results and functioning can be studied and resolved (Acevedo-Polakovich et al., 2007).

Conclusions

The task of providing neuropsychological evaluation in forensic areas that is sensitive to cross-cultural issues may be daunting, but it is necessary. When dealing with a heterogeneous group such as Hispanics, with various degrees of acculturation and bilingualism, the difficult task gets more complicated. My goal in writing this chapter is to identify specific areas of concern, offer potential solutions, and provide resources to those neuropsychologists who may be asked to conduct a forensic examination.

Biography

Dr. Inés Monguió, Ph.D., was born and raised in Spain. She is fully bilingual and completed her graduate work in the USA. Dr. Monguió is in private practice in Ventura, California, concentrating on clinical and forensic neuropsychology and behavioral medicine.

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Sociological Testimony in Employment- and Education-Related Litigation

12

Stephen J. Morewitz

Starting in the early twentieth century, and continuing today, sociological evidence began to play an increasingly important role in employment and education litigation in the USA. Roscoe Pound (1870–1964) was one of the most cited legal scholars of the century (Shapiro, 2000). He wrote a series of law review articles in 1911–1912, in which he argued for "sociological jurisprudence," or the process whereby judges used the social and political sciences as a foundation for resolving legal issues (Pound, 1911a, 1911b, 1912). Pound believed that sociological jurisprudence encourages judges to be more sensitive to the actual effects of laws on social groups and promotes the equitable application of law in specific cases.

In the US Supreme Court case, *Muller v. Oregon, 208 U.S. 412* (1908), Louis D. Brandeis (1856–1941) presented sociological data and other information to the court. The "Brandeis Brief" opined that long hours of hard labor had a deleterious impact on women's health. The Supreme Court agreed unanimously. This was a turning point in constitutional law because the US Supreme Court had for the first time accepted the relevance of the social sciences in a constitutional adjudication (U.S. Supreme Court, 1908).

Forty-six years later, a book by social scientist Gunnar Myrdal (1898–1987): *An American Dilemma*: *The Negro Problem and Modern Democracy* (1944) was cited by the US Supreme Court in its landmark decision in *Brown v. Board of Education of Topeka and 347 U.S. 483* (1954). That decision held that separate public schools for African-American and white students were unconstitutional.

One of the best examples of the impact that a sociological investigation can have on society was the "Coleman Study." In 1966, sociologist James S. Coleman's "Equality of Educational Opportunity Study" (EEOS) became one of the most cited investigations in educational sociology. It was widely used in litigation involving school boards that were confronted with lawsuits designed to compel them to desegregate. The "Coleman Study," also known as the "Coleman Report," triggered debates about the many factors that impact school effectiveness, and these debates continue to the present time. According to the "Coleman Study," a student's background and socioeconomic status is a much better determinant of educational success than merely the number of dollars spent per pupil. More importantly, the investigation showed that differences in the quality of teachers and schools had a high impact on student performance (Coleman, 1966).

Sociological testimony and consultations can assist attorneys in various aspects of litigation related to employment, schools, and colleges and universities (Coleman, 1966; Jenkins & Kroll-Smith, 1996; Morewitz, 1996, 2003, 2008; Myrdal, 1944; Weiner, 2006).

Sociologists teach, conduct research, and consult with organizations and policy makers on

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_12,

some of the following aspects of employment and education litigation, including:

1. Incidence, prevalence, and patterns of problems in the workplace and educational institutions.
2. Risk factors for workplace- and education-related problems.
3. Offender or criminal profiling.
4. Impact of workplace- and school-related conditions on social, family, educational, and occupational functioning.
5. Type and effectiveness of organizational policies, procedures, and prevention activities.
6. Sociological aspects of assessment and treatment of problems.

In this chapter, we will discuss research findings in these six areas and use some composite cases to demonstrate how a sociologist can assist defense and plaintiff attorneys and law firms in employment and education litigation.

Incidence, Prevalence, and Patterns

In employment law cases, plaintiff attorneys use sociological testimony to help prove that management knew or should have known that certain negative behaviors were prevalent and that management was derelict in not developing appropriate policies and procedures to deal with the issues caused by those behaviors. Sociological evidence can also be used by defense attorneys to help prove that both the incidence and prevalence of the problems were low and that management had developed and implemented reasonable and effective policies and procedures to deal with the problems (Centers for Disease Control and Prevention, 2010; Centers for Disease Control and Prevention, updated August 20, 2009; Morewitz, 1996, 2003, 2008).

Sociologists teach and conduct research about the incidence, prevalence, and patterns of problems such as discrimination, substance abuse, sexual harassment, stalking, death threats, bias and hate crimes, suicidal behavior, injuries, and homicide in the workplace. As a result, they serve as employment and public policy consultants and help develop laws and policies related to the prevention of these problems in work settings.

Employment Discrimination

Sociologists study the patterns of discrimination in different work and educational settings, including the incidence and prevalence of age, race, and gender discrimination (Morewitz, 1996; Tolbert Coombs & King, 2005). In one lawsuit, a sociologist was retained to testify against a trade union local that was accused of racial discrimination in assigning jobs during a period in which jobs were scarce (Jenkins & Kroll-Smith, 1996).

In age, race, and gender discrimination cases, sociologists collect and analyze statistical data related to alleged practices of employers in hiring, promotion, and termination. In addition, they may collect and assess qualitative data, such as the content of employment memoranda, in order to assess the patterns of alleged employment discrimination. For example, in discrimination cases involving the mandatory retirement of airline pilots at a specific age, sociologists can collect and analyze social, demographic, and behavioral conditions in human factor research related to airline pilots' competency.

Sociological surveys provide data on the incidence, prevalence, and patterns of self-reported sexual harassment (SH) in different work and educational settings (Kwok et al., 2006; Morewitz, 1996; Nagata-Kobayashi, Maeno, Yoshizu, & Shimbo, 2009; Wang et al., 2012). For example: A study of 536 responses to a "Hospital Sexual Harassment Questionnaire," given at two general hospitals in Taiwan, showed that the 3-month SH incidence rates of hospital staff members, allegedly harassed by coworkers, patients, and patients' families were 2.4 %, 4.3 %, and 1.7 %, respectively. "Telling sexual jokes was the most common type of SH" (Wang et al., 2012).

A survey of 285 dental hygienists in Virginia found that 54 % of the dental hygienists surveyed reported suffering SH. Of these dental hygienists, 50 % reported that SH had occurred 4 or more years previously, and that the offenders were either male dentists (73 %) or male patients (45 %). Fewer than 10 % of the dental hygienists surveyed reported being harassed by women (Pennington, Darby, Bauman, Plichta, & Schnuth, 2000).

Sociological studies can also assess the perceptions and concerns of students, faculty, and staff regarding discrimination. These investigations can determine the social impact of these perceptions and concerns.

Substance Use and Abuse

Workers who are intoxicated or are under the influence of other drugs, pose a safety risk both to themselves and others, as well as usually having impaired performance on the job. A survey, of a national sample of 9,828 Australian workers who were 14 years of age or older, found that almost 9 % of the employees surveyed usually drank alcohol on the job and that 0.9 % reported that they usually used drugs at work. Hospitality industry workers had the highest rates of alcohol and drug use on the job (Pidd, Roche, & Buisman-Pijlman, 2011).

Data on alcohol and drug use by US adolescents reveal different trends and patterns of substance abuse. For example, Johnston, O'Malley, Bachman and Schulenberg (2012) reported that marijuana use among teens increased in 2011 for the fourth year in a row. This trend is in contrast to the significant decline in marijuana use that had occurred in the previous decade. The survey also showed that one in every nine high school seniors reportedly used synthetic marijuana, which goes by such street names as "K2" and "spice." (Since March 2011 these substances have been listed on Schedule 1 of the Controlled Substances Act.) The perceived risk of drug use may be an important factor for alcohol and drug use. In recent years, teens have increasingly tended to view marijuana use as innocuous, and this factor is a possible explanation for their increased use of the drug in recent years (Johnston et al. (2012)).

Stalking and Violence in the Workplace and Schools and Universities

Researchers have studied the rates and patterns of stalking victimization in different populations (Dressing, Kuehner, & Gass, 2005; Miedema, Easley, Fortin, Hamilton, & Tatemichi, 2009; Morewitz, 2003; National Institute of Justice, 1998; Sheridan, Blaauw, & Davies, 2003). Some studies show that rates of stalking victimization among women were between 10 and 16 %, whereas among men, rates of stalking were between 4 and 7 %. Apparent rates of stalking differ, depending on factors such as the samples and definitions used and the rates of false victimization reports (Sheridan et al., 2003).

Sociologists evaluate the extent to which threatening behaviors or other violence occurs in different work and educational settings (Miedema et al., 2009; Morewitz, 2008). Individuals may threaten to kill people in the workplace or blow up the work sites. According to the US Department of Justice (July 26, 1998), two million individuals were the victims of violent crimes or threatened with a violent crime in the workplace between 1992 and 1996. Stalkers may be partners, ex-partners, acquaintances, or even strangers (Morewitz, 2003). Some of the victims of workplace stalking may lose their jobs if their employers believe that the stalking is disruptive or dangerous.

Nurses, social workers, and other professionals may be threatened with physical violence (McKenna, Poole, Smith, Coverdale, & Gale, 2003; Miedema et al., 2009; Morewitz, 2008). In a survey of 551 first-year registered nurses, 35 % of the nurses reported workplace-associated verbal threats, 30 % reported verbal SH, and 29 % reported intimidation (McKenna et al., 2003).

Sociologists have examined the incidence, prevalence, and patterns of workplace homicides (WHs) (Morewitz, 2008). In 1998, WHs were the second highest cause of job-related fatalities. Taxicab drivers and chauffeurs suffered 17.9 homicides per 100,000 workers, the highest WH rate, but only 4.2 % of all work-associated homicides. That same year, public police and detectives had 4.4 homicides per 100,000 workers or 4.4 % of all WHs. Retail trade and services accounted for ~60 % of all WHs (Sygnatur & Toscano, G. A. (Spring, 2000).

The rates and patterns of assaults and other violent crimes on the job have been investigated by sociologists. Between 2005 and 2009, health

professionals accounted for 14.1 % of the victims of workplace violence (WV) (Harrell, 2011). Data from the Minnesota Nurses' Study showed that for the 12 months, prior to October 1, 1998, the adjusted physical assault rates for licensed practical nurses was 16.4 per 100 persons per year and for registered nurses was 12.0 per 100 persons per year (Gerberich et al., 2004). An investigation of WV against nurses in Hong Kong found that: 20 % of the nurses reported physical abuse, 45 % of the nurses reported bullying, and 73 % reported verbal abuse. A majority of the nurses who suffered verbal abuse tended to tell a friend, family member, or colleague about the incident. "In one extreme case, a nurse attempted suicide following verbal and physical abuse" (Kwok et al., 2006).

Military sexual trauma (MST) is a term used by the Department of Veterans Affairs to refer to rape, sexual assault, and SH that occurred during military service. Suris and Lind (2008) reviewed studies of MST and found a 4–71 % prevalence rate reported in studies using face to face interviews and a 17–30 % prevalence rate in studies using mailed or telephone surveys. For example, in a telephone survey of 558 women veterans, who had served in the Vietnam war or in subsequent eras, 28 % reported that they had been raped while in the military (Sadler, Booth, Cook, & Doebbeling, 2003). The US Veterans Administration (VA)'s FY 2003 national MST surveillance data from 3.035 million VA patients indicated that 21.8 % of women and 1.1 % of men experienced MST (Kimerling, Gima, Smith, Street, & Frayne, 2007). Of the 125,729 veterans of the Iraqi and Afghanistan wars who received VA care, 15.1 % of the women and 0.7 % of the men reported MST when screened (Kimerling et al., 2010).

Sociologists have researched school-based bullying, death threats, suicidal behavior, and related problems (Morewitz, 2008). According to a 2010 study by the Centers for Disease Control and Prevention, 19.9 % of students in grades 9–12 indicated that they had been bullied at school settings in the previous 12 months. Female students (21.2 %) were more likely to report being bullied than male students (18.7 %). In this investigation, 11.1 % of the students surveyed (15.1 % of the male students and 6.7 % of the female students) reported being in a physical fight on school property in the 12 months that preceded the survey (Centers for Disease Control and Prevention, 2010).

Researchers have studied the rates of homicides, suicides, and suicidal behavior among school-age youth. Data from the School-Associated Violent Death (SAVD) study showed that between July 1999 and June 2006, 109 school-related violent events took place that resulted in 116 deaths. Approximately 1 % of all homicides and suicides among school-age young people occurred on school property, on the way to or from school, or on the way to or from school-sponsored activities (Centers for Disease Control and Prevention, 2008).

Sociological research can reveal the degree to which adolescents who have received specialty mental health services report having had thoughts about suicide or attempted to commit suicide. Among young people aged 12–17 who received specialty mental health services in 2009, 20.8 % thought about suicide or tried to commit suicide (Substance Abuse and Mental Health Services Administration, 2010).

Bias and Hate Crimes

With the expansion of social media, students increasingly are at risk of being the victim of bias and hate crimes on the Internet. In one high-profile case, a college student was secretly videotaped performing sex with another male. His roommate reportedly uploaded the videos to a social media site. The victim in this incident committed suicide (Schwartz, 2010).

Risk Factors

Sociological findings can be used to determine the social, behavioral, and demographic risk factors and predictors for workplace- and school-related problems (Fisher & Kettl, 2003; Ruff, Gerding, & Hong, 2004). For example, in one

investigation of teachers' perceptions of school violence, Fisher and Kettl (2003) discovered that elementary school teachers were more likely to be physically assaulted and more likely to fear parents compared to other teachers.

Different sociological theories have been used to explain why these workplace- and school-associated problems occur. The theory of school bonding, i.e., the extent to which students are integrated into school experiences and students' demographic and social characteristics may be useful in explaining juvenile delinquency in schools (Cernkovich & Giordano, 1992). In analyzing workplace problems, Robinson and Bennett (1995) formulated a typology of deviant workplace behaviors. The authors discovered that these problematic behaviors varied along two dimensions: minor versus serious deviance and interpersonal versus organizational problems. Their analysis revealed that employee deviant behavior could be categorized into "four distinct categories: production deviance, property deviance, political deviance, and personal aggression."

Investigators have studied the risk factors for substance abuse in employment and educational settings. For example, a sample of 13,582 Australian employees, 14 years of age and older, found that younger employees had a higher rate of high-risk drinking than younger employees (Berry, Pidd, Roche, & Harrison, 2007).

The risk of being a stalking victim has been studied (Morewitz, 2003). Female gender and young age may increase the risk of certain forms of victimization. For example, college women may suffer intrusive behaviors such as stalking (Jordan, Wilcox, & Pritchard, 2007; Morewitz, 2003).

The rates of violent crimes vary depending on the types of jobs and employment or educational settings. Sociological research has generated data on other risk factors associated with school-based and workplace-related death threats and other forms of violence (Morewitz, 2008). One investigation of WV revealed that senior management was more likely to be threatened than other employees (Risk Control Strategies, 2003). In addition, the investigators discovered that larger companies were threatened more often than smaller organizations.

Certain workplace environmental conditions increase the risk of violence. For example, Sadler et al. (2003) discovered that in the military, work and living environments were related to an increase in the risks that women would be raped.

Sociologists investigate which factors increase the risk of bias and hate crimes. Children with impairments are more at risk for violence than children without such disabilities (Morewitz, 2008; Olivan Gonzalvo, 2005).

Persons who hold negative cultural beliefs about disability may be more likely to commit violence against persons with disabilities (Waxman, 1991). Some investigations have demonstrated that women with disabilities are more likely to be sexually assaulted than women without such disabilities (Martin et al., 2006).

Offender or Criminal Profiling

Offender profiling or criminal profiling, is a method designed to assist law enforcement in determining the characteristics of unknown criminal subjects or offenders and their criminal behavioral patterns. Offender profiling can be applied to employment- and education-related litigation. For example examination of school-related violent deaths in the USA showed that a majority of these deaths took place during transition times such as near the starting or ending of the school day (Anderson, Kaufman, Simon et al., 2001). Individuals who committed school-related homicides were nine times as likely as victims to have shown some type of suicidal behavior before the incident. The offenders were also more than two times as likely as victims to have suffered peer bullying. Prior to their school-associated homicides, many perpetrators write notes containing death threats or make other threats (Morewitz, 2008). Death threat makers (DTMs) may be influenced by media reports of previous school massacres and may make copycat death threats as a result. They are also more likely, than non-DTMs, to suffer from mental health problems such as depression and engage in suicidal behaviors (Morewitz, 2008).

The profile of students who are likely to commit violence against teachers, administrators, and other staff members in educational settings has been investigated. Ruff et al. (2004) suggest that a combination of factors including parental influences, involvement of school staff and law enforcement professionals, peer influence, substance abuse, and students' preoccupation with weapons increases the risks of WV against K-12 teachers.

Impact

Victims of workplace- and school-based problems such as injuries, physical assaults, sexual harassment, death threats, suicidal behaviors, and stalking can suffer both short-term and long-term stress-related health problems. They may seek medical, counseling, and social services and receive informal support from friends, coworkers, family members, and others (Morewitz, 2003, 2008).

Workers who use and abuse alcohol and other drugs in the workplace are at increased risk for injuries, fatalities, and health problems. Likewise, young people who abuse alcohol and other drugs face increased risk of associated fatalities, health problems, and impaired educational, social, and family functioning.

In both 1980 and 2008, suicide was the third-leading cause of death among young adults aged 15–24. However, among children aged 5–14, suicide was the seventh leading cause of death in 1980, but by 2008 it had become the sixth leading cause of death. In this age group, the total of deaths from all causes had halved between 1980 and 2008, but the annual number of suicides had increased by 55 % (Centers for Disease Control and Prevention, 2011). Those who are bullied may be at increased risk of suicidal behavior. One investigation revealed that youths who were threatened or physically injured by a peer were 2.13 times more likely to have suicidal ideation and 3.17 times more likely to report suicidal behavior than non-victimized peers (Kaminski & Fang, online July 21, 2009).

In addition, students may avoid going to school because they fear violence. In 2009, a study of a nationally representative sample of US students in grades 9–12 showed that 5 % stayed home for one or more days in the 30 days preceding the survey because they felt unsafe at school or on their way to or from school. The victims of bullying and other violence or those who fear such violence are also more likely to carry a weapon to school. The survey also noted that 5.6 % of the students in grades 9–12 reported that they had carried a weapon, e.g., gun, knife, or club, on school property on one or more days in the 30 days before the survey (Centers for Disease Control and Prevention, 2010).

Type and Effectiveness of Organizational Policies, Procedures, and Prevention

Sociological theory and other research methods can be used to evaluate the type of workplace and school-based prevention training and policies and procedures that are in place and to study how prevention training, screening, and other policies and procedures can help administrators, health care providers, counselors/therapists, teachers, coaches, parents, and others to assist at-risk individuals (Cowan & Morewitz, 1995; Morewitz, 1996).

Sociologists can assess how screening protocols and procedures can be improved to reduce the risk of workplace- and education-related problems (Cowan & Morewitz, 1995). Alcohol/drug-related aggressions pose a danger to individuals. In work settings, some organizations use primary prevention programs in an attempt to prevent alcohol/drug-related problems from developing in the first place (Roman & Blum, 2002). Employers may also use secondary prevention programs such as employee assistance programs (EAPs) to help employees to overcome their substance abuse problems, maintain their productivity, and prevent employment loss. Sociologists can assess the effectiveness of these EAPs in achieving these outcomes. For example, sociologists can assess the type of referrals made to EAPs and the effectiveness of these referral patterns.

Work organizations and schools may develop different strategies for reducing the risk of

violence in these settings. They may use metal detectors, increase the frequency of police patrols, and post laws regarding assault, stalking, and other violence (Lipscomb, Silverstein, Slavin, Cody, & Jenkins, 2002).

Organizations develop other methods to handle the dangers associated with alcohol/drug abuse. Work and educational organizations often use drug-testing programs to identify drug users and deal with the behavioral problems associated with alcohol/drug abuse. Ferns and Cork (2008) have suggested personal and organizational strategies that clinical nurses can follow to minimize negative outcomes for staff, patients, and others. Sociologists can investigate the impact of these individual and organizational methods on reducing negative outcomes from alcohol/drug-associated aggression.

Sociological Aspects of Treatment

Social and behavioral factors may impact the assessment and treatment of individuals who are at risk for workplace/school-related problems. For example, employees who receive EAP services and participate in alcohol problem treatment frequently relapse (Roman & Blum, 2002). The low success rate of alcohol problem treatment may have no relationship to the effectiveness of other EAP services.

Sociological data have been used to study the effectiveness of school-based prevention programs such as drug abuse preventive interventions (Botvin, Griffin, Diaz, et al., 2001). Sociologists can measure the effectiveness of programs which give students the skills and information needed to resist drug offers, reduce motivation to use drugs, and reduce the students' vulnerability to social influences that promote drug use. One drug abuse prevention program reduced the rates of smoking, drinking, intoxication, inhalant use, and poly-drug use among adolescent participants, compared to controls. The program was found to positively influence cognitive, attitudes, and personality measures that were thought to be linked to substance use in adolescents (Botvin et al., 2001).

Composite Case Study: Alleged Wrongful Hiring and Retention of a Gym Employee Involved in a Sexual Assault of a Patron

I was retained by a law firm to testify about sociological issues related to an alleged wrongful hiring and wrongful retention of a gym employee who allegedly sexual assaulted a female gym member in the women's locker room. In this composite case, I reviewed the depositions and other court records. I also analyzed statistics on the number of female patrons who used the gym over several years. In addition, I reviewed the policies and procedures of the gym employees and policies and procedures of similar gyms. I also reviewed the literature on sexual assaults and related crimes at health clubs and gyms. On the basis of my analysis, I was ready to opine that the probability that a female patron would be sexually assaulted at the gym was extremely low. In addition, I was ready to opine that the gym policies and procedures were effective in reducing the probability of sexual assaults at the facility.

Composite Case Study: Alleged Workplace SH an Employee of a Fruit-Picking Company

I was retained to testify about the alleged patterns of workplace SH at a fruit-picking company. He reviewed the depositions and other court documents, interviewed managers, and reviewed the literature of organizational responses to SH (Morewitz, 1996). Based on these data, I opined that the management had effective SH policies and appropriately responded to the claim of sexual harassment.

Composite Case Study: Alleged Workplace Age Discrimination Against a Construction Worker

In a composite workplace-related age discrimination case, I was hired as an expert witness to evaluate alleged age discrimination in hiring and

termination practices at a construction company. I reviewed statistical data related to the hiring and termination of employees at the company over several years. In addition, he analyzed the depositions, other court documents, and the literature on hiring and termination practices in the construction industry. Based on these data sources, I opined that the company hiring and termination practices were unrelated to the age of the employees hired or terminated during the period under investigation.

Composite Case Study: Alleged Wrongful Hiring and Retention of an Ex-Convict Who Committed Sex Offenses and Other Offenses Against a Girl at a Youth Organization

I was retained as an expert witness in this composite case to testify about issues related to the alleged wrongful hiring and retention of an ex-convict, who as a counselor at a youth organization, allegedly sexually assaulted, sexually harassed, and stalked a child. After reviewing the depositions, court records, prison records, and relevant research literature, I testified about the ways in which the ex-convict's criminal history, behavior in prison, and other conditions influenced his risk of re-offending. In addition, I analyzed issues related to children's disclosure of sexual abuse and the impact of sexual abuse, sexual harassment, and stalking on victims. My testimony was based on a review of a variety of information, including pleadings, discovery, depositions, and documents, and a review of the relevant literature.

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13 Preventing Workplace Violence and Litigation Through Preemployment Screening and Enforcement of Workplace Conduct Expectations

Tessa Sugahara and Kenji Sugahara

Introduction

This chapter addresses employment issues and related litigation in which forensic psychologists and sociologists can play an important role in testifying in litigation regarding the hiring, firing, supervision, and training of the workforce.

Workplace Violence That Originates Internally

Workplace violence (WV) is recognized as a specific category of violent crime. Within the category of WV there are four subcategories that distinguish between external and internal sources of violence. The four types of WV are shown below in Fig. 13.1, with the estimated percentages of each type of WV that occurs.

While workplace homicides make headlines and receive extensive media coverage, the incidents often involve Type I or Type II WV, which originates externally. Types I and II WV, combined, constitute a majority of incidents of workplace violence, accounting for an estimated 90 % of incidents. Examples include stranger-to-stranger violence that comes from someone who enters as ostensible customer, such as a convenience store robbery or client service-related violence, such as an employee in a mental health treatment facility being assaulted by a patient.

This chapter focuses on Types III and IV WV, which involve incidents that originate internally, that is, within the workplace by an individual that has an employment-related connection or by an individual who has a personal relationship with an employee in the affected workplace. Examples include a disgruntled fired employee who returns to the workplace to commit an act of violence against his supervisor or an estranged spouse who tracks down and assaults his partner in the workplace.

Types III and IV (hereinafter "internal workplace") WV comprise an estimated 15 % of WV. While the percentage of incidents from internal factors is significantly less compared than those arising from external factors, these types of incidents cut across a broader spectrum of businesses, in effect, all businesses face this type of risk. Employers can potentially have the opportunity to exert greater control over internal factors, such as hiring and workforce management, than dealing with third parties strangers identified by the other 85% of incidents.

An additional opportunity for an employer, even after the hiring process, is the potential to identify warning signs that may emerge in the form of observable behavior or a pattern of past behaviors that may resurface. That knowledge and acting on it through an effective employee management and disciplinary process can further mitigate an employer's risk for internal workplace violence or in a potentially prevent it.

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_13,

Type 1—External—Assault or threat by outside third parties, usually criminals. No legitimate relationship with the affected workplace, which is commonly a retail establishment. (75%)

Examples: Robbers, Rapists, Murderers

Type II—Service-related—Assault or threat by someone who is the recipient of a service provider by the affected workplace, such as health care providers and the public sector, i.e., police, parole, welfare. (15%)

Examples: Patients, Clientele, Customers, Students

Type III—Internal—Assault or threat by an individual who has an employment-related involvement with the affected workplace. (10%)

Examples: disgruntled employees, troubled employees, management problems, co-worker problems

Type IV—Internal—Personal relationships. Assault or threat by an individual who has a personal relationship with an employee in the affected workplace. (5%)

Examples: domestic problems, acquaintance problems

Fig. 13.1 Types of WV

This chapter covers four areas:

1. Addressing upfront considerations about in hiring.
2. Pre-employment opportunities to screen for potentially violent behavior.
3. Post-hiring tools to assess employee behavior.
4. Examination of two case studies involving acts of violence committed by employees against coworkers and wending their way through the courts.

Distinguishing Businesses Prone to Violent Acts Versus Violent Employees

Employers encounter varying challenges in preventing WV depending on their business line and size and sophistication of their operations. Factors include the type of business, populations served, management, employees, location of the workplace, layout of the work area, and the relationship of the business with the community and the unique service sector. Some indication of industries at risk for WV is reflected in the voluntary federal guidelines published by OSHA that apply to employees in late night retail, health care, and the taxicab business. The initial guidelines were issued in 1998 and more recently in 2008 (Occupational Safety and Health Administration, 2009).

In other instances, several states have passed legislation or enacted regulations directed at reducing violence in specific industries, such as health care and for convenience stores, in the states of Washington, Florida, and New Mexico. Some industries have compiled association guidelines as a means of recommending "best

practices," such as the National Association of Convenience Stores (NACS), which issues training programs for members covering robbery and violence prevention. This chapter, while recognizing that a workplace may potentially experience an act of violence because of the nature of the employer's business, focuses on the threat posed from within by the potentially violent employee in virtually any type of business or industry, and uses the same focus as the FBI report in their Workplace Violence Report (U.S. Department of Justice, Federal Bureau of Investigation, 2003).

Upfront Considerations in Hiring

The Applicant Pool

Regardless of industry, all employers require an applicant pool from which they screen potential candidates for employment. Some industries, based on the qualifications required to perform the job, attract an applicant pool that itself experiences poverty, has limited educational opportunities and access to health care, and may live in a neighborhood with a high crime rate. Businesses such as late night retail, including convenience stores and fast food, have front and back end positions requiring limited or no educational requirements, do not emphasize work history or references, and offer on-the-job training as a substitute for prior work experience. Such positions are typically regarded as low-paying and experience a high turn-over in staffing, which means employers are less inclined to invest resources in screening applicants, instead opting to terminate employees that do not work out during a trial or probationary period.

Challenges for Small Business

Small businesses, while they may be participants in a broader industry, such as retail or fast food, account for the vast majority of employers. Among the nation's 5.6 million private employers, almost four-fifths have between one and nine employees (Office of Advocacy, 1998–1999). While small employers cover the full range of income and occupations, they are also the typical employers of the lowest paid, lowest status workers, including immigrants and members of ethnic minorities. Small business owners and managers because of limited resources often access to the specialized knowledge or skills in legal and human resources that are generally available in a large company to help guide a hiring process or recognize a potentially violent worker. Consequently, small businesses engaged in businesses at risk for workplace violence face considerable challenges in developing uniform hiring and screening processes.

Pre-Employment Opportunities to Screen

Pre-employment screening affords an employer multiple touch points where it can assess an individual's qualifications, personality, and potentially eliminate applicants who present with a violent past or a disposition that places them at risk to commit an act of violence in the workplace.

Going Beyond Qualifications and Duties: Defining Behavioral Expectations

The job posting provides a potential applicant an opportunity to assess whether they are fit for the position. However, from the employer's perspective, listing qualifications, duties, and, relevant to this chapter, behavioral attributes, is the first opportunity to begin screening for desirable behavior traits. Such traits, which might be included in a job posting, include effective communicator, function well in team settings, get along with others, demonstrate patience when under pressure, and help others. Conversely, some traits, such as defensiveness, irritation, impatience, and inability to communicate under pressure may suggest an individual who may be problematic in the workplace. By identifying and assessing behavioral attributes from the outset of the hiring process, the employer may show due

diligence in screening as part of a defense to a claim of negligent hiring.

Focusing on conditions that make it difficult to perform the duties or create stress on the job can also trigger events that could lead to WV. Thus, a job posting, as a best practice, takes into account any physical or mental attributes required for the position and environmental conditions, such as exposure to heat, cold, or dangerous environments. An employer can fairly ask applicants how they might respond in such settings. For example, fast food may include cramped working conditions and high volume delivery of product, while a parking lot security attendant may encounter strangers in unsafe settings, such as vehicles and isolated areas. Ascertaining the comfort level of an individual working alone at night in serving the public is critical.

The Interview

An interview can identify problem situations, risk factors, or raise red flags. Some prospective employers will have the benefit of expertise provided by trained human resources staff who will structure interview questions and conduct the interviews. On the other hand, for many small businesses, managers will review applications and conduct interviews. Regardless of the size of the business or sophistication of the interviewer, there are some core attributes about an applicant, including red flags that may alert an employer to a potential risk of WV that can be lawfully explored during an interview.

Questions dealing with job qualifications are among the most basic and sometimes the only questions covered in a job interview. However, an interview focus placed exclusively on qualifications, while helpful in demonstrating aptitude and competency in a given task, leaves unanswered questions about personality and judgment that may shed light on behaviors that could result in violence.

Among various red flags that may emerge during an interview include past conflicts with coworkers; past convictions for violent crimes; a defensive, hostile attitude; a history of frequent job changes; or a tendency to blame others for problems. Interview questions can be structured to draw out this information by asking questions focused on employment history, including the reasons for leaving prior employers and if references are identified, their relationship to the applicant.

In an interview setting and in light of the legal limitations, the challenge for an employer is asking lawful, objective questions to draw out desired information. An applicant, in the course of answering questions, may anticipate what a prospective employer wants to hear and present responses with that bias. An employer, to overcome bias, may benefit by linking questions to actual experiences or asking the applicant to explain how or why questions which help draw out judgment and feelings. Among questions to consider:

- Have you left an employer involuntarily?
  - Explain circumstances
  - How were you treated?
  - What actions triggered the decision?
  - Were you offered an opportunity to explain or address the concern?
  - How do you feel about the employer?
- Have you had a bad supervisor?
  - Explain circumstances
  - How did you respond?
  - Did you have an opportunity to explain or address the concern?
  - How did you engage with the supervisor day to day?
- Have you been offered constructive feedback in employment?
  - Explain circumstances
  - How did it make you feel?
  - Was it accurate?
  - Did you change anything as a result of the feedback?
  - How would you respond if you received feedback in this position?
- Have you had a negative encounter with a coworker?
  - Explain circumstances
  - Did you experience any emotional reaction to the encounter?
  - How did you interact with the coworker following the encounter?

- Have you had an experience where you were treated unfairly at work?
  - Explain circumstances
  - Did you tell anyone about it?
  - Did you change anything about how you did your job following the incident?
- Have you had a coworker who has caused a problem for you at work?
  - Explain circumstances
  - Did you tell anyone about it?
  - Did you approach the coworker to discuss?
  - How did you feel about the coworker after the incident?
- Do you think about problems at work when you're off the job?
  - Identify an example
  - Did thinking about the problem outside of work help you?
  - Did you talk with your employer about it?
  - How would you respond if you encountered a similar problem in this workplace?

To the extent an applicant describes not having any of the types of problems described above that may itself be problematic because any individual with some work history has either dealt with conflict in some form in the workplace or thought about work when they are off the job. If the applicant cannot identify anything specific when questioned, a follow-up would be what techniques they might apply (hypothetically) to avoid the circumstances described above.

Assessing responses to interview questions is not a simple task because there is no definitive checklist of behavioral indicators for a potential perpetrator of workplace violence. However, if a recurrent theme in responses suggests an emotional reaction and decision-making at odds with apparent facts, it may raise a red flag. In addition, while there is no definitive checklist, some general areas of potential behavior that should place an employer on alert include:

- Making direct or veiled threats
- Extreme negativity and defensiveness
- Holding a grudge
- Responding negatively to criticism
- Blaming others
- Intimidating or instilling fear in others

From a legal perspective, there are limitations on the nature and extent of an employer's inquiry during an interview. As a general rule, questions related to hiring, whether appearing in written materials or elicited during interviews, must be job related and consistent with business needs. It is almost always acceptable to inquire of someone how or the manner in which they will perform the work, but not to ask whether a physical or medical condition limits someone from doing a particular task, which by doing so would potentially violate workplace laws prohibiting discrimination based on disability. Asking someone whether they have a history of using or abusing drugs or alcohol impermissibly implicates workplace disabilities laws, but an employer who intends to conduct a criminal background check for its finalists may state that criminal history will be reviewed for any drug or alcohol-related convictions.

Additional impermissible areas that raise legal concerns include an applicant's marital status, whether they have children, have filed a worker's compensation claim, or have a negative credit history or declared bankruptcy. These areas are among the categories of questions that elicit responses about protected class status under anti-discrimination, state laws prohibiting the use of credit history information to draw negative inferences about an individual's trustworthiness or implicate the federal Fair Credit Reporting Act. In instances where the employer has gone too far, it may face a civil lawsuit or be named in a complaint filed with state or federal civil rights enforcement agency.

Reference Checking

Like other forms of background verification, the reference check can compare what was learned in the interview and written materials to assess whether it is candid and accurate. Contacting prior employers and verifying employment history is a critical component of any background check. That said, it is surprising how many employers, particularly small businesses in certain industries, do not do even the most routine, simple background check, criminal background

check, or reference check. It represents yet another avenue to identify red flags in an applicant's background and determine whether representations about job duties and the reasons for leaving employment are complete. It also presents an opportunity for the prospective employer to question a third party about personality attributes that may signal a difficult or potentially violent employee.

Some reference questions include exploring whether the management chain or coworkers experienced conflict in dealing with the employee, and if so, how the employee handled. If employment ended in termination, an employer can determine whether poor work performance or problematic behavior, including threats, belligerence, or hypersensitivity to criticism emerged. While not definitive indicators, some of the described behaviors may suggest an employee with a greater potential for violence, but all factors must be looked at in totality

Criminal Background Checks

After an employer has obtained authorization and a release from the applicant and typically after extending a conditional offer, it may conduct a criminal background check. There are numerous Web-based information clearinghouses that provide this service for employers, greatly expanded beyond the county-level. A check may be tailored to meet the employer's specifications, including the length of look back, 5 years, 10 years, a lifetime, and types of offenses, limited to felony, only personal crimes, and all criminal convictions without regard to time or severity. Notwithstanding the availability of Web-based providers to handle this aspect of the assessment, using an information broker does not excuse the employer from liability if a criminal background check strays beyond information that is job related and consistent with business needs. A rationale that an employer is seeking to mitigate workplace violence is not a defense in an antidiscrimination or privacy-based lawsuit.

It is a recommended practice to ask the applicant to self-disclose any criminal convictions whether felony or misdemeanor as part of the criminal background check process. While not all convictions may ultimately be disqualifying, an objective is to test the applicant's candor. It is also an opportunity for the employer to inquire whether the applicant knows of any inaccurate information in his criminal history so that it can be separately assessed. For example, an applicant may be confused with someone else or assert he has been the victim of identity theft.

The objective of any criminal background check is to eliminate individuals that may place others at risk of violence in the workplace or that may compromise the integrity of the business, such as fraud or dishonesty offenses. For any employer, it is important to identify up front what categories of offenses will be disqualifying. Certain drug convictions, such as manufacture or distribution or driving under the influence, may make an individual unsuitable for employment in certain industries, such as health care or commercial driving, but not in others, such as retail or food service.

Regardless of sophistication, for positions that have customer interaction, contact with children—even as customers in a retail setting, or contact with coworkers in non-public settings, such as inventory or back room staff, from a premises liability perspective, best practice is to conduct a criminal history check to determine whether there are convictions for any crimes of violence. If employees are subsequently injured in the workplace because of the violent actions of an employee and that employee had an established and clear criminal history, a typical claim of negligent hiring will include consideration whether the employer conducted a criminal background check. A key consideration in assessing criminal history involves whether the act of violence in the workplace was reasonably foreseeable in light of the employee's prior convictions.

Some examples of litigated cases involving a claim of negligent hiring where the conviction record did not make a subsequent violent act reasonably foreseeable include:

- Employee's failure to comply with requirement in peace officer manual and his reprimand for

using profanity to member of public did not make his assault of customer foreseeable.
- Employee's two DWI convictions did not make his sexual assault foreseeable.
- Mechanic's three prior forgery convictions did not present foreseeable risk that he would commit sexual assault.

Compare with an example where a violent act connected with employment was found reasonably foreseeable in the context of the employee's history:
- Employee's conduct involving indecency with a child could make the sexual assault of customer foreseeable when sales were made in the customers' homes.

It is possible the effect of time and subsequent employment history may mitigate some types of criminal convictions. If possible, adopt guidelines that are uniformly applied. For example, a conviction for assault that occurred beyond 10 years, where an individual has subsequently demonstrated a stable work history and no other convictions, he/she may be suitable for employment, depending on the industry and position. Some drug convictions, such as possession may be allowed with a shortened timeframe if the individually successfully passes a drug screen.

A specific caution about using arrest information in hiring decisions: Although arrest information is public record in most jurisdictions, it is unlawful for an employer to seek information regarding the arrest record of a potential candidate and use such information to make a hiring decision. Some states, such as California, have laws that expressly prohibit employers from seeking the arrest record of a potential employee, with limited exceptions. Apart from state laws specifically covering arrest records, federal antidiscrimination laws and their state analogues view arrest records as having a potentially disparate impact on minority groups that are susceptible to racial and ethnic profiling.

Web-Based Checks

Various studies acknowledge that Web-based background checking is on the rise. A reason for the increase may be the availability of public information, accessed through Web-based search engines, at virtually no cost to the employer. An immediate and, as yet unsolved concern with social media background checks, is the integrity of information. A Web-based search has the potential to unearth information that is irrelevant, taken out of context, or just plain wrong. At worst, the "John Smith" an employer thinks is their applicant is a case of mistaken identity, among the 10,000 plus Web hits for that name. Moreover, the risk of unearthing "irrelevant" information extends to information that, beyond its lack of relevance to the employment setting, implicates a protected class status that the employer legally does not want to know.

The laws prohibiting discrimination apply to all stages of the hiring process, including background checking. For example, a Web-based search could uncover information about an individual's sexual orientation, religious affiliation, or a disability. This is information that, if asked in an interview context, is impermissible because it implicates protected class status, and the digital setting does not change the legal analysis of the impropriety in seeking such information, even if inadvertent.

While cautions about the use of social media in background checking are well-placed, there are some potential benefits, including the ability to catch so-called red flags in an applicant's background that have not been accurately reported by the candidate in his application or interview. A publicly available profile or news media sites may reveal photos of an applicant abusing illegal drugs, being listed on a sex offender registry, participating or supporting crimes of violence, or engaging in other questionable behavior. Such information is readily accessible, free, and it could be argued that an employer's failure to undertake a rudimentary screening of publicly available information is a failure to exercise ordinary care in the hiring process.

Moreover, a social media site may expose false or inflated information. Instances of embellished or outright falsehoods that become apparent with some basic fact checking using search engines and publicly available information include fabricated educational qualifications and references to businesses that do not exist or exaggerated military service and honors.

Drug Screening

Courts have consistently upheld the legality of requiring a pre-employment drug test as a condition of employment. While employers may implement drug screening for a variety of reasons, ranging from corporate policy to impact on the bottom line, substance abuse costs businesses money and may contribute to accidents on the job. It is thought that testing and declining to hire applicants currently using illegal drugs, lessens the impact from drug abuse in the workplace, including turnover, attitude problems, crime, and violence. A benefit gained by an employer that conducts pre-employment testing, while difficult to track statistically, is that current users may simply avoid employers that test and instead apply at companies that do not test.

The issue of a connection between drugs and violence has been raised in the courts in the context of hiring individuals with convictions for drug-related offenses who subsequently engage in violence in the workplace. While some courts have recognized and acknowledged a street-level connection between drugs, weapons, and violence, it has not been sufficient to conclude that persons convicted of selling or using drugs, without any accompanying evidence of violence, will foreseeably commit an aggravated person crime.

Post-hiring Tools

Observations Post-hiring

According to the FBI's Workplace Violence report, risk factors at times associated with potential violence include personality conflicts (between coworkers or between worker and supervisor); a mishandled termination or other disciplinary action; bringing weapons onto a work site, drug or alcohol use on the judge; a grudge over a real or imagined grievance U.S. Department of Justice, Federal Bureau of Investigation (2003). Risks can also stem from an employee's personal circumstances that seep into the workplace—the breakup of a marriage or romantic relationship, other family conflicts; financial or legal problems; or an emotional or mental health disturbance.

While no definitive studies currently exist regarding workplace environmental factors that can contribute to discrete episodes of violence, it is generally understood that the following factors can contribute negativity and stress in the workplace, which in turn may precipitate problematic behavior. Among the factors:

- Understaffing that leads to job overload or compulsory overtime.
- Frustrations arising from poorly defined job duties.
- Downsizing.
- Labor disputes or poor labor management relationships.
- Poor management styles (e.g., arbitrary or unexplained orders, micromanaging, and inconsistent discipline).

Enforcement of Workplace Conduct Expectations

An employer is legally obligated to maintain a workplace that is safe from occupational hazards and free from harassment and discrimination. Beyond its responsibilities under workplace safety regulations and antidiscrimination and disabilities laws, the employer sets the standard for acceptable workplace behavior. Many employers rely on written workplace policies to establish expectations for professionalism and affirm the company's commitment to take action on any complaints regarding harassing, threatening, or violent behavior in the work environment, whether originating with third parties or coworkers. Some policies, and laws in some jurisdictions, extend to protect and afford a safe environment to employees that are the victims of domestic abuse or violence, although originating outside the workplace. These laws may require that personal information about the employee, including contact information, work location, and shift are not disclosed unless authorized by the employee.

Adopting a workplace conduct policy that includes a zero tolerance policy for acts of violence is a first step in deterring WV. However, a policy is ineffective unless coupled with staff training, meaningful supervision, timely reporting

of concerns, prompt investigation of problem situations, and appropriate remedial and disciplinary action, up to and including termination. Demonstrating policies and practices regarding hiring and management of the workforce was uniformly followed which is an important consideration for any employer who wishes to mitigate the risk of litigation arising from an incident of WV.

As earlier observed, no standardized profile or test is available to single out problem employees who might become violent. Court decisions analyzing the claim of negligent supervision are instructive as to the degree of responsibility imposed on an employer to remain attentive to potential problem employees. Where it is foreseeable that specific harms could result, the employer can be held accountable for a failure to address the workplace concern. In most instances, courts look to the totality of circumstances in the workplace, not a single circumstance, in assessing foreseeability. For example, an employee with a conviction for a violent, gang-related felony may be a red flag for the employer, but that factor would be assessed with other considerations, such as whether the employee ever displayed violent tendencies, his work performance and reliability, and the position he was hired to perform.

From a legal perspective, an employer is accountable for the safety and integrity of the work environment, from hiring decisions to its day-to-management decisions that impact individual employees. Whether an employer is found liable in civil litigation for acts of violence in the workplace depends on the nature of the violent act, whether the action was foreseeable, the standard of care that was owed, and causation. It may be that circumstances beyond the employer's control intervened, in which case neither foreseeability nor causation is present, or on the other hand, the employer, had it exercised due diligence, could have prevented the act of violence. The final section, dealing with two legal cases, explores these concepts in more detail and considers evidence where a forensic psychologist or sociologist could testify on personnel considerations in a security premises liability case.

Litigation as a Consequence of Internal WV

Case Study: *Barton v. Whataburger, Inc*

Overview

The courts apply a negligence standard, which includes analysis of duty of the employer to exercise reasonable care and foreseeability of a specific harm, in evaluating whether an employer is liable for the conduct of employees who engage in violent conduct. In Barton, the court found that an employer was not liable for the criminal acts of a restaurant manager that resulted in the death of an employee.

Facts

On the night of the murder, Gregory Love was the night manager on duty. Shortly after the beginning of Love's shift, he called another manager and indicated that he needed to leave work. Love left the restaurant and put Christopher Dean, a mentally impaired employee, in charge of the restaurant. Love never returned to the restaurant again that night.

Around 4:00 p.m., three men attempted to rob the Whataburger. One man entered the restaurant through the drive-through window. The man chased Dean through the restaurant and cornered him in the back. He demanded that Dean give him the key to the safe or he would shoot him. Dean repeatedly told the man that he did not have a key to the safe and could not comply with the robber's demands.

When Dean could not produce the key, the robber shot Dean in the face and fled the Whataburger. The robbers left with nothing but were apprehended later when they robbed a donut store equipped with video surveillance. The police later connected Love to the robbery at Whataburger because he was responsible for setting it up. Love was convicted of capital felony murder and was sentenced to life in prison.

The Legal Theories Pursued by Plaintiff

The victim's mother sued Whataburger under the state's wrongful death statute, asserting that

defendant's negligence caused her son's death. She alleged that Whataburger's failure to conduct an adequate background check ultimately caused the aggravated robbery that led to her son's murder.

The plaintiff, also under a general claim of negligence, contended that even if it was not legally foreseeable that Love would engineer the crime that resulted in Dean's murder, defendant was aware of an increased risk of a violent crime occurring at restaurants open late at night and should have taken reasonable security measures to prevent it. Additionally, plaintiff presented evidence of criminal activity at the Whataburger location in the years preceding Dean's murder in 2002 including:

- Six years before the incident, a customer was shot in the parking lot and another customer in the drive-through lane was robbed and shot in the thigh.
- Five years prior, a customer's purse was stolen; 2 years prior, a customer reported an assault (without injury).
- One year before, a woman reported an assault (without injury).
- In the same year, a woman reported her car was stolen from the parking lot and one customer intentionally hit another customer's vehicle in the drive-through lane.

Testimony of Plaintiff's Expert

Plaintiff's expert in premises liability testified that an undefined area surrounding the restaurant had a crime "index rate" four times greater than a national average and noted evidence of three drive-through robberies at other Whataburger restaurants, namely, an attempted drive-through robbery 5 miles away at Store No. 263, in November 1998, an attempted drive-through robbery 16 miles away at Store No. 462 in December 1998, and a drive-through robbery 5 miles away at Store No. 605 in April 2003. The expert opined that "an industry standard of foreseeability" exists because of the well-known high risk of armed robbery to late-night convenience stores and restaurants, pointing in particular to a study of convenience store robberies and literature that concludes that "the greatest risk of workplace violence including homicide (80 %) comes from being a victim of an armed robbery."

Whataburger's Background Check

Evidence presented to the court indicated that Love had a past criminal history. Ten years prior to the crime, Love was convicted of a felony offense of "dealing cocaine" in Indiana, where he served 1 year in jail. And in the year prior to the crime, Love was convicted of felony nonpayment of child support in Texas.

While Whataburger performed a background check on Love before hiring him, it limited the records search to criminal convictions in the county where the restaurant was located and looked back approximately 7 years. As a result, the background check performed by Whataburger did not reveal either conviction. Barton alleges that Whataburger's failure to conduct an adequate background check ultimately caused the aggravated robbery that led to Dean's murder.

The Legal Standards of Duty and Foreseeability

In the context of the employer–employee relationship, a company has a duty to:

1. Provide rules for the safety of employees and to warn them of reasonably foreseeable hazards.
2. To furnish reasonably safe machinery and equipment.
3. To furnish a reasonably safe place to work.
4. To exercise ordinary care to select careful and competent fellow employees.

Under the legal framework noted above, duty and causation, specifically, elements 1, 3, and 4 of a claim for negligence against the employer were implicated in the court's analysis. To impose a legal duty to prevent the criminal conduct of another, the crime must have been reasonably foreseeable at the time the defendant engaged in negligent conduct.

Foreseeability exists if the actor, as a person of ordinary intelligence, should have anticipated the dangers his negligent act creates for others. A danger is foreseeable if its general character might reasonably be anticipated, if not its precise manner.

The court examined whether plaintiff raised facts that could lead a reasonable juror to conduct that Whataburger should have anticipated the criminal danger presented by the employee.

The Court's Analysis of the Claim of Negligent Hiring

The court concluded that Whataburger did not engage in negligent hiring because the prior convictions, even if discovered, would not have made his participation in the acts leading to murder reasonably foreseeable. The court opined:

> While Love's convictions, if discovered, should have raised Whataburger's suspicions about his fitness to manage a restaurant, under Texas law, they did not make his eventual participation in an aggravated robbery leading to murder reasonably foreseeable. Even assuming that information about Love's prior convictions, if known, would have torpedoed Love's employment with Whataburger, his criminal acts of selling cocaine and failing to pay child support are different from an aggravated robbery—neither crime inherently requires violence or theft, the two essential ingredients of an aggravated robbery…The record contains no evidence that the events underlying either of Love's convictions involved violence or theft, or that Love engaged in any conduct during the seven months he was employed at Whataburger that would have made his participation in an aggravated robbery foreseeable. Even viewed in hindsight, Love's convictions for selling cocaine and nonpayment of child support do not indicate a propensity for violent criminal conduct, like aggravated robbery and murder. Thus, we hold that Love's own criminal behavior, and that of his cohorts, is a superseding cause that precludes Whataburger's liability for these crimes.

The Court's Analysis of the Claim of Failure to Provide a Safe Workplace

In evaluating the evidence of prior crimes at the location, the court found significant that while criminal activity had occurred, no evidence existed that Whataburger was the scene of any aggravated assault, aggravated robbery, sexual assault, or murder in the 3 years prior to Dean's murder. No crime similar to this one had ever occurred: no one had ever robbed the restaurant before, nor had it ever been the scene of any WV, nor had anyone ever committed any sort of crime against a Whataburger employee, nor had anyone ever been murdered. The court concluded that the evidence did not show rampant, violent criminal activity sufficient to raise a fact issue about the foreseeability of the aggravated robbery that resulted in Dean's murder.

Case Study: *Iverson v. NPC International*

Overview

As discussed in the *Whataburger* case, the court identified and applied the recognized legal doctrines of duty and foreseeability.

Facts

In February 2007, Pizza Hut hired Norman Williams as a utility worker who works behind the scenes preparing food, doing dishes, and cutting pizzas. When interviewed for the position, Williams told the manager that he was on parole for a felony conviction in Colorado and that his conviction involved a gang-related incident of "mutual combat resulting in serious injury." The manager did not follow up on the disclosure or make further inquiry into Williams' criminal history because the position for which he was applying was non-managerial and involved "back of house" duties. Williams worked as a utility worker without incident for approximately 7 months. During that time, a coworker of Williams, David Iverson, also worked at Pizza Hut but Iverson was fired in July 2007 for his inability to complete tasks. Williams and Iverson remained friends after Iverson's termination and spent time together at Williams' apartment.

On September 8, 2007, while working at Pizza Hut, Williams phoned Iverson and asked him to come to Pizza Hut to return a CD he had borrowed. Iverson and a friend drove to Pizza Hut. Iverson's friend took the CD into the restaurant, walked past the manager on duty, and gave it to Williams. Williams told Iverson's friend that he wanted to speak to Iverson directly because he believed Iverson owed him money and was avoiding him.

Iverson's friend then left the restaurant and returned with Iverson. The two walked past the

manager to Williams' workstation and Williams directed them to the back of the restaurant. There, Williams pressed Iverson against the wall and demanded money from him. Iverson refused. Williams then struck Iverson with an open-handed uppercut punch to the chin and jaw, knocking Iverson to his hands and knees. Williams reached into Iverson's pockets and took about $100 in cash. Iverson and his friend then left the restaurant.

The Legal Theories Pursued by Plaintiff

Iverson asserted four theories of liability against the employer: (1) vicarious liability under the doctrine of *respondeat superior*; (2) negligent hiring; (3) breach of the duty to control an employee; and (4) negligent supervision. The circuit court granted summary judgment in Pizza Hut's favor on all four theories and the judgment was subsequently appealed through the state courts.

Vicarious Liability

The doctrine of *respondeat superior* holds an employer liable for an employee's or agent's wrongful acts within the scope of employment. However, the doctrine does not hold an employer liable when the employee acts solely in their own interests. While Iverson conceded that that the motivation behind the attack was personal and not in furtherance of the employer's interests, he argued that William's employee relationship with Pizza Hut helped him accomplish the attack.

The Court's Analysis of the Claim of Vicarious Liability

The court concluded that the employer was not liable because the act was motivated by Williams' personal interests:

> Williams's position with Pizza Hut did not enable or afford him a unique advantage to assault Iverson. The mere fact that the assault took place on Pizza Hut's property was not enough to make Pizza Hut liable under the doctrine of *respondeat superior*. Under these facts, the agency relationship was immaterial to Williams's tort. Williams could have accomplished his tort in any number of public or private buildings.

Negligent Hiring

South Dakota courts recognize an employer's limited duty to conduct an employment investigation at the time an employee is hired and consider the degree of contact with the public as a factor.

"When an employee comes into minimum contact with the public or those in a special relationship with the employer, the employer need not perform a background investigation." But "[t]he opposite is true when the employee makes frequent contact with the public and those in a special relationship with the employer."

Iverson argued that a background check, if it had been performed, would have revealed William's felony conviction for carjacking and his dishonesty about the nature of his other felony conviction. Iverson also argued that duties of increasing responsibility that Williams subsequently performed, including waiting tables, assisting customers at the cash register, cleaning tables, and preparing the salad bar was sufficient contact with the public to justify a background investigation. Moreover, Iverson identified that when Williams was not working directly with the public, he was only 10–15 feet away from customers.

Pizza Hut countered that it initially hired Williams into a position that did not require contact with the public and therefore it had no obligation to perform a background check. While Williams eventually took on greater responsibilities, Pizza Hut argued that it was not obligated to subsequently perform a background check as Williams job duties evolved.

The Court's Analysis of the Claim of Negligent Hiring

The court agreed with Pizza Hut. The court reasoned that when Williams was initially hired, the anticipated responsibilities kept him away from the public. Any contact was incidental to his job and based on established precedent; incidental contact did not require the employer to conduct a background check.

Duty to Control an Employee

In most circumstances, the law does not impose a duty to prevent the misconduct of others.

An exception to this general rule is an employer's duty to control employees under certain circumstances. To show that a duty exists, a plaintiff must show that there was a special relationship between the parties and the employee's injurious act was foreseeable.

The Court's Analysis of Special Relationship and Foreseeability

The court held that a special relationship existed because Pizza Hut employed Williams.

The existence of a special relationship in this case stems from Pizza Hut's employment of Williams. Because the incident took place on Pizza Hut's premises, Pizza Hut had a "duty to exercise reasonable care to control [Williams] while [he was] acting outside the scope of his employment … to prevent him from intentionally harming others."

We have previously held that "the ability to control can be satisfied by the mere power to threaten dismissal." Here, Pizza Hut had the ability to either discipline or terminate Williams.

Upon recognizing a special relationship, the court next analyzed the foreseeability of Williams' act to determine if Pizza Hut had a duty to control. Courts in South Dakota use a "totality of circumstances test" in determining foreseeability. Liability does not depend on the extent of the harm nor the manner in which it occurred. The harm "need only be within the class of reasonably foreseeable hazards that the duty exists to prevent."

The court looked at the totality of circumstances surrounding the incident and concluded that Williams' conduct was not foreseeable to the employer.

The only circumstance Iverson can point to as evidence of foreseeability is Williams's parole status for a violent, gang-related felony. Except for Williams's felony conviction, there was no evidence that Williams ever displayed violent tendencies while employed at Pizza Hut. In fact, Williams was a model employee. Further, Iverson and Williams worked together peacefully and remained friends after Iverson was fired. One could not conclude, based on the surrounding facts and circumstances that Williams's attack of Iverson was "within the class of reasonably foreseeable hazards."

Negligent Supervision

A claim of negligent supervision asserts that an employer "failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third persons." By contrast, a claim of duty to control, covered infra, examines whether the employee caused harm while using equipment provided by the employer or while on the premises of the employer. While the legal claims are distinct, the duty of care in both depends on the foreseeability of the injury.

The Court's Analysis of Negligent Supervision

The Court considered the presence of a manager, who ostensibly observed Iverson and his friend enter the back room to meet with Williams.

Iverson's walk past the manager similarly did not make it sufficiently foreseeable that Williams would attack him. The manager's presence does not alter our foreseeability analysis. Given the surrounding facts and circumstances, it was not sufficiently foreseeable to impose a duty on Pizza Hut to prevent Iverson from meeting with Williams at the restaurant.

The Perspective of an Expert Witness

Although the published decision does not make reference to the expert testimony and there is no indication that an expert was retained, this fact pattern presents factors that lend themselves to an expert's analysis. The prior conviction history, that includes a crime of violence, coupled with how the premises was controlled, including members of the public allowed to enter a back room of the restaurant are potential red flags. The court discounted the weight given to the employee's criminal history as a predictor of future violent acts because the position had limited contact with the public and public policy considerations involving hiring individual's with a criminal

record. With regard to an employee's criminal history, the court opined in a footnote:

> In our discussion of the negligent hiring and retention we noted that to impose a duty on an employer based on an employee's limited criminal history would "create severe consequences for employees throughout the state." Imposing such a duty would "expose employers of those with some evidence of a violent past to potential liability …, [which] might make employers hesitant to hire those people, severely limiting employment opportunities." "Such a rule would deter employers from hiring workers with a criminal record and 'offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.'"

Iverson, fn 7. at 284

To the extent that public policy considerations, as quoted by the court, encourage employers to consider applicants, notwithstanding their criminal records, there is an opposing argument that could be raised by an expert. There is a point where a criminal record can be determinative of an applicant's fitness for employment and an expert could identify the connections between the existing record and a potential to commit violent acts.

Conclusions

An employer has multiple touch points where it can screen applicants for their fitness for a position and significantly, assess whether an individual may be at risk to commit an act of internal violence. While competency and aptitude are important considerations in determining whether an applicant can perform the work, an individual's behavioral attributes impact how he or she will interact with customers, clients, and coworkers. These behavioral attributes can be assessed during the interview and background checking stages of the hiring process. Thereafter, an employer has ongoing responsibility to train and manage new hires to ensure compliance with conduct and workplace safety policies as a means to prevent incidents of internal WV. Demonstrating compliance with policies and practices regarding hiring and management of the workforce is an important consideration for any employer that wishes to mitigate the risk of litigation arising from an incident of workplace violence. Forensic psychologists and sociologists can play an important role in testifying in employment-related litigation regarding behavioral attributes of individuals, their suitability for employment, and whether an employer acted reasonably in the hiring, firing, supervision, and training of the workforce.

Biography

Tessa M. Sugahara earned her J.D. from the University of Oregon. She has practiced law in the area of public sector labor and employment law for the last 10 years, where she deals with workplace issues and the social and workplace environmental factors, which may lead to potential violence. Ms. Sugahara has coauthored chapters for the Oregon State Bar publication, *Labor and Employment Law*: *Public Sector 2011 Revision*.

T. Kenji Sugahara earned his J.D. from the University of Oregon. He is the executive director of a nonprofit and works as a Research Associate for Athena Research Corporation regarding security and crime prevention, where he specializes in racing events and racing venues.

References

A discussion of the mechanics of threat assessment and response is beyond the scope of this chapter.

Barton v. Whataburger, Inc., 276 S.W.3d 456, 465 (Tex. App., 2008)

Barton v. Whataburger, *Inc*., 276 S.W.3d (Tex. App., 2008)

Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472 (Tex.1995)

Foreseeability provides that an employer will be held liable in a civil action if an employee's criminal conduct amounts to a foreseeable act. Duty provides that an employer will be held liable in a civil action if an employee's criminal conduct breaches a duty that is owed to the victim.

Fifth Club, Inc. v. Ramirez, 196 S.W.3d 788 (Tex.2006)

Houser v. Smith, 968 S.W.2d 542, 545 (Tex. App.-Austin 1998)

Iverson v. NPC International, 801 N.W.2d 275, 2011 S.D. 40 (S.D., 2011).

NPC International owns and operates Pizza Huts across the country. The subject restaurant is located in South Dakota.

Occupational Safety and Health Administration. (2009). *Recommendations for workplace violence prevention programs in late-night retail establishments*. OSHA 3153-12R.

On February 16, 2012, Agent Ezequiel Garcia of Immigration and Customs Enforcement shot his supervisor in a workplace confrontation in California. Garcia was being counseled on his job performance when he shot and wounded Kevin Kozak, ICE Homeland Security Investigations' second in command for the Los Angeles area. Amy Taxin, Associated Press.

On September 21, 2011, Calicto Aleman entered the back door of the Market Plus Café in Muriel, Louisiana and shot his wife who was working. WBRZ.com, Baton Rouge, LA

Office of Advocacy, U.S. Small Business Association (n.d.). *Employer firms, establishments, employment, annual payroll and receipts by firm size, 1998–1999*.

Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex.1998)

Referring to job duties performed "behind the scenes" of a restaurant operation, such as dishwashing and food preparation that have limited contact with the public.

The punch fractured Iverson's jaw. He claimed economic damages of approximately $29,000 in medical and dental bills as a result of the injury.

The court's reference to the public policy considerations appeared as a footnote in the opinion, and cited to other precedent in the jurisdiction.

The workplace typology was developed by the California Occupational Safety and Health Administration (Cal-OSHA) in the early 1990's and subsequently expanded and adopted by the Federal Occupational Safety and Health Administration (OSHA), the Federal Bureau of Investigation (FBI), the National Institute of Occupational Safety and Health (NIOSH) and others.

U.S. Department of Justice, Federal Bureau of Investigation (2003). *Workplace violence: Issues in response*.

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Critical Issues in the Evolving Diagnosis of PTSD

14

John P. Bair and Kathleen M. Long

Critical Issues in the Evolving Diagnosis of PTSD

The goal of this chapter is to demonstrate that the diagnostic criteria and the assessment procedures for posttraumatic stress disorder (PTSD) have been evolving rapidly and to discuss how this confounds the current criteria's diagnostic reliability and assessment ability. This is of vital importance, as there is widespread acknowledgment that PTSD and traumatic brain injury (TBI) increasingly command national resources and attention. This has been demonstrated by congressional action authorizing research and employment of providers for those returning to the USA from the current war in Iraq and Afghanistan. Congress passed Section 1661 of the National Defense Authorization Act for FY 2008 in response to the growing needs of OEF (Operation Enduring Freedom) and OIF (Operation Iraqi Freedom) active-duty service members, veterans, and families. The section required that the Secretary of Defense, in consultation with the Secretary of Veterans Affairs, enter into an agreement with the National Academies for a study of the physical, mental health, and other readjustment needs of members and former members of the armed forces who were deployed to OIF or OEF and their families as a result of such deployment. There is a "renewed emphasis on rehabilitation and treatment in criminal justice" regarding PTSDs (McGuire & Clark, 2011, p. 1; Howitt, 2012, p. 42).

In 1990, the diagnosis of PTSD was referred to as a "forensic minefield" (Sparr & Boehnlein, 1990, p. 283). There are many accounts in the literature on the history of the diagnosis of PTSD, as well as evidence of the validity of the currently established diagnostic criteria. This is summarized by the subcommittee on PTSD of the Committee on Gulf War and Health:

"The evidence for establishing PTSD as a valid disorder has been addressed and supported by using the five criteria proposed by Robins & Guze (1970): describing the core clinical features; differentiating from other disorders, conducting laboratory studies, determining temporal stability, and determining aggregation in families." Koch, Douglas, Nichols, and O'Neill (2006, p. 116) provides a thorough review of the growing clarity of the PTSD diagnosis and state, "we have reasonably good understanding of the core inclusion criteria of PTSD." This appears to be the consensus among researchers and "although imperfect and subject to continuous updating and refinement, the DSM is regarded by mental health professionals and the courts alike as a generally reliable diagnostic system" (Shuman in Gold,

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_14,

2005, p. 4). Gold indicates, "The diagnostic criteria and research supporting a diagnosis of PTSD is extensive." The phenomenology of PTSD is widely recognized as having considerable agreement regarding the core diagnostic features and assessment of the disorder, and is illustrated by Horowitz (2011, pp. 8–11):

> "Psychologically traumatic events may be followed by weeks, months, years, or even decades of reactions. The terror, sense of helplessness, and disorientation that may occur during dire life experiences can live on as memories, fantasies, and irrational expectations. Attitudes may be formed that lead to a range from effective coping skills and sense of self as resilient to feeling inappropriately and dysfunctionally vulnerable and incompetent. The aim of treatment is to repair a torn world within an impacted individual (Horowitz, 2011, p. 1)."

However, the diagnosis of PTSD continues to be considered by many as unreliable. This is a vital and important clinical issue, especially within the realm of forensic psychology. The diagnosis depends excessively on clinical judgment and patient report. Rosen (1995) reported that 86 % of naive subjects knew which symptoms to endorse to qualify for a DSM-IIIR Diagnosis of PTSD. Similarly, numerous authors refer to "criterion creep" with regard to PTSD diagnosis (Rosen, 2004, p. 1). Berwin et at., (2009) notes the extreme view that it is faddish and over used for some. However, there are emerging scientific, theoretical, and clinical contributions to this work that must be considered as contributing to evolving diagnostic specificity and reliability in the assessment of PTSD. As a senior PTSD clinician and Department of Veteran Affairs compensation and pension evaluator, it is my strong interest to more thoroughly bridge clinical phenomena with definitional specificity and reliability. This chapter will address and outline the areas of growth that need to continue in order to develop accurate clinical and forensic assessment of PTSD and evolve more reliable diagnostic criteria for the disorder.

The Controversy of PTSD Diagnosis

There has been a long-standing debate with regard to whether the most current diagnostic criteria for PTSD are accurate. "Since its introduction into DSM-III in 1980, no other diagnosis, with the exception of Dissociative Identity Disorder (DID), has generated so much controversy in the field as to the boundaries of the disorder, diagnostic criteria, central assumptions, clinical utility, and prevalence in various populations" (Spitzer, First, & Wakefield, 2007, p. 233). One way the American Psychological Association (APA) has attempted to solve this dilemma was by establishing the official Trauma Psychology Division (APA Division 56) to specifically research the discipline of trauma psychology in 2006. This development, along with proliferation of trauma-related organizations and studies has advanced knowledge and encouraged change in aspects of PTSD assessment. Yet the definition of PTSD remains in flux. The diagnosis was "adopted by a vote of psychiatrists on the basis of their understanding of research, thereby representing a value judgment rather than a careful scientific analysis" [Shulman, 2002, in Kane and Dvoskin (2011, p. 60)]. Currently, there are differences in DSM-IV-TR, used primarily in the USA and the International Classification ICD-10, which is used in much of the world. A new fifth edition of DSM will be released in 2013, and there are significant changes in definition predicted.

The history of PTSD diagnosis is interesting and thoroughly considered by Koch et al. (2006) and a number of other authors. It can be traced from Homer's Iliad, references to the mental impacts of war to The United States Civil War, terms including soldier's heart to shell shock in World War I, and DSM I listing as Gross Stress Reaction. In 1980, PTSD was first described with detail in DSM III, the Diagnostic Manual of the American Psychiatric Association and refined in DSM-III-R (1987). The refinement process has continued with inclusion of increased criteria specificity and subtypes for children. As of May 1, 2012 the proposed DSM-V criteria are as follows:

Note. The following criteria apply to adults, adolescents, and children older than six. There is a Pre-school Subtype for children age six and younger (see below):

A. Exposure to actual or threatened (a) death, (b) serious injury, or (c) sexual violation, in one or more of the following ways:
   1. Directly experiencing the traumatic event(s).

2. Witnessing, in person, the traumatic event(s) as they occurred to others.
3. Learning that the traumatic event(s) occurred to a close family member or close friend; cases of actual or threatened death must have been violent or accidental.
4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse); this does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

B. Presence of one or more of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:
1. Spontaneous or cued recurrent, involuntary, and intrusive distressing memories of the traumatic event(s). (*Note*. In children, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed.)
2. Recurrent distressing dreams in which the content or affect of the dream is related to the event(s). (*Note*. In children, there may be frightening dreams without recognizable content.)
3. Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) are recurring (such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings. (*Note*. In children, trauma-specific reenactment may occur in play.)
4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
5. Marked physiological reactions to reminders of the traumatic event(s).

C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by avoidance or efforts to avoid one or more of the following:
1. Distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
2. External reminders (i.e., people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about, or that are closely associated with, the traumatic event(s).

D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred), as evidenced by two or more of the following:
1. Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia that is not due to head injury, alcohol, or drugs).
2. Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g., "I am bad," "No one can be trusted," "The world is completely dangerous"). (Alternatively, this might be expressed as, e.g., "I've lost my soul forever," or "My whole nervous system is permanently ruined").
3. Persistent, distorted blame of self or others about the cause or consequences of the traumatic event(s).
4. Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).
5. Markedly diminished interest or participation in significant activities.
6. Feelings of detachment or estrangement from others.
7. Persistent inability to experience positive emotions (e.g., unable to have loving feelings, psychic numbing).

E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two or more of the following:
1. Irritable or aggressive behavior.
2. Reckless or self-destructive behavior.
3. Hypervigilance.
4. Exaggerated startle response.
5. Problems with concentration.
6. Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).

F. Duration of the disturbance (Criteria B, C, D, and E) is more than 1 month.

G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.
H. The disturbance is not attributed to the direct physiological effects of a substance (e.g., medication, drugs, or alcohol) or another medical condition (e.g. traumatic brain injury).

Specify if:

With Delayed Expression: if the diagnostic threshold is not exceeded until at least 6 months after the event (although the onset and expression of some symptoms may be immediate).

Subtype: Posttraumatic Stress Disorder in Preschool Children

A. In children (less than age 6 years), exposure to one or more of the following events: death or threatened death, actual or threatened serious injury, or actual or threatened sexual violation, in one or more of the following ways:
   1. Directly experiencing the event(s).
   2. Witnessing, in person, the event(s) as they occurred to others, especially primary caregivers. (*Note*. Witnessing does not include events that are witnessed only in electronic media, television, movies or pictures.)
   3. Learning that the traumatic event(s) occurred to a parent or caregiving figure.
B. Presence of one or more intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:
   1. Spontaneous or cued recurrent, involuntary, and intrusive distressing memories of the traumatic event(s). (*Note*. spontaneous and intrusive memories may not necessarily appear distressing and may be expressed as play reenactment.)
   2. Recurrent distressing dreams in which the content and/or affect of the dream is related to the traumatic event(s). (*Note*. it may not be possible to ascertain that the frightening content is related to the traumatic event.)
   3. Dissociative reactions in which the child feels or acts as if the traumatic event(s) were recurring (such reactions may occur on a continuum with the most extreme expression being a complete loss of awareness of present surroundings). Such trauma-specific re-enactment may occur in play.
   4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
   5. Marked physiological reactions to reminders of the traumatic event(s).One item from criterion C or D below:
C. Persistent avoidance of stimuli associated with the traumatic event, beginning after the traumatic event occurred, as evidenced by avoidance or efforts to avoid:
   1. Activities, places, or physical reminders that arouse recollections of the traumatic event.
   2. People, conversations, or interpersonal situations that arouse recollections of the traumatic event.
D. Negative alterations in cognitions and mood associated with the traumatic event, beginning or worsening after the traumatic event occurred, as evidenced by one or more of the following:
   1. Substantially increased frequency of negative emotional states (e.g., fear, guilt, sadness, shame, or confusion).
   2. Markedly diminished interest or participation in significant activities, including constriction of play.
   3. Socially withdrawn behavior.
   4. Persistent reduction in expression of positive emotions.
E. Alterations in arousal and reactivity associated with the traumatic event, beginning or worsening after the traumatic event occurred, as evidenced by two or more of the following:
   1. Irritable, angry, or aggressive behavior, including extreme temper tantrums.
   2. Hypervigilance.
   3. Exaggerated startle response.
   4. Problems with concentration.
   5. Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).

F. Duration of the disturbance (Criteria B, C, D, and E) is more than 1 month.
G. The disturbance causes clinically significant distress or impairment in relationships with parents, siblings, peers, or other caregivers or with school behavior.
H. The disturbance is not attributable to another medical condition.

Note. An individual can be diagnosed with both the Preschool and Dissociative Subtypes if criteria for both are met.

Subtype: Posttraumatic Stress Disorder: With Prominent Dissociative (Depersonalization/ Derealization) Symptoms

The individual meets the diagnostic criteria for PTSD and in addition experiences persistent or recurrent symptoms of A1, A2, or both:

A1. Depersonalization: Experiences of feeling detached from, and as if one is an outside observer of, one's mental processes or body (e.g., feeling as though one is in a dream, sense of unreality of self or body, or time moving slowly).
A2. Derealization: Experiences of unreality of one's surroundings (e.g., world around the person is experienced as unreal, dreamlike, distant, or distorted).
B. The disturbance is not due to the direct physiological effects of a substance (e.g., blackouts or behavior during alcohol intoxication), or another medical condition (e.g., complex partial seizures).

Note: The Dissociative and Preschool Subtypes are not mutually exclusive.

American Psychiatric Association. http://www.dsm5.org/Pages/TermsandConditionsofUse.aspx

The largest, leading evaluation system for PTSD is the Veterans Benefits Administration (VBA). The VBA recently began to provide new protocols for evaluation, which include detailed templates addressing PTSD assessment that have more specificity in appropriate levels of trauma exposure, stage of evaluation process, and discrimination of comorbid disorder evaluation. Protocols like these will increase the detail and utility of the diagnostic criteria for PTSD in subsequent DSM-V revisions.

A number of leading trauma experts have advocated for the introduction of a specific section in the DSM-V for trauma-based disorders, including complex subtype of PTSD, and other trauma, stress, or event-related disorder. This suggestion has also been posed for developmental trauma disorder for children. The complex PTSD addition is not in the proposed DSM-V, nor is developmental trauma disorder (DTD). The suggested phases of treatment, PTSD subtypes, and common symptoms and signs during avoidant, intrusive, and hyperarousal states proposed and detailed by Horowitz (2011, pp. 11–13) are not included. Sar (2011, p. 1) and others have recommended that a trauma-related disorders section be added to DSM-V to "facilitate integration of knowledge and expertise about interrelated and overlapping consequences of trauma."

The literature on PTSD has included growing support for the existence of different stages during the course of the disorder. The three-level stage model of PTSD has found general agreement from many experts (Brown, 2009; Courtois, 2009; Herman, 1992; Horowitz, 2011). Horowitz (2011) condensed and charted these general subtypes, as simple, compound, and complex PTSD. Horowitz (p. 20) stated that with, "simple PTSD the specifiable traumatic event occurred before symptom formation, with compound PTSD there is comorbidity with substance abuse, anxiety, depressive disorders, or traumatic brain injury, and complex PTSD is characterized by prior severe/multiple traumas reactivated by current stressors." A survey of 25 experts on complex PTSD and 25 experts on classic PTSD (Cloitre et al., 2011, p. 615) noted, "It is now well established that the majority of people who report exposure to trauma have experienced multiple traumas rather than a single event." It is suggested that considering all the evidence together, simple PTSD appears to be predicted by single or cumulative trauma events, whereas complex PTSD appears to be best predicted by insecure, especially

disorganized attachment aggravated by childhood abuse. Testimonials such as these suggest that individuals who present with complex PTSD symptoms should be assessed for disorganized attachments and childhood history of attachment disruptions. These individuals should also be assessed for substance abuse, physical/sexual abuse, and trauma history from their developmental years. In clinical systems, this includes repeated trial therapy observation with individual and group therapy settings, psychoeducational settings, or observation in treatment settings specifically used for observation and diagnostic information regarding interpersonal and learning styles.

Trauma psychology as a field is believed by some leading scholars and practitioners to have an overreliance or domination by the medical or disease approach to trauma response. It is suggested that the scientific exploration of traumatic stress adaptation use more theoretically driven studies based more on deductive reasoning than inductive studies of psychopathological outcomes, as they would "provide a more robust map for the emerging science" (Benight, 2012, p. 1). Benight (2012) argues that knowledge comes from research which includes theoretical propositions while empiricism may be overemphasized and result with primarily information which if attached to theory provides knowledge.

In summary, we believe that currently proposed DSM V diagnostic criteria for PTSD are advanced in evolution yet are lacking in their ability to provide appropriate, thorough diagnosis of individuals while ruling out those who may be exaggerating, feigning, or malingering. Kane and Dvoskin (2011, pp. 148–170) describe in detail the best practices for assessing exaggerating, feigning, or malingering. They reference Rogers (p. 149), "the malingering evaluation is essentially an evaluation of feigning an attempt, conscious or unconscious, to present oneself in a manner that is not an accurate presentation of one's symptoms and status. A comprehensive evaluation is necessary, addressing all important aspects of the person's functioning. Multiple strategies are necessary for the detection of the ways in which an individual may feign."

Ideally, PTSD and other trauma disorders will be allowed their own section within later DSM editions and this will provide the depth of description needed to adequately understand the range and dimensions of this complex diagnosis. It has been suggested that using the new, experimental criteria for PTSD in a supplementary appendix would still be in progress (Rosen, Lillenfeld, Frueh, McHugh, & Spitzer, 2010). If there were an elephant in the room of trauma psychology it would be that disrupted attachment looms very large and there is the challenge of devising assessment approaches that require adjusting our common existing meaning paradigms now supported by many of our customary social structures. Just as leading voices for detailed studies of trauma concerns proliferate, and our knowledge expands, the study of PTSD assessment must do so as well.

Physical Symptoms Associated with PTSD

Research results indicate that there are specific biological changes that can be measured in individuals with PTSD, such as increased heart rate and blood pressure upon exposure to trauma cues. However, to date, there are no definitive biomarkers or biological variables that are useful in the diagnosis and identification of individuals with PTSD. The use of eyetracking has received attention and shows promise in being used for research identification of levels of PTSD. This is an approach that measures where participants are looking on a screen as they attempt to explore and interface during a task. An initial study by Bryant, Harvey, Gordon, and Barry (1995) presented a series of words including a threat word in the parafoveal range of subjects to survivors of automobile accidents with and without PTSD. Those with PTSD demonstrated more initial eye movements toward threat stimuli. These findings are consistent with the hypervigilence and tendency for visual attention that is associated with PTSD. Kimble, Fleming, Brandy, Kim, and Zambetti (2010, p. 293) noted that eyetracking

has been largely unexplored in PTSD. They conducted a study with veterans of the Iraq War and had veterans view slides that had a negatively valenced image and half had a neutral image. Those with higher levels of PTSD symptoms had "larger pupil response to negatively valenced pictures and spent more time looking at them than veterans lower in PTSD symptoms. Veterans higher in PTSD symptoms also showed a trend toward looking first at Iraq images." This supports the idea that posttraumatic pathology is associated with vigilance when processing trauma relevant and negatively valenced stimuli.

There are five components that are particularly important considerations in the forensic assessment of PTSD. The first is that most symptoms of the disorder are entirely self-reported (note that some symptoms such as an exaggerated startle response can be objectively observed). In cases where secondary gain is involved, which would include most forensic cases, tests of malingering or distorted reporting should be administered in conjunction with the PTSD assessment.

A second critical component of a PTSD diagnosis is that the person's level of functioning pre- and posttrauma must be significantly different. For example, someone who was irritable, could not sleep, had difficulty concentrating, and felt detached and estranged before a trauma, and who continued to exhibit these symptoms at the same level of intensity after the trauma, usually would not be diagnosed with PTSD. There needs to be evidence of a general decline in functioning. Changes often observed as a result of PTSD include a deterioration of work or school performance, changes in one's ability to meet routine responsibilities of self-care, a worsening of physical health, and changes in interpersonal relationships, leisure activities, and family role functioning. A self-reported change in the level of functioning should be corroborated either with objective records or through collateral information.

The third critical component of a PTSD diagnosis is related to the above issue of a change in the level of functioning. This is the requirement that symptoms cause clinically significant distress or impairment in social, occupational, or other important levels of functioning. In forensic cases, it is important to obtain corroboration of this distress or impairment because of the potential for deliberate fabrication or exaggeration. Corroboration can be obtained either through a records review or through reports from collaterals.

A fourth consideration is that physical injuries, most particularly head injuries, have been found to complicate the accuracy of PTSD and traumatic stress disorder assessments (Chalton & McMillan, 2009). A study by Chalton and McMillan (2009) suggests that "protective effects" due to the limited memory of a head injury event can create disparity between self-report and clinician administered assessments of trauma. So, while the individual may be self-reporting symptoms that would partially meet, or actually meet criteria, this could mostly be due to the head injury and not an existing traumatic stress disorder. Even the MMPI-2, which has been previously validated as able to accurately detect exaggeration of trauma symptoms, is still not able to make the diagnosis with absolute "certain" accuracy (Tolin, Steenkamp, Marx, & Litz, 2010).

A fifth consideration is that the impairment in functioning should be linked to PTSD symptoms. Finally, these symptoms of PTSD must persist beyond 30 days in order to rule out acute stress disorder.

Proper assessment of PTSD is complex, and in a forensic setting, it should include substantial attention to corroboration of self-reports through thorough records review and examination of collateral information. The ability to evaluate these assessments can be very helpful for those involved in the legal system. PTSD evaluation will be particularly practical for those who want to conclusively and convincingly establish a PTSD diagnosis and for those who need to appraise the accuracy or veracity of a PTSD claim that seems dubious. By paying attention to the five areas mentioned above, one can make an improved initial assessment of the accuracy of a PTSD diagnosis. In addition, if all five of the above elements are attended to, evidence can be convincing that an individual indeed suffers from the disorder (National Research Council, 2010).

Clinical Assessment for PTSD

As the diagnostic criteria for PTSD have evolved, it is necessary that the assessment procedures for accurately diagnosing PTSD and other trauma disorders should evolve in a similar fashion. Complications during assessment of PTSD arise when the assessor considers it to be independently an Axis I diagnosis and does not take into consideration the enduring personality dispositions and other comorbid disorders that commonly occur with this disorder. The literature has suggested that many Axis I syndromes are not independent of personality, and personality often moderates treatment response and assessment. Brown (2009, p. 139) notes that patients diagnosed with personality disorder or dissociative disorder require assessment and "attachment-based treatment leading directly to increased organization of the mind, the development of affective regulatory structures, and metacognitive abilities, whereas trauma processing presupposes the presence of an organized mind, a health self, and secure attachment representations." According to Briere and Spinazzola (2009), because of the broad range of potential posttraumatic outcomes, it is unlikely that the psychological assessment of traumatized individuals can be accomplished only through the administration of a test for PTSD. Once it has been determined that trauma exposure is part of the clinical picture, the number of possible assessment targets proliferate. Briere and Scott (2006, p. 107) advocated for what they call a "components approach," which calls for a battery of relevant testing. Therefore, due to the more complex nature of PTSD from the overlapping Axis I and Axis II traits, clinicians should push for continued assessment during different stages of treatment and the disorder. Courtois (2004) suggested that as treatment proceeds, and new symptoms emerge, repeated administration of measures promotes accurate assessment. There is converging evidence that risk factors for developing PTSD include pretrauma mental health problems and subjective trauma severity. Frazier et al. (2011) observed that these risk factors are mediated by posttrauma protective factors including optimism, social support, and perceived control. Bonanno, Pat-Horenczyk, and Noll (2011) expanded on protective factors, measured perceived ability to cope with trauma, and indicated coping flexibility is a mediator of trauma impact. This review of the history of emotional predictors of PTSD found that anger consistently emerged as a predictor of PTSD and that these results demonstrated differences based on gender and ethnicity (Bonanno et al., 2011). These factors are important considerations in the assessment of PTSD trajectories.

The construct of treatment phases for complex stress disorders has been encouraged (Courtois, 2009, Horowitz, 2011). However, these conceptualizations contribute to the complexity of assessment for PTSD. Assessment needs to focus on uniqueness of symptoms depending upon the subtype, severity, and phase of treatment. There is agreement that assessment of PTSD should include clinical interview by experienced clinicians, and related information, as well as a solid therapeutic alliance of the assessor or clinicians involved with the individual. Horowitz (2011, p. 10) notes that, "Doing this well leads to the first framing of a therapeutic alliance and creates restored hope in the patient. The goal during initial contacts is to try to establish a frame in which the clinician helps to establish a therapeutic alliance." During treatment self-report rating scales and therapeutic alliance scales may be the most useful approach for assessing progress, for symptom reduction, and for improvement in quality of life (Horowitz, 2011). Three scales often used and cited by Horowitz (2011), which are not copyrighted, include: the Impact of Events Scale (IES) (Horowitz, Wilmer, & Alvarez, 1979), the Positive Mind Scale (PMS) (Horowitz, Adler, & Kegeles, 1988), and the Sense of Self Regard Scale (SSRS) (Horowitz et al., 1996).

PTSD assessment may occur within a range of these clinical phenomena, but it is imperative to include a therapeutic relationship assessment and symptom assessment in order to properly evaluate

PTSD. "The symptom clusters that often comprise PTSD include deflections from ordinary experiences into extremes such as intrusive flashbacks and denial of some aspect of reality (Horowitz, 2011, p. 10)." These concepts have been detailed as symptom assessment by the table Horowitz provides (p. 11) listing common symptoms and signs during avoidant, intrusive, and hyperarousal states.

The assessment of complex trauma behavior sequela is addressed by Briere and Spinazzola (2009), who note:

> "As is true of psychological tests in general, those evaluating the effects of complex trauma must have adequate reliability and validity, and should be standardized on demographically representative samples of the general population. Such tests also should have good sensitivity and specificity if they are to be offered as diagnostic instruments. For example, a measure intended to identify PTSD should be able to predict with reasonable accuracy both true cases of PTSD (sensitivity) and those case is which no PTSD is present (specificity). Unfortunately, because of the relative recency of the understanding of posttraumatic conditions, a number of currently used trauma-specific instruments were developed in research contexts and do not meet standards for clinical psychological tests….. Some have not been normed on the general population (p. 108)."

Briere and Spinazzola (2009) observed that there is wide variance in complex trauma outcomes and suggest that a clinician often makes an educated guess in the initial interview based upon history and how clinical presentation occurs (Briere & Spinazzola, 2009). Briere noted (2004) "no psychological test can replace the focused attention, visible empathy, and extensive clinical experience of a well-trained and seasoned trauma clinician." He recommended that, "This process be assisted by early use of broad spectrum screening instruments that assess a number of different areas of symptomatology simultaneously (p. 117)." There are many recommendations for assessment instruments, and theirs are among the most common and current. For use with children, Briere and Spinazzola (2009, pp. 108–116) recommend the assessment instruments:

1. The Child Behavior Checklist (CBCL.
2. The Trauma Symptom Checklist for Children (TCC).
3. The Trauma Symptom Checklist for Young Children (TSCYC).
4. The Child Sexual Behavior Inventory (CSBI).
5. Trauma Symptom Inventory (TSI).

For adults their recommendation includes generic measures, such as, the Millon Clinical Multixial Inventory-III (MCMI-III), the MMPI-2, Personality Assessment Inventory (PAI), and the Symptom Chicklist-90—Revised (SCL-90-R). Their recommendation for PTSD measures include:

1. Trauma Symptom Inventory (TSI).
2. The Posttraumatic Stress Diagnostic Scale (PDS).
3. The Detailed Assessment of Posttraumatic Stress (DAPS).
4. The Bell Object Relations Inventory (BORRTI).
5. The Inventory of altered Self-Capacities (IASC).
6. The Tennessee Self-Concept Scale (TSCS).
7. The Cognitive Distortions Scale (CDS).
8. The Trauma and Attachment Belief Scale (TABS).
9. The Dissociative Experiences Scale (DES).
10. The Multiscale Dissociation Inventory (MDI).
11. Rorschach

Overall, the confounding variables that can lead to misdiagnosis of PTSD and traumatic stress disorders support the need for a more extensive multiphasic assessment for these disorders using not only multiple valid measures, but more intensive clinician evaluation, as well (Nickerson, Bryant, Silove, & Steel, 2011). As Shultz suggests (Kane & Dvoskin, 2011, p. 31) expanding best practices in assessment of PTSD include:

1. Applying a biopsychosocial model.
2. Utilization of standardized procedures.
3. Using numerous information sources, including standardized tests and or other instruments and collateral sources.

4. Comparing the individual with other relevant group data and base rates.
5. Considering iatrogenic and litigation-related factors.
6. Comparison of current and premorbid levels of functioning.

Projective Testing for PTSD

There is an extensive history of projective testing in psychological and PTSD assessment. Such tests are typically used to examine interpersonal relationships and interpersonal trauma. Assessment of interpersonal history and trauma is essential in understanding complex PTSD (Courtois, 2009). The three most common of the tests are: the Rorschach, the Thematic Apperception Test (TAT), and Human Figure Drawings. None of these tests has had either validity or reliability demonstrated. "Despite hundreds of investigations there are no well-replicated relationships between specific drawing signs and either personality or psychopathology" (Lilienfeld, Wood, & Garb, as cited in Kapitan, 2010, p. 40). Rather, these tests are based on what is unsubstantiated personality theory. The hermeneutic approach to understanding is based upon multiple things: the individual, the data from projective testing, individual interview data, and creative expression. These all may be useful for adjunctive and depth assessment, along with standardized testing and ratings as part of a depth idiographic (Heilbrun, Grisso, & Goldstein, 2009) attempt at scientific understanding of the individual. The production of letters, drawings, cyberspace communications, and individual expression are important to forensic and all depth assessment of individual functioning. Conversations between science and art enhance assessment with converging reliability and individualize standard psychometric data. The former modernist view of science holds that all things could be known objectively and factually. Now post-modern viewpoints indicate that research knowledge is valid only within social and cultural contexts, and assessment of contextual setting is encouraged.

Forensic Assessment of PTSD

In forensic psychology "PTSD is virtually unique in that it requires the examiner to render a factual determination about whether or not the event in question actually occurred, a determination supposed to be left to the trier of fact" (Kane & Dvoskin, 2011, p. 63). Kane and Dvoskin indicate that the "most common diagnosis in personal injury cases is PTSD" (p. 59) and discuss the empirical foundations and limitations of assessment; they include guidance on "best practices" in designing evaluation to address issues directly from the referral and promote a "comprehensive evaluation" (Kane & Dvoskin, 2011, p. 39). According to McGuire and Clark (2011, p. 1), "the prevalence of civil actions has expanded in both mental impairment and mental harm arenas, with implications for benefit programs (e.g. Social Security disability, Veteran's disability, worker's compensation) that address these issues and hinge upon various components of PTSD diagnosis giving rise to an increased potential for fraudulent claims."

The diagnostic instruments for PTSD range from simple self-report measures to more elaborate clinician-administered assessments. It is noted by McGuire and Clark (2011, p. 1) that in 1998 PTSD was "characterized as a growth stock in the world of mental illness." This emphasis lessened in criminal defense but increased in civil legal context by positing a "straightforward causal relationship that plaintiffs… lawyers welcome" [Sparr & Pittman, 2007, in McGuire & Clark, 2011, p. 1)] suggesting that an important exception to declining use of insanity defense was the Jesse Bratcher case. In this case, a service-connected PTSD veteran was found guilty but was committed to psychiatric board evaluation, rather than prison. Over time, there has been more frequent use of combat exposure in a mitigating manner for sentencing in capital offenses.

In forensic contexts of evaluation, there have been years of research seeking the "holy grail" of a psychological testing that will accurately distinguish PTSD claimants who are malingering from those who are not. Unfortunately, there is not one test that can do this alone (Feldman-Summers, 2012).

One of the most pressing issues surrounding the forensic assessment of PTSD and traumatic stress disorders is the ability of clinicians to accurately diagnose PTSD and rule out individuals who may be malingering, exaggerating, or feigning symptoms. The diagnostic criteria for traumatic stress diagnoses, such as acute stress disorder, have been considered flawed by some researchers and clinicians since the current criteria leave room for these diagnoses to be abused in forensic and clinical settings (Rosen et al., 2010). The current diagnostic criteria include numerous symptoms that overlap with non-trauma-related anxiety and mood disorders. These can hinder clinicians from reaching what may be a more appropriate differential diagnosis when assessing for traumatic stress disorders and make detection of malingering more difficult (Bodkin, Pope, Detke, & Hudson, 2007; Spitzer et al., 2007).

The recent research on this subject was succinctly summarized in testimony before a committee of the U.S. House of Representatives on March 24, 2009 (Feldman-Summers, 2012, p. 1):

> Although there is need for a reliable and valid method to detect malingering, experts agree that there is no magic bullet or gold standard for doing so. Several investigators have used scales from such tests as the Minnesota Multiphasic Personality Inventory (MMPI) and MMPI-2 to indirectly infer the possibility of malingering, and the Best Practice Manual notes that they are useful in identifying the test-taking style of veterans and in assessing service-connected PTSD status. However, these measures have clear limitations and should not be used as the sole basis for assessing whether a veteran is malingering with respect to PTSD status.

Forensic experts should not rely solely on one source of information when forming an opinion about the existence of any mental disorder or its cause, including PTSD (APA, 2007; Kane & Dvoskin, 2011). "The same is true when making a determination about the presence or absence of malingering. Reponses to a standardized test would (or at least should) be but one of several sources of information to be carefully and thoroughly examined by the forensic expert" (Feldman-Summers, 2012, p. 1).

Psychiatrists and psychologists who diagnose veterans should be capable of assessment similar to that of a competent forensic psychiatrist or forensic psychologist when forming an opinion about a person's psychological condition in civil litigation. Kane and Dvoskin (2011) discussed that the wrong conclusion, e.g., that a veteran is malingering his or her PTSD symptoms, can have disastrous results. The veteran could be deprived of the benefits (including treatment) to which he or she is entitled, thus leading to needless suffering not only for the veteran but also for those whose lives are touched by this veteran. According to Worthen and Moering (2011, p. 1), there had only been one source of information on the Department of Veterans Affairs evaluations prior to their paper: "Despite being one of the most common forensic mental health evaluations, no article has ever appeared in a peer-reviewed journal describing how to conduct US Department of Veterans Affairs (VA) mental health compensation and pension examinations." According to Worthen and Moering (2011), their work outlines the legal framework, ethical considerations, and administrative challenges in these evaluations. Guidelines were provided for private practice clinicians and VA staff or contractors, and consideration of multiple sources of collateral information and records was encouraged. The possible resistance of administrators is discussed, and specific suggestions were made that are now being operationalized for different types of exams: Initial Posttraumatic Stress Disorder (PTSD), PTSD Review, Initial Mental Disorder, and Mental Disorder Review (Worthen & Moering, 2011, p. 1).

The Clinician-Administered PTSD Scale (CAPS) is a 30-item structured interview that corresponds with the DSM-IV criteria for PTSD (Blake et al., 1995). The CAPS has been shown to demonstrate high internal consistency ($r=0.94$), as well as strong convergent validity with other measures of PTSD, e.g. Mississippi Scale for Combat-Related Illnesses ($r=0.91$) and PK scale of the MMPI ($r=0.89$) (Blake et al., 1995). The Posttraumatic Stress Disorder Clinical Checklist (PCL) is a commonly used self-report measure for PTSD. The PCL has been found to

yield a similar overall picture of an individual's PTSD as the CAPS, and can be used when time does not allow for a full CAPS to be administered (Macdonald, Greene, Torres, Frueh, & Morland, 2012). High internal consistency ($r=0.96$) and convergent validity (e.g. with CAPS, $r=0.79$) have been established for the PCL (Keen, Kutter, Niles, & Krinsley, 2008). Unfortunately, a central issue with these, and other, PTSD assessments is that they are based on the diagnostic criteria of the DSM-IV. Therefore, as the diagnosis of PTSD has been significantly evolving and expanding to incorporate other traumatic stress disorders, the assessments commonly used to diagnose PTSD need to be adjusted in order to appropriately assess for these changes.

Gender and Ethnicity Differences in PTSD Assessment

The gender prevalence rates in the literature have typically shown that women have a higher risk for interpersonal trauma and increased risk for PTSD when compared to their male counterparts (Koch et al., 2006, p. 176). "Women may be at heightened risk for PTSD and overrepresent chronic cases of PTSD" (Lilly & Valdez, 2011, p. 140). Lilly and Valdez completed a study investigating timing of interpersonal trauma exposure and revictimization impact on development of PTSD. This included 180 undergraduates in four groups: IPT exposure group, no exposure, childhood only, adolescent/adulthood only, and life span. Results of a linear model indicated that when gender and interpersonal trauma were considered in relation to PTSD symptoms, only the IPT group membership predicted PTSD and was considered to be a better predictor of PTSD than gender. However, a control group for "no exposure," prospective design, and inclusion of an oversample of males is indicated. Similarly, certain types of trauma have been found to be stronger risk factors for PTSD development for women. Sexual assault, physical abuse, and neglect that occurred in childhood have been observed as stronger predictors of PTSD later in life than when the same events occur in adolescence or early adulthood (Koch et al., 2006; McCutcheon et al., 2010). "However, simple prevalence rates should not be misinterpreted as confirmation that female gender is a risk factor or vulnerability for PTSD" (Koch et al., 2006, p. 176).

Conclusion

The diagnosis of PTSD continues to evolve and gain specificity and reliability. Posttraumatic Stress Disorder is a multidimensional construct based upon a wide range of phenomenology of human suffering in response to trauma. Clinical and forensic understanding of assessment of PTSD requires recognition that the phenomenon is layered, multiphasic, and often comorbid with other diagnoses. Assessment best includes a range of observation, documentation, collateral information, psychological instrument use, and contextual information and clinical inference. Forensic and mental health users of PTSD diagnoses must be familiar with and understand the depth of the phenomena, its psychological meaning, and assessment practices to use the diagnosis. We agree with the National Center for PTSD that reliable and valid psychometric instruments should be used to determine whether an individual meets the symptomatic criteria for PTSD. As Shultz suggests (Kane & Dvoskin, 2011, p. 31), expanding best practices in assessment of PTSD should include:

1. Applying a biopsychosocial model.
2. Utilization of standardized procedures.
3. Using numerous information sources, including standardized tests and/or other instruments and collateral sources.
4. Comparing the individual with other relevant group data and base rates.
5. Considering iatrogenic and litigation-related factors.
6. Comparison of current and premorbid levels of functioning.

It is clear that using data from psychometric tests alone should not be the only means for diagnosing PTSD. Instead, the psychometric measures should be used to supplement and substantiate findings gleaned from interview assessment and other sources of data. The CAPS and the PCL are two widely used PTSD measures

that have been established as reliable and valid. However, it is essential to include unstructured clinician administered interviews and assessments, at multiple time points during treatment, in order to ensure that the individual is receiving appropriate evaluation and treatment for their current stage and phase of PTSD and for possible comorbid conditions.

The evolving diagnosis of PTSD has gained specificity and reliability, and the DSM-V will continue to advance with this trajectory. There are converging drivers, including the Department of Veterans Affairs, addressing the evaluation of increased incidence of PTSD and the need for timely and thorough evaluations and treatment. Their work includes examining the national priority of evaluation and treatment for incarcerated populations with regard to the growing forensic demand for appropriate utilization of standards in PTSD. These advancements in evaluation will "exert continuing pressure to conduct research to answer specific prevalence and outcome questions relevant to PTSD," and provide further momentum in advancing and clarifying the definition of PTSD diagnosis (McGuire & Clark, 2011, p. 3).

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Sociological Evidence in Suicide Litigation

15

Stephen J. Morewitz

Sociologists and other researchers can assist defense and plaintiff attorneys and law firms with various aspects of litigation related to suicide and attempted suicide (Jenkins & Kroll-Smith, 1996; Morewitz & Morewitz, 1991). Historically, Emile Durkheim (1858–1917) a French sociologist, was among the first to study predictors of suicide, and wrote a book on the subject (Durkheim, 1897, 1952 [English Translation]). Since then, sociological research has focused on various aspects of suicidal behavior, including:

1. Causes, incidence, and prevalence of suicide and suicidal behaviors.
2. Risk factors of suicide and suicidal behaviors.
3. Impact of suicide and attempted suicide on social, family, educational, and occupational functioning.
4. Social aspects of the treatment at suicidal patients.
5. Suicide prevention training.
6. Suicide screening.
7. Suicide prevention policies and procedures.

In this chapter, research in the above areas are analyzed and several case composite studies are presented to illustrate how sociologists use the research information when serving as expert witnesses in litigation involving suicidal behavior.

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Causes, Incidence, and Prevalence of Suicide and Suicidal Behaviors

According to the World Health Organization, one million people around the world commit suicide each year (Polewka, Kroch, & Chrostek Maj, 2004). Based on 2005 data from the Center for Disease Control and Prevention's National Violent Death Reporting System (NVDRS), Karch et al. (2008) found that males, American Indians/Alaska Natives, and whites had higher suicide rates than other groups. An earlier study found that among adolescents and young adults, aged 15–24 years of age, the annual rates of suicide per 100,000 were 12.0 for females and 14.2 for males (Pelkonen & Marttunen, 2003). Data on leading causes of death show that suicide is the third leading cause of mortality among adolescents (Ali, Dwyer, & Rizzo, 2011). Based on a questionnaire survey of 3,242 consecutive patients, aged 15–24 years of age presenting to 247 general practitioners in Australia, McKelvey, Pfaff, and Acres (2001) showed that 22 % of the patients had suicidal ideation that was clinically significant.

Use of suicide method can vary by group. For example, using data on 28,534 suicide decedents from the NVDRS, between 2003 and 2006, Kaplan, McFarland, and Huguet (2009) demonstrated that male and female veterans had higher firearm-related suicides than nonveterans.

According to Kirkcaldy, Siefen, Urkin, and Merrick (2006), adolescent suicide is often

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_15,

precipitated by family adversity, which includes rejection by family members, separation, and conflict in relationships. Karch et al. (2008) showed that a crisis in the prior 2 weeks, mental disorders, intimate partner problems, and health difficulties precipitated suicides. Based on a national, representative sample of adolescents, Ali et al. (2011) found that a 10 % increase in suicide attempts by family members was related to a 2.13 % increase in adolescent suicidal ideation and 1.23 % increase in adolescent suicide attempts. These results indicate that suicide by family members can have a social contagion effect.

Using the Copenhagen Perinatal Cohort, Sorensen et al. (2009) discovered that parental suicide was associated with a significant increase in suicide risk in their offspring. Previously, Brent et al. (2002) evaluated familial pathways to early-onset suicide attempts and found that the offspring of parents who attempted suicide were six times more likely to attempt suicide compared to the offspring of the control group.

Based on an evaluation of death records for individuals aged 25–64 years with suicide as the underlying cause of death, Morrison and Laing (2011) discovered that 90 % of the sample obtained health care in their year before their death. According to Pfaff and Almeida (2004), up to 70 % of a group of older adults had consulted a general practitioner in the month before committing suicide.

Risk Factors of Suicide and Suicidal Behaviors

Research shows that suicidal risks vary across the lifespan, and social conditions play an important influence in different groups. Various behavioral conditions can facilitate or protect against the risk of suicide.

Theories of socialization suggest that young children tend to have a low risk of suicide, but that adolescents have an increased risk of suicide as they try to find their identity and deal with the storms and stresses of adolescence (Gimenez, Gut, & Saint-Andre, 2011) Those adolescents, and young adults who, in addition have a history of physical, sexual, and psychological abuse are especially at increased risk of committing suicide (Eisenberg, Ackard, & Resnick, 2007; Kirkcaldy et al., 2006; Seguin, Renaud, Lesage, Robert, & Turecki, 2011). Eisenberg et al. (2007) reviewed survey results from 83,731 students in grades 6, 9, and 12 in Minnesota and found that young people with a history of sexual abuse had a greater risk for suicidal behaviors than youths without such a history.

Young people who are bullied may be at increased risk of suicidal behavior (Centers for Disease Control and Prevention, updated August 20, 2009). One investigation conducted by the Center for Disease Control and Prevention revealed that youth who were threatened or physically injured by a peer were 2.4 times more likely to have suicidal ideation and 3.3 times more likely to report suicidal behavior than those who were not victimized by peers (Kaminski & Fang, 2009).

Partner violence and other types of impaired intimate relations and the fear of social loss can increase suicidal risks (Morewitz, 2004). Pregnant women who are victims of partner physical abuse may have a higher probability of attempting suicide than women who are not pregnant (Amaro, Fried, Cabral, & Zuckerman, 1990). Girls who are the victims of dating violence may have a higher risk of attempting suicide or having thoughts about suicide (Covington, Justason, & Wright, 2001; Silverman, Raj, Mucci, & Hathaway, 2001; Wiemann, Agurcia, Berenson, Volk, & Rickert, 2000). Victims who cope with dating violence by isolating themselves and withdrawing from social interactions tend to exacerbate their depressive symptoms and thus increase their probability of attempting suicide.

Adolescents who are exposed to other forms of impaired family dysfunction are at risk for suicide (Kirkcaldy et al., 2006). Those adolescents who have limited social support also face a greater risk of suicide.

Adolescents are at greater risk of committing suicide if they suffer mood disorders, anxiety disorder, disruptive behavior disorders, and abuse

alcohol and other drugs (Pelkonen & Marttunen, 2003; Rowan, 2001; Seguin et al., 2011). Impaired social and occupational functioning is also associated with suicidal ideation among psychiatric patients with major depressive disorder (Sokero et al., 2003). Untreated depressive symptoms are a major risk factor for suicide (Niven, 2007). The presence of panic disorder or panic attacks may increase the risk of suicide in adolescents (Morewitz & Morewitz, 1991).

In Finland, Sokero et al. (2003) discovered that psychiatric patients with major depressive disorder had an increased likelihood of suicidal ideation, which appeared to be a precondition for attempting suicide in this group.

Oquendo et al. (2005) showed that a lifetime history of posttraumatic stress disorder (PTSD) increases the risk of suicide attempts. These individuals often have a comorbid major depressive disorder and this co-occurrence significantly increases the risk of suicidal behavior. Other social and behavioral factors such as a history of prior suicide attempts, family adversity and dysfunction, firearms in households, substance abuse, and precipitating problems also increase suicidal risk.

Tiet, Finney, and Moos (2006) evaluated recent and lifetime sexual abuse, physical abuse, and suicide attempts in a cohort of veterans, aged 19 and older, seeking treatment for substance use problems and/or other mental health disorders from the Department of Veteran Affairs. The investigators found that among male patients, sexual and/or physical abuse within the past 30 days and lifetime sexual abuse was related to an increased risk of suicide attempts within the past 30 days.

Antidepressants also have been linked to an increased risk of suicide in children and adolescents, causing the US Food and Drug Administration to issue a warning of emergent suicidality in children and adolescents based on placebo-controlled randomized trials (Rihmer & Akiskal, 2006).

Adults who suffer chronic pain and related chronic health problems may have an elevated risk of suicide and risk factors for suicide such as feelings of hopelessness (Fisher, Haythornthwaite, Heinberg, Clark, & Reed, 2001; Morewitz, 2006, pp. 19–20; Morewitz, Javed, Tata, & Clark, 2010; Morewitz et al., 2010; Janowicz, Morewitz & Nguyen, 2002; Saito, Morewitz & Reber, 2002).

In response to aging processes and associated declines in social functioning and deteriorating health, the elderly are another group that can be at increased risk of committing suicide (Morewitz & Goldstein, 2007; Oliffe, Han, Ogrodniczuk, Phillips, & Roy, 2011). Smith, Perls, and Haythornthwaite (2004) showed that chronic pain patients with self-reported insomnia and high intensity of pain had a high probability of passive suicide ideation. Assisted suicide and euthanasia in elderly populations is linked to a desire to escape chronic pain and suffering caused by disease and to feelings of hopelessness, despair, and depression (DeLeo & Spanthonis, 2003).

Runaway, throwaway, and homeless youth may have a greater likelihood of early death and suicide than other youth. Based on a cohort of 495 street youths, aged 14–26 years, in Vancouver, Canada, Hadland et al. (2011) found that 46 (9.3 %) of the cohort indicated that they had attempted suicide in the previous 6 months.

Inmates in jails or prisons are at increased risk of suicide. Social and behavioral factors that create severe humiliation and fear for these inmates, combined with other facilitating conditions such as alcohol/drug intoxication, can increase suicidal risks.

Using a Swedish national cohort study of 992,881 young adults, Bjorkenstam, Bjorkenstam, Vinnerljung, Hallqvist, and Ljung (2011) demonstrated that females with one conviction had a risk of suicide (incidence rate ratio) of 1.7, while men had a risk of 2.0. Women and men with five or more convictions had a risk of suicide of 5.7 and 6.6, respectively.

Soldiers exposed to wartime stressors who return home from war are a group at risk for suicide, PTSD, substance abuse, domestic violence, and other social problems. Suicide rates between 2005 and 2007, among veterans of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), were higher than expected,

particularly among active duty veterans of OEF and OIF. In addition, suicide rates were much higher than expected for veterans who had suffered trauma and injuries (Bruce, 2010).

Data from the NVDRS revealed that male and female military veterans were more likely to use firearms to commit suicide than nonveterans. Military veterans in the 18–34 year age group had both higher firearm-related suicide rates and higher total suicide rates than nonveterans (Kaplan et al., 2009).

Protective Factors

Family and social connectedness and family and social support can reduce suicide risk (Eisenberg et al., 2007; Purcell et al., 2012). Based on a sample of 130 inpatients and outpatients, 50 years and older with mood disorders, those who had more family connectedness were less likely to have suicidal ideation (Purcell et al., 2012). Kerr, Preuss, and King (2006) analyzed how gender and age factors affect the protective qualities of family and peer social support.

Increased feelings of connectedness, e.g., the perception that individuals' family, community, and natural environment ensures their well-being, protect against suicide for Alaska native young people (Mohatt, Fok, Burket, Henry, & Allen, 2011).

Impact of Suicide and Attempted Suicide on Social, Family, Educational, and Occupational Functioning

Christiansen and Jensen (2007) conducted follow-up studies of individuals who attempted suicide to determine the risk of repetition of suicide attempts. Based on a Danish register-based survival analysis of 2,614 suicide-attempters and 39,210 non-attempters, they showed that suicide attempters were more likely to commit suicide (2.33 %) in the follow-up period than non-attempters (0.04 %). The investigators found that a significant percentage of suicide attempters (31.33 %) attempted suicide again during the study's follow-up period.

Further research is needed to assess which social factors increase or protect against the risk of additional suicide attempts.

Social and Behavioral Aspects of Suicide Prevention Treatment

Sociologists and other specialists analyze how social factors may influence rates of compliance among high-risk individuals. Providing continuity of care for high-risk youth is often problematic because they have high rates of noncompliance with therapy and often drop out of treatment early (Pelkonen & Marttunen, 2003).

Suicide Prevention Training

Sociological data can be used to evaluate how suicide prevention training can be improved for healthcare providers, counselors/therapists, teachers, coaches, parents, and others who can help at-risk individuals.

Based on a systematic literature review, Mann et al. (2005) showed that the education of health professional regarding suicide prevention is often limited. Taliaferro and Borowsky (2011) point out that medical schools and residencies do not offer adequate training on pediatric mental health and the prevention of adolescent suicide. Therefore, many primary care practitioners lack knowledge about suicide risk factors and feel unprepared to treat adolescent patients with psychosocial problems. In Western Australia, Pfaff, Acres, and McKelvey (2001) discovered that a 1-day course significantly improved general practitioners' ability to detect patients suffering from psychological distress and suicidal ideation.

Research also has focused on the impact of suicide prevention training on different types of professionals. Johnson, Frank, Ciocca, and Barber (2011) showed that training increased the effectiveness of the mental healthcare providers' counseling of clients' parents regarding access to

lethal methods of suicide. They also reported that the training had a positive impact on the community mental health professionals' attitudes, beliefs, and counseling skills about how to counsel clients regarding suicide, especially about how to restrict access to different lethal methods of suicide.

Suicide Screening

Sociological methodologies have been employed to assess the degree to which suicide screening protocols and procedures can be improved to reduce the risk of suicide (Gaynes et al., 2004). Routine screening for depressive symptoms can lead to both a reduction in depressive illness and reduce the risk of suicide (Niven, 2007). Based on a study of 200 students awaiting treatment at a large, urban university, Cowan and Morewitz (1995) demonstrated that a short psychosocial questionnaire led to health providers becoming aware of conditions requiring treatment such as problems that the student had not discussed in prior visits. These short psychosocial questionnaires can be very useful in detecting patients who have clinically significant suicidal ideation.

Suicide Prevention Policies and Procedures

Sociological evidence can be used to evaluate the effectiveness of suicide prevention policies and procedure that specify ways in which suicide risks can be minimized through better training of staff directly involved in the management and monitoring of suicidal individuals.

Sociologists and other specialists also have conducted research on how the architectural design of psychiatric facilities, increased patient monitoring, and more effective management of psychiatric medications can minimize the risk of in-patients' suicidal behavior. They have analyzed how the spatial arrangements of psychiatric facilities can either increase the risk or protect against suicide (Carr, 2011; Gunnell & Nowers, 1997; Martelli, Awad, & Hardy, 2010; Topp et al., 2011). They have also examined how 24-h observation of suicidal individuals in psychiatric facilities, jails, prisons, and other settings can decrease the risk of suicide.

Systemic failures in organizations such as hospitals and mental health organizations may increase the risk of suicide. Janofsky (2009) has suggested that The Joint Commission for the Accreditation of Hospitals and Other Organizations (JCAHO) recognize the systemic nature of suicide risks and require hospitals to report reviewable sentinel events such as inpatient suicide as a condition of maintaining accreditation. Inpatient suicides have been the second most prevalent sentinel event that is reported to the JCAHO.

Mills, Huber, Vince Watts, and Bagian (2011) used root cause analysis (RCA) to help hospitals reduce suicidal risks among war veterans from OIF and OEF. Based on their RCA, the investigators recommend enhancing the referral of at-risk veterans, staff training in suicide evaluation, and follow-up of suicidal veterans.

Composite Case: Suicidal Risks Associated with Child Sexual Abuse at a Youth Organization

I testified in a case involving an ex-convict who exposed himself in front of a child at youth organization. In addition to testifying about the risk factors for recidivism among ex-convicts, I testified about the ways in which victims of childhood sexual offenses are at increased risk of adverse psychosocial effects, including suicidal behavior.

Composite Case Study: Suicide after Discharge from the Hospital

In this case, I was retained as an expert witness to testify about issues related to the effects of social support on suicide. I reviewed the medical records, depositions, and other records in the case. A young woman with a history of depression and who had hospitalized for attempting

suicide was discharged and committed suicide a day post-hospitalization. One theory in the case was that the hospital staff discharged the patient before her new medication for depression had reached its therapeutic effect. In addition, the hospital staff allegedly had not notified the patient's family members that for about 1 week they would have to provide family support to allow her new depression medication to take full effect. I wrote a report, opining that family support can significantly reduce the risks of suicidal behaviors and that in this particular case the family would have provided family support for the decedent, thus, minimizing her risks of suicide.

Composite Case Study: Attempted Suicide at a Residential Mental Health Organization

In this case, I was retained to testify about the type of support that should be provided to individuals at a residential mental health facility who allegedly exhibits possible suicidal behaviors. I was retained in a case involving an adolescent female who tried to commit suicide at a residential mental health facility. During art classes at the facility, the adolescent had painted many images of despair and hopelessness, and her art teacher reportedly had asked him to paint happier pictures. At that time, the adolescent female had been cutting herself and later tried to commit suicide. In this case, one of the issues that I opined about was the extent to which the facility staff provided social support for the adolescent female who allegedly exhibited possible suicidal behaviors.

Composite Case Study: Suicide Committed by a Nun Related to Sexual Abuse

In this case, I was retained to testify about the risk of suicide resulting from nun-on-nun abuse at a residential facility for disabled and retired nuns. I was retained to testify about the extent to which a disabled nun who was forced to live in the same residential facility with her sexual abuse perpetrator was at increased risk for committing suicide. I opined that risk factors such as close and daily proximity to a sexual abuse perpetrator combined with the disabled nun's impaired social functioning increased the disabled nun's risk for committing suicide.

Composite Case Study: Suicide by Falling over the Atrium at a Closed In-Patient Psychiatric Facility

In a wrongful death case involving the suicide of patient hospitalized in a psychiatric facility, I was hired as a consultant to evaluate the effect of architectural design, policies, and procedures at psychiatric facilities on the risk of in-patient suicides. In this composite case, I reviewed the literature on the types of architectural designs of in-patient psychiatric facilities and the ways in which these facilities are designed to reduce the risk of suicide. A major issue in the case was that the decedent had access to the psychiatric facility's atrium and committed suicide by jumping over the atrium. Another issue was the height and number of stories of the facility. Psychiatric settings that have a number of stories increase the risk of patients committing suicide by jumping from high stories of the facility.

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Sociological Data in Malpractice Lawsuits

16

Stephen J. Morewitz

"Medical malpractice is professional negligence by act or omission by a healthcare provider in which the treatment provided falls below the accepted standard of practice in the medical community and causes injury or death to the patient, with most cases involving medical error" (Wikipedia, 2012). It is estimated that 180,000–250,000 deaths from medical errors occur annually in the USA (Gutierrez, 2010; Harmon, 2009; Terry, 2011; Wilson, 2010). In addition, more than 1,000,000 injuries are also caused by medical errors annually. However, less than ~5 % of these incidents result in medical malpractice lawsuits.

Since social, behavioral, cultural, socioeconomic status (SES), demographic, and human factor issues are relevant to certain aspects of medical malpractice, sociologists can assist both defense and plaintiff attorneys in some types of malpractice litigation. They can help litigators analyze (1) a possible breach in the standard of care, (2) damages, and (3) the proximate cause between the provider's negligent acts and damage to the patient's health (Jenkins & Kroll-Smith, 1996; Livingston & Morewitz, 1996).

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A Possible Breach in the Standard of Care

Sociological factors may account for a breach in the standard of care that has occurred. A 24-year-long British study periodically assessed the smoking, alcohol consumption, diet, and physical activity of 9,590 civil servants, both men and women. 654 participants died during the study. The study found that those with the lowest SES had a 1.6 times higher risk of death from all causes than those with the highest SES (Stringhini et al., 2010). Another study that followed 520,000 European men and women over 6 years found that the total mortality among men with the highest education level was 41 % lower than those with the least education level, and that total mortality among women with the highest education level was 29 % lower than women with the lowest education level (Gallo et al., 2012).

The outcome of medical malpractice cases involving obstetrical care may be influenced by the patient's lifestyle as well as various social, cultural, and financial barriers to adequate prenatal care. Evidence concerning a patient's smoking, alcohol, and other drug use during pregnancy can help to explain why some obstetrical complications occur (Morewitz, 2004a, 2004c). Health professionals need to assess and monitor the prenatal patients' smoking and alcohol and other drug use to prevent obstetrical complications resulting from these high-risk activities.

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_16,

The patient's behavioral, lifestyle, cultural, and SES risk factors can impact malpractice lawsuits which allege the failure or delay in diagnosing cancer. Behaviors such as unhealthy nutrition, smoking, overweight, and obesity, and a sedentary lifestyle have been shown to increase the risk of colorectal cancers. An analysis of data from 506,488 participants in NIH-AARP Diet and Health Study showed that these adverse health behaviors were more prevalent in low-SES individuals. This SES disparity helps to explain that the risk of developing a new-onset colorectal cancer, especially cancers of the right colon are higher in low-SES populations (Doubeni et al., 2012). Physicians need to be aware of this information in effectively diagnosing, monitoring, and treating their patients.

In racial and ethnic minorities, low SES also increases both the risk of developing and dying from breast cancer (Baquet & Commiskey, 2000). "African-American women are 25 % more likely to present with late stage breast carcinoma and 20 % more likely to die from breast cancer than White women" (Gullatte, Phillips, & Gibson, 2006). Racial disparities in mortality rates from breast carcinoma may be partly due to the fact that many low SES women do not regularly see a doctor, and when they do, they find that they have stage 3 or 4 cancers.

Social, behavioral, SES, and demographic factors may influence the incidence and prevalence of surgical complications. Patients who are cigarette smokers and undergo surgery are at increased risk for postoperative complications (Lindstrom et al., 2008; Moller, Pedersen, Villebro, & Nørgaard, 2003). In addition, research shows that smoking cessation programs can reduce postoperative complications. In addition, Lindstrom et al. (2008) showed that participating in a smoking cessation program 4 weeks prior to general and orthopedic surgery lowered the patients' risk of postoperative surgical complications. Physicians need to be aware of the effectiveness of smoking cessation programs on reducing postoperative complications and require their patients to stop smoking at least 4 weeks prior to surgery.

In many diseases, without appropriate self-care behaviors, patients can develop life-threatening complications. Since there are possible social and cultural barriers to effective self-care, health professionals need to carefully assess and monitor the ability of their patients to engage in appropriate self-care practices.

Koo et al. (2011) analyzed data on 97 middle-aged and elderly Chinese with type 2 diabetes mellitus (DM). They evaluated factors associated with self-care behaviors and found that alcohol consumption and/or cigarette smoking in the prior 6 months and/or following certain religious or spiritual beliefs (such as fasting) were associated with worse self-care levels. These findings suggest that health providers should assess and educate their patients about their unhealthy lifestyle characteristics to avoid life-threatening of chronic diseases such as type 2 DM, cardiovascular disease, stroke, and cancer. In addition, clinicians should be aware that their patients' cultural traditions may also inhibit them from following their doctor's instructions.

In the USA, 25.8 million people, 8.3 % of the population, have DM. The condition is the leading cause of kidney failure, nontraumatic lower-limb amputations, and new cases of blindness among adults. It is also a major cause of heart disease and stroke, and the seventh leading cause of death (CDC, 2011).

Hispanic-Americans constituted 16.3 % of the US population in 2010 (Census Briefs, 2010). Hispanic-American adults have DM prevalence rates that are 66 % higher than that of White adults (CDC, 2011). They recognize that DM is a serious illness, and use both herbal and biomedical treatments, but many had a negative opinion of insulin. They integrate causes of type 2 DM such as heredity with folk beliefs. Some believed that DM was God's will, or a punishment from God. Others viewed religion as a support system. Cuban-Americans identified weight loss as a treatment, but other Hispanic-Americans thought it was unimportant, or that it was harmful. By using this information, doctors could offer more culturally oriented health care and potentially reduce DM in the Hispanic-American community (Hatcher & Whittemore, 2007).

The awareness and appreciation of cultural, social, demographic, and behavioral diversity

in society, including culturally competent communication skills, are needed to provide effective patient care in a culturally diverse society. Sociological data and research methods can be used to assess the extent to which deficits in cultural competent communications may lead to breaches in the standard of care (McClellan, White, Jimenez, & Fahmy, 2012; Teal & Street, 2009). Sociologists can assess the extent to which a health provider considers the patient's cultural preferences in determining a treatment plan that requires changes in the patient's cultural practices. In these instances, good communication between provider and patients is imperative in order to prevent medical complications due to patient noncompliance to the treatment plan.

Sociological data and methods can be used to assess possible healthcare disparities. In the past, elderly patients with lung cancer did not undergo a resection because the medical community did not consider it justified in terms of postoperative morbidity, mortality, and quality of life (QOL). However, based on a literature review, Chambers, Routledge, Pilling and Scarci (2010) found that patients over 70 years of age who receive an anatomical lung resection do well as younger patients. Thus, health providers should not restrict health care based only on chronological age. Health professionals who provide unequal care based on demographic, cultural, and SES factors increase their risk of being sued for medical malpractice.

Mental health professionals need to be aware of social, behavioral, demographic, and SES risk factors in diagnosing and treating their clients in order to avoid life-threatening complications such as suicidal behavior. Developmental issues across the life cycle can increase the risk of suicide in adolescents and the elderly (Goldstein & Morewitz, 2011; Morewitz & Goldstein, 2007; Morewitz & Morewitz, 1991).

Medical professionals also should incorporate knowledge about social conditions such as social support and family systems into their diagnostic and treatment procedures. Hospital personnel should make sure that newly discharge patients have effective social support to help them deal with potentially life-threatening health problems (Kripalani, Jackson, Schnipper, & Coleman, 2007).

Sociologists have analyzed the incidence and prevalence of the human factors such as inadequate supervision, breakdowns in team work, miscommunication, judgment errors, lack of vigilance, fatigue, and lack of technical knowledge which contributed to medical malpractice and hospital liability cases (Griffen & Turnage, 2009; Regenbogen et al., 2007; Tokuda, Kishida, Konishi, & Koizumi, 2011).

Singh, Thomas, Petersen, and Studdert (2007) studied the medical errors of 240 trainees and found that the main contributors to trainee medical errors were judgment errors, difficulties in teamwork, and problems in technical competence.

Damages

Sociological evidence can be used to assess possible damages in medical malpractice litigation. As in the case of other injury-related litigation, such as in personal injury, hospital liability, wrongful death, and toxic tort litigation, sociological data can help attorneys to determine the impact of diseases and injuries on social, family, occupational, and educational functioning. Sociologists use a variety of instruments to measure disease- and injury-related role losses, such as decreased QOL, stigma, and impairment in social interactions, leisure activities, family functioning, work performance and employee interactions, and educational performance (Goldstein & Morewitz, 2011; Morewitz, 2006a; Morewitz & Goldstein, 2007).

Proximate Cause Between the Provider's Negligent Acts and the Patient's Damages

In malpractice cases, sociologists can review complaint, the medical records, depositions, and other documents related to the case. They also review the literature related to sociological risk factors such as lifestyle, social, behavioral, and SES factors as predictors of disease onset

(Goldstein & Morewitz, 2011; Morewitz, 2006a; Morewitz & Goldstein, 2007).

Below, I shall describe how sociologists can assist in malpractice litigation using my experiences as a consultant or expert witness in several composite cases.

Composite Medical Malpractice Case: A Patient with Laryngeal Cancer

I was retained by a law firm to participate in a medical malpractice settlement conference involving a physician's alleged misdiagnosis of cancer. My experience studying cancer as an Assistant Social Scientist in the Radiobiology Section of the Medical and Biological Research Division at Argonne National Laboratory qualified me to discuss social, behavioral, SES, and demographic factors associated with poly-drug use, such as smoking and alcohol consumption, and cancer. My additional experience as a healthcare researcher with specialization in the social, behavioral, and demographic risk factors and protected factors associated with cancer and other chronic diseases also made me qualified in this case (Morewitz, 2006a; Morewitz & Goldstein, 2007). Also, my experience as a Visiting Assistant Professor and Behavioral Sciences Curriculum Coordinator at the University of Illinois, Department of Family Practice, College of Medicine, enabled me to discuss medical education training related to the social, behavioral, SES, and demographic factors associated with smoking, alcohol use, and cancer.

This particular medical malpractice case involved a physician who allegedly failed to diagnose laryngeal cancer, also known as cancer of the larynx (voice box), in an adult male patient who had a history of alcohol consumption and smoking. The patient subsequently died from this tumor. The law firm representing the defendant physician agreed to have an expert, who was chosen by the plaintiff's law firm, offer his or her opinion at a pretrial medical malpractice settlement conference. An attorney asked me to serve as an expert, and I agreed to review the medical records, and if the case had merit, then I would provide my opinion at this pretrial settlement conference.

In preparation for the upcoming settlement conference, I obtained copies of the medical records. I reviewed all of the medical records including each time the plaintiff was treated by the defendant physician. I reviewed the subjective, objective, assessment, and plan (S.O.A.P) findings for each visit.

In analyzing the medical records and preparing a chronology of events, I noticed that the patient had a recurring medical problem. He initially complained of a lump in his neck. His physician examined the lump and diagnosed a thyroid problem, which he treated with a medication. The medication shrank the lump, but the patient returned to the defendant physician several times over a 2-year period, complaining each time that the lump in his neck had grown back. Each time, physician's diagnosis and treatment was the same. The physician never ordered or even mentioned taking a biopsy of the patient's lump to rule out a possible tumor. The standard of care in this type of a case always includes a biopsy.

As a sociologist with experience in studying smoking, alcohol consumption, and other forms of substance use/abuse and the social, behavioral, SES, and demographic risk factors and protective factors associated with different types of cancer (Morewitz, 2006a, 2006b), I was aware that heavy smoking and alcohol consumption are risk factors for different types of cancer, particularly for malignant tumors of the oral cavity, pharynx, larynx, esophagus, and liver (Canova et al., 2010; Pelucchi, Gallus, Garavello, Bosetti, & La Vecchia, 2006, 2008), and a lump in the neck can be one of the symptoms of laryngeal cancer.

I reviewed the patient's medical records to ascertain the patient's smoking history, but found no detailed information. His medical records revealed that he smoked several cigarettes a day, but the treating physician had not documented the patient's use of other tobacco products such as cigars and chewing tobacco, or if he smoked filtered or unfiltered cigarettes. In the medical records, I also did not find a description of the patient's past history of tobacco use, and the age he started smoking, the frequency of his tobacco use, e.g., number of

cigarettes smoked per week, and the total number of total years that he had used tobacco products. The dose and duration smoking significantly influence the risk of upper aero-digestive tract cancers (Pelucchi et al., 2008).

I then reviewed the patient's alcohol and once again did not find a detailed history of alcohol use. The patient did report having a few drinks a day, but no mention was made of the type of alcohol that he consumed, i.e., whether he drank beer or straight whiskey. I also could not find information on the age he began drinking alcohol and what was his frequency of alcohol use, and the amount of alcohol consumed.

Alcohol use increases the risk of certain cancers and studies have demonstrated that the combination of smoking and alcohol consumption has a multiplicative effect on laryngeal cancer and other cancers of the upper aero-digestive tract (Pelucchi et al., 2006, 2008; Szymanska et al., 2011). An analysis of 2,252 cases of upper aero-digestive squamous-cell carcinoma and 1,707 controls found that the interactive effect of alcohol and tobacco consumption was greater than multiplicative (Szymanska et al., 2011).

In preparation for the upcoming pretrial medical malpractice settlement conference, I obtained articles and books based on the above medical record review and analysis of the relevant literature. I then participated as an expert in the scheduled settlement conference. The case was settled out of court.

Composite Psychiatric Malpractice Case: Suicide by a Patient Discharged from the Hospital

A law firm retained me as an expert witness in a psychiatric malpractice case involving a man who, after being hospitalized for attempting suicide, was prematurely discharged from the hospital. He then proceeded to jump from a high-rise building. The law firm asked me to testify about the impact of social support and family support in reducing the risk of suicide. I was hired because I have extensive research and teaching experience in the field of psychosocial assessment, including assessing suicidal behaviors and risk factors (Cowan & Morewitz, 1995; Morewitz, 2003, 2006a, 2006b, 2008; Morewitz, 2004a, 2004b, 2004c; Morewitz, Javed, Tata, & Clark, 2010; Morewitz & Morewitz, 1991). After discussing some of the facts of the case, I agreed to review the psychiatric malpractice case and possibly testify if I believed that the case had merit.

Upon reviewing the medical records, depositions, and other documents pertaining to this case, I learned that before the patient's hospitalization, he had attempted to commit suicide by jumping off a building. After the first attempt, he was hospitalized and treated with medications to help him control his suicidal behaviors. Unfortunately, he was discharged from the hospital about a week early, because his insurance did not cover a longer hospitalization period. The man's family members and friends were not told that he needed to continue taking his medicine for an additional week after his hospital discharge.

After my analysis of the medical records, depositions, and associated documents, I prepared an expert witness statement, indicating that the plaintiff's suicide risk could have been significantly reduced had the patient's family been involved in providing social support following his discharge from the hospital. Such support could have significantly reduced his suicide risk significantly because he would have felt more connected to and involved with his family, reducing his social isolation and giving him a reason to live.

I relied on research that showed how and why social support and family support can reduce the risks of social isolation and withdrawal, depression, and suicide among individuals in different social groups (Goldstein & Morewitz, 2011; Morewitz, 2004b; Morewitz & Goldstein, 2007; Morewitz & Morewitz, 1991). Purcell et al. (2012) has also shown that family connectedness moderated the association between living alone and suicidal ideation in a clinical sample of adults 50 years of age and older. Sokero et al. (2003) also demonstrated that poor perceived social support was one of the significant independent risk factors of suicidal ideation and attempts. In addition, the man was at increased risk of committing suicide because he had a previous suicide attempt, which is a major risk factor for suicide among different social groups (Morewitz, 2008; Morewitz & Morewitz, 1991).

Before I was to testify in this psychiatric malpractice case, the case was settled out of court.

Composite Case: Medical Malpractice Issues in a Personal Injury Case

This personal injury case involved a male employee who had suffered back injuries, a fractured nose, and other injuries when he fell over an uncovered trench plate at an open construction site near the employee's place of employment. During my trial testimony, I was asked to opine about possible medical malpractice committed by the physician who treated the employee immediately after the accident.

Because of my research and teaching experience in the areas of social, family, behavioral, and demographic aspects of injuries and diseases, I had been retained by a law firm to testify about the impact of the male employees' injuries on his social, family, and occupational functioning. During the discovery period, in a scheduled interview with the physician, I asked him about his diagnosis and treatment of the patient's injuries following his fall. He evaluated the patient after he fell but did not diagnose his back injuries at that time, and I noticed that the physician during my interview seemed reluctant to discuss this issue. After the interview with the physician, I told the patient's attorney that this physician seemed reluctant to discuss his patient's back injuries.

I then prepared my evaluation of the impact of the plaintiff's injuries on his social, family, and occupational functioning based on home observations, interviews, and a review of medical records and literature related to social, family, and occupational functioning (Morewitz, 2006a, 2006b; Morewitz & Goldstein, 2007).

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Sociological Testimony in Long-Term Care Litigation

17

Stephen J. Morewitz

With the growing population of residents in long-term care (LTC) facilities, sociologists can help defense and plaintiff attorneys and law firms in litigation involving the diagnosis, treatment, and management of various health and social problems at LTC facilities. Sociologists analyze medical records, develop questionnaires, scales, and other protocols, conduct experiments, and perform other research procedures (Cowan & Morewitz, 1995; Morewitz, 2006a, 2006b; Morewitz & Goldstein, 2007; Morewitz, Javed, Tata, & Clark, 2010) to evaluate the degree of social, family, and occupational functioning or capacity of individuals in LTC facilities and other healthcare settings (Morewitz, 2006a, 2006b; Morewitz & Goldstein, 2007). Research findings also are used to assess organizational structure and process of LTC and can assist policy makers in developing LTC-related legislation.

Below is a review of social and behavior conditions that affect LTC care. In addition, several composite cases are discussed that illustrate how a sociologist can provide assistance in LTC-associated litigation.

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Cognitive and Physical Impairment in LTC Residents

With the increase in the number of individuals requiring long-term care in the future, researchers are concerned about the cognitive and physical functioning of this vulnerable population. LTC residents are at increased risk of suffering decline in both cognitive and physical functioning (Ang, Au, Yap, & Ee, 2006; Carpenter, Hastie, Morris, Fries, & Ankri, 2006). LTC residents may decline in physical functioning due to the worsening of chronic illnesses. Their physical functioning also may decline due to acute illnesses or both chronic and acute illnesses.

Dementia is prevalent among LTC residents (USDHHS, 2000). However, few investigators have analyzed the ways in which LTC residents' physical functioning changes over time based on the residents' severity of cognitive impairment (Carpenter et al., 2006). Clinicians and researchers rely on various cognitive performance scales to measure possible changes in mental functioning and activities of daily living (ADLs) measures to assess alterations in physical functioning, such as mobility, bathing, dressing, and eating (Carpenter et al., 2006; McConnell, Pieper, Sloane, & Branch, 2002; Yap et al., 2003). These assessments help clinicians improve their prescription of medications to enhance the cognitive and physical functioning of residents in these settings.

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_17,

Using longitudinal data from LTC residents with moderate dementia ($N=7,001$) and severe dementia ($N=4,616$) without co-occurring health problems who had been at a LTC facility for over 90 days, Carpenter et al. (2006) analyzed changes in the LTC residents' cognitive and physical functioning. The authors found that LTC residents with moderate cognitive disability suffered the greatest decline in ADLs involving dressing, use of the toilet, and personal hygiene, while LTC residents with severe cognitive loss suffered the largest disability associated with the ADL involving eating.

Investigators are assessing risk factors associated with the cognitive and physical decline of LTC residents (Ang et al., 2006; McConnell et al., 2002). Based on data from 71,388 non-comatose LTC residents aged 65 and older, McConnell et al. (2002) showed that married residents suffered greater disability in ADLs (also known as ADL dependence) than unmarried residents. In addition, the researchers discovered that severity of cognitive disability at the time of admission to the LTC facility and the severity of cognitive disability over time increased the severity of ADL impairment. However, these conditions did not predict the rate of decline among LTC residents.

Composite Case: LTC Resident with Cognitive Impairment, Multiple Strokes, Hip Fracture, and Pneumonia

I was retained as a consultant by a law firm to analyze the records of a male LTC resident who developed various acute and chronic health problems. In this composite case, a 77-year-old male LTC resident developed multiple strokes, hip fracture, and pneumonia. I reviewed the resident's LTC records to determine if the LTC organization had breached its standard of care. The family was very concerned that their loved one had died prematurely since he had appeared to be in fairly good health during their prior visits to LTC facility.

I was asked by the law firm to prepare a written report. First, I analyzed the decedent's LTC records and developed a chronology of major events that preceded his death. I then analyzed his health problems in terms of the literature on cognitive impairment, dementia, hip fractures, and pneumonia among LTC residents. I then opined as to the extent to which these findings were indicative of any breaches in the LTC facility's standard of care.

Based on my review of the resident's LTC records, I found that the plaintiff, age 84, in April 2009, was diagnosed as having mild cognitive impairment. He was found to be forgetful. One month later, the resident was determined to have problems with recent memory. He reportedly forgets what he says and so he repeats a lot. However, at that time, the resident could remember events 50 years ago. In June, 2009, the resident was determined to not have any signs of dementia or delirium. At that time, he was described as being in good health and stood with a walker.

However, almost a year later, in April, 2010, the plaintiff apparently had multiple strokes and also suffered a hip fracture. At that time, he was diagnosed as having mild cognitive impairment and dementia. He was confused at times and suffered delirium. One month later, he was diagnosed as having senile dementia. In July 2010, he was diagnosed with dementia/delirium. His other diagnosed health problems included pneumonia also in July 2010. In that same month, the plaintiff also was diagnosed as having a right heel PU.

In summary, I opined that the LTC resident's physical, mental, and social functioning and life expectancy deteriorated significantly and rapidly following his multiple strokes and hip fracture in April 2010. Unfortunately, his multiple strokes and hip fracture may have worsened significantly his preexisting mild cognitive impairment and ultimately resulted in his death.

I concluded that with regard to possibility liability, additional investigation was necessary to determine if health providers deviated from accepted standard of care in their assessment, treatment, and management of the resident's medical problems at the LTC facility.

Pressure Ulcers (PUs) in LTC Settings

Historically, abuse and neglect have been recurring problems in LTC facilities and policies and laws were developed in response to these problems. Sociologists can assist attorneys and law firms in determining the extent to which a resident's pressure (PU), also known as a decubitus ulcer or bed sore, reflect LTC abuse, neglect, and substandard care. PU is a major medical problem and is a significant indicator of the quality of care rendered in LTC settings (Park-Lee & Caffrey, 2009). Heel PUs and other types of PUs can result in morbidity, mortality, and increased healthcare costs (Frain, 2008; Lyman, 2009).

Healthcare professionals use different systems to stage PUs. One common system stages PUs based on the depth of the soft tissue damage, and this damage ranges from least severe to the most severe (Park-Lee & Caffrey, 2009). Stage 1 consists of persistent redness of skin. In stage 2, a loss of partial thickness of skin presenting as an abrasion, blister, or shallow crater develops. In stage 3, a loss of full thickness of skin appears as a deep crater. In stage 4, a loss of full thickness of skin that exposes muscle or bone develops.

Practice guidelines that include specific treatment recommendations have been formulated for stage 2 or higher PUs (Park-Lee & Caffrey, 2009). These recommendations include wound care. Based on the results of the National Nursing Home Survey, 2004, 35 % of US nursing home residents with stage 2 or higher PU were provided with special wound care services in 2004 (Park-Lee & Caffrey, 2009).

Sociological studies can assist attorneys and law firms by determining the prevalence and incidence of PUs in LTC settings. Sociologists conduct surveys and analyze medical records to determine the incidence and prevalence of different types of PUs. Investigations have demonstrated that PUs are prevalent in LTC settings. According to Park-Lee and Caffrey (2009), 2–28 % of nursing home residents suffer from PUs. Using the National Nursing Home Survey, 2004, the researchers found that 11 % of the U.S. nursing home residents had PUs.

Findings can help the attorneys and law firms determine the causes and risk factors for PUs in LTC facilities and assessing whether their particular client at the LTC facility was at risk. PUs often develop over bony prominences such as the heel, elbow, hip, shoulder, and back of the head. Using data from the National Nursing Home Survey, 2004, Park-Lee and Caffrey (2009) discovered that nursing home residents who are 64 years of age and younger had a greater likelihood of PUs than older residents. LTC residents who had resided in the nursing home for 1 year or less had a greater likelihood of developing PUs those residents who had been in the nursing home for longer periods. The results also showed that recent weight loss was a risk factor for acquiring a PU; 20 % with recent weight loss had PUs.

Using the Braden Scale with a cohort sample of 1,684 older adults receiving home care, Bergquist (2001) showed that problems associated with friction/shear, limited mobility, and being occasionally moist, constantly moist, or very moist increased the likelihood of PUs.

If the LTC resident developed a stage 2 PU or higher, specialists can assess the extent to which the LTC facility followed clinical practice guidelines in treating the resident (Park-Lee & Caffrey, 2009). Expert witnesses can review the LTC resident's medical records and correlate these findings with the literature on PU risk factors, PU staging systems, and clinical practice guidelines. Specialists can assess the reliability and validity of these PU classification systems.

Research findings can be employed to assess the effects of intervention strategies on reducing the risks of PU development. For example, an in-service training and a heel protective device that was approved by the U.S. Food and Drug Administration may reduce heel PU in a LTC facility (Lyman, 2009).

Composite LTC Case Involving a Right Heel PU

In a composite case, I was retained as a consultant to review the care of a 75-year-old female resident at a LTC facility who had acquired a right

heel PU. This LTC resident had suffered a severe stroke, causing him to be bed-bound and increasing his risk of developing PUs. I reviewed the resident's LTC records and related them to the literature on PU care to assess if the LTC organization had breached its standard of care. The family was very concerned that their loved one had developed a heel PU and was concerned that he may have been neglected at the LTC facility. In my preliminary report, I opined that I could not find evidence that the LTC facility had breached the standard of care in treating the resident's PU.

The above-mentioned composite case illustrates that a severe stroke can have major effects of healthcare outcomes by increasing the immobility of the resident and decreasing his immune system's ability to fight the onset of PUs. Sociologists can discuss how other social, behavioral, and demographic factors may be risk factors for increased morbidity and mortality among LTC residents who develop PUs.

Care of Other Chronic Wounds in LTC and Other Settings

In addition to PU cases, I have been retained to assist attorneys and law firms in litigation involving other chronic wounds such as diabetic ulcers and venous and arterial leg ulcers. In addition to PUs, LTC residents may develop other types of chronic wounds such as diabetic ulcers and venous and arterial ulcers (Jones, Fennie, & Lenihan, 2007). These individuals can suffer a variety of wound-associated symptoms, including pain, exudates, malodour, infection, bleeding, and dressing discomfort. LTC residents with these chronic wound problems can suffer impaired social and psychological functioning (Chrisman, 2010).

Bedside Safety at LTC Facilities

Bed safety in healthcare settings has become a public concern in the past decade (Powell-Cope, Baptiste, & Nelson, 2005). LTC and other healthcare settings in different societies have to balance the need for bed safety rails with public and family concerns that using physical restraints such as side rails for older adults is a form of abuse (Gallinagh, Nevin, Campbell, Mitchell, & Ludwick, 2001).

Sociological findings can assist attorneys and law firms in assessing the causes, incidence, prevalence, human factors (HFs), and the social, behavioral, and demographic risk factors, and protective factors underlying bed-related patient-safety hazards. Sociologists and other researchers investigate how bed hazards in LTC and other healthcare facilities can result in life-threatening injuries. Researchers can use the U.S. Food and Drug Administration (FDA) MAUDE database to assess the incidence, prevalence, and risk factors associated with these bed-associated patient injuries and deaths (Hignett & Griffiths, 2005).

Powell-Cope et al. (2005) noted that a patient can become caught, trapped, or entangled in hospital or LTC bed parts, including the bed rails, mattress, or bed frame. They report that a patient's head, neck, or chest can become entrapped in the bed components.

Based on retrospective analysis of bed-related accidental deaths in Japan and abroad, Kibayashi, Shimada, and Nakao (2011) discovered that these deaths mainly occurred in infants and the elderly with neurological conditions. The investigators found that in these two social groups, the primary causes of death were head injuries resulting from falls from a bed and entrapment-related asphyxia. In these latter cases, the infant or elderly patient's neck became wedged against a bed rail and the subsequent pressure to their necks caused asphyxia.

In Italy, Osculati and Fassina (2000) analyzed two cases of accidental asphyxia by neck compression between bed bars. No lesions were found on the skin or in the anatomic structures of the neck in both cases. Diagnosis of asphyxia was based on evidence of acute pulmonary emphysema and petechiae.

Sociological data can be employed to measure the incidence and prevalence of different types of injuries that result from bed-related patient-safety hazards. Based on an analysis of the U.S. FDA MAUDE database, Hignett and Griffiths (2005)

discovered that incidents involving split-side bed rails only made up 5 % of the bed rail-related injury or death incident reports.

Sociologists investigate the ways in which HFs regarding patients' and health professionals' use of bed systems increase or protect against the risk of bed-related injuries and death. For example, researchers can assess which social, behavioral, and demographic conditions increase the likelihood that both the health professionals and the patients will use the bed systems correctly. The patients' education level may affect the degree to which they understand how to use the bed system correctly. The ease of operating the different bed systems, e.g., easy-to-understand instructions is another HF that may affect the risk of bed-related injuries and death.

Research can be used to measure the extent to which LTC facilities and other healthcare organizations respond to bed-safety patient alerts issued by the FDA and Joint Commission on the Accreditation of Healthcare Organizations (JCAHO). Since 1995, the FDA and the JCAHO have issued bed-safety alerts about the hazards of patient entrapment (Powell-Cope et al., 2005). In litigation involving bed-related injuries and deaths, sociologists and other professionals analyze the actual bed system used and the degree to which the bed system was used based on the manufacturer's safety instructions.

Behavioral data can clarify the effectiveness of the design of new practice guidelines, bed systems, and training programs in reducing the risk of bed-associated patient-safety hazards in LTC and other settings. The U.S. FDA MAUDE database can be used to investigate the effectiveness of preventive strategies on reducing the incidence and prevalence of bed-related patient injuries and deaths (Hignett & Griffiths, 2005). These data on preventive strategies can show the extent to which a LTC facility is following bed safety guidelines to reduce the risk of bed-related injuries and deaths (Kibayashi et al., 2011). Powell-Cope et al. (2005) note that new beds are being made without large gaps to minimize patient entrapment. However, health professionals need to ensure patient safety of patients who are in settings where older beds are still in use.

Kibayashi et al. (2011) describe preventive strategies that take into account both social and behavioral issues and bed system factors. For infants, they recommend that healthcare professionals place them in age-appropriate beds and place them on their backs. For elderly patients, their beds should have properly fitting bed rails to reduce the risk of patient entrapment.

Composite Case Study: LTC Facility Resident Alleged Fall from His Bed

I was retained as a consultant in a composite case involving a male LTC patient who fell from her bed. As a consultant, I reviewed the depositions and LTC records regarding the type of bed rails and bed safety procedures used at the facility, the conditions surrounding the resident's fall from his bed, his resulting injuries, and health status. In addition, I obtained information about the manufacturing and safety of the bed rails, bed system, and policies regarding bed rails and bed systems. I also reviewed the literature on the incidence and prevalence of falls from different types of bed rails and bed systems used in LTC settings.

Violence in LTC Settings

Violence has become a problem in LTC and other healthcare settings. Healthcare organizations have developed intervention strategies to reduce the risk of violence and associated injuries, death, and healthcare costs and lost work days (Blow et al., 1999; Harris & Rice, 1997; Isaksson, Graneheim, Astrom, & Karlsson, 2011).

Behavioral findings can be employed to develop profiles to predict which LTC residents and staff members are likely to become violent (Harris & Rice, 1997; Isaksson, Astrom, Sandman, & Karlsson, 2009; Isaksson et al., 2011; Soliman & Reza, 2001). Researchers also analyze the likelihood that organizational factors in LTC setting and other facilities increase the risk or protect

against violence in these settings (Isaksson et al., 2009). In an investigation of ten nursing facilities, Isaksson et al. (2009) discovered that in wards with high prevalence of violence (HPWs), residents had a higher prevalence of behavioral and psychiatric symptoms and were more likely to need assistance in dressing than in wards with low prevalence of violence (LPWs). In HPWs, the staff's psychological treatment load was higher than in LPWs. Compared to the staff in LPWs, the staff in HPWs had lower job satisfaction. Caregivers in HPWs had less experience caring for elderly residents and they regarded their work environment as less desirable than in LPWs. Compared to LPWs, HPWs had lower caregiver-to-resident ratio, more residents, and longer corridors. Caregivers in HPWs also had more problems in supervising residents than their counterparts in LPWs.

Investigators examine how physically violent behavior may vary depending on the characteristics of the perpetrators, victims, and settings in which the violence occurs. Among residents who suffer from Alzheimer's disease and other dementias and other mental disorders, certain social, behavioral, and demographic conditions may increase their probability of becoming physically violent. In their investigation of 40 group homes for 300 residents who suffer from dementia, Isaksson et al. (2011) discovered that male gender, treatment with antipsychotic medications and prescribed analgesics, and a decline in cognitive orientation were associated with an increased risk of physical violence. Residents with dementia who had impaired speech, trouble comprehending verbal communication, and took antipsychotic medications and prescribed analgesics were more violent than those without these characteristics. Incidents of physical violence were more likely to occur in instances in which caregivers provided intimate helping than in other situations.

Researchers study the organizational responses of LTC facilities to incidents of violence to determine the patterns and trends in organizational responses and the effectiveness of these organizational responses. Their findings can be used to provide evidence about the effective means of responding to violence in LTC facilities. Isaksson et al. (2011) reported that staff intervened in incidents of resident violence by using symptom-based approaches. For example, staff members used distraction, medication, and isolation to manage residents who were physically violent.

Sociologists have analyzed the extent to which behavior therapy is effective in reducing violence in healthcare settings. According to Harris and Rice (1997), research shows that behavior therapy can reduce the risk of violence in different types of institutional settings. In addition, behavioral staff training can be a useful tool in controlling violence in various facilities.

In litigation involving incidents of violence in LTC facilities, sociological findings can evaluate the training provided to the staff and the precautions and strategies that staff members utilize in these violent episodes. Expert witnesses review past incidents of resident violence to ascertain the prior patterns of violence as well as those residents who have repeatedly assaulted staff, patients, and others to help the attorneys and law firms assess LTC liability.

Composite Case: LTC Resident-to-Resident Physical Assault at a LTC Setting

I testified in litigation involving a LTC resident-to-resident assault and battery at a LTC facility (Morewitz, 2003, 2004, 2008). In this composite case, an elder resident at a nursing facility assaulted and battered another elderly resident at this facility. The victim of the assault and battery suffered disabling injuries. I was retained by a law firm to testify about the impact of the resident's injuries on his social and family functioning. I also testified about the social, behavioral, and demographic risk factors and protective factors associated with violence in nursing facilities. In addition, I testified about the incidence and prevalence of assaults in LTC settings and the types of policies and procedures used to reduce the rates of assaults at these facilities and protect the residents and staff in cases of assaults.

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Sociological Testimony and Evidence in Product Liability Litigation

18

Stephen J. Morewitz

Sociologists, like other expert witnesses and consultants, can assist attorneys in product liability litigation. Product liability is defined by a set of laws developed to protect consumers from unsafe products. These laws state that manufacturers and vendors are responsible for manufacturing and selling safe products. When a product causes a consumer's personal injury or death, its manufacturers and/or vendors may be held liable.

Product liability laws cover all types of defective products: auto parts, medical devices, drugs, food products that contain harmful bacteria or toxic ingredients, products containing toxic materials, toys, household equipment, and workplace machinery. In addition, products that are mislabeled can be considered defective under product liability laws.

In these cases, attorneys investigate the injury or death thoroughly; they use expert witnesses and consultants to examine the facts of the case and determine why the injury or death occurred. Once they have established liability, they seek to hold the responsible parties accountable for the injury or death. Manufacturers and/or vendors of defective products may be held responsible for consumer losses including medical bills, treatment costs, disfigurement, permanent disability, lost wages, lost ability to engage in normal employment, emotional pain and suffering, and funeral and burial costs.

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This chapter highlights how sociological testimony can assist attorneys in product liability litigation. This analysis focuses on product liability resulting from five products: tobacco, food, alcohol, joint replacements, and lawn mowers.

In the USA, sociological testimony was employed to prove the extent to which tobacco companies were negligent and deceitful, especially in the way that they developed and used tobacco promotion strategies to target vulnerable groups. Sociological evidence was used to prove the deleterious health effects of tobacco use as well as its impact on social interactions. Using similar techniques, sociological testimony also can show the extent to which the fast food industry and the alcohol beverage industry have been manipulative in promoting fast food and alcohol products as well as determining the health and social effects of fast food and alcohol consumption. Witnesses can testify regarding lifestyle and other social factors in joint replacement product liability litigation. They can also assist in product liability litigation involving the use and misuse of lawn mowers.

Evidence About the Health Effects of Tobacco Use

Even though tobacco is both toxic and extremely addictive, it is still legal in the USA and almost everywhere in the world. Tobacco smoke contains more than 7,000 chemicals, of which hundreds are toxic, and of which at least 70 can cause

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_18,

cancer. These include: benzene, polonium-210, vinyl chloride, formaldehyde, cadmium, lead, chromium, arsenic, toluene, butane, ammonia, hydrogen cyanide, and carbon monoxide (CDC, 2011a). Tobacco smoke has been shown to cause lung cancer (Doll & Hill, 1950; Wynder & Graham, 1950). In fact, it is the cause of the majority of new cases of lung cancer in the USA (Janjigian et al., 2010). In the 1960s, 45 % of US adults smoked cigarettes, but by 2010 only 19.3 % of US adults smoked, although the rate of decrease has leveled out in recent years (CDC, 2011b). However, cigarette smoking still remains the single greatest preventable cause of death both in the USA and the world. In the twentieth century, tobacco use killed 100 million people worldwide, and currently causes 5.4 million deaths per year (WHO, 2008). In the USA, more than 443,000 individuals die annually due to tobacco cigarette use. The deaths due to tobacco use far outnumber the deaths caused by alcohol and illicit drugs combined (CDC, 2008; NVSS, 2009).

Regulation of Tobacco Products in the USA

After more than 50 years of largely fruitless individual and class action lawsuits against the tobacco companies, and the continually rising public health care costs in the USA due to tobacco smoking, the attorney generals of 45 states combined their forces to obtain the 1998 Master Settlement Agreement (MSA) between their states and the four largest tobacco companies in the USA The settlement imposed heavy fines on the tobacco companies, severe restrictions on cigarette advertising, and led to the public release of internal tobacco company documents (Redhead, 1999; Wikipedia, 2012a, 2012b). When the tobacco companies' internal documents were examined, widespread breaches of public trust and laws were found (see below). In a separate case in 2006, a federal judge, Gladys Kessler, found that the top tobacco companies had violated the federal "Racketeer influenced and Corrupt Organizations Act" (Kessler, 2006). In 2012, the judge finally ordered tobacco companies to publish corrective advertisements acknowledging that they had lied about the dangers of smoking, and that smoking caused 1,200 deaths a day and that second-hand smoke caused more than 3,000 deaths a year (Kendall, 2012; LA Times, 2012).

The enactment in 2009 of the *Family Smoking Prevention and Tobacco Control Act* (TCA) gave the Food and Drug Administration (FDA) authority to regulate the manufacturing, marketing, and sale of tobacco products. Prior to the TCA, federal health and safety laws did not apply to tobacco products. In 2010, the FDA restricted the sale of cigarettes or smokeless tobacco to adults older than 18. They prohibited: the sale of cigarette packages with fewer than 20 cigarettes, the sale of cigarettes or smokeless tobacco from vending machines, the distribution of free samples of cigarettes, and the use of tobacco brand names in the sponsorship of any athletic, musical, or other social event (FDA, 2010). The FDA has published a list of 92 harmful and potentially harmful constituents (HPHCs) in tobacco products and tobacco smoke (FDA, 2012a). Currently, tobacco manufacturers and importers are required to report the levels of a subset of 20 HPHCs found in their products to the FDA (2012b).

Health Warning Labels on Tobacco Packages

In the USA, heath warning texts have been required on the sides of tobacco packages since 1966, a time when 46 % of US adults smoked. Today, the prevalence of smoking among US adults has dropped to 18.5 % (CDC, 2012). The 2009 antismoking TCA required the FDA to introduce graphic warning labels on tobacco product packages by 2011, but the implementation has been stalled in the federal courts (Marcus, 2012). Recent sociological research suggests that gruesome medical images showing the negative effects of smoking are effective deterrents, especially among the lower socioeconomic status (SES) smokers (Anonymous, 2009; Koebler, 2012).

Since 1966, at least 39 other countries have required tobacco product health warnings, some quite graphic (Wikipedia, 2012c; Wilson, 2011). One example is an Australian law, which was implemented in 2012 and requires all cigarettes to be sold in generic plain brown packages with the brand name at the bottom of the package. These packages are required to carry warning messages in large type, along with gruesome pictures of medical conditions caused by smoking such as a gangrenous foot, or a diseased lung (Schneider, 2012; Wikipedia, 2012d). Mexico passed a national smoke-free law that required both pictorial and text health warnings on all packages of smoking tobacco products (CTFK, 2012). This law was implemented in 2011 (ASPH, 2011).

Cigarette Substitutes

Because of restrictions on tobacco products and the high cost of cigarettes in the USA, cigarette substitutes such as e-cigarettes, roll-your-own tobacco, and hookah smoking are gaining in popularity (Bardin, 2012; Morris & Tynan, 2012; Riker et al., 2012).

Electronic cigarettes are battery operated, cigarette-shaped inhalers, which simulate smoking by aerosolizing a liquid in which nicotine is dissolved. E-cigarette vapor contains none of the FDA designated 92 harmful and potentially harmful constituents found in tobacco products. However, the health and safety effects of e-cigarettes have not been fully investigated, and some do contain toxic substances such as ethylene glycol. E-cigarettes were introduced in China in 2004 as a substitute for cigarettes and as an assist in smoking cessation. They were first imported into the USA in late 2006 (Anonymous 2011; Wikipedia, 2012e). US sales of e-cigarettes are currently $500 million/year, compared to $100 billion/year for tobacco cigarettes (Elliott, 2012). A pack-a-day tobacco smoker in California will pay $2,373/year (Turiciano, 2012). An equivalent e-cigarette smoker will pay about 50–75 % less (V2CIGS, 2012). The advertising of e-cigarettes in the USA is not currently constrained by the FDA (Elliott, 2012).

Evidence About the Patterns, Prevalence, and Incidence of Tobacco Use

Sociologists, who teach and conduct research on the use and abuse of drugs, can be expert witnesses on the health and addictive effects of tobacco products. They can testify about both the direct health effects of tobacco smoke on smokers, and the health impact of second-hand smoke on bystanders. They can testify about sociological patterns and trends in the prevalence and incidence of cigarette smoking and other tobacco use. They can also offer evidence about the impact of tobacco companies' advertising strategies. The 1997–2012 National Health Interview Survey estimated that 18.5 % of US adults aged 18 and over smoked cigarettes in 2012 compared to 22.4 % in 2002 (CDC, 2012). Sociologists have used the 2010 Behavioral Risk Factor Surveillance System to study differences in the rates of cigarette smoking on a state-by-state basis (CDC, 2011b). Differences in state smoking rates showed the extent to which tobacco companies had been successful in their smoking advertisement strategies in different states.

Various analyses of tobacco industry documents and tobacco advertisements have been used to ascertain tobacco industry strategies and the frequency with which their advertisements targeted children and low-SES groups (Hiilamo, 2007). Prior to 2010, tobacco advertisements often portrayed individuals who smoked cigarettes and used other tobacco products as glamorous, exciting, attractive, fun-loving, and with other desirable characteristics. Sociologists have conducted human behavior experiments to test the success of tobacco advertisements on those persons exposed to the advertisements. Focus groups and a content analysis of tobacco company internal documents also yielded data on the extent to which tobacco companies used sports, music, car racing, and other attractive activities to promote tobacco use. It was obvious that these promotional activities were successful and they are now prohibited by FDA regulations (FDA, 2010).

Sex Typing

Sociological theories of sex typing, or the classification into gender roles illustrates the ways in which the tobacco companies have manipulated their advertisements to impact sex typing (Berns, 2010, p. 472). The tobacco companies also used advertisements to promote cigarettes and other tobacco product among both women and men (Berns, 2010, p. 482). For example, tobacco advertisements portrayed women smoking cigarettes and using other tobacco products, as physically attractive and successful in all types of social interactions (Thornton, 1976).

Carpenter et al. (2005) scanned an internet archive of 7,000,000 internal tobacco industry documents, which were made public as part of the 1998 Master Settlement Agreement (MSA) between four of the largest tobacco companies in the USA and the attorney generals of 45 states (Redhead, 1999; Wikipedia, 2012e). They selected 320 documents for more intensive study. They then used 88 of these documents to assess the extent to which, in the years 1969–2000, the tobacco industry had performed substantial research on female smoking patterns and the types of tobacco products they preferred and then altered the design of their products to maximize smoking among women. The companies responded to women's health concerns by introducing slim, low-tar cigarettes in order to create the illusion of a healthier cigarette (Thornton, 1976). The tobacco industry also used their knowledge of female smoking patterns to promote cigarette brands that featured traditional female preferences.

Tobacco companies targeted men by showing smokers engaged in desirable masculine-oriented activities and in traditional male roles. Through content analysis of the tobacco advertisements, sociologists quantified the frequency with which the tobacco advertisements portrayed men in these roles.

Marketing to Minors

Sociologists investigated the process whereby advertisements were designed and used to attract children and adolescents to highly addictive tobacco-related activities (Berns, 2010, p. 320). They testified about the approximate amount of time children and adolescents were exposed to the tobacco companies' promotion of cigarette smoking and use of other tobacco products. These promotional activities are now prohibited by FDA regulations (FDA, 2010).

The tobacco companies used their advertisements to inculcate the concept that cigarette smoking and use of other tobacco products were morally appropriate and desirable behaviors. Role model theory describes this process as that in which the actors became role models for those who watched these commercials and thus increased their desire to engage in cigarette smoking and use other tobacco products. Children easily identify with models in advertisements and then imitate the behaviors portrayed in these commercials (Berns, 2010).

Adolescents and Young Adults

Sociologists analyzed tobacco industry documents to determine the extent to which the industry targeted adolescents and young adults with advertising and promotions. Such research has shown that most adult smokers started smoking during adolescence (Hiilamo, 2007). The tobacco industry itself had evaluated the smoking patterns and preferences of adolescents in previous decades in order to maximize tobacco's appeal to new smokers. Industry executives considered the targeting of adolescents as crucial to the financial survival of the industry. Subsequently, the tobacco industry altered the characteristics of their cigarette brands, cigarette packaging, and advertising to maximize their attraction to adolescent smokers. This involved the introduction of low tar and filtered cigarettes, adjusting package sizes to fit adolescent preferences, and the strategic placement of their products and advertising imagery in media that appealed to adolescents (Cook et al., 2003; Cummings et al., 2002; Dewhirst & Hunter, 2002; Stanton et al., 2011; Wakefield et al., 2002; Wayne & Connolly, 2002). Since 2010, FDA regulations prohibit these kinds of promotional activities (FDA, 2010).

Wakefield et al. (2002) evaluated the extent to which the tobacco industry used cigarette pack design to promote tobacco use among selected target groups such as young adults and women. Internal tobacco industry documents showed that the tobacco companies used cigarette pack designs to mislead young adults, women, and other targeted groups into thinking that lower tar or milder cigarettes were safer. At the same time, they sold "good tasting" cigarettes that appealed to young smokers.

Internal documents showed that RJ Reynolds (RJR) redesigned their Camel cigarette to promote cigarette smoking among young males. This redesign occurred at the same time that the company implemented its "Smooth Character" smoking advertising campaign. In the 5 years following the introduction of the "Smooth Character" campaign, RJR continued to modify Camel cigarettes to increase the cigarettes' smooth quality. They used additives and blends that reduced throat irritation while increasing the cigarettes' nicotine level. These modifications satisfied young smokers' complaints about throat irritation and harshness, previously associated with smoking Camel cigarettes. RJR's intense competition for market share among youth during the late 1980s may have been a factor in the increase in youth smoking (Wayne & Connolly, 2002).

The tobacco industry targeted specific psychosocial needs and lifestyle preferences of young adults to maximize tobacco use in this group. Internal documents showed that Philip Morris (PM)' global market research and international strategies focused on young adults' desires for social independence, freedom, pleasure, and comfort when developing their tobacco promotion strategies. In the early part of the 1990s, PM used these identified lifestyle and psychosocial needs of young adults to prepare standard marketing procedures on a worldwide basis and to further their campaign they implemented a central advertising production bank where they worked on developing brand images and tobacco promotions designed for young adults. At the same time, PM allowed regional managers to customize their tobacco advertisements to ensure that they were appropriate for their regions (Hafez & Ling, 2005).

Sociological analysis of internal documents also revealed how RJR relied on young adult trendsetters, known as hipsters, to promote tobacco use (Hendlin et al., 2010). Starting in 1995, RJR used hipsters to market Camel cigarettes in the USA. RJR recognized the importance of these hipsters and carefully constructed and maintained Camel cigarette's brand to foster the image of these hipsters in tobacco promotion. RJR promoted musical tours and other in-venue events to associate the Camel brand and tobacco smoking with the symbols and behaviors associated with the hipster lifestyle. RJR anticipated that the use of the hipster in their global strategies would also have a positive impact in the larger population, since other adults would seek to emulate the hipster lifestyle. Since 2010, the FDA has prohibited the use of musical events in tobacco promotion (FDA, 2010).

Tobacco companies also used the popularity of nightclubs and bars to foster youth smoking. Relying on internal documents from British American Tobacco (BAT), Stanton et al. (2011) investigated the degree to which BAT promoted tobacco use to young people using the international language of dance music. They discovered that as tobacco companies faced greater restrictions in tobacco promotions, they relied on music to influence brand image, create recognition of brands, and foster tobacco use among young adults. In 1995, BAT fostered young adults' use of "Lucky Strikes" by developing a partnership with London's Ministry of Sound (MOS) nightclub. BAT developed the MOS partnership in order to maintain credibility among British young adults. In 1997, BAT spread their MOS partnership to two other countries, Taiwan and China in order to foster use of "State Express 555" cigarettes. The authors concluded that BAT sought to use the prestige and status of the contemporary MOS lifestyle to include cigarette smoking as a component of enjoyable positive experiences. The researchers revealed how BAT relied on MOS partnerships to keep smoking fashionable among young adults and to promote use of international brands in different areas around the globe.

Faced with increasing restrictions that limited tobacco promotion, tobacco companies also used sponsorships of Formula One and CART auto

racing. Dewhirst and Hunter (2002) evaluated how tobacco companies fostered tobacco brand exposure and improved symbolic imagery through third-party advertising of events such as Formula One and CART auto racing. Since 2010, this type of promotional activity also has been prohibited by FDA regulations (FDA, 2010).

African Americans

Balbach et al. (2003) reviewed tobacco industry documents and magazine advertisements to assess the extent to which RJ Reynolds had targeted African Americans during their promotion and sale of the Uptown cigarette brand (1989–1990) and then examined the data from (1999–2000). They found that both before and after the Uptown campaign, RJ Reynolds had focused on the African American market segment. This focus also included other RJ Reynolds brands. The company used magazine advertisements, which emphasized smoking mentholated cigarettes while enjoying nightlife, surrounded by luxury items, while engaging in a variety of fantasies.

Asian American and Pacific Islander Immigrant Populations

Using internal tobacco industry documents, Muggli et al. (2002) assessed the extent to which the tobacco industry targeted Asian American and Pacific Islander (AAPI) immigrant populations in their tobacco promotion strategies. Beginning in the late 1980s, tobacco companies and their marketing specialists realized the financial potential of expanding into the AAPI communities since these communities had substantial purchasing power and consisted of a large number of retail businesses owners. The AAPI immigrant populations had a cultural preference for smoking, were experiencing population growth, and had a high rate of smoking in their countries of origin. The tobacco companies therefore focused their tobacco promotion strategies toward the AAPI consumer, retail, and business groups.

College Students

Telephone surveys, with campus informants from 35 postsecondary schools in Canada, showed that tobacco promotion activities were prevalent at all these institutions. In the previous year, every university and 50 % of all colleges in the study had been involved in some type of tobacco promotion activity. For example, 80 % of the university newspapers had carried tobacco advertisements and 18 % of the universities had held tobacco industry sponsored events at nightclubs (Hammond et al., 2005).

Sexual Minorities

Experts have estimated that the smoking rate in the LGBT community is much higher than the smoking rate of heterosexuals living in similar geographic and socioeconomic circumstances (Gruskin et al., 2007; Stall et al., 1999).

The existence of Project SCUM (Sub-Culture Urban Marketing), a 1995–1997 R.J. Reynolds Tobacco Company campaign that targeted LGBT, young adults, and homeless populations in San Francisco was uncovered when a court order forced the Company to release the documents (Landman, 2001; Lief et al., 2012; Wikipedia, 2011).

Investigations of the internal documents determined that the tobacco industry had used both direct and indirect advertising, community outreach activities, and sponsorships to target lesbian, gay, bisexual, and transgender (LGBT) populations. The LGBT communities were receptive to tobacco company campaigns since advertising campaigns targeting the LGBT had been infrequent in previous years (Gruskin et al., 2007; Smith & Malone, 2003; Stevens et al., 2004).

Homeless and Mentally Ill

The internal tobacco company documents also showed that the industry's marketing strategies to the homeless and mentally ill populations focused on developing advertising programs for homeless

shelters. The tobacco companies were thus able to obtain favorable media exposure and political advantage, even as they aimed to increase the use of tobacco products (Apollonio & Malone, 2005).

Military Personnel

An analysis of internal documents from the tobacco industry showed how US military personnel were the focus of tobacco promotion activities. The large number of US military personnel around the world gave the industry the opportunity to reach young adults who came from a specific socioeconomic status and cultural backgrounds. The tobacco industry took advantage of the unique price structure of commissaries and exchanges at US military installations. US military personnel were subjected to customized in-store merchandising, sponsorships, and brand development (Joseph et al., 2005).

Joseph et al. (2005) also found that the tobacco industry tried to shape the US Department of Defense's (DOD) policies regarding the use and sale of tobacco. However, the DOD has recently proposed and implemented some changes in smoking policy for military personnel (AFI, 2012; Tritten, 2010; Wikipedia, 2012f; Zoroya, 2009). For example, in January 2011, the US Navy banned personnel from smoking on submarines (Eade, 2011). In addition, since March 2012, the Air Force (AF) has prohibited tobacco use on all AF installations, except in Designated Tobacco Areas (DTAs) and some housing units (AFI, 2012).

Evidence About Smoking Cessation

Fletcher (2012) examined a sample of approximately 7,200 respondents to the National Health and Nutrition Examination III (NHANES) Phase 2 study (1991–1994). He found that 51 % of the respondents, with a specific variation in their nicotinic acetylcholine receptor, were able to stop smoking. The 49 % of the respondents, who did not possess this genetic variant, continued to smoke despite a 100 % increase in state tobacco taxes. This presence or absence of this genetic variant may be the reason why there has not been a greater change in adult tobacco smoking over the past 20 years. However, further research is needed to confirm this finding.

There may be important social factors that facilitate or inhibit smoking cessation. Sociological research focuses on a range of social conditions that impact the extent to which smokers are able to quit smoking. This evidence can show how different social factors throughout the life cycle influence success in quitting smoking.

In a longitudinal study, Wong et al. (2011) divided a group of 402 young Chinese smokers, 16–25 years old, into quitters, reducers, and persistent smokers. They found that young people with favorable smoking attitudes had a lower probability of quitting smoking. In contrast, most youths who intended to quit smoking at the beginning of the investigation were likely to have stopped smoking by the 6-month follow-up assessment.

Based on a study of 200 patients from an outpatient clinic, Merson and Perriot (2012) discovered that smokers from low SES, are more likely to have experienced negative events, had a fatalistic view of their lives, and consequently had a lower probability of being able to visualize themselves in the future than members of the larger community. These social factors may serve as barriers for stopping smoking. The authors found that those individuals who had a fatalistic view of life were more likely to quit smoking because of its cost but were more likely to start smoking again.

Obesity

Body mass index (BMI) is calculated by dividing a person's weight in kilograms by the square of the person's height in meters. When BMI exceeds 30 kg/m^2, a person is considered obese (WHO, 2000). The World Health Organization (WHO) formally recognized obesity as a global epidemic in 1997 (Cabaliero, 2007; WHO, 2000). As of 2008, 1.4 billion adults, 20 and older, were overweight and of these more than 200 million men

and nearly 300 million women were obese. In addition, more than 40 million children under the age of 5 were overweight (WHO, 2012). The rate of obesity also increases with age at least up to 50 or 60 years old (Kopelman et al., 2009). Once considered a problem only of high-income countries, obesity rates are rising worldwide. Obesity has increased the most in urban settings (WHO, 2000). However, a recent study showed that, even in sub-Sahara Africa, which at present has the world's lowest obesity rate, the rates of obesity were increasing (Cresswell et al., 2012; Wikipedia, 2012g).

The prevalence of obesity among US adults aged >19 was 19.5 % in 1997 and rose to 28.7 % in 2011 (CDC, 2012). Today, the USA has the largest percentage of obese people in the world (OECD, 2009). More than 78 million US adults and about 12.5 million children or approximately one in three adults and one in six children were obese or in 2009–2010 (Ogden et al., 2012). Obesity is epidemic in the USA today and is a major cause of death, attributable to heart disease, cancer, and diabetes (CDC, 2011). Obesity costs the USA about $150 billion a year, or almost 10 % of the national medical budget.

Food-Related Obesity Regulations

An analysis of data from the 2005–2006 National Health and Nutrition Examination Survey showed that only 21 % of adults older than 20 years, who ate more than seven "away from home" meals per week away from home, rated their overall diet as excellent or very good, compared to 43 % of those who ate out less than once per week. While many people recognize that eating out frequently can lower the quality of their diet, but they may be unable to change their situation due to the lack of information about calories and nutrients (Morrison et al., 2011). In 2007, New York City's Board of Heath required chain restaurants to post calorie information on their menus or menu boards (Rauh, 2007). This regulation was subsequently adopted by California and Oregon and then was incorporated in the 2010 Federal health care laws (Rosenbloom, 2010).

Trans fat, or hydrogenated vegetable shortening, is created by adding hydrogen to vegetable oil. The consumption of trans fats increases the risk of obesity, coronary heart disease, and a variety of other diseases (Wikipedia, 2012h). The use of trans fats by restaurants and food producers is banned in New York City, Suffolk, Nassau, Westchester, and Albany Counties in New York. It is also banned in Stamford, Connecticut, Philadelphia, Pennsylvania, and Cleveland, Ohio (Strom, 2011; Wikipedia, 2012h). The state of California has also banned trans fats from restaurant food and baked goods (Wikipedia, 2012h). A study of the effects of the 5-year-old trans fat ban in New York City showed that the average trans fat content of restaurant meals dropped from 2.9 to 0.5 g, while saturated fat increased only 0.55 g. Restaurant meals with 0 % trans fat increased from 32 to 59 % (Angell et al., 2012).

In California, in 2011, the Los Angeles City Council banned fast food restaurants in South Los Angeles, where rates of poverty and obesity are high. The Santa Clara County supervisors adopted a policy that forbids fast food restaurants from selling meals with toys (Strom, 2011).

Food-Related Obesity Litigation

Many children in poor families consume inadequate amounts of nutritious foods. The current image of food insecurity is an overweight or obese child consuming a poor-quality diet (Ludwig et al., 2012). Seven times as many poor children are obese as are underweight (Coleman-Jensen et al., 2012). One possible reason is that poor families spend their food budget on high calorie, low-quality food products such as sugary soft drinks. The Federal Supplemental Nutrition Assistance Program (SNAP) food stamp program currently pays for about 20 million soft drink servings per day, or an estimated $4 billion a year (Shenkin & Jacobson, 2010).

In September 2012, the New York City Board of Health banned the sale of sodas and other sugary drinks in containers larger than 16 ounces (Grynbaum, 2012a). This regulation is being

challenged by the beverage industry in New York State Supreme Court (Grynbaum, 2012b).

A group of overweight children sued McDonald's Corporation for their obesity-associated health problems, triggering legal and ethical controversies over the extent to which McDonald's Corporation and other fast food companies should be held legally accountable for obesity (Ahmed, 2009; Alderman & Daynard, 2006; Daynard et al., 2004; Mello et al., 2003). Critics of this type of litigation believe that the obesity lawsuits against the industry reflect the excesses of the tort system (Mello et al., 2003). Some critics argue that individuals should be held responsible for their own behaviors and that fast food companies are not at fault and should not be sued. Others argue that the fast food industry should be sued because they aggressively promote addictive unhealthy food, aimed especially at children and adolescents who are vulnerable to fast food promotion strategies. Other analysts argue that viewing consumption of fast foods as just a matter of free choice neglects the limited range of choices facing consumers of fast foods. This controversy also reflects the historic role litigation has played in protecting the health of the public in the USA (Daynard et al., 2004).

Alderman and Daynard (2006) assessed the extent to which the lessons learned from tobacco litigation can be applied to obesity lawsuits. Litigation strategies have been successfully employed when government regulation has been ineffective (Daynard et al., 2004). Lawsuits have helped to control both tobacco and asbestos and could be useful in controlling the high prevalence of obesity caused by "junk" food consumption. Daynard et al. (2004) believe that lawsuits are helpful because they publicize unfair and deceptive industry practices and strengthen self-policing within the industries.

The fast food industry may adopt the same "scorched earth" strategy for litigating cases that the tobacco industry used in opposing individual lawsuits. However, the industry might be vulnerable to state lawsuits that are based on consumer protection acts. These lawsuits might be successful if the plaintiffs could prove that the fast food companies used deceptive advertising to promote consumption of fast food. This type of litigation would bypass complicated issues related to causation in other types of litigation (Alderman & Daynard, 2006). Alternatively, the obesity lawsuits against the fast food industry might be based on tort law (Daynard et al., 2004).

Fast Food Industry Promotion Strategies

As in the case of the tobacco industry, sociologists can analyze the extent to which the fast food industry targets unhealthy food promotion to children, adolescents, and other groups and thus increases their risk of becoming overweight and obese (Lobstein & Dibb, 2005).

Sociological data can be employed to demonstrate the degree to which the food industry uses persuasive food marketing strategies to broadcast noncore food advertisements per hour during children's peak viewing times (Kelly et al., 2007, 2008; Neville et al., 2005). Based on analysis of food advertisements for a 1-week period on Australian television channels, Kelly et al. (2008) investigated the extent of persuasive marketing techniques such as use of premium offers and promotional characters in these advertisements. The researchers showed that food advertisements were broadcasted more frequently during children's peak viewing times than during nonpeak times. These food advertisement broadcasts often had promotional characters and premium offers. Popular television programs for children had 3.3 noncore food advertisements per hour contained premium offers compared to 0.2/h during popular adult television programs. Most of the advertisements using persuasive marketing techniques promoted noncore foods to children and were designed to promote children's recognition of brands and their preference for the items.

Food companies can claim that parents determine their children's eating habits and their food promotion strategies do not cause children to eat unhealthy foods. Sociological testimony can assess the impact of parental influence on the advertising influences on young children's food

choice. One study of 75 children, between 3 and 6 years of age, showed that the children's choices of food was moderately affected by television advertising and is resistant to parental influence (Ferguson et al., 2011).

Other sociological analysis can be employed to determine the extent to which the fast food industry promotes unhealthy food to adolescents. An analysis of television ratings over a period of 9 months showed that total food-associated advertising accounted for 26 % of advertised products that were viewed by adolescents, aged 12–17 years (Powell et al., 2007).

Litigation may involve claims that the food industry targets minorities. Sociological evidence can be used to determine the extent different ethnic and racial groups are exposed to food advertising. Powell et al. (2007) found that African Americans had a 14 % higher advertising exposure to food items than whites.

Food promotion strategies are designed to encourage consumer selection of specific brands and maintain consumer loyalty over time. Sociological analysis can reveal the patterns of fast food promotion strategies directed toward children. A survey of nine supermarkets in different areas of metropolitan Sydney, Australia, showed that 75 % of the food promotion strategies involved the use of television, movie celebrities, and cartoon characters. Giveaways made up 13 % of all food promotion strategies. 82 % of the food promotions were for unhealthy foods, while only 18 % of the promotions were for healthy foods (Chapman et al., 2006).

Sociologists have investigated the extent to which fast food companies develop and use social and behavioral profiles of people who consume fast food. An analysis of a national survey of fast food preferences among 20,527 individuals in Australia showed that characteristics, such as younger age, particularly younger than 45 years, a lack of concern about the health impact of actions, higher household income, greater exposure to advertising, and readiness to accept advertising, were the factors that predicted the amount of fast foods consumed (Mohr et al., 2007).

Efficacy of Weight-Loss Activities and Programs

Fast food companies claim that they should not be held liable for causing people to have unhealthy weight, since overweight individuals can easily lose weight. However, research on the effectiveness of weight loss programs can demonstrate the difficulties that overweight and obese persons face in attempting to lose weight.

A study of 4,021 obese adults in the 2001–2006 NHANES found that 2,523 (63 %) reported that they tried to lose weight in the previous year. Among the 2,523 obese adults, 1,026 (41 %) lost >5 % of their weight, and 510 (20 %) lost >10 % of their weight. Those who ate less fat, exercised more, and used prescription weight loss medications lost at least >5 % of their weight. The 510 people, who in addition joined a commercial weight loss program, were able to achieve >10 % weight loss (Nicklas et al., 2012).

The Underage Alcohol Drinking Problem

There are laws against underage drinking in all 50 states. However in 2011, approximately 9.7 million youths (25.1 %), ages 12–20 years, were alcohol drinkers, including 6.1 million youths (15.8 %) who were binge drinkers, and 1.7 million youths (4.4 %) who were heavy drinkers. (Binge drinking is defined as having 5 or more drinks on the same occasion on at least 1 day per month. Heavy drinking is defined as binge drinking on at least 5 days per month.) Rates of alcohol use increased with age among underage persons. By age 15, approximately 50 % have had at least one drink, and by age 18, approximately 80 % have had one drink. In any month, more youths are drinking than are smoking cigarettes or marijuana. Each year approximately 5,000 youths, under the age of 21, die as a result of drinking (DHHS, 2007; SAMHS, 2011, p. 38).

Alcohol Litigation

Many of the lessons learned from the tobacco litigation can be applied to lawsuits designed to decrease illegal alcohol use by underage youth (Jernigan et al., 2007). Litigation can be an effective tool in dealing with the alcohol industry's aggressive promotion of its addictive products. To support litigation claims, researchers should determine the extent to which the alcohol industry engages in unfair and deceptive alcohol promotion practices. The degree to which alcohol companies market to underage youth should be analyzed, and a database of studies related to the alcohol industry's unfair and deceptive alcohol promotion practices should be constructed. Developing experts in alcohol litigation and fostering collaboration among these specialists is also important (Mosher, 2009).

Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use

Studies of alcohol advertising and media exposure can evaluate the impact of alcohol industry self-regulation and lead to policy recommendations for improving industry practices. Such research can demonstrate how much youth and other groups are exposed to alcohol promotion strategies.

An analysis of 6,239 alcohol advertisements in 103 national magazines found that in 2002 underage young people were exposed to 45 % more beer and ale advertising, 12 % more distilled spirits advertising, 65 % more low-alcohol refresher advertising and 69 % less wine advertising than individuals in the 21 and older age group (Jernigan et al., 2004).

In 2000, the trade association for wine companies modified its voluntary marketing code to exclude advertisements in magazines that had an audience of more than 30 % youth, ages 12–20 years. The trade associations for beer and liquor producers also adopted this policy in 2003 (Jernigan et al., 2007).

A review of 143 national magazines for the 2001–2005 years, found that by 2005 alcohol advertising had been reduced 90 % in the nine magazines that had more than 30 % youth readership. Although youths in the 12–20 year age group represented only 15 % of the total US population, 45 % of the alcohol advertisements were in magazines with a >15 % youth readership (Jernigan et al., 2007). Implementing a 15 % threshold would still expose youth to extensive alcohol promotion based on alcohol company sponsorships, on-premise promotions, marketing to colleges/universities, and other unmeasured company practices (Jernigan et al., 2005). At the same time that alcohol ads in magazines with >30 % youth readership were being reduced, alcohol ads on TV were increased (CAMY, 2007).

Sociological research can reveal the extent to which alcohol companies target underage youth for alcohol promotion activities. In 2002, underage girls in the 12–19-year age group had a greater likelihood of viewing advertisements related to beer, ale, and low-alcohol refresher drinks than women, ages 21 years and older. During the period 2001–2002, the underage girls' exposure to low-alcohol refresher drinks increased 216 %, while underage boys' exposure increased by 46 % (Jernigan et al., 2004).

Sociological studies can reveal the degree to which the alcohol industry promotes both underage adolescents' initiation into early alcohol use and heavier drinking rates over time (Anderson et al., 2009; Jernigan et al., 2007; Mosher, 2012). A compilation of 13 longitudinal investigations that studied over 38,000 adolescents during a follow-up period ranging from 8 to 96 months, demonstrated that exposure of adolescents to alcohol-related media and commercials increased the probability that they would start drinking alcohol. If adolescents are already drinking alcohol, exposure to alcohol advertising leads to increased drinking (Anderson et al., 2009).

Quitting Alcohol Use

The alcohol industry can attempt to limit their liability and subsequent damages in alcohol-related litigation by claiming that people can

easily quit drinking alcohol and thereby limit any adverse effects of alcohol. In 2011, there were 978,000 youths aged 12–17 who needed treatment for an alcohol use problem, but only 63,000 received treatment at a specialty facility (SAMHS, 2011, p. 88). There are many factors, which affect an individuals' success in quitting alcohol use such as the perceived risk of drinking alcohol, perceived availability of alcohol, being approached by someone selling alcohol, perceived parental disapproval of alcohol drinking; parental involvement, feelings about peer alcohol drinking, involvement in fighting and delinquent behavior, participation in religious and other activities, and exposure to alcohol use prevention messages and programs. In addition, the quality of the individuals' relations with their families may help to predict success in quitting use of alcohol. Smith et al. (2010) found no significant differences in reasons for quitting alcohol use between young adults and adolescents. However, young adults (ages 18–25) had a significantly lower number of interpersonal reasons for quitting alcohol use than adolescents (ages 13–17 years), since they were more likely to experience fewer social control problems than the adolescents.

Joint Replacement Litigation

Research has demonstrated that smoking can impair the healing of skin flaps and increase the complication rates in the treatment of nonunions. Smoking can also reduce fusion rates in spinal surgeries (Glassman et al., 2000). For reasons that are as yet unknown, patients who smoked had higher hospital charges and longer anesthesia times than those who did not (Lavernia et al., 1999). Preoperation smoking cessation is more effective in reducing postoperative complications if cessation is long term rather than short term (Theadon & Cropley, 2006).

Sociological evidence can be used in joint replacement product liability litigation to prove the extent to which the joint replacement caused complications. Since smoking has been found to have adverse effects in microvascular, trauma, and spinal surgery, sociologists who study smoking can measure the effects of smoking on short-term and long-term complications among patients who undergo joint replacement surgery. Sociologists conduct research on smoking and teach courses on the smoking and other drugs in colleges. They can conduct research on the success rates of individuals who try to quit smoking to show that smokers often have difficulty in quitting smoking.

Sociological testimony can be useful in joint replacement litigation because it quantifies patients' current and past smoking history based on patient interviews and a review of their medical records. Sociologists develop different measures of smoking and can construct different behavioral and social profiles of smokers based on these data. For example, to assess smoking in current smokers, sociologists can calculate the mean number of packs of cigarettes smoked per day and multiply that number by the number of years as a smoker.

Social scientists can correlate smoking measures with different surgical outcomes such as the surgical time required, adjusted hospital charges, and the number of complications during hospitalization. Such testimony can be employ to reveal the extent to which smokers may have a higher degree of operative complexity because their smoking results in more severe orthopedic problems prior to joint replacement surgery. Clinical outcomes between former smokers and current smokers can be compared based on their construction of smoking measures.

Composite Case Involving a Hip Replacement

I was hired as a consultant in one composite case to evaluate possible design flaws in a hip replacement and social and behavior risk factors that may influence outcomes in hip replacement surgery. I reviewed the scientific literature on the complications associated with the use of the hip replacement surgery. For example, I reviewed the studies that determined that sometime after the hip replacement surgery, the patients began to

suffer complications because parts of their hip replacement began to deteriorate. Moreover, I reviewed the literature on smoking as a risk factor for hip replacement surgery. I reviewed the incidence and prevalence of these complications. In addition, I analyzed the adverse health effects of this hip replacement deterioration on the patients' social, family, and occupational functioning.

Riding Lawn Mower Rollover Collisions and Injuries

Another area of product liability litigation involves lawn mower injuries including injuries and collisions that result from ride-on mowers. Sociological data, including human factor research, can be employed to determine the social, demographic, and behavioral characteristics that increase the risk of lawn mower-associated injuries. Moreover, sociological research can assist in safer product design and the prevention of injuries.

Sociological findings have revealed that age is a risk factor for suffering lawn mower-associated injuries. Robertson (2003) found that a significant percentage of power lawn mower injuries are preventable, and this finding is especially applicable for children under the age of 14 years. An analysis of the 1990–2004 data from the National Electronic Injury Surveillance System found that lawn mower injuries are a major cause of morbidity in children (Vollman & Smith, 2006).

Age factors may affect the likelihood of injuries involving different types of lawn mowers. For example, older adults may be at increased risk of serious injuries related to ride-on lawn mowers. "Ride-on" lawn mower injuries data for 2002–2007 from the National Electronic Injury Surveillance System showed that older adults had more emergency department visits and a greater likelihood of being hospitalized than younger individuals. Rollover incidents and run-over injuries increased the risk of hospitalization (Hammig et al., 2009).

Prevention strategies should focus on increasing public awareness of the injuries related to the mowers, increasing user knowledge, and altering product design to minimize injuries and collisions (Hammig et al., 2009; Robertson, 2003; Vollman & Smith, 2006). For example, lowering the center of gravity and/or increasing the axle lengths of "ride-on" mowers could reduce rollover incidents. Moreover, preventing "ride-on" mowers from mowing while traveling in reverse could reduce some injuries.

Composite Case Involving a Rollover of a Ride-On Lawn Mower

In this composite case, I was retained as a consultant to review the accident records, depositions, and related documents of a case involving a man who suffered injuries as a result of the rollover of his "ride-on" lawn mower. I provided the law firm with an analysis of the reconstruction of the incident and research on the incidence, prevalence, and patterns of rollover injuries involving "ride-on" lawn mowers. In addition, I conducted research on the design of the "ride-on" lawn mower involved in the product liability litigation. I also reviewed standards and policies related to "ride-on" mower safety.

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Sociological Evidence in Human Factors-Related Litigation

19

Stephen J. Morewitz

Human factors (HF) involves acquiring knowledge about human capacity, applying these findings to technological systems and services, and making sure that ergonomic principles are followed. Sociological data can improve equipment design, task design, environmental design, the training of employees, and the selection of applicants. Social and behavioral studies can assist policy makers and legislators in the development of public safety-related policies and laws.

In this chapter, I analyze some historical developments in the sociological aspects of the HF field, review research in the above areas, and present several case composite studies to illustrate how sociologists can serve as expert witnesses in HF-related litigation.

Some Historical Developments

At the end of World War I, an aeronautical laboratory at the Brooks Air Force Base and one at the Wright airfield near Dayton, Ohio, were created to distinguish successful aviation pilots from unsuccessful pilots.

Edwin Link in the early 1930s created the first flight simulator, initiating a trend that resulted in more effective simulators and test apparatus. In the civilian area, researchers investigated the effects of lighting on worker productivity, which resulted in the discovery of the Hawthorne effect. According to the Hawthorne effect, employees' motivations can influence productivity more important than by changes in the employees' workplace physical environment. This recognition of the central role of human motivation facilitated the development of HR research.

The application of knowledge of human capability to the design of equipment was not significant prior to World War II. As a result, many fatalities occurred during the war. New systems were being created so quickly during the war that specialists had difficulty in integrating knowledge about human capability and response patterns in developing the new equipment.

Human performance specialists began to realize at the start of World War II that Taylor's approach of matching individuals to existing jobs was no longer relevant. Researchers had to design apparatus that considered human capabilities. Specialists worked to improve aviation safety by enhancing the design and use of military aircraft. During this period, social and behavioral scientists and physiologists worked in this area and the term, ergonomics, emerged to describe their application of social sciences and physiology principles to enhancing aircraft safety.

After World War II, Alphonse Chapanis, Paul Fitts, and others led the field of human factor research. For example, in 1947, Paul Fitts and Jones investigated the best design of control knobs for use in aircraft cockpits. Their work led to innovations in the ways that controls and

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_19,

displays of other equipment could be enhanced. After the war, the important role of the social and behavioral sciences in human factors research was exemplified in the establishment of the Behavioral Sciences Laboratory at the Army Corps Aeromedical Laboratory in Dayton, OH.

Sociological Data in HF Research

HF research incorporates findings from sociology and other social sciences to develop sociological knowledge about human capability, apply these results to designing and implementing systems and services, and ensure that ergonomic principles are integrated into these technological systems and services. Sociological studies explore the effects of social and behavioral factors on perceptual abilities such as acuity, attitudes toward safety, risk taking, risk assessment, and hazard perceptions.

Research methods illustrate how social and behavioral conditions can increase the risk of injuries and diseases on the job and in other settings. In terms of work-related injuries and diseases, sociologists and other social and behavioral scientists can perform methods analysis, time studies, and work sampling. Sociological findings can be used to measure the extent to which the time spent on tasks increases the probability of work-associated injuries and diseases.

In the field of aviation safety, HF researchers have analyzed social and behavioral conditions that contribute to airplane crashes (Li & Baker, 1995). Sociologists and other specialists analyze factors such as pilot age, gender, flight time, history of prior aircraft crashes, and a record of violations in contributing to an increased risk of aircraft crashes.

Researchers assess differences in rates of crashes and violations among pilots who fly different types of planes. Li and Baker (1995) followed a group of 580 pilots who were involved in commuter and air taxi crashes and a control group of 1,555 pilots for up to 3 years. The investigators discovered that pilots who had prior crashes were more likely than the control pilots to be involved in an additional aircraft crash. Moreover, those pilots who had an aircraft crash record had a greater probability of having a violation record than the control pilots. Other conditions such as the pilot age, flight time, and medical classification did not alter these findings.

Data are employed to evaluate the impact of social and behavioral factors on other workplace fatalities, injuries, and diseases (McPhee, 2004; Tinubu, Mbada, Oyeyemi, & Fabunmi, 2010). Sociological research can show how social and behavioral aspects of work practices can increase the risks of injuries and diseases and ways to reduce them. Sociologists study the possible effects of age, gender, socioeconomic status (SES), and race/ethnicity on workplace-related injuries and diseases.

Tinubu et al. (2010) investigated the extent to which age and other factors contribute to an increase in work-related musculoskeletal disorders (WMSDs) among nurses in Ibadan, South-west Nigeria. Based on a survey of 128 nurses, the investigators showed that 84 % of the nurses had suffered one or more WMSDs during their nursing career. The low back was the site of the most prevalent WMSD (44.1 %), followed by the neck (28.0 %), and knees (22.4 %). Tinubu et al. (2010) discovered that nurses with more than 20 years of clinical work were approximately four times more likely to acquire WMSDs compared with those with 11–20 years of work experience. The most perceived risks for WMSDs were working in the same positions for a long duration, lifting or transferring patients who are dependent, and treating an overload of patients in 1 day. To deal with the risks of WMSDs, nurses reported that they are most likely to get assistance in lifting or transferring heavy patients, change nursing procedures to avoid reinjuries and changing the positions of the patients and nurses.

Social and behavioral research can help determine how machine design in combination with social factors can affect the risk of injuries and diseases. Sociological studies can illustrate how social and behavioral conditions can contribute to slips, trips, and falls in mines. McPhee (2004) assesses the complex link between psychosocial and physical factors in illnesses and injuries in the mining industry. Prolonged sitting, inadequate

design of cab design, and vibration are conditions that require further investigation as possible risk factors for back and neck injuries.

Researchers have evaluated the extent to which social and behavioral conditions increase the rate of work-related injuries and mortality in different employment sectors such as the maritime industry. Roberts (2003) analyzed a sample of 200 deaths among British seafarers employed in flags of convenience shipping between 1976 and 1995. The investigator discovered that illnesses were responsible for 68 deaths, 91 of the deaths were accident related, 3 deaths were due to homicide, 7 were from suicide, 4 from drug and alcohol intoxication, and 27 resulted from disappearances at sea and other unknown causes.

Findings related to social and behavioral issues can clarify differences in injury and mortality rates within different sectors of the maritime industry. For example, Roberts (2003) discovered that maritime disasters caused a higher percentage of all deaths in flags of convenience than in British shipping. Hazardous working practices in flags of convenience increase the rate of occupational accidents in this sector of the maritime industry. Roberts (2003) found that many of the work-related accidents such as asphyxiation in cargo holds, and small cargo ships that are lost at sea during bad weather indicate that these ships may have been unseaworthy.

Seafarers and fishermen are at risk for developing substance dependence (Nitka, 1990; Shapovalov, 1992). Drug and alcohol intoxication is especially hazardous on board ship, contributing to maritime catastrophes, work-related accidents, and unexplained disappearances of individuals from ships (Nitka, 1990; Roberts, 2003; Shapovalov, 1992).

According to Nitka (1990), seamen are faced with many stressful conditions that increase their likelihood of escaping in alcohol consumption. Working at sea alone from family and friends in combination with certain personality traits may increase the probability of alcohol abuse among seafarers and fishermen.

Using sociological findings, HF specialists can measure the impact of training and career development on rates of injuries and diseases among workers and other groups. Roberts and Marlow (2006) found that better training of seafarers and enhanced career options for these workers may have helped to reduce fatal accident rates in UK Royal Fleet Auxiliary shipping from 1976 to 2005.

Research has focused on how social and behavioral issues influence driving performance (Quimby & Watts, 1981; Rothe, 1990). Various social and behavioral conditions influence drivers' attitude toward safety, their ability to assess risks, and their ability to perceive hazards in the environment. Sociologists can assess the possible effects of age, gender, SES, race, or ethnicity on driver errors vehicular collisions. This social and behavioral perspective also can provide evidence about the impact of driver training on these social conditions and related safety outcomes.

Studies have revealed that social and behavioral issues may be the most important determinant of traffic safety. Quimby and Watts (1981) discovered that risk taking was the most important predictor of driving performance. Other social and behavioral conditions such as the driver's attitude toward safety, risk assessment, and perception of driving hazards both on the road and under simulated conditions predicted driving performance.

Work in the HF field focuses on the social and behavioral correlates of reckless driving, use of seatbelts, aggressive driving, and other types of driving behaviors (Pharo, Sim, Graham, Gross, & Hayne, 2011; Rothe, 1990; Vaughn et al., 2011).

Social and behavioral researchers not only look at individual correlates of reckless driving but also the social ethos of risk taking that is promoted in the media. Television commercials promote risk taking in many ways. Television commercials try to sell popular makes of vehicles by showing them speed on controlled courses that do not exemplify real road conditions. Sociologists can study the impact of television commercials and other evidence of the social ethos on reckless driving and other types of driving behavior.

HF investigations demonstrate how community norms and values may influence driving behaviors in local communities. Communities may vary in how they inhibit or facilitate dangerous

driving, such as aggressive driving and driving without using a seatbelt. For example, police departments in various communities vary in how they enforce laws against dangerous driving behaviors. Research on social and behavioral issues can clarify the norms and values of these police departments with regard to the enforcement of traffic laws as well as the driving norms, values, and beliefs of the local communities.

Social and psychological attributes of individuals may predict their driving performance. Based on the National Epidemiological Survey on Alcohol and Related Conditions (NESARC) sample of 43,093 adults, Vaughn et al. (2011) showed that social factors were important correlates of reckless driving. Individuals who were diagnosed with antisocial and paranoid personality disorder were more likely to have their driver's license revoked or suspended.

Quimby and Watts (1981) showed that other social and behavioral issues such as additional driver training, age, SES, and personality traits were associated with driving performance. Sociological research on motor vehicle crashes explores the influence of social and behavioral issues on subgroups (Curry, Hafetz, Kallan, Winston, & Durbin, 2011; Hakamies-Blomqvist, 1994). Using a sample of 5,470 serious vehicle crashes between July 2005 and December 2007 from the National Highway Traffic Safety Administration National Motor Vehicle Crash causation Survey, Curry et al. (2011) found that 822 teen drivers were in 795 serious crashes. The most prevalent cause of these serious crashes was driver error (95.6 %). Teen drivers involved in vehicle crashes made three types of errors: recognition errors, e.g., were distracted or did not have adequate surveillance (46.3 % of all teen errors) decision errors, e.g., driving too fast for conditions or following too closely (40.1 %), and performance errors, e.g., losing control of the motor vehicle (8.0 %).

Social and behavioral research can help to clarify the causes of teen driver errors and motor vehicle crashes. Adolescents face a high risk of injury, disease, or death because they often engage in a variety of risky and unhealthy behaviors such as driving dangerously, abusing alcohol and other drugs, smoking, and having unprotected sex (Curry et al., 2011; Pharo et al., 2011). Sociological studies incorporate theories of early childhood and adolescent socialization to reveal how youth learn the norms, values, and beliefs concerning healthy and safe lifestyles. One theory is that children and adolescents develop feelings of invincibility and their relative good health during childhood and adolescence buffers their perceptions of invincibility. Youth who feel invincible will drive dangerously and engage in other risky behaviors because they do not expect to suffer negative behavioral and health consequences.

Other theories emphasize gender differences in childhood and adolescent socialization. Boys are socialized to be aggressive, while girls are not. These gender differences in socialization can encourage male adolescents to drive more aggressively than their female counterparts.

Peer norms, values, and behaviors also may increase the risk of teen driver errors and associated motor vehicle crashes. For example, teens drive with their friends and they may become distracted by them, causing motor vehicle crashes.

Another theory suggests that adolescents engage in reckless behavior because their brain system, especially their prefrontal cortex and associated structures, has not fully developed, causing deficits in their executive brain functioning. Based on a sample of 136 adolescents, ages 13–17 years, and 57 young adults, ages 18–22 years, Pharo (2011) showed that personality factors and neuropsychological tests of executive brain functioning predicted risk-taking.

Some reports demonstrate the influence of older age on driving performance (Hakamies-Blomqvist, 1994). HF research shows that older persons may be better drivers and less accident prone than younger drivers. Older drivers tend to compensate for any age-associated deficits in driving, whereas younger drivers may engage in more distracting behaviors and be less vigilant than older drivers. Based on a study of fatal motor vehicle accidents, Hakamies-Blomqvist (1994) discovered that older drivers, ages 65 and older, committed fewer motor vehicle accidents at nighttime and under adverse road-surface conditions and inclement weather than young and

middle-aged drives, ages 26–40 years. Compared to the young and middle-aged drivers, older drivers were less likely to drive in a hurry, to be intoxicated, or distracted by nondriving activities. The investigators believe that older drivers compensate for their age-related deficits in driving functioning, making them safer than young and middle-aged drivers.

Research can reveal obstacles to implementing innovative technological systems and services. For example, sociological evidence can reveal problems in implementing electronic medical records (EMRs) in different clinical settings. Despite the substantial benefits of EMRs over paper-based medical records, researchers have discovered low adoption rates and various obstacles to using EMRs in hospitals, private practice, and other settings (Boonstra & Broekhuis, 2010). Miller and Sim (2004) showed that for physician practices, EMRs can be costly and not easy to use. Based on a systematic literature review, Boonstra and Broekhuis (2010) discovered a number of barriers to physician acceptance of EMRs, including social, psychological, financial, legal, and organizational. The authors discovered that organizational and change process barriers mediate the other barriers. Therefore, they suggest emphasizing change management processes in improving physician adoption of EMRs.

Investigators analyze how physicians vary in the way they use EMRs. Miller, Sim and Newman (2004) discovered that physicians who use EMRs may be categorized into five types: Viewers, Basic Users, Strivers, Arrivers, and System Changers. Miller et al. (2004) found that most of the physicians in their study were Strivers and Arrivers. These physicians have put in substantial time integrating EMRS in their practice and as a result they are able to obtain benefits from using the system. To improve adoption of EMRs, administrators would need to meet the needs of different types of EMR users.

HF research could be employed to improve adoption of EMRS by focusing on the role of gatekeepers in the medical community. Sociologists could evaluate the role of Strivers and Arrivers in convincing other types of EMR users to increase their use of these technological systems.

Other findings demonstrate how EMRs improve the quality of physician–patient communication and reduce medical errors in clinical settings that use EMRs. For example, one investigation showed that the use of an EMR system in Israel sometimes resulted in the selection of incorrect medications or the input of data into the wrong patient's medical records (Shachak, Hadas-Dayagi, Ziv, & Reis, 2009). In addition, the authors discovered that use of the EMR disrupted physician–patient communication.

Future studies could examine the attitudes of health providers and administrators regarding ways to improve health provider–patient communication and reduce medical errors associated with EMR use. Other research could examine how to improve health provider–patient communication in conjunction with EMR system. Shachak et al. (2009) suggest that improving the spatial aspects of the physician practice settings could improve physician–patient communication in practice settings that use EMRs. Another focus is on enhancing the computer skills of physicians and other health providers (Shachak et al., 2009).

Other findings highlight the role of support systems in increasing the adoption of EMRs and improving the quality of patient care delivered in EMR environments. Miller and Sim (2004) assert that offering systems of work/practice support can help to overcome physicians' barriers to using EMRs. Sociological investigation would explore what structures and processes of support would most effectively improve physician adoption of EMRs and enhance patient care outcomes.

Researchers also can study how social and behavioral issues in using electronic clinical data exchange processes and structures can help to overcome obstacles to using EMRs. According to Miller and Sim (2004), improvements in electronic clinical data exchange will increase physician adoption of EMRs.

Other investigations evaluate the effectiveness of financial incentives in improving the rates of physician adoption of EMRs and enhancing the quality of patient care in EMR settings. Miller and Sim (2004) believe that offering financial rewards should be used to improve quality in EMR settings. Further research could

explore the type and frequency of such financial rewards and their impact on EMR use and patient care outcomes.

Sociological Research in HF and Policies, Laws, and Other Interventions

HF findings can be used to develop a range of policies, laws, and other interventions. Data on gender differences and other social, behavioral, and cultural factors in high-risk driving among young drivers can assist educators in developing appropriate instructional strategies based on these gender differences (Elliott, Shope, Raghunathan, & Waller, 2006; Shope & Bingham, 2008).

Data about the prevalence of cell phone use while driving and its impact on driving performance and vehicle accidents can assist policy makers in developing appropriate laws to ban cell phone while driving (Farmer, Braitman, & Lund, 2010).

Evidence about the driving performance among drivers who suffer from alcohol intoxication, attention deficit, and hyperactivity disorders, and other health problems that can impair driving performance can be used to develop policies and laws to promote traffic safety (Harrison & Fillmore, 2011; Weafer, Camarillo, Fillmore, Milich, & Marczinski, 2008).

Research on shift-work can be used to develop workplace safety policies and procedures. For example, sociological data reveal that demographic factors such as age and gender, lifestyle factors, living conditions, and worker motivation may increase the risk of impaired performance, errors, accidents, and impaired performance among shift workers (Costa, 2010).

HF research can help guide the development of airline policies to improve the performance and job satisfaction of aviation pilots. These results can reveal how different types of occupational, social, behavioral, and family factors influence job performance and job satisfaction (Cooper & Sloan, 1985; Nikolic & Sarter, 2007). For example, behavioral data can be used to evaluate how airline pilots diagnose and recover from disturbances in flight deck management (Nikolic & Sarter, 2007).

Composite Cases

The following cases illustrate the ways in which defense and plaintiff attorneys and law firms can rely on sociological testimony.

Composite Case Study: The Age 60 Rule – Age Discrimination in Commercial Aviation?

I was approached by a law firm about possibly serving as an expert witness to testify about issues related to alleged age discrimination in terminating the employment of commercial airline pilots. This case concerned whether commercial pilots should have mandatory retirement at age 60. The law firm wanted an expert witness to testify that commercial pilots had social and behavioral characteristics such as extensive flight time experience and social maturity that enabled them to be excellent commercial pilots well beyond the mandatory retirement age of 60.

Composite Case Study: HF Related to a Slip and Fall Incident

In this composite case, I was retained to testify about the causes and impact of injuries allegedly suffered by an employee who slipped and fell at a construction site. During my trial testimony, I was asked to reconstruct the process in which the employee had sustained his injuries. In addition, I testified about social factors that may have increased the risk of injuries as a result of the employee's slip and fall.

Riding Lawn Mower Roll-Over Collisions and Injuries

Another area of product liability litigation involves lawn mower injuries, including injuries and collisions that result from ride-on mowers. Sociological data, including human factor research, can be

employed to determine the social, demographic, and behavioral characteristics that increase the risk of lawn mower-associated injuries. Moreover, sociological research can assist in safer product design and the prevention of injuries.

Sociological findings have revealed that age is a risk factor for suffering lawn mower-associated injuries. Robertson (2003) found that a significant percentage of power lawn mower injuries are preventable, and this finding is especially applicable for children under the age of 14 years. Based on 1990–2004 data from the National Electronic Injury Surveillance System, Vollman & Smith (2006) found that lawn mower injuries are a major cause of morbidity in children.

Age factors may affect the likelihood of injuries involving different types of lawn mowers. For example, older adults may be at increased risk of serious injuries related to ride-on lawn mowers. Using results from the National Electronic Injury Surveillance System between 2002 and 2007, Hammig et al. (2009) discovered that older adults had higher emergency department visits for ride-on lawn mowers than younger individuals.

The health, social, family, and occupational impact of lawn mower injuries may vary depending on the age of the injured person. Hammig et al. (2009) showed that older adults had a greater likelihood of being hospitalized than younger persons.

The type of injury also may influence the risk of hospitalization. In Hammig et al.'s (2009) research, rollover incidents and run-over injuries increased the risk of hospitalization.

Prevention strategies should focus on increasing awareness of the injuries related to the mowers, increasing user knowledge, and altering product design to minimize injuries and collisions (Hammig et al., 2009; Roberts, 2003; Vollman & Smith, 2006). For example, altering the product design of ride-on mowers may reduce the risk of injuries involved in rollover incidents. Moreover, equipping ride-on mowers with a no-mow in reverse default feature may reduce injuries to children and other individuals.

Composite Case Involving a Roll-Over of a Ride-On Lawn Mower

In this composite case, I was retained as a consultant to review the accident records, depositions, and related documents of a case involving a man who suffered injuries as a result of the rollover of his ride-on lawn mower. I provided the law firm with an analysis of the reconstruction of the incident and research on the incidence, prevalence, and patterns of roll-over injuries involving ride-on lawn mowers. For example, I reviewed the literature on possible age and gender differences in injuries involving ride-on lawn mower roll-over incidents. I also conducted research on the design of the ride-on lawn mower involved in the product liability litigation. I also reviewed standards and policies related to ride-on mower safety.

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Sociological Testimony in Alcohol- and Other Drug-Associated Litigation

20

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Sociologists provide assistance in different aspects of criminal and civil litigation related to alcohol and other drugs (Jenkins & Kroll-Smith, 1996). Historically, sociologists have studied the causes, prevalence, incidence, and consequences of alcohol and other drug use, abuse, and dependence or addiction and participated in substance abuse-related policy development. Sociological research has focused on five areas:

1. Causes
2. Incidence and prevalence
3. Risk factors
4. Impact
5. Prevention

In this chapter, I present research in the above areas and offer several case composite studies to illustrate how sociologists can serve as expert witnesses and consultants in litigation involving alcohol and other drugs.

Causes

Sociological theory and research methods can be used to describe the causes of alcohol and other drug use, abuse, and dependence or addiction. Theories, such as structural-functionalism, conflict theory, symbolic interaction, and subcultural theory, view the problems from different perspectives.

Structural–functional theory looks at the societal norms and values and their impact on the use and abuse of drugs and alcohol. It is the weakening or breakdown in society norms and values (anomie) that is a major factor behind today's widespread substance abuse (Mooney, Knox, & Schacht, 2009).

Conflict theory claims that it is societal inequalities that underline substance abuse.

Symbolic interaction theory posits that it is peer group emphasis on the pleasurable results of substance abuse that is a major factor both in the continuing use of and in the creation of new drug abusers (Mooney et al., 2009). This theory helps to explain how individuals who view drug use as pleasurable are more likely to be dependent on drugs (USDHHS, 2006). The theory emphasizes how peers help new drug users to redefine their drug experiences in getting high or intoxicated as fun and pleasurable.

Subcultural theory emphasizes that it is the subcultural promulgation of its values regarding substance abuse that are important in the initiation, use, and maintenance of alcohol and other drugs. For example, in some societies the experience of drinking alcohol to excess is a rite of passage in becoming an adult. Sociologists investigate the relationship between cultural expectations, the user's loss of control and the impact of different substances on the body (Jenkins & Kroll-Smith, 1996). This type of investigation can help elucidate some of the limitations of biomedical explanations of alcohol and other drug use.

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_20,

Behavioral scientists investigate how participation in certain subcultural groups such as students, criminal gangs, athletes, and entertainers may increase the potential for drug use (Mooney et al., 2009). In addition they study the impact that subcultural use of drug terminology (argots) has on encouraging the use and abuse of alcohol and drugs by members of that subculture (Jenkins & Kroll-Smith, 1996). Peer pressure may also lead to the use of drugs because of the "wannabee's" belief that many of their peers are using drugs (Hanson, Venturelli, & Fleckenstein, 2009).

Scientists are interested in examining the process of drug initiation and have classified drug users as experimenters, compulsive users, and/or floaters or chippers (Forster, Widome, & Bernat, 2007; Hanson et al., 2009; Poulin, 2007). Experimenters are curious about drugs and are easily influenced by their peers to sample their products. Compulsive users are highly addicted and spend much of their time using drugs and discussing funny or unusual drug experiences. Floaters and chippers tend to use other individuals' drugs and do not have their own regular drug supply. Sociologists analyze the relative importance of peer norms in influencing drug use compared to other influences such as families and schools.

Researchers have attempted to analyze the harm caused by drug abuse, both to the individuals who used the drugs and to others who are harmed indirectly by that use. Multi-criteria decision analysis (MCDA) was used by the Independent Scientific Committee on Drugs (ISCD) to define the range of harm produced by drug use in the UK. The study used 16 criteria to score the amount of harm caused by 20 drugs. (The maximum possible score was 100.) MCDA modeling showed that the overall (others plus individual) harm score for alcohol was the highest (72), followed by heroin (55), crack cocaine (54), methamphetamine (33), cocaine (27), tobacco (26), amphetamine (23), cannabis (20), GHB (19), benzodiazepines (15), ketamine (15), methadone (14), mephedrone (13), butane (11), anabolic steroids (10), khat (9), ecstasy (9), LSD (7), buprenorphine (7), and mushrooms (6). The score for "harm to others" was highest for alcohol (46), followed by tobacco (26), Heroin (21), and crack cocaine (18). However, there was no correlation between ICSD results and drugs that are currently regulated by law (Nutt, King, & Phillips, 2010). The ICSD results were similar to those of several prior studies in the UK and the Netherlands (Nutt, King, Saulsbury, & Blakemore, 2007; van Amsterdam, Opperhuizen, Koeter, & van den Brink, 2010). The utility of these results has been criticized on the basis that the methodology is highly subjective and does not separate drug use harm from those related to government policy (Rolles & Measham, 2011).

Incidence and Prevalence

Sociologists are also involved in investigating the incidence and prevalence of legal and illegal drug use, abuse, and addiction in various demographic categories and subcultures. In 2011, the incidence of alcohol and cigarette use by 8th, 10th, and 12th grade students were at the lowest level since the Monitoring the Future (MTF) survey began to measure teen substance use in 1975.

Alcohol

In 2009, 24,518 people in the USA died of alcohol-induced causes, similar to the 2008 rate. (For comparison, there were 34,485 deaths in 2009 from motor-vehicle traffic-related accidents.) The age adjusted alcohol-induced death rate for males was three times that of females (Kochanek, Xu, Murphy, Minino, & Kung, 2011). The 2011 MTF survey results showed that 63.5 % of 12th grade students reported alcohol use in the past year, a decline from 74.8 % in 1997. In 2011, 26.9 % of 8th grade students reported having used alcohol in the previous year, a significant decline from the peak rate of 46.8 % in 1997. Among 8th, 10th, and 12th grade students, the incidence of binge drinking (defined as imbibing five or more drinks in a sequence during the prior 2 weeks) also declined from 2006 to 2011. In 2011, 6.4 % of the 8th grade students, 14.7 % of the 10th grade students, and

21.6 % of the 12th grade students reported binge drinking, a decrease from the 2006 rates (8.7 %, 19.9 %, and 25.4 %, respectively) (NIDA, December 14, 2011b).

Tobacco

Worldwide, tobacco killed about 100 million people in the twentieth century, and currently kills about six million people a year (Proctor, 2012). In the USA, cigarette smoking is estimated to cause 443,000 deaths annually or 20 % of all deaths (CDC, 2008). The 2011 MTF findings revealed that 18.7 % of the 12th grade students reported current cigarette use in the prior month, a decrease from a peak rate of 36.5 % in 1997 and 21.6 % in 2006. Eighth grade students reported a decline in current cigarette use from a recent peak rate of 21 % in 1996 and 8.7 % 5 years ago to the 2011 rate of 6.1 % (NIDA, December 14, 2011b).

Illicit Drugs

In 2010, 22.6 million Americans, or 8.9 % of the population aged 12 or older, were current illicit drug users This percentage can be compared to 8.7 % in 2009, 8.0 % in 2008, and 7.9 % in 2004 (SAMHSA, 2011). The 2011 MTF survey found that the decline in teenage use of illicit drugs that occurred in the middle to late 1990s has plateaued; illicit drug use remained unchanged among 8th, 10th, and 12th grade students from 2009 to 2010 (NIDA, April 2011a).

Marijuana use was the cause of nearly 400,000 emergency room visits in 2011 (Sack, 2012). In 2010, Marijuana was the most commonly used illicit drug (SAMHSA, 2011). Its use has increased in recent years. In 2011, 36.5 % of 12th grade students reported prior year marijuana use and 6.6 % reported daily use, up from 31.5 % and 5 %, respectively, in 2006. The increased use of marijuana probably reflects the adolescent view that the health risks involved are minimal. In the 2006 MTF survey, 25.9 % of the 12th grade students perceived smoking marijuana as very risky, while in the 2011 survey, only 22.7 % felt that it was very risky. Similarly, 48.9 % of 8th grade students perceived marijuana as very risky in 2006, compared to 43.4 % in 2011 (NIDA, December 14, 2011b).

There is increasing concern about the use of synthetic marijuana, which has been banned in many European countries. These designer drugs, called "K2," "spice," and a variety of other names such as "Bath Salts," contain synthetic cannabinoids which mimic the action of THC found in natural marijuana. Studies have shown that the use of these agents can trigger chronic psychotic disorders in susceptible individuals (Brauser, 2011; Pierre, 2011). These facts led the USDEA to ban these synthetic stimulants in 2011 (Meserve, 2011; Thomas & Jones, 2010). The 2011 MTF Survey results showed that 11.4 % of 12th grade students reported use of K2 and spice in the prior year (NIDA, December 14, 2011b). So far, efforts to eliminate the use of synthetic marijuana in the USA have been largely unsuccessful (Anderson, 2012).

"MDMA (3,4-methylenedioxymethamphetamine) or 'ecstacy' is a synthetic, psychoactive drug that is chemically similar to the stimulant methamphetamine and the hallucinogen mescaline. MDMA produces feelings of increased energy, euphoria, emotional warmth, and cause distortions in time, perception, and tactile experiences" (NIDA, revised December, 2010). Although MDMA is currently an illegal drug on schedule 1 of the DEA, it had been used previously in therapy for PTSD (Greer, 2001). According to the MTF survey, the lifetime use of MDMA (ecstasy) among 8th grade students increased from 2.2 to 3.3 % between 2009 and 2010. This reversed the previously downward trend (NIDA, April 2011a, March 2011b).

The MTF survey showed that 8th, 10th, and 12th grade students' lifetime use of amphetamine and methamphetamine has significantly declined. The use of amphetamine peaked at 15.5 % in 1996, but by 2010 had decreased to 8.9 %. In 1999, methamphetamine use was 6.5 % and in 2010, it declined to 2.2 % (NIDA, April 2011a).

Cocaine use in the USA is the cause of more than 400,000 emergency room visits and approximately

5,000 overdose deaths every year (SRI, 2012). The NSDUH results revealed that between 2003 and 2009, the number of cocaine users who were 12 years old or older, gradually declined from 2.3 to 1.6 million (NIDA, April 2011a). Findings from the MTF survey indicate that from its peak year in 1999 to 2010, the lifetime, current, and annual use of cocaine and crack by students had steadily declined.

The MFT survey revealed that LSD use had declined from the mid-1990s when 8.8 % of 12th grade students reported use in the prior year, and 4.0 % reported use in the prior month, whereas in 2010, 2.6 % reported annual use and 0.8 % reported use in the previous month (NIDA, April 2011a).

Products used as inhalants are such common items as: gasoline, correction fluids, glues, paint thinners, and air fresheners (NIDA, revised December, 2011b). 12–15-year-old users of inhalants are most likely to inhale glue, shoe polish, toluene, spray paint, and gasoline (NSDUH, March 13, 2008). The combined annual average of 2006–2008 data from the National Survey on Drug Use and Health (NSDUH) showed that an estimated 1.0 million (4.1 %) of 12–17-year olds used inhalants in the prior year (NSDUH, March 25, 2010). The 2009–2010 MFT noted that the prior year use of inhalants by 8th grade students remained stable at 8 % (NIDA, April 2011a).

Prescription and OTC Drugs

The drug problem in the USA appears to be shifting from the use of cocaine and similar substances to the abuse of prescription painkillers (Cave & Schmidt, 2012). In the USA in 2008 there were 36,450 overdose deaths, of which 20,044 involved prescription drugs (NSDUH, 2008). Among young adults aged 18–25, the nonmedical use of prescription drugs held steady at 5.9 % from 2002 through 2010. Over the same period use of cocaine decreased from 2.0 to 1.0 %, and the use of methamphetamine decreased from 0.6 to 0.2 % (NSDUH, 2011). The MFT survey provided mixed news with regard to prescription and over-the-counter (OTC) drug use by students. A little more than 8 % of 12th grade students used Vicodin (hydrocodone) in 2011. This percent is similar to 2010 but down from 9.7 % in 2009. Tenth grade students also reported a reduction in the use of Vicodin from 7.7 % in 2010 to 5.9 % in 2011 (NIDA, December 14, 2011b).

Among students in the 8th, 10th, and 12 grades, nonmedical use of OxyContin (oxycodone) in the prior year did not change from 2009 to 2010. However, over the previous 5 years, nonmedical use of the drug among 10th grade students increased (NIDA, April 2011a).

Nonmedical use of the ADHD drugs, Adderall and Ritalin, by 12th grade students in 2011 remained similar to the previous year (6.5 % and 2.6 %, respectively) (NIDA, December 14, 2011b).

The abuse of OTC cough medicine by 8th grade students declined significantly from 4.2 % in 2006 (when the MTF first surveyed its use) to 2.7 % in 2011. Similarly, 12th grade students' abuse of OTC cough medicine went from 6.9 % in 2006 to 5.3 % in 2011 (NIDA, December 14, 2011b).

Risk Factors

Sociological findings can be used to determine the risk factors and predictors for alcohol and other drug use, abuse, and dependence or addiction. A combination of factors, including biological, environmental, and developmental conditions, increases the likelihood that people will abuse alcohol and other drugs and become chemically dependent. These factors, detailed below, increase the chances that persons will abuse and become chemically dependent on one or more drugs (NIDA, revised March, 2011a).

Genetic makeup, combined with environmental factors, may predict about 50 % of individual's vulnerability to drugs (NIDA, revised March, 2011a). Factors such as gender, ethnicity, and coexisting mental problems can help to predict substance abuse and subsequent dependency.

The adverse impact of dysfunctional family members, friends, low socioeconomic status, and poor quality of life are predictors of drug abuse

and the subsequent escalation to dependence or addiction (NIDA, revised March, 2011a). Peer norms, conflict, the loss of livelihood with its concurrent loss of roles and identity, and other types of role losses, a history of physical and sexual abuse, stress, and negative parenting styles, all increase the risk of drug abuse and dependency (Hanson et al., 2009).

Extensive advertising and marketing helps to increase the risk of tobacco and alcohol use. The entertainment industry glorifies the use of both licit and illicit drugs, including cocaine, marijuana, and heroin. The media promotes alcohol and other drug use as fun, exciting, and glamorous, and as a way to develop and maintain friendships and intimate relations (CDC, 2001; Strasburger, 2010).

Across the human lifespan, many environmental and genetic factors interact to influence individuals' risk of drug abuse and dependence. Studies demonstrate that early use of alcohol and other drugs increase the likelihood of subsequent severe substance abuse, especially for adolescents. Early use of alcohol or other drugs may increase the risk of long-term drug dependence or addiction. If individuals start drinking before the age of 13, they have a 40 % likelihood of becoming alcohol dependent (Mooney et al., 2009). Adolescents are especially likely to participate in risk-taking behaviors such as substance use and abuse because at their developmental stage, they are unable to make careful decisions and judgments, anticipate the consequences of their actions, and control their impulses (NIDA, revised March, 2011a).

Adolescents typically experience conflicts over dependence versus independence, in the process of learning adult roles, and/or experience trepidation and confusion over these new roles. In an attempt to ease these conflicts and confusion, adolescents are at increased risk of using and abusing drugs (Hanson et al., 2009).

Lack of parental supervision, ineffective parenting, chaotic home settings, and family conflict also increase the risk of alcohol and drug abuse in adolescent populations (Hanson et al., 2009). Sociologists have analyzed a range of other social factors that predict substance, use, abuse, and addiction. They have investigated the impact of family socialization on the onset and maintenance of substance abuse, and the extent to which adolescents with divorced parents are more likely to abuse drugs than adolescents with non-divorced parents (Mooney et al., 2009; Needle, Su, & Doherty, 1990; NIDA, Summer, 1990; Siegel & Senna 1999). Parental divorce may affect adolescent drug use, depending on gender (Needle et al., 1990).

Social scientists have studied possible gender differences in alcohol treatment outcomes. Women experience more marital disruption than men, which may contribute to gender differences in alcohol treatment outcomes (Gomberg, 2003). Gender differences also may influence how drug users experience feelings such as sadness and drug impairment (Morewitz, 2009a).

Middle-age and older persons are at increased risk of drug use and abuse as they face divorce, declining physical and mental health, disability, the death of family members and friends, the loss of occupational, family, and social roles, poor body image, and other stressors (Hanson et al., 2009; Morewitz & Goldstein, 2007). Retirement may mean the end of occupational roles and occupational identity, leading to feeling of despair, alienation, depression, anxiety, and feelings of hopelessness. Parents who see their children grow up and leave the family may experience the empty nest syndrome, which could lead to the parents to suffer psychosocial problems and associated drug use. In older adults, poor mental and physical health, disability, and the death of family members and friends can lead to social losses, grief, and isolation and associated psychosocial difficulties, which increase the risk for drug use and abuse. A regression analysis of 2 years' worth of cross-sectional data from the National Survey on Drug Use and Health suggests that the number of older adults in need of substance abuse treatment will rise from 1.7 million in 2000–01 to 4.4 million by 2020 (Gfroerer, Penne, Pemberton, & Folsom, 2003).

Sociologists have analyzed the risk factors for heavy alcohol consumption and binge drinking, which is defined as drinking five or more alcoholic drinks on the same occasion on at least

1 day in the prior 30 days (USDHHS, 2006). Many binge drinkers begin alcohol consumption in high school and nearly one-third had their first drink before 13 years of age. Among adolescents and adults, heavy drinkers are more likely to be white, non-Hispanic males (USDHHS, 2006). Eighteen- to twenty-five-year olds have the highest levels of heavy drinking and binge drinking, which peaks at 21 years of age. Persons who are employed have higher rates of alcohol use than unemployed individuals. However, the unemployed have the highest rates of heavy or binge drinking. High school graduates have a higher rate of binge drinking than college graduates. However, college graduates are more likely to report alcohol use in the previous month than high school graduates. In 2010, among people 12 years or older in the USA, Asians were least likely (12.4 %) to report binge drinking, while Hispanics were most likely (25.1 %) to report binge drinking (SAMHSA, 2011).

Full-time students in college between the ages of 18 and 22 are more likely than their peers who are not enrolled in full-time college to consume alcohol in the prior month, binge drink, and have heavy drinking patterns. The 2006 Monitoring the Future Survey found that 40 % of US college students engaged in high-risk drinking (USDOE, 2008). Among persons aged 12–20, males are more likely than females to drink, binge drink, and drink heavily (USDHHS, 2006).

Sociologists have investigated the risk factors associated with driving under the influence of alcohol. One major risk factor is the individual's age. The 2010 NSDUH Survey found that: 11.4 % of persons aged 12 or older drove a vehicle while under the influence (DUI) of alcohol at least once in the prior year. Persons 21–25 years of age had the highest rate (23.4 %) of DUI. The rates of DUI decreased with increasing age after age 29 (SAMHSA, 2011).

Not everyone who consumes drugs becomes dependent on them. Sociologists have analyzed the risk factors that are associated with chemical dependence or addiction. A sample of 43,093 adults in the USA from the National Epidemiologic Survey on Alcohol and Related Conditions showed that men, whites, Native Americans, young and single adults, and persons with lower income were more likely to suffer from alcohol dependence (Hasin, Stinson, Ogburn, Grant, 2007).

Young people are continuing to use tobacco products, although cigarette use is at a historic low rate among teens (NIDA, December 14, 2011b). Children and adolescents are especially influenced by tobacco advertisements that promote smoking and the use of other tobacco products as fun, exciting, glamorous, and a way to make friends (CDC, 2001).

Youths using marijuana and hashish are at risk to becoming dependent on these drugs. They may also consume other illicit drugs such as amphetamine, methamphetamine, cocaine, ecstasy, hallucinogens, and inhalants. They may also abuse prescription medications such as the narcotics Vicodin and Oxycontin, the depressants such as Xanax and Valium, and the stimulants, such as Ritalin and Adderall. Teens also abuse OTC cough and cold medicines. The 2006 Monitoring the Future Survey found that during 2005, among US college students, 33.3 % used marijuana, 2.9 % used ecstasy, 6.7 % used amphetamines, 5 % used hallucinogens, 5.7 % used cocaine, 1.7 % used methamphetamine, and 6.4 % used tranquilizers (USDOE, 2008).

In the USA, an estimated 600,000 to 1 million people are active heroin addicts (Hanson et al., 2009). This rate has remained fairly stable despite changes in the number of individuals who use heroin infrequently and moderately. Thousands of persons die each year from heroin overdoses. Deaths from heroin injections frequently occur because the intravenous heroin addict was concurrently using alcohol or barbiturates. Heroin overdoses also often take place because the heroin addict has been without heroin for weeks or months and then injects the same amount of heroin he or she had done previously. In these instances, the heroin addict does not realize that tolerance has worn off (Rombey, 2003).

Impact of Alcohol and Other Drug Use, Dependence, and Abuse

Sociologists have evaluated the impact of substance abuse and dependence which can have devastating effects on both individuals and on society as

a whole. More than $600 billion each year are spent on the costs of substance abuse and addiction. This estimate includes the costs of health care, crime, and decreased employee productivity (NIDA, March 2011a, b). These annual costs include $181 billion for illicit drugs, $193 billion for tobacco, and $235 billion for alcohol (CDC, 2007; Rehm et al., 2009).

Substance abuse and addiction can lead to many fatalities, injuries, and diseases including drug overdoses, motor vehicle, firearm, workplace, and boating fatalities and injuries, fetal alcohol syndrome, mental disorders, suicide, cancer, lung disease, cardiovascular disease, including alcoholic cardiomyopathy, and alcohol-related liver cirrhosis (Hanson et al., 2009; Morewitz, 2004a, 2006).

Impact on Functioning

The effects of alcohol on motor vehicle driving performance are well known. Research also shows that marijuana use significantly impairs motor vehicle driving performance by reducing motor coordination, reaction time, sensory perceptions, and glare recovery and is responsible for motor vehicle accidents (Hanson et al., 2009; Mooney et al., 2009; Teen Challenge, 2000). Adolescents are especially at risk for marijuana-related motor vehicle accidents. According to research by the Drug Enforcement Administration, 600,000 high seniors reported that they drove a motor vehicle after using marijuana (Hanson et al., 2009).

Sociologists study how alcohol and other drug use, abuse, and addiction can lead to substantial role impairment and disability. Even though alcohol dependence is linked to higher levels of disability, only 24.1 % of people suffering alcohol dependence ever received treatment (Hasin et al., 2007).

Sociologists have also investigated how age, gender, and racial/ethnic factors may affect the process whereby persons become impaired by alcohol and other drugs. An analysis of the population-based National Health Interview Survey found that among African-American males, aged 26–40 years, frequency of feeling sad in the prior 30 days was strongly associated with alcohol or drug impairment. Among White females, aged 18–25 years, feeling sad was weakly associated with alcohol or drug impairment. However, among Whites and Blacks in older age groups, feelings of sadness were not related to alcohol or drug impairment (Morewitz, 2009a, March).

Substance abuse and addiction increase the risk of stranger violence and partner violence- and child abuse-related injuries and fatalities (Morewitz, 2003, 2004b, 2008a, 2008b; Sharps, Campbell, Campbell, Gary, Webster, 2001). Problem drinking by abusive partners is associated with an eightfold increase in the risk of attempted or completed femicide (Sharps et al., 2001). Certain drugs increase the risk of severe irritability, which can lead to homicidal impulses and death threats (Morewitz 2008a, 2008b). Substance abuse also increases the risk of partner violence against pregnant women (Morewitz, 2004b). Poly-drug use worsens these problems and lowers the success of substance abuse treatment.

Drug abuse and dependence lead to a variety of workplace problems, since 75 % of adult illicit drug users are employed. A majority of most binge drinkers and those who drink alcohol heavily are also employed. Workers who abuse alcohol and other drugs are more likely to be less productive employees, have a workplace accident, file a worker compensation claim, be late, or absent from work (USDHHS, Substance Abuse and Mental Health Services Administration, n.d.; NIDA, revised, July 2008).

Students who abuse alcohol, marijuana, and other drugs often develop difficulty with academic activities such as preparing homework and taking exams. Chronic abuse of marijuana has been linked to amotivational syndrome, which refers to apathy, a lack of interest in activities, and impairment in achieving goals. Substance abuse and addiction is associated with brain damage, cognitive impairment, lower academic achievement, poor school attendance, and an increased school dropout rate (Hanson et al., 2009).

Many drug abusers and addicts absent themselves from work and school because of drug-related medical emergencies and legal interventions. Drug abuse and addiction increase the

rate of hospital emergency room visits (NIDA, revised May 2011). Almost 4.6 million emergency department visits in 2009 were drug associated. Almost 50 were due to adverse reactions to prescription medication, and 45 % were attributed to drug abuse. The Drug Abuse Warning Network estimates that of the 2.1 million drug abuse-related emergency department visits, 27.1 % were due to the nonmedical use of prescription drugs, OTC drugs, and dietary supplements, 21.2 % were due to illicit drugs and 14.3 % were due to alcohol in combination with other drugs.

Poly-drug use is also associated with emergency room visits. The Drug Abuse Warning Networked estimated that 519,650 emergency department visits in 2009 involved alcohol combined with other drugs. Alcohol was most frequently combined with central nervous system agents, such analgesics, stimulants, and sedatives (229,230 visits), cocaine (152,631 visits), marijuana (125,438 visits), psychotherapeutic agents, such as antidepressants and antipsychotics (44,217 visits), and heroin (43,110 visits) (NIDA, revised May 2011).

Substance abuse and addiction have been linked to juvenile delinquency, crime, and drug-related arrests and convictions (Hanson et al., 2009; Morewitz, 2009b). Individuals who are under the influence of alcohol and other drugs may have impaired judgment, poor impulse control, and have decreased social inhibitions and fear, thus increasing their risk of committing crimes. Almost a third of state prison inmates and 25 % of federal prison inmates perpetrated their offense under the influence of drugs. Since 1997, these rates have remained constant (Bureau of Justice Statistics, 2004).

Alcohol and other drug use increases the risk of rape, sexual assault, and unsafe sexual activities and their consequences: unwanted and unplanned pregnancies, HIV/AIDS, and other sexually transmitted diseases (Morewitz, 2004b). Alcohol consumption is associated with reduced inhibitions regarding sexual activity, impaired judgment, impulsiveness, and the victims' unconsciousness or helplessness.

As in the case of sexual violence and unsafe sexual practices, alcohol and other drug use increases the risk of unsafe intravenous drug use, resulting in drug overdoses, HIV/AIDS, and other health problems (Hanson et al., 2009).

Alcohol and other drug use, dependence, and abuse can contribute to the risk of suicide in groups such as adolescents (Hanson et al., 2009; Minnesota Institute of Public Health, 1995; Morewitz & Morewitz, 1991). Adolescents are especially vulnerable to suicide; since 1980, the teenage suicide rate has doubled (Siegel & Senna 1999).

Alcohol abuse in vulnerable groups such as the elderly increases their risk of many health problems and premature death (Morewitz & Goldstein, 2007). Poly-drug use, such as alcohol use, in combination with concurrent use of certain prescription drug use and caffeine, may increase the risk for the elderly. Amoako, Richardson-Campbell, and Kennedy-Malone (2003) showed that concurrent use of alcohol, pain medications, hypertension drugs, and caffeine use may produce adverse risks.

The health effects of alcohol and tobacco are well known. However, the long-term psychosocial and physiological impact of marijuana use is less clear (Atakan et al., 2012; Grotenhermen & Muller-Vahl, 2012). Marijuana use had been linked to many adverse health consequences, including reduced memory, panic disorder, and increased heart rate.

Marijuana may be a "gateway" drug and leads individuals to progress to "harder" drugs (ONDCP, 2012). A possible explanation is that persons who experiment with one drug are likely to experiment with another drug. This hypothesis is supported by that fact that a majority of drug users are poly-drug users. Lee and Abdel-Ghany (2004) found that some individuals smoke cigarettes, drink alcohol, smoke marijuana, and use cocaine simultaneously. Researchers have investigated reasons why individuals are poly-drug users (Hanson & Li, 2003; Hanson et al., 2009; Hitti, 2006). Marijuana users may be more likely to combine alcohol with marijuana use because this intensifies intoxication (Liquori, Gatto, & Jarrett, 2002). However, the marijuana "gateway drug" hypothesis has not been proven (Anthony, 2002; Kenkel & Mathios, 2002; Lynskey, 2002;

Morral, McCaffrey, & Paddock, 2002a, 2002b). A study of US 12th graders found that, although neither marijuana nor tobacco were gateway drugs, alcohol was the "gateway drug" (Kirby, 2011). However, another recent study found "compelling evidence of the continuing association between cannabis, licit, and other illicit drug use well into young adulthood" (Swift et al., 2011).

Many cocaine abusers are poly-drug users. Pennings, Leccese, and Wolff (2002) report that cocaine abusers also often consume alcohol. Greater addiction to alcohol predicts greater cocaine addiction. Some crack cocaine smokers use heroin to help reduce the jitters caused by cocaine (Hanson et al., 2009).

Some amphetamines abusers are poly-drug users. Like cocaine abusers, amphetamine abusers may take amphetamines with narcotics such as heroin (Hanson et al., 2009).

Sociologists have studied the process by which heroin addicts become poly-drug users and may die from poly-drug use. Heroin addicts may use cocaine to withdraw or detoxify themselves from the use of heroin. In this process, known as "speed-balling," the heroin addicts gradually decrease the amount of heroin that they are using, while increasing their cocaine use. Heroin addicts claim that "speed-balling" helps them minimize the adverse effects of withdrawal from heroin. However, this is a risky practice since injecting these two drugs simultaneously can cause respiratory depression and/or lead to a heart attack (Anonymous 2007).

Prevention

Sociologists have evaluated drug prevention programs and strategies which seek to prevent and/or reduce health problems and social and individual problems (Hanson et al., 2009). Prevention is designed to improve protective factors and eliminate or reduce risk factors. Prevention programs should deal with all types of abuse. They should focus on the local community, targeting changeable risk factors, and improving protective factors. Prevention efforts should address the needs of specific populations or subgroups based on their social and demographic characteristics (Robertson, David, & Rao, 2003).

Alcohol and drug prevention efforts are directed at three levels: primary prevention, secondary prevention, and tertiary prevention. Primary prevention is aimed at nonusers and seeks to prevent the initiation of drug use. These efforts frequently target at-risk young people who may live in communities plagued by illicit drugs and in dysfunctional families. Secondary prevention programs work with at-risk groups, drug experimenters, and early drug abuse groups. Tertiary prevention programs intervene directly with drug addicts who require treatment. Prevention programs often combine all three levels since nondrug users, newer drug users, and drug addicts live in local communities (Hanson et al., 2009).

Sociologists have investigated the impact of special "driving-under-the-influence" (DUI) courts in reducing recidivism of DUI offenders. An evaluation showed that 3 DUI courts in Georgia prevented between 47 and 112 repeat arrests during a 4-year time period because of reduced recidivism (Fell, Tippetts, & Ciccel, 2011).

Sociological data have been used to assess the effectiveness of substance abuse programs in reducing abusive behavior among participants in court-mandated substance abuse and domestic violence programs. In the USA, 18.3 % of women and 1.4 % of men experience domestic violence in their lifetime (Black et al. 2011). One such study found that following court-ordered treatment, there was a notable decrease in physical violence and alcohol use, but little effect on drug use (Scott & Easton, 2010).

Sociologists have studied how effective school-based prevention programs can be implemented (Hanson et al., 2009). Effective programs conduct prevention needs assessments that use validated survey instruments and combine primary and secondary prevention strategies for most of the student population. School-based drug prevention programs use specific educational topics for elementary, secondary, and college students.

Sociological evidence has been used to assess the effectiveness of tobacco-policy interventions in preventing tobacco use in adolescents and

young adults. Investigations have shown that enforcement of youth access laws against retail establishments is associated with lower smoking rates among adolescents (Forster et al., 2007). However, other researchers have not found certain strategies effective in reducing smoking initiation among youth. For example, the 2002 Student Drug Use Survey of 12,990 students showed that smoking bans are not effective in preventing smoking initiation (Poulin, 2007).

A harm-reduction model is used to promote an open-door policy with the addicted community. The model welcomes drug addicts to participate in service regardless of their motivation to change. According to Trujols et al. (2010), harm-reduction strategies are efficacious and effective for preventing and managing HIV among injecting drug users. A similar harm reduction program, "The Perinatal Addiction Treatment Clinic of Hawaii," covered perinatal care, transportation, child care, social services, family planning, motivational incentives, and addiction medicine. This program provided very successful birth outcomes (Wright, Schurtter, Fambonne, Stephenson, & Hanning, 2012).

The influence of the community's young people, parents, business organizations, schools, police, courts, healthcare providers, and other groups have been used in community-based prevention efforts (Hanson et al., 2009). The main goal of community-based prevention programs is to offer coordinated programs among many organizations involved in prevention. Community-based prevention programs also focus on improving the legal and social environment to minimize the supply of alcohol, tobacco, and other drugs available to youth (CPRD, 2000).

Family-based drug prevention programs seek to reduce family-based risk factors such as chaotic home environments, ineffective parenting styles, and inadequate parental monitoring and supervision of children. These family-based drug prevention strategies are designed to enhance protective factors that can minimize the risk of drug use. These programs emphasize preexisting conditions such as nurturing bonding between parents and children and positive disciplinary practices (Dusenbury, 2000; Kumpfer, Alvarado, Smith, & Bellamy, 2002).

Sociologists have participated in the design and evaluation of drug prevention programs in higher education (USDOE, 2008). Higher education drug prevention strategies rely on several different models such as the social influence model and the ecological model. The social influence model assumes that college students' drug use is affected by prior socialization, a tendency to please others, the need to be accepted by peers, and other social influences. The ecological model assumes that successful drug prevention involve targeting college students' social norms, college policies and practices, and community influences.

According to Hansen (1997), social ecology theory assumes that socialization is the main cause of individual behavior. Therefore, specialists should focus on changing social institutions to change individual behavior.

Prevention programs that rely on trained peers as educators, mentors, counselors, or facilitators can be helpful in higher education drug prevention programs (Hanson et al., 2009). The infusion of a drug prevention skill or topic throughout the college curriculum can be useful. The use of improvisational theater groups and alternative events, such as mocktail parties and drug-free rock climbing, can assist in drug prevention efforts.

Data have been used to evaluate the impact of alcohol policies in colleges and universities. Based on a sample of 186 undergraduate students from four public universities in the Midwest region, Walter and Kowalczyk (2012) discovered that the type of alcohol policy (allowing or prohibiting the sale and use of alcohol) in place was not associated with heavy drinking.

Drug court programs, which work closely with drug treatment organizations and other organizations, can be effective in reducing the risks of drug abuse (Hanson et al., 2009). Drug court programs help to divert drug users into supervised community treatment programs.

Investigators have analyzed how social and behavioral factors may impact the treatment of individuals who are at risk for alcohol and other drug dependence and abuse. Sociological data can be used to evaluate how drug treatment can be improved for healthcare providers, counselors/therapists, teachers, coaches, parents, and others

who can helpful at-risk individuals. Sociological findings can be employed to assess how alcohol and other drug use screening protocols and procedures can be improved to reduce the risk of alcohol and other drug dependence and abuse (Cowan & Morewitz, 1995).

Sociologists as Expert Witnesses and Consultants

Sociologists have served as expert witnesses and consultants in a variety of cases involving the use of alcohol and other drugs. In one case, a sociologist opined that the convicted criminal defendant's chemical addiction should be taken into account as a mitigating factor to warrant a life sentence instead of death (Jenkins & Kroll-Smith, 1996). In these types of cases, the sociologists typically conduct in-depth interviews with the defendant and his or her family members, friends, employers, teachers, and others who know the defendant well. They also utilize data from the defendant's school, hospital, employment, and jail/prison records.

As litigation consultants, sociologists review medical, employment, social services, and law enforcement records and reports review the research literature related to alcohol and other drugs to assist attorneys and law firms. They help attorneys and law firms understand the causes and risk factors for substance use and abuse. Sociologists also provide consultations on the impact of substance use, abuse, and addiction on social, family, occupational, and educational functioning.

Composite Case Study of an Ex-Convict with a History of Drug Use Who Allegedly Committed a Sex Offense Against a Female Child at a Youth Organization

In this composite case, I was retained as an expert witness to testify about issues related to an inmate in a state penitentiary who used reportedly drugs before and during his incarceration and then allegedly committed a sex offense against a female minor at a youth organization. I testified about the rates of recidivism for ex-convicts and the risk factors that increase the possibility that ex-convicts will re-offend. In this context, I testified about how ex-convicts who have a history of substance abuse along with other adverse social characteristics are likely to have high rates of recidivism. For example, I opined that ex-convicts with a history of substance abuse, sexual offenses, and violence are at increased risk of re-offending.

Composite Case Study: Wrongful Death at a Residential Motel Associated with Alcohol Intoxication

I was retained as an expert witness by a law firm to testify about how sociological factors related to alcohol intoxication can contribute to the wrongful death of an individual during a physical assault at a residential motel. I reviewed the depositions, police reports, and other documents and the research literature of alcohol intoxication and management responses to violence. In this case, the decedent reportedly drank alcohol and was involved in several physical altercations during one day and evening. Using these data sources, I wrote a report in which I opined that the manager at the residential motel did not respond consistently to the various physical altercations.

Composite Case Study: Police Excessive Force Associated with Possible Alcohol Intoxication by an Automobile Driver

In this composite case, I was hired as an expert witness to evaluate police procedures in a case involving the arrest of a woman for resisting arrest and may have been intoxicated. As a result of the arrest, the woman may have sustained disabling injuries and I was also retained to evaluate the possible impact of the injuries on her social, family, and occupational functioning. The woman was with one of her sons and had just left a store after buying liquor. A patron at the store called

the police, thinking that the woman was intoxicated and that she was getting ready to drive away with his son in the automobile. When the police arrived, the woman reportedly told the police officers that she was not intoxicated and, furthermore, was concerned about being arrested in front of her son. I wrote a report, opining that the arrest resulted in substantial impairments in the woman's social, occupational, and family functioning.

Composite Case Study: Alcohol and Other Drug Use Committed by an Adolescent Who Later Attempts Suicide

I was retained in this composite case to testify about substance abuse and other factors that increase the risk of adolescent suicidal behavior at a residential mental health treatment facility (Morewitz & Morewitz, 1991). I conducted interviews and observations of the adolescent male who attempted suicide, interviewed and observed his parents, reviewed various treatment facility and school records, and analyzed studies about the impact of substance abuse on suicidal behaviors. I discovered that that the adolescent male had a history of substance abuse. In my report, I wrote about the conditions under which the type, frequency, and extent of substance use during adolescence can increase suicidal behaviors and reduce social, family, school, and occupational functioning.

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Sociological Theory and Methods in Toxic Tort Lawsuits

21

Stephen J. Morewitz

"A *Toxic Tort* is a particular type of personal injury lawsuit in which the plaintiff claims that exposure to a chemical caused the plaintiff's injury or disease" (Wikipedia, 2012). Toxic tort cases are often highly contested since they significantly impact the financial, social, health, and psychological welfare of affected communities (Brown, 2007; Erikson, 1994; Jenkins & Kroll-Smith, 1996). Potentially, there are huge costs associated with investigating and cleaning up toxic contamination. Local residents are increasingly likely to file lawsuits claiming various types of tort damages as a result of so-called chronic technical disasters (Couch & Kroll-Smith, 1985; Perrow, 1984; Picou, Marshall, & Gill, 2004).

Toxic tort lawsuits often involve a significant degree of scientific uncertainty regarding the impact of various toxic contaminations on community residents (Jenkins & Kroll-Smith, 1996). This scientific uncertainty opens the possibility for defense and plaintiff attorneys to use expert witnesses to opine about the physical health, social, psychological, and cultural effects of the toxic contamination on affected communities. Expert witnesses can testify about both the types of evidence and the losses that defense and plaintiff attorneys and law firms may contest.

Sociological evidence has been used to show the extent to which environmental contamination produced trauma in community residents (Erikson, 1994). Such contamination can bring about changes in the residents' self-concept and reduce their self-esteem, and can also change their social interactions, as well as their view of the world.

Sociological data can be employed to demonstrate the extent to which scientific investigations of environmental contamination and community as well as organizational responses to environmental pollution are shaped by professional, social, and political influences (Brown, 2007; Brown & Mikkelsen, 1997). For example, Brown (2007) reported that standard epidemiological analysis of environmental health problems such as the Gulf War syndrome and cancer clusters have been discouraged, not funded, and even suppressed. In these instances, expert witnesses challenged both the sources of the environmental health problems and even the very existences of these problems.

Toxic-polluting industries are often established in disadvantaged racial and ethnic communities with limited resources. This reduces the community's ability to respond to environmental problems. Sociological data have been used to analyze the impact of environmental social movements and citizen mobilization in responding to chronic environmental problems (Brown, 2007; Zavestoski, Mignano, Agnello, Darroch, & Abrams, 2002). Community and organizational processes may either inhibit and/or facilitate effective responses to environmental contamination. For example, in a study of high

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_21,

level of toxic contamination in a New England river, Zavestoski et al. (2002) showed that a government organization's public relations efforts helped to reduce public outrage over the environmental pollution. In this case, elected officials effectively responded to the environmental pollution by providing resources to the agencies involved in the environmental cleanup as well as supporting the agencies' decision making. As a result, community mobilization over this environmental problem did not emerge.

Sociological results can also provide the basis for radiation protection programs. For example, current radiation protection standards require that exposure be kept as low as reasonably achievable (ALARA)—"taking into account social and economic factors" (World Nuclear Association, latest update May 2012).

In this chapter, I will use three examples to illustrate how sociological testimony and data can help both plaintiff and defense attorneys in toxic tort cases:

1. The Radium Dial Workers (RDWs) Tragedy and Its Health and Environmental Effects
2. Radon Exposure in Homes and Other Settings, and the Risk of Lung Cancer
3. Health and Environmental Risks Associated with a Thorium Refining Plant in West Chicago, Illinois

These three examples originate directly or indirectly from my employment as an Assistant Social Scientist at Argonne National Laboratory (ANL), Division of Biological and Medical Research, Radiobiology Section, and the Environmental Research Division. As an Assistant Social Scientist at ANL, I collaborated with other scientists and staff in studying the effects of smoking and other social, socioeconomic status (SES), behavioral, and health risk factors on lung cancer in radium dial workers (RDWs). I studied different aspects of occupational exposure in the radium industry, including the structure, work practices, and history of the radium dial industry, the health effects of occupational exposure to radium, smoking, and other behavioral risk factors among RDWs, and the current state of radiation contamination and cleanup efforts at former radium dial facilities (see Appendix). In addition, I collaborated in other projects dealing with radiation exposure such as investigating residential radon exposure and radiation contamination sites throughout the USA.

Health and Environmental Effects of Ionizing Radiation and the RDW Tragedy

Starting with the discovery of X-rays and radium-226 in the last decade of the nineteenth century, radiation hazards in the workplace became a major worldwide problem. Dentists, RDWs, underground hard-rock miners, Atom Bomb survivors, participants in nuclear weapons tests, Chernobyl cleanup employees, and nuclear industry workers are some of the groups who have been studied to determine their health risks associated with occupational exposure to radiation (Clark, 1997; Mullner, 1999; Rowland, 1994; Rushton, Hutchings, & Brown, 2008; Wakeford, 2009).

Radium-226 is one of the naturally occurring heavy elements. It can produce harmful health effects since both it and its decay products emit ionizing radiations, which can damage living tissue, and because its chemical behavior is similar to that of calcium, it readily seeks bones when ingested (World Nuclear Association, latest update May 2012). Radium-226 spontaneously transforms into radon-224, both of which emit ionizing radiation in the form of alpha particles. Alpha particles are helium nuclei made up of two protons and two neutrons. They are intensely ionizing, but cannot penetrate the skin. They are harmful only if emitted inside the body.

At first, after its discovery in 1898, radium-226 was viewed as a miracle cure. Radium tonics and ointments became very popular. People swallowed radium tonics in an attempt to cure baldness and gastrointestinal problems. A German candy containing radium was advertised as a cure for a number of diseases, and was even touted as a rejuvenating agent (*N.Y. Times*, April 2, 1932). Radium water (bottled water containing radium) was one of the best known radium products available to the public. (It attempted to imitate the water from naturally radioactive hot springs, such as Radium

Hot Springs, British Columbia.) This product was sold over the counter or by mail. One brand, *Radithor*, received the most notoriety. In 1932, both the *N.Y. Times* and *Time* magazine published stories on the death of Eben MacBurney Byers, a well-known sportsman and Pittsburgh businessman. He died from radium poisoning after drinking more than 1,400 bottles of *Radithor* over a 2-year period (*N.Y. Times*, April 11, 1932) (*Time*, April 11, 1932).

Physicians began investigating possible uses for the gamma rays that were emitted by the radium progeny during the element's process of radioactive decay. (These gamma rays are similar to X-rays, but of higher energy.) The Standard Chemical Society (SCS) used its facilities to study medical uses of radium and established the journal, *Radium* in 1913 (Rowland, 1994). SCS's research laboratory director, Dr. Frederick Proescher, experimented with treating many patients with internally administered radium to determine which disorders were most suitable for radium therapy. By 1914 he had injected 34 individuals with radium (Proescher, 1913, 1914a, 1914b, 1914c).

Radium injection became the treatment of choice for a wide variety of problems. Dr. C. Everett Field was a physician who claimed to have administered 6,000 intravenous radium therapies (Field, 1926). After his death, he was found to have a significant radium burden. Dr. Findley John, a physician in the Midwest, also claimed that he had used both oral and intravenous radium therapy for hundreds of patients (Rowland, 1994). Thirty-two patients at the Elgin State Hospital in Illinois, who were mostly classified as suffering from dementia praecox (now known as schizophrenia), received intravenous injections of radium (Schlundt, Nerancy & Morris, 1933). Most of these early medical "experiments" with radium provided little or no useful results. However, the use of radium and radon to treat cancerous tumors, first suggested by Pierre Curie in 1901, was found to produce tumor shrinkage. By 1920, cancer treatment using local sources of radium was in wide use. The permanent implantation of hollow gold seeds filled with radon gas into tumors continued to be used until the 1950s, when radon was largely replaced by other radioisotopes.

More recently, several intravenous radioactive drugs have been approved for use in cancer treatments. A drug named Bexxar, consisting of ^{131}I attached to a monoclonal antibody, was approved by the Food and Drug Administration on June 30, 2003. It has been successfully used in treating follicular non-Hodgkin's lymphoma, a type of cancer which was formerly not considered treatable. One study, which followed 76 Bexxar patients for 8 years, found that "86 % of the patients were still alive and half had not had a relapse of their disease" (*Science Daily*, June 4, 2007). Thus, it is clear that an appropriately used intravenous radioactive drug can have beneficial health effects.

By 1920, 30 g of radium-226 had been produced (Rowland, 1994). SCS explored potential uses of radium to increase the market for the element. SCS established the Radium Chemical Company, Inc. (RCC), a wholly owned subsidiary, to sell radium. RCC manufactured a radium-based self-illuminating dial paint and experimented by adding rare earths to the zinc sulfide in the dial paint to enhance light emission under bombardment by radium alpha particles.

This industrial application of radium made use of the element's alpha particle radiation to cause zinc sulfide to fluoresce. (Scientists were very familiar with this fluorescence because it was one of the first methods used in assessing the strength of an alpha particle-emitting source. A scientist could measure the rate of alpha particles emission from a small source by observing microscopically and counting the number of flashes of light emitted by a fluorescent screen in a measured time interval.)

Health Effects from Radium Exposure in the Workplace

Starting in 1917, U.S. Radium Company (USRC), a private company, employed a group of young women to paint watch and instrument faces with a radium-based luminescent paint named *Undark*. Although the company officials knew the dangers

of using radium without appropriate protection, they still instructed their RDWs to use their lips to "point" their brushes in order to paint fine lines on the watch dials. In the mid 1920s these women began to fall ill from ingested radium. The company dismissed their complaints by falsely maintaining that they were suffering from syphilis. Five RDWs filed a classic toxic tort case, which finally reached the U.S. Supreme Court, and eventually led USRC to settle with the five RDWs.

Significance of the RDW Tragedy

The RDW tragedy resulted in extensive media coverage and widespread public awareness of the dangers of occupational radium exposure and the plight of workers in the industry. As a consequence of the RDW tragedy, legal precedents and labor safety standards were established, and workers were required to follow safety procedures to minimize exposure to different types of radiation exposure.

Media coverage led to public outrage over the lack of safety practices in the radium dial industry and the subsequent refusal of USRC and other radium dial companies and their experts to acknowledge the radium poisoning of the RDWs. Thus, the media played a major role in pressuring the government to enact more stringent occupational safety regulations. Public pressure to improve organizational responses to all occupational diseases and injuries, eventually resulted in the enactment of the Occupational Health and Safety Act (OSHA) in 1970 (U.S. Department of Labor, 2012).

The RDW tragedy also led to and/or facilitated major scientific advances in understanding the long-term effects of radiation and in the related fields of health physics, epidemiology, and social/behavioral sciences. It also contributed to the development of new radiation protection standards (Evans, 1981; National Bureau of Standards, 1941; National Committee of Radiation Protection and Measurement, 1941). In 1933, Dr. Robley D. Evans for the first time measured exhaled radon and radium excretion from a former RDW. Evans then obtained reliable body count measurements from 27 RDWs at the Massachusetts Institute of Technology. These results were the basis for determining the tolerance level for radium of 0.1 μCi (3.7 kBq) (Rowland, 1994).

In 1968, the Center for Human Radiobiology (CHR) was launched at ANL to offer medical examinations for living RDWs. CHR collected information and sometimes tissue samples from the RDWs. In 1993, the CHR closed down after collecting detailed data on 2,403 cases. The results showed that RDWs who had less than 1,000 times the natural radium-226 levels found in nonexposed individuals did not exhibit health symptoms, indicating a possible threshold for radium-induced cancers and other adverse health effects.

In toxic tort cases related to the RDW tragedy, it was shown that social, behavioral, and demographic factors influenced the risk of lung cancer, bone sarcomas, leukemia, and other health outcomes among former RDWs. In these cases, those former RDWs who may have been exposed to high levels of radiation at work may also have smoked cigarettes or engaged in other behaviors that increased their risk for lung cancer and other health problems. Specialists who studied the radium dial industry can testify about changes in work procedures and policies that affected the risk of radiation-related health problems (see Appendix). Expert witnesses who have investigated the radiation contamination that resulted from the radium dial industry can testify about the impact of this toxic contamination on local residents (see Appendix).

Since the early part of the twentieth century, researchers have identified a number of health risks from radium-226 exposure in other work settings (Rowland, 1994; Sharpe, 1971; Stebbings, 2001). Stebbings (2001) noted that the classic health outcomes of high occupational exposure to radium are osteosarcomas and fibrosarcomas of bone, carcinomas of paranasal sinuses and mastoid air cells, and microscopically and radiographically identified bone lesions and fractures. Almost 6,000 persons with all types of radium exposure had been found throughout the USA as of 1984 (Agency for Toxic Substances & Disease Registry, March 15, 2010). Of the almost 6,000 persons located, 1,907 were RDWs and their radium body

burdens were measured. In this RDW group, 44 cases of bone tumors and 19 cases of sinus or mastoid (related to the head) carcinomas were diagnosed. These numbers included three RDWs who had both bone tumors and sinus or mastoid carcinomas. Analysis of the data showed that internally deposited radium caused these cancers and the deterioration of skeletal tissues.

According to Stebbings (2001), breast cancer and the acceleration of cataract development are some of the probable outcomes of excessive occupational exposure to radium. However, Stebbings, Lucas, and Stehney (1984) found inconsistencies in the causal association between radium exposure and breast cancer. High-dose radium exposure is also a possible cause of thyroid carcinoma (Stebbings, 2001). Working in the radium industry was also likely associated with the development of leukemia. Marie Curie (1867–1934), the discoverer of radium, died of aplastic anemia following many exposures to radium and X-rays in the days before protective measures were implemented.

Different types of radium exposure may produce different health effects (Stebbings, 2001). High external gamma radiation from radium-226 daughters may have caused multiple myeloma and lung cancer. Extensive radium-226 exposure may also lead to impaired fertility. Stebbings (2001) recommended more research on the occupational health effects of radium exposure on the cardio-vascular system, hearing, and bone fracture-associated impairments which occur much later in life.

Additional Risk Factors for Health Problems Among RDWs

Multiple risk factors can increase the risk of health problems among workers exposed to radium-226 and among individuals who live and work in areas contaminated by radium. The impact of diseases and injuries on maternal and child health has also been investigated (Morewitz, 2004).

Occupational history, work practices and procedures, and social, behavioral, and demographic factors may increase the risk of health problems associated with occupational radium-226 exposure (see Appendix). Increased duration of employment in the radium dial industry may have increased the risk of death from cancer. Stebbings et al. (1984) demonstrated that a threefold excess risk of multiple myeloma mortality among female RDWs was more closely associated with employment duration (a proxy for external gamma radiation) than with intake of radium. Employment duration and safety precautions also may influence total occupational radium dose. RDWs stopped lip-pointing when the health risks became widely known. RDWs then eventually followed modern safety precautions in working with the radium-based paint which was used in radioluminescent watches until 1968 (NCRP Report 95, 1987).

Social, Behavioral, and Demographic Risk Factors Related to Health Problems

Adult bone sarcomas (ABSs) are ordinarily relatively rare diseases, with an age standardized incidence of 1 per 100,000 people in Europe (Parkin, Whelan, Ferlay, & Thomas, 2003). However, among American RDWs who had entered the radium dial industry before 1950, the incidence was 2,861 per 100,000 or 42 ABS cases in a population of 1,468 RDWs (Rowland, Stehney, & Lucas, 1983).

Other occupational, behavioral, SES, and social factors may increase the risk of cancers such as ABS (Merletti et al., 2006; Morewitz, 2006; Morewitz & Goldstein, 2007). For example, Merletti et al. (2006) found an increased risk of ABSs among blacksmiths, toolmakers, machine-tool operators, woodworkers, and construction workers. Exposure duration was not related to an increased risk of ABS. Among farmers and other pesticide users there was little evidence of an increased risk of bone sarcoma (Merletti et al., 2006).

Sociological evidence could provide data on social and behavioral risk factors that contribute to the risk of ABS among workers in different occupations and industries. Such characteristics

as age, gender, and SES may increase the risk of ABSs.

Maternal Factors

Various reproductive, hormonal, social, SES, demographic, and behavioral factors may influence the development of breast cancer and comorbid conditions (Morewitz, 2006; Morewitz & Goldstein, 2007). However, Adams and Brues (1980) evaluated breast cancer in female RDWs who were first employed before 1930 and showed that incidence and mortality ratios for breast cancer were only slightly higher for nulliparous women and not statistically significant.

Gender Factors

Gender differences in smoking and alcohol consumption may influence cancer risks and other health outcomes among RDWs and others exposed to occupational and residential radiation.

Stebbings (1998) noted that leukemias developed quite early in female RDWs compared to males exposed to radium in the workplace, who also exhibited an excess of leukemias. Also, rare erythrocytic leukemias developed in males either occupationally exposed to radium and/or to *Thorotrast* (a colloidal solution of thorium oxide that was utilized as a contrast medium for diagnostic radiographic studies from 1930s to the 1950s).

Because of the dramatic changes in women's participation in the work settings and other trends, Zahm and Blair (2003) recommend that much more research is needed to describe occupational cancer among women.

Age Factors

Age at first exposure to radium intake may be a risk factor for bone and breast cancers in female RDWs (Adams & Brues, 1980; Carnes, Groer, & Kotek, 1997). Carnes et al. (1997) studied the mortality pattern of female RDWs who began employment as painters in the radium dial industry before 1930 and were studied through 1990. The investigators reported "an effect of age at exposure" for bone sarcoma. Women exposed to radium-226 at ages when their bones were still developing were at a higher risk of bone sarcoma than older women whose skeletons were fully developed. Employment statistics for measured RDWs revealed that between 1915 and 1919, the average age of the employees was 19.6, between 1920 and 1924, 19.0, and between 1925 and 1929, 18.5, indicating that younger women were more at risk, especially during the 1920–1924 period (Rowland, 1994). Carnes et al. (1997) found that female RDWs who were exposed only to radium-226 also had an increased risk of acquiring carcinoma of the mastoid air cells and paranasal sinuses. An age effect at exposure was not found for those cranial sites, where adult development is achieved early in life.

Medical History

An individual's medical history and associated social and behavioral history may increase the risk of ABSs and other health outcomes associated with occupational radium and other occupational radiation exposures. Both the individual's history of cancer and his family history of cancer may increase his risk for certain cancers.

Sociologists can quantify smoking and alcohol history to assess its role in contributing to excess cancer incidence, morbidity, and mortality among persons exposed to radiation.

Radon in Houses and Other Settings and Risks of Lung Cancer

Sociological data have been used to describe the occupational, social, demographic, and behavioral risk factors for lung cancer among persons exposed to radiation (Morewitz, 2006). Lung cancer is mostly a preventable disease since it is caused mainly by smoking (Neuberger & Gesell, 2002). However, possibly 5–15% of lung cancer

cases have other causes, including exposure to radon (a radioactive noble gas) and its progeny (or decay products). Radon itself is a daughter of radium. All populations are exposed to radon, which is found naturally occurring in soil, water, and indoor and outdoor air. Radon exposure makes up "more than 50 % of the annual effective dose of natural radioactivity" (Al-Zoughool & Krewski, 2009; Bissett & McLaughlin, 2010). In the 1970s, lung cancer risks due to exposure to indoor radon gas and its progeny became a public concern and led to studies on the health effects of exposure to this known carcinogen (Axelson, 1995). The U.S. Environmental Protection agency (EPA) has published the "EPA Map of Radon Zones" showing the intensity distribution of radon-224 across all 50 states and Guam (U.S. EPA, 2012). Generally, the highest concentrations of radon-224 occur in the Northeastern and Northern Mid-western states.

As an Assistant Social Scientist at ANL, I collaborated with other researchers in developing research methods and policies and procedures to collect data and analyze risk factors for lung cancer among individuals exposed to radon gas and its progeny in residences, mines, and other settings. Evidence about these risk factors can be useful in toxic tort cases involving radon exposure.

Research has shown that underground miners who are occupationally exposed to high levels of radon gas and its progeny have an increased risk of lung cancer in both nonsmokers and smokers (Darby et al., 1998; Lubin & Boice, 1997). Thus, individuals who are exposed to radon and its progeny in their residences and elsewhere may also be at risk for lung cancer. Based on the extrapolation of studies of underground miners, indoor radon gas and its progeny may be responsible for an estimated 6,000–36,000 lung cancer deaths in the USA annually (Lubin & Boice, 1997). However, residential radon occurs at much lower levels than in mines, so that residential lung cancer risk is less certain (Krewski et al., 2005).

Based on an extrapolation of the results for miners, residential radon exposure in the UK is estimated to be responsible for 1 in 20 lung cancer cases (Darby et al., 1998). Most of these cancers occur in combination with smoking. Direct evidence about the real magnitude of the risk has been provided by a "combined analysis of the primary data from seven large-scale case–control studies of residential radon and lung cancer risk" (Krewski et al., 2006).

Studying the risks of lung cancer from residential radon is difficult, even though early estimates based on house type, building material, and geological characteristics have since been supplemented or replaced by extensive measurements (Axelson, 1995).

The best evidence of the magnitude of the lung cancer risk from residential radon has been obtained from an analysis of the pooled primary data from seven large-scale case–control studies (Krewski et al., 2006). This analysis showed that the previous extrapolation of the risk data from radon in mines was correct. There is a weak positive association between residential radon levels and lung cancer risk (Bissett & McLaughlin, 2010).

Sociological evidence can help clarify how other social, demographic, SES, and behavior risks factors may be associated with lung cancer incidence, prevalence, and mortality rates among persons exposed to radon (Morewitz, 2006; Neuberger & Gesell, 2002). Passive smoking, occupational exposure to certain chemicals, ionizing radiation, diet, and family history of cancer can affect the risk of lung cancer among individuals exposed to radon and its progeny. Sociological data also can be helpful in clarifying the risk of lung cancer due to radon exposure among nonsmokers (Neuberger & Gesell, 2002).

Sociological data shed light on the social, behavioral, and demographic risk factors associated with lung cancer among individuals who live or work in areas contaminated by radon and radon progeny (Morewitz, 2006). Expert witnesses can testify about the relative risks of lung cancer from radon in homes and commercial buildings compared to the risks of lung cancer from occupational exposure to radon among miners. These specialists can opine about the impact of radon and radon progeny contamination on local residents and workers.

Toxic Tort Case Involving a Thorium Refining Facility in West Chicago, Illinois

As a litigation consultant, I assisted in a toxic tort case involving health effects allegedly caused by the former Kerr-McGee Corporation (KMC) thorium refining plant in West Chicago, Illinois. The plant had operated for a number of years with no controls on large radioactive waste piles, which were exposed to the local weather and freely accessible to the public. This resulted in a wide distribution of thorium waste throughout the town, both by the wind and rain, and also by the local residents who used the thorium waste as a substitute for gravel around their houses.

The case involved two sisters who grew up in West Chicago and later developed blood diseases. The family claimed that the two children acquired their blood diseases from toxic exposure to thorium waste from the former KMC thorium refining facility.

Previously, when I was an Assistant Social Scientist at ANL, I had investigated the history of the thorium industry and the health effects of radiation and prepared a comprehensive registry of hazardous radiation sites, including the former KMC thorium refining plant site in West Chicago, Illinois (see Appendix).

As part of my consultation in the KMC case, I reviewed the qualifications of potential expert witnesses and interviewed them about their background and possible interest in serving as an expert witness in the KMC thorium refining plant case. To assist the law firm, I obtained a highly qualified health physicist and radiation safety specialist to discuss thorium and its health effects.

In this case, I also conducted research on the risk factors as well as the protective factors associated with exposure to thorium and its decay products. I analyzed the risk factors and discussed my on-going research findings on the social, SES, behavioral, and demographic risk factors and protective factors associated with exposure to thorium and other types of radiation with the law firm's technical specialist on the case. In our meetings, we identified additional areas of research, and we would then investigate those issues further. We also discussed the need for additional expert witnesses in the case. The law firm eventually won the case.

In 1991, the Illinois Department of Public Health (IDPH) discovered a greater than expected incidence of certain cancers among residents of West Chicago, the location of the KMC thorium refining facility. The IDPH investigation showed that between 1985 and 1988, the melanoma rate among men was three times higher than expected in a similar population (Starks, March 21, 1993). The IDPH study also found that, in West Chicago, almost twice the expected rates of lung cancer among women and colorectal cancer among men.

Additionally, after investigating the environmental contamination and potential health effects resulting from the former KMC thorium refining plant in West Chicago, the U.S. Environmental Protection Agency established four KMC Superfund sites on the National Priority List (NPL) in the West Chicago area (U.S. Environmental Protection Agency, updated November 2, 2011).

Thorium

Thorium-232 emits an alpha particle and decays to radium-228, which in turn decays down a chain of radioactive elements to radon-220 (also called thoron gas). Thorium and its daughters emit alpha and beta particles and gamma radiation during their decay (U.S. Environmental Protection Agency, updated August 9, 2011). Thorium exists almost everywhere in the world; it occurs at very low levels in rock, soil, water, and food. However, minerals such as monazite and thorite are rich in thorium (U.S. Environmental Protection Agency, July 8, 2011).

Health Effects of Thorium Exposure

Large amounts of thorium in the environment increases the public's exposure to the hazardous radioactive decay products of thorium such as radium-228 and radon-220 (Agency for Toxic Substances & Disease Registry, October 1990; Najem & Voyce, 1990).

A person breathes a small amount of thorium and likewise swallows a small amount thorium in food and water. A small amount of thorium in soil may enter a person's blood stream. Thorium can enter the body if it is on skin. Any individual who is directly exposed to thorium or ingests radioactive particles may be at increased risk of developing various types of cancer (U.S. Environmental Protection Agency, updated August 9, 2011).

Research has shown that employees who had industrial or mining exposure to thorium are at increased risk for acquiring lung cancer and chronic respiratory disease, cancer of the pancreas, colorectal cancers, and other major diseases many years after occupational exposure ceased (Agency for Toxic Substances & Disease Registry, October 1990; Najem & Voyce, 1990; Polednak, Stehney, & Lucas, 1983; U.S. Environmental Protection Agency, July 8, 2011). Occupational exposure to thorium is linked to increased mortality rates. For example, based on an investigation of a cohort of 3,039 men who worked at a thorium-processing plant between 1940 and 1973, Polednak et al. (1983) found high standardized mortality ratios (SMRs) for lung cancer, pancreatic cancer, and respiratory system diseases. The researchers analyzed the SMRs for a subgroup of 592 male workers who were employed for at least 1 year in jobs that entailed large thorium and thoron exposures. In this subgroup, the SMR for pancreatic cancer was significantly higher. The SMRs were also significant for lung cancer and respiratory diseases in this subgroup. Polednak et al. (1983) noted that smoking could have partly accounted for the excess lung and pancreatic cancer SMRs.

Internal exposure to thorium also has toxic consequences. *Thorotrast*, a suspension containing thorium oxide, was used in the USA from 1931 until the 1950s as an X-ray contrast agent. (Worldwide, between 2 and 10 million people were injected with *Thorotrast*.) Because thorium is radioactive, *Thorotrast* injections are associated with an increased risk of cancer. When injected, it is distributed to the liver, spleen, lymph nodes, and then bone where it is stored for a long time (Agency for Toxic Substances & Disease Registry, October 1990; Najem & Voyce, 1990). A group of 2,326 German *Thorotrast* patients had 151 times the normal risk of liver cancer, 6 times the normal risk of leukemia, and 4 times the normal risk of bone sarcoma (van Kaick et al., 1999). A group of 412 Japanese *Thorotrast* patients had 35.9 the normal risk of liver cancer, and 12.5 times the normal risk of leukemia (Mori et al., 1999).

Animal studies have demonstrated that drinking large amounts of fluids that contain thorium can cause metal poisoning-related death (Agency for Toxic Substances & Disease Registry, October 1990).

People may be exposed to high levels of thorium near hazardous waste sites which are uncontrolled (Agency for Toxic Substances & Disease Registry, October 1990; Najem & Voyce, 1990; Starks, March 21, 1993). In one investigation of the health effects of a thorium waste disposal site in Wayne Township, Passaic County, in northern New Jersey, Najem and Voyce (1990) discovered that individuals residing in the vicinity of a thorium waste-disposal site had a higher prevalence of birth defects and liver diseases than controls. However, the numbers were very small, and the confidence intervals were wide. More research is needed since other studies have revealed that thorium causes alterations in the genetic material of body cells among employees who breathe thorium dust (Agency for Toxic Substances & Disease Registry, October 1990).

Social and Behavioral Risk Factors

Occupational, social, SES, behavioral, and demographic factors may increase the risk of cancers and other health outcomes among persons exposed to thorium and other forms of radiation (Morewitz, 2006; Najem & Voyce, 1990; Polednak et al., 1983).

In addition, protocols and scales are used to study the social, SES, behavioral, and lifestyle factors that protect against the development of cancer and other diseases. For example, sociological evidence can be used to assess the protective effect of intake of green–yellow vegetables

in the development of oral and pharyngeal squamous cell carcinoma (Asakage et al., 2007).

Quantifying smoking and alcohol consumption can help clarify the correlation of between smoking and alcohol consumption with the development of different types of cancer and other diseases. Sociological data can be used to evaluate whether the amount of alcohol consumed has a stronger effect on the risk of esophageal cancer than the number of years that it was consumed (Lee et al., 2005).

Najem and Voyce (1990) analyzed social, behavioral, and demographic factors, such as age, gender, race, SES, duration of residency, and living conditions and habits of local residents living in the vicinity of thorium-processing plants. These authors investigated smoking history, alcohol consumption patterns, frequency of eating produce grown locally, and history of working in a chemical industry in their case–control study of individuals in households residing near a thorium-processing plant. The importance of behavioral factors as risk factors in thorium exposure is reflected by that fact that smoking patterns may contribute to excess lung cancer mortality rates among male workers at a thorium-processing plant (Polednak et al., 1983).

Sociological data can be employed to assist attorneys in toxic tort cases in a number of ways. For example, a law firm might need physicians, health physicists, sociologists, and other expert witnesses to testify about certain issues related to causation and damages.

Sociologists and other specialists testify about the social, SES, demographic, and behavioral factors that contribute to the risk of cancer and other diseases among children and adults exposed to thorium and other forms of radiation (Morewitz, 2006). These expert witnesses can also discuss the social, demographic, and behavioral factors that may protect a person from developing cancer after being exposed to various types of radiation.

Sociologists who study work practices in the radiation industry can testify about the type of work procedures and policies and the possible risks for different types of cancers and other adverse health effects associated with these work procedures and policies (see Appendix).

Appendix: History of Radiation Processing, Contamination, and Environmental Cleanup Efforts

Stephen J. Morewitz, Ph.DStephen J. Morewitz, Ph.D.

History of the Radium Dial Industry and Related Radium Industries

Dr. George F. Kunz first used radioluminous material in the USA in 1903 (Rowland, 1994). He reportedly painted the hands of his wrist watch so that he could see his watch in the dark. He subsequently received a patent for a radioluminous compound for use on watches. Hugo Lieber in May 1904 filed a similar patent in 1904. The first company to manufacture and sell radioluminous products was the Ansonia Clock Company (ACC) of New York. The company probably obtained the radium for their products from Europe.

Dr. Sabin A. von Sochocky was mainly responsible for extending the use of radioluminous products (Rowland, 1994). He prepared a radium-based paint and sold about 2,000 radium dial watches in 1913. Von Sochocky continued to investigate radioluminous compounds to meet the expanding market. He and Dr. George S. Willis established the Radium Luminous Materials Corporation (RLMC) in 1915. RLMC sold radium-based paint to other companies and also participated in the painting of radium dials. The demands of the war expanded the need for radioluminous compounds for use in making aircraft dials and watches for soldiers, and RLMC did well financially. RLMC's original plant was in Newark, New Jersey. In 1917, the company moved to larger quarters in Orange, New Jersey. In 1921, RLMC was reorganized as the U.S. Radium Corporation (USRC). Changing the name to USRC reflected the firm's desire to sell radium for medical uses and the dial painting industry.

In 1922, von Sochocky left the company and established a new firm, General Radium Corporation (GRC) (Rowland, 1994). GRC supplied radium for medical applications but did not manufacture luminous compounds.

USRC established a radium extraction plant and radium dial painting factory at the Orange, New Jersey site. The company extracted and purified radium from carnotite ore to manufacture luminous paints. USRC sold these radium-based paints to the public for general use under the brand name, "Undark" for $3 per set (Rowland, 1994).

USRC was a defense contractor and supplied radioluminescent instruments, watches, and related items to the armed forces. Soldiers during World War I reportedly wore radium dial watches in the trenches so they could keep track of the time without having to light up a lantern and risk being seen by the enemy (Steffen, March 1, 2009; Quigley, October 30, 2011). After the war, people wanted to have these futuristic watches; "glow-in-the dark" watches and clocks and other products became a popular fashion fad.

Clark (1997), in describing the radium dial painting at the Waterbury Clock Company (WCC) in Waterbury, Connecticut, noted that radium dial painting were the best jobs for girls with lower socioeconomic status (SES). During World War I, radium dial painting was viewed as very desirable for girls and women because it was considered war work, which enabled the RDWs to feel that they were "doing their bit" for the war effort (Sharpe, 1971). Radium dial painting was also considered more interesting and a higher form of employment than the average factory job. Radium dial painting was also fun because the RDWs could paint their nails, teeth, faces, and clothes with the radium-based paint so that they would glow in the dark.

The USRC employed over 100 workers, mostly late adolescent girls and young women, to paint radium-filled watch faces and instruments. The company employed mostly girls in their late teens and women in their early twenties to handle radium related to the dial work production, while the owners and scientists knowledgeable about the toxic effects of radium reportedly avoided any exposure to radium by using lead screens, masks, and tongs. The USRC reportedly even had disseminated literature about the harmful effects of radium to physicians.

At the USRC facility in Orange, New Jersey, and at the Radium Dial Company (RDC) in Illinois, RDWs were instructed to mix glue, water, and radium powder and then use camel hair brushes to apply the radium paint on to dials and instruments. After a few brush strokes, the brushes would lose their point. Therefore, supervisors at USRC encourage their RDWs to point the brushes with their lips (also known as lip-pointing), or use their tongues to keep the brushes sharp. Some of the RDWs, known as the "Radium Girls," painted their nails, teeth, and faces with the toxic paint that had been manufactured at the facility (Grady, October 6, 1998; Steffen, March 1, 2009; Sharpe, 1971). At the time, for painting 250 watch dials per day, they would be paid about a penny and a half per dial or $0.26 per dial today (Grady, October 6, 1998). One RDW, who was considered a good employee, painted 192 dials daily, using approximately 1.92 mg. equivalents of radium-226 or radium-228 (mesothorium) (Sharpe, 1971). Clark (1997) noted that RDWs who worked the fastest were most likely to develop health problems.

In May 1919, the RLMC began to employ mesothorium in its paint for the dials, enabling the firm to significantly reduce the price of its items (Rowland, 1994). Eventually, the company reportedly controlled all of the mesothorium output in the country. The Welsbach Company (WC) in Gloucester, New Jersey, and the Lindsay Light and Chemical Company (LLCC) of Chicago provided USRC with its raw materials. Both WC and LLCC extracted thorium from monazite sand and sold the residue to USRC. USRC's laboratory in Orange, New Jersey, performed the final refining of this radioactive substance, which was reportedly 50 % mesothorium and 50 % barium bromide.

Until about 1920, RLMC had a large-scale radium dial painting operation (Rowland, 1994). Around 1920, RLMC's major customers started to establish with the RLMC's assistance their own radium dial application factories. This organizational change reduced the number of RDWs at the USRC facility in Orange, New Jersey, to only a few by 1923 or 1924.

Around 1920, the radium dial painting industry experienced significant growth (Rowland, 1994). According to a *Scientific American* article in 1920, more than 1 million watches and clocks had been manufactured (Mount, 1920). Throughout the USA, watch-dial companies may have employed

about 4,000 workers to paint radium watch dials and instruments. Dial painting took place in the Midwest and was mainly in Illinois (Rowland, 1994). The RDC, a Division of SCS, was founded in 1917 to allow SCS to enter the dial painting field. Around 1918, the RDC had a dial painting studio in the Marshall Field Annex building in Chicago, Illinois. In 1920, the RDC moved from Chicago to Peru, Illinois, so that it could be nearer to its largest customer, the Westclox Clock Company, which became known for manufacturing the "Big Ben" alarm clock (Steffen, March 1, 2009). By around 1922, RDC relocated to a former high school building in Ottawa, Illinois and continued its radium dial painting operations until the mid-1930s. In addition, in 1925, the RDC set up a radium dial painting studio in Streator, Illinois, but this operation was closed after about 9 months (Rowland, 1994). RDC was in operation from 1918 to 1936 and its successor was Luminous Processes, Inc. (LPI), which operated from 1937 to 1978 (U.S. Environmental Protection Agency, updated June 29, 2011a; Irvine, October 4, 1998).

Swen Kjaer, an employee of the U.S. Department of Labor, Bureau of Labor Statistics, interviewed an officer of the RDC and learned that since the radium dial painting operations had begun in Illinois in 1917, the RDC had employed about 1,000 women to paint dials (Rowland, 1994; Steffen, March 1, 2009). Each RDW used about a millicurie of radium per month. RDC claimed that it was almost impossible to keep the RDWs from lip-pointing to obtain a sharp brush point when they applied the radium-based paint to the watch dials and other products. The RDC manufactured approximately 4,300 dials each day in 1925.

Rowland (1994) noted that an indicator of the size of the radium dial industry was the number of companies buying luminous paint. Approximately, 120 companies purchased luminous paint from USRC and 100 firms purchased the substance from RCC. RCC claimed that its primary customers were the RDC in Ottawa, Illinois, the Elgin Watch company in Elgin, Illinois, the WCC in Waterbury, Connecticut, the New Haven Clock (NHC) company in New Haven, Connecticut, Waltham Watch and Clock in Waltham, Massachusetts, and the ACC in New York City. Radium dial painting also took place in other factories including the Seth Thomas Clock (STC) factory in Thomaston, Connecticut, and the E. Ingraham Company (EIC) in Bristol, Connecticut (Agency for Toxic Substance & Disease Registry, updated March 15, 2010; Musante, June 24, 2001; Quigley, October 30, 2011; Samponaro, 2007). In Connecticut, the WCC hired the most RDWs, and they worked in a massive building complex that stretched from North Elm Street to Cherry Street on Cherry Avenue in the North End (Quigley, October 30, 2011).

The largest radium dial plant application factories were the USRC plant in Orange, New Jersey, and the RDC in Ottawa, Illinois. In addition to factories, at least one home business was involved in the repair and repainting of radium aircraft dials (U.S. Environmental Protection Agency, July 29, 2010). We do not currently know the number of other businesses, home or commercial, that were involved in the repair and repainting of radium aircraft dials and other radium watch and clock dials. An estimated 28 Ci of radium had been utilized in luminous compounds for watch and clock dials, gun sights, and similar uses by the end of 1921.

Soon after the USRC radium dial operations began at the Orange, New Jersey, factory, RDWs started to suffer health problems (Rowland, 1994; Sharpe, 1971; Abrams, 2001). RDWs started to develop anemia, bone fractures, and necrosis of the jaw. Dr. Theodore Blum, a dentist, diagnosed the disorder as "radium jaw" ["osteomyelitis of the jaw, plus poisoning by a radioactive substance" (Sharpe, 1971; Abrams, 2001)]. Some RDWs had radium-induced tumors bulge from their jaws or leg bones (Irvine, October, 4, 1998; Quigley, October 30, 2011). A dental firm in the early part of 1924 reportedly diagnosed some of the USRC's RDWs with what they considered to be "phosphorus poisoning." USRC became aware of this so-called phosphorous poisoning and thought that this problem was caused by the RDWs' paint brushes. The firm reportedly decided to sterilize the paint brushes before the RDWs used them. USRC also reportedly instructed RDWs not to lip-point.

RDC management did not want to attribute the RDWs' health problems to radiation exposure. For example, at autopsy of Margaret (Peg) Looney, an RDW at the RDC in Ottawa, Illinois,

by an RDC physician listed the cause of death as diphtheria despite her radium-induced osteomyelitis of the jaw in which Looney lost teeth and parts of her jaw (Irvine, October 4, 1998).

USRC retained Dr. Cecil K. Drinker of the Harvard University School of Medicine, Industrial Hygiene Section to survey its operations and make recommendations (Rowland, 1994). After visiting the plant several times and performing many tests, Drinker reported on June 3, 1924, that he could not ascertain any direct cause of the RDWs' health problems and associated disfiguring lesions, although radium was "suspicious."

In 1925, at the WCC in Waterbury, Connecticut, one of the RDWs, Frances Splettstocher, developed anemia, causing her extreme weakness after working as an RDW for 4 years (Quigley, October 30, 2011). The left side of her face felt tender and was it was extremely painful to touch. Splettstocher also had a very sore throat. She was treated by a dentist when she developed pain in her teeth and jaw. The dentist treated the pain by pulling a tooth. However, part of Splettstocher jaw fell off and came with the tooth during the procedure. The tissue in her mouth began to decay until she developed a hole in her cheek.

The Consumers' League of New Jersey took up the social cause of the afflicted RDWs by assisting five of them in bringing lawsuits against USRC (Quigley, October 30, 2011). Two lawsuits in early 1925 were filed by RDWs against USRC, claiming that their injuries resulted from their employment (Rowland, 1994). One RDW, Grace Fryer, sued USRC. However, 2 years went by before she could find an attorney who would be willing to sue USRC. A total of five RDWs joined the lawsuit, and they were called the "Radium Girls."

Around the time of the first RDW lawsuits, the Consumer's League of New Jersey asked Dr. Frederick L. Hoffman, Statistician at the Prudential Insurance Company, to investigate the RDWs' health problems. Hoffman, at the American Medical Association meeting in May 1925 was the first scientist to use the term, "radium necrosis" to describe the RDWs' problems at the USRC's Orange, New Jersey, factory (Hoffman, 1925).

In response to the lawsuit and Hoffman's findings, USRC sought the opinion of Dr. Frederick B. Flinn of the Industrial Hygiene section of the Columbia University, College of Physicians and Surgeons. Flinn became interested in the dilemma and then investigated the RDWs' health problems. He concluded in an article that no industrial hazard existed at the USRC facility. However, soon after his publication, Flinn became aware of a former RDW who had a certain amount of radioactivity inside her body. After 6 or 8 months of observation and treatment and an autopsy, Flinn concluded that radioactivity did contribute to the RDW's health problems.

By 1926, the USRC had to shut down its radium dial factory in Orange, New Jersey, because of the adverse media coverage surrounding the tragedies that befell the early RDWs (Rowland, 1994). USRC relocated its offices and facilities to New York City to continue its operation, but not at the same level that it did in Orange, New Jersey.

The USRC and their hired experts reportedly fought the early efforts to link radium exposure to the RDWs' health problems (Abrams, 2001). The firm even reportedly tried to squash the report of their own expert, Cecil Drinker. Martland et al. (1925) noted that the USRC president wrote that a hysterical condition caused by coincidence was underlying the reason for the RDWs' health problems. Experts who sided with the radium dial industry were not quick to link the RDWs' health problems with radium, emphasizing that little was known about the subject. For example, Martland (1929) reported that he was surprised when he was told by a major expert on occupational disease that little is known about radium disease.

Radium dial companies reportedly urged the physicians to attribute the RDWs' deaths to other causes besides radium such as syphilis. Attributing the cause of death to syphilis would sully the reputations of the girls and young women (Belton, 2010).

The USRC reportedly delayed the Radium Girls' legal proceedings and the afflicted RDWs became sicker and one died (Abrams, 2001). In 1928, the firm settled with the Radium Girls before trial (Illinois Federation of Public Employees, Local 4408). As part of the settlement,

each Radium Girl received $10,000 (about $128,000 in 2010 dollars) and a $600 annual annuity for life. In addition, USRC agreed to pay each Radium Girl all medical and legal expenses incurred. During this period, the RDWs did not have a union so no labor unions were able to resolve this occupational health problem.

In a letter, dated June 18, 1928, the USRC president wrote a letter to the Commissioner of Public Health of the City of New York, summarizing the chronology of events that affected the RDWs (Rowland, 1994). In this letter, the president wrote from the perspective of a company that was under siege by the adverse publicity surrounding the RDWs' health problems. In that letter, the president did not mention Dr. H.S. Martland's results and many publications that demonstrated that the RDWs' health problems were caused by radium and mesothorium (Martland, 1929).

Management's responses to the RDWs' health problems at WCC in Waterbury, Connecticut, were very similar to those of USRC (Quigley, October 30, 2011). WCC never acknowledged that Frances Splettstocher's health problems were connected to her activities as an RDW. However, in March 1925, 1 month after her death and the adverse media coverage of the health problems afflicting the RDWs at the USRC factory in Orange, New Jersey, the WCC passed a new rule for the RDWs: no lip-pointing.

Two years after Frances Splettstocher died, two more RDWs at the WCC factory, Elizabeth Dunn and Helen Wall, died (Quigley, October 30, 2011). Dunn developed spontaneous fractures of her upper and lower extremities. In 1925, she tripped on a dance floor and fractured her leg without falling to the floor. In 1927, Dunn died from radium jaw necrosis; she was the second RDW in Connecticut to die.

At this time, the WCC had to finally accept the fact that radium caused the RDWs' health problems (Quigley, October 30, 2011). The WCC paid almost $90,000 in settlements, support, and medical costs to 16 women. The company also put aside $10,000 a year in a reserve to pay future costs (Clark, 1997). The RDWs in Connecticut settled their cases out of court and reportedly no newspaper stories were published about their occupational health problems. Clark (1997) points out that Connecticut was antilabor and probusiness, and powerful individuals and groups did not want to help the afflicted RDWs.

The Commissioner of Labor Statistics of the U.S. Department of Labor published *Radium Poisoning* in 1929 (Stewart, 1929; Rowland, 1994), detailing its investigation of 31 radium dial factories. The report documented 23 radiation-associated deaths and another 19 living persons who were suffering from radioactive poisoning. Thirty-three of the 42 cases were RDWs. Fifteen of RDWs were dead and 18 were still alive. All of these RDWs reportedly had lip-pointed. Twenty-five of these RDWs were from the USRC factory in Orange, New Jersey. In addition, five other decedents, who were not RDWs, were from this location.

The report indicated that radium dials were not needed for the public and that importing and manufacturing of radium dials should not be allowed (Stewart, 1929; Rowland, 1994). The report emphasized modern techniques of making luminous dials that would eliminate hand painting. However, new methods meant the employees would have to work with twice the amount of radium. This new method was a trade-off between reduced ingestion and increased exposure to external radiation.

In 1938, another RDW, Catherine Wolfe Donohue, sued RDC in Ottawa, Illinois. However, Donohue was so sick that she had to be carried into the courtroom. Donohue, like the Radium Girls, won her lawsuit. Tragically, she died after the company agreed to pay her a few thousand dollars.

Radium dial painting in different radium dial painting factories resulted in the deaths of 41 women in New Jersey, 35 in Illinois, and 30 in Connecticut (Quigley, October 30, 2011). Some of these women died of radium poisoning while still young, while others lived for years but then died from bone or sinus cancer, or leukemia, or they acquired painful and disfiguring bone lesions and arthritis-like joint pain. Many of the RDWs endured intense suffering; they also suffered from anemia (Sharpe, 1971). Even with their symptoms, the RDWs had initial difficulty finding attorneys to sue the radium dial companies.

After the RDW tragedy, the U.S. Public Health Service initiated a national conference on radium (Abrams, 2001). According to Rosner and Markowitz (1987), scientists used the conference to take away power from radium dial companies to determine the occupational health hazards created by radium dial painting. As a result, scientists were able to continue using radium under their own scientific standards (Abrams, 2001; Rosner & Markowitz, 1987).

Companies continued to use radium paint until the 1960s. However, employees were given protective gear and were trained in safety precautions. Employee health now received greater attention as a result of the RDW tragedy.

Radioactive Contamination at Radium Industry Sites

The legacy of radium processing and the radium industry continues to the present day with public concerns about possible radioactive contamination from companies involved the radium industry. Although knowledge about the hazards of radium exposure had been established beginning in the 1920s, the government did not initiate any investigations and/or abatement of possible radiation contamination at any of the radium industry sites until around 1979 (New Jersey Department of Health and Senior Services, June 2, 1997).

Dr. Dada Jabbour, a physical chemist and the hazardous materials director at the Waterbury, Connecticut, Health Department, found it surprising that no one had considered investigating former radium dial factories in Connecticut, where it was a prosperous industry in the early part of the Twentieth Century (Musante, June 24, 2001). *Radium Girls*, a book on the radium dial industry, by Dr. Claudia Clark, a history professor at Central Michigan University, reportedly tipped off Dr. Ross Mullner, a public health professor in Illinois, who reportedly contacted the EPA about possible radiation contamination at the former clock company sites in Connecticut (Clark, 1997; Mullner, 1999; Agency for Toxic Substance and Disease Registry, updated March 15, 2010; Quigley, October 30, 2011; Musante, June 24, 2001).

USRC, Orange, New Jersey, EPA Superfund Site

The former USRC radium-processing plant is on 2 acres in the City of Orange, Essex County, New Jersey. At this site, beginning around 1915, RLMC and later USRC extracted, produced, applied, and distributed radium. About ½ to 2 tons of radium ore each day was processed and dumped on and off the site (U.S. Environmental Protection Agency, n.d.a). At the former USRC plant in Orange, New Jersey, the soil and buildings were contaminated with radium-226 and other radioactive materials. Moreover, radium-contaminated debris and soil were found at 250 noncontiguous areas near the USRC plant in Orange, New Jersey and at other sites throughout Orange, West Orange, and South Orange, New Jersey. Residences, light industries, offices, grocery stores, and apartments occupy these noncontiguous sites of contamination. The primary section of the USRC site is situated in a heavily populated, urban residential area. All residents and businesses in these locations get municipal water.

Individuals who are directly exposed to radium, radon and its progeny, and gamma radiation may be at increased risk for certain forms of cancer and birth defects (U.S. Environmental Protection Agency, n.d.a, b; U.S. Environmental Protection Agency. updated August 9 2011b; U.S. Environmental Protection Agency, n.d.a; DePalma, June 7, 1990). Accidental ingestion of radium-contaminated soil also may cause health problems.

Investigators have completed their efforts to identify additional areas of contamination and have completed the clean-up of contaminated locations at all but one site (U.S. Environmental Protection Agency, n.d.b). In August, 2006, the EPA completed an investigation of ground water at the site and decided that no action was needed. The agency will monitor the ground water for 5 years to protect human health and the environment. The EPA implemented immediate actions and long-term remedial efforts to clean up the entire site. Immediate EPA actions included installing radon mitigation systems and gamma radiation shielding of specific residential and business properties that had high levels of radon gas and its progeny and gamma radiation.

Remedial EPA activities included excavating and disposing off-site of radium-contaminated material at the former RLMC and USRC plant.

Montclair/West Orange, New Jersey, Radium Site, EPA Superfund Site

The Montclair/West Orange, New Jersey site is on 120 acres and includes 469 residences and 10 municipal properties (U.S. Environmental Protection Agency, n.d.b). Experts suspect that radioactive debris and soil from the nearby RLMC and later USRC radium processing plant beginning in 1915 were dumped in these locations, and subsequently residences were built on or near these radium waste disposal sites. In the low-lying areas of these areas, some of the radium-contaminated soil and debris were used as land fill. In addition, some of the radium-contaminated debris and soil were mixed with cement to construct sidewalks and foundations. The Montclair/West Orange Radium Site is similar to the Glen Ridge Radium Site (see below), which also was contaminated with radium debris and soil from the RLMC and USRC plant.

The EPA developed interventions jointly with the Montclair/West Orange Radium Site and the Glen Ridge Radium Site because both sites are in proximity to each other and had radium-contaminated debris and soil from the same source (U.S. Environmental Protection Agency, n.d.b). The EPA reported that more than 220,000 cubic yards of contaminated debris and soil were spread over private and public sites. Both radioactive waste sites are in heavily populated residential areas. In 1983, cleanup activities were started when the State of New Jersey located a number of homes with elevated levels of radon gas and its progeny and high levels of indoor and outdoor gamma radiation. Individuals exposed to radiation at these locations face the same health effects as those persons exposed to radiation debris and soil that originated from other RLMC and USRC sites of radioactive contamination.

The EPA took emergency cleanup actions and implemented long-term remedial activities in phases that are designed to clean up the radioactive-contaminated soil, debris, structures, and groundwater (U.S. Environmental Protection Agency, n.d.b). The EPA in 1983 installed temporary ventilation systems to lower the radon concentrations in 38 residences throughout this site and the Glen Ridge Radium site. The EPA also installed shielding from gamma radiation in 12 residences. In 1990 and 1991, the radon ventilation systems were upgraded and two additional ventilation systems were installed.

The EPA in 1989 selected a method to remedy the most contaminated properties and deferred remedies for less contaminated areas (U.S. Environmental Protection Agency, n.d.b). For all areas regardless of contamination severity, the EPA excavated the areas and disposed all radium-contaminated soil and debris off-site. The agency then restored the affected properties.

Glen Ridge, New Jersey, Radium Site, EPA Superfund Site

The USRC radium processing and radium dial facility operations in Orange, New Jersey, produced widespread radiation hazards in different communities in New Jersey. Radioactive waste from the USRC operations in Orange, New Jersey, may have been dumped on sites that were originally rural areas. However, homes were later built near or even on top of radium and mesothorium disposal sites (U.S. Environmental Protection Agency. updated August 9 (2011b). In the residential area of northeast New Jersey, the small suburban towns of Glen Ridge, Bloomfield, and East Orange became sites of widespread radiation contamination, and the EPA initiated radiation cleanup efforts in the Glen Ridge, New Jersey, community in 1991 (U.S. Environmental Protection Agency. updated August 9, 2011b; U.S. Environmental Protection Agency, n.d.b; DePalma, June 7, 1990). Residents in some parts of these communities had radiation in their yards and homes including radon gas and its progeny (which is produced when radium and other radioactive elements decay) and gamma radiation, which can increase the risk of lung cancer, birth defects, and other health problems.

Safety Light Corporation Superfund Site, Bloomsburg, Pennsylvania

The safety light corporation (SLC) Superfund Site is located in South Centre Township, Columbia County, which is about 5 miles east of Bloomsburg, Pennsylvania (Pennsylvania,

Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). The SLC was formerly the USRC and from the late 1940s to the 1960s was involved in manufacturing processes that used several isotopes including radium-226, strontium-90, cesium-137, americium-241, and tritium. USRC products that were manufactured included watch, clock, and instrument dials, self-luminous markers, such as ship deck markers, radiation therapy sources, and high-level neutron sources.

The SLC site covers about 10 acres and is made up of several buildings, structures, and open areas (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). Parts of the SLC site were used for disposing solid and liquid waste during the 1940s and 1950s. Two underground silos were used for disposing radium-226, strontium-90, cesium-137, and americium-241 in the 1950s and into the 1960s. Liquid chemical wastes, including strontium-90, were dumped into dry wells on the SLC site during the early 1950s. Liquid radioactive wastes were sent to open lagoons on the SLC for holding, additional processing, and eventual discharge into the Susquehanna River in the early 1960s. All of the lagoons except for two were back-filled eventually.

In the 1970s, decontamination, remediation, and removal efforts were implemented (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). Hurricane Agnes in 1972 caused the Susquehanna River to flood the lagoons and other parts of the SLC site. Hurricane Agnes flooding is believed to have played a role in the contamination of surrounding soils. Hurricane Agnes flooding also destroyed a liquid radioactive waste holding tank and evaporator.

At SLC the manufacturing process involved radium-226 and tritium was the only radioactive isotope used by 1980 (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). At the time of the latest report available, tritium is still used to manufacture self-luminous exit signs, aircraft signs, and other devices. The SLC site has produced solid and liquid waste streams that are contaminated with radioactive materials including radium-226, strontium-90, cesium-137, americium-241, and tritium.

The U.S. Nuclear Regulatory Commission (NRC) performed an environmental survey of the SLC site in 1981 (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). The investigation revealed high levels of radium-226, cesium-137, and strontium-90 in surface and subsurface soils. Their results also showed that monitoring wells on the site had high levels of tritium and strontium-90.

At the SLC, the buildings that are no longer in use are abandoned and need repair (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). At several buildings, the roofs have collapsed. In 1998, the upper story of a contaminated frame house burned and in 2003, a tree was knocked down by a hurricane, causing additional damage.

Experts have developed varying estimates for the costs of clean-up (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). In one report, estimates ranged from $72 million to $152 million.

The SLC started remediation of radioactive waste dumped in the two underground silos in 1999 based on an NRC requirement (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). However, the SLC did not have sufficient money to complete the project so the NRC asked the EPA for help. The EPA assessed the SLC site and included the site on the National Priorities List in April 2005.

The time of the report, the EPA is characterizing and disposing different containers of radioactive waste that is presently stored at the SLC site (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.). These containers came from the process of remediating the disposal silos and need to be shipped to a radioactive waste disposal facility off-site.

The EPA has started to collect drinking water samples from wells at adjacent residences. The

agency will determine the best method to remediate the buildings in disrepair at the SLC site (Pennsylvania, Department of Environmental Protection, Bureau of Radiation Protection, Decommissioning Section, n.d.).

EPA Superfund Site: Ottawa (Illinois) Radiation Areas

The RDC factory in Ottawa, Illinois, was demolished and the factory debris, which was still radioactive, was buried in a landfill in the area. The areas in Ottawa, Illinois are now designated as an EPA Superfund cleanup site. Experts estimate that the clean-up will cost $100 million.

Located in LaSalle County, Illinois, the EPA Superfund site known as the Ottawa Radiation Areas is made up of 16 areas that were contaminated by radioactive materials from the RDC from 1918 to 1936 and its successor, the LPI, from 1937 to 1978 (U.S. Environmental Protection Agency, updated June 29, 2011a). The radioactive contamination resulted from radioactive building demolition material and soil that were removed from the original radium dial factory sites and used in 16 areas scattered throughout the city of Ottawa, Illinois and in areas outside Ottawa. These 16 areas consist of residential locations and consist of some building structures.

The EPA removed the radioactive-contaminated soil and debris in the residential locations first and is currently removing radioactive contamination in the other locations (U.S. Environmental Protection Agency, updated June 29, 2011a). At the time of this report, the EPA had removed radioactive-contaminated soil and debris in 13 areas.

Radium Dial Facilities in Connecticut

In 1998, radium-226 and elevated levels of radon gas and its progeny were discovered in several former clock factories in three cities in Connecticut: Waterbury, Thomaston, and New Haven. However, based on environmental health analysis, the sites were not considered a threat to public health. Therefore, the EPA did not place these sites on the list of EPA Superfund Sites.

Nevertheless, the State Bonding Commission in Connecticut reportedly funded a $750,000 cleanup program. Cleanup activities began in the summer of 2002 at two former clock factories in Waterbury and three other radium dial factories in Bristol, Thomaston, and New Haven, Connecticut. These cleanup activities helped the WCC successor, Timex Corporation, which potentially could have been held liable for the cleanup efforts at the former WCC building in Waterbury, Connecticut (Quigley, October 30, 2011).

Environmental health investigators found the highest amount of radiation contamination at the former WCC building that housed the WCC on Cherry Avenue in Waterbury, Connecticut. Part of the building had been made into apartments (Agency for Toxic Substance & Disease Registry, updated March 15, 2010; Musante, June 24, 2001). According to Dennis A. Galloway, a physicist with the State Department of Environmental Protection (DEP)'s Radiation Section, the highest radiation exposure level was 30 millirems annually, which was discovered in one of the apartments at the Enterprise Apartments in the former WCC building (Musante, June 24, 2001). For comparison, an X-ray delivers 10 millirems of radiation, while the EPA's standard of exposure is 15 millirems. Based on the radiation contamination study, three apartments were deemed health hazards. They had to be vacated and quarantined after radiation was discovered in the apartment floors and in the adjacent hallway.

At the former STC factory in Thomaston, Connecticut, and at the former NHC facility in New Haven, Connecticut, environmental health officials also discovered radiation (Agency for Toxic Substance & Disease Registry, updated March 15, 2010; Musante, June 24, 2001). Radium was found in storage rooms that were being utilized by companies in the former STC and NHC buildings. A physicist at the State DEP's Radiation Section indicated that the radium in the storage rooms of the former STC building will have to be "cleaned up." However, the storage rooms posed little risk to employees for now since the rooms are not used much (Musante, June 24, 2001). In the former NHC building, radiation had been discovered in a room that is used to store lawnmower engines (Musante, June 24, 2001). A strip club and a restaurant occupied the building at the time of the radiation contamination survey. However, no radiation was found in either location.

Benrus and Lux, two former clock companies in Waterbury, Connecticut, were also investigated, and radiation was discovered in both facilities (Musante, June 24, 2001). The organization that occupied the Benrus building performed its own radiation clean-up. In both sites, the affected areas were not in use.

Surveys of other former clock companies, including the EIC in Bristol, Connecticut, the Parker Brothers clock company in Meriden, Connecticut, and the Gilbert Clock Company in Winsted, Connecticut, revealed no radioactive contamination (Musante, June 24, 2001).

Radium Chemical Company Chemical Site, New York City, 1989

From the middle of the 1950s through 1983, the Radium Chemical Company, Inc. (RCC) leased radium that was specially packaged for hospital use in the treatment of cancer (U.S. Environmental Protection Agency, January 26, 2012). The company operated in a building on about one-third acre of land at 60–06 27th Avenue in Queens, New York. When the site was abandoned, the building contained a large amount of radium-226 that was sealed in small metal tubes or rods known as "needles" and totaled about 120 curies.

Because of a multiple regulation violations, the State of New York closed the business in 1983 (U.S. Environmental Protection Agency, January 26, 2012). State inspections showed that the company had lost shipment of needles and within the plant, and radiation levels exceeded allowable standards. In addition, radon levels exceeding allowable levels were discovered, indicating microscopic defects in the needles. The RCC building interior was contaminated with residual radium and radon gas and its progeny from the site's former operations. A potential threat existed if people entered the RCC building because of possible inhalation of radon gas and its progeny and exposure to gamma radiation (U.S. Environmental Protection Agency, January 26, 2012). In the most contaminated areas of the RCC building, radiation levels were so high that an individual could exceed the annual occupational exposure limit in only 1 h (U.S. Environmental Protection Agency, updated July 29, 2010).

The State of New York ordered the company to remove its inventory of radioactive materials and to decontaminate the workplace in 1987 (U.S. Environmental Protection Agency, January 26, 2012). A state judge in 1988 declared the RCC site officially abandoned.

Within 3 miles of the RCC site, about 300,000 people reside (U.S. Environmental Protection Agency, January 26, 2012). Most of the surrounding area consists of light industry and small businesses and some residential areas are within ½ mile of RCC.

The EPA completed the clean-up of RCC, and on March 24, 1995, the site was deleted from the National Priorities List (U.S. Environmental Protection Agency, January 26, 2012). The EPA declared that the RCC site was no longer a threat to humans or the environment.

Bear Lake Radiation Site, Michigan, 1995

EPA Region 5 and the Michigan Department of Public Health found a home in Bear Lake, Michigan that had extensive radium contamination in 1994 (U.S. Environmental Protection Agency, updated July 29, 2010). Investigators discovered that a home business repairing and repainting radium aircraft dials took place at this site.

The EPA, based on an emergency, time-critical removal action, relocated the family and tried to decontaminate their belongings, residence, and land (U.S. Environmental Protection Agency, updated July 29, 2010). However, the family's possessions could not be decontaminated so they were disposed of as radioactive waste. The family's residence was demolished and the debris and large amounts of soil from the property were disposed of as radioactive waste.

History of Refining Thorium, Uranium, and Radium in West Chicago, Illinois

In West Chicago, Illinois, the Rare Earths Facility (REF) produced very rare chemicals and metals including thorium, uranium, and radium (U.S. Environmental Protection Agency, July, 2009). In

1931, the LLCC opened the site to process ore such as monazite in order to process thorium, uranium, and other elements (U.S. Environmental Protection Agency, February, 1990). The facility manufactured gaslight mantles and used a thorium extract as a constituent to coat each cloth mantle, which burned in the flame of the gas lamps. This procedure made the gas lamps glow brighter. During World War II, LLCC manufactured hydrofluoric acid.

American Potash and Chemical Company (AMPOT) owned the facility in 1958 and at one time had a Lindsay Chemical Division. In about 1967, KMC bought AMPOT and in about 1970, KMC reorganized and AMPOT became KMC. KMC closed REF in 1973. In 2005, KMC separated from Kerr-McGee and was renamed Tronox, prior to Andarko Petroleum buying Kerr-McGee. Tronox assumed responsibility for the Rare Earths Facility and other sites. In 2009, Tronox went bankrupt (U.S. Environmental Protection Agency, February, 1990).

Residents of West Chicago, Illinois, in the early years used the thorium processing plant's mill tailings as fill dirt for their yards, garden, driveways, and other locations (Starks, March 21, 1993). A woman who as a child played in a yard filled with such mill tailings sued KMC after developing Hodgin's disease. In 1988, her case settled out of court.

The thorium processing facility's radioactive waste was also put in landfill that subsequently became Reed-Keppler Park, a public park (U.S. Environmental Protection Agency, updated October, 2011).

Because of years of rainwater runoff from REF flowing into a storm sewer and then into the Kress Creek, the creek and West Branch DuPage River, including sediments, banks, and floodplains, including residents' yards, were contaminated (Starks, March 21, 1993).

REF mill tailings were used as fill dirt at the West Chicago Sewage Treatment Plant, causing this area to become contaminated (U.S. Environmental Protection Agency, updated October, 2011). Contamination of the West Chicago Sewage Treatment Plant and runoff and erosion caused the pollution of the West Branch DuPage River (U.S. Environmental Protection Agency, updated October 2011).

Public concern over the radiation hazards associated with the KMC facility in West Chicago was substantial, and the Illinois Department of Public Health issued a report in 1991, describing high cancer rates in West Chicago (Starks, March 21, 1993).

Possible radioactive contamination was also a concern at LLCC sites in Chicago, Illinois (U.S. Environmental Health Agency, updated December 19, 2011). The LLCC had operations at several locations in the Chicago downtown neighborhood of Streeterville until the middle of the 1930s. In 1993, the EPA first found thorium contamination in the soil of more than 12 locations. However, if the radium-contaminated soil is covered by an intact hard surface that is sufficiently thick, such as concrete or asphalt, then it is not viewed as a threat to human health and the environment. The EPA discovered that almost all of the sites were covered by such hard surfaces and therefore were not deemed a threat to human health or the environment.

Legacy of Thorium Refining at the WC and General Gas Mantle Company: Thorium Contamination in Camden and Gloucester, New Jersey

The EPA also investigated and initiated a clean-up of thorium contamination in Camden and Gloucester, New Jersey, other major locations for incandescent gas mantle manufacturing at the beginning of the Twentieth Century in America (U.S. Environmental Protection Agency, 2011b, updated August 9). In these two cities, WC and the General Gas Mantle Company (GGMC) produced gas mantle from the 1890s to 1941 and produced as much as 250,000 gas mantles each day. These two companies used thorium to make the gas lamps glow brighter.

Both WC and GGMC had a history of contaminating the soil with thorium and other radioactive materials in Camden and Gloucester, New Jersey by the time the two companies terminated their operations in the mid-1940s (U.S. Environmental Protection Agency, 2011b, updated August 9).

Different businesses have occupied two companies' buildings and land since 1941. The former WC plant is currently part of the port area of the Delaware River.

The New Jersey Department of Environmental Protection (NJDEP) studied thorium contamination at more than 1,100 properties in Camden and Gloucester, New Jersey, in the early 1990s (U.S. Environmental Protection Agency, 2011b, updated August 9). The NJDEP discovered that 100 of these properties had varying degrees of thorium contamination. The agency took different measures to protect human health, including placing gamma radiation shielding on 30 properties and setting up radon/thoron ventilating systems on three properties.

The state of New Jersey bought one property that was contaminated and relocated one business (U.S. Environmental Protection Agency, 2011b, updated August 9). The EPA placed WC and GGMC properties on the Superfund's National Priority List on June 16, 1996, based on the NJDEP study and in collaboration with the EPA.

The EPA started a remedial investigation and feasibility study (RI/FS) in August 1996 to ascertain the nature and degree of thorium contamination throughout the properties and the risks to human health caused by the locations (U.S. Environmental Protection Agency, 2011b, updated August 9). The agency plans to excavate the contaminated soil and waste materials and dispose of them at another location. The EPA will take additional samples at more than 800 identified properties in Camden and Gloucester, New Jersey, to ensure that these sites are not contaminated with thorium. The agency estimates that it will be able to clean up the WC and GGMC locations in 5 years.

At the time of its latest report, the EPA reported that it has started the first phase of soil and debris clean-up at 14 residences, a private swim club, and a County road (U.S. Environmental Protection Agency, 2011b, updated August 9). The contaminated areas and cleanup activities are close to residences and in some instances are in the backyard of residences.

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Child Custody Evaluations

22

Mark L. Goldstein

Forensic psychologists are utilized by the family courts to assess the best interests for children in current divorce cases or in post decree cases. In some instances, there is a request to ascertain which parent should serve as the primary residential parent, while in other instances, the evaluator is asked to recommend whether the parents have the capacity to jointly make decisions or whether one parent should have sole legal custody to make unilateral decisions regarding education, medical decisions, and/or extracurricular activities. The evaluator may also be asked to recommend a visitation schedule for the child or children, or to assess whether supervised visitation is appropriate. At times, evaluators are also assigned the task of recommending whether removal of the children to another state or country is in the best interest of the children.

Although most families arrive at decisions regarding custody and visitation without input from any professionals, approximately 10 % of divorces involving children do litigate (Melton, Petrila, Poythrees, & Slobogin, 1999) and about 1 % of custody decisions are the result of a trial.

Custody evaluations may be done by child psychiatrists, clinical psychologists, clinical social workers, marriage and family counselors, or licensed clinical professional counselors. In some municipalities, only licensed psychiatrists or clinical psychologists are deemed qualified to conduct evaluations. Regardless, most municipalities require specialized training in child custody evaluations. This may include training in child development, domestic violence, substance abuse, psychological testing, attachment, and/or mediation. Specialized training is available through a variety of sources, including the Association for Family and Conciliation Courts (AFCC), the American College of Forensic Psychologists (ACFP), and the American Psychological Association (APA).

There are arguments in the professional literature as to whether judges should refer families for child custody evaluations (Emery, Otto, & O'Donohue, 2005; Kelly & Ramsey, 2005; O'Donohue & Bradley, 1999), while Austin (2009) suggested that there be quality control of the work product that is provided by evaluators. Day (2008) indicated that custody evaluations provide information to both the Court and families in the form of information, clarification, and education. Tippins and Whitman (2005a, 2005b) have argued that custody evaluators should not make specific recommendations to the Court, while a number of others (Bala, 2005; Rotman, 2005; Stahl, 2005) have suggested that recommendations may be useful and appropriate. Martin (2005) has argued that recommendations should be viewed as a part of the process of evaluations rather than the outcome.

Typically, judges are interested in the best interests of the child and there are specific factors

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_22,

to be assessed. These may differ somewhat in different states. For example, in Illinois, the best interest factors (750 ILCS 602) include the wishes of each parent as to custody, the wishes of the child as to custody, the interaction and interrelationship of the child or children with the parents, siblings, and/or significant others, the child's adjustment to home, school, and community, and the mental and physical health of all individuals involved. Other factors to be assessed include the physical violence or threat of physical violence by the potential custodian, whether directed against the child or another person, the occurrence of ongoing abuse whether directed against the child or another person, and the willingness of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. Additional considerations include the stability of the environment, which parent has been the primary caretaker, and parental conduct which has an effect on the child.

In Michigan, the best interest factors include many of the factors cited in Illinois, but also include the preference of the child if of sufficient age, the moral fitness of the parties, the length of time the child has lived in a stable environment and the desirability of maintaining continuity, the capacity of the parties to provide for basic needs, medical care and other material needs, the permanence of the existing or proposed home, and the capacity and disposition of each party to give the child love, affection, and guidance and to continue the education and raising of the child in their religion or creed.

Additional factors may also be examined in removal cases. For example, in Illinois, the Illinois Supreme Court identified specific factors in determining best interest in removal. In *IRMO Eckhart*, these factors included whether the move has a likelihood of enhancing the general quality of life for both the custodial parent and the child, whether the custodial parent has a good motive in moving, whether the noncustodial parent has a good motive in resisting a move, whether a reasonable and realistic visitation schedule can be reached if removal is allowed, and whether there is a direct benefit to the child. *Eckhart* was modified to some degree by the *IRMO Collingbourne* Supreme Court decision, which indicated that both direct and indirect benefits to the child needed to be considered.

Best Practices and Guidelines

Most evaluators follow a model in conducting a child custody evaluation. Both AFCC (2006) and APA (2009) have recently redone their guidelines and there is much similarity between the two models. Both emphasize the necessity for specialized training. In addition, both cite the need for multiple sources of data collection. This may include interviews with each parent, interviews with the child, observation of each parent with the child, observation of other family members or significant others with the child, psychological testing, home visits, collateral interviews, and review of collateral information. There has also been an emphasis on differentiating a forensic evaluation from "normal" clinical services (APA, 2009).

Parent Interviews

At the initial interview with each parent, forms should be completed including an informed consent, whereby the individual acknowledges their understanding of the custody evaluation and the nonconfidential nature of the evaluation.

The initial interview should be designed to collect information on the history of the relationship, including their and their significant others' role in parenting. This may include who handled medical care and appointments, who got up at night with the child, who stayed home with an ill child, who changed diapers, fed and bathed the child, who transported the child to and from daycare and/or school, who helped with homework, school projects, and test preparation, who attended school open houses, parent teacher conferences, field trips, and school parties, who attended extracurricular activities, who transported the child to and from extracurricular activities, who served as a coach for a sport, who served as a room parent, and who took the child to religious education and/or services. In addition, inquire as

to whom prepared school lunches, who took the child for haircuts and cut their nails, who read to the child, who put the child to bed, who dressed them and made breakfast in the morning, and who bought their clothing. This information is designed to help the evaluator in assessing who, if either, has served as the primary parent.

The second area for assessment are the concerns of each parent, both concerns about the other parent as a parent, as well as the concerns about the other parent as a person. For example, a woman may cite that her partner is controlling. In what ways is the partner controlling? Is the parent also controlling towards the child and is this appropriate in setting an appropriate hierarchy? Is there any evidence of child abuse? Is there any physical or emotional abuse towards the partner witnessed by the children or not? Is there any substance abuse, whether witnessed or not by the children? Is there any inappropriate discipline or lack of discipline? Is there any exposure of the children to other partners? Is there any evidence of mental illness? Is there a lack of availability to the child? Is there a lack of involvement with the child? Is there any evidence of alienation? These questions help provide information on abuse, domestic violence, and the emotional status of each parent, which are three of the best interest factors in most municipalities.

It is also essential to ascertain the wishes of each parent, particularly their suggested parenting schedule for the other parent. This often provides valuable information as to each parent's ability to foster and facilitate a relationship between the child and the other parent, which is one of the best interest factors in most states. Querying each parent regarding the strengths of their partner often sheds light on this factor as well. Individuals who are unable to list strengths in other parent are more likely to have problems facilitating the child's relationship with that parent.

Finally, a thorough history of each parent is vital to an assessment. Is there a history of divorce in the family? Is there a history of abuse? Is there a history of substance abuse in the family? Is there a history of mental illness in the family? What was each parent's childhood like? Do either or both parents have a history of mental illness (including in- or outpatient treatment, medication), chronic medical problems, drug addiction, or alcohol problems? Has either had an arrest record and for what? This information provides data regarding the parent's emotional status. In addition, it can assist the evaluator in understanding the likelihood of the parent facilitating a relationship between the child and the other parent.

Ackerman (2001) suggested that parent interviews also cover employment history, educational history, current employment, place of residence and past moves, developmental history, major stressors, previous marital history, and outside activities.

Follow-up interviews with each parent are often conducted, in order to allow each parent to respond to concerns and issues raised by the other parent, and to allow each parent to articulate any additional concerns.

Some evaluators also have joint interviews with both parents. Stahl (2011) reflected that a joint interview allows an opportunity to observe the interaction between the parents, as well as their ability to communicate about the child. He suggests that it is unwise to have a joint session when there are allegations of domestic violence or when one parent is opposed to such a meeting. There is a danger of joint interviews, in that one parent may be strongly opposed to joint legal custody (in essence joint decision making in regard to educational, religious, medical, and extracurricular decisions). One parent may attempt to precipitate conflict during the joint meeting, making it almost impossible for the evaluator to recommend joint legal custody, in that most state statutes require cooperation between the two parties. Goldstein (2011) recommends against joint interviews for this reason.

Stahl (2011) also utilizes the follow-up interviews to assess how each parent understands the child. This would include the child's life, feelings, needs, and the parent's understanding of the child's functioning academically, socially, and emotionally.

Many evaluators also utilize questionnaires to gather information either prior to the initial appointment or early in the process. Dies (2008)

conducted a survey and found that examiner-designed questionnaires are used extensively in child custody evaluations, but noted concerns related to reliability, validity, helpfulness, and relevance. Goldstein (2011) has indicated that there is no assurance that the instruments are actually completed by the parent, unless the questionnaire is completed in the evaluator's office and during the initial appointment. Otherwise, there is nothing to assure that the parent did not have assistance in completing the questionnaire.

Child Interviews

A number of individuals (Ackerman, 2001; Benjamin, Andrew, & Gollan, 2003a, Benjamin, Andrew, Gollan, & Jackie, 2003b; Hynan, 1998; Kovera & McAuliff, 1999; Kuehnle, Greenberg, & Gottlieb, 2004; Stahl, 2011; Wolf, 2004) have offered strategies for interviewing children and adolescents in child custody evaluations.

Interviewing children and adolescents poses many challenges, in that children may have been coached by one or both parents. Hickson (1999) examined whether children's perceptions of their parents were susceptible to persuasion by either mothers or fathers and the extent to which children were influenced by the physical presence of either parent. The results suggested that children overall did not change their perceptions of parents and that susceptibility was impacted by self-esteem. Pipe and Wilson (1994) showed that a child may conceal information from an authority figure when asked to keep it secret by an adult. Bottoms, Goodman, Schwartz-Kenney, Sachenmaier, and Thomas (1990) demonstrated that a child is unlikely to spontaneously divulge secrets, but were more likely to do so in response to the adult's direct questioning about the event. It has also been found that children incorporate parental suggestions into their memory (Poole & Lindsay, 1995; Tate, Warren, & Hess, 1992). At times, parents may unintentionally use suggestive questioning that may alter the child's memory to some degree (Goodman, Sharma, Thomas, & Considine, 1995).

At times, one parent may have threatened the child or promised the child something (candy, ice cream, a toy, a new pet). Therefore, the child feels compelled to respond a certain way. Older children and adolescents better understand the consequences of their interview responses and may attempt to protect one or both parents. Some children take a neutral position and are reluctant to make negative comments about either parent, regardless of reality.

Typically, coached children are relatively easy to spot. One sign is the child who only has positive comments about one parent and only negative comments about the other parent. Another sign is the child who spontaneously announces to the evaluator their preference for residing with one parent at the beginning of the interview. Directly querying the child at the end of each interview as to what each parent shared with them prior to the interview is useful. In addition, it is efficacious to ascertain whether either parent asked them to share anything with the evaluator or whether either parent asked them to not mention something to the evaluator. After the initial interview, it is important to query whether either parent questioned or interrogated them after the interview and what was discussed.

Recent research on child interviews reflects that there are risks in interviewing kids. This is particularly evident in cases with abuse allegations. Ceci and Bruck (1993) have shown that a child's memory can be affected by the child's emotions and the interviewer's questions. A number of researchers (Ceci & Bruck, 1995; Ornstein & Hayden, 2001; Poole & Lamb, 1998; Saywitz & Lyon, 2002; Sternberg, Lamb, Esplin, Orbach, & Hershkowitz, 2002) have studied the issue of suggestibility in children.

The use of open-ended questions in child interviews has been universally accepted. Leading questions, repeated questions, and forced choice questions all have been demonstrated to lead to suggestibility (Ceci & Bruck, 1995). In particular, repeated questions, especially with young children, have been shown to lead to suggestibility (Cassel, Roebers, & Bjorklund, 1996; Poole & White, 1991; Siegel, Waters, & Dinwiddy, 1988). It has been shown that the use of clarification and elaboration through open-ended queries leads to more accurate assessments (Lamb, Orbach,

Hershkowitz, Esplin, & Horowitz, 2007). It is more useful to begin questions with "who," "what," "where," and "how." Also remember that most children, particularly young children, have exceeding difficulty with time. It is often best practice to "anchor" questions to a particular time frame. Interviewing children in a supportive and nonthreatening manner can contribute to positive outcomes in the acquisition of relevant information (Carter, Bottoms, & Levine, 1996; Goodman, Bottoms, Schwartz-Kenney, & Rudy, 1991).

As for the interview itself, remember that this is an anxiety-provoking experience for most children. To decrease anxiety, it is best to first observe the child with a parent, so that the child can become more comfortable with the evaluator, prior to the actual interview. From a consistency perspective, it is best practice to do observations with each parent prior to the child interview. In addition, this assists in developing rapport, which is essential in conducting child interviews. Furthermore, the interviewer's use of language needs to match the child's developmental stage. Also remember that the child may have little or no idea as to why they are at the evaluator's office. Dunn, Davies, O'Connor, and Sturgess (2001) have pointed out that children are told little or nothing about changes in their family. It is best to first introduce yourself, share some information about yourself, look for connecting points with the child (e.g., wow, we both have blue shirts on), and the interviewer's role. The APA (2009) Guidelines for Child Custody Evaluations in Family Law Proceedings stipulate that psychologists provide "an appropriate explanation" and help the child understand the evaluator's role as well as the issue of confidentiality.

The interviewer wishes to understand the child in relationship to each parent and their perception of each parent across a number of parameters. It is most efficacious to first ask the child to describe each parent and then to ask what the child does with each parent. In addition, how does each parent express their feelings, especially anger? What types of punishment does each parent utilize? Has the parent changed in their expression of affect and/or use of punishment?

It is also important to assess the child's perception of each parent's role in their life currently and historically. This may include which parent wakes the child in the morning for school, who makes them breakfast, how the child gets to school, who sets out clothes for the child or helps the child dress in the morning, how the child gets home from school, who is home after school, what the child does for lunch, who helps with homework, projects, and test preparation, and who handles bedtime rituals such as baths or showers, teeth brushing, nighttime reading, and tucking into bed. Who signs the child up for activities? Who takes the child to and from activities? Who attends the activities? Who has coached or assisted with an activity? Who stays home if the child is ill? Who does the child go to if ill? Who takes the child to the doctor, dentist, medical specialist, therapist, and/or tutor?

In follow-up interviews with children, it is essential to ask the child about specific concerns and issues delineated by both parents. These may include issues related to parental conflict, domestic violence, child abuse (physical, sexual, and emotional), substance abuse, and the exposure of children to significant others. It may also include boundary problems, such as a parent sharing inappropriate information about the other parent with the child, using the child as a confidant, making negative remarks about one parent when the child is present, and/or name-calling. Other areas of concern include the availability of a parent (whether not being home, being excessively on the phone or computer, or playing videogames or watching TV for countless hours) and the work hours of a parent.

As part of the child interview, the interviewer desires to determine the wishes of the child. However, it is typically not prudent to directly ask the child as to their preference as to where they would like to reside, although this is a common practice with adolescents. Younger children are typically not capable of participating in custody determinations. However, Larson and McGill (2010) have argued that adolescent input needs to be considered and that forensic evaluators should consider the adolescents' cognitive and decision-making ability as well as developmental factors

that may impact their abilities. Historically, children's views were often absent from custody decisions, although it is often one of the factors to be assessed. For example, in Illinois 750 ILCS602, the wish of the child is listed as one of the best interest factors.

Observation

Another key component to a child custody evaluation is an observation of each parent with the child. In addition, observation of siblings, step or half siblings, stepparents, and significant others such as grandparents (if they reside in the household or have an ongoing role in caretaking) is a necessary component of the forensic evaluation. Observations may be done in the home and/or office. Home visits are preferred when young children are involved or when there are concerns about the suitability of the home.

Observation allows for an analysis of the parent–child interaction (Acklin & Cho-Stutler, 2006; Hynan, 2003). However, Slaven (2002) surveyed 518 clinical psychologists and found that there is a lack of standardized and uniform observational practices. Some evaluators utilize only an unstructured format, e.g., having the parent play games with the child. Others allow the parent and child to choose from a variety of materials, which might include drawing supplies, Legos, games, and dolls. Some provide more structure, having the parent and child play a specific game, e.g., The Talking, Feeling, and Doing game (Gardner, 1989), while other clinicians simply observe the parent and child talking to each other. Still others combine structured and unstructured tasks (in my practice, I allow the family to play a game as an unstructured task and have the family create stories from TAT or CAT pictures). Regardless, the evaluator is attempting to assess the family dynamics and interaction patterns. This includes the hierarchy in the family system, boundaries, communication patterns, level of supportiveness, and attachment.

The applicability of attachment theory to the practice of conducting child custody evaluations has become a "hot" topic in the field in recent years. Lee, Borelli, and West (2011) have argued that current practice involves the use of terminology and conclusions that often distort the findings from attachment research. Emery et al. (2005) discussed the foundations of non-attachment-related evaluations and concluded that they had a limited scientific basis. Garber (2009) proffered that attachment theory is an empirically rich, developmentally informed, and systemically oriented model that holds promise as a useful tool, but is not as of yet adequately validated. Issacs, George, and Marvin (2009) have suggested the possibility of using attachment theory and attachment measures for child custody evaluations and presented a case study to support the use of attachment theory. Purvis, McKenzie, Kellermann, and Cross (2010) also presented a case study, utilizing the Adult Attachment Inventory, to demonstrate the efficacy of attachment theory in a child custody assessment. Mercer (2009) reviewed the use of attachment theory in custody evaluations and in particular assessed the use of the Strange Situation Paradigm (the most widely used methodology for evaluating attachment). She concluded that the scientific support for the use of attachment theory is weak and that there was no clear rationale for deriving a custody arrangement from the use of Strange Situation Paradigm. Mercer also postulated that the use of attachment-related assessments provided no improvement in the scientific foundation of custody evaluations.

Psychological Testing

Both AFCC and APA stress the need for multiple methods of data collection, and psychological testing is frequently utilized, in assessing both the parents and the children. Research on custody evaluations indicates that over 90 % of psychologists in the USA who perform custody evaluations utilize psychological tests in their evaluations (Ackerman & Ackerman, 1997). Bow, Gould, Flens, and Greenhut (2006) surveyed custody evaluators and found that psychological testing was most often used in ruling out psychopathology and assessing personality functioning.

Bray (2009) found that psychologists are using more testing instruments than was evident in the Ackerman study. In another survey, Phillips (2008) reported that psychologists use multiple psychological tests, use psychological tests to reveal major pathology, and combine test data with other sources of data.

A number of authors have commented on the use of psychological tests in custody evaluations. Flens (2005) has commented that the use of tests requires a thorough understanding of test selection and the legal criteria pertaining to the admissibility of psychological test data. He has also stipulated that there is a necessity to select psychological tests with demonstrated validity and reliability. Gould (2005) described a functional approach to the use of psychological tests and measures in custody evaluations and the relationship to parental competencies. Gould-Saltman (2005) expressed concern that the ways in which results are administered to litigants can be substantially different. Otto, Edens, and Barcus (2000) noted that some tests do not meet professional standards. Hagan and Hagan (2008) have questioned whether it is always necessary or appropriate to administer psychological tests in all custody evaluations. Brodzinsky (1993) commented about the risks, as well as the benefits, of psychological testing. Other authors (Bricklin, 1989; Gould, 1998; Stahl, 2011) have echoed similar thoughts.

The most widely used test in custody evaluations is the Minnesota Multiphasic Personality Inventory-II (MMPI-II) (Ackerman & Ackerman, 1997). More recently, there has been a revision of the instrument, resulting in the MMPI-II-RF, which consists of 338 True-False items in comparison to the MMPI-II, which has 567 items. Although the instrument is the most widely used evaluative tool in custody cases, Otto and Collins (1995) warned of the necessity of having multiple sources of data. Mandappa (2005) emphasized the need to consider both group and national norms to ensure informed decisions. Bow, Flens, and Gould (2010) expressed concern about the lack of verification of data entry, inadequate knowledge of significance cutoff scores, and overreliance on computer-generated interpretive reports.

Numerous studies have demonstrated that individuals undergoing custody evaluations tend to present themselves in a favorable light in comparison to control groups on the MMPI-II. Defensiveness and minimization are common response styles, resulting in an underreporting of psychological symptoms and an attempt to portray oneself in a positive light. Schenck (1996) examined MMPI-II norms for custody litigants and found significantly higher T-scores on the L and K scales in custody litigants in comparison to non-custody counseling outpatients. Caldwell (2005), Cook (2010), Greene (2003), Hopkins (1999), and Siegel (1996) all had similar findings. However, Medoff (1999) opined that these scores may be statistically significant, but fail to be clinically significant. Bagby, Nicholson, Buis, Radovanovic, and Fidler (1999) suggested that the S scale, as well as the Wiggins Social Desirability scale, was more effective in the identification of underreporting than the L and K scales.

After the development of the Superlative (S) scale, research has indicated that individuals undergoing custody evaluations tend to respond defensively on the L, K, and S scales. Gready (2006) found that custody litigants displayed higher mean scores on the L, K, and S scales in comparison to a normative population. Tinder (2009) had similar findings. Selbom and Bagby (2008) compared groups of custody litigants with university students and found that the two groups were differentiated by their L and K scores on the MMPI-II-RF. Archer, Hagan, Mason, Handel, and Archer (2011) examined MMPI-II-RF scores for child custody litigants and found elevations on the L and K scales, consistent with prior research.

Other researchers have examined the various scales on the MMPI-II and compared custody litigants to normative populations. Leib (2008) found that only scale 4 (Psychopathic Deviate) was significantly elevated and that none of the family problems scales were elevated, although male child custody litigants were significantly different than female custody litigants, in that females scored higher than males on all family problems scales. Kravit (2011) found elevations on Scales 3, 4, and 6 for custody litigants and that mothers without custody had the highest mean

scale scores on most scales, in comparison to the other groups. Wisneski (2007) examined high-conflict, re-litigation custody litigants and reported that these individuals had higher Represssion (R) scores.

The Millon Multiaxial Personality Inventory III (MCMI-III), designed to assess Axis 2 disorders, is also widely used in custody evaluations. An objective personality instrument "the MCMI-III" has been questioned as a tool for custody cases by Ackerman and Ackerman (1997). As with the MMPI-II, custody litigants are often seen as defensive (Lampel, 1999; Lenny & Dear, 2009), reflected in scores on the Modifying indices. In addition, females often score higher on three scales, particularly on the Histrionic. Lampel (1999) found that the majority of custody litigants elevated on one of three scales—obsessive–compulsive, histrionic, and narcissistic. Her study also demonstrated that males tended to elevate on only one scale, while females tended to litigate on combinations of scales. Lenny and Dear (2009) noted that custody litigants have shown elevations on the Desirability, Histrionic, Compulsive, and Narcissistic scales. Halon (2001) warned that the interpretation of profiles of custody litigants is highly problematic. However, McCann et al. (2001) related that the MCMI-III does not overpathologize child custody examinees.

Other objective personality instruments have been increasingly utilized in custody cases, including the Personality Assessment Inventory (PAI), the 16PF, the FIRO-B, the Bell Object Relations Test, as well as numerous instruments designed to assess specific personality components (depression, anxiety, psychopathy, post-traumatic stress, alcohol and drug abuse, domestic violence, sexual abuse, and trauma).

Projective personality tests are also administered at times, but these are often challenged in court, as not meeting *Daubert* or *Fry* standards. Some authors (Garb, Wood, Lillenfeld, & Nezworski, 2002; Grove, Barden, Garb, & Lillenfeld, 2002) contend that the reliability and validity of the Rorschach are insufficient to allow the data to be presented in court. Weiner (2005) addressed the limitations and utility of the Rorschach in child custody issues. He cited the value of the instrument in identifying level of adjustment or psychological disturbance as well as personality characteristics that inhibit or impede adequate parenting. Calloway (2005) opined that the Rorschach is uniquely suited for custody cases in that the instrument allows examiners to directly obtain measures of behavior from subjects and yields descriptions of individual's traits. Medoff (2003) and Ritzler, Erard, and Pettigrew (2002) offered similar opinions, while Evans & Schutz (2008) delineated the utility of the Rorschach for forensic cases.

Singer, Hoppe, Lee, Olesen, and Walters (2008) examined child custody litigants on the Rorschach and demonstrated that this group had marked deficits in managing interpersonal conflict, problematic ability to modulate, control, and tolerate their own affective experience, and difficulty in engaging collaboratively in problem solving. The authors added that these deficits are consistent with clinical descriptions of this population. In another study, Kennelly (2002) evaluated response sets of Rorschach responding within an imagined child custody evaluation. Participants were not successful in altering their protocols on several variables.

Other projective instruments, including the Thematic Apperception Test, projective drawings, and sentence completion tests, appear to lack the reliability and validity for use in custody cases, and these are infrequently utilized. When these assessment tools have been used, they have not met *Daubert* or *Frye* standards when challenged in court.

In addition to objective and projective personality tests, there are a number of parenting inventories. These include the Parenting Stress Index (Abidin, 1990), which is designed to measure sources of stress within areas of the child domain (Adaptability, Acceptability, Mood, Demandingness, Distractibility, and Reinforces Parent) and sources of stress within areas of the parent domain (Depression, Guilt, Attachment, Restrictions imposed by the role, Sense of Competence, Social Isolation, Relationship with spouse, and Health). There is also a Life Stress score, reflecting the amount of stress each parent is currently experiencing. A second parenting inventory is the Parenting Alliance Measure (Abidin & Konold, 1999), which reflects

the strength of the parent alliance between parents. The instrument is particularly beneficial in assessing communication between parents and is helpful in ascertaining whether to recommend joint versus sole custody.

A third tool is the Parent Child Relationship Inventory (Gerard, 1994). It assesses how parents view the task of parenting and how they feel about their children. There are scales related to Parental support, Satisfaction with parenting, Involvement, Communication, Limit setting, Autonomy, and Role orientation.

Other measures related to parenting include the Parent Behavior Checklist (Fox, 1994), the Achenbach Child Behavior Checklist (Achenbach 1997), the Family Relations Inventory (Nash, Morrison, & Taylor 1982), the Parent Perception of Child Profile (Bricklin, 1995a, 1995b), the Best Interest of the Child Questionnaire (Jameson, Ehrenberg, & Hunter, 1997), the Parent Discipline Techniques-Self Report (1997), and the Warshak Parent Questionnaire (2006).

There have also been attempts to assess the child's perception and a number of instruments have been developed with this goal in mind. Bricklin (1984, 1995a, 1995b, 1997) has published the Bricklin Perceptual Scales (BPS), the Perception of Relationships Test (PORT), the Parent Awareness Skills Survey (PASS), and the Parent Perception of Child profile (PPCP). The BPS is the most widely used custody measure for children (Ackerman & Ackerman, 1997), but it has been criticized for lacking adequate standardization, as well as reliability and validity to support its credibility. There has been little research on Bricklin's measures, and Otto et al. (2000) cited that these are either not valid or have significant limitations. Gilch Pesantez (2001) found a significant relationship between BPS scores and scores on the Family Environment Scale, but also indicated that the BPS did not provide an accurate picture of the family environment and their study did not support the hypothesis that the BPS is a valid and reliable instrument.

Bricklin and Elliott (1995) also developed the ACCESS, an integrated system in which each measure is designed to elicit information related to child custody. Ackerman and Schoendorf (1992) developed the ASPECT, in an effort to incorporate all the components of a custody evaluation. The ASPECT was later modified in 2001 (Ackerman) and the ASPECT-SF was published. There have been many criticisms of the Ackerman instruments, including Cornell (2005), who commented that the evaluator is led to offering unsubstantiated opinions on the central opinion. Ackerman (2005a, 2005b) disagreed with Cornell's opinion that the ASPECT should be "laid to rest." Stahl (2011) concluded that these instruments may be used as adjunctive sources of information rather than definitive tools in custody cases.

Some evaluators may utilize other psychological measures on occasion, including instruments to assess intelligence (e.g., the Wechsler Adult Intelligence Scale), neuropsychological issues (e.g., Halstead-Reitan), substance abuse (e.g., the Substance Abuse Subtle Screening Inventory-IV), post-traumatic stress (e.g., the Clinician-administered PTSD scale), anxiety (e.g., the State-trait Anxiety Inventory 2), depression (e.g., the Beck Depression Inventory-II), psychopathy (e.g., the Hare Psychopathy Checklist-Revised), and trauma (e.g., the Trauma Symptom Inventory).

In addition to the various Bricklin instruments, evaluators may also administer psychological instruments to children and adolescents, in order to assess their psychological functioning. These include the Minnesota Multiphasic Personality Inventory-Adolescent, Millon Adolescent Clinical Inventory, Millon Pre-Adolescent Clinical Inventory, Personality Inventory for Children, Personality Assessment Inventory-Adolescent, Beck Youth Inventories II for Children and Adolescents, Connors Comprehensive Behavior Rating Scales, Behavior Assessment System for Children-2, and various scales for assessing Attention Deficit Disorder or other specific disorders.

Collateral Information

Both the APA and AFCC stress the importance of collecting collateral information from neutral sources. A survey of AFCC member custody evaluators revealed that 100 % relied on collateral

sources in conducting custody evaluations (Kirkland, McMillan, & Kirkland, 2004). Collateral data include all information from other sources, including interviews and review of materials. This may include interviews with physicians, dentists, orthodontists, medical specialists, teachers, school social workers, school counselors, and school psychologists. It may also include interviews with clergy, marriage counselors, individual counselors, psychiatrists, and/or social service agencies. In addition, the evaluator may interview current spouses, significant others, half siblings, stepchildren, grandparents, and/or other significant family members. Interviews with an AA or NA sponsor may also be fruitful. At times, neighbors may also be interviewed. It may be prudent to also interview individuals who have had direct observation of the parent–child interaction, including a child's baseball or soccer coach, or Boy Scout leader. Most evaluators do not interview family or origin, because these individuals often have a bias on the behalf of their family member.

Bow (2010) reviewed the use of third-party information and its potential in enhancing the usefulness as well as accuracy in custody evaluations. Newton (2011) emphasized the data collection of school records, particularly when the parents are in disagreement related to school placement, the child's performance, and the child's adjustment to school.

Austin (2002) recommended that custody evaluators utilize a concentric circle approach when collecting collateral information. He indicated that those closest to the family, those in the most inner part of the concentric circle, are likely to have the most complete information about family members. These individuals are also most likely to be biased. In Austin's second concentric circle are those who are likely to have narrower knowledge of family members. This would include teachers, therapists, pediatricians, dentists, coaches, and scout leaders. In the third concentric circle are individuals who may know very little about the family, but may have information to share about a specific event. For example, a postal worker may have observed an argument between the parents with the child present, or another parent may have observed a parent striking a child at school.

Austin and Kilpatrick (2002) related that it may be helpful to consider the relationship between the collateral informants and the parent who suggested the collateral source. Generally, an individual who is closer to a parent is less credible while an individual who is more emotionally disconnected to a parent is more credible. Stahl (2011) suggests that the evaluator attempt to determine whether there is evidence that a particular collateral source is less than credible. He added that an individual's therapist may be less believable if they appear to be unwavering in their support of their client, particularly if they are unable to perceive any weaknesses in their client. Gould (1999) warned that information from family members in particular may be confounded by the self-interest inherent in the relationship with the parents.

In addition to collateral interviews, it is essential for an evaluator to examine collateral records. This may include school records, police or criminal records including incident reports, medical and hospital records, employment records, and therapist records. Furthermore, evaluators may also have access to prior psychological evaluations and/or testing, prior parenting agreements, divorce documents, and various motions and petitions related to the case. Stahl (2011) notes that the volume of material provided by the two parties is often indicative of the level of conflict, with volumes of material often related to high levels of conflict.

The record review may assist the evaluator in ascertaining each parent's role with the children and the veracity of each parent. For example, one parent may claim that he or she took the children for the majority of medical appointments, but the medical records and interview with the pediatrician and specialists reveal that the parent was only present for appointments on a few occasions. In another instance, one parent may contend that there was domestic violence, but a review of police records and interviews with neighbors and children do not support such a contention.

Special Issues

Custody evaluators are typically asked to make recommendations regarding the issue of residential custody and/or joint versus sole legal custody, as well as a preferred visitation schedule. However, at times, evaluators are asked to evaluate whether relocation or removal is in the best interest of the child. The evaluator is not only required to evaluate the best interest factors, but also other factors specific to removal in these cases. In most states, the issue of the child's access to the other parent is of paramount importance. Illinois provides a list of factors to be assessed in removal cases and evaluators can examine two major Illinois Supreme Court decisions related to removal. In Illinois, both factors that directly impact the child as well as indirect factors must be considered. This includes the child's access to the other parent, a plan to accomplish access, and direct and indirect benefits to the child (e.g., quality of education, economic advantages, access to extended family, support). Saini (2008) opined that these evaluations need to be framed within an evidence-based model. Austin (2008a) commented that the literature shows that residential mobility is a risk factor for children of divorce. He also related that predicting a child's adjustment to relocating or not relocating requires a careful and contextual investigation of the child and the family circumstances. Austin and Gould (2006) echoed the need for evaluating the child and the family. More recently, Austin (2008b) proposed a relocation risk assessment model.

In other instances, evaluators are asked to evaluate whether one parent should have supervised visitation with the child. This may include cases where there has been physical abuse, sexual abuse, neglect, mental illness, domestic violence, and/or substance abuse. These cases may require specialized assessments, which may be done by the evaluator if she or he has the necessary training to conduct such evaluations. In some cases, it may be necessary to hire a consultant, who has specialized training, to conduct this portion of the evaluation.

Certainly assessment of sexual abuse is one specialized arena where a specialist may be needed to assist the evaluator in a custody case. A number of authors Behnke and Cornell (2005), Bow, Quinell, Zaroff, and Assemany (2002), Cling (2005), Ellis (2000), Ehrenberg and Elterman (1995), Kuehnle and Kirkpatrick (2005), Kuehnle and Sparta (2006), McGleughlin, Meyer, and Baker (1999), Sachsenmaier (2005), and Tishelman, Newton, Denton, and Vandeven (2006) have all written about abuse evaluations in the context of custody evaluations and noted the importance of such assessments. Kuehnle and Kirkpatrick (2005) have suggested that a forensic evaluation model (Heilbrun) be employed, while Ellis (2000) and Sachsenmaier (2005) outlined alternate models. Johnson and Cavanaugh (2006) have warned that allegations of sexual abuse are sometimes based on a child's problematic sexual behaviors.

Another area of specialized assessment is domestic violence, which is frequently alleged in the course of a custody evaluation. Austin (2001), Bow and Boxer (2006), Geffner, Conradi, Geis, and Aranda (2009), Gould, Martindale, and Eldman (2008), Grossman (2006), Greenberg (2006), Harris (2004), Helfritz et al. (2006), Jaffe, Crooks, and Bala (2009), Logan, Walker, Jordan, and Horvath (2002), Moncho (2004), and Stahly (2009) have all offered thoughts on partner violence and risk assessment in the context of custody evaluations. Harris (2004) has expressed concern that there are no clear standards of best practice in assessing allegations of domestic violence in custody cases. Jaffe et al. (2009) have emphasized the need for crafting parenting plans that protect children and victims in domestic violence cases. Logan et al. (2002) note the high overlap between domestic violence and child abuse.

A third specialized area for forensic psychologists are parental alienation cases, and whether alienation is a form of abuse (Drozd & Olesen, 2004). Much has been written about parental alienation in the literature since Gardner (1987) coined the term. Many have argued that parental alienation syndrome is not a syndrome, while

others have argued that alienation clearly exists and that it exists in many different forms and extremes. Ellis (2008) proposed a three-step process for evaluating children for parental alienation syndrome, while Neustein and Lesher (2009) criticized her model. Johnston, Walters, and Olesen (2005) reported that their findings supported a multifactor explanation of children's rejection of a parent. Lee and Olesen (2001) suggested that evaluators can develop an accurate understanding of alienated children by integrating psychological test data, interview data, and collateral data. Rand, Rand, and Kopetski (2005) assessed a spectrum of parental alienation cases, particularly those at the severe end of the spectrum.

Evaluators may also be called upon to evaluate other issues, including substance abuse, psychopathy, and antisocial personality disorder (Billick & Jackson, 2007), physical disability (Breeden, 2005; Breeden, Olkin, & Taube, 2008), lesbian, gay, bisexual, and transgender parents (Tye, 2003), and nontraditional religious practices (Wah, 1997).

Conclusions

Forensic psychologists who conduct child custody evaluations are faced with the exceedingly difficult task of making recommendations to the Court as to which parent should serve as the primary residential parent and as to whether the parents have the capacity to share joint legal custody. In addition, the evaluator is asked to help craft a visitation schedule that is in the best interest of the child or children. At times, the evaluator may also be asked to address whether one parent can relocate with the children to another state or country, or whether supervised visitation is in the best interest of the children. In some cases, specialized evaluations may be necessary, for example, in cases involving allegations of domestic violence, child abuse, substance abuse, and alienation.

Custody evaluators collect data through multiple means, including interviews with parents, children, and collateral sources, psychological testing, observation of parent–child interactions in the office and/or home, and review of collateral information. Evaluators follow guidelines created by the APA and AFCC, which emphasize multiple methods of data collection, and evaluators ultimately generate reports which are designed to help the court in determining the best interest of the child.

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Parental Alienation

23

Demosthenes Lorandos

What Is the Phenomena of Parental Alienation

In a 1985 article for the *Academy Forum* (a publication of the American Academy of Psychoanalysis), child psychiatrist Richard Gardner began to discuss parental alienation (PA) in the journals of the behavioral sciences. Gardner observed that an alarming tactic in high-conflict custody cases was a false allegation of child abuse. Dismayed by the developing frequency of false allegations of child sexual abuse among divorcing parents, Gardner formulated what he saw as a *Parental Alienation Syndrome* (PAS). In 1998, with the introduction of the second edition of the text he began in 1985—*The Parental Alienation Syndrome*, Gardner refined the description of the parental alienation syndrome first introduced in his article for the American Academy of Psychoanalysis (Gardner, 1985):

> "The *parental alienation syndrome* is a disorder that arises primarily in the context of child-custody disputes. Although the dispute is most often between the parents, it can arise in other types of conflicts over child custody, e.g., parent vs. stepparent, parent vs. grandparent, parent vs. relative, etc. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification against a good, loving parent. It results from the *combination* of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present, the child's animosity may be justified, and so the parental alienation syndrome explanation for the child's hostility is not applicable. Inducing a parental alienation syndrome into a child is a form of emotional abuse because it can result in the attenuation and even destruction of the child's bond with a good, loving parent" (Gardner, 1998, 2006).

As Gardner explained in 1985 and again in 1998, the highly charged arena of child custody disputes dramatically intensified, when abuse allegations were made. These cases became fertile ground for extreme statements. Gardner's explication of PAS was lauded by some and criticized by others. However, it was Gardner's description of false sexual abuse allegations as a tactic in high-conflict custody cases that found him pilloried. The *ad hominems* and shoddy scholarship that characterized Gardner's critics in the two decades that followed his 1985 paper are well illustrated by three examples.

The criticisms of social worker Kathleen Faller (1998, 2000) with respect to Gardner and his formulation of PAS seemed to be based on her lack of methodological awareness and a frank desire to mislead readers (*Bielaska v Orley*, 1996; Lorandos, 2006, 2011; Warshak, 2003). Tony Hobbs, a researcher and teacher at Keele University in England, is an associate fellow of the British Psychological Society and a chartered psychologist. He described the impact of shoddy scholarship on the treatment of children in the

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_23,

courts of the United Kingdom. To illustrate, Hobbs (2006) pointed to the impact of a 2000 report by Claire Sturge and Danya Glaser, which relied solely on Faller's criticism of Gardner. Describing herself as a "research professor of law," Carol Bruch in a 2001 work relied upon newspaper articles and nine citations to Faller's material to support her arguments. Bruch ignored 200 years of case precedent concerning parents alienating children from another parent and two decades of careful, peer-reviewed research from the behavioral sciences to rely on Kathleen Faller and newspaper articles (Fidler & Bala, 2010; Lorandos, 2006, 2011). Use of any of these three critiques, without an explication of their essential flaws, is itself shoddy scholarship.

Working independently of Gardner in the late 1980s Stanley Clawar, a sociologist, and Brynne Rivlin, a social worker, published a study through the American Bar Association titled *Children Held Hostage*. Clawar and Rivlin followed 700 counseling cases over a 12-year period. They documented their observations over the course of their study and drew their conclusions in 1990. Clawar and Rivlin (1991) identified eight different processes involved in severe alienation:

1. Theme for the rationalization of rejection
2. Sense of support and connection to alienating parent is fostered
3. Feeling of sympathy for the alienating parent is fostered
4. Child's loyalty is tested by child's behavior/attitude
5. Reinforcement by seeking out behaviors of the rejected parent that reinforce the alienation
6. Maintenance of alienation: subtle reminders
7. Child shows support for beliefs of alienating parent
8. Child's compliance tested; rewarded or not admonished for inappropriate behavior.

Warshak (2001, 2010b) described a pattern he has observed in the literature of coercive control and domination. He pointed out that in these families, a parent continues harassing and controlling the ex-partner by manipulating the children to turn against the victim parent. He went on to explain that when the favored parent's behavior contributes significantly to the children's negative attitudes, leading authorities in the field label this as emotional abuse. He cited Clawar & Rivlin's, 1991 work explaining, "The legal system in most states is not currently adequate to protect children from this form of abuse." Gardner had made the same point in 1998 when he described alienation as child abuse: "Whether such parents are aware of the negative impact on the child, these behaviors of the aligned parent (and his or her supporters) constitute emotional abuse of the child." Johnston and Kelly (2004) agreed on the issue of alienation as abuse, referring to parental alienation as "an insidious form of emotional abuse of children that can be inflicted by divorced parents" (*also see*: Weigel & Donovan, 2006).

The formal proposal that PA be included in *DSM-5* and *ICD-11* (Bernet, 2010; *see also*: Bernet, Boch-Galhau, Baker, & Morrison, 2010) cited authors from many countries who describe PA as *child abuse*. As Bernet's team put it:

> We agree with Johnston, who stated that *parental alienation constitutes child abuse*. She said, "With respect to the parents' need for mandated treatment, we argue that alienating behavior by parents is a malignant form of emotional abuse of children that needs to be corrected, whether a parent agrees or not. A growing body of literature on the adverse effects of parents' psychological control, also called 'intrusive parenting,' supports this contention." (*emphasis added*)

Does the Phenomenon of Parental Alienation Have Validity and Reliability?

With respect to the construct, PA, Bernet (2010) as well as Bala, Hunt, and McCarney (2010) pointed out that there has been a significant increase over the last two decades in the number of cases explicitly raising "alienation" issues in the courts of Canada and the USA. Surveying the literature of the last 50 years, Bernet and colleagues (2010) made a strong case that many researchers or groups described the phenomenon of PA independently in the 1980s and 1990s. Bernet and colleagues explained that while the phenomenon was almost universally accepted, there had been a great deal of disagreement and

debate regarding whether it was a "syndrome" and what kind of interventions were appropriate.

Reviewing past efforts finds that Westman and colleagues wrote in 1970 that a "pattern is found in which one parent and a child team up to provide an effect on the other parent" (Westman, Cline, Swift, & Kramer, 1970). In 1976, Judith Wallerstein and Joan Kelly referred to an alliance between a "narcissistically enraged parent" and a particularly vulnerable child or adolescent who were "faithful and valuable battle allies in efforts to hurt and punish the other parent." Not infrequently, wrote Wallerstein & Kelly, children co-opted in this way "turn on the parent they had loved and been very close to prior to the marital separation" (Wallerstein & Kelly, 1976, 1980).

Writing in 1989, Judith Wallerstein and Sandra Blakeslee offered that some mothers could be "entangled with Medea like rage". They went on to say

> "a woman betrayed by her husband is deeply opposed to the fact that her children must visit him every other weekend … She cannot stop the visit, but she can plant seeds of doubt – 'do not trust your father' in the children's minds and thus punish her ex-husband via the children. She does this consciously or unconsciously, casting the seeds of doubt by the way she acts and the questions she asks … Fathers in similar circumstances make use of techniques congenial to them, often conveying to the boy or girl that the mother is depraved and dangerous."

At another point in this work, Wallerstein offered "I have seen a great deal of evidence that Medea—like anger severely injures children at every age." Wallerstein went on to write:

> "when one or both parents act the Medea role, children are affected for years to come. Some grow up with warped consciences, having learned how to manipulate people as the result of their parents' behavior. Some grow up with enormous rage, having understood that they are used as weapons. Some grow up guilty, with low self-esteem and recurrent depression." *Ibid.*

In 1993, Johnston noted the impact of polarizing parents in high-conflict cases. She wrote that "strong alignments are probably most closely related to the behavioral phenomena Gardner referred to as parental alienation syndrome…"

In 2000, Elizabeth Ellis published her text *Divorce Wars*: *Interventions With Families In Conflict*. Ellis explained that by the year 2000, the concept of PA had "come to be accepted by clinicians working with families involved in post divorce conflict." She went on to point out that the cogent diagnosis of "…PAS has been unclear, because clinicians still confuse a child's symptoms with the parents behavior." (Ellis, 2000). Three years after Ellis' point about confusion of child or alienator's symptoms, two systematic reliability studies emerged.

Carlos Rueda conducted the first inter-rater reliability study on PAS as part of a doctoral dissertation. Rueda sent a survey instrument to doctoral level mental health professionals and asked each to examine five vignettes that related to PAS. Rueda found a high rate of agreement regarding the diagnostic criteria for PAS (Rueda, 2004). In 2006, Stephen Morrison conducted a second inter-rater reliability study, using the same vignettes and PAS test instrument as Rueda (2004). In Morrison's replication, the survey instrument and vignettes were sent to child custody and mental health practitioners in the USA. Morrison avoided specialists in Florida, as that was the primary source of respondents for the Rueda study. The intra-class correlation coefficient values obtained in Morrison's second inter-rater reliability study all approach one and indicate significant agreement among evaluators. This was especially the case when vignettes described PAS symptoms, which were pronounced. The results indicate the PAS test instrument was reliable when testing for PAS. Rueda (2004) had found that of the total number of questions answered by all respondents in the five cases surveyed, only 2 % of the answers varied slightly in the second round of inquiry. Morrison reviewed Rueda's data and arrived at a similar conclusion. He said there were 2,666 questions that were answered during both the first and second administration of the questionnaires to the evaluators. Morrison wrote, "Of these 2,666 answered questions, 10.8 % changed from the first to the second administration." In addition to significant inter-rater reliability, the Rueda and Morrison studies indicate a high degree of

test–retest reliability for the PAS test instrument used. Writing in 2010, Joan Kelly pointed out that there was "broad consensus among the mental health and family law community that the risk of child alienation is increased in highly conflicted separations accompanied by protracted adversarial child custody disputes" (Kelly, 2010).

What Is the Incidence and Prevalence of Parental Alienation

Children live in many family configurations. Some live with a parent or parents who have never been married. Others live with grandparents or guardians when their biological parents are not functional caregivers in their lives. Still others live in family units that have broken through divorce of the parental figures. We do not have census data about the construction, deconstruction, and remaking of these family units. Further, the 50 States primarily handle our system of family law in the USA. Our State court systems are not uniform in their recordation of divorces with and without children and certainly not aware of the possible serial nature of family configurations in children's lives. This poses a serious difficulty for any calculation of the incidence of parental alienation.

With respect to the prevalence of PA, the same constraints apply. Nevertheless, behavioral science researchers identify many children living in family units, the deconstruction of which is supervised by the divorce responsibilities of the family courts. In a 1988 publication, alienation was seen in as many as 40 % of high-conflict cases (Johnston & Campbell, 1988). Studying false allegations of sexual abuse and alienation, Kopetski (1991) reported a fifth of her sample engaged in alienation. At that time, she noted that alienating mothers outnumbered alienating fathers by a ratio of 2:1. Kopetski's findings regarding the higher proportion of alienating mothers were similar to those of other researchers (Burrill, 2006; Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner, 1992, 2001b; Wallerstein & Kelly, 1980).

Kopetski's work on alienation began in the 1970s and was fully developed by the time she learned of Richard Gardner's work. In 1991, Kopetski presented her work on PAS at the Fifteenth Annual Child Custody Conference in Keystone, Colorado (Kopetski, 1991). She recognized Gardner's contribution in the introduction and described her astonishment upon learning of his work in 1987. While unaware of Gardner's work, she simultaneously arrived at observations and conclusions that were remarkably similar.

In the 1980s, an increase in child custody fights passing through the family court system created a concern for how to better manage the conflict. In their *Children Held Hostage*, Clawar and Rivlin (1991) found that in about 80 % of the 700 cases, there was some element of parental programming in an effort to implant false and negative ideas about the other parent, with the intention of turning the child against that other parent. Their work focused on emotional issues, persistent programming, and brainwashing, which sometimes resulted in severe PA. Janet Johnston (1993) reported that 7 % of the children in one study and 27 % of the children in a second study had "strong alignment" with one parent and rejection of the other parent. In a 1997 presentation to the American College of Forensic Psychology, Larry Nicholas reported on a survey of 21 custody evaluators. The majority of Nicholas' respondents reported that in about one-third of their custody evaluation cases, one parent was engaging in clear alienating behavior.

Sandra Berns (2001) reported on a study of divorce judgments from 1995 to 2000 in Brisbane, Australia, where PA was found to be present in 29 % of reviewed cases. Gardner conducted a qualitative follow-up of 99 children from 52 families he had previously diagnosed with PAS. Reporting the results in his 2001 text on therapeutic interventions for this population, he concluded: The court chose to either restrict the children's access to the alienator or change custody with 22 of the children. His follow-up work found a significant reduction or even elimination of PAS symptomatology in all 22 of these cases. In the 77 cases where the court chose not to reduce access or transfer custody, there was an increase in PAS symptomatology in 70 cases (90.9 %).

Hetherington and Kelly (2002) discussed findings from the Virginia Longitudinal Study of

Divorce and Remarriage. Since the early 1970s and "the Hetherington and Clingempeel Study of Divorce and Remarriage," E. Mavis Hetherington studied divorced parents and their children. One of Hetherington's comments was:

> As obviously destructive as conflict is to all involved in this dilemma, it was surprising to discover that six years after divorce, 20 to 25 percent of our couples were engaged in just such conflictual behavior; former spouses would make nasty comments about each other, seek to undermine each other's relationship with the child, and fight openly in front of the child. Aside from being damaging, constant put-downs of the other parent may backfire, producing resentment and a spirited defense of the criticized parent by the child. … Conflictual coparenting distresses children and undermines their well-being, and it makes parents unhappy, too. They feel guilty about fighting in front of the children, but their preoccupation with their anger and lingering resentment makes it difficult for them to begin focusing on a new, more fulfilling life and on the pain they are causing their children.

In 2003, Johnston reported on an "alignment" study. She defined alignment as the "child's behavioral and verbal preference for one parent with varying degrees of overt or covert negativity toward other parent." She found that 15 % of children in a community sample of divorcing families and 21 % in contested custody cases experienced either "some" or "much" alignment with one parent or the other. Bernet's group (2010) calculated Johnston's percentages using the raw data Johnston described and found that 18 % of the children in the community sample and 27 % in the contested custody cases experienced some degree of alignment.

In 2005, Johnston, Walters, & Olesen (Johnston et al., 2005a, b) reported rates of PA of about one-fifth of high-conflict populations. Two years later, Amy Baker (2007b) reported research wherein she surveyed 106 mental health professionals who conducted custody evaluations. The respondents reported that PAS occurred in as many as 55 % of their cases. An average rate over all respondents, whether skilled or unskilled in the differential diagnosis of PAS, was 11.2 % (SD = 13). Baker found that the evaluators who identified PAS more frequently were more familiar with the concept of PAS, were more likely to assess for PAS, were more likely to believe that one parent can turn a child against the other parent, and were more confident in their evaluations. Bow, Gould, and Flens (2009) reported on their survey of 448 mental health and legal professionals who were experienced with PA. They said, "When respondents were asked [in] what percentage of child custody cases was PA an issue, the mean reported was 26 %". Bala, Hunt, and McCarney reported in 2010 that between 1989 and 2008 alienation was found by the court in 106 out of 175 cases raising the issue (61 %). The mother was the alienating parent in 72 cases (68 %), and the father was the alienating parent in 33 cases (31 %). It seems that in this study, the alienating parent had sole custody of the children in 89 cases (84 %), and joint custody in 14 cases (13 %).

A recent collaborative study between the Vincent J. Fontana Center for Child Protection and New York University (Baker, 2010) revealed that about 28 % of adults in a community sample (i.e., not selected because of a precondition related to divorce or custody) reported that when they were children one parent tried to turn them against the other. These data are striking in that a significant portion of the sample was probably raised in an intact family. Not surprisingly, the proportion that reported that they had been exposed to parental alienation was higher in the subsample of individuals who had been raised by a stepparent, at 44 %. Cognizant of these research findings, Bernet and his collaborators (2010) conservatively estimate that approximately 25 % of children involved in custody disputes manifest PA. These data, wrote the *DSM-5*/*ICD-11* team, yielded a prevalence of 1 %, or about 740,000 children and adolescents in the USA. For comparison purposes, they inform that this prevalence is about the same as the prevalence of autism spectrum disorders among children and adolescents in the USA.

How Is the Differential Diagnosis of PA Made?

There are many reasons that children may not want to see a parent after a separation or divorce. Using Johnston's 2005 *Children of Divorce*

article, Baker (in press) makes a cogent point that most authors make a distinction between "estrangement" and "alienation." Estrangement refers to a child's rejection of a parent that is justified "as a consequence of the rejected parent's history of family violence, abuse and neglect" (Johnston, 2005). In contrast, alienation refers to a child's rejection of a parent that is unjustified, i.e., "unreasonable negative feelings and beliefs … that are significantly disproportionate to the child's actual experience with that parent" (Johnston, 2005). With that distinction in mind, estrangement is not a diagnosable mental condition because it is normal behavior. Alienation, on the other hand, is an abnormal mental condition because it consists of maladaptive behavior (refusal to see a loving parent) that is driven by a false or illogical belief (that the rejected parent is evil, dangerous, or not worthy of love).

PA then is a *general* term that covers any situation in which a child can be alienated from a parent. PAS may be described as one subtype of PA. It is the subtype that is caused by a parent systematically programming the children against the other parent who has been a good, loving parent. PAS typically refers to a child with PA who manifests some or all of eight characteristic behaviors, which include as follows:

1. The child's campaign of denigration against the alienated parent
2. Frivolous rationalizations for the child's criticism of the alienated parent
3. Lack of ambivalence
4. The independent-thinker phenomenon
5. Reflexive support of the preferred parent against the alienated parent
6. An absence of guilt over exploitation and mistreatment of the alienated parent
7. Borrowed scenarios
8. Spread of the child's animosity toward the alienated parent's extended family (Gardner, 1992)

Describing the contours of high-conflict cases with alienation, Warshak (2006) discussed "pathological alienation" and defined it as

> a disturbance in which children, usually in the context of sharing a parent's negative attitudes, suffer unreasonable aversion to a person, or persons, with whom they formerly enjoyed normal relations or with whom they would normally develop affectionate relations.

He made a cogent point that this recognition, that a child once had a secure attachment to the now rejected parent, notwithstanding personality or parenting flaws, is of particular relevance for accurate assessment and when remedies are considered. Warshak also noted that Jaffe, Johnston, Crooks, and Bala (2008) wrote

> Abusive ex-partners are likely to attempt to alienate the children from the other parent's affection (by asserting blame for the dissolution of the family and telling negative stories), sabotage family plans (by continuing criticism or competitive bribes), and undermine parental authority (by explicitly instructing the children not to listen or obey).

Lewis (2009) described weaponizing children. PA can occur, wrote Lewis, "when divorcing parents transform a child into a relationship weapon by engaging in patterns of behavior designed to destroy the child's psychological connection with the other parent." It is important to emphasize that the diagnosis of PA is based upon the level of symptoms in the *child*, not on the symptom level of the alienator. The primary behavioral symptom is that the child refuses or resists contact with a parent, either by extreme withdrawal or gross contempt, as well as the child's irrational anxiety and/or hostility toward the rejected parent.

What Are the Symptoms of Parental Alienation in the Child Victims: The Alienators and the Target Parent Victims When Identified in Family Court

Research literature consistently documents that psychopathology and personality disorders are present in a significant proportion of high-conflict parents litigating over custody or access (Feinberg & Greene, 1997, Friedman, 2004; Johnston, 1993; Siegel & Langford, 1998).

Child Victims of Parental Alienation

Decades ago, Johnston, Campbell, and Mayes (1985) offered that "The child consistently denigrated and rejected the other parent. Often, this was accompanied by an adamant refusal to visit, communicate, or have anything to do with the rejected parent." They went on to report the "distress and symptomatic behavior of 44 children, aged 6–12 years, … who were the subject of post-separation and divorce disputes over their custody and care." The authors described six primary responses of these children to their parents:

1. Strong alliance
2. Alignment
3. Loyalty conflict
4. Shifting allegiances
5. Acceptance of both with avoidance of preferences and
6. Rejection of both.

The authors' definition of "strong alliance" was "a strong, consistent, overt (publicly stated) verbal and behavioral preference for one parent together with rejection and denigration of the other. It is accompanied by affect that is clearly hostile, negative, and unambivalent."

Johnston, Walters, and Olesen (2005a) found that "alienated children had more emotional and behavioral problems of clinically significant proportions compared to their nonalienated counterparts." Janet Johnston wrote in 2005 that alienated children (those who express unreasonable negative feelings and beliefs about a parent) "are likely to be more troubled—more emotionally dependent, less socially competent, have problematic self-esteem (either low or defensively high), poor reality testing, lack the capacity for ambivalence, and are prone to enmeshment or splitting in relations with others." In this same treatise, she noted:

> "Severely alienated children also are likely to manifest serious conduct disorders and can behave very inappropriately, at least in the presence of the rejected parent. Extreme expressions of hatred, rage, contempt, and hostility can be acted out in rudeness, swearing, and cursing, hanging up the phone, spitting at or striking a parent, sabotaging or destroying property, stealing, lying, and spying on the rejected parent. In anyone's book, these are not helpful or moral ways of dealing with a difficult interpersonal relationship of any kind. Questions may be raised about the aligned parent's competence and need for counseling if she or he allows these children's behaviors to continue or does not have the ability to control them." (*Ibid.*)

Fidler and Bala (2010) reported that clinical observations, case reviews, and both qualitative and empirical studies uniformly indicate that alienated children may exhibit:

1. Poor reality testing
2. Illogical cognitive operations
3. Simplistic and rigid information processing
4. Inaccurate or distorted interpersonal perceptions
5. Disturbed and compromised interpersonal functioning
6. Self-hatred
7. Low self-esteem (internalize negative parts of rejected parent, self-doubt about own perceptions, self-blame for rejecting parent or abandoning siblings, mistrust, feel unworthy or unloved, feel abandoned) or inflated self-esteem or omnipotence
8. Pseudo-maturity
9. Gender-identity problems
10. Poor differentiation of self (enmeshment)
11. Aggression and conduct disorders
12. Disregard for social norms and authority
13. Poor impulse control
14. Emotional constriction, passivity, or dependency
15. Lack of remorse or guilt (*Ibid.* 2010)

Clinicians must remember that many studies exist of children and adult children of divorce, reporting a longing to have had more time with their noncustodial "target" parents (Ahrons & Tanner, 2003; Baker, 2005, 2007a; Fabricius, 2003; Fabricius & Hall, 2000; Hetherington & Kelly, 2002; Laumann-Billings & Emery, 2000; Parkinson, Cashmore, & Single, 2005; Parkinson & Smyth, 2004; Schwartz & Finley, 2009).

Alienators: The Perpetrators of Parental Alienation

Many researchers explain that alienator parents tend to be rigidly defended and moralistic. These alienators perceive themselves to be flawless,

virtuous, and externalize responsibility onto others. They lack insight into their own behavior and the impact their behavior has on others (Bagby, Nicholson, Buis, Radvanovic, & Fidler, 1999; Bathurst, Gottfried, & Gottfried, 1997; Siegel, 1996). In 1989, Judith Wallerstein and Sandra Blakeslee described female alienators with "Medea-like rage." They wrote:

> "A woman betrayed by her husband is deeply opposed to the fact that her children must visit him every other weekend. … She cannot stop the visit, but she can plant seeds of doubt – 'Do not trust your father' – in the children's minds and thus punish her ex-husband via the children. She does this consciously or unconsciously, casting the seeds of doubt by the way she acts and the questions she asks."

In 1998, Vivienne Roseby and Janet Johnston described the perspective of the alienators:

> The other parent is seen as irrelevant, irresponsible or even dangerous, whereas the self is seen as the essential, responsible, and safe caretaker. These parents tend to selectively perceive and distort the child's concerns regarding the other parent.

Psychological disturbance, including histrionic, paranoid, and narcissistic personality disorders or characteristics, as well as psychosis, suicidal behavior, and substance abuse are common among alienator parents (Baker, 2006; Clawar & Rivlin, 1991; Gardner, 1992; Hoppe & Kenney, 1994; Johnston & Campbell, 1988; Johnston, Walters, & Olesen, 2005b; Kopetski, 1998a, 1998b; Lampel, 1996; Rand, 1997a, 1997b; Racusin & Copans, 1994; Siegel & Langford, 1998; Turkat, 1994, 1999; Warshak, 2010a). In 1998, Jeffrey Siegel and Joseph Langford published research based on an analysis of MMPI-2 validity scales and PAS. The study involved 34 female subjects who completed the MMPI-2 in the course of child custody evaluations. Of the total, 16 subjects met the criteria for classification as PAS parents; 18 were considered non-PAS parents. Siegel and Langford concluded:

> "The hypothesis was confirmed for K and F scales, indicating that PAS parents are more likely to complete MMPI-2 questions in a defensive manner, striving to appear as flawless as possible. It was concluded that parents who engage in alienating behaviors are more likely than other parents to use the psychological defenses of denial and projection, which are associated with this validity scale pattern."

Gordon, Stoffey, and Bottinelli (2008) published research regarding the use of objective psychological measures in high-conflict custody cases. Gordon et al. examined the MMPI-2 data of 76 cases where PA was found and 82 custody cases (controls) where parental alienation did not operate. The subjects were identified as (1) alienating parent; (2) target parent; or (3) control parent. Their data demonstrated how alienating parents resorted to what they described as "primitive defenses." Gordon, Stoffey, and Bottinelli (2008) explained that these primitive defenses allow alienating parents to split reality in terms of an "all good parent" and an "all bad parent." These defenses were seen to motivate vicious attacks directed at the target parent. Two different MMPI-2 indexes were used to measure these primitive defenses: L+K−F and (L+Pa+Sc)−(Hy+Pt). The first index, L+K−F, identifies persistent defensiveness. Elevations on this index would be expected in those cases of parents viewing themselves as an "all good parent" and condemning the former spouse as an "all bad parent." The second, (L+Pa+Sc)−(Hy+Pt), is the Goldberg Index (1965) or "GI." The Goldberg Index (GI) is a regression equation score which is the T score of (Lie + Paranoia + Schizophrenia) − (Hysteria + Psychasthenia). Because Egger, Delsing, and De Mey (2003) found that the Goldberg Index was valid for the MMPI-2, Gordon et al. (2008) used the GI as an indication of "a borderline level of functioning and the favoring of primitive defenses such as projective identification."

Target Parents: The Adult Victims of Parental Alienation

It is axiomatic that most custody litigants want to make a good impression in any evaluation process. This is described as situational specific "impression management." Situational impression management and what many describe as active attempts by the subjects of custody evaluations to

"fake good" on measures like the MMPI-2 work to suppress clinical scales. This can be interpreted as an objective assessment of a parent's style of defensiveness (Bathurst et al., 1997; Brophy, 2003; Duckworth & Anderson, 1995; Lanyon & Lutz, 1984). Working in high-conflict custody cases with and without indications of PAS, Wakefield and Underwager (1990) compared data concerning the personalities of 72 parents who made false accusations of sexual abuse and 103 falsely accused parents to each other and to a group of 67 parents who were involved in custody disputes but without allegations of sexual abuse (controls). According to the data, the falsely accusing parents were much more likely than were the target parents or the controls to have a personality disorder such as Histrionic, Borderline, Passive-Aggressive, or Paranoid. While only a fourth of the sample of falsely accusing parents presented scores arguably in the normal range, the target parents and controls were significantly different. Almost all of the individuals in the custody control group and in the falsely accused group were seen as normal. Statistical analysis reached significance on F and F-K MMPI scales (*see also* Bernet, 2006).

With this in mind, Gordon et al. (2008) worked to test numerous hypotheses concerning a target parent's complicity or involvement in the origin of PA. Gardner insisted that the degree of rejection of the target parent by the child is not justified by the target parents' behaviors (Gardner, 1998, 2006). However, in their reformulation of PAS, Kelly and Johnston (2001) suggested a family systems model would find more involvement of the target parent in the onset of PAS symptomatic behaviors. Sensitive to this contrast, Gordon et al. (2008) thoroughly analyzed their data with these competing views in mind. They reported that their results showed strong support for a test of Gardner's definition of PAS and the critical role of the target parent. They explained:

> we predicted that, for both our measures of primitive defenses L + K − F and (L + Pa + Sc) − (Hy + Pt), the target parents (mothers and fathers) should be no different from the control parents (mothers and fathers), but score lower in both measures in comparison to the alienating. . Overall both the target parents and the control parents had lower mean scores as compared to the alienating parents in the use of primitive defenses.
>
> "We found evidence of primitive defenses in the alienating parents, but for most of our groups, we did not find significant evidence of primitive defenses in the target parents." (Gordon et al., 2008)

When closely examining the Kelly and Johnston (2001) reformulation that "target parents should be higher in the use of primitive defenses than the control parents in L + K − F and (L + Pa + Sc) − (Hy + Pt), but less than the alienating parents", the researchers were blunt: "we did not find support for this."

What Are the Sequelae of Parental Alienation?

The principle that family-of-origin relations influence future relationships and life adjustment is the foundation of many schools of developmental psychology. In 1996, Kenneth Waldron and David Joanis described the long-term deleterious effects of PAS on the children. They argued that in the PA context children learn that "hostile, obnoxious behavior is acceptable in relationships and that deceit and manipulation are a normal part of relationships." Philip Stahl (2003) reported that:

> "When children are caught up in the midst of this conflict and become alienated, the emotional response can be devastating to the child's development. The degree of damage to the child's psyche will vary depending on the intensity of the alienation and the age and vulnerability of the child. However, the impact is never benign because of the fact of the child's distortions and confusions."

Amy Baker (2005, 2007a) studied adults who had experienced PA as children. She conducted a retrospective, qualitative study in which she conducted semi-structured interviews of 38 adults who had been child victims of PA. She identified several problematic areas in these subjects: high rates of low self-esteem to a point of self-hatred; significant episodes of depression in 70 % of the subjects; a lack of trust in themselves and in other people; and alienation from their own children in 50 % of the subjects, which suggests that parental alienation is multigenerational. Approximately

one-third of the sample reported having had serious problems with drugs or alcohol during adolescence, using such substances to cope with painful feelings arising from loss and parental conflict. Baker found that these adults victimized as children had difficulty trusting that anyone would ever love them; two-thirds had been divorced once and one-quarter more than once. Baker's respondents reported that they became angry and resentful about being emotionally manipulated and controlled. They reported that this negatively affected their relationship with the alienating parent. About half of Baker's sample reported that they had become alienated from their own children. Baker reported that while most of the adults distinctly recalled *claiming* during childhood that they hated or feared their rejected parent and on some level did have negative feelings, they did not want that parent to walk away from them and secretly hoped someone would realize that they did not mean what they said. Clawar and Rivlin (1991) reported this same secret longing.

Writing from the perspective of the courts, Canadian Justice Martinson (2010) argued that:

> "While professionals may not agree on the exact nature of alienation or on what the best responses should be, it is crystal clear that in alienation and other high conflict cases the stakes for children are extremely high. They can be seriously harmed. The longer the problem continues, the more harmful the situation can become and the more difficult it will be to resolve. Not only does the alienating behavior and the conflict associated with it cause harm, but the court process itself may exacerbate the conflict, placing the children in the middle and affecting their lives on a daily basis in highly destructive ways. There are also long term adverse consequences for children including but not limited to difficulty forming and maintaining healthy relationships, depression, suicide, substance abuse, antisocial behavior, enmeshment, and low self-esteem."

What Role Should Mental Health Professionals Play in Parental Alienation

Sauber (2006) argued that many mental health professionals are reluctant to become more than superficially involved in these difficult cases because each parent's attorney will challenge them unless they support that parent's position. Advocacy for one parent leads opposing counsel to attempt to discredit them, disregard their evaluation, or present their work as inadequate in an effort to remove them from the case wrote Sauber (2006). If the mental health professional lacks sufficient understanding of and knowledge about PAS, or is inexperienced in the courtroom, the opposing attorney may succeed in confusing the judge, and diminishing the scientific and clinical basis for findings and the identification of PAS symptoms. Fidler and Bala (2010) explained that it is very difficult, if not impossible, for one mental health professional to achieve desired objectives and meet the various complex and often competing needs of different family members. Trouble is certain to begin where a mental health professional assumes additional roles, such as arbitrator. This can compromise the practitioner's effectiveness and neutrality in the eyes of family members. Indeed, assuming the dual roles of therapist and decision maker poses serious ethical and practical issues (Greenberg, Gould, Schnider, Gould-Saltman, & Martindale, 2003; Kirkland & Kirkland, 2006; Sullivan, 2004).

There are basically four roles mental health professionals occupy in high-conflict custody cases: Evaluator, Therapist, Parent Coordinator, Reunification Specialist.

Evaluator

In high-conflict custody cases, attempting to aid the court in its determination of the best interests of the children can be a thankless task. Evaluators must be cognizant of the interaction dynamics (1) between the parents; (2) between each parent and the children; (3) between the children and their siblings; (4) between the parents and the children's network of social support (stepparents, grandparents, friends, parents of friends, school personnel, etc.); and (5) between the parents and their communities. The use of multiple interviews, among the interested parties as well as collateral interviews, is essential. Evaluators must remember that repeated interviews of the

children with significant members of their social support network are *de rigueur*. In high-conflict cases, the children's sense of themselves and their histories—the stories they tell about themselves—must be carefully scrutinized. The evaluator who does not explore the nature, retelling, and origins of stories that children share, which later are described by one of the parents as skewed or clearly wrong, commits malpractice.

Bricklin and Elliot (2006) have spent decades scrutinizing children's sense of their relationships with others. Their diligent work with their Perceptions of Relations Test (P.O.R.T.) provides a detailed and ever expanding database of children caught in high-conflict custody cases. Objective psychological measures such as the ubiquitous MMPI-2 have immediate utility as demonstrated by Gordon and colleagues (2008) as well as by Hoppe and Kenney (1994) and Siegel and Langford (1998).

Perhaps the circumstance where children's perceptions of relations, multiple interviews, and the use of psychological measures are put to the strictest test is in the evaluation of *child sexual abuse* (CSA) allegations. As Campbell (in press) describes in detail, one of the earliest reviews of CSA related to custody and visitation disputes was reported by Blush and Ross (1987). Gordon Blush and Karol Ross worked in a clinic that operated as an arm of a family court in the 1980s. They began to track complaints and motions brought to the court by high-conflict parents. In reviewing the court file for any particular case, they learned to identify what issues provoked parental disputes between the parties, and when those disputes originated. Blush and Ross' "SAID Syndrome" (*S*exual *A*llegations *I*n *D*ivorce) directed evaluators to carefully assess the background and history of a couple before any allegations of sexual abuse developed. Campbell (in press) explained that carefully reviewing the legal history predating any CSA allegations helps evaluators to identify how escalating exchanges between the disputing parents may have triggered CSA allegations. In their SAID Syndrome article, Blush and Ross (1987) emphasized the necessity of considering the timing of the allegations. Were the allegations timed in such a manner that they gave the accusing parent significantly greater power and influence? In response to CSA, for example, a Department of Social Services would often pursue an alienator's agenda by blocking the target parent's visitation. Writing from Minnesota a few years later, Wakefield and Underwager (1991) suggested understanding the "natural history" of an allegation, paying close attention to the origin, nature, and timing of the allegation as essential in evaluating its validity and reliability. Blush and Ross (1987) and Campbell (1992) referred to factors they identified as "Sequence-Escalation-Timing" (or SET factors) when reviewing the background and history of any particular case. SET factors direct evaluators to look at the context in which allegations occurred. Disputes related to child support and costs of activities such as sports, music lessons, and special camps could have led to escalation and retaliation. Acrimonious exchanges also involve requests to modify visitation, or petitions to relocate or tend to occur when a romantic adult partner enters the children's lives. Campbell (1992) pointed out that SET factors create situations that are misinterpreted, because of relaxed thresholds of disbelief. These relaxed thresholds may develop into CSA allegations, which are driven by rumor formation and dissemination.

Gardner informed that whereas the *diagnosis* of PAS is based on the assessed level of the *child*'*s* symptoms, the court's decision for custody should be based primarily on the *alienator*'*s* symptom level. It is only when these two levels have been ascertained that the evaluator can make proper recommendations to the court as well as to other mental health professionals subsequently involved in the children's treatment (Gardner, 2006).

Therapist

The Association for Family and Conciliation Courts published a document in 2010, which defines and outlines court-ordered therapy as different and distinct from psychotherapy, entitled *Guidelines for Court-Involved Therapy*…

The guidelines formulated by the AFCC were intended to serve as a reference for those who depend on mental health services or on the opinions of mental health professionals in

> promoting effective treatment and assessing the quality of treatment services. The guidelines also are intended to assist the courts to develop clear and effective court orders and parenting plans that may be necessary for treatment to be effective. The purpose of these guidelines is to educate, highlight common concerns, and to apply relevant, ethical and professional guidelines, standards, and research in handling court-involved families… While appropriate treatment can offer considerable benefit to the children and families, inappropriate treatment may escalate family conflict and cause significant damage.

In a comprehensive overview of the literature on alienation and mental health professional intervention, Fidler and Bala (2010) argued that the goals of therapy should include not only reunification with the rejected parent, but also the facilitation of healthy child adjustment and coping mechanisms. This must include correcting the child's distorted and polarized views and replacing them with more realistic views of each parent, improving the child's healthy relationships with *both* parents, addressing divorce-related stress, boundaries, and age-appropriate autonomy, and restoring adequate parenting, co-parenting, and parent–child roles. Birnbaum and Radovanovic (1999) and Warshak (2010a) argued for several tiered options of court-ordered therapy. Conventional therapy, they wrote, is most likely to be effective in early stages with less severe problems and when the favored parent and child are likely to cooperate.

Mental health professionals working in court-ordered therapy must be prepared for the rationale they're going to hear from alienators. Kopetski (Kopetski, Rand, & Rand, 2006) listed the primary justification for alienation in each case. She identified 19 different justifications, including separation anxiety, child fearful of the other parent, child doesn't need father, child abuse, spousal abuse, and child has a right to refuse visits. Mental health professionals who work to aid courts in ordered therapy must remember that many children who participate in court-ordered therapy do so with overt resistance and reluctance. Parents who support or accept their children's rejection of the other parent usually lack motivation to participate in therapy when the professed goal is to heal the damaged parent–child relationship.

Mental health professionals who begin this work must also be ready to stop it as well. Donner (2006) explained that family therapy, co-parenting counseling, parent education, and cognitive-behavioral therapy may be insufficient to modify the complex behavior of alienating parents. These parents in therapy, wrote Donner, are unable to think beyond their own needs and harbor unconscious desires to hurt their children.

Parent Coordinator

Parent coordination was a concept introduced in 2001 and developed by the Task Force's of AFCC in the years of 2002 and 2003. The AFCC process resulted in *Model Standards of Parent Coordination* and finally the *Guidelines* in 2005. The overall objective of the parent coordinator is to assist high-conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy, and meaningful parent–child relationships (*AFCC* Guidelines, 2005). Essentially, it is an alternative dispute resolution process to help conflicting parents make parenting decisions and comply with parenting agreements and orders.

Sauber (2006) encouraged that the PAS-trained parent coordinator "does not need to tiptoe around in his or her treatment of the child, and his or her requests of the parents." The court appointment, access to the judge, and credibility with the court provide the power necessary to recommend and follow up with changes that need to be implemented within the family system. Sauber cautioned that if the child or parent understands that the parent coordinator can change or determine the parenting time schedule, therapeutic efforts to implement the parenting time or repair the family relationships will be seriously

compromised. If seen in the role of an assessor or evaluator, the parent coordinator is unlikely to ever be able to move beyond answering the question—*if* it is in the child's best interests to have contact with the rejected parent. Strong, explicit court orders and solid guidelines are the only way out of this dilemma.

Reunification Specialist

Severe cases of parental alienation involve significant parent psychopathology and character disorders, which may include paranoia, severe mental illness, disordered thinking, lack of insight capacity, and sociopathy. Discussions in the social science literature describe few options for children who suffer severe and unreasonable alienation from a parent and highlight the ineffectiveness of available remedies. Rand, Rand, and Kopetski (2005) reported similar findings in their follow-up study of the 45 children from 25 families Kopetski had studied over 20 years starting in 1976. A range of moderate to severe PAS characterized these cases. Alienation was interrupted by judicial action for 20 children from 12 families where there was enforced visitation or a change of custody. For those in the treatment group where there were orders for therapy and gradually increased access, alienation remained uninterrupted and in some cases became worse. Fidler and Bala (2010) concluded that severe cases "…are likely to require a different and more intrusive approach if the relationship with the rejected parent is not to be abandoned and the alienation is to be successfully corrected." Qualitative case studies and experienced clinicians supporting recommendations and orders to reverse custody maintain that therapy, as the primary intervention, simply does not work in severe and even in some moderate alienation cases (Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner, 2001a; Kopetski, 1998a, 1998b, 2006; Lampel, 1996; Lowenstein, 2006; Lund, 1995; Rand, 1997b; Rand et al., 2005).

Dr. Richard Sauber has developed a questionnaire to aid in the selection of a reunification specialist. This Questionnaire will assist the "selection committee," which may be comprised of the clients, attorneys, and/or the attorneys and their clients. This questionnaire is designed to determine the actual capability, experience level, and willingness of the therapist to adhere to a well-developed reunification plan or at least participate in the formulation of an effective approach to reunification as the process unfolds (Sauber, in press).

Short of reversing custody, one reunification option is for the court to order a prolonged period of residence with the target parent, such as during the summer or an extended vacation, coupled with counseling and *temporarily* restricted or suspended contact with the alienating parent. This arrangement, which in the long run provides less disruption and greater continuity of care, may be more appropriate than reversing custody permanently. This period of prolonged residence also affords the child and target parent the uninterrupted time and space needed to repair and rebuild their relationship. When an intermediate plan such as this will not work, Warshak (2010b) and Warshak and Otis (2010) recommended a more thorough approach called *Family Bridges*. This process was, in large part, developed by psychologist Anthony Rand in his work using video and educational materials in police officer training. Rand later honed the presentation in his work for the *National Center for Missing and Exploited Children* [NCMEC]. Sometimes called in the middle of the night by the State Department to aid children recovered from abduction, Rand found that his police officer video and didactic material could be reimagined for these children. This is a program in which the target parent and the alienated child travel to a program site, a family home, or vacation resort, for four consecutive days. The alienated children and the target parents share their experiences with one another and reexamine indoctrinated false beliefs to which the children have become accustomed.

Discussing her review of the *Family Bridges* program, Kelly (2010) offered that the daily structure and presentation of the *Family Bridges* workshop were guided by well-established evidence-based principles and incorporated multimedia learning, positive learning environment,

focused lessons addressing relevant concepts, and integrated learning materials. She noted that the most striking feature of the *Family Bridges* workshop was the empirical research foundation underlying the specific content of the 4-day program. The lessons and materials were drawn from universally accepted research in social, cognitive, and child developmental psychology, sociology, and social neuroscience. Another important feature of the *Family Bridges workshop*, wrote Kelly (2010), is the safe atmosphere created by the program leaders from the very beginning. She saw this as an essential feature of the program that promotes more willing participation and active learning. Kelly (2010) summarized that the *Family Bridges workshop*

> is a rigorous and disciplined approach designed to help participants repair parent–child relationships that have been severely derailed as a result of the dynamics of the separation and additionally fueled in some instances by the parenting and parent–child relationships prior to the separation.

What Court Action Is Warranted in PA

Justice Martinson of British Columbia (Martinson 2010) argues that courts are "… publicly funded institutions that exist to serve the public. They must be accountable to the public." And yet, one of the most frequent complaints parents make regarding their custody litigation is that repeated violations of orders go unpunished, with some parents making a mockery of the court's authority. According to Kelly (2010):

> A significant number of these parents have come to believe that noncompliance with court orders, whether for facilitating contact between the child and the rejected parent or attending divorce education classes or therapy, brings no negative consequences.

There is an assumption that in severe cases, all or most children are likely to be traumatized or go into crisis when separated from the alienating parent. Although we do not have empirical studies for this particular population, comparing alienated children who were separated and those who were not separated from their favored parent, Bernet and colleagues (2010) offered that examination of the child protection literature may be instructive. Research from retrospective studies and clinical anecdotes reported by many seasoned clinicians has suggested that for the most part, the suspected trauma is short-lived if it occurs at all.

To facilitate a transition from the polarized environment of an alienator, Warshak (2010b) recommended that rather than assessing the relative blame of each parent for the children's difficulties, the court could simply determine that alienator contact is likely to interfere with the children's improvement. To lessen the "blame" attributed in the adversarial process, Justice Martinson (2010) of Canada offered that the trial process must be carefully managed. The negative, destructive behaviors of alienators often become more pronounced during the trial, as parents see trial as a means for achieving vindication. Judge Michele Lowrance (2010, in press) of Chicago stresses the corrosive power of anger in these circumstances and offered many recommendations to redirect it. Sauber (2006) pointed out that the court that has the power and the influence, more so than the mental health professional, "… so the education, coaching, and threats of a judge can be a prime motivator for change." Many times in these circumstances, children adapt quickly to firm court orders. This was a phenomena documented in the largest study of alienated children (Clawar & Rivlin, 1991). When "a powerful third party (or parties) enters the scene and *imposes a settlement,*" wrote Pruitt and Kim (2004), conflict de-escalation is often an immediate result.

Bala, Fidler, Goldberg, and Houston (2007), speaking about the importance of case management in the alienation context, wrote:

> It is important for judges to take control of alienation cases, to limit the possibility of manipulating the court process by the parents, and to ensure a firm and quick response to violations of court orders. These are cases for which judicial case management is especially appropriate. Given the need for timely assessment and intervention, judges should ensure that assessments are completed in a reasonable time (say 90–120 days). Further, cases that cannot be settled should be

> brought to trial as soon as possible after completion of the assessment, so that it does not become stale and require an update.

This view is reinforced in Fidler, Bala, Birnbaum, and Kavassalis (2008), where the authors emphasize the importance of early identification, case management, and post-judgment control. As Sullivan and Kelly (2001) exclaimed more than a decade ago:

> A clear mandate for support, with a threat of court sanctions if alienating behavior persists, is essential to the intervention process. These sanctions may include financial payments or enforcement of an order that the aligned parent's primary legal or physical custody is conditional on supporting therapy and facilitating reasonable access.

Justice Martinson (2010) of British Columbia recommended:

> "several steps are necessary in order to maintain the focus on the best interests of the children and move the case to a resolution in a just, timely and affordable way:
> - Early identification of the high conflict cases;
> - Early identification of the issues that need to be resolved;
> - Setting, right at the start, firm rules about the expected conduct of the parents towards the litigation, the children and each other, both in and out of the courtroom; advising them that there will be consequences if they do not comply, and spelling out what the consequences will be, and then, if necessary following through with appropriate sanctions;
> - Setting a time frame within which the case must be concluded that ensures that the case will be resolved in a timely manner, through either judicial or other dispute resolution processes or after a trial;
> - Setting a schedule within the time frame for all the steps that must be taken before a solution can be reached including any necessary psychological or other assessments, or, where permissible and appropriate, therapeutic intervention;
> - Sticking to the time limits; not permitting changes to the schedule unless there would be a miscarriage of justice not to do so; and
> - Putting temporary (interim) court orders in place relating to the care and financial security of the children, and in doing so:
>   - Limiting the number of interim applications to the ones that are required to move the case to the resolution stage;
>   - Monitoring the nature of the evidence that is presented to make sure that it focuses on the issues, is not inflammatory and/or irrelevant and does not inappropriately involve the children;
>   - Ensuring that any court orders that are made are specific, clear and comprehensive; and
>   - Ensuring that the temporary orders are followed."

It is essential, argued Martinson, that the resolution is one that provides long-term stability and financial security for the children and significantly reduces conflict. To address this problem she reasoned, the trial judge must do two things: first, clearly explain in the judgment what the basis of the custody decision was and, second, issue orders that are detailed, comprehensive, and clear, and she argued, courts must enforce their orders because if the order was intended to promote the best interests of a child, its violation is contrary to the child's best interests. Judge Martinson argued that enforcement of the court's decision is critical to the process.

By way of example, Bala et al. (2010) discussed the Canadian case of *Cooper v. Cooper* to point out that often the defense offered during contempt proceedings in alienation cases is that it is the child(ren) and not the parent refusing contact. In *Cooper*, the custodial mother was found in contempt for having "willfully and deliberately sabotaged" telephone access between the children and their father. Although she made the children "available" by having them at home when the father called, she would neither answer the telephone nor, in her words, "put the telephone to the children's ears." The court rejected her argument that "it was up to the children to decide whether or not they would answer the phone" and found her in contempt for "shirking her responsibility and obligation directly, and … indirectly conveying to the children her disapproval of telephone access." The sentence included an order to secure counseling for the children, and to pay a fine of $10,000.

New York State Supreme Court Justice Robert A. Ross led a movement to change New York's matrimonial system. He presided over numerous sensational courtroom dramas, and in *Lauren R. v. Ted R.*,

he carefully handled a celebrated custody battle. In this case, Justice Ross faced Mrs. Lauren Lippe, "a vengeful roadblock, the barbed wire standing in the way of her two daughters and their desperate dad" according to the New York press. On the other side of the trauma was Ted Rubin, an alienated 52-year-old marketing executive. In months of hearings and over two hundred thousand dollars in fees and costs, the story of Mrs. Lippe's behavior unfolded. The court records documented that Mrs. Lippe, the Plaintiff in the original divorce:

> … intentionally scheduled their child's [*names of children withheld by author*] birthday party on a Sunday afternoon during defendant's weekend visitation, and then refused to permit defendant to attend … Plaintiff threatened to cancel [–]'s party, and warned her that her sister, too, would be punished "big time" for wanting to spend time with her father … when she completed [–]'s registration card for [*names of schools withheld*], she wrote that defendant is 'not authorized to take them. I have custody. Please call me.' … plaintiff wrote to [*names of school personnel withheld*], demanding that they restrict their conversations with the defendant to [–]'s academics, as plaintiff is 'solely responsible for her academic progress and emotional well being.' … she identified her new husband [–], as [–]'s parent/guardian.

Justice Ross carefully analyzed the extensive testimony and noted that Defendant father testified:

> that there were countless times when plaintiff deliberately scheduled theater tickets, family events and social activities for the girls during his visitation, and he was compelled to consent or risk disappointing the girls. These occurrences continued even during the time span of proceedings before me.

Plaintiff Lauren Lippe testified that it was the two girls "…who refused to see their father, because they were angry with the 'choices' he had made on their behalf…" "Choices" noted Justice Ross, that Lippe had forced the father into after the fact. Justice Ross took special note that the two girls "parroted their mother's demands" and on several occasions actually "…read from a script…" during dinner's dad was allowed to attend with them. Justice Ross reasoned:

> The fact that the children were as angry as they were with the defendant … demonstrates, in my view, that efforts to alienate the children and their father were seemingly effective … Plaintiff's contention that she had no involvement in these children's 'demands' was belied by the very fact that the children had intimate knowledge of their mother's position on all of these issues.

Justice Ross, was especially taken with Lauren's sabotage of holidays:

> I observed the plaintiff smirk in the courtroom as defendant emotionally related how he was deprived of spending Hanukkah with his children, and was relegated to lighting a menorah and watching his daughters open their grandparents' presents in the back of his truck at the base of plaintiff's driveway on a December evening.

Justice Ross found the proofs so compelling, he found that they went past the usual clear and convincing standard and rose to proofs beyond a reasonable doubt. He was especially troubled that, Mrs. Lippe:

> … frequently disparaged the defendant in the presence of the children, calling him a 'deadbeat,' 'loser,' 'scumbag' and 'f–g asshole.' On one particular occasion, while holding [–] and [–] in her arms, plaintiff said to the defendant, 'We all hope you die from cancer.'

Chagrined as he was over the terrible alienating behavior witnesses described in Lauren Lippe, Justice Ross noted that it just got worse and worse:

> The crescendo of the plaintiff's conduct involved accusations of sexual abuse. Plaintiff falsely accused defendant of sexual misconduct … shortly after defendant moved to [–] and the children's friends were enjoying play dates at defendant's home … Undaunted by the lack of any genuine concern for [*child*]'s safety, plaintiff pursued a campaign to report the defendant to Child Protective Services. To facilitate this, she spoke with [*psychologist*] at the school [–] attended. Plaintiff also 'encouraged' [–] to advise [*the children's pediatrician*] that defendant inappropriately touched her—but he saw no signs of abuse. Plaintiff also advised Dr. [–] Ms. [–] Dr. [–] … and family friends of the allegations … "

Justice Ross noted that after a thorough investigation, the Children's Protective Services investigators found the entire allegation process to be baseless. Ross explained " … by making such allegations, plaintiff needlessly subjected the child to an investigation by Child Protective Services, placing her own interests above those of the child."

Described as an "an extraordinary supervising judge," Justice Ross won numerous awards including a Memorial Tribute from the Nassau County Bar Association Matrimonial Law Committee. His findings of law are a veritable template for judges in the USA. In brief, this is what he did:

1. He explicitly and in great detail explained the court's jurisdiction in custody cases and the various mechanisms available for enforcement of the court's orders in these matters.
2. He explained in detail the court's powers to maintain jurisdiction in post-judgment custody cases in contradiction to arguments of *res judicata*.
3. He outlined statutes and cases that state "Visitation is a joint right of the noncustodial parent and of the child."
4. He outlined how a court must determine what is "in the best interests of the child" in custody cases; and laid out the standards in these cases.
5. He cited with specificity court cases that have found that parental alienation is *not* in the best interests of the child and how it amounts to custodial interference; how it is a pernicious violation of court orders in these cases and a direct violation of the target parent's rights.
6. He explained the resultant court procedures in his jurisdiction and specifically pointed out how it is in the best interests of the child that there be a prompt evidentiary hearing to determine appropriate custody/visitation time and any remedial issues that may be necessary to insure that the court's orders be followed and the target parent's rights are restored.
7. He explained what the appropriate procedure is for determining if criminal contempt charges are appropriate, where that court power derives from, what the burden of proof is, and how it is met.
8. He explained how and why the defendant has reached his burden of proof.
9. He delivered the factual findings with very specific details and specifically included his impressions and observations of the alienator plaintiff both during her own testimony and the testimony of the target parent. He included with painstaking detail many instances of the plaintiff alienator's egregious behavior and the effects on both the target parent and the children.
10. He explained exactly what remedies in civil contempt; criminal contempt; criminal sanction via the state's law prohibiting custodial/visitation interference and remedies in tort for money damages.
11. He summarized from precedent and the record before him reiterating the court's role in custody hearings, specifically in cases of Parental Alienation, and again explained why and how the court maintains jurisdiction in the children's best interests.
12. Justice Ross concluded by setting up a hearing to determine Lauren Lippe's responsibility for the hundreds of thousands of dollars in costs and attorney fees and then sentenced Mrs. Lippe to 12 days in jail.

Experience shows that environmental changes can be very effective in helping children overcome unreasonable negative attitudes (Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner 2001a, 2001b; Rand et al., 2005; Warshak, 2010b). Experienced clinicians and those reporting on their qualitative research using case studies have reported on the benefits of changing custody or enforced parenting time in severe alienation cases (Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner, 2001a; Lampel, 1996; Rand et al., 2005; Warshak, 2010b). For example, Clawar and Rivlin (1991) reported an improvement in 90 % of cases in children's relationships with rejected parents in 400 cases where an increase in the child's contact with the target parent was court ordered. Indeed, when they discussed the effectiveness of changes in living arrangements, Clawar and Rivlin (1991) reported, "Children may say, 'I hate her. I'll never speak with her if you make me go see her,' 'I'll run away,' or 'I'll kill myself if he comes to see me.' However, in some cases, children were told to say these things by the programming and brainwashing parent…. It is not uncommon to see these threats disintegrate after court orders change."

Warshak (2010b) argued that when judges make it clear to the children that the court expects them to work on repairing their damaged relationship with the target parent, "…that failure is not an option, that refusal to cooperate will not result in a custody award to the favored parent, and that the sooner the children heal their damaged relationship with the rejected parent, the sooner they will have contact with their favored parent" things tend to improve quickly. Today, there is general recognition that a reversal of custody may be warranted in severe cases (Drozd & Olesen, 2009; Gardner, 1998; Johnston & Goldman, 2010; Johnston, Roseby, & Kuehnle, 2009; Sullivan & Kelly, 2001; Warshak, 2010b). Bala et al. (2010) pointed out that a number of recent Canadian appellate decisions have affirmed a transfer of custody from an alienating parent. For example, in *J.W. v. D.W.*, the Nova Scotia Court of Appeal affirmed a trial judge's finding that the mother had "demonized" the father to the children and that they were emotionally abused. Describing another recent Canadian case, Bala et al. (2010) documented that in *A.A. v. S.N.A.*, the trial judge recognized that he faced a "stark dilemma" in whether to leave the child with a "highly manipulative" and "intransigent" mother who would never permit her child to have any sort of relationship with her father. The other side of this "stark dilemma" was to transfer custody to the father, who had little contact with the child for over a year. Despite the finding of alienation, Justice Preston refused to award custody to the father due to the Justice's concern that "the immediate effect of that change will be extremely traumatic." Justice Preston wrote:

> The probable future damage to M. by leaving her in her mother's care must be balanced against the danger to her of forcible removal from the strongest parental connections she has … I conclude that the forcible removal of M. from her mother's and her grandmother's care has a high likelihood of failure, either because M. will psychologically buckle under the enormous strain or because she will successfully resist re-integration with her father.

In reversing this decision and awarding custody to the father, the British Columbia Court of Appeal observed:

> the trial judge wrongly focused on the likely difficulties of a change in custody—which the only evidence on the subject indicates will be short-term and not 'devastating'—and failed to give paramountcy to M.'s long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if M is to have a chance to develop normally in her adolescent years.

The Court of Appeals carefully explained that:

> The obligation of the Court to make the order it determines best represents the child's interests cannot be ousted by the insistence of an intransigent parent who is 'blind' to her child's interests … The status quo is so detrimental to M. that a change must be made in this case.

Biography

Dr. Demosthenes Lorandos has worked as a clinical and forensic psychologist for more than 45 years. He is licensed as a psychologist in California and Michigan. While he is still involved in the practice of forensic psychology, he became an attorney two decades ago. He is a member of the Bar of California, New York, Washington, DC, Michigan, and Tennessee. He is a member of the Bar of the Second, Sixth, Ninth, and Eleventh Federal Circuits and of the United States Supreme Court. Dr. Lorandos is a Thomson-Reuters WEST *Key Author* in expert evidence law. He regularly teaches forensic psychology and expert evidence law to behavioral science and legal professionals. He is a member of several editorial boards and is a peer reviewer for journals of science and law. Dr. Lorandos is a principal of *Lorandos - Joshi*, a specialty litigation law firm with offices in Ann Arbor, Washington, DC, and New York City.

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Portions of this chapter are similar in content and style to material in D. Lorandos, W. Bernet & S. R. Sauber & (Eds.). Parental alienation: Handbook for mental health and legal professionals (in press). Springfield, IL: Charles C. Thomas. It has been used with the permission of the publisher.

Anger

24

A. Antonio González-Prendes

Anger

Overview of Anger

Anger is a common human emotion that is experienced by men and women alike, as well as by individuals from diverse socio-economic-cultural backgrounds. No one group of people has exclusive rights on the experience of anger. However, the expression of anger is often determined by cultural norms, societal rules, and gender role scripts that shape such culturally sanctioned forms of anger expression. But how do we define anger? Kassinove and Sukhodolsky (1995) offer a definition of anger that considers the cognitive, behavioral, physiological, and social aspects of anger. They define anger as:

> …a negative, phenomenological (or internal) feeling state associated with specific cognitive and perceptual distortions and deficiencies (e.g., misappraisals, errors, and attributions of blame, injustice, preventability, and/or intentionality), subjective labeling, physiological changes, and action tendencies to engage in socially constructed and reinforced organized behavioral scripts (p. 7).

Although Kassinove & Sukhodolsky's definition of anger includes important elements often associated with the experience of anger, it also raises the question as to whether the experience of anger must necessarily be associated with cognitive and perceptual distortions and deficiencies (1995). Could it be that some form of anger is indeed the emotional outcome of an individual's accurate appraisal of injustice, unfairness, maltreatment, and oppression? Potegal and Novaco (2010) cite several instances (e.g., the feminist movement, Abraham Lincoln's stand against slavery, and slave owners) in which anger, based on the appraisal of real injustices, led to action aimed at correcting the perceived problem. We could argue that a number of other social movements (e.g., civil rights, gay and lesbian rights, etc.) grew out of the accurate perception of maltreatment and oppression perpetrated on a group of people.

Nonetheless, Kassinove and Sukhodolsky's definition of anger (1995) provides a launching point to help conceptualize the experience of the emotion of anger. But first we must briefly look at how we might define "emotion." For this purpose we can refer to one of the early definitions of emotion, which addressed the cognitive elements later on proposed by Kassinove and Sukhodolsky (1995). Arnold and Gasson (1954) put forth a definition of emotion that suggested that an emotion is "a felt tendency toward an object judged suitable or away from an object judged unsuitable and reinforced by specific bodily changes according to the type of emotion (p. 294)." The authors went on to suggest that, for an emotion to arise, the person must perceive and judge (cognitive

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_24,

functions) the situation or object as suitable or unsuitable. The cognitive basis of emotions has been elucidated in works by Beck (1976), Ellis (1962), and others, and a detailed discussion of this theory is beyond the scope of this chapter. Another aspect of anger is that it is often considered and experienced as a negative emotion. Harmon-Jones, Peterson and Harmon-Jones (2010) suggest that emotions can be judged as positive or negative, based on the conditions within which the emotion arises; the adaptive consequences of the emotion; and the subjective feel of the emotion. The authors suggest that anger can be considered a negative emotion because it is generally experienced within the context of unpleasant situations, and most individuals subjectively regard anger as a negative experience, although the degree of valence of the emotion may vary from person to person. Harmon-Jones et al. (2010) point out that defining whether an emotion is positive or negative, based on its adaptive consequences, is a bit more difficult. The maladaptive experience and expression of anger has been suggested to be a contributor to pathologies such as bulimia (Meyer et al., 2005), self-cutting (Abu-Madini & Rahim, 2001; Matsumoto et al., 2004), and substance abuse (Gilbert, Gilbert, & Schultz, 1998; Larimer, Palmer, & Marlatt, 1999). Additionally, maladaptive anger has also been linked to health problems such as hypertension and coronary heart disease (Kamarack et al., 2009; Warren-Findlow, 2006; Webb & Beckstead, 2005) and obesity (Ricca et al., 2009; Robert & Reither, 2004). Similarly, other authors have suggested a link between anger and parental abuse of children (Dix, 1991), interpersonal violence and aggression (Lundeberg, Stith, Penn, & Ward, 2004; Norlander & Eckhardt, 2005), physical or verbal fights, damaged friendships, property damage, self-inflicted injuries, and legal and vocational difficulties among others (Deffenbacher, Oetting, Lynch, & Morris, 1996). Furthermore, one must consider that it is also possible that some individuals may receive short-term benefit from their aggressive anger expression (i.e., getting what they want, feeling powerful, etc.) that may reinforce their mode of anger expression. Yet, as previously noted, it is also important to recognize that not all expressions of anger are maladaptive, and that often anger has served as the catalyst for individuals to organize and take action to correct social injustices or unfair treatment.

Building on the cognitive bases of emotions González-Prendes (2007, 2009) proposed a conceptual model of anger derived from the available anger literature and research that suggests that anger is the emotional outcome of a series of sequential appraisals and judgments that a person makes about a situation or event. This model hypothesizes that, for anger to occur, an individual makes judgments and attributions that leads a person along a path on which one may experience anger ranging from mild or adaptive to possibly intense maladaptive anger or rage, depending on the nature of such judgments.

Anger: Gender, Age, and Culture

Although as previously noted the maladaptive experience and expression of anger have been associated with a number of adverse consequences (i.e., health, behavioral, and legal), research on anger has lagged behind that of other emotions, such as depression or anxiety. Even though a number of studies have shown that cognitive-behavioral treatment is effective in the reduction of anger problems (Beck & Fernandez, 1998; Butler, Chapman, Forman & Beck, 2006; DelVecchio & O'Leary, 2004; DiGiuseppe & Tafrate, 2003; Edmondson & Conger, 1996), significant gaps in anger research exist, particularly knowledge of specific individual characteristics, treatment variables, and theoretical processes that could be used to develop effective treatment models, especially for women, racial and ethnic minorities, and other marginalized populations.

The available literature suggests that the expression and communication of emotions, including anger, appear to be heavily predisposed by gender and culture-influenced norms and rules (Cox, Van Velsor & Hulgus, 2004; Hatch & Forgays, 2001; Tanaka-Matsumi, 1995). However, relatively little anger research has focused exclusively on women, as most of it has focused on men and particularly on college undergraduate students (DelVecchio & O'Leary, 2004; DiGiuseppe & Tafrate, 2003; Tafrate, Kassinove

& Dundin, 2002). While reviewing several meta-analytic studies on anger treatment, Thomas and González-Prendes (2009) reported that, out of the 148 studies included in the reviews, only two studies, unpublished dissertations, focused exclusively on women, and none of the studies focused exclusively on minority women. Since research is used to inform anger treatment models, most of these models tend to focus on the male-dominated form of anger expression, (i.e., through aggression) thus ignoring the qualitative differences that may exist between men's and women's anger expression. Although, some of the early studies on anger (Averill, 1982; Fischer et al., 1993) suggested that there are no significant differences in the propensity or frequency of anger expression among men and women; some authors have indicated that the way by which men and women express their anger is qualitatively different (Sharkin, 1993; Thomas, 1989); that is, men and women have different styles of anger expression. When exploring the issue of anger in women, one theme that prevails is the influence of gender-role socialization. It has been posited that the gender-role socialization messages young girls receive early in life underscore the notion that the direct expression of anger poses a threat to relationships and may result in social rejection and emotional distress (Hatch & Forgays, 2001). As a result, girls are less likely to learn to express anger directly and effectively in order to achieve their goals, and, instead, divert their anger or use indirect means of anger expression that may be less effective or engender adverse behavioral or health consequences (Cox & St. Clair, 2005; Cox, Stabb & Bruckner, 1999; Cox et al., 2004; Hatch & Forgays, 2001; Munhall, 1993; Sharkin, 1993; Thomas, 1989).

Another theme that seems to permeate the experience of anger in women is that of powerlessness (Fields et al., 1998; Thomas, 2005; Thomas & González-Prendes, 2009). Powerlessness may be interpreted as encompassing two factors: (1) an internal subjective experience of having little or no control over the solutions to one's problems and/or (2) external reality of having little or no access to valuable resources, (e.g., education, income, employment, etc.) which would enhance the individual's availability to make choices and develop potential solutions to problems. The lack of access to these valued resources limits one's ability to make choices and create solutions, thus contributing to the experience of powerlessness. Although powerlessness and a lack of sense of control are prevalent themes in the experience of anger in women in general, we argue that minority women, in particular, who often find themselves at the bottom of economic indicators are likely to experience powerlessness, or disempowerment, disproportionately, compared to white women. Additionally, it has been suggested that poor, inner-city women find themselves not only facing disempowering conditions and dependence, but often they also find themselves experiencing abusive and chaotic situations that make them more susceptible to the internal experience of distress, anger, and depression (Hagan, Finnegan & Nelson-Zlupko, 1994; Hobfoll, Johnson, Ennis & Jackson, 2003). African-American women, in particular, experience this very real powerlessness, underscored by limited access to empowering resources, which may come to clash with culture-bound messages of strength that compel these woman to a sense of duty to help others, while ignoring their own distress (Harris, 1995). A theoretical model discussing the relationship between powerlessness-anger/stress (see Thomas & González-Prendes, 2009) hypothesized that the implication of such conflict is that anger and stress are left in silence and may influence a host of adverse health consequences, including obesity, diabetes, and hypertension. Therefore, anger treatments with women and other historically oppressed and vulnerable populations may want to infuse strategies to address issues of powerlessness and empower the individuals to identify and create realistic solutions to their problems.

The focus on powerlessness in the treatment of women's anger was discussed by González-Prendes and Thomas (2009) in a single case study focusing on the treatment of anger in an African-American woman and by González-Prendes (2008) in another study evaluating the effects of a brief, 8-week, anger-control intervention with women recovering from alcohol and drug addiction. Treatment addressed five themes that promoted empowerment to help the women manage their anger more effectively and take socially appropriate action to address problems in their lives. These

themes were: increasing awareness of realistic boundaries of control and responsibility; developing and implementing appropriately assertive communication and conflict resolution; identifying individual and collective strengths as women, and the functionality of such strengths in coping with challenges and overcoming societal obstacles; recognition of positive contributions of women to our society; and identifying reasonable immediate and long-term steps, within their control, to access resources, expand opportunities, and achieve personal goals (e.g., family reunification, education, employment, improved finances, etc.). At the end of treatment, along with a reduction of anger and increased sense of control for their emotions and behaviors, the women also related a heightened sense of awareness of their own capabilities, potential, and sense of self-efficacy.

Another area of investigation regarding women and anger that has received little attention has been the examination of the effects of age on the experience and expression of anger across women's life spans (Hatch & Forgays, 2001). Studies on emotion regulation across the life span have suggested that as people get older, they are capable of regulating their emotions more effectively, respond to problems with less aggression, and experience an increased sense of well-being (Birditt, Fingerman & Almeida, 2005; Blanchard-Fields & Cooper, 2004; Charles & Carstensen, 2008, 2009; Labouvie-Vief, Hakim-Larson, DeVoe & Schoeberlein, 1989; Labouvie-Vief, Hakim-Larson & Hobart, 1987; Phillips, Henry, Hosie & Milne, 2008; Stone, Schwartz, Broderick & Deaton, 2010). However, the limited literature addressing the topic of women's anger across the life span has reported inconclusive results. Hatch and Forgays (2001) studied age differences in anger expression in a sample of 281 women and concluded that, even though the younger participants had a greater likelihood of experiencing and expressing anger than the older ones did, it was work status rather than age that seemed to be a better predictor of anger expression, although not of anger experience. In another study that examined differences in anger expression between younger and older women, Schmidt & Stabb (n.d.) reported that older women had significantly lower levels of anger experience and expression than did the younger women. However, as age increased the inward expression of anger decreased, with younger women having significantly more inward anger expression than older women did. Interestingly, the authors reported that no differences were found between the groups in the inward or outward attempts to control anger, as both groups resisted expressing their anger to others. In another study González-Prendes, Praill and Kernsmith (2011) surveyed 239 women to evaluate differences in anger experience and expression across three distinct age groups (18–30, 31–49, and 50 and above), while controlling for covariates of education, employment, and relationship status. The three age groups were formed along hypothesized points of life "transitions" (Levinson, 1978; Levinson & Levinson, 1996; Mitchell, 2009) and the corresponding levels of responsibility and stress associated with the each group. Although the overall direction of the older group's scores (e.g., lowest scores of state and trait anger, lowest frequency of outward anger expression, and highest anger control scores) supports the literature on emotional regulation and age, it was the middle group instead of the younger group, as it was hypothesized, that demonstrated higher levels of state and trait anger, higher frequency of outward expression of anger, despite higher attempts to control such expression. None of the covariates had a significant effect on the participants' anger experience and expression. Although this study did not study causality, the fact that the middle group had the highest scores in most measured categories could be hypothesized as a function of the multiple stressors experienced by women in that age group (31–49) (i.e., raising a family, getting established in a profession, settling into their careers, relationships, and families, caring for children as well as for aging parents, broken relationships and divorce, career/employment challenges or changes, and emerging health concerns, among others). This is an issue that needs further investigation.

Another important consideration related to the understanding of how people experience and express anger has to deal with the influence of culture on the experience and expression of anger. Expressions of anger with some modifications and variability can be found across cultures

(Matsumoto, Hee Yoo & Chung, 2010). Kövecses (2000, 2010) argues that the conceptualization of anger has universal aspects that go across cultures (e.g., the metaphor of anger as a heated pressurized container residing within the human body) as well as culture-specific elements (e.g., the prototypical model for venting anger). Various authors have suggested that the expression of anger is influenced by cultural norms and display rules (some universal and some culture-specific) that underscore the appropriateness of anger expression (Adam, Shirako & Maddux, 2010; Konwar & Ram, 2004; Matsumoto et al., 2010). Potegal and Novaco (2010) and Matsumoto et al. (2010) suggest that, across cultures, anger is generally seen as a divisive and disruptive force, leading to social disorganization and intragroup aggression. Potegal and Novaco (2010) further suggest that this is more pronounced in collectivist societies that place a greater value in maintaining social harmony than in societies with a more individualistic and egalitarian perspective. Therefore, collectivist societies are less likely to sanction the overt and amplified expression of anger than are individualistic societies. However, it remains that, across cultures, the direct and overt expression of anger seems to be primarily the realm of men.

Application of Anger Treatment to Batterers and Offenders

The inclusion of anger treatment in programs designed to treat interpersonal violence (IPV) by batterers has been the subject of controversy and diverging opinions for over 30 years. On the one hand, interpersonal violence is viewed by some as the result of male-privilege beliefs and power and control issues impacting primarily men. In other words, the belief is that men in intimate interpersonal relationships lash out in violence and aggression when the power and control in their relationships are challenged by their female partners. In this view, anger is seen as playing no role in the etiology and evolution of batterers' aggression. Proponents of this approach argue against the inclusion of anger treatment in programs for batterers (Gondolf & Russell, 1986). On the other hand, some have argued, pointing to the mounting empirical evidence, that anger plays a role in the aggressive behaviors of batterers (Anderson & Bushman, 2002; Dutton & Corvo, 2007; Eckhardt, Barbour & Davison, 1998; Eckhardt & Jamison, 2002; Eckhardt, Jamison & Watts, 2002; Eckhardt, Norlander & Deffenbacher, 2004; Eckhardt, Samper & Murphy, 2008; Landenberger & Lipsey, 2005; Lundeberg et al., 2004; Norlander & Eckhardt, 2005; Schumacher, Feldbau-Kohn, Slep & Heyman, 2001). Others have posited that anger is a risk factor for interpersonal violence, and that anger is a characteristic of interpersonal violence perpetrators (Norlander & Eckhardt, 2005). Dutton and Corvo (2007) argue that batterers' treatment programs that focus exclusively on power and control and "male privilege" and neglect to address the underlying issues that contribute to anger in batterers take away from the probability of treatment success. Those who acknowledge the role that anger may play in the dynamics of IPV have argued that concerns about the inclusion of anger-focused treatment for batterers must be addressed empirically, rather than ideologically (Norlander & Eckhardt, 2005).

Theoretical Model to Conceptualize Anger

Experiencing Injustice, Maltreatment, or Loss

If, as Harmon-Jones et al. (2010) suggest, anger is a negative emotion and that negative emotions are associated with the subjective appraisal of a situation as unpleasant, then Gonzalez-Prendes suggests that anger reactions, whether mild or intense, begin with the individual's perception of an unpleasant situation or maltreatment, which engenders a subjective appraisal of experiencing some form of "loss." The word "loss" here is used in a broad context that encompasses the experience of a tangible loss (e.g., of a significant other in one's life, employment, ability, valued object, etc.); obstruction or loss of opportunity to achieve a goal; a perceived personal attack in which the individual experiences a subjective devaluation of the self (e.g., a person feels "disrespected" or

"devalued" by the actions of another); violation of a cherished right, ideal, or moral value (e.g., a person who values the ideals of justice and fairness and becomes aware of unjust or unfair treatment of another individual or group of people); or some other form of real or perceived unjust or unfair treatment. Some have suggested that the experience of injustice or moral violation plays a crucial role in eliciting anger responses (Potegal & Novaco, 2010; Wranik & Scherer, 2010). Similarly, Beck (1999) suggests that the offenses that generally would make a person angry appear to have a common denominator: the person feels personally diminished as the result of the perceived transgressor's actions. Along these same lines, González-Prendes (2007) discussed a single case study of a man with anger problems who, when confronted with anger-inducing scenarios through the process of imaginal exposure, saw the vision of himself as "disrespected" and "devalued" as the initial trigger of his anger reactions. Beck (1999) also has indicated that "many people who 'fly off the handle' or have a 'short fuse' actually have a shaky self-esteem" (p. 52). D'Zurilla, Chang and Sanna (2003) reiterate this relationship between self-esteem and anger and suggest that individuals with anger problems, given their propensity toward low self-esteem, may be more sensitive to personal criticism and to interpret adversities or setbacks as self-devaluing events. Furthermore, the authors suggest that low self-esteem and deficits in problem- solving capacity may be risk factors for aggression and violence (D'Zurilla et al., 2003).

The External Attribution of Blame

However, this sense of "loss," by itself, may not be sufficient to generate anger. Rather it may lead to the experience of emotions such as sadness, disappointment, regret, and depression among others. So why anger? It seems that, upon experiencing a loss, anger arises when the aggrieved individual projects an attribution of blame or culpability onto a perceived transgressor. Kassinove & Sudhodolsky (1995, p. 24) suggested that "…anger is an accusatory response to some perceived misdeed. The typical instigation to anger is some value judgment; it is an attribution of blame." Attributions of blame seem to be influenced by two factors: the direction of responsibility and controllability (Brickman et al., 1982; Hareli & Weiner, 2002). Beck (1999) indicated that "assigning responsibility to another person for unjustly 'causing' an unpleasant feeling is a prelude to feeling angry" (p. 44). Furthermore, Averill (1982) also suggested that the formation of anger is associated with a judgment of personal responsibility. Therefore, we suggest that the external attribution of blame, which links elements of intentionality and controllability to the actions of the transgressor, is deemed to be pivotal in the experience of anger. For example, if, in the face of a perceived "loss" (e.g., losing a job) the attribution of blame is directed internally, the emotional outcome (e.g., depression) could be different than if the attribution of blame is directed externally (e.g., anger). Similarly, if the aggrieved individual makes an external attribution of blame, but concludes that the actions of the other were accidental or unintentional, that person may experience a different emotional outcome (e.g., annoyance, disappointment, or even mild anger) than if one were to conclude that the actions of the other were intentional and within the control of the transgressor. Hareli and Weiner (2002) have suggested that "anger is an accusation or a value judgment that another person 'could and should have done otherwise'" (p. 188). We suggest that this sense of "loss" or experience of injustice or moral violation, coupled with an external attribution of blame, (i.e., culpability and intentionality) underscores the experience of anger in most individuals.

However, one must ask, what differentiates those individuals who experience mild to moderate anger occasionally from those who may have "anger problems," punctuated by regular anger episodes with high levels of intensity and physiological arousal and experienced across various types of situations? One would argue that individuals with anger problems possess certain traits that increase the likelihood of more frequent and intense anger responses. These individuals tend to be exceedingly demanding, personalize events (i.e., see themselves as being personally attacked or targeted for maltreatment by others), and are quick to denigrate the perceived transgressor with devaluing or dehumanizing labels.

Demandingness

It has been suggested that demandingness, evident by verbalized imperatives (i.e., "should," "must," "ought to," "have to," etc.) that underscore rigid commands or rules of behavior, illogically applied to life circumstances, plays a significant role in the formation of unhealthy negative emotions (Ellis, 2003; Ellis & Dryden, 1997; Ellis & Tafrate, 1997). While discussing cognitive processes associated with anger, Deffenbacher (1999) suggested that

> Intense and dysfunctional anger eventuates when these cognitive processes become rigid, arbitrary, and overinclusive. Values cease to be preferences, but become sanctified dogma imposed on others. Personal desires take the form of commandments. Expectations and promises become absolute never to be fulfilled. (p. 296).

The role of demandingness in anger was also highlighted by Eckhardt and Jamison (2002) who, in a study of marital violence and men, observed that, during anger induction these maritally violent men were more likely to articulate more demanding thoughts than nonviolent, maritally dissatisfied men. In addition the authors reported that high levels of demandingness almost doubled the probability of study participants exhibiting violence.

Personalization: A Paranoid Perspective

The literature on anger suggests that another characteristic of individuals with anger problems is an exaggerated, egocentric perspective that may lead the angry person to erroneous conclusions about the perceived transgressor's intent or motivation (Beck, 1999). Beck goes on to suggest that this egocentric perspective fuels a sense of paranoia similar to clinically paranoid patients and that the aggrieved individual believes the perceived transgressors "seem even more culpable because they 'know' that they are hurting us but persist in their noxious behavior anyhow" (p. 27). Although the research in this area is rather limited, available studies seem to support this basic premise. While investigating the articulated thoughts of maritally violent and nonviolent men during anger arousal, Eckhardt et al. (1998) found that maritally violent men articulated more hostile attributional biases and fewer anger-controlling statements than did nonviolent men. Similarly, in a study of 120 college students, Epps and Kendall (1995) concluded that individuals with high levels of anger were more likely to attribute hostile intent to the actions of others, even in benign or ambiguous situations. In a study of 26 pilots involved in a labor dispute, Girodo (1988) found that those pilots with high scores in anger and hostility also scored high in measures of paranoia and obsessive-compulsiveness. A more recent study (González-Prendes & Jozefowicz-Simbeni, 2009) evaluated the effects of cognitive-behavioral therapy on anger and paranoid ideation. In this study the researchers compared a group of men seeking treatment for anger problems ($n=32$) to a group of men in treatment for mental-health issues other than anger ($n=28$). At pretreatment, the men with anger problems had significantly higher scores in the paranoid ideation scale of the Brief Symptom Inventory (Derogatis, 1993). At posttreatment the differences were no longer significant. What this limited research seems to suggest is that individuals with elevations of anger seem to attribute hostile intent to the actions of others and may be more apt to personalize events, believing that they have been singled out for intentional maltreatment from others.

Negative Labeling and Condemnation of Others

Framing perceived transgressors in derogatory and dehumanizing terms seems to be associated with high elevations of anger and may even increase the risk of aggression. For instance, Beck (1999) indicated that the "more extreme the undesirable derogatory adjectives, the less human the outgrouper appears and the easier it is to aggress against him or her with impunity" (p. 154). Ellis and Tafrate (1997) have suggested that angry people, whose demands have not been met, tend to label others as "bad" people who deserve to be punished. In this process of negative labeling

or other condemnation, the angry person is likely to use absolute deprecatory labels to define the transgressor (e.g., "stupid," "evil," "inconsiderate," "uncaring," etc.). Therefore, in the mind of the aggrieved individual the transgressor becomes "less than," (e.g., less than human, etc.) perhaps engendering a sense of righteous indignation and justifying aggression. In a study of marital violence, Eckhardt and Kassinove (1998) investigated the cognitive characteristics of maritally violent men during anger arousal and reported that these men articulated more irrational beliefs including global self/other ratings during anger-induction than maritally satisfied nonviolent men. In another study, Martin and Dahlen (2004) evaluated irrational beliefs in the experience and expression of anger and reported that derogation of others was predicted by what Spielberger (1999) refers to as trait anger (i.e., a disposition on the part of the individual to more commonly experience a wide range of situations as annoying or frustrating and to react to those situations with high elevations of anger).

The available literature seems to support the notion that most anger responses are rooted in the individual's perception of unjust or unfair treatment, a loss, and/or a violation of a principle, rule, or moral value, followed by an external attribution of blame to an object deemed to be responsible. However, there seem to be certain factors that may differentiate between individuals who experience anger occasionally from those who are prone to more frequent, widespread, and intense anger responses. The latter appear to be characterized by a more prevalent demanding attitude, a tendency to personalize events (i.e., paranoid perspective), and the negative labeling of others in derogatory and dehumanizing terms.

Clinical Implications for the Treatment of Maladaptive Anger

The available literature on anger offers several implications for treatment. The first consideration for clinicians is that one size does not fit all. Effective anger treatment must include considerations of gender and culture, and how these factors may influence the experience and expression of anger. However, because most of the research on anger has focused on the way men experience and express anger, paying relative little attention to women's anger, practitioners must use caution when generalizing and applying the results from anger research to the treatment of anger in women.

As Fernandez (2010) suggests, the treatment of maladaptive anger must be comprehensive and integrative and incorporate cognitive, behavioral, and affective elements. D'Zurilla et al. (2003) suggest that interventions to treat anger should also focus on improving self-esteem; increasing effective social problem solving; correcting negative problem orientation beliefs; and promoting a more optimistic perspective toward everyday problems. Effective treatment also needs to take into account gender-role socialization messages and cultural display rules that influence the expression of anger. For example, as Fischer and Evers (2010) suggest women's traditional role messages reinforce the view of anger as a disruptor of the quality of relationships and so discourage its overt and direct expression. At the same time, effective anger regulation must be sensitive to the culture of the client and how that culture may sanction the expression of angry feelings.

The tendency of women to avoid the overt and direct expression of anger, or to even acknowledge the experience of anger, suggests that anger treatment for women should include mechanisms to help the woman increase awareness of and acknowledge anger and help them to express angry feelings that are often left unstated. This may include addressing issues of powerlessness that may underscore the dynamics of the woman's interactions with people or situations in her life; identifying and reframing underlying beliefs that may interfere with the healthy expression of anger; and developing the skills for the appropriately assertive and direct expression of anger. On the other hand, for men, it would be important to recognize the maladaptive role that anger plays in their lives, while helping them to develop the skills to communicate angry feelings nonaggressively. At this point it is important to recognize that not all maladaptive anger is expressed through aggression, and not all aggression is the result of

anger. Nonetheless, men with anger problems would benefit from working to expand their range of emotional expression, so as to give a voice to those emotions that imply vulnerability (e.g., sadness, disappointment, fear, etc.) that are often masked by their expression of anger.

Finally, clinicians treating individuals with anger problems need to recognize and address possible warning signs and individual traits that may increase the risk of aggression. The first point of interest is the relationship between anger and interpersonal violence. Norlander and Eckhardt (2005) have argued that there is compelling evidence to support the notion that anger and hostility are factors that characterize perpetrators of interpersonal violence. Eckhardt et al. (1998) have suggested that maritally violent men may focus on specific cues, actively misconstrue, or otherwise distort situations, in ways that increase the likelihood of marital anger and aggression. In another study exploring anger disturbances among perpetrators of interpersonal violence, Eckhardt et al. (2008) reported that men with high anger expressiveness perpetrated more interpersonal violence than did those with low or moderate levels of anger expressiveness. Lundeberg et al. (2004) in a study differentiating between nonviolent, psychologically violent, and physically violent male college daters, suggested that physically violent men had the poorest anger management skills, characterized by raising their voice when arguing with a partner and applying negative attributions to the partner's behaviors. Similarly, violent men, when angry, are more likely to adopt more insulting and belligerent terms to communicate their feelings (Norlander & Eckhardt, 2005). This last point was also underscored by Beck (1999) who suggested that the more derogatory and dehumanizing the terms that the angry individual places upon the perceived transgressor, the more likely he is to react with aggression toward that person. Therefore, clinicians must be cognizant of attributional biases, deficits in anger management skills, and poor self-esteem issues that may increase the risk of aggression in individuals with anger problems.

Anger Theory and Suitability for Parenting

Given that anger-prone individuals appear to possess certain psychological characteristics that increase the risk of maladaptive anger expressions, including a heightened risk of aggression, one may ask: how might these theoretical variables and personality characteristics described in the previously discussed theoretical model of anger be used to determine the best interest of a child in child custody cases? Although research in this area is lacking, one could hypothesize that the degree to which the individual adheres to or exhibits such characteristics perhaps may indicate the probability that a parent would or would not be flexible and willing to cooperate with the other parent in shared custody and other activities involving the child. In other words, a look at those characteristics could provide a glimpse at how apt a parent might be to maintain an amicable relationship with the other parent following a divorce and to participate in shared activities with their children (i.e. birthdays, school events, etc.). On the other hand, these same characteristics (e.g., low self-esteem, personalization, rigidity, demandingness, demeaning of the other, etc.) may engender high elevations of anger and bitterness in a parent, resulting in a decreased potential for cooperation; increasing the prospect for difficulties adjusting to co-parenting responsibilities; and increasing the likelihood of that type of parent undermining the parental authority of the other parent and belittling or engaging in criticism of the other parent in front of the child. This attitude would not be in the interest of the child and becomes detrimental.

Case Vignettes

Here, we present two vignettes in order to illustrate key factors and personality characteristics associated with the experience and expression of anger that may point toward, in one case, an unfavorable prospect of maintaining healthy parenting after divorce and in the other case a favorable prospect of healthy parenting. The names and personal identifying characteristics have been altered.

The Case of Mark

The first vignette represents the case of Mark C. (a pseudonym). Mark was a 37-year-old engineer who had been married to Susan for nine years. Susan, 33 years old, had recently filed for divorce and although the couple continued to live in the same house, they each kept to separate sections of the house with little or no contact between them. On the occasions when they did communicate the outcome was generally an argument. Mark often pointed out that he was the main provider for the family and that Susan neglected spending an adequate amount of time with the children, aged 7 and 5. Mark was employed as a mid-level executive and engineer for a local company that manufactured parts for a major auto company. Mark and Susan's relationship had been deteriorating for the past 3 years. Initially, Susan dismissed Mark's behavior as the result of increased pressure due to the uncertainties that his company faced as a result of the problems surrounding the automobile industry. Susan had indicated that during those 3 years, Mark had become increasingly controlling, demanding, and prone to anger outbursts. However, she admitted that from the beginning of their relationship Mark had always seemed to be a rather driven, focused, and perfectionist individual, who tended to react with anger when things did not go his way. Nonetheless, the past 3 years had seen an increase in his angry outbursts punctuated by yelling, use of profanity, breaking and throwing things, and hurling accusations at Susan. Mark's accusations revolved around what he perceived to be Susan's carelessness with household expenditures, increased social activities with her workmates, and "neglecting" the children. Mark's beliefs about parental roles and responsibilities were punctuated by his views that it was the father's responsibility to work and provide for the family, and it was the mother's responsibility to manage the household, attend to the needs of the children, and spend time with them. Nevertheless, Susan had been consistently employed since her late teens, and at this time she was working as an administrative assistant to the lead attorney in a well-established law firm. Although Mark had never become physically aggressive toward Susan, she related that on several occasions she had become scared at the intensity of Mark's anger and his belittling and insulting comments about her. On several occasions these outbursts had taken place in front of their children.

Prior to Susan filing for divorce the couple had sought marital therapy in one last-ditch effort to try to correct their marital difficulties. Eventually, Mark thought this was a "waste of time" and the couple discontinued the therapy. Shortly after, Susan filed for divorce. She continued with therapy on her own to help her to cope and adjust to the divorce and the ensuing changes in her life. The marriage and family therapist had discussed with Mark the issue of his anger outbursts and suggested that perhaps he may want to address this issue with a therapist who specialized in helping individuals with anger regulation issues. Mark received a referral for a therapist, and after much prodding from his family he set an appointment to discuss his anger issues.

Although Mark admitted that at times he became angry, he did not fully accept responsibility for his anger and he often blamed others, particularly Susan, for "making me angry." He indicated that if Susan would act more responsibly, they would argue less and consequently he would have fewer reasons for feeling angry. Mark attended five visits of anger regulation therapy after which he disengaged from therapy. However, the information gathered during those five visits presented an interesting portrait of Mark and his anger.

During the first visit Mark was assessed by means of a clinical interview focusing on a bio-psycho-social evaluation and the completion of two instruments: the State-Trait Anger Expression Inventory-2, STAXI-2 (Spielberger, 1999) and the Brief Symptom Inventory, BSI, (Derogatis, 1993).

The STAXI-2 (Spielberger, 1999) is a 57-item instrument that has become the benchmark tool in anger research. It also used extensively in clinical practice for the evaluation of anger. The STAXI-2 measures the experience, expression, and control of anger. It consists of six scales (i.e. state anger, trait anger, anger expression-out, anger expression-in, anger control-out, and anger control-in); five subscales (feeling angry, feel like expressing anger

verbally, feel like expressing anger physically, angry temperament, and anger reaction); and an overall anger expression index. STAXI-2 normative data derived from female populations indicate alpha coefficients of internal consistency ranging from .74 (anger expression-out) to .93 (anger control-in), and subscales ranging from .76 (anger reaction) to .88 (feel like expressing anger verbally) (Spielberger, 1999).

"State anger" is defined as the intensity of a person's anger and the degree to which a person feels like expressing anger at a particular moment (Spielberger, 1999). State anger (S-Ang) is viewed as an individual's anger response to specific situations. The S-Ang scale has three subscales: Feeling Angry (S-Ang/F) which measures the intensity of current angry feelings; Feel Like Expressing Anger Verbally (S-Ang/V) which focuses on the intensity of current anger related to its verbal expression; and Feel Like Expressing Anger Physically (S-Ang/P) which focuses on the intensity of the physical expression of anger.

According to Spielberger (1999), the concept of trait anger denotes a more pervasive state of anger, and it underscores the frequency with which one experiences angry feelings over time. Individuals with high levels of trait anger often respond with a higher intensity of state anger in a wide range of situations. Two subscales of the T-Ang scale are: angry temperament (T-Ang/T) which measures the individual's propensity to react angrily without specific provocation and angry reaction (T-Ang/R) which measures the frequency with which the person experiences anger in situations that are frustrating or involve evaluations.

By way of explaining the anger control scales, anger control-out (AC-O) measures the frequency with which a person attempts to control the outward expression of anger, and anger control-in (AC-I) measures how often a person tries to control anger by calming down or cooling off (Spielberger, 1999). Anger expression includes two scales: anger expression-out (AX-O) measures how frequently anger is expressed through either physical or verbal aggression; and anger expression-in (AX-I) measures how frequently the person suppresses angry feelings. The anger expression index (AX Index) is an overall indicator of anger expression, based on the individual's responses to the anger-control and anger-expression scales (Spielberger, 1999). In the STAXI-2 scales scores falling within the 25th and 75th percentiles are deemed to be within the normal range. Spielberger (1999) suggests that individuals who score above the 75th percentile are likely to experience or express angry feelings in ways that are detrimental to optimal functioning.

In the case of Mark, his scores for the STAXI-2 were (score, percentile): S-Ang (22, 80th), S-Ang/F (10, 85th), S-Ang-V (10, 90th), S-Ang/P (5, 50th), T-Ang (29, 96th), T-Ang/T (11, 95th), T-Ang/R (13, 85th), AX-O (23, 97th), AX-I (16, 50th), AC-O (17, 15th), AC-I (16, 15th). Regarding the S-Ang scale an interpretation of Mark's scores suggested the following: (1) at the time of the assessment he was experiencing angry feelings evident by the scores in the S-Ang scale; (2) these feelings were rather intense as indicated by elevation in the S-Ang/F score; and (3) at that time he was experiencing more intense feelings about expressing his anger verbally (S-Ang/V) than physically (S-Ang/P).

Mark also showed high elevations in the T-Ang scale, as well as its subscales of T-Ang/T and T-Ang/R. What these scores suggest is that Mark frequently experienced angry feelings and he would see himself being treated unfairly by others; that he was quick-tempered and would respond angrily with little provocation; that he tended to be sensitive to criticism and would take such criticism personally as a sign of disrespect or affront from others. Also, interestingly the anger expression scores suggested that Mark was more likely to express his anger outwardly in aggressive behaviors. Although there had been no reports of Mark acting physically violent toward Susan, she had complained of his use of profanity, criticisms, verbal tirades, and hitting and breaking things, all forms of outward aggression.

The results of the clinical interview and the assessment tools led to a portrait of Mark that seemed to conform to the variables in the theoretical model of anger discussed earlier in this chapter. For example, Mark seemed rather vulnerable to criticism and he was quick to take such criticism personally. One could argue that the tendency to

personalize criticism maybe be rooted in one's own negative self-evaluations. In fact, Beck (1999) suggests that individuals who are prone to anger problems and who are potential offenders have a "shaky self-esteem" (p. 126), and may be also prone to depression. In the case of Mark this was confirmed by his *T* scores in the BSI which showed elevations in the scores for interpersonal sensitivity (*T* score = 57), depression (*T* score = 60), and hostility dimensions (*T* score = 62).

The BSI (Derogatis, 1993) is a 53-item instrument that assesses psychological distress along nine scales: anxiety (AX), depression (DEP), interpersonal sensitivity (I-S), hostility (HOS), phobic anxiety (P-A), obsessive-compulsive (O-C), somatization (SOM), paranoid ideation (P-I), and psychoticism (PSY). There is also a global severity index, (GSI), which gives an overall measure of psychological distress. The BSI is interpreted by converting the raw scores to *T* scores. A *T* score of 63 or above in the GSI, or two *T* scores of 63 or above in any of the other scales is considered indicative of psychological distress. Internal reliability for the nine scales of the BSI range from a low $\alpha = .71$ for psychoticism to a high of $\alpha = .85$ for depression. Test–retest reliability measures range from .68 (SOM) to .91 (P-A). Test–retest reliability of the GSI scale is .90 (Derogatis). Internal reliability for the GSI has been reported at .96 (Baider et al., 2004).

Using the five dimensions of the theoretical model of anger previously presented, we see how Mark may fit into that framework and what it may suggest about his personality. The first dimension in the cognitive conceptualization model of anger is the *experience of injustice, maltreatment, or loss*. In the case of Mark his sense of loss originated mainly from what he perceived as personal attacks to his sense of self and what he interpreted as a devaluation of his self-worth. He reported feeling disrespected and not appreciated; but most importantly, as the result of this he saw himself diminished and devalued. The fact that his wife had initiated divorce procedures was particularly aggravating to him. He saw himself as powerless and helpless and this engendered strong feelings of anger and bitterness. Beck (1999) has suggested that individuals with anger problems often experience a sense of uncontrollability and helplessness. In this case Mark projected the blame for his problem on Susan. He accepted little responsibility for his anger and verbalized the belief that others, particularly Susan, were to blame for his present situation and his feelings of anger. It is suggested here that this externalization of blame is the second dimension in the cognitive conceptual model of anger and a key component in the experience of anger. As it has been previously noted the notion of blame revolves around two key concepts, responsibility and controllability (Brickman et al., 1982; Hareli & Weiner, 2002). That is, in the face of a setback or adversity, the aggrieved individual assigns blame to the object that is deemed to be: (1) responsible for causing the problem; and (2) in control of the solutions to that problem. Mark deemed Susan to be responsible for his problems and in control of the solutions ("if only she would change, things would get better"). In short, Mark felt powerless and helpless. Mark's situation seemed to fit with Beck's suggestion (1999) that individuals with anger problems often feel a sense of uncontrollability and helplessness. Mark certainly felt both powerless and helpless.

Another characteristic that Mark exhibited was rigidity of thought or demandingness. Throughout his life Mark had internalized rigid rules of behavior as to how people "should" act. Along these lines he had been described as a "perfectionist" However, when the behavior of others failed to follow his rules of conduct Mark often would take it personally and respond angrily. This rigidity of thought prevented him from adopting more flexible and philosophical perspectives to adjust to life situations. Consequently he was rather intransigent and unwilling to compromise. This last point was not only exhibited in his relationship with Susan, but it was also characteristic of his personality that was exhibited across various spheres of functioning.

Mark also personalized negative events. Individuals with anger problems often may see themselves as personally targeted by others for humiliation or to make them feel bad. Beck (1999) describes this attitude as a "paranoid perspective." In other words, these individuals are more apt to be

hypervigilant to perceived criticisms or possible affronts. For instance, Mark, would interpret benign disagreements as having malevolent and hostile intent that require immediate retaliation; and differences of opinion would be taken as willful signs of disrespect. In such instances Mark was quick to protect himself with defensive hostility, an angry and aggressive stance aimed to protect his vulnerable sense of self.

One of the most concerning aspects of Mark's expression of anger was his use of derogatory and demeaning terms to frame the perceived transgressor; in this case it was Susan. The use of profanity, belittling and demeaning labels was particularly troubling. Beck (1999) submits that the more demeaning the criticism of the perceived transgressor, the stronger the likelihood of the angry individual responding with aggression. Similarly, it has been suggested that elevations of trait anger, hostile attitude, and the expression of anger outwardly (e.g., the use of demeaning or derogatory terms to define others during anger bouts, throwing and breaking things, etc.) are related to interpersonal violence perpetrators and increase the probability of the angry individual responding with aggression against the transgressor (Beck, 1999; Eckhardt & Kassinove, 1998; Eckhardt et al., 2008). A number of studies have suggested that elevations of anger experience and expression appear to be characteristic of men who perpetrate interpersonal violence (Anderson & Bushman, 2002; DeWall, Anderson & Bushman, 2011; Dutton & Corvo, 2007; Eckhardt et al., 1998, 2002, 2004, 2008; Eckhardt & Jamison, 2002; Landenberger & Lipsey, 2005; Lundeberg et al., 2004; Norlander & Eckhardt, 2005; Schumacher et al., 2001; Stith, Smith, Penn, Ward & Tritt, 2004).

So what might the above discussion allow us to infer about Mark's suitability for parenting? First one must consider various factors such as: the elevation in Mark's trait anger scores; his tendency to deflect responsibility for his anger and blame others; the propensity to personalize and ascribe negative intent to the actions of others; and his outward expression of anger and use of demeaning and derogatory terms to frame his wife during his anger bouts; and his lack of anger regulation particularly in front of the children. These characteristics suggested two points of concern: (1) the possibility of Mark's aggression escalating to physical violence and (2) the low probability of Mark cooperating with Susan to share parenting duties and other activities involving their children. One might argue that Mark's rigidity of thought would undermine his ability to be flexible in parenting matters. Moreover, although one would not expect Mark to maintain a close relationship with Susan, the prospect of maintaining at least an amicable relationship which would be in the best interest of the children seemed at that time unlikely also. Mark had, on several occasions, made derogatory comments about Susan in front of the children in ways that not only framed her in a negative light but also undermined her parental authority. In summary, one could argue that those attitudes could not be construed as serving the best interests of the children.

The Case of Raymond

Raymond (a pseudonym) was a 45-year-old medical technologist facing the prospect of divorce. He had been married to Gayle (a pseudonym) for 18 years and they had three children aged 15, 12, and 9. Although Gayle had initiated the divorce proceedings, this was a matter that they had discussed and both had agreed to proceed accordingly, albeit, Raymond had been reluctant to do so. Similarly to the case of Mark and Susan, Raymond and Gayle had sought marital counseling before actually filing for divorce. However, after almost 6 months of counseling the couple chose to file for divorce. It was obvious that Gayle wanted the divorce more than Raymond did. Yet, once Raymond recognized that his wife wanted out of the relationship he agreed and chose not to fight it. Raymond indicated that although he had experienced feelings of anger and resentment when Gayle first confronted him with her desire to seek a divorce, he soon realized that he would not want to stay in a marriage with somebody who no longer saw a value in it. This realization allowed him to shift his focus from "saving the marriage" to planning the divorce in a way that minimized the pain for all parties involved, including their children.

Both, Raymond and Gayle agreed that a primary concern was the well-being of their children during and after the divorce proceedings. Neither Raymond nor Gayle reported any episodes of heightened anger or aggression, verbal or physical, during their relationship.

Using the theoretical model of anger to understand and try to predict Raymond's prospect of shared parenting revealed the following picture. Raymond, as did Mark, experienced a sense of loss at the prospect of divorce. However, one key difference was in the meaning that each man attached to this loss. In the case of Mark his loss was related to his own sense of worth. He saw himself personally rejected. For Raymond, on the other hand, the sense of loss was related to an ideal. That is, Raymond wanted to be married and keep his family intact. He believed that marriage "should be forever" and, although he had initially experienced feelings of mild anger and resentment, his primary affect was one of profound sense of sadness and disappointment at the prospect of losing something of value and importance to him. His initial anger had been fueled by (1) his perception of losing something of value to him (i.e., his marriage) and (2) holding Gayle responsible (externalizing blame) for denying him that which he wanted. However, one major difference between Raymond's and Mark's reactions was that Raymond did not take Gayle's request for divorce as a sign of personal rejection. Ultimately, he concluded that Susan just wanted to take her life in a different direction from his, and although he did not agreed with her, he accepted that she had the perfect right to make her choices, even if those choices did not include him. As opposed to Mark, Raymond did not personalize the event. He did not think that Gayle was out to hurt him or humiliate him. Also, early on he accepted the facts she simply wanted to move on. Therefore, he was not demanding. As a person Raymond tended to look at things from a broader perspective than Mark. For instance, in the case of his divorce he looked at the broader picture of life. This included being on his own and pursuing his own interests, as well as sharing parental responsibility for the children and ensuring the least possible disruption for their lives. In addition, Raymond had never used any demeaning or derogatory labels to define Gayle because of her desire to seek a divorce. This attitude allowed Raymond to maintain a healthy level of communication with Gayle and facilitated his ability to work with her to plan for the divorce and beyond.

Overall, the portrait of Raymond suggested that he was someone that exhibited flexibility and was willing to cooperate with Gayle to facilitate a healthy outcome to their divorce. Although, he did not hold any illusions about reconciling with Gayle, Raymond recognized that maintaining a cooperative and amicable relationship would serve the best interests of the children and of each other. He also acknowledged that most likely he and Gayle would have to share and participate in a number of occasions as the children grew up, and therefore an amicable relationship seemed like a more favorable alternative.

Using elements of the theoretical model of anger presented here, one would suggest that Raymond's prospects of successfully sharing parenting responsibilities were promising. In contrast to Mark, one would suggest that Raymond processed his loss (i.e., his marriage) with a more rational and sensible outlook. Although he blamed his wife Gayle for causing this loss, he did not attach any hostile intent nor did he take it as a personal rejection. Once he had recognized that Gayle wanted the divorce he had adopted a nondemanding and rather flexible attitude to facilitate mutual cooperation. Finally, in contrast to Mark's behavior, Raymond at no time used derogatory and demeaning terms to define his wife. He was conscious of not criticizing Gayle or questioning her parenting approach in front of the children. He felt that matters were best left to be discussed in private between the parents. Raymond's personal characteristics as identified in the theoretical model of anger suggest that he would be open to cooperate and share in parental responsibilities with his ex-wife in a manner that would likely serve the best interests of their children.

Conclusion

Certainly the use of anger theory to establish parental suitability is something that needs to be evaluated and established through empirical

research. Nonetheless, the theoretical model of anger discussed in this chapter may provide a framework to identify personality characteristics (e.g., flexibility, rigidity, demandingness, etc.) and underscore cognitive processes that may facilitate cooperation with the other spouse and in the sharing of parental responsibilities in ways that serve the best interest of the child.

Biography

Dr. A. Antonio González-Prendes is an associate professor at Wayne State University's School of Social Work where he serves as Chair of the Interpersonal Practice Concentration and lead teacher in the cognitive-behavioral theory track for graduate MSW students. Dr. González-Prendes has also been a practicing licensed clinical social worker and a certified advanced alcohol and drug counselor in the State of Michigan for over 20 years. He is a member of the Academy of Certified Social Workers, the International Association of Cognitive Psychotherapy, and the Association for Behavioral and Cognitive Therapies, as well as several other professional organizations. Dr. González-Prendes' clinical and research interests revolve around the investigation of cognitive-behavioral mental health and substance abuse treatment with minority groups and more specifically on the conceptualization and treatment of anger problems. He has published his work in peer-reviewed professional journals and book chapters. He has also presented his research at national and international conferences.

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Forensic Evaluation of Child Abuse

25

Daniel S. Lobel

Forensic evaluation of child abuse (CA) involves two distinct components. The first is the clinical determination as to whether or not the child has been abused. Abuse must be differentiated from accidental events or incidental circumstances. The second component is establishing causality. This is necessary to link a specific individual or institution with the abuse. This chapter discusses both aspects of forensic evaluation of CA in the context of case material.

CA evaluations are utilized in several types of legal actions. The most direct legal action is criminal action. CA is against the law and perpetrators of CA are subject to criminal prosecution. CA allegations are also common in divorce and custody litigation. Even tort ligation utilizes these evaluations in the determination of financial liability associated with damages caused by CA or the failure to prevent CA.

Definitions of CA and Child Neglect

The Federal Child Abuse Prevention and Treatment Act (CAPTA), (42 U.S.C.A. §5106g), as amended by the Keeping Children and Families Safe Act of 2003, defines CA and CN as, at minimum:

- Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse, or exploitation
- An act or failure to act which presents an imminent risk of serious harm

In the Juvenile Justice Standards Project the American Bar Association's Institute of Judicial Administration defined "abused child" as "a child who has suffered physical harm, inflicted non-accidentally upon him/her by his/her parent(s) or person(s) exercising essential equivalent custody and control over the child, which injury causes or creates substantial risk of causing death, disfigurement, impairment of bodily functioning, or other serious injury" (Flicker, 1982).

Each state is responsible for defining CA and child neglect (CN) and there is substantial variation. There is currently movement in the direction of nationalizing efforts to identify and prevent CA and CN (ABCAN, 1993), but at present, a thorough understanding of the definitions of CA in the state in which the evaluation is being done is essential before embarking on the examination. Generally, with regard to child welfare there are four basic forms of CA, although the definitions of these terms differ from state to state: physical, sexual, emotional, and negligence. Some states now also include abandonment and parental substance abuse as a form in their definitions of CA and CN.

Physical abuse involves bodily harm caused to a child. The federal government utilizes the following definition: "Physical abuse is non-accidental physical injury (ranging from minor bruises to severe fractures or death) as a result of

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_25,

punching, beating, kicking, biting, shaking, throwing, stabbing, choking, hitting (with a hand, stick, strap, or other object), burning, or otherwise harming a child, that is inflicted by a parent, caregiver, or other person who has responsibility for the child. Such injury is considered abuse regardless of whether the caregiver intended to hurt the child. Physical discipline, such as spanking or paddling, is not considered abuse as long as it is reasonable and causes no bodily injury to the child" (CWIG, 2008). The specific exclusion of the intent of the caregiver in the definition of abuse is related, in part, to forms of abuse that arise from parental frustration rather than intent to hurt the child. Shaken baby syndrome is an example. This is related to the idea that a parent should have known that the action taken was potentially hazardous to the child.

According to the Child Welfare Information Gateway (CWIG, 2008), "Sexual abuse includes activities by a parent or caregiver such as fondling a child's genitals, penetration, incest rape, sodomy, indecent exposure, and exploitation through prostitution or the production of pornographic materials." CAPTA defines sexual abuse as "the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or rape, and in cases of caretaker or interfamilial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children or incest with children" (CAPTA, 1989).

Emotional abuse of children involves nonphysical harm to the child. This can take many different forms, the common thread being that they cause the child to have harmful emotional reactions. Emotional reactions are harmful to the child if they cause the child unnecessary discomfort or dysfunction. Emotional reactions that are harmful to the child include unnecessary shame or humiliation, self-loathing, fear, terror, or intimidation. Persistent experiences with these harmful emotional reactions can result in various sorts of dysfunction. Damage to the self-esteem, for example, may increase the chances that the child will develop depression and other forms of mental illness, including substance abuse. Persistent assaults to the child's self-esteem may also lead to social inhibition or other sorts of dysfunction throughout the lifespan. In its extreme, emotional abuse may lead to suicide. This is often the mechanism behind the bullying-related suicides increasingly reported. Emotional abuse is almost always found where other forms of abuse are identified (CWIG, 2008).

CN is generally defined as the failure of a parent, guardian, or caregiver to provide for a child's basic needs. Basic needs concern provision for survival and well-being with regard to physical, medical, education, and emotional requirements. Physical needs include food, shelter, and a safe environment. Medical needs include preventative and palliative medical intervention. Educational needs include education to state and local standards as well as attention to special educational needs. Attending to the child's emotional needs requires sensitivity to and communication about the child's ability to negotiate the environment such that these needs are satisfied. An example is a woman found some notes in the closet of her otherwise functioning 12-year old that expressed considerable pain and contemplation of suicide. She responded by speaking to the child and ultimately procuring a successful professional intervention. To have not acted in a similar fashion is considered emotional neglect. Failure to address a child's social isolation, obesity, and substance abuse all represent forms of emotional neglect.

According to APSAC (Myers, 2010), "Most, if not all, children who are physically neglected are also emotionally neglected at least to some extent. However, the converse is not always true" (pg. 107). Emotional abuse and neglect is the most difficult to prove, and yet the effects may be devastating. In the extreme, such children may suffer Failure to Thrive (FTT) Syndrome which may result in failure to grow or even survive despite adequate nourishment (Gardner, 1972). Because of the lack of physical evidence, these injuries are the most difficult to prove and most difficult to prosecute.

New York State's Penal Code (NY CLS Penal § 260.00 [2007]) defines abandonment of a child: "A person is guilty of abandonment of a child when, being a parent, guardian, or other person legally charged with the care or custody of a child less than 14 years old, he deserts such a child in any place with intent to wholly abandon it. Abandonment of a child is a class E felony." California adds the concept of financial support "Every person who knowingly and willfully abandons, or who having ability to do, fails to maintain his or her minor child under the age of 14 years…" (California Penal Code § 271a [2007]).

Parental substance above as a form of CA or CN is defined differently by different states, and not included at all in some states' penal code. Minnesota Statute § 609.378b includes as a form of endangerment: "knowingly causing or permitting the child to be present where any person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance…"

According to the Child Abuse Prevention and Treatment Act (Sec. 2 [42 U.S.C. 5101 Note]) more children suffer neglect than any other form of maltreatment. Congress found that approximately 60 % of children who were victims of maltreatment in the 2001 study sample suffered neglect. They found that 19 % suffered physical abuse, 10 % sexual abuse, and 7 % emotional abuse.

Evaluation of CA Victims

Almost every state in the USA as well as District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statues that mandate reporting of CA or the suspicion of CA. Each state has an agency, such as Child Protective Services, that is responsible for investigating CA and prosecuting CA perpetrators. For this reason forensic evaluation of CA is usually done by or done with the municipal agency of jurisdiction. Because there are many different forms of CA and CN, it often requires a team of professionals to comprehensively determine the presence or absence of CA or CN by examining different types of evidence.

Physical Evidence

Most forensic CA evaluations begin with a thorough physical evaluation of the child. This is generally done by a pediatrician. Specific guidelines for the physical examination of a child suspected of having been abused are offered by the U.S. Department of Health and Human Services (NGC, 2007). Key elements of this examination include:

- **Clinical Presentation and Settings**—this involves consideration of the circumstances under which the case comes to forensic attention: Infants and children are reported as suspected victims of physical abuse when 1 or more of the following occurs:
  - An individual (including a professional) sees and reports a suspicious injury
  - An individual witnesses an abusive event
  - A caregiver observes symptoms and brings the child in for medical care but is unaware that the child has sustained an injury
  - An individual asks a child if he or she has been hurt in an abusive way
  - The abuser thinks the inflicted injury is severe enough to require medical attention
  - The CA victim discloses abuse
- **Medical History** Explanations that are concerning for intentional trauma include:
  - No explanation or vague explanation for a significant injury
  - An important detail of the explanation changes dramatically
  - An explanation that is inconsistent with the pattern, age, or severity of the injury or injuries
  - An explanation that is inconsistent with the child's physical and/or developmental capabilities
  - Different witnesses provide different explanation for the injury or injuries

- **Physical Examination**
  - General assessment. This includes assessment of the child's development with regard to physical and emotional maturation and whether or not deviations have been attended to. For example, if a child's body weight was significantly less than expected given the height, or length, of the child, there should be evidence of medical and/or nutritional investigation and intervention.
  - Skin injuries—bite marks and burns are considered by the U.S. Department of Health and Human Services to be of particular interest
  - Cranial injuries
  - Thoracoabdominal injuries—that might result from blows to the stomach or midsection
  - Skeletal injuries—particularly those that might suggest "grab marks"
- **Diagnostic Testing**—This includes numerous different diagnostic tests depending on the nature of the injury, including: computerized tomography (CAT scan), blood testing, urine testing, etc.

If sexual abuse is suspected, physical evidence may include scarring of sexual areas or DNA samples from a perpetrator. In this case a professional qualified in DNA analysis may need to be added to the team. Audio and visual reproductions of assaults or incriminating behaviors may also be available. Consultation with forensic audio–video experts may be required to examine computer hard drives, Smartphone histories, or social networking traces.

Clinical Evidence

This refers to evidence obtained through clinical investigation. A significant portion of this type of evidence involves emotional injury that was caused by the abuse. Most child sex abuse crimes are proven without physical evidence and thus are highly dependent on this type of evidence (Janssen, 1984). Guidelines for the clinical evaluation of child and adolescent sexual abuse were compiled by the American Academy of Child and Adolescent Psychiatry (AACAP, 2010). Some of the critical procedures are as follows:

- The choice of clinician to evaluate the child for abuse. "Clinicians performing these evaluations should possess sound knowledge of child development, family dynamics related to sexual abuse, effects of sexual abuse on the child, and the assessment of children, adolescents, and families. Further, they should be trained in the diagnostic evaluation of both children and adults. They should be comfortable with testifying in court and prepared and willing to do so."
- The number of times the child is to be interviewed. The child should be seen for the minimum number of times necessary and by the fewest number of people as is necessary. It is also important not to err on the side of too few interviews. Sorensen and Snow (1991) reported that of 116 confirmed cases of child sexual abuse, 79 % of the children either initially denied the abuse or were tentative in disclosing.
- The location of the interview. Generally, it is recommended that interviewing be done in private areas that minimize distraction. Studies show that children's ability to focus on the interview is significantly adversely affected by distraction (Tun & Wingfield, 1993). This may be particularly of concern in mental health centers or clinics. Studies have also shown that children are inhibited from revealing abuse when interviewed in the presence of the abuser (Flin, Stevenson, & Davies, 1989; Peters, 1991) or to accuse a peer of wrongdoing in front of an innocent peer (Harari & McDavid, 1969). Pence (2011) cautions "it should not be assumed that a parent's presence will decrease stress. Whether a child will experience a particular person's presence as supportive depends on the nature of the relationship between the child, the person offering support, and the kind of support provided" (Goodman, Quas, Batterman-Faunce, Riddlesberger, & Kuhn, 1994, 1997).

- Obtaining the history. This should include: developmental history, history of prior trauma or abuse, relevant medical history. This step may be helpful in identifying vulnerability to abuse. For example, it is estimated that children with disabilities are 4–10 times more vulnerable to sexual abuse than their nondisabled peers (National Resource Center on Child Sexual Abuse 1992).
- Interviewing both parents in intrafamilial abuse. This should include a psychiatric assessment of each parent, especially if there is a concern that the allegation may be false, or when a parent was abused as a child. When the accused family member is not a parent, that person should be interviewed as well.
- Considering false allegations. False allegations of CA are not uncommon and may arise for a number of different reasons. One common source of false allegation is the misinterpretation of non-abusive actions as being abusive. Children sometimes characterize appropriate punishments as abusive as well as parents requiring children to do chores around the home. Some children characterize any criticism or statement of disappointment as abusive. Adolescents sometimes falsely claim to have been raped or abused in order to cover up for consensual sexual acts that are later regretted. Children sometimes make false allegations to punish or manipulate their parents. False allegations of CA may also be made by parents. This is particularly true if the parents are engaged in a custody dispute.
- Assessing the child's credibility. This is critical in giving the child's report proper weight in consideration of allegations. Assessing the child's credibility requires expertise in interrogative interviewing as well as knowledge of developmental differences in cognition and communication.
- Medical evaluation.

The psychiatric syndromes most often associated with exposure to trauma are acute traumatic stress disorder (ATSD) and posttraumatic stress disorder (PTSD). According to the American Psychiatric Association (APA, 2000), ATSD occurs when (pp. 471–472):

A. The person has been exposed to a traumatic event in which both of the following were present:
   1. the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others
   2. the person's response involved intense fear, helplessness, or horror
B. Either while experiencing or after experiencing the distressing event, the individual has three (or more) of the following dissociative symptoms:
   1. a subjective sense of numbing, detachment, or absence of emotional responsiveness
   2. a reduction in the awareness of his or her surroundings (e.g., "being in a daze")
   3. derealization
   4. depersonalization
   5. dissociative amnesia (i.e., inability to recall an important aspect of the trauma)
C. The traumatic event is persistently re-experienced in at least one of the following ways: recurrent images, thoughts, dreams, illusions, flashback episodes, or a sense of reliving the experience, or distress on exposure to reminders of the traumatic event.
D. Marked avoidance of stimuli that arouse recollections of the trauma (e.g., thoughts, feelings, conversations, activities, places, people)
E. Marked symptoms of anxiety or increased arousal (e.g., difficulty sleeping, irritability, poor concentration, hypervigilance, exaggerated startle response, motor restlessness)

PTSD is a similar cluster of symptoms but is defined by its presence, 6 months or more after cessation of the trauma. A thorough understanding of PTSD is critical given the findings that it is common for children to only partially reveal abuse during an initial interview with more complete revelation following successive interviews utilizing advanced interviewing techniques (Eliott & Briere 1994).

Interviewing suspected victims of CA requires a specialized method of inquiry. The American Professional Society on the Abuse of Children (APSAC) recommends that CA evaluators meet the following training criteria (APSAC, 2002):

1. The evaluator should possess a graduate level mental health degree or be supervised by someone who does.
2. The evaluator should have professional experience in assessing and treating children and families, and at least 2 years, but preferably 5 years, professional experience with sexually abused children.
3. The evaluator must have had specialized training in child development and child sexual abuse.
4. The evaluator should be knowledgeable about the dynamics and consequences of abuse victimization.
5. The evaluator should be familiar with different cultural values and practices that may affect definitions of CA.
6. If the evaluation is for forensic purposes, the evaluator should have experience with forensic evaluation and expert testimony.
7. The evaluator should approach the evaluation with an open mind to all possible responses from the child and all possible explanations for the concern about sexual abuse.

Specialized interviewing techniques are required for forensic evaluation of CA. Entire books have been written on interview techniques and should be consulted before embarking on an evaluation. The following is a discussion of general techniques specific to this endeavor.

Multiple interviews of suspected victims of CA are generally required. This is necessary because abuse is often not fully revealed on initial contact but later embellished on subsequent contact (Eliott & Briere, 1994).

Care should be taken to avoid asking leading questions. Studies have shown that children are quite suggestible (Ceci & Huffman, 1997) and that leading questions may significantly and permanently skew the obtained data. APSAC (2002) offers several interview components that increase the effectiveness of forensic evaluation of CA. The following are included in their guidelines (APSAC, 2002):

- Introduction of self and role—this involves formal introduction of the evaluator as well as introduction to the process. It often includes a statement of the purpose of the interview.
- Rapport building—this involves establishing a give and take exchange with the child and help the child to obtain a comfort level with the examiner and examination.
- Developmental screening—this allows the examiner to "make note of the child's capacity to provide a narrative account, knowledge of relevant concepts (e.g., prepositions), ability to understand and respond to questions, use of language, attentional capacity, and emotional and behavioral reactions to specific interview topics and to the interviewer. These observations enable the interviewer to speak to the child in developmentally appropriate language" (APSAC, 2002).
- Competency check—this is an evaluation of the child's ability to provide competent testimony or account.
- Ground rules—this is a communication from the evaluator to the child about expectations and understanding of parameters of the exchange. The following ground rules were suggested:
  1. The interviewer may inform the child that the purpose of the interview is to talk about "true things and about things that really happened."
  2. The interviewer may say he or she will be asking the child a lot of questions and it is okay if the child does not know or remember all the answers. The child may be told it is important that the child not guess, but tell the interviewer, "I don't know" or "I don't remember."
  3. If the interviewer makes a mistake, it is okay for the child to correct the interviewer.
  4. If the interviewer asks the child about a topic that is "too hard" or stressful to talk about, the child should let the interviewer know so the interviewer can consider asking the question in a different way.

5. If the child describes a particular event, he or she can be reminded that the interviewer was not present and needs the child's help to understand what happened.

- Introducing the topic of concern—this is where the topic of possible abuse is introduced. This may begin with general questions, such as "do you know why you are here today?" If necessary, more specific questions may be asked such as "What were you doing when the teacher took you away from that man?" Open ended questions, such as "what are some things you do and do not like to do with Cousin Kevin?" are also utilized.
- Eliciting detailed description of concerning events—the ideal outcome is the acquisition of a narrative of the event or events in the child's own words. APSAC recommends three areas of special attention in this endeavor:
  1. Detailed information about possible abusive events—who, what, and where questions are particularly helpful in eliciting as much detail as possible.
  2. Contextual detail—this includes information about when and where abuse occurred as well as details about the child or the perpetrator's clothing. This also includes query about instruments or items present or used in the abusive acts. This may include paddles, belts, creams, sex toys, photographs, magazines, videotapes, articles of clothing, costumes, and computer software. These items may also be recoverable and serve as corroborative evidence.
  3. Other person's knowledge of possible abuse—this should include not only people present during the abuse but also people the child told about the abuse.
- Closure—this involves an attempt to end the interview on a positive note. Recounting traumatic events may result in re-traumatization of the child. The evaluator should be prepared to do some debriefing prior to termination of interviews.

Critical areas of inquiry should be asked more than once, if possible with somewhat different wording. This allows for assessment of the reliability of the information obtained. However, the evaluators must be careful not to be coercive in their techniques. False reporting of abuse has been associated with use of repetition of suggestive questions (Cassel, Roebers, & Bjorklund, 1996; Goodman & Quas, 2008).

In addition to direct verbal inquiry, supportive devices may be used to enhance the child's ability to communicate his/her experiences. Anatomically correct dolls are an example of a supportive device. Children are shown the dolls and asked to show where they were touched or demonstrate what was done to them. Pencil or crayons and paper sometimes facilitate expression of victimized children as well.

Obtaining corroborating information from other sources is critical in forensic evaluation. Patients undergoing clinical evaluation tend to be open and candid with evaluators in order to maximize the information that the evaluator has to obtain to help resolving discomfort or dysfunction. Subjects of forensic evaluations are often invested in outcomes that are inconsistent with full revelation. Children may be protective of their parents or other perpetrators of abuse and they fear being removed from an abusive home and put into foster care. Corroborating sources of information may include: school, medical professionals, family friends, or domestic employees. For example, during an evaluation, the father of a child was alleged to have made frequent visits to the child's classroom while school was in session and humiliating her in front of her peers and teachers. When questioned, the father acknowledged going into the classroom, but denied humiliating his daughter. He also stated that he was welcomed in the school by both the child's teacher and the school psychologist. In this case it was necessary to speak to the child's teacher and school psychologist to verify the father's version of the story. In this case, both the teacher and the psychologist disconfirmed the father's account and stated that he was disruptive and inappropriate, and that they would prefer he visited only during parent–teacher events.

Case # 1: Sonny

Case study # 1 demonstrates the importance of forensic CA evaluators to be familiar with local definitions of child abuse as well as knowledge of cultural standards for sexual behavior in different cultures. It also demonstrates the application of the above discussed skills in evaluation of sexual abuse.

Sonny is a 6-year-old male only child. His parents, after 2 years of marriage, divorced in 2008. The mother was the sole legal custodian of the child and had residential custody as well. Sonny visited his father every other weekend and for dinner on Wednesday evenings. In 2011, Sonny's mother reported that upon return from a weekend visit with his father, the child shared with her some unusual activities. The report was made to Child Protective Services.

The mother claimed that the father was "sexually molesting my son." She reported that the child described touching his father's penis and that the father rubbed his penis against him in bed. She also represented that the child described kneeling in front of his father while his father was naked and that he had "something sticky" on his hands.

Sonny's father acknowledged that the child grabbed his penis once in February 2011 while he was dressing. He noted that he told the child "be very careful, it's really sensitive." He acknowledged a second occasion in March 2011 while the father was sitting on the toilet urinating. He stated that the child "ran in and grabbed my penis really hard." He also described a third incident where the child jumped into bed with him and "grabbed my penis and wiggled it once or twice," but added "there was never any arousal on my end." Despite this, the father maintained that he believed that he had not done anything wrong and that he had not hurt his child. He explained that he was raised in Germany and that this present situation is due to a "cultural misunderstanding." He explained that where he grew up the "naked body is seen in two different ways." He differentiated between "sexual intimacy" and "health reasons or being natural."

Because the allegations of sexual abuse came from the mother and were not confirmed by the father, it was necessary for Sonny to be interviewed by a professional, sometimes called a validator. During his interviews, he described touching his father's penis and "something came out." He explained that he and his father do "experiments to see if my papa can pee." The child also apparently made reference to his father's "big penis and hairy butt." The child stated that his father did not force him to do anything he did not want to do and that he was not afraid of his father in any way. The evaluator also noted that the child did not show signs or symptoms of emotional disturbance or alienation from either parent, although she did note that the child was "sexually precocious."

Several collateral sources of information were interviewed. This was due to concerns about the accuracy of the child's report due to the child's young age and because the initial source of the information was through the mother's reporting. Sonny's kindergarten teacher was interviewed as well as his mother to validate Sonny's reports. Sonny's father's sister was interviewed regarding cultural practice in the region in which they were raised and for her explanation of parenting practices in their parent's home.

Sonny's mother described a history of physical and sexual abusiveness towards her during the marriage and afterward. She revealed that she had obtained multiple temporary orders of protection (TOP), some of which were violated by him. This was verified with the courts, police, and some day care centers who provided confirmation of these claims.

Sonny's father's sister verified some of the father's statements about the normalization of nudity in the environment in which they were raised, but disconfirmed some of his specific descriptions. For example, he described that he and his sister walked freely through the street naked to the local swimming area and that other children did this on a regular basis. She could not recall any occasions where she did so.

Sometimes CA cases involve children who are not able to verbalize their experiences. This may occur because the child is unable or unwilling to verbalize his/her experiences. Children may be unwilling to speak of abuse because they are

embarrassed or because they fear that disclosure will bring consequences even worse than being abused again (Berliner & Barbieri, 1984). Perpetrators warning children that they will hurt their families if they disclose the abuse is a common threat designed to inhibit victims from disclosing. It may occur because the child is suffering from amnesia concerning the events of the abuse, as is common with ATSD and PTSD, or it may occur because the child is an infant and has not acquired language yet. In these cases, the focus of the evaluation must be on non-interview obtained data. Case # 2 is an example of this type of evaluation.

Case # 2 Ray

Ray is an 11-month-old infant. He is the third of three children born to an intact marriage, and there was a fourth child in gestation at the time of the evaluation. On January 15, 2009, Ray was brought to the emergency room of their local hospital. Ray's parents brought him to the emergency room complaining of unusual, unsynchronized eye movements. During the visit, a chest X-ray was performed which revealed three broken ribs. The emergency room staff noticed that the injuries to the rib were partially healed. They asked the parents what had happened but neither parent offered an explanation. For this reason, the case was referred to Child Protective Services for investigation.

Interview and observation was of little use due to the child's age. A full medical evaluation was ordered. The evaluation included a computer-assisted-tomography (CAT) scan of the brain. In addition to the broken ribs, it was found that the child had multiple hemorrhages (bleeds) in the retinas of both eyes.

Both parents were interviewed separately. Ray's father eventually admitted that he "slipped and fell backward" on the tiled kitchen floor, hurting the child's ribs as he grabbed the child tighter while he fell, thus hurting the child's ribs. He also explained that he decided to keep the incident to himself because "I didn't want anyone to accuse me of being negligent," "I didn't want anyone to get upset with me." Ray's mother had no knowledge of any event hurting her child or that he even was hurt.

This case demonstrates the need for comprehensive physical examination of suspected victims of child abuse. In cases of emotional neglect, children often do not realize that they are being neglected. This is particularly true when physical needs are met adequately. When this is the case a thorough evaluation of the child's history and mental status is essential to identify the neglect. Case # 3, which began as a child custody forensic examination, is an illustration of this.

Case # 3 Jess

Jess is a 9-year-old adopted female who was interviewed pursuant to her parents' divorce and associated contested custody trial. Jess and her younger sister were raised in substantial affluence, and all physical needs were well met by both parents. Private school, nannies, and academic tutors were freely available and generously supplied.

The child's medical history was significant for encopresis (incontinence of feces) and obesity, which were still active problems at the time of the custody interview. The parents were already living in separate residences at the time of the evaluation. The child's father expressed concern that, while the mother was generally loving to the children, she was not attentive to the child's emotional needs. Interviews with the children's nannies revealed that the mother was not compliant with recommendations of the child's therapist. For example, against professional advice, the mother put both children in diapers and gave them baby bottles to drink out of before bed. She told the children not to worry about wetting the bed after drinking bottles of water before bed because they were in diapers anyway. The mother shared that she wears adult diapers herself while traveling to reduce the need for stopping and expected her children to do so as well. Jess arrived at the examiner's office with her mother wearing only a jumper and no underwear. She explained that she had just come from

school, an expensive private school, and that her mother often allows her to go to school this way.

Not surprisingly, Jess suffered considerable social dysfunction. She was ostracized by peers due to her weight and frequent foul odor. The parents of her peers were reluctant for their children to visit with Jess at her home due to these factors, which raised concern about supervision. The child did not understand the connection between her inappropriate infantilization at home and her social dysfunction.

Expert Testimony

Anyone involved in doing forensic evaluations of child abuse must be prepared to give expert testimony. There are many different scenarios where expert witnesses might be called upon to give testimony. The most common were listed by Melon et al. (1997):

- Expert testimony about whether an injury has occurred. "In such a case, the clinician will usually be asked to determine whether a "mental injury" resulted from maltreatment of the child…The problem for mental health professionals is most likely to be the question of causation."
- Expert testimony about whether abuse or neglect has occurred. This aspect of testimony concerns whether or not abuse or neglect has occurred as distinct from whether or not injury has occurred. This testimony speaks to an expert opinion as to whether or not a child's testimony is credible.
- Expert testimony about characteristics of maltreated children. This is expert testimony that is not related to any particular child, but rather speaks to the effects of maltreatment in general based upon a general knowledge of related literature.
- Expert testimony about characteristics of child abusers. This may follow a formal examination of a particular suspected perpetrator, or it may involve general statements based upon the existing literature. An example of expert testimony based on examination of a particular suspected perpetrator of child sexual abuse is a specialized evaluation for pedophilia. Such examinations may involve lie detector testing as well as testing for indications of arousal during exposure to images depicting child sexuality. General statements are generally based on published empirical data.

Admissibility of Expert Testimony

Forensic evaluators of CA are often required to testify as to their findings. Those endeavoring in this area need to be aware of the standards that apply to the admissibility of expert testimony in court. Expert testimony usually involves presentation of data obtained through inquiry or examination and the expert's opinion as to the significance of the data obtained. The admissibility of the data obtained depends on the validity of the methods used for data collection, which is discussed above. The admissibility of expert opinion, or scientific evidence, is determined by judicial standard. Two such standards are most widely applied: *Frye* and *Daubert*.

The earlier of the two standards was established by *Frye v. United States*. This case involved appeal of a murder conviction that was, in part, based upon an examination that used systolic blood pressure as an indicator of lying. The appeal claimed that the lie detector evidence was inadmissible because it "had not yet gained such standing and scientific recognition among physiological and psychological authorities" (*Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923]). This established that the reliability and validity of a test or technique must be established by "general acceptance," whereas the previous standards of accepting testimony from a qualified expert as to the reliability and validity of the test were not sufficient. Unfortunately, this term was never specifically defined.

In 1992, the standards for the admissibility of scientific evidence into court were revisited with *Daubert*, *v. Merrell Dow Pharmaceuticals*, *Inc.*, (509 U.S. 579, 113 S.Ct, 2786 [1992]). This case concerns two children who were born with birth defects following the mother's ingestion of an antinausea drug that was prescribed for her called

Bendectin. The drug was made by Merrell Dow, and the petitioners were seeking damages. The defendant claimed that there was insufficient evidence to prove that the drug was the cause of the birth defects, because the studies that linked Bendectin to birth defects were based on animal studies and thus not sufficient to conclude that this causal relationship between the drug and the birth defects was valid for humans. This case advanced the standard of admissibility of scientific evidence to "have general acceptance in the field to which it belongs." Thus the drug studies were in the field of animal biology, and not yet accepted by physicians.

There are 30 states that currently deem the *Daubert* Standard consistent with their Rule of Evidence 702 or have adopted it. The rest of the states either continue to use the Frye standard or have their own. Knowledge of the state's orientation towards this standard is critical if expert testimony is needed.

Case # 3 offers several areas where rule 702 might be tested. While Jess' symptoms can be documented, they would have to be determined by the expert or by tests that these symptoms arose from abuse rather than organic or circumstantial causes. Under the *Daubert* standard, it would be necessary for child experts to agree on "general acceptance" that continued use of diapers and pacifiers with a 9-year-old child causes or exacerbates encopresis, obesity, or social dysfunction. Another, related, aspect of the findings in this case that might challenge the *Daubert* standard is whether or not Jess' symptoms would have improved if the mother had followed the recommendations of the child's psychotherapist. Under the *Daubert* standard, it may not be sufficient that the psychotherapist recommended the cessation of use of diapers and pacifiers with a 9-year old, it would need to be demonstrated that it is generally accepted by psychotherapists that these behavioral changes were effective in producing symptomatic improvement.

Case # 1 also offers a challenge to Rule of Evidence 702. Sonny's father did not deny the touching that occurred with his son on several different occasions. Rather, he challenged the finding that this was harmful or potentially harmful to his child. His challenge was based on his description that the sort of touching described was a non-abusive act by the standards upon which he was raised in Germany. While the issue of cross-cultural differences with regard to acceptable behaviors is relevant with regard to Sonny's father's intent, and perhaps his mental stability, the relevant aspect is whether or not experts in child sexual development "generally accept" that these behaviors are harmful to children and hence considered abusive. Since definitions of abuse generally do not require intent to do harm for conviction, the only aspect for challenge left would be to contend that this behavior affects German children differently from American children.

Conclusions

Each year, approximately 1,000,000 American children are victims of abuse and neglect (CAPTA, 1996). Forensic evaluation of child abuse requires specialized skills as well as specific knowledge of the definitions and statutes that are particular to the local area of practice. Laws, techniques, and governmental support for the forensic evaluation of child abuse continue to evolve. An emerging trend is the use of a team approach involving professionals of different disciplines integrating their work with judicial or governmental agencies (NGC, 2007). It is essential that professionals keep up with new developments in the areas of CA evaluation as well as changes in the laws that govern protection of children both on the local and the national level.

Biography

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Sociological Evidence in Abuse Litigation

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Stephen J. Morewitz

Sociologists and other specialists can assist in various aspects of criminal and civil litigation related to abuse (Jenkins & Kroll-Smith, 1996; Plumm & Terrance, 2009). Abuse refers to maltreatment, including physical, sexual, emotional, and financial. Sociologists and other specialists conduct research, teach college and university courses, and assist organizations and policy makers in developing policies and programs to deal with abuse. They analyze different types of maltreatment, including child mistreatment (CM), intimate partner violence (IPV), elder abuse (EA), dependent adult abuse (DAB), sibling abuse (SA), and parental abuse (PA). Within each category of abuse, the victim can be physically, sexually, emotionally or psychologically, or mentally abused. Certain types of victims can be financially exploited, neglected, or abandoned. Sociological analysis can clarify different aspects of maltreatment, including:

1. Causes of different forms of abuse
2. Incidence and prevalence of different forms of abuse
3. Risk factors associated with abuse
4. Impact of abuse on social, family, educational, and occupational functioning
5. Victims' responses to abuse
6. Abuse prevention

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In this chapter, I analyze research in the above areas and discuss several of my composite cases to illustrate how sociologists can serve as expert witnesses and consultants in litigation involving abuse.

Causes of Different Forms of Abuse

Sociological theory and research methods can be used to determine the prevalence and incidence of various forms of abuse. Different theories have been developed to explain why these forms of abuse occur. Theories such as family stress theory, cultural theory, functionalism, conflict theory, and symbolic interaction can be used to investigate the causes of abuse from different perspectives. Each of these theories emphasizes certain risk factors over others.

Incidence and Prevalence of Different Forms of Abuse

Abuse is often a hidden phenomenon, making it difficult to obtain reliable information about the incidence and prevalence of different types of abuse. Many sources of crime statistics do not have data on some forms of abuse. For example, the Federal Bureau of Investigation's *Uniform Crime Report* and the Bureau of Justice Statistics' *National Crime Victimization Survey* do not collect information on child abuse (Karmen, 2010).

S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_26,

Child Maltreatment

A U.S. Department of Health & Human Services survey, *Child Maltreatment*, *2010*, estimated that in the 2009 U.S. population of 74,639,251 children, 695,000 children were victims of Child Maltreatment (CM). (However, these statistics only include cases which were reported to state Child Protective Services and verified.) The majority (78.3 %) of CM cases involved neglect. The next most prevalent form of mistreatment was physical abuse (17.6 %), followed by sexual abuse (9.2 %), emotional or psychological abuse (8.1 %), and medical neglect (2.4 %). An estimated 10.3 % of the victims suffered other forms of maltreatment, including abandonment, threats of harm, and congenital drug addiction (these percentages add up to more than 100 % because some children may suffer more than one form of abuse) (USDHHS, 2011).

A different USDHHS study, *The Fourth National Incidence study of Child Abuse and Neglect* (*NIS-4*) found that in the study year (2005–2006) an estimated 1,256,600 children were victims of CM. Of the estimated 771,700 (61.4 %) who were neglected, 47 % (360,500 children) experienced educational neglect (a category not listed in *Child Maltreatment*, *2010*), 38 % experienced physical neglect, and 25 % were emotionally neglected. Of the estimated 44 % who were abused, 58 % experienced physical abuse, 24 % were sexually abused, and 27 % were emotionally abused (Sedlak et al., 2010).

In the NIS-4 study, children were included in the category of educational neglect "… when their parent (or parent-substitute) knowingly permits their chronic truancy an average of at least 5 days per month; exhibits a pattern of keeping the child home without legitimate reason; fails to register or enroll a school-age child in school in violation of state law; or refuses to allow or provide needed attention for a diagnosed educational problem, learning disorder, or other special education need. In all such cases, if the evidence supports the conclusion that the acts or omissions in question occurred, then the child is countable as educationally neglected and the NIS guidelines permit assuming that the child experienced moderate educational harm" (Sedlak et al., 2010).

Organizational factors may either protect against or facilitate abuse of children in schools, religious institutions, and other organizational settings. Sociological data and research methods can be used to assess the effectiveness of organizational policies and procedures in preventing CM and/or in responding to complaints.

CM occurs in many school settings. An investigation in Israel used a nationwide sample of 5,472 students in grades 4 thru 6 from 71 schools. This study found that 29.1 % of the students reported emotional maltreatment, while 22.2 % reported physical abuse by the school staff. Boys were more likely than girls to be the victims (Benbenishty, Zeira, Astor, & Khoury-Kassabri, 2002). A similar study of CM in the schools of the Republic of Cyprus questioned 1,339 students in the 4th, 5th, and 6th grades and found that 52.9 % of the students reported neglect, 33.1 % emotional abuse, and 9.6 % physical abuse. Again, boys were more likely than girls to be the victims of all types of abuse by teachers (Theoklitou, Kabitsis, & Kabitsis, 2012).

Intimate Partner Violence

Intimate Partner Violence (IPV), also known as intimate partner abuse (IPA), refers to the abuse that takes place between individuals in current and former relationships, such as dating, living together, and/or marriage (Ferraro, 1996). IPV can include death threats and/or harm to the victim or the family; emotional abuse such as stalking, continuous verbal degradation, and/or preventing the victim from seeing family or friend; physical violence, such as hitting, punching, and kicking; and sexual abuse including sexual assault and rape (Morewitz, 2003, 2004, 2008).

IPV is prevalent in the U.S.A. and around the world. In the U.S.A., almost 3 in 10 women and 1 in 10 men have been raped, physically abused, and/or stalked by a partner and any of these forms of abuse can have a substantial negative impact on the victims' functioning and quality of life (Black, Basile, Breiding et al., 2011; Morewitz, 2003,

2004, 2008). These statistics actually underestimate the prevalence of IPV, since many victims suffer in silence, and make no reports to either law enforcement or family and friends (Black et al., 2011). These victims may believe that law enforcement cannot assist them and/or that no one will believe their claim of abuse (Catalano, 2006).

Elder Abuse

Demographic trends indicate that the U.S. population aged 65 years and older will dramatically increase in the next 40 years, from 12.8 % in 2009 to 20.2 % in 2050 (Shrestha & Heisler, 2011). The projected increase in this population will produce added stress on families and professional healthcare professionals, and thus result in an increased risk of elder abuse (Schiamberg, Barboza, Oehmke et al., 2011). EA consists of physical or psychological abuse, financial exploitation, and/or medical neglect.

A 2004 survey of state adult protective services reports (for the prior fiscal year) stated that among U.S. adults, aged 60 and older, 0.83 % had reported abuse (Teaster, Dugar, Mendiondo et al., 2006). Based on a U.S. national representative sample of 5,777 respondents, Aciemo, Hernandez-Tejeda, Muzzy, and Steve (2009) found that in the previous year, 11 % of the respondents reported psychological, physical abuse, sexual abuse, or potential neglect. A 2006 study of EA in 2,111 private households in the United Kingdom found that 2.6 % of the elders reported abuse by family members, close friends, or care workers (Biggs, Manthorpe, Tinker et al., 2009). While the statics listed above vary, it is obvious that elder abuse is a very confusing problem in the U.S.A.

Studies reveal that neglect is the most prevalent form of EA. Neglect includes failing to meet the elder person's basic health and hygiene needs, such as taking the individual to healthcare visits, providing adequate nutrition, and ensuring that the older person is kept clean and has clean clothes. Neglect also consists of unreasonable confinement and isolation (Mooney, Knox, & Schacht, 2009). Aciemo et al. (2009) found that 5.1 % of the respondents, aged 60 and older, reported possible neglect. In Biggs et al. (2009)'s study, neglect was also the most prevalent type of elder mistreatment (1.1%). In a study of long-term care facilities, two-thirds of the elder resident abuse cases reported by staff members consisted of incidents of neglect (Natan, Lowenstein, & Eisikovits, 2010).

Financial abuse is another common form of EA. In Aciemo et al.'s (2009) investigation, 5.1 % reported current financial abuse by a family member. According to Biggs et al. (2009), financial abuse (0.6 %) was the second most prevalent form of EA. Financial abuse is probably under reported since some fragile victims may have no available means of making such a report.

Emotional or psychological abuse is a prevalent type of EA. The prevalence of emotional abuse was 4.6 % in Aciemo et al.'s (2009) investigation. In Biggs et al.'s (2009) analysis, the prevalence of psychological abuse was 0.4 %.

Physical abuse is another form of EA. In Aciemo et al.'s (2009) investigation, 1.6 % of the elder individuals reported physical abuse, whereas Biggs et al. (2009) found that 0.4 % of the elderly individuals reported physical abuse.

In regard to sexual abuse, Teaster and Roberto (2004) found that sexual abuse of older adults involves sexualized kissing and fondling as well as unwanted sexual interest in the elder person's body. In Biggs et al.'s (2009) study, 0.2 % of elder persons reported sexual abuse; 0.6 % of elder persons reported sexual abuse in Aciemo et al.'s (2009) analysis.

Studies show that older women are more likely to suffer abuse and neglect than their male counterparts. Women were involved in two out of three EA cases reported to adult protective services (Teaster et al., 2006). A majority of the sexual abuse victims were women, aged 70–89, who were nursing home residents (Teaster & Roberto, 2004).

Approximately 50 % of 510 staff members from 22 long-term care facilities reported one or more types of abuse of elderly residents in the previous year (Natan et al., 2010).

EA occurs in different settings, including nursing homes, paid home care, and assisted living facilities (Page, Conner, Prokhorov et al., 2009).

However, 89 % of EA took place in the home. The perpetrators were most likely to be adult children (33 %), other family members (22 %), or intimate partners (11 %) (Teaster et al., 2006). A comparison of the prevalence of abuse in nursing home, paid home care, and assisted living settings showed that EA was most prevalent in nursing homes (Page et al., 2009). The authors also found that a high rate of verbal abuse occurred in paid home care, and a high rate of neglect occurred in assisted living facilities.

Offenders who physically abused elderly men had more pathological attributes than those offenders who physically mistreated elderly women. Perpetrators of physical abuse were more likely to have legal problems, be in psychological therapy, suffer from substance abuse, live with the victim, and be related to the victim than those offenders who abused the elderly victim emotionally or sexually (Amstadter, Cisler, McCauley et al., 2010).

Other Forms of Abuse, Including PA and SA

Children and adolescents may abuse their parents emotionally and physically. They may perpetrate a range of abuse, including threatening to kill their parents and actually attacking them physically (Hong et al., 2012; Kennair & Mellor, 2007; Laurent & Derry, 1999; Ulman & Straus, 2003).

A retrospective analysis of the medical records of 645 French children, hospitalized in a child and adolescent psychiatry department between 1987 and 1996, found that 3.4 % of the children had assaulted their parents. The average age of the parent batterer was 14 years old and they were mostly male. Mothers were more likely to be victims than fathers. The parents had a high rate of psychiatric problems (Laurent & Derry, 1999).

A study of 472 boys and 492 girls showed that the children hit mothers more frequently than fathers. This study also found that sons committed more parent abuse than daughters. In a majority of parent battering cases, the parents previously had physically abused their children (Ulman & Straus, 2003).

A review of the literature by Hong, Kral, Espelage et al. (2012) found that older children are more likely to abuse their parents. In addition, when race/ethnicity was considered, white children had a higher probability of committing parent battering. Mothers were more likely to be the victim of abuse than the fathers. A history of domestic violence (DV) and child abuse was positively associated with parent battering. However, the review noted that more research is needed to clarify all of the risk factors of PA.

Studies indicate that SA is the most prevalent type of family abuse. One study of undergraduate men and women found that the prevalence of reported SA depended upon the definition of the behavior (Mackey, Fromuth, & Kelly, 2010). In another investigation, 98 % of the females and 89 % of the males reported having been the victim of emotional abuse by their sibling. 88 % of the females and 71 % of the males indicated that they had been victims of physical SA (Simonelli, Mullis, Elliott et al., 2002).

Researchers have also analyzed sibling sexual abuse (Latzman, Viljoen, Scalora et al., 2011; Krienert & Walsh, 2011). Sibling sexual abuse has been viewed as trivial, normal sexual exploration, although it has been associated with impairment in psychosexual and psychosocial functioning. Latzman et al. (2011) compared the prior histories of male sibling ($n=100$) and non-sibling adolescent offenders ($n=66$). Those who committed sibling sexual abuse had a greater chance of having been previously sexual abused and exposed to DV and pornography. They point out that sibling sexual abuse has not been investigated extensively even though they estimate that about 50 % of all adolescent-initiated sexual crimes involve a sibling victim (Latzman et al., 2011; Goldman & Goldman, 1988; Shaw, 1999). Furthermore, adolescents were responsible for one out of every six sexual assaults in 2010 (FBI, 2011).

Risk Factors Associated with Abuse

A number of factors lead to IPV and family violence and abuse. Cultural factors such as the media's promotion of violence, gender inequality, and gender differences in socialization increase the risk of IPV, CM, and other forms of abuse.

Cultural factors lead people to view violence as an acceptable and legitimate way of resolving conflict in the family and in other relationships. These cultural factors also promote men's violence against women and children. The acceptance of corporal punishment promotes CM in the family and in the schools (Mooney et al., 2009; Adams, 2004; Morewitz, 2004; LaFraniere, 2005; Straus, 2000).

Community conditions that lead to social isolation and limit access to community social services and healthcare services increase the risk of IPV, family violence, and neglect (Mooney et al., 2009; Morewitz, 2004).

Sociological theory and research methods can be used to determine the risk factors related to different types of abuse. The risks of abuse vary across the life span, and social and behavioral conditions can facilitate or protect against the risk of abuse. Sociologists rely on theories of socialization and other theories to determine who is at greater risk for abuse.

Child Maltreatment

Children who are at greatest risk for abuse are in the birth to 3 years age group. According to *Child Maltreatment*, *2010*, 2.06 % of children younger than 1 year, 1.19 % of 1-year-olds, 1.14 % of 2-year-olds, and 1.10 % of 3-year-olds were victims of abuse. The rates of victimization were lower for older children (USDHHS, 2011).

Some minority children face the highest risk of abuse. 1.46 % of African-American children, 1.10 % of Native American or Alaska Native children, 0.19 % of Asian children, 0.88 % of Hispanic children, 1.27 % of children with multiple racial backgrounds, and 0.78 % of White children were abused. Victimization did not vary significantly by gender (USDHHS, 2011).

Although CM takes place across all socioeconomic status (SES) groups, the factors associated with low SES, such as stress, substance abuse, and restricted access to healthy food and health services, increase the risk of CM (Kaufman & Zigler, 1992).

According to *Child Maltreatment*, *2010*, 15.8 % of the victims had a disability. Almost 4 % of the victims had behavior problems, 3.2 % had emotional disorders, and another 5.2 % had a medical problem. Victims could have more than one form of disability (USDHHS, 2011).

Parents of the abused children are most frequently the abusers (NCIPC, 2010; Mooney et al., 2009; Morewitz, 2004; USDHHS, 2011). Parents who have the greatest likelihood of abusing their children are those who are isolated socially, of low SES or unemployed, young and single, and/or suffer from a mental disorder. Those parents at highest risk also tend not to understand children's needs and child development, and have a history of domestic abuse (Morewitz, 2004, 2009).

From the caregiver risk factors data available in *Child Maltreatment*, *2010* (from 35 states), 25.7 % of the victims of child abuse was in families with either a perpetrator or victim who had a DV risk factor. Alcohol and drug abuse increase the risk of child abuse. Data from the 28 states reporting on caregiver risk factors showed that 10.9 % of the victims of child abuse were in a family that had a caregiver or victim with an alcohol abuse risk factor. Eighteen percent of the victims of child abuse were in a family with a drug abuse caregiver risk factor. (Some states just used the classification of substance abuse and do not distinguish between alcohol abuse and drug abuse in their statistics) (USDHHS, 2011).

Intimate Partner Violence

A number of risk factors are associated with IPV. Individuals who have a history of violence or aggression are at increased risk of committing IPV.

Children who were victims of violence or who observed violence are likely to become perpetrators of IPV as adults. Victims of child abuse had an increased chance of being the victim of abuse in an adult relationship (Heyman & Slep, 2002). Other research shows that mothers who were the victims of childhood sexual abuse had an increased likelihood of being physically abusive toward their own children (DiLillo, Tremblay, & Peterson, 2000). Studies have shown that men who saw their fathers abuse their mothers had a greater likelihood of being abusive toward their

partners as adults. Similarly, women who saw their mothers abusing their fathers had an increased probability behaving the same way toward their partners as adults (Heyman & Slep, 2002; Babcock, Miller, & Siard, 2003).

Substance use, especially heavy alcohol use and abuse, increases the likelihood of individuals perpetrating IPV. In 50–75 % of cases of physical and sexual abuse among intimate partners, alcohol use has been a risk factor (Lloyd & Emery, 2000). In some persons, alcohol and other drug use increases violent tendencies. Alcohol and other drug use enables the perpetrators to avoid responsibility for their behaviors by blaming their abusive behaviors on substance use.

Various stressful and traumatic life events, such as job loss and the breakup of relationships, may result in increased stress and subsequent IPV.

Although IPV occurs across all SES groups, it is more prevalent in low-SES groups (APA, 2006). Physical IPV victimization was four times higher for women who lived in households with annual incomes below $10,000, than for women in households above this income level (Browne, Salomon, & Bassuk, 1999).

EA and Dependent Adult Abuse

In response to aging processes and associated declines in social functioning and deteriorating health, the elderly and dependent adults can be at increased risk of abuse. Risk factors for EA include demographic trends, individuals in dependent relationships, stressful life events and other stressors, social isolation, a history of a poor quality relationship between the offender and the victim, a history of family violence, and offenders who have a history of mental health problems or substance abuse (Newton, 2005; Mooney et al., 2009).

As the U.S. elderly population has expanded, the rate of EA also increased. Reports of elder and vulnerable adult abuse increased 19.7 % between 2000 and 2004 (Teaster et al., 2006). As the number of persons with Alzheimer's disease increases, recognizing and responding to elder abuse can help maintain the quality of life for these individuals (Vandeweerd, Paveza, & Fulmer, 2006).

Impact of Abuse on Social, Family, Educational, and Occupational Functioning Child Abuse

Sociologists evaluate the impact of child abuse. The effects of abuse can be lethal. According to *Child Maltreatment*, *2010*, an estimated 1,537 children died due to abuse and neglect nationwide in 2010. In 2009, an estimated 1,668 children died from abuse and neglect. Children younger than 4 years of age accounted for 73.3 % of all child deaths. Boys had a higher rate of child fatality than girls (2.51 boys per 100,000 boys compared to 1.73 girls per 100,000 girls). A parent or other family member perpetrated 65.74 % of the homicides of children younger than age 4 (USDHHS, 2011). NIS-4 estimated that 2,400 children died in 2005–2006 from Harm Standard abuse or neglect. This estimate is a substantial increase from the NIS-3 estimate of 1,500 child deaths in 1993 or the NIS-2 estimate of 1,100 child deaths in 1986 from Harm Standard Maltreatment (Sedlak et al., 2010). Head injury was the major cause of death in children who were physically abused (Rubin, Christian, Bilaniuk et al., 2003). Children who were physically abused often suffered physical injuries that resulted in long-term disfigurement, scarring, pain, and mental and physical disability (Mooney et al., 2009). Short-term injuries included burns, cuts, bruises, and fractures. Abuse can also cause permanent impairments in visual, motor, and cognitive functioning (CDCP, 2011).

Persistent physical maltreatment produces intense, toxic stress that can impair early brain development and disrupt the functioning of the nervous and immune systems. As a consequence, such abuse can make children more susceptible to chronic diseases of the heart, lung, and liver later in life (CDCP, 2011; Middlebrooks & Audage, 2008).

Child abuse and neglect can have persistent social and emotional consequences, since the victims

often suffer from mental disorders such as anxiety or depression and are often low achievers in school. They frequently have trouble developing social relationships and are distrustful of people. Victims of child abuse often develop low self-esteem, engage in aggressive behaviors, and become juvenile delinquents and criminals as adults (CDCP, 2011; NCIPC, 2010; ACF, 2003; Zhang, Chow, Wang et al., 2011; Spertus, Yehuda, Wong et al., 2003; Briere & Elliott, 2003).

CM is also linked to an increased risk of substance abuse, obesity, sexually transmitted infections, sexual promiscuity, and adolescent pregnancy (NCIPC, 2010; ACF, 2003). Some victims of CM have suicidal ideation or attempt suicide. One study showed that childhood emotional abuse, emotional neglect, and physical abuse were linked to low self-compassion, which increased the risk of psychological problems, including alcohol problems and suicide attempts (Tanaka, Wekerle, Schmuck et al., 2011; Felitti et al., 1998). CM is also associated with abuse victimization in adulthood.

Children, who have been sexually abused, suffer various negative consequences whose severity depends on factors such as the degree of force used and the duration of the abuse. If the child's father or stepfather was the perpetrator, in addition to suffering the trauma, the child loses an important source of social support; the child has been betrayed by the very person who should have inspired love and trust (Spiegel, 2000).

Sexually abused young girls face increased risks of substance abuse, low self-esteem, becoming a runaway, and having multiple sexual partners (Lalor & McElvaney, 2010; Jasinski, Williams, & Siegel, 2000; Whiffen, Thompson, & Aube, 2000). They are more likely to become pregnant as adolescents, acquire sexually transmitted diseases, and suffer from sexual coercion. As adults, they have an increased risk of suffering from post-traumatic stress disorder (PTSD) and suicidal ideation (Spiegel, 2000; Thakkar, Gutierrez, Kuczen et al., 2000).

Child sexual abuse also may predict re-victimization in adolescence and adulthood (Lalor & McElvaney, 2010). A survey, of 300 women in one community, showed that childhood sexual abuse was a predictor of re-victimization. Alcohol and substance abuse, one of the consequences of childhood sexual abuse, appeared to increase the risks of coerced sexual intercourse by acquaintances and strangers, but not husbands (Messman-Moore & Long, 2002).

In addition, one sample of 147 adults, mostly African American, showed that the association between child and adolescent victimization was influenced by risky sexual behavior (Fargo, 2009). These results are supported by Lalor and McElvaney (2010) who also found that child sexual abuse is associated with later risky sexual behavior.

Boys who are sexually abused may develop problems similar to those of sexually abused girls, including depressive symptoms, suicidal ideation, flashbacks, sexual disorders, anger, and guilt (Daniel, 2005).

Victims of child physical and sexual abuse may have serious problems later in life when they marry. Nelson and Wampler (2000) noted that persons who were abused as children later report lower satisfaction with their marriage, higher levels of stress, and less family cohesion than those who were not the victims of child abuse.

Childhood emotional maltreatment can have severe, long-term effects. A study of college men and women showed that emotional abuse and emotional neglect during childhood were linked to later symptoms of anxiety and depression. Emotional neglect was also associated with later symptoms of dissociation (Wright, Crawford, & Del Castillo, 2009).

The consequences of child abuse may be underestimated because experts often do not consider the effects of different types of victimization. One investigation showed that more than 92 % of the children who were raped had suffered at least four other forms of victimization. Those children with multiple victimizations had more symptoms of anxiety and depression than did victims of a single type of victimization (Finkelhor, Ormrod, & Turner, 2007). A study of 17,337 adults showed that the individuals who experienced seven or more adverse childhood experiences had a 35.7 % lifetime history of attempted suicide compared to 1.1 % for those

who had not been abused as children, or 2.2 % for those who had been abused once (Middlebrooks & Audage, 2008).

Intimate Partner Violence

IPV causes adverse consequences in many ways. It produces physical, sexual, and emotional and psychological injuries in partners and their children (Morewitz, 2004). Many victims suffer severe physical injuries, necessitating emergency medical care. Some of these abuse-related physical injuries include internal bleeding, head trauma, and fractures. In 2007, intimate partner abuse caused 2,340 deaths (14 % of all homicides in the U.S.A.). Females constituted 70 % of these IPV deaths (DJBJS, 2012).

The victims of IPV often suffer severe psychosocial trauma, resulting in both short-term and long-term psychosocial problems. Victims of intimate partner sexual assault, rape, and death threats are at increased risk of developing the crisis syndrome, PTSD, and the Stockholm syndrome, which refers to a pathological bonding or attachment that develops between the victim and her or his abuser (Morewitz, 2003, 2004; Karmen, 2010). Victims are likely to suffer a range of traumatic symptoms, including panic disorder, flashbacks, sleeping disturbance, eating disorders, low self-esteem, and social isolation. The victims often have difficulty in social relationships. Victims of IPV may engage in suicidal behavior and eventually commit suicide.

IPV victims may participate in a variety of unhealthy behaviors such as having unprotected sex and abusing alcohol and/or other drugs in an attempt to ameliorate the related fear and anger that they suffer as a result of their traumatic experiences (Morewitz, 2004).

In 2002, state courts in 16 large urban counties heard 3,750 IPV cases. In 36 % of these cases, children were present during the violence, and 60 % of these children were direct witnesses of that violence (DJBJS, 2012). Children who witness IPV may suffer significant psychosocial trauma such as sleeping problems, poor academic performance, clinging behaviors, fretful behaviors, and difficult relations with their parents (Pagelow, 1990; Lemmey, McFarlane, Wilson et al., 2001; Morewitz, 2004).

IPV is very costly to the victims, their families, and society. In 2003, an estimated 8.3 billion dollars was spent on the medical care, mental health services, and time away from work associated with intimate partner abuse (CDCP, 2003; Max, Rice, Finkelstein et al., 2004). IPV also increases the risk of financial exploitation, since abusive partners may prevent their victims from going to work or restrict their access to financial resources.

Elder Abuse

In 2004, the various state Adult Protective Services in the U.S.A. received a total of 565,747 reports of elder and vulnerable adult abuse (Teaster et al., 2006). EA produces emotional difficulties such as low self-esteem and depression. It can also cause substantial family distress, lower social and cognitive functioning, immunologic impairment, and an increased rate of mortality (Vandeweerd et al., 2006).

Abuse Survivors and Stigma

Sociologists investigate how societal stereotypes and beliefs promote the stigmatization of abuse survivors. They analyze how abuse survivors can fight the stigma of abuse and reclaim their respect and identity (Dunn, 2011).

Victims' Responses to Abuse

Sociologists study the impact of different social, psychological, and financial factors on the various ways victims of abuse respond to their victimization. Some investigations have looked at the victim's response to the effects of stalking and other forms of traumatic abuse (Morewitz, 2003).

Sociologists have investigated how death threats made in intimate relationships can impede the coping strategies of the victim. Many IPV victims have a feeling of helplessness and apathy

in response to the traumatic nature of the abuse (Morewitz, 2008).

The factors that increase or reduce the victims' feelings of helplessness have been studied as well as the effects on self-esteem in victims' responses to abuse (Morewitz, 2003, 2004, 2008). Certain social conditions increase the risk that the victims of abuse may develop the Stockholm syndrome (Fuselier, 1999; Morewitz, 2003).

Researchers have developed profiles to highlight the most effective interpersonal resources needed by IPV victims to effectively cope with their victimization (Morewitz, 2003, 2004). For example, victims who have extensive social support and social networks are better able to leave their abuser and recover from their trauma, than those victims without such social support and social networks.

Sociologists have also assessed which social factors inhibit or facilitate the IPV victim's use of social services, police, health care, and other services to cope with their victimization (Morewitz, 2003, 2004, 2008).

Sociologists have also examined the victim's responses to the cycle of IPV, also known as "The Cycle of Domestic Violence," which reflects the different stages of IPV from tension building to violent outburst to tranquil loving relationships and then back to tension building (Walker, 1979).

Prevention

Sociologists have investigated the effectiveness of primary, secondary, and tertiary prevention strategies on reducing the rates of abuse in local communities (Mooney et al., 2009).

Primary Prevention

Primary prevention strategies target the general population to prevent abuse from occurring. Media and educational programs and campaigns develop awareness of the extent and nature of domestic violence to educate the public about ways to avoid abuse (Mooney et al., 2009). These programs teach parents, teachers, and others involved with children about what to expect in terms of reasonable child behavior, and effective ways to discipline children without resorting to violence.

Another primary prevention method is to reduce the violence-inducing stress by providing communities with employment opportunities, better educational programs, affordable housing, health services, and other resources (Mooney et al., 2009).

Secondary Prevention

Secondary prevention approaches focus on interventions for high-risk families and individuals in different settings. These strategies include parent effectiveness workshops, support groups for parents, counseling for individuals, couples, and families, substance abuse treatment, and programs involving home visits (Mooney et al., 2009). High-risk individuals and families tend to come from low-SES groups, have a history of mental disorders, abuse alcohol and other drugs, and have a history of CM. Single-parent families and teen parents can also be at risk.

Sociological data can be used to evaluate how secondary prevention training can be improved for those who can help at-risk individuals. This includes healthcare providers, counselors/therapists, teachers, coaches, parents, and others (Morewitz, 2008). Sociological findings can be employed to assess how abuse screening protocols and procedures can be improved to identify high-risk individuals. For example, Cowan and Morewitz (1995) found that a short screening questionnaire helped university students at a large urban university health services discuss problems such as dating violence and other types of abuse they may have suffered. Such protocols can be very helpful since health professionals may fail to adequately screen for abuse and, as a result, fail to detect it (Morewitz, 2004, 2008).

Researchers have evaluated the use of anatomically correct dolls (ACDs) in assessing child sexual abuse. Sociological data have been used to improve the training of child abuse investigators. For example, Powell, Fisher, and Hughes-Scholes (2008) demonstrated that instructors who offered

feedback to investigative interviewers during practice interviews increased the investigative interviewers' use of open-ended questions, which improved their performance.

Tertiary Prevention

Tertiary prevention provides a range of crisis assistance and treatment to abuse victims and perpetrators (Mooney et al., 2009). This assistance includes domestic violence shelters, rape treatment centers, and counseling programs. In some communities, shelters are also available for victims of elder abuse.

Tertiary prevention also may involve removing abused children from their homes and placing them in foster care or in the care of other family members (Mooney et al., 2009). Family preservation programs also intervene with families that are at risk of having a child removed because of abuse or neglect.

Sociologists evaluate the effectiveness of the legal system's response to children exposed to abuse in different settings. They also evaluate the effectiveness of policies that view CM as a public health problem, or as a social problem that harms individual children. Reading, Bissell, Goldhagen et al. (2009) have suggested that a 'children's rights approach,' as proposed in the United Nations Convention on the Rights of the Child, should be followed in cases of CM.

For children who are exposed to DV, the courts in some jurisdictions have coordinated court responses, child development instruction for the police, multidisciplinary team strategies, and supervised visitation centers (Lemon, 1999). However, the effectiveness of these approaches in improving the children's outcomes is not clear and is currently not being investigated.

A study of the impact of community notification policies on reducing recidivism among sex offenders found no statistically significant improvement (Madden, Miller, Walker, & Marshall, 2011). Previously, a survey of 261 sexual abuse professionals found that a majority did not believe that residential housing restrictions were helpful in reducing recidivism (Levenson, Fortney, & Baker, 2010).

A court may order an abusive parent or spouse to leave the residence (Mooney et al., 2009). About 50 % of the states have mandatory arrest policies that require the police to arrest the abuser. Sociologists have investigated the effectiveness of these various abuse prevention strategies. Based on an analysis of the National Incidence Reporting System for 2000, Simon, Ellwanger, and Haggerty (2010) showed that the probability of arrests for DV episodes and violations of orders of protection increased in jurisdictions that had mandatory and preferred arrest policies compared to jurisdictions that had permissive/discretionary arrest policies.

Sociologists have analyzed how the social characteristics of the individuals involved in IPV influence their perceptions of the effectiveness of the police in responding to IPV incidents. For example, in a national sample of 820 women, IPV victims with higher levels of educational attainment reported less police effectiveness (Cattaneo, 2010).

Abusers may participate in voluntary or court-mandated treatment programs. These programs consist of counseling, including substance abuse counseling, and training in anger management, conflict resolution, and communication skills. Sexual-abuse perpetrators receive treatment, including cognitive behavior therapy (Stone, 2004).

Sociologists have analyzed how social and behavioral factors may impact the treatment of both victims and perpetrators. They have studied what social conditions increased the likelihood of positive treatment outcomes. For example, investigators have studied how the motivation, locus of control, and degree of compassion of IPV batterers may influence the outcomes of court-mandated batterer treatment programs.

Sociological data have been used to assess treatment effects for participants in DV and substance abuse programs. Scott and Easton (2010) examined possible racial differences in the effect of treatment on white and African-American male IPV perpetrators who were substance dependent. They found that after completing a

court-mandated integrated domestic violence and substance abuse treatment program, white men reduced their use of verbal abuse, but African-American men did not. However, both white and African-American men reduced both their physical abuse and alcohol abuse.

Sociologists have investigated the effects of the court system on victims of clergy abuse. Balboni (2011) analyzed the experiences of victims of Catholic clergy sexual abuse in civil litigation against the Church and found that the civil law procedures overshadowed the survivors' desire to see the Church publicly admit its negligence.

Sociologists as Expert Witnesses and Consultants

Sociologists can assist attorneys in many areas of abuse litigation (Plumm & Terrance, 2009; Jenkins & Kroll-Smith, 1996). For example, in cases in which the battered woman is accused of killing her abuser, sociologists can testify about the abuse she received in her relationship, as well as her attempts to maintain her self-identity in the chaotic world of IPV (Jenkins & Kroll-Smith, 1996).

Composite Case Study: Allegations of Child Sexual Abuse against Child Care Center Owner

I was asked to obtain an expert witness in a child abuse case involving allegations that the owner of a child care center had sexually abused young children at the facility. I was contacted by a criminal law defense firm representing child care center owner. The law firm asked me to obtain an expert witness who would challenge the reliability and validity of using ACDs in assessing claims of child sexual abuse. Sociologists who study the use of ACDs in assessing child sexual abuse can testify about the effectiveness of these dolls in detecting child sexual abuse. These sociologists can testify about the reliability and validity of not only the ACDs, but also the procedures used by personnel involved in investigating child sexual abuse claims.

Composite Case of an Employee Who Allegedly Committed Sexual Offenses at a Youth Organization

I testified in a case involving a female ex-convict who was hired as a counselor at a youth facility. The female ex-convict allegedly committed sex offenses against a boy at that facility. Based on a review of the medical records, school records, and other documents in the case, I testified that the boy was at increased risk of adverse psychosocial effects, including depressive symptoms and suicidal behaviors because of his victimization. Child victims of sexual offenses are at increased risk of suffering from the effects of fear, embarrassment, anger, disgust, depression, guilt, and other psychosocial difficulties. Children who are sexually and physically assaulted and abused by adults are at increased risk for depression, self-mutilation, and suicide (Martin, Bergen, Richardson et al., 2004; Peters & Range, 1995; Morewitz & Morewitz, 1991).

I also opined that child victims can become withdrawn, less verbal, apathetic, retreat to fantasy world, and suffer dissociative reactions and memory loss. Victims also may use imaginary playmates, become fearful, cling to a parent, and exhibit provocative sexual behavior. In addition, they may suffer sleep disturbances and develop eating disorders.

I testified that sex offense victims have an increased probability of re-victimization and psychosocial dysfunction during adulthood (Morewitz, 2004). Among female victims, sexual assault and abuse in childhood may be associated with psychosocial dysfunction and physical and psychological abuse during pregnancy (Morewitz, 2004; Benedict, Paine, Paine et al., 1999). Female victims of sex offenses may have an increased risk of adolescent pregnancy (Rainey, Stevens-Simon, & Kaplan, 1995).

Composite Case Study: History of Abuse and Attempted Suicide: Case Study of Treatment at a Residential Mental Health Organization

I was retained as an expert witness to testify about sociological issues related to an adolescent female who attempted suicide at a residential mental health treatment facility. I interviewed and observed the subject, interviewed and observed her parents, and reviewed the residential mental health treatment facility records, school reports, depositions, and other records related to the case. These records showed that the adolescent had been sexually abused as a child by a neighbor. I testified that her prior sexual abuse was one of the factors that increased her risk both of suicide and other problems such as difficulties in social relations, problems in educational performance, substance abuse, and work problems.

Composite Case Study: Impact of Nun-on-Nun Abuse on a Nun Who Committed Suicide

I was retained by a law firm to testify about the impact of sexual abuse involving a nun who allegedly sexually abused a disabled nun at a residential facility for nuns. The victim had committed suicide after being sexually abused by a nun who was living in same residential facility. In this case, I reviewed depositions, residential facility records, and other documents about the religious history, work history, and social relations of the decedent. I testified in this case about how the decedent became socially impaired and traumatized because she had to live in the same residential facility as her abuser, and this situation increased her risk of committing suicide. In this case, the decedent had requested a transfer to another facility, but her request was denied.

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Using Expert Witnesses in Immigration Hearings/Court

27

Philip M. Levin and Stephen J. Morewitz

Whether an attorney is preparing a claim for political asylum or seeking other types of immigration relief, the use of sociological and psychological expert witness testimony at trial is common. Because most immigration judges require that an expert's testimony be reduced to writing prior to the witness testifying at trial, it is mandatory that both the written and verbal testimony of an expert be solid, credible, and offered in such a way as to further the client's ultimate goals. Experts in immigration cases may testify as to the client's rehabilitation, the hardship his or her family members will suffer in the event of removal (deportation), or about the horrors of the persecution the applicant will suffer if the request for political asylum is denied. Regardless of the situation, the preparation and presentation of expert witnesses in immigration hearings tend to follow the same six steps listed below.

Finalizing Client Testimony

It is of utmost importance that the attorney meets with his or her client as often as is necessary at the very initial stages of case preparation in order to solidify testimony and then reduce it to written form as an affidavit or a declaration. Every good case has a "story"—the thematic hook that explains and justifies the client's request for immigration relief. Reducing the client's story to writing sharpens the verbal testimony by eliminating inconsistencies and vagueness and allows the attorney to evaluate the case's relative strengths and weaknesses. This procedure is extremely important in formulating hearing/trial strategy.

Choosing the Proper Expert

In selecting an expert, the attorney should ask: what exactly am I trying to prove? The answer will give the attorney a good grasp of the type of qualifications that the expert will need. Generally, in immigration hearings, there are two types of expert witnesses: the first is the home country/cultural expert explaining the hardships which the applicant will endure if he or she is returned to his or her country of origin and/or the hardships which the client's U.S. citizen or lawful permanent resident (LPR) family members will encounter if they are forced to move with the applicant to his or her native land. The second type of expert witness is the psychiatric/psychological expert who testifies about the emotional and/or mental hardship to the applicant's U.S. citizen or lawful permanent resident family members in the event that the applicant is removed or if they are forced or decide to accompany the applicant home.

There are many types of expert witnesses, all of varying levels of expertise and credibility.

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DOI 10.1007/978-1-4614-7178-3_27,

To obtain the names of expert witnesses who might be suitable for the case, attorneys may obtain recommendations from their colleagues, and/or from their local chapter of the American Immigration Lawyers' Association (AILA).

The Personal Interview and Written Expert Testimony

The attorney should forward the client's finalized statement to the chosen expert so that expert is able to understand the client's claim as early in the proceeding as possible. This allows time for the expert to interview and evaluate the client, either in person or (much less commonly) over the phone. The expert can then begin to formulate a written opinion.

Finalization of the Expert Opinion

In order to present the strongest case possible, the attorney should discuss the opinion with the expert as it is being drafted. The attorney should help to clarify the facts to avoid any misperceptions, to correct mistakes, and to clear up inconsistencies. Most experts are willing to offer the attorney a draft opinion prior to finalization so that revisions and factual corrections can be made. Remember, the attorney's job is not to make substantive corrections; his changes should be focused on the factual, grammatical, and/or superficial or stylistic content of the opinion. The attorney should try to get the expert opinion finalized as early in the pre-litigation period as possible, since it must be filed with the application or prepared for trial. The attorney should stay in contact with the expert to arrange for his or her availability at the immigration hearing.

Pretrial Preparation of the Expert Witness

It is counsel's job and duty to prepare the expert witness for his or her direct examination. The attorney should review the general testimony with the expert and attempt to anticipate the Assistant Chief Counsel's objections and questions. In this regard, the attorney should try to view the expert's testimony with skepticism. Also, the attorney should review questions anticipated from the Immigration Judge. This strategy will help in viewing the expert's testimony objectively.

Finally, the attorney should know his or her (testimonial) limits. The attorney should remember that an Immigration Judge can receive any oral or written statement; hearsay is generally admissible. (If the attorney plans on contesting hearsay evidence offered by U.S. Immigration and Customs Enforcement, she or he will want a *prima facie* case based on actual testimony, not just affidavits.) The attorney should ask: What is the testimony being offered for? What are we trying to prove? Once the attorney has reviewed the direct examination with the expert, the attorney will be better able to assess the credibility of the expert witness and his or her potential impact at the hearing.

Direct Examination

The direct examination at trial will be either in person or, as is becoming more and more common, over the telephone. The attorney's prior discussions with the expert should have provided enough of a general sense of the expert's testimony so that minor variations in question form at the hearing will not be fatal. However, the expert must try not to ad lib or improvise. The attorney should make sure the expert is aware that many Immigration Judges will interrupt counsel or set aside time to question the expert themselves, seeking to clarify testimony or elicit a particular opinion. The attorney should also make sure the expert will not offer a legal opinion or conclusion, but merely gives psychological or sociological expert opinion. The attorney should try to ensure that verbal testimony does not stray too far from the written word. Following the above six steps will generally allow the expert opinion testimony to assist in having the requested relief granted.

Composite Deportation Case Involving a Certificate of Rehabilitation

In a case involving a woman who was facing deportation because of a criminal offence which had occurred 21 years previously, a forensic sociologist was retained to testify about the extent to which the petitioner had subsequently attained an exceptionally high level of personal rehabilitation. The sociologist had extensive knowledge of, experience with, and interest in the California criminal justice system.

He interviewed the petitioner, reviewed the petitioner's affidavits and employment records, and reviewed the literature on criminal rehabilitation, recidivism, and criminal risk factors. He opined that the petitioner had attained significant personal rehabilitation. In his opinion, the petitioner had demonstrated extensive evidence of high moral character. This testimony was based on the facts that the petitioner had a stable employment history and had won awards and certificates as an excellent employee. For example, the petitioner had worked as a store manager for 14 years and had won many employee-of-the-month awards. Furthermore, like other persons who have shown exceptional personal rehabilitation, the petitioner demonstrated extensive commitment to and participation in outstanding work roles, family activities, neighborhood watch groups, and other community activities (Bonta & Andrews 2007; Cottle, Lee, & Heilbrun 2001; Hawkins 2003).

The sociologist reviewed the petitioner's affidavits and employment records. He then interviewed her about her employment history, social history, family history, and current and past social, family, and occupational functioning. The expert witness interviewed the petitioner about her relations with coworkers, work supervisors, neighbors, and other community residents. The sociologist also reviewed the petitioner's Certificate of Rehabilitation, which she had obtained from the Superior Court of the State of California for the City and County of Los Angeles.

In addition to collecting and analyzing these data sources, the sociologist reviewed the literature on offense history, social, family, demographic, and educational factors and substance abuse history help to predict the likelihood of criminal rehabilitation among juveniles and adults (Bonta & Andrews 2007; Cottle et al. 2001; Hawkins 2003). The expert witness opined that the petitioner did not exhibit any of the risk factors that would increase her probability of re-offending. For example, the expert witness testified that the petitioner did not have family problems, e.g., unsupportive family members, employment difficulties, or impaired social relations. The expert witness also noted that the petitioner had been drug and alcohol free for 20 years, which indicated that she had reached a high degree of criminal rehabilitation.

This expert witness testified that petitioners for a Certificate of Rehabilitation in the state of California confront a very arduous process in trying to obtain such Certificate, and often do not try to obtain this Certificate because it is rarely granted. The sociologist testified that a Certificate of Rehabilitation in California is granted only in situations of substantial and exceptional personal rehabilitation.

In regard to family functioning, the sociologist stated that the petitioner has demonstrated commitment to her husband and other family members. For example, the expert witness testified that the petitioner reported having a loving relationship with her husband and has provided much assistance to her husband and other family members, including her husband's disabled sister. The expert witness also opined that the petitioner reported being very involved in the family's activities, such as cooking, barbecues, birthdays, holidays, and school events.

The sociologist testified that the petitioner offered help to her neighbors and friends whenever possible. The expert witness noted that the petitioner participated in community watch group meetings on regular basis and had offered concrete suggestions for improving the safety and quality of life of her neighborhood and community.

The expert witness also opined that the petitioner reportedly never drinks alcohol or uses illicit drugs and never curses. He noted that the petitioner is reportedly very careful to choose friends who do not use illicit drugs. The expert testified that the petitioner deeply regrets making mistakes 21 years ago, and is now extremely careful to be a law-abiding person.

Composite Deportation Case Involving a Former Nazi War Criminal

A law firm asked a sociologist to testify in a deportation case involving a former Nazi war criminal. The former Nazi war criminal had immigrated to the U.S.A. after World War II and later became a U.S. citizen. He had been living in an Eastern city ever since arriving in the U.S.A. He now was facing deportation because he had failed to disclose to U.S. immigration authorities that he had been employed as a Nazi tower guard at the Auschwitz Concentration Camp during World War II. The U.S. government had a policy of deporting individuals who had lied on their immigration documents about their employment status with the Nazi regime.

The petitioner, who was in his seventies, was seeking to avoid deportation by claiming that he had life-threatening health problems and disabilities. The petitioner argued that he was suffering from diabetes mellitus (DM) and had two total hip replacements (THRs) and as a consequence would suffer life-threatening medical and social problems if he were to be deported.

The sociologist, who teaches at a university and conducts research on the impact of DM and other health problems and injuries on social, family, educational, and occupational functioning, was asked to evaluate the impact of DM and the two THRs on the petitioner's physical, social, and family functioning. The sociologist was asked to review the petitioner's medical records, administered disability questionnaires and scales to assess his degree of impairment in physical, social, and family functioning, and observed the petitioner's ability to perform basic and instrumental activities of daily living.

If the sociologist had accepted the case, he would have correlated these findings with the literature on the social and behavioral factors that predict life-threatening health problems and disability among individuals with DM who have THRs (Marchant, Viens, Cook et al. 2009; Mraovic, Suh, Jacovides et al. 2011). The sociologist would also opine that older adults such as the petitioner are also at increased risk of suffering fatal venous thromboembolism as a complication of THR and other major surgery (Kapoor, Labonte, Winter et al. 2010). Based on the above facts, the sociologist would have testified that the petitioner had a high probability of facing life-threatening problems if he were to be deported because of the severe impairments in his physical, social, and family functioning due to his DM and two THRs.

Biography

Philip M. Levin, J.D. has been practicing U.S. Immigration and Nationality law for almost 30 years. From May 1985 to December 1990, Mr. Levin served as an Associate at Lawler and Lawler, where he specialized in family and business immigration and litigated cases on behalf of clients before the U.S. Federal District Court in San Francisco, California. Since 1990, Mr. Levin has been a Certified Specialist in Immigration Law by the State Bar of California.

Mr. Levin represents clients before the United States Citizenship and Immigration Services (CIS), United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE) as well as the U.S. Department of State (DOS) and U.S. Department of Labor (DOL). He has assisted corporate clients in developing winning strategies to hire and retain talented employees from all over the world. He has also helped hundreds of families immigrate to the U.S.A.

Mr. Levin has been named a Northern California Super Lawyer by Law and Politics Magazine every year since 2006 and received the Wiley W. Manuel Award for Pro Bono Service from the Board of Governors of the State Bar of California.

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Forensic Sociology: The Case of Honor Killing in the Muslim World

28

Shaul Gabbay

> Courts of law are dramatic public stages where moral and material fortunes depend on the capacity of the actors to tell persuasive stories. For many of the participants in these dramas, including defendants, plaintiffs, judges, juries, and attorneys, sociology is an abstract, perhaps arcane, academic discipline with no particular relevance to the important issues before the court. Medicine, psychology, and engineering, on the other hand, are first among those specialties generally recognized as legitimate areas of expertise… The sociologist is, in short, a witness for the explanatory value of sociology but is obviously doing more than representing the discipline.[1]

In 1996, Steve Kroll-Smith and Pamela J. Jenkins embarked on the daunting task of addressing the role sociologists play in the American court system as expert witnesses. As noted in their succinctly stated excerpt above, the role of the sociologist has often been sidelined when compared to those who practice medicine, psychology, and engineering: i.e., "empirical" scientists. As Kroll-Smith and Jenkins imply, the role of the sociologist in court proceedings is perceived as a meager one—a storyteller.

However, as this chapter will demonstrate, the use of a sociologist as an expert witness can serve a valuable, sometimes even indispensible function, particularly when cultural and societal differences divide a client and the court. Such has certainly been the case in my experience as an expert witness during the past decade.

As a scholar specializing in Muslim world studies, I have been asked to provide expert testimony in over 300 cases for individuals who fear persecution in their native countries. Throughout the course of my experience in immigration courts, I have been asked to not only provide country condition analyses concerning the various nations of the Muslim and Arab world but also to shed light on various aspects of Muslim society. The goal is to help the court understand the reality an individual would face if he or she would be forced to return to their home countries. In this capacity, I have not served merely as a sociologist, or a "witness for the explanatory value of sociology," but rather as an educator.

While I have provided analysis for many individuals facing differing circumstances (including the treatment of homosexuals in the Muslim world, those suffering from political oppression, individuals who have been subjected to the practice of female genital mutilation, and individuals and families who face persecution due to religious beliefs), a reoccurring issue that I am consistently asked to address is the practice and prevalence of "honor killings." As such, this chapter will employ the issue of honor killing and honor violence as a means to demonstrate how the use of forensic sociology can not only help to educate but also to help save lives. To begin, I offer the example of the case of Aisha and Gamila.

[1] Steve Kroll-Smith and Pamela J. Jenkins, "Old Stories, New Audiences: Sociological Knowledge in Courts," in *Witnessing for Sociology: Sociologists in Court* (Praeger: Westport, 1996), p. 2.

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_28,

Aisha and Gamila

In the spring of 2011, I was asked to provide expert analysis for the case of Aisha and Gamila, two sisters who were born in Yemen, but due to family ties and clan alliances, they also spent a great deal of time in Ethiopia. Raised in a conservative Muslim family, both Aisha and Gamila were subjected to female genital mutilation (female circumcision) as young girls. Growing up, their father always guarded them with a certain amount of sacredness; and as the girls began to mature, their father became more protective.

Concerned about Aisha and Gamila's "purity" their father placed the two girls in isolation, not even allowing them to attend school. After several years of confinement and physical abuse at the hands of their father, both Aisha and Gamila became severely depressed—to the point where Gamila attempted suicide. Perhaps frightened by the situation, Gamila's father allowed them to return to school—as long as their brother escorted them. And if their brother was not available on certain days, he would hire a cab driver to follow them.

Eventually both girls were able to finish and graduate high school, while their father spent months at a time working at his business in Djibouti, Ethiopia. Still, the girls were under close supervision of their uncle in their father's absence. Following graduation, however, Aisha and Gamila's father decided it was time for them to marry and made arrangements. Neither Aisha nor Gamila wanted a life being married to a man chosen by their father, so they made the choice to flee while their father was away. After careful planning and under great danger, given the watchful eye of their uncle, both girls managed to escape first to Europe and then to the USA. When their father discovered what had happened, he vowed to kill them if they were ever to return to Yemen. In his eyes, they had not only disgraced him, but they had brought dishonor on the entire family and extended clan. For that, according to Aisha and Gamila's father, their blood must be shed in order to cleanse the family name.

The case presented by Aisha and Gamila may seem too fantastical to believe—perhaps even something out of a Brothers Grim tale. Indeed, that is exactly what the immigration adjudication officer thought when he first received their case. Their application for asylum was denied. However, Aisha and Gamila appealed the case, this time calling on outside help to explain how and why they would be so threatened. And when I agreed to provide expert testimony for their case, I knew that it was important not only to substantiate their concerns but also to educate the court on the situation that women (and even men) around the Muslim world are faced with concerning honor killings and honor violence when they are perceived to have brought shame on the family. In order to do so, it was imperative to provide an explanation of the nature of family honor, societal norms, and practices, as well as how they can eventually lead to extreme violence. Instinctively, the first question to be addressed was, "What is an honor killing?"

The Practice of Honor Killing: An Explanation

Honor killing is defined as, "The murder of a person, usually a woman, suspected of having offended the honor of the family or community, generally on the basis of sexual behavior deemed transgressive—for example, engaging in a sexual relationship outside of marriage."[2] Honor killings have been on the rise with the increase in fundamentalism sweeping the region. In 1997, roughly 400 women were killed for honor in Yemen. In 1999, over a 1000 Pakistani women were killed for this cause. Iraq and Iran do not keep relevant statistics, though honor killings are frequent in both countries. In 2003, 17 women were reportedly killed in neighboring Jordan in the name of "family honor," while another 20 were reported murdered in 2004.[3] In a report issued by

[2] Human Rights Watch: http://hrw.org/reports/2008/turkey0508/turkey0508web.pdf

[3] Matthew A. Goldstein, "The Biological Roots of Heat of Passion Crimes and Honor Killings".

the *New York Times*, roughly 5,000 cases of honor killings take place each year and in predominately Muslim countries.[4]

Adding to the picture, and according to the Global Campaign to Stop Killing and Stoning Women, an organization that has been monitoring reported incidents involving honor killings in the Arab world, over 50 cases have been reported in just the past 2 years.[5] Furthermore, in a report issued in early August 2010, the organization notes that in June 2010 alone, 40 cases of violence against women were reported including 21 murders, 8 major injuries, 8 rapes, and 4 "suicides as a result of living conditions."[6] In its own collection of data, the United Nations has also been monitoring both the prevalence of honor killings, as well as the manner in which and by whom they have been conducted. The UN finds that:

> Information collected showed also that means used in honor killing ranged from strangling, burning, forcing the woman to take poison, or throwing her from the window. Killing the girl is not only for establishing pre-marital relationships but also the brother, it was found that in many cases the murderer admits quickly the crime to the police because he feels proud of his act and believes that his tribe or community should know and value what he has done. Mothers sometimes commit honor crimes and kill their daughter especially in cases of daughters having pre-marital relations and having become pregnant.[7]

Between Religion and Culture

During the past decade, the issue of honor killings and honor-related violence (HRV) has garnered an increasing amount of attention, both in the academic world and in the mass media arena. In the realm of the latter, the focus has often been on tying the practice to extremist principles grounded in Islamic beliefs. In the former, however, the task has been more complex, whereas a deeper conceptualization of the ideals and values that serve as the bedrock of society is sought out in order to explain *why* HRV continues to flourish. This means digging deeper than focusing on religion alone.

To be certain, the role of religion cannot be discounted entirely, as cultural values and religion are typically intrinsically married. However, when one discusses practices such as HRV, it is irresponsible to simply "blame" religion (i.e., Islam) based on general stereotypes. Rather, particularly when one reviews the historical context of honor killings and HRV, we can begin to see that the practice was first grounded in secular, tribal traditions.

Predating the revelation of Islam in Babylonia and Mesopotamia, Hammurabi, King of Babylonia, drafted a series of 282 civil and criminal laws, which not only systemized the "*Talion* Principle" (eye for an eye, tooth for a tooth) but also addressed the treatment of women. The Hammurabi Code (1700 BCE), as it is known, ordered that an adulterous woman should face death at the hands of her husband, unless the husband chose not to carry out the task. According to Law 129 of the Hammurabi Code:

> (§129) If a married lady is caught lying with another man, they shall bind them and cast them into the water; if her husband wishes to let his wife live, then the king shall let his servant live.

As a secular judicial instrument, the Hammurabi Code was essentially a product of cultural norms and values that prevailed in ancient Babylonia and Mesopotamia, where women were deemed as subservient to men, thus solidifying an already patriarchal society. As such, any action that was deemed dishonorable to the man and his family name should be punished accordingly. And as both a judicial instrument and a guide to moral behavior, the Hammurabi Code laid the foundation for social interaction and acceptable gender roles for centuries to come.

[4] "A Dishonorable Affair," *The New York Times*, September 23, 2007: http://www.nytimes.com/2007/09/23/magazine/23wwln-syria-t.html?pagewanted=1&sq

[5] "Frequently Asked Questions About 'Honor Killing'" The Global Campaign to Stop Killing and Stoning Women: http://stop-stoning.org/node/12

[6] Violence against women in Egypt on the rise," The Global Campaign to Stop Killing and Stoning Women, August 9, 2010: http://stop-stoning.org/en/node/1266

[7] Ibid

Transitioning into nonsecular discourse, religion has indeed played its role—justifiable or not—when it comes to the practice of honor violence. Indeed, each of the monotheistic traditions (Judaism, Christianity, and Islam) proffers social and moral prescriptions, including when it comes to gender roles. By all accounts, each of them has received criticism for their treatment of perceived moral and sexual deviants and the violence they seemingly promote. Take for example the following:

> From the Hebrew Bible, Leviticus 20:10
>
> If a man commits adultery with his neighbor's wife both adulterer and adulteress shall be put to death. The man who has intercourse with his father's wife has brought shame on his father. They shall both be put to death; their blood shall be on their own heads.

> From the New Testament, 1 Corinthians 6:9–10
>
> Surely you know that the unjust will never come to the possession of the Kingdom of God. Make no mistake: fornicator or idolater, none who are guilty either of adultery or of homosexual perversion, no thieves or grabbers or drunkards or slanderers or swindlers, will possess the Kingdom of God.

> From the Quran, verse 4:34 (Surah An-Nisa)
>
> Men are the protectors, guardians and maintainers of women, because Allah has made the one of them to excel the other, and because they spend (to support them) from their means. Therefore the righteous women are devoutly obedient (to Allah and their husbands), and guard in the husband's absence what Allah orders them to guard (their chastity, their husband's property, etc.) As to those women on whose part you see ill-conduct (disobedience, rebellion, *nashuz* in Arabic) admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly if it is useful), but if they return to obedience, seek not against them the means (of annoyance). Surely Allah is Ever Most High.

Clearly, the above excerpts present the negative aspects of the monotheistic teachings when it comes to gender relations and immoral behavior, and it should be noted that each of the three religions also include commands for the fair treatment of women. Unfortunately, however, the negative verses are the types of verses defenders (and opponents) of the practice of HRV use to support their arguments and actions, whether they be misconstrued or not.

Perhaps no religion has come under more fire and more scrutiny than Islam when it comes to the treatment of women and perceived moral deviants. This is in part due to the fact, as previously documented, that a majority of honor killings take place in the Muslim world and also due in part to the rising sociological trend of Islamophobia that has engulfed the Western world since September 11, 2001. Without doubt, the issue of honor violence and Islam is a contentious issue and has caused a great deal of consternation among those who study the subject. Aptly addressing the tensions between the true meaning of Islam and the allowance of honor violence, Sadia Kausar and Sjaad Hussain of the Faizan al-Rasool Educational Institute in Birmingham (UK) argue:

> Verse 4:34 of the Quran is a verse that is often cited to show the apparent legality and justification in using force against women, but the verse is largely misunderstood and misconstrued…Perhaps asking the question 'Does the Quran condone domestic violence?' is actually inappropriate because the Quran itself does not directly provide the answer. While Islamic law is derived from the principles of the Quran and the *Ahadith*, not all its details are found there…The primary problem that Muslims face is in this issue (like many others, for example, suicide bombing) is that they bypass the sound methodology of the *Fuqaha* and attempt to interpret the sacred texts according to their own deficient understandings in highly charged politicized contexts.[8]

Much like Kausar and Hussain, Amir Jafri (2008) discusses the disconnect between religious values and cultural practices and argues that there is no place in Islam for killing in the name of honor (*ghairat*). Rather, Jafri argues that the practice of HRV is based on a tribal, pre-Islamic worldview, which is influenced by mythical paradigms.[9] Jafri adds:

> The killing of kinswomen in response to perceived breaches of honor clearly finds no endorsement from the relatively rationalistic Islamic texts but

[8] p. 108 Honour, Violence, Women and Islam.

[9] Amir H. Jafri, *Honour Killing: Dilemma, Ritual, Understanding* (Oxford University Press: New York, 2008), p. 67.

> seeks inspiration from more primal codes. Honor killing may occur in certain Islamic societies but such killing is not confined to these societies. There is tension between tribal and the Islamic discourses, the latter unable to completely overwhelm the former, just as the magic (or the mythic) world can never be totally obliterated by the mental, and surfaces in cathartic times.[10]

Explaining the Societal Aspects of Honor Violence

In Muslim society, the community is essentially defined by a normative structure strongly based on religion and family ties; and in these societies, Islam dominates human interaction and its teaching impacts all aspects of life. As both a religious and social guide, the Quran defines individual and family relations that govern all the members of the *umma* (extraterritorial community formed by all Muslims) establishing a close link between religion, family, and community as basic pillars of social cohesion. The Quran also establishes the network of the community and smaller nuclear family, which is an extremely important social structure of Muslim society.

Muslim society is patriarchal. It is a society where men are regarded as the ultimate authority within the family and society, and in which power and possessions are passed on from father to son. So, just as the family represents the main pillar of society in the Muslim community at large, the male represents the pillar of the smaller nuclear family. As such, the importance of the male head-of-household cannot be underestimated. In Muslim communities, the man is responsible for upholding family cohesion as it relates to the community in general. Furthermore, he is responsible for maintaining cultural, religious, and social practices, as well as maintaining family honor within the community.

In terms of family honor and gender roles, it is important to remember that purity is ultimately tied to the woman, which helps to explain why male heads-of-households go to extreme lengths to ensure that their daughters remain chaste. Concerning the man who is seeking a bride, it is incumbent upon him, for the sake of his own family's honor to marry a pure woman who will raise an honorable family. As such, in Muslim society, a woman's virginity upon entering a marriage is not only desirable; *it is a prerequisite*.

As previously noted, Muslim society maintains much of its tribal character, whereas the family, including the larger tribe or clan, represents the most important foundation of society. Family ties are exceedingly important, and maintaining the honor of the family is considered to be the most important value in the culture. In turn, expanding family ties, through marriage, is an important aspect of providing social cohesion and harmony in the community, further strengthening existing bonds. In this sense, marriage is not merely a legal contract, but it also serves as a vital social institution. First, marriage is the only socially acceptable (and legal) way in which a man and a woman can partake in sexual relations.

Sex outside the marriage is referred to as *zina* (fornication), is forbidden by Sharia law, and is severely punished. Sexual issues notwithstanding, marriage also provides a means for men and women to build lasting relationships and to carry out their socially prescribed roles as men and women. As dictated by Islam, men are responsible for upholding religious and social values and are charged with maintaining society. A major aspect of this role is to marry and to develop a strong family that will interact within society at large. Women, on the other hand, are responsible for child-bearing and child-rearing. In general, marriage promotes social cohesion in that it serves to strengthen family relationships and serves as the basis for forming strong families and communities.

Aisha and Gamila Revisited

Turning our attention back to the case of Aisha and Gamila, it is not only necessary to provide a depiction of the nature of family honor and purity in countries such as Yemen, it is also imperative

[10] Ibid., p. 68.

to relate it to the specific case at hand. Given the societal and cultural realities on the ground in the country—which holds family honor as a paramount value—one can begin to see the threats facing the two sisters. From birth, Aisha and Gamila were held to conservative standards, and they were well aware that any deviation from socially prescribed norms would bring about severe consequences. Despite this fact, they eventually decided to disobey their father and flee arranged marriages. And given the significance placed on female purity, along with the traditional rite of arranged marriage carried out by the paternal member of the family, an honor killing would have been inevitable.

Fortunately, this story has a happy ending. Both Aisha and Gamila were eventually granted asylum in the USA, have begun new lives, and are raising children of their own. The outcome, of course, was dependent on many factors and the diligent work of many individuals. But the fact of the matter is that without the use of forensic sociology, and without the bridging of the gap between the "fantastical" and the *understandable* that sociological perspectives provide, it is questionable whether or not either Aisha or Gamila would have lived to see their children grow and thrive.

Biography

Professor Shaul M. Gabbay, Ph.D., is an expert on the Muslim World. His expertise spans 25 years of academic research and teaching at universities including Columbia University, the University of Chicago, Tel-Aviv University, and the Technion. He is currently at the Josef Korbel School of International Studies, University of Denver.

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Courting Media: Mass Media Studies of Immigration Courts

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Katherine R. Abbott

Although scholarship has found that there is no link between immigration and crime or, if a link exists, increased rates of immigration are associated with lower crime levels (Martinez & Valenzuela, 2006; Sampson, 2008; Zatz & Smith, 2012), media still commonly construct immigrants as deviants and threats (Altheide, 2009; Chavez, 2008; Maneri & ter Wal, 2005; Zatz & Smith, 2012). By portraying a link between immigration and crime, media can intensify public opinion and support a moral panic; this moral panic has contributed to restrictive immigration and anti-immigrant legislation (Zatz & Smith, 2012). The media is not the only support of said moral panic and legislation; surrounding social, legal, economic, and political conditions in the USA contribute as well (see Newton, 2008; Ngai, 2004). This deep reciprocal relationship exists between law and society has been highlighted by law and society literature (see Calavita, 2010; Friedman, 2004).

While there has been research into the relationship between media, immigration, and legislation, media analysis of immigration courts (and immigrants who interact with these courts) is lacking. Immigration courts "adjudicate applications for relief from removal or deportation, including, but not limited to, asylum, withholding of removal ("restriction on removal"), protection under the Convention Against Torture, cancellation of removal, adjustment of status, registry, and certain waivers" (United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008, p.7). Proposals to reform the United States' Immigration Courts have been recently suggested (see Appleseed & Chicago Appleseed, 2009; Coyle, 2009, August 10; Wheeler, 2009, July). Given the matters that immigration courts handle, said reforms would impact court cases of national importance; examinations of the narratives surrounding these proposals can identify social conceptions of justice within law and immigration.

Given the relationship of the social institution of media and policy/law (Altheide, 2006; Zatz & Smith, 2012) and the potential impact of the proposed reforms, examining media portrayals of immigration courts and immigrants associated with these courts is imperative and instructional. This analysis will facilitate a better understanding of these proposals, as well as contribute to their evaluation. Because immigration policy and law have been racialized and gendered (Newton, 2008; Ngai, 2004; Zatz & Smith, 2012), it is also important to consider the relationship displayed in popular media between social identifiers (sex/gender, race, class and sexual orientation) and characterizations of immigration courts and the immigrants who pass through them.

After presenting some background information, this chapter will discuss and display a selection of my findings from two media analysis studies of the discourses around immigration

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_29, © Springer Science+Business Media New York 2014

courts. Examining newspaper articles that cover important social issues related to immigration and immigration courts, these studies do not analyze or take a position on the issues themselves. I identify and analyze the present framing and formatting of these issues in newspapers. By doing so, I reveal complexities in the discourse regarding immigration courts, immigrants, and reforming immigration courts. A thorough understanding of this dialogue will assist practitioners in these courts as they proceed with their work and take a position within this dialogue; it will also support these individuals in examining their role in this discourse. Consequently, to conclude, I will highlight the importance and applicability of the discussed studies, as well as similar media studies, for individuals engaged in work at immigration courts, such as individuals providing expert testimony.

Background

Immigration courts are located within the United States' Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) (see Appendix A: Executive Office for Immigration Review Diagram). Although immigration courts ultimately do not handle every case dealing with immigration, for those that they do, they "provide a forum to hear and adjudicate the claims of immigrants whom the government seeks to deport" (Appleseed & Chicago Appleseed, 2009, p. 6). In this court, immigrants, known as "respondents," can argue their eligibility for a "form of relief"; if granted, the respondent can remain within the USA. Forms of relief include asylum, cancellation of removal, adjustment of status, and registry (see The United States Department of Justice: Executive Office of Immigration Review: The Office of the Chief Immigration Judge, 2008, p. 7).[1]

The DOJ provides a graphic and description of removal proceedings (see Appendix B: Department of Justice Diagram and Description of Removal Process), which is the most common proceeding in immigration courts. In 2009, immigration courts completed 352,233 matters (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2010, p. B2), 283,969 of which were removal proceedings (p. C4).[2] In 2009, therefore, removal proceedings made up 80.6 % of immigration court's matters.

Research into immigration courts has explored a variety of topics including patterns in immigration court litigation (Schuck & Wang, 1992–1993), asylum claims adjudication (Anker, 1990), caseload and time (Appleseed & Chicago Appleseed, 2009; Heath, 2009[3], March 29; Transactional Records Access Clearinghouse, 2009a; Wheeler, 2009, July), resources and staff (Appleseed & Chicago Appleseed, 2009; Wheeler, 2009, July), representation of aliens (Appleseed & Chicago Appleseed, 2009; Wheeler, 2009, July), judicial independence (Wheeler, 2009, July), the court recording process (see United States Governmental Accountability Office, 2006a), court records (see Appleseed & Chicago Appleseed, 2009), and the appeals process (Alexander, 2006–2007; Appleseed & Chicago

[1] Information regarding these reforms of relief is found within statistical yearbooks presenting data on immigration courts (e.g., United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2010).

[2] This statistical yearbook notes: "For the purposes of this Year Book, the term 'immigration court matters' includes proceedings (deportation, exclusion, removal, credible fear, reasonable fear, claimed status, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), and withholding only), bond redeterminations, and motions. Receipts are defined as the total number of proceedings, bond redeterminations, and motions received by the immigration courts during the reporting period. Completions include immigration judge decisions on proceedings, bond redeterminations, motions, and other completions such as administrative closings and changes of venue" (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2010, p. B1).

[3] Heath's 2009 research is a study conducted by and published by USA Today. His article was responded to by EOIR (see Snow, 2009).

Appleseed, 2009; Wheeler, 2009, July). Coyle (2009, August 10) summarized this research:

> "The problems or issues have been documented thoroughly by independent studies and congressional oversight hearings: 238 judges with an average caseload per judge of 1,200 cases, compared to 380 cases per federal district judges; four to six judges sharing one law clerk; translators too few in number and often unqualified; antiquated recording equipment (judges issue oral decisions that they personally tape record); insufficient time off the bench to study and research foreign-country developments to aid in asylum and removal decisions; huge backlog of cases; inconsistent rulings; political interference; and high level of stress and burnout."

Reforms have been attempted to address these "problems." Transactional Records Access Clearinghouse (TRAC) analyzed the 2006 DOJ project to improve immigration courts; they concluded that this project "has failed to achieve many of its ambitious purposes" (Transactional Records Access Clearinghouse, 2009b). In the same year that TRAC reviewed this pervious reform project, the National Association of Immigration Judges and Appleseed and Chicago Appleseed suggested restructuring the courts in the hopes that this reform would address the issues that exist within these courts (Appleseed & Chicago Appleseed, 2009; Coyle, 2009, August 10).

To best evaluate this and other proposals to reform the immigration courts, the problems perceived to exist in immigration court system should be contextualized. In an ethnographic study of the Phoenix immigration Court, I found that court actors contextualize problems documented in the courts against other legal and immigration systems' issues. As a result, the interviewed/observed court actors defined the court as the immigrants' "chance" in the immigration system. In comparing the courts to the bureaucratic immigration system, a desire for achieving justice through law, as opposed to bureaucracy, was expressed. This developing viewpoint could provide insight into how some want to reform immigration courts and the immigration system (Abbott, 2012).

Further, given the previously discussed relationship between law and the social institution that is media, analysis of newspaper articles on immigration courts published during 2009 will provide additional information about suggestions for reform. Media analysis of news coverage regarding immigration courts highlights how these stories are framed and formatted in the media. By doing so, this analysis allows its readers to increase their media literacy and understanding of the discourse regarding immigration courts, immigrants, and reforming immigration courts. For practitioners of immigration courts, such as expert witnesses, study of this research assists in their comprehension of the media's and their own role in a discourse that ultimately impacts the development of immigration laws and policies and the structure of immigration courts. This chapter provides two examples of media studies of newspaper articles on immigration courts; before discussing the results of these studies, their theory, methods, and data are presented.

Theory

In addition to their foundation in tenets of law and society literature and research, as demonstrated and referenced above, social constructionism and symbolic interactionism are two theories that are used within the studies to be discussed in this chapter. In combination, these theories recognize the importance of examining the construction of knowledge and meaning and interactions within society (Berger & Luckmann, 1966; Sandstrom, Martin, & Fine, 2006).

The work discussed in this chapter further pulls from cultural criminology, cultural studies, and media studies. Ferrell, Hayward, and Young (2008) desire a progressive cultural criminology that, while acknowledging the work of past criminology, updates this past work (p. 82). They note several different types of research that meet their calls. Of interest to this chapter, they include the possible use of media analysis, and the particular

framework of content analysis from David Altheide, as a method that may assist in the creation of a progressive cultural criminology (see p. 189).

Although not specifically examining immigration courts in particular, there are several works that have discussed media analysis in relation to possible related, connected narratives of immigration courts, such as immigration, race, ethnicity, criminalization, and terrorism: for example, Altheide (2009) has explored media and terrorism, and Marcello Maneri & Jesika ter Wal (2005) outline past use and possibilities of media analysis to explore the "criminalization of ethnic groups" (including mention of migrants and immigrants).[4] Marcello Maneri & Jesika ter Wal's (2005) discussion demonstrates past findings and media approaches that have found ethnic groups, immigrants, and individuals applying for asylum portrayed as criminals in media. In addition, Altheide mentions that "The sources of public information still shout about terrorism, but they have added topics such as global warming and, more recently, immigration threats […] This emphasis is born of the discourse of fear" (2009, p. 16). Discourse in media about immigrants has thus been tied to the use of fear (particularly the message, "fear immigrants"), which can impact how the public views immigrants. This, in turn, may influence law developing in response to these constructed understandings of immigrants.

Methods and Data

The methods utilized for the studies highlighted in this chapter are discussed by David Altheide in his work *Qualitative Media Analysis* (1996).[5] His approach to ethnographic content analysis combines participant observation and objective content analysis (1996, p. 2) and derives its methodological and theoretical stance [as this chapter does, as explained above] from social constructionism and symbolic interactionism (1996, p. 8–9).[6]

The research presented in this chapter, especially the second study, is also influenced by work that recognizes intersectionality, as well as how social identifiers converge and relate with policy, law, processes, and everyday life (Crenshaw, 1989). Like Erez, Adelman, & Gregory (2009), this project will "utilize *immigrant* as a positioned identity within the social structure as well as within interactions" (p. 37).

To gather data for both studies, I conducted a search for newspaper articles using Lexis Nexis Academic of the word "immigration court" during the timeframe of January 1, 2009 to January 1, 2010. The time-period of 2009 was used as current proposals to reform immigration courts—the related interest of this work—appeared during this time. The search results included 87 newspaper articles; of which, 40 articles were within three newspapers: *The New York Times* (with 19 articles), *The Washington Post* (with 11 articles), and *St. Petersburg Times* in Florida (with 10 articles) (see Appendix C: Articles Used for Analysis).[7] I analyzed the articles utilizing a protocol that focused on areas developed to provide answers to each study's proposed

[4] Maneri and ter Wal further discuss different types of media analysis approaches, techniques, and issues in tdesign.

[5] His method is demonstrated in his works *Terror Post 9/11 and the Media* (2009), "Terrorism and the Politics of Fear" (2006), and "The News Media, the Problem Frame, and the Production of Fear" (1997). Altheide outlines his methodological process in his 1996 work.

[6] This method involves utilizing protocols. Altheide's approach also examines frames, themes, and discourse (see p. 28–33), where "*Themes* are the recurring typical theses that run through a lot of the reports. *Frames* are the focus, a parameter or boundary, for discussing a particular event" (p. 31) and "Discourse refers to the parameters of relevant meaning that one uses to talk about thing" (p. 31). In the studies to be discussed in this chapter, the protocols focused on these concepts in order to answer research questions regarding how discourses around immigration courts are framed.

[7] Because other newspapers were lacking in articles and/or did not meet my theoretical sampling (of demonstrating discourses around immigration courts), I choose to examine these three newspapers.

research questions.[8] The articles were examined for both studies presented in this chapter.

Study 1[9]

In order to provide examples of media studies that provide valuable information to, for example, practitioners of immigration courts, this chapter will discuss two media analyses of discourses about immigration courts and the immigrants who appear in these courts. The first study asked: *What are the media representations of immigration courts*? To answer this question, three subquestions were addressed:

1. How are discourses around immigration courts framed?
2. Who is portraying these discourses around immigration courts?
3. How do these discourses around immigration courts relate to other narratives (such as the criminal, terrorism, and immigrant narratives)?

This first mass media analysis study found the following results:

1. Discourses around immigration courts are primarily structured by the problem frame (as outlined by Altheide, 1997). Secondarily, there is some use of conflict to frame the stories. An additional version of the problem frame, the problem-conflict frame, is presented.
2. A Lexus Nexus Academic search for articles referencing the phrase "immigration court" in major World and US newspapers (and focusing just on newspaper articles) in 2009 resulted in a selection of 87 newspaper articles. Of the 87 articles, three US newspapers were the sources of 40 articles. Focusing on these 40 articles, the study identifies and discusses individuals that appear most often as authors.
3. This study analyzes the connections between the identified immigration court news articles and the immigrant, terrorist, and criminal narratives (which have been documented with prior research).[10] Unlike these narratives, which frequently describe immigrants in a negative light and something to be feared, the immigration court articles describe many immigrants more as victims, as individuals we should have fear for.

[8]For the first study, the finished protocol allowed me to examine several, what I called, "demographic" details, "discourses around immigration courts" details, and "(possible) connecting narratives" details. Demographic details included such things as source, byline (author), institutional sources used, and individual sources used; this data was sought in order to primarily assist in answering who is writing the stories. Discourses around immigration courts details included such things as topics, themes, frames, fear, and metaphors; this gathered data was utilized to answer how immigration court stories are being framed. (Possible) connecting narratives considered included crime, terrorism, and immigration (and their connection with fear); the data gathered in relation to these details helped to answer how discourses around immigration courts relate to other narratives.

For the second study, I utilized the research protocols from my previous study, expanding upon it to examine social identifier details. These details noted description of race, sex/gender, class, and sexuality of the featured "immigrant(s)" discussed within each article. The social identifiers were operationalized through an evolutionary process with the data. Identification of race was expanded to race and ethnicity identification, as well as notation of country of origin. Sex/gender became defined as male and female. Class became categorized as lower and higher economic status; articles with references to these statuses (such as poor, upper-class, etc.) were placed under corresponding categories. Identification of sexuality did not occur. The protocol further provided space for the notation of general labels ascribed to the featured immigrant(s) discussed within the articles, such as victim of the US government, victim of domestic abuse and/or rape, criminal, terrorist, and student. In combination with my past study, the labels assisted in gathering discourses of and portrayals of immigrants in these news stories. Of particular interest is the label of "victim of violence" (sexual). This label became conceptualized according to the perspective of the articles' authors, as represented in the terms and arguments presented in the articles; consequently, it includes individuals who are alleged as victims of rape, forced sterilization, sexual abuse, and the like. Thus, in conclusion, the modified protocol examined how social identifiers relate to the discourses and framing within newspapers articles on immigration courts, which were discovered in my previous study.

[9]For further information regarding this study, including additional data and its limitations, please direct correspondence to katherine.abbott@asu.edu

[10]The immigrant narrative is defined here as the discourse which has promoted the fear of immigrants, as previously discussed in this work. As presented earlier within this chapter, the terrorist narrative and criminal narrative are defined as the respective discourses that have also promoted fear. The three narratives have been linked and this discourse has promoted the image of a terrorist, criminal, racialized, and gendered immigrant. This imagery is linked with the promotion of a moral panic regarding immigration.

This study found that the examined newspaper articles portray problem framing. By using this framing, and perhaps with the perceived existence of public dissatisfaction with courts and related government institutions and laws, the articles were able to argue that the problem in these cases/stories was the government and the featured immigrants were victims of this problem. This format results in the "fear *for* immigrant" discourse. To demonstrate these conclusions, each research question will be addressed below and examples of the findings are presented. A discussion of these findings follows the presentation of the findings.

How Are Discourses Around Immigration Courts Framed?

The discourses around immigration courts are framed by the problem frame and the problem–conflict frame. Altheide (1997) outlines the "problem frame," stating that "The problem frame promotes a *discourse of fear that may be defined as the pervasive communication, symbolic awareness and expectation that danger and risk are a central feature of the effective environment*" (p. 648). The characteristics of this frame include:

> Narrative structure
> Universal moral meanings
> Specific time and place
> Unambiguous
> Focus is on disorder
> Culturally resonant (p.653)

The frame implies:

> Something exists that is undesirable
> Many people are affected by this problem (it is relevant)
> Unambiguous aspects or parts are easily identified
> It can be changed or "fixed"
> There is a mechanism or procedure for fixing the problem
> The change or repair agent and process is known (usually government) (p. 655)

In the articles examined for this study, the problem frame supports the authors' and sources' arguments that there are problems with immigration courts, immigration law, and the government's handling of immigrants. The problem frame was identified as a major frame present in the examined newspaper articles; however, there was some introduction of conflict within the articles as well. When problem and conflict were both present, a modified version of the problem frame occurred, which I termed the problem-conflict frame. This modified version of the problem frame demonstrates the political atmosphere occurring in these articles; consequently, media analysis of articles displaying this frame assist in mapping the debate regarding immigration courts and their "problems."

Example 1

Strained judges

For example, the problem-frame is present within a *New York Times* article entitled "Immigration Judges Found Under Strain" (July 11, 2009a). In this article, reporter Julia Preston discusses recent research findings that immigration court judges are extraordinarily stressed. Preston wrote:

> Surging caseloads and a chronic lack of resources to handle them are taking a toll on judges in the nation's immigration courts, leaving them frustrated and demoralized, a new study has found.

She continued:

> The study, published in a Georgetown University law journal, applied a psychological scale for testing professional stress and exhaustion to 96 immigration court judges who agreed to participate, just under half of all judges hearing immigration cases. The survey found that the strain on them was similar to that on prison wardens and hospital physicians, groups shown in comparable studies to experience exceptionally high stress.

Within this article, Preston references claims-makers, researchers/academia, to portray a problem existing within these courts.[11]

[11] This study took a broad definition of claims-maker to be a person who argues an argumentative point or makes a definitive statement (usually quoted or paraphrased by the newspaper). This term is used as opposed to reference because it places emphasis on the individual's support and ownership of a claim/argument.

This article includes further references to claims-makers by citing some quotes the researchers gathered from judges:

> "We judges have to grovel like mangy street dogs" to win exemptions from unrealistic goals to complete cases, one judge commented. Another wrote of the "drip-drip-drip of Chinese water torture" from court administrators demanding more and faster decisions. A third judge cited "the persistent lack of sufficient time to be really prepared for the cases," while still another said simply, "There is not enough time to think."

What is particularly notable here is the choice of the authors, and researchers, to highlight judges using metaphors to describe the problems of the courts. These quotes depict a vivid, violent, and emotional imagery of the problems that a multitude judges are dealing with and are affected by. The two quotes below highlight what seem to be indirect suggestions that the resolution to this problem is changing the conditions within these courts (and, again, note the authors of these quotes are additional claims-makers: a judge and a representative of immigration lawyers):

> One judge said, "This job is supposed to be about doing justice, but the conditions under which we work make it more and more challenging to ensure that justice is done."

> Bernard Wolfsdorf, president of the American Immigration Lawyers Association, the immigration bar, said: "If you go into these courts and see the workload, you ask, Is this a real American court? It appears that this broken system is wearing down many of the good judges."

In this last quote, not only is the focus on disorder and values, but the quote also asks the readers to utilize their commonsensical view of American courts as a whole to judge the situation of immigration courts. One could argue that this essentially asks readers to use their value-system of (American) courts to evaluate these courts and assumes an understanding of how (American) courts should be. What is relayed is that the readers need to develop a concern, if not fear, of the situation within and the problems of immigration courts.

Example 2

Problematic personnel

The problem frame structured additional news stories, such as articles regarding how problematic personnel affect the court operations and case outcomes. Several articles reported on this problem, including a *New York Times* August15, 2009 article "Unscrupulous Lawyers Are Said to Prey on Illegal Immigrants." The author, Dan Frosch, outlines the issue of "immigration lawyers" "scamming" immigrants, particularly highlighting the case of lawyer James Alcala, a lawyer who allegedly ran an immigration fraud operation by lying to companies/immigrants when he promised he could obtain temporary employment papers for immigrants who were not eligible for said papers:

> In the wake of the Alcala investigation, scores of illegal immigrants who had paid him for help inundated Salt Lake lawyers with phone calls, *fearful* that their chances for legal residency in the United States were ruined. [emphasis added]

This article is notable not only because it constructs that there is a problem with some immigration lawyers but also because it is the one article of all the articles analyzed for this study that uses a version of the term "fear." The term itself is possessed by immigrants. They are in fear. This also implies that, perhaps, we should fear *for them.* The article additionally uses terms such as "scam" and "fraud" and describes the lawyers who participate in these acts as "unscrupulous." These terms support the construction of these lawyers as a problem by portraying them in a negative light. Further, the author uses quotes from claims-makers to formulate the issue as a problem:

> "It has been getting worse," said Cheryl Little, executive director of the Florida Immigrant Advocacy Center in Miami. "Immigrants are easy prey for unscrupulous attorneys, and they are often unwilling and unable to complain because they are likely to be deported if they do."

> 'The biggest harm here is that immigration lawyers have traditionally been the only real

> bridge between immigrants coming to this country and the American dream," Mr. Tarin said. "This case undermines not only that trust, but the system as a whole.'

What is argued is that there exists a problem that needs to be fixed and that is affecting a lot of immigrants. The first quote places the immigrant in the role of victim by highlighting the difficult situation immigrants with "unscrupulous" lawyers find themselves in. Here immigrants are the ones in fear and the audience is invited to share in that fear while at the same time feeling pity and concern for the victim. The second quote does not rest on depicting the immigrant as a victim. Instead, the system is the victim and the problem is not just that belonging to immigrants, but others as well—this situation hurts the American system and the "American Dream." In short, all of "us" are threatened. The author cites attempts by the government to solve this issue, but notes-with a variety of metaphors and terms that speak of violence and confusion and, consequently, illicit fear-that this problem is still occurring:

> In 2000, the Executive Office for Immigration Review, the Justice Department arm that oversees immigration courts, began disciplining immigration lawyers who *ran afoul* of the law. Since then, it has suspended or expelled more than 300 such lawyers from practicing in immigration courts. But that has not stopped *predatory lawyers* from *exploiting* illegal immigrants and the companies that hire them, most of whom are unfamiliar with the *labyrinth* of federal immigration laws. [emphasis added]

No new solutions to this problem are offered in the article; rather, quotes merely point to the impact and great presence of this issue, and the need to resolve it. The article also reports on attempts to resolve the problem, which are falling short.

Example 3

Effective counsel

Additional articles report that a "problem" of these courts is its law, including law regarding immigrants' rights to effective counsel. These pieces depict the problem as the law being inappropriate for the particular situation and the solution to this issue is to change law. While some desire more stringent anti-immigrant laws, other claims-makers argue that immigrants are victims of the law, again as individuals to have fear for. Further, these conflicts of opinion get a problem framing: the problem to be resolved is the conflict presented, with one side of the conflict creating/maintaining the problem and the other side represented as the solution. This becomes a version of the problem frame, the problem–conflict frame. The problem–conflict frame is particularly present in articles that pit the Obama administration against and as the solution to the problems that are portrayed as not resolved or were created by the Bush administration.

One presence of the Bush–Obama conflict was exhibited in articles reporting on laws/policies regarding immigrants' right to effective counsel: specifically, the issue discussed is if, and under what conditions, respondents have the legal right to sue their lawyer for bad representation. This issue was covered by the *New York Times* articles "A Bush Rule Bolstering Deportations Is Withdrawn" (by John Schwartz, June 4, 2009b) and "Deportation and Due Process" (an editorial with no identified author, February 14, 2009), and a *Washington Post* article titled "Precedent Reinstated In Deportation Cases; Holder Says Immigrants Can Appeal Removal Orders Over Lawyer Errors" (by Spencer S. Hsu, June 4, 2009a). These articles pit Bush versus Obama, particularly Mukasey's (with the Bush administration) opinion (which restricted the immigrant's legal rights in regards to this issue) in conflict with Holder's (with the Obama administration) decision to review Mukasey's opinion. In the February 14th editorial, it was written:

> Mr. Mukasey's cramped view of due process runs counter to the prevailing view of most federal appeals courts. Happily, Mr. Holder pledged during his recent confirmation hearing to re-examine Mr. Mukasey's policy.

As is gathered from the language of "cramped" and "happily," the author argues

that the problem is Mukasey's policy and the potential solution may be Holder's review and opinion. The author's choice of terms highlights the existence of a conflict (Mukasey versus Holder) and the problem framing (with the problem being Muksey's policy), while arguing for a solution to the problem/conflict (i.e., Holder's review). Some months later, the *Washington Post* June 4th article noted the decision of Holder to reverse the Bush administration's order and to thoroughly look into the issues:

> Attorney General Eric H. Holder Jr. yesterday overturned a Bush administration ruling in January that immigrants do not have a constitutional right to effective legal counsel in deportation proceedings.
>
> Holder also announced plans to initiate federal rulemaking to cover how immigration courts decide claims of ineffective legal representation, saying Mukasey's ruling did not thoroughly consider the issues involved.

For some, this is a project towards a solution of the problem; but for others, it is not. Thus, conflict appears in another form; this is apparent in the *New York Times* article that was published on the same day (June 4th):

> Lee Gelernt, a lawyer for the American Civil Liberties Union, applauded the overall decision as a good beginning to restoring the legal rights of immigrants, though he criticized Mr. Holder for applying it only to immigration judges and not Justice Department lawyers.
>
> That aspect [not applying the decision to Justice Department lawyers], Mr. Gelernt said, threatens to continue "a troubling legacy of the Bush administration."
>
> But Jon Feere, a legal policy analyst for the Center for Immigration Studies, said that restoring the ineffective counsel rule would "give aliens one too many bites at the apple" and could be used by immigration lawyers as a delaying tool.
>
> "If this is going to result in people remaining in the country for years and years on end," Mr. Feere said, "we really have to question whether or not our immigration system is meeting the public interest of finality."

In this last article, the conflict appears in a different manner than before: disagreement over the ownership of the problem frame. The author highlights the different sides' (different claims-makers) attempts to employ the problem frame for themselves and portray it to and through the media. Some claims-makers (such as Gelernt) are arguing a solution is occurring (although not completely). Other claims-makers (such as Feere) are utilizing metaphors (i.e., bites out of an apple), connecting narratives (i.e., immigrant narrative invoking "fear *of* immigrants"), and terms (i.e., alien) that enlist fear to support their argument that, instead, a problem has been created. Thus, with this analysis, it is shown how problem framing is not just used by articles, but by claims-makers as well. This discussion also demonstrates how the problem frame and conflict become interwoven, creating what I call the problem-conflict frame.

Example 4

Megahed

A series of *St. Petersburg Times* articles highlights several features of the problem-conflict framing of discourses around immigration courts, previously discussed, together in one "human interest story:" problems with (anti-terrorism) laws, fear/concern for immigrants, use of claims-makers and metaphors, and conflict (in terms of conflicting opinions). What is novel with these articles is that they are formatted into a sort of "human interest story" and the impact of this format on how the problem-conflict frame emerges.

St. Petersburg Times reporter Kevin Graham, with Justin George (in the April 7th article) and with Alexandra Zayas and Justin George (in the April 16th article), cover the story of Youssef Megahed across several articles: "Megahed Faces New Test" (April 7, 2009), "Immigration Arrest Angers Megahed Jurors" (April 16, 2009), "ACLU Urges Megahed Release" (April 21, 2009a), "Immigration Judge Will Have the Final Word" (August 15, 2009b), and "Es-USF Student Megahed Walks Free" (August 22, 2009c). Youssef Megahed was a young man who had been cleared of terrorism charges by

a jury and then later arrested and facing deportation in an immigration court because, the articles argue, of the government's concern he might be involved in terrorism.[12]

In the April 7th article, Graham (with Justin George) begins to construct the "problem" in this case: the government. The articles argue that the government is wrong in deciding to detain and bring Megahed to immigration court (to deport him) due to fears that he might be involved in terrorism. They further maintain that the government is mistaken in its actions because a jury of citizens has cleared him of terrorism charges already. This position is carried throughout all the articles regarding this storyline and comes across in several ways, particularly by the choices of what the author highlights and who he quotes. Throughout the articles, Graham gets help to construct the narrative and its problem framing by using quotes from Megahed, his lawyers, his family, and the "outraged" jurors who cleared him in his criminal case. The below claims-makers' quotes are a selection taken from across all the articles:

> "It's troubling that the government gets another bite of the apple on this issue," Rios [St. Petersburg immigration attorney] said. "You figure if the poor guy has survived the gauntlet of a federal trial, which is as good as it gets in our legal system, you would think that was it. Now all of a sudden, you turn around and you have Goliath waiting on you." (April 7, 2009)

> "We're completely disappointed with this action by the government," said Adam Allen, Megahed's public defender. "My understanding is that they have arrested him to seek to deport him based solely on the same grounds for which he was acquitted." (April 7, 2009)

> "This sure looks and feels like some sort of 'double jeopardy' even if it doesn't precisely fit the legal definition of that prohibited practice," the juror statement says. "More troublesome is the government's seeming blatant disregard of the will of its own people." (April 16, 2009)

> Calder thinks Megahed's detention is "disrespectful" to jurors who worked hard to make the decision. (April 16, 2009)

> "He's been freed once," Calder said in an interview last week. "He shouldn't be convicted or put through this again. I just hope he gets a good break. I hope he gets out of this." (April 16, 2009)

> Said Cleland: "I hope he receives justice." (April 16, 2009)

> "This is really a slap in the face of the jury system," Steele [of the ACLU of Florida] said. "It may be legally and technically proper, but that doesn't make it right." (April 21, 2009a)

> Five jurors told the Times they felt disrespected by immigration officials who charged and arrested Megahed just three days after they acquitted him. (April 21, 2009a)

> The American Civil Liberties Union decried the immigration charge as vindictive. The Council on American-Islamic Relations called it a slap in the face. The arrest angered enough jurors who spent 21 h deliberating after the 2-week criminal trial that they spoke out and labeled it "fundamentally wrong." (August 15, 2009b)

> "Allen [lawyer] said he has told Megahed's family to have faith that the truth will come forward in Miami as it did in Tampa." And "If it doesn't, it's an unfortunate miscarriage of justice," Allen said." (August 15, 2009b)

These claims-maker statements (in the form of quotes and paraphrases) construct the "problem" to be the government, who is "Goliath," has "blatant disregard of the will of its own people," is "disrespectful," has "slapped" the jury system, and is "vindictive." These quotes—full of metaphors, imagery, and terms—construct the government in a negative light. They also express concern for (if not fear for) Megahed and hope that he receives "justice" (i.e., release). Both Megahed and (angered) citizens are constructed as victims of this perceived disordered government. This brings an additional layer of cultural resonance and morality to the articles: not only do "we" want our institutions to treat others right, as they represent "us" and "our"

[12] Although he was charged with terrorism and this is noted in the articles, it does not cause Megahed to be described as someone to be feared (because he is cleared of such charges). This will be further discussed later within this chapter.

values, we also want them to treat "us" right. According to these articles, to solve the problem, the government needs to do two things, which happen at the same time: let Megahed go and listen to the jurors.

The problem and solution is constructed throughout all the articles; however, it is not until the last article that two new things appear: the solution occurs and a claims-maker quote that supports the government's position. In the last article of this "human interest story," Megahed is cleared and released. At the same time, a lawyer who has been quoted and assisting in the construction of the problem frame (see quotes in previous list of quotes above), is quoted somewhat supporting the government's position to try Megahed in an immigration court:

> "At the end of the day, I'm sure their security concerns were genuine," Rios [lawyer] said. But he thought the case was weak. (August 22, 2009c)

It might be argued that the addition of this last quote creates some more legitimacy to the article/source/author by making them appear less biased. What it does do is further document a presence of conflict (i.e., conflicting opinions: Megahed and his supporters versus the government and this claims-maker's quote). While this conflict had been present in all the articles, it is not until this last piece that the newspaper highlights a claims-maker in support of the government's position.

Thus, this example, as well as the above examples, demonstrates how the problem and problem–conflict frames impact the discourses around immigration courts. These examples have further established how these frames are constructed through the use of socially constructed metaphors, imagery, examples, and terms, and claims-makers. Overall, what has been discovered is that the framing of the articles created the message of "fear for immigrants" (or, minimally, concern for) by identifying them as victims of the problematic government.

Who Is Portraying These Discourses Around Immigration Courts?

A search utilizing Lexus Nexus Academic for articles referencing the phrase "immigration court" in major World and US newspapers (and focusing just on newspaper articles) in 2009 resulted in 87 articles. Of the 87 articles, three US newspapers are the sources of 40 articles. These three newspapers are *The New York Times*, *The Washington Post*, and *St. Petersburg Times* (in Florida).[13]

Regarding *The New York Times* articles, there are three individuals that author multiple pieces. The first is Julia Preston, who authors four of the nineteen *New York Times* articles. The second is Nina Bernstein, who authors seven. A review of these two authors' *The New York Times* staff pages demonstrates that these journalists frequently write on immigration subject matter (The New York Times Company, 2010b, 2010c). In addition to being *New York Times* staff, Julia Preston co-wrote a book entitled *Opening Mexico*: *The Making of a Democracy* (2005), while Nina Bernstein penned *The Lost Children of Wilder*: *The Epic Struggle to Change Foster Care* (2002). The third author, John Schwartz, wrote two articles. His staff page indicates that he is the National Legal Correspondent for the paper and has previously written on a number of topics (see The New York Times Company, 2010a).

Of the eleven *Washington Post* articles, N.C. Aizenman appears as the author of three articles and Steve Hendrix of two. A review of Aizenman's recent articles online highlights that

[13] Both the *New York Times* (based in New York) and *The Washington Post* (based in Washington D.C.) have a national audience, while *St. Petersburg Times* is based in and has an audience primarily located in Florida. It is notable that both the states of New York and Florida house not just immigration courts, but some of the biggest immigration courts in the nation (see Department of Justice: Executive Office for Immigration Review, 2010). Further, the federal immigration laws, utilized in immigration courts, are discussed, created, and modified within the governmental institutions in Washington D.C.

she writes on immigration issues (The Washington Post Company, 2010a), while a review of Hendrix's recent articles appears more eclectic (The Washington Post Company, 2010b). What is particularly interesting with the *Washington Post* articles is that they include an editorial from non-staffed, non-journalist authors: the editorial, "Time to End an Asylum Limbo for Abused Women" (July 18, 2009), is written by Esta Soler and Karen Musalo. The piece indicates that Esta Soler is president of the Family Violence Prevention Fund and Karen Musalo directs the Center for Gender and Refugee Studies.

Of the *St. Petersburg Times* articles, Kevin Graham is identified as an author in eight of the ten articles. In a profile on tampabay.com, Graham is described as becoming the federal court reporter in 2007 (see tampabay.com, 2010).

In summary, the authors report on areas (immigration or legal) that make them candidates to write about immigration courts.[14] Through their work, they contribute to social understandings of immigrants and immigration. The choices they and their newspapers make in framing articles on immigration courts assist in a more positive imagery of immigrants. Their work challenges the traditional conceptions of immigrants. As will be discussed later in this chapter, the work of practitioners in immigration courts also impacts the social constructions of immigrants and immigration courts.

How Do These Discourses Around Immigration Courts Relate to Other Narratives (Such as the Criminal, Terrorism, and Immigrant Narratives)?

When the criminal narrative connects with discussion of immigrants, it often contributes to a, what Altheide (1997, 2006, 2009) describes as, "fear machine:" immigrants are criminalized and portrayed as something to be feared. In the articles analyzed for this study, the criminal narrative (as well as the terrorism narrative) and its connection with immigrants can take a different turn: immigrants are the victims of crime and to be feared for. The above examples included discussion of immigrants in fear and as victims of "scrupulous [and criminal] lawyers."

Example 1

Battered women

Additional examples discuss women who have allegedly been victims of domestic violence in foreign countries. Quotes to support fear for these women often describe the violence that some have experienced. In a *New York Times* article "New Policy Permits Asylum for Battered Women" (July 16, 2009b), Julia Preston wrote:

> Over the years, he made her live with him, and forced her to have sex with him by putting a gun or a machete to her head, by breaking her nose and by threatening to kill the small children of her sister. Once when she became pregnant, she said, she barely escaped alive after he had poured kerosene on the bed where she was sleeping and ignited it. He stole the salary she earned as a teacher and later sold her teacher's license.

In a *Washington Post* editorial, "Time to End an Asylum Limbo for Abused Women," Esta Soler and Karen Musalo wrote:

> Sadly, cases like this aren't going away. Violence against women and girls is a global crisis. In the past year, rape has been used as a weapon of war in Zimbabwe, grandmothers have been hacked to pieces in the Democratic Republic of Congo, and a 13-year-old rape victim was stoned to death in Somalia. Every day, there are "honor" killings, acid attacks, bride burnings, and horrific domestic and sexual violence worldwide.

Articles that highlight the issue of domestic violence utilize examples that display very violent and graphic images. Concern for women *and* children is relayed. This is not surprising as Altheide (2009) has found that concern for women and children may be employed by the media in its construction of fear (p. 119–121).

[14] It is also apparent that the sources are located in geographical areas where the topic of immigration courts is salient.

Additional articles provide examples with graphic imagery to relay concern for immigrants and construct them as victims while also discussing them in relation to the criminal narrative.

Example 2

Criminal past

There are exceptions to this finding that authors are able to utilize terms, metaphors, claims-makers, imagery, and examples with commonsensical ideas and social constructions to depict immigrants as victims of crime (rather than criminals). Some articles discuss immigrants committing crimes. One article specifically remarked about how immigrants with criminal records are not sympathetic characters to employ in a public relations campaign; this article was written by Nina Bernstein of the *New York Times* and is titled "Immigrant's Criminal Past Colors a Group's Legal Challenge to Detentions" (June 12, 2009). This is particularly interesting because the same might be said for newspaper articles: that it may be difficult for newspaper article to argue for sympathy for immigrants if they have criminal records. On the other hand, as will be highlighted further in this chapter, the examined news articles for this study have used problem-framing to do just that.

Example 3

Megahed

Research has found that when the terrorism narrative is discussed in relation with immigrants, immigrants can be described as terrorists and individuals we should fear (see Altheide, 2009). Yet, in this study's data, when terrorism is mentioned, immigrants can also be constructed by sources/authors as victims, such as in the case of Megahed (a story line covered by the *St. Petersburg Times*). But it must be additionally noted that the Megahed articles are complicated; although Megahed is cleared on charges of terrorism by a jury, the articles do note that he had co-defendants, including a man Mohamed, who pleaded guilty to terrorism:

> The FBI accused Megahed, Ahmed Mohamed and two other men of conspiring to form a terrorist cell. Mohamed pleaded guilty to a terrorist charge and is serving a 15-year sentence. (Graham, August 22, 2009c)

> Mohamed pleaded guilty to providing material support to terrorists and received 15 years in prison. FBI agents found a laptop in the car that showed Mohamed had posted a YouTube video telling how to turn a child's toy into a detonator. (Graham, August 15, 2009b)

However, the focus and majority of the story is not on Mohammed, it is on Megahed, his case, and constructing him as the victim of the government. Mohammed's part is merely secondary to the rest of the story. The two above quotes where part of articles that were 870 and 1,098 words, respectively. Thus, while these articles do note a convicted terrorist, the format of the article (with the problem frame, etc., and focus on Megahed), and the limited space given to discuss the convicted terrorist, allowed the article to instead focus on the construction of an immigrant as a victim (and not as a terrorist).

Example 4

Ahmad

The criminal and terrorism narratives, connected with immigration and fear, also appeared in stories that might be described as "indirect" discourses around immigration courts (as compared to the more "direct" discourses around immigration courts). "Indirect" is used to define articles that mention immigration courts but the focus of the story is not on immigration courts, their cases, their personnel, or the law within the courts (rather those become secondary); focus of indirect stories, instead, includes things such as discussion of locating immigrants and detention centers. In opposition, direct stories focus on immigration courts, their cases, their personnel, or the law used within these courts.

Some stories within this indirect genre do still construct immigrants as victims, to be feared for. For example, a *New York Times* article, "Piecing Together a Life That U.S.

Immigration Refused to See," by Nina Bernstein (with Margot Williams contributing research), highlights the story of Tanveer Ahmad. Ahmad's story, which culminates in his death in a detention center, notes that Ahmad was once convicted of a crime, although the author utilizes language to suggest that it was not a serious crime:

> His only trouble with the law was a $200 fine for disorderly conduct in 1997: While working at a Houston gas station, he had displayed the business's unlicensed gun to stop a robbery.

The majority of the 1,550-word article discusses his life, a "terrifying" ordeal in the detention center that resulted in his death, the government as a problem (by having detention centers where people die, inappropriately labeling him as a terrorist, and not appropriately noting his death in statistics), and his children losing their father:

> It [his criminal conviction] would come back to haunt him. For if Mr. Ahmad's overlooked death showed how immigrants could vanish in detention, his overlooked American life shows how 9/11 changed the stakes for those caught in the nation's tangle of immigration laws.
>
> When the 43-year-old man died in a New Jersey immigration jail in 2005, the very fact seemed to fall into a black hole. Although a fellow inmate scrawled a note telling immigrant advocates that the detainee's symptoms of a heart attack had long gone unheeded, government officials would not even confirm that the dead man had existed.
>
> Yet if his death was not counted, his arrest was—it had been added to the agency's anti-terrorism statistics, according to government documents showing he was termed a "collateral" apprehension in Operation Secure Commute, raids seeking visa violators after the London transit bombings.
>
> How his children will remember him is another matter. Without the money Mr. Ahmad used to send, they had to move in with relatives far from his grave in Pakistan. But his 10-year-old son clings to a souvenir, the widow said: "He keeps his father's photograph in his pocket."

Not only is he negatively impacted by 9/11 and dies within detention, he is "haunted," "vanishes," and is "caught." All these terms help to construct his reality as one of terrifying circumstances. The author utilizes society's social construction of children, as innocents, to help formulate this story as one of the government as the problem (with bad detention centers that result even in immigrants deaths) and the immigrant (and his family) as victims. Therefore, by using problem framing (with terms and the social construction of children), the article was able to formulate the conception of an immigrant as a victim in an "indirect" article on the discourses around immigration courts.

Example 5

Tracking criminal immigrants

But not all "indirect" articles on the discourses around immigration courts depict immigrants as victims and the government as the problem. Some pieces discuss programs that are tracking "criminal immigrants." Although not all these articles do so, one of the articles does present conflicting opinions as to the conflation of immigrants and crime: a *Washington Post* article by Spencer S. Hsu titled "U.S. to Expand Immigration Checks to All Local Jails; Obama Administration's Enforcement Push Could Lead to Sharp Increase in Deportation Cases" (May 19, 2009b). In this piece, the author has chosen to highlight both a concerned opinion about conflating immigrants with crime (as the relation between the criminal narrative and immigrants can do) and an opinion that holds this conflation:

> Critics say that deporting the worst criminal illegal immigrants, by itself, does not go far enough because it would not fully address the estimated 11 million illegal immigrants already in the United States or deter further illegal immigration.
>
> "If the Obama administration abandons immigration enforcement in all but the most serious criminal cases, then they will create a de facto amnesty for millions of illegal immigrants and will encourage even more illegal immigration," said Rep. Lamar Smith (Tex.), the ranking Republican on the House Judiciary Committee.
>
> He said the Obama administration should complete construction of a border fence, enforce

> laws against hiring illegal workers and deport illegal immigrants before they commit crimes.
>
> Amnesty International and immigrant advocates warn that the change could lead to immigration checks in other arenas and the "criminalization" of illegal immigration.

To demonstrate both the sides of this "conflict"-between those who link crime and immigrant and those who are wary of linking the two - the author/source has utilized quotes directly from claims-makers (including a Representative and a human rights organization) and more general references to claims-makers (such as "critics" and "immigrant advocates"). Both sides' opinions illicit fear: one for *fear of* immigrants and the other for *fear for* them. As this article demonstrates, in terms of indirect articles on the discourses around immigration courts, the traditionally portrayed link in media between immigration and crime (where immigrants are described as implicit criminals) does occur and is supported by claims-makers.

In summary, when an article is "directly" about immigration courts, immigrants appear most often as victims; yet, when articles are "indirectly" about immigration courts, an argument of immigrants as terrorists and criminals begins to show at times. This last finding is tentative: there are not a sufficient number of articles within the examined timeframe that can be utilized for a full comparison between direct and indirect stories. While this finding is tentative, it is quite telling and is consistent with the possible (tentative) reason—to be discussed below—of how authors/sources are able to utilize metaphors, imagery, examples, terms, claims-makers, and the problem frame to depict the immigration courts as having problems and immigrants as victims, to be feared for, of these problems.

Discussion

Why has this analysis found a different conclusion of how immigrants are constructed in newspaper than other works? Why has it found a "fear for immigrant" message rather than the typical "fear of immigrants" message? To begin, immigration courts are not just about immigration, they are also about courts and related government institutions. In 1977, Austin Sarat argued that public attitudes toward major legal institutions reflect democratic ideals, particularly the demand for equal treatment (centered on the demand for no preferential treatment). Democratic dissatisfaction within the public, accordingly, has occurred because the public has perceived that the legal culture has failed in achieving equal treatment (1977, p. 457). Thus, failing to achieve legal values has resulted in dissatisfaction amongst the public with legal institutions.[15] Throughout this first study's articles, a focus on promoting culturally resonant values of courts as being just, orderly, and the solvers of problems has occurred, while also arguing the court is having difficulties achieving these values. For example, courts were described as having problems with disorder (with stressed-out judges, overwhelming large caseloads, scrupulous lawyers, and inappropriate application of laws), and citizens were quoted as desiring justice for an immigrant(s) while finding the government's handling of a case(s) unjust (as in the case of Megahed). At the same time, society may have come to accept and expect that institutions/courts can have issues. Consequently, when the courts are described as having difficulties obtaining values of justice and order, society is willing to accept the argument that these courts have (especially when described by authoritative claims-makers), and immigrants can become victims of (and, in some articles, citizens are victims of), this problem. What is maintained is the endorsement of American (court) values in the articles and the public has/can become dissatisfied with the courts for not achieving these values (i.e., the public will see the court as the problem for not achieving these values). Thus, the combination of the problem frame, social constructions by metaphors, terms, examples, imagery, and

[15] Nolan (2001) presents an analysis of public attitudes toward courts in his work. Critical of the level of public dissatisfaction with courts other works present, Nolan's statistics still do argue that the public is not entirely satisfied with its court system.

claims makers, and the social reality that many see courts/government as having issues, immigrants get a positive portrayal and can even be depicted as victims and to be feared for. By starting out with the problem being the government, instead of immigrants, how fear becomes related to immigrants in a newspaper article can be, and is, completely changed.

The argument that immigrants are victims and to be feared for, and the immigration courts have problems, has been written most extensively by a select number of newspapers and a select few of their authors. The authors, as noted prior, have been assigned to or have chosen to cover immigrant and/or legal issues. They have also chosen to frame and construct the stories with these certain formats. The sources have chosen to publish these authors and their articles. It must be realized that these authors and sources are claims-makers themselves and their work, as described in the introduction of this chapter, has the potential of impacting law/policy.

Study 2[16]

Because immigration policy and law have been racialized and gendered (Newton, 2008; Ngai, 2004; Zatz & Smith, 2012), it is important to consider ways in which social identifiers such as sex/gender, race, class, and sexual orientation figure into media's characterizations of immigration courts, and the immigrants who pass through them. With the potential of these characterizations impacting the future structure of the immigration system and immigration law/policy, there is a need to explicitly explore the relationship between immigrants' social identifiers and the social constructions of immigrants in these articles. Thus, in a second media analysis study, I asked: *In newspaper articles about immigration courts*, *how do the media's identification of immigrants' social identifiers relate to its broader depictions of immigrants*? To answer this research question, I asked:

1. Are immigrants' social identifiers beyond immigration status noted in newspapers?

   And, if so,

2. What is the relationship between noted social identifiers (such as sex/gender, race, class and sexual orientation) and corresponding depictions of immigrants in immigration courts?

Regarding the second study, this chapter highlights the following findings:

1. Immigrant social identifiers beyond immigration status are noted within newspapers. More specifically, while race/ethnicity and gender identity are mentioned, there is a lack of discussion regarding class and sexuality.
2. Although the results are tentative, the initial findings currently suggest that the relationships between noted social identifiers and corresponding depictions of immigrants in immigration courts includes the attachment of (non-white) women with messages of fear for and (non-white) men with narratives of fear of immigrants.

The results of this second study further an understanding of media's portrayal of immigration courts and the immigrants connected with them. To demonstrate this study's conclusions, each of its research questions will be addressed below and examples of the findings are presented; this is followed by a discussion of these findings.

Are Immigrants' Social identifiers Beyond Immigration Status Noted in Newspapers?

Social identifiers examined in this study included race, sex/gender, class, and sexuality. Sexuality was not explicitly used to label immigrants in the articles; however, victim of violence (sexual) was. See Appendix D: Study 2 Table 1 for a table that describes the general patterns that appear in each of the three examined newspapers.[17]

[16] For further information regarding this study, including additional data and its limitations, please direct correspondence to katherine.abbott@asu.edu

[17] While such a table may suggest that social identifiers can be analyzed separately, the following discussion shall demonstrate the unsuitability of doing so (which is consistent with the theory and methodology of intersectionality).

Patterns emerged in analysis of the data:

Race/ethnicity was rarely directly discussed. There was significant mention of the nationality/country-of-origin of immigrants, which may suggest to readers that an immigrant is a particular race; more specifically, the nationality identified may additionally suggest to readers that the featured immigrant(s) is of a race that is non-white.[18] The only direct social identifier indication of race/ethnicity is "Latino" and this occurs three times; further, this is only mentioned in one newspaper: *The Washington Post*.

Of the social identifiers, sex/gender was the most present social identifier of those examined. The use of pronouns—if not direct mention of sex/gender—indicated the female/male identity of individuals. The only sex/gendered identities discussed were male and female. The *St. Petersburg Times* featured stories focused on immigrants who were male; their articles featured two story-lines (regarding two different males, Megahed and Ahmad) that ran throughout several articles. The other two newspapers included articles featuring males and females.

For the most part, class was not directly discussed. Class was only minimally referenced in two of the three newspapers.

Sexuality was not directly employed as a label within the examined articles.

Although the initial sample of newspaper articles is a substantial size for an ethnographic content analysis, as demonstrated above in the discussion of the first study, the number of articles that explicitly discussed the social identifiers examined in this second study is limited. Consequently, the findings of this study must be considered tentative. While these findings are bolstered by the fact that they are consistent with the previous study's conclusions, further research is needed.

What Is the Relationship Between These Social Identifiers and the Portrayal of Immigrants?

In my previous study discovering the presence of problem framing in these articles, I found that immigrants featured in these newspaper articles on immigration courts were portrayed as victims, as individuals to be feared for. In this current study, the finding of this discourse becomes more nuanced.

Race/Ethnicity and Portrayal of Immigrants

First, as mentioned above, direct mention of race/ethnicity is regulated to discussions of Latinos/as.[19] The three articles that include the word Latino—all within the newspaper *The Washington Post*—are not articles whose main topic is on immigration courts, although they reference immigration courts. Rather, these articles discuss immigration officers detaining immigrants

[18] The nationalities mentioned are fairly consistent with the most common nationalities of the respondents who appear in immigration courts: In 2009, by nationality, 77 % of the proceedings involved respondents from ten nationalities (United States Department of Justice: Executive Office of Immigration Review: Office of Planning, Analysis, & Technology, 2010, p. E1). These were: Mexico (128,501 proceedings, 44.28 %), Guatemala (23,509 proceedings, 8.10 %), El Salvador (22,204 proceedings, 7.65 %), Honduras (15,149 proceedings, 5.22 %), China (11,797 proceedings, 4.06 %), Haiti (5,210 proceedings, 1.80 %), Colombia (4,919 proceedings, 1.69 %), Dominican Republic (4,810 proceedings, 1.66 %), Cuba (4,616 proceedings, 1.59 %), and Jamaica (3,292 proceedings, 1.13 %) (p. E1). All other nationalities made up 66,226 cases, 22.82 % (p. E1). The articles also discussed individuals whose nationality is encompassed within this 22.82 %.

[19] While the newspapers make reference to nationalities of immigrants discussed within their articles, and these references might suggest to readers the race/ethnicity of the featured immigrant, it is beyond the scope of this chapter to explore this in depth. Future studies should examine the relationship between immigrants' nationality in articles on immigration courts and the nuance within the portrayals of these immigrants.

(N.C. Aizenman, February 18, 2009a), immigrants returning to their country of origin (Steve Hendrix, July 12, 2009a), and an immigration raid conducted by police (N.C. Aizenman, November 11, 2009b):

> About an hour later, the nine-person team went to a nearby 7-Eleven and *arrested* 24 *Latino* men. But most of the detainees were hardly the threats to the United States that the team was designed to focus on. (N.C. Aizenman, February 18, 2009a) [emphasis added]

> *Outlaws* in the U.S., Strangers at Home; Downturn Strands *Illegal Latino* Immigrants Between Cultures. (Steve Hendrix, July 12, 2009a) [emphasis added]

> Immigrant advocates filed a federal civil rights lawsuit Tuesday on behalf of a Salvadoran woman who was detained by Frederick County sheriff's deputies in a case they say illustrates the problems with a federal program that has deputized dozens of state and local police departments nationwide to catch *illegal* immigrants. (N.C. Aizenman, November 11, 2009b) [emphasis added]

> A vocal crusader against *illegal immigration*, Jenkins has often pointed to the 287g program as a crucial tool for keeping the community safe and recently touted the force's 500th arrest of an *illegal immigrant*. He has also stated that his deputies are "not pulling over people because they look *Latino*… We need probable cause to make a traffic stop or an arrest." (N.C. Aizenman, November 11, 2009b) [emphasis added]

While articles on immigration courts do not always mention the terms "illegal immigrant" and "criminal immigrant," and do not always discuss immigrants in relation to crime and related terms, all three articles that include the word Latino do so.

In this selection of articles, mention of criminality and illegality, and immigrants described as threats, does not necessarily correlate with the claim that immigrants are criminal, illegal, or threats; however, it can. The construction of immigrants as deviant does not appear as a consistent and strong discourse promoted by the majority of the articles in this study. As I found in my previous study, articles that do not directly discuss immigration courts—as opposed to those that do—mention criminality and illegality in relation to immigrants more often; however, when these terms do appear, their portrayal of immigrants is mixed. The analysis of this study has provided more nuance to this finding by discovering that race is further implicated in this process: when articles discuss immigration courts indirectly, they utilize terms related to criminality and illegality more often and will mention the race/ethnicity of Latino. Overall, in these particular articles, the presence of a discourse that depicts immigrants as criminal, illegal, and a threat is relatively weak. Further research is needed.

Sex and Portrayal of Immigrants

All three newspapers included indirect mention, and direct mention, of the immigrant's sex, either by direct mention of "man" or "woman" or indirectly by use of the pronouns "he" or "she." In two of the newspapers—*The New York Times* and *The Washington Post*—females were mentioned more often than males. In the *St. Petersburg Times*, however, all the articles focus their attention on male immigrants.

The *St. Petersburg Times* articles focus on two story-lines, each following one male: Megahed and Ahmad. In both story-lines, as discussed in study 1 above, the males are portrayed as victims of a problematic, over-reaching United States' government institution. As discussed in the articles, the proposed resolution to the problems in these stories is a change in how the government is handling these particular cases.[20]

In the articles from *The New York Times* and *The Washington Post* that feature discussions regarding women, a different portrayal of victimhood occurs. This portrayal is further associated with the mention of violent victimization of a sexual nature.

[20]It is beyond the scope of this chapter to discuss the nuances of the relationship between terrorism and these social identifiers but initial analysis during this research suggests it a promising area to explore in future work.

Violent Victimization (Sexual) and Portrayal of Immigrants

Two newspapers made reference to the violent victimization (sexual) of immigrants: *The New York Times* and *The Washington Post*. Their articles cover the very real and important social issue of violence against women (and children). This study examines the format of articles that cover this subject matter. In all articles in which this is discussed, the focus is on immigrant women being victims. In some articles, male sexual deviance and violence is discussed as they are the alleged individuals who committed sexual violence towards these women; however, the primarily focus in these articles remains the females. In *The New York Times* articles, there are four pieces on sexual abuse/violence of women and two articles on forced sterilization of women. In *The Washington Post* articles, there are two pieces on sexual abuse/violence of women. In all of these articles, women are portrayed and defined as victims of sexual violence occurring in a country outside the USA:

> The administration laid out its position in an immigration appeals court filing in the case of a woman from Mexico who requested asylum, saying she feared she would be murdered by her common-law husband there. According to court documents filed in San Francisco, the man repeatedly *raped her at gunpoint*, *held her captive*, *stole from her and at one point tried to burn her alive when he learned she was pregnant*. (Julia Preston, July 16, 2009b) [emphasis added]

> "She did not deliver in a hospital, and she almost died," said the younger sister, Yu, 33, the first to emigrate. A few days after the birth, she added, officials found Ms. Jiang, *sterilized her* and imposed a heavy fine. Later, divorced and desperate, Ms. Jiang borrowed the equivalent of $35,000 to be smuggled by boat to the United States, hoping to find political asylum and bring over the young sons she left with their grandmother. (Nina Bernstein, May 4, 2009e) [emphasis added]

> Nobody disputes the facts of this case. At age 16, Alvarado P [sic] married a career soldier. He *raped and beat her with abandon*, *breaking mirrors over her head*, *causing a miscarriage by kicking her until she hemorrhaged and viciously beating her until she lost consciousness*. With divorce impossible without her husband's consent, and no shelters or supports available, Alvarado P fled to the United States. (Esta Soler & Karen Musalo, July 18, 2009) [emphasis added]

> Sadly, cases like this aren't going away. *Violence against women and girls is a global crisis*. In the past year, *rape has been used as a weapon of war in Zimbabwe*, *grandmothers have been hacked to pieces in the Democratic Republic of Congo*, *and a 13-year-old rape victim was stoned to death in Somalia*. Every day, there are "*honor*" *killings*, *acid attacks*, *bride burnings*, *and horrific domestic and sexual violence worldwide*. (Esta Soler & Karen Musalo, July 18, 2009) [emphasis added]

> Abramson drops onto a stool, composing her thoughts before entering on a laptop the horrifying story of her most recent patient at the District nonprofit organization's new monthly clinic for political asylum-seekers: a 24-year-old Kenyan woman who recently fled Mexico and is petitioning to stay in the United States. Raised by abusive grandparents who *beat her and*, *at 10*, *subjected her to genital mutilation*. Cast out by her family for choosing school over marriage, she was *tricked into a prostitution ring* couched as a scholarship opportunity. She *ended up in a Mexican brothel*, *where she was held captive*, *beaten and knifed by a customer* (Steve Hendrix, September 27, 2009b) [emphasis added].

Females are described as victims of violent acts by males and foreign governments. Language and description is utilized to argue that the treatment these women have experienced was violent and support the reader to experience fear for these individuals. In some of the articles, there is an argument that the USA must take steps to assist these women:

> It's time we put our regulatory house in order and assured victims of gender-based violence that they can count on justice in the United States. As the Obama administration sets its priorities, this one should be easy. Diverse groups—from conservative Christians to liberal feminists—agree that Rody Alvarado P deserves asylum and that it's time to finalize the regulations affecting cases like hers. If federal agencies don't do it through regulation, it's time for Congress to do it through legislation (Esta Soler & Karen Musalo, July 18, 2009).

In line with David Altheide's (1997) notes on problem framing, the government is framed as the problem (in not yet assisting these women)

and the solution is the government (by assisting these women). Further, in some articles, there is a recognition, and even a celebration, when it is believed that the USA has taken steps to assist these victims:

> In an unusually protracted and closely watched case, the Obama administration has recommended political asylum for a Guatemalan woman fleeing horrific abuse by her husband, the strongest signal yet that the administration is open to a variety of asylum claims from foreign women facing domestic abuse. (Julia Preston, October 30, 2009d)

> After 14 years, Rody Alvarado finally has the full support of the United States government in her struggle to find safe haven here. She fled Guatemala in 1995 after enduring years of horrific beatings and sexual abuse by her husband. Though the facts of her suffering were not disputed, her case took a tortuous route through immigration courts, where the question of asylum for battered women has long been muddled by controversy, indecision and inaction. (no name, November 9, 2009)

In many of these cases, the solution is to modify US law in order to provide a "safe haven"—through asylum—for women who have experienced sexual violence in foreign countries.

Masculinity becomes implicit within these articles. Not only are males (from foreign countries) cited as individuals who have committed violent acts against women, but the US government and laws are offered as a masculine protector for these women. In these cases, although they are not offered as the main characters in the news stories, males from foreign countries are constructed as deviants, while the females are victims and the US government is a potential protector. Thus, examining this discourse of victimhood further in relation to social identities suggests a link with past research finding immigrants constructed as deviants. Further, articles that note the countries where these women experienced such violence (such as Mexico) may suggest to readers that the males who commit these crimes are of a certain race (particularly, non-white).

In conclusion, while the discourse of victimhood within these articles, at first, appears to be distinctly different from past studies finding immigrants as deviants, a more nuanced examination finds this discourse is a duality of victimhood and deviance. There are victims of violence and perpetrators. While immigrant women receive a more favorable treatment - in terms of labeling them not as deviants - some immigrant males (who may be perceived as non-white) are identified as deviants.

Discussion

The discourses on and social constructions of immigrants interacting with immigration courts both reflect and depart from traditional immigration narratives that depict immigrants as threats and deviants. These articles are a re-articulation of social identifiers and related discourses. Re-articulation was defined by Omi and Winant (1994) as "the process of redefinition of political interests and identities, through a process of recombination of familiar ideas and values in hitherto unrecognized ways" (p. 163). In their 1994 work, Omi and Winant propose the theory of racial formation, outline the development of theories on race, and discuss re-articulation and racial formation in the social/political environment in the 1960s to the 1990s. Their work highlights how the re-articulation of race in history has supported post-racial ideologies that fail to address racial inequality and injustice. In light of the findings of this study and my previous work (e.g. study 1 above), it may be suggested that proposals to reform immigration courts could be supported by re-articulated social constructions of immigrants, race, sex, class, and sexuality: these courts are problematic, immigrants are victims (and perpetrators), and the courts thus need to be reformed. New and familiar social constructions of immigrants could combine and support reforms in immigration law, policies, and courts. In summary, in the media, there exists a complex layering of discourses.

Conclusion: Application of Studies for Practitioners

Mass media analysis has been proven useful for a variety of reasons. For example, activists have recognized media as a medium for their work. This is demonstrated in the article "Immigrant's Criminal Past Colors a Group's Legal Challenge to Detentions" (Nina Bernstein, June 12, 2009c), discussed above. This article argues that particular social constructions of immigrants are supportive of a public relations campaign that seeks a change in the treatment of immigrants, while other images are not supportive and can harm pursued goals. This section will discuss mass media analysis and its use for practitioners whose work brings them to immigration courts, such as expert witnesses. The two studies that have been discussed within this chapter so far provide exemplars of the type of information that can be obtained from media analysis and that is useful for practitioners.

The stories of immigrants that appear in the media, working with various other conditions, can influence public opinion and, consequently, immigration legislation. As discussed above, focusing on immigration in general, research has found a link between social, cultural, political, and economic conditions, media, moral panics, and policy/legislation. The pursuit of particular policies/laws can be supported by a socially constructed view of immigrants that, although negated by academic research, has been promoted through society and in the social institution of media. The process that supports the status quo via hegemonic narratives can be interrupted, challenged, and/or modified by counter narratives and ideologies. With this in mind, concern within progressive cultural criminology, and other fields, has arisen and called for revealing the fragility of social constructions and their relationship with state and social practices. This work compels society to examine the ways in which it constructs itself and, possibly, change.

It must be recognized that this same media—social construction—legislation process can occur with a variety of topics, such as the social views of race and resulting policies (see Omi & Winant, 1994) and, now, immigration courts. As demonstrated by the mass media studies discussed in this chapter, the work of immigration courts is impacted by various narratives and conditions. Although not acting alone, media's role in choosing to cover specific topics, as well as frame these topics and present particular viewpoints on them, impacts society and the subject matter covered. The framing of discourse regarding immigration courts was discussed within the first study presented in this chapter.

For individuals who engage in the work of immigration courts, such as individuals providing expert testimony, studies such as those highlighted in this chapter demonstrate the various ways in which their work is discussed and, consequently, how it may change. For example, mass media arguments for the need to provide asylum status for women who have experienced domestic and/or sexual violence in foreign countries are straight-forward examples of the media possibly supporting and playing a role in changing immigration law. Media coverage that highlights "problems" of immigration courts may also demonstrate to society the need for reforming immigration courts to address the courts' issues. These stories have provided explicit and supportive arguments to reform immigration policies, laws, and courts by challenging the social construction of immigrants as individuals to fear, as demonstrated within the media studies discussed in this chapter. At the same time, however, this news coverage has also utilized other social and hegemonic views and ideologies to promote reform, as highlighted in the second mass media analysis discussed within this chapter. For example, the discussion of women and domestic violence proposes the need to change immigration law to allow particular victims of violence to live in the USA, while at the same time they further the construction of the non-white, immigrant male as deviant, an imagery that is consistently fought against by scholars and activists alike as appropriate for all said immigrants. Thus, there exists a complex layering of discourses that might inadvertently support initiatives not intended, nor perhaps desired, by the authors. Consequently, media analysis brings to relief one aspect of

society that has a large role in impacting and structuring the institutions, both abstract and physical, of our society.

Practitioners might ask themselves, what role do I play in furthering, negating, and/or supporting particular narratives and ideologies, and do I desire to do so? Individuals whose work brings them to immigration courts play a part in the complex web of conditions that support, negate, and/or complicate images and narratives of immigration and law, and thus have a role in the current and future structure and process of immigration courts and views of immigrants. Today, experts' expressed view - those that are explicit and those that are implicit - are valued not only by the US government but also by society at large. In fact, the work of expert witnesses has been referenced in the media as support for arguments that promote immigration court reform. Some practitioners actively engage with the media in the pursuit of reforming immigration courts and the narratives of immigration, such as the work of Esta Soler and Karen Musalo (discussed above). Further, even when not actively engaged with the media, all practitioners that appear within immigration courts contribute to the ideas of these courts through their roles and expressed viewpoints. While one viewpoint may not dramatically influence the role and structure of immigration courts and how US society should/does relate to immigrants, although it can impact the lives of some immigrants, the aggregate of said expert views has a significant role similar to that of media.

In summary, increased media literacy for practitioners, such as expert witnesses, allows them to understand media's role in their work; recognize presuppositions, biases, and assumptions regarding their topic; and, finally, further develop their position and how they will present it to society.

Appendix A: Executive Office for Immigration Review Diagram

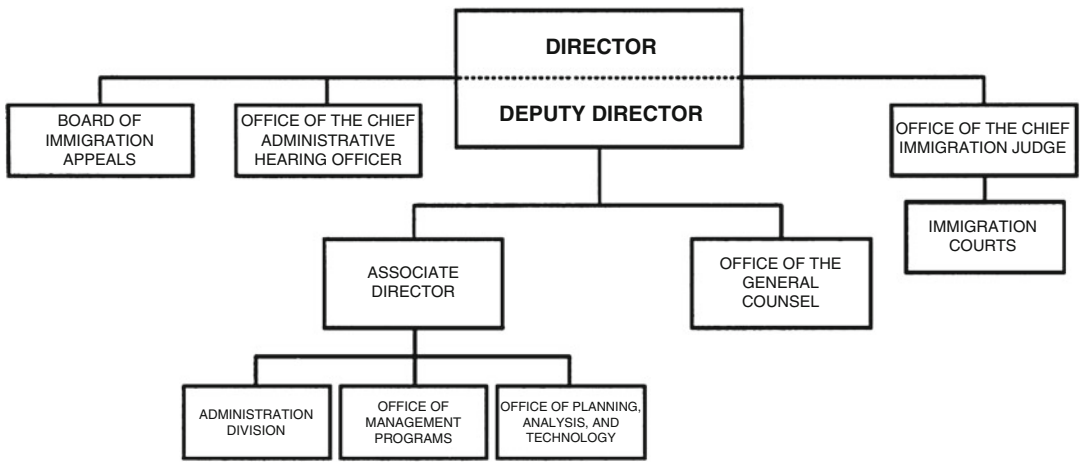

Fig. 1 Executive Office for Immigration Review. Source: United States Department of Justice (2004)

Appendix B: Department of Justice Diagram and Description of Removal Process

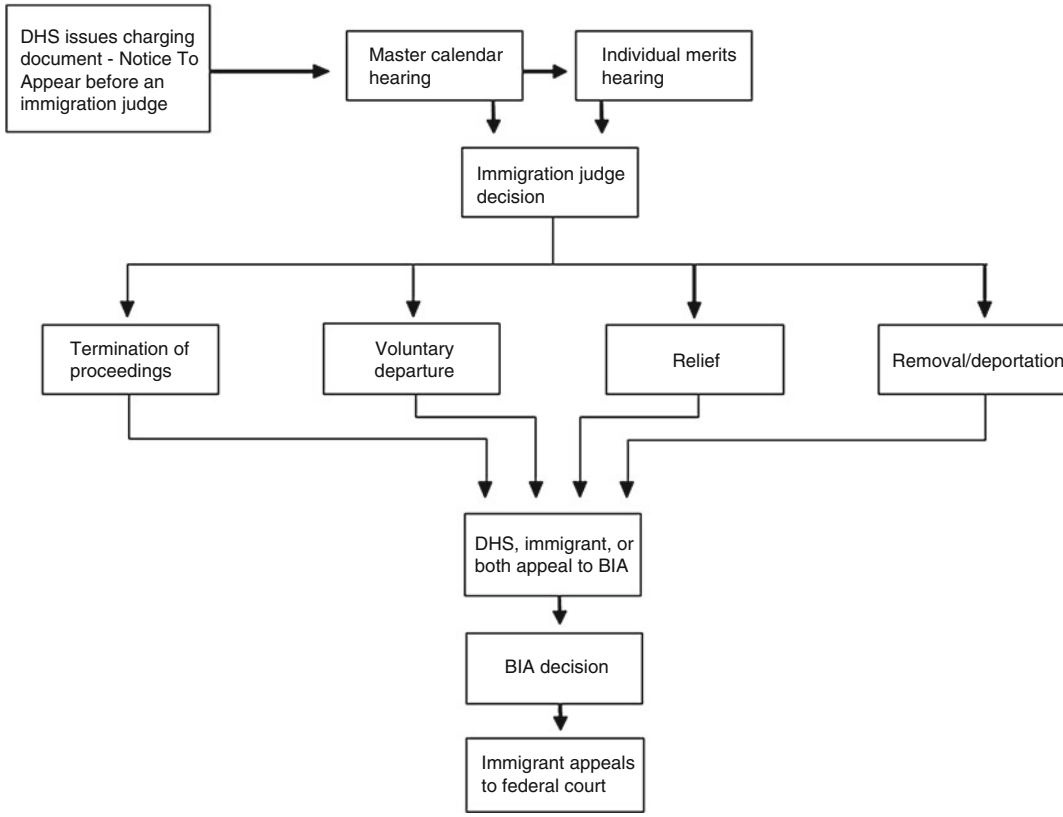

Fig. 2 Figure 1: Steps in the Immigration Court Removal Proceedings Process. Source: United States Government Accountability Office (2006b), p. 10

The Department of Justice writes: In removal proceedings, Immigration Judges determine whether an individual from a foreign country (an alien) should be allowed to enter or remain in the United States or should be removed. Immigration Judges are responsible for conducting formal court proceedings and act independently in deciding the matters before them. Their decisions are administratively final unless appealed or certified to the Board. They also have jurisdiction to consider various forms of relief from removal. In a typical removal proceeding, the Immigration Judge may decide whether an alien is removable (formerly called "deportable") or inadmissible under the law, then may consider whether that alien may avoid removal by accepting voluntary departure or by qualifying for asylum, cancellation of removal, adjustment of status, protection under the United Nations Convention Against Torture, or other forms of relief. (United States Department of Justice: Executive Office for Immigration Review, 2009, *Office of the chief immigration judge*)

Appendix C: Articles Used for Analysis

All articles below were obtained by Lexus Nexus Academic search of "immigration court" on February 25, 2010.

Articles are organized into categories of the newspaper they belong to. Under these categories, each article is identified with the following information: Study's protocol identification number (referred to as "code" in protocol). Name of author. Date of publication. Title of article. Page number in newspaper.

The New York Times articles

01. Julia Preston. June 17, 2009. Study Finds Immigration Courtrooms Backlogged. Pp. 20
04. Julia Preston. July 11, 2009. Immigration Judges Found Under Strain. Pp. 11
07. Damien Cave; Lynn Waddell contributed reporting from Tampa, Fla. June 4, 2009. Cleared of Terrorism Charges, but Then a Target for Deportation. Pp. 1
09. Julia Preston. October 30, 2009. Officials Endorse Asylum for Abuse. Pp. 14
10. John Schwartz. January 9, 2009. Ruling Says Deportation Cases May Not Be Appealed Over Lawyer Errors. Pp. 16
12. Nina Bernstein. September 11, 2009. For a Mentally Ill Immigrant, a Path Clears Out of the Dark Maze of Detention. Pp. 20
13. Nina Bernstein. March 13, 2009. In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone. Pp. 21
14. Julia Preston. July 16, 2009. New Policy Permits Asylum for Battered Women. Pp. 1
15. Dan Frosch. August 15, 2009. Unscrupulous Lawyers Are Said to Prey on Illegal Immigrants. Pp. 11
16. Nina Bernstein. December 3, 2009. Two Groups Find Faults In Immigrant Detentions. Pp. 25
18. John Schwartz. June 4, 2009. A Bush Rule Bolstering Deportations Is Withdrawn. pp. 16
22. Nina Bernstein. May 4, 2009. Mentally Ill and in Immigration Limbo. pp. 17
28. [no name]. February 14, 2009. Deportation and Due Process. Pp. 22
35. [no name]. October 4, 2009. Lauren Currier, Christopher Coots. Pp. 18
38. [no name]. November 9, 2009. Rody Alvarado's Odyssey. Pp. 22
51. [no name]. July 19, 2009. Asylum for Battered Women. Pp. 9
68. Nina Bernstein. June 12, 2009. Immigrant's Criminal Past Colors a Group's Legal Challenge to Detentions. Pp. 24
89. Nina Bernstein. October 6, 2009. Ideas for Immigrant Detention Include Converting Hotels and Building Models. Pp. 14
96. Nina Bernstein; Margot Williams contributed research. July 6, 2009. Piecing Together a Life That U.S. Immigration Refused to See. Pp. 1

The Washington Post articles

02. Spencer S. Hsu. June 4, 2009. Precedent Reinstated In Deportation Cases; Holder Says Immigrants Can Appeal Removal Orders Over Lawyer Errors. Pp. A19
11. Esta Soler & Karen Musalo. July 18, 2009. Time to End an Asylum Limbo for Abused Women. Pp. A15
20. Judy Rakowski. April 2, 2009. 2010 Deportation Hearing Is Set for Obama's Aunt. Pp. A03
29. N.C. Aizenman. February 18, 2009. Conflicting Accounts of an ICE Raid in Md.; Officers Portray Detention of 24 Latinos Differently in Internal Probe and in Court. Pp. A01
58. Steve Hendrix. September 27, 2009. Giving Voice to Asylum-Seekers' Scars. Pp. C01
63. N.C. Aizenman. November 12, 2009. U.S. antiterrorism laws causing immigration delays for refugees; More than 18,000 people affected since 2001, report says. Pp. A04
70. Steve Hendrix. July 12, 2009. Outlaws in the U.S., Strangers at Home; Downturn Strands Illegal Latino Immigrants Between Cultures. Pp. A01

72. Phuong Ly. February 22, 2009. The Outsider; Though he's lived in this country since he was 2, Juan Gomez has no permanent legal right to stay in the United States, let alone a guarantee of a chance to graduate from Georgetown University. Pp. W10
83. N.C. Aizenman. November 11, 2009. Lawsuit targets immigration enforcement; Racial profiling alleged in Salvadoran's arrest in Frederick. Pp. B02
95. Spencer S. Hsu. May 19, 2009. U.S. to Expand Immigration Checks to All Local Jails; Obama Administration's Enforcement Push Could Lead to Sharp Increase in Deportation Cases. Pp. A01
97. Steven Pearlstein. December 23, 2009. Highlighting the corporations that stepped up to help the neediest in a rough 2009. Pp. A16

St. Petersburg Times (in Florida) articles

08. Kevin Graham & Justin George. April 7, 2009. Megahed Faces New Test. Pp. 1A
21. Kevin Graham. April 21, 2009. ACLU Urges Megahed Release. Pp. 3B
42. Kevin Graham. August 15, 2009. Immigration judge will have final word. Pp. 1B
45. Kevin Graham. August 15, 2009. Immigration judge will have final word. Pp. 1B
50. Alexandra Zayas, Kevin Graham, & Justin George. April 16, 2009. Immigration Arrest Angers Megahed Jurors. Pp. 1A
60. Dong-Phuong Nguyen. October 22, 2009. A Lost Dream Reborn. Pp. 1B
85. Saundra Amrhein. August 30, 2009. Ruined without reason. Pp. 1A
86. Saundra Amrhein. August 30, 2009. Ruined without reason. Pp. 1A
87. Kevin Graham. August 22, 2009. Ex-USF student Megahed walks free. Pp. 1A
88. Kevin Graham. August 22, 2009. Ex-USF student Megahed walks free. Pp. 1A

Appendix D: Study 2

Table 1 Social Identifiers of Immigrants discussed within Newspapers in articles on "immigration courts" in 2009

	The New York Times (New York) (19 articles)	*The Washington Post* (Washington, DC) (11 articles)	*St. Petersburg Times* (Florida) (10 articles)
Race	*Direct mention of race/ethnicity*: Not present *Reference to country of origin, perhaps suggesting race*: China (2) Ghana Guatemala (2) Jamaica Mexico (3) Pakistan Trinidad	*Direct mention of race/ethnicity*: Latino (3) *Reference to country of origin, perhaps suggesting race*: Bangladesh Burundi Democratic Republic of Congo Kenya (2) Mexico (2) Salvadoran	*Direct mention of race/ethnicity*: Not present *Reference to country of origin, perhaps suggesting race*: Egypt (3) Mexico (2) Salvadorians
Sex	*Reference to sex of immigrant(s)*: Female(s) (8) Male(s) (5)	*Reference to sex of immigrant(s)*: Female(s) (5) Male(s) (4)	*Reference to sex of immigrant(s)*: Male(s) (10)
Class	*Reference to class of immigrant(s)*: Lower (2) Upper (1)	*Reference to class of immigrant(s)*: Not present	*Reference to class of immigrant(s)*: Lower (1)
Victim of violence (sexual)	*Reference to victim of violence (sexual)*: Sexual abuse/violence: women (4) Forced sterilization: women (2)	*Reference to victim of violence (sexual)*: Sexual abuse/violence: women (2)	*Reference to victim of violence (sexual)*: Not present

Biography

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Sociological Evidence in Courts-Martial Pertaining to War Crimes

30

Stjepan G. Mestrovic

In this essay, I will draw upon my experiences as an expert witness in sociology at courts-martial for war crimes committed at Abu Ghraib, Operation Iron Triangle, the Baghdad Canal killings, and the Afghanistan "kill team" murders. I have discussed some of these cases elsewhere,[1] but in this discussion, I will focus on the theoretical and practical aspects of serving as an expert witness in sociology at war crimes courts-martial.

The law in modern, democratic societies tries individuals, but not societies or social groups. Furthermore, the law focuses on individual but not collective responsibility. Experts in psychology and psychiatry commonly testify in civilian court trials, and they have also testified in some of the war crimes courts-martial listed above. Experts in psychology and psychiatry testify in the fact-finding as well as mitigation portion of trials. Typically, the psychology experts testify as to whether or not the accused was sane at the time the crime was committed, and whether the accused knew the difference between right and wrong. (The latent sociology in this endeavor, telling the difference between right and wrong, is typically blocked out of psychological analyses, even though it necessarily touches upon the social constructions of right and wrong by various groups.) However, experts in sociology rarely testify in trials, and I am the only sociologist who testified at the aforementioned courts-martial. More importantly, my expert testimony in sociology has been limited to the mitigation portion of the courts-martial and was never allowed in the fact-finding portions. Mitigating evidence is defined as evidence which tends to negate or reduce the guilt of the accused or reduce the punishment. Mitigation can include a host of facts, including but not limited to psychological and sociological factors.

In practice, expert sociological testimony in the mitigation phase of the court-martial involves making "connections" between the accused soldier's "command climate"—which he or she cannot control—and the accused soldier's crimes. From my experience, I have gathered that the various attorneys who had won the right to have me testify in this manner did so by invoking the Uniform Code of Military Justice (UCMJ). The UCMJ allows for "command climate" to be used as a defense in courts-martial. It is beyond the scope of this chapter to delve into the history of the concept of command climate or its relationship to various important legal concepts and doctrines, especially the doctrine of "command responsibility" (Pfiffner, 2010). Suffice it to summarize that in the US military, commanders are held to be responsible for all the actions of their troops, from writing bad checks to committing war crimes. How often, in what contexts, and when is the doctrine of command responsibility invoked or not invoked? This is another set of issues that is beyond the scope of the present

[1] See Mestrovic (2007, 2008, 2009).

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_30,

discussion. The more important point is that the existence of "command climate" as a defense "opens a door" (this is a term that lawyers seem to like to use) to the use of sociological concepts and of expert witnesses in sociology in courts-martial. It is a connection which the defense attorney must argue in front of a military judge. To put it another way, sociological imagination (Mills, 1961) is required to connect the pre-existing defense of "command climate" with the sociological ideas of dysfunctional, disorganized, and anomic societies and social groups.[2]

The theory behind this connection—command climate and sociological concepts pertaining to social dysfunction—is intricate, ambiguous, and so far, mostly unacknowledged in the literature of the various professions involved in courts-martial (law, psychology, psychiatry, forensics, criminology, and others). Part of the theoretical scaffolding seems to rest upon the assumptions that are crystallized by Paul Fauconnet in his seminal book, *La responsabilite* (1928). Fauconnet was one of Emile Durkheim's disciples, and Durkheim was the world's first professor of sociology with that formal title. In *The Division of Labor in Society* (1893), Durkheim focuses upon the development of the law and the social shift from collective to individual responsibility in the law from traditional to modern societies. Fauconnet, who was a legal scholar as well as a sociologist, developed Durkheim's insights further. Fauconnet's book has not yet been translated into English. Its central claim is that traditional social ideas concerning collective responsibility do not disappear simply because modern law focuses primarily upon individual responsibility. According to Fauconnet, military societies (and it is important to keep in mind that platoons, companies, battalions, brigades, and other military units are societies) are still traditional societies, and this holds for modern armies in modern societies. Military society is authoritarian, hierarchical, and concerned with group cohesion at the expense of the individual soldier—this still holds true for the modern US military (Kolenda, 2001; Stouffer, 1949). Furthermore, modern law's failure to account for collective and command responsibility in war crimes is compensated by the "court of public opinion" as found among jurors, spectators in the courtroom, journalists, and laypersons.

Combining pragmatism with the theory of sociological expert witness in mitigation, one arrives at the following conclusions: the task of the sociologist is to connect a dysfunctional social or command climate with the individual soldier's crimes. In both practical and theoretical terms, the consequences of making this connections for judges and military panels (the jury in courts-martial is called a panel) is that the individual soldier's guilt and responsibility is lessened (mitigated) and the collective guilt and responsibility of the commanders who created the dysfunctional command climate is highlighted. In accordance with Fauconnet's findings, responsibility is fluid, not fixed. Responsibility attaches itself to an object through a social construction of reality, and the object of responsibility can and has ranged from animals, scapegoats, individuals, families, cities, and nations. The practical aim of the sociological testimony is to demonstrate a connection between a dysfunctional command climate and various acts of deviance, which are not limited to the accused, and to suggest that if commanders were responsible for the dysfunctional command climate, then they are also partly responsible for the deviance or war crimes committed by individuals.

The intricacy and ambiguity of this argument lies in the many dimensions of these connections as they are refracted through various professions (especially the law and sociology) as well as traditions and what passes for "common sense." There have been cases in which the law equated command responsibility with criminal responsibility and hanged General Yamashita and Captain Henry Wirz for the actions of their troops (Mestrovic, 2007). On the other hand, no one should expect that contemporary generals, secretaries of defense, or other high-ranking or civilian leaders will ever be charged for crimes committed at Abu Ghraib, Operation Iron Triangle, or the other cases being discussed here.

[2] It is beyond the scope of this paper to explore these claims fully. See Caldwell & Mestrovic (2010), Mestrovic & Caldwell (2009), and Mestrovic & Lorenzo (2008).

In practice, the sociological defense suggests a shift in the perception of responsibility from the individual soldier to the command structure—but does not imply criminal responsibility in the strict, legal sense of the term. The constraints of the present-day UCMJ are such that the defense might be able to effect a change of opinion in the jury or the mind of the judge or some laypersons, but no more than that.

Similarly, the sociological connection between a disorganized, dysfunctional, or otherwise anomic social, work, or command climate and deviance is simultaneously clear and ambiguous. Literally thousands of studies have followed Durkheim's lead in his path-breaking book, *Suicide* (1897) to establish these connections between social disorganization and deviance. There is an entire subfield in sociology called "deviance" which has documented these connections. Nevertheless, sociology is just one discipline among many and has not altered public opinion significantly as to the theory of crime. For example, the government and the culture industry (Adorno, 1991) were successful in laying the responsibility for the abuse at Abu Ghraib on the so-called seven "rotten apples." This occurred despite the Levin-McCain report (2008) and other reports which documented the fact that the torture and abuse at Abu Ghraib had been planned and orchestrated from the White House and traveled down the chain of command to the lowest ranking soldiers at Abu Ghraib. At least since the publication of *Whoever Hunts Monsters* (Ressler & Schachtman, 1993), the dominant approach in explaining heinous crimes has been to focus on the individual sociopath. But as the experts in psychology testified at their courts-martial, none of the accused soldiers involved in the Abu Ghraib saga were sociopaths. Moreover, in every war crimes case in which I have participated, the individual soldiers who were court-martialed were *not* psychopaths, but the command climate was always dysfunctional.

However, the social world does not speak with Aristotelian clarity—and this holds especially true for the military court room. Despite the truth of the propositions I have laid out above, it is extremely difficult to introduce mitigating, sociological evidence into the court record. As I have indicated, the defense attorney must argue for allowing such testimony into the trial record, and of course, the attorney must conceive of the possibility that sociological theory could be useful in war crimes cases. The expert must withstand cross-examination by the government prosecutors, and the prosecutor yelling "objection" in response to claims which would never be contested in a classroom, university, or by one's sociological peers. The typical grounds for the objections are that the connections are not "relevant," that the government reports do not constitute "learned treatises," and that the expert's opinions are "hearsay." Only a naïve observer would fail to miss the fact that beneath the veneer of court room decorum, prosecution, and defense teams are engaged in metaphorical combat, complete with strategies, ambushes, and efforts to reveal or suppress information that the other side does not wish to be revealed or suppressed. Testifying as an expert witness is nothing like giving a lecture in sociology.

The Abu Ghraib Courts-Martial

I testified at the courts-martial of the soldiers Javal Davis, Sabrina Harman, and Lynndie England, in that order. The lead attorneys in those cases were Mr. Paul Bergrin, Mr. Frank Spinner, and Captain Jonathan Crisp, respectively. In the Davis case, the psychologist, Dr. Edwin Staub, and I both testified in the mitigation phase. His testimony was centered primarily on Philip Zimbardo's (2008) Stanford Prison Experiment and the "obedience to authority" paradigm. Davis was sentenced to 6 months, which was the second lightest sentence of all the soldiers who were convicted. No psychologist testified at Harman's court-martial, and I testified in the mitigation phase of her trial. She received the lightest sentence of all the convicted soldiers: 3 months. England's defense included the psychology expert, Dr. Xavier Amador, who testified in the fact-finding as well as mitigation phases, and I testified in the mitigation phase. Amador also relied upon Zimbardo's theory. England was sentenced to 5 years, which was one of the most severe sentences. Zimbardo testified in the mitigation phase of Ivan Frederick's trial, and

Frederick was sentenced to 8 years. Jeremy Sivits and Megan Ambuhl made plea-bargains and no expert of any sort testified at their courts-martial. Charles Graner also had no expert at his court-martial and was sentenced to 10 years.

The size of the sample of cases is too small to determine with any certainty whether or not expert witness testimony in sociology or social psychology (Zimbardo's theory) correlates with length of sentence. However, sufficient qualitative data exist to make some tentative generalizations about the nature and impact of such expert witness testimony (for a fuller discussion, see Mestrovic, 2007). I will begin with the observation that during our pretrial interview, the prosecutor in all the Abu Ghraib cases, Captain Christopher Graveline, seemed supremely confident about destroying the impact of references to Zimbardo and the obedience to authority paradigm. His strategy was simple and effective: He conceded all the details of Zimbardo's findings and then asked each of the experts who invoked his theory the direct question, "Despite the situation, did the accused soldier have a choice to walk out of the situation?" I was not present for Zimbardo's testimony and do not know Zimbardo's reply. I was present for the testimonies of Staub and Amador, who relied upon Zimbardo's theory, and do know that they replied in the affirmative. The moment that they agreed under cross-examination that the accused had a "choice," the import of their testimony for mitigation collapsed. If the accused had a choice, regardless of the "difficult situation" that existed at Abu Ghraib, that meant legally that they were guilty, and therefore responsible for their actions. Mitigation in psychology can occur primarily if the accused suffers from some particular sorts of mental impairment. Mitigation in sociology can occur if some of the accused's guilt can be transferred onto the command climate.

This is not an occasion to discuss the theology, philosophy, or other analysis of the concept of "choice." In terms of the law and pragmatism, the connection of the word "choice" with the actions of the accused yields "guilt." The situation really is that simple. However, as a sociologist, I relied upon Durkheim's (1897) original claim that an anomic society *must* produce its quota of deviance regardless of what choices the individuals in that society are making or are not making. I also relied upon Talcott Parsons's (1937) interpretation of Durkheim via structural–functionalism, namely: the individual agent is always constrained by society's norms, values, sanctions, and beliefs in making what appears to be a choice. Captain Graveline had little patience for such theorizing. In a dramatic gesture, he pointed to the door of the court room and asked me, under cross-examination: "Doctor, could Sabrina Harman have walked out that door?" Of course, he was making the analogy that the door to the court room represented the metaphorical door to Abu Ghraib. I replied: "Captain, even I cannot walk out that door. The judge would have to dismiss me in order for me to walk out the door. There are always norms and constraints in any situation." It seemed to help significantly that the military judge nodded his head and openly agreed with me and said, "that's right." It is a sign of defeat in the court room when an attorney sits down following a question and answer, and following this exchange, Captain Graveline sat down.

It is worth taking a moment to reflect on the differences between Zimbardo's social psychology and my own more Durkheimian sociological approach. Zimbardo (2009) does not address the groupthink aspects of an abusive situation which make it difficult for anyone to stop, correct, or exit the scene of abuse. Indeed, he confesses in his account of his experiment that he had an extremely difficult time in stopping his experiment and did so only after his assistant and future wife, Christina Maslach, confronted him about the abusive situation which he, as the "warden," had created in his experiment. The concept of "choice" emerges in the court room because the idea of "free will" is essential to the conviction of the accused. However, what passes for "choice" and "free will" in the law is not what these terms mean to a theologian, philosopher, psychologist, or sociologist. My position is not an either-or, black-or-white, extreme position that the accused does or does not have a choice. It is that the accused soldiers had a difficult time exercising their choices due to the many choices they did *not* make and could *not* make: they did not choose their commanders; they did

not choose the unlawful techniques which they were ordered to carry out; they could choose to alter the army's rigid authoritarian system. Finally, it is simply not true that there was one, central authority at Abu Ghraib, which would lend itself to the "obedience to authority" paradigm. It is an empirical fact, established during testimonies, that there were three competing commanders at Abu Ghraib; no one was certain as to who was in charge; and no one was certain as to which chain of command they belonged. It is this connection between an anomic society at Abu Ghraib and the actions of the soldiers that was the crux of my testimony.

Evidence for the existence of anomie and extreme social dysfunction at Abu Ghraib is to be found in the Taguba, Fay, and Schlesinger reports (Strasser, 2004), all of which were available at the time the courts-martial were conducted. However, anytime any expert witness in any field tried to cite these reports, the prosecutor objected that they were "irrelevant," and the military judge (MJ) sustained the objection. (The same military judge presided over all the Abu Ghraib courts-martial.) Only Mr. Spinner managed to introduce a small portion of this evidence into the trial record and only in the court-martial of Sabrina Harman. Even the two words, Guantanamo and Afghanistan, were taboo in the courtroom. Anytime these words were mentioned, the prosecutor objected. The reason is that the government reports demonstrate that the torture "techniques" at Abu Ghraib migrated from Guantanamo Bay via Afghanistan to Abu Ghraib. If this is true, then it cannot be true that seven low-ranking soldiers dreamed up the abusive techniques on their own. Unlawful techniques were systemic and out of sync with a host of other norms, ranging from the Geneva Conventions to conventions against torture.

The moment that Mr. Spinner asked me about how these unlawful techniques "migrated" from Guantanamo and Afghanistan to Abu Ghraib, the prosecutor objected, and the MJ asked the military panel to leave the courtroom. Spinner and the judge wrangled for a considerable length of time as to the "relevance" of the government reports. In total, the panel was sent out of the courtroom three times, and I was also sent out once. At long last, the MJ relented and allowed me to state for the record what is known to anyone who has read the government reports, namely, that Abu Ghraib was a "poisoned command climate" due to unlawful techniques which were not invented at Abu Ghraib. The important point is that "relevance" is not obvious, and much drama is involved in labeling a piece of evidence as relevant versus irrelevant.

The Operation Iron Triangle Courts-Martial

On May 9, 2006, a brigade commander in the 101st Airborne Division in Iraq, Colonel Michael Steele, apparently issued a rule engagement (ROE) to kill every military-aged Iraqi male on sight at a location near Baghdad. I have published two books on this case (Mestrovic, 2007, 2008), so that I will only summarize it here from the perspective of forensic sociology. Sworn testimony by approximately a dozen soldiers at the joint Article 32 hearing (the equivalent of a civilian pretrial hearing) confirms that this problematic ROE was, indeed, issued. Soldiers followed the ROE and made an undetermined number of killings. However, one particular squad leader, led by Sergeant Raymond Girouard apparently took pity on four males in the target area and took them prisoner instead of following the ROE. When the First Sergeant was told over the radio that the soldiers took prisoners, he yelled (for everyone in the platoon to hear): "Why in the f____ do we have prisoners?" Two soldiers, Specialists William Hunsaker and Corey Clagett, promptly executed three of the prisoners. (There is absolutely no explanation as to what happened to the fourth prisoner.) Girouard, Hunsaker, and Clagett were charged with premeditated murder. Hunsaker and Clagett took plea-bargains and pleaded guilty in exchange for 18 years, and they testified against Girouard. However, Girouard, who pleaded not guilty, was found not guilty by a military panel.

I worked on the defense team led by civilian attorney Paul Bergrin, who represented Clagett. Bergrin's theory was going to be that the ROE

issued by the brigade commander were unlawful, and he was the only attorney who had convinced the military judge to compel the brigade commander to testify in exchange for immunity. My sociological testimony was going to be that under normal circumstances, ROE are supposed to be in sync with the larger canopy of other, interlocking norms, such as the Geneva Conventions, the Laws of Armed Conflict, and traditions. These particular ROE amounted to turning the soldiers into assassins of sorts. The discrepancy between the traditional ROE—namely, to engage an enemy only when he is hostile—and this new ROE created cognitive dissonance for the soldiers. They would have been acting unlawfully had they obeyed or disobeyed the ROE: it was a classic, "damned if you do, damned if you don't" situation. Other evidence suggested that none of the battalion commanders dared to question or disagree with the brigade commander, and those who did were threatened with being removed from command.

In a surprising turn of events, Bergrin was arrested on charges of prostitution a week before Clagett's court-martial was scheduled to begin. My appearance as an expert was cancelled, and Clagett claimed that he was coerced into taking a plea bargain. The brigade commander never testified at any of the courts-martial. One could dismiss Bergrin's arrest on the eve of an important war crimes court-martial as a coincidence. On the other hand, I have documented numerous instances of prosecutorial misconduct in this case, including the withholding of evidence of similar killings by other soldiers on this same mission, who were never prosecuted (Mestrovic 2008). Similar to the continuing controversies surrounding the punishment of Lieutenant Calley—but not his superiors—for the My Lai massacres, the Operation Iron Triangle killings will remain an enigma forever. More importantly, the issue of dysfunctional command climates in both cases will remain unexplored.

The Baghdad Canal Killings

In the Spring of 2007, Sergeants Michael Leahy, Joseph Mayo, and John Hatley apparently executed three Iraqi prisoners at a canal near Baghdad, Iraq. Leahy and Mayo were both Purple Heart recipients, and Hatley was a highly decorated First Sergeant who was idolized by his troops. The social context for the crimes must start with the fact that General Petraeus had just introduced COIN (counter-insurgency) doctrine in the Spring of 2007. The thinking in the COIN manual seems to have been that the iron fist approach (used at Abu Ghraib and Operation Iron Triangle) would not contain insurgencies, but tightening the ROE, "having tea with the village elders," and other endeavors to "win hearts and minds" might work. Mayo took a plea bargain for 20 years while Leahy and Hatley pleaded not guilty. Both were found guilty and sentenced to the mandatory minimum sentence of life imprisonment with the possibility of parole. Frank Spinner was Leahy's defense attorney, and I testified in sociology during the mitigation portion of his trial.

During the fact-finding portion of the trial, the intelligence officer, Captain Nelson-Fischer, testified that the accused soldiers' company was responsible for a sector with 1.5 million inhabitants in Baghdad. The soldiers worked 14 h days and grumbled about the "catch and release program," as they called it. Due to the restrictions of COIN, which in turn were a response to the over-reactions at Abu Ghraib and Iron Triangle, soldiers had to turn over Iraqi insurgents who were shooting at them over to the Iraqi police. Moreover, they had to engage in police work and gather evidence that would be acceptable in Iraqi courts. The end result was that insurgents who had been trying to kill US soldiers were released a few days after being arrested and were mocking and taunting the very soldiers who had arrested them. The intelligence officer also testified that full-scale ethnic warfare between the Shia and Sunni was occurring at the time, and most significantly, various platoons, companies, and battalions in the brigade were "cross-leveled" every month. Cross-leveling is a slang term for the process of moving soldiers around without their usual command structure. Army doctrine and research by Stoufer (1949) hold that cross-leveling detracts from group cohesion, and the maintenance of group cohesion is an important goal in the military. Due to these and other factors, the soldiers in this particular company felt demoralized, abandoned by the army,

and many suffered from PTSD (post-traumatic stress disorder).

The expert witness in psychology who testified for the defense in the fact-finding portion of the trial was Colonel Charles Hogge. Colonel Hogge testified that Leahy—who was a medic and had saved hundreds of American and Iraqi lives—suffered from extreme PTSD. However, during cross-examination, the prosecutor asked the predictable question, "Did Sergeant Leahy have a choice to walk away when he pulled the trigger?" Hogge replied, "Yes." In a remarkable display of sociological imagination, several panel members asked Hogge whether Leahy might have been under the influence of "group think" or been swayed by loyalty to his First Sergeant. (In military courts-martial, panel members have the right to ask questions of any witness.) Hogge, a psychologist and psychiatrist, was not familiar with the concept of group think. The panel found Leahy guilty of premeditated murder. The only issue left during the mitigation phase of the trial was whether the panel would grant him the possibility of parole.

I testified on the similarities between this case and the dysfunctional command climates at Abu Ghraib and Operation Iron Triangle—including the cross-leveling, which is known to ruin group morale, cause stress, and lead to deviance of all sorts. During cross-examination, the prosecutor asked me the same predictable question about Leahy's alleged choice. I answered that "he did not have a choice in the fullest sense of the term." Why must choice be an all or nothing concept? It is a highly ambiguous concept and is influenced by group factors. Spinner drove this point home by asking me on the witness stand whether I knew that by finding him guilty, the panel had automatically sentenced Leahy to a mandatory minimum life sentence. The prosecutor objected, because the panel is not supposed to (and did not) know this during the fact-finding portion of the trial. The judge allowed me to answer because this was the mitigation portion. I answered that I knew. But the panel did not know! Many of them gasped at this news, and two began to sob. So much for the concept of "choice"—Spinner drove home the point that even the panel's choices were limited by secret legal procedures. The panel granted Leahy the possibility of parole.

More dramatically, the entire panel wrote separate letters to the Convening Authority, asking him to reduce Leahy's sentence to 10 years. In the end, the Convening Authority reduced his sentence from mandatory minimum life to twenty years and the possibility of parole.

The Afghanistan "Kill Team" Murders

In the Spring of 2010, five members of a platoon in Stryker Brigade in Afghanistan murdered three innocent Afghanis, apparently for sport. The highest ranking soldier was Sergeant Calvin Gibbs, and the "kill team" included Corporal Jeremy Morlock, Specialist Adam Winfield, Specialist Andrew Holmes, and Specialist Wagnon. Winfield had told his father about the first killing, and his father tried to inform the Pentagon and other government organs—to no avail. Morlock blew the whistle on Gibbs, his actions, and the actions of his comrades, but the government treated his report as a confession. Spinner was Morlock's defense attorney, and Morlock took a plea-bargain for twenty four years. On the face of it, the crimes in this particular case seem to be particularly heinous, and one is tempted to conclude that the soldiers must have been sociopaths.

However, none of the soldiers were sociopaths. Spinner was also struck by the connection that Sergeant Gibbs had worked as the brigade commander's (Colonel Harry Tunnell) personal bodyguards before being assigned as a squad leader in Morlock's platoon. This platoon did not score any kills prior to Gibbs's arrival. It was as if there was a "contagion effect" between the brigade commander and Morlock's platoon via Gibbs. Moreover, the army had conducted a secret internal investigation, called an AR 15–6, under the supervision of General Twitty. The report came to be known as the Twitty Report and was immediately put under a gag order. Spinner was the only defense attorney in these cases who persuaded the judge to allow an expert witness in sociology to study the report and testify on it.

Rather than summarize Morlock's case, I will illustrate many of the issues I have already raised (dysfunctional command climate, the ambiguity of choice, and the power plays over revealing social dysfunction) by quoting from my testimony and brief cross-examination. (I should note that quoting from the trial record does not violate the judge's gag order, because the record of trial is considered to be a public document.) Mr. Spinner asked:

Q Now, let's go back to the 15–6 [Twitty Report]. On top of just the findings and recommendations, what was the data underlying the 15–6 that you had access to?

A The 15–6 was shocking to me… What was shocking was the level of chaos and disorganization; the level of mistrust among the lieutenant colonels, the battalion commanders, which was confirmed to me by the ones I spoke with; the level of lack of mentoring; and the lack of "circulation," which is the term that was used.

Prosecutor Sir, objection. I thought the question was innocuous enough, but listening to Dr. Mestrovic's answer, it's entirely hearsay. The government objects that it is hearsay and lack of authentication.

Spinner We would ask to relax the rule of evidence, Your Honor, for sentencing.

MJ With regard to the relaxation of the rules of evidence, I mean, it's not documentary evidence. Ordinarily, the rules are relaxed for documentary evidence and affidavits, however—

Spinner Correct.

MJ It might be—being given this information to understand the full basis of the doctor's opinion or opinions he's going to render—

Spinner Yes, Your Honor, as an expert witness.

MJ I'm not going to consider it for the truth of the matter, but certainly I will consider as it informs his opinions.

ATC Yes, Sir.

MJ Please proceed….

A Yes, it's about 500 pages, and it includes Colonel Tunnell's supervisors, General Johnson, General Hodges, and General Nicholson. It also includes the battalion commanders, and it also includes several captains, lieutenants, majors, sergeants, so it's a full range—because that was the request given by General Scaparrotti, to go from brigade level and also the brigade commander's superiors, down to the level of the platoon.

Q And the point of the 15–6 was to get into issue surrounding the command during the time that these offenses occurred?

A Correct, and also, based on my reading, it seemed like General Scaparrotti was asking questions pertaining to command responsibility. He specifically asked: "could these leaders have known, should they have known," some of the issues pertaining to the drug use and the murders. It was very clear and a very pointed question.

Q Now, you talked about some climate surveys that you had access to. How many pages are we talking about and who provided the information in the climate surveys?

Prosecutor Sir, but I would still maintain that it's hearsay. And in this case, we're talking about double hearsay.

MJ Well, I'm going to relax the rules of evidence, so I am going to consider it. Again, if, in an abundance of caution you want to put hundreds or perhaps even thousands of pages of evidence into the record so that I have, and the record has a full report, I will certainly entertain that motion from either side. But, at this point, I'm going to consider what the doctor—his review of that evidence that you have access to.

ATC Roger, Sir.

MJ I sat on the witness stand with some anticipation as to which way the tide would turn and felt some relief that the judge was giving Spinner and me the green light to continue discussing the report. I had been in a similar position before, and the tide had gone against the defense. However, I also knew, based upon previous experience that the prosecutor would continue to object along the way. Spinner had carefully laid out my path through the metaphorical minefield that would follow, "insulating" me, as he put it, from objections that could have derailed the entire discussion. For example, he scrupulously laid out the boundaries to be strictly sociological and to prevent any meanderings into psychology or the things that Morlock had told me privately.

Q Before we get to your opinions and the justifications for those opinions, because you have degrees in psychology, you are not here to testify as a psychologist, correct?
A That's my understanding, correct.
Q You are not addressing any issues of mental responsibility, right?
A Correct.
Q You are applying the principles of sociology, which go to the issue whether or not the brigade was a functional or dysfunctional organization, right?
A Correct.
Q And so, you're not, in that sense, relying on anything that Specialist Morlock has said, other than the fact that you have viewed his videotape that he gave to the CID [Criminal Investigation Division]?
A Correct.
Q Now, how does sociology help us understand—how could we understand what happened here?
ATC Sir, the government objects. (Objection is) based on the proffer that Mr. Spinner just articulated for the court that this entire line of testimony is irrelevant to the sentencing proceedings.
MJ Any other basis?
ATC Sir, yes, that is a starting point.
MJ I'll tell you what I'm going to do. Your initial—I'm going to reserve ruling. I will hear the answer. I'm going to consider your objection as a continuing objection of relevance, and if at any point I believe that I have heard irrelevant testimony, I will note it on the record and disregard it.
ATC Yes, Sir.
MJ Basically, the prosecutor was arguing that sociology is irrelevant to this court-martial. Again, I was relieved that the judge, in lay-person's terms, ruled that the prosecutor should keep quiet and that he, the judge, would determine whether my sociological opinions were relevant or not. In effect, the judge would stop further objections by transforming them all into one "rolling objection," which he would consider only after I had had my say. I glanced at the prosecutor's table and saw a look of helplessness, frustration, and surprise—all mixed into one pained expression—on the prosecutor's face. I said:
A Your Honor, what I found striking was that the Twitty report constantly refers to the conflict between COIN (Counter-insurgency) versus counter-guerrilla doctrines. Then, when I read the COIN manual, I saw a lot of sociology in this COIN manual. There is an entire chapter on sociology. I recognize it. It's my language. It's exactly what I lecture on all the time. So, the relevance that I see here is that the definitions used by Generals McChrystal and Petraeus, in understanding the US mission in Afghanistan is commensurate with what I know about sociology in terms of, and these are the exact phrases they and I use, "norms," "values," "sanctions," and "beliefs," and how they hang together to provide good morale and ensure victory for certain goals. I will define these terms if you'd like. "Norms" are social agreements about what is expected. "Beliefs" are social agreements about what is true. "Sanctions" are social agreements about how to enforce them. And "values" are social agreements about what is preferred. It's how these hang together in synchronicity that makes for not just a better unit, a synchronized, integrated unit, but ultimately ensures victory. So, I see a real overlap here between what sociology does, in other words, we explain how societies work, and the COIN document, which in turn, is the object of a lot of focus in the 15–6 report.
Q In that regard, what conclusions, and we're going to come back to this, but what conclusions have you drawn from your examination of all the materials that you have been provided in this case?
A My conclusion is that Colonel Tunnell's leadership style contributed to a dysfunctional social climate in the brigade. Which, in turn, created the environment that led to these crimes, and that, in turn, it also led to a certain dysfunction in the values or the way the USA is represented, because the Afghan people are going to respond to these crimes in a way that will promote vengeance against Soldiers in the future…

Q In that respect, I would like to ask you to explain the conflict you saw within the brigade in terms of the pro-COIN versus the anti-COIN conflict….

A Your Honor, I had honest conversations with the battalion commanders. At a certain point, they acknowledged to me that there was tremendous conflict with the brigade commander. I asked them very bluntly, "Which side are you on? Are you on the side of General McChrystal, or are you on the side of Colonel Tunnell?" Every one of the battalion commanders—

Q Let's be clear now, Geneal McChrystal's side is?

A COIN

Q And Colonel Tunnell's side is?

A Counter-guerrilla. And these are incompatible according to the Twitty report, and according to the battalion commanders I interviewed.

Q Explain how they are incompatible?

A They are incompatible in that, according to the report and these battalion commanders, Colonel Tunnell was only focused on the aggressive offensive aspect and not on the defensive as well as the strategic, hold, and other governance aspects of COIN. In other words, COIN is an interrelated system which includes some offensive elements but intends for US Soldiers to basically act as ambassadors of the USA, and that was not a concern or a priority for Colonel Tunnell. So, in that sense, it was like Team A versus Team B, "choose your side." You were either on Colonel Tunnell's side, or you were on the side of the chain of command. And that caused confusion down the ranks, down from battalion through the company commanders, to the sergeants. And that impression was confirmed to me by the battalion commanders…. In the 15–6, it basically said that the units performed COIN not because of—but despite Colonel Tunnell. I asked Lieutenant Colonel Demaree about this, and he said, indeed, at the NTC (National Training Center), that he handed in two separate reports. One was to appease Colonel Tunnell, and the other one was to appease the NTC trainers, and they were totally different.

Q And to be clear, because you were working very closely with this, the brigade went to NTC just before their deployment?

A Yes.

Q So, this was the place where they were supposed to work out any issues or bugs as far as how they were going to operate in Afghanistan?

A Yes, and be certified to go to Afghanistan. Now, furthermore, the generals in the 15–6 state in their sworn statements that Stryker Brigade almost failed getting certified to be deployed…. And they said that they gave him another chance, and then afterwards, General Johnson and General Nicholson wrote in their reports that they regret that they did not remove him from command. And if you look at the conclusion by General Twitty, after he notes this fact, that four generals expressed regret, one of his conclusions is that Colonel Tunnell should be removed from command.

Q And why did they almost fail NTC?

A Because he did not want to listen to the advice of these generals who told them he must follow chain of command General McChrystal's directives.

Q COIN?

A COIN. Lieutenant General Johnson was sent in because of the dispute, to try to appease the situation, and in his sworn statement, he states that he had an interview with Colonel Tunnell, and he bluntly told him, "You must do what the trainers want of you. You must comply with the chain of command."

Q So, when the unit arrives to Afghanistan, was there still this conflict between COIN and non-COIN commanders?

A Yes. It only got exacerbated. Lieutenant Colonel French told me that when he arrived there, he was initially, for the first two months, not under the direct control of Colonel Tunnell. He was doing COIN without Colonel's Tunnell's knowledge. A number of other statements indicate basically that they were sneaking COIN. I mean, it's just very unusual to think of an Army unit that's being dishonest, that has to feel like they have to hide something from the boss which is in compliance with the larger chain of command. And they said this was very confusing. So, yes, it was exacerbated, it got worse.

Q What, in practical terms, as the brigade operated, at the times that these offenses occurred,

what was Colonel Tunnell pushing in terms of anti-guerrilla activities, or his approach? Or his philosophy, however you want to put it?

A The words that I saw used were "strike and destroy." Chief Warrant Officer Two Picinich, his sworn statement states that he was appointed to maintain a body count board. And several others also mentioned the fact that it was a matter—you were good in Colonel Tunnell's eyes if you were aggressive, and if the body count was high… At the conclusion of my testimony, Spinner asked the military judge to rule on the prosecutor's objections. The judge replied:

MJ Well, let me tell you what I am going to consider. I'm going to consider that dysfunctional norms within the brigade precipitated an environment that deviance, particularly in the form of both the violations of Article 112a, and the violence which occurred in this case were more likely, and there was a greater likelihood they would have been prevented with more active leadership measures. That's what I am going to consider.

Spinner That's what you are going to consider?

MJ Correct.

Spinner That's all I needed to know.

Q Spinner smiled, because he had clearly won this legal battle with the prosecution. The cross-examination was incredibly short and focused predictably on the issues of "free will" and "choice." The prosecutor asked: And so, you would agree that an individual makes his own decisions, correct?

A No.

Q So, there's no concept of free will in a society?

A I'm a sociologist. We talk about groupthink, group influences on decisions. I'm being honest. I cannot answer in any sense about a person in a vacuum making a decision.

MJ Counsel, with regard to your question regarding free will, I would note the doctor has a significant background in theology. Do you want him recognized as an expert in theology to fully answer your question?

ATC No, sir.

MJ Or do you want to save your arguments for closing argument?

ATC I'll save my arguments for argument, sir.

MJ Please.

And it was over for my testimony. The prosecutor's question regarding the notion of free will in sociology is a fascinating one. It would have made for great classroom discussion. There is no space here to pursue the interesting issues of fate, destiny, and determinism on the one hand, versus choice, free will, and freedom on the other, all in relation to crime. The judge was right: theologians debate the idea of free will as an abstraction. Sociologists cannot imagine any variation of choice without a social context. And the legal profession assumes the existence of free will to commit crime without philosophical debate or social context. There was an unmistakable tone of high-brow sarcasm in the way that the judge dismissed the prosecutor's efforts to have me say that Morlock chose to kill out of his own free will. The prosecutor's face and body language indicated that he was stunned by the judge's comment. I was stunned that the prosecutor gave up so easily. In any case, I was excused and returned to my seat.

Conclusions

Expert witness testimony in forensic sociology at courts-martial for war crimes is currently in the stage of infancy. In my testimonies, I have relied upon Durkheim, Parsons, and structural–functionalism as theoretical scaffolding. Fauconnet's theory of collective versus individual responsibility is crucial It is an open question whether other theoretical paradigms in sociology (such as symbolic interactionism and conflict theory) would be useful in such testimony, and to what extent. I have never witnessed sociological testimony during the fact-finding portion of courts-martial. The usefulness of sociological testimony during the mitigation phase of courts-martial is that it reduces the responsibility from the accused as an abstracted individual without a group context to the command and group structure in which the soldier is embedded. However, the expert witness in sociology must also reckon with the combative nature of the trial process.

Biography

Stjepan Mestrovic, Ph.D. is a Professor of Sociology at Texas A&M University. He has served as an expert witness in sociology at The Hague in 2000 and at seven US war crimes courts-martial since 2005. His books on forensic sociology in war crimes cases include *The Trials of Abu Ghraib (2006), Rules of Engagement? (2007), The Good Soldier on Trial (2010),* and *Strike and Destroy (2012).*

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Gender Matters! Socio-Legal Studies, Courts-Martial, and the US Military

31

Ryan Ashley Caldwell

As a sociologist and social theorist, my job in both the research and courtroom aspects of courts-martial is to make sense of the situation from a social scientific perspective and through considerations of context. This means that what I see as important are social and cultural environments and how individuals exist within and as a part of these contexts. In this chapter, I draw from my experiences in both roles, as a researcher and consultant, and during two of the Abu Ghraib courts-martial trials—specifically those of Lynndie England and Sabrina Harman. I provide a dialog about how the social world actually shapes individual actions and put into conversation the law with sociology and social theory, so as to create an additional possibility for understanding the behaviors of individuals as interacting within and through contexts. Additionally, I narrow this focus specifically to incorporate gender and show how this kind of gender analysis is important with regard to legal studies and specifically an analysis of courts-martial.

Indeed, these perspectives for analysis become an important means for understanding the law within my research precisely as it focuses on the US military, and an analysis of command responsibility and "command climate," which takes place on a group level. In this way, the soldier's accused crime is put into conversation with the larger command structure (considering power permutations and social context) as a means for understanding the deviance that allegedly took place. The doctrine of command responsibility further allows for the recognition that commanders should be accountable for the actions of their troops, which additionally shows the connectedness between actors within contexts in terms of hierarchy, responsibility, and the law. Nonetheless, many times it is only an individual who is charged for an alleged crime, whereby the focus for an analysis of command responsibility is overlooked. This is why it is so important to include the sociologist and this kind of group epistemological analysis within the realm of what I call socio-legal studies, and specifically within the court-martial itself, as an entirely different contextual level for analysis and focus considering power is made manifest.

In fact, many times inquiries within trials focus on issues of free will and the autonomy of the individual—Was there a choice for action? Could the defendant have acted in a different way? Who was responsible? These are all valid and philosophically important questions within democratic modern societies that operate according to enlightenment paradigms of individual rights. Indeed, modern philosophers, such as Immanuel Kant, John Locke, Jean-Jacques Rousseau, and others, focus on the individual as the agent in question for issues of ethics, duty, questions of property, notions of freedom, questions of autonomy, authenticity, and early discourses about rights within democracies. These very discourses also inform ideas about the social contract, which is the social confirmation of rights upon the

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3_31,

individual, along with the responsibilities of the individual to their government within these socio-cultural contexts and in terms of said contracts. Interestingly, these very discourses actually come to highlight the importance of sex and gender in that who actually counts as a legal individual under the eyes of the law within the USA was historically defined by membership to this legal category and under the social contract through the abilities of property ownership, socially valued paid labor, early access to education opportunities, as well as the ability to vote—all opportunities, which were given initially to men and were ascribed to the masculine gender role. Thus, the universal ideas of reciprocity, freedom, and equality can be understood as homogenizing difference and instituting patriarchal authority, which in turn can be understood as a specific kind of sexism in early understandings of social contract discourse. It is for these kinds of reasons that I argue for an expansion of legal analysis to include both the consideration of the individual within a reflexive context, along with an analysis of gender as important. It is with these theoretical concerns that I argue courts-martial should be approached for analysis.

Sociological Analysis, Context, and the Individual

I argue that the narrative of initially looking to the individual solely for responsibility comes from the Enlightenment paradigm and modernist vein of philosophy, where the notion of the self is championed as the prioritized perspective for consciousness and perception, ethics, interpretation, representation, autonomy, etc. However, as a sociologist I argue that one narrative that this line of questioning precludes is the series of questions that considers we are not isolated actors existing alone within a vacuum. Indeed, as social beings, we are socialized and exist within society and culture as in groups and with others, constrained and encouraged by their actions and behaviors such that our own behavior always and in all cases reflects these connections. As a sociologist, this social connection is taken as a postulation in all situations and considerations, and as a priori.

Take as basic piece of evidence a famous sociological study about a seemingly very private and individual choice, namely suicide. Emile Durkheim shows in his book *Suicide*: *A Study in Sociology* (1897) that this action, to take one's life, is actually influenced by one's social ties, or social bonds and integration within society. The gist of Durkheim's seminal study in France is that the more connected to others that we are, in whatever the way (and he examines many different modes of connectedness), the less likely we are to kill ourselves, thereby predicting levels and measures of suicide for certain groups given certain social arrangements. Specifically, categories of people with strong social ties had low suicide rates, and the highest suicide rates are found among categories of people with the lowest social integration. Durkheim believed that too much or too little integration or regulation (cohesion) was unhealthy for society and was mostly concerned with the connection of anomie, an unhealthy and destructive pathological state for society resulting in derangement (Caldwell & Mestrovic, 2010; Durkheim, 1897). This may seem quite counterintuitive to some understandings of individual suffering (although not all, as the existentialists and Marxists foresaw this connection), where suicide specifically might be thought of as a freely chosen act, or at the very least influenced by an internal state of being that does not involve one's connection to larger society in general.

Nonetheless, Durkheim bridges a microanalysis of suicide with his macrotheory of how low levels of social bonds actually cause suffering (anomie), thereby providing sociological evidence for how the social world affects individual action. Indeed, he even focused on gender and gendered connections as a marker for suicide, and found that women, Catholics, Jews, and married people had low suicide rates, and that men, Protestants, wealthy people, and unmarried individuals had high suicide rates (Durkheim, 1897).

This is the job of the sociologist, to show how society and culture (or context) affects the individual, and in terms of a give and take feedback loop. What I am trying to highlight is the important connection about how individuals are indeed linked to both society and culture in radically

important ways, such that these connections both constrain and enable how it is that we exist within the world—both shape how we make decisions and how we respond and react to the context that we find ourselves intermingled and trapped within and under. It is quite impossible to be uncontextualized and radically unsituated, existing as individuals without a sense of culture. We can never take off our experiences of culture and exist as fully objective beings, as these contextual schemas are exactly the categories that we use to make sense of the world—gender being just one of these kinds of categories. In fact, many feminist academics of science have been making these kinds of claims for decades (Fox-Keller [1985]1995; Keller & Longino, 1996). It is as William James proclaims with his radical empiricism—we create meaning from our connected experiences of the world, and I read this to mean our connections we make of the experiences themselves as well as our connections with one another. In this way, considering legal studies and specifically a courts-martial, the effects of culture and context as well as how individuals are situated within contexts become always important to consider, and especially that of gender.

The Individual, Gender, and the Military

Since about the 1980s, gender has become an important analytical tool within the social sciences. I view gender as something that we are socialized to within a culture or context, where social and cultural norms prescribe the boundaries for categorical understandings of "masculinity" and "femininity," among other gender identifications. These gender norms, or the socially constructed "gender code" used within a context to make sense of gender, supply the cultural translations or shared set of meanings used to make sense of gender-related performance. These gender rules or codes are not natural and do not derive from biology and instead are socially constructed—they are a shared and agreed upon set of practices, which have themselves been reified over time and within a context and by social actors. In this way, gender code counts as cultural knowledge and has consequences, in that gender code informs our behavior (how we act), our viewpoints (how we see the world and others), and our perspective (our outlook on and how we understand the world). In fact, gender code itself gives legitimacy to certain bodies and not others, where the politics of gender shows how power creates certain dominant stereotypes for understanding gender such as how certain bodies conform to certain standards for value (such as patriarchy) or certain laws for interpretation (such as heterosexuality). Gendered bodies conform, in terms of social control, so as to garner viable and valuable social identities, and ones where dominant culture will confer the status of subject upon their gendered performances (Butler, 1993; Rubin [1975(2002)]).

Using gender as a tool for analysis, it is possible to provide a rich understanding of the gendered masculine nature of the American military. Although I find it problematic to define gender in terms of sexuality categories, I found that because the military functions as a patriarchal and heterosexist entity, masculinity is forcibly aligned with heterosexuality for its understanding. Even though laws have been passed prohibiting discrimination given the repeal of "Don't Ask, Don't Tell," my experiences within my research of the military are still those of a heterosexist and patriarchal institution in nature (Caldwell, 2012). In this way, both gender and sexuality are connected in the military as part of the normative code for gender identity. Thus, the "*code of cultural masculinity*," where both masculinity and heterosexuality function together as powerful cultural ideology exists as a basic means for gender interpretation and conceptualization. Although DADT has been passed, my experiences within the courtroom are always those of heterosexism and patriarchy, thus far. I look forward to a more welcoming place for soldiers of more diverse identities.

This code also informs at the basic level how individuals are made sense of within legal and courts-martial proceedings, and in similar ways that identifications such as race, ethnicity, rank, status, etc., might cloud one's decisions and bias perception within a trial. In this way, the military itself, much like larger culture, has a bias in terms

of gender in that there are certain oppressive assumptions that exist with regard to identity. This matters a great deal when a soldier is on trial as this identity bias might in fact color how it is that crime is understood and framed, how defendants are portrayed to the panel, what kinds of evidence are presented for contemplation, how individuals are portrayed within the courtroom, among other considerations.

Abu Ghraib Courts-Martials: Charges

Within the Abu Ghraib singular courts-martial of Lynndie England and Sabrina Harman, I argue there was a gender bias that existed in terms of how legal concepts were applied to these women, which thusly prejudiced their trials. In this section, I analyze several of their charges and show how gender played an important role in "framing" these indictments. Additionally, I discuss how gender played an important role within the courtroom as well as how crime and evidence were understood in gendered ways—all using the social theoretical perspective of Talcott Parsons.

Gender categories provide descriptions of gender characteristics, and in modern patriarchal societies, the gender binaries of masculine and feminine are used to describe some aspects of social phenomena. For example, some theories associate stereotypical masculinity with all that is essential, rational, reasonable, strong, orderly, active, controlled, and logical. Conversely, femininity is stereotypically associated with all that is emotional, chaotic, weak, inconsistent, inessential, passive, uncontrolled, and irrational. Notice that this binary system is an arrangement of opposites, where masculine descriptions and traits are positively valued, and feminine qualities have less value. This value system has been socially constructed in terms of a gendered opposition and oppression and serves as a frame of reference when conceptualizing cultural understandings and meanings associated with gender.

Feminist social theorists are critical of these kinds of gender binaries and focus on understanding the fundamental inequalities between the sexes, specifically with the analysis of patriarchal power. This kind of analysis of power associated with gender shows how our society and culture is organized in terms of attitudes and beliefs concerning gender categories and the focus on how gender roles are developed out of these kinds of understandings.

Social theorist Talcott Parsons developed his binary systems theory of the gendered division of labor based on biological sex roles within the family (Parsons, 1937, 1951, 1954; Parsons & Bales, 1955). According to Parsons, we come to understand gender socializations within the family, which he sees as a social system itself, and in the same way the military is a social system. Parsons argues that these gender roles function in tandem toward equilibrium and assimilation with all of society's other subsystems in a structural functional manner (again, such as the military).

In Parsonian terms, the "expressive" feminine role is associated with care giving and domestic mothering obligations, is concerned with the welfare of others, aimed at providing emotional assistance, as well as a sense of belonging or integration to the family/group. Parsons associates the "instrumental" masculine role with the ability for paid labor, and other rational goal centered tasks. In this way, Parsons views the male as a social "agent" who thinks in terms of "rationally linked goals and means," and is valued for such within society (Parsons & Bales, 1955). The social world thus becomes organized in this gendered way, where sex categories are associated with these Parsonian gender roles, both as a means of providing social order and social solidarity for the family and larger culture as well.

Applied to the US military, we can see this very gender role ideology that Parsons theorizes become clear when considering Abu Ghraib and the charges that were leveled at Lynndie England and Sabrina Harman, two of the "rotten apples" who were accused of prisoner abuse. Interestingly, these women were charged with ***dereliction of duty*** at their separate courts-martials, and what I

argue is that these women in fact either did not have any duties at Abu Ghraib, or were assigned expressive duties (Caldwell, 2012).

Consider Lynndie England. England was assigned to be a clerk at Abu Ghraib and one would assume that her job might be to keep files on prisoners. However, what we now know is that the filing system at Abu Ghraib was nonexistent and that detainees at the prison were not organized using paperwork in an ordered fashion. In fact, England's "job" was not even actually located at Tier 1-A or 1-B at Abu Ghraib, where the photographed abuse of prisoners took place, and it became clear in her courts-martial that the reason that she was even at this tier of the military compound was to visit her then boyfriend Charles Graner. One then wonders what duty exactly she was in dereliction of and further, what exactly she was being charged with negligently and recklessly abandoning. Certainly, there was no discussion at her trial of a lack of paperwork duty, as the organization of prisoners at Abu Ghraib made it almost impossible to rationally organize them apart from means such as writing on their bodies and other methods described to me by soldiers at the trials.

Considering Sabrina Harman, another low ranking soldier like England, it was argued repeatedly that she should have somehow stopped the abuse aimed at detainees, which she witnessed by her fellow male soldiers, and did not participate in at all (Caldwell, 2012). This is an interesting instrumental role expectation for such a low-level soldier and given her small stature, and I often wonder what she was supposed to do in a heated moment when her male-counterparts were abusing prisoners physically and sexually. Says Jeremy Sivits about the pyramid incident on November 7, 2003:

"Specialist Harman was standing back with me looking at the pyramid with a look of disgust on her face like she could not believe this was happening. SPC Harman did not appear to approve of this behavior…Based on SPC Harman's size and nature she was not in a position to challenge CPL Graner or SSG Frederick" (June 24, 2004, Harman Article 32).

However, what most do not know is that Harman did in fact report this abuse time and time again to her commanding officers. It was argued at Harman's courts-martial that she somehow was *in charge* at Abu Ghraib, and that this was her *dereliction of duty*—not stopping abuse. But again, Harman actually expressively helped detainees at the prison and reported abuse up the chain of command. Consider the following testimony at Harman's trial that substantiates the fact that at no time did she physically harm any detainees.

"I did not witness Harman hit any detainees at anytime." **SPC Matthew K Wisdom**, **24 June 2004**, **Harman Article 32**

"I never saw SPC Harman put a hand on a detainee." **SPC Israel Rivera**, **B Company**, **24 June 2004**, **Harman Article 32**

"I did not see Harman strike anyone." **PV1 Jeremy Sivits**, **24 June 2004**, **Harman Article 32**

Kenneth Davis, 16 May 2005, Harman Court-Martial

Re October 25th event…questions by the civilian defense counsel

Q Did she [Harman] yell at the detainee? Shout at them? Handcuff them?

A Not while I was there

Instead, some detainees at Abu Ghraib said Sabrina was their sister and friend, which is expressive in Parsonian language. The translated deposition of Mr. Amjad Ismail Khail Kjalil Al Taie was presented at Harman's courts-martial in Fort Hood, Texas in open court. There were connection problems with Iraq via telephone, and so there were several attempts at questioning and translation. Mr. Al Taie (via the translator) claimed that he saw Harman five times weekly and that he had witnessed her with other detainees. Stated Mr. Al Taie,

"It was good contact between Sabrina and the prisoners. It was a good relationship. She was very kind to them…the contact with Sabrina seems to be a good relationship between a guard and detainee…we have a view of peacefulness of this woman…[she] did good things. They [prisoners] respect her and, in right, she respects them as well….one thing is the surgery. He must be taken care of…they used to give him two

doses of medicine and two meals, but she used to help them in giving more doses for the cure and more meals for him. She helps him. She gives him aid—she gave him aid. This is one of the facts that proved her peacefulness with him….for all detainees not only for him…she had such behavior for all detainees, yes" (A translated deposition of Mr. Amjad Ismail Khail Kjalil Al Taie, 17 May 2005, Harman Court-Martial).

Moreover, in an interview that I conducted with Harman, she told me that even though she was actually an MP (military police officer) at Abu Ghraib (which would be considered in Parsonian language to be an instrumental role), when detainees were brought into the tier, the handlers would take them directly to the male MPs. Additionally, when female MPs were dealing with prisoners, they were always being watched by male officers overhead. I found it interesting that Harman even internalized some of these beliefs about female/feminine competence and capabilities within the military given her experiences regarding gendered labor and her experiences being an MP.

(Harman): I do remember in the prison that the female MPs were watched and looked over. If I worked in 1A or 1B the handlers would go straight to the male soldier working. If I was to remove an inmate from the cell, I noticed SGT Snyder or SGT Cathcart watching from the top tier.

(Caldwell): Ok, so would you say this is because females were seen as needing protection? Or as incapable? Or something else??

(Harman): Yes, it's because males feel they need to protect the females. I really believe in a war zone females become a distraction and can be dangerous.

What I noticed in Harman's responses was the lack of an autonomous female soldier's subjectivity understood apart from the gaze of patriarchal protection rhetoric, and which understood the female soldier not a derivative or problematic contextual individual, but one which was also a valued MP equal to the male soldier. All of these examples ranging from the charge of dereliction of duty, to the assignment of jobs, to how work was done at the prison, as well as the analysis of gender within contextual examples speak to the importance of the analysis of gender within the military and within the courts-martials themselves. Moreover, these examples show how gender roles are stratified within the military itself as an institution, which also applies to the court-martial process, which is something for all legal members to consider when in trial.

Looking at the charge of ***maltreatment***, different charges seemed to be leveled at men versus women in this category of alleged deviance at Abu Ghraib. In fact, males framed the charges for England and Harman that taking photographs of abuse counted as maltreatment, and along the same likes as punching and hitting detainees (which incidentally is what the male soldiers actually did, and *not* the female soldiers, although both male and female soldiers took photographs). What is really interesting is that this kind of difference in the charging of crimes goes along with Parsons's theorizing of gender, where it is understood that men would have a gender role that instrumentally informed active physical deviance, whereas women's crimes would be understood as expressive and passive, or that of taking photographs. In this way, the macrolevel institutional gendered structure of the military actually informed how microlevel crimes were understood and charged within the courts-martials themselves.

Moreover, Harman had evidence in her trial in the form of a letter to her wife that suggested Harman was taking photographs of abuse as a whistle-blowing tactic, which can in itself be understood as instrumental according to Parsons. This, however, was not a fathomable action within her court-martial, and I argue this was because of a gendered interpretation that associated Harman's actions as being interpreted in terms of her expressive gender role, and not as an instrumental rational, goal/means agent. Indeed, Harman is seen not as an autonomous agent, but as a passive female—although quite able to agree to conspire to maltreat, although not to whistleblow. Nonetheless, none of the men who took photographs at Abu Ghraib were charged with this kind of "photographing" maltreatment, and even though they did take photographs, and even though their female counterparts were charged. So again, gender makes a difference in how crimes become understood and

perceived and based here seemingly on gender role expectations—notions of active versus passive, instrumental versus expressive.

The charge of ***conspiracy*** was a very interesting charge at the Abu Ghraib trials, and at the minimum is the basic agreement on the part of the soldiers to enter into an agreement to abuse. The "rotten apples" faced similar charges of conspiracy because they were present for the events of abuse, and were taking photographs, and according to the prosecution, this was the overt act of agreement necessary for conspiracy needed, and apart and without any actual voiced or overt agreement on the part of any soldier. Taking the photographs was enough to count as an overt agreement for conspiracy within the courts-martial. What is more, "conspiracy" is relatively easy for the government to prove—any action that involves the actions of two or more persons can be interpreted as a conspiracy, even if one of the actors *did not intend* what the other or others in the group intended—and extremely difficult for the defense to disprove. To put it another way, "conspiracy" colors the commission of other crimes carried out during the "conspiracy" as being performed deliberately in terms of rationally chosen goals and means (Caldwell & Mestrovic, 2008).

So why did some of the soldiers go along with the abuse at Abu Ghraib? At the Harman trial, the only female defense attorney in the courtroom, Captain Patsy Takemura—who outwardly wore the persona of the expressive female—was the only one who was able to elicit confessions of fear out of male soldiers during their testimonies. According to the masculine military "code," the expression of fear is not a stereotype for a masculine soldier; however, Takemura was able to procure these confessions from male soldiers, whereas none of the soldiers made these confessions to any of the male attorneys or the male judge. Again, I argue this is another example of how gender matters within courts-martial, as Takemura wore the persona of the motherly caregiver who could empathize with fear, and who could make it a safe place to address this fear. She was soft spoken and calm as compared to the other civilian defense attorney, Frank Spinner, who came across as tough, rational, and hard-edged. (I personally think this was their legal gender juxtaposition performance!)

Although Israel Rivera was offered immunity for testifying against Harman, why did Rivera *not attempt to stop* the abuse? Additionally, why was Rivera not charged with "dereliction of duty" for failing to attempt to stop the abuse? One should note that the female soldier, Harman, was charged with this military crime, while the male soldier, Rivera, was offered immunity from this and all charges—even though both soldiers expressed learned helplessness with regard to the abuse all around them. Rivera stated in open court that he was afraid—afraid to stop the abuse that evening because he had fear of his fellow-soldiers—fear that they would retaliate against him physically. Disclosed Rivera to Takemura, "I feel an obligation to step in if someone is in violation of the law. I did not step in and stop this situation because I was in fear" (24 June 2004, Harman Article 32).

Q (defense counsel Takemura)
Because you're afraid of Cruz?
A (Rivera)
I was at the time, yes.
Q (defense counsel Takemura)
Ok, and as an American soldier that was at Tier 1 that night, it was your duty to make sure that these detainees were safe…and you never stopped what was going on…
A (Rivera)
No I never made any effort to make it stop.
Q And you said that Staff Sergeant Frederick was there? And Corporal Graner was there? And you never asked [them] what was going on or tr[ied] to stop [them]?
A No, ma'am
Q Because you were afraid?
A Well I mean they were the ones—authority with the rank and they were the ones that were doing this, it seemed rather foolish of me to say, hey, what are you guys doing? It seemed like I would be compromising my own safety…because they were willing to do this to a detainee why would they not do it to me?
(13 May 2005, Harman Court-Martial)

It is clear from Rivera's testimony that he did not trust his fellow soldiers at Abu Ghraib. Interestingly, the phrase "don't be a pussy" was

used by soldiers at the prison when they resisted calls for prisoner abuse, and this very statement shows the ultimate importance of gender within the hypermasculine context of the US military. It could further be argued that Rivera's fear goes against the unwritten "code" (Baudrillard, 1983; Lyotard [1979], 1984) of constructed military masculinity, and thus his crimes can be construed as embarrassing the USA with his feminine-expressive fear, and even though he did not participate in physical abuse.

Moreover, in the courtroom, when Takemura described Sabrina Harman in her soft voice, it was as a maternal caregiver, and she used huge photographs showing Harman doing service activities and making friends with Iraqi families and children. During the closing arguments of the Harman trial, again Takemura pled with the panel, sometimes so softly that you could barely hear her, as she motioned to maternal-Sabrina and the pictures from Iraq featuring Harman performing the roles associated with stereotypical femininity. In these ways, gender was used by Takemura within the courts-martial to elicit confessions and also to depict both Harman and herself as an attorney *vies a vie* the other defense attorney in a gendered light, and with certain legal benefits for her client. Again, gender matters in these regards as crimes become overwritten in terms of female gender passivity, as Takemura adopts a gender submissive passive role to establish trust with male soldiers, and also so as to depict Harman in such a way as to show her ultimate connectedness with both families and children within Iraq (and thus her contextual associations).

Last, gender played an important role in establishing bias within the Abu Ghraib case of Lynndie England in terms of what photographs were shown to the panel, and thus what actually counted as evidence. Although the defense team were not shown these images, as they were neither images of abuse nor were they images that were leaked to the public, about 20 or so explicit photographs were shared with the panel at the England trial. These photographs depicted England either naked, having sex with Charles Graner, or were close up images of England's genitalia. Now, one might question the logic behind showing these images given that they had nothing at all to do with the courts-martial. In fact, even now, I wonder why other than establishing a sexist bias these images would have been shared, as not all of the images from the Abu Ghraib collection of images were indeed shared with the defense or panel. Yet, these explicit images were shown only to the military panel (jurors) and were not shown in the courtroom, despite the legal obligations that all evidence in a trial must be made public and transparent. Nonetheless, I find this to be a particularly important way that gender has been used in courts-martial to establish a sexist bias against a defendant within a trial, and thus another example of how gender again matters within courts-martial. Once these images were seen by the panel, it is all but impossible to avoid the labeling of the individual, the remaining of objective, or the avoidance of bias within the decision-making process of the trial. In fact, one of the concluding statements at England's trial was something like, "Look how this woman has tainted our Army!" I still wonder how much of these sexual images played a part in this interpretation versus the facts of her case.

Conclusions

As described, it becomes clear that not only does context matter, as the context itself provides the blueprints for understanding how actions become interpreted, but gender also matters. Moreover, the context under consideration, such as a culture or institution such as the military has rules and norms for gender, or a "gender code." In labeling behavior as criminal by CID agents (Criminal Investigative Division), gender seems to matter at Abu Ghraib in the following ways: in terms of dereliction of duty, the females were either given no duties or expressive labor; and maltreatment seems to differ in terms of gender role expectations, where females were charged with photographing, and males with actual physical abuse. Hence, in charges made by the prosecutor, who basically extends the social constructions of reality made by the CID agents, additional legal theories are constructed to justify the charges in relation to the events.

The prosecutor constructed a gender-specific "theory" that taking photographs by a female soldier constituted a crime, while taking photographs by a male soldier was not a crime. In this way, charged crimes refer to very different behaviors associated with the gendering of soldiers.

Likewise, in opening and closing statements made by prosecutors and defense attorneys, the choice of language, metaphors, body posture, demeanor, and other factors served specific gendered functions. For example, the prosecutor in both cases was male and portrayed both female defendants, explicitly or implicitly, as sexual and therefore as tainted beings. Conversely, the defense teams for both Harman and England included a female JAG officer, who approached the panel in a more expressive manner.

Additionally, in the process of jury selection, gender was a factor and I remember lengthy discussions about the benefits of male versus female panel members (jurors), and how each were scrutinized closely with regard to bias concerning male versus female soldier conduct, and especially sexualized conduct, and not just the objectivity of the charges. I found this fascinating that even in this part of the pretrial that gender was a factor for consideration. Likewise, as stated, in jury deliberations, not only were England's panel members deliberately exposed to photographs of her sexual activities with Graner, but also the entire panel was completely male. They handed down a sentence of 5 years. On the other hand, Harman's panel included some female panel members and handed down a sentence of 3 months, and even though both soldiers were convicted of the same exact charges.

In all of these ways, from the early stages of the legal process to full-blown courts-martial, gender matters.

Biography

Ryan Ashley Caldwell, Ph.D., is an Assistant Professor of Sociology at Soka University of America. Dr. Caldwell's research focuses on social, theory, cultural studies, power relations and social inequality, feminism, human rights, and women's studies. Dr. Caldwell was awarded the Women's Studies Dissertation Fellowship at Texas A&M University and the American Civil Liberties Union, Joan Glantz Research Fellowship. She earned her BA in Liberal Arts, concentrating in Philosophy, from Austin College, Sherman, Texas, her MA in Philosophy (applied ethics) from Texas Tech University, Lubbock, TX, and her PhD in Sociology from Texas A&M University, College Station, TX. She also earned a Women's Studies Certificate from Texas A&M University, College Station, TX. Currently, her research interests include war crimes, military accountability, cultural understandings of gender and sexuality, and PTSD.

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3,

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S.J. Morewitz and M.L. Goldstein (eds.), *Handbook of Forensic Sociology and Psychology*,
DOI 10.1007/978-1-4614-7178-3, © Springer Science+Business Media New York 2014