

THIRD EDITION

Psychology and the Legal System

Lawrence S. Wrightsman

Michael T. Nietzel

William H. Fortune

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*Dedicated to Franz Joseph Haydn, who
wrote: "Since God gave me a joyful
heart, He will forgive me for having
served him joyfully."*

Preface

The legal system has, for centuries, exerted an immense influence on everyday activities of all citizens. But in the last half of this century the legal system has become a focus of interest for laypersons and scholars alike. From the Supreme Court's school desegregation decision of 1954 through the recent controversial trials of prominent persons such as Mike Tyson and William Kennedy Smith, as well as recent court rulings on abortion rights, the last five decades have seen an increasing ambivalence about the law. Attorneys are distrusted; yet their numbers increase, and they continue to be consulted when people face decisions or respond to emergencies. Citizens of the United States are reminded that their country is "a nation of laws, not of men" (sic); yet they are also told (by some, at least) that social change will not result from new regulations alone.

This pervasiveness of the law demands analysis, and in the last 20 years especially, scholars from a wealth of disciplines have applied their concepts to the legal system. As one of these perspectives, psychology has much to offer. The purpose of this book is to examine the legal system through the use of psychological concepts, methods, and research results. The primary audience for the book is those stu-

dents taking a course in psychology and the law or the criminal justice system, as well as others who seek to know more about the law as a profession. This book may also be used as a supplement in those psychology courses that emphasize applied social psychology, social issues, or policy analysis. In addition, it offers coverage of a number of topics relevant to law school courses that introduce law students to social science findings and applications.

Organization

This book is organized around four basic conflicts that pervade a psychological analysis of the law. These conflicts generate dilemmas that persist and recur, whether the topic is the training of lawyers, the punishment prescribed by judges, or the rights of the mentally ill. Society demands responses to these conflicts, and psychology provides methods and empirical results that bear on their resolution. Chapter 1, by introducing these conflicts and dilemmas, provides an organizing structure for the rest of the book. Chapter 2 identifies four roles for psychologists in response to the dilemmas in Chapter 1; much of the material in this chapter is not found in other psychology-and-law texts.

Textbooks on psychology and the law are mostly a product of the last 15 years, and fewer than a dozen have appeared. The field is still taking shape, but certain changes are apparent. Most earlier texts focused on the courts; others limited their coverage to the criminal justice system; some acknowledged that they were selective for other reasons. This book aspires to be comprehensive in its coverage of relevant issues. The criminal justice system is not slighted; a chronological treatment of this process is provided, with chapters on theories of crime, the police, criminal investigations, bail setting and plea bargaining, the trial process, and sentencing. But psychology has much more to offer. For example, the socialization and training of lawyers have generated empirical inquiry in recent years, in studies summarized in Chapter 4. The appellate process, neglected in most other books, also is a subject for chapter-length coverage. Conceptions of morality and legality that form a cornerstone of responses to the four conflicts are analyzed in Chapter 3 and then utilized in subsequent chapters of the book. Children's rights, a topic receiving renewed attention in our society today, are discussed at length in an expanded chapter on the rights of special groups. An entire chapter is devoted to the psychological analysis of rape.

Other, more specialized topics that receive extended coverage (often for the first time in such a book) include recent views on the hereditary explanations for criminal behavior, the use by jurors of confessions as evidence, entrapment, death-qualified jurors, and alternative dispute resolution.

This text offers a variety of devices to aid students in their learning. Each chapter begins with a chapter outline and ends with a detailed summary. Throughout the book, examples from actual cases and trials—often in the form of interest boxes—are used to illustrate concepts and to stimulate thought. Frequently used con-

cepts are cross-referenced. A glossary of terms, prepared by Dr. Nancy W. Perry of Creighton University with the assistance of Angela Kraybill, has been supplemented with new terms for the third edition by Michael T. Nietzel and William Fortune. A separate instructor's manual is available from the publisher.

A recent survey of instructors of psychology-and-law courses by Professor Marsha B. Liss, published in the August 1992 issue of *Law and Human Behavior* (Vol. 16, No. 4, pp. 463–471), indicates that this book is the most frequently assigned textbook for undergraduate courses (Table 2, p. 467). In commenting on the second edition in her article, Professor Liss notes that its coverage, although strong on the social psychology of legal procedures, could benefit from greater recognition of clinical applications and issues of mental health law.

This third edition seeks to redress this imbalance. Two coauthors have been added: Michael R. Nietzel is a clinical psychologist who has written several texts, including ones on psychological consultation in the courtroom and theories of criminal behavior; William Fortune is a practicing attorney and a professor of law who specializes in criminal procedure and legal ethics. A completely new chapter on Competence in the Legal System (Chapter 11) has been added; this chapter contains material on various criminal competencies, particularly competence to stand trial. It also discusses the special questions surrounding the competence of children as participants in the justice system.

Mental health issues receive extended coverage in other parts of this edition. For example, additional material on mental illness and the law, the prediction of dangerousness, and the insanity defense has been included, especially in Chapters 16 and 17. At several points throughout this edition, aspects of expert forensic testimony are discussed. New material,

including the latest empirical studies, has been added to several chapters dealing with the psychology of law enforcement. Forensic uses of hypnosis, analysis of eyewitness identification and lineup procedures, police selection, and intervention by police in crises are examples of topics that have been expanded. An entirely new section describes and evaluates the techniques used in criminal profiling.

The addition of an attorney as one of the three authors of the third edition has resulted in an expanded discussion of legal assumptions and important case law as well as an increased sophistication of the book's legal analyses. More material on civil case law and civil procedures has been included, in order to complement the already extensive coverage of the criminal justice system.

Discussion of alternative dispute resolution—a wave of the future in civil disputes—has been increased. New material on the death penalty, on theories of crime, and on jury selection has been provided, as well as a completely new section on pretrial publicity and resulting changes in venue. The references section, with well over 1000 entries, reflects our expanded and updated coverage.

The responsibility of textbook authors does not end with the preparation of the manuscript; any publication is only a step in the never-ending search for understanding. We continue our quest, and we earnestly hope that the third edition of *Psychology and the Legal System* will aid in yours.

Acknowledgments

Our preparation of this third edition was aided by the thoughtful comments of several colleagues who read initial drafts of the manuscript and provided detailed suggestions that contributed immensely to the quality of the book. We want to thank Lieutenant Fran Root

of the Lexington Fayette County Division of Police and David Berry and Richard Milich of the University of Kentucky for their careful examination of portions of the initial draft.

Along with these evaluations, the book received extremely conscientious, well-informed prepublication reviews from a team of law and psychology scholars commissioned by the publisher. In each case these reviewers supplied lengthy evaluations of the manuscript that were both fair and pointed. We owe a considerable intellectual debt to the following people who took the time to provide a set of reviews that challenged us to improve our manuscript in important ways: Brian Cutler of Florida International University, Valerie Hans of the University of Delaware, Robert Mauro of the University of Oregon, Gary Melton of the University of Nebraska, Gary Moran of Florida International University, Steve Penrod of the University of Minnesota, and Gary L. Wells of Iowa State University. We hope they recognize their impact on the final version of the book.

Our editor at Brooks/Cole, Marianne Taflinger, was extremely helpful in coordinating the project and guiding it to completion. She provided just the right combination of support and gentle pressure to help us maintain our schedule. Once again, Fiorella Ljunggren coordinated the production with dedication and skill. And Susan Haberkorn contributed her talent and creativity to the design and cover of the book. To all of them our sincere thanks.

We received invaluable assistance from several staff members at the University of Kentucky. Cheryl Jones and Carol Parris of the University of Kentucky College of Law Library helped locate important legal materials. Finally, Shirley Jacobs of the Department of Psychology masterminded the final preparation of our manuscript while simultaneously providing editorial assistance, solving our technical word processing problems, coordinating the corre-

spondence among three authors separated by half a continent, updating the entire bibliography, and generally keeping us on track to the final destination. Although we have become accustomed to this level of efficiency from Shirley, we never quite understand how she

manages it. We cannot thank her strongly enough.

Lawrence S. Wrightsman
Michael T. Nietzel
William H. Fortune

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Psychology and the Law: Impossible Choices

THE IMPORTANCE OF LAWS

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Laws as Human Creations
Laws and the Resolution of Conflict
The Changing of Laws

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The Anthropological Approach
The Sociological Approach
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BASIC CHOICES IN THE PSYCHOLOGICAL STUDY OF THE LAW

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Truth versus Conflict Resolution in Plea
Bargaining and Settlement Negotiation

The Fourth Dilemma: Science versus the Law as a Source of Decisions

Law Is Doctrinal; Psychology Is Empirical
Law Functions by the Case Method,
Psychology by the Experimental Method
Law Supports Contrasting Views of Reality;
Psychology Seeks to Clarify One Muddled
View of Reality

SUMMARY

It's "one of those semesters." Over the last couple of months, you have suffered several problems. First, your "little" sister has called. Actually, she's not so little anymore. She's a junior in high school, and she's just discovered she's pregnant. She's mortified; what should she do? Although abortions are still legal in her state, she questions whether abortion is the proper choice for her. However, she seriously doubts whether having a baby would be a good idea.

Next, your bank mails you an official notice, informing you that a check has bounced. The bank claims that you wrote a check for \$90; you know you didn't. But the bank, frustrated by a wave of "hot" checks by students, is considering prosecuting you. Actually, you lost your checkbook several weeks ago, and now someone apparently has forged your name. You are innocent of any criminal intent or action. But are you liable for the overdraft?

Distraught by these events, and hence distracted, you drive your car through a crosswalk and gently bump a pedestrian. As far as you can tell, he is outraged but not seriously injured. However, he copies down your name, address, and license number, and he angrily tells you to expect a call from his lawyer. Certainly these events are distressing. And we hope they do not happen to you. But they are frequent in the United States. Close to half the pregnancies in this country occur outside of wedlock, and about one-third of all pregnancies now end in abortion, at a rate of 1.6 million per year or more than 4000 a day. Although your "hot check" was beyond your control, someone has committed fraud and the bank is entitled to legal redress. And the nudging of a pedestrian by your car's fender caused no real harm, but there are close to 800,000 attorneys in the United States—most of whom stay quite busy—and more than a few of them would be willing to assist the aggrieved party in bringing suit against you.

THE IMPORTANCE OF LAWS

To outsiders, the incidents just described may seem commonplace, but they are urgently important to the people involved. Taken together, they illustrate the pervasiveness of the law in our society. But just how *does* the law work? The purpose of this book is to help you understand how the legal system operates, by applying psychological concepts, findings, and methods to its study.

The Extensiveness of Laws

Laws are everywhere. They entwine us; they bear on—often intrude on—everything from birth to death (Post, 1963). Laws regulate our private lives and our public actions. Laws dictate how long we must stay in school, how fast we can drive, when (and, to some extent, whom) we can marry, and whether we are allowed to enjoy many individualistic pleasures, such as playing our stereo at full volume or letting our dog romp through the neighbors' yards and gardens. Some say our society has too many laws, but almost all people agree that a system of laws is necessary. Social life without law as a means of social control would result in anarchy, and anarchy—for most of us—carries costs that far outweigh its freedoms.

Laws as Human Creations

Given that the body of laws is so wide in its impact, we might expect that the law is a part of nature, that it was originally discovered by a set of archaeologists or explorers. Perhaps we summon the image of Moses carrying the Ten Commandments down from the mountain. But our laws are not chiseled in stone. Rather, laws are human creations that evolve out of the need to resolve human conflicts. Any complex society

generates differences in behavior and hence disagreements among people. When disagreements occur, society must have mechanisms to resolve them. So societies develop laws and other regulations as conflict-resolution mechanisms (for an example, see Box 1-1).

Laws and the Resolution of Conflict

Conflict—that is, disagreement, argument, and dispute—is not necessarily bad; nor is it always good. Mainly, conflict is inevitable. It cannot be avoided, any more than you can avoid sneezing when the urge to sneeze begins. But society can establish procedures to control your behavior when your sneezing intrudes on another's rights. We recognize the need for mechanisms—laws, rules, habits—to discourage a person from sneezing in people's faces or on their food. Customs and rules of etiquette evolve partly to deal with the conflict between one person's impulses and others' rights; hence we cover our face with a handkerchief when a sneeze is coming on, or we apologize if the act can't be constrained. Similarly, laws are developed to try to untan-

gle and resolve conflicts that cannot be prevented.

The Changing of Laws

Because our society is so technologically developed, it also is constantly changing. As society changes, so does our day-to-day existence. The basic raw material for the construction and the revision of laws is human experience. Laws need to be developed, interpreted, reinterpreted, and modified to keep up with the rapid changes in our lives. As George Will (1984) expressed it, "Fitting the law to a technologically dynamic society often is like fitting trousers to a 10-year-old: Adjustments are constantly needed." For example, back in 1973, when the U.S. Congress passed the 55-mile-per-hour speed limit, the law made sense because of the urgent need to conserve gasoline. A decade later, with gasoline more abundant and, temporarily, less costly, the federal government allowed states to return speed limits to 65 miles per hour. Critics of the 55-mile-per-hour limit acknowledged that it conserved fuel and saved lives, but they also argued that it resulted "in a

Box 1-1

A "Boom" for 50 Bucks

States have passed laws restricting the "boom car," or the playing of a car stereo at a very high volume. Effective at the beginning of 1990, California made it illegal to operate a car sound system that can be heard 50 feet away (Bishop, 1990). Convicted violators must pay a \$50 fine for the first offense and increased fines for any subse-

quent violations.

Although California was the first state to pass such a law, other states have enacted even more severe penalties, including the confiscation of such sound systems. And many cities and municipalities have passed local ordinances that require drivers to turn down the volume.

One driver who may be affected by "boom" laws is Pat Brister, of Arlington Heights, Illinois, winner of the "Thunder on Wheels" competition for two consecutive years. His 1987 Thunderbird has a 15-speaker system with 890 watts of sound, leaving enough space for "a passenger and maybe a folding toothbrush" (Bishop, 1990, p. 10).

tremendous loss of time—and time has an economic value, just as fuel and lives have economic value” (Kilpatrick, 1985).

Certainly the framers of the U.S. Constitution, and even the lawmakers of 20 years ago, never anticipated that the possibility of surrogate motherhood would lead to a conflict between the natural mother of an infant and a couple contracting for her services. Yet this is what happened in the “Baby M” case. After agreeing to be artificially inseminated and receiving payment from a couple named Stern, Ms. Mary Beth Whitehead decided that she wanted to keep the child. The Sterns filed a lawsuit against her to gain custody of Baby M and establish their legal parental rights; a New Jersey judge ruled in their favor, although Ms. Whitehead was awarded visitation privileges. Concerned with the ethical implications of “baby selling,” several states have since made it illegal to pay a surrogate mother more than her out-of-pocket expenses in connection with the pregnancy and birth.

Finally, no one could have anticipated in the early 1980s the spread of a disease like AIDS to the point that, by 1991, the U.S. Senate would vote to require mandatory AIDS testing for some health-care workers and to further require these workers, if HIV-infected, to inform their patients of the infection.

Consider again the examples at the beginning of this chapter. Each reveals how, in our complex and advanced society, basic values come into conflict. Should a woman have the legal right to have her own pregnancy aborted? Although that question has been controversial for centuries, only recently have legally tolerated and medically safe abortions become frequent in the United States. The U.S. Supreme Court, in its 1973 *Roe v. Wade* decision, gave virtual sanction to abortion on demand during the first trimester of pregnancy. Almost two decades later, in the case of *Rust v. Sullivan*

(1991), this same court ruled that federally funded family-planning clinics could be barred from even discussing abortion as an option with their clients.

These controversial rulings force us to re-examine our basic values and beliefs about the foundations of morality. Citizens of the United States are divided on this issue: On one side are women who have availed themselves of legal abortion, various organizations that advocate for its availability, and many citizens who believe that the right to an abortion is part of a fundamental right to privacy. On the other side are protesters who urge the overthrow of the *Roe v. Wade* decision, legislators attempting to change the ruling, and people who believe that abortion is the killing of an unborn child and is morally justified only in the rarest circumstances. Which do we value more: an ethic that endorses freedom, especially the right of individual women to control their own bodies, or a principle of interdependence that emphasizes the state's obligations to others, including the unborn (Woodward & Uehling, 1985)? The 1992 Supreme Court decision of *Planned Parenthood v. Casey*, in which the Court upheld its basic ruling of *Roe v. Wade* but allowed the states to add some restrictions on the availability of abortion, shows that the Court itself is balanced (perhaps unsteadily) between the conflicting sides of this issue.

Likewise, the ease with which checks can be forged or credit cards misused reflects a conflict in modern society. A materially abundant society must develop some system that can substitute for carrying large amounts of cash on your person. Security is an important value; you want your money to be protected. But access is also vital; when you have a reason to spend some of your hard-earned money, you want to do so right away. Bank checks and credit cards seem like a good trade-off, and ideally they work. But occasionally the system breaks down.