

## CHAPTER 1

# *Forensic Psychology: Toward a Standard of Care*

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### INTRODUCTION

In his groundbreaking book, *On the Witness Stand* (subtitled *Essays on Psychology and Crime*), Hugo Münsterberg (1908) was highly critical of judges, attorneys, and jurors. He wrote, “The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more” (p. 11). Without citing a single reference, Münsterberg indicated that the “strong strides” (p. 10) made in experimental research had profound implications for new roles for psychologists—as expert witnesses in court. He described the potential contributions psychologists could make in addressing issues such as inaccurate perceptions and faulty memories of witnesses, the use of reaction time and visible “traces of emotions” to distinguish truth from lying and to establish guilt, the role of suggestion in contaminating witness recall, the use of hypnosis as a possible contributing factor to false confessions, and the role of posthypnotic suggestion as a potential motivating factor in some crimes. Furthermore, Münsterberg explained that psychologists not only possessed the skills to treat those who committed crimes, but, at the turn of the twentieth century, had the knowledge and expertise to prevent crime as well.

Münsterberg’s advocacy for these new roles for psychologists did not, unfortunately, fall on deaf ears. Rather, as described by Ewing (2003), John H. Wigmore (1909), a leading scholar on the laws of evidence, attacked Münsterberg’s assertions in a scathing article in the *Illinois Law Review*. Consequently, Münsterberg’s somewhat grandiose proposals for new roles for psychologists were rejected by attorneys. Unless called as fact witnesses (or as defendants or plaintiffs), psychologists rarely saw the inside of a courtroom. Yet, over time, some of Münsterberg’s ideas proved to be, at least in part, valid. Psychologists assumed some of the roles envisioned by him. For example, empirical research abounds on eyewitness memory for people and events (see Castelli et al., 2006; Wells & Loftus, 2003) and factors contributing to false confessions (see Oberlander, Goldstein, & Goldstein, 2003). Although none of what Münsterberg foresaw as valid indicators of malingering was ever empirically validated, psychologists have developed reliable and valid methods

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to assess response style (see Rogers & Bender, 2003). The use of hypnosis in a range of forensic settings has become almost commonplace (Schefflin, 2006; also see Chapter 28).

Almost 100 years after the publication of Münsterberg's book, forensic psychology has been recognized as a field unto itself. *Jenkins v. U.S.* (1962) held that psychologists could serve as experts in federal court. The American Psychological Association (APA) frequently submits *amicus* briefs to appeals courts and to the U.S. Supreme Court on those matters for which relevant empirically based research is available. The APA formally recognized forensic psychology as an area of specialization in 2001 (A. M. Goldstein, 2003b; Heilbrun, 2000). Journals devoted to forensic psychology research and practice are plentiful. Forensic assessment instruments, designed to assist forensic mental health professions in conducting evaluations in a wide range of civil and criminal settings, continue to be developed and researched (Grisso, 1986, 2003a). Graduate courses at the master's and doctoral levels continue to proliferate, and new clinical-forensic doctoral programs have been developed (e.g., Sam Houston State University in Texas; John Jay College of Criminal Justice in New York; see Krauss & Sales, 2006). Postdoctoral continuing education in forensic psychology is regularly offered by professional organizations such as the APA and the American Academy of Forensic Psychology (listings of representative forensic training workshops can be found at [www.abfp.com](http://www.abfp.com)). The American Psychology-Law Society now schedules its national meetings annually, as opposed to biannually, to accommodate the increased interest and research in this field. Postdoctoral training programs receive a steady stream of applicants seeking formalized training in the field (Grisso, personal communication, 2005). The APA, the Association of State and Provincial Psychology Boards, and the National Register of Health Service Providers formally recognize board certification in forensic psychology, awarded by examination through the American Board of Professional Psychology. (For a thorough description of the origins of the field of forensic psychology, see Bartol & Bartol, 2006; Brigham & Grisso, 2003.) The state of the field of forensic psychology has evolved such that a standard of care is emerging in selecting forensic assessment methodology, conducting ethical forensic assessments, and in presenting opinions in written reports and in courtroom testimony.

*Forensic Psychology* (A. M. Goldstein, 2003a), a volume of the *Handbook of Psychology* (I. B. Weiner, 2003), consisted of 28 chapters, each of which was written by an expert or experts on a different aspect or area of forensic psychological practice. The topics included what is generally thought of as the "meat and potatoes" (or, if a vegetarian, the "bread and butter") of forensic practice (i.e., trial competence, mental state at the time of an offense, eyewitness memories, child custody, personal injury, and violence risk assessment). Limiting that book to only 28 chapters and 606 pages was a challenge. A number of emerging psycholegal issues that forensic mental health experts may be called on to address were not included. This volume, in many ways, represents a continuation of that book.

In 28 new chapters, the latest research on a number of assessment techniques and methods commonly used in the field of forensic psychology is considered, the most recent and significant case law in the areas of civil and criminal forensic



mental health practice is described, and ethical issues, research, case law, and methodology in emerging areas of forensic mental health practice are presented. As such, this book describes expanding roles for forensic experts—not only beyond those fantasized by Münsterberg, but also beyond those psycholegal areas covered in the 2003 book. The forensic assessment methodology and the models for assessment described by the authors of these chapters should be considered in light of the emerging standard of care in the field: what the reasonably prudent professional should do in conducting similar evaluations. Although specific methodology must be determined on a case-by-case basis, forensic mental health practitioners should consider the material in those chapters that address methodology as a template in designing their own evaluation methodology on similar psycholegal issues.

### Definition of Forensic Psychology

Although many definitions of forensic psychology exist (e.g., Committee on Ethical Guidelines for Psychologists, 1991; Hess, 2006), most share common characteristics. In the successful petition submitted to the APA to designate this field as a specialty in professional psychology, Heilbrun (2000) defined forensic psychology as

the professional practice by psychologists within the areas of clinical psychology, counseling psychology, neuropsychology, and school psychology, when they are engaged regularly as experts and represent themselves as such, in an activity primarily intended to provide professional psychological expertise to the judicial system. (p. 6)

The definition of this expanding area of practice proposed by this author (A. M. Goldstein, 2003a) in *Forensic Psychology*, Volume 11 of the *Handbook of Psychology* (I. B. Weiner, 2003), proposes that forensic psychology “involves the application of psychological research, theory, practice, and traditional and specialized methodology (e.g., interviewing, psychological testing, forensic assessment and forensically relevant instruments) to provide information relevant to a legal question” (p. 4).

Forensic psychologists may conduct *research* on topics related to the civil and criminal legal systems or may focus on specific questions that these institutions of justice consider; such findings may take the form of expert testimony, whose goal is to educate a jury or judge about a specific legally relevant topic (i.e., issues related to eyewitness identification; factors that may contribute to false confessions). Those in the *practice* of forensic psychology typically conduct individual assessments of defendants, plaintiffs, or parents involved in child custody cases; the product of these evaluations has a similar goal: to educate jurors and judges by providing them with information they may not otherwise have known when they consider making a legal determination (i.e., the impact of mental retardation or mental illness on the ability of a defendant to assist an attorney in defending the client in court; the possible role that duress or coercion may have played in a defendant’s involvement in a criminal act to be considered by a federal judge at the time of sentencing; the effects of Alzheimer’s disease on a patient’s ability to make an informed decision about consenting to or refusing medical treatment). The chapters in this book reflect the perspective that an element of the evolving standard of care

in the field of forensic psychology involves the integration of practice and research to reach ethical, relevant, informed forensic opinions.

## TOWARD A STANDARD OF CARE

Over the past 20 years, there have been considerable advances in forensic mental health assessment involving research that has supported the theoretical underpinnings of psycholegal evaluations, the development of valid, reliable forensic assessment instruments (A. M. Goldstein, 2003a, 2005; Grisso, 1986, 2003a; Heilbrun, 2001; Heilbrun, Marczyk, & DeMatteo, 2002; Melton, Petrila, Poythress, & Slobogin, 1997; I. B. Weiner & Hess, 2006), and a dramatic increase in the number of criminal and civil issues that forensic mental health experts are retained to address. Because of this growth, the need for a standard of care—those steps the reasonably prudent forensic mental health expert should take to ensure quality, ethical, relevant opinions, reports, and testimony that are data-based—is even more critical.

In his landmark text, *Evaluating Competencies: Forensic Assessments and Instruments*, Grisso (1986) described some of the common criticisms leveled against forensic mental health experts. These focused on the lack of relevance of opinions to the legal issue, incredibility as to the opinions reached, and opinions that were based on inadequate sources of information. With the recognition of forensic psychology as a specialty by the APA in 2002 (A. M. Goldstein, 2003b; Heilbrun, 2000), the APA acknowledged that as a field, forensic psychology has, among other characteristics, unique educational and training requirements, its own theoretical orientation, a specialized knowledge base (including research and journals devoted to the field), and its own methodology to ensure the credibility of the field and to protect the public from uninformed or unqualified practitioners. The recognition of these characteristics or factors that contributed to the APA's approval of forensic psychology as a specialty in many ways serves as a foundation for the premise that a standard of care for conducting forensic mental health assessments is emerging. The acknowledgment that there is an expected threshold for the quality of forensic psychological assessments should be not merely an aspirational goal or theoretical concept, but a reality.

The standard of care in forensic psychology is composed of a number of elements: ethical conduct; knowledge of the legal system and the statutes and case law that drive forensic assessments; use of appropriate methodology, including, when appropriate, traditional psychological tests, forensic assessment instruments, and forensically relevant instruments; the integration of information from a variety of data sources to formulate opinions; an awareness of empirical research relevant to the psycholegal issue being evaluated and the use of results of such studies to inform the forensic decision-making process; and the preparation of written reports and presentation of expert testimony in court that is objective and thorough and that honestly reflects *all* findings, not only those advanced by the retaining attorney. These elements of the standard of care are also areas of knowledge and practice that are considered when applicants for board certification in forensic psychology are examined by the American Board of Forensic Psychology.



It is expected that the reasonably prudent forensic psychologist practices in a manner consistent with the APA (2002) ethical principles, follows the aspirational guidelines established in the "Specialty Guidelines for Forensic Psychologists" (Committee on Ethical Guidelines for Forensic Psychologists, 1991), and adheres to other guidelines such as those related to record keeping (APA, 1993) and those focusing on specialized areas of forensic practice such as child custody evaluations (APA, 1994). Weissman and Debow (2003) argue that adhering to these ethical principles and guidelines serves to enhance the competence of the expert. These documents stress that, from an ethical perspective, the standard of care includes practicing within one's area of competence, presenting credentials in court that are honest and without "puffery," rendering an opinion based on sufficient information and data, and considering alternative opinions and being able to explain why they have been rejected. Some of these documents describe the methodological steps that should be followed in conducting a forensic assessment (APA, 1994) and thus suggest a standard of care to be followed by practitioners in terms of expected methodology.

As advanced by Grisso (1986) and reinforced by other experts in the field (A. M. Goldstein, 2003a; Heilbrun, 2001; Heilbrun et al., 2002; Melton et al., 1997; I. B. Weiner & Hess, 2006), forensic mental health professionals must understand those legal concepts that serve as the basis for their evaluations. The standard of care must include not only a reasonable familiarity with the relevant statutes and case law that shape the forensic assessment and any report and testimony that flow from them, but, in addition, experts are expected to know the rules that govern expert testimony in those jurisdictions in which the assessments are conducted. Forensic psychologists must be familiar with the nature of expert testimony, including rules of evidence and limits placed on the content of such testimony (Ewing, 2003).

The standard of care includes the recognition that any forensic referral may result in courtroom testimony. As such, forensic mental health experts are expected to memorialize their interviews by recording sessions (where permissible) or by keeping thorough, contemporaneous written notes (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Experts should not rely on their memory when preparing written reports or testifying. Rather, the reasonably prudent expert documents the content of interviews, maintains these records, and relies on them as a source of information in formulating, explaining, and defending opinions.

Part of the emerging standard of care in the field is the reliance on multiple sources of information to arrive at opinions. Shapiro (1991) urges forensic mental health experts to integrate data from numerous sources to arrive at informed, credible opinions. Unquestioned acceptance of an examinee's presentation of his or her background, history, or rendition as to what occurred at the time of a crime or how well qualified he or she is as a parent (and how poor a parent an ex-spouse would be) is naive at best. It ignores the obvious motivation to deceive and does not meet acknowledged practice standards in the field. Malingering and exaggeration are coping strategies used by examinees to make the best of a bad situation and, thus, should be expected in forensic evaluative contexts (Rogers, Salekin, Sewell, Goldstein, & Leonard, 1998; Rogers, Sewell, & Goldstein, 1994). The assessment of response style is considered by many to be a fundamental element, a cornerstone of

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any forensic assessment (i.e., A. M. Goldstein, 2003a; Heilbrun, 2000; Rogers, 1997; Rogers & Bender, 2003; see Chapter 2), and must be considered in all forensic evaluations. It is at least partially addressed by incorporating third-party information into the assessment process to corroborate information provided by those who have much to gain or lose by successfully deceiving the evaluator (Heilbrun, Warren, & Picarillo, 2003; see Chapter 8). Forensically relevant instruments that address issues of response style related to claimed symptoms of memory loss, Schizophrenia, and other cognitive disorders (including intellectual deficits and neurological symptomatology) are part of the evaluation process (Rogers & Bender, 2003), and their appropriate use is part of the evolving standard of care.

Reliable and valid forensic assessment and forensically relevant instruments provide information relevant to a determination of legal competency and address issues related to response style. Grisso (1986, 2003a) describes a wide range of forensic assessment instruments developed by experts to provide information of direct relevance to specific legal questions and competencies. When used with other sources of information, forensic assessment instruments may help determine whether or not the examinee's performance suggests competence or incompetence. Forensically relevant instruments may serve to evaluate the credibility or genuineness of an examinee's responses to other tests and thus address the significant issue of malingering. However, these techniques do not explain *why* an examinee is not competent. The use of traditional psychological tests (i.e., those that measure cognitive functioning or personality characteristics) as part of the forensic assessment battery may contribute to an understanding of the source of an examinee's lack of competence. Forensic psychology experts should consider the use of instruments from all three categories when conducting evaluations, and if testing is not included in the evaluation protocol, there should be a clearly stated rationale for omitting this element of the forensic assessment. Consistent with the evolving standard of care, information derived from these instruments must be integrated into the written report and testimony.

Numerous high-quality peer-reviewed journals are devoted to research on a broad range of topics relevant to forensic mental health practice (i.e., *Law and Human Behavior*, *Behavioral Sciences and the Law*, *Criminal Justice and Behavior*, *Journal of Forensic Psychology Practice*). The results of empirical studies appearing in these and other journals often provide the foundation on which forensic assessment and forensically relevant instruments are based. Research findings relating to specific demographic groups are of prime significance when practitioners must interpret data and present opinions in court, and results of such studies must be considered in formulating opinions about those from minority populations (a group overrepresented in the criminal justice system and, thus, among examinees in criminal forensic evaluations). Studies that consider factors that may serve to increase or decrease the risk of future violence must be familiar to forensic mental health practitioners conducting risk assessments. As such, part of the developing standard of care involves a reasonable familiarity with current research to inform forensic opinions and testimony. Forensic experts are expected to integrate published research results with their findings to formulate informed opinions and present them in an accurate and meaningful manner to the trier of fact.



In preparing reports and offering testimony, there is a recognized standard, most clearly articulated in the "Specialty Guidelines" (Committee on Ethical Guidelines for Forensic Psychologists, 1991; also see I. R. Weiner, 2006). Forensic mental health experts are ethically obligated to present opinions in an objective manner, independent of the spin hoped for by the retaining attorney. It is expected that experts will bring to the stand all material they relied on to reach the opinions that are the subject matter of the testimony, including detailed notes that serve to memorialize interviews. The report and testimony should focus solely on the specific legal issue in question (Heilbrun et al., 2002). In presenting findings based on a forensic evaluation, whether in a written report or on the witness stand, the emerging standard of care from an ethical and practice perspective requires the expert to serve an educative function rather than adopt an advocacy role.

## SELECTION OF TOPICS

As previously described, there was a dilemma in limiting topics covered in *Forensic Psychology* (A. M. Goldstein, 2003a) to a total of 28 (and 606 pages). For practical reasons, including the fact that the 2003 book was part of a 12-book series, certain topics were purposefully omitted, even though some in the field may have considered them as in the mainstream of forensic mental health practice. This text includes those areas of forensic psychological and psychiatric assessment. Also, forensic mental health experts may have been referred cases for assessment involving somewhat uncommon psycholegal questions with only a modest research and practice literature to which they can refer. These areas of forensic assessment are addressed in this volume as well. In addition, over the past decade, a number of new, unique areas requiring forensic evaluations and expert opinions have emerged. The range of psycholegal questions for which attorneys seek expert opinions from forensic mental health professionals has expanded. Some of the chapters included in this work focus on these emerging topics, areas of forensic involvement about which few if any chapters or books have been written that integrate an appropriate research-practice knowledge base. As such, this book provides practitioners with a foundation and perspective to consider when accepting (or rejecting) a referral for a specific assessment and to assist them in selecting appropriate evaluation methodology and to familiarize them with representative case law and research. In short, this volume is designed to assist forensic mental health practitioners in acquiring a clearer understanding of the legal, ethical, research, and methodological issues related to each topic—elements of the evolving standard of care in the field.

Chapter authors are nationally recognized experts in their specific areas. Most are board certified in forensic psychology by the American Board of Professional Psychology. (For information on board certification in forensic psychology, readers are referred to the web site of the American Board of Forensic Psychology, [www.abfp.com](http://www.abfp.com).) Many of these authors have conducted national workshops on behalf of the American Academy of Forensic Psychology and are noted for their clarity of thought and teaching abilities. Others are legal scholars, many of them law professors, who have published extensively on the topics they were invited to cover

in this text. Still others are authors of tests commonly used in the fields of clinical and forensic psychology, or they are considered to be among the field's leading experts on these instruments. In short, the authors of these chapters were selected because of their specific expertise, national reputation, and familiarity with the most up-to-date case law, ethical issues, research, and methodology in their specific area of expertise.

## ORGANIZATION OF THIS VOLUME

The field of forensic mental health assessment is rapidly expanding, and forensic experts are retained by attorneys to address an increasing number of psycholegal questions. The topics included in this volume are organized into eight major areas: (1) forensic assessment methodology, (2) ethical issues in forensic practice, (3) civil forensic psychology, (4) criminal forensic psychology, (5) forensic mental health experts in court, (6) forensic psychological consultation, (7) special populations, and (8) special topics in forensic practice.

### Forensic Assessment Methodology

Forensic experts must rely on multiple sources of information when conducting forensic mental health assessments. In this section, a general model for designing and conducting these evaluations is described. The application of psychological tests commonly used in clinical psychological practice to forensic cases, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the Personality Assessment Inventory (PAI), and the Rorschach, is presented by authors and coauthors who are nationally recognized experts on each of these instruments. Because forensic cases in both civil and criminal settings may raise questions about the presence and implications of underlying neurological disorders, a section addressing the use of neuropsychological tests in forensic mental health assessment is included.

### *A Principles-Based Approach to Forensic Mental Health Assessment: Utility and Update*

There are *many* incorrect and inadequate ways to conduct a forensic psychological evaluation. But is there only *one* correct way to perform a thorough, ethical, and credible forensic assessment? The answer to this question is somewhat complex because each forensic case is different. Experts must design assessment methodologies based not only on the referral question (i.e., the psycholegal issue to be addressed), but also on the individual characteristics of the examinee (i.e., language, culture, age, reading level). However, there are agreed-on components that constitute a thorough forensic psychological assessment that will meet the emerging standard of care in the field, and experts should select from among these elements in light of each examinee's characteristics. In his book *Principles of Forensic Mental Health Assessment*, Heilbrun (2001) described those elements that forensic mental health practitioners should consider when conducting psycholegal evaluations. In many ways, the principles advanced by Heilbrun (see also Heilbrun, DeMatteo, & Marczyk, 2004) reflect, in part, an emerging standard of care in forensic psychology practice.



In their chapter in this volume, Kirk Heilbrun, Geoffrey Marczyk, David DeMatteo, and Jenette Mack-Allen present 29 principles that guide effective and acceptable practice in performing forensic mental health assessments. Their goal in providing these principles is to promote and improve the quality and consistency of forensic evaluations. According to Heilbrun and his colleagues, these principles “should help minimize arbitrariness in the legal decision-making process through promoting thoroughness, consistency, and impartiality” (Chapter 2). Their principles-based approach has significance for (a) the education and training that those entering the field of forensic practice should receive (see Packer & Borum, 2003, for a discussion of forensic psychology training and education); (b) research and theory in the development of forensic assessments; and (c) shaping of public policy regarding the development of legal standards, interpreting legislation, and applying and developing administrative codes (Heilbrun, 2001). Heilbrun and his coauthors propose, among other areas, the need to correctly identify, understand, and focus assessment strategies on appropriate statutes; the requirement that reliable, valid, and appropriate data sources be used in forming opinions; the need to rely on third-party sources of information (for more information on this topic, see Heilbrun et al., 2003; Chapter 8); the inclusion of strategies to address issues related to response style (malingering, exaggeration, and defensiveness; see Rogers & Bender, 2003, for additional information on this topic); avoidance of responding to the ultimate issue; and the need to rely on “scientific reasoning” in forming opinions. Although the specific steps required to conduct an individual forensic assessment must be determined on a case-by-case basis, these principles should serve to increase the quality of forensic mental health assessments, a view presented by Heilbrun et al. (2004).

### ***Forensic Applications of the Minnesota Multiphasic Personality Inventory-2***

In conducting forensic psychological assessments, the need to rely on objective, valid, and reliable sources of data is well established (Grisso, 1986, 2003a; Heilbrun, 2001; Melton et al., 1997). There is little controversy from mental health experts that the MMPI-2 fulfills this need. Developed by Hathaway and McKinley (1940), the MMPI became the most researched and most frequently administered instrument in mental health practice (Lubin, Larsen, Matarazzo, & Seever, 1985). For a number of reasons, including the outdatedness of item content, this instrument was restandardized (Butcher, Dahlstrom, Graham, Tellegen, & Kaemmer, 1989, 2001), and the MMPI-2 gradually replaced the initial version of this instrument. The MMPI-2 is used in a wide range of forensic settings when behaviors relevant to psycholegal issues are in question.

Roger Greene (Chapter 3) describes the use and limitations of the MMPI-2 in a number of forensic settings. In his chapter, Greene cautions that, despite the voluminous research on the MMPI and MMPI-2, individuals involved in legal cases (e.g., defendants, plaintiffs) have rarely, if ever, been represented in research studies. He reviews the literature related to the effects of the context in which the MMPI-2 was administered (e.g., personal injury versus custody evaluations) and its impact on MMPI-2 results. In forensic contexts, especially those involving criminal cases, those tested are typically younger and less educated and frequently come

from minority culture backgrounds. Greene reviews the effects of age on MMPI-2 results (there is a substantial effect for those under the age of 20; Greene, 2000), level of education (affecting a number of scale scores; Caldwell, 2000; Dahlstrom & Tellegen, 1993), and the role of ethnicity (there is no consistent pattern of differences between scale scores for any two ethnic groups; Greene, 2000; Timbrook & Graham, 1994; Zalewski & Greene, 1996). Among the issues addressed by Greene are questions of validity, item omissions, consistency of item endorsement, and research and interpretation of scales related to response style as reflected by malingering, exaggeration, defensiveness, and social desirability. Because those who are evaluated in a legal context have much to lose (e.g., freedom, custody of a child) or to gain (e.g., acquittal by reason of insanity versus incarceration, financial award in a personal injury case), Greene discusses the effects of "coaching" on MMPI-2 results. Because those involved in forensic cases may be retested some time in the future with the MMPI-2 (e.g., by opposing counsel, the result of successful appeals), he discusses the stability of MMPI-2 performance over time. In his chapter, Greene also reviews research on content-based interpretation of the MMPI-2.

### ***The Personality Assessment Inventory: Issues in Legal and Forensic Settings***

As described in the introduction to this chapter and by Heilbrun et al. (Chapter 2), it is essential that, whenever possible, experts in forensic psychology include valid, objective tests as sources of data on which to rely in formulating opinions. Many of the instruments used in conducting forensic assessments provide essential information relevant to diagnostic issues and personality dynamics and address a major area of concern in forensic assessments: response style (see Rogers & Bender, 2003, for a thorough description of issues and instruments related to the assessment of malingering). In forensic psychological practice, examinees, especially in criminal settings, may have difficulty with both reading and comprehending questions on paper-and-pencil personality tests, making the administration of many of these instruments inappropriate. Similarly, under *Frye v. United States* (1923) and *Daubert v. Merrell Dow Pharmaceuticals* (1993), instruments used by experts may be challenged in court as to their admissibility. Experts must carefully select methods in terms of their relevance to the psycholegal issue under scrutiny and choose tests that are appropriate for the demographics of the examinee, including reading level; test also must possess the properties delineated in *Frye* and *Daubert* that will convince the trial judge that testimony based on such instruments meets the legal standard for admissibility.

Leslie Morey (1991), the author of the Personality Assessment Inventory (PAI), and his coauthors, Megan Warner and Christopher Hopwood (Chapter 4), describe the development of this frequently used instrument, its structure, its psychometric properties, and studies that support its use in a wide range of forensic settings. In their chapter, they review those PAI scales designed to assess profile validity and its clinical scales and several treatment consideration scales of this 344-question self-report measure. A brief consideration of those legal issues relevant to the admissibility of expert testimony is included. This review is followed by a description of the empirical literature with which forensic psychologists should be familiar so



that they may respond to evidentiary challenges that may arise regarding the use of the PAI in court. Studies on the PAI that address the criteria for admissibility are organized in terms of legal questions: (a) Is the method based on scientifically tested or testable theories?; (b) Has the method been subjected to peer review and publication?; (c) Is there a known error rate and standards for drawing conclusions from the method?; and (d) Is the method accepted within the field? Morey, Warner, and Hopwood describe the relevance of the PAI as part of an overall forensic assessment strategy to evaluate the genuineness of claimed symptoms of mental illness, emotional damages, and self-reports of physical pain, risk to self, and risk to others. They further describe its use in addressing psycholegal issues relevant to criminal culpability, competence to confess, and fitness for trial and its role in custody evaluations and assessments designed to screen for high-risk occupations. Because of the length of this instrument, its fourth-grade reading level (Morey, 1991), and the empirical research supporting its reliability and validity in a range of settings, the authors of this chapter emphasize the value of the PAI as part of a forensic mental health assessment battery.

### ***Rorschach Assessment in Forensic Cases***

Psychologists frequently use psychological tests, both objective and projective, as part of the methodology relied on to address psycholegal issues that involve personality characteristics and functioning (Borum & Grisso, 1995). Over the past decade, criticism has been leveled at projective techniques, much of which has been specifically aimed at the Rorschach Inkblot Method (RIM). Questions have been raised regarding its reliability, validity, norms, and tendencies to identify psychological dysfunction where none exists and whether Rorschach-based evidence meets the legal standard for admissibility in a court of law (Grove, Barden, Garb, & Lillienfeld, 2002; Wood, Nezworski, Gard, & Lillienfeld, 2001; Wood, Nezworski, Stejskal, & McKinzey, 2001). As such, the RIM has been viewed as a controversial technique.

Citing research published in peer-reviewed journals, Irving Weiner (Chapter 5) addresses these issues and criticisms. His chapter serves to educate experts about the proper use of this instrument in a wide range of forensic cases, including those involving child custody issues, personal injury claims, Posttraumatic Stress Disorder, and assessments to determine mental state at the time of the crime. Weiner presents empirically based data to prepare experts to effectively present Rorschach-based evidence in reports and in court testimony in an ethical, scientifically grounded manner. In his chapter, Weiner reviews research that supports the use of a number of criteria of the Rorschach Comprehensive System (CS; Exner, 2003; I. B. Weiner, 2003). He describes studies that establish interrater reliability, short- and long-term stability, and validity of the CS. He describes the proper use of the Rorschach to address issues of malingering and defensiveness and its use with culturally diverse populations. In addition, Weiner discusses the role of computer-based printouts, such as the Rorschach Interpretation Assistance Program (Exner & Weiner, 2003) and the forensic edition of this instrument (I. R. Weiner, 2004). The information presented by Weiner should help experts explain the nature of the RIM to judges and juries, to establish its admissibility if challenged, and to prepare the expert for questions focusing on its norms, validity, and reliability.

***Neuropsychology for the Forensic Psychologist***

Whether in criminal or civil areas of forensic practice, it is somewhat common to encounter defendants or plaintiffs whose history, presentation, or test results unexpectedly suggest the presence of an underlying neurological disorder. At times, the referral question itself may require an assessment for brain dysfunction. The APA's (2002) *Ethical Principles of Psychologists and Code of Conduct* requires that psychologists limit their practice to those areas that fall within the boundaries of their expertise. Clinical and forensic psychologists may appropriately screen for neurological impairments, but if they do not possess the required background, skills, training, experience, and knowledge required by the law to qualify as experts (and to engage in this specialized area of work consistent with the APA ethics code), practitioners should refer cases whose screens are found to be positive (and cases in which referral questions require a specific focus on the assessment of neurological dysfunction) to those properly qualified in this specialized area of practice. At other times, forensic experts may need to consult with trained neuropsychologists and incorporate their findings into their forensic reports and testimony.

Wilfred van Gorp (Chapter 6), a board certified neuropsychologist by the American Board of Professional Psychology (ABPP), describes the training and qualifications of neuropsychologists. In his chapter, he describes the role of the forensic psychologist in screening for neurocognitive impairments and in integrating neuropsychological findings into forensic expert opinions and testimony. He distinguishes between a process-oriented and a fixed battery approach to neuropsychological test selection and reviews the basic principles of test interpretation. Of specific relevance to forensic psychologists is a section on the use of screening instruments that may be of value in detecting the presence of cognitive impairments in forensic cases. The appropriate use of normative data in interpreting neuropsychological tests and batteries is described. Van Gorp provides a description of commonly used measures to evaluate neuropsychological dysfunction in a number of domains: motivation (including malingering), intelligence, attention, language, learning and memory, visuospatial abilities, motor functioning, and, of most relevance in forensic cases, executive or decision-making functioning. The use of neuropsychological tests and batteries with children and adolescents and with culturally and ethnically diverse populations is considered.

**Ethical Issues in Forensic Practice**

Those working in the field of forensic mental health assessment are aware of the conflicts that routinely develop when professional ethics collides with the demands of the legal system. Experts are under close scrutiny not only because of the high profile nature of their work but also because their adherence to the code of ethics of their profession may be a major topic of cross-examination during testimony. This section considers both the nature of those common ethical dilemmas facing forensic mental health experts and the legal and ethical issues that arise when accessing and utilizing third-party information and when conducting forensic evaluations.

### *Ethics and Forensic Psychological Practice*

As previously noted, it is inevitable that ethical issues and conflicts will arise whenever psychologists enter the legal arena. The realities of a legal system, adversarial in its approach to achieving justice, inherently place demands on forensic mental health experts who, by training, professional orientation, and ethics, approach evaluations and the formation of opinions in an objective, empirical manner. Experts are exposed to cross-examination and potential ethics complaints because of the methodology they employed in conducting an evaluation, the opinions they reached, how they were reached, statements made in court, and cases that end with unhappy litigants; all these circumstances increase the potential for allegations of unethical conduct. As such, the expert's entire participation in the legal process receives close scrutiny. Because, with very few exceptions, forensic psychologists have not received degrees from forensically oriented programs and because specialized knowledge, training, and skills are required to practice in a competent fashion, consistent with the *Ethical Principles of Psychologists and Code of Conduct* (APA, 2002), the need to appropriately address ethics issues and conflicts as they arise is paramount. As Weissman and DeBow (2003) have described, following the *Ethical Principles* and adhering to the aspirational guidelines set forth in the "Specialty Guidelines for Forensic Psychologists" (Committee on Ethical Guidelines for Forensic Psychologists, 1991) not only serve to decrease the chances of ethics complaints, but enhances professional competence as well.

In his chapter, Paul Lipsitt (Chapter 7), an attorney and practicing forensic psychologist, analyses those sections of the *Ethics Code* that relate to the practice of forensic psychology. He approaches ethics from both legal and practice perspectives. Lipsitt discusses the legal origins of the notion that individuals have a right to privacy (*Bowers v. Hardwick*, 1986; *Griswold v. Connecticut*, 1965; *Roe v. Wade*, 1973; *Schloendorff v. The Society of New York Hospital*, 1914). He describes the relationship between legal privilege and the ethical principle of confidentiality and emphasizes the obligation of forensic psychologists to understand and appropriately address the delicate balance that exists between these two concepts. Among those conflicts described by Lipsitt that psychologists encounter because of their involvement in the legal system are those related to dual relationships, informed consent, fees, and the nature of courtroom testimony (including legal evidentiary issues). Strategies for negotiating these conflicts are presented.

### *Legal and Ethical Issues in Accessing and Utilizing Third-Party Information*

In conducting forensic evaluations in criminal and civil contexts, the expert must rely on multiple sources of information. In part, the need to integrate data from a number of different sources is attributable to the distinct differences between clinical and forensic assessments (A. M. Goldstein, 2003b; Greenberg & Shuman, 1997) and the demand characteristics associated with evaluations that, inherently, encourage deception because of the possibility of secondary gain. Whereas mental health experts can generally rely on the truthfulness of an examinee's responses to interviews and psychological tests in the *clinical* setting, the need to consider

response style (i.e., malingering, exaggeration, and defensiveness) in *forensic* settings is obvious. As described by Heilbrun et al. (2003), third-party information serves as a major source of corroboration of information provided by forensic examinees and contributes to the validity of opinions reached by forensic experts (and the perception of credibility of those opinions by judges and juries). In fact, authorities agree that reliance on third-party information is part of the standard of care in forensic psychiatry and psychology (Grisso, 2003a; Melton et al., 1997; Shapiro, 1991; Simon & Gold, 2004; see Chapter 2).

In their chapter, Randy Otto, Christopher Slobogin, and Stuart Greenberg (Chapter 8) describe the essential role third-party information serves in forensic mental health assessment. They discuss a number of reasons why experts must consider information contained in written records (school, mental health, employment, military, and legal documents) and provided through interviews conducted with those other than the examinee. Although such data are relied on by forensic mental health experts and are necessary to formulate opinions, nonetheless, this information falls within the hearsay category, and, as such, it is normally inadmissible for consideration by the jury for any purpose other than to establish the credibility (or lack thereof) of the expert's opinions. Otto, Slobogin, and Greenberg review relevant statutes and case law, including federal rules of evidence, related to the admissibility and use of third-party information. They consider the nature of the expert's appointment in a case (i.e., examinee-retained experts, adverse party-retained experts, and court-appointed experts) and its effect on the process of obtaining third-party information. The authors describe a range of practice issues that forensic mental health experts must address in obtaining, considering, and testifying about third-party data and the relationship of these issues to the *Ethical Principles of Psychologists and Code of Conduct* (APA, 2002), the "Specialty Guidelines for Forensic Psychologists" (Committee on Ethical Guidelines for Forensic Psychologists, 1991), the model codes of professional responsibility and professional conduct of the American Bar Association (1969, 1983), and the Health Insurance Portability and Accountability Act. A model for conducting interviews with third parties is included, with a focus on the notification that should be provided to the third-party interviewee, the need to assess the relationship between this person and the examinee, content areas to be covered in third-party interviews, and how to bring closure to the interviews.

### **Civil Forensic Psychology**

Forensic mental health experts are frequently called on to evaluate cases that involve civil psycholegal issues. In this section, emerging topics for forensic assessment are considered. Recent landmark decisions are reviewed and a number of areas of civil forensic practice are covered, including: (a) the role of the psychologist in civil commitment, (b) evaluating capacity to consent to treatment, and (c) termination of parental rights.

#### ***Recent Civil Legal Decisions: Implications for Forensic Mental Health Experts***

In conducting forensic mental health assessments, experts recognize that such evaluations are always legally driven, fueled by statutes and case law that define the



psycholegal issue under consideration. As such, competence as a forensic expert is enhanced and, in part, defined by knowledge of up-to-date federal and state statutes and case law relevant to the psycholegal issue that is the focus of the evaluation (Weissman & DeBow, 2003). Legal decisions help to determine the nature of the questions asked of the examinee, the types of records that are reviewed, the focus of the information gleaned from those records, and, ultimately, the focus of the report and testimony. In the civil arena, there have been significant changes in case law in areas related to civil commitment, duty to protect, and advanced directives for health care created by psychiatric patients. A familiarity with these changes and their implications for forensic mental health practice is essential for experts working in these areas of civil forensic practice.

John Petrila (Chapter 9) considers significant recent developments in civil laws that have a direct impact on forensic mental health assessments. In his chapter, he summarizes the history of civil commitment laws and describes a shift in such laws to a more medically oriented model (Wisc. Stat. § 51.20 (1)(a)(2e)). A specific focus is on the application of civil commitment laws to sexually violent predators (*Kansas v. Crane*, 2002; *Kansas v. Henricks*, 1997). In the wake of *Tarasoff v. Board of Regents* (1976), issues of confidentiality and privileged communication are foremost on the minds of clinical and forensic mental health petitioners. Petrila describes two recent California cases, *Ewing v. Northridge Hospital Medical Center* (2004) and *Ewing v. Goldstein* (2004), whose holdings may serve to broaden the doctrine of duty to protect to those situations in which a therapist is informed of a possible danger to others presented by his or her patient through a relative or other third party (in this case, the father of the patient). Changes in the application of advanced directives created by psychiatric patients to express their wishes for future mental health care are described as well (*Hargrave v. Vermont*, 2003).

### ***The Role of the Psychologist in Civil Commitment***

The criminal justice system grants defendants accused of crimes due process rights. If convicted of an illegal activity, such people may be segregated from society—incarcerated for the main purpose of punishing them for their past actions. They are deprived of their freedom, in part, to protect others from future criminal acts. In the mental health system, those who are believed to be at risk of violence to themselves or others are also guaranteed their constitutional rights. At a hearing, if a judge concludes that they represent a likely risk, as required by law they may be involuntarily civilly committed to a mental hospital, deprived of their right to freedom, and to self-determination. These people have committed no crimes, but they have been found to need protection from themselves, or society requires protection from them. Civilly committed individuals are not recipients of punishment; rather, it is assumed that they will receive appropriate treatment for their mental condition. The process of civil commitment of those found to be mentally ill is traceable to colonial times (Harvard Law Association, 1974). In many states, forensic psychologists may serve as evaluators, conducting assessments of individuals to determine the presence or absence of those criteria legally required to involuntarily hospitalize a patient; these experts may then present their findings in court.

In their chapter, David Mrad and Eric Nabors (Chapter 10) describe the historical foundations of civil commitment laws, which have their basis in the *parens patriae* doctrine. Under this principle, the state assumed the power and responsibility to serve as guardian for those deemed unable to protect themselves. Mrad and Nabors review landmark cases, in the main, addressing procedural and due process issues (e.g., *Baxstrom v. Herold*, 1966; *Lessard v. Schmidt*, 1972), and those cases attempting to delineate the treatment to which civilly committed patients are entitled (e.g., *O'Connor v. Donaldson*, 1975; *Wyatt v. Stickney*, 1971). The authors consider the application of civil commitment laws to special populations, including children, those diagnosed with mental retardation, and criminal offenders, and they discuss the concept of outpatient commitment. Current procedures for civil commitment are described. Mrad and Nabors review risks for suicide, including research findings related to demographic factors associated with suicide and the management of such risk. Ethical issues involved in assessing individuals who may be denied the right of self-determination and deprived of their freedom are considered.

### ***Evaluating Capacity to Consent to Treatment***

Grisso (1986) described a model applicable for conducting forensic psychological assessments. He proposed that psychologists asked to conduct forensic assessments of a specific legal competency must first understand the legal constructs that define that competency. They must then operationalize those legal constructs—translate them into psychological concepts and terms that can be objectively evaluated—using valid and reliable forensic assessment instruments and available research. This approach to forensic psychological evaluations described by Grisso has been embraced by those in the field and in many ways represents the standard of care in forensic psychology. At times, questions are raised as to the capacity of a patient “to make informed, reasoned judgments in his or her best interests and that accurately respect the individual’s intentions” (A. M. Goldstein, 2003b, p. 13; see Stanley & Galietta, 2006). Referrals for evaluations related to this general issue may address situations involving living wills, health care surrogacies, conservatorships and guardianships, and durable powers of attorney (Drogin & Barrett, 2003).

Jennifer Moye, Michele Karel, and Jorge Armesto (Chapter 11) focus on the capacity of adults to provide consent to medical treatment. Specifically, they consider a range of issues related to whether those with psychiatric and neurodegenerative disorders can make autonomous decisions about their treatment in health care settings. In their chapter, they describe the legal basis for assessing the components of this capacity: understanding, appreciation, reasoning, and the ability to express a choice. Moye, Karel, and Armesto review a range of statutes and case law on surrogate health care decision making. They discuss the role of a patient’s personal values as a factor to be considered in assessing consent capacity. A model based on Grisso’s (1986, 2003a) approach to forensic psychological assessment is described; it integrates legal standards (i.e., statutes and case law), including those addressing proxy consent and guardianships, with forensic assessment methodology. Factors such as the individual’s functional capacity and judgment, complexity of the decision to be made, and those factors unique to the situation itself are described. The authors review the research literature on the capacity to provide consent for treatment for a number of groups, including those with Schizophrenia, those with de-

mentia, and patients who are institutionalized and hospitalized. A range of forensic assessment instruments, including tests and semistructured interviews used to assess capacity to consent, are reviewed and compared to evaluations based on the clinical judgment of the evaluator. Moyer and Karel present information on those factors that forensic evaluators should consider when evaluating this issue, including concepts involving the patient's expectation of quality of life and the impact of the treatment decision on family members. They conclude with specific suggestions for future research on a number of topics related to capacity to consent to medical treatment.

### ***Termination of Parental Rights***

Most, if not all, societies expect parents to meet certain minimum requirements in caring for and protecting their children. Beyond providing food, clothing, and shelter, it is anticipated that parents will provide for their children's emotional, moral, and educational needs. Beyond commonly held expectations, public policy, in the form of statutes and regulations, delineate this requirement, define the behaviors associated with the capacity needed to parent, and authorize the termination of parental rights under severe, specified circumstances. In cases in which allegations have been filed alleging maltreatment or neglect, forensic mental health experts may be retained to evaluate parental fitness and to submit reports to the court, which will be used, in part, to determine whether there is a pattern of neglect, abuse, or maltreatment. In other cases, judgments may be made by the court about the suitability of returning the children to the custody of their parent(s).

In their chapter, Lois Oberlander Condie and Don Condie (Chapter 12) address the legal and practical issues that are involved in assessing termination of parental rights. The authors describe the organization of the legal and administrative systems for child protection intervention from historical and legal contexts, including an 1864 landmark case reviewed by Shelman and Lazoritz (2005) that affords children the same protections granted to animals. They include a discussion of U.S. Supreme Court cases specific to parental rights termination (*Lassiter v. Department of Social Services*, 1981; *Santosky v. Kramer*, 1982). In the context of this topic, Oberlander Condie and Condie review child development theory and research, focusing on issues of linguistic capacity, accuracy of children's memories, and suggestibility. They address the methodology that forensic mental health experts should consider when conducting evaluations of both adult caregivers and children. Also included in this chapter is a comprehensive review of the scientific literature related to factors associated with maltreatment, cognitive development of children, risk of child maltreatment (physical and sexual abuse), and amenability to treatment.

### ***Criminal Forensic Psychology***

Criminal psycholegal evaluations have long been a major area of focus of forensic mental health assessments. This section provides readers with an update on recent landmark legal decisions and their implications for experts conducting criminal forensic evaluations. Two emerging areas of criminal forensic assessment are considered: (1) the role of experts in federal sentencing proceedings and (2) postconviction assessments.

### ***Recent Criminal Legal Decisions: Implications for Forensic Mental Health Experts***

Forensic mental health evaluators are keenly aware of the essential relationship between the structure, methodology, and focus of their assessments and the driving force behind such assessments: statutes and case law. In cases involving criminal psycholegal issues (e.g., competence to stand trial, evaluating sexual predators, death penalty assessments, sentencing reports), case law is rapidly changing and evolving. As Perlin (1996, 1999) has noted, the U.S. Supreme Court has demonstrated a “fascination” with mental health disability law, accepting cases and issuing decisions on a wide range of criminal issues, holdings that have a direct impact on the work of forensic mental health experts. Since 2001, the Court has issued decisions involving mental retardation and its relationship to the death penalty (*Atkins v. Virginia*, 2002); involuntarily medicating those adjudicated as unfit to stand trial in order to establish trial competence (*United States v. Sell*, 2003); involuntary civil commitment of sexually violent predators following expiration of their criminal sentence (*Kansas v. Crane*, 2002; *Kansas v. Hendricks*, 1997); and the unconstitutionality of the once mandated federal sentencing guidelines (U.S. Sentencing Guidelines, 2003, in *United States v. Booker & Fanfan*, 2005). Each decision has important implications for criminal forensic mental health evaluators.

In his chapter, Michael Perlin (Chapter 13), an attorney specializing in criminal mental health law, describes the historical background of issues that serve as precedents for these recent landmark cases and discusses both the legal implications of these holdings and their impact on forensic practice. Perlin focuses primarily on the *Atkins* (2002) and *Sell* (2003) decisions, noting the profound effects both are likely to have on forensic mental health evaluations. In *Atkins v. Virginia* (2002), the Court barred the execution of those people found to be mentally retarded. Questions raised by this case, as presented by Perlin, include defining mental retardation, a criterion left entirely up to each state; problems in assessing the level of intellectual functioning of those for whom English is a second language; application of this decision to those found to be functioning within the borderline range of intelligence; and the proper role of experts in addressing issues related to subnormal intellectual functioning. In *United States v. Sell* (2003), the Court held that if specific conditions are met, those defendants adjudicated as incompetent to stand trial might be medicated against their will for the sole purpose of establishing or restoring trial competence. Perlin describes why the *Sell* decision may prove to be of tremendous importance both from legal and forensic mental health practice perspectives, and the impact *Sell* is likely to have on expert witnesses (e.g., side effects of “typical” versus “atypical” medications, issues related to least restrictive alternative). In his consideration of *Atkins* and *Sell*, Perlin provides the legal historical background for these cases, and he discusses the reasoning behind both the majority and dissenting opinions. In this chapter, Perlin reviews two other areas involving mental health law addressed by the Court in recent decisions: sexual violent predator laws (*Kansas v. Crane*, 2002; *Kansas v. Hendricks*, 1997) and the status of the federal sentencing guidelines (*United States v. Booker & Fanfan*, 2005; see also Chapter 14). Again, the likely implications of these decisions for forensic practitioners are described.



### ***The Role of Mental Health Experts in Federal Sentencing Proceedings***

To be convicted of a crime, two elements must be proven: (1) The defendant actually committed the proscribed behavior, *actus reas*; and (2) at the moment of the crime, the actor possessed the requisite mental state legally required to be held responsible, *mens rea*. A number of different mental states may be associated with the same criminal act, and the degree of responsibility and punishment relates, in part, to the degree of evilness associated with a particular act, or, as A. M. Goldstein, Morse, and Shapiro (2003) have stated, "Moral responsibility depends crucially on the mental state with which a person acts" (p. 382). In most state jurisdictions, forensic mental health experts may be asked to evaluate and proffer testimony during sentencing proceedings related to a convicted defendant's level of emotional maturity, intelligence, mental health history, substance abuse, or history of abuse—the purpose of which is to persuade the court to take mitigating factors into account when imposing a sentence. In the past, such factors were not typically relevant in federal court (Lutjen, 1996). Judges were constrained by the federal sentencing guidelines (U.S. Sentencing Commission, 1987), which for almost 2 decades limited the ability of federal judges to exercise discretion in sentencing and instead required a relatively rigid set of factors to be applied in a formulaic manner to reach a sentencing determination. However, U.S. Supreme Court decisions in *U.S. v. Booker & Fanfan* redefined the role of the guidelines from mandatory to advisory status. Because the federal sentencing system is responsible for the largest population of the nation's prisoners, this dramatic change in the role of the guidelines has important implications for the use of expert opinions as information a federal judge may choose to consider before the imposition of sentence.

In their chapter, Daniel Krauss (an attorney and forensic psychologist who served as a U.S. Supreme Court Fellow assigned to the U.S. Sentencing Commission in 2002 to 2003) and Alan Goldstein (Chapter 14) describe the purpose, development, and structure of the federal sentencing guidelines. They consider categories in the guidelines that permit judges to grant downward departures in sentencing, including diminished capacity, aberrant behavior, and coercion and duress. Case histories are included to illustrate the role that forensic mental health professionals may play in providing the court with relevant data to consider at the time of sentencing. They review a series of U.S. Supreme Court decisions that paved the way for the shift in the guidelines from mandatory to advisory (e.g., *Apprendi v. New Jersey*, 2000; *Blakeley v. Washington*, 2004; *Jones v. United States*, 1999), as well as the historic *Booker & Fanfan* (2005) holdings. Krauss and Goldstein describe the potential impact of these discussions and the relevance of these changes on forensic mental health practice and research.

### ***Postconviction Assessment***

In the criminal justice arena, forensic mental health experts may be asked to conduct a range of assessments, starting from those involving pretrial hearings (i.e., the validity of *Miranda* rights waivers, Oberlander et al., 2003; competence to stand trial, Stafford, 2003; Zapf & Roesch, 2006); questions raised at trial (i.e., the trustworthiness of a confession; Oberlander et al., 2003; a defendant's mental state at the time of the offense, A. M. Goldstein, Morse, et al., 2003; Zapf, Golding, &

Roesch, 2006); and presence or absence of mitigating and aggravating factors that may impact sentencing decisions (Cunningham & Goldstein, 2003; Chapter 14). If a trial ends with a finding of guilt (or the defendant entered a plea of guilty), Article I of the U.S. Constitution provides the prisoner the right to seek relief by filing a writ of *habeas corpus*. Petitioners are granted the right to appeal the findings of guilt; in many cases, the basis for such claims is ineffectiveness of counsel. To be granted an appeal in such cases, the petitioner must meet a two-pronged test: (1) It must be established that the attorney's performance was "deficient" in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) these errors rose to a level so "as to deprive the defendant of a fair trial, a trial whose result is reliable" (*Strickland v. Washington*, 1984, p. 687). Petitioners may claim that the forensic mental health expert retained by counsel was, in fact, not an expert in the area in which an assessment was conducted or that the evaluation itself was substandard in terms of scope, methodology, and opinions reached. In some cases, the basis for relief may be that the attorney failed to obtain the services of a mental health expert when information was available to indicate that a forensic evaluation should have been pursued. As such, forensic mental health experts may be retained to both examine the data, reports, and testimony of trial experts and to conduct a forensic evaluation of the petitioner for submission to an appeals court for review and as a possible basis for future testimony if a new trial is granted. Although referrals for postconviction assessments are increasingly requested by attorneys, little has been written in the professional literature on this topic.

Eric Drogin (Chapter 15), a forensic psychologist and attorney, examines the legal, ethical, and methodological issues involved in postconviction assessments. He reviews the legal background that serves as the foundation for these evaluations, including recently decided U.S. Supreme Court cases on this topic (*Dodd v. United States*, 2005; *Mayle v. Felix*, 2005; *Rompilla v. Beard*, 2005). He describes legal guidelines promulgated by the American Bar Association and the National Legal Aid and Defender Association designed to address requirements for attorneys practicing in this area. Drogin presents a model based on the integration of data from numerous sources, which may serve as guidance for forensic mental health experts conducting postconviction relief assessments. Relevant ethical considerations involved in peer consultation, obtaining data, and reporting obligations are discussed. Because postconviction assessments may arise in a number of legal contexts, Drogin describes the application of these evaluations to cases involving criminal responsibility, trial competence, prison programming, parole board reviews, release of insanity acquittees, competence to confess, and competence to be executed. The emphasis of this chapter is not on second-guessing juries (Bodenhause, 1990) or criticizing the work of colleagues, but on providing methodologically reliable and ethical assessments that serve the interests of justice.

### **Forensic Mental Health Experts in the Courtroom**

When forensic mental health experts testify, their ethical conduct, the methodology they relied on, the opinions they have reached, and their demeanor and ability to respond to questions on both direct and cross-examination are closely scrutinized. Is

the expert likely to be considered an objective, credible source of information by the trier of fact, or merely a hired gun? In this section, authors and coauthors address issues related to courtroom testimony, including: (a) ways in which credibility may be enhanced by presenting testimony in a balanced, thorough, fair manner; and (b) issues that should be considered by testifying experts related to potential malpractice lawsuits that may arise from their testimony.

### ***Expert Witness Testimony: Law, Ethics, and Practice***

When forensic mental health experts accept a referral to conduct a forensic assessment, it should be done with full recognition that the case may eventually result in a hearing or trial before a judge or jury. As such, the preparation for expert testimony, including *voir dire*, direct examination, and cross-examination, should begin not days or weeks before the expected date of testimony but at the moment the decision is made to participate in the legal process. Experts should ask themselves if involvement in a specific case will conform to all *ethical* standards (APA, 2002): *Is the subject matter within the expert's boundaries of expertise? Is there a dual relationship or a possible perception of such? When selecting methodology to be used in conducting the evaluation, are multiple sources of information being used? Are tests and instruments appropriate for the individual(s) to be assessed? Are tests being used for the purposes for which they are intended? Do they have established reliability and validity? When writing a report, are there sufficient reliable data on which to base an opinion? Does the report present information from an objective, balanced perspective (i.e., are positive as well as negative findings of the assessment included)? Are issues related to response style such as malingering, exaggeration, and defensiveness addressed? Are alternative hypotheses or opinions considered or addressed, either directly or indirectly in the written document?* Ewing (2003) has traced the development of the field of forensic psychology and the acceptance of psychologists as experts in court, describing the contribution and, ironically, the negative consequences of Münsterberg's 1908 book (*On the Witness Stand*) for his "undoubtedly, premature, if not grandiose [claims for the benefits of lawyers retaining psychologists as experts in court]" (p. 56). Ewing discussed the reaction to this book by law professor John Henry Wigmore (1909), who discouraged law students from employing psychologists as courtroom experts. He traced those events, starting some 15 years after the Münsterberg/Wigmore publications, which contributed to the acceptance of psychologists as expert witness (i.e., Guttmacher & Weihofen, 1952; *Jenkins v. United States*, 1962).

In their chapter, Steven Bank and Ira Packer (Chapter 16) trace the historical roots of the advocacy trial process back to the medieval period and early Saxon "or-deals," which were designed to determine guilt or innocence. They describe how the current role of the expert has evolved. Bank and Packer discuss the steps forensic mental health experts should follow to present testimony in a legally relevant, ethically consistent manner, including the proper role for forensic mental health experts in court. Of particular significance to forensic experts, the authors present a courtroom communication model (Bank, 2001) designed to maximize clarity, effectiveness, and credibility of experts in presenting their findings to a judge or jury. This model emphasizes witness characteristics, such as expertise and presentation

style; the content of the testimony itself, such as emotional and logical appeals and addressing counterarguments; and factors that may affect jury receptivity to the testimony, including heterogeneity of the jurors and maintaining their attention. In their chapter, Bank and Packer present representative questions that may be asked of experts by both the retaining and the opposing attorneys during *voir dire* (or qualification process), direct examination, and cross-examination. Sample responses to such questions are analyzed in an effort to lessen the likelihood that either attorney distorts or misuses the expert's findings and with the hope that the expert can best express his or her opinion in the most accurate, ethical light.

### ***Lessons for Forensic Practice Drawn from the Law of Malpractice***

Forensic mental health professionals are highly visible in their role as experts; in legal terms, they have a high degree of exposure. Reports they submit are carefully scrutinized for even minor, often inconsequential, errors and omissions, not only by the retaining attorney, but also by opposing counsel and possibly by other forensic experts retained by opposing counsel as trial consultants (see Chapter 18). On the witness stand, their credibility will be questioned during cross-examination, designed to decrease the weight the judge or jury will give to their testimony and opinion. Some of these questions may focus on the appropriateness of the methodology used, failure to employ specific techniques to complete the assessment, possible scoring errors on tests, misinterpretation of data, and suggestions that the expert deviated from the ethics of his or her profession and the standard of care in conducting the forensic evaluation. In trials, there is typically a winner and a loser. Litigants on the losing side are, understandably, angry, may feel that they were treated unfairly, and may look for someone, in addition to their attorney, to blame. With or without adequate justification and support, litigants and attorneys may not only file ethics complaints against mental health professionals because of their actions in a specific case but, in many states, are free to file malpractice actions against retained experts.

Stuart Greenberg, Daniel Shuman, Stephen Feldman, Collin Middleton, and Charles Patrick Ewing (Chapter 17) review the laws of malpractice, specifically cases that address the liability of experts for their professional activities. In their chapter, they describe the fundamental differences between therapeutic and forensic roles, as previously delineated by Greenberg and Shuman (1997). Arguments both for and against the granting of expert witness immunity from malpractice actions related to their work are presented along with legal decisions that both recognize and deny immunity for forensic mental health professionals. Some decisions have granted absolute immunity to experts (e.g., *Bruce v. Byrne-Stevens*, 1989); other holdings, acknowledging some immunity for experts, have noted exceptions to this rule (such as destruction of records that were relied on to reach opinions; *Ingham v. United States*, 1999). The authors emphasize that most successful malpractice suits against experts address issues of negligence. In such cases, a duty must exist to the party who retained the expert's services, there must be a breach of that duty, and damage or harm must occur to that party as a result of the breach of duty (e.g., the retaining party loses his or her case) for it to constitute actionable negligence. Based on these holdings and legal principles, Greenberg and his colleagues



suggest ways for forensic mental health professionals to reduce the likelihood of successful malpractice actions in those jurisdictions where absolute immunity is not granted to experts. They contend that by following the suggested guidelines (many of which are necessitated by the differences between therapeutic and forensic roles), experts' credibility and effectiveness are increased.

### **Forensic Psychological Consultation**

Not all experts are retained with the expectation that they will offer sworn testimony in court. Forensic mental health professionals may be asked to assist attorneys in trial preparation and in jury selection or may be hired to conduct evaluations for insurance companies or by businesses. In this section, the role of the forensic psychologist in a range of emerging consultation capacities is considered. Topics include: (a) consulting for attorneys "off the witness stand," (b) conducting disability psychological independent medical evaluations (IMEs), and (c) assessing and consulting in cases involving potential or actual workplace violence.

#### ***Off the Witness Stand: The Forensic Psychologist as Consultant***

Watching rebroadcasts of episodes of *Perry Mason*, a television series popular decades ago, a naive viewer would have the impression that all witnesses, whether lay or expert, come to court, take the stand, and answer questions they have heard for the first time. Mr. Mason, a defense attorney, always managed to catch witnesses off guard, asking unanticipated questions and ultimately winning the case. The district attorney, Hamilton Burger, consistently failed to prepare his witnesses for the difficult questions put to them by Mr. Mason during cross-examination, and viewers watched as his "airtight" case fell apart before their eyes. Any person who has been to court in the role of witness quickly discovers that unanticipated questions are few and that any negative or embarrassing material is dealt with on direct examination. Lawyers prepare witnesses as to what will be asked of them on the stand. But how does an attorney unversed in forensic psychological theory, research, methodology, ethics, and practice know what questions to ask on direct or cross-examination? For that matter, how do attorneys know how to locate, identify, and work with forensic mental health experts?

In their chapter, Eric Drogin (a practicing attorney and forensic psychologist) and Curtis Barrett (Chapter 18) consider the roles of the forensic expert as court consultant. They describe the history of the use of consultants, first in medicine in the thirteenth century (Brown, Pryzwansky, & Schulte, 1998), then in psychiatry, and finally in forensic psychology, involving such well-established activities as jury selection (see Kovera, Dickinson, & Cutler, 2003) and the roles of trial or courtroom consultant (Boccaccini & Brodsky, 2002; Nietzel & Dillehay, 1986), litigation support (Friedman & Klee, 2001), and forensic consultant (Drogin, 2000, 2001). Legal and ethical considerations related to the roles played by forensic consultants are described, including the caution that consultants must avoid serving as both expert witnesses and as consultants in the same case. Among the specialized areas of involvement for forensic psychological consultants reviewed by Drogin and Barrett are case analysis and development, review of reports and files, identification and retention of expert witnesses, assisting in the development of direct and

cross-examination strategies, and preparing witnesses, both lay and expert, for trial. They offer concrete advice for forensic psychological consultants in the identification of appropriate expert witnesses, reviewing mental health records, entering into a contract to provide consulting services to attorneys, and preparing experts to offer sworn testimony in court.

***The Disability Psychological Independent Medical Evaluation Case Law, Ethical Issues, and Procedures***

With increasing frequency, forensic psychologists are being called on by insurance carriers to address issues related to mental health disability claims filed by an insured party. Typically, the insured has requested benefits, claiming that symptoms of a mental disorder are such that it is no longer possible to continue employment at his or her own occupation or in any occupational capacity. Referral questions from carriers may focus on a number of issues, and the opinion of the expert may serve as a basis for denial or discontinuation of benefits. Forensic experts may be asked to determine the claimant's diagnosis or to comment on the diagnosis provided by the treating mental health professional. An opinion may be sought on the appropriateness of the treatment the claimant is currently receiving and for a prognosis as to if or when the claimant may be capable of returning to work. Of greatest significance are questions focusing on the nature of the claimant's symptoms and their impact on the ability of that person to function in his or her specific occupation (or any occupation). In addition, the independent medical examiner may be asked to assess the claimant's response style, focusing on issues of malingering and exaggeration of symptoms (Rogers & Bender, 2003).

In his chapter, David Vore (Chapter 19) defines and explains the relevant terms and concepts usually contained in disability contracts. As Grisso (1986, 2003a) has indicated, forensic experts must operationalize these legal concepts to conduct relevant forensic evaluations that address the specific psycholegal issues in question. For example, to select appropriate methodology for the IME, the expert must understand such terms as short- and long-term disability, partial and total disability, and own and any occupation. Vore describes the components and methodology involved in conducting IMEs, including the need to rely on multiple sources of information and issues related to the weight to be given to videotapes of the claimant provided to the examiner by the carrier. The issues of response style, including malingering, defensiveness, irrelevant responding, feigning, suboptimal effort, and dissimulation, are addressed, as are those situations in which a claimant is unwilling to cooperate in the IME process. Case law addressing a range of legal issues is reviewed and the application of the relevance of the holdings from these cases to IMEs is described. For example, Vore describes cases related to definitions of disability (e.g., *Gates v. Prudential Insurance Company of America*, 1934; *Massachusetts Mutual Life Insurance v. Ouellette*, 1992; *Wright v. Paul Revere Life Insurance Company*, 2003), substance abuse as a basis for disability claims (i.e., *Adams v. Weinberger*, 1977; *Gaines v. Sun Life Assurance Company of Canada*, 1943; *O'Connor v. Sullivan*, 1947), and relapse potential as a basis for the continuation of disability benefits (e.g., *Hinchman v. General American Insurance Company*, 1998; *Kupshik v. John Hancock Mutual Life Insurance Company*, 2000; *Massachusetts Casualty Insurance Company v. Rief*, 1962). He discusses legal issues related to the ad-

missibility of testimony and potential liability of experts conducting IMEs (see also Chapter 17, for a thorough discussion of the issue of liability of experts). Vore describes and provides potential solutions to a range of ethical conflicts that independent medical evaluators may encounter, focusing on identification of the client, informed consent, and boundaries of expertise.

### ***Workplace Violence: Advances in Consultation and Assessment***

Referrals to forensic mental health experts to conduct violence risk assessments arise in a number of contexts. In considering job applications for high-risk positions (e.g., law enforcement) or in performing fitness-for-duty evaluations, a major focus of the assessment is on the propensity of that person to act in an inappropriately impulsive, aggressive manner when under stress (Borum, Super, & Rand, 2003; Inwald & Resko, 1995). In some jurisdictions, states may conduct a hearing to determine whether a juvenile's case should be transferred from family or juvenile court, where the stated goal is rehabilitation or treatment, to criminal court, where the major purpose is punishment (Grisso, 2003b); the assessment of the likelihood of future violence may be one of the factors considered at such hearings. If a capital case proceeds to the penalty phase of the trial, an aggravating factor a jury may consider in deciding if the defendant is "death-worthy" may be the risk of future aggression if not sentenced to death; testimony by experts on this issue may be requested (Cunningham & Goldstein, 2003) and considered by the jury in reaching the decision. Many states now have statutes allowing courts to determine whether an inmate who has completed his or her maximum sentence for a sexually violent crime can be civilly committed as a sexually violent predator. In such cases, risk assessments to inform the court of the level of risk the individual presents may be ordered (Conroy, 2003). A major factor addressed in civil commitment proceedings, designed to determine whether an individual can be involuntarily committed to a mental hospital, is the likelihood of imminent harm to self or others (see Chapter 10). Judges assign considerable weight to expert opinions on violence risk in reaching opinions on this legal issue (see Chapter 26). Judicial focus on the potential for future violence also occurs in cases involving termination of parental rights (see Chapter 12) and sentencing decisions in federal (see Chapter 14) and state criminal cases. Questions about the risk of violence an inmate may present if released into the community are considered by parole boards at inmate hearings for those applying for early release from prison (see Chapter 15). In recent years, there has been a marked increase in referrals to forensic mental health experts from corporations and government and private agencies for evaluations of employees who, they believe, pose a threat of violence to fellow workers, supervisors, other third parties, and themselves.

In his chapter, Harley Stock (Chapter 20) focuses on organizational, legal, ethical, and methodological issues involved in the assessment of risk of violence in workplace settings. He provides various incidence rates for workplace violence (including surprising data on violence at U.S. postal facilities) and the financial consequences of workplace threats and violence. He reviews those factors associated with increased risk of violence in the workplace. He describes the legal theories and contexts that underlie lawsuits arising from workplace aggression (i.e., negligent action, respondent superior, negligent hiring, negligent retention, negligent supervision, and

negligent training). Stock reviews the history of violence risk assessment and the acknowledged validity (or lack thereof) of such evaluations over the past 2 decades, including the legal status of risk assessments reflected in case law. Current risk assessment practices are analyzed and the author presents a model for conducting workplace violence risk assessments (Stock, 2000). This model includes consideration of those variables, factors, and questions that forensic mental health experts must consider in providing opinions to businesses and agencies about an employee whom they consider to be a potential threat.

### **Special Populations**

In recent years, new demographic groups have been identified as a focus of forensic mental health evaluations. Because of research, the development of new forensic assessment instruments, and the expanding psycholegal areas for which forensic assessments are requested, a number of special populations have emerged as forensic evaluatees, each group requiring specialized knowledge and methodology. The topics presented in this section include: (a) forensic assessment from a development perspective, focusing on children and adolescents as clients for evaluation; (b) psychological evaluation and testimony in cases of clergy and teacher sex abuse, focusing on children who may have been sexually victimized; (c) correctional psychology, a field that provides a range of evaluations of and services to prison inmates; (d) evaluating the psychological sequelae of elder abuse; and (e) forensic issues at the end of life.

### ***Forensic Assessment from a Developmental Perspective***

Although at first glance, Piaget's (1953) theory of cognitive development and forensic psychological assessment appear to have nothing in common, changes in the law and recent research on the competency of juveniles have established a strong connection between these seemingly disparate areas of psychology. In the past, delinquent youths were viewed as youngsters who were in need of understanding and treatment, and such cases were handled in juvenile courts. However, many states have instituted "get tough" approaches to juveniles who commit crimes, and these changing attitudes have resulted in legislation that calls for the transfer of some juveniles, especially those accused of committing violent crimes, to adult courts, exposing them to adult punishments (Grisso, 1998, 2003b, 2004; Grisso & Schwartz, 2000; Otto & Goldstein, 2005). As such, because these youths may receive long sentences in adult prisons (rather than a limited course of "treatment" at a juvenile detention facility), defense attorneys and judges now question whether these young defendants are competent in terms of their ability to waive *Miranda* rights, to stand trial, and to make other legal decisions about the handling of their cases. Research on juvenile legal competencies reinforces what has always been known: juveniles are not miniature adults; competence is a developmentally related process (Grisso, 1981, 1998; Grisso & Schwartz, 2000). Other research shows that substantial numbers of juveniles are susceptible to providing false confessions to crimes they might not have committed (N. E. Goldstein, Condie, Kalbeitz, Osman, & Geiger, 2003). Had forensic psychology been an established field in the 1940s and 1950s, Piaget could well have proposed a stage in his theory of cognitive



development that follows the formal operations stage: the legal competence stage. Forensic mental health professionals may be asked to evaluate the competence of juveniles, and familiarity with the theory and research on legal competence as a developmental process appears to be an important, emerging area of knowledge such experts should possess.

Randy Borum and Thomas Grisso (Chapter 21) provide the legal and research background that supports the relevance of a developmental perspective to forensic assessment in delinquency cases. Drawing on concepts from developmental psychopathology (Cicchetti, 1984, 1990), they present a framework for considering juvenile maladaptive behavior as it relates to factors involving physical, cognitive, and psychosocial domains. In their chapter, Borum and Grisso consider the relationship between biological development (i.e., brain structures and functions, related physical changes), cognitive development (i.e., mental and intellectual functioning, including reasoning), and psychosocial maturation (i.e., responsibility, perspective, and self-restraint), and the impact of these maturational processes on a number of adjudicative capacities. They review the research on the effects of the developmental process on such issues as culpability, risk appraisal, impulse control, resistance of peer pressure, and the ability of juveniles to empathize with potential victims. The authors describe the relationship between the developmental perspective and law and public policy, research, and forensic mental health practice.

### ***Psychological Evaluation and Testimony in Cases of Clergy and Teacher Sex Abuse***

In the past 2 decades, increased attention has been paid to claims made by adults that as children, they were sexually abused by clergy and teachers who had been entrusted with their care. In a study commissioned by the U.S. Conference of Bishops (2004) of the Catholic Church conducted by John Jay College of Criminal Justice, between 3% and 7% of ordained priests have been accused of sexual abuse, and it was estimated that between 1950 and 2002, a total of 10,505 victims had been abused. Teachers have not fared much better, according to the research. Studies found that 9.7% of students in the 8th to 12th grades had reported sexual misconduct with educators, involving either contact or noncontact (American Association of University Women, 1993, 2001). Children who have been sexually abused may face a number of emotional, social, and vocational impairments as a direct or indirect consequence of their abuse (Beitchman et al., 1992; Neumann, Houskamp, Pollock, & Briere, 1996; Paolucci, Genuis, & Violato, 2001). Thus, forensic mental health experts may be called on to address issues that arise in cases involving allegations of clergy and teacher abuse. Evaluations and testimony may focus on a number of questions, including the presence or absence of those factors established in the professional literature that tend to support or refute the nature of the specific allegations, the impact of the abuse on the victim, the assessment of the severity of such harm, and what would be required to restore the victim to his or her premorbid level of functioning.

William Foote (Chapter 22) presents an overview of the history of allegations of sexual abuse by clergy and educators and reviews data indicating the scope of this problem. In his chapter, he considers legal issues related to liability of church

organizations, school boards, and municipal entities because of the activities of their employees; causes of action; claims of immunity; and statutes of limitation. Research on the impact of clergy and teacher child sexual abuse on its victims (both during childhood and later, as adults) is reviewed. Based on his extensive experience as an evaluator in these cases and the published literature (Finkelhor, 1984; Foote, 2002; U.S. Department of Education, 2004), Foote discusses typical patterns of abuse used by perpetrators to identify, isolate, and abuse children in their care, and ensure their cooperation and silence. Methods designed to establish a link between the abuse and the presence of symptoms and behavioral dysfunctions (proximate cause) are provided, including guidelines for evaluating the severity of the trauma. In his chapter, Foote describes the need for mental health professionals to distinguish between genuine symptoms and those that may be malingered or exaggerated or are related to traumas a victim may have been exposed to other than or in addition to sexual abuse by the clergy or teacher. The chapter includes a consideration of the impact these forensic mental health assessments have on those who conduct these emotionally charged evaluations.

### ***Correctional Psychology: Law, Ethics, and Practice***

Roles for forensic psychologists who work in the criminal justice system encompass not only evaluations of behavior that relate to a specific crime (i.e., validity of *Miranda* rights waivers, Oberlander et al., 2003; insanity assessments, A. M. Goldstein, Morse, et al., 2003; Zapf et al., 2006); they are also concerned with evaluations that relate to hearings or the trial itself (i.e., trial competence; Stafford, 2003; Zapf & Roesch, 2006), address posttrial issues (i.e., sentencing reports, postconviction evaluations; Nussbaum, 2006; Chapters 14 and 15), and issues arising from prisoners' incarceration. In the 1930s and 1940s, psychologists employed in prison settings focused primarily on administering psychological tests (i.e., Wilson, 1951) and providing treatment to inmates (i.e., Lindner, 1944, 1954). Over the years, as a result of successful lawsuits that have created a legal responsibility for prisons to address the mental health needs of inmates, there has been a significant expansion of roles for psychologists working in correctional settings. However, because of the nature of this special population and the unique demands of the prison environment (including the need to maintain safety for staff and other inmates), ethical conflicts frequently arise when psychologists perform these various roles.

Joel Dvoskin, Erin Spiers, and Stanley Brodsky (Chapter 23) provide a summary of the history of the expanding role for psychologists in prison and jail settings. In their chapter, they attribute this growth to a number of factors, including the development of graduate training in departments of correctional-clinical psychology, successful class action suits filed on behalf of prisoners (Metzner, 2002a, 2002b), the formation of professional associations for psychologists working in corrections, and the publication of peer-reviewed journals devoted to or including research on correctional psychology. They review landmark cases that established the obligation of prisons to address the medical needs (*Estelle v. Gamble*, 1976) and psychiatric needs (*Bowring v. Godwin*, 1977) of inmates and cases related to the responsibility of prisons to meet the general mental health needs of residents (i.e., *Langley v. Coughlin*, 1989; *Ruiz v. Estelle*, 1980). The authors consider the

consequences that may follow the failure of correctional institutions to fulfill these obligations. These include lawsuits, investigations, and the effects on other prisoners and staff. Dvoskin et al. describe a number of roles for psychologists employed in prison settings, with a focus on providing treatment for those with serious mental illness, conducting reception and classification assessments, screening for potential suicide risk and suicide prevention, managerial and administrative positions in the institution, designing and conducting training programs, and consulting with prison boards and external committees. A range of mental health programs relevant to correctional settings is considered, including outpatient clinical services, residential treatment, and discharge and prerelease planning. The authors consider problems encountered when working with special populations of inmates: women, ethnic and cultural minorities, "manipulative" prisoners, and those placed in long-term segregation.

### ***Evaluating the Psychological Sequelae of Elder Abuse***

Much has been written about the aging of America. In the past 100 years, the percentage of Americans who are age 65 or older has tripled (to 12.3% of the population), and those between the ages of 75 and 84 have increased more than 16-fold (Greenberg, 2003). According to projections, by the year 2020, those age 60 or older will constitute approximately 18% of the world's population (Daly, 2002). Accompanying the increase in this segment of our population is a greater reliance on caregivers: family, in-home providers, and staff in nursing care or residential facilities. Because of the nature of this population (i.e., declines in physical condition, cognitive abilities, neurological functioning), they are highly vulnerable to physical, sexual, and psychological abuse, and the effects of physical and psychological neglect.

In her chapter, Beth Rom-Rymer (Chapter 24) considers the psychological sequelae associated with elder abuse. She reviews statutes that address mandatory reporting requirements and civil and criminal sanctions that arise from such claims. She reviews representative case law, focusing on statutes of limitation, procedural protections, levels of neglect, the causal link between the alleged abuse and harm to the individual, emotional damages, damages related to pain and suffering, and punitive awards. Rom-Rymer describes the multiple sources of information that experts should consider when conducting these assessments and the need for evaluators to determine or rule out the presence of a causal link between any impairment found and the alleged abusive incident. She summarizes relevant ethical issues that arise in these assessments, the standard of practice, and expert testimony. Her chapter concludes with an illustrative case, one that alleges sexual abuse and medical malpractice occurring in a nursing home setting.

### ***Forensic Issues at the End of Life***

Most forensic mental health assessments focus on the evaluation of competencies, a legal construct (Grisso, 1986, 2003a) delineated by statute and defined most often in case law, that identify those cognitive abilities and skills necessary to waive *Miranda* rights, stand trial, be held criminally culpable, adequately parent, exercise a duty to protect others, and make autonomous decisions, to name just a few

psycholegal competencies commonly addressed by experts. The role of the forensic mental health evaluator is to assess a defendant, plaintiff, or other party in order to assist the trier of fact in determining when a significant disparity exists between that individual's cognitive abilities and those the law mandates are necessary to establish a finding of competence. In the case of terminally ill patients who seek to have their life prematurely ended either by physician-assisted suicide (where legal) or by withholding life-sustaining treatment, forensic experts may be asked to evaluate their competence to elect such a drastic, irreversible course of action. As in the evaluation of any psycholegal competence, the forensic expert must be familiar with relevant federal and state statutes, case law, appropriate forensic assessment instruments, and the standard of care in the field, including, as always, the need to rely on and integrate information obtained from a number of sources (see Chapter 2).

Barry Rosenfeld and Colleen McCain Jacobson (Chapter 25) review issues that arise when forensic mental experts are asked to conduct end-of-life evaluations. In their chapter, they describe the historical roots of the concept of the right to die, summarizing a number of recent, high-profile cases that have focused attention on this topic (i.e., *Cruzan v. Director, Missouri Department of Health*, 1990; *In re Quinlan*, 1976; and the Jack Kevorkian and Terri Schiavo cases); they further describe the prevailing legal standards. Physician-assisted suicide, advanced directives, and do-not-resuscitate requests may all serve to trigger the need for a forensic assessment of the decision-making competency of the patient. Rosenfeld and McCain Jacobson review the empirical research on decision-making capacity in this psycholegal context and focus on the effects of depression and cognitive impairment, conditions that frequently accompany terminal illness and pain. They describe the methodology that should be used when conducting end-of-life evaluations, including the role of patient interviews, interviews with third parties, and record reviews and the use of such forensic assessment instruments as the Macarthur Competence Assessment Tool-Treatment (Grisso & Appelbaum, 1998) and the Hopkins Competency Assessment Test (Janofsky, McCarthy, & Folstein, 1992). The authors explain how these varied sources of information contribute to a forensic opinion and caution that the forensic expert must avoid imposing his or her own personal, cultural, and religious values on the process of assessing the patient's decision-making ability.

### **Special Topics in Forensic Practice**

In addition to the traditional and emerging roles for the forensic mental health professionals described in this volume and in Goldstein (2003a), a number of other roles and topics have emerged within the field of forensic mental health practice. In the final section of this chapter, these special topics are considered, including: (a) judicial decision making about forensic mental health evidence, (b) the psychopathology of homicide; and (c) forensic hypnosis.

#### ***Judicial Decision Making about Forensic Mental Health Evidence***

Although most research on legal decision making has focused on juries, recent attention has been devoted to the decision-making process of judges. In juvenile

court, the judge is the sole trier of fact, and in some states, the judge rules on issues related to the transfer of juveniles to adult court. In civil cases, judges are involved in civil commitment proceedings (see Chapter 9), child custody cases (Otto, Buffington-Vollum, & Edens, 2003), and cases involving parental abuse and neglect petitions (see Chapter 12). In criminal cases, judges are the sole decision makers for questions raised at pretrial hearings (i.e., validity of *Miranda* waivers, Oberlander et al., 2003; trial competency, Stafford, 2003; competence of a witness to testify during trial; e.g., admissibility of evidence), and posttrial sentencing (see Chapter 14). At times, courts have seemingly distrusted and ignored input provided by mental health experts in the form of reports, testimony, and amicus briefs aimed at providing information to judges that they might not otherwise have available (Fradella, Fogarty, & O'Neill, 2003; Tanford, 1990). In still other cases, including those decided by the U.S. Supreme Court, social science research has been cited in holdings in support of the Court's ruling (*Atkins v. Virginia*, 2002; *Roper v. Simmons*, 2005). As such, the question has been raised, "Do judges listen?" (A. M. Goldstein, Thomson, Redding, & Osman, 2003).

Richard Redding and Daniel Murrie (Chapter 26) review the current empirical research on judicial decision making for a number of legal issues frequently raised in juvenile, civil, and criminal cases. The authors focus on decision making about forensic mental health evidence in these cases, the receptivity of judges to forensic reports and testimony on these issues, judges' ability to understand this testimony, and the process by which judges reach decisions about such evidence. In their chapter, they describe the successes and failures of forensic mental health professionals to influence the courts. Redding and Murrie discuss research that sheds light on judges' perceptions of forensic mental health evidence and the ability of judges to grasp and apply the *Daubert* standard (*Daubert v. Merrell Dow Pharmaceuticals*, 1993) when considering the admissibility of forensic psychological and psychiatric testimony. They present the argument for judicial education on social science methodology in adjudicating individual cases.

### ***Psychopathology of Homicide***

In forensic psychology education and training, and as reflected in texts recognized as authorities in these fields (A. M. Goldstein, 2003a; Heilbrun, 2001; Melton et al., 1997; I. B. Weiner & Hess, 2006), major emphasis is placed on the relevance of legal statutes and case law and the use of appropriate assessment methodology in formulated criminal psycholegal opinions (e.g., *mens rea*, diminished capacity, extreme emotional disturbance, insanity). Very little, if any, attention is devoted to psychopathological disorders and the psychodynamics that may be associated with crimes such as homicide. An increased understanding of the motivational aspects and psychopathology of homicide may assist forensic experts in formulating psycholegal opinions related to criminal culpability and in conducting risk assessments on the likelihood of similar violent behavior by the offender in the future. Opinions as to the psychopathology that fueled a specific homicide may provide important information to the court, probation and parole boards, and those agencies involved in the management and disposition of the offender.



In his chapter, Louis Schlesinger (Chapter 27) offers an approach to the evaluation of homicide designed to complement the traditional model of assessment (see Chapter 2), which may assist forensic mental health experts in understanding the psychopathology of homicide. He presents a model for the classification of homicides based on the motivational dynamics of the offender (Revitch & Schlesinger, 1978, 1981, 1989; Schlesinger, 2004b) and focusing attention on the behavioral crime scene characteristics, rather than relying on the defendant's rendition and explanation as to what occurred. He describes and provides illustrative case histories of homicides that fall along a motivation spectrum: environmentally stimulated homicides, situational homicides, homicides that are impulse driven, catathymic homicides, and compulsive homicides. Schlesinger (2004a) explains the connection between the psychodynamics and underlying psychopathology of a homicide offender to violence risk prediction.

### ***Forensic Hypnosis***

Initially barred as expert testimony more than 100 years ago (*People v. Ebanks*, 1989), the use of forensic hypnosis as an investigative tool to refresh memories of crime victims and witnesses gained notoriety and acceptability in the 1970s because of its role in solving the Chowchilla kidnapping case. A school bus was hijacked, and the children in it virtually disappeared, unable to be found by investigators. Although the driver of the bus escaped, he was unable to provide useful information to assist in locating the missing children. He underwent forensic hypnosis and was able to recall new details of the kidnapping, including the license plate number of the car driven by the kidnappers, and investigators eventually located the bus and children, hidden from view in a cave. Suddenly, the use of forensic hypnosis became popular. Numerous explanations have been proposed to explain the phenomenon of hypnosis, tending to view it either as an altered state of consciousness or as a behavior having psychological and sociological explanations (Hilgard, 1992; Schefflin & Shapiro, 1989; Spanos & Coe, 1992). The impact of hypnotically refreshed memories on a jury is potentially considerable, and as such, questions as to the accuracy of hypnotically recalled memories are significant.

Susan Knight and Robert Meyer (Chapter 28) define and distinguish between clinical and forensic hypnosis. In their chapter, they review research related to the trustworthiness of hypnotically refreshed memories and describe the arguments advanced in support of or discouraging their use in court. They focus on issues related to suggestibility, reliability, and believability, and they consider the topic of pseudomemories. The role of forensic hypnosis with crime victims and witnesses is described, along with relevant case law addressing the admissibility of testimony that has passed through the sieve of forensic hypnosis. Knight and Meyer consider the legal issues and practical use of forensic hypnosis with those claiming they were sexually abused as children, defendants in criminal cases, and those who may seek to provide additional information (i.e., investigative leads, details that might assist in a defense against the charges). They also consider the use of forensic hypnosis by investigators seeking to obtain confessions from defendants. Research on behavior that may have been coerced while in a hypnotic state and on the detection of mimicked hypnotic states is described. The authors review those criteria, based on case

law (*State of New Jersey v. Hurd*, 1981) and guidelines prepared by a number of organizations and agencies, that describe the proper use of forensic hypnosis. They consider ethical issues involved in performing forensic hypnosis, qualifications and training of those serving as experts in this area, and methods to reduce legal liability from claims arising from information gleaned through forensic hypnosis.

## CONCLUSION

Forensic psychology has evolved to the point that a standard of care in conducting forensic psychological assessments is emerging. Each forensic referral is different, and methodology must be determined on a case-by-case basis, yet there is general agreement that forensic evaluations are legally driven, fueled by statutes that are defined by case law. Before accepting a case, experts must familiarize themselves with the applicable statutes and case law that will then determine what questions to ask the examinee; what tests to administer (including traditional, forensic assessment, and forensically relevant instruments); what records to request and review; what third parties should be interviewed; and how to write a relevant, focused report that will assist the trier of fact. It is accepted in the field of forensic psychology that multiple sources of information must be considered in arriving at opinions, that opinions should be based on sufficient data, and that issues related to response style, including malingering, defensiveness, and exaggeration, must be addressed. It is agreed that forensic psychological evaluations must conform to the principles of the APA (2002) Code of Ethics and should follow the aspirational "Specialty Guidelines" (Committee on Ethical Guidelines for Psychologists, 1991).

A standard to care, not an unreasonably high threshold to meet from a legal perspective (what the *reasonably* prudent profession would do—and who among us would chose to have the reasonably prudent neurosurgeon operate to remove a brain tumor?), should guide forensic mental health experts in their decisions to accept or reject referrals, in designing and conducting forensic assessments, in preparing reports, and in offering expert testimony in court. It is hoped that the information contained in these chapters contribute to the understanding that practitioners should possess in their efforts to meet the emerging standard of care when working in the land-mined field of forensic mental health assessment.

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