

CANADIAN EDITION

Mark Costanzo
Daniel Krauss
Regina Schuller
Kaitlyn McLachlan

**FORENSIC AND LEGAL
PSYCHOLOGY**

Psychological Science Applied to Law

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Forensic and Legal Psychology

First Canadian Edition

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First Canadian Edition

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For my three magnificent daughters:

Marina, Zoey, & Sophia –M.C.

For my wife and the boys:

Trina, Jared, & Alex –D.K.

For the ones who keep me grounded:

Richard, René, & Andrée –R.S.

For my wonderful family:

Mikkel, Macy, & Pia –K.M.

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About the Authors



Mark Costanzo received his Ph.D. in social psychology from the University of California at Santa Cruz. He is a professor of psychology at Claremont McKenna College and a member of the plenary faculty at Claremont Graduate University. He has published research on a variety of law-related topics including police interrogations, false confessions, jury decision making, sexual harassment, attorney argumentation, alternative dispute resolution, and the death penalty. Professor Costanzo is author of the books *Just Revenge: Costs and Consequences of the Death Penalty*, and *Psychology Applied to Law*. He has co-edited four books, including *Expert Psychological Testimony for the Courts*, and *Violence and the Law*.

Professor Costanzo has served as a consultant or expert witness for more than 100 criminal cases involving coerced and potentially false confessions. He has received Outstanding Teaching and Mentoring Awards from the Western Psychological Association, the Society for the Teaching of Psychology, the Society for the Psychological Study of Social Issues, and the American Psychology-Law Society.



Daniel Krauss completed a joint degree program in psychology and law at the University of Arizona, receiving his J.D. (Juris Doctorate) and then his Ph.D. in clinical psychology and psychology, policy, and law. He is a professor at Claremont McKenna College. Professor Krauss is primarily interested in the interaction of law and clinical psychology, and has published research articles and book chapters relating to clinical psychological evaluations for the courts, legal and psychological expertise, and jury decision making. He has co-edited three books, and is the co-editor of *The Law and Public Policy: Psychology and the Social Sciences Series* by the American Psychological Association (APA) Press. He is a licensed clinical psychologist in the state of California, and a diplomate in forensic psychology, board-certified by the American Board of Professional Psychology. In 2010, he was awarded the Early Career Research Award by the Western Psychological Association. He and Professor Costanzo were authors of the first U.S. edition of *Forensic and Legal Psychology: Psychological Science Applied to Law*. A second edition of this book is expected shortly.



Regina Schuller received her M.A. and Ph.D. in social psychology from the University of Western Ontario, followed by a post-doctoral fellowship in the Law and Social Science program at Northwestern University in Illinois. Currently, she is a professor of psychology at York University and also holds a cross-appointment with the graduate program in Sociolegal Studies at York. She has published extensively in the area of jury decision making on a variety of topics, including jury selection, receptivity to expert testimony, and victim blame in sexual assault trials, and has received funding from the Social Sciences and Humanities

Research Council of Canada (SSHRC) and the Australian Research Council (ARC). Professor Schuller was awarded Fellowship status by the Canadian Psychological Association and the Society for the Psychological Study of Social Issues (Div. 9, APA). In 2001, she and James Ogloff co-edited the first Canadian text to be used in Canada for courses in psychology and law, *Introduction to Psychology and Law: Canadian Perspectives*.



Kaitlyn McLachlan received her M.A. and Ph.D. in clinical psychology with a forensic specialization from Simon Fraser University in British Columbia. She is presently a post-doctoral fellow in the Department of Pediatrics at the University of Alberta, and a research fellow of NeuroDevNet. She has published in the area of clinical forensic psychology on topics such as psycholegal abilities, rights comprehension, fitness to stand trial, and risk assessment, and also researches procedural justice in vulnerable populations, including adolescents and adults with fetal alcohol spectrum

disorder. Dr. McLachlan was awarded the Governor General's Gold Medal at Simon Fraser University. In 2007, she and Ronald Roesch co-edited an international collection of seminal publications in the field of forensic clinical psychology, *Psychology and Law: Clinical Forensic Perspectives*.

Brief Contents

Chapter 1	Psychology and Law: A Cautious Alliance	1
Chapter 2	Interrogations and Confessions	1
Chapter 3	Lie Detection	61
Chapter 4	Criminal Profiling	87
Chapter 5	Eyewitness Identification and Testimony	113
Chapter 6	Child Sexual Abuse: Evaluating the Memory of Children and Memories of Abuse	143
Chapter 7	Jury Selection	169
Chapter 8	Juries and Judges as Decision Makers	193
Chapter 9	Fitness to Stand Trial and the NCRMD Defence	219
Chapter 10	Predicting Violent Behaviour: The Psychology of Risk Assessment	247
Chapter 11	Corrections: Sentencing, Imprisonment, and Alternatives	273
Chapter 12	Intimate Partner Violence	303
Chapter 13	The Role of Psychology in the Civil Arena: Child Custody Disputes and Workplace Discrimination	323

Glossary G-1

References R-1

Name Index NI-1

Subject Index SI-1

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Contents

Why We Wrote This Book xix

Chapter 1 Psychology and Law: A Cautious Alliance 1

The Origins of the Canadian Legal System 2

A Brief History of Psychology and Law 5

A Clash of Cultures 9

Goals: Approximate Truth versus Approximate Justice 9

Methods: Rulings versus Data 12

Style of Inquiry: Advocacy versus Objectivity 12

The Importance of Bridging the Two Cultures 14

Roles Played by Psychologists Interested in Law 14

Psychologists as Advisors 14

Psychologists as Evaluators 15

Psychologists as Reformers 17

Five Pathways for Influencing the Legal System 17

Expert Testimony 17

Science Spotlight: Brain Scans Go Legal 20

Cross-Disciplinary Training 23

Legal Update: Experts Conferring and “Hot-Tubbing” 24

Amicus Curiae Briefs 25

Broad Dissemination of Research Findings 27

Influencing Legislatures and Public Policy 28

Has Psychology Influenced the Courts? 29

In Conclusion 29

Chapter 2 Interrogations and Confessions 31

The Challenge of Police Investigation 32

The Power of a Confession 33

The Rights of Suspects and Legal Safeguards to Protecting These Rights 35

How Well Are the Rights of Suspects Understood? 37

Determining the Voluntariness of Disclosures 38

Inside the Modern Interrogation Room 40

Hot Topic: Mr. Big: A Controversial Undercover Investigative Technique Used in Canada 42

The Problem of False Confessions 47

Types of False Confessions	49
Should Interrogators Be Allowed to Lie?	50
Potential Solutions to the Problem of False Confessions	52
Video Recording of Interrogations	52
Time Limits on Interrogations	55
The “Appropriate Adult” Safeguard for Vulnerable Suspects	55
Expert Testimony on Interrogations and Confessions	57
Alternative Models of Interrogation	58
In Conclusion	59
Chapter 3 Lie Detection	61
The Complexity and Pervasiveness of Deception	61
Can We Tell When Others Are Lying?	62
The Police and Lie Detection	63
The Polygraph	67
Hot Topic: Use of the Polygraph in Hiring Practices	69
The Process of Polygraphing	69
Weaknesses of Polygraphing Techniques	71
Research on the Polygraph	73
Legal Status of the Polygraph	75
An Alternative Polygraph-Based Technique	76
Looking for Lies in the Brain	79
Functional Magnetic Resonance Imaging (fMRI)	79
The Electroencephalogram (EEG)	81
Hot Topic: Lower Tech Lie Detection: Words and Wizards	82
Telling Lies from the Eyes	83
In Conclusion	84
Chapter 4 Criminal Profiling	87
The Process of Profiling	88
Three Famous Profiles	90
Jack the Ripper	90
The Olympic Bomber	91
The Mad Bomber	91
Typologies of Serial Offenders	93
Research on Profiling	97
Issues with Profiling	99
Basic Assumptions	99
Cross-Situational Consistency	100
The Utility of Inferences	100
The Dangers of Stereotyping and Discrimination	102

Current Status on Profiling Techniques	103
Hot Topic: Profiling Terrorism	104
Alternative Profiling Methods	105
Violent Crime Linkage Analysis System (ViClas)	105
Geographic Profiling	106
Legal Status of Profiling	109
In Conclusion	111
Chapter 5 Eyewitness Identification and Testimony	113
How Memory Works	115
Eyewitness Testimony and the Legal System	116
Guidelines for Evaluating Eyewitness Testimony	117
How the Legal System Attempts to Expose Eyewitness Bias	118
Constructing and Reconstructing Eyewitness Memories	119
Cross-Racial Identifications	119
Stress and Weapon Focus	120
Unconscious Transference	122
Leading or Suggestive Comments	122
Pre-Existing Expectations	123
Witness Confidence	124
When the Eyewitness Is a Child	126
Using Research Findings to Improve Eyewitness Accuracy	127
Guideline 1: Blind Lineup Administrators	128
Guideline 2: Bias-Reducing Instructions to Eyewitnesses	128
Guideline 3: Unbiased Lineups	129
Guideline 4: Confidence Ratings	131
Guideline 5: Video Recording	132
Guideline 6: Sequential Lineups	132
Guideline 7: Expert Testimony	134
Techniques for Refreshing the Memories of Witnesses	136
Hypnosis	137
Hot Topic: Translating Science into Practice	138
The Cognitive Interview	140
In Conclusion	141
Chapter 6 Child Sexual Abuse: Evaluating the Memory of Children and Memories of Abuse	143
Contextualizing Allegations of Sexual Abuse	144
The Reported Memories of Young Children	145
Interviewing Children	146
Problematic Interviewing Techniques	146

Effective Interviewing Techniques	149
NICDH Investigative Interview Protocol	149
Step-Wise Interview	153
Testimony by Children at Trial	153
Legal Update: Stereotype Induction	154
Evaluating Children’s Testimonies	157
Courtroom Accommodations	158
Recovered Memories of Sexual Abuse	160
Hot Topic: Child Sexual Abuse Accommodation Syndrome	161
Were the Memories Created or Recovered?	161
The Ingram Case	163
Research on Implanting False Memories	164
In Conclusion	167
Chapter 7 Jury Selection	169
The Jury in Canada	169
The Role and Function of the Jury	170
Conflict between the Jurors’ Sense of Justice and the Law	170
Hot Topic: The Case of Robert Latimer: The Jury Weighs in on Punishment	173
Assembling a Jury	173
Out-of-Court Process	173
In-Court Process	174
Selecting a Jury	176
Juror Characteristics and Attitudes as Predictors of Verdict	177
Defendant–Juror Similarity	178
Characteristics of the Jury	180
Representativeness	180
Impartiality	181
Jury Bias and Remedies	182
Partiality	182
Pretrial Publicity	183
Remedies	186
An Overview of Trial Procedure	187
Legal Update: Canadian Research on the Challenge for Cause	189
Hot Topic: Is There Really a <i>CS</i> Effect?	190
In Conclusion	191
Chapter 8 Juries and Judges as Decision Makers	193
Studying Juries	194
The Jury Decision-Making Process	196
The Impact of Evidence	197

The Effects of Non-Evidentiary Factors	198
Defendant Characteristics	198
Hot Topic: Connectivity and the Courts	199
Inadmissible Evidence	200
Complex Evidence	202
In-Court Comprehension Aids	203
Jury Deliberation Dynamics	205
Strong Jurors and the Power of the Majority	206
Stages in the Deliberation Process	207
Size of the Jury	209
Hot Topic: Allowing Jury Discussion during Trial	210
Decision Rules (Unanimous or Majority Rule)	210
Exhortations to the Jury	211
Judges Compared to Juries	212
Agreement between Juries and Judges	215
In Conclusion	217
Chapter 9 Fitness to Stand Trial and the NCRMD Defence	219
The Case of Vincent Li	219
Fitness to Stand Trial (FST)	221
Canadian Legal Standards	222
Who Can Assess Fitness?	223
Hot Topic: Diagnosing Mental Disorders	224
Who Is Declared Incompetent?	225
Legal Update: Adolescent Competency to Stand Trial	227
Techniques for Evaluating Fitness to Stand Trial	227
Competency Restoration and Treatment	229
Not Criminally Responsible on Account of Mental Disorder (NCRMD)	231
The Case of Allan Schoenborn	231
The Evolution of Insanity Law	233
Hot Topic: Postpartum Mental Illness	234
Automatism	237
Who Is Declared NCRMD?	237
Hot Topic: Fetal Alcohol Spectrum Disorder	238
Assessing Mental Disorder and NCRMD	239
Malingering	240
Public Perceptions of FST and NCRMD	241
Ultimate Issue Testimony	243
In Conclusion	244

Chapter 10	Predicting Violent Behaviour: The Psychology of Risk Assessment	247
	Violence Risk Assessment	248
	Methods and Outcomes of Risk Assessment	249
	Legal Update: Confidentiality and Obligations of Mental Health Professionals	251
	Base Rates of Violence	251
	Types of Risk Factors	253
	Historical Factors	253
	Dynamic Factors	255
	Risk Management Factors	255
	Protective Factors	256
	Types of Risk Assessment	256
	Unstructured Clinical Judgment	257
	Actuarial Techniques	258
	Structured Professional Judgment (SPJ) Instruments	260
	Hot Topic: Psychopathy and Violence Risk Assessment	261
	High-Risk Offenders and Canadian Law	263
	Dangerous Offenders (DO)	263
	Long-Term Offenders (LTO)	265
	Profiling Canada's Dangerous and Long-Term Offenders	266
	Management Approaches to Reduce the Risk of Violence	266
	Legal Update: Canada's National Sex Offender Registry	267
	In Conclusion	270
Chapter 11	Corrections: Sentencing, Imprisonment, and Alternatives	273
	Penal Philosophy in Canada	275
	Sentencing Guidelines and Decisions	276
	Sentencing Disparity	280
	Hot Topic: Mandatory Minimum Sentences	281
	Legal Update: <i>Gladue</i> and Aboriginal Sentencing	284
	Legal Update: Accommodations for Aboriginal Offenders	285
	Hot Topic: Canadian Prison Population Trends	286
	Hot Topic: Women in Prison	287
	Public Attitudes toward Sentencing	288
	Types of Prisons	290
	Prison Conditions	291
	Incarceration Rates in Canada	291
	Prison Culture	292
	The Harshness of Prison Life	292
	Gangs and Drugs	293

Treatment and Rehabilitation	294
Correctional Psychologists	295
Community-Based Sanctions	295
Hot Topic: Solitary Confinement and Offenders with Mental Illness	297
Does Prison Work?	298
In Conclusion	300
Chapter 12 Intimate Partner Violence	303
What Is Intimate Partner Violence?	304
IPV and Same-Sex Relationships	306
Hot Topic: The Hidden Violence against Men	307
Syndromes in Legal Proceedings	308
Battered Woman Syndrome (BWS)	308
Hot Topic: Characteristics of Batterers	311
BWS and the Legal System	311
Assessing Expert Testimony of BWS	312
Problems with BWS Testimony	313
Legal Update: Battered Woman Syndrome and Canadian Law	314
Rape Trauma Syndrome (RTS)	315
The Legal Definition of Sexual Assault in Canada	315
Rape Trauma Syndrome Defined	316
The Scientific Validity of RTS	317
Recovery from Rape and Sexual Assault	317
Problems with RTS Testimony	318
Post-Traumatic Stress Disorder (PTSD): Moving beyond Syndromes	320
PTSD in the Courtroom	320
The Use of Expert Testimony	321
In Conclusion	322
Chapter 13 The Role of Psychology in the Civil Arena: Child Custody and Workplace Discrimination	325
Psychology in the Family Courts	325
Child Custody Disputes	325
Custody Arrangements	326
Custody and Access Law in Canada	328
Weaknesses of the BICS	328
Hot Topic: Parental Alienation Syndrome	329
Research on Children's Responses to Divorce	330
Negative Outcomes	331
Positive Outcomes	332
The Psychologist's Contribution to Custody Decisions	333

- Psychological Tests 335
- Judges' Views of Experts 336
- Custody Mediation 337
- Psychology in the Workplace 339
 - History of Laws Governing the Workplace 339
 - Bona Fide Occupational Requirements and the Duty to Accommodate 339
- Sexual Harassment 341
 - The Evolution of Sexual Discrimination Law in Canada 342
 - Prevalence and Perceptions 344
 - The Legal Boundaries of Sexual Harassment 345
- The Psychology of Sexual Harassment 346
 - Some Causes 346
 - Some Effects 347
 - Prevention 348
- Hot Topic: The Gender Gap in Salaries 349
- Racial Discrimination in the Workplace 349
 - The Role of the Forensic Psychologist in Workplace Discrimination Cases 351
- In Conclusion 352

Glossary G-1

References R-1

Names Index NI-1

Subject Index SI-1

Why We Wrote This Book

Every year, each of us teaches a course in either Forensic Psychology or Psychology and Law. This combined teaching experience—spanning more than three decades—prompted us to write this book and guided our writing process. Our goal was to produce a student-friendly textbook, a book that is both accessible and rigorous. Drawing on research in forensic, social, cognitive, clinical, and developmental psychology, we have attempted to show how psychological science can be used to enhance evidence gathering, improve legal decision making, reduce crime, and promote justice.

One aspect of this book that makes it a distinctive alternative to existing textbooks is writing style. Of necessity, all textbooks designed for a particular course must be similar in content. Often, it is how content is presented that makes a book appealing to students and instructors. Great care has been taken to write *Forensic and Legal Psychology* in a lively, engaging style. When presenting research findings, we have tried to portray the research process as a kind of detective story—an effort to unravel a mystery through systematic data collection. We have also made extensive use of real cases and trials to draw students into the material and to illustrate the relevance of research findings. To ensure our writing was clear and engaging, every chapter was reviewed and edited by both students and scholars. Finally, to enhance the visual appeal of the book and to clarify research findings, we have used tables, graphs, photographs, and figures throughout the text.

Forensic and Legal Psychology is intended to provide a comprehensive introduction to the varied, expanding field of psychology and law. The chapters that follow explore virtually every aspect of the legal system that has been studied by psychologists. We emphasize how research and theory can deepen our understanding of key participants (e.g., criminals, victims, witnesses, police, lawyers, judges, and jurors) and basic psychological processes (e.g., decision making, persuasion, perception, memory, and behaviour change) in the legal system. In addition to core chapters on topics such as eyewitness identification, jury decision making, and interrogation and confessions, we have included full chapters on a few topics not well covered in most textbooks. For example, Chapter 9, on fitness to stand trial and the NCRMD defence, examines key cases and the legal updates in this area. We have also devoted an entire chapter to two rapidly evolving areas in the civil domain: child custody evaluations and workplace law (a topic that includes issues such as sexual harassment and discrimination). Full chapters are also devoted to risk assessment (a key consideration in arrest, sentencing, and parole decisions), intimate partner violence, and lie detection.

This is an introductory textbook to the field of psychology and the law. We have assumed that some students taking the course may not yet have a strong foundation in psychology or research methods. Although many students who take forensic or legal psychology are psychology majors, many are not. Because the course has become

an attractive breadth requirement for students majoring in criminal justice, pre-law, legal studies, anthropology, sociology, and political science, we have written this textbook to be accessible to students from a variety of academic disciplines. We hope this book provides a lucid overview of the field and also conveys our enthusiasm for the many applications of psychological science to the legal system.

Pedagogical Features

Nearly every chapter includes at least one **Hot Topic** box. These boxes showcase controversial topics and summarize research findings on contentious issues. Hot Topic boxes include the following topics: The use of controversial methods in undercover investigations (Chapter 2); the use of the polygraph in hiring practices and lie-detection through the analysis of written documents and facial expressions (Chapter 3); the use of racial profiling (Chapter 4); the use of sequential versus simultaneous lineups (Chapter 5); child sexual abuse accommodation syndrome (Chapter 6); the Robert Latimer case, and jury decision making and whether the CSI effect exists (Chapter 7); how courts are dealing with new technologies (Chapter 8); diagnosing mental disorders, postpartum mental illness, and fetal alcohol spectrum disorder (Chapter 9); psychopathy and violence risk assessment (Chapter 10); mandatory minimum sentences for convicted offenders, women in the prison system, and solitary confinement especially of offenders with mental illness (Chapter 11); the characteristics of batterers (Chapter 12); and parental alienation syndrome and the disparity in salaries between genders (Chapter 13).

Some chapters also include **Legal Update** boxes that provide concise summaries of complex areas of law and research in psychology that may influence aspects of the law. These boxes summarize established and emerging laws and describe the balance courts are attempting to strike between competing interests (e.g., rights of a defendant to an impartial trial versus the interests of crime victims). Chapter 1 includes a **Science Spotlight** box that contains a brief article and excerpts from the pages of *Scientific American Mind*. The boxed article has been judiciously selected to highlight important new research relevant to the study of psychology and law. The Science Spotlight box explores the use and misuse of brain scans in the courtroom.

To reinforce student learning and encourage students to go deeper, each chapter ends with a list of readings, questions, and terminology. The **Discussion and Critical Thinking Questions** encourage students to think about what they have learned and to go beyond mere memorization by considering the implications of the ideas presented in the chapter. The questions also help students make connections between research findings and the functioning of the legal system. The list of **Key Terms** allows students to immediately test their comprehension and retention of information in each chapter. For quick reference, the key terms from every chapter are compiled and clearly defined in an extensive **Glossary** at the end of the textbook. Each **Readings to Supplement This Chapter** list points students (and instructors) to sources that add depth and detail to the ideas presented in the chapter. These readings include books, journal articles, reports of original research, and scientific reviews.

Supplements

For Instructors

Test Bank The *Test Bank* features approximately 35 multiple-choice and 5 essay questions per chapter.

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Because this textbook was written for university students, we sought out advice and feedback from our own students, graduate and undergraduate. Their comments were essential in helping us to improve the clarity and readability of the chapters. The students listed below read and commented on one or more chapters in this book.

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Kaitlyn is grateful to Regina for the invitation to work on the Canadian revision of this text. It has been a rewarding experience and Regina was a pleasure to work with.

Kaitlyn and Regina have now come full circle, as Kaitlyn conducted her undergraduate thesis research under Regina's supervision at York University.

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*Mark Costanzo and Daniel Krauss
Regina Schuller and Kaitlyn McLachlan*



Psychology and Law: A Cautious Alliance

1

A defendant stands accused of a terrible crime. Lawyers make opening statements, witnesses are called, motives are questioned, private information revealed. In their closing arguments, lawyers make impassioned pleas to the men and women of the jury. Jurors struggle to find the truth. In a hushed courtroom, thick with tension, the jury foreperson announces the verdict: “We find the defendant”

The courtroom trial is a staple of great and trashy literature, of distinguished films and lousy television. This is so because the trial is a compelling psychological drama. There is the question of motivation—was it love, hate, fear, greed, or jealousy that caused the behaviour of a criminal? There is persuasion—lawyers and witnesses attempt to influence a judge or jury and, during deliberations, jurors attempt to persuade each other. Perceptual and cognitive processes come into play—eyewitnesses must remember and report what they saw, jurors must sift through evidence to reach conclusions. Finally, there is decision making—the goal is to reach a decision, called a “verdict.” And, if the verdict is guilty, there is a choice about what punishment the defendant deserves.

The trial is the most visible piece of our justice system. But it is only a small piece. When we look beyond the trial, we find that the legal system is saturated with psychological concerns. Every area of psychology (e.g., developmental, social, clinical, cognitive, cultural) is relevant to some aspect of law. Here are a few examples:

Developmental psychology—Following a divorce, which kind of custody arrangement will promote healthy development of the child? Can a child who commits a murder fully appreciate the nature and consequences of his or her crime?

Social psychology—How do police interrogators make use of principles of coercion and persuasion to induce suspects to confess to a crime? Do the group dynamics of juries influence their verdict decisions?

Clinical psychology—How can we decide whether or not a person with a mental illness is competent to stand trial? Is it possible to predict whether a person with a mental illness will become violent in the future? How likely is a convicted sex offender to repeat the unlawful behaviour?

Cognitive psychology—How accurate is the testimony of an eyewitness? Under what conditions are eyewitnesses able to remember what they saw? Do jurors understand jury instructions in the way that lawyers and judges intend?

The Origins of the
Canadian Legal System

A Brief History of
Psychology and Law

A Clash of Cultures

Roles Played by
Psychologists
Interested in Law

Five Pathways for
Influencing the
Legal System

Science Spotlight:
Brain Scans Go Legal

Legal Update: Experts
Conferring and
“Hot-Tubbing”

Has Psychology
Influenced the Courts?

Cultural psychology—What is the experience of diverse groups in the justice system? Why are certain ethnic or cultural groups overrepresented in Canadian prisons? Does discrimination take place in the Canadian criminal justice system?

In the abstract, psychology and law seem like perfect partners. Both focus on human behaviour, both strive to reveal the truth, and both attempt to solve human problems and improve the human condition. However, in practice, the relationship between psychology and law has not always been smooth or satisfying.

The Origins of the Canadian Legal System

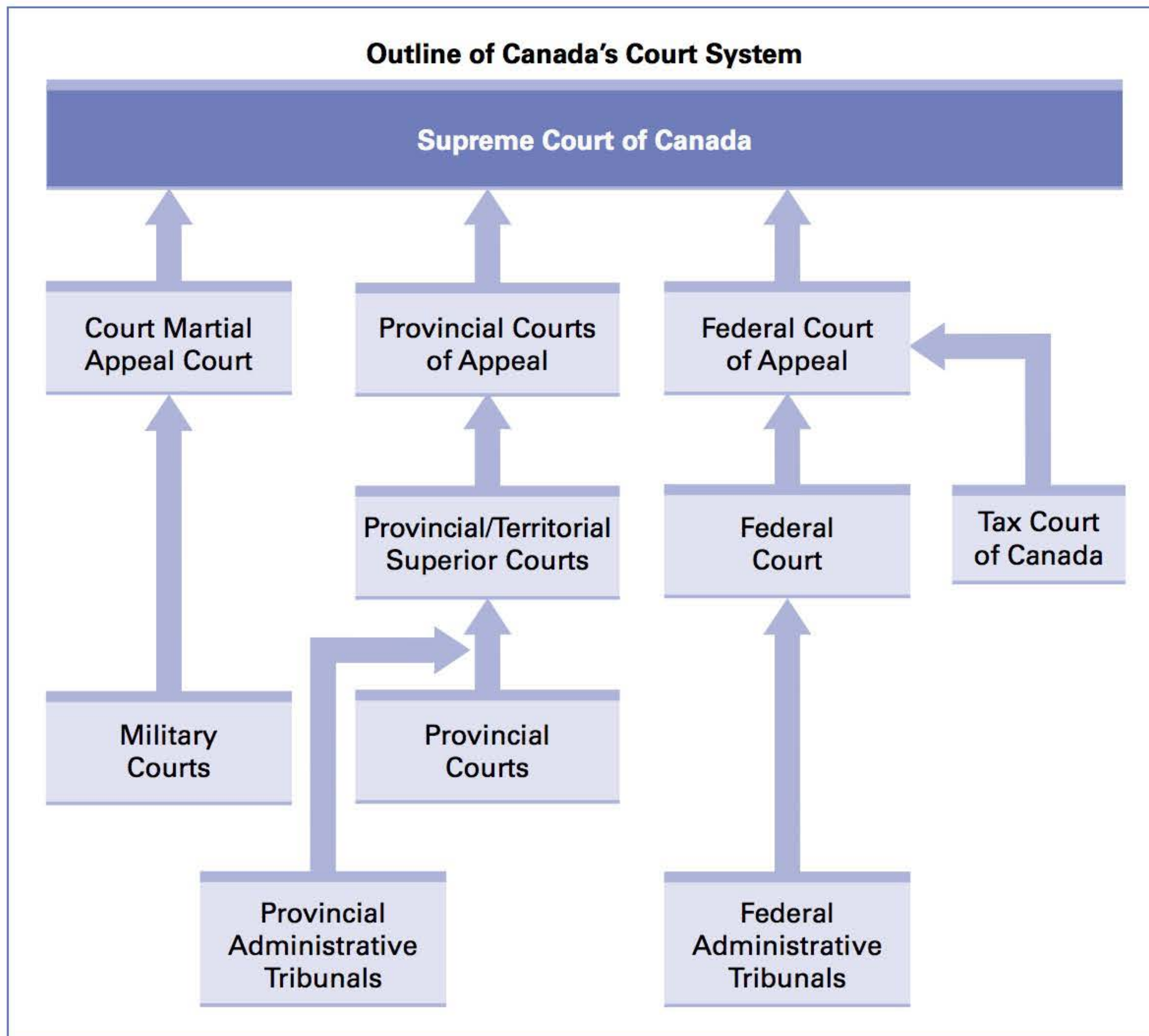
In order to fully appreciate the important tensions inherent whenever psychology and law interact, it is important to understand the roots and foundation of Canada's legal system. As a former British colony and a member of the Commonwealth of Nations, Canada has a legal system based on the British common law system. All provinces and territories employ the style of British common law in conducting criminal prosecutions, with the exception of Quebec, which retains a civil system for issues of private law. In keeping with all common law countries, Canadian law follows the legal doctrine of *stare decisis*, a principle which states that lower courts must follow the decisions of higher courts by which they are bound. Figure 1.1 (on the next page) shows the hierarchical structure of the Canadian court system. For instance, all lower courts in one province are bound by the decisions of the court of appeal in the same province. However, decisions made by a province's highest court (provincial court of appeal) are often considered "persuasive" even though they are not binding on other provinces. The Supreme Court of Canada has the authority to bind all lower Canadian courts with a single ruling. When there is no clear history of legal rulings on a particular legal issue in Canada, Canadian

courts may turn to non-Canadian legal authorities for reference, and decisions of English and American courts are often relied upon in this context.

All Canadian laws must conform to the Constitution of Canada, and Canada's constitutional system impacts the way laws are created and governed across the country. Under the *Constitution Act* (1867) the federal parliament and provincial legislatures have the constitutional authority to create courts. In Canada, criminal offences are found within the *Criminal Code of Canada*, a federal statute, among a few other pieces of federal legislation such as the *Motor Vehicle Safety Act*. Thus, individuals living in all provinces and territories across the country are bound

The Supreme Court of Canada in Ottawa.



**FIGURE 1.1**

The hierarchical structure of the Canadian court system.

by the same legislation when it comes to governing behaviours deemed illegal. Assaulting someone in British Columbia will trigger the same criminal charge as it would in Nova Scotia.

In contrast to common law, Canada's second main form of law, civil law, evolved from Roman law, based on a written civil code. This type of law was adopted in France following the French Revolution in 1789, and covers only matters of private law, such as the relationships between individuals and property. Civil codes are intended to be easy to understand and do not rely on precedents to the same extent as common law. Civil law is used in many European countries, as well as in Quebec. A new *Civil Code of Quebec* came into force in 1994, consolidating a number of outdated legal rules and integrating some concepts from common law.

Much of our understanding of legal issues comes from what we read, hear, and see in popular media. Given the scope of American influence in the popular media consumed by Canadians, it is very important to recognize that there are critical differences between Canadian and American law. Some of these differences are highlighted in Table 1.1 (on the next page), where a discerning reader will observe that although Canada and the United States started out as British colonies, some of their legal developments have followed quite different paths.

Table 1.1 A Few Important Differences between Canadian and American Law

	Canada	United States
Courts	Constitutional authority for the judicial system is divided between federal and provincial/territorial governments. It is roughly the same across Canada, with two levels of courts: provincial and superior courts. Provincial courts try most criminal offences. Superior courts, the highest level in a province, are divided into trial level and appeal level. Superior courts try serious offences and have the power to review decisions of the provincial or lower courts. The final authority over all public and private law in Canada is the Supreme Court of Canada.	The United States has parallel federal and state systems, with 50 independent state court systems each having laws that can be markedly different. Federal courts deal with federal law, and the United States Supreme Court has the limited mandate of dealing with federal legislation and the United States Constitution.
Judicial Independence	Judges are appointed, with the federal government appointing judges who hear cases in the superior courts. Provincial and territorial governments appoint judges who hear cases in the provincial and territorial (lower) courts. Judges are self-governing and cannot be fired or demoted for unfavourable decisions.	Federal judges are appointed for life. However in many states, judges are elected for fixed terms and must periodically run for re-election.
International Influence	Canadian courts are open to looking at international law and the domestic laws of other countries, preferring cases from other commonwealth countries, in particular the United Kingdom and Australia. It is also interested in American case law. Though these laws are not binding, decisions taken in non-Canadian jurisdictions are still considered influential.	American courts generally do not cite international law, or the domestic law of other countries.
The Jury	Most juries are found in criminal cases. There are very few civil jury trials but they occasionally occur in Ontario and British Columbia. Canadian law prohibits jurors from talking about their deliberations or decisions after a trial.	The jury is a centrepiece of American law. There is a constitutional right to a jury trial in criminal and most civil cases. Jurors are free to speak with others once their verdict has been delivered.
Criminal Law	The <i>Criminal Code</i> consolidates most criminal rules into a single piece of criminal law, applicable to all Canadians across the country.	There are 50 different individual state criminal codes plus federal criminal law.
Criminal Sentences	In addition to imprisonment, many different sentencing options or a combination of penalties can be imposed. These include an absolute or conditional discharge, a fine or restitution, probation, or community service.	Criminal sentences are harsher in the United States, with fewer alternatives to incarceration. This country has the highest per capita incarceration rate in the Western world.
Capital Punishment	Canada abolished the death penalty in 1976.	The United States is the only remaining Western democracy to retain the death penalty. Although 18 states have abolished capital punishment, it is used in 32 states for certain federal crimes and for crimes committed by United States military personnel.

Table compiled from Bowal, P., (2002). Ten differences (between Canadian and American law). *Law Now*, 26, 9–11; Canadian Judicial Council Resource Centre (2013). Retrieved from http://www.cjc-ccm.gc.ca/english/index_en.asp; and N. Vidmar, personal communication, July 12 and 16, 2013.

A Brief History of Psychology and Law

Scholarly disciplines seldom have clear starting points. It is only in retrospect that we can look back and identify the many small streams that eventually converge to form a strong intellectual current. What is clear is that a full appreciation of the possible applications of psychology to the legal system began to emerge at the end of the nineteenth century. Psychiatrists throughout North America were beginning to act as witnesses in criminal trials with growing frequency, particularly with regard to issues on eyewitness testimony. The opinions of forensic psychiatrists in Canada proved critical in several important legal cases, including the trial of Louis Riel in 1885 (Perr, 1992).

Riel was the leader of the Metis people of the Canadian prairies and led two resistance movements against the Canadian government in an effort to preserve Metis rights and culture. The second resistance escalated into a military confrontation known as the Northwest Rebellion of 1885, and resulted in Riel being arrested and tried for high treason. Several psychiatrists testified about Riel's mental state both at the time of his offences, as well as during his trial, with conflicting opinions about his sanity and whether he should be held responsible for his actions. The jury found Riel guilty of treason, but with a recommendation for mercy.

Given the highly conflicting and politically tied opinions of the forensic experts at trial, Prime Minister John A. MacDonald appointed a special committee to review Riel's mental status to determine whether he knew right from wrong and whether he should be held accountable for his actions. The panel again disagreed about Riel's level of accountability, and he was eventually hanged for his crimes. Four months after his execution, it was moved in the House of Commons

[t]hat this House feels its duty to express its deep regret that the sentence of death passed upon Louis Riel, convicted of high treason, was allowed to be carried into execution. (Houses of Commons, 1886)

Riel's trial was heavily laced with political tension between English and French Canada, as well as issues involving Aboriginal rights. However, disagreements among forensic experts continue in modern day trials and accurately reflect the often emotionally loaded environment forensic mental health experts must navigate within the legal system.

Twenty years later in Europe, Sigmund Freud gave a speech in which he cautioned Austrian judges that their decisions were influenced by unconscious processes (Freud, 1906/1959). He also noted that insights from his theory could be used to understand criminal behaviour and to improve the legal system. However, it was two events in 1908 that triggered a broad recognition among psychologists that their ideas might be used to transform the legal system.

The first event was the publication of a book entitled *On the Witness Stand*. The author was an experimental psychologist named Hugo Münsterberg. He had been a student of Wilhelm Wundt (the person generally regarded as the founder of modern psychology) and he left Germany to direct the Psychological