



RUTGERS LAW RECORD

The Digital Journal of Rutgers Law School

lawrecord.com

Volume 45

2017-2018

WHY CALIFORNIA GOT IT RIGHT: ASSESSING PSYCHOPATHS BEFORE RELEASE

CHRISTA MCLEOD¹

I. Introduction

Psychologist Robert Hare (“Hare”) first released the Psychopathy Checklist Revised (“PCL-R”) in 1991² and it has consistently demonstrated success in predicting recidivism.³ California is the only state that requires an individual sentenced to life with the possibility of parole to receive a certain score on the PCL-R before release.⁴ Some have questioned the efficacy of this assessment and its place in the criminal justice system.⁵ Nevertheless, research confirms the PCL-R is a reliable predictor of recidivism and thus other states, including New Jersey, should adopt the same requirement that California enforces.

In this note, Section II will clarify what psychopathy is and address the misconceptions that exist regarding its definition. Section III will describe what the PCL-R is in detail, including its history and motives. Then, Section IV will delve into where the PCL-R meets the legal system.

¹ J.D. Candidate 2018, Rutgers Law School; B.A. Psychology, Ramapo College of New Jersey.

² ROBERT D. HARE, *THE HARE PSYCHOPATHY CHECKLIST-REVISED (PCL-R)* (2d ed. 1991) [hereinafter HARE, 1991].

³ Grant T. Harris et al., *The Construct of Psychopathy*, 28 *CRIME & JUST.* 197, 217 (2001).

⁴ See *infra* Section V.

⁵ See *infra* Section VI.

Section V will describe the process that is currently implemented in California in terms of the administration of the PCL-R. Next, Section VI will raise a number of the criticisms voiced by those in the legal field as well as by psychologists. Finally, Section VII is devoted to addressing the potential modifications, with those criticisms in mind, that will make further PCL-R application viable. Such modifications will allow for utilization of this assessment as originally intended.

Hare worried about making his discovery public for fear of its effect on the criminal justice system.⁶ Despite his apprehensions, California utilized the correct approach and with minor reforms, the PCL-R can be successfully implemented across the country.

II. What is Psychopathy?

a. Generally

Many experts agree, “the single best predictor of criminal behavior and recidivism is psychopathy.”⁷ But what is psychopathy? Studies reveal the public is unsure of the answer.⁸ “Despite centuries of anecdotal references to psychopathic personality (psychopathy) and decades of research on the construct, researchers continue to debate the core features of this disorder.”⁹ Psychopathy outside of the mental health field is often misunderstood.¹⁰ Most notably, psychopathy is still confused with psychosis or insanity.¹¹ Hollywood’s portrayal of psychopaths as serial killers and villains further skews the public’s perception of the true nature of psychopathy.¹²

⁶ Alix Spiegel, *Creator of Psychopathy Test Worries About Its Use*, NATIONAL PUBLIC RADIO (May 27, 2011, 3:00 PM), <http://www.npr.org/2011/05/27/136723357/creator-of-psychopathy-test-worries-about-its-use> [hereinafter *Worries About Its Use*].

⁷ Lyn M. Gaudet et al., *Can Neuroscience Help Predict Future Antisocial Behavior?*, 85 FORDHAM L. REV. 503, 510 (2016).

⁸ Shannon Toney Smith et al., “So, What Is a Psychopath?” *Venireperson Perceptions, Beliefs, and Attitudes About Psychopathic Personality*, 38 LAW & HUM. BEHAV. 490, 490 (2014).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.* at 490-91.

¹² *See id.* at 490, 495. Contrary to Hollywood’s portrayal, a psychopath need not be violent and a violent individual is not necessarily a psychopath. Ken M. Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to*

Despite the public’s uncertainty, there are a number of generally accepted characteristics of psychopathy. A psychopath is “essentially a person who is unable – lacks the psychological capacity – to feel concern or compassion for others.”¹³ Psychopaths “may have problems fully appreciating the emotional meaning or consequences of their actions and using their emotions to make choices and plans.”¹⁴ In 1941, Hervey Cleckley (“Cleckley”) published the book, *The Mask of Sanity*, where he laid out sixteen attributes he considered to be the defining traits of a psychopath.¹⁵ These were the traits that Hare later expanded upon in developing the PCL-R.

In an interview for National Public Radio, Hare defined his perception of psychopathy and explained how certain personality traits are responsible for criminal behavior.¹⁶ He described how he administered various tests to prisoners to measure their emotional arousal.¹⁷ In one of the tests, he showed prisoners an array of pictures, some highly emotional and some neutral, like a picture of a rape versus a picture of a table.¹⁸ Hare found the prisoners manifested no difference in reaction to emotional pictures.¹⁹ He concluded that psychopaths are “emotionally deaf” and thus determined they do not have the capacity to feel empathy, remorse, or love.²⁰ Hare clarified, “[i]t [is] sort of like

Criminal Punishment And to Preventive Detention, 48 SAN DIEGO L. REV. 1299, 1307-08 (2011). Furthermore, lacking concern or compassion in a particular instance does not make someone a psychopath. *Id.* at 1308.

¹³ Levy, *supra* note 12, at 1306 (citing RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1052 (2d ed. 1997)) (defining a psychopath as “a person having a character disorder distinguished by amoral or antisocial behavior without feelings of remorse.”).

¹⁴ E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 569 n.280 (2012) (citation omitted).

¹⁵ This list includes: “1. Superficial charm and good ‘intelligence;’ 2. Absence of delusions and other signs of irrational thinking; 3. Absence of ‘nervousness’ or psychoneurotic manifestations; 4. Unreliability; 5. Untruthfulness and insincerity; 6. Lack of remorse or shame; 7. Inadequately motivated antisocial behavior; 8. Poor Judgment and failure to learn by experience; 9. Pathological egocentricity and incapacity for love; 10. General poverty in major affective reactions; 11. Specific loss of insight; 12. Unresponsiveness in general interpersonal relations; 13. Fantastic and uninviting behavior with drink and sometimes without; 14. Suicide rarely carried out; 15. Sex life impersonal, trivial, and poorly integrated; 16. Failure to follow any life plan.” HERVEY CLECKLEY, *THE MASK OF SANITY* 337-39 (5th ed. 1988).

¹⁶ *Worries About Its Use*, *supra* note 6.

¹⁷ *Worries About Its Use*, *supra* note 6.

¹⁸ *Worries About Its Use*, *supra* note 6.

¹⁹ *Worries About Its Use*, *supra* note 6.

²⁰ *Worries About Its Use*, *supra* note 6.

trying to explain to a colorblind person what the color red is...[y]ou can have all the dictionary definitions you want, but this person will never quite get it.”²¹ It was this type of research and the lack of a tool to assess this emotional deficit that prompted Hare to devise a test that could identify psychopaths.²²

b. As it Relates to Criminal Law

The legal field is still unsure of how to treat psychopathic criminals in terms of culpability. When an individual is found guilty of a crime, the next phase of the judicial process is punishment. There are two competing theories on the types of punishment convicted individuals should receive: utilitarianism and retributivism.²³ First, “according to classical utilitarianism, formulated by Jeremy Bentham, the purpose of all laws is to maximize the net happiness of society.”²⁴ Utilitarians believe people generally act rationally, balancing expected benefits against possible risks before acting, and these calculations lead people to avoid criminal activity.²⁵ Proponents of this viewpoint are “forward looking” and focus on deterrence because the public will benefit from the absence of future crimes.²⁶ Utilitarians also believe in tailoring punishment to the individual to increase the chances of preventing him from reoffending.²⁷ For this reason, advocates of utilitarianism believe in punishments such as incarceration, incapacitation (the death penalty), and rehabilitation where there

²¹ *Worries About Its Use*, *supra* note 6.

²² *Worries About Its Use*, *supra* note 6.

²³ *Theories of Punishment – Utilitarian vs. Retribution Theorists*, MIB LAW (May 5, 2012), <http://www.miblaw.com/lawschool/theories-of-punishment-utilitarian-vs-retribution-theorists/> [hereinafter *Theories of Punishment*].

²⁴ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14 (6th ed. 2012) (internal citation omitted).

²⁵ *Id.* Some have voiced concerns regarding the utilitarian approach. First, they argue this theory can only exist under the assumption that all people possess the information necessary to conduct the cost-benefit analysis properly. *Id.* at 14-15. Utilitarian’s are also criticized for using individuals as a means to an end in the effort to improve society as a whole without concern for whether they are even guilty of the crime. *Id.* at 19-20. Furthermore, moral culpability and remorse are not weighed with this form of punishment. *Theories of Punishment*, *supra* note 23.

²⁶ *Theories of Punishment*, *supra* note 23.

²⁷ *Theories of Punishment*, *supra* note 23.

is a fear of recidivism.²⁸ Retributivists, on the other hand, believe punishment is justified when it is deserved.²⁹ They think “[i]t is morally fitting that an offender should suffer in proportion to her desert or culpable wrongdoing.”³⁰ Retributivists are “backward looking” and focus their perspective on the notion that individuals possess free will and may justly be blamed when they make the choice to break the law.³¹ Proponents of retributivism maintain the ideology of “an eye for an eye” and promote punishment proportional to the victim’s suffering.³²

Following the utilitarian theory, “criminal law often treats psychopathy as an aggravating factor . . . that warrants increased punishment.”³³ However, under a theory of retributivism, what appears to be a mental disorder³⁴ should be reason to replace culpability with mercy and empathy, meaning people who struggle with emotion like psychopaths should be given lighter rather than harsher sentences.³⁵ But, criminal law rejects this retributive approach for several reasons. First, psychopathy does not fall under the category of a mental illness and therefore psychopaths may not use an insanity defense to negate culpability.³⁶ Second, a certain abnormality within the defendant does not absolve him of culpability because this does not change the fact that he committed the

²⁸ *Theories of Punishment*, *supra* note 23.

²⁹ DRESSLER, *supra* note 24, at 16; IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Ladd trans., 2d ed. 1999).

³⁰ Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 *Nw. U.L. REV.* 843, 860 (2002).

³¹ DRESSLER, *supra* note 24, at 16.

³² *Theories of Punishment*, *supra* note 23. Critics point out that retributivists care very little about the offender’s future conduct and therefore offenders will not be deterred from recidivating. *Theories of Punishment*, *supra* note 23. Opponents of this perspective also highlight its approval of punishing based on emotions like anger and hatred. DRESSLER, *supra* note 24, at 21-22.

³³ Levy, *supra* note 12, at 1302 (emphasis omitted).

³⁴ It has been accepted that psychopathy is as an issue separate from other mental illnesses; psychopathy is not recognized by the Diagnostic and Statistical Manual of Mental Disorders and the most similar disorder that is included in the manual is Antisocial Personality Disorder. Johnston, *supra* note 14, at 570; *see* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AMERICAN PSYCHIATRIC ASSOCIATION 1, 659-660 (5th ed. rev. 2013).

³⁵ Christina Lee, *The Judicial Response to Psychopathic Criminals: Utilitarianism Over Retribution*, 31 *LAW & PSYCHOL. REV.* 125, 133 (2007).

³⁶ *Id.* at 133.

crime.³⁷ Finally, the fact that psychopathy is viewed by many as untreatable weakens the retributivism argument because there is no treatment alternative to imprisonment.³⁸

Instead, criminal law views psychopathy as an aggravating factor when sentencing offenders due to concern for public safety and the grave danger psychopathic individuals pose to society.³⁹ Under this utilitarian approach, the law generally punishes psychopathic offenders aggressively to deter future harm.⁴⁰ A “psychopath knows what he is up to, what the rules are, and what will happen to him if he is caught for breaking them,” and is therefore responsible for his behavior.⁴¹ The law maintains that psychopathic individuals should know better than to commit serious crimes and acts of violence.⁴²

Debate still permeates the study of psychopathy, but one thing that is well-settled is that Hare’s PCL-R is one of the most widely accepted conceptualizations of psychopathy.⁴³ “[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system”⁴⁴ and although prediction is difficult, the PCL-R has repeatedly demonstrated its utility in this area.

³⁷ *Id.* at 133-34.

³⁸ *Id.* at 134. No sound treatment or re-socialization programs have been found effective, instead treatment has been found to increase the rate of violent recidivism. Harris et al., *supra* note 3, at 216-17.

³⁹ Lee, *supra* note 35, at 134-35; Marion Godman & Anneli Jefferson, *On Blaming and Punishing Psychopaths*, 11 CRIM. L. & PHIL. 127, 133 (2017) (agreeing the legal field favors more severe punishment for psychopaths, sometimes even the death penalty, over a life sentence).

⁴⁰ Lee, *supra* note 35, at 134-35.

⁴¹ Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1635-36 (1994).

⁴² Johnston, *supra* note 14, at 169.

⁴³ Smith et al., *supra* note 8, at 490; Harris et al., *supra* note 3, at 217. The realization that psychopathy can be measured with “scientific adequacy” is so recent that scholars disagree about the fundamental characteristics of psychopathy. Harris et al., *supra* note 3 at 201. While “[a]t first blush, this might seem a fatal limitation – how can psychopathy be studied scientifically when scientists do not agree on who is a psychopath and who is not . . . [s]cientific endeavors [] usually progress by overlapping and converging operations so that the final definition of a phenomenon occurs in parallel with its explanation.” Harris et al., *supra* note 3 at 201. For example, the meaning of the word “species” was altered numerous times as scientists attempted to understand how they changed and evolved. Harris et al., *supra* note 3 at 201.

⁴⁴ *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976).

III. What is the PCL-R?

The PCL-R is considered the best tool for predicting violent recidivism among criminal and psychiatric populations.⁴⁵ The Hare Psychopathy Checklist, referred to as the PCL, was first published in 1980,⁴⁶ revised in 1991 to become the PCL-R,⁴⁷ and is now considered the gold standard for measuring psychopathy in institutional settings.⁴⁸ The administration of the PCL-R includes an interview that typically lasts two hours.⁴⁹ The assessment itself is based on the interview and consists of twenty items that are each scored on a scale from zero to two.⁵⁰ A score of zero indicates the item does not apply at all to the individual's life, a score of one indicates the item applies to some aspects of the individual's life, and a score of two means the item applies to most aspects of the individual's life.⁵¹ The maximum possible score on the assessment is forty and a score of thirty or higher is indicative of a psychopathic personality.⁵²

PCL-R scores are based on a two-factor analysis, representing interpersonal or affective features (Factor 1) and behavioral features (Factor 2).⁵³ Examples of Factor 1⁵⁴ characteristics include superficial charm and callousness while Factor 2⁵⁵ focuses on traits such as irresponsibility

⁴⁵ Harris et al., *supra* note 3, at 217.

⁴⁶ Robert D. Hare, *A Research Scale for the Assessment of Psychopathy in Criminal Populations*, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111 (1980) [hereinafter Hare, 1980].

⁴⁷ See HARE, 1991, *supra* note 2.

⁴⁸ David J. Cooke & Christine Michie, *Refining the Construct of Psychopathy: Towards a Hierarchical Model*, 13 PSYCH. ASSESSMENT 171, 172 (2001).

⁴⁹ Hare, 1980, *supra* note 46.

⁵⁰ Hare, 1980, *supra* note 46.

⁵¹ Hare, 1980, *supra* note 46.

⁵² Gaudet et al., *supra* note 7, at 511.

⁵³ David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991-2004)*, 12 PSYCHOL. PUB. POL'Y & L. 214, 216 (2006).

⁵⁴ The complete list of Factor 1 traits is: impression management, grandiose sense of self-worth, pathological lying, manipulation for personal gain, lack of remorse, shallow affect, callous/lacking empathy, and failure to accept responsibility. HARE, 1991, *supra* note 2.

⁵⁵ The complete list of Factor 2 traits is: stimulation seeking, parasitic orientation, poor behavioral control, early behavioral problems, lacks goals, impulsivity, irresponsibility, juvenile delinquency, and revocation of conditional release. HARE, 1991, *supra* note 2.

and poor behavioral control.⁵⁶ The second edition of the PCL-R was released in 2003⁵⁷ and this manual divides Factor 1 into subfactors: 1a, Interpersonal and 1b, Affective and Factor 2 into: 2a, Impulsive Lifestyle and 2b, Antisocial Behavior.⁵⁸ Many believed Factor 2 was the sole indicator of criminality and recidivism.⁵⁹ However, this belief was disproven by studies that indicate Factor 1 also correlates with the likelihood of reoffending.⁶⁰

Essentially, Hare's PCL-R answered questions that Cleckley left open in *The Mask of Sanity*.⁶¹ Cleckley failed to address what would happen if an individual satisfied some but not all of the sixteen characteristics he identified, or if a person satisfied some or all of them but only to a small degree.⁶² Hare answered by placing psychopathy on a continuum to be understood in degrees.⁶³ This continuum may be viewed either from a categorical perspective, with those scoring a thirty or higher designated as a distinct group from the rest of society, or from a more dimensional viewpoint that recognizes a varying prevalence of traits among different individuals.⁶⁴ The dimensional view falls more in line with Hare's intent and has become the modern position.⁶⁵ As one scholar noted, "[o]ne cannot help but be impressed at the astuteness of Cleckley's original clinical observations and Hare's operationalization of them in the PCL-R."⁶⁶

IV. What the PCL-R Means for the Legal System

⁵⁶ DeMatteo & Edens, *supra* note 53, at 214. Item 17 and Item 20, many short-term marital relationships and criminal versatility, respectively, do not belong to Factor 1 or Factor 2. HARE, 1991, *supra* note 2.

⁵⁷ For the 2003 update of the manual, see ROBERT D. HARE, *Manual for the Revised Psychopathy Checklist* (2d ed. 2003) [hereinafter HARE, 2003].

⁵⁸ DeMatteo & Edens, *supra* note 53, at 214. *But see, infra* text accompanying notes 135-40 (criticizing this structure of the PCL-R).

⁵⁹ Carmen E. Flores-Mendoza et al., *Factor structure and behavioural correlates of the Psychopathy Checklist-Revised [PCL-R] in a Brazilian Prison Sample*, PERSONALITY & INDIVIDUAL DIFFERENCES 584, 589 (2008).

⁶⁰ *Id.* (finding both Factor 1 and Factor 2 traits indicative of violent recidivism as well as property and fraudulent crimes).

⁶¹ See CLECKLEY, *supra* note 15 and accompanying text.

⁶² Levy, *supra* note 12, at 1312.

⁶³ Levy, *supra* note 12, at 1312.

⁶⁴ DeMatteo & Edens, *supra* note 53, at 216.

⁶⁵ DeMatteo & Edens, *supra* note 53, at 216.

⁶⁶ Harris et al., *supra* note 3, at 217.

Hare's initial results reflected consistently high recidivism rates.⁶⁷ One of Hare's undergraduate students, Randy Kropp, suggested they follow up with the prisoners Hare first evaluated.⁶⁸ Kropp selected a group of prisoners with a wide range of scores and looked into their behavior upon release.⁶⁹ He found approximately twenty to twenty-five percent of low scorers were reconvicted within four or five years whereas the high scoring group had a recidivism rate of eighty percent.⁷⁰ At a time when the only indication of what caused criminal behavior was a poor environment, this personality test stunned Hare's colleagues.⁷¹ Hare's seventeen page paper on these prison studies was released to the public in the 1980s.⁷²

In the interview on National Public Radio,⁷³ Dr. Steve Hart, a former student of Hare's, recalled that soon after Hare's paper was released, Canada's National Parole Board reached out hoping to acquire the test.⁷⁴ He said the Parole Board conveyed, "[w]hat we want to do is give everybody this test and then have the test score written in big red numbers on the front of the file. No parole board should be able to make a decision without having some knowledge about whether or not somebody is psychopathic."⁷⁵ However, Hare was reluctant to release the PCL-R to anyone who worked in the criminal justice system.⁷⁶ He worried the test would be misused if applied to anything other than research.⁷⁷ Even so, Hare eventually admitted that "science cannot progress

⁶⁷ Alix Spiegel, *Can A Test Really Tell Who's a Psychopath?*, NATIONAL PUBLIC RADIO (May 26, 2011, 2:24 PM), <http://www.npr.org/2011/05/26/136619689/can-a-test-really-tell-whos-a-psychopath> [hereinafter *Can A Test Really Tell*].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*; *Worries About Its Use*, *supra* note 6.

⁷¹ *Worries About Its Use*, *supra* note 6.

⁷² *Worries About Its Use*, *supra* note 6.

⁷³ See *Worries About Its Use*, *supra* note 6 (discussing the interview).

⁷⁴ *Worries About Its Use*, *supra* note 6.

⁷⁵ *Worries About Its Use*, *supra* note 6.

⁷⁶ *Worries About Its Use*, *supra* note 6.

⁷⁷ *Worries About Its Use*, *supra* note 6.

without reliable and accurate measurement.”⁷⁸ After arguing with his research assistants, he reconsidered, which is how the test came to have “incredible power in the American criminal justice system.”⁷⁹ It is now used “to make decisions such as what kind of sentence a criminal gets and whether an inmate is released on parole. It has even been used to help decide whether someone should be put to death.”⁸⁰

In 2003, Hare developed the finalized PCL-R⁸¹ now used regularly in forensic settings across the world.⁸² But, until recently, the PCL-R’s true impact on the legal community remained a mystery.

⁸³ In 2006, David DeMatteo (“DeMatteo”) and John F. Edens (“Edens”) conducted a case law survey to document the types of cases where the PCL-R was introduced from 1991 through 2004.⁸⁴ The United States’ state and federal court opinions published on the legal database Lexis Nexis served as the sample for the survey.⁸⁵ This project shed light on which cases the PCL-R was used for, how it was introduced, and whether it was truly answering questions posed in the legal context.⁸⁶

The results showed that within this time period, the PCL-R was administered in eighty-seven cases and its use increased throughout the years.⁸⁷ The assessment was used in fifteen different states, predominantly in sexually violent predator (“SVP”) evaluations to help determine whether the defendant should be classified as a predator and whether he should be subjected to a post-criminal sentence of involuntary commitment.⁸⁸ The assessment’s second most common use was to evaluate

⁷⁸ *Worries About Its Use*, *supra* note 6.

⁷⁹ *Can A Test Really Tell*, *supra* note 67.

⁸⁰ *Can A Test Really Tell*, *supra* note 67.

⁸¹ *See* HARE, 2003, *supra* note 57.

⁸² DeMatteo & Edens, *supra* note 53, at 214.

⁸³ DeMatteo & Edens, *supra* note 53, at 214.

⁸⁴ DeMatteo & Edens, *supra* note 53, at 214.

⁸⁵ Since not all federal trial courts issue written opinions on every case they hear, federal opinions have limited representation in this case study. DeMatteo & Edens, *supra* note 53, at 216-17.

⁸⁶ DeMatteo & Edens, *supra* note 53, at 214.

⁸⁷ DeMatteo & Edens, *supra* note 53, at 218.

⁸⁸ DeMatteo & Edens, *supra* note 53, at 219 Table 3.

the future dangerousness of offenders generally, not just those accused of sexual crimes, to determine the appropriateness of parole or probation.⁸⁹ Notably, the introduction of the PCL-R was successfully challenged in only two of the eighty-seven cases.⁹⁰ The study also found that high PCL-R scores were related to violent and aggressive behavior in the community, poorer treatment outcomes, general criminal recidivism, violent criminal recidivism, and institutional misconduct.⁹¹

DeMatteo conducted a second study in 2014 using a research strategy identical to the one just discussed.⁹² This time, the study identified 348 cases that used the PCL-R from 2005 to 2011.⁹³ It revealed that the PCL-R was still being administered predominantly in SVP cases, and that the bulk of the remaining cases where the assessment was administered were parole hearings.⁹⁴ Again, the use of the PCL-R was challenged in a small fraction of these cases – only six percent, a total of nineteen cases.⁹⁵ Evidence was successfully excluded in only four of the nineteen cases.⁹⁶ This study depicts the rapid acceleration in PCL-R use since 2004 and particularly the frequent application in SVP and parole cases.

More recent research confirmed the results of these studies and demonstrated that “psychopathic personality traits, when present in high levels (i.e., a score greater than or equal to thirty out of forty), are at least as predictive as combinations of traditional risk variables and can add predictive utility beyond criminal history variables alone.”⁹⁷ Lyn M. Gaudet and several others

⁸⁹ DeMatteo & Edens, *supra* note 53, at 219 Table 3.

⁹⁰ DeMatteo & Edens, *supra* note 53, at 220.

⁹¹ DeMatteo & Edens, *supra* note 53, at 221-22.

⁹² David DeMatteo et al., *Investigating the Role of the Psychopathy Checklist-Revised in United States Case Law*, 20 PSYCHOL. PUB. POL’Y & L. 96, 100 (2014).

⁹³ *Id.*

⁹⁴ *Id.* at 102.

⁹⁵ Where an attorney, most often defense counsel, brought legal challenges on admissibility, he claimed the PCL-R had little or no relevance or that evidence pertaining to the PCL-R was prejudicial. *Id.* at 100.

⁹⁶ *Id.*

⁹⁷ Gaudet et al., *supra* note 7, at 511.

studied the impact of neuroscience on antisocial behavior and a portion of their research was devoted to understanding the effects of the PCL-R.⁹⁸ As in Hare’s initial research,⁹⁹ their review of various case studies showed that those who scored the highest on the PCL-R were most likely to reoffend.¹⁰⁰ They found that within one year of release from prison, high scorers were three times more likely to commit a violent crime than those who received low scores.¹⁰¹ Furthermore, results indicated that over seventy percent of high scorers with a history of violence would commit another violent offense within ten years of release.¹⁰² They also uncovered longitudinal studies to suggest that within twenty years, ninety percent of the high scorers would be arrested for a subsequent violent crime.¹⁰³ On the other hand, the recidivism rate for low PCL-R scorers was about forty percent.¹⁰⁴

As research results confirm, the PCL-R is both “a reliable and valid measure for assessing stable personality traits that are associated with violation of norms and poor behavioral controls.”¹⁰⁵ Since high PCL-R scorers recidivate at such high rates, to disregard the PCL-R would be to intentionally inhibit the proper function of the legal and criminal justice systems.

V. California’s PCL-R Requirement

Due to the vast body of research indicating a strong connection between PCL-R results and recidivism rates, the State of California requires government evaluators use the PCL-R in parole-fitness evaluations for those sentenced to life imprisonment.¹⁰⁶ The California Code of

⁹⁸ Gaudet et al., *supra* note 7, at 511.

⁹⁹ For Hare’s initial conclusions, see *Worries About Its Use*, *supra* note 6.

¹⁰⁰ Gaudet et al., *supra* note 7, at 511.

¹⁰¹ Gaudet et al., *supra* note 7, at 510.

¹⁰² Gaudet et al., *supra* note 7, at 510.

¹⁰³ Gaudet et al., *supra* note 7, at 510-11.

¹⁰⁴ Gaudet et al., *supra* note 7, at 510-11.

¹⁰⁵ Gaudet et al., *supra* note 7, at 511.

¹⁰⁶ Karen Franklin, *New evidence of psychopathy test’s poor accuracy in court*, IN THE NEWS (Jan. 5, 2014)

<http://forensicpsychologist.blogspot.com/2014/01/new-evidence-of-psychopathy-tests-poor.html> [hereinafter *New Evidence*].

Regulations released the *Revised Final Statement of Reasons* explaining its reasoning behind implementing various psychological risk assessment measures under Title 15, § 2240.¹⁰⁷ This document codifies the Board of Parole Hearing’s (“BPH” or “the Board”) guidelines for the preparation of Psychological Risk Assessments.¹⁰⁸

In California, those sentenced to life imprisonment with the possibility of parole are reviewed for parole “for the first time at the initial parole consideration hearing.”¹⁰⁹ At this hearing, either a parole date will be set or the prisoner will be found unsuitable for parole.¹¹⁰ In determining suitability, the Board considers factors including the prisoner’s social history, mental state, criminal history, behavior,¹¹¹ and conditions of treatment or control such as special conditions under which a prisoner must be released into the community.¹¹² Circumstances that typically indicate unsuitability include an especially heinous crime,¹¹³ previous record of violence, unstable social history, sadistic sexual offenses, a history of mental problems, and misconduct in prison or jail.¹¹⁴

As the California Code of Regulation indicates, psychological factors are particularly important in assessing whether a prisoner is prepared for release into the community. Therefore, California Penal Code § 5068 requires the preparation of a psychological evaluation before considering parole.¹¹⁵ Section 2240(a) of the California Code of Regulation interprets California

¹⁰⁷ BD. OF PAROLE HEARINGS, REVISED FINAL STATEMENT OF REASONS: NEW TO CALIFORNIA CODE OF REGULATIONS, CAL. CODE REGS. tit. 15, § 2240, PSYCHOLOGICAL RISK ASSESSMENTS, at 1, http://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ CAL. CODE REGS. tit. 15, § 2280 (2015).

¹¹⁰ *Id.*

¹¹¹ In considering behavior, the Board looks to conduct before, during, and after the crime was committed. *Id.*

¹¹² *See id.* § 2281(b).

¹¹³ In determining whether a crime is especially heinous, the Board considers the number of victims, how calculated it was, abuse of victims, whether the crime was carried out with a callous disregard for human suffering, and the motive. *Id.* § 2281(c)(1).

¹¹⁴ *Id.* § 2281(c)(2) -(6).

¹¹⁵ CAL. PENAL CODE § 5068 (2016).

Penal Code § 5068 to demand that all inmates sentenced to life receive a Comprehensive Risk Assessment (“CRA”) before the initial parole hearing.¹¹⁶ Section 2240(a) further instructs that licensed psychologists employed by the BPH perform the CRA.¹¹⁷ In an effort to help predict the chance of recidivism, “[t]he Comprehensive Risk Assessment will provide the clinician’s opinion, based on the available data, of the inmate’s potential future violence.”¹¹⁸ Section 2240(b) explains that a new CRA will be administered every five years and sets forth exactly what assessment tools will be utilized for each CRA.¹¹⁹ This section was intended to address concerns regarding inconsistencies in CRAs and the failure to utilize empirically supported risk assessment tools.¹²⁰

“The panel agreed that a multi-method psychological risk assessment battery would be employed by the State of California for adult inmates sentenced to a life term with the possibility of parole.”¹²¹ The battery of risk assessment tools includes the Level of Service/Case Management Inventory (“LS/CMI”), the Historical Clinical Risk Management (“HCR-20”), and the PCL-R.¹²² The LS/CMI is a forty-three-item instrument that measures criminogenic factors such as criminal history, education/employment, leisure/recreation, alcohol/drug problems, and antisocial pattern that is well correlated with general criminal recidivism.¹²³ The HCR-20 is an assessment that

¹¹⁶ BD. OF PAROLE HEARINGS, REVISED FINAL STATEMENT OF REASONS: NEW TO CALIFORNIA CODE OF REGULATIONS, CAL. CODE. REGS. tit. 15, § 2240, PSYCHOLOGICAL RISK ASSESSMENTS, at 1, http://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf.

¹¹⁷ CAL. CODE REGS. tit. 15, § 2240(a) (2015).

¹¹⁸ *Id.* § 2240(b) (“Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate the inmate’s potential for future violence.”); BD. OF PAROLE HEARINGS, REVISED FINAL STATEMENT OF REASONS: NEW TO CALIFORNIA CODE OF REGULATIONS, CAL. CODE. REGS. tit. 15, § 2240, PSYCHOLOGICAL RISK ASSESSMENTS, at 7, http://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf. (“A large body of research demonstrates that dangerousness and violence risk potential cannot be reliably predicted...[r]ather than predict violence, forensic psychologists are asked to assess risk of or determine the likelihood of dangerousness or violence.”).

¹¹⁹ CAL. CODE. REGS. tit. 15, § 2240(b) (2015).

¹²⁰ BD. OF PAROLE HEARINGS, REVISED FINAL STATEMENT OF REASONS: NEW TO CALIFORNIA CODE OF REGULATIONS, CAL. CODE. REGS. tit. 15, § 2240, PSYCHOLOGICAL RISK ASSESSMENTS, at 3, http://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf.

¹²¹ *Id.* at 3.

¹²² *Id.* at 10.

¹²³ *Id.* at 11.

evaluates overall violence and, unlike other tools, measures both static and dynamic risk variables.¹²⁴ The HCR-20 focuses on three main areas: historical, clinical, and risk management variables.¹²⁵ The PCL-R is then used to score the psychopathy variable within the HCR-20.¹²⁶ Scholars agree, “[t]he PCL-R, HCR-20, and LS-CMI are among the most studied and commonly used violence risk assessment instruments in the field of forensic psychology and each have accumulated a great deal of research to support their validity.”¹²⁷

All evaluations are conducted by parole board psychologists and since administering the PCL-R in California is part of the regular parole evaluation, neither the prosecution nor the defense is responsible for introducing the assessment.¹²⁸ Furthermore, the results indicate that the PCL-R is regularly taken into account when deciding on release.¹²⁹ Those granted parole by the Board typically score an average of five points lower than those denied.¹³⁰ However, many remain concerned “that the chance assignment of an evaluator who typically gives high scores on the PCL-R might quite literally mean the difference between an offender remaining in prison versus being released back into the community.”¹³¹

VI. Criticisms of Using the PCL-R in the Legal System

¹²⁴ *Id.*

¹²⁵ Historical (past) variables include: previous violence, relationship instability, employment problems, substance abuse problems, major mental illness, psychopathy, early maladjustment, personality disorder, and prior supervision failure. Clinical (present) variables include: lack of insight, negative attitudes, active symptoms of a major mental illness, impulsivity, and unresponsive to treatment. Risk management (future) variables include: plans lack feasibility, exposure to destabilizers, lack of personal support, noncompliance with remediation attempts, and stress. *Id.* at 11-12.

¹²⁶ Item Six under Historical variables is psychopathy. *Id.* at 12.

¹²⁷ *Id.* at 20.

¹²⁸ *New Evidence*, *supra* note 106; *see also infra* Section VI.b. (discussing the problematic application of the PCL-R where it is offered by the prosecution far more frequently than the defense).

¹²⁹ *New Evidence*, *supra* note 106.

¹³⁰ *New Evidence*, *supra* note 106.

¹³¹ *New Evidence*, *supra* note 106.

Hare adamantly opposed releasing the PCL-R to anyone in the criminal justice system because he feared using the test for anything other than research purposes could lead to misuse and hurt people.¹³² He admitted, “I’m very concerned about the inappropriate use of this instrument for purposes that have serious implications for individuals and for society” and “it shouldn’t work that way.”¹³³ As Hare anticipated, once the assessment was utilized within the criminal justice system, he and the PCL-R faced great criticism.

a. The Sample and Design – The Issue that is a Non-issue¹³⁴

The format itself and the way the PCL-R is divided according to Factors 1 and 2 have caused pushback. A common concern is that the two-factor model overemphasizes criminal history.¹³⁵ Psychologists Jennifer Skeem (“Skeem”) and David J. Cooke (“Cooke”) critiqued the two-factor model, calling it both under-inclusive of some psychopathic people and over-inclusive of some nonpsychopathic people.¹³⁶ They asserted that by assuming psychopathic tendencies stem from this central characteristic of criminality, the two-factor model misses many true psychopaths.¹³⁷ They believed this to be true because “psychopathic tendencies may be manifested in one individual’s criminality, in another individual’s heroism, and in still another’s worldly success.”¹³⁸ They further argued that the two-factor model is over-inclusive because it identifies individuals who are antisocial

¹³² *New Evidence*, *supra* note 106; *see supra* text accompanying notes 74-77 (discussing when Hare was first approached by Canada’s Parole Board for a workable version of the PCL-R).

¹³³ *Worries About Its Use*, *supra* note 6.

¹³⁴ A secondary issue, not focused on in this section, has been raised regarding the PCL-R’s design. There is concern about the PCL-R’s focus on identifying static factors (mainly those in Factor 1 and Factor 2) rather than directing attention toward how to help psychopaths and addressing whether they can be treated. Jordan Thompson, *Reconsidering the Burden of Proof in Dangerous Offender Law: Canadian Jurisprudence, Risk Assessment and Aboriginal Offenders*, 79 SASK. R. 49, 65 (2016). These critics argue that the focus should be on the future rather than the past. *Id.*; *but see* Harris et al., *supra* text accompanying note 3 (asserting that no treatment method for psychopaths has found any success).

¹³⁵ Jennifer L. Skeem & David J. Cooke, *Is Criminal Behavior a Central Component of Psychopathy? Conceptual Directions for Resolving the Debate*, PSYCHOLOGICAL ASSESSMENT, Vol. 22(2) 433, 435 (2010).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

but not psychopathic.¹³⁹ Critics like Skeem and Cooke hold that a greater emphasis on criminal features rather than on other relevant traits, such as those related to anxiety, promote the over diagnosis of psychopathy.¹⁴⁰

These concerns prompted the development of alternative approaches. Cooke teamed up with Christine Michie (“Michie”) and the two became well-known for the three-factor model they devised.¹⁴¹ They examined the structure of the PCL-R and its possible overemphasis on criminality.¹⁴² They spoke of what they referred to as “local dependence” and explained that certain items on the PCL-R have more in common with each other than with the construct of psychopathy itself, causing such items to be double counted because they are essentially measuring the same factor.¹⁴³ As a result, they found psychopathy scores become inflated and psychopathy is over-diagnosed.¹⁴⁴ In their theoretical model, Cooke and Michie eliminated seven items they felt were most prone to local dependence and ended up with a PCL-R of only thirteen items.¹⁴⁵

However, critics of the PCL-R make several mistakes in arriving at their understanding of the assessment’s two-factor model. Hare and Craig Neumann (“Neumann”) addressed such errors in their response paper, *The Role of Antisociality in the Psychopathy Construct: Comment on Skeem and Cooke (2010)*.¹⁴⁶ Skeem and Cooke began their critique by referencing an article by Hare and Neumann

¹³⁹ *Id.* at 435-436.

¹⁴⁰ *Id.* at 436.

¹⁴¹ Cooke & Michie, *supra* note 48, at 175.

¹⁴² Cooke & Michie, *supra* note 48, at 175.

¹⁴³ Cooke & Michie, *supra* note 48, at 175.

¹⁴⁴ Cooke & Michie, *supra* note 48, at 175.

¹⁴⁵ The items eliminated included poor behavioral controls, promiscuous sexual behavior, early behavioral problems, many short-term marital relationships, juvenile delinquency, revocation of conditional release, and criminal versatility. Cooke & Michie, *supra* note 48, at 175.

¹⁴⁶ Robert D. Hare & Craig S. Neumann, *The Role of Antisociality in the Psychopathy Construct: Comment on Skeem and Cooke (2010)*, *PSYCHOLOGICAL ASSESSMENT*, Vol. 22(2) 446 (2010) (citing Skeem & Cooke, *supra* note 135, at 437).

from 2005 and misquoting their words.¹⁴⁷ They accused Hare and Neumann of stating that criminal behavior is central to psychopathy, but Hare and Neumann clarified what they actually said was that, “an integral part of psychopathy is the emergence of an early and persistent pattern of problematic behaviors”¹⁴⁸ – no mention of criminality at all. Further, Skeem and Cooke asserted that the PCL-R’s origination in prisons highlights the assessment’s inappropriate focus on criminality.¹⁴⁹ However, Hare and Neumann explained that the PCL-R’s start came from a correctional setting because of the high prevalence of psychopathy in criminals.¹⁵⁰ It was this pre-existing high prevalence that allowed for the availability of information to develop a valid and reliable assessment.¹⁵¹ They did not choose to look only at prisoners, rather the prison population happened to be the ideal sample. Hare and Neumann further stated that “[t]he PCL-R was designed to discriminate psychopathic individuals from other criminals – a job it does very well – but this does not mean that criminality is essential to the construct of psychopathy, any more than studentship must be essential to the construct tapped by self-report measures developed with college students.”¹⁵²

Yet, Skeem and Cooke persisted in their position that an individual without a history of criminal behavior could not possibly receive a score indicative of psychopathy.¹⁵³ Hare and Neumann disproved this notion by pointing to Item 19: Revocation of Conditional Release.¹⁵⁴ They explained that it is the only item reflective of criminal behavior and without a conviction or chance

¹⁴⁷ *Id.* at 446-47. Hare and Neumann noted this was not the first time Cooke and Skeem misstated their ideas or those of other researchers. *Id.*

¹⁴⁸ *Id.* at 447 (quoting themselves in Robert D. Hare & Craig S. Neumann, *Structural Models of Psychopathy*, CURRENT PSYCHIATRY REPORTS, 57, 58 (2005)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Hare & Neumann, *supra* note 146, at 447.

¹⁵³ Hare & Neumann, *supra* note 146, at 448.

¹⁵⁴ Hare & Neumann, *supra* note 146, at 448.

to violate conditional release, the item is omitted.¹⁵⁵ This can hardly be considered strong dependence on criminal behavior. Finally, Hare and Neumann pointed out that Skeem and Cooke focused so much on how unsuitable they found the PCL-R to be in the criminal context that they made no mention of the role it plays in other areas.¹⁵⁶ Without this misdirected attention on condemning the use of the PCL-R, Cooke and Michie would have had no need to devise their three-factor model and perhaps more consideration could have been given to the assessment's widespread use and acceptance.

b. Adversarial Allegiance – The Issue to be Considered

As Hare and Neumann properly maintained, criticism of the PCL-R's two-factor model is without merit. However, there is criticism that warrants attention. “‘Adversarial allegiance’ is the name of [a] well-known phenomenon in which some experts’ opinions tend to drift toward the party retaining their services.”¹⁵⁷ Partisan bias is nothing new in the legal field, however research on its workings is just beginning.¹⁵⁸ So far, results indicate the bias operates largely outside an expert's consciousness and has the power to influence even objective measures like scoring and interpreting psychological testing.¹⁵⁹

¹⁵⁵ Hare & Neumann, *supra* note 146, at 448.

¹⁵⁶ There has been extensive research on the Psychopathy Checklist: Screening Version (“PCL-SV”), which was developed in another context so its scoring does not rely at all on criminal behavior. Hare & Neumann, *supra* note 146, at 448. It “is so strongly related to the PCL-R, both conceptually and empirically, that it can be considered a short or parallel form of the PCL-R.” Hare & Neumann, *supra* note 146, at 448. (internal quotation marks and citation omitted). Hare and Neumann argued that if the PCL-R was so heavily focused on criminality, this parallel measure would be impossible. Hare & Neumann, *supra* note 146, at 448.

¹⁵⁷ Karen Franklin, *Adversarial allegiance: Frontier of forensic psychology research*, IN THE NEWS (Sept. 3, 2015), <http://forensicpsychologist.blogspot.com/2015/09/adversarial-allegiance-frontier-of.html> [hereinafter *Adversarial allegiance*].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

i. The Allegiance and the PCL-R

An overview of American case law revealed there have been 231 cases where the PCL-R was introduced by either the prosecution or the defense (i.e. cases other than parole hearings).¹⁶⁰ Of these 231 cases, the prosecution introduced the PCL-R in sixty-seven percent of them while the defense only introduced it nineteen percent of the time.¹⁶¹ In the aforementioned 2006 study conducted by DeMatteo and Edens, results revealed that PCL-R evidence was introduced by the prosecution's witnesses in over eighty-five percent of the cases studied.¹⁶² Thus, in United States courts, the PCL-R is indisputably introduced more frequently by the prosecution.¹⁶³ DeMatteo and Edens expressed their concern that, "[c]onsistent with our own anecdotal experiences, the increase in its introduction suggests that prosecutors are becoming more aware of this measure and its potential to influence jurors when mental health evidence is at issue."¹⁶⁴ The research indicates the prosecution is using PCL-R scores to bolster legal arguments that a defendant poses a threat to others and should therefore be kept from society.¹⁶⁵ Prosecutors appear to be taking advantage of the adversarial allegiance effect to ensure scores support their argument.

ii. Where is the Allegiance Coming from?

Arguably the most crucial question regarding the proper use of the PCL-R is whether mental health professionals possess the capability to remain unbiased in administering the test. The application of all psychological assessments must be objective, yet when it comes to the PCL-R, this no longer seems to be a certainty. Karen Franklin, PhD studies clinical and forensic psychology,

¹⁶⁰ *New Evidence*, *supra* note 106.

¹⁶¹ *New Evidence*, *supra* note 106.

¹⁶² DeMatteo & Edens, *supra* note 53, at 218.

¹⁶³ DeMatteo & Edens, *supra* note 53, at 218.

¹⁶⁴ DeMatteo & Edens, *supra* note 53, at 218.

¹⁶⁵ DeMatteo & Edens, *supra* note 53, at 218.

specializes in evaluation and treatment of criminal defendants and writes a blog called “In the News.”¹⁶⁶ In one of her blog posts, she explained her concerns about the manner in which the PCL-R is used in the legal system today.¹⁶⁷ She echoed concern that the PCL-R is introduced predominantly by the prosecution.¹⁶⁸ She found that scores reported by prosecution experts are generally as many as five points higher than those reported by defense-retained experts.¹⁶⁹ The experts chosen by the prosecution are giving PCL-R scores of thirty or above, scores indicative of psychopathy, in almost half of the cases.¹⁷⁰ Meanwhile, experts chosen by the defense give scores above thirty less than ten percent of the time.¹⁷¹

A study was conducted in which one hundred forensic psychologists were told they were being consulted on a big forensic case.¹⁷² The psychologists became unknowing participants in a psychological study and were split into two groups; members of one group were told they were working for a public defender’s office and members of the other were told they were hired by the prosecution.¹⁷³ The subjects of the study were trained for two days on how to administer the PCL-R and the Static-99R¹⁷⁴ and spent the third day scoring individuals using the assessments.¹⁷⁵ These psychologists were unaware that they were all looking at the same set of four cases but had been “primed” to view the cases from either the point of view of a defense attorney or that of a prosecutor.¹⁷⁶ The act was so believable that only four of the 100 were able to tell that something

¹⁶⁶ Karen Franklin, *Clinical & Forensic Psychology* (2016) <https://www.karenfranklin.com>.

¹⁶⁷ *New Evidence*, *supra* note 106.

¹⁶⁸ *New Evidence*, *supra* note 106.

¹⁶⁹ *New Evidence*, *supra* note 106.

¹⁷⁰ *New Evidence*, *supra* note 106.

¹⁷¹ *New Evidence*, *supra* note 106.

¹⁷² Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side That Retained Them?*, *PSYCHOLOGICAL SCIENCE* (2013).

¹⁷³ *Id.* at 1890.

¹⁷⁴ Another widely used forensic assessment tool.

¹⁷⁵ Murrie et al., *supra* note 172, at 1891.

¹⁷⁶ Murrie et al., *supra* note 172, at 1891. An actual attorney pretended to work on a Sexually Violent Predator (SVP) unit and phrased the case differently for each side, saying things like, “[w]e try to help the court understand that ... not every

questionable was going on.¹⁷⁷ As expected, the adversarial allegiance effect¹⁷⁸ materialized, as those primed for the prosecution gave PCL-R scores notably higher than those produced by the defense.¹⁷⁹ Not only did this study affirm the real presence of adversarial allegiance, it demonstrated for the first time that this pull toward one side of the law or the other might not be the result of attorneys shopping for the perfect experts. Instead, it may be derived from the biased way in which the facts are framed, whether intentional or not.¹⁸⁰

VII. Modifications Moving Forward

a. Insisting Upon Objectivity

California got it right. Any state, including New Jersey, would benefit from following California's lead and requiring the administration of the PCL-R prior to prisoners' release on parole. Critics would likely reject the thought of spreading the PCL-R but, this reaction comes from misinformation. Opponents of the PCL-R, like Cooke and Skeem, center their attention exclusively on denouncing the assessment, thus failing to recognize the few measures that can and should be taken to alleviate their apprehensions.

For the PCL-R requirement to be implemented, it is necessary to eliminate adversarial allegiance and instead, insist on the appointment of objective, qualified experts. California has

sex offender really poses a high risk of reoffending" to those working for the defense and "[w]e try to help the court understand that the offenders we bring to trial are a select group [who] are more likely than other sex offenders to reoffend" in his prosecution role. Karen Franklin, *Remarkable experiment proves pull of adversarial allegiance*, IN THE NEWS (Mar. 5, 2013) <http://forensicpsychologist.blogspot.com/2013/03/remarkable-experiment-proves-pull-of.html> [hereinafter *Remarkable experiment*].

¹⁷⁷ Those four individuals were dismissed from the study. *Remarkable experiment*, *supra* note 176.

¹⁷⁸ See *supra* Section VI.b.i. for the explanation on how adversarial allegiance makes a prosecutor more inclined to use the PCL-R to demonstrate a defendant is unfit for reintegration into society.

¹⁷⁹ See *Adversarial allegiance*, *supra* note 157.

¹⁸⁰ This question into whether expert opinions can truly be relied on has allowed PCL-R critics to further assert that psychological evaluations are irrelevant to legal proceedings and have no place in the courtroom. DeMatteo & Edens, *supra* note 53, at 215. The concern is that in general, the reliability and validity of expert testimony is often uncertain and this issue of heightened bias regarding psychopathy specifically warrants a complete denial of its use in court. DeMatteo & Edens, *supra* note 53, at 215.

already successfully done this, so few changes are necessary moving forward. To begin, concern regarding which party introduces the PCL-R evidence need not be addressed. Since California requires the PCL-R, the court introduces the assessment, rather than either the prosecution or the defense.¹⁸¹ Thus, testimony cannot be subject to adversarial allegiance.¹⁸² As other states adopt the PCL-R requirement, they too will call for judicial institution of psychological testing prior to review by a parole board. Application of the psychological assessment *by the court* before a prisoner appears for his initial parole hearing eliminates the dilemma over which party seeks introduction – the mandated assessment will already have been conducted and reviewed.

Furthermore, adversarial allegiance has shown a tangible impact on the extent experts are able to properly fulfill their duties.¹⁸³ Even so, the way the PCL-R is administered will dissolve this issue as well. The CRA, which is currently permitted by the California Code of Regulation, requires a psychological assessment of each prisoner eligible for parole *before* the initial parole hearing.¹⁸⁴ This means, not only will neither party have the opportunity to request introduction of the assessment, but counsel for both sides will also be denied the chance to sway the experts before they administer the test. Thus, the experts who conduct the PCL-R before the parole hearing will be selected by the court and remain free from influence by either party.

b. Improvements to Further Enhance Reliability

¹⁸¹ See *supra* text accompanying notes 115-20 (discussing California’s process for administering psychological assessments).

¹⁸² See *supra* text accompanying notes 115-20.

¹⁸³ See Murrie et al., *supra* note 172.

¹⁸⁴ See *supra* notes 116-120 and accompanying text.

Another necessary consideration in requiring the administration of the PCL-R is that a prisoner who receives a psychopathy diagnosis faces a lifelong label with serious implications.¹⁸⁵ The severity of the ensuing stigma calls for additional precautions when applying California's law.

Most importantly, the court must be sure to appoint a qualified, objective doctor or psychologist to conduct the assessment. This individual should be specifically trained in administering the PCL-R and have a deep understanding of the study of psychopathy. Furthermore, it is advisable that the person entrusted with the responsibility of conducting the assessment has an advanced degree such as a PhD or M.D. and be registered with a reputable organization with experience in this type of evaluation.¹⁸⁶

Moreover, implementing another assessment tool in addition to the PCL-R has been shown to strengthen reliability.¹⁸⁷ In fact, PCL-R evidence is increasingly accompanied by results from other psychological tests.¹⁸⁸ Therefore, as the PCL-R requirement is enforced in other states, it should be administered in conjunction with the HCR-20, just as California's statute currently instructs.¹⁸⁹

Finally, reliability will be further bolstered with a second qualified professional administering the assessment. Those who remain concerned with the court appointed experts will likely be comforted knowing this task is not charged to a single individual. Where possible, two trained

¹⁸⁵ DeMatteo & Edens, *supra* note 53, at 215 (“[T]he term *psychopath* has the strong potential to impact perceptions of a criminal defendant in a deleterious way.”) (citation omitted); *see also* The Gale Group Inc., *Hare Psychopathy Checklist*, ENCYCLOPEDIA.COM (2003),

<http://www.encyclopedia.com/psychology/encyclopedias-almanacs-transcripts-and-maps/hare-psychopathy-checklist> (“[D]iagnosing someone as a psychopath is a very serious step. It has important implications for a person and for his or her associates in family, clinical, and forensic settings.”).

¹⁸⁶ The Gale Group Inc., *supra* note 185.

¹⁸⁷ DeMatteo et al., *supra* note 92, at 102.

¹⁸⁸ DeMatteo et al., *supra* note 92, at 102.

¹⁸⁹ *See supra* notes 122-26 and accompanying text. The HCR-20 is typically used in cases for the development of a structured professional judgment, i.e. on whether an inmate should be released on parole. DeMatteo et al., *supra* note 92, at 102, Table 1. Cases that instead incorporate the PCL-R as part of an actuarial system typically compliment the PCL-R with tests known as the Violence Risk Appraisal Guide (“VRAG”) or the Sex Offender Risk Appraisal Guide (“SORAG”). DeMatteo et al., *supra* note 92, at 102, Table 1.

psychologists or doctors should assess the prisoner individually and the result should consider both PCL-R scores.

VIII. Conclusion

Every new development faces criticism. However, in the study of psychopathy, the advantages of using the PCL-R far outweigh the concerns. Robert Hare provided a universal assessment necessary for any growth in the field and it “has facilitated progress that would not have occurred otherwise.”¹⁹⁰ The PCL-R’s positive effect is clear since “essentially every credible current theory about the proximal mechanisms underlying psychopathy leads to several PCL-R items, and there are very few clinical characteristics implied by any theory that are not represented in the PCL-R.”¹⁹¹ The assessment has repeatedly demonstrated that those who score high are significantly more likely to *violently* recidivate than those who receive lower scores.¹⁹² Therefore, it would be foolish for the rest of the country to disregard the logic and reason California employed in utilizing PCL-R results to prevent future wrongdoing. Instead, other states should follow suit and implement the PCL-R prior to releasing prisoners on parole.

¹⁹⁰ Harris et al., *supra* note 3, at 217.

¹⁹¹ Harris et al., *supra* note 3, at 217.

¹⁹² Godman & Jefferson, *supra* note 39, at 134.