May 31, 2011

Psychopathy as Sword or Shield? A Legislative Proposal for the Greater Good

Vanessa Catherine Whirl

Available at: https://works.bepress.com/vanessa_whirl/1/
Psychopathy as Sword or Shield? A Legislative Proposal for the Greater Good

Vanessa C. Whirl

---

1 Thank you to Professor Robert Gates for the conversation leading to my wording choice for the title.
2 I would like to thank Professor Jasmine Gonzales Rose for allowing me the creative liberty to write on a topic that means so much to me. Thank you for your excitement and interest in my topic from the first moment we discussed it all the way through the end! Also thank you to MMJr. for your belief and support throughout the semester.
# Table of Contents

I. Introduction ........................................................................................................... 2

II. Analysis .................................................................................................................. 3
   A. Part I - What makes a psychopath? ................................................................. 3
      1. Characteristics
         a. Glib and superficial .............................................................................. 4
         b. Egocentric and grandiose .................................................................. 4
         c. Lack of guilt or remorse ..................................................................... 4
         d. Lack of empathy .................................................................................. 5
         e. Deceitful and manipulative .................................................................. 5
         f. Shallow emotions .................................................................................. 5
         g. Impulsive ............................................................................................... 6
         h. Poor behavior controls ........................................................................ 6
         i. Need for excitement ............................................................................. 6
         j. Lack of responsibility .......................................................................... 6
         k. Early behavioral problems ................................................................... 7
         l. Adult antisocial behavior ...................................................................... 7
   B. Psychopathy Checklist ..................................................................................... 7
   C. Part II - History ................................................................................................ 10
      1. Current laws, rules, regulations on psychopathy ...................................... 10
      2. History of civil commitment .................................................................... 12
      3. Problem resulting from lack of psychopath legislation .......................... 14
   D. Part III - The psychopath today ..................................................................... 15
   E. Part IV - SVP legislation in relation to psychopaths .................................... 17
      1. SVP legislation currently .......................................................................... 17
      2. *Hendricks* ............................................................................................... 18
      3. *Crane* ..................................................................................................... 18
   F. Part V – Arguments against adoption of civil commitment for psychopaths.. 20
      1. Double jeopardy and ex post facto ......................................................... 20
      2. Debate between community safety and civil liberties .............................. 21
   G. Part VI – Proposed legislation/ changes to be made .................................... 23
      1. Adopt SVP legislation as a model for civil commitment of psychopaths .. 23
         a. Why adopt new legislation? ................................................................. 23
            i. Traditional treatment doesn’t work ................................................. 23
            ii. They will recommit ............................................................... 24
         b. How do we adopt current SVP legislation for psychopaths ............ 25
         c. Proposed Legislative Language ......................................................... 28
      2. Increase public interest in mental health law issues .................................. 28
      3. Potential accountability around immunity for parole boards? ............... 29
      4. No Experts in capital sentencing cases without in depth evaluation of the
         defendant by an impartial expert ............................................................... 31
   III. Conclusion ......................................................................................................... 32
I. **INTRODUCTION**

The inmate said that his girlfriend’s infant daughter had been crying nonstop for hours and because she smelled he reluctantly decided to change her diapers. “She shit all over my hand and I lost my temper,” he said, a grisly euphemism for what he really did. “[I] picked her up by the feet and smashed her against the wall,” he said with -unbelievably- a smile on his face…the prison psychiatrist had diagnosed this man as a psychopath and had recommended against parole. The parole board could not really be faulted for having ignored this professional advice. At the time, the procedures for the diagnosis of psychopathy were vague and unreliable, and the implications of such a diagnosis for the prediction of behavior were not yet known… the situation is quite different now and any parole board whose decision does not take into account current knowledge about psychopathy and recidivism runs the risk of making a potentially disastrous mistake.³

Psychopathy is a combination of personality traits and behaviors that are commonly viewed as anti-social and negative.⁴ The term literally means “mental illness” (from psyche, “mind”; and pathos, “disease”);⁵ yet somehow, in the legal definitions used for “mental illness”, psychopaths, who are arguably one of the most dangerous types of the mentally ill, fall through the cracks of our justice system. Some use the term sociopathy because it is less likely to be confused with psychoticism or insanity.⁶ Psychopaths do not experience the characteristics of most other mental disorders such as: delusions, hallucinations, or intense subjective stress; actually psychopaths are not out of touch with reality at all.⁷

This paper is organized into five parts addressing the major issues at hand. Part I will break down psychopathy as defined primarily by Dr. Robert Hare. This section will provide the necessary background information to understand the subject of the paper. Part II will give a detailed analysis of the current laws, rules and regulations in relation to psychopathy; the history of civil commitment; and the problems resulting from the lack of psychopath legislation

---

⁴ See Id. at ix.
⁵ Id. at 22.
⁶ See id. at 23.
⁷ See id. at 22.
specifically. Part III will emphasize the threat the psychopath poses to society, and how it is currently affecting crime rates. Part VI will discuss sexually violent predator legislation and the major cases associated with it. It will become apparent that this legislation will be used as a model for the proposed legislation that will round out the discussion. Part V will address current arguments against sexually violent predator legislation and how the arguments are used against implementation of civil commitment for psychopaths. Finally, Part VI will propose adoption of sexually violent predator legislation for psychopaths. It will address how we should rewrite the standards for civil commitment to apply to the subject of psychopaths. This section will also propose other institutional and societal suggestions for adapting to the new knowledge about psychopathy, and how we can adjust our system to fight back.8

II. ANALYSIS

A. Part I - What makes a psychopath?

While an in-depth explanation of the characteristics and behaviors of a psychopath are not the focus of this paper, it is important to touch on some of the major defining traits of the disorder so to better understand the subject.9 Individually, these traits are not such that they raise the proverbial red flag in the mind of society. However, when combined, they tend to explain a certain mind set; a certain type of person of whom we should beware.

The [psychopath] is unfamiliar with the primary facts or data of what might be called personal values and is altogether incapable of understanding such matters. It is impossible for him to take even a slight interest in the tragedy or joy or the striving of humanity as presented in serious literature or art. He is also indifferent to all these matters in life itself. Beauty and ugliness, except in a very superficial sense, goodness, evil, love, horror, and humor have no actual meaning, no power to move him. He is, furthermore, lacking in the ability to see

8 This paper will not include: discussion of nature v. nurture regarding psychopathy; discussion of treatment of psychopathy; or the in-depth debate between the two types of risk assessment currently used in psychology.

9 This section uses a heavy reliance on the works of Dr. Robert Hare, supra note 3, due to the fact that the characteristics that will be mentioned are specific parts of the psychopathy checklist which Dr. Hare created.
that others are moved. It is as though he were color-blind, despite his sharp intelligence, to this aspect of human existence. It cannot be explained to him because there is nothing in his orbit of awareness that can bridge the gap with comparison. He can repeat the words and say glibly that he understands, and there is no way for him to realize that he does not understand.\footnote{Hervey Cleckley, The Mask of Sanity, 90 (Mosby 1976) as cited in Hare, supra note 3, at 27-28.}

1. **Glib and superficial**

   Often witty and articulate, psychopaths can charm those around them with their amusing personalities.\footnote{See Hare, supra note 3, at 34} They are entertaining and clever in their interactions with others in a way that allows them to blend into society unsuspected.\footnote{See id. at 35.}

2. **Egocentric and grandiose**

   Narcissism and grandiosity in the mind of the psychopath convinces him that the world revolves around him.\footnote{See id at 38.} They have an inflated self-worth leading them to beliefs of entitlement and egocentricity.\footnote{See id. at 38.}

3. **Lack of guilt or remorse**

   Where a non-psychopathic personality would usually be overwhelmed with guilt subsequent to a negative action, the psychopath has no capacity to feel for others in this way.\footnote{See Daniel Seagrave & Thoman Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, Law and Human Behavior, Vol. 26, No. 2, 219, 226 (2002)(detailing the implications of mental health and adolescent behavior development).} They tend to be very forthcoming about the fact that they simply do not care about the pain they cause to others.\footnote{See Hare, supra note 3, at 38.}
4. **Lack of empathy**

Psychopaths lack the ability to empathize with the situation of those around them\(^\text{17}\); they fail to “get into the skin” of others which makes it easy for them to act in a way that will inflict pain and distress on innocent bystanders.\(^\text{18}\)

5. **Deceitful and manipulative**

To fake recovery or improvement is not something unusual to psychopaths in the criminal justice system.\(^\text{19}\) They are aware of what they need to do and say in order to lay under the radar long enough, and slip back into society seemingly improved yet behaviorally unadjusted in reality.\(^\text{20}\)

6. **Shallow emotions**

Range and depth are non-existent in the emotions of psychopaths.\(^\text{21}\) It has been said that the emotions of these personalities are “so shallow as to be little more than proto-emotions: primitive responses to immediate needs.”\(^\text{22}\) “Normal” personalities are driven by the fear produced by threats of pain or punishment; we make choices based on these feelings that affect our behavior.\(^\text{23}\) The psychopath lacks this process and the reaction that typically follows.\(^\text{24}\) While they might know what is going to result from their behavior, they just do not seem to care.\(^\text{25}\)

---

\(^{17}\) Seagrave & Grisso, *supra* note 15, at 226.

\(^{18}\) See HARE, *supra* note 3, at 41.

\(^{19}\) *Id.*

\(^{20}\) See *id.*


\(^{22}\) HARE, *supra* note 3, at 53.

\(^{23}\) See *id.*

\(^{24}\) See *id.*

\(^{25}\) See *id.*
7. Impulsive

Much of the behavior of psychopaths is done without any balancing of benefits and consequences. They are more focused on instant relief or satisfaction rather than the long term implication of their actions. The life of a psychopath is day-to-day; carried on without any major thought or concern about what has been done, or will be done with his life.

8. Poor behavior controls

Whatever provocation the average person might be able to overcome through self-control, this same provocation consumes the psychopathic personality. This leads to a short fuse, and an inability to handle frustrations, criticism, aggression, threats, etc. To be offended and to subsequently overreact to unwarranted actions is not abnormal for such a short temper.

9. Need for excitement

“Psychopaths have an ongoing and excessive need for excitement – they long to live in the fast lane or ‘on the edge,’ where the action is.” This traits tends to lead to different “weekend personalities” for many “white collar” psychopaths.

10. Lack of responsibility

Psychopaths have no concern for commitments or obligations; anything that they have gotten themselves into for a long term, they are just as easily going to get themselves out of it. Using their powers of manipulation, it is not uncommon for them to receive probation,

---

26 See id. at 58.
27 See Seagrave & Grisso, supra note 15, at 229.
28 See HARE, supra note 3, at 58.
30 HARE, supra note 3, at 58.
31 See id.
32 Id. at 61.
33 See id.
34 See id. at 62.
suspended sentences, or early release from prison time.\textsuperscript{35} The conditions, on which these decisions are based however, are not paid any attention by a psychopath; he will agree to the terms and then ignore them once he is free.\textsuperscript{36}

11. Early behavioral problems

Often psychopaths tend to show early behavioral problems including: persistent lying, substance abuse, pyromania, violence, bullying, truancy, running away, theft, and precocious sexuality.\textsuperscript{37} The implications of conduct disorder will be addressed in a later section of the paper\textsuperscript{38}, but this is often a form in which these early behavioral problems show themselves.

12. Adult antisocial behavior

“Not all psychopaths end up in jail. Many of the things they do escape detection or prosecution.”\textsuperscript{39} The antisocial behavior that they display will walk a fine line between socially unacceptable and against the law.\textsuperscript{40} The behavior is just not what we, as a whole, are willing to accept on a daily basis.

B. Psychopathy checklist

Dr. Robert Hare began releasing first drafts of the Psychopathy Checklist (“PCL”) from 1980-1985.\textsuperscript{41} This checklist is “a highly reliable diagnostic tool that any clinician or researcher could use” which yields “a richly detailed profile of the personality disorder called

\textsuperscript{35} See id.
\textsuperscript{36} See id. at 64.
\textsuperscript{37} See id. at 66.
\textsuperscript{38} See infra, Part VI, at 27.
\textsuperscript{39} HARE, supra note 3, at 68.
\textsuperscript{40} See id.
\textsuperscript{41} See id. at 223.
Clinicians and researchers around the globe are now administering this test to set apart those of whom we should be particularly concerned about existing in our society. This checklist provides an in-depth analysis of certain characteristics and traits that when clustered together, present a strong likelihood of psychopathy according to a numerical rating. Antisocial Personality Disorder (“ASPD”) is a disorder defined by the Diagnostic Statistical Manual-IV as one that leads to antisocial and criminal behavior; this too is identified by a cluster of personality traits. While not all ASPD patients are psychopaths (actually only about 30% are), all psychopaths concurrently have ASPD. Most prison inmates meet the criteria for ASPD; however most of them would not be diagnosed as a psychopath according to the PCL. The PCL provides a score from 0 (an individual with absolutely no psychopathic tendencies) to 40 (the prototypical psychopath). A score of 30 or above qualifies an individual with a diagnosis of psychopathy. To put these numbers into perspective, “people with no criminal backgrounds normally score around 4…many non-psychopathic criminal offenders score around 22.”

The current tests that exist for assessing mental illness or disorders do not assess the individuals in a way that will present a diagnosis of psychopathy. Because of the uncanny ability of psychopaths to charm and manipulate in the way that they do, many criminals being...
assessed in prison are able to easily fake the results of these tests. With the development of the PCL, a test that yields such reliable results into the diagnosis of psychopathic personalities, it is extremely important that accurate assessments be made, not only for the purpose of distinguishing psychopaths from other mental health patients, but also in the interest of the criminal justice system’s ability to handle them accordingly. Such a uniform classification could then aid in treatment of these individuals while in prison or mental health facilities, and preparation of those around them who will be exposed to their toxic personalities. For example, the largest hospital for the mentally disordered in North America uses a high score on the PCL and a history of violence to adjust the level of security that will be used on each individual patient.

There is an ongoing debate in the field of psychology in relation to violence risk assessment. Such assessment determines the risk of violence and recidivism of a potential parolee up for parole or a criminal in his sentencing. This determination has a great impact on how the system handles violent criminals being sentenced, while in prison, and after release. While the field of violence risk assessment is still evolving, most of the developments are in the civil context rather than criminal. Currently there are two approaches used for such assessment: clinical and actuarial. The clinical approach is a subjective decision based assessment by professionals in the field. The actuarial (or, statistical) approach uses specific

52 See id.
53 See id. at 184.
54 See id.
56 See id.
57 See id. at 405.
58 See id.
rules identifying factors to be measured to present an objective estimate.\textsuperscript{59} While the debate between the two assessments has continued between professionals, the PCL has presented what some have called an “‘unparalleled’ ability to predict future violence in criminal samples.”\textsuperscript{60}

C. \textbf{Part II - History}

1. \textbf{Current laws, rules, and regulations on psychopathy}

Current legislation does not include the psychopath in a way that allows our legal system to adequately address his particular needs and issues. “The psychopath confounds traditional and legal categories of sanity and insanity.”\textsuperscript{61} Even the smallest details such as the wording of these statutes and laws, leave just enough of a gap for the psychopaths in our society to slip through unnoticed and continue on their path of destruction. These statutes typically require that the subject of their application meet certain requirements before involuntary commitment. Susan Schmeiser, Professor of law at the University of Connecticut School of Law, explains that “Psychopathy is a Darwinian adaptation and not a biomedical disorder.”\textsuperscript{62} This theory creates an obvious conflict when applying it to the current legislation regarding psychopathy.\textsuperscript{63} Although the term psychopath literally means “mental illness”, the definitions of the term for legal purposes often leave out this specific type of personality.\textsuperscript{64} The meaning of the term is interpreted differently by professionals across the field, leading to a frequent confusion and miss-diagnosis.\textsuperscript{65}

\textsuperscript{59} See id. at 405-406
\textsuperscript{60} Id. at 421.
\textsuperscript{62} Id. at 240.
\textsuperscript{63} See id. at 236-237.
\textsuperscript{64} See Harris et al., \textit{The Construct of Psychopathy}, 28 CRIME \& JUST. 197, 236 (2001) (addressing the recidivism rate in correlation to a diagnosis of psychopathy).
\textsuperscript{65} See id.
Much of the determination of criminal punishment is justified by culpability based on responsibility. Mental health law deals with the issue that if the accused is not responsible due to the lack of reason in his mind, then we cannot apply the usual standard of culpability in relation to consequences. The diagnosis of a mental disorder or illness however, does not instantly trigger this issue. The American Psychiatric Association warns “psychiatric diagnosis and criteria entail no legal conclusions about responsibility or even about whether an agent meets legal criteria for the presence of a mental disorder,” because of this, no diagnosis will stand alone in the court of law. So even when applying psychological standards in mental health law, the legal system is faced with a major moral and procedural dilemma. Dr. Hare, the foremost leading expert on psychopathology today states, “In my opinion, psychopaths certainly know enough about what they are doing to be held accountable for their actions.” Model Penal Code § 4.01 presents an example of this legal paradox. “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of their conduct or to conform his conduct to the requirements of the law.” According to Dr. Hare’s assessment on the ability of psychopath’s to appreciate the criminality of his actions, this standard does not apply, and therefore, the accused in such a case would be considered “responsible.”

---

67 Id.
68 Id. at 1040.
69 HARE, supra note 3, at 143. See also DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS (FOURTH) (1994).
70 MODEL PENAL CODE § 4.01(1) (1962).
71 MODEL PENAL CODE § 4.01(1) (1962).
2. **History of civil commitment**

Civil commitment has developed over the years and been expanded to reach multiple groups of individuals. Through history, the courts have allowed for civil commitment of individuals who were “dangerous to themselves or others, or could not take care of themselves.”

Currently, each state possesses its own version of a statute allowing it to involuntarily commit someone in a psychiatric hospital. A typical requirement for such commitment is that the individual suffer from a “mental illness” which causes him to be “dangerous to others” or to himself. In the interest of protecting society, we allow forcible commitment when someone poses a danger to the community. Coming to a nationwide agreement of civil commitment statutes has been no easy feat. The U.S. Supreme Court has heard multiple arguments regarding the constitutionality of these statutes. As a result, the Supreme Court has ruled that they are willing to uphold the statutes so long as there are procedural safeguards in place to protect abuse; one such safeguard is the requirement of dangerousness as proven by clear and convincing evidence. This standard was defined in *Addington v. Texas*, where the Court stated that, “To commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others.”

---

73 See Monahan, supra note 55, at 399.
74 See id.
75 See Fabian, supra note 72 at 1384.
76 See Addington v. Texas, 441 U.S. 418, 425-426 (1979), See also Monahan, supra note 55, at 400.
Civil commitment is a “forward-looking” inspired action as opposed to the “blameworthiness” inspired action of prison time.\textsuperscript{78}

Civil commitment statutes began to change in 1990 when the State of Washington enacted the first sexually violent predator (SVP) legislation.\textsuperscript{79} Although statutes were already present to address the commitment of the “mentally ill,” legislatures were starting to realize that the current statutes were “inadequate to confront the risks presented by ‘sexually violent predators.’”\textsuperscript{80} The Kansas legislature codified this adaptation in response to an increased awareness on behalf of society regarding the prevalence of sexually violent crimes and the need to adjust legislation accordingly.\textsuperscript{81} An additional problem leading to this change is that the treatment of these predators cannot be the same used to treat the “mentally ill.” “Sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment.”\textsuperscript{82} Because of this, psychopaths, when viewed along institutionalized offender samples, show their diagnosis of psychopathy is the strongest predictor that they will recidivate and present an adverse response to traditional treatment.\textsuperscript{83}

The presentation of this new legislation led to expanded civil liberty attacks. Addressing the issue, Justice Thomas expressed the opinion that civil commitment statutes will continue to be upheld where they “limit the class of persons eligible for confinement to those who are dangerous and who are unable to control their dangerousness due to mental illness.”\textsuperscript{84} Justice O’Connor in a separate opinion expanded upon the justification where “the nature and durations

\textsuperscript{78} See Monahan, supra note 55, at 429.
\textsuperscript{83} See Harris et al., supra note 64, at 197.
\textsuperscript{84} See Hendricks, 521 U.S. 346, 358 (1997). See also Morris, supra note 80, at 1202.
of detention were tailored to reflect pressing public safety concerns related to the [detainee’s] continuing dangerousness.\footnote{See Foucha, 504 U.S. at 87-88 (O’Connor, J., concurring).} While a detailed discussion of SVP legislation and the arguments against it will be discussed later in this paper in parts IV and V respectively, for now it is important to know that the courts ultimately determined that SVP legislation will be upheld when there is presence of inability to control sexual behavior and that inability is due to volitional or emotional impairment.\footnote{See Fabian, supra note 72, at 1402.}

3. **Problem resulting from lack of psychopath legislation**

Significant developments have been made in applying civil commitment to those who pose a major threat to society. These developments however, have yet to touch on the psychopathic personality alone. Recent studies show that public safety will likely be improved upon with increased usage of the PCL\footnote{Bonta, J. et. al., The Dangerous Offender Provisions: Are They Targeting the Right Offenders?”, Canadian Journal of Criminology 377-400, See also Harris et al., supra note 76, at 239.}. An appropriate example can be found in Canada where indefinite sentences are determined at the time of conviction for those designated as “dangerous offenders”\footnote{Davis, R.P.N. 1982. Canadian Sentencing Digest. Vol. 1. Toronto: Carswell, See also id. at 238.}. Canada is actually using psychopathy assessments to increase sentence length as justified by the need for public protection.\footnote{See Davis, supra note 88.} Benjamin Karpman, in his life of detailed studies of psychopathy, envisioned an adjustment in the legal system regarding treatment of criminals who are psychopaths.\footnote{See Schmeiser, supra note 61, at 195. (Benjamin Karpman studied the psychopath and spent his career attempting to treat the disorder).} He suggested that if psychopathology was of focus in a criminal conviction, ground breaking reformulation would be necessary.\footnote{See Benjamin Karpman, The Principles and Aims of Criminal Psychopathy, 1 Crim. Psychopathology 187, 189 (1939).} His justification was as follows:

The criminal psychopathologist [unlike the forensic psychiatrist], convinced that criminality, being an unconsciously conditioned reaction, and therefore but a symptom of a disease over which the individual has no control, will go to court
and testify in cases of rape, bigamy, pyromania, etc., that the individual is mentally sick, that though he may intellectually know the difference between right and wrong, he is unable to choose so emotionally, that he is therefore not guilty by reason of such a disease, that punishment will be of no avail, for the etiology keeps on operating after the sentence is over and that his place is not in a prison but in a psychiatric institution, and that what he needs is not a sentence, but an indefinite period of confinement until he is cured.92

This explains how the psychopath needs to be looked at by professionals who deal specifically with psychopathy, and how their knowledge should be used in conjunction with the criminal justice system to move towards their civil commitment. This very theory is the adjustment we need in the U.S. legal system and its encounters with psychopaths.

D. Part III – The psychopath today

Today we know of many psychopaths who have made major headlines for the dreadful acts they have committed. John Gacy entertained children as “Pogo the Clown,” and murdered thirty-two young men, burying most of them under his house.93 One of the Hillside Stranglers, Kenneth Bianchi, raped, tortured, and murdered dozens of women in Los Angeles and subsequently fooled experts into thinking he suffered multiple personality disorder.94 Diane Downs, “shot her children to attract a man who didn’t want children and portrayed herself as the real victim.”95 Ted Bundy was a notable serial killer responsible for murders of several dozen women.96 These are only a few of the psychopaths that have gained notoriety in our society for their horrific actions. Dr. Hare estimates there are approximately 2 million psychopaths in North America, and more specifically, approximately 100,000 in New York.97 Their “chameleonlike

92 Id.
96 See HARE, supra note 3, at 5.
97 Id. at 2.
abilities” place them within arm’s reach of us, as we unsuspectingly stand looking for the face of a monster, when we really should be looking right at those we least suspect.98 As they live their lives outside of prison walls, they leave behind a “broad trail of broken hearts, shattered expectations, and empty wallets.”99 These “social predators” are responsible for a large portion of the violent crimes we see on a daily basis.100 “On average, about 20 percent of male and female prison inmates are psychopaths. Psychopaths are responsible for more than 50 percent of the serious crimes committed.”101 Though psychopathy does not always mean violence, “both male and female psychopaths are much more likely to be violent than are other individuals. They commit more than twice as many violent and aggressive acts, both in and out of prison, as to other criminals.”102 We do not know the prevalence of psychopathy in the general public, but Dr. Hare estimates the rate to be approximately one percent;103 that is about the same as the rate of schizophrenia.104

The current situation in mental health law legislation allows for these predators to walk amongst us notwithstanding the overwhelming reasons that they should be locked away. So long as the system continues to work the way it does, psychopaths will commit crimes, serve some jail time, receive treatment with no positive results, and will be discharged back into society to begin the cycle once more. This paper touches on the solutions to that problem to significantly reduce the effects that the psychopath has on society today.

98 Id.
99 Id. at xi.
100 Id.
101 Id. at 87.
102 Id. at 88. (Emphasis in the original quote)
103 See Harris et al., supra note 64, at 201.
104 See HARE, supra note, 3 at 2.
E. Part IV – SVP Legislation in relation to psychopaths

1. SVP legislation currently

The aforementioned discussion on civil commitment laws touched on the development of SVP legislation. The different variations of SVP legislation throughout the country have received necessary alterations to sufficiently narrow the class targeted, yet keep the definition broad enough so that no sexually violent individual falls into a grey area. The current standards allow for preventative detention notwithstanding the barrage of arguments made against them. 105 To reiterate, the targeted sexual predators, regardless of a concurrent mental disorder, do not fall into the legal standards for the insanity defense. 106 Therefore, they also do not meet the non-responsibility standard for civil commitment. 107 That being said, SVP legislation was created to cure this defect that was leaving a very dangerous species of criminal out of the system. Examples of that cure came from Kansas and a substantial minority of other states that have created such legislation applying to SVPs. 108 As a template for the proposed legislation to be discussed later in this paper, we look to the Kansas Act 109 which has been disputed and upheld in the Supreme Court. This act “requires a finding of future dangerousness, and then links that finding to the existence of a “mental abnormality” or “personality disorder” that make it difficult, if not impossible, for the person to control his dangerous behavior.” 110 Kansas v. Hendricks 111

---

105 See Harris et al., supra note 64, at 239. (Some of these arguments will be addressed, infra Part V; they include: double jeopardy, ex post facto laws, civil liberties, and reliability).
106 See Morse, supra note 66, at 1027.
107 See id.
and *Kansas v. Crane*,\(^{112}\) teased out this terminology to give us a comprehensive rule to apply for involuntary commitment of sexually violent predators.\(^{113}\)

2. **Hendricks**

Leroy Hendricks was convicted of “indecent liberties with a child” and committed under the Kansas Sexually Violent Predator Act.\(^{114}\) Hendricks appealed based on the constitutionality of the act and the case made its way to the United States Supreme Court in 1996.\(^{115}\) In his majority opinion, Justice Thomas stated that “(1) [the] act’s definition of “mental abnormality” satisfied substantive due process requirements for civil commitment, and (2) [the] act did not establish “criminal” proceedings, and involuntary confinement pursuant to Act was not punitive, thus precluding finding of any double jeopardy or ex post facto violation.”\(^{116}\)

In its reasoning, the Court explained that “States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.”\(^{117}\) The *Hendricks* Court ruled that SVP legislation will continue to withstand constitutional objections given “proper procedures and evidentiary standards,” combined with a finding of “dangerousness either to one’s self or to others,” and that proof of dangerousness is “coupled… with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality’”.\(^{118}\)

3. **Crane**

The state of Kansas was seeking to civilly commit Michael Crane under the Kansas SVP statute when his exhibitionism and antisocial personality disorder, led him into the criminal

---

\(^{113}\) See Morse, *supra* note 66, at 1029, *See also* Hendricks 521 U.S. 346, *See also* Crane, 534 U.S.407.
\(^{114}\) Hendricks, 521 U.S. at 346.
\(^{115}\) See Morse, *supra* note 66, at 1029.
\(^{116}\) *Id.*
\(^{117}\) Hendricks 521 U.S. at 357.
\(^{118}\) See *id.*
justice system.\textsuperscript{119} After a battle in the lower courts, the Supreme Court addressed the issue of whether the decision in Hendricks requires the “State [to] always prove that a dangerous individual is completely unable to control his behavior.”\textsuperscript{120} The Court determined that the “Act did not require [a] state to prove offender’s total or complete lack of control over his dangerous behavior, but (2) [the] federal constitution does not allow civil commitment under the Act without any lack of control determination.”\textsuperscript{121}

The Court reasoned that Hendricks’s reference to the sufficiency of the language of “mental abnormality” and “personality disorder” in the Kansas statute made it “‘difficult’ if not impossible, for the [dangerous] person to control his dangerous behavior.”\textsuperscript{122} The Court elaborated that “‘difficult’ indicates that the lack of control to which [it] referred was not absolute.”\textsuperscript{123} The Court warned that “insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.”\textsuperscript{124} Although Hendricks focused its determination on volitional impairment to control behavior, the Supreme Court ordinarily does not distinguish between emotional, volitional, and cognitive impairments according to Crane.\textsuperscript{125} The difference between volition (choosing to act), and emotion in the gauge of culpability becomes even more blurred in the context of psychopaths.

\textsuperscript{119} Kansas v. Crane, 534 U.S. at 410.
\textsuperscript{120} Id. at 411.
\textsuperscript{121} Id. at 407.
\textsuperscript{122} Hendricks, 521 U.S. at 358.
\textsuperscript{123} Crane, 354 U.S. at 411.
\textsuperscript{124} Id. at 412.
\textsuperscript{125} See id. at 408.
F. Part V – Arguments against adoption of civil commitment for psychopaths

1. Double jeopardy and ex post facto

The two most common arguments against civil commitment are double jeopardy and ex post facto. “Persons may not be twice put in jeopardy for the same offense.” This constitutional language is often cited by opponents of civil commitment of any United States citizen. “The line between civil and criminal is obliterated if a state can punish a person as criminally responsible for his actions and then, upon completion of that sentence, civilly commit him as mentally abnormal and unable to control his dangerousness.” The argument is, if as convicted criminals, they have served the time imposed by the court, what right do we have to then civilly commit them for the same crime? The second point opponents look to is based on Ex Post Facto laws. “Critical to relief under the Ex Post Facto Clause is… the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” Combining these two points, the common argument is that the statutes used for civil commitment simply provide no justification for confinement and criminal punishment.

Both arguments turn on the issue of whether civil commitment is another form of secondary punishment for the same crime. Courts such as Selling v. Young and Hendricks have consistently rejected the idea that commitment under civil commitment and SVP statues qualifies as “punishment” in the context of double jeopardy arguments. The first argument that it is not punishment is that the conditions of civil commitment institutions are the same as those of

126 US CONST. I § 15.
127 See Morris, supra note 79, at 1208.
128 Id.
130 Weaver, 450 U.S. at 30. (Italics mine)
131 See Morris, supra note 79, at 1207.
individuals who are involuntarily committed without criminal punishment. The former facility is no more restrictive as the latter, as both facilities are aimed at treatment and not a penal functions. A second argument aims at the commitment being a form of incapacitation, not incarceration. Incapacitation deprives the dangerously mentally ill of their freedom; “a legitimate nonpunitive governmental objective”. It is essential that we clarify the separate justifications for both criminal and civil confinement. We justify criminal punishment based on culpability; civil confinement is justified by the fact that the individual is not responsible for their dangerous conduct. While dangerousness might be involved in the decision making process of both criminal and civil confinement, we do not confine based on dangerousness alone, thus other factors must be present.

2. Debate between community safety and civil liberties

Perhaps the largest conflict we face in the legal community is where to draw the line between preserving the safety of society and protecting individual civil liberties. Too much regulation of one can have a significant, adverse affect on the other. This argument ties to the subject at hand when there is discussion of indefinitely committing dangerous criminals for the purpose of keeping them off the streets to protect society. The previously mentioned problem with multiple uses of the term “mental illness” presents an equal protection argument as well when we intrude on the civil liberties of those similarly situated; if we are going to commit indefinitely, and justify it, we have to use a uniform standard.

133 See Fabian, supra note 72, at 1387.
134 See id.
135 Morris, supra note 79, at 1202-1203.
136 See Morse, supra note 66, at 1026.
137 See id.
138 See id.
139 See Morris, supra note 79, at 1213.
While it is not disputed that civil commitment is an extreme infringement on liberty, it is often justified when limited to a narrow class of a particular nature. Historically, the Supreme Court has held that “under the appropriate circumstances, and when implemented by adequate procedures and safeguards, incapacitation is allowed under civil law.” To combat this difficult argument, the *Hendricks* court successfully laid out the procedural safeguards present in the Kansas SVP statute. First the burden of proof is placed upon the state to prove the elements necessary in the SVP statute. The accused is also afforded the right to present witnesses and evidence, as well as addressing the witnesses and evidence of the state. Finally, following a decision of civil commitment by the court, the individual as three different forms of review: annual review of whether the confinement is warranted; permission by the Secretary that the individual no longer needs to be confined based on a change in the individual’s condition; and the right of the individual at any time to petition for release.

Finally, the wording used in the Kansas statute sufficiently narrows the class subject to civil commitment to those who suffer from “mental illness” or “mental disorder,” who are also sexually violent or dangerous. Such a narrow definition leaves no room for individuals to improperly become committed under the statute. This is an important part of the legislative proposal to be discussed later in Part VI. In order for the proposed violent psychopath civil commitment legislation to survive constitutional arguments, it must be certain to properly narrow the class to those for whom it is intended.

---

140 See Morse, *supra* note 66, at 1042.
141 Fabian, *supra* note 72, at 1390.
142 See *Hendricks*, 521 U.S. at 353.
G. Part VI - Proposed legislation

1. Adopt SVP legislation as a model for civil commitment of psychopaths

The discussion thus far has addressed some of the current SVP legislation that is being used by select states. It has touched on the wording and standards of the statutes, the arguments against them, and the support for them found from the Supreme Court. Therefore, these statutes serve as a sufficient model for this paper’s proposal of violent psychopath legislation. The problems that result from a lack of legislation aimed directly at psychopathy have become too prevalent to continue to be ignored. It is now necessary to create a statute that looks and sounds like SVP legislation, but is tailored to adequately narrow its intended class to the dangerous and violent psychopaths that this paper has been warning about. The verbiage and standards used may be adjusted as it is not required for state legislatures to use specific wording in their civil commitment statutes; legislators are left “the task of defining terms of a medical nature that have legal significance.”146 While this is a general proposal and not state specific, the states are given considerable discretion “to define the mental abnormalities and personality disorders that are predicates for civil commitment,”147 therefore allowing for this proposal to restructure the current civil commitment statutes of any state.

a. Why adopt new legislation?

i. Traditional treatment does not work

Notoriously, the psychopathic personality is completely resistant to change.148 The leading studies done by the current experts in the field are telling us that traditional “mental illness” treatment of psychopaths does not work.

---

147 Morse, supra note 66, at 1031.
148 See HARE, supra note 3, at 94.
A basic assumption of psychotherapy is that the patient needs and wants help for distressing or painful psychological and emotional problems. Successful therapy also requires that the patient actively participate with the therapist in the search for relief of his or her symptoms. The patient must recognize that there is a problem and must want to do something about it. And here is the crux of the issue: *Psychopaths don’t feel they have psychological or emotional problems, and they see no reason to change their behavior to conform to societal standards with which they do not agree.*

Not only do their personality characteristics create a dilemma when applying conventional treatment, but these characteristics have actually proven to make the psychopaths *more dangerous* after treatment;150 “psychopaths, who did not take part in the program were *less* violent following release from the unit than were the treated psychopaths.”151 Additionally, these evaluations displayed that the psychopaths use their traits to convince the clinicians to “recommend them for discharge and to give them leadership roles in the program.”152 Legislation targeted at dangerous and violent psychopaths will allow us a tool to identify these individuals as a very specific group. Using the concept of psychopathy as this classifier is “of paramount importance in assessment and treatment of serious offenders (especially violent offenders)”.153 Once classified, we can then treat them accordingly, using the suggested treatment for psychopaths as described by the experts of the field. If we know that traditional approaches of treatment are lost on these personalities, there seems to be no reason to identify them as psychopaths, yet treat the same as other mental health patients.154

ii. **They will recommit**

Violence risk assessment is used for the purpose of determining the likelihood of criminals recommitting crimes if released from incarceration. In a study, Dr. Hare said

149 HARE, supra note 3, at 195 (emphasis in original quote).
150 See Harris et al., supra note 64, at 200.
151 HARE, supra note 3, at 199 (Hare explains these results from the psychopaths’ tendencies to dominate the proceedings and play “head games”)
152 Harris at al., supra note 64, at 200.
153 Id. at 198.
154 See HARE, supra note 3, at 195
“psychopaths were almost four times more likely to commit a violent offense following release from a therapeutic community program than were other patients.”\textsuperscript{155} He also explains that “the recidivism rate of psychopaths is about \textit{double} that of other offenders \textendnote{\textsuperscript{156}} and the \textit{violent} recidivism rate of psychopaths is about \textit{triple} that of other offenders.”\textsuperscript{156} The toxic combination of traits specific to psychopaths creates a person who not only commits crimes without a second thought, but has no subsequent guilt or even acknowledgement that what he did was wrong. This inevitably leads to recidivism upon release; by nature, they just more often than not cannot be corrected. When the rates of recidivism are narrowed to psychopaths, it has been found that they are at a higher risk of reoffending and violating conditions of release, and do so faster and more often than other released offenders.\textsuperscript{157} Here is a chilling example: prior to receiving a 15 year sentence for sexual assault, Carl Wayne Buntion had a record dating back to 1961; he was released from that sentence making it his 18\textsuperscript{th} parole in 1990.\textsuperscript{158}

These facts should have significant implications on how we release psychopaths from the system, if ever. If many “mentally ill” civilly-committed patients are released upon the determination that they are no longer “mentally ill” that standard will not apply to psychopathy because (1) they are not “mentally ill” in the first place; and, (2) they cannot be “cured” in the traditional sense of the word.\textsuperscript{159} Release decisions, if ever made at all in this case, should be based on an entirely different standard when applied to psychopaths.

b. How to adopt civil commitment under SVP legislation for psychopaths?

This paper has addressed the acceptable standards of current SVP and civil commitment legislation. While these standards are decent as a model for this proposed legislation, they must

\textsuperscript{155} \textit{Id.} at 199.  
\textsuperscript{156} \textit{Id.} at 96.  
\textsuperscript{157} \textit{See} Harris et al., \textit{supra} note 64, at 199.  
\textsuperscript{158} \textit{A Current Affair, Carl Wayne Buntion}, May 7, 1991.  
\textsuperscript{159} \textit{See} Harris et al., \textit{supra} note 64, at 237.
be adjusted slightly in order to be applied to psychopathy specifically. Currently “involuntary civil commitment is justified in those cases in which a mental abnormality predisposes a person to dangerous conduct and the abnormality sufficiently compromises the person’s rationality and responsibility for such conduct.”\textsuperscript{160} First we address the “mental abnormality” prong. To avoid any further confusion regarding “mental illness”, “mental abnormality”, or “mental disorder”, the standard to be applied in the proposed legislation should state specifically that the individual must suffer from psychopathy. This clear identification would be determined by a score of 30 or higher in the PCL which would provide a standard uniform and nationally accepted assessment of psychopathy. With nationwide use of the PCL, we would be removing the current gap that leaves psychopaths out of the existing civil commitment statutes, solving a problem that has been ongoing throughout mental health law history. Furthermore, use of the diagnosis of psychopathy specifically gets rid of the problem with the non-responsibility and lack of control standards\textsuperscript{161} as addressed in Hendricks.\textsuperscript{162} These standards which are used to satisfy a moral rationalization no longer serve their purpose in the context of a psychopath. Where the standards applied to other mental illnesses justify such commitment, the psychopath is a rare creature in that he does not suffer from lack of control per se; psychopaths are actually completely responsible for their actions.\textsuperscript{163} “Unless they have a co-occurring psychotic disorder, people with psychopathy are entirely in touch with reality, instrumentally rational, and know the applicable moral legal rules. They simply do not “get” the point of morality and cannot be guided by it”\textsuperscript{164}

Secondly, we need to adjust the standard of dangerousness. A small percentage of psychopaths never actually commit acts that are legally relevant although they may still be

\textsuperscript{160} Morse, \textit{supra} note 66, at 1036.
\textsuperscript{161} See \textit{id.} at 1039.
\textsuperscript{162} See Hendricks, 521 U.S 346.
\textsuperscript{163} \textit{Id. at} 1072.
\textsuperscript{164} \textit{Id.}
socially unacceptable. In fact, a score of 30 or higher can be given to a psychopath who has never committed a violent act in his life. Therefore, a finding of psychopathy alone will not efficiently narrow the class; there must be an element of dangerousness or violence that has been displayed through previous behavior. Dr. Hare explains that psychopathy can often be seen at a very early age, most often in Conduct Disorder. The characteristics of this disorder often, if untreated, can develop into the cluster of characteristics present in psychopathy. While this paper is not suggesting that we diagnose psychopathy early and indefinitely commit young children, it does suggest that we begin to take notice of these children when they begin to enter the criminal justice system. A child who has been in the juvenile system and diagnosed with conduct disorder or some variation of it, should be paid special attention and noted in his record. Upon becoming a legally recognized adult, any violent offenses committed by these children, should be carefully evaluated under psychopathy standards. If an individual’s rap sheet presents with a history of violence or dangerousness, the PCL should be administered. If a diagnosis is made in addition to this presence of dangerousness, a strong case for civil commitment should be made.

165 See HARE, supra note 3, at 68.  
166 See id. at 159 (Conduct Disorder is defined as disruptive behavior in youths accompanied by anti-social behavior).  
167 Seagrave & Grisso, supra note 15, at 229.
C. Proposed Legislative Language

To be eligible for civil commitment by motion of either party, or the Court *sua sponte*, the accused must meet the following requirements:

1. A diagnosis of psychopathy as determined by a score of 30 or higher on the Psychopathy checklist; and

2. A display of violence or dangerousness as determined by past criminal acts and future risk-violence assessment

2. Increase public interest in mental health law issues

The Kansas legislature showed the country that with an increased awareness of sexually violent predators and the crimes they perpetrate on those around them, changes can be made to put a stop to it. A certain stigma seems to surround the mentally ill when viewed by the general public. Because of this, mental health issues do not receive their due attention. If awareness was increased about mental health law and psychopathy specifically, we could begin to put an explanation with the faces that citizens see in the news. “Psychopathy is the most important and useful psychological construct yet discovered for criminal justice policies.”

Awareness could have a positive impact on these policies and thereby a positive effect on crime rates across the nation.

As of yet, there are few, if any, teams protesting the capitals for changes in the mental health law arena. Not only is the lack of legislation a problem, but as will be addressed below, the parole boards are continually releasing psychopaths back into society with no repercussions if they negligently release a monster. Increased public interest of psychopathy could lead to a

---

168 Harris et al., *supra* note 64, at 230-231.
legislative lobbying team to speak for the issues discussed not only in this paper, but the other important related issues that this paper does not address.

3. **Potential accountability around immunity for parole boards?**

Most people are perplexed whenever a convicted killer, paroled from prison, promptly commits another violent offense. They ask incredulously, “Why was such a person released?” Their puzzlement would no doubt turn to outrage if they knew that in many cases the offender was a psychopath whose violent recidivism could have been predicted if the authorities – including the parole board – had only done their homework.169

Often, the political appointments that make up a majority of the parole boards are not familiar with medical or psychological issues and terminology, or important facts regarding recidivism, let alone the topic of psychopathy.170 Given their lack of time to give each case its due attention, many board members avoid the clinical reports supplied by the psychologists and psychiatrists that have evaluated the inmate during his time in prison.171 These clinical reports, though filled with medical jargon, could be the first signs of risk of violence assessment and future recidivism. Most commonly, when a prisoner is released on parole, it is because the parole board has determined that the individual has been “corrected” and no longer poses a significant threat to society; occasionally, this is a big mistake.172 When a parole board member was asked about the previously mentioned situation of Carl Wayne Buntion, he responded, “the parole board did not share any of the blame for the police officer’s death “No more than his mother should be blamed for bearing him as a son.”173 While current knowledge of psychopathy has affected the decisions of parole boards slightly, without uniform diagnosis and evaluation of

169 HARE, supra note 3, at 6-7.
170 See id. at 183.
171 See id.
172 See id. at 182.
173 Id.
psychopathy in inmate records, there is still room for disastrous consequences. Take for example, the following situation as explained by Dr. Hare.

A prison psychologist told me that the institutions in his state routinely use the Psychopathy Checklist to keep the “blame line”: for poor parole decisions from reaching them. “It helps us in our recommendations to the parole board,” he said. “We tell the board whether or not an offender is a psychopath and explain the implications of the diagnosis. It’s then up to the board to decide how to use the information. If he’s a psychopath and they let him out and he kills someone, we’re off the hook and the parole board has to do the explaining to the public and the victim’s family. If he’s not a psychopath and all other evidence indicated he was a good risk and he kills someone, we’re still okay. So is the parole board. We all did the best we could and no parole is without risk.”

The same psychologist also said that “it was only a matter of time until the family of someone killed by a parolee sued the state on the grounds that it had released “a psychopathic killer who had not been properly diagnosed.” The Psychopathy Checklist, he said, was useful insurance against such a claim.” So long as immunity is in place for parole boards that continue to make these bad decisions, our community will be at the mercy of psychopaths on parole. Dr. Hare suggests that in the case of Carl Wayne Buntion, if the prison authorities had insisted on proper assessment to be made on the inmate as a condition of his parole, and had the parole board then used that assessment, “it is unlikely that Buntion would have been released from prison.” Changes need to be implemented to bring awareness to this issue in particular, which will hopefully lead to institutional changes for parole board accountability.

174 Id. at 181.
175 Id.
176 Id. at 182.
4. No experts in capital sentencing cases without in-depth evaluation of the defendant by an impartial expert

In the interest of protecting civil liberties in the midst of the suggested changes in this paper, it is important to filter out current problems existing in mental health law as well. One such problem arises in the case or “Dr. Death.”177 In Texas, the death penalty is issued in the case of murder upon the determination of three special issues: “(1) that the murderer deliberately sought the death of his victim; (2) that there is a “probability that the defendant will commit criminal acts of violence” in the future; [and] (3) that there were no reasonable “provocations” for the defendant’s murderous conduct”.178 Dr. James Grigson (Dr. Death) typically enters the court room in the determination of the second issue.179 After hearing the facts of the case, and without examining the accused or even seeing him before the date of trial, Dr. Death will “tell the jury as a matter of medical science, he can assure them the defendant will pose a continuing danger to society. That’s all it takes.”180 This paper does propose harsh legislation for violent psychopaths, but what it does not do is support this kind of preposterous behavior by medical experts. Hare emphasizes that proper diagnostic procedure requires “careful examination and testing of the individual.”181 If judges continue to let such horrendous “expert medical opinion” into trials, mental health patients will suffer and so with them, mental health law.

The PCL is suggested for use to diagnose psychopathy which will alter the subsequent criminal proceedings, hopefully ending with commitment and treatment of very dangerous people. The PCL and other tests should not be abused by testifying experts as a means to

---

177 Ron Rosenbaum (May 1990), *Travels with Dr. Death*, Vanity Fair.
178 *Id.* at 187.
179 Ron Rosenbaum (May 1990), *Travels with Dr. Death*, Vanity Fair.
180 *Id.*
181 *Id.* at 189.
convince the jury of what a threat the defendant is, pushing for the harshest sentence possible. Additionally, if as suggested, criminal proceedings are halted with an affidavit of suspected psychopathy of the accused, the therapists that have been seeing the accused on an ongoing basis should not be allowed to administer the PCL which will be used in civil court. The phenomenon with such a situation is that these clinicians tend to “perceive their clients positively”; this could alter the results of the exam that will later be used in commitment hearings.\textsuperscript{182} The PCL should be administered by independent assessors on two separate occasions, presenting an averaged score to increase accuracy.\textsuperscript{183} Medical expert testimony is a necessary and helpful source as mental health law continues to develop. However, only when this source is used correctly and ethically, can the system continue to provide justice and not persecution.

\textbf{III. CONCLUSION}

The options left to be explored in solving the conflicts of psychopathy and the law are vast. What we know now about psychopathy could change over the next decade in a way that could add either clarity or more complication. The proposed legislation and suggestions do not intend to solve the problems that have been mentioned throughout this writing; many questions are still left unanswered. For example, what is the difference between someone who scores a 29 and a 31 on the PCL? If we have to create a cut off rating for the psychopathy diagnosis to be applied for legislative purposes, what is the significance of that number and the intervals in-between? Another question is how do we handle non-violent psychopaths? Although they may not be committing acts of violence which bring them to the attention of the criminal justice system, there are still those out there that cause just as much damage in different forms. Do we let them be since their actions are just on the ugly side of the law? Does that raise and equal

\textsuperscript{182} Harris et al., \textit{supra} note 64, at 232.

\textsuperscript{183} See id.
protection argument since we are proposing different treatment of those similarly situated? There are many questions left unanswered that can only be addressed with time. This paper is only a step in the direction we need to be heading. This topic deserves the attention of great legal and political minds far beyond that of a myself.

“Psychopathy is a lifelong persistent condition”,184 it is not going anywhere, so it is imperative that we adapt quickly. The facts even show us that psychopaths don’t seem to grow out of their criminal behavior. Research shows that "among nonpsychopaths there was an age-related decline in the likelihood of violent recidivism but this was not true for psychopaths".185 The case of the psychopath mentioned in the opening quote of this paper was a prime example of the importance of this issue. For a man to take an infant by her feet and smash her against a wall there must be a serious mental issue present. That very issue needs to be properly identified as early as possible, and used as a tool to prevent the psychopath from being able to repeat such violent behavior. Carl Wayne Buntion, as referred to, would likely never have been released given proper awareness of psychopathy and use of the PCL.

Even one example of psychopathic destruction is one too many. My hope is that this paper has created an interest in the topic of psychopathy, created awareness in its association to the law, and will be a first step toward harnessing this fatal threat to the greater good.

184 Id. at 197.
185 Id. at 199.