

THE ROLE AND RELEVANCE OF THE PSYCHOPATHY CHECKLIST–REVISED IN COURT

A Case Law Survey of U.S. Courts (1991–2004)

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The Psychopathy Checklist–Revised (PCL–R; R. D. Hare, 1991, 2003) is the most empirically validated instrument for measuring psychopathy in correctional and forensic psychiatric populations. The PCL–R’s predictive utility with criminal justice populations has led to its frequent use by clinicians conducting forensic assessments in criminal and sexually violent predator (SVP) cases. Despite its apparent wide acceptance in U.S. courts, little is known about how often the PCL–R is being introduced, the types of cases in which it is being used, and whether claims made in court regarding psychopathy are empirically defensible and/or relevant to the question at hand. This project documents some uses of the PCL–R in U.S. courts from 1991 through 2004 by year, jurisdiction, type of evaluation, and party. The results suggest that the PCL–R is being used by expert witnesses with increasing regularity across U.S. jurisdictions, primarily to assess risk of future violence. A review of 3 recent cases is also provided that illustrates concerns about the validity of the PCL–R for certain types of legal questions that may arise in criminal and SVP trials.

Keywords: psychopathy, PCL–R, expert testimony, legal decision making, death penalty

The Psychopathy Checklist–Revised (PCL–R) (Hare, 1991, 2003) is considered to be the most valid and reliable instrument for measuring the construct of psychopathy in correctional and forensic psychiatric populations (Fulero, 1995; Hare, 2003; Rice, 1997; Salekin, Rogers, & Sewell, 1996). A considerable body of research suggests that psychopathy, as measured by the PCL–R, is modestly to moderately associated with several outcome variables (e.g., criminal recidivism) that are of significant interest to clinicians, legal decision makers, and institutional administrators (Gendreau, Goggin, & Smith, 2002; Guy, Edens, Anthony, & Douglas, 2005; Hemphill, Hare, & Wong, 1998). Although the exact prevalence of its use is unclear, surveys of the field and other sources of information (Cunningham & Reidy, 2002; Lally, 2003; Ogloff & Lyon, 1998; Hart, 2001, as cited in Otto & Heilbrun, 2002; Petrila & Otto, 2001) suggest that the courts are admitting evidence of the PCL–R with increasing regularity to address a variety of pretrial, trial-related, and dispositional issues in criminal and civil cases. Nonetheless, we know surprisingly little about how often the PCL–R is being used

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in court, in what types of cases it is introduced, and whether the instrument truly has much relevance or probative value for the questions it is used to address.

The history and contentiousness of the utility of psychological tests and assessment procedures to address various types of questions before the courts is well documented (Grisso, 1986; Melton, Petrila, Poythress, & Slobogin, 1997). Concerns regarding the introduction of evidence or testimony about these instruments frequently center on two separate but closely related issues. First, from the perspective of mental health professionals, questions arise as to the validity of opinions or conclusions based on (or at least informed by) psychological test data such as PCL-R scores. That is, to what extent does consideration of the test in question improve the accuracy of assertions or predictions made about a party in a legal dispute, especially when asked to opine about the likelihood of future outcomes? Particularly in the context of violence risk assessments, in which the PCL-R appears to be frequently used, there is an extensive history of professional debate regarding the capacity of mental health professionals to identify those individuals who will engage in violent behavior in the future (Cunningham & Reidy, 1999, 2002; Edens, Buffington-Vollum, Keilen, Roskamp, & Anthony, 2005; Ewing, 1983; Monahan & Steadman, 1994; Monahan et al., 2001). Evidence demonstrating the predictive validity of any instrument or assessment procedure is of paramount importance when the goal of the clinician is to draw inferences or conclusions about an individual's likely conduct in the future.

Second, from the perspective of the legal system, a question closely related to the issue of validity is the extent to which the test or assessment procedure can provide information that is relevant to the legal question being addressed in a particular case (Otto & Heilbrun, 2002). In reviewing a litany of historical problems with forensic mental health assessments, Grisso (1986, 2003) specifically noted irrelevance as a common criticism of psychological evaluations conducted for the courts. Although the courts, in theory, have become more sensitive to issues of legal relevance and admissibility in relation to the use of psychological tests (e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993), anecdotal evidence that the PCL-R has been introduced in contexts and for purposes in which its relevance seems highly questionable (Cunningham & Reidy, 2002; Hare, 1998; Ogloff & Lyon, 1998) prompts a closer examination of cases in which that evidence has been admitted. In large part, the questionable relevance of the PCL-R in certain contexts stems from the absence of evidence that psychopathy has any bearing on the legal question at hand (e.g., whether a stepfather accused of incest did or did not commit the crime; Edens, 2001). Potential misuses or questionable applications of instruments such as the PCL-R in legal contexts are of serious concern because psychopathy may be afforded great weight in relation to certain legal issues, such as indeterminate sentencing, the determination of whether an offender is a sexually violent predator (SVP), and capital sentencing proceedings (Edens & Petrila, 2006; Zinger & Forth, 1998). Moreover, the term *psychopath* has the strong potential to impact perceptions of a criminal defendant in a deleterious way (Edens, Colwell, Desforges, & Fernandez, 2005).

One purpose of this article is to enhance our understanding of the types of legal contexts in which evidence concerning psychopathy has been introduced by summarizing trends in the introduction of the PCL-R in U.S. courts from 1991

(publication date of the PCL–R) through 2004. Unfortunately, the vast majority of cases in which the PCL–R is introduced at the trial level do not typically result in published opinions that are reported in electronic legal databases. Thus, the available database is limited. However, by documenting published accounts of cases involving the PCL–R, we hope to provide an overview of the relative frequency with which this instrument has been used in recent years, the types of cases in which it has been introduced, and the legal issues it is used to address.

A second goal of this article is to discuss the validity of the PCL–R in relation to its use in the U.S. legal system, focusing on professional standards for the appropriate applications and interpretations of psychological test data as well as legal guidelines for the relevance and admissibility of psychological evidence. Following an overview of these issues, we describe examples of recent cases in which we believe the introduction of psychopathy evidence was on questionable grounds. Three examples highlight instances in which examiners made assertions about a defendant's PCL–R score that ran counter to the available scientific literature on the topic, which raises serious concerns regarding the relevance and probative value of psychopathy in these cases. We do not assert that these cases represent common misuses of psychopathy evidence, but they are examples illustrative of the more general problem of using and interpreting assessment instruments to address potentially life-altering legal questions in a manner that appears inconsistent with the tests' empirical foundations. Of particular concern in each of these cases is the fact that the invalid (or at least highly questionable) inferences drawn by the examiners were presented to the courts as grounded in scientific research conducted using the PCL–R.

Case Law Survey

Method

Measure. The PCL–R is a 20-item symptom–construct rating scale designed to assess psychopathic characteristics among correctional and forensic psychiatric populations. The items are scored on the basis of a semistructured social history interview and a review of collateral records, which yields a Total score (ranging from 0 to 40) representing the extent to which the individual matches the prototypical description of psychopathy as initially conceptualized by Cleckley (1941), although the PCL–R is more heavily weighted with criminogenic factors than Cleckley's original formulation. In terms of categorical distinctions, scores of 30 or higher are typically considered indicative of someone who is a psychopath (Hare, 1991, 2003).

The PCL–R also yields scores on two factor-analytically derived dimensions representing the interpersonal or affective features (Factor 1) of psychopathy, such as superficial charm and callousness, and the behavioral features (Factor 2) of psychopathy, such as irresponsibility and poor behavioral controls (Farrington, 1991; Hare, 1991, 2003). The second edition of the PCL–R professional manual (Hare, 2003) divides Factor 1 and Factor 2 into four subfactors: Factor 1a, Interpersonal; Factor 1b, Affective; Factor 2a, Impulsive Lifestyle; and Factor 2b, Antisocial Behavior. We note, however, that the relevance of the Antisocial Behavior subfactor to the core construct of psychopathy has been questioned (Cooke, Michie, Hart, & Clark, 2005).

Procedure. Using a comprehensive computerized legal database (Lexis–Nexis), we conducted a case law survey to identify published U.S. court cases involving the PCL–R from 1991 through 2004. The scope of the case law survey included all reported opinions from U.S. state and federal courts as maintained in the Lexis–Nexis database. Lexis–Nexis provides coverage of all appellate decisions from the U.S. Circuit Courts of Appeal and the U.S. Supreme Court. Lexis–

Nexis also provides coverage of all published federal trial court decisions (i.e., by U.S. District Courts), but because not all federal trial courts issue written opinions in all cases they hear, the representativeness of the cases included at this level is limited. Coverage of state case law in Lexis–Nexis is typically restricted to appellate courts and high courts in each jurisdiction. A case is heard by a state appellate court or high court to resolve a question of law (as opposed to a question of fact), so appellate or high court cases are typically considered important enough to warrant a published opinion. To our knowledge, the scope of cases contained in Lexis–Nexis has not changed appreciably in the past 15 years, so it is unlikely that the results of this case law survey were biased by changes in the types of cases reported on Lexis–Nexis.

The following terms were used in both separate and combined searches in Lexis–Nexis: *PCL*, *PCL–R*, *psychopath**, and *checklist*. We limited this case law survey to those cases involving the PCL–R, so cases involving the original Psychopathy Checklist (PCL) and derivative PCL instruments, such as the Psychopathy Checklist: Youth Version (PCL:YV), were excluded. The presence of psychopathy among adolescents raises questions distinct from the purposes of the current project, so examining the use of the PCL:YV in court should be addressed separately. Each case identified by the searches was read for content to confirm that it was appropriate for inclusion in this survey. We excluded cases in which the PCL–R was simply mentioned by the court or a witness, such as the many cases in which the judicial opinion referred to the PCL–R as a commonly used instrument to measure psychopathy but in which the PCL–R was not actually used. We included only cases in which the results of an assessment involving the PCL–R were admitted in evidence. We categorized the use of the PCL–R in those cases by year, jurisdiction, type of evaluation, and party introducing the PCL–R. Although published cases often lack sufficient detail to ascertain whether the expert’s testimony concerning psychopathy was based on sound empirical research, we identified a number of cases in which the inferences based on PCL–R scores seemed questionable, raising concerns about the relevance of this instrument to the question at hand.

Results and Discussion

From 1991 through 2004, the PCL–R was used in 87 reported cases: 76 state cases and 11 federal cases (the Appendix lists these cases). As indicated in Table 1, use of the PCL–R increased considerably from 1991 to 2004, with two rather precipitous increases between 1999 and 2000 and between 2003 and 2004. These steep increases may simply reflect random fluctuation in reported cases involving the PCL–R. It is also possible, however, that changes in accepted practices in certain jurisdictions account for the increases. For example, if PCL–R evidence is favorably received by the courts in certain types of cases, this may open the floodgates for further use of the PCL–R in those types of cases. Another potential explanation is that the increase in use of the PCL–R at those points in time

Table 1
Psychopathy Checklist–Revised Use in Reported Cases by Year

Year	No. of cases	Year	No. of cases
1991	0	1998	2
1992	0	1999	2
1993	0	2000	10
1994	1	2001	9
1995	1	2002	13
1996	1	2003	16
1997	2	2004	30

resulted from developments in the psychological literature that enhanced the relevance and probative value of the PCL-R in certain types of cases (e.g., newly derived empirical support suggesting that the PCL-R reliably predicts postrelease adjustment among incarcerated populations may lead to increased use of the PCL-R in helping to determine the appropriateness of parole). From 1991 through 2004, the PCL-R was used in 15 different states and at both the trial level and appellate level in the federal court system (see Table 2). The PCL-R was introduced in several different types of forensic mental health evaluations from 1991 through 2004. Table 3 summarizes use of the PCL-R by type of evaluation, broken down by state and federal courts.

Among the 76 state cases, the PCL-R was introduced by the prosecution (or state) in 49 cases (64%), the defense in 13 cases (17%), both sides in 4 cases (5%), a court-appointed clinician in 9 cases (12%), and the prosecution (or state) and a court-appointed clinician in 1 case (1%). In each of the 10 cases involving court-appointed clinicians, the expert witness was called to testify for the prosecution. In all 11 federal cases involving the PCL-R, it was introduced by the prosecution (or government). As such, in over 85% (74 of 87) of the cases that we identified, PCL-R evidence was introduced by a witness called by the prosecution. In sharp contrast, it was introduced by an expert witness called by the defense in slightly less than 20% (17 of 87) of the cases reviewed.

In sum, these results suggest that in U.S. courts, the PCL-R tends to be introduced more commonly by the prosecution to bolster legal arguments that a defendant is a danger to others and who consequently should be removed from society (e.g., by indeterminate civil commitment or a death sentence). Consistent 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. Although in some instances the absence of psychopathy has been introduced by the defense (Edens, 2001; Hare, 1998) in reported cases, this use appears relatively less common. We should stress that this conclusion may only apply to those cases in which the PCL-R actually makes its way into evidence. It is likely that experts employed by the defense may administer the PCL-R in certain cases and, if the attorney judges the results unhelpful, the expert is never called to testify, and psychopathy evidence

Table 2
Psychopathy Checklist-Revised Use by Jurisdiction

Jurisdiction	No. of cases	Jurisdiction	No. of cases
California	21	Ohio	9
Florida	4	Oklahoma	1
Hawaii	1	Texas	3
Illinois	7	Virginia	1
Iowa	2	Washington	5
Minnesota	9	Wisconsin	8
New Jersey	2	Federal district courts	8
New York	1	Federal appellate courts	3
North Dakota	2		

Table 3
Psychopathy Checklist-Revised Use by Evaluation Type and Court Level

Evaluation type	Use	State cases	Federal cases
Sexually violent predator	To assist in determining whether an offender should be classified as a “sexually violent predator” and subjected to postcriminal-sentence involuntary civil commitment.	60	2
Future dangerousness	To assist in determining whether an offender poses a risk for future danger, typically for purposes of determining the appropriateness of probation or parole.	11	3
Mental state at the time of the offense	Part of a criminal defendant’s insanity or diminished capacity defense.	3	0
Sentencing	Used in the punishment phase of a trial to assist in determining the appropriate disposition of a convicted offender.	2	1
Capital sentencing	To assist in determining the presence of aggravating factors (e.g., future violence risk), which are required to impose a death sentence.	0	4
Juvenile transfer	To assist in determining whether a juvenile offender should be tried in criminal court or returned to family court.	0	1 ^a

^aThe prosecution sought to transfer a defendant, who was between 15 and 17 years old when he was alleged to have committed several serious criminal offenses, to criminal court. At the time of the juvenile transfer evaluation involving the Psychopathy Checklist-Revised, the defendant was an adult.

is not introduced at trial. As such, psychopathy may be assessed by experts retained by the defense more frequently than it is actually introduced by the defense.

Additionally, there is some indication that courts are willing to examine critically the relevance of psychopathy evidence in individual cases. Thirteen of the 87 cases we found involved challenges to the introduction of the PCL-R, and courts excluded the PCL-R evidence in 2 of those 13 cases. In both instances, the courts excluded PCL-R evidence in contexts in which it was believed that such information would have had little, if any, probative value, or in situations in which its introduction may have been prejudicial to the interests of the defendant. In the first case, *United States v. Taylor* (2004), the U.S. District Court for the Northern District of Indiana rejected the use of the PCL-R as one component of a substance abuse evaluation in a capital sentencing proceeding. Specifically, the Court stated that “due to the uncertainty of the validity and reliability of the PCL-R as it is used in capital sentencing hearings, the Government and any of its experts is prohibited from utilizing this test in evaluating [the defendant]” (p. 13). In the second case, *United States v. Lee* (2000), the U.S. District Court for the Eastern District of Arkansas held that erroneously admitted psychopathy evidence during the penalty phase of a capital case improperly emphasized the defendant’s

potential for future dangerousness. Given concerns about the highly prejudicial impact of the psychopathy evidence, the Court ordered a new sentencing hearing.

This discussion is not meant to imply that courts only rarely exclude PCL–R evidence; rather, we are simply noting that only 2 of the 87 published cases we found involved successful challenges to the admission of the PCL–R. An inherent limitation of a case law survey is that it likely does not reflect the many instances in which trial courts properly excluded PCL–R evidence. Those cases do not result in published opinions unless the exclusion of the PCL–R evidence is challenged on appeal. As such, those cases are not maintained in commonly used electronic legal databases, such as Lexis–Nexis or Westlaw. Conversely, it is also possible that many trial courts err on the side of admitting PCL–R evidence, even if its probative value is slight, to avoid being reversed on appeal. As a result of these factors, it is difficult to accurately identify trends regarding the willingness of courts to admit or exclude PCL–R evidence. Nevertheless, as this discussion illustrates, there is at least some indication that certain courts are becoming better informed consumers of PCL–R evidence.

Written court opinions may be a useful means of gauging the types of cases in which the PCL–R is being introduced, but they are more limited in terms of attempting to evaluate the specific quality and content of a mental health professional's testimony. We identified nine cases in which there seemed to be a reason to question whether the claims made regarding the PCL–R were based on scientific data. Oftentimes, however, the written opinions were not particularly clear, and in the few cases in which there was some question as to the applicability or interpretation of psychopathy data, it was difficult to determine whether the mental health professional's use of the PCL–R was questionable or whether the court had misinterpreted the clinician's testimony. For example, in one case, the published opinion indicated that 45% of psychopaths would reoffend, regardless of treatment. Although this statement was reported in the context of other statements made by the expert, it was impossible to determine (without access to the transcript) whether the expert explicitly made this assertion, or whether the court misinterpreted the expert's testimony. It is important to note, however, that in the vast majority of the cases we reviewed, the assertions made regarding the PCL–R seemed to be consistent with extant scientific research, given the facts described in the published cases (e.g., conclusions that high PCL–R scores were associated with an increased risk of violent reoffending following release into the community). Despite some evidence of sophistication in evaluating the contribution of PCL–R scores in the foregoing cases, however, there were some examples in which it appeared that the courts admitted evidence that had little scientific basis in relation to the legal questions addressed.

The Validity and Relevance of the PCL–R to Legal Decision Making

A second goal of this article is to discuss the validity of the PCL–R in relation to legal decision making and examine some recent examples of cases that illustrate how PCL–R evidence and testimony may lack a strong connection to the test's empirical foundation. As noted earlier, questions concerning the contribution of psychological assessment data to the legal system are by no means unique to the PCL–R. Grisso (1986, 2003), for example, argued that irrelevance, igno-

rance, intrusion, insufficiency, and incredibility have been long-standing criticisms of forensic mental health assessments of legal competencies. Before reviewing examples of cases in which examiners appeared to make claims about PCL-R scores that were of questionable relevance, we briefly discuss what we believe are key issues that forensic examiners should consider when determining whether or how the PCL-R should be used in any given case.

The PCL-R as a Forensically Relevant Instrument

The PCL-R has been construed by some authorities as a “forensically relevant instrument” (FRI) in legal contexts (Otto & Heilbrun, 2002, p. 9). FRIs are measures that assess clinical constructs that ostensibly have some bearing on a particular legal issue, and they “do not assess or focus on specific legal standards and the associated functional capacities of the examinee” (Otto & Heilbrun, 2002, p. 9). By comparison, forensic assessment instruments (FAIs) are designed to operationalize specific legally relevant abilities (e.g., measures attempting to quantify competence-related capacities, such as the MacArthur instruments). Despite the fact that some of the older (and newer) sexual psychopath statutes incorporate the term *psychopath*, this by no means indicates that the PCL-R is isomorphic with the statutory definition of such an offender. In fact, the defining features are quite distinct from the construct operationalized by the PCL-R in most states, and examiners should not equate a PCL-R diagnosis of psychopathy with these statutory definitions (Edens & Petrila, 2006; Petrila & Otto, 2001; see Tex. Health & Safety Code § 841.023 (2005); Wash. Rev. Code § 71.06.010 (2005)).

An FRI such as the PCL-R should, in principle, strike a balance between legal relevance and clinical confidence (Grisso, 2003; Otto & Heilbrun, 2002). We say “in principle” specifically because the fact that a measure can be construed as an FRI does not result in its automatic applicability to any particular legal case. Consistent with recognized authorities in the field (e.g., Grisso, 2003; Melton et al., 1997) and professional guidelines regarding the conduct of psychological assessments, the appropriateness of any instrument is contingent on the extent to which it meaningfully addresses the referral question in a given case. Somewhat more broadly, whether the PCL-R is valid in any given case has been argued to be dependent on the specific purpose for which it is being used (Edens & Petrila, 2006). As noted by Messick (1995) and others, validity is not a static property of a test but is rather a question of the accuracy of the inferences that may be drawn from test scores. As such, PCL-R scores are valid only to the extent that the inferences that are drawn from them are empirically defensible, and the relevance of the PCL-R to any given case warrants close scrutiny. Along these lines, in the following section, we briefly review evidence addressing the validity of PCL-R scores, focusing on outcomes of particular concern to the legal system.

The Criterion-Related Validity of the PCL-R

As noted earlier, a wealth of studies has examined the predictive utility of the PCL-R in relation to various criteria of interest to legal decision makers, and many of these areas of research have been meta-analytically summarized in the past several years. In regard to criterion measures of direct concern to the legal

system, research generally suggests that the PCL–R is related to violent and aggressive behavior in the community (Hare, Clark, Grann, & Thornton, 2000; Serin, 1991, 1996; Skeem & Mulvey, 2001), poorer treatment outcomes (Ogloff, Wong, & Greenwood, 1990; O’Neill, Lidz, & Heilbrun, 2003; Rice, Harris, & Cormier, 1992; Seto & Barbaree, 1999; cf. D’Silva, Duggan, & McCarthy, 2004; Salekin, 2002; Skeem, Monahan, & Mulvey, 2002), general criminal recidivism (Barbaree, Seto, Langton, & Peacock, 2001; Hart, Kropp, & Hare, 1988; Hemphill et al., 1998), violent criminal recidivism (Douglas, Vincent, & Edens, 2006; Grann, Långström, Tengström, & Kullgren, 1999; Harris, Rice, & Cormier, 1991; Hemphill et al., 1998; Serin, 1991, 1996), and institutional misconduct (Guy et al., 2005; Walters, 2003b).

Effect sizes reported in most of the meta-analytic reviews of these bodies of literature have been in the small to medium range, using Cohen’s (1988) widely accepted guidelines for interpreting the magnitude of relationships in social science research. It is important to note, however, that considerable heterogeneity among the effect sizes emerged in these meta-analyses, which indicates that the variability in magnitude of the effects across studies is greater than would be expected simply by chance. This suggests that a discussion of average effect sizes is somewhat misleading because the strength of the relationship between the PCL–R and the outcome measures of interest varies quite substantially across the individual studies. Therefore, the results of these meta-analyses should not be blindly relied on by experts as conclusively establishing that the PCL–R is a robust predictor of these various outcome measures.

Standards of Practice, Legal Admissibility, and the PCL–R

As might be surmised from the brief summary of the literature on the predictive utility of psychopathy provided above, various authors have argued that there is ample evidence to support clinicians’ use of the PCL–R to inform a number of referral questions in legal contexts (Edens & Petrila, 2006; Hare, 2003; Ogloff & Lyon, 1998). Despite this general contention, we submit that the relevance of any FRI to address any specific legal issue should not be presumed, but rather should be demonstrable in relation to the accumulated scientific evidence that has addressed the topic. We believe this position is consistent with the American Psychological Association’s (2002) *Ethical Principles of Psychologists and Code of Conduct* and with commonly used legal guidelines regarding the admissibility of expert evidence (e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993; *Kumho Tire Co., Ltd. v. Carmichael*, 1999). According to the American Psychological Association ethics code, psychologists are obligated to use assessment measures “in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques” (Section 9.02a, p. 1071). Similarly, under the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991), forensic psychologists have an obligation to maintain current knowledge of scientific, professional, and legal developments within their areas of claimed competence. There are comparable ethical guidelines that govern other types of mental health professionals, such as the *Ethical Guidelines for the*

Practice of Forensic Psychiatry (American Academy of Psychiatry and the Law, 1995).

Moreover, because of the potentially biasing effects of the psychopath label on laypersons (Edens, Colwell, et al., 2005), introduction of the PCL-R in contexts in which it has little or no evidence to support its use raises additional concerns related to the ethical principles of nonmaleficence and justice. Although it is ultimately up to the courts to determine whether evidence is prejudicial, this does not circumvent the need for forensic examiners to consider the ramifications of introducing instruments such as the PCL-R and labeling defendants as psychopaths.

In terms of guiding legal principles, according to *Daubert*, a trial court faced with a proffer of expert scientific testimony performs the gate-keeping function of evaluating “whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue” (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, pp. 592–593). In short, this means that an expert witness’s testimony must be supported by “good grounds” in accordance with the current state of the knowledge (p. 590). Certainly, one would assume that clinical opinion informed by empirical research would be more likely to pass muster in those jurisdictions that have adopted *Daubert* or *Daubert*-like standards. Although experts should certainly seek to present relevant, nonprejudicial, and empirically supported testimony, we recognize that the ultimate decision regarding admissibility is a legal matter decided by the court. Nevertheless, experts have an affirmative ethical obligation to be knowledgeable about the proper uses and limitations of the PCL-R, or any assessment instrument, in forensic contexts.

Questionable Inferences Concerning Psychopathy: Three Case Examples

In the following sections, we describe three cases that illustrate our concerns regarding the questionable validity of the PCL-R for certain types of legal questions. We note at the outset that our concern in each case is not about the quality or accuracy of the examiner’s opinions and conclusions broadly speaking; rather, our concern is narrowly focused on whether there is empirical support to justify the use of the PCL-R as part of a forensic evaluation to address the particular legal question(s) at issue. That is, to what extent would inferences drawn from a PCL-R score add to the clinician’s ability to provide useful and accurate information to the courts concerning a defendant’s future (or, in the case of sanity examinations, past) behavior? The foregoing survey suggests that psychopathy evidence seems to be introduced in cases in which the inferences drawn on the basis of the PCL-R data have some scientific justification, so the cases we have chosen to review more extensively do not necessarily constitute common misuses of this instrument. However, even a small percentage of questionable cases are a source of concern, particularly when considered in the context of the potentially stigmatizing effects of the psychopathy label and the under reporting of published cases.

Our discussion of these three cases will progress from contexts in which the PCL-R is more frequently used according to the results of our case law survey (i.e., SVP evaluations) to contexts in which the PCL-R is less frequently used

(i.e., capital sentencing evaluations and mental state at the time of the offense evaluations). The first case was an SVP case in which the PCL–R would indeed seem quite relevant to the legal question before the court. We include it as an example of potential irrelevance because the interpretation of certain aspects of the PCL–R assessment seemed to be at odds with the extant scientific literature. In the second and third cases, we believe that the PCL–R had, at best, very limited probative value because of limited evidence regarding its validity in relation to the questions it was used to address. The second case involved an assessment of a capital murder defendant to determine the extent to which he represented a future danger to society if not put to death. The third case was also a capital proceeding, but the PCL–R was used in the culpability phase of the trial to address the issue of criminal responsibility. In each case, it is worth noting that the examiner either directly asserted or indirectly implied that the inferences made about the defendant’s PCL–R score were based on empirical research. As such, following a short summary of the facts of each case and the opinions offered by the examiners, we review the relevant scientific literature ostensibly supporting each examiner’s arguments.

Case 1: Questionable Inferences Concerning PCL–R Factor Scores and Violence Risk

The first case, *Garcetti v. Superior Court* (2000),¹ involved the evaluation of an inmate to determine whether he should be classified as an SVP and thus involuntarily civilly committed on his release from incarceration. The controlling Sexually Violent Predators Act (Cal. Welf. & Inst. Code § 6600 *et seq.*) stated that an inmate can be declared an SVP if the jury finds beyond a reasonable doubt that the inmate suffers from a diagnosed mental disorder that makes him or her a danger to others in that it is likely that the inmate will engage in sexually violent criminal behavior. Before going to trial, a preliminary hearing must be held to determine whether there is probable cause to believe that the inmate would engage in future acts of sexual violence if released from custody.

During the preliminary hearing, the court received the testimony of several mental health experts. One psychiatrist administered a PCL–R and several other measures to assess whether the inmate posed a risk of committing future acts of sexual violence. The inmate received a PCL–R Total score of 28 from this examiner, which did not place him in the traditional psychopathic range. The inmate did receive a very high score on Factor 1 (13; 86th percentile for prison inmates), however, as well as a Factor 2 score of 11 (42nd percentile for prison inmates). On the basis of these results, the psychiatrist concluded that the inmate posed a “significant risk of sexually reoffending” (*Garcetti v. Superior Court*, Transcript, Probable Cause Hearing [No. ZM002909], July 14, 2000, p. 455). In reaching this conclusion, the psychiatrist opined that high scores on Factor 1

¹Because the California Supreme Court granted review of *Garcetti v. Superior Court* (2000), the opinion was depublished per rule of court, and the superseding California Supreme Court’s decision is *Cooley v. Marentez* (2002) (Weedin, J. T., appellate counsel for Marentez, personal communication, December 21, 2005). Despite the subsequent history in this case, our discussion remains focused on the proceedings that occurred in the California Superior Court.

indicated the presence of “psychopathic character traits” (p. 457). When questioned about the significance of a high score on Factor 1 to the case at hand, the examiner stated that “the more psychopathic an individual is, the more we worry about them (sic) committing future serious offenses of all types” (p. 457). In essence, the psychiatrist relied in part on the defendant’s higher Factor 1 score to justify the conclusion that the defendant presented a significant risk of sexually reoffending. Although the trial court failed to find probable cause, the appellate court held that the mental health evidence provided a rational basis for believing that the inmate would engage in future acts of sexual violence. Accordingly, the matter was set for trial.

A review of the research that existed at the time this case was decided reveals that the psychiatrist’s assertion regarding the relevance of Factor 1 to predicting future crimes was not well supported. Instead, a well-established body of literature indicated that although Factor 2 is a better predictor of general recidivism, there was no difference between Factors 1 and 2 in terms of predicting violent recidivism (Grann et al., 1999; Hemphill et al., 1998). Although one small study found that Factor 1 was a better predictor of violent recidivism (Serin, 1996), most studies that existed at the time of the psychiatrist’s involvement in this case concluded that Factors 1 and 2 were equally adept at predicting violent recidivism (Grann et al., 1999). It should be noted that two later meta-analyses, which were not available to the psychiatrist at the time of his involvement in this case, have suggested that Factor 1 is a less robust predictor of both general and violent recidivism than is Factor 2 (Gendreau et al., 2002; Walters, 2003b). Given the research that existed at the time of this case, the psychiatrist was on shaky ground, at best, in interpreting the inmate’s elevated Factor 1 score as more relevant than Factor 2 in determining the likelihood that the defendant would be violent in the future.

Perhaps an even more important point is that all SVP statutes require that the individual be at risk for committing future acts of sexual violence, as opposed to violent recidivism more broadly (Jackson, Rogers, & Shuman, 2004). A review of the literature that existed at the time of the clinician’s involvement in this case reveals that the PCL-R had demonstrated modest to moderate predictive validity with respect to sexual offenses (Dempster, 1998; Firestone et al., 1999; Hanson & Harris, 2000; Rice & Harris, 1997), particularly when used in conjunction with measures of sexual deviance (Hare, 2003). However, there was very little, if any, research examining the relationship between sexual recidivism and the PCL-R factor scores at that time, and the limited information available failed to support the assertion that Factor 1 was a meaningful correlate of sexual recidivism (Firestone et al., 1999). Subsequent studies conducted since 2000 have offered only minimal support for the claim that Factor 1 is a significant predictor of sexual reoffending and no evidence to suggest that it is a stronger correlate than Factor 2 (Barbaree et al., 2001; Olver & Wong, 2003, as cited in Hare, 2003; Hildebrand, de Ruiter, & de Vogel, 2004).

In sum, the examiner’s claim regarding the importance of Factor 1 scores was at best poorly supported by and at worst directly at odds with the extant research available at the time regarding sexual recidivism. In this case, as well as the two cases that follow, testimony with the potential to be highly detrimental to the defendant was “cloaked in the guise of science” (Edens et al., 2001, p. 460) yet

not actually based on empirical data on the PCL–R. Given the frequency with which the PCL–R is apparently used in SVP determinations—that is, over 70% of the cases in our case law survey—misinterpretation of the PCL–R results (against the interests of the offender, in this case) could have profound effects on a large number of offenders. Among other things, the misidentification of an offender as being a high risk for engaging in future acts of sexual violence could lead to unwarranted restrictions on the offender’s freedom.

Case 2:

Misapplication of the PCL–R in Capital Sentencing Determinations

In the second case, *United States v. Barnette* (2000), a defendant was evaluated as part of capital sentencing proceedings to provide information on his risk for future violence. The defendant had been convicted of two capital murders, and the government was seeking a death sentence. The psychologist for the defense conducted a comprehensive risk assessment and concluded there was little likelihood the defendant would commit future violent acts if serving a life sentence in prison, which was the only option available to the jury other than capital punishment. In rebuttal, the government presented the testimony of a psychologist who disagreed with the conclusion that the defendant would not be a future danger while in a U.S. federal prison. The psychologist assessed the defendant as having a PCL–R score of 35, which placed him well within the range typically associated with being a psychopath (Hare, 2003). In part on the basis of the PCL–R score, the examiner globally concluded: “I think I could say with a reasonable degree of medical or psychological certainty that I feel that the defendant is at a much greater risk of being violent in the future” (*United States v. Barnette*, Transcript, Sentencing Phase [No. 3:97CR23-P], Feb. 5, 1998, p. 988). Following the sentencing jury’s unanimous recommendation of a death sentence, the trial court sentenced the defendant to death.

Although the examiner’s conclusion was based on more than just the PCL–R score, it is clear that it was judged to be a key component of the evaluation. In fact, the expert asserted that the PCL–R was “above any other instrument that we currently have in predicting future dangerousness” (p. 990) and additionally pointed out that

criminal psychopaths are three times as likely to engage in violent future criminal behavior when compared to nonpsychopathic criminals. Although in any prison population only about 20% of that population typically are psychopaths, they are responsible for over 50% of the violent crimes that are committed. (p. 974)

Despite the fact that the above-noted statistics were based on research examining violence in the community, implicit in this testimony was the position that PCL–R scores were predictive of prison violence, which was also reflected in statements such as “identifying someone as a psychopath helps institutions to be able to place them either in a maximum or lower security penitentiary based on what they score out” (p. 974).

Of note, when testifying to the jury, the expert spent a considerable amount of time individually reviewing each item on the PCL–R and the case, interview, and historical factors that were considered when scoring it. For example, when

describing the defendant's capacity to feel emotions, the examiner compared psychopaths to "fake fruit" (p. 977) and suggested that they had the superficial appearance of normality but on close inspection were unable to experience emotions such as fear. This lack of emotional responsiveness was described as evident in the defendant's descriptions of his prior violent crimes, in that "if you were not careful you would walk away from the conversation thinking that you had had a conversation about a football game" (p. 978). Conversely, when the defendant believed his claims of suicidal ideation were not seen as credible, his behavior was described as

... kind of like flipping a switch. He got very angry, his voice increased, he got up on the edge of his chair. I was sitting on the side of the table holding a big binder, and I felt the need to put the binder down in case he was going to go further than the edge of his chair. (p. 981)

Only two sentencing options were available to the jury: life in a federal prison with no chance of parole or a death sentence. In relation to the examiner's claim about psychopathy and future dangerousness, at the time this case was decided only one small-scale study had examined the relationship between PCL-R scores and violence in U.S. prisons (for subsequent reviews, see Cunningham, Sorensen, & Reidy, 2005; Edens, Buffington-Vollum, et al., 2005). In a retrospective analysis of 98 U.S. federal prison inmates, Kosson, Steuerwald, Forth, and Kirkhart (1997) reported nonsignificant correlations between institutional aggression and PCL-R Factor 1 scores ($r = .05$) and Factor 2 scores ($r = .07$). As noted by Cunningham and Reidy (1999), there was essentially no empirical support for the assertion that PCL-R scores were predictive of serious institutional violence, particularly in high-security federal prisons in the United States that would house life-sentenced offenders. Although a 1996 meta-analysis concluded that there was "some merit for ... utilizing the PCL-R when making probability statements regarding placement decisions in correctional institutions" (Salekin et al., 1996, p. 212), this conclusion was based primarily on studies of prisoners in institutions outside the United States that often used postdictive designs involving criterion measures such as verbal aggression, hostility, and self-harm (for a more extensive review of these studies, see Edens et al., 2001). As such, there was very little support at the time of the psychologist's testimony in this case to use the PCL-R to predict future violence in prison, particularly in the context of a federal capital murder case.

Given the increasing use of the PCL-R in capital sentencing evaluations, the ability of the PCL-R to predict future violence among prison populations has received a considerable amount of attention in the years since this case was decided (e.g., Cunningham & Goldstein, 2003; Cunningham & Reidy, 2002; Edens, Buffington-Vollum, et al., 2005; Edens, Petrila, & Buffington-Vollum, 2001; Gendreau et al., 2002; Guy et al., 2005; Walters, 2003a, 2003b; Walters, Duncan, & Geyer, 2003). Most of the studies that have examined the issue have reported either nonsignificant correlations or small to modest correlations between PCL-R scores and institutional adjustment. In a recent comprehensive meta-analysis of published and unpublished studies examining the PCL measures, Guy et al. (2005) reported weighted average correlations of only .10 for various forms

of aggression ($n = 902$) and .11 for physical violence ($n = 804$) in U.S. prison studies.

Taken together, these studies and meta-analyses provide little support for the ability of the PCL-R to predict violent institutional behavior among capital murderers facing death sentences, particularly when one factors in the lower than average rates of institutional misconduct of life-sentenced offenders (Edens, Buffington-Vollum, et al., 2005). Nevertheless, the results of our case law survey indicate that the PCL-R was used in at least four capital sentencing evaluations. Although this use of the PCL-R appears to be relatively infrequent (when compared with the other uses of the PCL-R documented in the case law survey), it is important to remember that most cases involving capital sentencing evaluations are unlikely to result in published opinions that are available on electronic legal databases. As a result, the four cases may underestimate the actual number of times that the PCL-R is used in capital sentencing proceedings.

Given the PCL-R's limited predictive utility, several authors have concluded that there is virtually no support for using the PCL-R to predict institutional violence in the high-stakes context of a capital case (Bersoff, 2002; Cunningham & Goldstein, 2003; Cunningham & Reidy, 2002; Edens, Buffington-Vollum, et al., 2005; Edens et al., 2001; Guy et al., 2005). There was even less support at the time this case was decided. At a minimum, one could argue that the examiner who testified regarding research concerning the PCL-R and community violence had an affirmative ethical obligation to point out the limitations of these studies in relation to predicting violence in prison, where the defendant would remain without the possibility of parole if not executed. Despite the relatively infrequent use of the PCL-R in capital sentencing evaluations (at least in terms of published cases found in our case law survey), the high-stakes nature of capital proceedings underscores the importance of ensuring that expert testimony is based on sound scientific research.

Case 3: Criminal Responsibility, Malingering, and the PCL-R

In the final case we describe, one of us served as a rebuttal witness called to testify regarding various aspects of a forensic evaluation conducted in a capital murder trial. Although not published, we review it here because it illustrates several important issues concerning the appropriateness of inferences drawn regarding a defendant's PCL-R score. The defendant, a relatively young Caucasian man, was on trial for a particularly horrific double homicide involving the strangulation of his wife and mother-in-law. The defendant pursued a not guilty by reason of insanity (NGRI) defense and was first evaluated by a court-appointed forensic psychiatrist. The examiner was somewhat equivocal regarding the defendant's mental state at the time of the offenses, but ultimately opined in his written report (and in subsequent testimony at trial) that the defendant was insane when he committed the murders. On learning of the results of the first evaluation, the prosecution subsequently retained two other mental health experts (one psychiatrist and one psychologist) to evaluate the defendant, both of whom were called to testify at trial. Both examiners asserted at trial that the defendant was not insane at the time of the murders, although the psychiatrist did acknowledge that the defendant showed some evidence of significant mental health problems. The

psychologist, however, opined that the defendant showed no legitimate signs of mental disorder and was in fact malingering mental illness in an attempt to pursue an NGRI acquittal.

Of primary interest to the current review, the psychologist retained by the prosecution not only opined that the defendant showed no signs of mental disorder that would impair his capacity to determine right from wrong at the time of the offense, he offered a very specific explanation for the defendant's criminal conduct: The reason he committed the murders was because he was a psychopath. This assertion was based on the administration and scoring of the PCL-R, which was described in the examiner's report as "well researched" and "critically important in criminal assessments."² Much like the expert in *Barnette*, the examiner spent considerable time reviewing the results of the PCL-R assessment (item by item) in his report and when testifying, concluding that the defendant's score (33 out of a possible 40) placed him in a range that typically is considered psychopathic in a diagnostic sense (Hare, 2003). At trial, the scoring of each item was reviewed individually during a PowerPoint slide show, and in the six and a half pages of the written report that were devoted to information relevant to the defendant's mental state, almost three full pages were devoted to a review of the PCL-R items and scoring. The examiner additionally testified that his PCL-R rating of the defendant was highly reliable, and that if 100 other examiners had administered the PCL-R, 90 of them would have given the defendant exactly the same score.

Aside from being proffered as an explanation for the defendant's violent criminal conduct, psychopathy also was invoked to support the conclusion that the defendant was not mentally disordered but was malingering symptoms of serious mental illness. This assertion was not based entirely on the PCL-R results (e.g., personality testing data resulted in protocols that were uninterpretable), but it was clear that the primary source of data for this conclusion was the PCL-R. In the examiner's concluding paragraph to his report, he flatly stated: "It appears to me that what we are dealing with is a psychopath who is attempting to exaggerate psychopathology."

Various aspects of this evaluation are controversial, but our focus is exclusively on the validity of the inferences made regarding the "well-researched" PCL-R and a defendant's mental state at the time of the offense. To use the PCL-R in criminal responsibility evaluations, one must justify its relevance to the psycholegal issue in question (Borum, 2003; Melton et al., 1997). There seem to be two possible rationales for its use. First, does the presence of psychopathy rule out the possibility that defendants are suffering from serious mental disorders that might have some bearing on whether they meet the legal standard for insanity in any given jurisdiction? The accumulated evidence regarding the co-occurrence of psychopathy and major mental disorders (Nolan, Volavka, Mohr, & Czobor, 1999; Rice & Harris, 1995; Skeem & Mulvey, 2001; Tengström, Hodgins, Grann, Långström, & Kullgren, 2004) indicates that the answer to this question is a clear "no." Persons high in psychopathic traits have been found to suffer from serious mental illness, and persons with serious mental disorders also may be quite

²A complete, sanitized version of this report is available from John F. Edens on request.

psychopathic. As such, introducing the PCL-R into this process adds little or nothing to an examiner's ability to substantiate the presence or absence of serious mental illness. Even more troubling, there is at least some evidence to suggest that an early precursor to the PCL-R misidentified a nontrivial number of individuals with schizophrenia as psychopathic (Howard, Bailey, & Newman, 1984; cf. Hare & Harpur, 1986).

More specific to insanity standards themselves, can a high score on the PCL-R aid in determining that a defendant does or does not meet the cognitive prong of M'Naughten or American Law Institute criteria? (See Melton et al., 1997, for a discussion of these criteria.) Although almost all commentators agree that the presence of psychopathy in isolation would not meet this standard (cf. Fine & Kennett, 2004), there is nothing about psychopathy per se that rules out the presence of psychosis or other factors that may strongly impact whether a defendant understands the wrongfulness of his or her actions at the time of the offense. Moreover, the examiner's attempt to explain the defendant's criminal conduct by invoking the psychopath label arguably goes well beyond the purpose of a sanity evaluation, in which the role of the examiner is to attempt to inform the court about the defendant's mental state at the time of the offense. In response to cross-examination questions regarding the relevance of the PCL-R in a criminal responsibility evaluation, the examiner asserted that he was required to "explain the defendant's crimes" and that, after ruling out psychosis, psychopathy was the best explanation as to why the defendant had committed the murders.

A second and somewhat related justification for introducing the PCL-R might be that the presence of psychopathic traits raises the likelihood that a defendant is malingering. At first blush, such an argument would appear to have some merit, in that the closely related diagnosis of antisocial personality disorder (APD) is listed as one of the four risk factors for malingering in the American Psychiatric Association's fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*; American Psychiatric Association, 2000), and the PCL-R itself includes two items specifically related to deceptiveness (i.e., pathological lying; being conning or manipulative). Despite this, extant data offer very little support for the claim that APD or the PCL-R is strongly associated with either an increased likelihood or an increased ability to malingering serious mental disorder (Clark, 1997; Edens, Poythress, & Lilienfeld, 2005). A particularly informative analysis of the problems with the *DSM* criteria for malingering was provided by Rogers (1997). Even if there were a meaningful relationship between psychopathy and dissimulation, however, it is unclear why one would rely on an at best indirect indicator such as the PCL-R, rather than conduct a direct assessment of malingering by administering what is widely considered to be the gold standard in this area, the Structured Interview of Reported Symptoms (SIRS; Rogers, Bagby, & Dickens, 1992). Of particular note, the examiner who administered the PCL-R and argued that the defendant was malingering in the present case did not administer the SIRS, although he asserted that he conducted a "SIRS-type" assessment by determining whether the defendant was using various malingering strategies that could be detected by means of other sources of information (Minnesota Multiphasic Personality Inventory-2 validity scales and other instruments designed to detect malingered cognitive deficits).

Given the lack of support for these two justifications for using the PCL-R, the

probative value of psychopathy in terms of its relevance to insanity defenses appears very weak. This seems particularly so given that at best it is a modest and indirect indicator of other factors more directly relevant to criminal responsibility, which themselves can be directly assessed via other methods and instruments (e.g., FAIs and FRIs such as the SIRS). One is therefore hard-pressed to come up with a rationale for its inclusion in such an evaluation. It is also notable that, despite the examiner's claim that the PCL-R was "critically important" in evaluating offenders, no widely regarded authoritative sources in this area suggest that one should assess for psychopathy in insanity cases (Borum, 2003; Melton et al., 1997; Rogers & Shuman, 2000; Shapiro, 1999), and no professional surveys indicate that examiners consider the PCL-R to be a relevant component of insanity evaluations (e.g., Borum & Grisso, 1995; Lally, 2003). This sentiment against using the PCL-R in insanity evaluations is reflected in the results of our case law survey, which indicated that examiners very rarely (3% of the cases we found) used the PCL-R as part of an evaluation to assess a defendant's mental state at the time of the offense.

Summary and Concluding Remarks

Previous reviews of the use of the PCL-R in U.S. courts have been largely anecdotal (Cunningham & Reidy, 2002; Edens, 2001, 2006; Edens et al., 2001). The current study documented the increasing use of the PCL-R in published U.S. court opinions from 1991 through 2004 and provided an overview of the types of cases in which it was being introduced. Since being published in 1991, the PCL-R has been used in 87 reported cases, more commonly in state cases (76) than federal cases (11), spanning 15 states and the federal court system. Moreover, use of the PCL-R in reported cases has increased considerably since 1991. Although limitations inherent in our case law survey methodology do not permit us to determine the exact number of times that the PCL-R was admitted into evidence, this study provides an indication of the increasing frequency of the PCL-R's introduction in U.S. jurisdictions as well as a general indication of the array of issues it typically is used to address. A comprehensive practitioner survey addressing the use of the PCL-R in court would add significantly to our knowledge base on this issue.

In the large majority of cases included in this case law survey, the PCL-R was used to evaluate whether an offender poses a risk of future danger, either for violence generally or for sexual violence in particular. Specifically, the PCL-R was used most often to determine whether an offender was appropriate for probation or parole or as part of an evaluation to determine whether an inmate should be classified as an SVP. As previously noted, there is considerable empirical evidence suggesting that PCL-R scores are associated with violent recidivism in the community (Dolan & Doyle, 2000; Douglas et al., 2006; Grann et al., 1999; Hemphill et al., 1998; Serin, 1996), although the strength of this relationship varies widely from one study to another. There is also emerging evidence that the combination of psychopathy and deviant sexual arousal is a robust predictor of sex offender recidivism (Hanson & Harris, 2000; Hare, 2003; Rice & Harris, 1997). Therefore, when the PCL-R is used in evaluations to assist in determining whether an offender poses a likelihood of committing future

violent acts (either violence in general or sexual violence in particular), empirical studies buttress the argument that the PCL–R may provide relevant information that can assist the legal decision maker.

Although the increasing use of any assessment tool in highly adversarial contexts may raise concerns about various types of misuses and abuses that may occur, as previously noted, the inferences drawn concerning the PCL–R appeared questionable in only a relatively small percentage of reported cases. As such, when considering all of the cases we identified, the vast majority suggests that psychopathy evidence is introduced to address issues in which it is likely to have some probative value. That being said, the fact that evidence has some probative value must be weighed against its potential for prejudicial effects (termed the *relevance/prejudice hurdle*). Our case law survey is not a useful means of addressing this question directly as the potentially prejudicial effects of psychopathy, as determined by the fact finder in each case, likely depend on the content of the proffered testimony and the types of opinions expressed by the examiner. For example, in criminal cases, descriptions of psychopaths as being similar to “fake fruit” might be considerably less biasing than describing them as being similar to Ted Bundy. Similarly, the statement that psychopathy is the single best correlate of violence among released psychiatric patients might have a stronger impact on legal decision makers than an equally correct statement indicating that psychopathy explains only 7% of the variance in violent behavior among these same patients (Skeem & Mulvey, 2001). Clearly, future research examining the specific content of the testimony provided across a representative sample of cases in which the PCL–R is used would shed more light on these important issues.

The general conclusion that the PCL–R seems relevant in most reported cases notwithstanding, its relevance to address any particular legal question is an open issue that we believe warrants close scrutiny in each case in which it may be used. Our concerns about the potential lack of relevance of the PCL–R in some cases are reflected in the three cases we reviewed, in which the PCL–R’s probative value seemed very limited or its interpretation was inconsistent with extant research available at the time of the evaluation. In all three cases, the evidence concerning the PCL–R went against the interests of the defendants. In an earlier review, Edens et al. (2001) argued that the PCL–R was becoming a strategic weapon, specifically in death penalty cases, in that psychopathy testimony might outweigh other relevant mental health evidence introduced to argue that a defendant will not be a “future danger to society” (p. 465).

In conjunction with the questionable inferences offered about PCL–R scores in the two capital cases reviewed above, the potential for prejudicial effects would seem to be very profound. Labeling a criminal defendant as a psychopath can have a pronounced effect on how that person is viewed by laypersons (Edens, Colwell, et al., 2005; Edens, Guy, & Fernandez, 2003; Guy & Edens, 2006). It appears that some prosecutors are well aware of this in relation to future dangerousness issues, and it now seems that psychopathy may be used in an attempt to supersede other forms of mental health evidence, in that the attribution made for the person’s behavior is that he or she is “bad” rather than “mad” (with little or no consideration that one may in fact be both). Moreover, we are aware of a recent case (*United States v. Fell*, 2005) in which a defense team opted to withdraw mental

health mitigation evidence to avoid the prosecution calling a rebuttal witness who would testify about the PCL-R and other similar instruments.

The three cases reviewed above highlight the importance of drawing empirically defensible inferences about defendants on the basis of PCL-R scores. This is not simply a suggestion for maintaining a high standard of practice; it is an ethical obligation. The American Psychological Association (2002) ethics code requires psychologists to use assessment measures for purposes that are appropriate in light of the available research, and clinicians have a duty to maintain knowledge regarding the proper applications of the PCL-R. Similar ethical guidelines are applicable to psychiatrists engaged in forensic work (American Academy of Psychiatry and the Law, 1995; American Psychiatric Association, 2001), such as in *Garcetti*. Along these lines, clinicians should recognize that there are certain legal questions that simply may not be usefully informed by a PCL-R score. We would argue that in the two capital murder cases reviewed, the examiners should not have even administered this particular instrument. In those cases in which the validity of the PCL-R seems more defensible, clinicians who choose to use it still should be forthcoming about the limits of its relevance to the question being addressed. Moreover, if an expert realizes that previously provided testimony based on the PCL-R was in error, the expert should take affirmative steps to minimize the harm (American Psychological Association, 2002). For example, in *Stitt v. United States* (2005), a psychologist voluntarily recanted his testimony after realizing it was based on an erroneous interpretation of the extant literature regarding the PCL-R's predictive utility.

In conclusion, we hope that the preceding review is informative regarding the use of the PCL-R in the U.S. legal system, and that it will assist both mental health professionals and legal decision makers to better scrutinize the contribution of this instrument in criminal and SVP cases. Global assertions that the PCL-R is valid in such cases should be met with a more exacting analysis of the available research (i.e., valid for what purpose?), which we believe will foster a more critical appraisal of its appropriate role in and relevance to the legal system.

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Appendix

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