

**A CAUSE FOR COMPASSION: UNDERSTANDING AND APPLYING
NEUROBIOLOGICAL FACTORS ASSOCIATED WITH PSYCHOPATHY**

by

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ABSTRACT

Psychopaths have neurobiological irregularities which are manifested by learning and fear processing deficits and neurotransmitter abnormalities. These irregularities influence the behaviours of psychopaths and help explain their propensity to engage in antisocial behaviour. It is argued that these factors should mitigate criminal responsibility for the actions of psychopathic offenders. An analysis of sentencing hearings for offenders with psychopathy and fetal alcohol spectrum disorder (FASD) in British Columbia, Ontario, and Nova Scotia is presented to illustrate that psychopathy is often perceived as an aggravating factor, while this is not the case for FASD, which shares some common traits with psychopathy. This indicates a lack of internal consistency in the sentencing of offenders with neurobiological impairments. In an attempt to rectify this problem, potential sentencing alternatives are discussed, focusing on alternatives that would safeguard the public from dangerous psychopaths, while also protecting the rights of psychopathic offenders as individuals with neurobiological dysfunctions.

Keywords: psychopathy, neurobiology, sentencing

Subject Terms: antisocial personality disorders, psychopaths, sentences (criminal procedure Canada)

DEDICATION

For Sapta and Saba, Bubie and Zaidy
Mom and Dad, David and Myk

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INTRODUCTION

A dichotomy has formed among the prison population and, as a result, offenders can typically be placed into one of two categories: those for whom society has mustered a certain level of compassion and those for whom society has no compassion. The former is typically reserved for offenders who have been diagnosed with serious mental disorders, such as schizophrenia and bipolar disorder; in such cases, it becomes possible to shift blame from the individual to the disease and to view the offender as an innocent victim of illness. The latter group, for whom society musters no compassion, is comprised of individuals who are presumed capable of rational behaviour premised upon a conception of the difference between right and wrong. Psychopaths are invariably slotted into the latter group. However, there is a great deal of evidence that psychopaths more appropriately belong to the former, as their behaviours have been linked to several neurobiological factors, thus suggesting that they too are victims of their biology.

Prior to discussing neurobiological factors associated with psychopathy and the implications they present, it is useful to provide a brief overview of psychopathy. Although the term 'psychopath' is familiar to most individuals, few are aware of its true meaning. Psychopathy is currently defined as a cluster of behaviours and personality traits that are typically viewed as negative by greater society (Hare, 1993). Psychopaths are callous individuals who are aware of their wrongdoings but lack remorse. They are individuals who fail to accept responsibility for their actions, while priding themselves in having the ability to avoid sanctions (Cleckley, 1982). They possess superficial charm and are able to emit the impression that they are agreeable individuals, yet they possess the ability to lie with conviction. They have average to above-average intelligence and are typically unreliable (Cleckley, 1982). Contrary to popular belief, not all psychopaths are criminal. In fact, researchers estimate that psychopaths comprise approximately one percent of the general population (Hare, 1998). Further, while it is typically the more brutal and savage crimes of

psychopaths that are featured in the headlines, in actuality, the crimes of psychopaths range from petty theft and fraud to cold-blooded violence (Hare, 1998).

The term 'psychopath' applies to a group of individuals with a very extreme set of traits and thus is not to be used lightly. The main characteristics can be broken down into two categories, those relating to emotional and interpersonal deficits and those relating to social deviance. This classification is useful because it provides a detailed description of the traits associated with psychopathy. Those traits related to emotional and interpersonal deficits describe qualities that influence the personalities of psychopaths. These qualities indicate that, in addition to the traits listed above, psychopaths are glib, articulate and have inflated notions of self-worth. They lack remorse and empathy and are deceitful, manipulative, and prone to dramatic, short-lived displays of emotion that are more analogous to stage performance than true human emotion. Finally, psychopaths lack a true understanding of emotion, typically confusing sexual arousal with love and mistaking frustration for sadness (Hare, 1993). In short, although they may seem so upon first impression, psychopaths are not pleasant individuals.

While the emotional and interpersonal traits describe who psychopaths are, those related to social deviance address the behaviours of individuals with psychopathy. Psychopaths are impulsive, in that they do not spend a great deal of time weighing the benefits and consequences of their actions. Indeed, when asked why they have committed various acts, it is not uncommon for psychopaths to respond simply with comments such as 'I did it because I felt like it' (Hare, 1993). In addition to acting impulsively, psychopaths possess poor behavioural controls, which are illustrated by their short tempers and disproportionate responses to frustration, failure, discipline, and criticism. These responses are often characterized by outbursts of violence and threats, which are typically short-lived and followed by 'normal' behaviour, thereby illustrating a failure on the part of psychopaths to acknowledge their misconduct (Hare, 1993). Finally, psychopaths need excitement, lack responsibility and display behavioural problems early in life that often transcend into adult antisocial behaviour (Hare, 1993). Thus, it is clear that in addition to being unpleasant, psychopaths do unpleasant things that are often premised upon sheer disregard for the well-being of others.

The recognition of these emotional and interpersonal traits and those pertaining to social deviance has facilitated the development of the leading instrument that is used for measuring psychopathy. This test, the Psychopathy Checklist-Revised (PCL-R), consists of 20 items related to interpersonal, emotional, and lifestyle traits and behaviours (Babiak & Hare, 2006), which include those described above. The PCL-R is a clinical rating scale that is completed by a trained professional; it is not a self-report test or questionnaire. The information necessary to complete the PCL-R is drawn from an in-depth interview and from the records of the person who is being evaluated (Babiak et al., 2006). Completion of the PCL-R requires the rater to make a judgement as to the degree that each trait applies to the subject. A score ranging from zero (no sign of the trait) to two (clear presence of the trait) must be assigned for each trait, with a score of 40 indicating perfect psychopathy (Babiak et al., 2006). More than 20 years of research has supported the assertion that the PCL-R is the most reliable, valid, and widely used instrument for measuring psychopathy (Hare, 1993).

The PCL-R exists to identify psychopathy as a set of behaviours and traits only, as psychopathy is not recognized as a mental disorder. This is counter-intuitive, as the literal meaning of the term 'psychopath' is 'mental illness' from the roots psyche (mind) and pathos (disease) (Hare, 1993). Yet despite this, the mental health community regards psychopaths as sane because they do not have a distorted sense of reality, and because they are rational and aware of their actions. Further, the mental health community regards the conduct of psychopaths as being derived from a combination of cold rationality and an inability to view others as feeling beings. These are argued to be independent of mental illness (Hare, 1993). As a result, psychopathy continues to be understood as a mere set of traits and behaviours, completely independent of a mental disorder.

However, if psychopathy is not the result of a mental disorder, the question arises as to what does cause these traits and behaviours to develop. There have been some arguments in favour of the contention that psychopathy is related to upbringing, and more specifically that children with difficult childhoods are more prone to psychopathy. However, many individuals who had troubled childhoods do not go on to become psychopaths and more importantly, there are a great number of psychopaths who were raised in loving and nurturing environments (Hare, 1993). Thus it is clear that psychopathy cannot be attributed

solely to environmental factors and, therefore, there must be alternative factors that can more completely explain this set of traits and behaviours.

While environmental factors fail to provide a solid explanation for the development of psychopathy, these factors are clearly connected to the development of antisocial personality disorder (APD). It is useful to discuss APD because it is the closest condition to psychopathy that is currently recognized as a mental disorder. Further, it is generally accepted that, while not all individuals with APD are psychopaths, all criminal psychopaths have APD. A brief overview of the similarities and differences between APD and psychopathy will be provided, highlighting the counterintuitive fact that psychopathy is associated with biological factors, whereas APD is also associated with biological factors, but unlike psychopathy, is highly influenced by environmental triggers.

Prior to discussing this association, some background information about APD will be provided. APD is a mental disorder that is included in the revised fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), which is the standard manual for the definition and diagnosis of mental disorders. APD is defined as “a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood” (American Psychiatric Association, 2000, p. 701). APD can only be diagnosed in individuals who are 18 years-of-age or older and who have displayed a pattern of law-breaking, deceitfulness, impulsivity, aggressive behaviour, reckless disregard for the safety of self and others, lack of remorse, and mistreating or stealing from others since the age of 15 years (American Psychiatric Association, 2000). Furthermore, to make a diagnosis, these behaviours must not be present exclusively during the course of a schizophrenic or manic episode (American Psychiatric Association, 2000). One very important distinction between APD and psychopathy is that the mental health community considers APD a mental disorder, whereas this is not the case for psychopathy.

There are several similarities between APD and psychopathy and each of the aforementioned behaviours associated with APD are consistent with psychopathy. The primary reason for this parallel can be drawn from the history of the term ‘antisocial personality disorder’. When this term was first coined, it was intended to be synonymous with ‘psychopathy’. The goal was to develop a label that would carry essentially the same meaning as ‘psychopathy’ while providing mental health practitioners with a set of diagnostic

criteria that could be objectively identified. The definition of APD and the traits it encompasses thus reflect the socially deviant behaviours associated with psychopathy that can be objectively identified, rather than the personality traits like empathy or perceptions of self-worth, which can be difficult to categorize (Hare, 1993). It is therefore clear that APD and psychopathy are related but that they are not synonymous.

The relation between APD and psychopathy is deeper than mere history suggests. In a recent experiment designed to study the relation between APD and psychopathy, it was found that the two share a common genetic factor (Larsson et al., 2007). Interestingly, it was also noted that psychopaths are not sensitive to environmental stimuli in the development of their behavioural patterns, whereas a greater proportion of those who were subjected to environmental strains developed APD than those who were not exposed to such stressors (Larsson et al., 2007). Thus it becomes clear that environmental factors influence the development of APD while the same is not true for psychopathy. This suggests that APD may be characteristic of behavioural adaptations, whereas psychopathy is more likely to be innate, or hardwired, to the individual. Thus APD and psychopathy are bound by a common genetic factor, yet they differ in that APD is susceptible to external triggers, while psychopathy is not. This means that the major difference between criminal and non-criminal psychopaths may be their environments.

Similarly, Blair (2006) has acknowledged the possibility that there is a genetic factor that predisposes individuals with psychopathy to develop antisocial behaviour. While he argues that it is unlikely that a genetic factor *causes* antisocial behaviour, genetics are recognized as a possible mitigating factor in the expression of antisocial behaviour. More specifically, it is argued that when individuals with certain genetic factors are placed in strenuous environments, genetics may play a role in the probability that those individuals will learn an antisocial, rather than socially acceptable, method of achieving their goals (Blair, 2006). For example, faced with the desire to obtain some money, an individual with a genetic predisposition to antisocial behaviour (i.e., a psychopath or an individual with APD) may choose to steal money, rather than to lawfully withdraw funds from a bank, as would be the more socially acceptable response (Blair, 2006). This illustrates how genetics could play a role in bringing out some psychopathic behaviours in addition to the antisocial behaviours

associated with APD. However, the fact remains that, although APD and psychopathy are meaningfully related through common genetic factors, they are not the same.

The focus of the current research is to argue that individuals with psychopathy are neurobiologically different from their non-psychopathic counterparts and that these differences impact their propensity to violate the law. In making this argument, research will be limited to adult male primary psychopaths, as there has been controversy over the methods used to identify female and juvenile psychopaths. Primary psychopaths have been selected for study, as they have the most pronounced affective deficits and theirs are constitutional rather than learned or due to early emotional trauma which distinguishes them from dyssocial and secondary psychopaths.

The purpose of this research is to provide support for the assertion that psychopathy should be considered akin to a mental disorder and be considered a mitigating factor in the courtroom. In making this argument, neurobiological factors associated with psychopathy will be discussed in relation to the implications they present for the criminal responsibility of individuals with psychopathy. Once it has been established that individuals with psychopathy are neurobiologically different from their non-psychopathic counterparts, a discussion of current sentencing practices in relation to individuals with psychopathy will be provided to illustrate that psychopathy is currently considered an aggravating factor at the sentencing phase. A discussion of legal theory pertaining to mental health provisions in the *Criminal Code* will then be provided. It will be articulated that, while psychopaths are not currently recognized as being protected by these provisions, psychopathy does fit within the definition of a mental disorder as outlined by the *Criminal Code* and case law. Finally, a discussion of treatment options will be provided. It will ultimately be argued that the presence of psychopathy should not totally absolve offenders of their crimes, but should be recognized as a mitigating factor that can be addressed by appropriate sentencing alternatives.

This topic is not a popular one; not surprisingly, as a group, the general population does not favour psychopaths. However, it is important to remember that though they may do terrible things and may even be characterized as 'bad people', psychopaths are nevertheless human beings and have rights and needs just like everyone else. The purpose of this research is to articulate that psychopaths are a product of their biology and as such,

are not fully culpable for their actions. As such, it is important to ensure fair and appropriate responses to psychopaths at the sentencing phase in exactly the same manner as the courts currently attempt to do for offenders with other neurobiological abnormalities that influence their behaviour. In essence, this research is important because, as human beings, psychopaths deserve the same benefits and consideration as all others in the courtroom.

It must be noted that this topic is not entirely novel, as two articles relating to the criminal responsibility of individuals with psychopathy have been published within the last few years. The first was written by Australian researchers, Fine and Kennett, who argue that affective deficits associated with psychopathy hinder the ability of psychopaths to morally develop (Fine & Kennett, 2004). As such, it is argued that individuals with psychopathy are not culpable for their actions, but should remain in custody for the protection of the public (Fine et al., 2004). The second article was written by Canadian researchers Schneider and Nussbaum, who argue that information-processing deficits common to psychopaths should operate to exculpate offenders with psychopathy from criminal responsibility because these deficits make it impossible for psychopaths to understand that their criminal actions are morally wrong (Schneider & Nussbaum, 2007).

While both of these articles make the argument that cognitive and affective deficits should be taken into consideration when trying psychopaths, neither provide an extensive overview of relevant scientific literature. In fact, Schneider and Nussbaum go so far as to describe their review of the scientific literature as “admittedly over-simplified and miniscule” (Schneider et al., 2007, p. 213). Further, both articles focus heavily on moral development, omitting discussion of relevant cognitive-behavioural factors associated with psychopathy that affect criminality. As such, these articles leave room for expansion in the discussion of the criminal responsibility of individuals with psychopathy. This thesis builds on that of Fine and Kennett (2004) and Schneider and Nussbaum (2007). It provides an in-depth analysis of neurobiological research relating to selected cognitive and affective deficits common to psychopaths. Further, this research features case analysis and a discussion of sentencing alternatives for individuals with psychopathy. While the main point of this piece is similar to that of the aforementioned works, each features a different approach. As such, this work may still be considered novel.

CHAPTER ONE: NEUROBIOLOGICAL FACTORS ASSOCIATED WITH PSYCHOPATHY

Clearly, individuals with psychopathy are different from their non-psychopathic counterparts; if they were not, there would be no need for the term. Based on the definition of psychopathy, it is evident that psychopaths act differently, that they conduct their lives differently, and on an emotional level, they feel differently. What is less evident is *why* this is the case. Throughout this chapter it will be argued that in addition to acting and feeling differently from others, individuals with psychopathy are different from their non-psychopathic counterparts in terms of their neurobiology. A discussion of the fear processing deficits associated with psychopathy will be provided first, followed by a discussion of learning deficits and neurotransmitter abnormalities. The implications of each of the neurobiological factors explored will be discussed in relation to criminal behaviour.

1.1 Fear-Processing Deficits

One of the most striking characteristics common to psychopaths is their general lack of fearful expression. This is so striking because fear is one of the most basic human emotions and to be devoid of fear seems both unnatural and inhuman. Yet, if that is true, psychopaths must be the exception to the rule, as they live and breathe each day in the absence of fear. A great deal of research has been conducted to determine whether psychopaths are in fact devoid of fear and, if so, why this might be the case. There is overwhelming agreement that psychopaths possess fear-processing deficits (Birbaumer et al., 2005; Lorenz & Newman, 2002; Patrick, Bradley, & Lang, 1993; Dolan & Fullam, 2006; Dolan et al., 2006). However, the cause of these deficits is less clear.

Nearly fifteen years ago, it was revealed that the startle reflexes of psychopaths differ from those of their non-psychopathic counterparts. One notable study indicated that unlike individuals without psychopathy, when shown pleasant, unpleasant, and neutral pictures, the blinking patterns and heart rates of psychopaths remain constant (Patrick et al., 1993). This

essentially means that psychopaths are not emotionally affected by unpleasant images and do not exhibit signs of fear. More than a decade later, similar experiments were conducted, with a new focus on measuring the brain activity of psychopaths during the presentation of images, ranging in degree of unpleasantness, which were accompanied by the application of painful pressure to the subject. The findings of these studies indicate that psychopaths have highly unusual brain activation patterns, as some parts of the emotion-related brain circuit were found to be significantly overactive, while other parts of the same circuit were severely underactive (Birbaumer et al., 2005; Müller et al., 2003). Thus, psychopaths do not exhibit normal physiological responses to fear.

Psychopaths also show abnormal physiological responses to frightening sentences. Upon listening to sentences designed to elicit fear, the muscular responses of psychopaths remain largely unchanged. It is common for people to unconsciously tense their muscles when they are afraid, yet psychopaths failed to show significant muscular responses to frightening sentences (Patrick, Cuthbert, & Lang, 1994). This suggests that psychopaths have difficulty interpreting such sentences at an emotional level. This further illustrates that psychopaths do not respond to fear in the same way as most other individuals.

In addition to exhibiting diminished physiological responses to fear, there is evidence that psychopaths have difficulty identifying fear expressed by others. Research has indicated that psychopaths have difficulty recognizing fear and sadness in facial expressions, typically misinterpreting them as neutral (Dolan et al., 2006). This is particularly interesting in light of the fact that psychopaths have no difficulty identifying happy facial expressions (Dolan et al., 2006). Thus, while psychopaths are capable of experiencing happiness and recognizing it in others, they appear to have a fear-processing deficit that prevents them from experiencing fear themselves and from recognizing fear in the facial expressions of others.

Despite the fear-processing deficits common among psychopaths, there is evidence that suggests that they do have some conception of the emotion of fear. It would be logical to assume that, because psychopaths cannot normally experience fear or recognize it in facial expressions, they should not be able to identify fearful words; yet, this is not the case (Lorenz et al., 2002). Research shows that psychopaths are able to differentiate between a word that may elicit fear and one that would not. This counter-intuitive ability introduces a central paradox of psychopathy: psychopaths are able to appraise emotional cues but those

cues are meaningless to the psychopath and cannot be used to guide their personal judgements or behaviours (Lorenz et al., 2002).

It has been suggested that the atypical physiological responses of psychopaths to fear may be associated with dysfunction of the amygdala and/or orbitofrontal cortex (OFC) of the brain (Müller et al., 2003). The amygdala, which is located in the temporal lobe of the brain, is associated with impaired startle reflexes and poor recognition of facial expressions, particularly that of fear (Blair, 2006). In contrast, the OFC, which is part of the frontal lobe, is associated with the anticipation of punishment and reward (Birbaumer et al., 2005). The anticipation of negative responses plays an integral role in fear, as fear is typically premised upon the realization that something negative may happen. This results in anxiety until the negative event occurs, or until an intervention takes place to alleviate the anxiety (i.e., it becomes clear that the negative event will not occur). As a result, dysfunction in the OFC, which is associated with the anticipation of negative responses, could logically result in failure to experience fear. Further, OFC dysfunction is associated with increased reactive aggression, which is common among psychopaths (Blair, 2006), thus providing further evidence to support the hypothesis that OFC dysfunction is characteristic of psychopathic individuals.

The fear deficits common to psychopaths have also been explained through the application of the integrated emotions systems (IES) model. The IES model utilizes research that implicates amygdala dysfunction in psychopaths, while providing an alternative explanation to the one outlined above, as to why this dysfunction results in fear deficits. The IES model suggests that an amygdala-based impairment hinders the ability of the individual to be successfully conditioned. While fearful and sad expressions are unconditioned responses to negative stimuli, the association between those expressions and the actions that result in them (e.g., violence) is a conditioned association. As a result, proponents of the IES model postulate that individuals with amygdala dysfunction fail to learn and subsequently recognize the link between fearful and sad experiences and expressions related to those emotions (Dolan et al., 2006).

Although the role of the OFC and amygdala dysfunctions is debatable, there is relative agreement that the OFC and/or amygdala are related to the fear-processing deficits associated with psychopathy. Regardless of their precise causes, these deficits have serious

implications. The first relates to the presumed relationship between fear and moral socialization, as there is some belief that moral socialization is achieved through the use of anticipated punishment, which most people fear, thus resulting in the inhibition of the prohibited behaviour (Hare, 1993). In fact, fear and anxiety have been referred to as the “springboards of conscience” (Hare, 1993 p. 76) because in most people, early childhood punishments produce life-long associations between wrong-doing and fear or anxiety, which are associated with potential punishment (Hare, 1993). However, because psychopaths are less aversively aroused by punishment (resulting from a lack of fear), they make only weak connections between misconduct and punishment and are thus more likely to engage in punishable acts than are individuals without fear deficits (Blair, 2006).

Another important characteristic associated with the lack of fear experienced by psychopaths relates to empathy. Given that psychopaths are unable to recognize fear or sadness in others, it is not surprising that they do not experience empathy; after all, it is impossible to vicariously experience the emotions of others when those emotions are not acknowledged and it is more difficult still when those emotions are foreign to the individual. This bears great importance because there is a counter-belief to the proposition that punishment is necessary for moral socialization that argues that moral socialization is instead achieved through empathy. This assertion is based on research illustrating that children tend to learn better to avoid punishable offences when they understand the effects that their actions have on others than when they are simply punished (Hoffman, 2000). However, for this method of moral education to be effective, it is necessary to be capable of empathy, which clearly presents a problem for the moral socialization of psychopaths.

Another theory suggests that emotional deficits of psychopaths can be explained by a malfunctioning of the right hemisphere. Using functional MRI, it was determined that psychopaths have difficulty activating various regions of the right hemisphere while processing abstract words, performing abstract categorization tasks, and interpreting abstract ideas as conveyed through metaphors. This difficulty acts as an impediment for psychopaths preventing them from completing these tasks (Kiehl et al., 2004). As such, it is suggested that some of the emotional deficits associated with psychopathy may be related to difficulty processing abstract notions, which include abstract emotions, such as love (Kiehl et al., 2004). While empathy is not an emotion, but a state of mind, it is premised upon abstract

concepts that are linked to an awareness of the emotions of others and thus requires the processing of abstract ideas. For this reason, it is possible that the absence of empathy among individuals with psychopathy may be a result of right hemisphere malfunctioning.

The fear deficits of psychopaths are both severe and extensive enough to explain a great deal of psychopathic behaviour. However, these are not the only deficits that are common to individuals with psychopathy. Another notable set of deficiencies that are hosted by psychopaths are those that relate to learning. As such, the focus of this chapter will now shift to address the learning deficits of psychopaths.

1.2 Learning Deficits

Prior to discussing the learning deficits of psychopaths, it is useful to provide some basic definitions that will facilitate greater understanding of the concepts that will be discussed. It is appropriate to provide definitions of ‘stimulus-reinforcement’ and ‘stimulus-response’ associations, as these are the bases of a great deal of research relating to the learning patterns of psychopaths. Both stimulus-reinforcement and stimulus-response associations are learned when an individual’s behaviour is consistently reinforced with the use of punishment or reward. However, stimulus-reinforcement associations are dependent upon changes in reinforcement and thus, as the nature of the reinforcement changes, so too does the behaviour of the individual (Baxter & Murray, 2002). In contrast, stimulus-response associations are insensitive to changes in the reinforcement and thus regardless of how the reinforcement is altered, the behaviour of the individual will remain consistent (Baxter et al., 2002). The two further differ in that neural processing underlying stimulus-reinforcement involves the amygdala, whereas this neuroanatomical structure is not necessary for the successful acquisition of stimulus-response associations (Baxter et al., 2002).

Stimulus-reinforcement is an umbrella term that encompasses several forms of learning, including passive avoidance. Passive avoidance learning is a form of stimulus-reinforcement whereby a punishment is applied each time a particular behaviour is performed. The goal of the punishment is to inhibit the behaviour by creating an association in the individual’s mind between the punishment and that behaviour. As the association that is formed through this method is ultimately one of stimulus-reinforcement,

the amygdala is implicated (Blair et al., 2004). Given the large body of research that has suggested a link between amygdala dysfunction and psychopathy, it is not surprising to learn that psychopaths present deficiencies related to stimulus-reinforcement learning. This can be illustrated through deficiencies that psychopaths present in relation to learning through passive avoidance tasks. Research has shown that, as the level of punishment for a particular behaviour increases, most people modulate their behaviour to avoid punishment; however, this is not the case for individuals with psychopathy (Blair et al., 2004).

In contrast to the failure to modulate behaviour when faced with a passive avoidance learning task, individuals with psychopathy present no difficulty altering their behaviour when faced with stimulus-response learning tasks (Blair et al., 2004). This point introduces an important distinction with reference to the learning deficits associated with psychopathy. Although individuals with psychopathy do not have the cognitive ability to modulate their behaviour as the nature of the reinforcement is changed, when faced with a stimulus-reinforcement task, they are able to learn the initial rule that is taught through the basic stimulus-reinforcement association. This can be explained by referencing back to the abilities of individuals with amygdala dysfunction, who are capable of learning through stimulus-response associations, but are not able to modulate their behaviour accordingly as the reinforcement changes (Baxter et al., 2002). As a result, individuals with amygdala dysfunction are able to grasp initial stimulus-response associations, but are unable to change their behaviour as reinforcements are modified – a step which is necessary to properly develop stimulus-reinforcement associations.

The question may arise as to why the learning deficits of psychopaths are explained by amygdala dysfunction. The reason is that both psychopaths and individuals with amygdala dysfunction perform similarly when faced with learning tasks. To test this assertion, Mitchell et al. (2006) performed an experiment whereby individuals with known amygdala dysfunction were asked to complete a series of learning tasks that were also completed by individuals with psychopathy. When faced with tasks that required the individuals to learn behaviours through the use of stimulus-reinforcement association, both groups performed poorly, presenting evidence of similar difficulties in the development of these associations (Mitchell et al., 2006). These findings have been interpreted to confirm

that there are parallels between individuals with amygdala dysfunction and psychopathy in relation to learning capabilities.

Another important question that arises in the discussion of the link between psychopathy and amygdala dysfunction refers to the behaviours of non-psychopaths with amygdala dysfunction. If it is true that amygdala dysfunction can explain several of the behaviours associated with psychopathy, why then are there individuals who have amygdala dysfunction but are not psychopaths? Though this is a logical question, its answer does not affect the strength of the hypothesis that amygdala dysfunction may help to explain the behaviours of psychopaths. Although it is true that the amygdala is required for several forms of learning, an injury sustained in the amygdala will not wipe out information that had been acquired prior to that injury (Blair, 2006). As a result, individuals who sustain injuries to the amygdala later in life have typically already formed the associations necessary to inhibit antisocial behaviour. Thus amygdala dysfunction can help to explain the behaviours of individuals with psychopathy; however, amygdala dysfunction is not synonymous with psychopathy.

Despite the existence of research indicating a strong link between psychopathy and amygdala dysfunction, there is reason to believe that the learning deficits associated with psychopathy are not caused solely by this dysfunction. In an attempt to better understand the behaviours of psychopaths, a study that included two experiments was carried out. The first experiment tested the ability of psychopaths to complete a learning task that is known to implicate the OFC of the brain, while the second tested their ability to complete a learning task that is thought to implicate either the amygdala or OFC (Mitchell, Colledge, Leonard, & Blair, 2002). The rationale behind this experiment was to determine whether OFC dysfunction may be a factor associated with psychopathy. The central hypothesis was that, if the psychopathic participants were unable to complete the task known to involve the OFC, dysfunction of this structure may help to explain some of the deficits associated with psychopathy that were previously thought to be associated with the amygdala despite the knowledge that some of these deficits could implicate either of these neuroanatomical structures (Mitchell et al., 2002). Subjects with psychopathy did have difficulty completing the task involving the OFC and thus there is reason to believe that some of the learning

deficits associated with psychopathy may be linked to dysfunction of the OFC (Mitchell et al., 2002).

The second experiment in the abovementioned study is of particular interest, as it tested the ability of psychopaths to learn stimulus-response associations and to subsequently apply the information learned from the associations to avoid making 'risky' decisions (Mitchell et al., 2002). The experiment required individuals with and without psychopathy to select cards from one of four decks, each of which was associated with a set of potential consequences and rewards. The experiment was designed so that it would become clear which decks were most advantageous through the process of trial and error, thus facilitating stimulus-response associations (Mitchell et al., 2002). Though psychopaths are able to acquire information from stimulus-response associations, this experiment illustrated that psychopaths were less likely than those without psychopathy to learn and apply the associations necessary to avoid making 'risky' decisions (Mitchell et al., 2002). Thus, despite awareness that some of the decks were advantageous, psychopaths would continue to select cards from the less advantageous decks. This suggests that psychopaths are apt to participate in high-risk behaviour.

Contrary to the typical assumption that the stimulus-reinforcement deficit is caused by a dysfunction of the amygdala, Mitchell et al. (2002) interpreted the propensity of psychopathic participants to make high-risk decisions to indicate a dysfunction either of the amygdala or OFC, or of the connections between the amygdala and the OFC (Mitchell et al., 2002). This interpretation was based on the first finding of the study, which indicates that the OFC may have a role in explaining some of the deficits associated with psychopathy (Mitchell et al., 2002). This suggests that the roots of the learning deficits common to psychopaths may be more complex than other interpretations have suggested. The amygdala and OFC are part of a neural circuit that is believed to play a crucial role in the interpretation and neurological imprinting of information regarding learned associations and their motivational value (Mitchell et al., 2002). As a result, difficulty with stimulus-reinforcement associations could indicate a dysfunction with any part of this neural circuit. Furthermore, it is possible that both the amygdala and the OFC dysfunctions are caused by a third abnormality, which may be the true source of the learning deficits common to psychopaths (Mitchell et al., 2002).

There is still another theory that posits to explain why psychopaths present with learning deficits. The response modulation hypothesis (RMH) has been used to explain these deficits as a consequence of deficient emotional processes (Lorenz et al., 2002). Response modulation is a brief, automatic shift of attention from one focal point to another. This shift of attention allows individuals to monitor, and if relevant, use information that is outside their deliberate focus of attention (Lorenz et al., 2002). According to the RMH, in addition to the learning and emotion-processing deficits of psychopaths, many of the behavioural problems may be related to a failure to meaningfully process peripheral information (Lorenz et al., 2002). This means that the source of many deficiencies associated with psychopathy may actually be caused by an inability to readily shift from one focus of attention to another. This can easily be applied to stimulus-reinforcement associations; for example, according to the RMH, it may be possible for psychopaths to learn to avoid prohibited behaviour through passive avoidance if the *goal* of the psychopath is to avoid punishment while completing the task. However, if the psychopath is focusing on an alternative goal during completion of the task, the negative association between the punishment and behaviour will remain a peripheral focus and the inability to shift attention will prevent the formation of a meaningful association (Lorenz et al., 2002).

The fact that psychopaths have difficulty using learned associations to guide their behaviour is of interest. One of the aforementioned experiments was designed to measure the likelihood that psychopaths would use learned associations to avoid risky behaviour (Mitchell et al., 2002) and, therefore, has clear implications. This experiment which used the gambling task, can be considered somewhat analogous to the legal system. The decks that were used in the experiment can be considered to represent the two paths that stand before each individual: the path of law-abiding behaviour, and that of misconduct. Individuals who select the path of legal obedience are rewarded with continued liberty; those who select the path of misconduct are subject to legal sanctions. However, psychopaths have difficulty internalizing these associations in a meaningful way and thus participate in 'risky' behaviours that are sometimes punishable. As a result, the inability to learn to avoid 'risky' decisions presents a conundrum in relation to psychopaths and the criminal justice system.

Just as it is unclear as to what causes the fear-processing deficits of psychopaths, the cause of the learning deficits associated with psychopathy is also unclear. However, much

like the fear-processing deficits, the implications of those pertaining to learning are serious regardless of the fact that a specific cause remains unknown. The aforementioned learning deficits combine to illustrate the point that psychopaths are neurobiologically different from their non-psychopathic counterparts. One thing that is clear from the above discussion of learning deficits is that the brains of psychopaths work differently and are comparable to those of individuals with brain damage resulting in amygdala and/or OFC dysfunction.

Indeed, the learning deficits associated with psychopathy are serious and help to explain a great deal of the behaviours of psychopaths. Yet there is still another body of research relating to the biological factors associated with psychopathy that contributes to the explanation of the behaviours allied with psychopathy. This remaining body of research relates to neurotransmitter abnormalities

1.3 Neurotransmitter Abnormalities

Prior to discussing the role of neurotransmitters in the behaviours of individuals with psychopathy, it is useful to provide some background information regarding the concept of neurotransmission. Neurotransmitters are chemicals that transmit impulses across synapses, which form a junction between nerve cells. They are secreted from the presynaptic site and act at the postsynaptic receptor (Lawrence, 2005). Thus neurotransmitters make communication possible from one nerve cell to another. The message that is sent is dependent upon the type of neurotransmitter released into the synapse and the type of receptor at the postsynaptic site (i.e., the part of the synapse that the neurotransmitter acts upon). Neurotransmitters can send messages related to processes such as urges, emotions, and physical sensations (Lawrence, 2005).

Research pertaining to neurotransmitters and psychopathy suggest that psychopaths have reduced serotonin (5-hydroxytryptamine) activity (Dolan, 1994). More recent research suggests that behavioural problems characteristic of individuals with psychopathy are linked to both serotonin and dopamine levels (Soderstrom, Blennow, Manhem.A, & Forsman, 2001; Soderstrom, Blennow, Sjodin, & Forsman, 2003). It has been suggested that aggressive behaviours associated with psychopathy are related to the ratio of cerebrospinal fluid homovanillic acid (HVA), a metabolite of the neurotransmitter dopamine, and 5-hydroxyindolacetic acid (5-HIAA), a metabolite of the neurotransmitter serotonin

(Soderstrom et al., 2003). More specifically, psychopaths tend to have a higher ratio of HVA to 5-HIAA (Soderstrom et al., 2003). These findings may explain the outwardly directed aggressive behaviours that are often exhibited by psychopaths, in addition to the disorganized behaviours such as the need for stimulation, poor behavioural controls, impulsivity, and irresponsibility that are so common among individuals with psychopathy (Soderstrom et al., 2003). Soderstrom et al. (2003) raise the possibility that aggression associated with psychopathy may relate to high dopamine turnover in combination with relative serotonergic dysregulation. They suggest that the high dopamine turnover may be an adaptation to postsynaptic dysfunction or due to deficient serotonergic tonic regulation of the dopamine system, and that pharmacological interventions targeting the dopamine and serotonin systems may be beneficial in terms of reducing the aggression associated with psychopathy. Neurotransmitter abnormalities are of great interest because they may provide an important step towards the development of successful medical interventions for management of some of the traits associated with psychopathy. They also provide further evidence to support the contention that psychopaths are indeed biologically different from non-psychopaths.

1.4 Conclusion

Although an attempt has been made to recognize aspects of psychopathy as a mental disorder by including APD in the DSM-IV-TR, APD does not mirror psychopathy. At present, psychopathy is not recognized by the medical or mental health community as anything other than a set of behaviours and traits. This is strange given that so many of the behaviours that are characteristic of psychopathy can be explained by neurobiological abnormalities.

The exact causes of the fear-processing and learning deficits, in addition to the neurotransmitter abnormalities experienced by psychopaths, remains unclear. However, a great deal of the research focusing on the neurobiological differences between psychopaths and their non-psychopathic counterparts has emphasized dysfunctions of the amygdala and OFC of the brain, suggesting that psychopathy is likely related to some form of frontal and/or temporal lobe dysfunction. However, research that implicates genetic variations and neurotransmitters cannot be overlooked. It seems quite likely that psychopathy is mediated

by genetic factors, neurotransmitter abnormalities and the aforementioned frontal and temporal lobe dysfunctions.

While it is useful to connect potential causes with the biological abnormalities that are associated with psychopathy, what it is most important is an acknowledgement that psychopaths are neurobiologically different from their non-psychopathic counterparts. These differences influence the behaviours of psychopaths to the extent that many of the antisocial behaviours of individuals with psychopathy can be explained with reference to neurobiological differences. This is significant; it means that, contrary to popular belief, psychopaths are indeed victims of their own biology, acting out in accordance with neurobiological systems that have failed them, preventing them from forming 'normal' emotions and associations, thereby resulting in antisocial behaviour. Psychopaths are by no means pleasant individuals but, when assessing their misconduct, it is imperative to remember that their behaviours are related to neurobiological dysfunction, much like that of individuals who have mental disorders that are catalogued in the DSM IV-TR.

CHAPTER TWO: CASE ANALYSIS OF SENTENCING PRACTICES

In the previous chapter, it was established that individuals with psychopathy have neurobiological differences that influence their behaviours and propensity to break the law. Accordingly, it was argued that psychopaths cannot logically be held fully accountable for their wrongdoings, as psychopaths are, to at least some extent, the products of their own neurobiology. Thus, it follows that psychopathy should be taken into consideration prior to sentencing an offender. This chapter will discuss current sentencing practices as they relate to individuals with psychopathy. Following an overview of the literature relating to sentencing practices, an analysis of sentencing decisions in Canadian cases relating to psychopaths will be provided to illustrate the reality that psychopathy is typically considered an aggravating factor in sentencing decisions. This analysis will be contrasted with an examination of sentencing decisions handed down to individuals with fetal alcohol spectrum disorder (FASD). FASD was selected for comparison because individuals with FASD present with some behavioural traits and learning deficits that are similar to those associated with psychopathy and because it is a permanent, congenital, untreatable disorder.

2.1 Literature Review

2.1.1 Sentencing individuals with psychopathy

In practice, judges generally take psychopathy into consideration during the sentencing phase. However, they most frequently recognize psychopathy as an aggravating factor. Canadian research indicates that, when mental health professionals are called upon to give expert evidence relating to psychopathy, the courts appear to be influenced by the testimony provided (Zinger & Forth, 1998). Most commonly, the evidence provided by experts is used to justify longer sentences (Zinger et al., 1998; Hare, 1998), as psychopathy is typically considered to be an aggravating factor in determining criminal responsibility in most Canadian jurisdictions (Hare, 1998). It is likely that this phenomenon is related to the

fact that testimony depicting psychopaths as untreatable offers judges a “hard-to-resist justification” for harsher sentences imposed against psychopaths (Zinger et al., 1998).

In Canada, the maximum sentence that an offender can receive for first-degree murder is life imprisonment with a non-parole-eligibility period of 25 years, as outlined in section 745 of the *Criminal Code* (see Appendix A) (*Criminal Code*, 1985). However, for offences other than murder, it is possible for an offender to receive an indeterminate sentence that could ultimately exceed 25 years under the dangerous offender provisions, outlined in section 753(4) of the *Criminal Code* (see Appendix A) (*Criminal Code*, 1985). Section 753(1) of the *Criminal Code* (see Appendix A) outlines the application process to have an offender declared a dangerous offender (*Criminal Code*, 1985). Prior to declaring an individual a dangerous offender, it must be shown that the offender has a pattern of harmful and aggressive behaviour that is unlikely to be inhibited in future (*Criminal Code*, 1985). Not surprisingly, this describes the behaviour of many psychopaths and, as a result, psychopathy has been used to justify the declaration of dangerous offender status culminating in indeterminate sentences for many individuals with psychopathy (Zinger et al., 1998). Indeed, it appears that judges equate psychopathy with violent recidivism (Zinger et al., 1998).

While psychopathy may unofficially be considered grounds to declare an individual a dangerous offender in Canada, in the United States, psychopathy appears to be linked to the likelihood that an offender will be sentenced to death. Using a mock jury, a study was designed to test the effects of evidence relating to the presence of psychopathy, psychosis, and mental illness in defendants on jury decisions. More specifically, the study was designed to test whether evidence of any of the aforementioned conditions would increase the likelihood of mock juries to sentence offenders to death (Edens, Colwell, Desforges, & Fernandez, 2005). The findings suggest that expert testimony indicating the presence of psychopathy results in a heightened perception of dangerousness (Edens et al., 2005). It was further determined that the identification of psychopathy using the PCL-R results in an “appreciably” higher rate of jury participants supporting capital punishment than when presented with evidence that defendants are mentally ill or psychotic (Edens et al., 2005). Conversely, expert evidence supporting the presence of psychosis appears to have a mitigating effect, as jury participants had the lowest level of support for capital punishment in cases with psychotic offenders (Edens et al., 2005). Thus unlike recognized mental

disorders, which are considered mitigating factors, psychopathy is perceived as an aggravating factor.

2.1.2 Sentencing individuals with fetal alcohol spectrum disorder (FASD)

Prior to discussing sentencing practices as they pertain to FASD, it is useful to provide some background information. The disorder referred to as FASD was initially defined in 1973 as fetal alcohol syndrome (FAS) (Verbrugge, 2003). The term FAS was used to describe the craniofacial abnormality, growth deficiency, and central nervous system dysfunction present among individuals whose mothers chronically abused alcohol during pregnancy (Verbrugge, 2003). Individuals who were presumed to have alcohol-related dysfunctions that did not fit within the definition of FAS were believed to have fetal alcohol effect (FAE), which was used as a catch-all diagnosis associated with prenatal maternal alcohol abuse (Bookstein, Sampson, Streissguth, & Connor, 2001). FAE was not associated with craniofacial abnormalities and was believed to play a less significant role in behavioural and neurological dysfunctions than was FAS (Bookstein et al., 2001). As research on FAS and FAE was conducted and information was gathered, it became clear that the relationship between the two was more complex than originally thought. FAS and FAE are now recognized as two parts of the same spectrum disorder and are thus referred to as FASD. This was first established when it became clear that FAS and FAE share common neurological dysfunctions related to the brain stem and corpus callosum. It was further regarded that with the use of MRI technology, it is not possible to distinguish between FAS and FAE, thus indicating a high level of commonality between the two, thereby suggesting that they are part of a larger spectrum of related disorders (Bookstein et al., 2001).

Given this research, dysfunctions associated with maternal prenatal consumption of alcohol is now discussed in terms of FASD, which is an umbrella term that encompasses diagnostic categories associated with the effects of prenatal alcohol consumption (Verbrugge, 2003). There are two categories of FASD, which are useful for explaining the disorder, but are now typically discussed as FASD instead of by their more specific names. The first is Alcohol-Related Birth Defects (ARBD). Individuals with ARBD are those who have congenital abnormalities related to the heart, skeleton, kidneys, eyes, and ears (Verbrugge, 2003). In contrast, individuals with Alcohol-Related Neuro-Developmental

Disorder (ARND) are afflicted with nervous system developmental abnormalities. Features include cognitive and behavioural abnormalities such as poor academic performance, learning difficulties, poor impulse control, deficits in receptive and expressive language, poor capacity for abstraction or meta-cognition, difficulty connecting actions with consequences, brief attention span, and poor judgement. It is this cluster of features that was typically previously diagnosed as FAE (Center for Disabilities, 2002; Verbrugge, 2003).

The pronounced impulsivity common among individuals with FASD may manifest itself in such conduct as deception, stealing, and participation in deviant acts (Center for Disabilities, 2002). The poor judgement of individuals with FASD is exemplified by the fact that they have trouble identifying and assessing dangerous situations (Center for Disabilities, 2002). Further, offenders who have FASD are prone to becoming frustrated and overreacting in impulsive and violent ways (Chartrand & Forbes-Chilibek, 2003). FASD should not be confused with psychopathy; they are not the same and are not diagnostically related. However, based on the aforementioned traits associated with FASD, it is clear that there are several characteristics shared by individuals with FASD and psychopathy. Both conditions are related to deceptive, impulsive, antisocial behaviour. Both result in learning deficits and difficulty understanding abstract concepts, and both result in difficulty appraising dangerousness. Each of these characteristics impacts propensity to commit crime.

Over the past three decades, FASD has been considered both an aggravating and mitigating factor at sentencing (Verbrugge, 2003). Research suggests that across Canada, the courts have been inconsistent and divided on how to sentence individuals with FASD (Chartrand et al., 2003). Traditional sentencing principles emphasize punishment and deterrence. However, neither punishment nor deterrence have much effect on offenders with FASD because the biological nature of the disorder impedes their ability to connect actions with consequences (e.g., antisocial behaviour results in legal sanctioning) or to adapt their behaviour (Chartrand et al., 2003). As a result, it became common to argue in youth courts (where FASD is more likely to be mentioned because it more likely to be diagnosed in young offenders than adults) that since FASD is untreatable, individuals with the disorder possess an ongoing threat to society and should thus receive longer sentences (Verbrugge, 2003).

However, there is a growing trend to recognize the cognitive and intellectual deficits associated with FASD as mitigating factors with respect to degree of responsibility (Verbrugge, 2003). This trend is based on the argument that individuals with FASD are less able to restrain their behaviour and are thus less responsible when they fail to exercise restraint and commit criminal acts (Verbrugge, 2003). Further, in contrast to the *Young Offenders Act*, the *Youth Criminal Justice Act* provides alternatives that can be applied in cases involving youth with FASD. As a result, FASD is now typically considered a mitigating factor in youth courts (Verbrugge, 2003). There is also some movement among judges to recognize FASD as a mitigating factor in adults, yet there are no specific provisions in the *Criminal Code* for adult offenders with FASD and as a result, judges remain divided on how to sentence such offenders (Chartrand et al., 2003).

2.2 Focus of Current Research

The focus of this chapter will now shift to an analysis of Canadian sentencing decisions in cases where the offender had either psychopathy or FASD. The purpose of this analysis is to observe current sentencing trends as they relate to psychopathy and FASD individually and to then compare and contrast the observed trends. FASD was selected for comparison to psychopathy because, like psychopathy, it is a congenital, untreatable disorder. Further, individuals with FASD present with many characteristics similar to those in individuals with psychopathy.

This analysis is important in developing a full understanding of how psychopathy is perceived in the courtroom both independently from, and in comparison to, a disorder with some similar characteristics. It is necessary to come to a comprehensive understanding of how judges respond to psychopathy at the sentencing stage in order to determine whether individuals with psychopathy are being sentenced appropriately. If it is shown that they are not being sentenced appropriately, this analysis will provide information to suggest how sentencing for individuals with psychopathy may be adjusted. It is hypothesized that, despite the commonalities between psychopathy and FASD, psychopathy will be found to be an aggravating factor while FASD will be a mitigating factor in most cases.

2.3 Methods

Sentencing decisions for individuals with psychopathy and FASD were identified using the Quicklaw database. The search terms used to identify decisions were: “psychopath AND sentence” and “fetal alcohol AND sentence”. In 1997, the dangerous offender provision was redrafted so that offenders who may meet the criteria to be labelled as dangerous offenders, but whose behaviour can be controlled in the community, may instead be labelled as long-term offenders (Department of Justice Canada, 2006). This was reaffirmed in the case of *R. v. Johnson* (2003), where the Supreme Court of Canada indicated that the designation of long-term offender must be considered before applying the status of dangerous offender and that if the necessary conditions to be designated a long-term offender can be satisfied, the offender should not be sentenced as a dangerous offender. As outlined in section 753.1(1) (see Appendix A), long-term offenders will be sentenced to a fixed period of imprisonment followed by up to 10 years of intensive supervision in the community. To ensure that the same legislation was applied in all cases addressed here, cases heard prior to the redrafting of this legislation were excluded from this analysis. Case selection was further limited to adult male offenders, as this is the study population addressed throughout this work.

Decisions for offenders who were labelled as psychopaths by the judge in the absence of expert testimony or evidence of tests indicating psychopathy were eliminated from the analysis because it was not clear that those individuals truly were psychopaths. In addition, cases where the judge did not accept that an offender was psychopathic were eliminated because it is not within the scope of this analysis to study how judges perceive expert evidence on the presence of psychopathy, but instead to study how they reacted when they did accept that an offender was psychopathic. All cases of adult male offenders who were believed to suffer from FASD were included in the analysis.

Owing to the overwhelming number of cases involving offenders with psychopathy and FASD, sentencing decisions were further limited to those heard in British Columbia, Ontario, and Nova Scotia. One of the primary criteria for selecting these provinces was to ensure that all Canadian regions were represented in the analysis. Thus one province from eastern, western, and central Canada was selected. British Columbia was selected to represent western Canada because it is the province where the research was conducted.

Ontario was selected to represent central Canada since it has the largest population and would be likely to generate the most substantial number of relevant cases. Finally, Nova Scotia was selected to represent eastern Canada because it has the largest population in that region and, of all the eastern provinces, it is the closest demographic match to British Columbia (Canadian Council on Social Development, 2007).

In assessing cases relating to offenders with psychopathy, expert testimony, use of the PCL-R, and mention of psychopathy in the judge's decision were considered. Similarly, in assessing cases relating to offenders with FASD, expert testimony, use of assessment tools to diagnose FASD, and mention of FASD in the judge's decision were considered. The psychopathy sentencing decisions were assessed first, followed by the sentencing decisions for cases involving FASD offenders. Finally, sentencing decisions for cases involving offenders with psychopathy were compared and contrasted to those involving offenders with FASD.

In all cases, either psychopathy or FASD was mentioned in the case at least once. In each case, there was a brief summary of the case and relevant information located in a head note at the beginning of the document. As all cases mentioned either psychopathy or FASD at least once, it is accepted that the judges believed that these disorders were relevant to the decisions provided. However, this analysis is concerned primarily with the section of each case that outlines the judge's final decision in relation to the sentence handed down. This section is generally found at the end of the case and typically includes the rationale for assigning the sentence in question. This section was selected for more focused study because this is where judges most explicitly express how various factors associated with each case impacted their decisions. As such, focusing on this section provides the clearest picture of how psychopathy and FASD impact the decisions without resorting to a great deal of inference about the judges' decisions. Throughout the analysis provided below, the section described above will be referred to as the "reasons" provided by the judge.

2.4 Findings

2.4.1 Overview

In total, 41 cases involving offenders with psychopathy and 19 cases involving offenders with FASD were identified (for a list of all cases identified, please see Appendix B). A breakdown of the number of offenders who committed various offences is provided in Table 1. After ranking the proportion of offenders whose crimes fall within the categories of offences committed, it becomes evident that, overall, the types of crimes committed by offenders with psychopathy were not very different from those committed by offenders with FASD. It is useful to discuss the proportion of various types of crimes rather than the number of offenders who committed those crimes because the sample sizes of psychopathy and FASD cases are different.

For both psychopathy and FASD, the largest proportion of cases were concentrated in the category of sexual offences (psychopathy $n=51.22\%$, FASD $n=41.11\%$), which includes sexual assault and sexual assault compounded with robbery. Similarly, for both psychopathy and FASD, the second largest proportion of cases were concentrated in the category of breaking and entering (B&E) (psychopathy $n=19.51\%$, FASD $n=36.84\%$), which includes B&E, B&E compounded with assault, and B&E compounded with kidnapping. While the third largest proportion of psychopathy cases are categorized as assaults ($n=17.07\%$), the third largest proportion of FASD cases are categorized as impaired driving ($n=10.53\%$). Offences related to murder/manslaughter, including attempted murder, manslaughter, and second-degree murder comprise the fourth largest category for both psychopathy ($n=9.76\%$) and FASD ($n=5.26\%$). However, breach of probation ties with this category for FASD ($n=5.26\%$), with this being the fifth most common offence among psychopaths ($n=2.44\%$).

Table 1: Case Breakdowns by Offence

Offence	Number of Cases		Percentage of Cases	
	Psychopathy	FASD	Psychopathy	FASD
Assault				
Aggravated Assault	3	0	7.32%	0.00%
Assault	4	0	9.76%	0.00%
<i>Category Total</i>	7	0	17.08%	0.00%
Breach of Probation	1	1	2.44%	5.26%
Breaking and Entering (B&E)				
B&E	3	6	7.32%	31.58%
B&E AND Assault	4	1	9.76%	5.26%
B&E AND Kidnapping	1	0	2.44%	0.00%
<i>Category Total</i>	8	7	19.52%	36.84%
Impaired Driving	0	2	0.00%	10.53%
Murder/Manslaughter				
Attempted Murder	1	0	2.44%	0.00%
Manslaughter	2	1	4.88%	5.26%
Second-Degree Murder	1	0	2.44%	0.00%
<i>Category Total</i>	4	1	9.76%	5.26%
Sexual Assault				
Sexual Assault	17	6	41.46%	31.58%
Sexual Assault AND Robbery	4	2	9.76%	10.53%
<i>Category Total</i>	21	8	51.22%	42.11%
Total	41	19	100.00%	100.00%

2.4.2 Psychopathy

In total, 41 sentencing decisions involving offenders with psychopathy in British Columbia, Ontario and Nova Scotia were identified (for a breakdown of cases involving psychopathy, see Figure 1). In 22 of these cases, psychopathy was mentioned in the reasons that the judges provided for the sentence. In all 22 cases, psychopathy was expressed in terms of risk for recidivism. Though psychopathy was never overtly listed as an aggravating factor, it was consistently implied to be such.

The most overt example of a judge implying that psychopathy was perceived as an aggravating factor can be found in *R. v. A.N.* (2002), where Justice Wilson listed psychopathy in a paragraph outlining other clear aggravating factors:

Mr. A.N. has a serious, long-standing addiction to crack cocaine. He has poly drug dependencies. He is diagnosed as having a severe anti-social personality disorder. According to the PCLR, he meets the cut-off for the diagnosis of psychopathy. His actuarial studies place him at high risk to reoffend. The VRAG places him in the 7th out of a possible 9 bins, and suggests that actuarially the prediction for the risk of

violent recidivism is 64% in the next ten years. The LSIR predicts the likelihood of recidivism, either violently, or non-violently, as 48% for the one year following release (para. 253).

Similarly, in *R. v. W.T.W.* (1997), Justice Callaghan mentioned psychopathy in addressing the risk that the offender poses to the community, clearly implying that the offender's psychopathy impacted the decision:

W.T.W. has a very severe personality disorder. He is very clearly a psychopath. In my view, based on the material before me, I have concluded that there is no real possibility that future therapeutic interventions will be effective and that, if released, he would continue as a sadistic sexual deviant by committing further violent sexual offences. The paramount consideration must be protection of the public, and the only way of ensuring that the public is protected is to remove this offender from society. For the reasons given, it follows that an indeterminate sentence must be imposed (paras. 38-39).

Psychopathy was also clearly an aggravating factor in *R. v. M.J.O.* (2005), where Justice Langdon stated:

Based on the trail of human misery and destruction, mostly psychological, that you have left in your wake and on the entrenched and hard-to-treat psychopathy that you possess, not much of an argument can be mustered against a life sentence based on you, as an offender (para. 193).

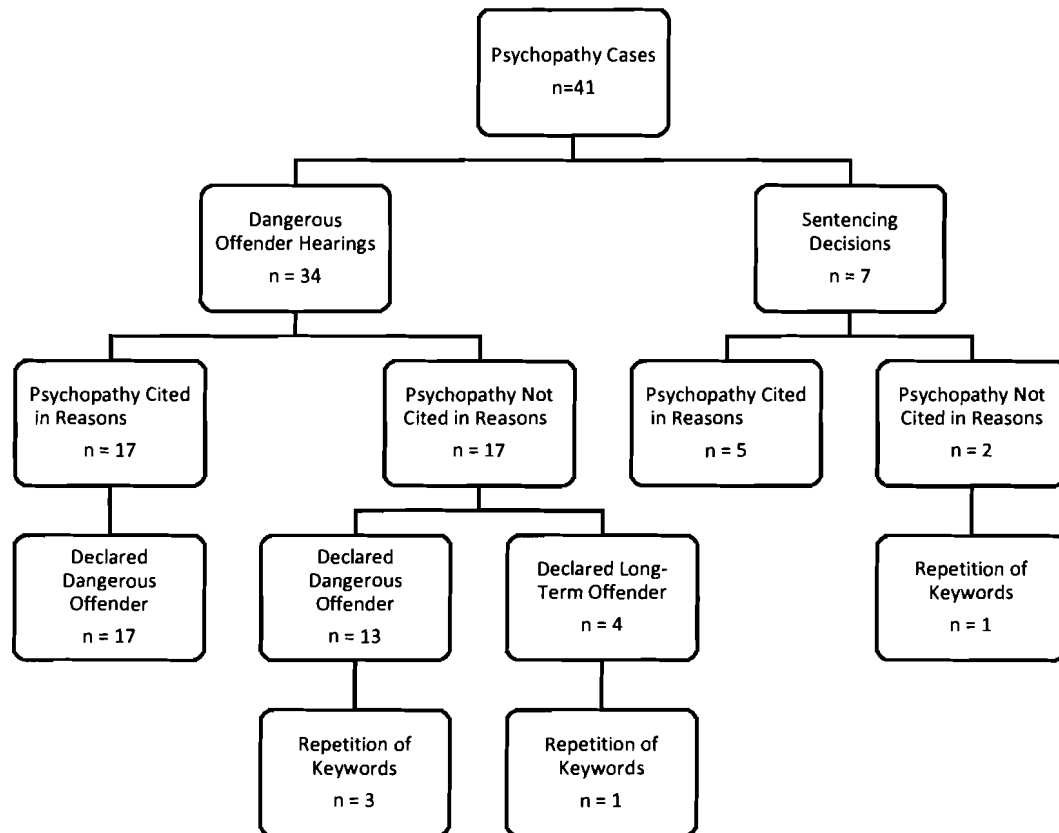
Some judges were more cautious in their discussions of the impact that the offender's psychopathy had on their decisions. In five of the cases that did not overtly mention psychopathy, the judge insinuated that psychopathy impacted the decision by repeating key words that experts who gave testimony in the case used to describe psychopathy. For example, in *R. v. Bennett* (2002), which was a sentencing appeal, the expert at the initial trial explained that psychopaths are manipulative, superficially charming, and deceptive. In handing down the original sentence, Justice Parrett explained:

There is before the court on this hearing an extensive body of evidence which in my view establishes beyond a reasonable doubt the fact that the accused is manipulative and superficially charming, easily fabricating stories and evidence to achieve his perceived goals. He is intelligent and very adept at spinning seemingly credible stories which get him what he wishes (para.11).

Not only does this passage repeat the words used by the expert, it accurately describes psychopathic behaviour, without actually using the word 'psychopath'. On appeal, Justice Huddart did not use the word either, but did not refute the reasons provided by Justice Parrett or alter the sentence (*R. v. Bennett*, 2002).

In total, 34 of the 41 cases involving offenders with psychopathy were dangerous offender hearings and the remaining 7 cases outlined the sentencing decisions for offenders for whom the Crown did not seek dangerous offender status (see Figure 1). It is useful to consider the dangerous offender hearings separately from the remaining seven sentencing decisions because the cases were quite different.

Figure 1: Breakdown of Psychopathy Cases by Outcome



Conversely, in the cases where psychopathy was mentioned in the reasons provided by the judge, many more of the experts failed to provide sufficient information regarding the methods they used to identify the offenders as psychopathic. In 2 cases, one expert failed to mention the tool used to identify the level of psychopathy and did not provide any specific test scores which would have indicated the use of particular assessment tools. In 3 cases, 2 out of 3 experts failed to provide information relating to the assessment methods that were used to identify the offender as a psychopath. In fact, in *R. v. Sipos* (1998), 2 of the experts provided no mention of the tools that they used to arrive at their conclusions that the

offender had psychopathy, and the third, who used the PCL-R, assigned the offender a score of 16 out of a possible 40, indicating that the offender was not a psychopath. However, the offender was nevertheless labelled as a psychopath and his psychopathy was inferred to be an aggravating factor (*R. v. Sipos*, 1998).

Finally, in five of the 17 cases where psychopathy was mentioned in the reasons provided by the judge, none of the experts provided information about how they arrived at their conclusions. The most surprising of these cases was *R. v. Shrubbsall* (2001), where the first two experts provided no information about the method used when deciding that the offender had psychopathy, and the third expert did not use any assessment tool at all. What is particularly striking about this case is that Judge Cacchione unequivocally accepted the testimony of the third expert, stating that his "experienced clinical judgement more than compensates for his not employing actuarial risk assessment instruments" (*R. v. Shrubbsall* (2001, para. 190). This suggests that the quality of evidence presented in cases regarding level of psychopathy is not as relevant as the assertion that an offender is psychopathic.

As mentioned above, in addition to the 34 dangerous offender hearings, there were 7 cases that outlined the sentences provided to offenders for whom the Crown did not seek dangerous offender status. In 5 out of 7 of these cases, the judge mentioned psychopathy when providing the reasons for the sentence applied, and in 2 cases, there was no mention of the methods used to identify the level of psychopathy in the offender. Conversely, both of the cases where psychopathy was not mentioned in the reasons included information about the tools used by the experts to identify the level of psychopathy. It is noteworthy that the sentencing decisions typically involved only one expert who gave testimony, while those for dangerous offenders typically involved 2 or 3 experts.

2.4.3 Fetal alcohol spectrum disorder

In total, 19 sentencing decisions involving offenders with FASD in British Columbia, Ontario and Nova Scotia were identified. Of these 19 cases, 10 included mention of the disorder by the judge in the reasons for the sentence. While FASD was not found to be an aggravating factor in any of these cases, it was explicitly listed as a mitigating factor in 3 cases. For example, in *R. v. W.P.W.* (2005), Justice Dohm used the word 'mitigating', providing the following summary to the court:

The next mitigating factor I was directed to is a report of Dr. Nielson, a psychologist who spoke of his childhood, his victimization, the fact that he suffers from fetal alcohol syndrome and that he does not apparently minimize or deny his offences. Those things are most important when it comes to the treatability of the offender (para. 21).

In *R. v. Dayfoot* (2007), Justice Shamai went as far as to explain that to punish an individual with FASD goes against the principles of Canadian law:

In my view it is important, in light of the unusually detailed evidentiary base in this case, to review the propriety of conditional sentence for a crime of violence in the presence of confirmed Alcohol Related Neurodevelopmental Disorder. The pattern of non-compliance with court orders is symptomatic of ARND, it appears. The violence in this case is at a low level, being expressed in words and threats rather than causing bodily harm. It is in a setting where the accused Mr. Dayfoot was negatively influenced by his co-accused. Again this is symptomatic of a person suffering ARND. To punish behaviour which results from a clinically recognized disability runs contrary to the principles of criminal law (para. 21).

In addition to the 3 cases where FASD was overtly considered a mitigating factor, there were 4 cases where the judges implied that FASD was considered a mitigating factor. Such can be seen in the case of *R. v. J.H.* (2002), where Justice Trueman discusses “cognitively challenged” individuals, without actually naming FASD as he spoke of just sanctions:

I do not believe that Canadians will think it a “just sanction” that a man who is cognitively challenged should be incarcerated on the principle that his jail sentence would denounce criminal conduct generally. I do not believe they would find it a “just sanction”, on principle, to jail him to deter others. I do not believe that, on the facts of this case, they would think he should be separated from society to keep them safe (para. 128).

Further, in *R. v. Mumford* (2007), Justice Kiteley appears to show the offender compassion and understanding with regard to previous failures to follow through with treatment as it was explained that the offender would be declared a long-term offender instead of a dangerous offender:

You told me that you want treatment. You have said that in the past and you have not followed through. But now we know that you have Fetal Alcohol Syndrome. Now the prison authorities can create programs that you can understand. I am counting on you to participate in the programs that are offered to you (para. 277).

Of the 19 cases identified, 2 were dangerous offender hearings and 2 were applications by the defence to have the status of dangerous offender removed. In all cases, the offenders were spared being/remaining labelled as dangerous offenders. In fact, in *R. v.*

George (1998), FASD was originally considered to be an aggravating factor because it is a permanent condition but, on appeal, it was recognized as a mitigating factor.

Surprisingly, a proper diagnosis of FASD did not seem to be highly relevant to the decisions of judges. Of the 19 cases with offenders who were identified as suffering from FASD, only 4 had offenders who were actually tested for FASD by an expert. In 9 of the cases, FASD was merely suspected, yet the offenders were treated as though they had already been tested and diagnosed. For example, in *R. v. Creighton* (2002), the offender refused to be tested for FASD, but Justice Trueman was convinced that he did have the disorder and thus proclaimed that “it is fundamentally wrong to sentence this man” (para. 31). In the remaining 6 cases, there was no discussion of the methods used to diagnosis the offenders, or if there was an actual diagnosis at all. However, the presence of an actual diagnosis did not seem to affect the decision of the judge, as the cases where judges found FASD to be a mitigating factor were spread fairly evenly among the three categories, with 3 such cases among those who had proper diagnoses and 2 cases each from the remaining categories of those who were merely suspected of having FASD and those that provided no information about the diagnosis.

2.5 Discussion

In the cases pertaining both to offenders with psychopathy and FASD, the judges mentioned the respective disorders in just over half of the cases. What is interesting is that psychopathy was consistently viewed as an aggravating factor, while FASD was consistently recognized as a mitigating factor. Given that psychopathy and FASD share certain features and both are congenital and permanent, it is difficult to explain why this might be the case. However, it is possible that judges are more inclined to recognize FASD as a mitigating factor because it is a recognized medical condition, whereas psychopathy is not recognized by the medical community as such. It is also possible that individuals with FASD are perceived less as offenders and more as victims, as there is a clear third party to blame in the development of their disorder: their mothers who drank alcohol during pregnancy. As such, in cases with individuals who have FASD, it becomes possible to shift moral blame from the offenders to their mothers. Conversely, as the root causes of psychopathy are unknown, in cases involving psychopathy there is no third party to whom the blame can be shifted.

There is no evidence that such a shift of blame occurred in any of the FASD cases analysed, but a lack of such evidence does not rule out the possibility.

Also of interest is the fact that information about assessment tools used to identify the level of psychopathy among offenders was missing in a greater proportion of the cases where psychopathy was mentioned in the judges' reasons than in those cases where it was not mentioned. Based on the analysis provided, it is clear that psychopathy is viewed negatively in the courtroom. As such, it is possible that, in the presence of a great deal of information about the offenders' psychopathy, including evidence to support the assertion that the offenders were psychopathic (i.e., by mentioning the actuarial tool used to identify the level of psychopathy), judges did not feel the need to expand on the negative impact of psychopathy on the sentencing decision. In essence, it is possible that the more the expert witnesses discussed the offenders' psychopathy, the less the judges felt the need to do so, as the judges may have felt it was redundant that psychopathy was an aggravating factor and so it would not need to be overtly listed as such. In contrast, it is possible that when experts did not provide a great deal of information about the offenders' psychopathy, the judges felt that it was necessary to more overtly express to the court that the offender was perceived to be a psychopath and that this designation has negative impacts in the courtroom. However, given the information available for each decision, it is not possible to know whether this is truly the case.

Finally, it is curious that, in nearly half of the FASD cases analysed, there was a mere suspicion that the offender had FASD; however, in the vast majority of the cases involving offenders with psychopathy, at least one expert employed actuarial assessment tools. It is not clear why this may be the case, or why mere suspicion of FASD was accepted as a mitigating factor. However, it is likely that this is associated with the fact that testing for FASD is expensive and requires a neuropsychologist, while applying the PCL-R is relatively inexpensive and simple to administer. It is further likely that this discrepancy is associated with the positive perception of FASD as compared to that of psychopathy.

This analysis suggests that Canadian courts lack internal consistency in the approaches taken to the sentencing of individuals with cognitive impairments. Both psychopathy and FASD are perceived to be untreatable, congenital disorders that present with cognitive impairments and a host of associated deficits, yet one is most frequently

considered an aggravating factor, while the other is often treated as a mitigating factor. It was established in the first chapter that antisocial behaviour can logically be linked to cognitive impairments. The courts seem to acknowledge this link in individuals with FASD and have thus recognized such individuals as victims of their disorder. As such, FASD is often perceived as a mitigating factor. While it is not clear why the same principle has not been applied to offenders with psychopathy, it is clear that this illustrates a lack of internal consistency within the justice system and thus represents a miscarriage of justice.

2.6 Limitations

There are several limitations associated with this analysis that must be taken into consideration. First, the Quicklaw database does not host a complete record of all Canadian cases. As such, it is possible that some relevant cases were not represented in the analysis provided because they are not stored in the database. This became evident when it was discovered that it is possible to find appeal decisions involving trial decisions which are not themselves stored in the database. As a result, it was not always possible to get complete case histories and thus it is possible that there was relevant information in initial hearings that was not reproduced in appeal decisions or reports outlining reasons for sentences. However, the analysis included very few appeals and the majority of the decisions analysed related to dangerous offender hearings, which typically provided detailed information about the sentencing proceedings.

A further limitation is that FASD is not a perfect match as a condition which may be compared to psychopathy. Although the two share several commonalities, they are not the same and they are manifested in significantly different ways. Furthermore, as discussed above, FASD involves a third party that can be blamed for the disorder, while there is no comparable blameworthy third party for individuals with psychopathy. Finally, the use of FASD cases presents an additional limitation in that there were far fewer FASD cases to analyse than cases involving psychopathy. In fact, there were no cases involving offenders with FASD identified from Nova Scotia. However, overall, the analysis did have a relatively large sample and thus a considerable amount of data was extracted, thereby making some generalizations possible.

Finally, owing to limited information provided about the psychopathy of the offenders in question, it was impossible to note whether they were primary psychopaths as opposed to secondary or dysocial psychopaths. However, while primary psychopaths are the focus of this work, the courts typically do not differentiate between types of psychopathy and thus the classification of psychopaths is more relevant to this work than to court decisions. Since judges appear to be indifferent to the types of psychopaths that are presented in their courtrooms, it is possible that such classifications are irrelevant in the courtroom.

2.7 Conclusion

Despite certain similarities which exist between psychopathy and FASD, the courts have taken opposite approaches to addressing the two; psychopathy is most often recognized as an aggravating factor, while FASD is typically a mitigating factor. It is not entirely clear why this is so, but analysis of cases involving offenders with FASD strongly suggests that treating psychopathy as an aggravating factor is a miscarriage of justice. Individuals with psychopathy have cognitive impairments and, as explained by Justice Trueman in *R. v. J.H.* (2002), to punish individuals for actions perpetuated by their cognitive impairments does not equate with justice. Although it is not advisable to absolve individuals with psychopathy of criminal responsibility entirely, the courts should apply the same standards to psychopaths as applied to other offenders with similar disorders. As such, the remaining chapters will focus on various legal techniques that can be applied to cases involving psychopathy and potential sentencing alternatives to those exposed in the above analysis.

CHAPTER THREE: APPLYING LEGAL THEORY

Thus far it has been determined that individuals with psychopathy cannot logically be held fully responsible for their antisocial behaviour and that to do so disrupts the internal consistency of the courts in addressing individuals with cognitive impairments. This chapter will go one step further to argue that psychopathy may be consistent with the legal doctrine of being found not criminally responsible on account of mental disorder (NCRMD). It will also be argued that, if the courts continue to recognize psychopathy as falling outside of the scope of the NCRMD defence, psychopathy should be considered a mitigating factor at sentencing.

3.1 Defence of Not Criminally Responsible on Account of Mental Disorder

3.1.1 Mental disorder provisions

Canadian legislation pertaining to mentally disordered offenders has its roots in British case law, as the foundation for the defence of mentally disordered offenders in Canada was set in the 1843 British case of *M'Naghten* (Verdun-Jones, 2007). In 1843, Daniel M'Naghten shot and killed Edward Drummond, who was then the Secretary to Sir Robert Peel, Prime Minister of Britain. The incident was a case of mistaken identity, as M'Naghten thought that he was shooting Peel, whom M'Naghten believed was responsible for a systematic campaign of persecution lodged against him (Verdun-Jones, 2007). At his trial for the murder of Peel, the defence argued that M'Naghten was insane because, despite his awareness that his actions were wrong, M'Naghten's delusions of persecution resulted in a loss of the ability to control his actions (Verdun-Jones, 2007). Accepting this explanation, the jury returned a special verdict of insanity, thereby acquitting M'Naghten of the crime (Verdun-Jones, 2007). As a result of this case, the British House of Lords articulated a set of rules which thereafter determined the manner in which juries would be instructed in cases in

which the accused raised the insanity defence. These rules were appropriately referred to by the courts as the *M'Naghten Rules* (Verdun-Jones, 2007).

The defence of mental disorder in Canada is outlined in section 16(1) of the *Criminal Code* (see Appendix A) (*Criminal Code*, 1985). The section stipulates that

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or knowing that it was wrong (*Criminal Code*, 1985).

This section bears great resemblance to the *M'Naghten Rules*: the wording is nearly identical, with the most significant difference being that the word 'appreciate' has been substituted in the Canadian provision for the original word 'know' in reference to awareness of the nature and quality of the act in question (Verdun-Jones, 2007).

It is important to highlight that the basic requirement in section 16(1) is that the accused person was suffering from a "mental disorder" (defined by section 2 of the *Criminal Code* as a "disease of the mind"). Once the existence of a mental disorder has been established, it must then be proved that the accused person lacked either the capacity to appreciate the nature and quality of the act or omission concerned or the capacity to know that the act or omission was wrong. These alternative states of mind have been described as the "two branches" of the NCRMD defence. The NCRMD defence is concerned with the state of mind of the accused at the time that the offence was committed and not with the state of mind at the time of the trial (Verdun-Jones, 2007). At present, relatively few mentally disordered offenders meet the criteria for successful application of the NCRMD defence (Verdun-Jones, 2007) and to date, psychopathy has not been recognized as fulfilling the criteria articulated in the two branches of the test outlined in section 16(1) of the *Criminal Code*, thus preventing psychopaths from using the NCRMD defence successfully (Zinger et al., 1998).

It is important to understand that a finding of NCRMD is not the same as a finding of 'not guilty'. As explained in section 672(1) of the *Criminal Code* (see Appendix A), a verdict of NCRMD means that the accused is recognized as having committed the offence in question but cannot be held criminally responsible on account of a mental disorder (*Criminal Code*, 1985). As a result, accused persons who are found NCRMD may still be subject to restrictions on their liberty. This is made explicit in section 672.54 of the *Criminal*

Code (see Appendix A) where it is explained that in considering how to respond to not criminally responsible (NCR) accused persons, the safety of the public, the mental condition of the accused, and needs of the accused that pertain to reintegration must be taken into consideration (*Criminal Code*, 1985). Based on these points of consideration, section 672.54 presents three possible outcomes for NCRMD accused persons: absolute discharge, conditional release, or detainment in hospital (*Criminal Code*, 1985). This makes the application of the NCRMD defence to offenders with psychopathy particularly appealing, as it would have a built-in mechanism to indefinitely restrict the liberty of psychopathic accused persons as long as they remain a threat to society without labelling them as dangerous offenders.

3.1.2 Defining 'mental disorder'

Though the term 'mental disorder' typically refers to psychological and medical disorders, when used in the context of the NCRMD defence, it has a specific meaning defined by the courts. Section 2 of the *Criminal Code* defines a mental disorder as a "disease of the mind" (*Criminal Code*, 1985). As explained by Justice Dickson for the Supreme Court of Canada in the case of *R. v. Cooper* (1980),

One might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong (para.19).

While the concept of the 'diseased mind' is closely related to notions of mental health ascribed by the medical community, 'disease of the mind' is a legal term and is not dictated by the medical community (*R. v. Stone*, 1999). In *R. v. Stone* (1999), it was made clear that it is at the discretion of judges alone to determine whether a particular condition should be recognized as a disease of the mind. In making this assertion, Justice Bastarache cited *R. v. Parks* (1992) and *R. v. Rabey* (1980), as both of these cases stipulate that 'disease of the mind' should be understood as a legal concept.

Since 'disease of the mind' is a legal concept, it is possible for a condition that is not recognized as a mental illness by the medical community to be recognized as a disease of the

mind. As such, the failure of the medical community to recognize psychopathy as a mental illness or medical condition has not affected its categorization by the courts. In *R. v. Kjeldsen*, it was declared that “as a matter of law, psychopathy is a disease of the mind” (para. 1), thereby indicating that in the legal sense, psychopathy is a disease of the mind. However, it was also noted in this case, that while recognized as a disease of the mind, psychopathy does not meet the requirements for either of the two branches for the test outlined in section 16(1) of the *Criminal Code* (*R. v. Kjeldsen*, 1980).

3.1.3 Understanding and applying ‘appreciate’

Much like the term ‘disease of the mind’, the words ‘appreciating the nature and quality of an act’ take on a distinct legal meaning. To be clear, these words are not synonymous with *knowing* the nature and quality of a physical act (Royal Commission on the Law of Insanity as a Defence in Criminal Cases, 1956). Indeed, the capacity to appreciate the nature and quality of one’s actions involves more than mere knowledge that the act is being committed. It further requires an appreciation of the factors involved in the act and the mental capacity to anticipate and measure the consequences associated with that conduct (Royal Commission on the Law of Insanity as a Defence in Criminal Cases, 1956).

The meaning of ‘appreciate’ was further explained in *R. v. Cooper* (1980), where it was asserted that cognition is not the sole criterion necessary to appreciate an act, as emotional and intellectual awareness of the action are also at issue. Cognition may simply refer to awareness of a physical act but, according to the Courts, to appreciate that act involves an estimation and understanding of the consequences associated with that action (*R. v. Cooper*, 1980). The meaning of appreciate was further elaborated in *R. v. Barnier* (1980) to make it clear that in addition to a basic awareness of an event or circumstance, to appreciate that event or circumstance, one must possess the mental capacity to perform an analysis of knowledge. However, as explained in *R. v. Simpson* (1977), appreciation of an act does not require that the act be accompanied by appropriate emotional responses on the part of the offender in reference to the effect that the act has on others. Thus in addition, to having an ability to foresee probable consequences, it is necessary for the offender to understand the action at both an intellectual and emotional level, but it is not necessary for the offender to have an emotional response to the harm inflicted upon individuals affected by his actions.

To further illustrate the interpretation of the term ‘appreciate’ as applied by the Courts, it is useful to briefly discuss the case of *R. v. Kjeldsen* (1980), where as mentioned above, psychopathy was accepted to be a disease of the mind. In February of 1977, while on a day pass from a mental health facility in Alberta, Kjeldsen entered a taxi cab and subsequently killed the driver. Approximately 40 miles into the trip, Kjeldsen instructed the driver to pull over and held her at knifepoint while he sexually assaulted her. He then killed her by delivering several blows to her head with a large rock and disposed of the body in nearby bushes (*R. v. Kjeldsen*, 1980). Both physicians who testified for the defence identified Kjeldsen as a psychopath who was unable to appreciate the quality of his actions. However, in doing so, they had interpreted ‘appreciation’ as involving a conscious recognition of all factors involved, including the emotions or fears expressed by the victim (*R. v. Kjeldsen*, 1980). In response to these testimonies, the judge explained to the jury that the correct interpretation of the term involves an awareness of the effects of one’s actions and that the presence of emotion is not necessary, especially because the words “nature and quality of the act” are interpreted to refer only to the physical nature and quality of the act or omission (*R. v. Kjeldsen*, 1980; *R. v. Abbey*, 1982; *R. v. Landry*, 1991). As such, psychopathy failed to meet the second branch of the NCRMD defence in this case.

Given the interpretation of ‘appreciate’ in the cases mentioned above, it is clear that psychopathy has not been recognized as falling within the scope of the accepted interpretation of this term. Though a laymen’s interpretation of ‘appreciate’ would likely involve some reference to the ability of the individual to possess appropriate emotions in relation to the act in question, emotional awareness or response is not included in the legal interpretation of the term. As such, the emotional affects associated with psychopathy cannot be used to justify a failure to appreciate the nature and consequences of actions, and thus to successfully apply the NCRMD defence. Psychopaths are capable of a cognitive and intellectual awareness of their actions and the potential consequences of those actions. As such, psychopaths are perceived as being capable of appreciating the nature and consequences of their actions.

3.1.4 Understanding and applying ‘know that it was wrong’

While also complicated by legal interpretation, the use of the words ‘know that the act was wrong’ are far less difficult to understand than that of ‘appreciate’. In 1976, speaking for the dissenting in *R. v. Schwartz*, Justice Dickson examined the meaning of the word ‘wrong’ as used in section 16(1) of the *Criminal Code*. Justice Dickson first noted that the primary issue should not be whether the offender knew that his actions were wrong, but whether he was *capable* of knowing that the actions were wrong (*R. v. Schwartz*, 1976). In essence, Dickson instructs that in applying section 16(1), it must be asked if “disease of the mind so affected the capacity of the accused to make a moral choice that he is unable to discern between what is right and what is wrong” (*R. v. Schwartz*, 1976, para. 39).

Justice Dickson goes on to explain that, if the intended interpretation of ‘wrong’ was to be ‘contrary to law’, then a more likely word choice for Parliament would have been something closer to “unlawful”, which can be found elsewhere in the *Criminal Code* (*R. v. Schwartz*, 1976). Further, section 16(1) discusses whether the offender is *capable* of appreciating and knowing the act was wrong. As explained by Dickson, “one looks at capacity to reason and to reach rational decisions as to whether the act is morally wrong. If “wrong” simply means “illegal” this virtually forecloses any inquiry as to capacity” (*R. v. Schwartz*, 1976, para 64). Thus it is clear that Justice Dickson’s analysis suggests that the correct interpretation of ‘wrong’ includes both legal and moral standards.

More than 20 years later, Justice Lamer, speaking for the majority in *R. v. Chaulk* (1990) stated that the Court erred in *Schwartz* and that the views expressed by Justice Dickson accurately represent the intended interpretation of ‘wrong’. As such, there are two meanings applied to the word ‘wrong’; the first is that the offender knows that the act in question contravenes the law, and the second is that the offender knows that the act is contrary to the standard of moral conduct embraced by general society (*R. v. Chaulk*, 1990). In *R. v. Oommen* (1994), it was further established that the word ‘wrong’ should not be applied in an abstract sense, but instead on a very specific level to the act or omission in question. Thus to be found guilty, the accused must be aware that the act or omission in question was wrong given the specific circumstances that led to the prohibited behaviour (*R. v. Oommen*, 1994). The word ‘wrong’ was explored again in *R. v. Molodowic* (2000), where it was established that it is possible to be aware that something is legally wrong, while at the

same time, lack an awareness that the that action would be considered as morally wrong by a reasonable person. As such, in addition to being applied to legal standards, the term 'wrong' is now interpreted to refer to the moral standards of ordinary individuals.

There is little question that psychopaths are capable of appreciating the nature and consequences of their actions; however, whether they know that their actions are wrong is debatable. A study conducted by Blair, Jones, Clark and Smith (1995) suggests that psychopaths have difficulty understanding and applying the concept of morality. Before discussing this research, it is useful to note that on a very basic level, there are two types of rules: moral rules, which are defined by the consequences for the rights and welfare of others, and conventional rules, which are defined as the behavioural principles that govern social interactions within social systems (Blair, Jones, Clark, & Smith, 1995).

To test the capacity of psychopaths to differentiate between moral and conventional rules, Blair et al. (1995) conducted an experiment involving the use of stories describing various transgressions. At the conclusion of each story, participants were asked if the events described were wrong, and if so, why they were wrong (Blair et al., 1995). In general, participants with psychopathy scored the moral transgressions as being more serious than those pertaining to conventional transgressions. However, this was perceived to be linked to the fact that many of those participants had been incarcerated for committing similar transgressions and thus it is possible that their perception of seriousness is related to likelihood of imprisonment and not morality (Blair et al., 1995). Further, unlike participants without psychopathy, those with psychopathy were not able to distinguish between the moral and conventional transgressions described (Blair et al., 1995). Finally, participants with psychopathy were much less likely than their non-psychopathic counterparts to reference the welfare of others in explaining why the transgression was wrong (Blair et al., 1995). This experiment suggests that psychopaths are aware of societal rules but that they do not understand the nature of moral transgressions (Blair et al., 1995).

It is not entirely clear why psychopaths are unable to distinguish between moral and conventional transgressions as this is an ability that most children have by age four (Blair et al., 1995). It is possible that this inability is linked to emotional affects associated with psychopathy. The failure of psychopathic participants to cite the welfare of others when discussing transgressions may be linked to their incapacity to feel empathy, which as

previously explained, can be linked to fear-processing deficits that may be rooted in brain functioning of individuals with psychopathy. As discussed in chapter one, the inability of individuals with psychopathy to recognize moral standards can also be linked directly to fear-processing deficits, as there is some belief that moral socialization is achieved through the use of anticipated punishment, which most people fear (Hare, 1993).

It may not be clear why individuals with psychopathy are not able to distinguish between moral and conventional transgressions, but one thing is clear: they simply cannot make the distinction. This means that psychopaths are not able to judge their actions by the moral standards of ordinary individuals because they are unaware of those standards. Hare (1998) explained that the consciences of psychopaths are only partially formed, consisting of only an intellectual awareness of the rules of society and as a result, “their rule books are pale, abridged versions of those that direct the conduct of other individuals” (p. 205).

Since individuals with psychopathy do not understand the concept of moral rules, they are unable to apply accepted moral standards to their actions. While it is true that individuals with psychopathy are cognitively aware that their actions contravene the law, they lack an awareness of the immorality of their actions. As such, when using Justice Dickson’s interpretation of the word ‘wrong’ in section 16(1), individuals with psychopathy are not capable of knowing that their offences are wrong. Accepting this assertion suggests that individuals with psychopathy meet the criteria to be recognized NCRMD; since psychopathy is recognized as a disease of the mind, the first criterion is met, and acknowledgement that individuals with psychopathy are incapable of knowing that their actions are wrong fulfills the second criterion. Thus it is possible that the NCRMD defence can appropriately encompass offenders who have psychopathy.

3.2 Grounds for Mitigating Circumstance

It has been argued that psychopathy does fit within the accepted definition of an accused person who is NCRMD. However, the courts have been adamant that offenders with psychopathy should not be permitted to apply this defence on the grounds of their psychopathy alone. As a result, it will be argued here that, if psychopathy remains to be viewed as incompatible with the NCRMD defence, psychopathy can – and should be – considered a mitigating factor at sentencing. As illustrated in chapter two, FASD, which is

recognized as a disease of the mind, is often considered a mitigating factor. It is suggested that the same principles should be applied when sentencing offenders who have psychopathy. The remainder of this chapter will discuss the use of reactive and instrumental aggression by individuals with psychopathy to exemplify the impact of the neurobiological irregularities outlined in Chapter One on the behaviours of psychopaths. It will be argued that individuals with psychopathy are predisposed to behave aggressively and since psychopathy can be used to explain these behaviours, it should be considered a mitigating factor.

It should be noted that the argument here is not that criminal behaviours that can be explained should also be excused. If this were the case, the offensive behaviours of individuals with alcoholism and drug addictions would consistently go unpunished. However, where addicts *choose* to take illicit mind-altering substances, psychopaths do not *choose* to have neurobiological factors that impede their ability to feel and behave like their non-psychopathic counterparts. The argument made here is that psychopathy so infringes upon the ability of individuals to remain law-abiding citizens that it is unreasonable to apply the same standards that are applied to individuals who do not have psychopathy. As a disorder that has a great impact on criminality, psychopathy should be considered a mitigating factor.

3.2.1 Reactive aggression

Prior to discussing reactive aggression among individuals with psychopathy, it is useful to provide some background information. Reactive aggression, which is also referred to as affective or impulsive aggression, relates to aggressive behaviour that is, in nature, responsive. Reactive aggression is most commonly triggered by a threatening or frustrating event that induces anger on the part of the aggressor (Blair, 2007). This aggression is initiated without regard for a particular goal, but is instead fuelled by hostility and rage (Blair, 2007). Reactive aggression is typically targeted at victims who are familiar to the aggressor and who are perceived by the aggressor as having provoked violence (Cornell et al., 1996).

Individuals who abstain from regular reactive outbursts of an aggressive nature typically have the capacity to select alternative responses to aggression when angered, providing an opportunity for them to control if, and how, they will display their aggression

(Blair, 2007). For example, those who are not prone to reactive outbursts are less likely to show aggression towards a high status colleague than towards a colleague of lower status because displaying aggression to the former carries greater potential consequences in the workplace (Blair, 2007). However, those who are prone to reactive outbursts are typically indifferent to conventional rules and fail to modulate their behaviours according to the status of individuals with whom they are interacting (Blair, 2007).

Individuals with psychopathy are generally at pronounced risk for engaging in reactive aggression (Blair, 2007). This is evidenced through their short-temper and tendency to respond to frustration, failure, discipline, and criticism with sudden outbursts of violence, threats, and verbal abuse (Hare, 1993). These outbursts are typically short-lived and, once over, psychopaths usually return to their usual behaviour, acting as though nothing out of the ordinary has taken place (Hare, 1993).

The brain activity involved in aggressive outbursts of a reactive nature is not fully understood, but several regions of the frontal cortex have been implicated in the regulation of the basic threat system that mediates threat responses. In particular, the OFC, which is believed to be impaired in psychopaths, has been linked to this system (Blair, 2007). This information is valuable because reactive aggression is linked to perceptions of threat and it is believed that modulation of the basic threat system is more difficult in the presence of dysfunctional frontal regulatory systems (Blair, 2007). It has been hypothesized that, when a threatening or frustrating stimulus is highly intense, the frontal regulatory systems may be unable to reduce the activity of the basic threat system and so reactive aggression is displayed (Blair, 2007). A comparable overload of the basic threat system resulting in aggressive behaviour exercised by an individual with a fully functional frontal cortex would be recognized as a 'crime of passion' (Blair, 2007).

Since individuals with psychopathy have reduced sensitivity to threat, which may be related to fear-processing deficits, it is unlikely that the increased propensity for reactive outbursts is related to perceived threats (Blair, 2007). It is more probable that the primary trigger for reactive aggression in psychopaths is frustration, which can be affected by an overload of the basic threat system (Blair, 2007). In short, this means that reactive aggression can be near automatic for individuals with psychopathy when they are faced with intense frustration.

3.2.2 Instrumental aggression

In contrast to reactive aggression, instrumental, or proactive, aggression is purposeful and goal-oriented. It is aggression that is carried out as a means to a desired end, such as acquiring a victim's belongings (Blair, 2007). As is the case for reactive aggression, individuals with psychopathy are more likely to engage in instrumentally aggressive behaviour. Research indicates that incarcerated instrumental offenders have higher PCL-R scores than reactive offenders, thereby suggesting that higher levels of psychopathy are consistent with instrumental offending (Cornell et al., 1996). Interestingly, the authors of this study hypothesize that instrumental aggression is characteristic of psychopathy and should be included in the list of behaviours and traits that are used to describe the disorder (Cornell et al., 1996).

Another study indicated that psychopaths are more likely to commit homicide for instrumental purposes than their non-psychopathic counterparts (Woodworth & Porter, 2002). This may be related to emotional affects associated with psychopathy that allow psychopaths to carry out ruthless, cold-blooded, premeditated acts. For example, one offender with a high PCL-R score reported that he murdered his ex-girlfriend because he thought that she was interfering with his current relationship and he believed that murdering her would resolve this issue (Woodworth et al., 2002). It is likely that the inability to feel empathy played a role in this crime. Further, it is possible that the extreme lack of concern and respect for others combined with the impulsivity that is characteristic of psychopathy may override any inhibitions the psychopath has and drive him to act aggressively to achieve instrumental goals (Cornell et al., 1996).

It is highly probable that instrumental aggression expressed by individuals with psychopathy is related to their neurobiological irregularities. While instrumental aggression is mediated by poor socialization (Cornell et al., 1996), psychopaths cannot be socialized (Blair, 2007). The process of moral socialization requires individuals to find the distress of others aversive, as expressions of fear and sadness in others serve as important social reinforcements (Blair, 2007). Moreover, moral socialization requires the ability to perform stimulus-reinforcement associations to learn that various actions are good or bad (Blair, 2007). Yet owing to neurobiological irregularities, individuals with psychopathy do not have

either of these capabilities and are, therefore, less able to absorb and apply lessons pertaining to moral socialization.

While reactive aggression can be automatic in psychopaths, individuals with psychopathy *choose* to engage in acts of instrumental aggression. However, this choice is mitigated by a mind that features dysfunctional neural regions necessary for successful moral socialization. When considered under these terms, instrumental aggression seems like less of a choice for psychopaths and more like a logical step to achieve goals.

3.3 Conclusion

The vast majority of people live their lives within the context of the law. They do so for many reasons, including fear of legal sanctions, rational appraisal of the odds of getting caught, appreciation for social cooperation, and a capacity for taking into consideration the rights and well-being of others (Hare, 1993). However, psychopaths are not capable of any of these thoughts or feelings and so there are fewer reasons to abide by the law that speak to individuals with psychopathy.

It has been illustrated that psychopathy falls within the terms associated with the NCRMD defence. However, owing to the reluctance of the Courts to recognize psychopathy as such, it has been suggested that psychopathy should simply be recognized as a mitigating factor, as is often the case for FASD. The antisocial behaviour of psychopaths is directly related to neurobiological factors associated with the disorder such that when psychopaths commit offences, they may know that their actions are wrong, but they may not understand why. Further, it is possible that in some cases their actions are instructed by faulty neural systems that produce automatic responses to frustration.

Psychopaths are sometimes discussed as ‘bad people’, but what is more evident is that they have ‘bad parts’ in the form of dysfunctional neural regions. They do not choose to be the way that they are; they simply do not know how to be any other way. To punish offenders with psychopathy by treating their disorder as an aggravating factor used to justify longer sentences is to punish them for having a congenital disorder that renders parts of their brains dysfunctional. This does not equate with justice and there simply must be a better way to address the transgressions of individuals with psychopathy. The final chapter in this work will address treatment options, which may provide further support for the

application of alternative sentencing approaches to those currently applied to offenders with psychopathy.

CHAPTER FOUR: TREATMENT OPTIONS

Describing psychopathy as untreatable provides judges with a justification for longer sentences that is hard to resist (Zinger et al., 1998). Furthermore, in the absence of effective treatments for psychopathy, there are few appropriate sentencing alternatives that can be applied. Applying shorter sentences to individuals with psychopathy does not make sense since they continue to pose a threat to society as long as they remain untreated. Sending them to mental health facilities would be inappropriate, as there is a shortage of hospital beds and these should not be taken by individuals who will not benefit from hospital care (Schneider et al., 2007). However, in recent years there has been a shift from the belief that no treatments affect the behaviours of psychopaths to a belief that treatment is possible and can modify certain aspects of the psychopath. This is important because the advent of effective treatment can be used to devise just and logical sentencing alternatives for offenders with psychopathy. This chapter will discuss research relating to treatment.

4.1 The Current State of Treatment

It was once believed that the threat posed by criminal psychopaths could not be diminished in any way and that each psychopath would pose a threat to society throughout his lifetime. However, research has shown that this is not the case, as the criminal activities of psychopaths tend to decline significantly as the psychopath ages, with the decline usually beginning around 40 years of age (Hare, 1993). However, this decline is more drastic for non-violent offences than for those that incorporate violence (Hare, 1993; Harpur & Hare, 1994). Further, while the activities of the psychopath may change, the individual remains psychopathic, as it is only the factors associated with social deviance that change with age, while the emotional and interpersonal factors associated with psychopathy remain static (Harpur et al., 1994). Thus the 50-year-old psychopath is not less psychopathic, but may merely be characterized by a different set of behaviours.

It is unclear why the antisocial behaviours of individuals with psychopathy decline with age, but it is hypothesized that psychopaths may simply burn-out, mature, or tire of being in conflict with the law (Hare, 1993; Harpur et al., 1994). It is also possible that the measured changes in behaviour reflect an improved ability among aged psychopaths to evade the police and thus escape detection when they commit offences (Hare, 1993; Harpur et al., 1994). Since it is known that it is primarily the non-violent offences that decline with age, and it is unclear whether the observed changes represent actual changes in behaviour, it is not logical to assume that aging psychopaths will 'burn-out' and to simply wait for them to age out of their psychopathy. Instead, effective treatment programs must be developed and provided to individuals with psychopathy to reduce their criminality and thus the threat that they pose to society.

Owing to pessimism regarding the success of treatment programs, it is difficult to develop and implement them. Psychopathy is often described as an untreatable, unchangeable personality disorder and this characterization is fuelled by the many clinicians and researchers who are pessimistic about the effectiveness of treatment for individuals with psychopathy (Wong, 2000; Wong & Hare, 2005). Many clinicians are so pessimistic about the probable outcome of treatment that they will not even attempt to treat such offenders (Wong et al., 2005). Furthermore, many forensic institutions take the position that it is more cost-effective to exclude offenders with psychopathy from their treatment programs than to attempt to treat them (Wong et al., 2005).

However, it is possible that the problem is not that psychopaths are unreceptive to treatment but rather that they are unreceptive to the types of treatment that are available to them. Hare (1998) has eloquently described the problem as follows:

At present, we ask psychopaths to participate in treatment programs that have little chance of success, and that fool them into thinking that the exercise is worthwhile and of practical benefit to them. It would be better for all concerned if we were to mount a concerted effort to develop innovative procedures designed specifically for psychopathic offenders (p. 203).

In fact, the problem is not that programs are not being developed for psychopathic offenders; rather, the problem is that these programs are not being implemented. In 1992, Hare developed a program designed to meet the rehabilitative needs of psychopaths at the request of the Correctional Service of Canada (CSC) (Hare, 1998). This program focused

less on attempting to make psychopaths feel empathy and more on showing them that they are responsible for their actions and that they can learn pro-social ways to achieve their goals (Hare, 1998). However, CSC did not adopt this program and the result has been that offenders with psychopathy continue to participate in programs that are ill-suited to their needs (Hare, 1998).

4.2 Treatment Pessimism

As previously mentioned, there is considerable pessimism regarding the likelihood of successfully treating psychopathy. This pessimism can be divided into two categories: that which reflects the belief that no treatment is effective, and that which reflects the belief that treatment actually does more harm than good. As it is necessary to understand the pessimism directed at psychopathy treatment to combat the pessimism, this section will provide a breakdown of the various arguments that are used to suggest that psychopathy is ultimately untreatable.

4.2.1 The ‘nothing works’ argument

A popular belief among treatment pessimists is that there is no point in trying to treat psychopathy because simply nothing works. To support this assertion, many treatment pessimists would cite the basic assumption of psychotherapy, which states that to achieve treatment success, the patient must want – and need – help for the distressing and/or painful psychological problems they have (Hare, 1993). This is perceived to be true for treatment of all psychological problems, including, but not limited to anxiety, depression, poor self-esteem, obsessive thoughts, and compulsive behaviours (Hare, 1993). The idea here is that successful treatment requires the patient to recognize that there is a problem and have a desire to fix it (Hare, 1993). Yet psychopaths do not believe that there is anything wrong with them and do not see any reason to change their behaviours (Hare, 1993). When psychopaths do seek change, it is typically related to a perception that this change will provide some personal reward and not to a desire to heal (Hare, 1993).

Furthermore, anxiety and dread of emotional pain are the primary motivators for change and, since psychopaths do not experience anxiety to the same degree as others, their motivation to seek change is limited and thus few wish to enter into treatment or continue

with it when it becomes difficult or inconvenient (Reid & Gacono, 2000). As such, psychopaths are unable to meet the most basic criterion for treatment success. This is further complicated by the fact that owing to emotional deficits and behavioural problems including impulsivity, lack of remorse, and an unwillingness to tolerate frustration, individuals with psychopathy have trouble forming a working alliance with their therapists (Gacono, Nieberding, Owen, Rubel, & Bodholdt, 2001; Thornton & Blud, 2007). Finally, treatment pessimists argue that there is no empirical evidence to suggest that psychopathy is treatable (Gacono et al., 2001).

4.2.2 The ‘more harm than good’ argument

The second common argument cited by treatment pessimists is that treatment actually makes psychopaths behave worse and can cause problems for others in the correctional facility, thereby doing more harm than good. Pessimists who use this argument generally reference the harms experienced by the psychopath, other patients, and correctional staff. An overview of each of these potential harms will be provided.

The most commonly cited argument regarding refusal to treat offenders with psychopathy is that therapy programs provide them with the tools necessary to develop new excuses and rationalizations for their behaviour (Hare, 1993). In addition, while in therapy, individuals with psychopathy gain new insights into human vulnerability, which are not used to change their own views or attitudes, but are instead applied to exploit and manipulate others in new ways (Hare, 1993; Thornton et al., 2007). As explained by one psychopath, “these programs are like a finishing school. They teach you how to put the squeeze on people” (Hare, 1993, p. 199). In addition to using their new tools to manipulate others to facilitate antisocial behaviour, they may also learn buzz words related to interpersonal and emotional processes, thus making it easier to convince people that they have been rehabilitated (Hare, 1993).

In a sense, treatment for all offenders is a trade-off, as it is always somewhat risky to bring together like-minded offenders to share anecdotes about their antisocial behaviour. Such sharing may encourage further misbehaviour through modelling (Thornton et al., 2007). When treating non-psychopathic offenders, the benefits of treatment programs are thought to outweigh the possible risk of modelling. However, as some believe that

offenders with psychopathy are incapable of benefiting from treatment, it is argued that they will only receive the negative effects associated with treatment (Thornton et al., 2007).

Individuals with psychopathy may also use their new manipulation strategies to con correctional staff. In extreme cases, this could lead to staff consenting to sexual relations with the offender, smuggling items into the facility, or assisting with escape attempts (Thornton et al., 2007). More commonly, the staff are lied to or manipulated in ways that leave them unable to trust their own judgment, which can lead to emotional exhaustion or burn-out (Thornton et al., 2007). The new insights into human vulnerability that are learned in treatment programs can be further applied by psychopathic offenders to identify, amplify, and exploit small divisions between the staff. In doing so, individual staff members may be psychologically isolated from their colleagues so that they will become more vulnerable to manipulation for future purposes (Thornton et al., 2007).

Finally, offenders with psychopathy are thought to negatively impact the likelihood for other offenders to benefit from treatment as well. Individuals with psychopathy like to dominate situations and thus often try to control group sessions, playing “head games” with the group leaders and other offenders, thereby distracting others from the goal of helping themselves (Hare, 1993). Thus it is clear that treatment pessimists have identified several negative impacts that can be associated with the treatment of offenders with psychopathy. However, it has yet to be determined that all treatment efforts have these effects. As such, the following section will discuss various forms of treatments and their effects on psychopathic offenders.

4.3 Problems with Previous Treatment Attempts

Despite a common belief that psychopathy is untreatable, there is little scientific evidence to substantiate this claim (Salekin, 2002; Wong et al., 2005). A meta-analysis of 42 studies relating to the treatment of psychopathy found that previous research is flawed. In particular, it was found that there is disagreement among many studies as to what the defining characteristics of psychopathy are, and there are few empirical investigations into the relationship between psychopathy and treatment (Salekin, 2002). Despite these methodological flaws, Salekin (2002) notes that there are some studies indicating that certain

treatments are more successful than others and, therefore, treatment pessimism is not empirically warranted (Salekin, 2002).

D'Silva, Duggan, and McCarthy (2004) and Wong (2000) conducted similar analyses of research relating to treatment for individuals with psychopathy and reached similar findings. Their research suggests that there are five main methodological flaws that sully the psychopathy treatment literature. The first methodological flaw is that many studies do not have an appropriate control group, making it difficult to measure success rates for various programs (D'Silva, Duggan, & McCarthy, 2004). Second, it was found that offenders with psychopathy are often not the focus of the treatment program in question, meaning that the programs were not developed to meet the unique needs of psychopaths (D'Silva et al., 2004). This is troubling, as it has been determined that treatment programs that are not well suited to offenders with psychopathy can result in the serious consequence of increased propensity to violently recidivate (Wong et al., 2005). Further, many off-the shelf programs are inappropriate or of insufficient intensity to address the needs of the psychopathic offender (Wong & Burt, 2007). As such, it is not surprising that some studies reported increased rates of violent recidivism.

The third flaw identified is that the diagnostic criteria used to identify psychopathy is poor. It was noted that some studies did not use the diagnostic criteria outlined by Cleckley or Hare and thus there were varying perceptions of what 'psychopathy' meant across the studies (Wong, 2000). Fourthly, it was found that many studies relating to the treatment of individuals with psychopathy are not replicable because there is not an adequate description of the treatment program provided (Wong, 2000). This is problematic because if findings cannot be replicated, it cannot be assumed that they were conducted without flaw. Finally, it was found that many studies did not include a follow-up period to determine the long-term effects of the treatment program (Wong, 2000). Wong reviewed 74 studies and found that only four included a follow-up with the participants (Wong, 2000).

The problem is that the studies reviewed by Salekin (2002), D'Silva et al. (2004), and Wong (2000) are often cited as evidence that individuals with psychopathy are untreatable. While their research does not prove that the opposite is true, it does indicate that, given current research on the subject, it is simply not possible to know whether treatment is a viable option for offenders with psychopathy. However, Salekin (2002) was able to identify

some research suggesting that cognitive behavioural therapy (CBT) may help reduce recidivism among offenders with psychopathy (Salekin, 2002); this does suggest that there may be some promise for psychopathy treatment programs after all.

4.4 Types of Treatment

4.4.1 Cognitive-behavioural therapy (CBT)

CBT is a treatment option that has some promise for individuals with psychopathy. CBT involves several components, the first of which is an examination of the precursors to the offender's crimes, including an analysis of the thought patterns, feelings, and behaviours experienced prior to the offence. Each of these elements is considered in relation to alternative behaviours that could have been exercised under the circumstances surrounding the offender at the time of the offence (Thornton et al., 2007). It is believed that by helping offenders cognitively restructure their thoughts and beliefs, their propensity to recidivate can be reduced. To help achieve this goal, CBT involves systematic skills training, which is usually focused on the development of self-control and problem-solving skills (Thornton et al., 2007).

The value of CBT in treating individuals with psychopathy is unclear. Thornton (2007) reports that while CBT is generally believed to be an effective form of treatment for offenders who do not have psychopathy, there are no studies that show recidivism among adult psychopaths has been reduced as a result of CBT. In contrast, Salekin (2002) reports that CBT is slightly more effective at treating psychopathy than other forms of therapy because it addresses the offenders' thoughts about themselves, others, and society, allowing some of their psychopathic traits to be addressed. Similarly, Wong et al. (2005) report that CBT can be used successfully to help individuals with psychopathy to modify their cognitions and behaviours that precipitate violence, thus allowing them to develop and use specific strategies to interrupt violence-prone behaviours, thereby reducing risk of recidivism.

The discrepancy among research studies pertaining to success of CBT in offenders with psychopathy may be related to the use of poor research methodology. While Thornton (2007) exposes that there is no evidence to suggest that CBT has been effective to date,

Salekin (2002) urges acknowledgement that treatments programs using CBT have had greater success rates, but that these successes must be considered in light of the use of flawed research methods. Further, Wong et al. (2005) do not argue that there is evidence to support the success of CBT in psychopathic populations, but instead argue that in principle, CBT *should* be effective. Since there is no definitive proof that CBT is not effective and some evidence that it could be effective, it should not be ruled out as a tool that can be shaped to meet the treatment needs of offenders with psychopathy.

4.4.2 The therapeutic community (TC)

The TC was once thought to present a highly effective treatment environment for offenders with psychopathy. However, this belief has been quashed (Rice, Harris, & Cormier, 1992). The democratic TC features an environment devoid of a hierarchical division between staff and patients, and as such, decisions about rules for the community are made with the input of all community members during inclusive meetings (Thornton et al., 2007). Each community member is charged with the task of caring for the others on an emotional and material level and to submit to the authority of the group (Thornton et al., 2007).

Generally, the TC is more tolerant of outbursts and verbally aggressive behaviours than other mental health facilities and prisons. However, such behaviour is noted and members of the community receive feedback from the group about the impact of their behaviour on others and how others experienced the outburst in question (Thornton et al., 2007). In cases of more severe transgressions, the actor is subject to suffer sanctions imposed by the group as a whole (Thornton et al., 2007).

Under the assumption that the TC was a viable treatment option for offenders with psychopathy, the Oak Ridge Social Therapy unit at Penetanguishene in Ontario was thought to be effective at rehabilitating psychopaths (Thornton et al., 2007). This may have been the case for psychopaths with lower PCL-R scores, as they were 50% less likely to violently recidivate after ten years than matched offenders in conventional prisons (Thornton et al., 2007). However, the TC may have had the reverse effect on psychopaths with higher PCL-R scores, who violently recidivated at a rate of 78% after ten years as compared to 55% among matched offenders in conventional prisons (Thornton et al., 2007). A facility in

England that was thought to be particularly well-suited to the needs of offenders with psychopathy had a similar outcome. It was determined that non-psychopathic offenders who received treatment in the TC had reduced recidivism rates, while offenders with psychopathy typically experienced higher recidivism rates (Rice et al., 1992).

It is likely that offenders with psychopathy do not experience therapeutic benefits from being in a TC because their motivations are not in-line with the goals of the TC. Individuals with psychopathy are typically interested in recognizing social cues because this helps them learn to read people, which helps them to more easily manipulate people (Rice et al., 1992). While in a TC, offenders with psychopathy have many opportunities to learn about emotional language and to act socially in a skilled manner. These skills are then transformed into manipulation techniques used to facilitate antisocial behaviour (Rice et al., 1992). As such, the TC is not an effective method to change the behavioural traits associated with psychopathy, but may instead reinforce the use of such traits.

4.4.3 Prison education

The next option to be discussed is that of prison education, which can be rehabilitative, but is not itself a treatment program. The rationale behind prison education is to strengthen the ability of offenders to earn an honest living, thereby reducing the perceived need to contravene the law to acquire goods and money (Thornton et al., 2007). Generally, prison education helps to reduce recidivism among most offenders, but it does not help those who have psychopathy, particularly those who have high scores pertaining to interpersonal and emotional affects (Thornton et al., 2007). Among such offenders, prison education increases the likelihood of recidivism by nearly 50%, even when the education is directly relevant to the particular needs of the offender (Thornton et al., 2007). It is not clear why education has this effect on offenders with psychopathy. However, it is known that offenders with psychopathy are less likely to complete educational programs, as they have a tendency to remove themselves from programs when they become difficult, or when the outcome cannot be directly linked to personal gain (Thornton et al., 2007). As such, prison education is not a viable rehabilitative tool for offenders with psychopathy.

4.4.4 Structured environments

There is some research to suggest that highly structured community initiatives may be effective in reducing recidivism among non-violent offenders with psychopathy and APD. These initiatives are developed within group homes that offer intensive, highly consistent treatment (Reid et al., 2000). The initiatives require participating offenders to monitor the behaviours of one another and to ensure peer compliance with strict rules, including avoidance of antisocial behaviour, support of one another, and completion of house maintenance tasks (Reid et al., 2000). The program is premised upon a hierarchy of participants and those who work through the program may work their way up the hierarchy until eventual program completion (Reid et al., 2000). Research indicating that such programs may reduce recidivism among psychopaths is exciting, as it provides some hope that it may be possible to safely release offenders with psychopathy into the community. Furthermore, such facilities offer an alternative, in the form of highly structured environments that may prevent antisocial behaviour among offenders with psychopathy, while providing a less harsh alternative to conventional correctional facilities.

4.5 A Plan for Success

Given that there is insufficient evidence to prove that it is not possible to treat and rehabilitate offenders with psychopathy and that there is some research that suggests that this is possible, treatment pessimism is not warranted. In the presence of even the slightest hope for successful rehabilitation of offenders with psychopathy, it is necessary to strive to reach the goal of rehabilitation. As such, it is important to devise appropriate treatment plans focused on success. The following section will outline the steps that may be taken to work towards this goal.

4.5.1 Important factors to consider

In addition to surveying the literature to find clues as to what should be done to treat offenders with psychopathy, it may be useful to look to the literature for ideas of what not to do. Indeed, the literature on the subject may provide greater insight into what not to do than what should be done (Wong et al., 2005). Thus previous treatment attempts should be acknowledged as learning experiences where the outcomes for various programs were often

poor. The main lesson from these attempts should be that, to prevent repeating previous mistakes, certain treatment elements should be avoided.

As mentioned above, the use of programs that are ill-suited to the needs of offenders with psychopathy can have dire consequences (Wong, 2000). As such, it is important to devise programs that are developed with the specific intent of treating offenders with psychopathy. In doing so, there are some factors that should be taken into consideration. The first is that the shallow emotional affect and the lack of empathy which are common to psychopaths make some forms of treatment ineffective for offenders with psychopathy (Thornton et al., 2007). Examples of such programs include those that aim to challenge distorted beliefs about the harm caused to victims. The rationale for such programs is centred on the belief that offenders possess a capacity to feel empathy and that if they could simply be motivated to realize that their actions are harmful, they would behave differently (Thornton et al., 2007). However, psychopaths do not have this capacity and, as a result, such programs are wasted on them.

Furthermore, it is important to remember that individuals with psychopathy are prone to boredom, impulsivity, and disregard for commitments (Thornton et al., 2007). If these factors are carried into treatment, it may lead to the offenders failing to complete assignments, skipping sessions, or generally failing to apply the lessons learned if doing so does not yield the desired result quickly and easily (Thornton et al., 2007). Additionally, failed attempts to apply this information could lead to an increased likelihood of the offender withdrawing from the treatment program (Thornton et al., 2007).

As a general rule, for treatment to be effective and to change behaviours, an individual must work hard to develop new attitudes, and to apply these to learn new ways of functioning outside of the treatment group (Thornton et al., 2007). This requires that the offender be motivated to change, as it does involve considerable effort and hard work. The problem is that it is difficult to motivate psychopaths to change because they lack empathy and tend to avoid taking responsibility for their actions, thereby making it difficult for them to identify the aspects of themselves that require adjustments (Thornton et al., 2007). To counteract this problem, it is useful to attempt to establish a bond between the therapist and offender. However, this bond should be premised upon treatment goals rather than one premised upon an emotional level. Not only does this help to reduce the risk of boundary

violations and exploitation, it is also more likely to reach the offender, as psychopaths form only weak emotional bonds (Wong et al., 2005).

Clearly there are some obstacles that must be overcome before offenders with psychopathy can be treated. However, these obstacles are not insurmountable. By acknowledging the obstacles, we take one step closer to developing realistic treatment goals and devising programs to meet these goals. As such, discussion will now focus on which treatment methods provide the greatest promise for the successful rehabilitation of offenders with psychopathy.

It is useful to note what has been learned from previous research attempts that can be carried into future attempts to develop treatment programs. First, it is now clear that a radical transformation in the personality of individuals with psychopathy is not a realistic goal (Wong et al., 2005). The interpersonal and emotional affects associated with psychopathy are engrained in the identity of the individual and are thus not likely to be drastically altered. However, it is realistic to seek to reduce the violent recidivism of the psychopathic offender (Wong et al., 2005). In essence, it is realistic to believe the reductions in impulsive, irresponsible, violent, and antisocial behaviour are possible, but it is not realistic to believe that the offender will become capable of empathy or stop being impulsive, as these factors are too closely related to the underlying personality structure of the individual (Thornton et al., 2007).

Psychopaths fundamentally do not care if someone gets hurt as a result of their actions, so programs geared at trying to make them care simply will not be effective (Thornton et al., 2007). The goal of treatment should be to reduce violence and antisocial behaviours expressed by offenders with psychopathy, not to change the psychopathic personality traits identified in the PCL-R (Wong et al., 2007). It is crucial to remember that, while the personality traits associated with psychopathy are unpleasant, they are not illegal and should not be targeted for treatment. It is the antisocial and violent behaviours that bring individuals with psychopathy into contact with the criminal justice system and so it is those factors that should be targeted (Wong, 2000). In attempting to modify behavioural patterns, CBT has been cited as the most effective program available to offenders with psychopathy (Salekin, 2002).

The literature has also indicated that the scope, duration, and intensity may be the key to successful rehabilitation efforts (Salekin, 2002). It has become clear that individual attention is key to the success of treatment programs directed towards offenders with psychopathy (Salekin, 2002). It has already been mentioned that offenders with psychopathy tend to distract and manipulate group members and leaders from the treatment goals of the group to satisfy their own desire to dominate. Further, by participating in group sessions, they often develop new insights into emotionality and use this insight to become better manipulators. As such, programs that do not focus primarily on individual attention from a trained professional are often doomed to result in poor treatment outcomes (Salekin, 2002). Finally, programs that involve at least four private sessions per week for at least one year have proven to be most effective (Salekin, 2002). This suggests that a great deal of dedication, time, and resources must be devoted to ensure successful rehabilitation.

4.5.2 Developing a treatment program

After acknowledging each of the obstacles that stand to thwart treatment attempts, the first step that must be taken to successfully rehabilitate the psychopathic offender is to target the behaviours that interfere with treatment (Thornton et al., 2007). These include, but are not limited to, lack of motivation, impulsivity, and short attention span. Once these behaviours have been addressed, fewer obstacles stand between the offender with psychopathy and the likelihood of successful rehabilitation.

CBT is the method that is most highly recommended for the treatment of individuals with psychopathy (Wong et al., 2005). This method can be used to help individuals with psychopathy recognize their high-risk cognitions and behaviours and help them to develop and use specific strategies to interrupt violence-prone behaviours (Wong et al., 2005). As such, CBT can be used to modify the cognitions and behaviours that directly or indirectly precipitate violence, thereby reducing risk of recidivism (Wong et al., 2005).

However, throughout the treatment regimen, it is necessary to take into consideration the various stages of treatment readiness and the implications that accompany each stage. The first is referred to as the pre-contemplation stage, and features the unmotivated offender who has no intention of changing his behaviour in the foreseeable future (Wong et al., 2005). As previously discussed, the offender may become more

motivated after developing a bond with the therapist based on mutual treatment goals. In the earlier phases of this stage, it may be difficult to establish treatment goals (because the offender simply may not have any) and so it may be useful for the therapist to use a simple cost-benefit analysis in illustrating the benefits associated with treatment, or encouraging the offender to speak with other offenders who have made positive changes so that he may witness the benefits himself (Wong et al., 2005).

The second stage is the contemplation stage, which features an offender who is aware that a behavioural problem exists and is considering addressing this problem through treatment (Wong et al., 2005). During this stage, it is useful to continue using the techniques used in the previous stage to further motivate the offender and to try to instil an understanding of the balance between short- and long-term gain (Wong et al., 2005). Next comes the preparation stage. It is during this stage that the offender combines a serious intention to improve himself with attempts to realize this improvement by actively seeking treatment (Wong et al., 2005). It is helpful to divide goal-directed behaviours into manageable chunks, reward small successes and help offenders learn to deal with failures during this stage (Wong et al., 2005). Changes that are exhibited during this stage are unstable and it is typical to cycle through the contemplation and preparation phases several times before moving on to subsequent stages (Wong et al., 2005). It is important for treatment providers to remain focused and help the offender while he cycles through these stages, while continuing to provide the appropriate motivation for each stage (Wong et al., 2005).

Last comes the action stage, which is reached when the offender actively modifies his behaviours and attitudes (Wong et al., 2005). Behavioural changes that take place during this phase are extensive and stable. However, it is at this stage that individuals with psychopathy can make great short-term changes when they perceive it is necessary to do so, i.e., for an upcoming parole hearing, to suggest that they have made long-term adjustments. To ensure that long-term changes have been achieved, the offender's behaviours must be tested in a variety of situations and maintained over a long period of time (Wong et al., 2005). It is not sufficient to take the word of the offender that he has achieved change, as psychopaths are notorious for being dishonest and manipulative (Wong et al., 2005). Once it is clear that the offender has made meaningful changes, he enters into the maintenance phase, which is

premised upon the development of relapse prevention techniques and provides the offender with opportunities to test and solidify his new skills (Wong et al., 2005).

4.6 Conclusion

There is no question that it is difficult to rehabilitate offenders with psychopathy. Offenders with psychopathy have trouble learning that inappropriate behaviours are associated with punishment, they lack conscience, and must rely on external factors to control their impulses (Reid et al., 2000). Further, they tend to have pronounced difficulties associating negative correlates of prior activities with new examples of various activities, especially when those activities were pleasurable or fun for them (Reid et al., 2000). These traits are engrained in the very being of the psychopath and are difficult to change.

Treatment pessimists would argue that it is impossible for individuals with psychopathy to make meaningful behavioural changes and thus there is no point in even attempting to treat them. This might be true. However, it might not. There is no definitive answer as to whether individuals with psychopathy can be treated, but there is some research that provides hope that it is possible to do so. Previous research has been analysed by several competent investigators to identify key themes that can be seen throughout the research in order to identify where investigators have gone wrong and what they have done right. These lessons have been used to develop new techniques that outline steps that may be taken to provide the most basic elements necessary for successful rehabilitation of psychopathic offenders. Given that these lessons have not been applied to any treatment program to date, claims that psychopathy is untreatable are unconfirmed. As such, it becomes unreasonable for judges to cite psychopathy as an aggravating factor at sentencing on the grounds that it is untreatable.

If there is even the slightest chance that offenders with psychopathy can be rehabilitated, it is imperative that steps be taken to achieve this goal. Attempts to devise appropriate and effective treatment methods are essential first and foremost because offenders with psychopathy should enjoy the same privilege of appropriate treatment as do their non-psychopathic counterparts. Another reason to try to develop effective treatment relates to the reality that offenders with psychopathy have higher rates of recidivism and to fail to consider treatment on the grounds that it cannot be successful, when this is not

necessarily the case, is to fail to prevent future harms to the members of the general community. If effective treatment methods can be developed and implemented, the risk that offenders with psychopathy pose to the community upon reintegration can be reduced. Use of highly structured environments upon release from correctional facilities may also help to mitigate potential harms to the public and, if this is the case, such programs must be made available to offenders with psychopathy to benefit both the offender and society as whole. Since treatment has yet to be ruled out as a viable possibility, it would be negligent to refuse further treatment attempts.

RECOMMENDATIONS AND CONCLUSIONS

It has been argued that individuals with primary psychopathy are neurobiologically different from their non-psychopathic counterparts and that these differences impact their propensity to violate the law. Of particular interest are the learning and fear-processing deficits, and neurotransmitter abnormalities that impact the behaviours of individuals with psychopathy. Each of these irregularities affects the behavioural traits of individuals with psychopathy to such an extent that it is hard to believe that there are any individuals who suffer from psychopathy who do not commit crimes. The argument put forth here is that individuals with psychopathy are victims of their biology such that to the psychopathic mind, criminality is not so much a choice as it is a rational way of life.

Not surprisingly, psychopathy appears to be an aggravating factor in court during the sentencing phase. This appears to be linked to testimony asserting that psychopathy is untreatable and permanent in addition to the notion that psychopaths are generally viewed as 'bad' or 'evil' people. However, there is no concrete evidence to confirm that psychopathy is untreatable and thus psychopathy should not be considered as such in the courtroom. Furthermore, it is evident that FASD, which presents with similar traits to psychopathy, is considered a mitigating factor at sentencing. This illustrates a failure of the courts to maintain internal consistency in addressing cases relating to disorders with a neurobiological basis. This lack of consistency threatens the notion of justice in the courtroom, as it stands to penalize one group of offenders while benefiting another for exercising similar behaviours related to similar traits.

Whether there is room within the NCRMD defence to include psychopathy is debatable. It can be argued that individuals with psychopathy do not know that their actions are morally wrong and thus meet the criteria for the second branch of the defence. However, the courts have voiced adamant opposition in regards to allowing offenders with psychopathy to apply the NCRMD defence. Thus it is argued that psychopathy would more likely be acknowledged as a mitigating factor at sentencing on account of the fact that

neurobiological factors associated with psychopathy can act as an explanation for, and possible cause of, the antisocial behaviours committed by offenders with the psychopathy.

In recognizing psychopathy as a mitigating factor, it is necessary to ensure that the benefits enjoyed by the offender as a result of this recognition do not come at an unreasonable cost, in relation to risk of potential harm to the public. The ultimate goal of the correctional system should be to protect the public from individuals who pose a threat to the community. However, this goal must be balanced with the secondary goal of protecting the interests of the offender. Recognition of psychopathy as a mitigating factor must not result in an increased risk of harm to the public due to shorter sentences for untreated psychopaths. As a result, a compromise must be established.

It would be ideal for a system similar to that imposed against NCR accused persons to be applied to offenders with psychopathy, whereby offenders can be held indefinitely until a review board declares that the NCR accused person is no longer a significant threat to society. This would mean that offenders with psychopathy could remain in custody indefinitely if they continue to remain a threat to the public, but that they could also be released early if they are successfully rehabilitated. However, in the absence of such a system, it becomes necessary to devise an alternative system whereby offenders with psychopathy will be prevented from rejoining society but will not be exposed to prolonged penal detention.

There are several potential alternatives to the current sentencing approaches applied to offenders with psychopathy that may help to establish the aforementioned compromise of enhancing the rights of psychopathic offenders while protecting the public. A brief discussion relating to these alternatives will be provided, highlighting various options that currently exist to address similar goals. Each of the options that will be discussed has strengths and weaknesses, as do most correctional interventions. Nevertheless, these alternatives may still prove viable, as all of them centre around the proposition that, as long as offenders with psychopathy remain untreated, their liberty should remain restricted as a measure to protect the safety of the public.

One possible alternative to the current practices imposed may be to develop long-term facilities for untreated offenders with psychopathy that bear a closer resemblance in physical environment and atmosphere to a mental health facility. A wing of a mental health

facility designated to such individuals may be appropriate. Such a facility would be more suited to offenders with psychopathy because their neurobiological abnormalities set them apart from other offenders and thus they should not be regarded in the same way. While it is accepted that the liberty of psychopathic offenders should be restricted, this restriction should not come in the form of punishment. Untreated offenders with psychopathy cannot be permitted to wander throughout the community, but their imprisonment need not be uncomfortable. It is important to remember that psychopaths are essentially victims of their biology and thus should not be *punished* so much as prevented from causing additional harms. As a facility akin to a mental health facility may bear additional comforts to that of a prison cell, such may be an appropriate location to house psychopathic offenders until it is clear that they no longer pose a threat to society.

Another alternative, which may be more economical than the development of new structures, may be to house psychopathic offenders in actual mental health facilities. It is possible that existing Canadian legislation can be used to make this type of detention feasible, as was the case in *Starnaman v. Penetanguishene Mental Health Centre et al.* (1995). In this case, Starnaman, who was serving a two-year sentence for uttering a death threat, was a known paedophile with a history of aggressive sexual misconduct (*Starnaman v. Penetanguishene Mental Health Centre et al.*, 1995). Starnaman refused treatment to address his sexual misconduct and part way through his sentence, it became clear that he remained a threat to society, when a search of his cell revealed pictures of young children and a list of single mothers with young children. It was believed that this list would be used in a scam whereby Starnaman would lure young women and their children to his home under the guise that he was a babysitter (*Starnaman v. Penetanguishene Mental Health Centre et al.*, 1995). Upon the discovery of this material, Starnaman was ordered to serve his full sentence before release. However, one week prior to his release, a psychiatrist applied to have Starnaman subjected to a psychiatric assessment, during which it was concluded that Starnaman should be held as an involuntary patient. The legality of this procedure is set out in the *Ontario Mental Health Act* and this form of detention is consistent with the *Canadian Charter of Rights and Freedoms* (*Starnaman v. Penetanguishene Mental Health Centre et al.*, 1995). As such, it becomes clear that in some cases, mental health legislation can be used to prevent offenders from exiting the custody of the state by means of involuntary commitment to a mental health facility. Using the same principles and legislation, it may be possible to commit psychopathic offenders

who pose a continued risk to society so that they will remain under state care, unable to harm others. However, since health care falls within provincial jurisdiction and regulations relating to civil commitment vary across the provinces, it may be difficult to apply the same legislation or procedures across the country.

While legislation was used to keep Starnaman from rejoining society, this is not common practice in Canada. However, several states within the United States have developed specific legislation to prevent sexual offenders who are believed to pose a continued risk to society from re-entry into the community. This legislation is referred to as “sexual predator” legislation and provides for the indefinite involuntary commitment of untreated sexual offenders with a mental abnormality to mental health facilities upon completion of their prison sentences (Mental Health America, 2008). This legislation was challenged, but upheld by the United States Supreme Court in the case of *Kansas v. Hendricks* (1997). It was established in this case that involuntary commitment is not a form of punishment and when individuals pose a sexual threat to members of society, infringement upon their constitutionally protected liberty is justified (*Kansas v. Hendrix*, 1997). While sexually predatory behaviour and psychopathy are not synonymous, it may be possible to draft similar legislation in Canada for psychopathic offenders to that of “sexual predator” legislation in the United States on the common premise of protecting society from an ongoing threat to peace, order and security of the person. While psychopathy is not recognized as a mental abnormality, it is related to neurobiological abnormalities, which could be interpreted to meet this criterion.

However, civil commitment is not a perfect solution, regardless of the means used to detain offenders. One of the most glaring weaknesses of this option is that it is premised upon a medical model and while the courts recognize the psychopathic offender as having a ‘disease of the mind’, the medical community does not recognize psychopathy as a medical condition. Given this fact, and since to date there is no treatment method that is known to be effective for psychopathy, committing offenders to mental health facilities on the grounds of psychopathy may result in some dissent from the medical community. However, when faced with such dissent, it is necessary to remember that the behaviours of psychopaths are mitigated by dysfunctional neuroanatomical structures and thus their behaviours are related to neurobiological impairments. Just as dysfunctional organs are a medical issue, so too are

dysfunctional neuroanatomical structures and thus psychopathy should rightfully be considered to be a medical issue.

Another possible argument related to civil commitment may centre on the belief that civil commitment would merely result in the warehousing of psychopathic offenders in mental health facilities that can offer no treatment services to these individuals. While it is true that mental health facilities cannot offer treatment to cure psychopathy, offenders with psychopathy would not merely be warehoused in such facilities; instead, they would be provided with an environment whereby they would be monitored by trained staff who are familiar with caring for individuals with similar neurobiological abnormalities. Such an environment may be more conducive to appropriate behavioural controls and may house staff who have a better understanding of the highly specialized needs of psychopathic offenders. Furthermore, it is important to remember that not all mental disorders are responsive to treatment, yet we do not routinely release individuals who have other unresponsive disorders into the public under the assumption that they have no place in a mental health facility because they are not receptive to treatment.

While each of the alternatives offered recommend indefinite civil commitment, it is recommended that research into the treatment of offenders with psychopathy remain actively pursued. Sufficient data has not been collected to definitively prove that psychopathy is untreatable, yet there is some data to support the position that the opposite may be true. As long as there is even a slight possibility that effective treatment methods can be devised, research into the treatment of psychopathy should be pursued. If such treatment does become available, offenders with psychopathy who participate in treatment and are effectively rehabilitated may be subject to shorter periods of imprisonment. In devising treatment plans for psychopaths, it is imperative that the treatment phases outlined in chapter four be taken into consideration and that all treated psychopaths are provided with access to maintenance programs upon reintegration into the community to reduce the likelihood of relapse.

In considering the sentencing of offenders with psychopathy, it is easy to lose sight of the fact that the actions of these offenders are mediated by neural systems that function abnormally. It is easy to dislike offenders with psychopathy; they are manipulative, cold, callous, and shallow. They provide every reason for us to detest them, right down to their

painful disregard for the suffering of others. However, they are no less human and should not be a target of hate, but instead of pity. Psychopaths do not choose their personas, as their personalities are developed in accordance with neurobiological abnormalities that make them believe that their behaviours are logical. It is true that psychopaths do not desire to be different, but this is a consequence of their abnormalities, as they have no awareness that there is anything wrong with them. Individuals with psychopathy are truly victims of their own biology and this should not be forgotten when considering how they should be sentenced.

To provide harsher sentences to individuals with psychopathy on the basis of their disorder *per se* does not result in justice. Justice demands that individuals with psychopathy are recognized as having a disorder that impedes their ability to function like their non-psychopathic counterparts. Justice demands that everything is done to treat these individuals so that they can become productive members of society. Justice demands that we seek to reduce the pains associated with the disorder, not to intensify them with harsher penal sanctions. It is these principles that should inform the decisions that are made in regards to how individuals with psychopathy are addressed in the courtroom and the correctional system. After all, psychopathy *is* a mitigating factor, the courts simply have not recognized it as such yet.

APPENDICES

Appendix A: Relevant Sections of the Criminal Code

From *Criminal Code*, R.S.C. 1985, c. C-46.

Imprisonment for Life

- 745** Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be
- (a) in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
 - (b) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
 - (b.1) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of an offence under section 4 or 6 of the *Crimes Against Humanity and War Crimes Act* that had as its basis an intentional killing, whether or not it was planned and deliberate, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
 - (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4; and
 - (d) in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.

If Offender Found to be Dangerous Offender

- 753(4)** If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period.

Application for Finding that an Offender is a Dangerous Offender

- 753**(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied
- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
 - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
 - (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
 - (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

Application for finding that an offender is a long-term offender

- 753.1** (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
 - (b) there is a substantial risk that the offender will reoffend; and
 - (c) there is a reasonable possibility of eventual control of the risk in the community.

Defence of a Mental Disorder

- 16**(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or know that it was wrong.

Disposition by a Court or Review Board

672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Appendix B: Cases Used in Analysis

Psychopathy Cases

Appeal Cases

- R. v. *B.A.P.*, [2005] B.C.J. No. 396 (BCCA) (QL)
R. v. *Bennett*, [2002] B.C.J. No. 2446 (BCCA) (QL)
R. v. *C.W.*, [2006] O.J. No. 1392 (ONCA) (QL)
R. v. *G.L.*, [2007] O.J. No. 2935 (ONCA) (QL)

Application to Declare Accused a Dangerous Offender

- R. v. *A.N.*, [2002] O.J. No. 5026 (OSCJ) (QL)
R. v. *Berikoff*, [2000] B.C.J. No. 1373 (BCSC) (QL)
R. v. *Browne*, [2001] O.J. No. 5543 (OCJ) (QL)
R. v. *Chevrier*, [1999] O.J. No. 5213 (OSCJ) (QL)
R. v. *D.A.S.*, [2000] B.C.J. No. 2697 (BCSC) (QL)
R. v. *D.S.*, [2001] O.J. No. 2589 (OSCJ) (QL)
R. v. *Doyle*, [1998] O.J. No. 6674 (OCJ) (QL)
R. v. *Elizée*, [2007] O.J. No. 288 (OSCJ) (QL)
R. v. *F.G.B.*, [1998] B.C.J. No. 3212 (BCSC) (QL)
R. v. *F.W.M.*, [2001] O.J. No. 4591 (OSCJ) (QL)
R. v. *Ferguson*, [2000] O.J. No. 3008 (OSCJ) (QL)
R. v. *Hartling*, [2005] O.J. No. 545 (OSCJ) (QL)
R. v. *J.F.H.*, [2002] O.J. No. 362 (OSCJ) (QL)
R. v. *J.H.*, [2005] O.J. No. 4169 (OSCJ) (QL)
R. v. *J.M.C.*, [2005] O.J. No. 176 (OSCJ) (QL)
R. v. *Johnson*, [1998] B.C.J. No. 3216 (BCSC) (QL)
R. v. *K.J.B.*, [2003] O.J. No. 4966 (OSCJ) (QL)
R. v. *L.D.A.*, [1999] B.C.J. No. 1781 (BCSC) (QL)
R. v. *L.E.B.*, [2002] N.S.J. No. 285 (NSSC) (QL)

R. v. M.E.K., [2006] B.C.J. No. 1131 (BCSC) (QL)
R. v. M.O., [2003] O.J. No. 434 (OSCJ) (QL)
R. v. S.M.R., [2002] O.J. No. 652 (OSCJ) (QL)
R. v. S.S., [2005] O.J. No. 1391 (OSCJ) (QL)
R. v. Shrubbsall, [2001] N.S.J. No. 539 (NSSC) (QL)
R. v. Sipos, [1998] O.J. No. 985 (ONCJ) (QL)
R. v. Smaaslat, [2007] B.C.J. No. 766 (BCSC) (QL)
R. v. Talbot, [1997] O.J. No. 4549 (ONCJ) (QL)
R. v. W.T.W., [1997] B.C.J. No. 3157 (BCPC) (QL)
R. v. Weatherbee, [2001] N.S.J. No. 259 (NSPC) (QL)

Trial Decisions

R. v. Conley, [1997] B.C.J. No. 3186 (BCPC) (QL)
R. v. Frechette, [2000] B.C.J. No. 2874 (BCSC) (QL)
R. v. M.J.O., [2005] O.J. No. 5824 (OSCJ) (QL)
R. v. Manzié, [2006] B.C.J. No. 1096 (BCPC) (QL)
R. v. S.L.L., [2004] B.C.J. No. 2454 (BCPC) (QL)
R. v. Smith, [2000] B.C.J. No. 2886 (BCPC) (QL)
R. v. Zola, [2006] O.J. No. 2825 (OSCJ) (QL)

FASD Cases

Appeal Cases

R. v. Barnes, [2005] B.C.J. No. 1934 (BCCA) (QL)
R. v. George, [1998] B.C.J. No. 1505 (BCCA) (QL)

Application to Declare Accused a Dangerous Offender

R. v. J.N.J., [2004] B.C.J. No. 1710 (BCSC) (QL)
R. v. L.T.P., [2005] B.C.J. No. 1066 (BCSC) (QL)
R. v. Mumford, [2007] O.J. No. 4267 (OSCJ) (QL)

Trial Decisions

- R. v. Burnard*, [2005] O.J. No. 5854 (ONCJ) (QL)
R. v. Creighton, [2002] B.C.J. No. 2985 (BCPC) (QL)
R. v. D.B., [2002] O.J. No. 4183 (ONCJ) (QL)
R. v. D.B., [2003] B.C.J. No. 1735 (BCPC) (QL)
R. v. D.G.O., [2001] O.J. No. 3358 (ONCJ) (QL)
R. v. D.R.B., [2004] B.C.J. No. 480 (BCPC) (QL)
R. v. Dayfoot, [2007] O.J. No. 2869 (ONCJ) (QL)
R. v. J.H., [2002] B.C.J. No. 313 (BCPC) (QL)
R. v. J.L.H., [2000] B.C.J. No. 2820 (BCPC) (QL)
R. v. Lalonde, [2000] O.J. No. 252 (OSCJ) (QL)
R. v. R.L., [2004] O.J. No. 384 (OSCJ) (QL)
R. v. Steeves, [1998] B.C.J. No. 3135 (BCPC) (QL)
R. v. W.P.W., [2005] B.C.J. No. 2654 (BCPC) (QL)
R. v. X.W., [2002] O.J. No. 4188 (ONCJ) (QL)

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