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# **A Foucauldian Discourse Analysis of Judiciary Talk About Psychopathy**

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By

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## **Disclaimer**

The term 'psychopath' is used throughout this thesis in inverted commas to indicate to the reader that the researcher does not endorse this term. This is because of the negative connotations and misconceptions that this label carries, which have historically stigmatised and marginalised individuals. However, this term is recognised as a standard terminology in psychopathy research and practice and will, therefore, be referenced in this thesis in its adapted form. For the most part, the term 'psychopath' will not be used as a noun but rather to deliver an impact where issues related to this categorisation are pertinent.

## Abstract

Psychopathy-focused literature has primarily been situated in the positivist school of thought, aiming to understand this concept through cognitive, biological, neurological, and behavioural perspectives. Much of this research has been carried out in prisons, conflating the relationship between psychopathy and criminality. The findings from this knowledge base have contributed to the development of different practices and legislation in judicial settings. Some of the consequences of these practices, such as diagnosing psychopathy in the courtroom, have led to harsher sentencing outcomes at the expense of rehabilitation and treatment options. This is despite the lack of consensus as to the definition, cause, and treatment of psychopathy. Traditional research methods have largely overlooked how sociopolitical and cultural contexts have contributed to how psychopathy is understood and responded to. No research exists that sets out to examine how psychopathy is discursively constructed in courtrooms internationally, including in Aotearoa, New Zealand. Therefore, this thesis adopts a Foucauldian discourse analysis approach to uncover the discursive structures that contribute to the construction of psychopathy in Aotearoa New Zealand courtrooms. Four key discourses were uncovered: *'the psychopath' as a moral failure, psychopathy and risk, psychopathy and pathology, and 'the psychopath' as untreatable*. The findings highlighted how psychopathy as a construct has evolved over time in the courtroom. The findings uncovered how shifts in discourses, discipline-specific practices, and technological knowledge have implications for how psychopathy is provided meaning and managed in judicial settings. Through the available discursive frameworks, truths about psychopathic individuals as deviant outsiders who posed a risk to the broader population were constructed. These truths often led to their incarceration and further exposure to practices such as assessment, diagnosis, monitoring and treatment. Through this process, the experiences and authority of those individuals labelled as psychopathic were marginalised.

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## Chapter One: Introduction

*“The psychopath does not exist as a mythic in a film, as a medical entity with a hardwired brain, predisposed toward violence, or as an isolated individual preying on the weak, but as a reality created by certain discursive contexts based on shifting behavioural classifications that try to meet criminological theories of deviance and dangerousness.” (Federman et al., 2009, p.38)*

The study of psychopathy has an extensive history and has been widely debated as one of the most critical concepts in the field of forensic psychology. This is because of psychopathy’s perceived associations with criminality, violence, and antisocial behaviour (Hare & Neumann, 2005; DeMatteo & Olver, 2022). Based on international research, individuals labelled as psychopathic have been recorded to commit a disproportionate number of serious crimes (Kiehl & Hoffman, 2011), including violent (Shaffer et al., 2021) and sexual offences (Hawes et al., 2013) and are reported to have a higher rate of recidivism after release (Olver et al., 2013). The costs associated with those individuals labelled as psychopathic have also raised concerns due to the significant economic burden resulting from their frequent involvement in the justice system (Gatner et al., 2023).

The chapter aims to provide context as to the rationale for this study by briefly introducing the presenting problem in psychopathy research. This section then provides context to the relationship between psychopathy in the courtroom before describing the research aims.

### **Presenting Problem**

Psychopathy-focused research has primarily been conducted in two contexts: prisons, where studies often focus on risk assessment, recidivism, and intervention, and psychiatric

institutions, with a focus on mechanisms, diagnosis, and treatment. Since its proposed conception, psychopathy and so-called psychopathic individuals have been subjected to numerous social, political and scientifically endorsed definitions and practices (Tamatea, 2022). Whilst some have argued that psychopathy was first recognised in bible scriptures (Horley, 2014), Psychiatrist Hervey Cleckley is widely known as a pioneer in the field of psychopathy research for his definition and conceptualisation of psychopathy as a clinical construct (Arrigo & Shipley, 2001). In his seminal work, *“The Mask of Sanity”* (1941), he writes about his observations of individuals in inpatient psychiatric settings and describes these patients as having characteristics that included emotional detachment, impulsivity, and an inability to feel remorse but to be absent of delusion or psychotic features. Focusing on intrapersonal characteristics, Cleckley’s understanding of psychopathy was less concerned with the potential association with criminality (Arrigo & Shipley, 2001).

As medicine and psychological research practices developed, the way psychopathy was understood and managed changed. By the 1980s, Robert Hare’s refined description and understanding of psychopathy dominated the field (Hare, 1991). Hare contributed extensive empirical and theoretical research on psychopathy. As most of his research was carried out with predominantly male offenders, his findings supported the association between psychopathy and interpersonal, affective, and behavioural features linked to an increased risk of criminality (Hare, 1991; Hare & Neumann, 2005). Hare’s contributions towards this domain also involved the development of an assessment measure for psychopathy, the Psychopathy Checklist (Hare, 1980), which enabled later revised versions (PCL-R; Hare, 2003; Psychopathy Checklist: Screening-Version PCL: SV – Hart et al., 1994) and the ability for psychiatrists and psychologists to assess and diagnose a person with psychopathy. Since Hare’s research contributions, technological and scientific advances have produced new understandings about psychopathy. These have included neurological and biological

explanations for ‘the psychopath’ and their behaviour. Through these historical changes, ‘the psychopath’ has been powerless against the centuries of inquiries that have privileged positivist approaches to understanding this proposed condition. For the most part, these approaches have disregarded how sociopolitical and cultural contexts have contributed to how psychopathy is provided meaning and responded to.

## **Psychopathy in the Courtroom**

Some researchers have argued that because psychopathy research has focused on criminal justice and forensic populations, this has reinforced an existing stigma surrounding the label ‘psychopath’, potentially perpetuating the notion of these individuals as inherently criminal because of their “biological dangerousness” (Federman et al., 2009, p.37; Tamatea, 2022). This has been argued to produce a fundamental misconception of psychopathy as manipulative serial killers, violent offenders and moral outcasts frequently portrayed by Hollywood cinema and the broader media (Leistedt & Linkowski, 2014). Polaschek (2015) asserts that psychopathy is more ordinary than has been understood or “(mis)understood” as she weighs in on the debate, stating,

*“What is Psychopathy? It is a term that is used casually to refer to everyone from improbably skilled super-criminals to businessmen who succeed in making astronomical profits by staying more-or-less on the right side of the law but on the wrong side of morality or ethics.” (Polaschek, 2015, p.500).*

Despite these (mis)understandings about psychopathy, the very real consequences of this label in the courtroom have been explored. Researchers have investigated the relevance of using the PCL in court cases (DeMatteo & Edens, 2006; Walsh & Walsh, 2006) and the prejudicial effects of this diagnosis resulting in harsher judicial outcomes for defendants

(Berryessa & Wohlstetter, 2019; Edens et al., 2005). For the most part, psychopathy-focused research in the courtroom has primarily been concerned with investigations that aim to reduce future harm, develop or improve assessment tools, produce treatment modalities, and understand the etiology of psychopathy.

There have been some discursive investigations into forensic admission documents concerning psychopathy (Stowell-Smith & McKeown, 1999), psychologists talk about psychopathy (Clark-McGhee & Romero, 2018), mass newspaper representations (Paulsen, 2010), and theoretical and philosophical discussions regarding the discursive construction of psychopathy (Federman et al., 2009; Ruffles, 2004). These have provided insights into how discourses and discursive structures have contributed to the production of ‘the psychopath’. However, there is an outstanding gap in psychopathy-focused literature that has interrogated how psychopathy is constructed in the courtroom and the impacts of these discursive structures. This is despite psychopathy frequently occurring in this context and the very real consequences of being assigned this label. Therefore, by adopting a Foucauldian discourse analysis approach, this research study seeks to uncover the discursive structures that impact how psychopathy is understood in this setting. There are no studies, internationally or in Aotearoa, New Zealand, that have examined how psychopathy is discursively constructed in the courtroom. This thesis provides an opportunity to develop insights into the enduring truths about psychopathy in this setting.

## **Research Aims**

Utilising Foucauldian discourse analysis, this research aims to address this gap by examining summaries of Judges’ sentencing notes from Aotearoa New Zealand courtrooms from 1985 to 2023. This research aims to uncover the discursive structures that contribute to the construction of psychopathy in Aotearoa, New Zealand courtrooms. And to explore the

impacts of these structures and constructions on practices and consequences for so-called 'psychopaths' in this setting.

## **Chapter Two: Literature Review**

This chapter includes a brief description of the historical evolution of psychopathy, beginning with its emergence in the nineteenth century. The dominant research surrounding psychopathy and its assessment and treatment will also be provided. Following this, the Aotearoa, New Zealand justice system risk-centric focus will be briefly located, and some of the consequences of this approach for those labelled as psychopathic will be detailed. Existing international research on the criminal justice system's relationship with psychopathy will be highlighted, including inquiries that have been concerned with the impacts of being assigned the label of psychopathy on sentencing outcomes. A review of existing discursive research on psychopathy will be discussed, and due to the dearth of research in this area, consideration of discursive research on other mental health conditions within the courtroom will be explored. The chapter concludes by illustrating how psychopathy has been constructed by positivist understandings and research, marginalising alternative understandings of psychopathy.

### **Historical Evolution of Psychopathy Research**

#### **Nineteenth Century**

Phillipe Pinel has generally been afforded the title of pioneering the initial recognition of what is now described as psychopathy (Horley, 2014). In 1801, whilst Pinel was a medical director of a psychiatric facility, he was reported to have observed in his patients' impulsive and explosive rage and extreme violence (Millon et al., 1998). He described these patients as being psychologically disturbed but without disordered thought, terming this “*manie sans delire*” or mania without delirium (Hervé, 2007, p.32). Other researchers, such as psychiatrist Benjamin Rush, physician James Prichard in 1835 and Psychiatrist Henry Maudsley in 1897, later reinforced this belief that psychopathy was a result of moral derangement, moral insanity, and moral defectiveness (Arrigo & Shipley, 2001; Tamatea, 2022). Both Rush and

Maudsley were particularly concerned with placing these individuals in the criminal class, with Maudsley describing these individuals as “chronic offender(s) of lower-class origin because of their “moral imbecility” (Arrigo & Shipley, 2001, pp. 331-332). The definitions in the nineteenth century have been described as a “wastebasket” for a large group of people that were considered to display “antisocial behaviour” such as petty crimes, various violent crimes and even homosexuality (Hervé, 2007, p.34). Those individuals who were assigned to this category shifted from being considered under the umbrella of mental illness to being understood through the lens of social condemnation. Hervé (2007) described this period as the beginning of the debate as to whether psychopathy is an illness or whether those assigned this label are just bad; he states this “value-laden position has been debated ever since” (p.33).

All those considered to be deviant individuals were at risk of being labelled as morally deficient. As psychiatry attempted to distinguish itself as a medical profession in the nineteenth century, and as the concept of moral deviance, morality, and justice became a central debate amongst lawmakers, politicians, and medical professionals, this enabled psychiatry to expand its “psychiatric power” in attempts to support this maintenance of moral order (Mason, 2006, p.100). This pursuit of moral order often involved confining those cast as morally deviant individuals in insane asylums where, in some cases, psychiatrists such as Pinel would expose these individuals to what was termed “moral treatment” (Horley, 2014, p.94). Moral treatment and the use of asylums were seen as a significant development in terms of human rights, as individuals were less likely to be subjected to being chained and abused as a form of treatment. However, this moral treatment did not address morality or the ethics of a person and instead mostly involved the enforced hospitalisation of these individuals. In the latter part of the nineteenth Century, German psychiatrist Julius Koch described the etiology of psychopathy as a congenital condition, shifting the perspective of the condition to be viewed through a lens of health rather than condemnation. He

recommended that facilities that were “neither asylums nor prisons” be built specifically for these individuals (as cited in Eghigian 2015, p.286), asserting that the purpose was to house these individuals until they were no longer a threat to the moral collective.

This shift in psychopathy being viewed as somewhat of a health-related disorder appeared short-lived as the social condemnation of these individuals became the focus once again. In the latter years of the nineteenth century, morally deviant individuals were again linked to criminality and antisocial behaviours. As psychiatric technologies and diagnostic tools developed, these professionals became immersed in the identification of deviant persons to ensure the safety of the broader society. It is argued that this promise of excluding those deviant persons enabled the production of further discipline-specific technologies to achieve this (Federman et al., 2009; Oosterhuis, 2014). In some countries, psychiatrists even advocated for the early diagnosis of all potential ‘psychopaths’ and their forced treatment prior to crimes being committed (Oosterhuis, 2014).

Psychopathy, through this period, was heavily influenced by a focus on moral deficits as explanations for socially unacceptable behaviour, which contributed to decades of debates and confusion as to how psychopathy was later defined and identified (Horley, 2014). The implications of this period on those so-called psychopathic individuals were their social condemnation, which sanctioned the use of punishment, subjection to unethical treatment approaches and containment in insane asylums.

## **Twentieth Century**

Through this period, psychiatrists and experimental psychologists were attempting to distinguish psychopathy as a disorder to move away from the wastebasket approach and what was understood as the use of moral judgment rather than scientific inquiry to identify psychopathy (Kiehl & Hoffman, 2014; Tamatea, 2022). German Psychiatrist Emil Kraepelin (1915), who is often described as the founder of modern scientific psychiatry (Chase, 2018),

led the embrace of new technological and classificatory frameworks and produced the concept of multiple psychopathies. He labelled some of these “the born criminal” and “the morbid liars and swindlers” (as cited in Hervé, 2007, p.35). Despite scientific advances, psychopathy continued to be associated with criminality and anti-social behaviour, conflating existing fears around this construct (Arrigo & Shipley, 2001). During this time, governments and correctional bodies were being met with a demand for better (comparatively) treatment of offenders in prisons, with a focus on offering and developing new rehabilitation pathways (Oosterhuis, 2014). However, for those offenders categorised as incredibly dangerous or not to be easily treated, such as ‘psychopaths’, the moral panic of the public continued to support the use of punitive practices, such as incarceration or containment in secure hospitals.

The mid-twentieth century saw a rise in biological and neurological understandings of psychopathy. This knowledge shift further entrenched psychopathy within medical and psychiatric disciplines. In 1941, Hervey Cleckley became the first to define psychopathy as a personality disorder (Blair, 2024). Other theories began to emerge linking psychopathy with a reduced capacity for experiencing emotions such as fear and biological differences, which meant that because of their cortical inhibition, they were stimulus-seekers (Tamatea, 2022). Some scholars maintained a developmental approach to understanding psychopathy, examining psychopathy from a lens that encompassed both psychological and neuropathological insights (Wooton 1959, as cited in Duff, 1996). Others theorised that psychopathy was an adaptive feature from exposure to traumatic events in childhood (Porter, 1996; Harris et al., 1994). Most of the research and understanding of psychopathy at this time positioned psychopathy as a malady or illness that may or may not be able to be cured by medical professionals. This positioning of psychopathy often meant the involuntary hospitalisation of those individuals who were displaying what were perceived to be psychopathic traits (Habermeyer et al., 2020).

Despite significant amounts of research into psychopathy during the mid-twentieth century, there were still ongoing criticisms as to the continued perceived failure of researchers to arrive at a single definition of psychopathy and a lack of consensus as to its cause. The definitions were regarded as overly inclusive, often considering other symptoms of disorders such as borderline personality disorder, mania, and those with brain injuries and or neurological brain disease (Hervé, 2007; Millon et al., 1998; Tamatea, 2022). As new technologies continued to emerge with the establishment of actuarial assessment tools, psychopathy-focused research was less concerned with understanding this construct as a mental health condition and instead emphasised risk factors and the prediction of risk (Federman et al., 2009). At this time, psychiatry, psychology and law became intertwined, enabling psychiatric and psychological knowledge and practices in legal settings to endorse how social problems, such as psychopathy, were managed or contained (Mason, 2006).

### **Twenty-First Century**

The twenty-first-century literature and clinical understandings of psychopathy have continued to rely on positivist research methods to conceptualise and understand this concept. Through this period, there has been an increased focus on neuropsychological and biological understandings of psychopathy as medical, psychiatric, and psychological technologies improved (Viding & McCrory, 2012). Using neuroimaging studies, researchers have posited that psychopathy may be a result of an impairment in the amygdala (Blair et al., 2006), deficits in the functioning of parts of the orbital frontal cortex (Blair, 2007), or a result of affective processing issues (Patrick et al., 2009). Other explanations have also been provided, including the role of genetic predisposition, where children who were found to have high levels of callous-unemotional traits were genetically vulnerable to developing psychopathy (Viding & McCrory, 2012). As a result of these developing technologies, psychopathy has

been defined as something locatable in the body, or more specifically, the brain (Pickersgill, 2009).

Gillet and Huang (2013) describe how these findings have contributed to the notion that those individuals labelled as psychopathic are fundamentally, biologically, and neurologically different from the majority population. The consequences of this perspective have been the alienation of those individuals deemed psychopathic from what is considered normal society and the ongoing neglect of cultural and socio-political factors contributing to how psychopathy is understood. Additional consequences for so-called 'psychopaths' following the development and focus on special technologies include what Pickersgill (2009) describes as a "preoccupation with the body as the locus of psychopathology" (p.45). This ability to locate psychopathy in the body has pulled psychopathy further into only being understood through a medical lens and by medical and health professionals. Federman et al. (2009) argue that the dominant research focusing on locating psychopathy within the body has positioned these individuals as subjects that can only be managed or understood by certain professions and researchers. Despite the current research base constructing psychopathy as resulting from neurological impairments or apparent biological differences, this has not appeared to impact how psychopathy has been managed in the courtroom, as it is not considered a mental impairment impacting their legal culpability as they continue to be incarcerated or contained for the purposes of protecting the public from their predicted future risk (Pillsbury, 2013).

## **Summary**

From the nineteenth century to the present day, the construct of psychopathy and how it has been managed has evolved. Where psychopathy was once understood through a lens of morality and was then replaced by technological and empirical knowledge bases. Institutional practices, professional disciplines and knowledge shifts contributed significantly to how

psychopathy was understood and managed. Whilst there have been changes to how psychopathy was managed, including the move from insane asylums to scientifically endorsed treatment programs in prison, those individuals labelled psychopathic have been subjected to the reproduction of different forms of social exclusion and control. For the most part, academics, clinical and legal professionals have controlled how those individuals assigned a diagnosis of psychopathy are managed and treated, with the voices of these individuals being absent from the literature.

## **Assessment**

The purpose of personality assessment has been to collate various kinds of information about a person so that their personality characteristics are understood, which can potentially contribute to recommendations in clinical, forensic, educational, organisational and criminal settings (Weiner, 2017). Depending on the assessment, the results are often used to provide insight into the person's attitudes towards themselves and others, adaptive capacities, strengths, and weaknesses, or assign a diagnosis (Archer & Smith, 2014). In criminal justice settings, treatment planning, monitoring, and sentencing outcomes can be informed by the results of a personality assessment. There have been three dominant approaches to actuarial personality assessments for psychopathy. These are self-report scales (PPI-R, Lilienfeld & Widows, 2005), informant rating scales (The Childhood Psychopathy Scale – CPS, Lynam, 1997) and expert rating scales (PCL, PCL-R, PCL: SV).

Robert Hare's development of the Psychopathy Checklist and its later variations (Psychopathy Checklist-Revised (PCL-R), Psychopathy Checklist Screening Version (PCL: SV; Hart et al., 1994), and the Psychopathy Checklist, Youth Version (PCL-YV developed by Forth et al., 2003 as cited in Neumann et al., 2006) has been and continues to be the most widely used and researched assessment tool for psychopathy. The PCL and its variations generally involve a semi-structured interview and review of a person's case notes, clinical

records and/or criminal history (DeMatteo & Olver, 2022). When this information is compiled, a total score is provided and then compared to a normative range that will indicate how closely the individual may display characteristic traits of psychopathy. Most of the research supporting the PCL's reliability and validity has been carried out in forensic and criminal justice settings with a focus on its perceived ability to predict risk (Hart et al., 1998; Hemphill et al., 1998; Olver et al., 2013). Despite the PCL being widely acknowledged as reliable, most of the studies in support of its use have generally been carried out with white males who have offended (Skeem et al., 2004). The tool has also met scrutiny regarding its administration, including adversarial allegiance (Lloyd et al., 2010; Murrie & Boccaccini, 2015) and inconsistent and unreliable scoring of the PCL-R (Hare, 1998).

Inquiries have been made about the usefulness of these assessments that produce labels and the function they serve. Tamatea (2022) argues to this point, describing psychopathy assessments as part of an "agenda to preserve the security and wellbeing of the community" that ultimately serves to reinforce the negative stereotypes of individuals as different (p.30). In the case of psychopathy, because it has been described as an elusive condition with individuals being able to mask their less desired traits (Cleckley "*Mask of Sanity*"), this elusiveness has entrenched the belief that only certain professions and their discipline-specific techniques or tools can be used to uncover this undesirability (Jalava, 2006). The dominant belief about actuarial assessment tools is that they, too, are more reliable than professional judgment and provide an opportunity to measure and observe an individual's mind that otherwise could not be achieved. By assessing and assigning a diagnosis of psychopathy, they are subsequently located within biomedical and psychological sciences; these practices then contribute to the regulation of a medical framing of what potentially is a social issue. For psychopathy, the assessment results sit at the intersection of law, psychology, and medicine. The consequences of framing psychopathy as an illness

enable the notion that treatment is needed. However, the PCL is additionally used to provide a risk classification to individuals, impacting their sentencing outcomes.

## **Treatment**

There has been a persistent, scientifically endorsed belief amongst researchers, health professionals, and the public that psychopathy is untreatable or at least difficult to treat. This has been partly a result of a persistent notion that these individuals are biologically and fundamentally different from the criminal population and broader society (Tamatea, 2015). Some have regarded this persistent 'truth' as the stigmatisation of yesterday's research (Larson, 2019). Earlier researchers who have been considered prominent in the field of psychopathy have supported this construction of psychopathy as untreatable. James Prichard argued that the morally insane were criminally inclined and immune to punishment (Hervé, 2007). Cleckley later weighed in on this belief and noted in their final edition of *The Mask of Sanity* that despite individuals being subjected to multiple forms of psychotherapy, they were unaffected (as cited in Polacshek & Daly, 2013). The endorsement of this belief was not reserved to the nineteenth century, and following the emergence of technologies supporting empirically driven research, this notion persisted.

Rice, Harris, and Cormier (1992) concluded in their study that those individuals labelled as psychopathic who were subjected to treatment had poorer outcomes and a higher risk of violence following release in comparison to those identified as non-psychopaths. Other studies' findings suggested poorer perception from clinicians around psychopathic individuals' motivation towards treatment (Salekin, 2019), that individuals labelled as psychopathic were challenging to treat (Hemphill et al., 2002; Hobson et al., 2000; Langton et al., 2006) or that treatment made their behaviour worse which resulted in their exclusion from treatment programs (Rice et al., 1992). Many of these studies were found to be of poor quality because they were conducted during a time when psychopathy was not well understood. Other

issues, such as a lack of randomised controlled trials, minimal information surrounding the specific focus of treatment, and poor clinical consensus across studies regarding the characteristics that indicate psychopathy and its etiology, have been highlighted (Polaschek & Daly, 2013; Salekin, 2019). In contrast, more recent research has concluded that psychopathic individuals are treatable through cognitive-behavioural and psychoanalytic treatment modalities (Polaschek, 2011; Sewall & Olver, 2019; Skeem et al., 2002; Wong et al., 2012). Concerns about this persistent discourse of untreatability have sparked debates about the ethical and professional standards of those health professionals responsible for providing adequate support to service users (Larson, 2019). Salekin (2019) concluded that “clinical lore” has led to the belief that psychopathy is untreatable, as there is little scientific basis for this conclusion (p.79).

There have been real consequences to this scientifically endorsed notion, including the prolonged social exclusion of these individuals either through incarceration or hospitalisation (Edens et al., 2001). The longstanding truth about the treatability of psychopathy has led health professionals and correctional staff to avoid treating offenders with this label, dampening their attempts for early release (Wong & Hare, 2005). D’Silva et al. (2004) contested previous findings on psychopathy treatability, specifically detailing the impacts of this notion on policy and practice. They described this as a “Catch-22 situation” where individuals who are assigned a diagnosis of psychopathy and high-risk classification from their PCL score are denied from treatment groups, but their inability to attempt treatment impacts the possibilities of release and parole (p.163). Across the literature on treatment, the voice of these individuals is invisible, as they have never been involved in establishing treatment programmes specific to psychopathy.

## **Psychopathy and the Justice System**

This section briefly outlines the risk-centric approach of the Aotearoa, New Zealand judicial system. The direct impacts on individuals labelled as psychopathic and how they are managed as a result are described. Following this, the role of the label as an aggravating factor in sentencing outcomes and dominant assumptions regarding the legal culpability of these individuals is detailed. The purpose of highlighting these two issues is to describe the very real implications of being assigned a diagnosis of psychopathy in the courtroom and the dominant responses to managing or responding to these individuals.

### **Psychopathy and the Aotearoa, New Zealand Justice System**

The Aotearoa, New Zealand judicial system has historically adopted and imported criminal systems influenced by and established in other neoliberal and Anglo-settler countries (Pratt & Anderson, 2016 as cited in Gordon & Webb, 2022). Similar to that of Canada, the U.S., Australia and the U.K., through the 1980s, 90s and 2000s, a shift occurred as to how crime was managed in New Zealand (Gordon & Webb, 2022). This shift involved a change in focus from punishing dangerousness to an emphasis on the prediction of future risk and crime prevention for the purposes of protecting the public. Gordon and Webb (2022) describe how in Aotearoa, New Zealand, the Integrated Offender Management (IOM) framework was imported from overseas in the late '90s and 2000. This approach towards prisoner management aimed to privilege psychological assessments and interventions for offending reduction, with a focus on the measurement of risk through actuarial assessment tools.

Aotearoa's risk-centric approach has meant the privileging of assessment tools, like the PCL, for 'psychopaths', resulting in their categorisation and classification based on risk. High psychopathic traits on the PCL frequently lead to individuals being deemed 'high-risk', which means certain professionals are then able to make decisions about those individuals'

treatment, management in prison, and sentencing outcomes (Day & Tamatea, 2021). Risk classification tools and frameworks in the courtroom have been described as a means to both assign individuals to and control the 'risky' group through social exclusion (O'Malley, 2004). Those individuals labelled as psychopathic are subjectified and created into docile beings who can be measured, categorised, treated and criminalised. The assignment of these risk labels or diagnoses that carry connotations of risk, highlight the power of the concept of risk and its use by governments and judicial systems as a means to carry out actions on identified risky individuals (O'Malley, 2008).

### **Implications of a Psychopathy Label on Court Outcomes**

In Aotearoa New Zealand courtrooms, when individuals suffer from a mental illness that significantly impairs their ability to make decisions or understand their offending, their assigned condition can serve as a mitigating factor in sentencing. Judges are able to draw on relevant information provided by legal and clinical staff regarding an individual's capacity at the time of offending to make decisions regarding their legal culpability, future treatment pathways, supervision, and, in some countries, consideration as to whether they should be trialled in a specialised Mental Health Court (Schneider, 2010; Sinclair, 2019). In New Zealand (and most other countries), psychopathy is not considered to be a mitigating factor in sentencing under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (Pillsbury, 2013).

Internationally, researchers have investigated the impacts of introducing a psychopathy diagnosis or the results of psychopathy-focused actuarial assessments on courtroom outcomes. Scholars have found that psychopathy is often the focus of expert testimony across criminal cases (Edens & Cox, 2012; Kelley et al., 2019). Findings have also indicated that psychopathic individuals are more likely to be subjected to harsher outcomes

and that the psychopathy label more frequently functions as an aggravating factor during sentencing (Cox et al., 2013). In one study, when defendants were described as psychopathic, participants were significantly more likely to support the death penalty in comparison to no disorder (Edens et al., 2005). Parallel findings have occurred where the use of labels such as ‘psychopath’ had significant impacts on sentencing outcomes. This more often occurred when the label was provided as evidence of the potential future risk of the offender (DeMatteo et al., 2014; Truong et al., 2021; Wayland & O’Brien, 2013).

These prejudices were not reserved for mock jurors; Zinger and Forth (1998) carried out a review of case law in Canada with the aim of investigating the testimony of mental health professionals when speaking about psychopathy. They found that expert testimony did not accurately reflect the scientific knowledge base around psychopathy and that there was an increase in severity for judicial outcomes when psychopathy was present. These prejudices towards individuals labelled psychopathic in the courtroom have been positioned as being a result of notions disseminated about psychopathy’s treatability and prediction of future risk (Lloyd et al., 2010; Viljoen et al., 2010). The literature investigating the implications of a diagnosis of psychopathy in the courtroom has highlighted that this label functions to stigmatise these individuals in the courtroom. For other mental illnesses or conditions, a diagnosis typically acts as a mitigating factor or at the very least, provides opportunity for alternative understandings of the condition and behaviours to be considered. For those individuals labelled as psychopathic, researchers have even described psychopathy as “perhaps one of the least-favourable traits one could possess in terms of legal ramifications” (Fox et al., 2013, p.2).

## **Psychopathy, Criminal Responsibility and Moral Agency**

Legal experts, psychiatrists, psychologists and philosophers have long debated over whether or not psychopathy should be considered a mental illness that diminishes capacity and reduces legal culpability in a court of law. Two key schools of thought have been uncovered; some researchers have regarded individuals who were perceived to display psychopathic traits as insane or suffering from a biological and neurological illness, therefore mitigating their punishment (Haksar, 1965). Others have perpetuated the notion that these individuals were ‘morally dead’ and had no rights as persons (Murphy, 1972). A key component to this notion of moral agency and blameworthiness has been the argument that individuals assigned a label of psychopathy have the ability to make rational decisions because they are only morally and emotionally impaired (McSherry, 1999, as cited in Fine & Kennett, 2004). This is in contrast to disorders such as schizophrenia and psychosis, which may impact an individual’s understanding of reality. Schopp and Slain (2000) investigated how psychopathy in sexual offenders impacts criminal responsibility and civil commitment under sexual offending statutes. Whilst acknowledging potential impairment, they argue that conviction and civil commitment provide a logical approach to the management and control of psychopathic individuals for the purpose of public safety. This notion of public protection from ‘psychopaths’ is frequently framed within a legal discourse and is introduced in arguments in support of ‘psychopaths’ being legally responsible.

Those legal and philosophical researchers who have argued that psychopathic individuals are not rational moral agents (Morse, 2008; Watson, 2023) have generally grounded their argument in a biomedical understanding of psychopathy. The key assertion from this perspective is that psychopathic individuals have psychological and neurological impairments, and considering them as blameworthy in a court of law is unjust (Godman & Jefferson, 2014; Fine & Kennett, 2004). These perspectives have given rise to concerns

related to neuro-ethics in the court of law, such as the difficulty in deciding on criteria for responsibility and agency (Malatesti & McMillan, 2021). Pillsbury (2013) describes what they call “The Problem of Psychopathy”, where they discuss the issue of and need to distinguish law and science in the court of law. Pillsbury explains through a series of generalised statements that science is concerned with why someone commits crimes, and Judges and the courts are less concerned with a categorisation that “says nothing directly about guilt” (p.300) and instead focuses on a moral judgement about an offenders choice to commit offences.

The two schools of thought regarding criminal responsibility and the agency of psychopathic individuals have dominated psychopathy-focused literature. However, Rezneck (1997) argues that a psychopathy diagnosis and its implications on sentencing in the court of law are less about providing evidence for impairment, and instead, they assert that is because of the focus of clinical descriptions that highlight traits such as deficits in empathy and remorse and being difficult to treat, that they are then considered irredeemable and that this has the most significant impact on sentencing outcomes (as cited in Fine and Kennett, 2004).

## **A Discursive Approach to Psychopathy Research**

Positivist perspectives have dominated how the public, researchers, and forensic, legal, and clinical practitioners regard people so identified as psychopathic. This has enabled the production of psychopathy to be framed as a legal, medical, and psychological issue, legitimising the use of practices derived from these discursive fields and knowledge bases. Discursive research has prompted alternative ways of talking about psychopathy and will be considered here.

Whilst there is a dearth of investigations in this area, researchers Clark-McGhee and Romero (2018) sought to understand how psychologists in forensic settings understood and talked about psychopathy. From interviewing eight clinical psychologists in the United

Kingdom, their findings highlighted how psychologists who talk about psychopaths typically framed them as dangerous, challenging, manipulative, 'at risk' or vulnerable and deficient psychologically. Frequently, discursive constructions of 'psychopaths' were grounded in a dominant biomedical discourse, where discursive tools such as formulation, diagnosis, and assessment tools like the PCL legitimised the regulation of how psychopathic individuals were constructed. They found through medicalising deviance, psychologists described psychopathy as particularly challenging and elusive, legitimising the need for containment rather than a focus on treatment. These findings resonated with Pickersgill's (2009) findings, following their discursive analysis of interviews with neuroscientists that focused on their relationship with research and clinical practice about psychopathy and other personality disorders linked to antisocial behaviour. Neuroscientists talk about psychopathy emphasised the notion that this condition is complex and elusive and that this is due to the biological and genetic aetiological factors interacting with environmental causes that contribute to its apparent manifestation. Despite the focus on genetic and biological factors, neuroscientists spoke frequently about how this is not properly understood or located yet. The consequences of this framing led to the reduction of psychopathic individuals to their neurology and biology, positioning their behaviour as innate and immovable.

This discourse of biological difference has been found to transcend academia and clinical practice to the public's framing of psychopathy. Paulsen (2010) carried out a critical discourse analysis of media representations of psychopathy and found that 'the psychopath' was constructed as different to other human beings because of their biological deviance. This biological difference meant that psychopathy was framed and understood as untreatable or to have no cure. For the most part, psychopathy was constructed by a psychiatric discourse disseminated through the media lens, which Paulsen (2010) argued likely contributes to the legitimisation of the control of these individuals. Through incarceration and increased

management and surveillance, they stated that “only more power makes the psychopath manageable.” (p.78).

This biological and neurological framing has appeared in another discourse analytic study but as being dependent on and framed by race. Stowell-Smith and McKeown (1999) found that admission reports for inpatient psychiatric services differed in their understanding of black and white ‘psychopathic’ males. Their findings indicated contrasting discourses about the mental component of white and black patients. Following offences carried out by white patients with a label of psychopathy, the incident and the patient were described within a framework that considered them to be passive and that their symptoms were a result of a complex framework of biological and psychological factors. Whereas, for black patients labelled as psychopathic, the incident and the patient were positioned within a discourse that focused on their behaviour as abnormal and dangerous with less emphasis on internal states and disorders. Stowell-Smith and McKeown (1999) concluded that black patients were assessed within a framework of morality, where the focus was on responsibility and accountability, locating these individuals within a discourse of dangerousness.

No studies were found that explicitly examined how psychopathy is discursively constructed in the courtroom. However, courtroom discourse has been explored by researchers in relation to mental health diagnoses and conditions more generally. Mousourouli, Neztekidou and Georgaca (2024) investigated the construction of defendants in Greek courtrooms by analysing 49 criminal court rulings. They found that individuals with mental health concerns were constructed as either “dangerous mental patients” or “criminal personalities” (p.93). Mousourouli et al. (2024) uncovered the construction of “criminal personalities”, which made reference to psychopathy in the courtroom. Psychological assessments and discourses of normality were employed to attribute criminality and antisociality to individual traits. Differences between biological illness and “moral illness”

were highlighted, and for those who were assigned the “criminal personalities” position, the courtroom focused more so on the defendants’ free will and decision-making. Expert reports were used as evidence of the defendant’s criminal personality, and individuals were constructed as having a mental disorder that did not impact their ability to control their actions but rather just their moral judgment. These individuals were then categorised as being incapable of being treated to fit within social norms, resulting in their “social exclusion” rather than treatment (p.92). The findings from this study highlighted how biomedical discourses were drawn upon when understanding the connection between crime and mental illness. At times, this was used to categorise defendants as impaired and, therefore, less responsible for their actions, whereas for others, their behaviour was connected to their disordered personality.

Other studies have highlighted the specific functions of different practices and discipline-specific tools in the courtroom and how these have contributed to the construction of individuals. MacDonald (2016) carried out a multi-method design, which included a review of mental health court files, site visits, and interviews. Informed by discourse methods and key Foucault theories, they sought to understand how people with mental illnesses are constructed and managed when they are on trial for committing minor crimes. Their findings indicated that regulatory practices such as information gathering by police and health professionals produced institutionally constructed knowledge about the person, resulting in their subjectification. MacDonald discusses how this subjectification provided foundations for individuals to be shaped by various tools and institutional practices, which further legitimised the subject’s ability to be assigned new practices, habits, and identities. In this study, they found that the court was heavily reliant on psychiatric evaluations in decision-making. A dominant framework within these evaluations was the discourse of individual responsibility and the individual’s levels of compliance. This extended beyond taking responsibility for their

crimes to how and if these individuals would take the advice provided by health professionals to regulate and control themselves. This need for regulation and control of self was managed and motivated by the conditions of their orders and recommendations imposed by the courts. MacDonald described this as the process of “transforming their otherness into a more acceptable and self-regulated essence” (p.33).

These research studies reflect a different perspective on how psychopathy is understood and the impacts of discourses and discursive constructions of ‘psychopaths’ on social, legal, and clinical practices. The findings from these studies challenge our accepted truths about the concept of psychopathy. They additionally highlight how scientific knowledge has functioned as a means of control over the bodies of the mentally and criminally ill.

## **Summary**

By outlining the evolution of research and clinical perspectives on psychopathy, this chapter begins to demonstrate how the histories, knowledge shifts and opinions from the academic, legal, and clinical fields have contributed to the construction of ‘the psychopath’. The knowledge produced from these fields has led to various scientifically endorsed practices such as moral therapy, the use of insane asylums, incarceration and treatment. As has been demonstrated here, the literature on psychopathy and the associated issue of ‘risky’ types of people consistently supports clinical practices in offender monitoring, management and containment. In addition to this, psychopathy research has been understood through traditional research methods that have focused on moral deficiency or neurological, psychological and biological implications. As a result of this positioning, individuals have been placed at the centre of the pursuit to understand this concept as occurring within the body, ignoring socio-political, cultural and historical influences on the construction of psychopathy. A small body of research explores psychopathy from a discursive lens,

examining and interrogating the dominant discourses in various contexts (i.e., psychiatric inpatient notes, media representations, and psychologist perspectives). However, none of which investigates how individuals labelled psychopathic are discursively constructed in the courtroom. This study aims to address this gap, potentially uncovering new insights into how psychopathy is constructed and the potential consequences of this in New Zealand courtrooms.

## **Chapter Three: Method**

This study aims to uncover and examine discursive structures that reveal how psychopathy has been constructed in the context of Aotearoa, New Zealand courtrooms. This section begins with the epistemological position guiding this study. The following section highlights the significance of discourse analysis in psychopathy-focused research and the opportunity this method provides to discover new insights. A brief overview of discourse analysis and the other approaches considered for this research are presented. Following this, a rationale will be given for employing Foucauldian discourse analysis to answer the research aims. The subsequent section will outline some of the key concepts of Michel Foucault and his theories. The procedural aspects of this research are described, including the data collection and analysis process. Following this, my subjective position will be explored, and the ethical considerations will be discussed.

### **Epistemological Position**

I was motivated to embrace an integrated epistemological position of social constructionism and discursive psychology because I was curious as to how psychological concepts are, in some sense, socially constructed. This research is less concerned with whether psychological concepts such as psychopathy exist but instead with how language and discourse have contributed to the construction of this concept. By employing a social constructionist approach, this study supports the notion that through our lived experiences and interactions with our environment, our beliefs and knowledge about the world are historically, socially, and culturally located (Harper, 2012). It is essential to be transparent about the scope of this study and its aim not to establish an objective truth about psychopathy but to uncover how truths and knowledge about psychopathy are constructed through language and action (Burr, 2015). Social constructionists encourage inquiry into our assumptions about our lives

and what we see as normal. This position provides a foundation to clarify how meaning is constructed through social interaction by interrogating and uncovering discursive structures that contribute to this production of meaning and establishment of truths (Khan & MacEachen, 2021).

Discursive psychology is seen as a non-traditional approach to psychological research because of its focus on how talk, text, and practices, such as constructions, categories, and orientations, exist within social interactions in particular settings (Billig, 2009). This contrasts with traditional research methods that are concerned with objective outcomes as a key component of discursive research, which involves interrogating these conventional practices and research. It also breaks away from the constrictions of social psychology in that it focuses on everyday practices in institutional settings and uncovers how psychological concepts, identities, activities, relationships, and systems are produced through interactions (Hepburn & Wiggins, 2008; Potter, 2012). There are different approaches to discursive research, each focusing on different types of discursive practices (Wetherall, 2015). Some researchers have focused on how psychological processes, such as categorisation and evaluation, are discursive processes. This approach has provided new insights into how psychologists conceptualise different objects, such as psychopathy. For example, in a discursive inquiry carried out by Federman et al. (2009), they describe how the existing literature on ‘the psychopath’ has been dominated by absolutism, which has neglected alternative understandings of psychopathy. They argue how this dominant perspective has contributed to the establishment of a “socially constructed monster of modern times” (p.44).

## **Discourse Analysis**

Parker (2013) describes discourse analysis as an opportunity to think critically about psychological concepts and challenge the realities that have been shaped by social contexts and interactions. This has represented a move from cognitive conceptions of behaviour to

instead focus on reality as socially constructed (Gillies & Willig, 1997). Various explanations for discourse have been provided, with some researchers asserting that it is formed by a combination of language, meaning, images, stories, actions, and statements that produce reality (Burr, 2015). Others have focused on the socio-cultural context of the words spoken as essential in the production of discourse and meaning (Alvesson & Kärreman, 2000) or are more concerned with the function and actions resulting from these discourses and their relationship with power (Foucault, 1996; Wodak & Krzyznowski, 2008). Ultimately, discourse analysis allows us to uncover and highlight existing assumptions that have been widely accepted as truth and, as a result, have rarely been contested.

Discourse analysis goes beyond the process of uncovering and highlighting these assumptions that have been taken for granted and involves challenging how discourse contributes to the production of different practices. Potter and Wetherell (1987) describe discourse analysis as a process that involves focusing on how language, like what appears to be a simple description, is constructive and produces real-world consequences. Jones et al. (2015) explain how all social practices are mediated through discourse and how “discourse is used as a tool for performing social practices” whilst simultaneously maintaining and reproducing these social practices (Jones et al., 2015, p.4). It is these real-world consequences that this thesis is also concerned with. This affirms the use of this approach to answer the research aims of this study.

Discourse analytic methods have been used to examine different types of text within the study of psychopathy, including interviews (Clark-McGhee & Romero, 2018), newspaper articles (Paulsen, 2010), and psychiatric inpatient reports (Stowell-Smith & McKeown, 1999). Across these approaches, discourse analysts' key principle is studying how the objects or subjects, in these cases, psychopathy or ‘the psychopath’, are constructed through discourse,

how this construction functions as disseminating ‘truths’ about these individuals and the implications of these discourses on the production and legitimisation of social practices.

### **The Rationale for Foucauldian Discourse Analysis**

Foucauldian discourse analysis provides a framework to uncover and investigate how psychopathy is discursively constructed and how these discursive structures legitimise and negate certain practices. Foucauldian discourse analysis is concerned with how discourses exist within systems derived from bodies of knowledge and the exercise of power in various forms (Arribas & Walkerdine, 2017). It is through this exercise of power that different discursive practices are institutionalised and regulated, producing settings in which subjects are spoken about (Jäger & Maier, 2009). Michel Foucault is well known for his exploration of how psychiatric disorders or ‘madness’ have been made into subjects of knowledge. Through discursive statements, which are made up of objects, statements, and concepts together, they produce meaning or discourse (Federman et al., 2009; Simpson, 2023). These discourses are then reproduced and maintained by institutions, techniques, legislation, and processes, which Foucault calls discursive practice (Bacchi & Bonham, 2014).

Courtrooms are institutions where multiple discursive fields interact with and produce various subjects. Shuy (2015) asserts that as law depends heavily on written language, the texts derived from this space can be highly productive for discourse analysts. For this reason, a Foucauldian discourse analysis approach was employed to examine the taken-for-granted discourses, discursive constructions, and practices regarding psychopathy in the courtroom to uncover how these are produced, reproduced, and maintained as legitimate within New Zealand courtrooms (Arribas-Ayllon & Walkerdine, 2017). As has been described, the research field of psychopathy has been filled with positivist-oriented investigations with ongoing disagreements as to psychopathy’s definition, etiology, and treatability. By employing Foucauldian discourse analysis and Foucault’s theoretical concepts, the aim is not

to oppose empirical research or evidence but rather to provide new insight and knowledge to that which dominates the area of psychopathy.

The existing data corpus provides a chance to view the discursive construction of psychopathy within judicial settings that have not yet been examined. As individuals labelled as psychopathic are met with very real consequences such as incarceration, stigmatisation and, internationally, the death penalty, I was driven to understand further the various ways power and knowledge interact in the courtroom. By employing a discursive psychology epistemology, this thesis looks at how psychopathy is socially constructed, whereas Foucauldian discourse analysis then encourages a broader insight into how these constructions are produced within broader systems of power and knowledge in everyday settings and the real-world consequences of this.

### **Limitations to Foucauldian Discourse Analysis and Consideration of Other Methodological Approaches**

There are existing limitations to Foucauldian discourse analysis. For example, Foucauldian discourse analysis has no prescribed method for conducting the analysis process. Foucault stated this was to avoid the same truths being exposed (Willig, 2008). This has led to criticism, as Foucauldian discourse analysis relies on the researcher's perspectives and understanding of Foucault's concepts and theories. Therefore, the researcher must be transparent regarding their reflexive position about the research. In addition to this, there is a risk of analytical errors and misunderstandings about Foucault's key concepts (Graham, 2011). There are also numerous enquiries about Foucauldian discourse analysis's ability to theorise subjectivity from analysing only discourse. Willig (2008) outlines this argument where it is questioned that despite subject positions being constructed or made available, this does not consider whether individuals have emotional attachments to these positions or

identify themselves as such. There are additional arguments about the relationship discourse has with material reality, whether reality is mediated and constructed by discourse and if references can be made to broader discursive practices beyond the text available (Hook, 2007; Fairclough, 1992).

Alternative discourse analysis methodologies were considered for this research. Stubbe et al. (2003) conducted a study that focused on five different approaches to discourse analysis. This aimed to understand how each approach to discourse analysis interprets and understands the same data. Critical discourse analysis was employed throughout their study and was considered for this thesis. Critical discourse analysis has been used in studies focused on analysing discourse within courtrooms both internationally (Cheng, 2016; Stygall, 2001; Svongoro et al., 2012; Yuan, 2019) and within Aotearoa New Zealand (Haider et al., 2021; Mann et al., 2014). Stubbe et al. (2003) describe critical discourse analysis as distinguished by its primary focus on exposing the connections between language, power, and ideology. The key focus within this approach is how power and control are exerted and constructed through discursive activity and how these maintain unequal power relations. Critical discourse analysis and Foucauldian discourse analysis share a focus on power and discourse. However, critical discourse analysis typically focuses on how power is enforced as a means of social domination and aims to uncover and challenge these existing ideologies and dominant discourses (Van Dijk, 2015). Foucauldian discourse analysis promotes a different understanding of power; instead, power is understood as productive and exists as an interconnected web (Khan & MacEachen, 2021). Critical discourse analysis would be better suited to this study if it was specifically focused on critiquing and addressing power imbalances in the courtroom that contribute to the stigmatisation of individuals and social inequalities. The key focus of this study is how discourse contributes to the construction of

how psychopathy is understood in the courtroom and subsequent actions in response to these discursive frameworks (Foucault, 2013).

Grounded theory was also considered for this research. Grounded theory is predominately concerned with building a theory from the analysis of data. Through an iterative analysis of the data, Glaser and Strauss (1967) argue that the result is the emergence of a new hypothesis or theory with limited researcher bias influencing the outcome (as cited in Charmaz et al., 2008). Traditional grounded theory uses intensive data coding to produce themes to generate a theory, but this research study does not seek to create a new theory. This research study examines the discourses available within the dataset and how the concept of psychopathy is discursively constructed. Therefore, rather than generate a new theory, this research investigates the foundations of power within the existing theories present in the courtroom that produce constructions about psychopathy.

## **Overview of Foucault's Key Concepts**

This section provides a brief overview of some of Foucault's key concepts, which will be employed to carry out the analysis in this thesis. This range of theories and ideas has been described as a "toolbox" that researchers can draw on (Dewey, 2020).

### ***Power/Knowledge***

Foucault was concerned with how power and knowledge interact and how discourse can function as a lens to what is counted as knowledge or truth (Geerlings & Lundburg, 2018; Hook, 2007). Statements and social interactions are then governed by rules that are related to this knowledge, and this knowledge provides a framework as to how an object or topic can be spoken about (McHoul and Grace, 2015). Foucault did not attribute power to a particular person or group because he theorised power to be dependent on an interconnected web of power/knowledge and discourses that have been understood and accepted as 'truth' (Ryan,

2014). These discourses are functional with real impacts and are both governed by and produce rules that lead to statements or taken-for-granted assumptions that are dispersed through society (McHoul and Grace, 2015).

Power and knowledge can have an effect and contribute to the legitimisation of certain actions and the minimisation of others, along with discourse. For example, a dominant discourse surrounding psychopathy has been that they are untreatable. This notion has been reiterated across the research community, and some have theorised that this is because of the biological nature of psychopathy, meaning it is difficult to treat. This has resulted in the prolonged incarceration of these individuals with the development of minimal treatment options. In recent years, this notion of untreatability has been contested. This is one demonstration of how power and knowledge create and maintain social practices and policies that have real impacts on individuals.

### ***Disciplinary Power and the ‘Clinical Gaze’***

Foucault’s 1991 conceptualisation of power and knowledge was heavily established through his seminal work, *Discipline and Punish* (Mathieson, 1997). In this work, he describes the concept of the ‘Panopticon’ and how it functions to create and maintain relational power. The Panopticon was a prison design that involved grouping prisoner cells around a viewing tower so prisoners could be constantly watched. However, the prisoners could not see anyone in the tower or each other. Foucault draws on this concept and argues that prisoners would manage and monitor their behaviour to avoid punishment, whether the tower was occupied or not. This is one example of the relational aspect of power/knowledge and how certain discursive practices tell individuals how to act and follow “common sense truths” that we are all expected to know and understand (Khan & MacEachen, 2021, p.5). Those individuals who deviate from these common-sense expectations are judged as deviant and to have transgressed what is considered normal. Foucault’s concept of the panopticon

enabled new and existing forms of knowledge around the control and observation of people in various circumstances and institutions, including schools, hospitals, and places of employment, to be challenged (Roberts, 2005).

Roberts (2005) and Kiehl and Hoffman (2011) describe how this form of power and control is easily generalised to health institutions, where individuals are constructed as subjects that can be diagnosed, categorised, and compared to population norms. Through this process, individuals become objects that can be assessed and treated and, at times, lose their rights and autonomy by being placed under the Mental Health Act (Roberts, 2005).

Individuals or subjects are observed by experts, who both draw on and disseminate knowledge that ultimately legitimises and enforces discourses, such as a discourse of diagnosis that can construct and assign people to specific identities and subject positions. Through this process, they are relegated as outsiders to what is assumed to be normal.

This practice is commonly known as the medical or clinical gaze, where health professionals fit individuals into a biomedical model, frequently neglecting information that does not fit this discourse. Flick (2019) describes this as including not just gaze, but the way different techniques and instruments are used to find truths about individuals. This use of tools can frequently neglect people's social and cultural context whilst also minimising their distress and experiences. Flick explains how Phillippe Pinel was credited for humanising treatment for the mentally ill by no longer using chains, but that these chains then became internal. These internal chains are also normalised through what Foucault terms technologies of power, which can serve to construct certain subject positions. Technologies of power are deeply entwined with discipline-specific knowledge bases. Examples of these technologies of power include psychometric tests, risk classification systems, and assessments that result in individuals being assigned a specific identity (Roberts, 2005). The consequence of this was

that psychiatrists and medical professionals were able to maintain authority over mentally ill individuals, and this authority was frequently endorsed by judicial systems and policies.

### *The 'Subject'*

Foucault (1972) argues that discourse defines and produces our understanding of our realities and governs how subjects can be meaningfully spoken about and understood (as cited in Valverde, 2017). Through a Foucauldian lens, discourse, and power/knowledge influence how ideas are implemented and used to regulate the behaviour of individuals (Hall, 2001). Discourses, therefore, exercise power within society through institutions and regulating ways of speaking, thinking, and behaving. Through these discourses, humans are constructed or created into what Foucault states are 'subjects'.

A key concept within Foucault's work is how human beings are constructed or created into 'subjects' through discursive and power relations (McHoul & Grace, 2015). Through these means, subjects can be othered. For example, in a courtroom, many subjects are constructed through a legal discourse, including the Judge, defendant, victim, prosecuting lawyers, defence lawyers, and health professionals (psychiatrists/psychologists). If we closely consider an example of how a defendant can be constructed as either a "model prisoner" or "a lost cause", the defendant is then provided a subject position. The defendant is then subject to being 'othered' from other prisoners and the general population as a "lost cause" with potential implications. Another example is when a Judge labels an individual a victim or a survivor, our perceptions and discourses around each subject position and what discursive practices they may be subjected to change.

Foucault (1982) argues that this division can also occur within the self through the process of being made a subject. From this subject position, he describes individuals as understanding themselves as being "tied" to a specific identity through knowledge about themselves. This conscience of knowledge, as Winiecki (2008) explains, can derive from

multiple separate institutions and discipline-specific knowledge bases such as psychiatry, psychology, law, and medicine, all of which can contribute to how an individual is categorised or classified and, ultimately how they come to understand themselves.

Discipline-specific knowledge bases produce discursive practices like the categorisation of human beings, which then come to be understood as normal practices. In the courtroom, if a defendant is assigned a diagnosis of psychopathy through the practice of assessment, a subject is formed. The subject, or 'psychopath' may then be "'invited' to understand themselves as dependent, to varying degrees, on mental health professionals for advice, treatment, or medication" (Roberts, 2005, p.39). Treatment and assessment are then discursive practices that regulate and maintain these discourses. By focusing on discursive practices, we can see how they are expressions of those discourses they derive from and how they contribute to the construction of taken-for-granted assumptions and truth.

## **Data Collection**

The data corpus for this study was collected from the online database Lexis Nexis Advance. This website is specifically designed for professionals and researchers in legal, risk management, corporate, government, and law. The database provides access to Judges' sentencing notes from the Court of Appeal, the High Court, the Family Court, and the Employment Relations Authority in Aotearoa, New Zealand. Within the Judges' sentencing notes is information related to the court in which the hearing is held, the sentencing outcome (where relevant), the use of risk assessment tools (if used), and details as to the rationale for the sentencing or outcome made by the Judge. The corpus of data collected provided numerous strengths, including the ability to discover discourse over a significant period and allowing easy access to somewhat frequently occurring language in the courtroom.

Many of Foucault's research studies consisted of large quantities of material, with a key criterion for text selection for Foucauldian discourse analysis being that it is carried out

where any meaning exists. Arribas-Ayllon and Walkerdine (2017) provide some additional criteria for selecting a data corpus when conducting Foucauldian discourse analysis. They assert that collecting statements encompassing the knowledge being studied, including history, theories, rules, classifications, and interventions, is essential. Courtrooms and the criminal justice system can be considered a hub for concepts, theories, rules, classifications, and interventions contributing to the construction of psychopathy. Other methods of collecting data could be suitable for this research study, such as interviewing mental health professionals who provide reports or appear in court to discuss relevant assessments addressed in court may have provided a rich data corpus. Aside from the transcripts produced from these interviews, other forms of language could have been analysed, including body language, tone, and any changes in speech (volume, etc.). However, the original aim of this research wasn't to focus on the views of individuals or specific professions but rather, through Foucauldian discourse analysis, to uncover how discourse, discursive practices and subject positions operate within a specific environment. Jansen (2008) describes the Foucauldian discourse analysis as one in which subsets of texts must be manageable and time efficiency is important. Therefore, for these reasons, Judges' sentencing notes were considered the most suitable text and data to collect to meet the research aims.

Judges' sentencing notes concerning the terms 'Psychopath', 'Psychopathy', 'Psychopaths', and the risk assessment tools 'PCL-R' and 'PCL: SV' were selected from between the years of 1985 and December 2023. Each Judge's sentencing note was recorded in an Excel spreadsheet. It included the case reference, year, court, issue (sentencing, appeal, etc.), outcome (including years sentenced if relevant), offence, determination of psychopathy (if PCL was used or the term was lay), the role of psychopathy in the final decision, gender (if available), and any relevant notes. This provided a general overview of the data and enabled further enquiry into any trends and the frequency at which the terms were used. The sample

consisted of 169 Judges' sentencing notes. These were then uploaded to NVivo and printed to form a data corpus, which was read through multiple times.

## **Analysis Procedure**

This study employed Willig's 6-step approach (2008) to analyse the data and answer the research questions. Willig's steps include *discursive constructions, discourses, action-orientation, positionings, practice, and subjectivity*. Consideration was made to use Parker's (2014) criterion and associated steps. However, in attempts to not convolute the process, this thesis adopts Willig's (2008) 6-steps to provide a framework to the analysis process and ensure the findings of this research are consistent with the epistemological position and Foucauldian discourse analysis. This approach also enabled the research aims to be kept at the forefront of the analysis. The rationale for this approach also considers my role as an amateur researcher. Through the employment of these steps, the analysis process is guided so that the results of this study can be concise and representative of the key principles of Foucauldian discourse analysis.

### ***1. Discursive Constructions***

This step focuses on identifying the object within texts and how it is constructed using language. This involved looking beyond the obvious in statements and instead analysing the implicit references made throughout the text. The data corpus was printed, and the first reading was in paper form. Using the key steps, various discursive constructions were highlighted and recorded by hand. Following this, a second reading was conducted using the qualitative data analysis software NVivo. As each text was read through on this software, the research questions and prompts from Willig's 6-step (2008) approach were on hand, including the questions, how is the discursive object constructed through language? And what type of

object is being constructed? These were compared to the initial paper codes and then filtered down to dominant findings.

## ***2. Discourses***

This step of the analysis involved identifying and highlighting discourses within the text and their relationship to one another. Throughout the analysis, how the discursive object was constructed through various discourses was categorised into nodes on NVivo.

## ***3. Action-orientation***

Through step three, the researcher interrogated the function of these discourses and what they may achieve. This involved returning to the research aims and examining how discourses produce discursive constructions in text and what the functions of this are (Willig, 2008).

Within this research study, the action orientation of constructions and the discourse employed were largely identified as legitimising and supporting the need for increased monitoring, management, and supervision for the purpose of ensuring the safety of the community.

Through the analysis process, the following questions were addressed at each reading of the selected texts: What is gained when constructing psychopathy in a certain way in the courtroom? What is the function of this construction? Are there differences in the construction of psychopathy across this period? And Who is impacted by these constructions?

## ***4. Positionings***

This step involved highlighting the subject positions produced by the available discourses. Davies and Harré (1999) describe how taking on available subject positions in discourses can locate a person within a structure, and this subject must then speak and act from that discursive location. Within this research study, health professionals—namely psychiatrists,

psychologists, and doctors—were positioned as experts, informing the court. Ultimately, their opinions and perspectives influenced decisions about sentencing.

### **5. Practice**

Discourses can impact what can be said and done from certain subject positions. This stage involved the examination of what actions or practices can or cannot occur from these positions. For example, despite expert opinions in the court having some influence, the Judges and courts frequently stated their role in the final decisions made about the future of the defendants, bringing the legal discourse and practices to the forefront.

### **6. Subjectivity**

Davies and Harré (1999) argue that from subject positions, the person will ultimately view the world from a certain position and that this ‘view’ will involve “particular images, metaphors, storyline, and concepts that are made relevant within the particular discursive practice in which they are positioned” (p.35). This step encourages us to explore how certain subjects understand themselves and their positions. For example, if a Judge positions oneself within a legal discourse where their duty is to ensure the safety of the wider society, they may then prosecute an offender more harshly, potentially feeling a sense of security or pride in that action.

## **Reflexivity**

It is essential that I am grounded in my position as one of the key “instruments” through the collection and analysis of the data corpus in this qualitative research study (Watt, 2007, p.82). Subjectivity is present throughout the qualitative analysis approach, and through reflexivity, the researcher is reminded to openly acknowledge their own biases, judgements, and position in relation to the research (Parker, 1994). This does not mean that the research is

then objective, but it ensures authenticity and transparency when presenting the findings. Reflexivity, as is discourse analysis, remains bound to history, culture, and context. For this reason, the practice is particularly relative to discourse analysis, and as Parker (1990) states, Foucauldian discourse analysis must be grounded if the aims are intended to be progressive. Therefore, it is essential to reflect on the research process that is carried out from my position and my relationship to the research.

At the time of this research study, I was in my second year of clinical psychology training. I had been a student for 6 years prior, and over the past eight years, I have been employed by Youth Justice New Zealand and completed a six-month placement at the Department of Corrections, New Zealand. Reid et al. (2018) explain how when a researcher has knowledge from working in a specific field and potentially has a shared identity with participants, the researcher is valuable in developing insights for practice based on the outcome of their findings. However, additional assumptions and biases held by the researcher need to be explicitly described. I have played both 'insider'/'outsider' roles. I have close whānau members who have been in prison for significant periods of their lives, and in consideration of my life experiences, it is essential to state that I acknowledge and understand that the wider implications of discourse are real. I am additionally aware of my biases toward the profession of psychology, as I have invested years of my life in pursuit of the qualifications that subsequently provide significant amounts of input into the discourses and discursive practices uncovered in this thesis. I was frequently critical of the practice of psychology and its contributions to the regulation and production of conditions that have had negative impacts on those involved with the justice system. The emphasis on this subject position was not to disregard the role of psychology but to remain critical and reflective so that we can continue to grow the profession to benefit the communities we serve.

Another strength of considering reflexivity is the opportunity to navigate ethical and emotional challenges relevant to the research process (McGowan, 2020). I faced many challenges through this research study, one of which was my ability to manage reading some of the details of sexual offending against children included in the data corpus. I found myself having a strong emotional response, which proved challenging when trying to maintain the position of a researcher and maintain a consistent social constructionist view. When this occurred, I would return to Foucault's work, Willig's six steps and the research aims to re-orient myself to the purpose of this study, which is to maintain the described epistemological and methodological approach.

## **Ethical Considerations**

The data collected for this research is publicly accessible. The information that was included in this study did not require consent from the individuals. Understandably, there is ongoing debate as to the ethical challenges when using publicly accessible data, particularly because of the potential harm to individuals if identifiable information is included in research (Tripathy, 2013). Considering that those involved in the justice system have limited autonomy, and even when they are providing consent, this occurs within a framework of power differentials, careful consideration as to how the data was used in the study was made. Considering these ethical concerns, all identifiable information has been anonymised in this study.

Other considerations were made, including my position as a clinical psychology student and the ethical responsibilities that must be upheld through adherence to the New Zealand Psychological Society Code of Ethics (2002) standards (as cited in Ali, 2024). When analysing and reporting on these cases, four ethical principles in the Code of Ethics were maintained: responsible caring, integrity in relationships, respect for the dignity of persons, and social justice. Other ways in which an ethic of care was upheld was the consistent

acknowledgement of individuals labelled psychopathic as a stigmatised, marginalised and, in part, a vulnerable group. Through this explicit consideration throughout the study, the researcher aimed to not comply with stereotypical or pejorative language that further discriminated against this group.

## **Representation of Māori in the Data Corpus**

The ethnicity of defendants was rarely explicitly stated in the data corpus. Those that were identified included Māori defendants on 10 occasions in comparison to Samoan (1) and European (1) defendants. Using a text frequency function on Nvivo, the term ‘European’ appeared seven times across the corpus in the ‘European Court of Human Rights’. Despite some Māori ethnicities being detailed in the text, terms such as “Treaty of Waitangi”, “intergenerational trauma”, and “colonisation” did not appear across the data corpus.

An ethic of care was taken when considering the likely involvement of Māori in the data corpus. This involves having a sound understanding of the cultural and socio-political history in which Māori are more likely than any other ethnic group in New Zealand to be arrested, prosecuted and imprisoned (Norris & Tauri, 2024). These high rates of Māori offending are matched by Māori as victims of crime (Brittain & Tuffin, 2017). Various studies and independent reports have investigated the reasons for this, which have included structural racism within the justice system, discrimination, and the impacts of colonisation and the resulting intergenerational trauma on Māori (McIntosh & Workman, 2017; Te Uepū Hāpai I te Ora, 2019). This concern regarding Indigenous incarceration has been written about at length in Aotearoa and internationally in other colonised nations such as Australia (Blagg, 2008), Hawai’i (Taschner, 2021), Canada (Wood & Griffiths, 2000) and First Nations in mainland United States (Jeffries & Stenning, 2014) where the indigenous populations are also disproportionately incarcerated in comparison to other ethnicities.

It is essential to acknowledge the overrepresentation of Māori in the justice system and to state the reasons for this explicitly. Despite the lack of clarity within the data regarding ethnicity, many researchers have argued through Foucauldian concepts and research that discourses of racism and colonialism are upheld by and uphold a mono-cultural carceral system (Norris, 2019). This research cannot exclude this fact, and therefore, the imported colonial judicial system must be culturally, socially and historically located to understand and provide context to the research and data. This study does not claim to propose new evidence or solutions to Māori overrepresentation in the justice system; however, the research focuses on the discursive structures legitimised through various discursive frameworks and subject positions frequently resulting in the policing, marginalisation and criminalisation of what are perceived to be deviant bodies. Therefore, it is argued that through this approach, a foundation is laid for future research in criminal justice and psychopathy context to address discourses of race, ethnicity, class and gender in this way.

## Chapter Four: Findings

This chapter presents an analysis of the data corpus. Four dominant discourses have been highlighted. These are *'psychopath' as a moral failure*, *psychopathy and risk*, *psychopathy as pathology*, and *'psychopaths' as untreatable*. An analysis of available discursive constructions, subject positions, and discursive practices is presented within each broader discourse. The implications of these discursive frameworks, which appear to influence practices and opportunities for action with consequences for those labelled as psychopathic, are explored.

Supporting evidence drawn from the data corpus is referred to by code throughout this chapter (e.g., 2000a – see Appendix for further details).

### Discourse 1: 'The Psychopath' as a Moral Failure

The discourse *'the psychopath' as a moral failure* contributed to the production of how psychopathy was understood and spoken about in Aotearoa New Zealand courtrooms. This discourse was dominant from the 1980s to the early 2000s. In this section, various discursive constructions, including the production of *'psychopaths' as moral agents*, *'psychopaths' as committing senseless crimes*, *'psychopaths' as morally deviant outsiders*, and practices such as *the derogatory use of the term 'psychopath'*, are examined. These discursive constructions, as well as the available subject positions and discursive practices that contributed to these, are uncovered. The consequence of this discursive framework was the normalisation of the courtroom as a site for the punishment of the morally inept 'psychopath'.

### ***'Psychopaths' as Moral Agents***

'Psychopaths' were constructed as having the moral agency to understand and have control over their decisions and behaviours. Through legal statements, reports, and expert definitions of psychopathy, Judges, doctors, psychiatrists, and psychologists reinforced the prevailing notion of 'psychopaths' as being dangerous due to their decisions not to follow society's moral rules. The Judge in the following account reviews a report made by a psychiatrist:

*"XXX is fully responsible in law for his actions, and all his offences appear to be planned and deliberate. Dr XXX said that XXX has evolved a way of life which, for him, is meaningful but for the other members of society, is threatening and abnormal. XXX expresses no form of regret or guilt and has no social insight. The psychiatrist opines that unless XXX can acquire some concept of right and wrong, some concept or moral propriety, some form of spiritual value, his future is indeed bleak."* (1986)

In this statement, the defendant's behaviour is described as "threatening", and 'the psychopath' is "abnormal". This abnormality is compared to "other members of society", asserting the defendant's differences and othering them and their actions. The so-called 'psychopaths' motivations for a meaningful life are positioned at odds with the assumed collective. The defendant's dangerousness is then conflated through conclusions made in the assessment around their inability to display "regret", "guilt", or "social insight". These humanistic qualities are assumed to be normal in society, and an indication of an absence of these traits supports this notion of difference and threat to the collective way of life. The Judge then emphasises components of the report that solidify the individual's agency and, therefore, legal culpability. The defendant is even described explicitly as "fully responsible in

law” for the “planned and deliberate” transgression of moral norms through their actions. This is demonstrated again in the following legal statement, where a different Judge reviews another assessment completed by a psychiatrist. The Judge emphasises the characteristics the defendant is described to have:

*“She was of the opinion his total lack of insight was a result of his egocentricity which he was effectively only able to relate to his own needs and emotions and lacked the capacity to be able to engage emotionally outside of his own experiences. Accordingly, there was an absence of empathy, remorse, and responsibility for his own actions.” (1998c)*

As can be seen in the above statement, so-labelled psychopathic individuals are described as being incapable of displaying “empathy” and “remorse” due to their “egocentricity”. This reference to egocentricity conflates the notion of responsibility, particularly in the courtroom context. ‘The psychopath’s’ moral agency is again highlighted through the reiteration of their absence of responsibility for their actions.

The taken-for-granted assumption here is that everyone knows and understands what is morally acceptable in society. If people cannot manage and control themselves to follow the rules of life, then this is understood as a deliberate choice. These statements contribute to the notion of personal agency and responsibility in law, and ‘psychopathic’ individuals are constructed as having the same agency as others despite their diagnosis. Other forms of knowledge, such as clinical dysfunction or historical, social, economic, and cultural circumstances influencing behaviour, are marginalised. Through this process, these individuals are cast as blameworthy for what was perceived as their conscious decision to

violate these widely accepted norms. Through this production of this subject position, the construction of individuals as moral monsters likely silenced their voices in the courtroom.

### ***'Psychopaths' as Committing Senseless Crimes***

Part of the construction of psychopathy within Aotearoa courtrooms was the notion that 'psychopaths' commit crimes that are senseless, and their reasons for committing crimes are difficult to understand. Through legal statements made by various Judges, the difficulty in understanding psychopathic individuals' motivations for their transgressions of moral norms was highlighted. Judges described the defendants' motivations as follows: "I simply do not know what motivated you" (2000a), and their actions were "for reasons that are not easy to determine" (2003a). In addition, legal statements frequently used terms such as "random" to consolidate their differences and inability to be understood. This can be seen in the following statements made by Judges:

*"The Crown suggests that there was a brutal and psychopathic randomness about the murder."* (2003a)

*"This was a random killing which had all the hallmarks of the work of a lone psychopath."* (2000a)

In both cases, no official diagnosis of psychopathy was confirmed within the text. The use of a lay diagnosis by the Judges demonstrates the power this subject position has in disseminating truths about individuals. In addition to this, these statements framed so-called psychopathic individuals as "brutal," "lone," and dangerous to society, which served to position them as outsiders. Other definitions within the courtroom included descriptions such as "absent of empathy" and "manipulative" (1996b, 1989, 1998c, 2006f), which functioned to

further isolate these individuals from our supposed shared humanity. This again positions them as threats to social order and isolates them from the morals and social values of the broader society.

### ***'Psychopaths' are Morally Deviant***

During the 1980s and 1990s, the term psychopathy was often listed alongside labels for other marginalised and excluded communities. For example, psychopathy and homosexuality were usually grouped or listed together. This presentation of homosexuality as a comorbidity to psychopathy places these labels within a discourse of moral and social deviance. This practice can be seen in the following statements:

*“Dr XXX was of the view that the applicant was a psychopathic personality and a homosexual” (1988a)*

*“Dr XXX, as a result of his examination formed the opinion that the applicant is a psychopathic personality suffering from pedophilia with homosexual involvement with adolescents.” (1998a)*

*“Re confirms that the appellant is essentially a homosexual with a predilection to young teens. He notes that, significantly, the appellant does not have a history of mental disorder or a history of psychopathy, that is, a pattern of remorseless and predatory behaviour.” (1997b)*

The extracts above potentially reflect the broader morals and values of that time. Federman et al. (2009) describe the approach of Hervey Cleckley during the 20th century, who stated that “the psychopathic personality can be linked with “psychopathic sexuality,”

whose manifestations are: "homosexuality, erotomania, sexual perversion, sexual immaturity." (p.48). This pairing can exacerbate the stigma around both. Homosexuality is abhorrently framed as a pathology, while psychopathy gains additional moral and social implications situated within the historical context of that time. It constructs this deviant group as one that lives outside of the moral collective, reproducing the notion that they are a threat to the moral order and are "abnormal" (1986).

The grouping of labels within these statements can be argued that they are not just descriptive language. Instead, it is the intersection of the power held by Judges and psychiatrists and the discipline-specific knowledge that gives them authority to assign meaning to what psychopathy (and homosexuality) is and who is subjected to and associated with the label. As they sit in a position as judges of morality, their own understanding of what is normal and what fits within the boundaries of morally acceptable behaviour is regulated by this dominant discourse. Through this process, psychopathy is potentially entrenched further as a moral failing requiring increased management to maintain social order.

### ***Derogatory Use of the Term 'Psychopath'***

The term 'psychopath' was often used by lay parties to describe someone who was accused of being "dishonest", "erratic", "reckless", or a "pathological liar". This can be seen in the below statements:

*"The respondent admits calling the applicant a "psychopathic bitch". It seems that he also called her the other names she mentioned such as "fat whore", "hysterical bitch", and accused her of leading him on."* (1996b)

*"Mother has throughout the proceedings sought to cast Father as (variably) narcissistic; a controlling manipulator; a bully; poisoning the children; having violent*

*psychopathic abusive behaviour; passive aggressor; prolific liar; duplicitous and grooming the boys what to say.” (2013a)*

These statements appear to function as a means to frame the individual as dangerous by equating them and their behaviour with psychopathy. The function of this use of psychopathy as a slur is to cast someone outside of the morally accepted norms and to frame them as undesirable. In one particular instance, the accused ‘psychopath’, was compared to “Hannibal Lecter” by radio hosts, as detailed in the following defamation case:

*“hosts discussed sentencing of ‘Urewera Four’ members – comparisons made with treatment of complainant who was discharged without conviction after being found guilty of similar charges – complainant phoned in to the programme and explained the background to his case – hosts accused him of lying and called him a “psychopath” and “sociopath” and compared him to “Hannibal Lecter” (2012a)*

In the above case, the perspective and beliefs shared by the caller around their own experiences within the legal system are potentially delegitimised through the radio host’s use of a lay diagnosis and comparison to a serial killer who gained fame through mass media. In these examples, the lay use of the term functions to marginalise and effectively attempt to silence the accused individual’s voice within the context.

In one instance, a Judge responds to the use of the term ‘psychopath’ as a slur. In the following statement, an applicant is recorded as “studying the literature on bullying” and later states they believe a previous colleague appears to "fit the criteria of an organisational psychopath ". The Judge responds to the applicant’s use of psychopathy:

*“When non-experts bandy about such terms, it devalues the concept and it undermines credible research into a significant and serious personality disorder. It also has the effect of alarming reasonable people charged with managing such allegations, which has the potential to backfire on the accuser.” (2007a)*

Through this statement, the Judge is upholding who precisely can wield the knowledge base and power to diagnose another person and justify the use of the term psychopath. Subject positions of experts and “non-experts” are reinforced, and the potential impacts of transgressing these roles in the courtroom are detailed. However, this lay use of psychopathy was not only reserved for the general population. Occasionally, experts, including Judges and other professionals, made lay diagnoses. For example:

*“This was a random killing which had all the hallmarks of the work of a lone psychopath. I am not in a position, in the absence of relevant reports, to determine whether XXX falls into that category.” (2000a)*

The Judge draws upon their professional judgement to provide a lay diagnosis of psychopathy without using discipline-specific practices such as assessment. In the above statement, the Judge wields apparent diagnostic authority even without legitimate expertise. This is representative of the relationship between power and knowledge and the authority sometimes provided to those in particular subject positions despite them having inadequate qualifications to carry out practices such as diagnosis.

### ***Protecting the Moral Collective from ‘Psychopaths’***

Various subject positions were produced through the discourse of morality, which depicted how other subjects were spoken about and understood. Across the data corpus,

Judges, lawyers, doctors, psychiatrists, and psychologists were framed as ethical subjects responsible for upholding moral and social order. This frequently was discussed in a way that referred to the legal institution and systems as an entity that maintains order and that Judges and other professionals are ultimately responsible for. This can be seen in the following statements:

*“Further, the previous convictions of a prisoner may indicate a predilection to commit a particular type of offence of which he is convicted, in which case it is the duty of the court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly.” (2004e)*

*“Finally, there is the principle that a lengthy finite sentence is preferable if it provides adequate protection for society. In this case your counsel has submitted it is. I am afraid, frankly, that I have been forced into a different conclusion because of the contents of both the psychiatric and psychological reports. The risk of continued serious offending by you is high, and this Court must consider the protection of the public from that offending.” (2007d)*

*“The primary consideration I must take into account is the protection of the community. The purpose of preventive detention is not to punish you but to protect the community from persons who pose a significant and ongoing risk to the safety of its members.” (2022c)*

This construction within the discourse of morality was upheld and reproduced through practices or technologies of power that were regarded as ethical practice, including

referencing actuarial assessment tools, reports, references to discipline-specific research, and legislation that normalised these practices as essential in the courtroom to protect “society” (2017i). The taken-for-granted assumption here is that the broader collective has actively been involved in the assignment of these subject positions tasked with “protecting” them and that the broader collective may agree with the means necessary to ensure their future safety.

### ***Punishment***

The above discursive constructions and subject positions legitimise the use of punishment to reinforce conformity to moral and social rules. This was prevalent in the data corpus from the 1980s until the early 2000s. The construction of ‘the psychopath’ as a threat to social order and to have individual agency over what is perceived to be their deliberate transgression of moral norms enables the assumed need to exclude these individuals from society. This contributed to the production of the courtroom being seen as responsible for maintaining social and moral hygiene. This practice appeared to marginalise alternative perspectives and responses, such as considering clinical dysfunction or historical, social, economic, and cultural circumstances influencing behaviour. The focus on legal responsibility can be seen in the following legal statements made by Judges during this period:

*“He has been diagnosed as a true psychopathic personality, medically insane though not insane in the legal sense.” (1988b)*

*“People like you fall through the cracks. You are not diagnosed as criminally insane. But, on the other side of the ledger (2006d)*

In these statements, a taken-for-granted assumption of all individuals, regardless of mental health or context, is to conform to societal norms, even when structural or

psychological factors might mitigate blame. These statements contributed to the construction of psychopathy as a moral failure and appeared to legitimise the use of harsher sentences.

This can be seen in the below statements:

*“The accused had an almost psychopathic personality which this Court considered warranted a sentence adequate to protect the community. While observing that with his plea of guilty he could have expected 7 years, a longer than normal sentence would be imposed in the public interest and the term was increased to 9 years.*

(1991)

*“Where a defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely if left at large to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.”* (1986)

In the texts above, the manifestation of “psychopathic tendencies” is adequate evidence of the danger posed by these individuals, particularly to those who are constructed as vulnerable (women). This construction of these individuals as persistently dangerous, with little consideration given to rehabilitation or treatment, “warrants” the use of exclusion or incarceration to manage the so-called psychopaths. As described, harsher sentences were further legitimised by asserting the need to protect the vulnerable public. Discourses that enable the consideration of treatment or rehabilitation appear marginalised despite the employment of the diagnostic label of psychopathy and reference across the data corpus to expert knowledge bases.

The discourse of *‘the psychopath’ as a moral failure* involved the production of so-called psychopathic individuals as a threat to social and moral order. The term was frequently

used in the courtroom by laypersons; this use of a diagnostic label functioned to position ‘psychopaths’ as morally deviant outsiders because of their inability to follow moral and social rules. This was further legitimised through this notion that broader society shares and participates collectively in socially acceptable behaviours that ‘psychopaths’ are unable to understand. The use of the term in the courtroom still held significant weight and frequently led to the prolonged incarceration of individuals for the purpose of protecting the broader society.

## **Discourse 2: Psychopathy and Risk**

The notion of risk was a prevailing discourse across the entire data corpus. However, there was an apparent shift in focus in judiciary talk about ‘the psychopath’s’ moral reprehensibility and agency to an emphasis on actuarial risk assessments and managing predicted future harm. Through this period, psychopathic individuals were positioned as passive subjects to a framework of risk management that maintained and reproduced power within the courtroom. This discourse of risk took shape because of the construction of *psychopathic individuals as risky, the subject position of the experts, the classification and categorisation of risk, and the courtroom as a site for preventing future harm to the public*. These conditions contributed to the institutionalisation of discipline-specific knowledge, practices, and meanings around psychopathy and risk as truths within Aotearoa, New Zealand courtrooms.

### ***‘The Psychopath’ as a Risky Individual***

Individuals who were labelled as psychopathic were constructed as risky individuals to the broader population. The terminology within the courtroom to describe psychopathy reinforced the notion that these individuals are a “threat” to others due to their “unpredictability”, “violent temper”, “impulsivity”, “dangerous behaviour”, and “special

difficulties linked to the issue of dangerousness” (1997a, 1998a, 1988b, 1998c, 2008). As in previous discourses, speakers were typically Judges, psychiatrists, and psychologists. However, this was not always limited to professionals; in one instance, a psychiatrist reports that a defendant described himself as a “time bomb” who believed it was best they were incarcerated (1988b). When a discourse of risk was dominant, psychopathic individuals’ perceived dangerousness was frequently categorised by their likelihood to re-offend based on legal frameworks that empowered certain subjects whilst reducing the agency of others. Psychopathic individuals were constructed as passive subjects, their identities and experiences determined by risk level classifications and risk factors. This appeared to remove their individuality and their perceived capacity for change.

### ***Classification and Categorisation of the Risky ‘Psychopath’***

Psychopathic individuals, their actions, and experiences were frequently assigned a risk category or classification, which was produced through technologies of power, such as actuarial risk assessment tools and psychological assessments. By discursively constructing psychopathic individuals as “high-risk,” they became risk subjects. This assignment of a subject position legitimised their need to be assessed, reported on and treated. In addition, it led to an increase in surveillance and containment.

Following the introduction of the PCL in the year 2000 within the data corpus, the discourse of risk appeared more explicitly across the corpus. Individuals were frequently provided with the label of ‘psychopath’ after being administered the PCL and its variations. It is essential to state that the production of discourses cannot be limited to the introduction of a single risk assessment tool. This is because discursive practices are one component of a framework of mechanisms influenced by what is occurring inside a setting and outside (Foucault, 2013). Other “Structured Decision Making Systems” were used and various other actuarial risk assessment tools were administered (1998c, 2000b, 2006e, 2006h, 2010kl).

When these assessments were reported, individuals labelled as psychopathic were reported to be “high-risk” or to have scored in “the very high category”, at times fitting the profile for a “prototypical psychopath” (2006h). Frequently, scientific research and empirical knowledge were provided as evidence for a person’s level of psychopathy; this can be seen in the following statements:

*“The New Zealand research has demonstrated that high scores on factor one of the PCL: SV (indicating affective and interpersonal deficits) provides actuarial support to the probability that an individual will commit a serious violent offence within two years of release” (2010k)*

*“His evidence was that the literature shows a very high correlation between scores on the screening version and the revised version and that the PCL-R has been consistently found in international research to be one of the best predictors of future violent offending amongst offenders.” (2000b)*

As time progressed in the data corpus, the terms ‘psychopath’ and psychopathy appeared less frequently, and instead, defendants’ results on the PCL and its variations were reported without confirmation of a diagnosis. However, these discursive tools contributed to the production of psychopathic individuals as risk subjects, legitimising a framework of risk prevention that involves assessment, formulation, reporting, recording, and classification.

The consent process to assess and report on defendants is often referenced. In various cases, psychopathic individuals declined to engage in assessments and were described as “non-compliant”, “resistant”, and “to have poor prognosis based on non-engagement” (2009k, 2017c, 2022h, 2023a). In one case, a defendant sought to challenge a prior “maximum

security risk” classification that they argued had not been reduced over their imprisonment due to a trainee psychologist administering the PCL without consent:

*“Mr XXX contends that lay staff involved in processing his security classification reviews relied on the MCMI-III and PCL-SV tests. He says he was never told that the tests might be used in this way. Nor was he told that neither test had been validated with New Zealand populations.”* (2010h)

Those individuals labelled as psychopathic are mostly unable to contest their diagnosis or exposure to psychopathy-specific assessment tools unless they enter the courtroom in a different subject position, that is, as an applicant. Through the discourse of risk and the detailed discursive practices, those individuals labelled as psychopathic were additionally stripped of their identity.

### ***The Experts and Their Knowledge***

Psychologists, psychiatrists, and doctors were explicitly referred to as experts throughout the data corpus. Their practices were regarded as “expert opinions,” “expert reports,” and “expert evidence” that was considered essential in the court’s decision-making, particularly in cases resulting in prolonged incarceration (2016a, 2017d, 2017j, 2022e, 2023a). These expert positions were frequently introduced in the courtroom following declarations of their “considerable experience”, which were decades long or to “specialise” in the areas of psychopathy and forensic psychology (2000b, 2004e, 2016e, 2018d, 2023c). Other titles such as “director of psychological services” and “senior lecturer” were employed to reinforce the subject position of expert (2007h).

In cases where multiple, sometimes four to six “registered clinical psychologists” were tasked with completing separate assessments on a defendant, there was an “expert dispute”.

Judges managed this to ensure “clinical consensus” was reached (2022i). These experts were the only subject positions within the courtroom who were provided permission to define, assess, report on, and provide recommendations as to how to manage psychopathy specifically. Part of this assessment involved establishing the level of future risk psychopathic individuals posed based on their assessments (2004d, 2009a). In one instance, an expert provides a statistic to assess the risk of a psychopathic individual in comparison to the general offender population:

*“They reported a sexual re-conviction rate of 82% over an average follow-up of 11.8 years for offenders who were both psychopathic and sexually deviant, compared to 18% for offenders who were both non-psychopathic and non-deviant.”* (2006f)

Experts often referenced research conducted by other specialists or the likes of Cleckley and Hare to provide empirical evidence when making decisions regarding risk. This was prevalent when actuarial risk assessment tools were administered, and recommendations were made based on the results (2000b, 2005b, 2008a, 2009a, 2009j, 2011i, 2012c). Referencing these knowledge bases was understood as providing support for ‘best practice’ including use of actuarial risk assessment tools. It was because of the test’s “validity” and “reliability” that the results were seen as the best representation of an individual’s risk of future harm (2008a). This reinforced the use of discursive practices to mediate the reproduction of disciplinary power from Judges to psychiatrists and psychologists.

Through the data corpus, experts frequently reinforced their position as one that was “ethical”, “balanced”, and “constrained” (2020). For example, a Judge describes a psychologist as being reluctant to make a “quantitative probabilistic assessment” because of their perceived limitations in risk assessments:

*“For health assessors, risk assessment should lead to treatment and management, and engagement in risk assessment primarily for punitive purposes creates an ethical conflict. He did however, when questioned, state as follows: Would I be concerned that if Mr XXXX was released to the community and left to his own devices he might quickly re-offend? Yes I would have that concern, how quickly I don’t know, how likely, we can’t reliably quantify that.” (2017i)*

In this statement, the Judge considers the view of the psychologist regarding risk assessment and their focus on rehabilitation and treatment; ultimately, the Judge draws on a legal discourse to confirm their concerns about future risk of harm and take punitive action. From the Judges’ subject position, the frequently accepted belief is that it is their responsibility to protect the community from harm and punish socially unacceptable behaviour. This statement is an example of the intersection of legal and risk discourses and the potential attempts by this psychologist to contain what they can say and do within their assigned subject position.

The reported risk levels and findings about psychopathic individuals were frequently referenced when Judges stated the outcomes of the proceedings (2023b). Another instance was in the case of the imposition of an Extended Supervision Order (ESO), where “it is not imposed lightly and only after a rigorous and complex process involving expert evidence.” (2023b). In the following case, the psychologist reported ‘the psychopath’ to be “high-risk”:

*“preventive detention is the appropriate sentence to protect the community and keep it safe from you, particularly having regard to all your offending, both that for which you are being sentenced today and your previous offending.” (2004d)*

Expert assessments and reports were frequently regarded as essential in evaluating the risk that individuals posed. Through the discourse of risk, the expert's power ultimately expanded as this discourse became dominant in the 2000s. In this process, power was not removed from the legal systems but reproduced. Power briefly sits with the experts legitimised by their use of actuarial tools, discipline-specific knowledge, assessments, and reports. While some psychiatrists and psychologists may have attempted to focus on the use of assessment to direct treatment and rehabilitation, it appears within the network of Judges and the courtroom as a site for the prevention of future harm; statistical risk was paramount in decision-making.

### *The Courtroom as a Site for Preventing Future Harm*

The focus on the discourse of risk within Aotearoa New Zealand courtrooms appears to include a shift in the way in which the court manages individuals labelled psychopathic. Through the discourse of morality, there was a keen focus on punishment for the crimes committed, whereas, within the discourse of risk, the interest turns to preventing future harm and ensuring risky individuals, such as 'psychopaths', are contained. This led to the sanctioning of practices such as prolonged incarceration and the use of orders that allow the court to monitor individuals considered psychopathic for prolonged periods.

The most prevalent example of this within the data corpus was the imposition of legislation and court orders that were described as serving the purpose of "protecting the public". This prevention of future harm was specified in cases that considered extended supervision orders (ESOs,) which could be imposed under the Parole Act 2002 and public protection orders (PPOs) that the court can impose under the Public Safety (Public Protection Orders) Act 2014. ESOs appeared frequently within the data corpus (2006a, 2006f, 2007h, 2008, 2008o, 2009a, 2009b, 2010k, 2016a, 2016c, 2017b, 2017d, 2017e, 2017f, 2017h,

2019a, 2019b, 2019c, 2020, 2021a, 2021c, 2021e, 2021f, 2022b, 2022c, 2022d, 2022e, 2022f, 2022j, 2022k, 2023a, 2023b, 2023c, 2023d, 2023e ) and PPOs (2016a, 2017d, 2017i, 2018d, 2022e, 2023a). In these cases, ESO and PPO orders were both agreed upon, contested or considered. Various principles, laws, and Acts were referred to when describing the purpose of these orders as they “provide adequate protection for society” from those who pose a “real and ongoing risk” of committing crimes (2016c, 2022c). Those who proved to be at the highest risk across the corpus were individuals labelled as psychopathic or those who scored high on the PCL.

Judges frequently cited their responsibilities to protect the public from future risk of harm posed by psychopathic individuals:

*“I am afraid, frankly, that I have been forced into a different conclusion because of the contents of both the psychiatric and psychological reports. The risk of continued serious offending by you is high, and this Court must consider the protection of the public from that offending.”* (2007d)

*“I have to balance the risk of you reoffending against the need to protect the community. If I were to impose a sentence of preventive detention, that would ensure that you would not be released until there was a degree of confidence that the safety of the community would not be placed at risk. It would also ensure that if you were released and you engaged in high-risk behaviour, you could be promptly recalled to prison.”* (2022c)

Within these statements, court orders that sanctioned the prolonged detention and monitoring of defendants were imposed on the basis of protecting society from the risky

‘psychopath’. The focus on risk and prevention of future harm negated the ability of psychopathic individuals to be considered for treatment and rehabilitation. Specifically, in cases where ESO and PPOs were imposed, the focus of the court was to manage and contain individuals labelled as psychopathic who were deemed difficult to treat. These orders and the widely accepted notion that we must protect the “vulnerable” society normalised and sanctioned the surveillance and containment of the “dangerous” and “high-risk” ‘psychopaths’.

Although Judges employed expert assessments that provided conclusions regarding future risk to support their decisions, there were instances where Judges, on behalf of the court, would assert their position of decision-making powers despite psychiatric and psychological assessments, reports, and opinions being regarded as an essential component in the decision-making and outcomes for defendants in the courtroom (2005b). This can be seen in the following statements:

*“In this case the Applicant and the Respondent rely on evidence from expert psychologists and the Board is entitled to give full weight to the experts but it is for the Board to decide whether it accepts those opinions making that decision depending on the Board’s assessment of the experts, their respective levels of expertise and the manner in which they gave their evidence.”(2005b)*

*“We wish to make it clear, however, that first instance Judges need not accept it as necessary, or right, to rubber stamp opinions of health assessors advanced by the Department of Corrections in ESO applications” (2022)*

Various expert subject positions and discursive practices upheld the courtroom as a site for preventing future harm. However, in the above legal statement, the Judge asserts that it is the court of law that ultimately holds the final powers regarding the actions that could be carried out in relation to individuals labelled psychopathic. Amongst this relationship of power between the psychiatrist, psychologists and Judges, those defendants' voices and experiences appeared to be silenced. Significantly, the voice of the vulnerable public is also rarely seen throughout the data corpus.

Within the discourse *of psychopathy and risk*, those individuals labelled psychopathic were constructed as passive subjects to a framework of risk management. As this discourse emerged, discursive practices such as actuarial assessment tools and legislation supported the subjectification of defendants as risk subjects. Psychopathic individuals were constructed as passive subjects, their identities and experiences determined by risk level classifications and risk factors. This appeared to remove their individuality and their perceived capacity for change. Through this subjectification, like with other discourses, Judges, psychiatrists, and psychologists were able to make decisions about how to manage, treat or contain 'psychopaths'.

### **Discourse 3: Psychopathy as Pathology**

This discourse transpired through discursive practices such as diagnostic classification, the redistribution of power from the Judge to the health assessors, and legislation in the courtroom that mediated these subject positions.

#### ***Classification of 'The Psychopath'***

The practice of diagnostic classification contributed to the regulation of the discourse of psychopathy as pathology. Through the mediation of scientific knowledge and the diagnostic tools derived from this knowledge, individuals were assigned the subject position

and identity of a 'psychopath'. Foucault (2013) describes the use of diagnosis as originating from the discourse of medicine, creating opportunities for the medical and clinical gaze where individuals are classified and categorised based on knowledge produced and disseminated by certain subjects. Within the data corpus, individuals assigned a diagnosis of psychopathy sit at the intersection of medical and legal discourses, constructed as a diagnosable pathology enabling individuals to be assessed and treated whilst the individual also remains legally culpable. This can be seen in the following statement:

*"There have been a series of psychiatric reports on him, of which we have seen three. He has been diagnosed as a true psychopathic personality, medically insane though not insane in the legal sense." (1988)*

In the above extract, the individual is diagnosed as having a "true" psychopathic personality; the psychiatrist exercises their power from the expert position to place an identity on the individual through diagnosis. After being exposed to a "series of psychiatric reports", the individual remains powerless through these actions. In addition, the individual's identity is constructed within a specific framework that involves a distinction between "medically insane" and "insane in the legal sense". Through this, psychopathy is ultimately constructed in two different ways and is dependent on the two discursive fields: the medical and legal. This intersection can be seen again in the following statements, where consideration is made as to the influence of the diagnosis of psychopathy on legal culpability:

*"his personality disorder is long-standing and "need not" significantly influence the sentencing process. Although Mr XXX is not within the criteria allowing him to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992,*

*Dr XXX says the Court “may or may not” wish to see Mr XXX’s presentation as constituting mental impairment within the spirit of the Criminal Procedure (Mentally Impaired Persons) Act 2003.” (2015b)*

In the above statements, psychopathy can meet two different sets of criteria. The psychiatrist positions the psychopathic individual as a clinical subject, suggesting consideration of their “mental impairment” to reduce a potentially punitive response. Through this process, legislation is also employed to indicate that the individual does not fit the criteria to label them as legally impaired. Ultimately, the health assessor leaves the decision to the Judge, who, from their subject position, can carry out the actions of deciding the defendant’s level of impairment. The diagnosis provides institutions with the evidence needed to legitimise the treatment and management of individuals in the courtroom. For those individuals labelled as psychopathic, this diagnostic classification is used to provide legal grounds for incarcerating individuals. This can be seen in the following statement:

*“While mental health issues might reduce culpability, they might also signal an ongoing and unacceptable risk to the public if they cannot be brought under control. The expert reports, including that of Dr XXX, indicate that is so here. Mr XX still requires extensive treatment which should be administered in the context of a sentence of life imprisonment.” (2022i)*

Defendants may be diagnosed, categorised, “brought under control”, and treated through assessments and classifications conducted by psychological professionals as part of the criminal justice system. Consequently, their criminal behaviour is viewed as a symptom needing intervention. This alternative focus on treatment as a response to punitive action can

be seen in the above statement; however, it illustrates how the perceived need for treatment can be used to extend the number of years they are incarcerated. Throughout this process, the self-determination of the individual continues to be marginalised as they become an object of clinical intervention.

### ***The Health Assessors***

The first use of the term health assessors to describe clinical psychologists and psychiatrists within the data corpus occurred in 2005 (2005a). Following this period, the commonly and previously labelled experts shifted into the health assessor subject position. Health assessors frequently appeared in ESO and PPO cases but were not limited to these cases. Various legislations were referenced across the data corpus to provide evidence for the need for health assessor assessments and reports. For example, where decisions were to be made regarding indeterminate sentencing under “s87”, the court was required to “*consider reports from health assessors about the likelihood of further qualifying sexual offending occurring.*” (2007d). For cases that were heard in mental health court or decisions regarding the “s34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003” (2006e), psychiatric and psychological knowledge was further entrenched as essential to the decisions made in court. This reflected a redistribution of power from the court to health assessors. This can be seen in the below case:

*“A minimum of two reports from health assessors is an essential prerequisite of imposing a preventive detention sentence. Both assessors had access to and read all relevant background information, including previous probation reports, sentencing notes, police summaries, clinical notes and assessments whilst you were in prison.”*  
(2011)

In the criminal justice system, offenders are subjected to assessment tools based on norms, following which they can be classified. They are subjectified, and knowledge is produced about them based on “clinical notes”, previous court reports, summary of facts, and other professional reports. This gathered data and records of behaviour impact their levels of surveillance, access to treatment, and sentencing. Often, these individuals, through classification, are cast to the fringes, grouped in with other marginalised groups and even excluded within the offender population. In the statement above, the available legislation reinforces the health assessors' subject position as essential to decision-making and provides them access to confidential information that contributes to the reproduction of this knowledge about psychopathy in the courtroom.

The discourse of *psychopathy and pathology* demonstrated how individuals labelled psychopathic sit at the intersection of legal, medical and clinical discourses. Psychopathy was constructed as an illness or pathology linking these subjects to the notion of treatment, yet this did not appear to impact legal consequences. In many cases, the diagnostic label functioned to prolong sentences for the purposes of treating their pathology. The use of the title health assessors was representative of the shift to a rehabilitative-focused discourse rather than a traditionally punitive or risk-focused one. However, when final sentencing decisions were made, the subject position of the Judge ultimately made the final decision, at times using the notion of treatment to enforce longer sentences.

#### **Discourse 4: ‘Psychopaths’ are untreatable**

Across the data corpus, there were prevailing notions about psychopathic individuals being either challenging to treat or untreatable.

### *Psychopathy as Untreatable*

Psychopathic individuals were discursively constructed as having poor treatment prognosis or being untreatable. In the following extract from 1988, we see this hopelessness around the defendant's ability to rehabilitate themselves or to be rehabilitated:

*“The severe personality disorder from which he suffers is said to be basically untreatable, at any rate, in New Zealand. At one stage he went voluntarily into Odyssey House, but this appears to have achieved nothing in the long run.”* (1988)

In this extract, psychopathy is regarded as “basically untreatable at any rate in New Zealand”. The Judge reinforces the view of psychopathy as being resistant to treatment, with past attempts at treatment described as achieving “nothing in the long run”. These statements reinforce and contribute to the widely uncontested assumption that psychopathy is resistant to treatment. Within other cases, psychopathy is described as having “no cure” and a “poor treatment prognosis” that has been described as “bleak” because of defendants’ high scores on the PCL and its variations (2016, 2016b, 2008h, 2008i, 2008l, 2009j, 2012e, 2016f). Even with the prospect of “specialised treatment”, psychopathic individuals are still regarded as potentially gaining no benefits from this (2007b).

In the 1988 case, the Judge later describes “the only ray of hope” for the individual as having a potential for change as the psychiatrist explains that psychopathic personalities “mature” with age. Through this dissemination of expert knowledge, psychopathy is presented as having potential for change. This potential for change is additionally employed across the data to justify the extended periods of incarceration to ensure public safety until Judges and health professionals perceive this change to have occurred (2005k, 2007b, 2008h).

### ***Psychopathy as Challenging to Treat***

Individuals labelled as psychopathic are regarded in the data corpus as having a “poor response to available treatment interventions” (2006f) because of the “significant treatment barrier” the characteristics of this disorder posed (2005j). Psychopathic traits were frequently regarded as “not easily moderated by psychological treatment”, to be “very challenging to treat”, and to be a “significant responsivity barrier” (2005j, 2008h, 2017j, 2019a). When psychopathic individuals were provided treatment opportunities, they were described as “disruptive in programmes and make few gains” (2007g). Within legal statements, this was at times directly stated to the defendant, for example, “It is very difficult for society to deal with people who suffer from your disorders.” (2006d).

The PCL and its variations were frequently employed by Judges and psychologists when providing statements that regarded “high scores on the measure” as indicating the individual is “challenging to treat” (2013d). This can be seen in the following statements:

*“Research has consistently found psychopathy to have a strong relationship to a variety of negative criminal justice outcomes. These include poor response to available treatment interventions, increased involvement in institutional misconduct while incarcerated and high levels of violent and sexual re-offending as compared to less psychopathic offenders.”* (2006f)

*“It must be emphasised that the presence of psychopathic personality traits indicates at best that future successful treatment will need to be long and intensive. Even with the successful engagement in appropriate treatment, Mr XXX’s high assessed risk of serious sexual reoffending is unlikely to change in the immediate future.”* (2007b)

*“Mr XXX’s personality style acts as a barrier to his acceptance of responsibility and ability to fully engage in treatment. The literature on treatment suggests that effective therapy will take a considerable time, and any therapeutic gains that might occur will need to be stable over time and in different situations before they can be accepted as true treatment progress.” (2005k)*

Across these statements, Judges and psychologists employ scientific evidence from their specific disciplines to reinforce this notion of untreatability. This functions to endorse this perspective as truth. This taken-for-granted assumption about psychopathy being treatment-resistant was prevalent across the corpus. Yet, treatment for psychopathic individuals remained a focus during sentencing, with Judges statements such as: “without treatment there is no real hope for you.” (2013d). In various cases, despite references to literature drawing a relationship between untreatability and psychopathy, defendants’ sentencing outcomes were heavily influenced by their perceived attitude and motivation towards treatment.

### ***Treatment Success Reliant on ‘The Psychopaths’ Attitude and Motivation***

When Judges, psychiatrists and psychologists reported on a defendant’s attitudes and motivations towards treatment, those defendants who displayed a perceived “genuine” interest and commitment to treatment during psychological assessments were commended. In contrast, those who refused to engage in assessment or had a recorded history of having a “poor attitude” towards treatment were often cast as unmotivated and non-compliant. In some instances, despite a willingness to engage, due to the defendant’s psychopathy, the Judge stated there would be “significant responsivity barriers”, resulting in poor outcomes (2008h). Judges frequently referred to psychological assessment reports when discussing treatment attitude and motivation:

*“you would need to change your attitudes, otherwise the prognosis is not great.”(2005j)*

*“The prognosis for longer-term risk management is dependent on whether Mr XXX shows any willingness to meaningfully engage in psychological intervention to address the issues that have facilitated the current offending (2007b)*

Across the extracts, individuals are positioned as having agency over their attitudes, decisions and behaviours. They are constructed as responsible for their treatment despite psychopathy being constructed as a condition that involves deficits in some of these areas. In some cases, a defendant’s refusal to engage in assessment with psychologists provided the court evidence as to their unwillingness to potentially “meaningfully engage” in future treatment (2009j). This reinforces the notion of individual responsibility, which the courtroom can draw upon to reinforce blameworthiness and justify the response of the court to individuals labelled. Professional reports describing individuals as having poor attitudes held the power to recommend the need for prolonged incarceration of these individuals until authoritative subject positions such as the Parole board members, psychiatrists and psychologists deemed the individual to have been treated or for their attitude towards treatment to have changed. Those so-called psychopathic individuals were also powerless in their attempts to enact their rights to consent to or decline to engage in assessments. Ultimately, their choice to decline served to impact their sentences negatively.

Discursive practices such as actuarial assessment tools, reports, and legal statements contributed to the production of the discourse *‘psychopaths’ are untreatable*. Those subject positions that wielded these technologies of power drew upon discipline-specific research to

legitimise their position and authority to make decisions about whether an individual could or could not be treated based on their assigned condition and attitude. The implications of this were the loss of autonomy of individuals labelled psychopathic through their prolonged incarceration, subjectification to treatment defined by professionals and the deterministic notion that there may be no prospect of wellness for these individuals.

## Chapter Five: Discussion

This research was designed to uncover the discursive structures that contribute to the construction of psychopathy in Aotearoa New Zealand courtrooms and to explore the impacts of these structures and constructions on practices and consequences for so-called ‘psychopaths’ in this setting.

Using Foucauldian discourse analysis, four discourses were uncovered, these were: *‘the psychopath’ as a moral failure, psychopathy and risk, psychopathy as pathology, and ‘psychopaths’ as untreatable*. In this section, these discourses are explored with consideration of how individuals labelled as psychopathic were discursively constructed and the impacts of these discursive structures on practices and interventions. This study’s limitations are outlined alongside recommendations for future research.

### The Evolution of ‘The Psychopath’

On analysis of these four discourses, an evolution of how psychopathy was discursively constructed over time is uncovered. ‘The psychopath’ was initially constructed within a discourse where Judges, laypersons and health professionals could be judges of morality and attribute a diagnosis of psychopathy to any individual or behaviour that transgressed social norms as set out by the collective. The response to perceived moral transgressions was punitive, as psychopathy was framed as threatening to social order. The courtroom served as a site for the punishment of those individuals described as psychopathic.

This understanding and response to psychopathy evolved with the introduction of discipline-specific tools and knowledge within a discursive framework dominated by a focus on the prediction of future risk. Using instruments such as the PCL, a formally identified undesirable outgroup of ‘psychopaths’ was constructed. Psychopathy could now be assessed, categorised, and, by extension – treated (or untreatable). During this period, the legal context

of psychopathy was discipline-focused, and only certain authoritative subject positions could assign and construct who and what is a 'psychopath'. These discursive practices were rooted in a scientifically sanctioned mode of knowledge. The courtroom became a site where clinical professionals' opinions and practices were prominent and required through specific legislation. Through this process, public opinion and even the person's own experience and authority were minimised.

This thesis highlighted how the courtroom acted as a discursive site where knowledge (diagnosis, risk classifications, assessments) about those labelled psychopathic enabled power over these individuals in the form of decisions regarding sentencing and treatment. This power/knowledge relationship was regulated by psychologists and psychiatrists who held positions of authority over who was psychopathic because of the discipline-specific knowledge they held and their exclusive ability to carry out these discursive practices to identify and subjectify these individuals. This identification and subjectification additionally regulated the ability to decide what can and should be done to manage them. The findings from this study question this power imbalance, as the voice of so-called psychopaths was nearly absent across the corpus.

## **Psychopathy and the Criminal Justice System**

In the courtroom, psychopathy was constructed as a criminal identity. Those individuals assigned this label were framed as fundamentally deviant and risky individuals via discursive practices such as assessments, actuarial assessment tools (PCL), risk classifications, reports, and legal statements. Through this process of knowledge production about 'psychopaths,' the information about these individuals served as determinants for legal culpability, the level of threat they posed to society, and, ultimately, their realities. Those individuals labelled psychopathic were constructed as legally culpable despite their assignment of a psychopathy diagnosis, and frequently, this diagnosis appeared to function as

an aggravating factor and sanction the imposition of lengthy sentences or exposure to treatment pathways that required the containment of individuals for long periods of time.

These findings were reflective of the literature base and the role of discursive tools such as diagnosis and assessment in constructing psychopathy and how this knowledge, despite being located within a biomedical discourse, frequently served to sanction the use of social exclusion through incarceration (Clark-McGhee & Romero, 2018). Other studies, such as Mousourouli et al. (2024), uncovered similar consequences as reports were used as evidence for the defendant's criminal personality that was constructed as only impacting their moral judgment, therefore deeming them legally culpable.

Whether through the discourse of morality, risk or pathology, under these discursive conditions, so-called 'psychopaths' were cast into the social outgroup and as a threat to the broader moral collective. This positioning in the out-group was further enforced by the subject position of "the public". In the courtroom, "the public" was frequently presented as a collective that was vulnerable to the ongoing threat psychopathic individuals posed. So-called 'psychopaths' were constructed as intentionally transgressing the values the broader society all value and live by. This dichotomy legitimised the need for intervention in the form of institutional control or intervention to reduce this threat. Within this was the unseen assumption that the collective society all understood these unsaid social rules that 'psychopaths' needed to follow to be considered socially acceptable citizens. These unsaid rules were reflective of Foucault's concept of the panopticon and how certain discursive practices tell individuals how to act and that we are all expected to know and understand (Khan & MacEachen, 2021). The subject positions of the Judge and judicial system then reinforced the unacceptability of their moral deviance through punishment, and the court became a "site of exclusion" (Federman et al., 2009, p.53). Judges, psychiatrists and psychologists were also provided with the authority to make decisions on behalf of society to

ensure “the public” was protected. This positioning of subjects, particularly those in authoritative positions, is accepted as normal in the courtroom, with little consideration given to other stakeholders such as the victims of the offending, the family of the accused and ‘the psychopath’.

The dichotomy of the threatening ‘psychopath’ and vulnerable public reinforced the use of actuarial assessment tools and risk classification systems in the courtroom. Actuarial assessment tools frequently shifted the construction of psychopathy from being a mental illness or pathology requiring treatment to being a risk subject requiring containment. This study’s findings highlighted how the actions of the experts and judges in response to the perceived risky ‘psychopaths’ were further legitimised by the courtroom being constructed as a site for preventing future harm to the broader society. Psychiatric and psychological frameworks of knowledge were institutionalised as essential to understanding this risk, and this was particularly prevalent in ESO and PPO cases.

Within the norms and rules of the courtroom, contesting what can be said and done from the subject position of the ‘risky psychopath’ was limited, leaving them disempowered. Where the discourse of risk was employed, psychopathic individuals were constructed as unpredictable, impulsive, having a “violent temper”, and having “special difficulties linked to the issue of dangerousness”. Through these descriptive statements, psychopathy and risk were frequently constructed as synonymous. This construction of the ‘risky psychopath’ enabled them to be positioned as objects of risk that could be measured and categorised. Following this, they were assigned subject positions that cast them as “high-risk” and to have a “high level of psychopathic traits” because of their PCL results. These labels were used in legal statements to describe individuals, often marginalising other understandings such as personal experiences, their identities, and realities. Through this process, they were provided with a new identity to make sense of.

The focus on the discourse of risk within Aotearoa New Zealand courtrooms demonstrated a shift in the way in which the courts manage individuals assigned a psychopathy label. Through the discourse of morality, there was a keen focus on punishment for the crimes committed, whereas, within the discourse of risk, the interest turns to preventing future harm and minimising risk to society. Through these processes, psychopathic individuals were denied agency and decontextualised. Their voices and experiences were silenced in the courtroom, only understood through expert reports about them reviewed and reinterpreted by judges and their legal statements.

Subject positions of psychiatrists and psychologists were assigned insurmountable authority over defendants in the courtroom; as expert witnesses or health assessors, their assessments and reports were frequently regarded as essential in the courtroom. Psychiatrists and psychologists were positioned as the only subjects able to diagnose, measure and provide recommendations as to how individuals were managed following sentencing. Their tools, such as the PCL and other assessments, establish the boundaries around who fits the norms of the general and offender population, and psychiatrists and psychologists are then able to measure if and how an individual deviates from these norms.

Through this pathologisation of deviance, the 'psychopath' was then subjectified and could be judged, modified, and contained by the judicial system and those professionals who aid in its regulation (psychiatrists, psychologists, and their knowledge bases) (Federman et al., 2009). Following the assignment of a classification or diagnosis, so-called psychopathic individuals were deemed unable to have authority over themselves and their decisions whilst simultaneously being regarded as being rational in their decisions. The consequences of this framing were the alienation of those individuals deemed psychopathic from what is considered normal society and the ongoing neglect of cultural and socio-political factors contributing to how psychopathy is understood. This finding is broadly in line with

researchers such as Federman et al. (2009) and MacDonald (2016) as they describe how, through a framework of discursive practices that involves the regulation of individuals by psychiatrists or psychologists, an exertion of power exists. Knowledge about psychopathy is institutionally constructed ultimately influenced by and influencing how the subjectified individual is understood. This subjectification sometimes led to psychological treatment, which essentially functioned to coerce subjects into law-abiding and socially acceptable citizens who adhere to moral norms.

### **The Persistent ‘Truths’ about Psychopathy and Treatability**

The discourse ‘*psychopaths are untreatable*’ reflected the treatment-focused literature on psychopathy treatability and the scientifically-endorsed notion that individuals labelled as psychopathic are untreatable or at least challenging to treat (Hare et al., 2000; Hobson et al., 2000). This is despite the ongoing criticisms of the findings of those studies (Polaschek & Daly, 2013; Salekin, 2019). This thesis highlighted how the subject positions of psychiatrists, psychologists and Judges in the courtroom drew upon the literature to endorse and legitimise a notion of difference and dangerousness in ‘psychopaths’ that, in comparison to other criminals, was difficult to change. Other conditions, including technologies of power, such as court-ordered psychological assessments, actuarial assessment tools and the research that supported their use, reinforced this notion. These discursive practices were constructed as ethical and professional practices, put in place to ensure the safety of the public and those individuals being assessed and reported on. However, the consequences of this notion of being untreatable were the frequent employment of harsher sentencing and prolonged incarceration.

These discursive practices enacted by certain authoritative subject positions subjectified so-called psychopathic individuals; they became docile bodies that could only be managed, treated, or contained by psychiatrists, psychologists and sometimes Judges who had

the endorsement of discipline-specific knowledge bases. Only through the pathologisation and label of psychopathy the treatability of the individuals could be contested. In cases where defendants were reported to be treatable, this potential for change was also drawn upon to justify extended periods of incarceration to enable opportunity for further treatment.

These findings highlight the disciplinary power held by the legal institution, psychiatrists, psychologists, and their knowledge bases. Despite empirical research being unable to evidence how psychological, psychiatric or medical treatment can treat psychopathy, 'the psychopath' can continue to be contained and tested with various treatment approaches. The other taken-for-granted assumption here is that treatment can only take the form of what is being delivered by these professionals. These authoritative subject positions were further reinforced by legislation in the courtroom, attributing these experts' authority over if, how and what should be done about 'psychopaths' to modify or manage their behaviour for the purposes of creating or re-establishing socially acceptable citizens. This enabled a feedback loop where further assessment was conducted to monitor and record the progress that practitioners ultimately determined could be enacted. These findings resonated with Roberts's (2005) description of how a subject, or in this case, the 'psychopath', is then constructed as dependent on those health professionals and their discipline-specific tools and practices that enable them to be treated and potentially released.

This thesis also highlighted how individuals labelled psychopathic were consistently subjected to the notion of personal responsibility for their treatment success. Through the assessment and reporting process, defendants' perceived motivations to engage in treatment impacted what treatment options were made available to them and appeared to impact the outcome of their sentencing. When defendants exercised their right not to provide consent to engage in assessments, they were cast as difficult and unmotivated towards rehabilitation.

The consequences of these discursive conditions and discourse were the complete loss of autonomy of those so-called ‘psychopaths’, their subjectification to treatment defined by psychiatrists, psychologists, and Judges and the deterministic notion that there may be no prospect of wellness for these individuals. Given the ongoing criticism of conclusions made about the treatment of psychopathy, this nuanced understanding of how scientifically sanctioned stereotypes shape the discourse of untreatability provides further insight into the power of knowledge (or (mis)understandings) impacts on practices in the courtroom. As this research is believed to be the first of its kind, it offers new insights into the present discussions about the long-standing truths regarding psychopathy and treatment.

### **Research Limitations**

This study’s findings have provided a different understanding of how psychopathy is constructed in New Zealand courtrooms and, importantly, the potential consequences of these discursive constructions and discourses. It is well known that Foucault did not prescribe a standardised approach to Foucauldian discourse analysis (Arribas & Walkerdine, 2017). This can mean that the researcher’s experience and subjective position can impact the method and findings. Various approaches were employed to consider how to offset these, including transparency when discussing my reflexive position and the employment of Willig’s steps. In addition, the researcher’s subjective position and potential impacts were addressed consistently over the course of supervision.

The findings of this study are limited in their scope. The available Judges’ sentencing notes that can be retrieved online did not include notes from the District Court. As each District Court in New Zealand has a localised system to store records, gathering this data would involve reaching out to 50 different district courts. Given the time constraints, it was decided that these records were to be excluded. Other limitations to consider are how those notes included in the data corpus do not provide comprehensive insight into all factors

involved in the courtroom. Judges' sentencing notes must meet legal mandates, and only information relevant to sentencing outcomes is included. In addition, informal interactions, statements from other stakeholders, and broader societal influences on discourse within the courtroom were not readily available in the data. Other discursive domains, such as media, likely influence the construction of psychopathy in the courtroom.

Other limitations included the focus on presenting the findings on specific subject positions and discourses that were perceived to relate best to the research aims and methodology. This research study could have been more expansive and captured various available discourses, subject positions, and discursive tools. The focus on psychologists' and psychiatrists' subject positions and discursive tools was dominant due to the most frequent talk about psychopathy being conducted by and around these subjects. However, consideration should be made for how the institutional context and interactions between the Judge and the psychiatrist or psychologist reports would have impacted how these report findings were referenced in the text. Their subject positions and discursive tools were somewhat filtered through the lens of the Judge and other courtroom practices. Whilst still providing insight as to how psychopathy is constructed in the courtroom, the findings in this study cannot be taken as evidence for cause-and-effect inferences, and given the described limitations, the findings within this thesis should only provide data that could serve as a foundation for future research.

## **Opportunities for Future Research**

The preliminary data from this research may serve as a valuable foundation for future inquiries. The current research cannot be regarded as evidence for how discursive constructions of psychopathy may more broadly influence sentencing outcomes, policy and practice in Aotearoa, New Zealand courtrooms. Other avenues for future research could concentrate more specifically on confirming evidence of potential outcomes when

psychopathy diagnoses and assessment tools are incorporated into sentencing decisions in Aotearoa, New Zealand. Future research that involves interviewing expert witnesses who have provided evidence to the court, such as psychologists and psychiatrists may prove to be valuable. Considering the weight of psychological professionals' reports within the data corpus and the limitation of analysing their contributions through the voice of the Judge potential new insights into how expert witnesses understand psychopathy may be available. Other interviews with Judges and lawyers might offer valuable insights, providing a broader view of how psychopathy is discursively understood in the courtroom. Across data corpus, the majority of individuals labelled as psychopathic or who were exposed to psychopathy-focused assessment tools were males. Only two of the Judge's sentencing notes included women who had been accused of being "psychopathic" by laypersons.

Considering the concerns highlighted in this thesis about the stigma and marginalisation of individuals labelled as psychopathic and the issues with the conception of psychopathy, efforts should be made to reframe psychopathy as a health issue and look beyond criminality. This may involve exploring how psychopathy is discursively constructed in alternative contexts by health professionals not involved in the justice system. Ultimately, it would be advantageous for future inquiries to include the perspectives and insights of those labelled as psychopathic or who have been subjected to psychopathy-focused assessment tools. It has been argued elsewhere that it is common within psychopathy research to exclude these voices, as these individuals are often discussed and constructed by others, namely academics (Tamatea, 2022). They are rarely provided with a platform to share their understandings of how they make sense of this identity constructed about them and how they might discursively construct their own identities in relation to this label.

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## Appendix: Judges Sentencing Notes and Internal Reference Code

**Table 1**

*Analysed Judge's Sentencing Notes*

Internal Code	Case Reference	Court
2023e	CIV-2016-404-000756 [2023] NZHC 2278	High Court
2023d	CRI-2022-063-3836 [2023] NZHC 1239	High Court
2023c	CRI-2023-019-001131 [2023] NZHC 3509	High Court
2023b	CRI-2023-404-466 [2023] NZHC 3733	High Court
2023a	CIV-2021-409-585 [2023] NZHC 1085	High Court
2022k	CRI-2022-404-000127 [2022] NZHC 2767	High Court
2022j	CIV-2021-409-000539 [2022] NZHC 2508	High Court
2022i	CA441/2016 [2023] NZCA 53	Court of Appeal
2022h	CIV-2017-485-802 [2022] NZHC 3170	High Court
2022g	CRI-2022-404-000127 [2022] NZHC 2767	High Court
2022f	CA616/2020 [2022] NZCA 507	Court of Appeal
2022e	CRI-2023-404-466 [2023] NZHC 3733	High Court
2022d	CRI-2021-409-138 [2022] NZHC 1148	High Court
2022c	CRI-2021-009-004366 [2022] NZHC 607	High Court
2022b	CA166/2021[2022] NZCA 149	Court of Appeal
2022a	CIV-2021-404-1651 [2022] NZHC 1854	High Court
2021f	CA468/2020 [2021] NZCA 160	Court of Appeal
2021e	CRI-2021-441-000005 [2021] NZHC 3488	High Court
2021d	CRI-2021-009-001846 [2021] NZHC 3396	High Court
2021c	CRI-2021-409-000138 [2021] NZHC 3325	High Court

Internal Code	Case Reference	Court
2021b	CRI-2021-404-0383 [2021] NZHC 2745	High Court
2021a	CRI-2018-070-3720 [2021] NZHC 1016	High Court
2020	CRI-2015-409-000038 [2020] NZHC 3184	High Court
2019f	CRI-2019-404-406 [2019] NZHC 2482	High Court
2019e	CRI-2019-441-11 [2019] NZHC 2371	High Court
2019d	FAM-2019-020-164 [2019] NZFC 7122	Family Court
2019c	CRI-2019-485-18 [2019] NZHC 1784	High Court
2019b	CA593/2018 [2019] NZCA 320	Court of Appeal
2019a	CRI 2017-085-2927 [2019] NZHC 1276	High Court
2018e	CIV-2017-485-000779 [2018] NZHC 903	High Court
2018d	CIV-2018-404-683 [2018] NZHC 3106	High Court
2018c	CA134/2017 [2018] NZCA 380	Court of Appeal
2018b	CRI-2018-063-000085 [2018] NZHC 2170	High Court
2018a	CIV-2018-454-29; [2018] NZHC 2092	High Court
2017k	CIV-2016-485-84 7 [2017] NZHC 1019	High Court
2017j	CRI-2017-019-2515 [2017] NZHC 2800	High Court
2017i	CIV-2016-404-000756 [2017] NZHC 3120	High Court
2017h	CRI-2017-409-000109 [2017] NZHC 2561	High Court
2017g	CIV-2017-485-754; [2017] NZHC 2398	High Court
2017f	CRI 2015-485-69 [2017] NZHC 135	High Court
2017e	CRI 2017-485-015 [2017] NZHC 2527	High Court
2017d	CIV-2016-409-001196 [2017] NZHC 2366	High Court
2017c	CRI-2016-087-335 [2017] NZHC 1913	High Court
2017b	CRI-2016-404-000404 [2017] NZHC 1406	High Court

Internal Code	Case Reference	Court
2017a	CRI-2015-404-000352 [2017] NZHC 559	High Court
2016f	CA676/2015 [2016] NZCA 304	Court of Appeal
2016e	CRI-2015-012-001620 [2016] NZHC 614	High Court
2016d	CIV 2016-419-58 [2016] NZHC 2816	High Court
2016c	CRI-2015-441-000042 [2016] NZHC 1717	High Court
2016b	CRI-2016-012-001153 [2016] NZDC 24301	District Court
2016a	CIV-2015-404-002878 [2016] NZHC 1081	High Court
2015	CRI-2014-004-002949 [2015] NZHC 189	High Court
2014c	CIV-2013-404-005218 [2014] NZHC 612	High Court
2014b	CRI-2012-012-2754 [2014] NZHC 1923	High Court
		Employment Relations
2014a	[2014] NZERA Auckland 239 5432361	Authority
2013d	CRI 2012-042-2825 [2013] NZHC 527	High Court
2013c	CRI-2011-069-002110 [2013] NZHC 805	High Court
2013b	CA 403-2013 [2013] NZCA 676	Court of Appeal
2013a	FAM-2011-009-001126 [2013] NZFC 2558	Family Court
2012g	CA 640-2011 [2012] NZCA 18	Court of Appeal
2012f	CRI-2010-019-6868 [2012] NZHC 479	High Court
2012e	CRI-2011-085-001917 [2012] NZHC 780	High Court
2012d	CRI 2012-463-16 [2012] NZHC 737	High Court
2012c	CRI-2012-409-26 [2012] NZHC 1634	High Court
2012b	FAM-2012-009-001382 [2012] NZFC 4432	Family Court
		Broadcasting Standards
2012a	BSA 2012-072	Authority

Internal Code	Case Reference	Court
2011l	CIV 2010-409-002933	High Court
2011k	CA 232-2011 [2011] NZCA 409	Court of Appeal
2011j	CA 853-2010 [2011] NZCA 324	Court of Appeal
2011i	CRI-2010-009-017567	High Court
2011h	CRI-2009-090-7995 [2011] NZHC	High Court
2011g	CRI-2010-019-5901 [2011] NZHC	High Court
2011f	CRI-2009-044-2878	High Court
2011e	CRI-2010-019-003093	High Court
2011d	CRI-2008-054-223	High Court
2011c	FAM-2005-009-003589	Family Court
2011b	FAM-2011-075-000006	Family Court
2011a	FAM-2004-009-004782	Family Court
2010k	CA351/2009 [2010] NZCA 269	Court of Appeal
2010j	CIV-2010-454-232	High Court
2010i	CIV-2009-485-1781	High Court
2010h	CA555/2008 [2010] NZCA 258	Court of Appeal
2010g	CRI-2010-004-002752	High Court
2010f	CRI 2010-063-000715	High Court
2010e	CA521/2009 [2010] NZCA 112	Court of Appeal
2010d	CRI-2008-092-001835	High Court
2010c	CRI 2008-044-010515	High Court
2010b	CA67/2009 [2010] NZCA 600	Court of Appeal
2010a	F AM-2009-078-000324	Family Court
2009n	CIV-2007-485-1829	High Court

Internal Code	Case Reference	Court
2009m	CRI-2009-409-000047	High Court
2009l	CA555-2008 [2009] NZCA 321	Court of Appeal
2009k	FAM-2002-019-309	Family Court
2009j	CRI-2008-087-1850	High Court
2009i	CRI 2008-054-5987	High Court
2009h	CRI 2009 078 0809	High Court
2009g	CRI-2007-054-2425	High Court
2009f	CRI-2008-054-5852	High Court
2009e	CRI-2009-069-255	High Court
2009d	CRI 2008-063-1376	High Court
2009c	CRI-2009-063-002237	District Court
2009b	CA 489-2008 [2009] NZCA 352	Court of Appeal
2009a	CRI 2008-085-008190	District Court
2008o	CA 498-2008 HRNZ 770	High Court
2008n	CIV 2005-485-1785	High Court
2008m	CRI 2007-092-018897	High Court
2008l	CRI 2007-019-6446	High Court
2008k	CRI 2007-019-4667	High Court
2008j	CRI-2007-054-3426	High Court
2008i	CRI 2008-004-010135	High Court
2008h	CA 381-2008 [2008] NZCA 396	Court of Appeal
2008g	CRI 2007-063-0877	High Court
2008f	CRI 2007-020-43	High Court
2008e	CIV 2004-485-1460	High Court

Internal Code	Case Reference	Court
		Employment Relations
2008d	AA 28-08 5050368	Authority
		Employment Relations
2008c	AA 313/08 5081338	Authority
2008b	CRI 2007-404-0398	High Court
2008a	CRI 2005-404-000239	High Court
2007k	FP 070196-02	Family Court
2007j	CRI 2004-019-007442	High Court
2007i	CRI 2006-092-9497	High Court
2007h	BCL 417; (2007) 22 CRNZ 925	Court of Appeal
2007g	BCL 774; BC200769138	High Court
2007f	CA258-06 NZCA 55	Court of Appeal
2007e	CA201-05 NZCA 398	Court of Appeal
2007d	CRI-2005-009-9492	High Court
2007c	CRI 2007 085 736	High Court
2007b	CRI-2006-041-1239	High Court
		Employment Relations
2007a	AA 33-07 AEA 1291-05	Authority
2006h	CRI.2005-027-630	High Court
2006g	FAM-1997-054-82	Family Court
2006f	CA48-06 NZCA 28	Court of Appeal
2006e	CRI 2005-083-806	High Court
2006d	CRI-2006-044-5276	High Court
2006c	CRI 2006 409 44	High Court

Internal Code	Case Reference	Court
2006b	CRI 2006-485-51	High Court
2006a	CA184-05	Court of Appeal
2005e	CA446-04	Court of Appeal
2005d	CRI-2003-070-6113	High Court
2005c	FAM-2004-073-27	Family Court
2005b	CRI 2005-404-00064	High Court
2005a	CRI 2004-404-000444	High Court
2005f	CIV 2004 485 611	High Court
2004e	CRI 2004-090-002122	High Court
2004d	BCL35; BC200469447	High Court
2004c	CRI 2003 032 9587	High Court
2004b	CRI 2004-485-37	High Court
2004a	CRI 2004-485-106	High Court
2003a	CA330-03	Court of Appeal
2001	CA459-00	Court of Appeal
2000b	M 139-00	High Court
2000a	1 NZLR 387	High Court
1999	CA 48-99	Court of Appeal
1998c	MFPIO-97	Family Court
1998b	SRT 69-95	District Court
1998a	AP 3-98	High Court
1997b	CA 195-97	Court of Appeal
		Mental Health Review
1997a	SRT 69-95	Tribunal

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Internal Code	Case Reference	Court
1996b	FP004-1445-96	Family Court
1996a	CP 631-94, 3	High Court
1994	CA 406-92	Court of Appeal
1993	CR 3004004634	District Court
1991	CA 221-90	Court of Appeal
1989	CA 39-89	Court of Appeal
1988b	CA 121-88	Court of Appeal
1988a	CA 185-88	Court of Appeal
1986	CA 173-86	Court of Appeal
1985	R v X	High Court