Incarcerated Minds:
A Comprehensive Analysis on the Legal Origins of the Mental Health Crisis in the Canadian Correctional System

By

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Abstract

While various sectors have increased awareness of mental health, the criminal justice system lags behind. Many correctional systems face an alarming prevalence of serious mental illness (SMI), which remains inadequately addressed. This thesis unravels the complex narrative underlying the mental health crisis within corrections.

I argue that the crisis of SMI in the Canadian correctional system is fundamentally rooted in the legal understanding of psychiatric illness, thus infringing upon the human rights of persons incarcerated with SMI. First, the stringent criteria of the legal defence of not criminally responsible on account of mental disorder (NCRMD) in s.16(1) serve as a significant barrier for those with SMI who offend. Second, sentencing judges inadequately consider essential mitigating factors such as their mental state and the social contexts contributing to their offence. These limitations result in many individuals with SMI being convicted and admitted to non-psychiatric facilities that fail to adequately prioritize their mental health needs.

In Chapters 1 and 2, I contextualize the mental health crisis in corrections and the legal defence of NCRMD. In Chapter 3, I focus on the conviction stage, examining the limitations of s.16(1) and its implications for persons with SMI who offend and the broader criminal justice system. In Chapter 4, I focus on the sentencing stage, examining how sentencing judges often fail to adequately consider the mental health of offenders with SMI, particularly among Indigenous and Black persons, due to the conflict of balancing public safety with rehabilitation. Finally, I conclude my thesis by recommending that access to mental health care and social services be significantly increased in both the community and in prisons to tackle the epidemic of SMI in corrections.

Ultimately, it is my hope that this thesis will advocate for the human rights and dignity of persons who are incarcerated with psychiatric illnesses, one of the most disadvantaged and marginalized populations in society.

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I am forever indebted to my *Mom* and *Dad*, who have supported me throughout my life, and who have been there at every milestone. You have been behind my every accomplishment.

Lastly, I dedicate my thesis to every individual who is experiencing a mental health condition while incarcerated. You are seen, you are heard, and I hope that my thesis will shine a light on the challenges you face, advocate for criminal justice reform, and contribute to breaking the stigma surrounding mental health in the criminal justice system.

Note

In this thesis, I will be using person-first terms such as "person convicted of an offence," "person who is incarcerated," and "person who has a psychiatric illness" to replace identity-first terms such as "offender," "prisoner," and "mentally disordered individual." While the legal system prefers to use identity-first terms as they accurately embody the unique lived experiences and the challenges that they face, referring to individuals and groups in this manner is highly problematic[5] for the following reasons. First, these labels objectify individuals and make their involvement with the criminal justice system a defining feature of their identities.[6] Second, these labels do not acknowledge their full humanity nor allow opportunity for personal growth and redemption. Lastly, these labels propagate negative stereotypes, discrimination, and fear, which continue to stigmatize individuals who have been involved with the criminal justice system and create barriers for successful reintegration into their communities.[7]

Jerome R. Wright became a statewide organizer for the #HALTsolitary campaign in New York, USA, after his incarceration. He states that, "The minute you are arrested, the language begins to be totally derogatory, debasing, and dehumanizing. Our humanity is maintained and respected by not referring to us in those impersonal and definitive terms, but by acknowledging our intrinsic value as human and not by defining us by the worst day or act in our lives… If you can't see me as [a] human being, then you will never treat me as a human being. And I can never escape the parameters of the system."[8]

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[5] See e.g., Casey E. Orr, "People and Power: Person-First Language Usage and the Criminal Justice System" (2023) 2:1 A Journal of Writing-as-Activism to understand the positive impacts of using person-first language instead of identity-first language in the criminal justice context.
[6] Erica Bryant, "Words Matter: Don't Call People Felons, Convicts, or Inmates" (31 March 2021), online: <https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates>.
[7] *Ibid*.
[8] *Ibid*.

The usage of language that centers personhood and humanity is essential for this thesis as it can positively influence public opinion, promote legal reforms, and improve access to services and healthcare in corrections while preventing discrimination.[9]

[9] Nguyen Toan Tran et al, "Words matter: a call for humanizing and respectful language to describe people who experience incarceration" (2018) 18:41 BMC Int Health and Hum Rights, DOI: <10.1186/s12914-018-0180-4>.

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List of Abbreviations

ASPD - antisocial personality disorder

BPD - borderline personality disorder

CAMH - Centre for Addiction and Mental Health

CCRF - *Canadian Charter of Rights and Freedoms*

CO - correctional officer

C-PTSD - complex post-traumatic stress disorder

CSC - Correctional Service of Canada

CC - *Criminal Code*

IMHI - Institutional Mental Health Initiative

JHSO - John Howard Society of Ontario

MHCC - Mental Health Commission of Canada

MHRC - Mental Health Research Canada

NCR - not criminally responsible

NCRMD - not criminally responsible on account of mental disorder

NGRI - not guilty by reason of insanity

OCI - Office of the Correctional Investigator

PTSD - post-traumatic stress disorder

RNR - Risk, Needs, Responsivity model

SCC - Supreme Court of Canada

SMI - serious mental illness

SSCA - *Safe Streets and Communities Act*

"Mental illness, even today, is all too often considered a crime to be punished, a sin to be expiated, a possessing demon to be exercised, a disgrace to be hushed up, a personality weakness to be deplored or a welfare problem to be handled as cheaply as possible."

- *Canadian Mental Health Association, More for the Mind: A Study of Psychiatric Services in Toronto, Canada (1963), p. 1.*

"Prisons do not disappear social problems, they disappear human beings. Homelessness, unemployment, drug addiction, mental illness, and illiteracy are only a few of the problems that disappear from the public view when the human beings contending with them are relegated to cages."

- *Angela Yvonne Davis*

Incarcerated Minds:

A Comprehensive Analysis on the Legal Origins of the Mental Health Crisis in the Canadian Correctional System

Chapter 1: Introduction

Despite mental health awareness significantly increasing in various sectors such as the workplace, education, and sports, the Canadian criminal justice system has not kept pace with these advancements. In workplaces, mental health programs and support structures have become integral to employee well-being, promoting a more inclusive and supportive environment.[16] Educational institutions are providing mental health education and resources to ensure students receive the necessary support to thrive academically and personally.[17] Similarly, the sports industry has made strides in recognizing and addressing the mental health needs of athletes, fostering a culture where seeking help is encouraged and normalized.[18] However, in the criminal justice system, there remains a critical lag in adequately addressing the mental health needs of

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[16] See, for example, Canadian Mental Health Association, "Workplace Mental Health Programs" (2024), online: <https://cmha.ca/what-we-do/national-programs/workplace-mental-health/> and Keith S. Dobson et al, "Mental health initiatives in the workplace: models, methods and results from the Mental Health Commission of Canada" (2018) 17:3 World Psychiatry, DOI: <10.1002/wps.20574>.

[17] See, for example, Alana Read et al, "A Descriptive Overview of Mental Health Services Offered in Post-Secondary Educational Institutions Across Canada" (2023) 68:2 The Canadian Journal of Psychiatry, DOI: <10.1177/07067437221128168>. While post-secondary institutions ensure support services for students, improvements are required. Access to mental health services in universities varies widely, presenting several issues. Nearly all institutions offer some form of counselling or psychotherapy, but the nature and extent of these services differ significantly. Less than half provide multiple counselling sessions with a defined maximum limit, and this is more prevalent in large universities with and without Faculties of Medicine (FoM). Short-term counselling is common, but many institutions do not specify the duration of limits of these services. A minority offer only single-session interventions or additional resources like peer support, online tools, and virtual group counselling, indicating a disparity in the accessibility and comprehensiveness of mental health support across post-secondary institutions.

[18] See, for example, Dr. Natalie Durand-Bush et al, "Mental Health Strategy for High Performance Sport in Canada" (The Mental Health Partner Group [Canadian Centre for Mental Health and Sport, Canadian Olympic and Paralympic Sport Institute Network, Game Plan, and Own the Podium], 2021) and Signa Butler, "'It's OK not being OK': Even the most successful stars of sport face mental health challenges" (May 18 2023) *CBC News*, online: <https://www.cbc.ca/sports/bianca-andreescu-kelsey-mitchell-mental-health-awareness-1.6847412>.

persons who are accused of an offence and who are incarcerated, resulting in a persisting and alarming mental health crisis in correctional facilities.

The Mental Health Crisis in Corrections

Psychiatric illness refers to "a clinically significant behavioural or psychological syndrome or patterns that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom."[19] It is well documented that the Canadian correctional system contains a disproportionate prevalence of persons experiencing psychiatric illnesses. The Ombudsman for federal offenders in 2010 claimed that the rate of psychiatric illness among the adult incarcerated population is two to three times higher than in the general population.[20] Many other statistics echo this finding. One estimate suggests that more than 1 in 10 males and 3 in 10 females who are incarcerated in Canada have experienced a psychiatric illness prior to their admission into provincial and federal prison but had not received mental health treatment. Another study found that the rate of any mental health disorder among male persons incarcerated in a provincial prison in Edmonton, Alberta, was as high as 91.7%.[21] Further, in two studies, every four out of

[19] Dan J. Stein et al, "What is a Mental/Psychiatric Disorder? From DSM-IV to DSM-V" (2010) 40:11 Psychol Med, DOI: <10.1017/S0033291709992261>. DSM-IV claims that… "Although [the DSM-IV manual] provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations… Mental disorders have also been defined by a variety of concepts (e.g., distress, dyscontrol, disadvantage, disability, inflexibility, irrationality, syndromal pattern, etiology, and statistical deviation. Each is a useful indicator for a mental disorder, but none is equivalent to the concept, and different situations call for different definitions."

[20] Joseph H. Michalski, "Mental health issues and the Canadian criminal justice system" (2017) 20:1 Contemporary Justice Review, DOI: <10.1080/10282580.2016.1226817> at 2.

[21] Fiona Kouyoumdjian et al., "Health status of prisoners in Canada" (2016) 62:3 Can Fam Physician.

five youth in detention in Ontario and British Columbia met criteria for at least one mental health disorder.[22]

Serious mental illness (SMI) refers to "a mental, behavioural, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."[23] It is also well documented that the Canadian correctional system system has an alarmingly high prevalence of persons incarcerated with SMI. In one study, it is estimated that 15-20% of persons who are incarcerated have SMI, which includes psychotic, bipolar, and major depressive disorders, as well as suicidal ideation.[24] Fazel and Seewald (2012) conducted a meta-analysis on the prevalence of SMI in prisons.[25] It considered 109 samples of 33,588 individuals who are incarcerated from 34 countries. They concluded that 15-20% of persons who are incarcerated have SMI that require psychiatric treatment, which is a significantly higher rate than in the general population.[26] In a federally commissioned report

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[22] *Ibid*.

[23] Lauren Gonzales et al, "Reliability of the Term "Serious Mental Illness": A Systematic Review" (2022) 73:11 Psychiatric Services, DOI: <10.1176/appi.ps.202100661>. It is important to note that serious mental illness is very different from general psychiatric illness as defined above. While psychiatric illness may be temporary and minor, for example, an individual experiencing anxious thoughts and poor sleep and eating for only one week, serious mental illness is considered to be long-lasting with severe symptoms that may lead to harm to oneself or to others without prompt treatment. In a systematic review of 788 psychiatric studies, SMI typically constitutes specific psychiatric illnesses such as Schizophrenia and Schizoaffective Disorder (62%), Bipolar Disorder (52%), and depression (34%). A third of the studies included other psychotic disorders or, more broadly, "psychosis" as a symptom. Other conditions less commonly labelled SMI are mood disorders (14%), anxiety (14%), personality disorders (14%), substance use disorders (11%), and post-traumatic stress disorder (9%).

[24] Alexander I. F. Simpson, et al., "Challenges for Canada in Meeting the Needs of Persons with Serious Mental Illness in Prison" (2013) 41:4 J Am Acad Psychiatry Law at 501. The prevalence of general and severe psychiatric illnesses among persons who are incarcerated is likely increasing, due to a variety of systemic issues in society and corrections that result in inadequate diagnosing and treatment of those with SMI.

[25] *Ibid*.

[26] *Ibid* at 502. See also, Chloe I. Pedneault et al, "Approaches to Addressing Serious Mental Illness in the Canadian Criminal Justice System" (2023), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2023-r001/index-en.aspx>.

using self-reported data, the magnitude of the mental health crisis in corrections is highlighted. 12% of male persons incarcerated and 21% of female persons incarcerated reported that they had significant symptoms of SMI on admission to a federal prison, and the rate of severe SMI symptoms among the incarcerated population has increased 61-71% since 1997.[27] However, the data has not yet been validated against a research-based diagnostic tool, and it is unclear whether the rising rate of reported distress can be associated with the increased rates of specific disorders.[28]

Further, the prescription rates for persons entering federal prisons receiving psychotropic medications has doubled in the past decade, rising to 21% in 2008.[29] The Correctional Service of Canada has raised concerns about the epidemic of SMI among women and Indigenous persons who are incarcerated at federal prisons. A 2002 report by CSC stated that women who are incarcerated at a federal prison had a lifetime prevalence of schizophrenia of 7% and 19% for major depressive disorder, compared with the community of 1% and 8.1%, respectively.[30] And

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A national study concluded a similar finding. Out of 1,100 newly admitted men in federal prisons, 12% met the diagnostic criteria for an SMI. The Atlantic and Ontario regions had the highest rates of SMIs (16% and 15%, respectively), followed by Quebec (13%), the Prairies (10%), and the Pacific region (7%). Estimates suggest 2-5% of men who are incarcerated have a psychotic disorder, 6-14% have major depressive disorder, 4% have bipolar disorder, and 16% have borderline personality disorder. Newly admitted federally sentenced women had a higher rate of SMIs (17%) compared to men. Combining newly admitted and in-custody samples, 5% of women had a psychotic disorder, 10% had major depressive disorder, and 4% had bipolar disorder. In a Quebec jail sample, women had higher rates of depressive disorder (26% vs. 20%) and affective psychoses (13% vs. 7%) than men. Women in federal prisons were also twice as likely to meet criteria for borderline personality disorder (33%), and were more frequently diagnosed with PTSD (27%) compared to men.

[27] *Ibid* at 504.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid*.

while less than 5% of the Canadian population is Indigenous, Indigenous persons comprise 40% of the incarcerated population.[31] As the Correctional Investigator states:

> "In the ten-year period between March 2009 and March 2018, the Indigenous inmate population increased by 42.8% compared to a less than 1% overall growth [in the total adult custodial population] during the same period. As of March 31, 2018, Indigenous inmates represented 28% of the total federal in-custody population while comprising just 4.3% of the Canadian population. The situation continues to worsen for Indigenous women. Over the last ten years, the number of Indigenous federally sentenced women increased by 60%, growing from 168 in March 2009 to 270 in March 2018. At the end of the reporting period, 40% of incarcerated women in Canada were of Indigenous ancestry. These numbers are distressing."[32]

Indigenous persons who are incarcerated with SMI at admission increased from 5% in 1996-1997 to 14% in 2006-2007 but decreased to 9% in 2008-2009.[33] The high rates of SMI among the Indigenous population that is incarcerated can be attributed to the unique and complex narrative of colonialism, displacement, and racism, and it continues to be a key challenge to address.[34]

The implications for untreated SMI in Canadian prisons are severe. Between 1996-1997 and 2009-2020, the average annual suicide rate among persons incarcerated at a federal prison was 3.7 to 7.4 times higher than in the age-matched general population.[35] The rate is similar across pretrial and sentenced populations. Women are significantly more likely than men to

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[31] Government of Canada, "Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice System: Causes and Responses" (20 January 2023), online: <https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html>.
[32] *Ibid*.
[33] Simpson et al., *supra* note 24 at 509.
[34] *Ibid*. For more discussion on the complex socio-economic disadvantages that contribute to the epidemic of psychiatric illness in Indigenous communities, see Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) and Victoria Smye et al, "Social Suffering: Indigenous Peoples' Experiences of Accessing Mental Health and Substance Use Services" (2023) 20:4 Int J Environ Pub Health.
[35] *Ibid* at 503.

attempt suicide while in a prison due to undiagnosed or untreated SMI.[36] Therefore, the prison environment houses a disproportionately large population that experiences a variety of disadvantages, including psychiatric illnesses. While psychiatric illness is a common phenomenon in the criminal justice system, perhaps even rendering it a natural feature of the prison population, I consider the incarcerated population in Canadian corrections to be experiencing a mental health crisis due to the alarming prevalence of serious mental illness (SMI), which are often left untreated and constitute cruel and inhumane treatment for those incarcerated living with a severe psychiatric illness, as well as for those incarcerated sharing spaces who may be subjected to harm or similar distress.

Systemic Issues Contributing to the Crisis

There are several persistent systemic issues that result in the mental health crisis in Canadian corrections, which include a punitive legal culture with strict criminal justice policies that impact individuals who have SMI, and a lack of access to sufficient rehabilitative services and mental health treatment in corrections.

a. Punitive Legal Culture

From the mid-19th century to 2006, Canadian official policy statements from both the Conservative and Liberal governments established a legal culture that perceives offending as socially determined; that is, individuals who become involved with the criminal justice system experience socio-economic disadvantages and require support from the state to address their needs.[37] The main goal of incarceration was to successfully reintegrate those who offend back into mainstream society by providing rehabilitation to change attitudes and behaviour.

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[36] *Ibid*.
[37] Cheryl Webster et al, "US punitiveness 'Canadian style'? Cultural values and Canadian punishment policy" (2015) 17:3 Punishment & Society.

Imprisonment was thus viewed as a necessary evil to be avoided as much as possible. The values among elite policy-makers and politicians idealized a less punitive culture underscored by understanding, compassion, and inclusiveness.[38] The statements made by government figures demonstrate this progressive legal culture:

> "If we don't get to the root causes of crime, we cannot make our streets and communities safe. True safety and security are based in caring homes, good schools, shared values, and communities where people care about and reach out to one another." (Progressive Conservative Party of Canada, from their 1993 election platform)[39]

> "We have always enforced that a person is innocent until proven guilty. In this country, we do not draw a distinction between good people and bad people. They are all people, but they may have been convicted of an offence." (Gordon Aiken, House of Commons, January 30, 1970)[40]

> "An inmate is always a citizen who, sooner or later, will return to a normal life in our society and as such, is basically entitled to have his human rights as a citizen respected by us to the largest possible extent." (Jean-Pierre Goyer, House of Commons, October 7, 1971)[41]

Criminal justice policies that embody this progressive legal culture include refraining from punitive measures by restraining the use of imprisonment as punishment, especially in the use of custodial sentences, and prioritizing more community sanctions and the rehabilitation and eventual reintegration of individuals who are incarcerated.[42] The over-reliance on imprisonment in Canada was acknowledged to have negative effects on those who were incarcerated, as there was insufficient rehabilitation inside of prisons, and the issue was criticized in government policy statements on sentencing in 1984. One statement reads, "Canada's level of incarceration looks relatively restrained only in comparison to that of the United States, and such other

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[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid*.

countries as the Soviet Union and South Africa."[43] Another statement, in a 1938 Royal Commission report, claims, "The evidence before the Commission convinced us that there are very few, if any, prisoners who enter our penitentiaries who do not leave them worse members of society than when they entered them."[44] Between the years 1996-2000, specific criminal justice policies that were culturally and legally progressive included more diversion programs and other alternative measures, the decarceration of low-risk persons who offend, and more restorative justice and mediation approaches.[45] Thus, the government advocated for a moderation in the use of imprisonment as punishment, and when used, it would prioritize the rehabilitation and reintegration of persons who are incarcerated.

However, legal scholars have determined that the era since 2006 appears more American in its legal culture, which can be attributed to the Progressive Conservative Party of Canada's new stance on criminal justice.[46] The elite policy-makers and politicians have changed their perceptions on offending, as persons who commit offences are viewed as inherently 'bad' people and qualitatively different from 'ordinary law-abiding' Canadians.[47] There is a clear shift from a progressive legal culture that emphasized values of understanding, compassion, and inclusiveness, to one that emphasizes punitiveness and ambivalence. In 2006, the Conservatives had won the election, and several policies and practices linked to increased punitiveness elsewhere have appeared in Canada.[48]

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[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*.
[47] *Ibid*.
[48] Canada has had a relatively stable rate of incarceration since the 19th century, especially in comparison to the United States and the United Kingdom. The level of incarceration can be a good measure of the degree of punitiveness in a criminal justice system, thus Canada appears to be faring better than other nations at resisting harsh and strict penalties for those who offend.

Such issues policies and practices include the politicization of crime, a reduction in the reliance on expert advice as a knowledgeable and neutral voice, and the increasing advocacy for the use of prisons to effectively address crime.[49] Many legislative proposals were created without the consultation of criminal justice policy experts outside of the government and were reluctant to empirical evidence. As one Justice Minister noted in 2010: "We don't govern on the basis of statistics. We govern on the basis of what we hear from the public and what law enforcement agencies tell us."[50] Offending was now perceived as individually determined; that is, the result of ration choice by certain persons who disobey the law. This is evident when the Conservative Party remarked on the Liberal Party's focus on the social causes of crime during the 2011 federal election, labelling it an "out-of-touch ideology that makes apologies for criminals."[51]

i. *Safe Streets and Communities Act*

The Conservative Party enforced a punitive legal culture in sentencing and imprisonment. Sentencing objectives emphasized deterrence, denunciation, and incapacitation, and a slew of tough-on-crime policies followed.[52] Mandatory minimum sentences were increased, especially for certain violent offences. In 2012, there were no mandatory minimum penalties under the *Controlled Drugs and Substances Act*, but the advent of *Safe Streets and Communities Act* raised maximum minimum penalties and many more were introduced.[53] The *Safe Streets and*

See also, Anthony Doob and Cheryl Webster, "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate" (2006) 40:2 Law & Society Rev at 331. Doob and Webster argue that the Canadian incarceration rate has been relatively stable since 1960, and that there has been no consistent upward trend.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] *Ibid*. The use of alternatives to imprisonment were curbed. There were restrictions placed on the use of conditional sentences of imprisonment, a suspended sentence introduced in 1996 by the Liberal Party to reduce the use of imprisonment, which were passed in two separate bills in 2007 and 2012.

[53] *Ibid*.

Communities Act (*SSCA*), which received Royal Assent on March 13, 2012, and was implemented in phases between August and November 2012, represented a pivotal element of the Conservative Party of Canada's tough-on-crime agenda.[54]

SSCA introduced extensive amendments to various statutes, including the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Corrections and Conditional Release Act*, the *Youth Criminal Justice Act*, among others.[55] This legislation marked a significant policy shift towards expanding the Canadian prison system. Despite government statistics indicating that 93% of Canadians were satisfied with their personal safety from crime, the *SSCA* incurred substantial financial costs and significantly increased the Canadian prison population.[56] The *Act*'s implementation had also exacerbated federalism-related tensions in Canada. Particularly concerning was its impact on Indigenous communities, where over-incarceration has been a long-standing issue. The *SSCA* further aggravated this crisis, compounding the challenges faced by Indigenous peoples in the criminal justice system.[57]

The Conservative Party's use of an omnibus bill to enact these reforms attracted significant criticism for hindering thorough debate and scrutiny. During its second reading in the House, Liberal MP Sean Casey claimed that "[t]he bill is large and includes nine bills from the previous Parliament all lumped into one big buffet of division and fear."[58] The *SSCA*'s mandatory minimum sentencing provisions were particularly contentious, as they restricted judicial discretion and undermined culturally specific diversion programs, exacerbating the

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[54] Ryan Newell, "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51:1 Osgoode Hall LJ at 200.
[55] *Ibid* at 218.
[56] *Ibid* at 201.
[57] *Ibid*.
[58] *Ibid* at 218.

already-severe issue of Indigenous over-incarceration.[59] Throughout parliamentary discussions, the Conservative Party dismissed substantive critiques with tough-on-crime rhetoric, failing to engage with concerns about the *Act*'s adverse effects on Indigenous communities and its inadequacy in addressing the societal causes of crime. Despite testimonies before the Senate Committee on Legal and Constitutional Affairs highlighting the *SSCA*'s potential to worsen Indigenous over-incarceration and make communities less safe, the Conservative-dominated Senate did not amend the *Act* to incorporate the *Gladue* principles, which sought to mitigate Indigenous over-representation in prisons by examining the social context from which many Indigenous persons involved in the criminal justice system originate.[60] New Democratic Party of Canada (NDP) MP Carol Hughes questioned the House whether "we should be stocking our prisons with [Indigenous peoples]... as opposed to providing rehabilitative and proper services for them," to which Conservative MP Kevin Sorenson replied:

> "Madam Speaker, I think our prisons should be full of those who have committed crimes against our society and who have been found guilty in a court of law. I think our prisons should be a place where we can try to rehabilitate people, but we should hold them, incarcerate them and tell them that the penalty for crime is prison in some cases. … *We realize that there is a high percentage of [Indigenous peoples] in our penitentiaries, and, yes, that must be addressed as well*, but in many cases [sic] there are many [Indigenous] victims who are standing right there while the offender is locked in prison."[61]

Further, Christa Big Canoe of Aboriginal Legal Services of Toronto cautioned that the *SSCA* would impede the improvements made by the Bill C-41 reforms and their interpretation in *Gladue*:

> "Our biggest concern with the passing of the *Act* is that there will be an undermining of the principles of sentencing as set out in section 718.2 of the *Criminal Code of Canada*. When I say that, I mean the entire section, not just (e)... We believe that the *Safe Streets and Communities Act* will make the problem of [Indigenous] over-representation in

[59] *Ibid*.
[60] *Ibid* at 221.
[61] *Ibid* at 219.

> prison even worse, while at the same time not actually addressing the legitimate safety concerns of [Indigenous] and non-Indigenous peoples in this country."[62]

Catherine Latimer of the John Howard Society of Canada echoed a similar conclusion, noting that the *SSCA* was likely to make communities less safe "while eroding rights and principles of justice and having a disproportionate impact on some of the most marginalized among us, whether it is the poor, the mentally disordered, the [Indigenous peoples] or the aged."[63]

The amendments under the *Controlled Drugs and Substances Act* enforced by the *SSCA* established a series of mandatory minimum sentences for drug-related offences, which varied based on specific aggravating factors. For instance, producing more than five but fewer than 201 marijuana plants for trafficking carried a mandatory minimum sentence of six months, while producing over 500 plants using someone else's property resulted in a mandatory minimum of three years' imprisonment.[64] Mandatory minimum sentences for individuals charged with a drug-related offence had implications that particularly impacted individuals with psychiatric illnesses. By removing judicial discretion, these amendments prevented judges from considering the unique circumstances of persons experiencing psychiatric illness, which often resulted in disproportionately harsh sentences.[65] This rigidity contributed to incarceration rates among the most marginalized populations, placing individuals in prison environments ill-equipped to provide the necessary mental health care and exacerbating their conditions.[66] Additionally, the focus on punitive measures rather than rehabilitation hindered the chances of recovery and reintegration for individuals with psychiatric illnesses. The stigma and discrimination associated

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[62] *Ibid* at 221.
[63] *Ibid*.
[64] *Ibid* at 224.
[65] Darcie Bennett et al, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) at 9.
[66] *Ibid*.

with mandatory minimum sentences reinforced negative perceptions of persons who have psychiatric illnesses, further marginalizing them and limiting their access to support.[67] Indigenous populations, already disproportionately affected by the criminal justice system and more likely to experience SMI, were particularly vulnerable to these negative impacts, as noted by many critics of the *SSCA*.[68]

However, one mitigating provision in the *Controlled Drugs and Substances Act* allowed courts to delay sentencing to enable persons who offend to participate in approved drug treatment programs.[69] If a person who offended successfully completed such a program, the court would not be obligated to impose the mandatory minimum sentence. This provision is especially relevant for Indigenous peoples and persons with psychiatric illnesses, who often experience drug and alcohol issues linked to systemic dispossession and marginalization. While the

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[67] *Ibid* at 10, 11. Theodore, who at the time of being interviewed in 2013, was in his late 40s and sober, but he would have been impacted by mandatory minimum drug sentencing. He experienced substance use disorder as a result of untreated psychiatric illness, as well as committing more serious offences to sustain his addiction. He was convicted and sentenced to prison in the 1990s, prior to the *SSCA* amendments to the *Controlled Drugs and Substances Act*. He stated, "From the first time I smoked [marijuana], at about 13 or 14, I liked it, and it slowly progressed to selling drugs, doing acid and mushrooms. At 17, I started robbing drug stores and started actually trying the product. Narcotics, the first time I did it, it just eased every psychological, emotion, physical pain that I had. It just seemed at the time, it made me feel whole." Regarding his perception of mandatory minimums, he claimed that he "was very lucky, for some things I could have definitely gotten a worse sentence. Because they did not have to follow those mandatory minimums, they were able to look at the broader scope, and that was always a positive thing." Subjecting persons with psychiatric illness and substance use to incarceration has dehumanizing effects, as he noted: "I would say the longer you are there, the more you become accustomed to the jailhouse mentality, so I don't think it's helpful to keep anyone in for an overabundance of time. I think getting rid of flexibility for judges is the worst thing. He is able to look at all the different dimensions of a person. Once you take that away, you are not looking at a person, a human being, you are looking only at a number, or at the worst things in a person's life. We are all different, so our sentences should be on a different scale."

[68] Newell, *supra* note 54 at 225.

[69] *Ibid* at 224.

effectiveness of Canadian drug treatment courts is debated, offering treatment options is preferable to immediate imprisonment.[70]

ii. Bill C-14

The punitive legal culture also targeted policies that specifically impacted individuals with psychiatric illnesses. One notable implementation in criminal law during the Harper Conservative era was Bill C-14, known as "*The Not Criminally Responsible Reform Act*." which introduced significant changes to Part XX.1 of the *Criminal Code* and particularly affected persons with SMI who were classified as NCR.[71] It was passed by the House of Commons in 2013 and received Royal Assent in 2014, coming into effect that same year. The bill marked the only reform to the NCR regime since the 1990s; however, this reform was excessively punitive towards offenders with SMI rather than progressive. It proposed a "high-risk" designation for certain individuals found NCR, prioritizing public safety, and enhancing victims' rights.[72] Despite being a reform, these amendments gave rise to several issues regarding their punitive nature and constitutional violations.

Firstly, Lacroix et al claim that the transfer of authority over the "high-risk" designation from specialized Review Boards to general criminal courts is problematic. Review Boards possess the necessary expertise in mental health to make informed decisions about individuals

[70] *Ibid*.
[71] Robert Lacroix et al, "Controversies Concerning the Canadian Not Criminally Responsible Reform Act" (2017) 45:44 J Am Acad Psychiatry Law at 44. See also, Lisa Kerr and Anthony Doob, *The Conservative Take on Crime Policy*, The Harper Decade (20 August 2015), online: <https://www.theharperdecade.com/blog/2015/8/17/the-conservative-take-on-crime-policy>. Kerr and Doob both note that under Harper's Conservative government, Canada shifted from its historically moderate approach to criminal justice, which had prioritized expert-driven decision-making and comparatively low incarceration rates. This shift has been marked by the politicization of criminal justice, leading to harsher punishment practices. This included Bill C-14, which was the only reform in the NCR regime in the 21st century and largely emphasized unfairly punishing persons with SMI.
[72] *Ibid* at Lacroix et al at 44.

found NCR, while courts lack this specialized knowledge.[73] This shift undermined the established role of Review Boards, which traditionally oversee NCR cases, making ongoing assessments and crafting appropriate dispositions. The courts' involvement lead to less informed decisions, compromising the treatment and management of persons with psychiatric illnesses who offend.[74] Secondly, the bill's emphasis on victims' rights did not substantially improve their current standing.[75] Although the bill mandated notification and consideration of victim impact statements, these provisions are already part of the existing regime. Undue emphasis on victim impact statements overshadowed the primary concern of assessing the risk of future violence among individuals found NCR.[76] Consequently, the bill's purported enhancements to victims' rights were minimal and largely rhetorical.

Thirdly, Lacroix et al argue that Bill C-14 contravened ss.7 and 15(1) of the *Charter of Rights and Freedoms*.[77] Section 7 ensures that every individual has the right to life, liberty and security of the person without deprivation except in accordance with the principles of fundamental justice, and s.15(1) ensures that every individual has the right to equal protection and benefit of the law without discrimination, specifically towards individuals with psychiatric illnesses.[78] The amendments shifted the balance away from protecting the rights of the accused, with the 'high-risk' designation and changes to section 672.54 being overbroad and infringing on the accused's liberty.[79] The removal of the 'least onerous and least restrictive' requirement in favour of 'necessary and appropriate' dispositions increased the likelihood of excessive and

[73] *Ibid* at 47.
[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid* at 48, 49.
[78] *Ibid* at 49.
[79] *Ibid*.

unjustified restrictions on individuals found NCR.[80] Additionally, the extended review periods for 'high-risk' individuals found NCR risked arbitrary detention, further violating constitutional rights.

Fourthly, the bill restricted the ability of psychiatric hospitals to manage 'high-risk' individuals found NCR effectively. Hospitals' flexibility to adjust conditions based on the individual's mental state is crucial for effective treatment and rehabilitation, but the rigid restrictions imposed by the bill undermined this flexibility, hindering the recovery process and the overall effectiveness of the forensic mental health system.[81] A fifth issue is that empirical evidence did not support the necessity of a 'high-risk' designation for protecting public safety. Persons with psychiatric illnesses who offend constitute a small percentage of the offending population, and existing measures under Part XX.1 are effective in managing the risks they pose.[82] Studies indicate that Review Boards are not lenient and already impose detention orders and conditions when necessary.[83] The proposed 'high-risk' designation appeared to be driven more by fear and stereotypes than by actual data.[84]

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[80] *Ibid* at 50.
[81] *Ibid*.
[82] *Ibid* at 47. The National Trajectory Project conducted a study of 1800 individuals who were followed for an average of 5.7 years. It was found that the overall recidivism rate after three years was 16.7%, and those who committed severe violent offences such as homicide, attempted homicide, and sex offences had a lower recidivism rate of 6%. These are compared to 15.3% for less severe offences against a person and 21.7% for non-person offences. Non-severe reoffences against persons occurred at a rate of 8.8%, with 29% of these being threats, while severe reoffences were very rare at 0.6%. The severity of the index offence did not significantly impact the likelihood of reoffending against persons, and challenged the basis for high-risk designations based on the index offence.
[83] *Ibid*. The issue of indefinite detention among individuals found NCR will be further discussed in Chapter 2.
[84] *Ibid*. It is common to see legislation such as Bill C-14 be created, which is based on perceptions of individuals with psychiatric illnesses as "dangerous" to the public. It is well-studied that there is significant stigma towards individuals with psychiatric illnesses, which has led to bias in the criminal justice system.

Lastly, Bill C-14 had detrimental effects on both the criminal justice and mental health systems. The potential for 'high-risk' designations deterred individuals from pleading NCR, leading to longer and more contested trials.[85] This reluctance worsened the mental health crisis in prisons, as more persons who are incarcerated enter custody without access to appropriate treatment. Furthermore, the influx of 'high-risk' individuals found NCR in psychiatric hospitals strained resources, compromising the quality of care and treatment available.[86] It is an ongoing challenge for the government to ensure that adequate resources are in place to accommodate these changes, or risk exacerbating the mental health crisis and the existing challenges in the system.

While Bill C-14 was ultimately not found unconstitutional, I agree with Lacroix et al's argument, as Bill C-14 poses significant risks to individuals with SMI, raising concerns about potential violations of sections 7 and 15(1) of the *Charter*. In relation to section 7, individuals with SMI face prolonged and indefinite detention without a clear pathway to release, which is particularly troubling when compared to the comparatively shorter sentences imposed on individuals convicted of less serious offences. As for section 15(1), Bill C-14 may be viewed as unintentionally discriminatory, as it disproportionately affects a vulnerable and marginalized

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For example, duty counsel has observed that in cases involving accused individuals with mental health challenges, police officers and crown attorneys often rely on misconceptions about mental health when determining bail release plans. Crown attorneys frequently read synopses from arresting officers, which include subjective statements about the accused's mental health, such as claims of "uncontrolled" mental health or behaviour that makes others "nervous." These statements can create barriers to the accused's release at the bail stage, as unpredictability is often conflated with riskiness. As a result, crown attorneys may argue that an accused's mental health issues warrant their continued detention for public safety reasons. See Marsha Rampersaud, "Punitive Justice: When Race and Mental Illness Collide in the Early Stages of the Criminal Justice System" (2022) 37:3 Can J of Law and Society, DOI: <10.1017/cls.2022.23>.

[85] *Ibid* at 48.

[86] *Ibid*.

population, imposing legal burdens such as indefinite detention and the erosion of personal freedom and autonomy.

Despite the proliferation of a punitive legal regime, Canadian incarceration rates have increased only slightly since 2006, with 110 adult persons incarcerated per 100,000 residents in 2006-2007 to 114 in 2012-2013.[87] However, other statistics reveal that the use of custody had increased over the past 25 years, despite crime rates decreasing, which has also been linked to the punitive criminal justice policies.[88] The transition from a progressive legal culture to one more punitive did not have drastic changes to the rates of incarceration, but it did greatly influence negative political and public perceptions of offending. Punitive legislation such as the *Safe Streets and Communities Act* and Bill C-14 have continued to create stigma and bias towards individuals with psychiatric illnesses who become involved with the criminal justice system, and they have directly resulted in exacerbating the mental health crisis in prisons.

b. Barriers to Mental Health Treatment

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[87] Webster, *supra* note 37, As Rebecca Peters states, "The explosion in prison populations in the United States over the past few decades is not necessarily mirrored in Canada as the overall custody rate for adult offenders has increased at a much slower rate than that of the United States. In 1997-1998, the adult incarceration rate in Canada was approximately 109 inmates per 100,000 adults, increasing to roughly 139 inmates per 100,000 adults in 2015-2016." Peters also claims that the Punitive Turn in the legal system has led to a significant increase in the Indigenous incarcerated population across Canada. In 2003, the total Indigenous population represented 3.3% of the general population but accounted for 13% of the federal prison population. The prevalence of Indigenous persons in federal prisons rose to 25% in 2016 even though the total Indigenous population grew to 4.3% that same year. Indigenous women are particularly over-represented in federal prisons. While only 3% of the total female population, they comprised 33% of the female federal prison population, a 90% increase from 2001. See Rebecca Peters, "Managing the Unmanageable: An Analysis of the Punitive Turn & its Impacts on Marginalised Populations in Canada & the United States" (2017) 2 York U Criminological Rev at 70.

[88] Michael Weinrath, *Behind the Walls: Inmates and Correctional Officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016) at 17, 18.

Current criminal justice practices in courts unintentionally criminalize those with psychiatric issues, rather than diverting them out of a system that is designed for punishment and accountability, and not targeted intervention.[89] The law targets specific forms of conduct, but it results in a disproportionate percentage of individuals with psychiatric illness being arrested, as persons with psychiatric illness are more likely to commit offences. This unintended consequence of criminalizing individuals with psychiatric illnesses is a critical and escalating issue in Canada. This problem has intensified since the mid-20th century deinstitutionalization of mental health care, which shifted treatment from hospitals to community settings.[90] The intention behind deinstitutionalization was to enhance community-based support for those with psychiatric illnesses. However, it has led to numerous negative consequences, such as limited access to mental health services in the community, a shortage of supportive housing, and insufficiently funded community services.[91]

Recognizing this problematic trend, the criminal justice community has advocated for enhanced access to specialized mental health courts, better mental health crisis services, and comprehensive case management.[92] Despite these efforts, the unintended consequence has been

[89] John Howard Society of Ontario, *Unlocking Change: Decriminalizing Mental Health Issues in Ontario* (Toronto: John Howard Society of Ontario, 2015) at 5.
[90] *Ibid* at 7.
[91] *Ibid*. A particularly troubling outcome is the increased interaction between persons with psychiatric illnesses and law enforcement, effectively turning the criminal justice system into a fallback for those without adequate community resources.
[92] *Ibid*. See also, Canadian Mental Health Association, *Mental Health Courts in Ontario: A Review of the Initiation and Operation of Mental Health Courts Across the Province* (Toronto: Canadian Mental Health Association, 2017). Mental health courts are especially necessary for the criminal justice system, given the significant prevalence of persons with psychiatric illnesses coming into contact with the law. Mental health courts are specialized judicial programs designed to address the needs of individuals with psychiatric illnesses by providing access to treatment and support services, while diverting them from traditional criminal justice processes. Most mental health courts require a nexus between the client's mental health issue and the offence, and client willingness to participate in treatment, with exceptions like Toronto's Old City Hall's 102 court, which handles very ill clients without this requirement.

the increasing role of the criminal justice system as one of the few points of access to mental health treatment. As Kathleen Hartford states, "The criminal justice system has moved from a position of last alternative to first, oftentimes because it provides the only available option."[93] Many individuals with psychiatric illnesses are processed through traditional court systems rather than specialized courts that center mental health, often ending up in overcrowded detention centers. Studies have shown that a significant portion of those deemed NCR had prior psychiatric hospitalizations and criminal records, highlighting a gap in preventative mental health care services in prisons.[94]

The John Howard Society of Ontario claims in its report that prisons are ill-equipped to function as mental health treatment centers.[95] The barriers to accessing mental health treatment for persons incarcerated with SMI include low availability due to the high demand, understaffing, and of those who are able to access mental health treatment while incarcerated, the

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This nexus can be very difficult to prove in a legal context, which will be thoroughly explored in this thesis. Persons with psychiatric illnesses may opt out of diversion plans, citing a lack of insight into their mental health issues, preference for trial, or perceptions of the diversion process as overly burdensome. Furthermore, challenges faced by mental health courts include the lack of dedicated funding and the availability of psychiatrists, with courts operating on existing resources and the initiative of a core group of stakeholders, highlighting the need for improved resource allocation to sustain and enhance these programs.

[93] Kathleen Hartford et al, "Design of an algorithm to identify persons with mental illness in a police administrative database" (2005) 28 Int J of Law and Psychiatry at 2. See also, Marina Morrow, Paul K. B. Dagg & Ann Pederson, "Is Deinstitutionalization a 'Failed Experiment'? The Ethics of Re-institutionalization" (2008) 3:2 Journal of Ethics in Mental Health. As Dr. Marina Morrow and Dr. Paul K. B. Dagg state, in certain instances, deinstitutionalization has resulted in the relocation of beds from large psychiatric institutions to the back wards of hospitals, or the implementation of institutional treatment models marked by paternalism and coercion within community settings. They suggest that the institution has not disappeared but rather shifted its location. Further evidence of trans-institutionalization is found in research documenting the criminalization of individuals with psychiatric illnesses following their discharge from institutional psychiatric care. As a consequence, individuals with psychiatric illnesses are institutionalized in correctional facilities instead of receiving treatment in hospitals or other healthcare settings.

[94] *Unlocking Change*, 2015, *supra* note 89 at 9.

[95] *Ibid*.

duration and quality of treatment are insufficient. The JHSO notes that access to healthcare personnel, health issue monitoring, treatment options, and medications are limited in most correctional settings.[96] Services that aim to specifically address the mental health needs of the incarcerated population are grappling with high demand that cannot be met with the current level of funding and staffing, and as access to mental health care in society is challenging, it is doubly so in corrections due to the sheer prevalence of mental health issues in ranging severity and causes.[97] The provincial Ombudsman, who oversees these institutions, serves as the authority to which individuals who are incarcerated can file complaints. Health care services complaints, such as issues with accessing medications and medical staff, consistently constitute a large portion of total complaints, with 2,138 complaints of this nature recorded in 2015.[98]

Adding to these concerns, a 2017-2018 interim report by the senate committee established a study that highlighted the connections between physical and mental health, and the relationship between health and disability in both penitentiaries and community corrections. Specifically, Dr. Adeline Iftene, a law professor, informed the committee about the chronic lack of specialists, extended waiting times, insufficient emergency care responses, and restricted access to external medical appointments due to limited escorts in penitentiaries.[99] The availability of medications is also restricted, with inadequate quality and variety to address

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[96] John Howard Society of Ontario, *The Counter Point: Health Care in Corrections* (Toronto: John Howard Society of Ontario, 2017) at 2.
[97] Weinrath, *supra* note 88 at 48.
[98] John Howard Society of Ontario, 2017, *supra* note 96 at 2.
[99] Wanda Elaine Thomas Bernard, Salma Ataullahjan & Jane Cordy, *Interim Report - Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right Is To Be Treated as a Human Being (1 February 2017 - 26 March 2018)* (Ottawa, The Standing Senate on Human Rights, 2019) at 27. Testimonies by the committee revealed that the correctional environment can exacerbate physiological and psychological issues. Individuals with mental health needs are overrepresented in the federal correctional system, and those with physiological issues are increasing.

chronic pain and other illnesses. These systemic problems disproportionately affect older individuals who are incarcerated, who may face numerous challenges, including inadequate facilities for those with mobility issues and insufficient medical supplies.[100]

In one 2015 study, more than 80% of individuals incarcerated in Canadian jails and prisons were receiving treatment while in custody; however, between 50% and 75% of individuals with a current psychiatric illness never receive treatment while incarcerated.[101] Further, another study indicated that 43% of persons incarcerated received some form of treatment, although often of short duration; 8% received treatment for at least half of their incarceration.[102] Half of all persons incarcerated with a known mental health need prior to incarceration experienced at least one interruption in care, and only 46% of persons incarcerated with a diagnosable psychiatric illness received treatment for more than 10% of their incarceration.[103] In conclusion, many persons who are incarcerated fail to access mental health treatment, and when accessed, the treatment is of short duration and may not sufficiently respond to their needs, especially for those with SMI. The authors also note that mental health screening

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[100] *Ibid*.

[101] Michael S. Martin et al, "Mental Health Treatment Patterns Following Screening at Intake to Prison" (2018) 86:1 Journal of Consulting and Clinical Psychology, DOI: <10.1037>.
Dr. Michael Weinrath also notes that persons who are incarcerated and do have access to mental health treatment in prison may refuse it, fearing that their restrictions on freedoms will be further curtailed if they are suicidal; stigma regarding their reputation; prior negative experiences; or as a symptom of severe SMI.

[102] *Ibid*. An observational study was conducted involving 7,965 consecutive admissions to Canadian federal prisons nationwide. The study described patterns of mental health treatment from admission until first release, death, or March 2015, with a median follow-up of 14 months. The association between screening results and the timing of first treatment contact, the duration of the first treatment episode, and the total number of treatment episodes was explored.

[103] *Ibid*. Screening results were predictive of treatment initiation and recurrent episodes, with stronger associations among those who did not report a history of psychiatric illness prior to incarceration.

may have diverted resources from cases with the highest known needs toward newly identified cases, who often received brief treatment indicative of lower needs.[104]

The Mental Health Commission of Canada investigated barriers that persons who are incarcerated face in accessing mental health treatment. The transition from federal penitentiaries to the community can disrupt the continuity of care as individuals may lose their provincial or territorial health coverage, including drug plans, upon incarceration in federal prisons.[105] This loss restricts access to essential provincial health services during reintegration until health cards and disability benefits are reinstated.[106] The provision of mental health services within provincial institutions is inconsistent, resulting in inadequate access to treatment and support for many individuals incarcerated with psychiatric illnesses.[107] Federal mental health services are generally unavailable to those incarcerated in provincial institutions unless provincial workers are unable to provide the necessary support. Additionally, there are notable differences in release planning between the Correctional Service of Canada and provincial authorities. While federal corrections emphasize release from custody planning and gradual release supports, these services are limited within provincial systems, particularly for those serving sentences in local detention centers.[108]

Lastly, the loss of mobility rights is a consequence of incarceration, but it has negatively impacted persons incarcerated with SMI who may need intensive mental health treatment that is best conducted outside of the prison system.[109] Mental health professionals in health care settings are better equipped at treating psychiatric illness as they have the funding, staffing, resources,

[104] *Ibid*. Further research is needed to determine the most cost-effective responses to positive screens or alternatives to screening that increase the uptake of services.
[105] Andrew Galley et al., *The Mental Health Needs of Justice-Involved Persons: A Rapid Scoping Review of Literature* (Toronto, Mental Health Commission of Canada, 2020) at 3.
[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] Weinrath, *supra* note 88 at 49.

and ideal environment for the incarcerated population; however, CSC restricts the mobility of persons who are incarcerated and it is a lengthy process receiving a referral to outside mental health care professionals.[110]

Despite these challenges, significant efforts have been made to address the mental health needs of individuals who are incarcerated. In 2012, the CSC introduced a mental health strategy focusing on five key priorities: enhancing intake screening and assessment, providing primary mental health care within regular prison settings, developing intermediate care units for specialized treatment within federal prisons, upgrading facilities and staffing at regional treatment centers that centers that function as both penitentiaries and psychiatric facilities, and improving community partnerships to support parolees with mental health needs during their release and reintegration.[111] These strategic initiatives aim to improve mental health care continuity and support for individuals who are incarcerated and for those transitioning back into the community.

c. Barriers to Rehabilitation

In an attempt to respond to the psychiatric needs of persons who are incarcerated and the mental health crisis in corrections, the Correctional Service of Canada (CSC) developed a variety of rehabilitative programs since the 1980s.[112] These programs are largely based on social learning theory and the psychology of criminal conduct (PCC), and they are considered an RNR model: Risk, Needs, Responsivity.[113] These rehabilitation programs purportedly reduce recidivism by

[110] *Ibid*.
[111] Galley et al., *supra* note 105 at 4.
[112] Weinrath, *supra* note 88 at 47.
[113] There are three principles of RNR treatment, which include the risk principle, wherein high-risk persons who are incarcerated receive more intensive treatment compared to low-risk persons who are incarcerated; the needs principle, in which the goal of the programs should be to meet the criminogenic needs of the incarcerated population; and the responsivity principle, where the right program is delivered to the incarcerated population at the right time.

5-10%, while others that are more rigorous and well-funded can be more beneficial.[114] However, there are reported issues with the availability and quality of rehabilitation programs in corrections.

Programs often exaggerate the effectiveness of such programs, and that the goal of risk management becomes more important than reforming persons who have offended, and classification is problematic because it places blame on the persons incarcerated and deflects attention from the social conditions that cause crime.[115] The programs face challenges with strict program design and fidelity, comprehensive staff training, delivering programs at ideal times, and the general severity of prison conditions that prevent programs from being more effective at responding to the population's needs.[116] Other persistent issues that negatively impact the availability and quality of rehabilitative programs include a lack of funding, resources, and staffing to effectively carry out the programs, and security concerns.[117]

Referring to the 2019 senate committee's report on human rights in prisons, there are similar barriers identified that prevent persons who are incarcerated from accessing vital and consistent rehabilitative programming.[118] The *Corrections and Conditional Release Act* (*CCRA*)

The RNR model provides cognitive-behavioural interventions to address the criminogenic needs of the incarcerated population, and it states "Central Eight" areas that need to be treated. They include anti-social attitudes, anti-social associates, criminal history, substance abuse, family/marital relations, use of leisure time, financial problems, accommodation problems, and emotional/personal issues.

[114] *Ibid*.

[115] Kelly Hannah-Moffatt, "Criminogenic needs and the transformative risk subject: Hybridizations of risk/need in penalty" (2005) 7:1 Punishment & Society, DOI: <10.1177/1462474505048132>.

[116] *Ibid*.

[117] John Howard Society of Ontario, *Broken Record: The Continued Criminalization of Mental Health Issues* (Toronto: John Howard Society of Ontario, 2015) at 14. These issues persist because prisons are not viewed as healthcare settings, thus they do not receive the funding, coordination, and planning that the programs deserve.

[118] Bernard, *Interim Report, supra* note 99 at 24.

mandates that the CSC offers a variety of programs aimed at addressing the needs of offenders and facilitating their successful reintegration into the community.[119] Although Hannah-Moffat refuted claims that these correctional programs greatly reduce the risk of recidivism and enhance community safety, they are still essential for the incarcerated population, who fail to have their needs met outside of the community.[120] Completion of these programs is a prerequisite for federally-sentenced individuals to be considered for lower security levels, parole, or other forms of conditional release.[121] Unfortunately, individuals in maximum security and solitary confinement face significant barriers to accessing these programs, hindering their progress towards early release and participating in community programming.

Witnesses have highlighted that these barriers disproportionately impact federally-sentenced women, Indigenous and Black persons, and those with psychiatric illnesses, who are overrepresented in maximum security and solitary confinement.[122] Many individuals in these conditions reported feelings of despair and hopelessness, as well as generally poorer mental health.[123] Furthermore, concerns have been raised that the mandatory programs provided by the CSC are not adequately tailored to meet individual needs. Instead, a one-size-fits-all approach is generally applied, with separate programs available only for those convicted of sexual offences and Indigenous persons. This lack of personalization renders many programs repetitive or irrelevant, particularly for women, Indigenous, Black, and ethnocultural persons, as the programs are perceived to cater primarily to the needs of White male offenders.[124]

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[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid*.
[122] *Ibid* at 25.
[123] *Ibid*.
[124] *Ibid*.

Additionally, the committee learned that numerous federally-sentenced individuals were denied access to programming due to reasons such as capacity constraints, staffing issues, security classification, sentence duration, and rigid entry requirements.[125] Many expressed that they felt unprepared for release and urgently needed access to programs to aid their reintegration. It was also noted that individuals returning to prison were not allowed to re-enter programs that they had previously accessed.[126] There is a strong desire among persons who are incarcerated to engage in educational upgrading, including post-secondary education and vocational training. However, aside from the limited availability of CORCAN jobs, most individuals leave prison with no more skills than they had upon entry, even after serving long sentences.[127]

Rehabilitation programs that specifically address the mental health needs of Indigenous persons who are incarcerated are also experiencing issues regarding funding and staffing. Nearly 25 years after the implementation of Canadian legislation designed to empower Indigenous communities to rehabilitate persons who offend through community-run healing lodges, these lodges are facing significant challenges while the Indigenous incarcerated population continues to expand.[128] Sections 81 and 84 of the 1992 *Corrections and Conditional Release Act* permit Indigenous communities to manage the care and custody of Indigenous persons who are incarcerated and participate in planning their release, with the CSC responsible for funding these

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[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*. According to the CSC, CORCAN is a Special Operating Agency that "offers employment training and employability skills to offenders in correctional institutions, to support rehabilitation and help lower rates of reoffending… Through CORCAN, offenders can get valuable on-the-job training that prepares them for jobs in trades such as carpentry, cabinet making, mechanic, electronic, welding, and auto repair."
[128] Martha Troian, "Healing lodges designed to help rehabilitate Indigenous offenders underfunded, advocates say" (March 1 2017) *CBC News*, online: <https://www.cbc.ca/news/indigenous/indigenous-healing-lodges-unfairly-funded-advocates-1.4002806>.

initiatives. Healing lodges, which offer rehabilitation guided by Indigenous spirituality and elders, were established to address the overrepresentation of Indigenous peoples in the prison system and the lack of Indigenous-specific programming. However, according to Allen Benson, the CEO of Native Counseling Services of Alberta, financial constraints severely impact these lodges.[129] Despite providing fewer beds, CSC-managed lodges receive significantly higher budgets compared to community-managed ones, creating staffing and retention issues. For instance, the Stan Daniels Healing Centre in Edmonton, which Benson's agency co-manages, operates on an annual budget of $2.8 million and offers 73 beds, while CSC-operated lodges receive between $7 million to $12 million annually but offer less than 73 beds.[130]

Benson highlights that this financial disparity hinders the Stan Daniels Healing Centre from competing with CSC salaries, resulting in high staff turnover. Moreover, elders, integral to the rehabilitation process, are overburdened due to government expectations, which compromise cultural integrity.[131] Elders have been providing healing services since 1992, with a majority of Indigenous persons who are incarcerated utilizing these services.[132] Despite these challenges, the issues with healing lodge funding are not new; a 2012 report by the Office of the Correctional Investigator, titled "Spirit Matters," detailed CSC's failures to meet its legislative obligations under the *CCSA*.[133] Ed Buller, who authored the report, suggests that CSC's reluctance to expand Indigenous healing lodges stems from a fear of losing control over persons who offend, driven

[129] *Ibid*.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid.* These healing services include spiritual guidance and counselling, ceremonial practices, cultural education, healing circles and talking circles, and release and reintegration support.
[133] *Ibid*.

by concerns about negative publicity from escapes and riots.[134] This indicates a deeper systemic issue within CSC's approach to Indigenous rehabilitation.

Incarcerated Minds: A Comprehensive Analysis on the Legal Origins of the Mental Health Crisis in the Canadian Correctional System

It is therefore well documented that there is a mental health crisis in the Canadian correctional system, a persistent phenomenon marked by numerous systemic legal issues such as a punitive culture fostering strict criminal justice policies that disproportionately target individuals with psychiatric illnesses, and barriers to accessing mental health treatment and rehabilitation in prisons. Despite the prevalence of psychiatric illnesses among individuals who offend, very few of them are found NCR during conviction, implying that the mental state of individuals at the time of committing their offences is not a sufficient rationalization for their behaviour.[135] In this thesis, I aim to unravel the intricate narrative underlying the mental health crisis in Canadian corrections, moving beyond the socio-economic causes of criminal justice involvement, and investigating the legal origins of the crisis.

I argue that the disproportionately high incarceration of individuals with untreated SMI in Canada is fundamentally rooted in the legal understanding of severe psychiatric illness under the *Criminal Code* and in sentencing judges' narrow approach to mental health as a mitigating factor. Specifically, the legal defence of not criminally responsible on account of mental disorder (NCRMD) as outlined in s.16(1), poses a major barrier - not because it is difficult to diagnose a psychiatric illness, but because of the stringent second component of the test, which requires proving that the individual was incapable of appreciating the nature and quality of the act or of knowing that it was wrong. This high threshold excludes many individuals with severe but

[134] *Ibid*.
[135] The prevalence of NCR verdicts will be discussed further in Chapter 3.

complex forms of psychiatric illness from successfully proving that they are NCR. Moreover, sentencing judges often fail to meaningfully consider both the mental condition and the broader social contexts of persons with SMI who offend, especially among Black and Indigenous individuals. As a result, the current legal regime contributes to the unintentional criminalization of psychiatric illness, infringes on the human rights of those affected, and places them in prisons that are ill-equipped to provide mental health care - ultimately undermining the justice system's obligation to balance public safety with rehabilitation.

My third and fourth chapters will attempt to answer the following questions, respectively: (1) How does section 16(1) of the *Criminal Code* impact the judge's legal understanding of the accused's mental health during the conviction stage? (2) How sufficiently do judges consider the role of socio-historical contexts and psychiatric illness of racialized persons during the sentencing process? In answering these questions, I will employ a doctrinal legal methodology, relying primarily on legislation and legal cases as my key sources of information. I will utilize a critical legal theory perspective throughout my thesis, while also utilizing critical race theory to assess how these provisions and the courts treat justice-involved marginalized persons with complex social histories who have psychiatric illnesses.[136]

In Chapter 1, I introduced the high prevalence of severe mental illness in the correctional system and explored the systemic barriers contributing to the crisis, which include a punitive legal culture that harshly treats individuals with psychiatric illnesses, and a lack of sufficient and appropriate mental health treatment and rehabilitation for persons who are incarcerated. In

[136] Critical legal theory examines the power structures and biases within the criminal justice system, highlighting how these may fail to address the complexities of mental health issues and perpetuate injustices for persons with psychiatric illnesses. Critical race theory provides frameworks for analyzing how race, particularly Indigenous and Black persons, intersect with legal practices, exposing systemic biases and injustices faced by marginalized individuals with psychiatric illnesses in the criminal justice system.

Chapter 2, I will provide a comprehensive background on NCRMD, covering legal definitions, historical context, major cases, and its associated issues that render an NCR verdict undesirable. In Chapter 3, I will focus on the conviction stage by delving into the limitations of s.16(1) and its implications for persons with SMI who offend and the broader criminal justice system. In Chapter 4, I will then focus on the sentencing stage by examining how sentencing judges often fail to adequately consider the mental state and the social context of persons with SMI who offend, largely due to a conflict between balancing public safety and rehabilitation.

Ultimately, it is my hope that this thesis will advocate for the human rights and dignity of persons who are incarcerated with psychiatric illnesses, one of the most disadvantaged and marginalized populations in society.

Chapter 2: Section 16: The Legal Defence of Not Criminally Responsible on Account of Mental Disorder

In this chapter, I will provide a comprehensive background on s.16(1) of the *Criminal Code*, which serves as the legal defence for individuals who are found guilty but are deemed not criminally responsible due to exhibiting SMI at the time of committing their offence. I will first examine the connection between SMI and offending, detailing how individuals with SMI can become entangled in the criminal justice system. Subsequently, I will define NCRMD and specify the particular provision to be analyzed in later chapters. I will then trace the historical development of this legal defence, from the seminal 1843 *M'Naghten's Case* to the enactment of Bill C-54 (previously known as Bill C-14). I will explain how an NCR defence is advanced at trial. Lastly, I will discuss the unintended consequences of an NCR verdict, exploring why it may act as a disincentive due to factors such as the risk of indefinite detention, negative experiences with the psychiatric correctional system, and the stigma associated with offences committed under the influence of SMI.

The Nexus Between Serious Mental Illness and Offending

It is well documented that certain psychiatric conditions can increase an individual's risk of becoming involved with the criminal justice system. Specifically, persons who have a diagnosis of a SMI are statistically more prone to violent behaviour if they do not receive adequate treatment and are actively experiencing hallucinations and paranoia.[138] Comorbidities such as substance abuse disorders, unemployment, poverty, homelessness, and cognitive impairment can compound the risk of violent crime in persons with SMI. The most significant and independent risk factor for criminality and violence among individuals with SMI is

[138] Noman Ghiasi et al, *Psychiatric Illness and Criminality* (Treasure Island, Fl.: StatPearls, 2023).

long-term substance abuse disorder.[139] Persons with diagnoses of SMI, particularly Schizophrenia and bipolar disorder, have higher rates of violent perpetration, and persons with triple morbidity - having SMI, substance abuse disorders, and antisocial personality disorder (ASPD) – have a substantially higher likelihood of becoming violent perpetrators than persons with SMI alone.[140]

Further, international research for both youth and adults concludes that certain psychiatric conditions, such as substance abuse disorders, conduct disorder, and ASPD have a significant correlation to offending and re-offending. Of all offences committed by persons diagnosed with SMI in the United States, only 7.5% were directly influenced by the psychiatric condition, suggesting that the connection to psychiatric illness and offending should move beyond psychiatric symptoms to risk factors of both psychiatric illness and offending, such as substance abuse disorders, unemployment, and poverty.[141] There is a disproportionate rate of violent offending among persons with SMI and substance abuse disorders in some studies (Coker et al., 2014; Van Dorn et al., 2012; and Swanson et al., 1990), while other studies do not show a clear correlation between both SMI, substance abuse disorders, and offending (CMHA, 2011; Stuart & Arboleda Florez, 2001; Elbogen & Johnson, 2009).[142]

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[139] *Ibid*.
[140] Graham Thornicroft, "People with severe mental illness as the perpetrators and victims of violence: time for a new public health approach" (2020) 5:2 The Lancet Pub Health, DOI: <10.1016/S2468-2667(20)30002-5>.
[141] Public Safety Canada, *Crime Prevention - Research Highlights 2017-H01-CP - Youth Mental Health, Mental Illness and Crime* (Ottawa: Public Safety Canada, 2017), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-h01-cp/index-en.aspx>. However, it is important to note that more research considering multiple risk factors should be conducted to consider the connection between all mental disorders and criminal behaviour. Statistics on the link between mental health and crime are limited and flawed, largely because it is challenging to determine which offences were directly caused by the psychiatric condition alone.
[142] *Ibid*.

In Canada, research has also shown that Canadians who have SMI are disproportionately more likely than those without psychiatric illness to become involved with the criminal justice system. In the latter half of the 20th century, the process of deinstitutionalization, in which mental health treatment centers and hospitals closed, contributed to the over-representation of persons with psychiatric illness in the criminal justice system.[143] Deinstitutionalization was believed to be helpful in caring and treating for persons with psychiatric illnesses because they could access mental healthcare in their communities. However, the mass-closing of psychiatric institutions led to unintended consequences, such as difficulty accessing mental health treatment, a shortage of supportive housing units, and inadequate resourcing of community-based services.[144]

Persons with SMI or substance abuse disorders who have difficulty accessing treatment are more likely to encounter police due to their troubling psychological and behavioural issues. Individuals who display symptoms of SMI have a 67% higher likelihood of being arrested than do individuals who do not have SMI, as they are more likely to engage in criminal behaviour.[145] Following arrest, they are more likely to be detained in jail and less likely to be released or have their cases dismissed, largely because their cases are more likely to justify detention. Once jailed, they remain incarcerated 2.5 to 8 times longer than their non-psychiatrically ill counterparts.[146] They are also at a higher risk of being denied full parole, reoffending, and being reincarcerated.[147] Among Canadians with psychiatric illnesses, key risk factors for becoming involved with the criminal justice system due to difficulty in accessing mental health treatment

[143] *Unlocking Change*, 2015, *supra* note 89 at 7.
[144] *Ibid*.
[145] Simpson et al., *supra* note 24 at 502.
[146] *Ibid*.
[147] *Ibid*.

include marginalization, racism, a history of trauma, poverty, and homelessness.[148] These socio-economic risk factors disproportionately impact Indigenous and Black Canadians, women, and youth, as these social groups experience structural and systemic biases in healthcare and in the justice system.[149]

Many persons with SMI who are charged with an offence are then handled through regular court channels, as opposed to specialized courts or in the mental health system.[150] Thus, there is a large population of persons with SMI who are sent to increasingly overcrowded detention centres. The challenge of accessing mental healthcare services for persons with SMI led to their increased risk of engaging in criminal behaviour, especially if severe symptoms such as paranoia and delusions are present.[151] The risk of engaging in criminal behaviour among persons with SMI is especially pronounced post-pandemic due to the national mental health crisis, high demand for mental health treatment, and the scarce availability of spots. Statistics reveal that psychiatric illness is two to three times higher in corrections than in the general population.[152] A study involving federal prisons across Canada in 2015 found that 41% of persons who were incarcerated experienced at least one severe mental health problem during incarceration, and 35% of women and 18% of Indigenous peoples in provincial corrections had more than two symptoms of SMI.[153] Alarmingly, one in ten males and three in ten females entered federal custody with pre-existing psychiatric illnesses, while many others arrived without psychiatric illnesses but later developed them due to the negative experiences of incarceration.[154]

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[148] *Broken Record*, 2015, *supra* note 117 at 6.
[149] *Ibid*.
[150] *Unlocking Change*, 2015, *supra* note 89 at 8.
[151] *Ibid*.
[152] *Broken Record*, 2015, s*upra* note 117 at 14.
[153] *Ibid*.
[154] *Ibid*.

The public mental health crisis has led to a phenomenon of violent crime outbreaks in many Canadian cities. In 2022, there were 874 homicides across Canada, 78 more than in the previous year.[155] The national homicide rate climbed by 8% to 2.25 homicides per 100,000 population, representing a fourth consecutive yearly increase.[156] The media frequently reports incidents of violent crime occurring in public spaces, and the interplay between mental illness and substance abuse are seen as major factors in the perpetration of violence.[157] Youth and those involved in gangs are most likely to be accused of homicide, while Indigenous persons are disproportionately the accused and the victims in such cases.[158] Nonetheless, homicides remain a rare form of crime in Canada, accounting for less than 0.2% of all police-reported crimes.[159]

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[155] Statistics Canada, "Homicide trends in Canada, 2022" (29 November 2023), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/231129/dq231129b-eng.htm?indid=3435-1&indgeo=0>.

[156] *Ibid*.

[157] The media has largely placed attention on the phenomenon of violence on public transit systems in major cities. A report reveals that violent assaults against passengers on Toronto transit have surged to 46% compared to 2021, and violent crime calls have increased to 53% a year in Edmonton. Causes of the violent outbreaks include a lack of housing and shelter, a lack of social services, and a mental health and addictions crisis, which are challenges that individuals who experience homelessness face. Paul Hantiuk, "Why a criminology prof wants addiction clinics within 500m of major transit hubs" (1 April 2023) *CBC News*, online: <https://www.cbc.ca/radio/day6/treatment-sites-near-transit-1.6798026>. Professor Martaza Haider, director of research at Urban Analytics Institute of Toronto Metropolitan University, collected data on all violent incidents from Toronto Police Services between January 2014 and June 2022. He noted that there has been a drastic increase in the number of violent incidents, with 7,306 incidents on Toronto's transit system during that time frame. He also cites a lack of mental health and social services funding as a contributing factor to the epidemic. Camille Bains, "Lack of data on transit violence amounts to 'blanket of ignorance': Toronto researcher" (31 March 2023) *Global News*, online: <https://globalnews.ca/news/9592824/lack-of-data-transit-violence-ttc-toronto-researcher/>.

[158] Statistics Canada, 2023, *supra* note 155. See also, Government of Canada, "The Overrepresentation of Indigenous People in the Criminal Justice System," (18 November 2024), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015701>. In 2023, one-third (33%) of accused of homicide were identified as Indigenous, and the rate of Indigenous persons accused of homicide was nine times higher than non-Indigenous persons accused for the same offence.

[159] *Ibid*.

However, it is important to note that persons experiencing psychiatric illness are statistically more likely to be victims of crime rather than perpetrators of crime.[160] In a national Danish study of more than two million individuals, the incidence of being victimized by any crime and violent crime was more frequently reported by those with psychiatric illness, particularly individuals who have substance abuse disorders and personality disorders.[161] Women who have substance abuse disorders were nearly seven times more likely than women without psychiatric illness to be victims of violent crime, demonstrating that gender and health status can influence vulnerability to violence.[162]

Defining NCRMD

The following chapters will analyze a specific provision of the *Criminal Code*, as section the strict criteria of 16(1) implicitly affects persons with SMI who engage in criminal conduct because it makes it difficult for them to claim the defence of NCR at conviction. Section 16 of the *Criminal Code* addresses the phenomenon of criminal justice involvement among those with untreated SMI. Specifically, s.16(1) establishes the legal defence of being "Not Criminally Responsible on Account of Mental Disorder" (NCRMD).

> **16 (1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.[163]

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[160] Statistics Canada, "Violent victimization of Canadians with mental health-related disabilities, 2014" (18 October 2018), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54977-eng.htm>. For example, in 2014, 236 incidents of violent victimization was reported in a year for every 1,000 Canadians with a mental health condition, compared to 66 per 1,000 Canadians with no mental health condition.

[161] Kimberlie Dean et al, "Risk of Being Subjected to Crime, Including Violent Crime, After Onset of Mental Illness: A Danish National Registry Study Using Police Data" (2018) 75:7 JAMA Psychiatry, online: <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2680807>.

[162] *Ibid*.

[163] *Criminal Code*, R.S.C., 1985, c. C-46, s.16.

This section stipulates that an individual cannot be held criminally responsible for an act or omission if, at the time of the offence, he or she was suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of the act, or of knowing that it was wrong. The purpose of this defence is to acknowledge that psychiatric illness can impair judgement and moral understanding to such a degree that holding the individual criminally liable would be unjust.[164] If successfully argued, this defence results in a verdict of NCR, leading to different legal consequences, including the possibility of mandatory treatment and supervision, rather than conventional criminal punishment.

A History of Section 16

a. *M'Naghten's Case* (1843)

The NCR verdict in Canada has its roots in the 1843 M'Naghten case in England, where Daniel M'Naghten fatally shot Edward Drummond, mistakenly believing he was targeting the Prime Minister.[165] M'Naghten claimed he was coerced by the Tories and was suffering from delusions.[166] At his trial, the insanity defence was used, supported by medical testimony that

[164] It is not inherently unjust to hold individuals with SMI criminally liable for their offences, as they are still in many ways capable of free and responsible choices. However, incarceration can further exacerbate their mental health condition as prisons fail to address the underlying needs that contribute to their involvement in the criminal justice system. The negative experiences of incarceration, which serve as part of the punishment, have particularly detrimental effects on individuals with SMI, including the risk of solitary confinement, exposure to violence, and overcrowded conditions. Moreover, persons with SMI are disproportionately affected by socio-economic factors that render them a marginalized and vulnerable group in society, often experiencing childhood abuse and trauma, involvement in the foster care system, poverty, and homelessness at higher rates than those without SMI. Consequently, incarceration would intensify their marginalization and oppression, and this gives the impression that incarceration is unjust for persons with SMI.

[165] Stephen Allnutt, Anthony Samuels, & Colman O'Driscoll, "The insanity defence: from wild beasts to M'Naghten" (2007) 14:4 Australasian Psychiatry at 294. The original case cited is *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 ER 718 (HL) [*M'Naghten*].

[166] *Ibid* at 294.

M'Naghten lacked self-control due to his delusions.[167] Despite arguments from the prosecution, the jury found him "not guilty by reason of insanity," leading to his confinement in a psychiatric institution. Public backlash followed, prompting legal clarification on the insanity defence.[168] The resulting M'Naghten Rules, established by judges, defined criminal insanity as an inability to understand the nature of one's actions or to know right from wrong due to a mental disorder.[169] Ironically, these rules may not have acquitted M'Naghten himself under their criteria. While never codified in England, these rules influenced other jurisdictions, including Canada, where the insanity defence became part of the *Criminal Code* in 1892.[170] The Canadian version initially resulted in acquittals under the term "not guilty by reason of insanity" (NGRI), with the individual being detained "at the pleasure of the Lieutenant Governor in Council."[171]

b. Legal Reform in the 1970s and 1980s

During the 1970s and 1980s, a series of reports highlighted significant issues associated with NGRI acquittals. The Law Reform Commission of Canada published a Working Paper in 1975 and a subsequent Report in 1976, which identified confusion in the application of the law, a system more focused on custody than treatment, and the prolonged detention of NGRI acquittees compared to convicted individuals.[172] Concerns were raised about the provincial government's absolute control over the dispositions of NGRI accused, leading to potential politically motivated

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[167] *Ibid* at 295.
[168] *Ibid.*
[169] *Ibid*.
[170] *Ibid.*
[171] *Ibid*.
[172] House of Commons, *Review of the Mental Disorder Provisions of the Criminal Code: Report of the Standing Committee on Justice and Human Rights* (June 2002) (Chair: Honourable Andy Scott, MP) at 1-2 [14th Report] citing Law Reform Commission of Canada, "The Criminal Process and Mental Disorder" (1975) Working Paper 14 at 11, and Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Law Reform Commission of Canada, 1976) at 12 [Law Reform Commission, 1976 Report].

decisions and a lack of transparency.[173] Although provinces had the option to appoint Review Boards to advise the Lieutenant-Governor on NGRI cases since 1969, it was only in the early 1990s that all provinces had established such boards. By this time, the Lieutenant-Governor typically accepted the advice from these Review Boards, which were required to review NGRI cases annually.[174]

In its 1976 Report, the Law Reform Commission of Canada provided policy guidelines for addressing mental disability within the criminal law, recommending that the criminal process be used only when it was the best available option.[175] They suggested limiting the number of accused applying for the NGRI defence, given its infrequent use and the broader need for discussion on criminal responsibility. They proposed that NGRI should be considered a "true acquittal," followed by a post-acquittal hearing to determine the necessity of civil detention under provincial mental health legislation based on dangerousness.[176] As part of a broader review of Canadian criminal law, the Department of Justice initiated the Mental Disorder Project in 1982, concluding with a final report in 1985.[177] Consultations on a draft bill tabled in 1986, partially based on this project, continued through the late 1980s and early 1990s. However, significant legislative changes did not occur until two landmark Supreme Court of Canada decisions in 1991, which struck down several NGRI provisions.

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[173] *Ibid*.
[174] Simon N. Verdun-Jones, "Tightening the Reins: Recent Trend in the Application of the Insanity Defence in Canada" (1991) 10 Med & L 285 at 298.
[175] Law Reform Commission, 1976 Report, *supra* note 172 at 7.
[176] *Ibid* at 22, 46.
[177] 14th Report, *supra* note 172 at 2. The Project also began the same year that the *Charter* was enacted.

These two landmark Supreme Court of Canada decisions were *R v Swain* and *R v Chaulk*.[178] At the time, the legal regime of NGRI was widely criticized for its arbitrary and outdated provisions. One of the most problematic elements was s.542(2) of the *Criminal Code*, which mandated the automatic and indefinite detention of individuals found NGRI at the pleasure of the Lieutenant Governor, without any right to a hearing or individualized assessment.[179] In *Swain*, the Supreme Court struck down this provision as unconstitutional under the *Charter*, citing violations of s.7 (the right to life, liberty, and security of the person), s.9 (protection against arbitrary detention), and s.15 (equality rights).[180] The Court emphasized that individuals with psychiatric illness were being unfairly subjected to detention without procedural safeguards, unlike other persons that were accused. Additionally, *Swain* limited the Crown's ability to unilaterally raise the insanity defence without the accused's consent, recognizing the fundamental importance of autonomy and dignity in the criminal process.[181] Although *Chaulk* was released in late 1990, it is often grouped in *Swain* due to its influential clarification of the mental disorder defence.[182] In *Chaulk*, the Court upheld the constitutionality of the presumption of sanity and the NGRI framework but interpreted the phrase "know that the act was wrong" in s.16 to mean "morally wrong" and not merely "legally wrong."[183] This clarification helped modernize the legal understanding of moral culpability in the context of SMI.

c. <u>*Cooper v R* (1979)</u>

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[178] These landmark decisions are cited as *R v Swain*, [1991] 1 SCR 933, 1991 CarswellOnt 93 and *R v Chaulk*, [1990] 3 SCR 1303, 1990 CarswellMan 239, respectively.
[179] Christopher Nowlin, "Will the Ghost of Chaulk Past Ever Stop Haunting the NCRMD Present?" (2018) 65:3/4 Criminal Law Quarterly at 298.
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid* at 299.
[183] *Ibid*.

One leading case demonstrates the complex issue of whether a trial judge must address the defence of insanity when the person accused of an offence has an extensive psychiatric history, yet medical evidence suggests they do not have a "disease of the mind."[184] In *Cooper*, the key issue was whether the trial judge properly addressed the insanity defence, despite medical evidence suggesting that the person accused, Gary Albert Cooper, did not have a "disease of the mind." Cooper, who had a history of personality disorders, was charged with murdering Denise Hobbs.[185] Although a psychiatrist concluded that Cooper did not suffer from a disease of the mind, the trial judge's brief instruction on insanity was insufficient. The judge failed to fully consider the psychiatric history and improperly dismissed the insanity defence based on the medical expert's opinion alone.[186] The Supreme Court ruled that it is the jury's responsibility - not medical experts' - to determine if a mental disorder qualifies as a "disease of the mind."[187]

Unlike the M'Naghten Rules in England, which focus on whether the accused knew the nature of their act, section 16 of the *Criminal Code* uses the term "appreciating," which requires both intellectual and emotional awareness of the act's significance and consequences.[188] The trial judge failed to guide the jury in assessing whether Cooper, due to his mental disorder, could fully appreciate the nature and consequences of his actions.[189] The appeal court found that the insanity defence should have been presented more thoroughly, allowing the jury to make an informed decision. As a result, the appeal was allowed, and a new trial was ordered.[190]

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[184] *Cooper v R*, [1980] 1 SCR 1149, 1979 CarswellOnt 60.
[185] *Ibid* at para 65.
[186] *Ibid* at para 42.
[187] *Ibid*.
[188] *Ibid* at para 54.
[189] *Ibid* at paras 77, 78.
[190] *Ibid* at para 78.

This case contrasts with *M'Naghten*, as Canadian law under Section 16 requires a deeper understanding ("appreciation") of an act's consequences, going beyond mere awareness. This broader definition impacts the court's responsibility in instructing the jury, emphasizing the need for a comprehensive examination of both the person accused's mental condition and their capacity to foresee the consequences of their actions.

d. *R v Chaulk* (1990)

The first constitutional challenge to the NGRI (Not Guilty by Reason of Insanity) provisions heard by the Supreme Court of Canada was *R v Chaulk* in 1990.[191] During that case, s.16 of the *Criminal Code* defined the test for insanity, which remained consistent with the M'Naghten definition.[192] The appellants, Mr. Chaulk and Mr. Morrissette, had been convicted of first-degree murder and had invoked the insanity defence.[193] They contended that s.16(4), which presumed all individuals sane until proven otherwise, was unconstitutional. They argued that the reverse onus clause violated s.11(d) of the *Charter*, which guarantees the right to be presumed innocent until proven guilty.[194]

Chief Justice Lamer, writing for the majority in *Chaulk*, concluded that s.16(4) did indeed violate the presumption of innocence and thereby contravened s.11(d) of the *Charter*.[195] However, he also determined that without s.16(4), the Crown would face an "virtually impossible

[191] *R v Chaulk*, [1990] 3 SCR 1303, 1990 CarswellMan 239.
[192] *Ibid* at para 6.
[193] *Ibid* at para 3. Both accused were minors at the time of committing the offence. The sole defence presented was insanity as defined under s.16 of the *CC*. Expert testimony at trial indicated that the appellants suffered from paranoid psychosis, leading them to believe they possessed the power to rule the world and that killing was a necessary step towards achieving that goal. Although they were aware of Canadian laws, they considered themselves to be exempt from these laws, perceiving them as irrelevant. They believed they had the right to kill the victim, whom they deemed "a loser."
[194] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 11(d) [*Charter*].
[195] *Chaulk*, *supra* note 191 at paras 82-85.

burden" of proving sanity. Therefore, he found that s.16(4) imposed the least reasonable limit on the presumption of innocence and upheld it under s.1 of the *Charter*.[196] In his judgment, Chief Justice Lamer made several observations on the function and purpose of the NGRI provisions. He refuted the argument from several Attorney General that the presumption of innocence did not apply because the accused would be detained under s.16 rather than being released.[197] He emphasized that an accused raising s.16 was actively seeking to avoid a criminal conviction by asserting the absence of criminal intent, thereby seeking an acquittal rather than the "special detention" that followed an NGRI finding.[198] Chief Justice Lamer acknowledged that due to the substantial constraint on liberty following a successful insanity plea, s.16 would seldom be invoked.[199]

e. *R v Swain* (1991)

Less than a year after the *Chaulk* decision, the Supreme Court of Canada scrutinized the constitutionality of the NGRI provisions in the case of *R v Swain*.[200] This case also assessed whether the common law rule that permitted the Crown to invoke the insanity defence against the wishes of the accused was consistent with the *Charter*. At the time, the *Criminal Code* stipulated that a judge who found an individual NGRI must order their confinement in strict custody as directed by the court, until the lieutenant governor of the province issued further instructions.[201] The decision regarding the custody or release of the accused then fell to the lieutenant governor or a provincial review board appointed by the lieutenant governor.[202] Mr.

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[196] *Ibid*.
[197] *Ibid*.
[198] *Ibid* at para 52.
[199] *Ibid* at para 78.
[200] *R v Swain*, [1991] 1 SCR 933, 1991 CarswellOnt 93.
[201] *Criminal Code*, RSC 1970, c C-34 at s 542(2) [*Criminal Code*, 1991].
[202] *Ibid* at ss 545, 547.

Swain, charged with assault and aggravated assault during a delusional episode, responded well to treatment and was quickly released on bail with a community treatment plan.[203] Despite this, the Crown successfully argued for an NGRI verdict at his trial against his objections, resulting in his detention under the Lieutenant Governor's warrant.[204] His opportunities to present submissions were restricted, and he was only granted absolute discharge over a year post-trial.[205]

Chief Justice Lamer, representing the majority, ruled that the pertinent *Criminal Code* provisions in s.542(2), and the common law rule - the Crown's ability to raise the insanity defence against the person accused's wishes during trial - were unconstitutional. These legal provisions were found unconstitutional because in his *Charter* s.7 analysis, Chief Justice Lamer noted that an NGRI verdict resulted in a loss of liberty. He observed that permitting the Crown to raise the NGRI defence could undermine the accused's control over their own defence and negatively impact other defences by damaging their credibility with the jury, due to prevailing societal biases against mental illness.[206] Recognizing the historical mistreatment of individuals with psychiatric illnesses, he emphasized the ongoing irrational fear of the mentally ill within society, and how such stigma could undermine the credibility and defence strategy of the person accused.[207]

In his s.1 *Charter* analysis, Chief Justice Lamer stated that judicial rules, unlike parliamentary laws, should not be given deference, and that the rule must be the least intrusive means necessary.[208] He suggested that charges against an accused found NGRI should be dropped, as they lack criminal culpability. Although this approach might not fully address the

[203] *Swain*, *supra* note 200 at para 2.
[204] *Ibid* at paras 4, 5.
[205] *Ibid* at para 6.
[206] *Ibid* at para 39.
[207] *Ibid*.
[208] *Ibid* at para 67.

goal of protecting the public from dangerous individuals, provincial civil commitment mechanisms could be used, which generally provide greater procedural safeguards than the system of Lieutenant Governor warrants. Chief Justice Lamer was hesitant to formulate a new rule dependent on provincial legislation due to the division of powers. He concluded that the objectives could be achieved by allowing the Crown to invoke the insanity defence only after a guilty verdict had been rendered, or after the accused had raised their mental capacity as an issue.[209]

When examining the constitutionality of the *Code* provisions for NGRI acquittees, Chief Justice Lamer found that these provisions were primarily preventative, a valid aim of criminal law that does not necessitate a conviction.[210] He pointed out that the provisions applied to those whose actions had placed them within the scope of criminal law, and it was legitimate for Parliament to aim to protect society from future dangerous conduct. The provisions' aim was not punitive but protective, with treatment serving as a means to achieve this goal. Chief Justice Lamer determined that the automatic detention of NGRI individuals constituted arbitrary detention, infringing upon ss.7 and 9 of the *Charter*, as not all NGRI individuals are dangerous.[211] The automatic and indefinite detention of NGRI accused could not be justified as a reasonable limit under s.1. A six-month transitional period was provided to allow Parliament to enact *Charter*-compliant legislation to replace s.542(2).[212]

f. Bill C-30

Following the *Swain* decision, Parliament finally revised the NGRI provisions of the *Criminal Code* with the introduction of Bill C-30 on September 16, 1991, which became law in

[209] *Ibid*.
[210] *Ibid* at para 102.
[211] *Ibid* at para 144.
[212] *Ibid* at para 170.

February 1992.[213] This legislation replaced the NGRI verdict with "not criminally responsible on account of mental disorder" (NCRMD) and eliminated the practice of automatic detention. Instead, courts could now either make dispositions themselves or refer the case to a provincial review board for a hearing within 90 days. Additionally, reviews of dispositions, excluding absolute discharges, were mandated to occur at least annually. The role of lieutenant governors in this process was abolished.[214]

Bill C-30 also established new criteria for making NCR dispositions, emphasizing that such dispositions must be the least restrictive necessary under the circumstances. Courts were instructed to consider factors such as public safety, the mental condition of the NCR-accused individual, and their potential reintegration into society.[215] Importantly, individuals charged with summary conviction offences were now eligible for the NCR verdict.[216] Concurrently, capping provisions were introduced, setting a maximum time period during which a person found NCR could remain under review board jurisdiction, based on the severity of the index offence.[217] This aimed to ensure that the potential detention period did not exceed the time the person would have been imprisoned if convicted.[218] For example, an individual found NCR for a summary conviction offence would be subject to Part XX.1 for a maximum of six months.[219] However, the implementation of the capping provisions and some other aspects of Bill C-30 was delayed. Parliament mandated a comprehensive review of these significant changes, which did not

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[213] 14th Report, *supra* note 171 at 3, 4.
[214] *Ibid*.
[215] *Ibid*.
[216] *Ibid*.
[217] *Ibid*.
[218] *Ibid* at 19; Wade Raaflaub, *Bill C-29: An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, (Canada, Library of Parliament, 7 May 2004) (Legislative Summary, LS-478E) at 23 [Legislative Summary Bill C-29].
[219] *Ibid* at 19.

commence for another decade, leaving the capping and other unproclaimed provisions ineffective during this period.[220]

g. *Winko v British Columbia (Forensic Psychiatric Institute)* (1999)

The new NCR provisions were challenged in the case of *Winko*, following a decision by the British Columbia Review Board, and ultimately evaluated by the Supreme Court of Canada in 1999.[221] Chief Justice McLachlin, representing the majority opinion, upheld these provisions, characterizing Part XX.1 of the *Criminal Code* as Parliament's solution to the challenge of balancing fair treatment for those committing crimes due to psychiatric illness and public safety.[222] The case, alongside three companion cases,[223] examined whether the 1991 disposition provisions aligned with ss.7 and 15 of the *Charter*, particularly questioning if s.672.54 was discriminatory towards individuals with mental disabilities and if it infringed on the NCR accused's rights to liberty and security.

While the case centered on the constitutionality of the NCR provisions, Chief Justice McLachlin also provided interpretive guidance. She acknowledged common challenges in such cases, including concerns about the relevance of dated incidents, recent records of peaceful behavior by the accused, risks associated with medication compliance, and prolonged constraints on liberty without foreseeable resolution.[224] She emphasized the necessity of a system that

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[220] *Ibid*.
[221] *Winko v Forensic Psychiatric Institute*, [1999] 2 SCR 625, 1999 CarswellBC 1266, 1999 CarswellBC 1267.
[222] *Ibid* at paras 1-2.
[223] *Bese v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 722, 1999 CanLII 695. *Orlowski v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 733, 1999 CanLII 696. *R v LePage*, [1999] 2 SCR 744, 1999 CanLII 697.
[224] *Winko*, *supra* note 221 at para 9.

ensures maximum liberty for the accused, public safety, and responsiveness to individual circumstances.[225]

Chief Justice McLachlin clarified the reading of s.672.54, describing the new Part XX.1 as introducing a "third alternative" between conviction and acquittal, diverting NCR accused into a distinct category.[226] This approach aimed to balance public protection and fair treatment of mentally ill offenders.[227] Although the appellants argued that s.672.54 presumed dangerousness and placed the burden of disproving it on the NCR accused, Chief Justice McLachlin rejected this interpretation, noting that the provisions did not inherently assume the NCR accused posed a threat.[228] She emphasized that the NCR verdict is neither a conviction nor an acquittal, and the individual is not entitled to release but may only be detained if they pose a significant threat to society. She highlighted that people with mental illnesses are not inherently dangerous and supported the notion with research indicating that NCR accused are not more likely than convicted persons to reoffend.[229]

Chief Justice McLachlin stressed that continued application of criminal law to an NCR accused requires evidence of a significant threat to public safety, and without such evidence, the individual must be absolutely discharged.[230] The burden of proof does not rest on the NCR accused, and any ambiguity should favor their liberty. She dismissed the appellants' concerns about litigation difficulties and the practical operation of the provisions, asserting that a significant threat finding must be substantiated by evidence of serious potential harm, not trivial

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[225] *Ibid*.
[226] *Ibid* at para 20.
[227] *Ibid* at para 21.
[228] *Ibid* at paras 15-16.
[229] *Ibid*.
[230] *Ibid* at paras 45-47.

harm.[231] In her constitutional analysis, Chief Justice McLachlin concluded that the scheme was not overly broad as it ensures NCR accused individuals' liberty is restricted only as necessary to protect public safety.[232] Additional safeguards, such as annual disposition reviews and appeal rights, supported this conclusion.[233] She found that s.7 of the *Charter* was not violated. Regarding s.15, she determined that the NCR provisions were not discriminatory towards those with mental disabilities.[234] She reasoned that the provisions' intent and effect did not discriminate, as decisions are based on individual circumstances rather than group affiliation, and dispositions are tailored and reviewed regularly.[235]

Chief Justice McLachlin also addressed the concern that an NCR verdict for minor offences could lead to prolonged liberty restrictions, acknowledging the possibility of undesirable detention under any system but emphasizing that the built-in procedural safeguards for NCR accused mitigate this issue.[236] She concluded that the non-punitive nature of the NCR verdict negates the need for finite supervision periods, as restrictions on liberty are aimed at rehabilitation and public protection, not punishment.[237]

h. Post-*Winko* Legislation

In June 2002, the Standing Committee on Justice and Human Rights submitted its 14th Report to the House of Commons, entitled "Review of the mental disorder provisions of the *CC*."[238] This review followed a February 2002 House Order of Reference.[239] Input was solicited

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[231] *Ibid* at para 57.
[232] *Ibid* at para 71,
[233] *Ibid* at para 72.
[234] *Ibid* at para 96.
[235] *Ibid*.
[236] *Ibid* at para 92.
[237] *Ibid* at paras 93-94.
[238] 14th Report, *supra* note 172.
[239] *Ibid* at 4.

from various authorities, including community organizations, review board members, and the public.[240] Based on this input, the Standing Committee made several observations and issued 19 recommendations concerning the mental disorder provisions, fitness, NCR provisions, and the automatism defence. Three recommendations addressed the unproclaimed provisions of Bill C-30, specifically the capping provisions. The Committee explained that capping provisions were introduced to address concerns about the indefinite detention of individuals found NGRI. The intent was that those still deemed potentially dangerous at the end of their statutory cap could be involuntarily committed to a secure hospital under provincial mental health legislation.[241] The Committee noted that the Supreme Court of Canada in *Winko* unanimously held that the potentially indefinite supervision period in the updated *Code* provisions did not violate the *Charter*, emphasizing that because the NCR accused person's liberty is not restricted for punishment, there is no reason for finitude.[242]

There was a split among organizations providing input to the Committee on the unproclaimed provisions: legal representatives, advocacy groups, and civil liberties organizations mainly supported capping provisions, whereas treatment providers almost unanimously opposed them.[243] Proponents of capping argued that the absence of caps led to inequities between NCR accused and those convicted of offences and that provincial mental health laws could be utilized after the cap expiry if necessary.[244] Opponents contended that some provincial legislation and services were inadequate.[245] The Committee sided with the treatment providers and

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[240] *Ibid* at 4 and Appendix B.
[241] *Ibid* at 19, citing Canada, Department of Justice, *Mental Disorder Amendments to the Criminal Code, (Information Paper)* (September 1991) at 6.
[242] 14th Report, *supra* note 172, citing *Winko*, *supra* note 221.
[243] *Ibid* at 19.
[244] *Ibid*.
[245] *Ibid*.

recommended repealing the capping provisions due to the lack of uniform provincial mental health legislation and services, concerns over resource expenditure if caps were implemented, and apparent provincial opposition. They also noted that "the *Criminal Code* should accurately reflect the intentions of Parliament,"[246] though they did not clarify this point. The Committee further recommended repealing the Dangerous Mentally Disordered Accused Provisions, which would have extended the cap for certain NCR accused, reasoning that without capping provisions, these individuals could be supervised indefinitely, rendering the categorization unnecessary.[247]

The Department of Justice agreed with several of the Committee's legislative change recommendations, including repealing the unproclaimed provisions.[248] The Government also noted concerns from defence bar representatives that accused persons could be detained until reaching their cap, with little incentive for treatment.[249] Additionally, it was noted that provinces did not support capping provisions, arguing that their legislation was inadequate for detaining dangerous individuals solely for societal protection.[250] Reviewing takeaways from *Winko*, the Government concluded that dispositions were not indefinite under the updated provisions, which required more frequent review mechanisms and mandatory discharges if no significant risk was found, making capping unnecessary.[251]

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[246] *Ibid* at 20.
[247] *Ibid* at 20, 21.
[248] Canada, Department of Justice, *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code* (November 2002) [Gov't Response to 14th Report].
[249] *Ibid* at "Unproclaimed Provisions."
[250] The Government referenced individuals diagnosed with Antisocial Personality Disorder, formally termed psychopathy, as examples of those who cannot be treated but still may pose significant danger to the public, even though a diagnosis of ASPD alone may not qualify an accused for an NCR verdict.
[251] Gov't Response to 14th Report, *supra* note 248 at "Unclaimed Provisions."

Bill C-29 was first read in the House of Commons on March 29, 2004, and subsequently referred to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.[252] Later that year, the substance of Bill C-29, which died on the Order Paper, was reintroduced as Bill C-10.[253] The Standing Committee then heard further submissions from various interest groups, including the Canadian Bar Association (CBA).[254] The CBA expressed concerns about the lack of data to inform legislative decisions, noting that while recent Supreme Court decisions provided additional safeguards for NCR accused's liberty, Review Boards applied the legislation inconsistently, and there had been no comprehensive national evaluation of Review Board decision-making.[255] Information was needed on how long NCR accused were spending under Review Board jurisdiction compared to sentences for similarly situated offenders.[256] The CBA would have supported repealing capping provisions if data showed consistent application of *Winko*.[257]

Bill C-10 received royal assent on May 19, 2005.[258] Many proposed amendments were enacted, including the repeal of the unproclaimed capping provisions. The Government supported this repeal, citing *Winko* and the general provincial consensus that capping was unnecessary.[259] Additional amendments included extending the time between disposition review hearings in certain circumstances and provisions for arresting NCR accused who allegedly failed

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[252] Legislative Summary Bill C-29, *supra* note 218.
[253] Wade Raaflaub, *Bill C-10: An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, (Legislative Summary, LS-481E) (Canada, Library of Parliament, 20 May 2005) at FN 1 [Legislative Summary Bill C-10].
[254] *Ibid* at "Commentary."
[255] National Criminal Justice Section, *Bill C-10: Criminal Code Amendments (Mental Disorder)* (November 2004) [CBA, "Bill C-10] at 7-8.
[256] *Ibid* at 8.
[257] *Ibid*.
[258] Legislative Summary Bill C-10, *supra* note 253.
[259] *Ibid* at "E. Repeal of Unproclaimed Provisions (Clauses 24 to 26, 37 to 39, 41 and 12)."

to comply with their dispositions. The repeal of the capping provisions reportedly sparked little discussion or controversy during House of Commons Committee consideration.[260] Wade Raaflaub, in a legislative summary of the Bill, noted that other issues raised before the House of Commons, such as the overrepresentation of mentally disordered individuals convicted of offences in the prison system, were likely beyond the legislative scope of Bill C-10, with no connection made between this overrepresentation and the lack of capping provisions.[261]

i. Bill C-54

As mentioned at 1.1.B, Bill C-54: "*The Not Criminally Responsible Reform Act*," previously Bill C-14, introduced significant changes to Part XX.1 of the *CC*, affecting persons who are found NCR. The bill, which received Royal Assent in 2014, proposed a "high-risk" designation for certain individuals found NCR, prioritizing public safety and the rights of victims.[262] New s.672.64(2) of the *Criminal Code* requires the Court to consider all relevant evidence when determining if a person accused is "high-risk," including the nature and circumstances of the offence; any pattern of repetitive behaviour connected to the offence; the current mental state of the person accused; the past and anticipated treatment of the person accused, as well as their willingness to follow it; and expert opinions from those who have examined the person accused.[263] Under s.672.64(3), if the Court designates the person accused "high-risk," they must be detained in a hospital under s.672.54(c). The person accused cannot leave the hospital unless two conditions are met: (1) The hospital's authority determines that absence is appropriate for medical or treatment reasons, and the person accused is escorted by an

[260] *Ibid* at "Commentary."
[261] *Ibid*.
[262] Refer to Robert Lacroix et al, *supra* note 71.
[263] Tanya Dupuis, *Legislative Summary of Bill C-54: An Act to amend the Criminal Code and the National Defence Act (mental disorder)*, 41st Parl, 1st Sess, Publication No 41-1-C54-E (16 September 2013) [Legislative Summary Bill C-54].

authorized individual, and (2) A structured plan is in place to manage any risks, ensuring the absence does not pose undue danger to the public.[264] Further, clause 15 of the bill provides that, for a high-risk accused, a review board may extend the time for holding a hearing to a maximum of 36 months if the accused is represented by counsel and both the accused and the Attorney General agree to the extension. It also allows the review board to extend the time for a subsequent hearing to a maximum of 36 months if the board, based on relevant information such as disposition details and an assessment report, determines that the accused's condition is unlikely to improve and continued detention is necessary during the extension period.[265]

During the Harper Conservative era, Bill C-54 introduced one of the few reforms to the NCR regime since the 1990s. However, instead of progressive or sympathetic change, the reform aligned with a decade of "tough on crime" politics, rendering the NCR framework even more punitive and exclusionary. Section 16, which is discussed in Chapter 3, already imposes stringent criteria, excluding many individuals with SMI from utilizing the NCR defence. Bill C-54 did not seek to amend the test for NCRMD; rather, it sought to toughen the response to potentially high-risk individuals found NCR. This legislation therefore exemplifies the challenges of addressing deeply politicized and polarizing issues within legal reform, where progress often becomes entangled in toxic political dynamics.

The responses to Bill C-54 reflected a range of conflicting perspectives, particularly regarding its impact on both the criminal justice system and the mental health system.[266] Some

[264] *Ibid*.
[265] *Ibid*.
[266] See Meagan Fitzpatrick, "10 voices on the 'not criminally responsible' reform bill" *CBC News* (6 June 2013), online: <https://www.cbc.ca/news/politics/10-voices-on-the-not-criminally-responsible-reform-bill-1.1330502>. Isabelle Gaston, a victim, emphasized the need for the justice system to prioritize public safety, stating that the horrific deaths of her children demand better protection for victims. She expressed fear for her own safety and criticized the system for being unpredictable, noting the

commentators argued that "Bill C-54 seems like a tailor-made response to the feeling of horror that the public has felt towards a number of recent crimes," drawing parallels to high-profile cases such as Guy Turcotte's.[267] From this viewpoint, the bill represented a response to public demand for harsher treatment of offenders deemed not criminally responsible due to mental disorders. Others supported the bill for its focus on victim rights, contending that it provides a necessary rebalancing of priorities by enhancing public safety and increasing victim participation in the judicial process outlined in Part XX.1 of the *CC*.[268]

However, significant concerns were raised about the bill's potential unintended consequences, but they were largely ignored by the government. Critics pointed to the removal of hospital absences, a key element in the treatment and rehabilitation of persons incarcerated with SMI, as a measure that undermines rehabilitation efforts. Bernd Walter, Chairman of the B.C. Review Board, argued that such amendments might "actually have the opposite of the desired effect, by discouraging plea bargains that see mentally ill offenders opt for treatment."[269] This resulted in more untreated persons with SMI who offend being released into the community, posing greater risks to public safety. Others were alarmed by the bill's creation of the "high-risk

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importance of being notified of an offender's release. Carol de Delley, whose son was also a victim, argued that her son's death should lead to reforms that prioritize public safety. She highlighted the toll the NCR process has taken on her ability to grieve and called for more mental health treatment, but insisted that victims' rights should not be overshadowed. Dr. J. Paul Federoff acknowledged the need to support victims but argued that the bill wouldn't offer significant new protections, as notifications of release already occur. David Parry from the Canadian Bar Association criticized the high-risk designation as punitive, cautioning that it is counterproductive to public safety and should not be based on a few extreme cases. Catherine Latimer of the John Howard Society raised concerns that more people with serious mental illnesses will end up in prisons rather than receiving appropriate care in hospitals. Erin Dann from the Criminal Lawyers' Association urged the government to invest more in mental health services and warned that the high-risk designation could disrupt the treatment of those found NCR.

[267] *Ibid* at "Commentary."

[268] *Ibid*.

[269] *Ibid*.

accused" designation, and suggested that this change was rooted in fear rather than evidence-based policy. Additionally, there was concern about the stigma it imposed on individuals with psychiatric illnesses. The Canadian Alliance on Mental Illness and Mental Health (CAMIMH) warned that the bill perpetuates the myth that people with mental illnesses are inherently violent, highlighting that these individuals are more often victims of violence than perpetrators.[270]

Advancing an NCR Defence at Trial

The NCR defence in Canada is distinct because either the defence or the Crown can raise it at any point during a trial.[271] An accused individual can assert this defence from the trial's onset, after the Crown has presented its case, or even after a guilty verdict but before sentencing. This right allows the accused to craft their defence strategy; however, it is not absolute. If the accused chooses not to invoke an NCR defence, the Crown can still raise it to prevent wrongful convictions, but must first prove both the actus reus and mens rea beyond a reasonable doubt. The Supreme Court of Canada's decision in *R v Swain* established that the Crown can introduce the issue of mental capacity during a bifurcated trial, either when raised by the accused or after determining guilt.[272]

The bifurcated trial allows the accused to present other defences - such as identity or alibi - before addressing the NCR defence if found guilty.[273] Legal scholars have debated whether the Crown should be compelled to raise the NCR defence, with some arguing that it is essential for safeguarding against wrongful convictions of individuals who were experiencing psychosis at the

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[270] *Ibid*.
[271] HY Bloom and Richard D Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals* (Toronto: Irwin Law, 2017) at 164.
[272] *Ibid* at 165.
[273] *Ibid* at 164.

time of the offence. The NCR defence does not negate mens rea but presupposes it has been established; it can sometimes indirectly disprove mens rea by showing that the accused lacked the capacity for criminal intent due to mental illness. Thus, if a mental capacity issue is raised, the Crown can present evidence of insanity, and the trial judge must inform the jury about Section 16.[274]

In *R v Piette*, the court ordered a criminal responsibility assessment against the wishes of both parties, which raised questions about the timing and authority of raising the NCR defence.[275] The appeal court underscored the importance of allowing either the accused or the Crown to introduce the issue of criminal responsibility appropriately, reinforcing the accused's constitutional right to control their defence during the trial.

The Consequences of an NCR Verdict

a. Indefinite Detention

The NCR process involves a legal test and the subsequent supervision and treatment, which can be life-changing.[276] Despite its benefits, mental health lawyer Erin Dann argued that the NCR regime often feels uncompromising and lacks nuance, failing to provide a clear victory

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[274] *Ibid*.
[275] *Ibid* at 166, citing *R v Piette*, 2005 BCSC 1724, [2005] BCJ No 2688.
[276] An individual found NCR is referred to a provincial or territorial Review Board, established under s.672.38 of the *CC*. These Review Boards are specialized tribunals led by a judge or a person qualified for judicial appointment, and include at least four other members, one of whom must be a practicing psychiatrist. The purpose of this separate system is to ensure public safety while addressing the mental health needs of the accused. Although courts can directly order a disposition, they usually defer to Review Boards unless an immediate disposition is necessary. According to s.672.54 of the *CC*, the possible dispositions are absolute discharge, conditional discharge, or detention in a hospital. The chosen disposition must be the least restrictive option while balancing public protection with the humane treatment of the accused. Government of Canada, "The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study" (2022), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p1.html>.

for those subjected to it.[277] Two consequences of the NCR defence that act as a disincentive to those under the regime include the length of detention not being primarily driven by the offence's severity and the absence of a time limit for how long individuals can remain under NCR provisions. A significant issue in the NCR regime is that individuals found NCR for minor offences often spend years in detention, whereas a guilty verdict might result in a short or no jail sentence.

A 2013 study by the Department of Justice found that serious violence incidents account for only 8% of total cases where an individual is found NCR, with less than 3% involving homicide, 3.3% attempted murder, and 2.1% serious sexual offences.[278] The media's emphasis on severe violent offences creates a misleading perception that most NCR individuals are dangerous.[279] Consequently, many persons found NCR risk indefinite detention for offences that would otherwise result in short, definite prison sentences if found criminally responsible. The study "Not a Get Out of Jail Free Card" compared the legal supervision of NCR-convicted individuals to non-NCR offenders, revealing that NCR individuals are 3.8 times more likely to be detained following a verdict.[280] One year after the verdict, 73% of NCR individuals remain under legal supervision, with 42% detained in forensic hospitals, compared to 41% of convicted

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[277] Erin Dann, "A Blunt Instrument: Long-term detention of individuals found not criminally responsible," Compassionate Justice 2023-2024 Speaker Series (Toronto, February 18, 2024) [Erin Dann, 2024].

[278] Anne G. Crocker et al, *Description and processing of individuals found not criminally responsible on account of mental disorder accused of "serious violent offences"* (Ottawa: Department of Justice, 2013).

[279] Refer to note 157, for example.

[280] Sandrine Martin et al, "Not a "Get Out of Jail Free Card": Comparing the Legal Supervision of Persons Found Not Criminally Responsible on Account of Mental Disorder and Convicted Offenders" (2022) 12 Frontiers in Psychiatry. These statistics on the higher likelihood of indefinite and lengthy detention among NCR individuals do not account for the severity of offences committed. Instead, the statistics consider NCR-accused persons based on their SMI alone, which can include NCR-accused persons who have committed less severe offences.

offenders under supervision and 1% in jail. After three years, 45% of NCR individuals remain under supervision, with 15% still detained, compared to 2% and less than 1% for convicted offenders, respectively. In Ontario, 92% of NCR individuals remain under supervision one year after the verdict, and 90% are detained in forensic hospitals, with 45% under supervision and 15% detained after three years.

The study also highlighted that many convicted offenders, including those with mental disorders, do not serve lengthy jail sentences. In 2000, 37% of convicted offenders received custodial sentences, with a median length of 34 days, and 70% of these sentences were six months or less.[281] Only 4% of sentences exceeded two years. NCR individuals, however, are detained in forensic hospitals, which are theoretically therapeutic environments but may not always be beneficial. Justice Watt's remarks in *R v Lambie* emphasize that the NCR regime can be blunt and uncompromising, impacting those with mental disorders who commit non-violent crimes.[282] The NCR process involves legal tests, post-verdict supervision, and treatment, which can be life-changing but may also lead to indefinite detention.

Erin Dann critiques the NCR regime, arguing it can result in indefinite detention and is not always a "victory" for the accused.[283] She highlights the case of Jay, who was found NCR at 16 for seven minor assaults but spent 17 years in forensic hospitals. Jay had a traumatic, unstable upbringing marked by abuse, intellectual disabilities, and inadequate legal representation. His NCR finding was based on minimal psychiatric evidence and no formal assessment. Despite expressing remorse and understanding his actions, he was indefinitely detained due to treatment-resistant mental illness - a situation not uncommon among NCR individuals with

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[281] *Ibid*.
[282] Erin Dann, 2024, *supra* note 277.
[283] *Ibid.*

complex needs.[284] Erin Dann contributed to the overturning of Jay's case, and he was released back into the community.[285]

Dann also describes Mrs. N., found NCR for mischief after repeated break-ins tied to delusional beliefs.[286] Though detained for 18 months, her NCR finding was later overturned, and she received an absolute discharge. Similarly, Mr. C., who was found NCR after stealing a CD and resisting arrest, spent seven years in hospital due to a co-occurring substance use disorder.[287] His case was later overturned, although a conviction would have likely resulted in probation.[288] These examples reflect how individuals with concurrent disorders often face disproportionate and prolonged detention under the NCR system, especially when their conditions are resistant to treatment.

In conclusion, while the NCR verdict provides access to stable treatment, gradual community release, supportive housing, and meaningful societal integration, it can also result in prolonged detention and challenges in overturning unjust NCR findings. The notion that the NCR regime does not inflict adverse impacts is challenged by these cases, as the system can lead to miscarriages of justice when the individuals accused do not understand or agree with the NCR verdict. The risk of indefinite detention is too damaging on one's civil liberties and psychological well-being, and as a result, it is not just for persons with untreated SMI who are convicted of an offence to pursue.

b. Negative Experiences

[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid.*
[288] *Ibid.*

While the forensic mental health system is vital for individuals found NCR, as it provides them with consistent and effective treatment in a safe environment, some patients have reported negative experiences while under the NCR regime.[289] While the forensic mental health system can offer necessary structure and treatment for those found NCR, it can also lead to deeply negative experiences. Erin Dann highlighted this through Jay's case, where the hospital environment often caused him distress and undermined his progress. Despite being unable to read, Jay's 300-page annual reports detailed personal aspects of his life, such as his habits, mood, rule-breaking, and even his interest in pornography - contributing to anxiety before hearings. Three examples of extreme privacy intrusion from June 2017 highlight the meticulous and intrusive nature of these reports:

- At 14:25, Jay used his off-unit privileges but got frustrated when the DVD drive on his computer didn't work and slammed his door.
- At 17:27, before dinner, Jay requested five blue laundry bags for his ward duties. Staff questioned why he used five bags when only three were filled, and he shrugged and left the unit.

[289] See Nicole Lafaivre, *The Harsh Reality of Life after the Verdict of Not Criminally Responsible on account of Mental Disorder* (Halifax, NS: Saint Mary's University, 23 April 2019) (Approved by Dr. Jamie Livingston, Department of Criminology) at 40, 53. The personal accounts of individuals found NCR regarding their experiences with psychiatric hospitals are limited in academia. However, this valuable paper by Lafaivre sheds light on the challenges and concerns that persons found NCR have while detained and undergoing treatment. The author notes that a common issue from the interviews of those found NCR is not feeling heard, as they reference 'lack of communication,' 'difficulty understanding,' and 'miscommunication.' Some individuals claimed that the environment of the forensic mental health hospital had a negative effect on their recovery, citing "deprivation of liberty, feeling as though the patients live in a prison-like environment, being exposed to violence, and experiencing a general lack of resources within the hospital.

- At 17:47, Jay returned from dinner, loud and argumentative, questioning why staff were concerned about the laundry bags, and was advised to drop the matter.[290]

Jay struggled in the hospital system due to multiple diagnoses, including intellectual disability, PTSD, and personality and impulse control disorders. His behaviour remained volatile, marked by aggression, self-harm, and fascination with violence. Although a trauma-informed behavioral program helped somewhat, it was not enough for him to live independently. After 17 years in detention, the Ontario Court of Appeal found that Jay's original NCR finding was unjust, given the flawed legal process, and replaced it with a finding of guilt. He was released the same day. Jay's release was not based on recovery but on the recognition that he should never have been found NCR. Once out, he visited his girlfriend - also a former patient - but lost access to the treatment and support services he had relied on, such as regular psychological care and housing support. Dann argued that his detention was a wrongful deprivation of liberty that kept him from living a normal life. Thus, admission to a psychiatric facility can be a negative experience for individuals found NCR, due to the lack of freedom, strict regime, and loss of privacy, all of which are more pronounced in the forensic mental health system compared to prisons. These issues only further prove why the current s.16 criteria for proving NCR should not be expanded so that individuals, such as Jay, can risk being trapped in a hostile system.

c. Stigma

Lastly, the stigmatization faced by individuals experiencing SMI can act as a disincentive for seeking the legal defence. This stigma negatively impacts their social and legal standing, further marginalizing them and complicating their involvement in the criminal justice system. Consequently, the intended benefits of NCR provisions, such as humane and appropriate care,

[290] *Ibid*.

are undermined by the negative public perception. One study examined the perceptions of individuals with SMI found NCR in the media, which influences public view towards individuals who offend with SMI.[291] The study is part of a broader 10-year study evaluating media portrayals of mental illness, with detailed methodologies published previously.

For this specific analysis, four months of daily newspaper articles (from September 1, 2015, to December 31, 2015) were extracted to examine media representations of NCR.[292] The analysis accounted for the following: whether NCR was a major theme, the overall tone towards mental health, the presence of stigmatizing content, the emphasis on recovery/rehabilitation, and the mention of resource shortages or poor care quality.[293] The key finding of the study is that newspaper articles with NCRM as a major theme are predominantly negative, with almost half containing stigmatizing tones or content.[294] Few articles on NCR discuss recovery, rehabilitation, resource shortages, or poor care quality, indicating that media reporting rules on reducing stigma toward persons with psychiatric illness were ignored. This finding contrasts with earlier research suggesting an overall improvement in the reporting of psychiatric illness in Canadian newspapers, although significant portions of psychiatric illness coverage remain negative and stigmatizing.[295] The following quotes are examples of the negative stigmatization towards those found NCR in the media:

"We understand these people [at Waypoint Centre for Mental Health Care] are mentally ill and need treatment. But they've been convicted of some of the most heinous crimes and it's utterly foolish not to have armed prison guards patrolling the facility." (#20092015002)

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[291] Rob Whitley et al, "Newspaper Articles Related to the Not Criminally Responsible on Account of Mental Disorder (NCRMD) Designation: A Comparative Analysis" (2017) 62:10 Can J of Psychiatry, DOI: <10.1177/0706743717720688>.
[292] *Ibid*.
[293] *Ibid*.
[294] *Ibid*.
[295] *Ibid*.

"'PTSD caused murder; Defence admits soldier killed wife in bloody knife battle'…. He killed her, all right—a bloody, hands-on stabbing that Melissa Richmond fought until the life drained out of her." (#30092015004)

"Thomas Brailsford is a very, very sick man. On June 30, 2010, he cut off his mom's head and placed it on a silver platter.…Not surprisingly, he was found not criminally responsible due to mental illness and ordered detained at the Centre for Addiction and Mental Health."[296] (#12092015011)

The study suggests that articles about NCR might contribute significantly to the negative and stigmatizing portrayal of psychiatric illness in media, potentially skewing public perception.[297] This coverage could lead readers to conflate the characteristics of high-profile NCR cases with psychiatric illness in general, fostering misunderstanding and rejection of individuals with psychiatric illness. Such negative media portrayals could counteract the positive impact of increasing recovery-oriented articles about psychiatric illness. The study highlights that NCR-related media might create inaccurate stereotypes about this population, despite research showing that the NCR group is diverse, with low recidivism rates and high recovery rates.

There are limitations to this study, such as the narrow four-month data sampling, which provides a snapshot but may not capture broader trends.[298] Future research should consider a longer time frame for more robust results. Additionally, the study did not perform formal interrater reliability testing, following the methodology of similar studies from the UK and New Zealand. The study relied on a single, closely supervised coder to maintain consistency. Lastly, the research did not differentiate between NCR and non-NCR cases by diagnosis, which could

[296] *Ibid*.
[297] *Ibid*.
[298] *Ibid*.

confound results since NCR cases might include more instances of highly stigmatized disorders like Schizophrenia.[299]

Conclusion

In this chapter, I have provided a thorough examination of s.16(1) of the *CC*, which establishes the legal framework for individuals deemed not criminally responsible (NCR) due to serious mental illness (SMI) at the time of their offences. I explored the intersection of SMI and substance use disorders, highlighting the significant role these conditions play in increasing criminal justice involvement. The overrepresentation of individuals with mental health conditions within the Canadian correctional system underscores a critical mental health crisis that demands attention.

By tracing the historical evolution of the NCR defence from M'Naghten's Case (1843) to the implications of Bill C-54, I revealed the many changes of this legal provision - but there still have not been any amendments to expand the stringent criteria for proving SMI. Bill C-54 was the only reform to the NCR regime since the 1990s, but its amendments only exacerbated the punitive and exclusionary nature of this defence. I also noted the unique nature of the NCR defence, which can be invoked at any point during a trial, offering both potential benefits and significant challenges for the person accused of an offence. The consequences of receiving an NCR verdict - most notably, the prospect of indefinite detention - pose serious ethical and practical concerns, particularly for individuals with SMI who may experience prolonged periods of incarceration despite demonstrating progress in treatment. The negative ramifications of such experiences, including deprivation of liberty and loss of privacy, fundamentally contradict the principles of effective mental health care.

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[299] *Ibid*.

Moreover, societal stigma surrounding psychiatric illness further complicates the decision to pursue an NCR defence for the few individuals with SMI who seek it. Individuals may hesitate to seek this avenue, fearing the lasting repercussions of a criminal label associated with mental health issues. Thus, the implications of s.16 extend beyond legal considerations, revealing a complex interplay of mental health, public perception, and justice that necessitates a reevaluation of how the criminal justice system addresses the needs of individuals with SMI.

Chapter 3: Raising NCR at Conviction: A Difficult Test, and A Rare Verdict

In this chapter, I will provide an in-depth analysis of the limitations of s.16(1) of the *Criminal Code*, which governs the legal defence of NCR, highlighting how its stringent requirements make it a difficult and rare verdict. I will first note the prevalence of NCR verdicts and then examine expert perspectives on the legal test to demonstrate the difficulty in proving criminal responsibility. Following that, I will demonstrate how the high bar of this defence prevents many individuals with severe SMI, who should otherwise be found NCR, from successfully proving their case, and discuss the detrimental impacts this has had on individuals with SMI.

The Prevalence of NCR Verdicts

It is well-known that the media overwhelmingly reports on the most serious offences, such as violent crime. This practice often leads to the public overestimating the frequency of violence. There have been many prolific Canadian cases of individuals who are psychiatrically ill who have committed serious and violent offences, such as Allan Schoenborn, Vincent Li, and Matthew de Grood.[301] This reporting skews the reality of the statistics pertaining to individuals with offences who are psychiatrically ill, and the rate of NCR verdicts in criminal cases.

[301] See David P. Ball, "Allan Schoenborn granted overnight leave from psychiatric hospital, 14 years after killing his 3 children" (11 March 2022) *CBC News*, online: <https://www.cbc.ca/news/canada/british-columbia/allan-schoenborn-granted-unescorted-leave-from-coquitlam-psychiatric-hospital-1.6382094>, CBC News, "Vince Li, man who beheaded passenger on Greyhound bus, given absolute discharge" (10 February 2017) *CBC News*, online: <https://www.cbc.ca/news/canada/manitoba/vince-li-discharge-1.3977278>, and Wallis Snowdon, "Man who killed 5 at Calgary house part to remain at group home after failed bid for more freedom" (15 June 2023) *CBC News*, online: <https://www.cbc.ca/news/canada/edmonton/matthew-de-grood-caglary-stabbings-alberta-appeal-1.6877936>.

Overall, cases of NCR verdicts are rare in Canada; however, the number of people found NCR has increased over the past 20 years.[302] The National Trajectory Project examined 1,800 men and women who received an NCR verdict in British Columbia, Ontario, and Quebec between May 2000 and April 2005, followed until December 2008.[303] The demographics and circumstances of those found NCR in the sample were identified. Women represented 15.6% of the sample, and the average age of persons found NCR was 37 years old.[304] One-half had completed high school education and two-thirds were Canadian-born citizens.[305] Three-quarters had received some form of government income support, such as welfare, pension, or disability. Regarding the mental state of those in the sample, the most common psychiatric diagnosis was psychotic spectrum disorder.[306] One-third also had severe mental illness in conjunction with substance abuse disorders, with those from British Columbia having the highest rate of individuals found NCR with both factors. The majority (72.4%) had at least one psychiatric hospitalization prior to committing their offences.[307] These results demonstrate that there are certain risk factors to offending persons who have psychiatric illnesses, such as being male, being younger, under-educated, being of low-income status or unemployed, and, most significantly, having an SMI as well as a substance abuse disorder.

Despite the media's tendency to report high-profile cases on violent crime and NCR verdicts, homicide, attempted murder, and sexual offences constituted less than 7% of all index

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[302] Anne G. Crocker et al, "The national trajectory project of individuals found not criminally responsible on account of mental disorder in Canada. Part 3: trajectories and outcomes through the forensic system" (2015) 60:3 Can J Psychiatry, online: <https://pubmed.ncbi.nlm.nih.gov/25886687/>.
[303] *Ibid*.
[304] *Ibid*.
[305] *Ibid*.
[306] *Ibid*.
[307] *Ibid*.

NCR verdicts. The most common offences for those found NCR were offences against the person (65%), property offences (17%), and other *Criminal Code* violations (18%).[308] Thus, criminal cases in which persons who are convicted receive an NCR verdict is relatively rare in Canada, and most NCR cases do not involve the most serious offences.

The Limiting Nature of Section 16

According to Berger, the criminal justice system sets a high bar for a finding of NCR, a threshold that has been criticized for failing to account for mental conditions that should influence criminal responsibility.[309] While one might acknowledge the underinclusiveness of the NCR category, Berger directs your attention to a different question: Why does this standard remain so strict? Despite what one knows about the effects of certain mental disorders on criminal responsibility, the law still refuses to recognize them as sufficient grounds for excusing guilt. Berger argues that this rigidity reflects a broader function of the criminal justice system - its need to channel and contain blame.[310] If one were to acknowledge the deeper social and political contributors to crime, it would destabilize the process of assigning responsibility, undermining the system's functionality. By maintaining a high NCR threshold, the law preserves its capacity to focus blame, particularly toward those already marginalized. Reform could be possible, but for Berger, confronting this issue would reveal a profound instability in the foundations of criminal law itself.[311]

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[308] *Ibid*.
[309] Benjamin L. Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in François Tanguay-Renaud and James Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2011) at 4.
[310] *Ibid*.
[311] *Ibid*.

Berger argues that the criminal justice system's approach to the insanity defence raises profound questions about the nature of criminal responsibility.[312] Historically, this defence fully exempted individuals from criminal prosecution, but modern legal frameworks, including Canada's designation of NCR, attempt to distinguish between guilt and responsibility.[313] This is reflected in the cognitive-based tests derived from the M'Naghten rules, which focus on whether an individual can appreciate the nature of their actions or understand that they were wrong.[314] However, this narrow focus on cognition excludes individuals with volitional impairments or emotional disturbances, such as those suffering from personality disorders like psychopathy or sociopathy, effectively limiting the application of the defence to extreme cases, particularly Paranoid Schizophrenia.[315]

Berger emphasizes that this cognitive model creates a binary system in which individuals either meet the high threshold for NCR or they do not, leaving no room for partial responsibility based on mental disorder.[316] As a result, the law overlooks the possibility that mental illnesses may exist on a spectrum, only addressing such nuances during sentencing rather than at the stage

[312] *Ibid*.
[313] *Ibid* at 5.
[314] *Ibid* at 7.
[315] *Ibid* at 10.
[316] *Ibid* at 11. Referring to Bill C-54, the politicization of NCR reform exacerbates the issues that Berger identifies within the NCR regime by reinforcing the rigid binary that characterizes the law's approach to psychiatric illness and criminal responsibility. Berger critiques the criminal justice system for setting an exceptionally high bar for NCR findings, which restricts the recognition of mental conditions that significantly influence culpability. This rigidity, according to Berger, serves to preserve the system's functionality by channeling blame onto marginalized individuals rather than addressing broader social contributions to psychiatric illness and criminal behaviour. Bill C-54 compounds this issue by introducing the "high-risk" designation, which prioritizes public safety and victim rights over nuanced understandings of psychiatric illness. By imposing additional barriers and emphasizing prolonged detention, the legislation narrows the applicability of NCR even further, effectively excluding those with less extreme psychiatric conditions or volitional impairments. This approach not only reflects but intensifies flaws Berger identifies, where the law fails to engage with the spectrum of psychiatric illness and instead reinforces the system's punitive and exclusionary tendencies.

of determining guilt. Theoretically, Berger identifies two main justifications for excusing individuals based on mental disorder: the "reason-based account," which aligns with the current legal framework, and the "agency/authorship-based account," which focuses on whether an act can be fairly attributed to an individual as the author of an autonomous and authentic human life.[317]

a. Reason-Based Account

The "reason-based account" of criminal responsibility focuses on an individual's capacity for practical reasoning as the foundation for attributing guilt. According to this theory, a person is only criminally responsible if they can apply rationality to the situations they face and use that reasoning to guide their actions.[318] The mental disorder defence responds to the inherent unfairness of holding someone accountable for actions that are not the product of rational decision-making. Stephen Morse supports this view by arguing that volitional impairments are essentially defects of reason, as they hinder an individual's ability to align their behavior with rational assessments.[319]

Susan Wolf's "reason view" complements this account by suggesting that moral responsibility depends on one's intellectual capacity to exercise rational thought and govern actions accordingly.[320] This view emphasizes the importance of flexibility and adaptability in reasoning, as individuals must be responsive to changes in their environment. From this perspective, the insanity defence is justified because it recognizes that individuals with mental

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[317] *Ibid*.
[318] *Ibid* at 12.
[319] *Ibid*, citing SJ Morse, "Diminished Capacity" in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford, Clarendon Press, 1993).
[320] *Ibid*, citing Susan Wolf, *Freedom within Reason* (Oxford and New York, Oxford University Press, 1990) at 71.

disorders that impair their capacity for reason should not be held responsible for their actions.[321] Rational thought and the ability to conform to its outcomes are preconditions for moral and criminal responsibility, and this principle serves as a plausible foundation for the NCR defence.[322]

b. Agency/Authorship-Based Account

The "agency/authorship-based account" of criminal responsibility emphasizes the importance of an individual's autonomous will in the commission of an act. This perspective assesses whether an action genuinely reflects the individual's free and voluntary choices, aligning with the view that responsible agents are those capable of shaping their lives autonomously in accordance with moral considerations central to criminal law.[323] Legal scholar Daniel Robinson highlights that the law presumes an "agentic power" - a state of competence sufficient to bring about or refrain from bringing about a particular event.[324] This underscores the expectation that individuals possess the capacity to act as autonomous agents, making choices that align with their authentic selves. In this framework, the mental disorder defence is applicable when a disease of the mind impedes an individual's ability to act in accordance with their genuine will, thereby challenging the attribution of full criminal responsibility.[325]

Tadros elaborates on this by suggesting that responsibility is linked to one's capacity to live autonomously in relation to the moral principles of the criminal law.[326] Thus, mental disorder may serve as a defence when an individual can rightfully claim that the act in question does not

[321] *Ibid* at 13.
[322] *Ibid*.
[323] *Ibid*.
[324] *Ibid*, citing DN Robinson, "Madness, Badness, and Fitness: Law and Psychiatry (Again)" (2001) 7 Philosophy, Psychiatry, & Psychology 209 at 209.
[325] *Ibid*.
[326] *Ibid,* citing V Tadros, *Criminal Responsibility* (Oxford and New York, Oxford University Press, 2005) at 135.

reflect their true self as an agent.[327] Taylor's concept of human agency deepens this understanding by placing "strong evaluation" at the core of what it means to be a responsible agent.[328] He argues that the ability to reflect on one's desires is essential to the exercise of will, and that without this capacity, a person cannot be considered fully responsible. In this view, the law of mental disorder acknowledges those instances where, due to a mental disease, an individual's actions cannot be attributed to their autonomous will.[329] This shifts the emphasis toward self-authorship, where responsibility hinges on whether an act is a true expression of one's authentic self. Ultimately, through these lenses, the law's strict boundaries around mental disorder serve to contain and channel blame, limiting the defence's applicability to a narrow set of cases.

R v Warsing

One major case that demonstrates the limitations of s.16 is *R v Warsing*. Kristian Warsing, the appellant, was convicted of two charges of second-degree murder and one charge of attempted murder arising from incidents on May 27, 1994, when he was almost 19 years old.[330] At his original trial in 1995, he was found guilty of first-degree murder and attempted murder by a jury, but in a retrial held in 2000, the judge, sitting without a jury, downgraded the charges to second-degree murder. Warsing was sentenced to life imprisonment without parole for 13 years for the murders of his young half-siblings, and one day in jail for the attempted murder of his stepmother, given the time he had already spent in custody.[331] He appealed, seeking a verdict of NCR.

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[327] *Ibid* at 14.
[328] *Ibid*, citing C Taylor, "What is Human Agency" in *Human Agency and Language* (Cambridge and New York, Cambridge University Press, 1985) at 28.
[329] *Ibid*.
[330] *R v Warsing*, 2002 CarswellBC 205, 2002 BCCA 131 at para 2.
[331] *Ibid*.

Warsing's background reveals a troubled family dynamic. He was born in 1975 to Terry and Evelyn Warsing, who divorced in 1981.[332] His mother suffered from bipolar disorder, and his father experienced depressive episodes. While he generally lived peacefully with his father and stepmother, his younger sister Nicole had a strained relationship with their stepmother, eventually accusing her stepmother's father of molestation and being placed in foster care.[333] Warsing graduated from high school in 1993, but the family faced financial difficulties, and his father moved to Calgary for work, leaving Warsing, his stepmother, and younger siblings in Sparwood.[334] At times, Kristian spent a lot of time in his room and was considered a recluse by his family.[335] Despite these challenges, his mental state appeared normal to those around him, with no signs of distress leading up to the tragic events of May 27, 1994.

Following his arrest, Kristian Warsing was assessed by Dr. Howard, a psychiatrist, at the request of the police and Crown counsel to determine his fitness to stand trial.[336] Dr. Howard concluded that Warsing was fit to stand trial, as he understood the proceedings and could instruct counsel, but no assessment was conducted to determine whether Warsing was not criminally responsible due to mental disorder. The initial trial in 1995 did not raise an NCR defence, and Warsing was found guilty of two counts of first-degree murder and attempted murder. His defence at the time focused on a claim that he did not kill his siblings, implying that his stepmother, Debora Warsing, was responsible for their deaths. In a subsequent appeal, Chief Justice McEachern expressed astonishment that an insanity defence was not raised.[337]

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[332] *Ibid* at para 3.
[333] *Ibid* at paras 4, 5.
[334] *Ibid* at para 6.
[335] *Ibid* at para 11.
[336] *Ibid* at para 27.
[337] *Ibid* at para 29.

At the second trial in 2000, Warsing admitted to killing his siblings and attacking his stepmother. His defence then centered on the argument that he was NCR at the time of the offence, supported by testimony from two psychiatrists, Dr. Wanis and Dr. Hodalet.[338] Both psychiatrists diagnosed Warsing with bipolar disorder and believed he was in a delusional state during the events of May 27, 1994. Dr. Wanis, referencing the "Obsidian Order" symbol Warsing had painted in the house, concluded that Warsing believed he was acting under divine command. Dr. Hodalet supported this diagnosis, though she was more cautious in her conclusions regarding the attack on his stepmother.[339] Both doctors acknowledged the difficulty in assessing Warsing's mental state so long after the events and conceded that their examinations could have benefited from additional contemporaneous information.[340] Despite these assessments, both psychiatrists agreed that Warsing's actions exhibited signs of rationality at times, raising complexities in determining his criminal responsibility.

At the appeal, it was noted that the appellant did not testify at trial, leading to difficulties in establishing the necessary factual foundation for the psychiatric opinions on his mental state during the offence.[341] The expert testimony from two psychiatrists, Dr. Wanis and Dr. Hodalet, relied heavily on statements made by the appellant during interviews, but these were deemed inadmissible as evidence to prove the truth of the facts underlying their opinions.[342] The trial

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[338] *Ibid* at paras 31, 33.
[339] *Ibid* at para 33.
[340] *Ibid* at para 34.
[341] *Ibid* at para 45.
[342] Specifically, Chief Justice McEachern stated that, "It follows from the foregoing that the weight to be given to an expert opinion will depend, in significant measure, on whether the underlying material facts have been proven in evidence. To put this in proper context, the issue is not whether the psychiatrists correctly diagnosed the accused from a medical perspective but whether the necessary factual foundation has been proven at trial so that I can give weight to their opinions expressed in these proceedings."

judge, Macaulay J., referenced the rulings in *R v Abbey*[343] and *R v Lavallee*,[344] which outline that while expert opinions based on second-hand information are admissible, their weight depends on whether the facts supporting those opinions are proven by admissible evidence. In this case, there was insufficient evidence to support the assumptions underlying the psychiatric conclusions that the appellant was in a manic or delusional state at the time of the offence.[345]

Macaulay J. noted that while there was evidence of some irrational behaviour, such as the disarray at the crime scene, the appellant's actions could also be interpreted as purposeful, leaving open the possibility that the violence was motivated by personal resentment. The lack of corroborative evidence of the appellant's delusional state, combined with his purposeful behaviour around the time of the incident, led the judge to place little weight on the psychiatric opinions.[346] On appeal, it was argued that the trial judge had erred by not giving proper weight to the psychiatric testimony. However, the appellate court upheld the trial judge's decision, emphasizing the importance of a factual foundation for psychiatric opinions and affirming that there was insufficient evidence to support the appellant's defence of NCR.[347] The court also rejected the argument that requiring the appellant to testify infringed upon his rights, noting that in cases like *R v Oommen*,[348] where sufficient evidence exists from other sources, testimony from the accused may not be necessary, but in this case, it was required to establish the factual basis for the defence.[349] Ultimately, the NCR defence was rejected, and the trial judge's analysis was upheld.

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[343] *R v Abbey*, [1982] 2 SCR 24.
[344] *R v Lavellee*, [1990] 1 SCR 852.
[345] *Warsing*, *supra* note 330 at para 46.
[346] *Ibid* at para 57.
[347] *Ibid* at para 56.
[348] *R v Oommen* (1994), 91 CCC (3d) 8 (SCC).
[349] *Ibid* at paras 45, 54, 55.

Berger's critique of the limitations of s.16, examined through the theories of "reason-based" and "agency/authorship-based" accounts of criminal responsibility, result in the high threshold required to establish a successful defence of NCR. In *Warsing*, the trial judge's approach aligns with Berger's theories of the "reason-based account" and "agency/authorship-based account" of criminal responsibility. Berger's "reason-based account" posits that criminal responsibility hinges on whether an individual can reason and appreciate the nature of their actions. This is reflected in the judge's skepticism about the psychiatric diagnoses due to a lack of factual support for the claim that the appellant was in a delusional state. The judgment emphasizes that the appellant displayed "purposeful and rational behaviour" around the time of the crime, such as obtaining PIN numbers and taking money, which contrasts with his claims of irrational actions influenced by delusions. This rational behaviour suggests that, from a reason-based perspective, the appellant may have had the capacity to understand the consequences of his actions.

The "agency/authorship-based account," which focuses on whether the defendant acted as the true author of their actions, is demonstrated when the court highlights the disparity between the appellant's statements to psychiatrists and the observed facts. The judge noted the lack of evidence supporting his claim that he was "delusional" and expressed doubt over his claim of intending to kill the children to save them from divorce, pointing out the inconsistencies between this narrative and the deliberate actions during the crime, such as waking his stepmother and concealing his identity. The court's focus on these rational, deliberate behaviors demonstrates an adherence to an authorship-based account, as it underscores that the appellant appeared to exercise agency over his actions rather than being controlled by mental illness, thus weakening the NCR defence.

The Inconsistent Application of Section 16

I will now compare two cases - one in which a person accused of a serious offence with SMI was found NCR and another where the accused was not - highlighting their similar facts and backgrounds to demonstrate how the second criterion of the s.16 test is inconsistently applied, resulting in unequal verdicts. The second criterion of s.16 acknowledges that the mental disorder of the person accused must have prevented him or her from appreciating the nature and quality of the act or omission or of knowing that it was wrong.

a. *R v Mullings*

Andywele Carlan Mullings, charged with the second-degree murder of his intimate partner, Emily Appleyard, committed the offence on March 2, 2021, at their shared residence in New Westminster, British Columbia.[351] Mullings admitted to causing Appleyard's death by striking her multiple times with a hammer, with the central issue being whether he was suffering from a mental disorder at the time, potentially exempting him from criminal responsibility under s. 16(1) of the *CC*.[352] Born in Jamaica in 1979, Mullings was raised by his mother, aunts, and grandmother.[353] Although no signs of psychiatric illness were reported by his relatives, his uncle and cousin had a history of psychiatric illness. Mullings immigrated to Canada in 2008, sponsored by his then-partner, Dominique, with whom he lived alongside his eldest son, Chad, born in Jamaica in 2000.[354] Mullings later had an intermittent relationship with Khadija Mohammed, with whom he had two children. Mullings began his relationship with Appleyard in 2014, and they started living together in 2017 or 2018.[355] At the time of the offence, Mullings

[351] *R v Mullings*, 2023 CarswellBC 1816, 2023 BCSC 1095, 2023 WCB 963. at para 1.
[352] *Ibid* at para 2.
[353] *Ibid* at para 20.
[354] *Ibid* at para 21.
[355] *Ibid* at paras 22, 23.

was working as a subcontractor in carpentry, and his employer, George Haddad, reported no signs of psychiatric illness in Mullings during their daily interactions in early 2021.[356]

In late February 2021, Mullings exhibited signs of significant mental deterioration.[357] He became increasingly paranoid, believing that his intimate partner, Emily Appleyard, and others were conspiring to kill him. This paranoia escalated over several days, marked by erratic and manic behavior. On February 27, he called the police out of concern for his children's safety, was briefly detained, and later apologized but remained convinced of an ongoing plot against him.[358] Over the following days, Mullings made several distressed calls to family members and coworkers, describing delusional beliefs of being poisoned and targeted.[359] On March 2, despite multiple welfare checks and a visit to a hospital, where he was assessed but left before receiving psychiatric care, Mullings returned home with Appleyard.[360] Shortly after their arrival, he struck her multiple times with a hammer, causing her death.[361] Afterward, he posted a photo of her body on Facebook and fled the scene, later being arrested with her blood on his clothes. Throughout his interactions with police and family members post-arrest, Mullings continued to display delusional thoughts, maintaining that he had been poisoned and was the victim of a conspiracy.[362]

Dr. Lacroix, a forensic psychiatrist, provided an expert opinion on Mullings' mental state at the time of the offence.[363] After two interviews and an extensive review of evidence, Dr. Lacroix diagnosed Mullings with Schizophreniform Disorder, an acute psychotic illness. He concluded that Mullings was experiencing severe psychosis during the days leading up to and at

[356] *Ibid* at para 24.
[357] *Ibid* at para 25.
[358] *Ibid* at paras 26, 27.
[359] *Ibid* at para 28.
[360] *Ibid* at para 38.
[361] *Ibid* at para 41.
[362] *Ibid* at paras 45, 46.
[363] *Ibid* at para 48.

the time of the offence.[364] Mullings' psychotic state involved persecutory delusions, particularly about being poisoned and the safety of his children, and these delusions extended to include his intimate partner, Emily Appleyard.[365] Dr. Lacroix testified that while Mullings knew it was wrong to kill, his ability to make rational decisions was impaired by his psychotic fear, making him incapable of distinguishing right from wrong. Thus, Mullings' psychotic illness rendered him unable to appreciate the moral wrongfulness of his actions when he killed Appleyard.[366]

The judge, in their analysis of Mr. Mullings' case, accepted the forensic psychiatrist Dr. Lacroix's diagnosis of Schizophreniform Disorder and concluded that Mullings was suffering from a mental disorder at the time of the offence, as defined under s.16 of the *Criminal Code*.[367] This finding aligns with the legal understanding of a "disease of the mind" as described in the *Cooper* case. In the second stage of the analysis, following the principles outlined in *Oommen*, the judge examined whether Mullings' mental disorder impaired his capacity to know that his actions were morally wrong.[368] Based on the substantial evidence, including Dr. Lacroix's testimony, the judge found that while Mullings knew it was generally wrong to kill, his acute psychosis rendered him unable to apply this knowledge to his specific circumstances on the day of the offence.[369] Thus, the court determined that Mr. Mullings had met the burden of proving, on a balance of probabilities, that he was incapable of understanding the moral wrongfulness of his actions due to his mental disorder, leading to a finding of NCR.[370]

b. <u>*R v Salifu*</u>

[364] *Ibid* at para 50.
[365] *Ibid* at para 51.
[366] *Ibid* at para 52.
[367] *Ibid* at para 54.
[368] *Ibid* at para 55.
[369] *Ibid* at para 56.
[370] *Ibid* at paras 57, 58.

The judicial analysis in *Mullings* starkly contrasts with *Salifu*, despite both Mullings and Salifu committing serious offences while demonstrating strong signs of SMI. In 1991, Galina Alexander gave birth to her son Hassan in Russia.[371] After her marriage ended, she raised Hassan as a single mother. The two had a close but volatile relationship. In 2015, Hassan, at 23 years old, killed his mother, then 44, in their shared Brampton apartment. Despite earlier incidents of conflict, including 911 calls and arguments, their bond was described as intense and loving.[372] On August 15, 2015, an argument between the two escalated over a minor issue involving boiled eggs, leading Hassan into a blind rage.[373] The argument involved insults, with Galina saying she should have choked Hassan at birth, which triggered Hassan's violent outburst.[374] He struck his mother, causing her to fall, and then strangled her with a belt. Hassan had no prior criminal record, and his actions seemed out of character.[375] Testimonies revealed that Hassan had been experiencing paranoia, familial stress, and isolation in the months leading up to the incident.[376] Alcohol and drug use also exacerbated his mental state in the days before the killing. Ultimately, Hassan's deep emotional turmoil and momentary loss of control culminated in the tragic murder of his mother, an act driven by extreme anger and underlying family tensions.

The role of psychiatric illness in Mr. Salifu's case is significant, although the jury rejected his plea of being NCR under s. 16 of the *Criminal Code*.[377] This rejection does not imply that Mr.

[371] *R v Salifu*, 2019 CarswellOnt 1054, 2019 ONSC 483, 153 WCB (2d) 83 at para 1.
[372] *Ibid* at para 3.
[373] *Ibid* at para 5.
[374] *Ibid* at para 11.
[375] *Ibid* at para 13.
[376] *Ibid* at paras 18, 19, 20.
[377] *Ibid* at para 31. See also, Annik Mossiere and Evelyn M. Maeder, "Juror decision making in not criminally responsible on account of mental disorder: Effects of defendant gender and mental illness type" (2016) 49 Int J of Law and Psychiatry. While it was clearly established that Salifu was experiencing SMI at the time of the offence, the jury still rejected the NCR defence. It is important to note that the general public, including juries, hold biases towards individuals with SMI. Maeder et al. (2015) found that educating jurors about the NCR defence improved attitudes

Salifu is not psychiatrically ill, only that the jury either found he was not suffering from a "disease of the mind" (Schizophrenia, in this case) or that he had the capacity to appreciate his actions or understand their moral wrongfulness at the time of the offence.[378] The court remains uncertain as to which specific element of s. 16 the jury found unproven.

Expert testimony was divided on the issue. The defence's experts, Dr. Pomichalek and Dr. Gojer, diagnosed Schizophrenia, while Dr. De Freitas, testifying for the Crown, questioned this diagnosis, suggesting paranoid traits rather than a full disorder.[379] Despite these differences, all parties agreed that Mr. Salifu suffers from some form of psychiatric illness.[380] Evidence of paranoia in his teenage years, exacerbated by bullying and a traumatic stabbing incident at 18, established a history of mental instability.[381] By his early twenties, he experienced episodes of auditory hallucinations and delusions, such as believing satellite radio was broadcasting his thoughts.[382]

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but did not reduce biased verdicts, indicating that biases stem from more than just misinformation. Broader attitudes and perceptions about psychiatric illness, particularly Schizophrenia, may influence decisions. These perceptions are largely shaped by negative media portrayals, which often depict people with psychiatric illness as dangerous. Silton et al. (2011) found that individuals with Schizophrenia were seen as most likely to have a psychiatric illness and were perceived as more dangerous, contributing to a desire for social distance. Similarly, a review of 62 population studies (Angermeyer & Dietrich, 2006) revealed that the public often misidentifies mental disorders, with schizophrenia most commonly recognized as a psychiatric illness. Those who identified characters as psychiatrically ill were also more likely to view them as dangerous and unpredictable. This demonstrates how persistent misconceptions about psychiatric illness, especially Schizophrenia, contribute to biased judgements. The jurors were also more likely to reject the NCR defence for defendants with SMI who have committed serious offences and instead opt for incarceration due to perceiving the defence as being "too easy" on the defendants.

[378] *Ibid*.

[379] *Ibid* at para 33.

[380] *Ibid* at para 34. The trial judge claimed that "The Crown at no time during the trial… argued that Mr. Salifu is not mentally ill. The evidence is incontrovertible that he is."

[381] *Ibid* at para 35.

[382] *Ibid* at para 36.

At the time of the homicide, Mr. Salifu's paranoia had escalated, affecting his interactions at work, where he believed he was being sabotaged due to his race and Muslim identity.[383] He reported delusions of persecution, believing coworkers and even his friends were conspiring against him.[384] These delusions intensified during his time in jail, where he frequently heard voices and experienced heightened paranoia.[385] His violent outburst in court, where he irrationally claimed the police killed his mother, further demonstrated his delusional state and reinforced the conclusion that he suffers from SMI.[386]

While Dr. De Freitas argued that some of his paranoia could be based on real events, such as workplace racism, she did not dispute that his delusions were indicative of SMI. The court found that the delusions, hallucinations, and paranoid thoughts present before and after the offence establish a consistent pattern of psychiatric illness, likely aggravated by his incarceration.[387] His mental instability was further evidenced by his outburst during sentencing, which illustrated both his detachment from reality and the profound impact of his illness.

The court concluded that SMI played a central role in Mr. Salifu's offence, determining that his mental state significantly contributed to the homicide of his mother.[388] Despite the voluntary nature of the act, the court found that the explosive rage that led to the murder could only be explained by his psychiatric illness, particularly as there was no significant history of violence or family discord that could account for such an extreme reaction.[389] This conclusion

[383] *Ibid* at para 37.
[384] *Ibid* at para 38.
[385] *Ibid* at para 40.
[386] *Ibid* at para 42.
[387] *Ibid* at para 43.
[388] *Ibid* at para 45.
[389] *Ibid* at para 47.

was based on the absence of other plausible explanations for the crime and the strong evidence of SMI presented during the trial.

Mr. Salifu's case underscores the complex challenges faced by individuals with psychiatric illnesses in the criminal justice system, particularly when they are found criminally responsible despite significant evidence of SMI at the time of the offence. In this case, while the court acknowledged that Salifu's SMI played a central role in the crime, it did not exonerate him under the legal framework of s.16(1) in the *Criminal Code*. The decision to hold him criminally responsible, even while recognizing the severity of his mental health condition, reflects key issues within the intersection of law and psychiatry, where the rigid legal standards for NCR often exclude individuals with serious mental illness. Salifu reveals that even when an individual has a diagnosed mental disorder, their actions may still appear goal-directed or emotionally driven, making the NCRMD defence harder to apply. Unlike Mullings, whose behaviour stemmed from active psychotic delusions, Salifu's conduct was framed by the Crown as an angry overreaction, thus Salifu could still appreciate the nature and quality of his conduct, and that it was wrong. Juries may interpret motive and rationality differently even when psychiatric illness is present. This distinction underscores the difficulty in proving that a person's psychiatric illness rendered them incapable of appreciating the nature or wrongfulness of their actions.

Berger's theories, particularly regarding the stringent criteria and high bar set for proving the NCR defence, are relevant here. He critiques the rigid application of the law that often fails to accommodate the nuanced realities of mental illness. The legal tests for NCR focus on whether the defendant could appreciate the nature and quality of their actions or whether they knew their actions were morally wrong. In Salifu's case, while he showed clear signs of mental illness - delusions, paranoia, hallucinations - the court's decision suggests that these symptoms

were not deemed severe enough to negate his ability to form the requisite intent for murder. Berger's critique highlights how the criminal justice system's binary framework for SMI (either NCR or criminally responsible) fails to account for the complexities of psychiatric disorders, leaving individuals like Salifu trapped in a system that prioritizes punishment over treatment.

Additionally, Berger argues that the stringent criteria for NCR disproportionately exclude individuals who may suffer from chronic, severe psychiatric conditions but who exhibit moments of clarity or the ability to reason through their delusions. This echoes Dr. De Freitas' testimony in Salifu's case, where she noted that although he suffered from delusions, they were not consistently severe enough to meet the legal threshold for NCR. This demonstrates how Berger's theory of exclusion applies in cases where individuals with SMI do not fit neatly into the legal definitions of insanity, yet are clearly affected by their conditions in ways that diminish their culpability.

In *R v Mullings*, the court deemed the defendant's psychiatric illness - particularly Schizophrenia and severe delusions - severe enough to impair his understanding of the nature and quality of his actions, leading to a conclusion that he could not be held criminally responsible. This stands in stark contrast to Salifu's case, where despite exhibiting similar symptoms of paranoia, delusions, and auditory hallucinations, the court did not find these symptoms sufficient to meet the NCR threshold because Salifu could still appreciate the wrongfulness of his conduct at the time of committing the offence. The contrast highlights the inconsistencies and subjectivities in applying the NCR defence. While both defendants suffered from SMI, Salifu's condition was not found to have rendered him incapable, at the time of the offence, of appreciating the nature and quality of his actions or that they were morally wrong, despite the clear influence his condition had on the events leading up to the homicide. This

suggests a disparity in how courts assess psychiatric illness, where some individuals are more likely to benefit from NCR protections than others, even when their psychiatric conditions are similarly debilitating.

Implications of Found Criminal Responsibility Despite SMI

One of the primary consequences of Salifu being found criminally responsible is that he is subject to the full weight of the criminal justice system's punitive measures rather than the rehabilitative focus typically associated with NCR findings. Instead of receiving treatment in a mental health facility, Salifu faces imprisonment, where his SMI may worsen, as evidenced by the escalation of his delusions and hallucinations while incarcerated. This outcome highlights the limitations of the criminal justice system in addressing the needs of persons with psychiatric illnesses who offend, who often face environments that exacerbate their conditions rather than mitigate them through appropriate psychiatric care.[392]

Furthermore, this decision raises concerns about the broader implications for individuals with psychiatric disorders who, despite overwhelming evidence of psychiatric illness, fail to meet the stringent legal criteria for NCR under s.16(1). The court's judgment in Salifu's case suggests that even when SMI clearly influences behaviour, it does not always lead to the defendant being relieved of criminal responsibility. This creates a gap in the system where

[392] See Craig Haney, ""Madness" and penal confinement: Some observations on mental illness and prison pain" (2017) 19:3 Punishment & Society. Prison conditions can exacerbate pre-existing psychiatric illnesses due to overcrowding, isolation, and lack of access to adequate mental health care. The stressful environment, with constant surveillance, violence, and lack of personal control, can worsen symptoms of anxiety, depression, and other mental health issues. Solitary confinement, often used in prisons, can intensify feelings of loneliness and lead to severe psychological deterioration. Additionally, limited access to psychiatric treatment or medication in prison settings often leaves inmates without the necessary support for managing their conditions.

individuals face punishment alone, and are less likely to access the comprehensive and specialized mental health care that is offered outside of traditional prisons.

The broader implication of Salifu's case is the potential for individuals experiencing SMI to experience harsh prison conditions that exacerbate mental disorders, without sufficient access to critical mental health treatment. It is imperative that access to mental health support is expanded within the correctional system, given the high prevalence of persons incarcerated with SMI, such as Salifu. Moreover, it raises critical questions about the role of expert testimony in shaping court decisions. In Salifu's case, the disagreement between the defence and Crown experts on the diagnosis of schizophrenia versus paranoid disorder played a significant role in the outcome, demonstrating how subjective interpretations of psychiatric illness can influence legal outcomes.

Conclusion

In conclusion, the stringent legal criteria under s.16(1) often prevent individuals with SMI who seek an NCR defence from accessing the psychiatric care they require. Specifically, the difficulty in proving NCRMD is not determining whether the person accused was suffering from a mental disorder at the time of committing the offence, but rather whether the symptoms of the mental disorder rendered the person accused unable to appreciate the nature and quality of the act, or the wrongfulness of the act. The inconsistencies in how courts assess psychiatric illness, as seen in the cases of *Mullings* and *Salifu*, reflect a broader issue in the application of the NCR defence. Despite suffering from debilitating psychiatric conditions, individuals like Salifu are frequently held criminally responsible, whereas others benefit from NCR protections based on subjective interpretations of their mental state and its impact on their ability to appreciate the wrongfulness of their actions. The high prevalence of individuals with SMI who become

involved in the criminal justice system, as well as the difficult component pertaining to an NCR defence that shuts out many who seek it, underscores the need to significantly increase access to mental health support both within corrections to help alleviate the mental health crisis in Canadian prisons.

Chapter 4: The Diminished Role of Mental Health in Sentencing Decisions

In this chapter, I will focus on the sentencing stage for persons with psychiatric illnesses who offend but are deemed criminally responsible despite their mental disorder being a key factor in their offence. Building on the previous chapter, where I discussed how the second criterion of s.16, in which it must be proven that the accused's mental disorder rendered them unable to appreciate the wrongfulness of their action at the time of committing their offence, this chapter will explore the concept of moral blameworthiness for such persons who offend. When found criminally responsible, the only option for these individuals is to argue that their psychiatric illness diminished their moral blameworthiness, warranting a compassionate approach at sentencing. I will begin by explaining two key sentencing principles that are challenging for judges to balance, as well as section 718.2(e) of the *Criminal Code*, which directs judges to consider alternatives to incarceration specifically for Indigenous offenders. Following this, I will critically analyze how these sentencing judges often fall short in adequately accounting for the mental state and the social context of the person who offends, especially due to an overemphasis on public safety. Lastly, I will examine how courts disproportionately penalize racial minorities, particularly Black and Indigenous persons who offend with psychiatric illnesses, by failing to consider the unique social conditions that contribute to their mental health challenges and offences.

Sentencing Principles: Public Safety and Rehabilitation

In Canada, the primary purpose of sentencing is to protect society and support crime prevention efforts while fostering respect for the law and ensuring a just, peaceful, and safe society. Sentencing achieves these aims through the imposition of fair penalties that may serve one or more of the following objectives: (1) Denouncing unlawful conduct and addressing the

harm caused to victims or to the community; (2) Deterring the person offending and others from committing future offences; (3) Separating persons who offend from society when necessary; (4) Facilitating the rehabilitation of persons who offend; (5) Providing reparations for harm inflicted on victims or the community; and (6) Encouraging persons who offend to take responsibility for the actions and acknowledge the harm they have caused.[396] All six sentencing objectives aim to enforce the principles of public safety and rehabilitation. During the sentencing stage, judges also consider aggravating and mitigating factors as outlined in s.718.2 of the *CC* to determine an appropriate sentence that reflects the personal circumstances of the person accused.[397] However, it is interesting to note that the majority of the factors are aggravating; there are only a few mitigating factors outlined in ss.(b) to (e). While the mental state of the person accused at the time of their offence - as well as other socio-economic considerations such as homelessness, substance abuse, and trauma - can be accounted for as mitigating factors, they are not explicitly outlined in s.718.2. This has contributed to sentencing judges failing to consider the significance of SMI and criminal offending, and given the high prevalence of individuals in the criminal justice system who have untreated SMI, the mental state of the person accused should be made explicit in s.718.2.

For Indigenous persons, the *Gladue* principles play a crucial role in sentencing. These principles, which stem from the landmark *R v Gladue*[398] decision and are codified in section 718.2(e) of the *Criminal Code*, instruct judges to consider all reasonable alternatives to incarceration, especially given the overrepresentation of Indigenous peoples in the criminal justice system.[399] The *Gladue* principles require courts to acknowledge the unique systemic and

[396] Julia Nicol, *Sentencing in Canada*, Library of Parliament (2024).
[397] *Criminal Code*, RSC 1985, c C-46, s 718.
[398] *R v Gladue* [1999] 1 SCR 688.
[399] *Criminal Code*, RSC 1985, c C-46, s 718(2) (e).

historical factors, such as colonialism, residential schools, and intergenerational trauma, that have contributed to the social and economic marginalization of Indigenous peoples, often leading to higher rates of criminality.[400] The importance of the *Gladue* principles lies in their aim to address the disproportionate rates of incarceration among Indigenous populations and to promote restorative justice. By considering these alternatives, courts are encouraged to impose sentences that better reflect the need for healing, rehabilitation, and reconciliation, rather than resorting to punitive measures that may not serve the best interests of Indigenous persons who offend nor their communities.[401]

Public safety and rehabilitation are central considerations in sentencing law, reflecting the balancing act judges must perform when determining an appropriate sentence. On the one hand, public safety demands that the courts protect society from individuals who pose a risk, often leading to incarceration or other restrictive penalties. On the other hand, rehabilitation emphasizes addressing the underlying causes of criminal behaviour, such as psychiatric illness or addiction, to reduce recidivism and reintegrate the individuals into society. However, these objectives often come into conflict, particularly for persons with psychiatric illnesses who offend. While mitigating factors like psychiatric illness can reduce moral blameworthiness, the priority given to public safety frequently results in disproportionately harsh sentences. This tension is exemplified in *R v Fabbro*, where despite evidence that the individual accused's mental state significantly contributed to their offence, the court imposed a prison sentence that reflected public safety concerns over the potential risk of reoffending. This case illustrates how, even when individuals successfully argue that their psychiatric illness played a critical role in

[400] Government of Canada, "Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System" (2023), online: <https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p3.html>.
[401] *Ibid*.

their criminal behaviour, the sentence can still prioritize public protection, overshadowing rehabilitation and resulting in punitive outcomes.

The overemphasis on public safety during sentencing often leads to significant harm to the person accused. Individuals with psychiatric illnesses may receive lengthy prison sentences without access to the specialized care they need, exacerbating their mental health issues and failing to address the root causes of their offending behaviour.[402] This undermines the goal of rehabilitation, which should focus on treatment and support to prevent future crimes rather than punishment. Incarcerating individuals with psychiatric illnesses without adequate psychiatric care can lead to a cycle of worsening mental health, increasing the likelihood of recidivism upon release, and failing both the person offending and society.[403]

Rehabilitation is particularly crucial for individuals with psychiatric illnesses, especially within Indigenous and Black communities, where mental health issues are often intertwined with historical and systemic marginalization. These groups continue to face disproportionate rates of incarceration, a trend that persists despite the introduction of the *Gladue* principles for Indigenous offenders. Indigenous and Black individuals in prison also experience alarmingly high rates of psychiatric illness, which highlights a failure in both the justice system and the application of the *Gladue* principles.[404] The underuse or misapplication of *Gladue* principles, which are meant to emphasize alternatives to incarceration, has not effectively addressed the root

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[402] Refer to Chapter 1, "Barriers to Mental Health Treatment" and "Barriers to Rehabilitation."
[403] See Colin MacKenzie and Joanna Amirault, "From Incarceration to Reintegration: Using the Human Services Model to Manage Canadian Prisoner Mental Health" (2021) 27:1 J Correct Health Care. The insufficient mental health care provided in Canadian correctional institutions is a significant factor contributing to recidivism (Goomany & Dickinson, 2015). According to Gagliardi et al. (2004), incarcerated individuals with psychiatric illnesses have a recidivism rate of nearly 75%, while the rate is less than 50% for those without psychiatric illness.
[404] Government of Canada, "Overrepresentation of Indigenous Peoples," *supra* note 31.

causes of criminal behavior for these marginalized groups.[405] The emphasis on public safety, rather than on rehabilitation and addressing underlying social and psychological factors, has contributed to this ongoing crisis of overrepresentation in the criminal justice system.

The epidemic of racial overrepresentation among incarcerated Indigenous and Black individuals, coupled with the high rates of mental illness in these populations, suggests a systemic failure to incorporate both *Gladue* principles and rehabilitative justice effectively. This failure further entrenches cycles of disadvantage, as prisons are ill-equipped to address the mental health needs of these communities, which are often rooted in trauma, poverty, and social exclusion. A shift toward more meaningful rehabilitation, focusing on psychiatric treatment and programs addressing these underlying issues, is essential for breaking this cycle and achieving true justice for these vulnerable populations.

(a) *R v Fabbro*

[405] Government of Canada, "Spotlight on *Gladue*," *supra* note 400. *Gladue* considerations aim to address over-incarceration by tackling the effects of colonialism. However, critics question whether these principles are adequate, given the close link between the two issues. The Royal Commission on Aboriginal Peoples emphasized the necessity of Indigenous self-governance in the justice system as part of a new nation-to-nation relationship. They noted that colonialism has heavily impacted Indigenous peoples through legal systems, suggesting that enhancing Indigenous self-determination is vital for long-term solutions to over-incarceration. The Commission rejected merely "indigenizing" the existing criminal justice system—keeping current structures but adding Indigenous personnel and programs—in favor of empowering Indigenous communities with the political, legal, and financial resources needed to establish justice frameworks rooted in their legal traditions. Gevikoglu argues that s. 718.2(e) is a limited approach, representing a compromise rather than a full integration of Indigenous legal perspectives (*See* Jeannette Gevikoglu, "Ipeelee/Gladue and the Conundrum of Indigenous Identity in Sentencing" (2013) 63:9 The Supreme Court Law Rev: Osgoode's Annual Constitutional Cases Conference). Rudin similarly points out that the colonial legacy has stripped Indigenous peoples of their authority to govern their communities (*See* Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 Criminal Law Quarterly). Therefore, he argues that restorative justice solutions must be developed by Indigenous peoples themselves.

One case that highlights how sentencing judges overlook the mitigating factor of psychiatric illness, therefore insufficiently considering the reduced moral blameworthiness of the person accused, is *R v Fabbro*. Justin James Fabbro, the appellant, faced legal proceedings following an incident on January 20, 2019, in Sault Ste. Marie, Ontario.[406] At 36 years old, Fabbro was grappling with a severe heroin addiction, stemming from an overprescription of Percocet and OxyContin after a boating accident at age 25.[407] This addiction intensified after he transitioned to illicit drug purchases when prescriptions were no longer available. Compounding his struggles were unresolved trauma and grief linked to witnessing multiple traumatic events, including a neighbor's suicide, a friend's decapitation, and a snowmobiler's fatal accident.[408]

In the month prior to the incident, Fabbro sought medical help for suicidal ideation on several occasions but was sent away each time.[409] On the morning of the incident, police received reports of Fabbro leaving a residence with a firearm and the possibility of self-harm. He was already wanted on a surety revocation warrant for outstanding firearm charges and was under a recognizance prohibiting him from possessing firearms.[410] Upon being located by police, Fabbro attempted suicide by placing a shotgun in his mouth but ultimately engaged in a negotiation with law enforcement, expressing his desire to harm only himself.[411] Following the incident, Fabbro was released on bail and took significant steps to address his substance abuse and mental health issues, including completing a residential treatment program and engaging in ongoing psychiatric care.[412]

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[406] *R v Fabbro*, CarswellOnt 9557, 2021 ONCA 494 at para 1.
[407] *Ibid* at paras 2, 3.
[408] *Ibid* at para 4.
[409] *Ibid* at para 5.
[410] *Ibid* at para 6.
[411] *Ibid* at para 8.
[412] *Ibid* at para 11.

Fabbro faced several charges stemming from the January 20, 2019 incident, including: Carrying a weapon for a purpose dangerous to the public peace; possessing a prohibited firearm with readily accessible ammunition while lacking a license; failing to comply with a recognizance condition prohibiting him from possessing any weapons; and possessing a sawed-off shotgun while prohibited from doing so under a recognizance.[413] Fabbro pleaded guilty to these charges and was sentenced to two years less a day in prison, followed by three years of probation, along with several ancillary orders.[414]

The sentencing judge acknowledged Fabbro's struggles with compromised mental health and drug addiction at the time of the incident, recognizing that he had since embarked on a significant path of rehabilitation. The judge characterized the incident as a "catalyst for an awakening or intervention," prompting Fabbro to seek rehabilitation and reform.[415] However, the judge emphasized that the nature of the offence, particularly involving a sawed-off shotgun, necessitated a focus on denunciation and deterrence as primary sentencing principles. While he noted that Fabbro had expressed remorse and had not threatened harm to anyone but himself during the incident, he maintained that the seriousness of possessing a firearm warranted a strong response. Additionally, the judge observed that Fabbro had adhered to strict bail conditions for over two years without any breaches.[416]

On appeal, Fabbro contended that the sentence was demonstrably unfit, but he did not contest the conditions of probation or the ancillary orders. Ultimately, the appeal court decided to

[413] *Ibid* at para 12.
[414] *Ibid* at para 13.
[415] *Ibid* at para 14.
[416] *Ibid* at para 15.

allow the appeal and substitute the original sentence with a conditional sentence based on the terms agreed upon by both parties.[417]

The key issues raised in the appeal by Fabbro pertain to perceived inadequacies in the sentencing judge's ruling. Fabbro contended that the sentence was demonstrably unfit based on three primary arguments. First, he argued that there was an undue emphasis on societal protection, with the judge focusing too heavily on this principle due to the nature of the offences involving firearms.[418] Second, Fabbro asserted that he should have received credit for the time he spent under house arrest prior to sentencing. Third, he claimed that the judge did not adequately consider the impact of his mental health issues on his criminal behaviour, arguing for the imposition of a conditional sentence based on these factors.

The court identified two key errors in the sentencing judge's approach. The first error was an undue focus on denunciation and deterrence. The court determined that the sentencing judge failed to consider a crucial aspect of the case: Fabbro's possession of the firearm was linked to his intent to commit suicide rather than a desire to harm others.[419] It emphasized that, in Canada, attempting suicide is not a criminal offence and argued that the danger posed to the public was significantly lessened by the circumstances of the case; notably, the shotgun was not loaded, and Fabbro had indicated he did not intend to harm anyone but himself. Consequently, the court posited that the principles of rehabilitation should also have been considered alongside denunciation and deterrence.

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[417] *Ibid* at paras 16, 17. A conditional sentence is a jail sentence served in the community under strict conditions, typically when the sentence is less than two years and the person who offended is not considered a danger to the public.
[418] *Ibid* at para 18.
[419] *Ibid* at para 22.

The second error involved the causal link between Fabbro's mental health and his offence.[420] The court found that the sentencing judge did not adequately explore whether a causal relationship existed between Fabbro's mental health condition and his criminal actions. Evidence indicated that Fabbro's mental health issues and substance abuse significantly contributed to his conduct.[421] The court referenced pre-sentence reports and medical records as supportive evidence of this link, arguing that a lengthy custodial sentence would likely undermine Fabbro's progress in treatment and rehabilitation.

In light of these errors, the court concluded that the original sentence did not adequately reflect the circumstances of the case.[422] Consequently, it decided to allow the appeal and substitute the custodial sentence with a conditional sentence, recognizing Fabbro's significant strides in rehabilitation while maintaining the seriousness of the offences. The probation order and other ancillary orders imposed by the sentencing judge were left undisturbed.[423]

According to Chris Rudnicki, sentencing should be based on the principle of proportionality, considering both the severity of the crime and the degree of responsibility of the person offending.[424] Psychiatric illness can be a mitigating factor in reducing moral culpability, as persons with SMI may not be as morally responsible for their actions. Moreover, the impact of a sentence on a person offending with psychiatric illness should be considered, as such individuals may experience more severe consequences from incarceration, justifying a reduced sentence.[425] The decision in *Fabbro* exemplifies the difficulties of the conjunctive test. For

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[420] *Ibid* at para 24.
[421] *Ibid* at para 26.
[422] *Ibid* at para 31.
[423] *Ibid*.
[424] Chris Rudnicki, "The Troubling Conjunction in *R. v. Fabbro*" (2022) 70 Criminal L Quarterly at 430.
[425] *Ibid*.

example, a person who offends and suffers from psychiatric illness may be treated effectively in custody, but if they experience no lasting negative effects, they might not qualify for mitigation under the current test. This demonstrates the need for a more flexible approach in recognizing psychiatric illness as a factor in sentencing.[426]

Thus, in Fabbro's case, the sentencing judge failed to adequately appreciate the mental state as a mitigating factor. The sentencing judge focused predominantly on principles of denunciation and deterrence, neglecting to consider how Fabbro's mental health issues, including his intent to use the firearm for suicide, were integral to understanding the circumstances surrounding the offenses. By not recognizing the significant impact of his unresolved trauma and substance abuse on his actions, the sentencing judge overlooked the possibility of rehabilitation as a key sentencing principle, which could have led to a more compassionate and proportionate response that aligned with the objectives of restorative justice.

(b) *R v Ellis*

Like *Fabbro*, *Ellis* similarly demonstrates the challenges of the conjunctive test. This case involved Stevan Ellis, a member of the Immigration and Refugee Board's Refugee Protection Division, who was convicted of breach of trust contrary to section 122 of the *Criminal Code*.[427] His conviction stemmed from an incident where he attempted to pressure a female refugee claimant into a sexual relationship by offering to approve her application in exchange for intimacy.[428] This conduct was captured through audio and video recordings arranged by the complainant with the assistance of law enforcement.[429]

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[426] *Ibid.*
[427] *R v Ellis*, 2013 ONCA 739 CanLII at para 1.
[428] *Ibid* at para 29.
[429] *Ibid* at para 24.

At trial, Ellis was convicted and sentenced to 18 months' imprisonment.[430] The sentencing judge emphasized the seriousness of the offence, particularly the exploitation of power by a public official in a vulnerable setting.[431] The judge also considered the need for denunciation and general deterrence, stating that a custodial sentence was necessary to maintain public confidence in the integrity of administrative tribunals.[432]

Ellis appealed both his conviction and his sentence. Regarding the conviction, he argued that the verdict was unreasonable and that his interactions with the complainant were misinterpreted.[433] He claimed the recorded comments were misunderstood and lacked criminal intent. However, the Court of Appeal dismissed this argument, noting that Ellis chose not to testify at trial.[434] This failure to provide an innocent explanation for the recorded conversation allowed the trier of fact to reasonably conclude that his conduct was deliberate and criminal in nature.[435] The Court emphasized that in the absence of any credible alternative narrative, the trial judge was entitled to rely on the evidence presented and infer that Ellis had indeed abused his position.[436]

On the issue of sentence, Ellis submitted that his Bipolar Disorder should have been given more weight as a mitigating factor.[437] He argued that his mental illness contributed to his actions and that a custodial sentence was overly harsh in the circumstances. The majority of the Court of Appeal upheld the 18-month prison sentence, agreeing with the trial judge that the need for denunciation and deterrence in cases involving public corruption outweighed the mitigating

[430] *Ibid* at para 1.
[431] *Ibid* at para 54.
[432] *Ibid* at para 53.
[433] *Ibid* at para 54.
[434] *Ibid* at paras 26, 51.
[435] *Ibid* at para 51.
[436] *Ibid* at para 52.
[437] *Ibid* at para 54.

effects of his mental illness.[438] The Court acknowledged that while mental health can be relevant to sentencing, it does not necessarily reduce moral blameworthiness in every case - particularly where the offence involves a breach of trust and an abuse of power.[439]

Justice Laskin, dissenting, took a more lenient view. He argued that the sentencing judge did not properly balance the principles of sentencing in light of Ellis's mental health condition.[440] Laskin believed that a conditional sentence - one served in the community under strict conditions - could have adequately addressed the goals of rehabilitation, accountability, and deterrence without resorting to incarceration.[441] He highlighted that bipolar disorder, if causally linked to the offence, can reduce moral culpability and justify a less punitive sentence.[442]

Although Ellis had Bipolar Disorder, the majority of the Ontario Court of Appeal upheld his custodial sentence, emphasizing that the seriousness of his offence and the need for deterrence and denunciation outweighed the mitigating effect of his mental illness.[443] This reflects a key feature of Canadian sentencing law: while mental health issues can reduce moral culpability, they do not automatically lessen the severity of the sentence, especially when the person who offends is in a position of authority or the public interest is at stake. The decision also highlights that sentencing courts prioritize the accused's mental state at the time of the offence only when it demonstrably impairs their ability to understand or control their actions. In Ellis's case, the court found no sufficient link between his illness and the calculated nature of his conduct, reinforcing that Canadian courts require compelling evidence that mental illness

[438] *Ibid* at paras 128, 129.
[439] *Ibid* at para 128.
[440] *Ibid* at para 132.
[441] *Ibid* at para 202.
[442] *Ibid* at para 179.
[443] *Ibid* at para 129.

significantly influenced the offending behaviour in order to meaningfully affect sentencing outcomes.

The Socio-Historical Context of Racialized Persons with Psychiatric Illnesses

Racialization refers to the process by which certain groups of people are categorized and treated as distinct based on perceived racial differences, often leading to systemic inequalities.[444] In the context of mental health and the criminal justice system, racialization plays a crucial role in shaping how racialized individuals, such as Black and Indigenous Canadians, experience both psychiatric illness and criminal justice involvement. Understanding racialization is essential because it reveals the deep-rooted social, political, and economic factors that disproportionately affect these communities, contributing to their overrepresentation in experiencing mental illness and facing harsher treatment within the criminal justice system.

For Black Canadians, the socio-historical context of psychiatric illness is deeply tied to the legacies of slavery, colonialism, and systemic racism.[445] Black Canadians have historically been marginalized, subjected to discriminatory practices, and excluded from equal access to economic opportunities, education, and healthcare. These structural inequalities have created environments where poverty, trauma, and stress are prevalent, leading to higher rates of psychiatric illness within the community. The ongoing experience of anti-Black racism, coupled with generational trauma, exacerbates mental health challenges and limits access to mental health services.[446]

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[444] Adam Hochman, "Racialization: a defense of the concept" (2019) 42 Ethnic and Racial Studies.
[445] See Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Winnipeg, Fernwood Publishing, 2017).
[446] Bukola Salami et al, "Factors that contribute to the mental health of Black Youth" (2022) 194:41 CMAJ.

Indigenous Canadians face similar challenges, rooted in their own unique history of colonization, forced assimilation, and cultural erasure. The intergenerational trauma caused by events such as residential schools, the Sixties Scoop, and the forced removal of Indigenous peoples from their land has led to profound mental health impacts within Indigenous communities.[447] Many Indigenous youth experience family dysfunction such as poverty, psychiatric illness, abuse and violence, addiction, and as a result, disproportionately end up in foster care, which continues instability. Indigenous communities continue to be underfunded, remote reserves, where mental health services are either scarce or nonexistent.[448] The legacy of colonialism, along with the resulting poverty and lack of access to basic services, has left Indigenous populations disproportionately affected by psychiatric illnesses.[449]

Racialized individuals with psychiatric illnesses are at a heightened risk of involvement in the criminal justice system for several reasons. First, mental health care is often inaccessible due to socio-economic factors like poverty, which disproportionately affects Black and Indigenous populations.[450] For those living on remote Indigenous reserves, mental health services are underfunded and understaffed, leaving many without the necessary care to address their psychiatric conditions. Moreover, racialized individuals often face negative experiences with healthcare systems, including discrimination and a lack of cultural competence, which further discourages them from seeking help. Cultural concerns also play a role, as traditional ways of

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[447] Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto, University of Toronto Press, 2016) at 69, 74, 125, 138, and 145.
[448] *Ibid*.
[449] Sarah E. Nelson, "The mental health of Indigenous peoples in Canada: A critical review of research" (2017) 176 Social Science & Medicine.
[450] See Emily K. Hansson et al, "Rates of Mental Illness and Suicidality in Immigrant, Refugee, Ethnocultural, and Racialized Groups in Canada: A Review of the Literature" (2012) 57:2 The Can J of Psychiatry.

healing and mental health treatment may be disregarded or misunderstood by mainstream healthcare providers.[451]

As mentioned in Chapter 2, this lack of access to adequate mental health care significantly increases the likelihood that untreated mental illness will lead to criminal behaviour. When psychiatric conditions are left unaddressed, individuals may act in ways that are perceived as threatening or criminal, bringing them into contact with the justice system. Once there, the system often fails to consider the socio-historical context that has contributed to their mental health issues, instead prioritizing public safety over rehabilitation.

Two significant cases will be examined to demonstrate how these socio-historical contexts gave rise to the psychiatric illnesses of Christopher Husbands, a Black Canadian man, and Manasie Ipeelee, an Indigenous man. Both individuals ultimately offended due to their psychiatric illnesses and were harshly penalized by the courts,[452] reflecting the difficulty of the justice system to adequately consider the impact of racialization, psychiatric illness, and the structural inequities they faced.

(a) *R v Husbands*

On June 2, 2012, the appellant, Christopher Husbands, opened fire with a fully loaded semi-automatic handgun in the crowded food court of the Eaton Centre in Toronto, where over 700 people were present.[453] The shooting left one man dead at the scene, another critically injured who died nine days later, and a 13-year-old boy severely wounded after being shot in the head. Four other individuals suffered gunshot wounds, and a pregnant woman was trampled as

[451] *Ibid*.
[452] Ipeelee was originally sentenced harshly given his personal circumstances as an Indigenous man; however, his sentence was ultimately overturned after his appeal was successful.
[453] *R v Husbands*, 2024 CarswellOnt 2315, 2024 ONCA 155 at para 1.

the panicked crowd fled. The appellant was originally charged with two counts of first-degree murder, but a jury found him guilty of two counts of second-degree murder in December 2014.[454]

In 2017, the appellant's conviction was overturned on appeal, leading to a new trial where he could only be retried on second-degree murder charges. At his second trial in 2019, the jury found him not guilty of second-degree murder but guilty of two counts of manslaughter, five counts of aggravated assault, one count of criminal negligence causing bodily harm, and one count of recklessly discharging a firearm.[455] Husbands was sentenced to life imprisonment for the manslaughter convictions, with parole eligibility set at the statutory minimum of seven years.[456] The judge also imposed concurrent sentences for the other convictions, including a 14-year term for the aggravated assault of the boy shot in the head, with 10 years of credit for pre-sentence custody.[457] The appellant and the Crown both abandoned their appeals of the convictions and acquittals, leaving this as an appeal from sentence only.[458]

The appellant argued that the trial judge made several errors, including: (i) improperly applying the legal framework for considering social context evidence; (ii) using the wrong test to determine whether the appellant's PTSD was linked to his criminal behaviour; (iii) misapplying the test for delayed parole and failing to provide an adequate remedy for harsh pre-trial conditions and *Charter* violations; and (iv) imposing an unfit sentence.[459] The appellant sought to have the life sentences replaced with a fixed 15-year term of imprisonment. However, the court ultimately dismissed the appeal.[460]

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[454] *Ibid* at para 2.
[455] *Ibid* at para 3.
[456] *Ibid* at para 4.
[457] *Ibid* at para 5.
[458] *Ibid* at para 6.
[459] *Ibid* at para 7.
[460] *Ibid* at para 9.

In this case, the sentencing decision must be understood in the context of the jury's verdicts and the routes to liability. The trial focused on whether the appellant, who was undisputedly guilty of committing the offence, was criminally responsible for the deaths and injuries caused during the incident. The jury first considered the appellant's defence of being not criminally responsible due to a dissociative state at the time of the offence, but rejected it.[461] They then assessed whether the Crown had proven the necessary mens rea for second-degree murder, considering factors like the appellant's PTSD, fear of the brothers, and the rapid pace of events.[462] The jury ultimately found the appellant guilty of manslaughter, but not second-degree murder, possibly considering the defence of provocation. This set the stage for the sentencing issues raised on appeal.

In sentencing Christopher Husbands, the trial judge considered several key factors, including his challenging background and mental health issues. Husbands grew up in poverty and violence, first in Guyana and later in Toronto's Regent Park, where he faced systemic racism, crime, and police harassment.[463] His difficult childhood, marked by abuse and crime, shaped his choices, leaving him with limited options. While the judge acknowledged these social conditions as mitigating factors, particularly through an Impact of Race and Culture Assessment (IRCA) report,[464] the Ontario Court of Appeal found that his PTSD, though present, did not significantly impair his actions on the day of the shooting.[465] Husbands' decision to carry a concealed firearm into the Eaton Centre and target the brothers was viewed as a deliberate choice

[461] *Ibid* at para 26.
[462] *Ibid* at para 28.
[463] *Ibid* at para 39.
[464] An Impact of Race and Cultural Assessment (IRCA) is a report prepared for sentencing hearings in Canada that outlines how an individual's experiences of racism, systemic discrimination, and cultural background have influenced their life and contributed to their involvement in the criminal justice system.
[465] *Ibid* at para 38.

rather than a reaction rooted in psychiatric illness. Despite his youth, pro-social activities, and potential for rehabilitation, the trial judge found that his remorse was "ambiguous" and that without treatment, he posed a high risk of reoffending. Thus, while his environment contributed to his actions, the sentence remained severe due to the nature of the crime and his uncertain prospects for rehabilitation.[466]

The key issue in this case concerned whether the trial judge properly applied the legal framework for considering social context evidence, particularly regarding anti-Black racism, during sentencing. The appellant argued that the judge should have followed the principles outlined in *R v Morris*, which addresses the impact of social context evidence in mitigating moral blameworthiness.[467] Specifically, the appellant claimed that the judge wrongfully required a "direct causal link" between the social context evidence and the crime, rather than recognizing a "some connection" approach, as *Morris* later established.[468] The appellant maintained that a more lenient connection standard would have mitigated his blameworthiness for carrying a gun and shooting it at the Eaton Centre.

The trial judge, however, rejected this argument. While *Morris* was decided after the appellant's sentencing, the Ontario Court of Appeal found that the trial judge had already applied the principles consistent with *Morris*.[469] The judge admitted and considered the social context evidence but concluded that its connection to the appellant's actions - bringing a loaded gun to a public space - offered limited mitigation.[470] The judge reasoned that, even though the appellant faced anti-Black racism, this did not sufficiently reduce his moral responsibility for carrying and

[466] *Ibid* at para 44.
[467] *Ibid* at para 50, citing *R v Morris*, 2021 ONCA 680, 159 OR (3d) 641.
[468] *Ibid* at para 51.
[469] *Ibid* at para 66.
[470] *Ibid* at para 77.

using a deadly weapon in a way that endangered the public. The Court thus upheld the trial judge's decision, emphasizing that the appellant's objection was not to the legal framework but to the judge's conclusions, which are owed deference.[471]

The appellant also argued that the trial judge applied an overly strict test when determining whether his PTSD was linked to his criminal conduct.[472] He claimed his PTSD was a clear underlying cause of the 2012 shooting, which should have been a mitigating factor in his sentencing. The appellant criticized the judge for not applying a more lenient "some connection" test and instead looked for a connection as strict as that required for a defence under Section 16. Additionally, the appellant argued that the trial judge wrongly required further evidence to prove that a severe negative impact of the sentence was necessary for a reduced sentence on compassionate grounds.[473]

The trial judge based his decision on established case law, summarizing previous rulings like *R v Prioriello* and *R v ACKT.*[474] He acknowledged that a mental illness could mitigate a sentence if it was an underlying reason for the criminal conduct. However, the judge found that the appellant's PTSD, while possibly explaining the speed of events, was not a significant mitigating factor.[475] The appellant was not dissociative during the shooting and made conscious choices, like carrying a concealed, loaded handgun, which were not influenced by PTSD.[476] Although the PTSD may have contributed to the appellant's hyper-vigilance and rapid response, it did not significantly reduce his culpability.[477]

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[471] *Ibid* at para 78.
[472] *Ibid* at para 79.
[473] *Ibid.*
[474] *Ibid* at para 80. See *R v Prioriello*, 2012 ONCA 63, 288 OAC 198 and *R v ACKT*, 2015 ONSC 1169.
[475] *Ibid* at para 83.
[476] *Ibid* at para 85.
[477] *Ibid* at para 89.

Husbands felt as though the sentencing judge did not fully appreciate the broader social context of his experiences as a Black man who had been the victim of violence and lived with PTSD, which are experiences that many Black racialized minorities face. This limited understanding has significant consequences in both sentencing and how mental illness is treated within the justice system. By focusing narrowly on the absence of a dissociative state or other extreme mental health symptoms at the time of the offence, courts miss a broader understanding of how chronic trauma, especially from racialized violence, can affect decision-making, hypervigilance, and survival instincts. Black individuals are often exposed to higher levels of violence, systemic oppression, and discrimination, which contribute to conditions like PTSD.[478] Without appreciating this, sentencing judges may underplay the impact of such trauma.

Further, the sentencing judge's narrow view of PTSD as a mitigating factor, focusing on more direct and extreme links between the mental illness and the criminal act, overlooked the complex social realities that racialized minorities face. Black individuals are more likely to experience traumatic events due to systemic racism and marginalization, yet these experiences are often under-recognized in legal settings. By not considering this broader context, the sentencing judge failed to acknowledge the systemic inequalities that contribute to the offender's mental health struggles, perpetuating the cycle of disadvantage within the justice system. In this case, Husbands' psychiatric illness, marked by his adversity and background, was ultimately insufficient in reducing his moral blameworthiness.

Lastly, a narrow interpretation of psychiatric illness and trauma as mitigating factors in sentencing can lead to punishment outcomes that are harmful for individuals such as Husbands.

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[478] See, for example Tanya N. Alim, Dennis S. Charney, & Thomas A. Mellman, "An overview of Post-Traumatic Stress Disorder in African Americans" (2006) Journal of Clinical Psychology 62.

It is well documented that sentencing individuals with PTSD to prison worsens their condition due to the stressful, violent, and isolating environment of incarceration.[479] Without access to specialized mental health care, symptoms like hypervigilance, flashbacks, and emotional dysregulation can intensify, increasing the risk of harm to themself or to others. These individuals may also struggle to follow rules or interact with others, leading to disciplinary actions and longer sentences.[480]

(b) *R v Ipeelee*

R v Ipeelee is a leading Supreme Court of Canada decision that reaffirmed the mandatory consideration of *Gladue* principles when sentencing Indigenous offenders, regardless of the seriousness of the offence or the prior record of the person offending.[481] The case involved Manasie Ipeelee, an Inuk man from Nunavut, who had a deeply troubled upbringing marked by the death of his mother, early exposure to alcohol, time in foster care, and significant disconnection from his cultural roots.[482] He had accumulated a long criminal record primarily involving violent and alcohol-related offences.[483] In 1999, Ipeelee committed a serious offence when he physically and sexually assaulted a homeless woman and threatened to kill her.[484] In 2001, Ipeelee was declared a long-term offender and sentenced to six years in prison, followed by a 10-year Long-Term Supervision Order (LTSO).[485] In 2008, while living in Kingston, Ontario, he breached a term of the LTSO by consuming alcohol.[486] Despite this being a

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[479] Emma Facer-Irwinn et al, "PTSD in prison settings: A systematic review and meta-analysis of comorbid mental disorders and problematic behaviours" (2019) PLoS ONE 14:9.
[480] *Ibid.*
[481] *R v Ipeelee*, 2012 SCC 13 CanLII, [2012] 1 SCR 433.
[482] *Ibid* at para 2.
[483] *Ibid* at para 3.
[484] *Ibid* at para 9.
[485] *Ibid* at para 10.
[486] *Ibid* at para 13.

non-violent breach, the sentencing judge imposed a three-year prison sentence, reasoning that *Gladue* considerations were of little relevance due to Ipeelee's lengthy record and repeated breaches.[487]

The legal issue before the Supreme Court was whether sentencing judges are still required to apply *Gladue* principles in cases involving breaches of supervisory orders, and whether failure to do so renders a sentence unfit or disproportionate.[488] The Supreme Court decisively ruled in favour of this, reaffirming that *Gladue* principles, rooted in s. 718.2(e) of the *Criminal Code*, are not optional and must be applied in all cases involving Indigenous persons who offend.[489] The Court clarified that these principles are not a form of leniency, but are intended to remedy the systemic discrimination faced by Indigenous people in the criminal justice system, and to ensure that sentencing reflects the offender's reduced moral blameworthiness where applicable.[490]

Justice LeBel, writing for the majority, emphasized that courts must engage with the offender's individual and collective history, including the intergenerational effects of colonialism, residential schools, poverty, substance abuse, and cultural dislocation.[491] In Ipeelee's case, the Court found that the trial judge had failed to meaningfully consider these factors, instead treating his background as irrelevant because of his prior offences.[492] This was a legal error. The Supreme Court found that Ipeelee's moral blameworthiness for the breach was mitigated by his

[487] *Ibid* at para 14.
[488] *Ibid* at para 16.
[489] *Ibid* at para
[490] *Ibid* at para 37, 38.
[491] *Ibid* at paras 126, 134.
[492] *Ibid* at para 134.

background and circumstances, and that a three-year sentence was grossly disproportionate.[493] The sentence was reduced to one year.[494]

Ipeelee underscores a key failure in sentencing practices: the inadequate consideration of how the unique experiences of Indigenous offenders - particularly those involving intergenerational trauma, colonial displacement, and substance dependency - affect their mental state in such a way that it leads to their criminal behaviour. Ipeelee's alcoholism, rooted in a life marked by systemic marginalization, the loss of his mother, foster care, and cultural disconnection, was more than a personal vice. It reflected a broader psychological and emotional struggle that impaired his ability to regulate emotions, exercise reason, and avoid harmful conduct. Yet, the sentencing judge initially dismissed these factors, illustrating a recurring issue by sentencing judges where Indigenous offenders' mental health challenges, shaped by their collective and individual histories, are not treated with the nuance required by *Gladue*. This omission not only undermines the principle of proportionality in sentencing but also perpetuates systemic injustices by failing to recognize the ways in which colonialism continues to shape Indigenous peoples' interactions with the justice system. The Supreme Court's correction in *Ipeelee* signifies that Indigenous offenders' mental and emotional realities must be central, not peripheral, when assessing moral blameworthiness and determining fair, rehabilitative sentences.

One of the key challenges in applying *Gladue* principles for psychiatrically ill Indigenous persons who offend lies in the legal system's struggle to meaningfully integrate mental health considerations within a culturally informed framework.[495] While *Gladue* requires courts to consider the systemic and background factors that affect Indigenous offenders, such as

[493] *Ibid* at paras 135, 137.
[494] *Ibid* at para 93.
[495] Sujung Lee, "Re-Evaluating Moral Culpability in the Wake of *Gladue*" (2020) 28 Toronto Fac. L. Rev. 109 at 135.

residential school trauma, poverty, and colonial displacement, it does not provide a clear structure for how to weigh these factors when they intersect with psychiatric illness.[496] Further, some judges have incorrectly applied s.718.2(e) due to reserving their application in two situations: 1) if a causal link could be established between the offence, the individual's Indigeneity, and systemic factors, and 2) the offence committed was not deemed serious.[497] Indigenous persons who offend commit non-serious offences significantly more than serious offences,[498] and as demonstrated throughout cases such as *Salifu, Husbands,* and *Ipeelee*, it is difficult for judges to establish a causal link between psychiatric illness and the committing of the offence in any given case. This is because the person who offended is still viewed as having the moral agency to appreciate the wrongful nature and quality of the act, thus moral blameworthiness and criminal responsibility are reduced only for persons who offend with the most severe SMI.

Another challenge reported by judges is that they often lack the training or resources to properly understand the link between colonial trauma and psychiatric disorders like depression, PTSD, or substance use disorders, leading to inconsistent and sometimes superficial application of *Gladue* principles.[499] Moreover, when the psychiatric illness leads to violent or repeated criminal behaviour, sentencing judges frequently prioritize public safety, often sidelining

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[496] *Ibid*.
[497] Michael Michel, "The Application of *Gladue* Principles During NCRMD and Fitness Disposition Hearings" (2022) 44:5 Manitoba L Rev at 143.
[498] Mary Allen, "Crime reported by police serving areas where the majority of the population is Indigenous, 2018) Statistics Canada (18 November 2020), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00013-eng.htm>. Non-serious offences include theft under $5,000, trespassing, and low-level motoring offences.
[499] Hayden King and Paula Hill, "Twenty-Five Years of Gladue: Indigenous 'Over-Incarceration' & the Failure of the Criminal Justice System on the Grand River" (Yellowhead Institute, 2024) at 18.

rehabilitation and cultural context in favour of incarceration.[500] This creates a paradox in which psychiatric illness - although often caused or worsened by colonial harms - is used to justify more punitive responses.

Conclusion

In analyzing the cases of *R v Fabbro*, *R v Ellis*, *R v Husbands*, and *R v Ipeelee*, it becomes evident that sentencing in Canada often experiences difficulty in adequately accounting for the social context and mental health of individuals who offend. In *Fabbro*, rehabilitation is a key sentencing principle, yet its implementation can fall short in recognizing the unique circumstances surrounding the person offending. In *Ellis*, the Ontario Court of Appeal upheld his prison sentence, reasoning that the severity of his offence and the importance of deterrence and denunciation were more significant than the mitigating impact of his psychiatric illness. Similarly, in *Husbands* and *Ipeelee*, the intent of section 718.2(e) to address the specific needs of persons who offend is undermined by a lack of effective consideration for their social backgrounds and mental states, particularly in the context of intergenerational trauma and systemic marginalization. While the Supreme Court in *Ipeelee* ultimately ruled in favour of applying *Gladue* principles to Indigenous persons involving breaches of supervisory orders, ensuring the consistent and fair application of *Gladue* to all Indigenous persons who offend is an ongoing challenge.

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[500] It is appropriate for judges to favour incarceration as public safety is a key consideration; violent crime and recidivism can lead to lack of public confidence in the justice system if judges fail to hold persons who offend accountable. However, the main concern is that the necessary rehabilitation is not sufficiently considered. Indigenous persons have the highest rate of recidivism, and this is the result of the prison system struggling to provide access to culturally sensitive mental health care and rehabilitative services for Indigenous persons. *See* Gloria Park, "Colonialism and the Failure of Retribution in the Canadian Justice System: How to Support Indigenous Offenders" (2021) 8 Revue YOUR Rev at 8. Park notes that Indigenous persons are 5 times more likely to be recidivists compared to non-Indigenous offenders in Canada.

These cases illustrate a critical gap in the justice system, where the complexities of psychiatric illness and the social realities of offenders are not sufficiently integrated into sentencing decisions. Consequently, incarceration often proves ineffective in addressing the root causes of psychiatric disorders, leaving individuals without the necessary support for rehabilitation. As such, a more comprehensive approach that prioritizes mental health treatment and considers the unique experiences of offenders is essential for fostering true rehabilitation and reducing recidivism.

Chapter 5: Conclusion

In conclusion, the mental health crisis in the Canadian correctional system is a complex, systemic issue that demands urgent attention. While prisons are intended to serve as institutions for punishment and, ideally, rehabilitation, they are increasingly being populated by individuals with serious mental illness who are unable to access the care and treatment they need. As outlined in this thesis, one of the most alarming aspects of this crisis is the significantly high rate of SMI in correctional institutions, a reality that prisons are ill-equipped to address. Barriers to mental health treatment in prison are numerous, ranging from inadequate mental health services, lack of specialized staff, and a carceral environment that exacerbates rather than alleviates psychiatric symptoms. Particularly concerning is the overrepresentation of Indigenous persons in prisons, many of whom experience mental illness in conjunction with their historical and socio-economic marginalization.

The causes of this mental health crisis are varied, with punitive legal frameworks such as the *Safe Streets and Communities Act* and Bill C-14 being significant contributing factors. These pieces of legislation reflect a broader cultural tendency towards punishment over rehabilitation, especially for those with mental health issues. However, there is an often-overlooked yet critical aspect in understanding the roots of this crisis - the role of the *Canadian Criminal Code* itself. The provisions of sections 16(1) and 718.2(e), which ostensibly aim to balance public safety with rehabilitation, have instead played a detrimental role in worsening the mental health crisis in Canadian prisons.

Section 16(1) of the *Criminal Code*, which governs the NCR defence, has historically been intended to address situations in which a person's psychiatric illness significantly impairs their ability to understand the nature and quality of their actions. While the NCR defence

provides an alternative to imprisonment for individuals who qualify, this thesis has demonstrated second criteria for obtaining this defence - proving that the SMI of the accused rendered him or her unable to appreciate the wrongful nature and quality of their act - is prohibitively high. A review of the case law, including *R v Warsing* and *R v Salifu*, reveals that even individuals with strong evidence of a connection between their mental disorder and criminal behaviour can fail to meet this stringent standard. Warsing, for example, had a history of psychiatric illness that played a significant role in his offending, yet he was unable to secure an NCR verdict. This leads to individuals with SMI being incarcerated in environments that cannot accommodate their needs, thus perpetuating the cycle of psychiatric illness.

In addition to the limitations of section 16(1), this thesis has explored how sentencing judges have also contributed to the mental health crisis in Canadian prisons. The sentencing principles of public safety and rehabilitation require sentencing judges to consider mitigating factors, including psychiatric illness, in sentencing decisions. However, as the case of *R v Fabbro* illustrates, sentencing judges do not always adequately weigh mental health in their decisions. Fabbro, who was suicidal at the time of his offence and had no intention of harming anyone else, was sentenced harshly despite the role his psychiatric illness played in his actions. His case demonstrates the diminished role of mental health considerations in sentencing, which fails to reflect the intended purpose of the sentencing principles. This not only undermines the rehabilitative aspect of sentencing but also results in individuals with untreated mental health conditions being incarcerated for lengthy periods, where their conditions often deteriorate. In *Ellis*, the Ontario Court of Appeal upheld his prison sentence despite his psychiatric illness, stressing the seriousness of the offence and the importance of deterrence. This reflects the challenging legal principle that while SMI must be considered by sentencing judges, the presence

of it does not automatically reduce a sentence unless it clearly impacts moral culpability. Courts give weight to psychiatric illness only when it significantly impairs the offender's ability to understand or control their actions. In Ellis' case, the sentencing judge found no strong link between his mental state and his deliberate conduct.

I also examined how a key issue with psychiatric illness as a mitigating factor is that accused may feel that sentencing judges do not sufficiently consider how their psychiatric illness influenced their behaviour, thus reducing their moral blameworthiness. In *Husbands*, Husbands believed the sentencing judge failed to understand the broader social context of his trauma as a Black man living with PTSD, shaped by violence and systemic racism. This narrow view led to a limited consideration of his psychiatric illness during his sentencing. Sentencing judges often overlook how chronic trauma from adversity can influence behaviour, focusing instead on the absence of extreme symptoms like dissociation. Black individuals are disproportionately affected by adversity such as violence and discrimination, increasing their risk of psychiatric illnesses such as PTSD. When sentencing judges do not give sufficient weight to these mitigating factors, they risk underestimating the impact of trauma on the person accused. Ultimately, Husbands' psychiatric illness, marked by his adversity and background, was insufficient in reducing his moral blameworthiness.

Furthermore, Section 718.2(e) instructs sentencing judges to consider alternatives to imprisonment for Indigenous persons who offend, taking into account the historical and socio-economic factors that contribute to their overrepresentation in the criminal justice system. However, the application of this provision has been inconsistent, and Indigenous persons with psychiatric illness are frequently overlooked in sentencing. As discussed in the case of *Ipeelee*, there is a strong need for sentencing judges to consider how intergenerational trauma, substance

abuse, and systemic discrimination, - often linked to mental health struggles - shape the moral blameworthiness of Indigenous persons who offend. The failure of the justice system to address the intersection of psychiatric illness and the historical marginalization of Indigenous communities exacerbates the continued overrepresentation of Indigenous persons in Canadian prisons.

The failure of these provisions - sections 16(1) and 718.2(e) - to properly address mental health needs in the criminal justice system is evident. Instead of achieving a balance between public safety and rehabilitation, the application of these provisions often skews towards punishment, with little consideration for the long-term impact on individuals with SMI. Those who do not qualify for the NCR defence under section 16(1) are sentenced to prison, where they are subjected to an environment that exacerbates their mental health conditions, without access to the treatment they need. For individuals with psychiatric illness who do not meet the NCR criteria, it is difficult to prove that psychiatric illness can reduce moral blameworthiness. Persons who offend disproportionately come from backgrounds marked by racialization or psychiatric illness, yet mitigating factor provisions that implicitly include mental state and *Gladue* principles do not protect these individuals from lengthy incarceration sentences - the worst option for those with psychiatric illness.

My thesis argued that a fundamental rethinking of the centrality of psychiatric illness in one's offence is necessary to address the growing mental health crisis in Canadian correctional institutions. Given that a disproportionate rate of persons who become involved in the criminal justice system present psychiatric illness, it is imperative that governments and the justice system strive to increase access to mental health services and social services to address the underlying mental health needs of persons both in the community and in prisons. Furthermore, the

application of section 718.2(e) should be revisited to ensure that mental health and socio-historical factors are given greater weight in sentencing decisions. Judges must be provided with clear guidance on how to incorporate these considerations, particularly for marginalized groups such as Indigenous persons, whose overrepresentation in the prison system is inextricably linked to their experiences of historical trauma and psychiatric illness. By placing a greater emphasis on rehabilitation and treatment in sentencing decisions, the justice system can begin to address the root causes of offending and break the cycle of incarceration for individuals with psychiatric illness.

Therefore, while the *Canadian Criminal Code* aims to balance public safety with rehabilitation, the current application of sections 16(1) and 718.2(e) undermines this goal. The stringent second component of the NCR test under section 16(1), along with the inconsistent application of mental health considerations in sentencing, have contributed to the growing mental health crisis in Canadian prisons. To address this, both the community and the correctional system should enforce greater access to mental health support and treatment.

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