The Socially Acceptable NCRMD Defence

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Abstract

Not criminally responsible on account of mental disorder (NCRMD) is a necessary but often unknown and underappreciated legal defence, used to divert offenders from the criminal justice stream to the medical stream when suffering from mental health issues that impair understanding for their criminality. NCRMD in various capacities has had a long history in Canadian justice, yet research suggests Canadians remain unaware of how NCRMD works, and why this legal defence is necessary. Lack of understanding surrounding NCRMD has led to misconceptions in the public about this judicial defence, and continued stigmatization towards mental illness. A definition and history of NCMRD is summarized, along with an outline of NCRMD legislation in Canada, literature examining criminological theories, and an exploration of society's understanding of justice. Research also explored the benefits and limitations of the NCRMD system based on perceptions expressed through media. Through a Canadian lens, this research summarizes three well-documented cases where NCRMD was the successful defence: *R v de Grood*, 2016 ABQB 294; Vincent Li; *R v Schoenborn*, 2010 BCSC 220. These cases have been widely discussed in the media, and are referenced frequently throughout this thesis. These case summaries also include victim and offender statements, speaking to victim/offender experiences within the NCRMD system. This thesis concludes with an analysis of perceptions on NCRMD expressed through the media, a focus on the language of the NCRMD defence, how aspects of NCRMD and restorative justice align, and drawing conclusions around the viability for NCRMD reform in Canada.

Keywords: Not criminally responsible, NCRMD, Review Board, mental illness, stigma

The Socially Acceptable NCRMD Defence

Exemption from criminal responsibility due to an offence being committed as a result of a mental disorder, has lived within the Canadian criminal justice system for many years (Pilon, 2002). It exists due to the foundational belief that the criminal justice system recognizes those who are morally innocent when assessing guilt (Baron, 2019). There is a long history of established insanity defence cases in Canada for over 100 years (Goossens et al., 2021). Not criminally responsible on account of mental disorder (NCRMD) research is broad, including the history of NCRMD, NCRMD legislation through the years, understanding who NCRMD serves, appreciating how society perceives justice within NCRMD, operationalizing the definition of NCRMD, and evaluating NCRMD and its ties to restorative justice. The aim of this research is to answer the research question: how have perceptions towards NCRMD and mental illness impacted society's view of the NCRMD defence, and is there merit to (or what benefit could be realized from) initiating reform and modernizing the legal defence of NCRMD?

The perceptions of NCRMD from the standpoint of victims, offenders, and the public including political references will be reported. Exploring these positions by uncovering perceptions, comparing theories and measuring against observations, supports the hypothesis that NCRMD can be seen as a more appreciated and socially accepted defence.

Methodology

Researching the background of NCRMD in Canada to understand overall perceptions of the NCRMD legal defence is operationalized through this research by exploring the history of NCRMD, criminological theories of crime, how society views justice, researching the benefits and limitations of NCRMD and looking at NCRMD case studies. The methodology for this research explains the process for how these areas will be explored, in pursuit of answering the

question: based on the research of legislation, public perceptions, and use of the NCRMD defence, is NCRMD reform required?

The research for this thesis employs a qualitative approach, including data collection and literature review, exploring both peer-reviewed and grey literature. Grey literature is described as a three tier process: the first tier includes publications, government reports and book chapters; the second tier includes news articles; the third tier includes blogs and tweets (Adams et al., 2016). There is benefit to including grey literature in research, where grey literature augmented peer-reviewed literature and was seen as a gap-fill measure, including information not always reported in academic writing (Adams et al., 2016).

The literature review for this research is primarily of Canadian focus, aside from discussion of the inception of NCRMD and programs within the restorative justice field, which include reference to research outside of Canada. The NCRMD cases reviewed in this thesis are solely of Canadian focus.

Media reports identified for this research are cited for the purpose of gathering quotes from victims and offenders. Media reports (a type of second tier grey literature) is the primary source of grey literature in this research, and represents first-hand accounts of explaining in their own words how victims and offenders perceive the system of NCRMD. This approach is employed with the goal of understanding the needs of users of the NCRMD system.

Grey literature through media reporting offers the opportunity to hear the words of those impacted by NCRMD in the absence of primary data collection.

Limitations of this research include the absence of primary data collection, which would greatly benefit future research on this subject, in collecting first-hand accounts from victims and offenders rather than relying on quotes in the media.

Literature regarding perceptions of NCRMD is outdated and understudied (Goossens et al., (2021). They argued that research discussing public opinion on NCRMD has declined (Goossens et al., 2021). These gaps in literature highlight the connection between the NCRMD defence and the opportunity to expand research as it relates to understanding public perceptions towards NCRMD.

What is NCRMD

NCRMD is a legal defence in Canada, available to those found guilty of an offence who did not have the mental capacity to understand their behaviour was wrong (Yamamoto et al., 2017). It is also referred to as being incapacitated by a mental disorder (Pilon, 2002). Offenders found NCRMD are exempt from criminal responsibility (*Criminal Code*, RSC 1985, c, C-46, s 672.34). The *Supreme Court of Canada* (SCC) echoed this definition, stating NCRMD is an exemption from criminal responsibility and an exemption from criminal liability (*R v Schoenborn*, 2010 BCSC 220, at para 22). "Although expert medical evidence is typically used to support a finding of mental disorder, NCRMD is a legal rather than a scientific finding" (Baron, 2019, p. 6).

NCRMD is similar to the defence of Not Guilty by Reason of Insanity (NGRI) in the United States (Goossens et al., 2021; Yamamoto et al., 2017).

Offenders who successfully claim NCRMD will bypass the criminal justice stream and instead receive treatment within the mental health system (Haag et al., 2021). A further explanation states, "The law recognizes that in some cases, a person's mental capacity fails to meet the basic elements required for participation in the criminal process" (Baron, 2018, p. 5).

The majority of those claiming NCRMD were diagnosed within the psychosis spectrum, with many offenders not having committed violent crimes, and most had low recidivism rates (Mental Health Commission of Canada, 2013).

The interpretation of mental disorder is outlined in section 672 of the *Criminal Code*, along with applicable definitions, Review Board regulations, rules surrounding unfit to stand trial versus mental disorders, assessment reports, and verdict requirements of NCRMD (*Criminal Code*, RSC 1985, c, C-46, s 672, 1-95).

Section 672.54 discusses the three dispositions available to a Review Board when determining sentences for NCRMD, with consideration towards the discharge being "the least onerous and least restrictive to the accused" (Government of Canada, n.d.). The three dispositions, outlined in section 672.54 of the *Criminal Code*, and expanded upon by Crocker et al., (2015), Goossens et al. (2021), and Wakefield (2021), include:

- Absolute discharge, meaning freedom from authority, without conditions.
- Conditional discharge, which allows offenders to live in the community under restrictions and supervision.
- Detention in custody/hospital, also referred to as full warrant, includes detention in a mental hospital or approved group home.

NCRMD offenders will be subject to annual review of their disposition (Brodsky, 2017). The timing of the review is legislated but the certainty of a release date is not (Brodsky, 2017). The NCRMD offender who is designated high-risk accused will have their disposition reviewed every three years (Brodsky, 2017).

NCRMD Legislation

NCRMD is defined in section 16 of the *Criminal Code* as the "Defence of mental disorder" (*Criminal Code*, RSC 1985, c, C-46, s 16, 1-3). Section 16 discusses criminal responsibility and the burden of proof, which states:

"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.

16(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

16(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue." (*Criminal Code*, RSC 1985, c, C-46, s 16, 1-3).

The *Criminal Code* is legislated federally, with mental health and criminal justice services being administered provincially (Crocker et al., 2015).

History of NCRMD

The insanity defence has existed in Canada since the mid 1800's, with frequent reference to the landmark case of Daniel M'Naghten (Hunt et al., 2019; McLachlin, 2010; Yamamoto et al., 2017). M'Naghten, having shot and killed secretary to the British prime minister, Edward Drummond in 1843, was acquitted by reason of insanity (Hunt et al., 2019). M'Naghten suffered from mental illness (McLachlin, 2010). Negative public reaction to the jury decision of insanity in M'Naghten's case caused higher courts to promulgate the definition of insanity within judicial systems, known as the M'Naghten Rules (Hunt et al., 2019; McLachlin, 2010).

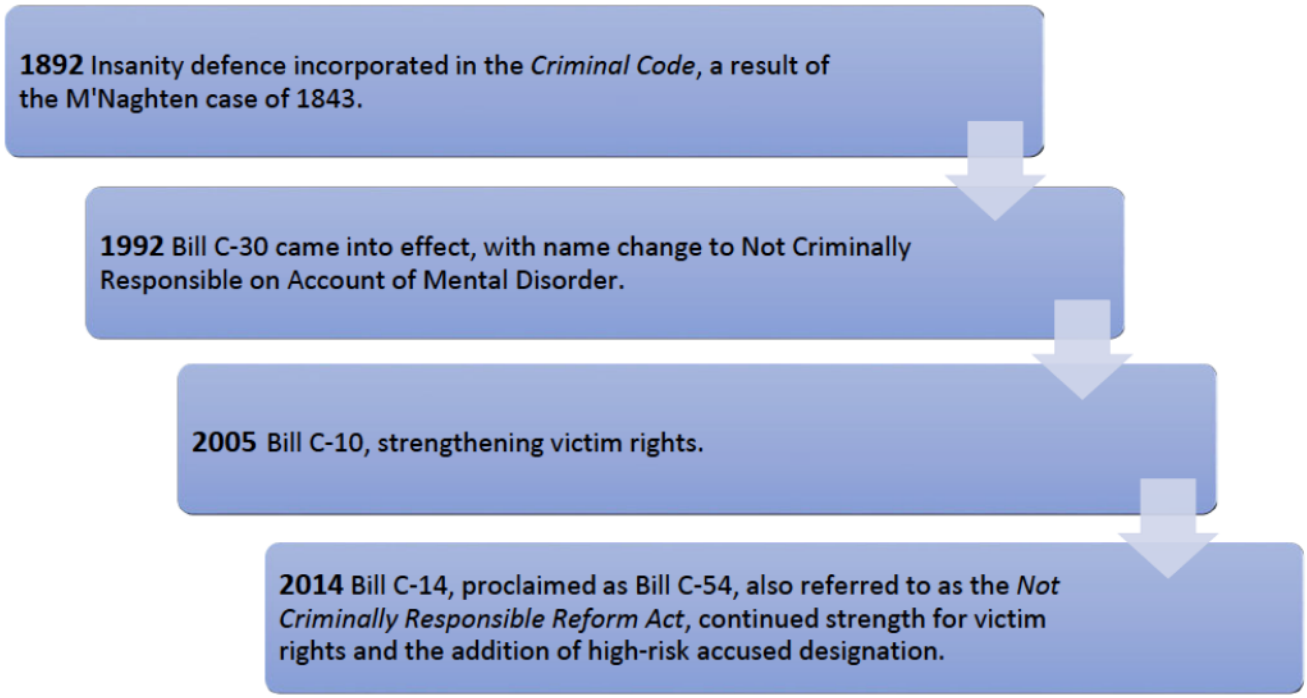
The defence of insanity, born from M'Naghten's case, became entrenched in the Canadian *Criminal Code* in 1892 which, "disallowed conviction of any accused who, because of 'natural imbecility or disease of the mind,' was 'incapable of appreciating the nature and quality of the act or omission,' and of knowing that it was wrong" (Pilon, 2002, "History" section).

The insanity defence in Canada was not changed until the 1992 introduction of Bill C-30, including the change in wording from 'not guilty by reason of insanity' (NGRI) to 'not criminally responsible on account of mental disability' (NCRMD), and the 2014 introduction of Bill C-14/C-54 (Baillie, 2015; Hunt et al., 2019). A third bill is noted in the research by Grantham (2014), Bill C-10 introduced in 2005.

Figure 1 provides an overview of the important dates in the history of the insanity defence in Canada, following the M'Naghten decision.

Figure 1.

History of NCRMD reform in Canada and summary of major changes.



Bill C-30

An amendment to the *Criminal Code* in 1992 introduced new legislation, with the purpose of providing fair treatment for the accused while still protecting the public from danger (Lacroix et al., 2017). According to Pilon (2002), 1986 saw initial discussions of reform to the mental disorder defence which then became Bill C-30 in 1992. Bill C-30, introduced in 1992, was referred to as an "overhaul of the mental disorder regime", with changes leading to an increase in offenders using the NCRMD defence (Lacroix et al., 2017, p. 48).

Bill C-30 as it relates to NCRMD included: expanding the defence to include summary convictions, more autonomy provided to courts in assigning the disposition (which removed reference to the role of the Lieutenant Governor), giving courts greater access in obtaining psychiatric assessments, and giving provinces responsibility for autonomously enacting their own provincial Review Board (Pilon, 2002). The name of the defence was also changed to 'not criminally responsible on account of mental disorder' (Pilon, 2002).

Hunt et al. (2019) discussed the defining aspects of two Canadian landmark cases: *R v Swain* (1991) and *Winko v British Columbia* (1999) as it pertains to NCRMD reform, with Bill C-30 being implemented because of *Swain*. *Swain* and *Winko* held significance in how the NCRMD defence was reformed, as it relates to the rights of NCRMD accused and how Review Boards adjudicate dispositions (Haag et al., 2021).

***R v Swain* (1991)**

Owen Swain was found not guilty by reason of insanity in the offence of assault against his family in 1983 and was detained under the Lieutenant Governor Warrants system (McLachlin, 2010). Because of his automatic detention, which did not include a hearing, Swain

brought forward a constitutional challenge to the *Supreme Court of Canada* (SCC) in 1991 (McLachlin, 2010).

The *Swain* decision at the SCC stated a person should not be held "indefinitely at the pleasure of the Lieutenant Governor", as was the case prior to the *Swain* ruling (Lacroix et al., 2017, p. 45). The *Swain* decision limited a Review Board's authority to detain the acquitted without end, seen to improperly deprive the offender's liberty (Lacroix et al., 2017). Prior to the case of *R v Swain*, the safety of the public superseded the freedom of the NCRMD offender (Lacroix et al., 2017). Concerns raised regarding a section 7 *Charter* infringement during the *Swain* decision was the impetus behind the changes to the *Criminal Code* as it relates to mental disorder, with such changes coming into effect in 1992 (*R v Pinet*, 1995 CanLII 371 (ONCA)).

***Winko v British Columbia* (1999)**

The appeal of a Review Board's disposition decision brought about the case of *Winko v British Columbia* (1999) (Lacroix et al., 2017). Having a history of mental illness and a diagnosis of schizophrenia, Joseph Winko was arrested in 1983 after attacking two people with a knife (*Winko v British Columbia*, 1999 2 S.C.R. 625 at para. 3). The case of *Winko v British Columbia* was important as it expanded on the definition of significant threat, resulting in the elaborated definition being codified into the *Criminal Code*: "significant threat means the accused poses a real risk of serious physical or psychological harm to members of the public" (Walker-Renshaw & McIntyre, 2018, para. 3). In the SCC case of *Winko v British Columbia*, section 672.54 of the *Criminal Code* was referenced, stating an accused who falls under the successful defence of NCRMD cannot be held if the Review Board does not deem that person a significant threat to public safety (Walker-Renshaw & McIntyre, 2018). The *Winko v British Columbia* SCC decision also reinforced the principle that evidence not presumption must support significant threat, and

that the conduct of the offender needs to be deemed criminal as opposed to incidental (Walker-Renshaw & McIntyre, 2018). Research shows that *Winko v British Columbia* was a defining case as it relates to the disposition of the accused, balanced with the safety of the public, quoting SCC Justice McLachlin for the majority, "Justice requires that the NCR accused be accorded as much liberty as is compatible with public safety" (Lacroix et al., 2017, p. 49).

Other Court Cases Impacting NCRMD Reform

Although impactful, but not referenced as widely as *Swain* and *Winko,* research discussed additional court cases relevant to the initiation of NCRMD reform. The appeal of *Pinet v St. Thomas* (2004) is one such case. In the appeal, Pinet was found not guilty by reason of insanity (the historical name of the defence) on four counts of murder dating back to 1976 (*R v Pinet*, 1995 CanLII 371 (ONCA)). At his review hearing in 1993, Pinet, still housed in a maximum-security facility since the late 1970s, appealed to move to a medium-security facility, seen as being least onerous on the offender and referencing the *Swain* decision (*R v Pinet*, 1995 CanLII 371 (ONCA)). The SCC *Pinet v St. Thomas* decision emphasized the importance of the balance of the offender's liberty and that of public safety, with the safety of the public highlighted when it comes to a Review Board considering decisions of discharge for the NCRMD acquitted (Lacroix et al., 2017).

Research identified additional cases that had relevance to *Charter* challenges in SCC decisions related to NCRMD. These cases included: *R v Chaulk,* 1990, and *R v Cooper*, 1980 (Baron, 2019), as well as *Penetanguishine Mental Health Center v Ontario*, 2004 (Lacroix et al., 2017).

Bill C-10

Bill C-10, introduced in 2005, was an amendment to the *Criminal Code* in reference to dealing with mentally ill offenders (Grantham, 2014). Although scant mention of Bill C-10 in research explored on NCRMD for this thesis, Grantham (2014) stated Bill C-10 strengthened victim rights and offered less regard for offenders. Research stated this bill repealed disposition capping provisions, added the ability for victims to present impact statements at disposition hearings where applicable, provided notice upon request to victims of disposition hearings, and the ability in certain circumstances to extend occurrence of disposition reviews (Grantham, 2014).

Bill C-14, Proclaimed as Bill C-54, and also known as the *Not Criminally Responsible Reform Act*

Research on this bill showed three names it is referred to: Bill C-14; proclaimed as Bill C-54; and the *Not Criminally Responsible Reform Act* (NCRRA). The use of these three names varies by author.

Bill C-14, brought to life in 2014 during the reign of former Prime Minster to Canada, Stephen Harper, was enacted by the federal government to amend sections of the *Criminal Code* and the *National Defence Act*, as it relates to mental health (Lacroix et al., 2017). Bill C-14 was reported as controversial, and "the 'tougher-on-crime' approach" seen as having a significant impact on NCRMD (Hunt et al., 2019, p. 304). The "Tough-on-crime" agenda (referenced with regards to the sitting Conservative government's harsh stance on crime) is also mentioned in research on Bill C-54, also known as the *Not Criminally Responsible Reform Act* (Haag et al., 2021, p. 2).

The federal government passed the *Not Criminally Responsible Reform Act*, with the partial purpose of the Act to improve the rights of victim's (*Not Criminally Responsible Reform Act*, S.C. 2014, c6). Also known as Bill C-14, this legislation would "enhance victim involvement in the disposition process" of NCRMD (Lacroix et al., 2017, p. 47). These changes, it was stated, could elicit support from those who may have otherwise been critical of NCRMD (Lacroix et al., 2017).

Changes in Bill C-14 included the introduction of a high-risk accused (HRA) designation, which limited when a Review Board discharged an NCRMD offender, which in turn limited the offender's ability to access support and treatment within the community (Baillie, 2015). The high-risk accused designation is adjudicated based on criteria including the nature of the crime, described as: "the brutal nature of the act perpetuated by the accused person in the alleged offence" (Baillie, 2015, p. 93). Two additional changes represented in Bill C-14 included: "the alteration of the wording of review board dispositions", and "changes in the involvement of victims in the [NCRMD] process" (Hunt et al., 2019). This bill was passed and came into effect as Bill C-54 in July, 2014 (Baillie, 2015). This bill represents the last significant change to NCRMD legislation in Canada, and is the current legislation we see in place today.

Gaps in the History of NCRMD Reform

Apart from the introduction of bills to reform NCRMD, the M'Naghten case of 1843, Bill C-30 (1992), Bill C-10 (2005) and Bill C-14/C-54 (2014), other attempts were proposed and considered to reform the insanity defence in Canada, but never codified, explaining the gap in insanity defence legislation.

An amendment in 1969 allowed the Lieutenant Governor the unlegislated discretion to appoint an advisory board for NGRI disposition recommendations (Grantham, 2014). Grantham

(2014, p. 3) stated, "…although the need for reform was recognized, change would not be realised until the 1900s".

Pilon (2002) reported a proposed reform to the insanity defence in 1975, where the old system of mentally ill offenders being 'held at the pleasure of the Lieutenant Governor' was recommended to evolve to a hearing system to determine the disposition; a process that would be subject to review and assigning some determinates of length to the disposition process. This proposed reform was outlined in a report developed by the Law Reform Commission of Canada (Pilon, 2002).

In 1982, the Department of Justice, as part of a review of criminal law, initiated the Mental Disorder Project (Pilon, 2002). This project outlined flaws within the *Criminal Code* mental health provisions and the possibility for *Charter* infringements (Pilon, 2002). The Mental Disorder Project report was released in 1985, containing recommendations for reform through a draft bill, that continued to be debated through 1988, at which time the appeal of *R v Swain* was before the SCC (Pilon, 2002).

Grantham (2014) identified calls for change to NGRI were seen in 1956, 1976 and 1982, with true changes realized in 1992.

Criminological Theories and NCRMD

Research on criminological theories as they relate to NCRMD provide readers a brief overview on theories of crime as it relates to classical versus positivistic theories of crime, to help explain societal views on programs such as NCRMD. This overview enlightens the next section of this research that discusses how society understands justice.

Classical Theories of Crime

The classical criminological theory is a deterrence model and assumes offenders have free will, and are deterred by punishment (Winterdyk, 2016). The punishment needs to be: certain, swift and proportionate to the crime (Winterdyk, 2016). Although there are several variations of classical theories, the overarching premise in a classical criminological theory is an emphasis that those who commit crimes evaluate the cost of committing the crime (determinacy of punishment) and the benefit that will be derived from committing the crime, with their actions being a representation of this cost-benefit analysis (Tibbetts & Piquero, 2023). Research on the effectiveness of a deterrence model indicates it is reasonable yet inconclusive (Winterdyk, 2016).

The public values and believes in punishment and retribution for offenders and crimes (Lacroix et al., 2017). Research states there is commonality in legal definitions of crime, described as the violation of laws (Winterdyk, 2016). It is also stated that crime is a social construct, applying intervention and control towards behaviours that a particular society deems criminal (Winterdyk, 2016). In this vein of classical views, if crime is a social construct, then so too is the punishment required to make victims feel that justice has been served.

In contrast to this classical view of crime, it was stated, "The insanity defense is not in keeping with publicly held values of punishment, retribution, and an overall 'culture of punishment' in today's society" (Lacroix et al., 2017, p. 45).

Positivist Theories of Crime

A positivist theory of crime looks at scientific measurement and explanation of criminality, with a view towards rehabilitation over retribution (Winterdyk, 2016). Criminality, according to the positive school of criminology, is attributed to more than an offender's free will (Tibbetts & Piquero, 2023). Used synonymously with the term determinism, positivism as it

relates to theories of crime, operates under the assumption that people are not offending because of logic and free will, but rather because of "biological, psychological, and sociological variables" (Tibbetts & Piquero, 2023, p. 83).

Summary of Criminological Theories

Although neither classical or positivistic views on crime serve to reduce crime, "positivist ideas continue to have an influence on the judicial process" (Winterdyk, 2016, p. 104).

While the classical theory of criminology speaks to free-will, and the positivist view aligns with scientific measurement, one may assume the concept of NCRMD and the actions required to claim NCRMD are void of free-will (the intention, or mens rea, to commit the crime). This would bring us to see NCRMD as falling more within the positivist theory, with an eye to the science behind the crime.

Society's Understanding of Justice

The research of Grossi and Green (2017) state that criminal responsibility is seen as a social construct. With respect to social construct there is variation depending on the country studied, as ideas around social acceptance and practices differ due to conflicting legal standards, and the prevalence or lack of psychiatric evaluations (Grossi & Green, 2017). Therefore, demographic comparisons are difficult (Grossi & Green, 2017). Grossi and Green (2017) discussed that in Canada, the United States, the United Kingdom, and Australia, determinations of a defendant's criminal responsibility is made with mental illness being considered, however offenders in Sweden are responsible for their actions despite any disease, defect, or illness of the mind (Grossi & Green, 2017). For the purpose of this research, the view of society's understanding of justice will focus geographically in Canada.

Politics and NCRMD

There have been several instances where political involvement has influenced cases within the NCRMD stream.

Political influence is thought to be evident in the case of Vincent Li, when Li had privileges expanded to include escorted outings on the grounds of his medical facility (Brodsky, 2017). Manitoba Justice Minister, Andrew Swan, suspended the Review Board's decision to allow Li outings (Brodsky, 2017). It was said that Justice Minister Swan's decision was political pandering and this political interference demonstrated that issues related to NCRMD draw negative public reaction (Brodsky, 2017).

When Li was granted an absolute discharge, Interim Conservative Party Leader Rona Ambrose is quoted publicly criticizing the decision, asking Prime Minster Justin Trudeau to put the rights of victims first (Russell, 2017).

Political involvement is also cited in the case of Matthew de Grood, when in 2019, the Review Board granted additional privileges of unsupervised outings to de Grood, a move that was admonished by then Alberta Justice Minister, Doug Schweitzer (Wakefield, 2021). This political involvement resulted in the resignation of the Review Board chairperson, and the replacement of board members with appointees selected by the sitting political party, a move seen by the legal community as politicizing the Review Board process (Wakefield, 2021). Minister Schweitzer called the resignation of the board chair, Jill Taylor, "regrettable" and that he makes "no apologies for standing up for the rights of victims in our criminal justice system" (Dormer, 2019, "Schweitzer calls resignation 'regrettable'" section). Minister Schweitzer said Taylor was appointed by the former sitting government (Dormer, 2019). Minister Schweitzer is quoted, "I believe this [resignation] presents an opportunity for a reset whereby the Review

Board can put in place protocols that ensure the maximum possible role for the families and loved ones of victims of crime to participate in the hearing process" (Dormer, 2019, "Schweitzer calls resignation 'regrettable'" section).

Research looked at the victims' families being integrated into the NCRMD Review Board process. The social media post on Twitter in 2019 by Alberta Minister of Justice, Doug Schweitzer, indicated that victim involvement is a priority (Krugel, 2019). The Tweet reads: "I've heard from many Albertans who are frustrated and disturbed by this decision [to extend privileges to de Grood with his doctor's approval]. I'll be formally requesting that Alberta's review board ensure a maximum possible role for victims to be part of the hearing process and advocating that Ottawa conduct a review of standards of release" (Krugel, 2019, para. 2).

Former Prime Minster, Stephen Harper, quoted through Twitter said "Brutal cases like Allan Schoenborn & Vince Li undermine confidence in our justice system. Our tough new law would change that", when referring to Bill C-14 and NCRMD reform (Lacroix et al., 2017, p. 46).

Benefits and Limitations of NCRMD

This section of research looked at the perceived benefits and limitations of the NCRMD defence found in literature.

Benefits of NCRMD

A benefit of NCRMD is that offenders experiencing mental illness are provided with treatment, rather than incarcerated, being diverted to a medical stream, which is seen as treating offenders appropriately, and protecting the public (McLachlin, 2010). Reiterating the words of McLachlin, it was also stated that it is safer for society, and for mentally ill offenders, to have a program in place that does not just incarcerate those with a mental disorder (Baillie, 2015).

There is limited research found on the benefits of NCRMD.

Limitations of NCRMD

Research on the limitations of NCRMD is more expansive, with most of the literature reviewed for this thesis citing criticisms of NCRMD.

Limitations of NCRMD were seen in the research of G. Greg Brodsky (2017). Brodsky (2017) provided discussion on caution to consider when an offender claims NCRMD. Brodsky's article discussed the effect the NCRMD defence has on an offender's liberty (or deprivation of liberty), and disproportionate dispositions in NCRMD cases for more serious offences (Brodsky, 2017). With respect to indictable offences, offenders experiencing mental illness may be apprehensive about claiming NCRMD, with the possibility of the offender being deemed high-risk accused (Brodsky, 2017). An NCRMD offender deemed high-risk accused by a Review Board will experience longer dispositions, and less ability to work towards privileges that would promote a more successful reintegration into society (Brodsky, 2017). It was stated, "For most offenses, individuals found NCRMD tend to be detained longer under Review Boards than had they been found guilty and sentenced to prison" (Mental Health Commission of Canada, 2013, "Outcomes Under Review Boards" section). If the defence of NCRMD is avoided, more offenders will serve their sentence in a correctional retributive system rather than a medical rehabilitative system (Brodsky, 2017).

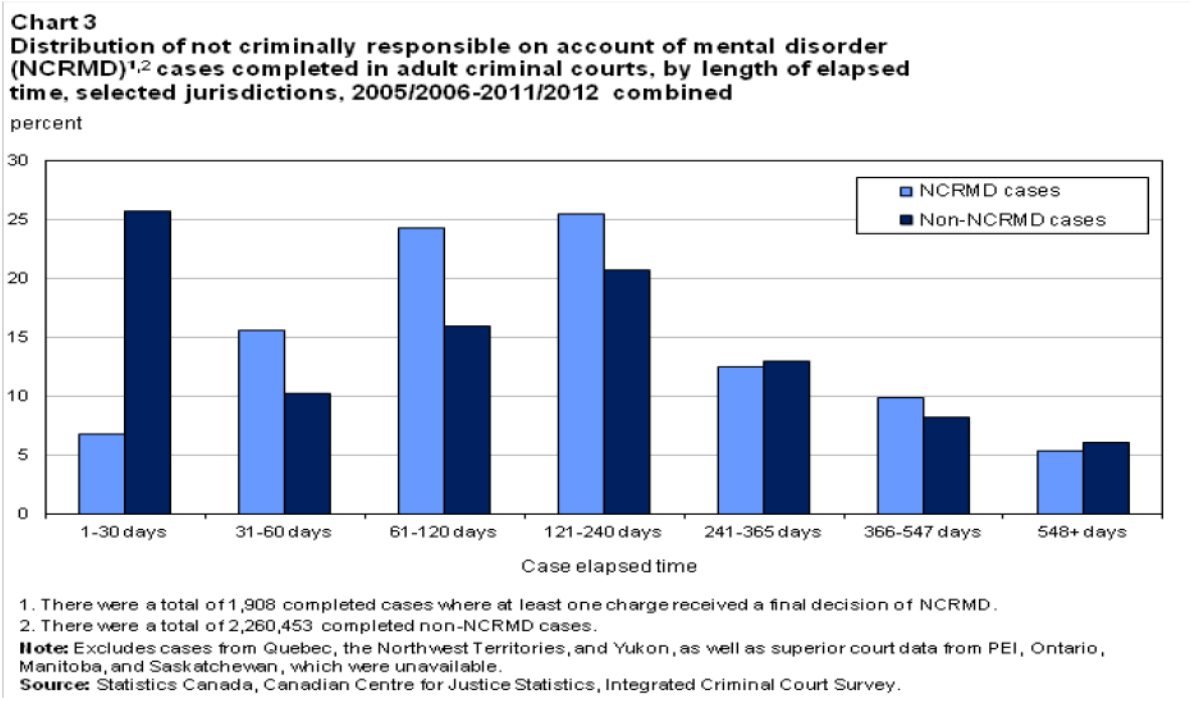
Lacroix et al. (2017) also suggested that NCRMD offenders may be reluctant to use NCRMD as a defence because offenders run the risk of being labelled a high-risk accused and therefore serving more time than through a disposition in the criminal justice system. Should an accused with mental health concerns serve their disposition within the criminal justice system rather than the medical stream, they would likely serve their time and be released without

receiving treatment for their mental health issues (Lacroix et al., 2017). Research also stated that although an offender may meet the threshold of NCRMD criteria, they may be reluctant to use the NCRMD defence because "being found guilty and being subject to punishment is often viewed as a more advantageous option than submitting to possibly lengthy hospital detention" (Baron, 2018, p. 11).

Statistics Canada data from 2012 reports that dispositions for those serving terms under NCRMD are up to 17% longer than dispositions that are within the criminal justice system (Miladinovic & Lukassen, 2014). The statistics represented in Figure 2 (Miladinovic and Lukassen, 2014, "NCRMD cases took longer to complete" section) indicate the elapsed time for NCRMD cases compared to non-NCRMD cases:

Figure 2.

Distribution of not criminally responsible on account of mental disorder cases.



From "Verdicts of not criminally responsible on account of mental disorder in adult criminal courts" by Z. Miladinovic and J. Lukassen (2014, September 18, "NCRMD cases took longer to

complete" section). https://www150.statcan.gc.ca/n1/pub/85-002-x/2014001/article/14085-eng.htm

Sentiments of uncertainty in disposition lengths are echoed in research discussing expanding the application of NCRMD from its current narrow threshold, with such expansion not being seen as desirable in the eyes of those with mental illness (Baron, 2019). Baron (2019) adds that "Even as narrow as this defence is today, the NCMRD defence is often not brought forward because of the serious implications of this defence, both in terms of stigma and risk of long-term psychiatric detention" (Baron, 2019, p. 10). With the fear of being deemed a high-risk accused in the NCRMD stream and thus greater uncertainty of a release date, offenders experiencing mental illness may avoid claiming NCRMD, which will see offenders with mental illness "emerge from prison with no treatment and no supervision" (Brodsky, 2017, p. 112).

Case Studies of NCRMD

This research explored three significant Canadian cases where NCRMD was the successful defence. Case studies in this research detail the NCRMD defence cases of Matthew de Grood, Vincent Li (Li's name now changed to Will Lee Baker), and Allan Schoenborn. These three NCRMD cases represent a modest sample size based on the criteria: all being Canadian cases of NCRMD, and each case representing an indictable offence that was well publicized, so as to have access to victim statements available through the media. This research provides an introductory overview of each case, along with supporting statements through media reports, primarily isolating victim and offender quotes.

NCRMD Defence, Case 1. Matthew de Grood

In April 2014, in the province of Alberta, university student Matthew de Grood, while attending a house party, killed five people (Goossens et. al., 2021). Having no prior history with

police, de Grood, a university undergraduate and University of Calgary pre-law student, stabbed five victims to death with a knife (*Matthew de Grood*, 2014). de Grood went to trial, and was found NCRMD in May 2016 (Goossens et al., 2021). The victims included: Zackariah Rathwell, Kaiti Perras, Lawrence Hong, Jordan Segura and Joshua Hunter (Martin, 2017).

Patty Segura, family member of victim Jordan Segura, was quoted during the trial process, "The justice system has made me feel completely invisible", and goes on to say "Is anyone really listening to me when I say how broken-hearted I am." (Martin, 2017, para. 22).

In 2018, Gregg Perras (father of victim Kaiti Perras) is quoted calling the NCRMD process a "very flawed system", and "No one in the process acts for the victims and we as victims were only mentioned once during the hearing" (Martin, 2018, paras. 13-14). It was during this NCRMD Review Board hearing in 2018 that the Review Board expressed concern that the head of de Grood's treatment team was taking the concerns of the victim's families into consideration when making his treatment recommendations for de Grood (Martin, 2018). The consideration of the victim's families was seen as a conflict of interest (Martin, 2018). Perras' father stated during another NCRMD Review Board hearing, "This review board has heard innumerable heartfelt accounts of all the damage and sorrow, of five wonderful people who were killed. As I see it, these descriptions have fallen on deaf ears" (The Canadian Press, 2020, para. 12). In discussing de Grood's time spent in treatment, Perras is also quoted, "We know every year the privileges just keep increasing to the point where he's going to be let out, which doesn't make any sense at this stage given it's only been four years since he was found NCR", followed by the statement, "The main message I want the board to hear is why are you in such a hurry to grant him privileges in an unsupervised situation" (Sidhu, 2020, paras. 3-4).

The mother of victim Zachariah Rathwell, Ronda-Lee Rathwell, is quoted, "I want them [the Review Board] to look at the reason why we are there, not just how well he's [Matthew de Grood is] doing and how well he's progressed" (Edmonton Journal, 2019, 1:20). Rathwell also described the difficulty of reliving the deaths of their children through the Review Board hearings, stating "it is so painful to have to go back to that same place, and then to have people look at you with no compassion and no caring, and tell you 'we're just so happy the man that murdered your children is doing so well'" (Edmonton Journal, 2019, 1:54).

This de Grood case study concludes with a statement from Matthew de Grood, and the parents of Matthew de Grood. Matthew de Grood, at his Review Board hearing in 2021, stated, "I accept what I have done and I'm truly sorry. I just hope one day I will be seen as a person who is able to earn his way back into society. The weight of this tragedy bears heavily on my shoulders and has not lightened over time. I carry the shame and guilt with me 24-7 and will forever. I want to make amends in any way I can. I'm committed to managing my illness" (Global News, 2021, paras. 16-17). de Grood's parents are also quoted at the Review Board hearing saying, "Nothing prepared us for the increasing crusade of seeking a lifetime punishment for Matthew. We feel the need to remind those who seem to have forgotten that Matthew has already been through the trial and found to be not criminally responsible. Yet some people feel the review board hearings every year should be treated like a quest for justice" (Global News, 2021, paras. 19-20).

NCRMD Defence, Case 2. Vincent Weiguang Li (name subsequently changed to Will Lee Baker, but referred to as Li in this thesis)

In 2008, Vincent Li decapitated and cannibalized fellow passenger, Tim McLean, on a Greyhound bus in Manitoba (Lacroix et al., 2017). Li was reported to have suffered from

untreated schizophrenia (Pauls, 2015). In 2009 Li was found NCRMD (Lacroix et al., 2017; Pauls, 2015). After seven years of treatment in a mental health facility, Li was granted additional freedoms in 2015, including being moved to a group home under several conditions (Pauls, 2015). Today, Li is out of treatment and custody, having been granted an absolute discharge in 2017 (Russell, 2017).

The mother of Tim McLean, Carol de Delley, a self-appointed advocate for NCRMD awareness and reform (openparliament.ca, 2013), is quoted as saying:

"I have no comment today, I have no words" when referring to Li being granted an absolute discharge (Russell, 2017, 0:40).

"I hope that level heads prevail and that the public is kept safe in the future and I think that's best done by keeping Li at least under conditions" (Russell, 2017, 1:18).

"It's systemic failures at every level that led to the death of my son and I don't see any significant changes to prevent that happening again. The main problem here is that in Canada there is no legal mechanism that would require Vince Li, even now, to treat his illness" (Roy Green, 2015, 2:50). de Delley continued, "He is not legally required to take that medication, it is still his choice. I don't think that that choice should be his to make anymore" (Roy Green, 2015, 3:20). "I don't think that the system, that the community is any more prepared to deal with an individual like Vince Li on the outside than they were six and a half years ago" (Roy Green, 2015, 3:34).

When asked who is responsible, de Delley stated "Nobody. That's what I've learned over all of this over the past six and a half years is that absolutely nobody is responsible. We know that Vince Li is not responsible. The Review Board will never be held accountable should

anything go wrong. The treating psychiatrist, none of them are held responsible. There's no accountability." (Roy Green, 2015, 4:12).

When speaking about victim advocacy, de Delley stated she speaks for the victims in her public statement about failings of the NCRMD system, saying significant support is provided to the offenders, and that survivors, family members and first responders are all victims of the offender (openparliament.ca, 2013).

Chris Summerville, CEO of the Schizophrenia Society of Canada interviewed Vince Li in 2012, four years after Li's offence. Summerville's report stated, "I have decided that Mr. Li's story needs to be told, to add a human touch to a horrible tragedy. What we have here are two victims and two families who are victims of untreated, uncontrolled psychosis" (Pauls, 2015, "Interview with Vince Li" section). Summerville wanted to publicize his interview with Li to show another side of NCRMD (National Post, 2012). In the interview, Li describes appreciation for the health care he is provided, and states that he should be under a treatment order (National Post, 2012).

In referencing Li's case, Associate Dean of Research and Graduate Studies at the University of Manitoba's law faculty, Debra Parkes, discussed concerns in notifying the public when an NCRMD offender is released into the community (Pauls, 2015). Parkes stated public notification could lead to vigilantism against the offender, stemming from public fear similar to when a sex offender is released into the community, with NCRMD and sexual offences being very different circumstances (Pauls, 2015).

NCRMD Defence, Case 3. Allan Schoenborn

Allan Schoenborn killed his three young children (ages 5, 8 and 10) in Merritt, British Columbia in April 2008 (Lacroix et al., 2017; Larson, 2022). Schoenborn killed his children

while experiencing paranoid delusions in a psychotic state, believing that his children, from a broken marriage, were being exposed to drugs and sexual violence (*R v Schoenborn*, 2010 BCSC 220). Schoenborn was found to have committed first degree murder in the deaths of his three children and deemed NCRMD by the Supreme Court of British Columbia (*R v Schoenborn*, 2010 BCSC 220). Schoenborn remains in custody today, with recent discussion of extending privileges such as unescorted leave (Larsen, 2022).

The now deceased Darcie Clarke, former wife of Schoenborn and mother of the children, when referring to Schoenborn's potential for release, was quoted "He could be in our community at any time without the public's knowledge because the review board does not have the public's safety as their paramount concern" (Mooney, 2019, para. 7). On her now defunct website, Clarke had stated: "Allan Schoenborn is a man with a lifelong criminal history which includes violence. This violence continues to this day inside the Colony Farm Psychiatric hospital where he has lived for the last seven years since being found not criminally responsible (NCR) for the murders of my children" (Tieleman, 2017, para. 20). Clarke's quote continued, "Today's ruling has not only failed my family including my children, Kaitlynne, Max and Cordon, but the justice system has failed others dealing with similar NCR hearings. During this hearing we heard from the doctors who treat Allen that he is dangerous. During this hearing we heard from former doctors and hospital staff that this triple child killer continues to be a threat to others. But now, we have heard from a judge that Allan is NOT to be designated a risk to public safety? Shameful." (Tieleman, 2017, paras. 21-23).

Allan Schoenborn, interviewed in 2022 during his annual Review Board hearing in British Columbia, stated "I'm just a puppet on a stick right now. I've lost everything and I'm just trying to be the way people want me to be" (Larsen, 2022, para. 7). When speaking about how he

will respond if recognized in public if granted privileges or release, Schoenborn replied, "When that time comes that I'm found out, I will walk away from the job, walk away from the apartment and come back to hospital. I don't think I can live with the overwhelming feeling that comes with that" (Larsen, 2022, para. 16).

Overall Public Perceptions

This section explores opinions of NCRMD in Canada, including views communicated through expressions in the media, and the role the media plays in how the public receives information. Literature review for this research also explored stigma surrounding NCRMD, to better understanding the social acceptance for this criminal designation.

Research found significant information that suggested NCRMD and mental illness are not viewed favorably by the public (Haag et al., 2021; Lacroix et al., 2017; Yamamoto et al., 2017). Quoting the research of Hans (1986) and Skeem et al. (2004), it was stated "Research on public conceptions of the insanity defence has consistently shown that it is perceived as a loophole that allows guilty defendants to go free" (as cited in Yamamoto et al., 2017, p. 314). Yamamoto et al. (2017) go on to state, "the legal concept of insanity has a history of mistrust and has even been met with outcry to abolish the defence" (p. 313). It is also stated both the public and the media believe that public safety remains at risk and do not appreciate the nature of NCRMD (Lacroix et al., 2017). The insanity defence is "seen as a legal excuse for offenders whose criminal behaviour is presumed to be due to a serious mental illness" (Grossi & Green, 2017, p. 3). Canadian media has improved in their reporting on mental illness which was seen to reduce stigma, however an exception to that finding is that NCRMD continues to be "widely misunderstood by the public" (Whitley et al., 2017, p. 698).

Common beliefs and misconceptions held regarding NCRMD include: the defence is used too frequently, offenders claim mental illness to avoid punishment, NCRMD offenders serve less time in detention than they would in prison, NCRMD offenders are released sooner into the community than those not deemed NCRMD whose dispositions are within the criminal justice stream, high recidivism amongst those who claim NCRMD, and NCRMD offenders are involved in more violent crimes (Baillie, 2015).

Further literature review found there are additional misconceptions within society regarding NCRMD, cited from Hans (1986), with beliefs that the NCRMD defence puts public safety at risk, the NCRMD defence is overused, beliefs that those claiming NCRMD are "usually faking their condition", and the belief that once in medical custody offenders are released too soon (as cited in Lacroix et al., 2017, p. 45). Literature showed there is low regard for, and stigmatization of people who claim NCRMD, and those suffering from mental illness in general (Goossens et al., 2021).

Offenders who commit crime based on their mental illness are hospitalised and treated, with the reported misconception that hospitalization is seen as a measure of security, rather than punishment (Bal & Koenraaddt, 2000, as cited in Grossi & Green, 2017). Once offenders are in treatment, research showed that misconceptions exist regarding the release of NCRMD offenders from these facilities, and public concern that offenders are released from their disposition without conditions (Yamamoto et al., 2017).

Negative perceptions towards NCRMD and mental health held by jurors is proposed "as a barrier to ensuring that defendants receive fair trials when using the insanity defence in the United States and Canada" (Grossi & Green, 2017, p. 5). Grossi and Green (2017) report that

although the belief may be that offenders widely use the defence, it is a defence rarely used in North America.

In exploring the research on educating jurors about NCRMD and how it may impact verdict decisions, a review of the research by Corrigan et al. (2001) and Maeder et al. (2015), stated educating jurors about NCRMD did not produce a significant difference in attitudes (as cited in Yamamoto et al., 2017). Evidence suggested that educating jurors about mental disorders may play a role in the use of NCRMD, although the issue of mental health and juror prejudice in North America is understudied (Yamamoto et al., 2017).

To enrich research on offender perceptions, the case of Jordan Kankam from Edmonton, Alberta is reviewed. Kankam, found NCRMD experienced schizophrenic delusions during the offence of stabbing his mother in 2013 (Wakefield, 2021). Kankam's mother survived the attack, and upon learning of his NCRMD verdict in 2015, was pleased her son would be receiving help, rather than punishment (Wakefield, 2021). Media reports describing this offence state Kankam's mother, six-years since the verdict, felt that her son was serving a sentence without end, and that there would be a release date if he had been sentenced through corrections rather than the medical system (Wakefield, 2021). Kankam's lawyer, Jacqueline Petrie, is quoted: "This is supposed to be a compassionate, treatment-oriented stream of criminal justice. Their underlying mental disorder or illness is to be the focus. Once that is properly managed and under control and they are no longer a significant risk to public safety, or that risk can be managed in the public some way through supervision, then they are to be released" (Wakefield, 2021, para. 15).

Media, Social Media, and NCRMD

Social media and the media in general, are a key mode of information delivery and influence when it comes to learning about the justice system (Gavrielides, 2022). With the idea

of influence in mind, Gavrielides stated "the media can misrepresent justice (the law), creating confusion and hostility that are unjustifiable and unfair" (Gavrielides, 2022, p. 41).

The research of LeBeau (2020) discussed the role media plays in informing people about mental health instances in the criminal justice system, and that the media is most likely to report on significant or 'horrific' news which may lead the public to associate violence with mental illness (LeBeau, 2020). A comment quoted by Larry Cornies, stated, "If it bleeds it leads" (Richardson & Fullerton, 2016, p. 23), implying that stories that relate to criminal atrocities are more likely to garner the attention of reporters and therefore appear in the news. The general public, stated LeBeau (2020), is not gathering their knowledge of NCRMD by reading scholarly reports.

Brendan McCabe, a close friend to Matthew de Grood, and host of the party on the night of de Grood's offence, stated the violence of the crimes committed by de Grood will only further perpetuate stigma around mental illness (McCabe, n.d.). McCabe stated, "We [McCabe and de Grood] share an intimate experiential knowledge of the intersectional gaps within our mental health, judicial, and social structures" (McCabe, n.d., para. 4).

Research discussed the role of the media in reporting crime, and such media reporting can be seen to not only entertain and inform readers but can have an impact on fostering public opinions on what is deemed right or wrong (Richardson & Fullerton, 2016). When reported appropriately, such crime reporting can be seen to build community rather than be divisive, but reporters need to understand the gravity of their influence through reporting (Richardson & Fullerton, 2016).

Goossens et al. (2021) gathered themes from social media regarding NCRMD, finding NCRMD is not viewed favorably in the eyes of the public. Goossens et al. (2021) also reported

that those who use social media mistrust authority, displayed scepticism as to how NCRMD is judicially processed, and felt the defence of NCRMD is not seen as a true punishment for the crime, but rather as an easier form of justice served. Other common themes reported in the media included NCRMD equating to a not guilty verdict and thus a lack of accountability for the crime, the NCRMD verdict being viewed as dangerous to the public, and a general lack of awareness towards the NCRMD defence and mental illness (Goossens et al., 2021). Giving context to the validity of social media posts, the research by Goossens et al. (2021) recognized the unpredictability of "how much overlap exists between one's behaviour and utterances on social media, and one's real-world behaviour, opinions, and life" (p. 60).

Although NCRMD is reported to be a defence rarely used for major crimes (Mental Health Commission of Canada, 2013), "[m]any NCRMD cases lead to major media coverage" (Whitley et al., 2017, p. 698). It is through this media coverage that those in the mental health field point to stigmatization of mental illness when it is reported by the media, "based on studies suggesting that news articles of mental illness often contain stigmatising language and inaccurate content" (Whitley et al., 2017, p. 698). Supporting the words of Whitley et al. (2017), research points to mental illness being viewed negatively when violent cases are publicly reported, with NCRMD cases in particular drawing negative attention and reaction (Lacroix et al., 2017).

Whitley et al. (2017) reported that media coverage has improved when reporting on mental illness, although this improvement has not been seen in media coverage on NCRMD, which continues to be misunderstood. An analysis of Canadian newspaper articles that discussed NCRMD over a four-month period in 2015 were analysed, finding that articles discussing NCRMD were seen by the researchers as overwhelmingly expressing negativity and stigmatization (Whitley et al., 2017). Stigma surrounding mental illness was also discussed in the

article by McCabe (n.d.), saying it was mental illness that caused de Grood's actions, and it was the stigma surrounding mental illness that prevented de Grood and his family and close friends from accepting that de Grood was suffering from issues related to mental illness.

Research explored the number of violent NCRMD cases compared to the total number of violent crimes committed. It was stated, "The focus on a very small number of cases paints an inaccurate picture of violence and mental illness. The more mental illness is stigmatized, the harder it is to get people to seek treatment and to stay in treatment. Yet, treatment is the most effective preventive measure for the small number of people with mental illness who commit violent offenses" (Mental Health Commission of Canada, "Why paying attention to stigma matters" section).

NCRMD statistics reported to Justice Canada demonstrate NCRMD offenders do not typically commit serious crimes:

Figure 3.

Type of offence versus % of total NCRMD population.

Type of Offence	% of total NCR Population (weighted)
Homicide	2.6%
Attempted Murder	3.3%
Sexual Offence	2.1%

Mental Health Commission of Canada (2013)

Future Directions: NCRMD Reform and Pathways to Social Acceptance

This research evaluated two pathways of NCRMD reform. Such reform looked at the operationalizing of words associated with the name: not criminally responsible on account of mental disorder, and the correlation between restorative justice and NCRMD.

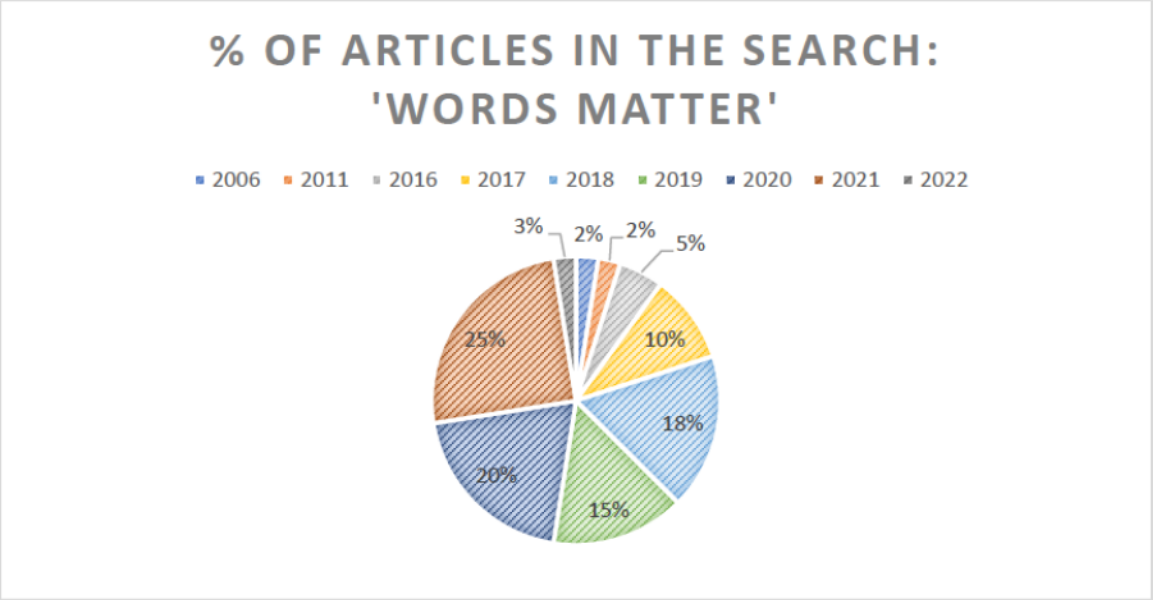
The Name of NCRMD

The name 'not guilty by reason of insanity' was officially changed in 1992 to 'not criminally responsible on account of mental disorder' (Pilon, 2002). This name change was first discussed in 1986, with the goal of modernizing the language of the defence, and proposing the change to include the words "mental disorder" (Pilon, 2002, para. 5). The name NCRMD has been used for 30 years, and is the name in use for this legal defence today.

Research showed that more attention is being given to the discussion of: 'words matter', with dialog around the choice of words one uses becoming topical. An on-line library search was conducted using the term 'words matter' with a filter of peer-reviewed literature in all genres. The first 40 journal articles to appear in this search (the population for this survey) had publication dates between the timeframe 2006 and 2022. Of these dates, the majority of articles were published between 2018 and 2021, with the mode of this data collection being the year 2021. Only the years identified in the articles are represented in this survey. For example, there were no articles found in this search for the years 2007 to 2010, and 2012 to 2015. This survey was conducted to see if there is validity to the assumption that a focus on the importance of words is growing. This search reflected an increase in journal articles with the search term 'words matter' in the years 2018, 2019, 2020 and 2021. Frequency for the number of peer reviewed journal articles found in this survey are identified below:

Figure 4.

Number of peer-reviewed articles by year found in an online library search with the search term 'words matter':



With an understanding of the prevalence within literature discussing the importance of 'words matter', this research reflected on the quotes of NCRMD victims, and noted a common word continued to surface: 'responsibility'. With the word 'responsibility' in mind, this research looked purposively at the words used in the name of the NCRMD defence.

This research compares the names 'not guilty by reason of insanity' against 'not criminally responsible on account of mental disorder'. The word 'not' is the only word from the original name that remains unchanged in the current name used today. The word 'guilty' became 'criminally responsible'. The phrase 'by reason of' became 'on account of'. The word 'insanity' became the term 'mental disorder'. Former Chief Justice of Canada, Beverley McLachlin wrote, "This change in terminology recognizes that mental illness may operate to exempt an accused person from criminal responsibility" (McLachlin, 2010, p. 23).

In comparing the definition of 'guilty' versus the definition of 'criminally responsible', Oxford English Dictionary defines guilty as "that has offended or been in fault; delinquent, criminal", and "that has incurred guilt; deserving punishment and moral reprobation; culpable" ("Guilty", n.d.). By removing the word 'guilty', criminal fault is removed from the definition.

The definition of 'criminally responsible' is defined in two parts: the word 'criminally' is defined as "According to criminal law" ("Criminality", n.d.). The word 'responsible' is defined as "Capable of fulfilling an obligation or duty; reliable, trustworthy, sensible" ("Responsible", n.d.). By changing the words from 'not guilty' to 'not criminally responsible', the definition goes from: not having offended or not being at fault, not delinquent and not criminal, not incurring guilt, not deserving punishment and not culpable, to: not, according to law, capable of fulfilling an obligation or duty; not, according to law, reliable, trustworthy or sensible.

The latter part of the NCRMD name, where 'insanity' becomes 'mental disorder', we see insanity defined as "The condition of being insane; unsoundness of mind as a consequence of brain-disease; madness, lunacy" ("Insanity", n.d.).

Mental disorder is defined in two parts: 'mental' is defined as "Of or relating to the mind", and 'disorder' is defined as, "absence or undoing of order or regular arrangement; confusion; confused state or condition" ("Disorder", n.d.; "Mental", n.d.).

The former definition using the dictionary definition reads: by reason of the condition of being insane, unsound mind as a consequence of brain disease, madness, and/or lunacy. The current definition reads: on account of relating to the mind the absence or undoing of order or regular agreement, confusion and/or confused state or condition.

Expanding upon the meaning of the words used, both past and present, the definitions in full read as:

> PAST: Not having offended or not being at fault, not delinquent and not criminal, not incurring guilt, not deserving punishment and not culpable by reason of the condition of being insane, unsound mind as a consequence of brain disease, madness, and/or lunacy.

PRESENT: Not, according to law, capable of fulfilling an obligation or duty, reliable, trustworthy or sensible on account of relating to the mind the absence or undoing of order or regular arrangement, confusion and/or confused state or condition.

In appreciating the impact of words, research stated "The emotionality of a word causes 'more attention' to be devoted to processing the identity of the word, thereby amplifying response competition from the word name" (Harris et al., 2004, p. 4). This research by Harris et al. (2004) stated emotional words can "produce a defensive reaction" in slowing responses, with studies conducted that show a relationship between emotionally charged words and participant responses to these words (p. 4).

Research looked at the recent changing of the name 'overdose' to 'poisoning', when analysing how names are perceived. This name change, discussed in the media, said referring to the fentanyl crisis in a clinical way (with the change from 'overdose' to 'poisoning'), more clearly articulated the factual reference: "a public health issue that can be addressed through the medical system" (Allingham, 2017, para. 5). The word 'poisoning', it was stated, "is a technically accurate diagnostic term for what's happening inside the body" and that to imply personal responsibility can "exacerbate stigma" (Allingham, 2017, paras. 6-7).

Allingham (2017) discussed the power of stigma, and that stigma "prevents people from seeking help" (para. 8). There is a notable difference between drug use and being found NCRMD, however exploring research comparing the name change of 'overdose' to 'poisoning' explores the suggestion that a name change could facilitate the removal of personal responsibility to reduce stigma. Allingham (2017) stated, "Words matter, and stigma is powerful" (para. 8).

Recommendations for a name change would be from: Not Criminally Responsible on Account of Mental Disorder, to: Mental Disorder Criminal Diagnosis, or, Criminal Diagnosis of

Mental Disorder. Both suggestions remove the word 'responsibility' and emphasise the medical nature of a diagnosis.

NCRMD and Restorative Justice

This research explored correlations between the defence of NCRMD and the system of restorative justice. The definition of restorative justice, by Marshall (1999), is "a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (as cited in Kirkwood, 2022, p.1; Wenzel et al., 2008, p. 377).

The idea of rehabilitation saw a shift in the 1960's and 1970's, with a move away from the model of institutional confinement (McLachlin, 2010.). McLachlin writes "Whereas before the law locked them [mentally ill] into institutions, now it must interface with them in society" (McLachlin, 2010, p. 20). The concept and use of restorative justice is not restricted to criminal matters (Wenzel et al., 2008). Restorative justice involves an emphasis on healing, rather than punishment, while offering alternatives to dispositions of incarceration (Wenzel et al., 2008).

Forms of Restorative Justice

Restorative justice manifests in several forms, including but not limited to, mediation, interaction between the accused and victim(s), sentencing circles, and community involvement (Wenzel et al., 2008). The United Nations describes the main categories of restorative justice as: "(a) victim offender mediation; (b) community and family group conferencing; (c) circle sentencing; (d) peacemaking circles; and, (e) reparative probation and community boards and panels" (United Nations, 2006, pp. 14-15). These categorizations of restorative justice are also discussed in the research of Winterdyk (2021), further expanding on the definitions of victim offender mediation (VOM), family group conferencing, and circle justice.

VOM, also known in Canada as the "Kitchener Experiment", 1974, (p. 109), a program designed close to Kitchener, Ontario, had two primary aims: reconciliation and restitution (Winterdyk, 2021). VOM brought together victims and offenders where the offender offered an apology to the victim, provided a platform for victims to speak to the impact of the offence against them, and outline modes of restitution (Winterdyk, 2021). Seen as an "innovative probation program", VOMs spread in use and popularity, although primarily in the area of minor offenses (Winterdyk, 2021, p. 110). A second variation of VOM, described as "Prison Fellowship Canada" (p. 110), was derived in the mid 1970's in England (Winterdyk, 2021). Without continuity in the program federally or provincially, the program was only moderately used, with such use being to promote restorative justice within corrections Canada, and by communities through local events (Winterdyk, 2021). The success of VOMs varied based on the mode of delivery, differing between in-person and remote interactions (Winterdyk, 2021).

With similarity to VOMs exists the victim-offender conference (VOC). The VOC brings together victims and offenders in a neutral environment, to discuss the offense, the harm caused by the offense, and how restitution is made, if possible (Paul & Schenck-Hamlin, 2017). Victims are more likely to use VOC if they feel the opportunity for restitution exists, and if their own goals in the process could be met (Paul & Schenck-Hamlin, 2017). Such goals include wanting to help the offender, or to ask the offender questions (Paul & Schenck-Hamlin, 2017). Paul and Schenck-Hamlin (2017) reported that VOCs are utilized in situations of smaller offenses.

Family group conferencing (FGC) (Winterdyk, 2021), also known as community and family group conferencing (United Nations, 2006), was conceptualized in New Zealand and brought to life circa 1989 (Winterdyk, 2021). As the name suggests, the core of FGC is engaging and empowering families as a whole, with the protection and safety of children within the family

being of primary concern and focus, and attention given to cultural diversity (Winterdyk, 2021). Within the realm of FGCs we see the use of "victim impact panels" (VIP), also known as "victim-offender panels" (VOP), with such titles being used interchangeably in Canada (Winterdyk, 2021, p. 112). VOPs have a broad use in Canada by the well-known advocacy group, Mothers Against Drunk Driving (MADD) (Winterdyk, 2021). The VOP program in Canada is described as "having a mediation and reconciliation aspect" and "draws on legal accountability, emphasis on deterrence, and moral responsibility" (Winterdyk, 2021, p. 112). Reparative probation and community boards and panels, a stand-alone category by the United Nations, also fall within this category.

The definition of circle justice explores the final category of restorative justice, with circle justice and peacemaking circles being intertwined in their definitions. Quoting the research of Pranis et al. (2003), Winterdyk (2021) describes the distinct types of circle justice to include: "reintegration circles, healing circles, sentencing circles, talking circles, and support circles" with the most common practice within Aboriginal communities being healing circles (p. 113). This restorative justice practice has a particular focus on conflict resolution, which encapsulates "moral responsibility, legal accountability, and repression of wrongful behavior" (Winterdyk, 2021, p.113). Sentencing circles, albeit a practice primarily within Indigenous culture but adapted for Canadian judicial systems, bring all parties of the offense together, including the judge and lawyers (Monchalin, 2016). The parties, including the victim and offender, hold the proceedings in a circle formation, with the judge responsible for rendering a decision (Monchalin, 2016).

Alternatives to Retributive Justice

Many assume punishment is necessary after a criminal offence is committed (Wenzel et al., 2008). One alternative to punishment is restorative justice (Wenzel et al., 2008). Restorative justice is about giving a voice to the victims, to share their story of victimization, the impact of the victimization, and to participate in the restoration of justice, with a focus on healing rather than punishment (Wenzel et al., 2008). Similarities can be drawn between NCRMD and restorative justice in that the process for justice is not retributive, but rather on healing the accused. Although the emphasis is on healing, punishment, states Wenzel et al. (2008), can still be part of the restorative justice practice. Wenzel et al. (2008) discussed a disruption to the "moral balance" when a crime is committed and righting this imbalance will restore justice (p. 378).

Connection Between Restorative Justice and NCRMD

Gavrielides (2022, p. 60) asked, "what is restorative justice offering that we don't already know philosophically?". This question explores how society views NCRMD today and how it could be viewed in the future as restorative justice measures gain popularity in the criminal justice system.

Research stated the punishment of an offender needs to be proportionate to the "severity of the wrongdoing" (Wenzel et al., 2008, p. 375). Wenzel et al. reported there are challenges in the assumption that punishing an offender is required in order to have justice restored (Wenzel et al., 2008). In this vein, there is also discussion that "there is little agreement on how best to control or prevent crime" (Winterdyk, 2021, p. 107). Crimes committed, regardless of the intention, disempower the victims and the affected communities, and change the power relationship between the offender and the victims (Wenzel et al., 2008). Citing the work of

Murphy and Hampton, (1988), it was stated, "Intentional wrongdoing insults us and attempts (sometimes successfully) to degrade us – and thus it involves a kind of injury that is not merely tangible and sensible" (as cited in Wenzel, 2008, p. 380). It is important to note, "NCRMD does not negate the elements of an offence" (Baron, 2018, p. 5). This research identified that having aspects of the NCRMD process fall under the umbrella of restorative justice, does not negate the process of justice.

Wenzel et al. (2008) stated, the practice of restorative justice is about giving a voice and involvement in the justice process to all affected parties: the accused, the victims, and the affected communities, and that retributive justice (or punishment) is one-sided (Wenzel et al., 2008). This point is further expanded in Wenzel's research which stated, "because crime is considered the domain of the state, there is only a limited role for the stakeholders themselves" (Wenzel et al., 2008, p. 377).

A question to ask when considering the application of restorative justice to NCRMD: could restorative justice be effectively applied to every level of offence, from summary to indictable? This question leads research to identify the rate of incidents, and prevalence of, violence in those that claim NCRMD.

Latimer and Lawrence (2006) pointed to the rarity of NCRMD cases in Canada, occurring in 1.8 per thousand criminal cases per year (Baillie, 2015). Research stated that between the timeframe of 1992 to 2004, admissions into the Review Board system increased significantly in Canada, with three provinces, British Columbia, Ontario and Quebec, being analysed, showing variation by province, with increases experienced in Ontario and a slight decline in rates in British Columbia (Jansman-Hart et al., 2011). Supporting documentation stated "most people who are NCRMD-accused have not committed offences involving serious

violence" (Baillie, 2015, p. 94). The Mental Health Commission of Canada (2013), reported that "among NCRMD cases, 8% involve serious violence", and "in Canada, cases involving an offender with a mental disorder make up less than 3% of violent offenses" (Yamamoto et al., 2017). Research reported that "NCRMD is only considered in a small number of cases" (Baron, 2019, p. 10).

The research of Gavrielides (2022) stated, "there are two types of justice: the lawful and fairness" (p. 51), with fairness being seen as more abstract. Quoting the work of Hill et al. (2005), the word *justice* is defined as "refers to fairness with regard to outcomes, procedures, and interaction" (as cited in Paul & Schenck-Hamlin, 2017, p. 49). Research stated that for justice to be restored, there needs to be a social consensus that the values and principles once harmed have been restored, which is seen as an issue with restorative justice (Wenzel et al., 2008). Looking at two different forms of justice, retributive and restorative, literature points to the question posed by Gavrielides (2022): "How can there be two forms of justice for the same criminal act?" (p. 138). Other research stated it is possible that punishment, although retributive, "could also serve to restore values" (Wenzel et al., 2008, p. 381). These quotes give credence to the notion of intersectionality between NCRMD and restorative justice, and as stated by Wenzel et al. (2008), punishment and restorative justice can happen together.

Conclusion

This research explored the requirement to make the defence of NCRMD more socially acceptable, with a focus on how NCRMD is viewed today, how those views are formed, how the victims of NCRMD perceive the system, and with an eye to two prospective methods for NCRMD reform: changing the name of NCRMD and classifying NCRMD within the restorative justice arena.

The NCRMD designation isn't going anywhere, supported in the research of The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada, which stated "there is a firmly established legal doctrine in criminal justice systems around the world that recognizes that it is inappropriate to punish people who do not have the capacity to form criminal intent at the time of an offence" (Crocker et al., 2013, p. 96). The NCRMD defence is a utilized defence amongst those deemed "incapable of meeting the basic cognitive requirements that criminal law requires for prescription of responsibility" (Baron, 2018, p. 5). And, "Since time immemorial, criminal law systems have considered the simple idea that an accused person should not be convicted when their illegal behaviour stemmed from a disease of the mind" (Baillie, 2015, p. 94). Ensuring systems are in place for everyone's protection, research stated "A truly safe society does not change that established principle by incarcerating people with mental disorders – or by further stigmatizing them" while (Baillie, 2015, p. 94).

This research does not negate the importance of the defence of mental disorder, but rather seeks to explore why the defence may be negatively perceived and what changes could be implemented to garner more social acceptance.

The research for this thesis demonstrates continued stigma towards mental illness, and stigma towards those who claim NCRMD. Stigma may prevent offenders from receiving treatment, or the family and friends of offenders admitting treatment is needed. Victims report in the media that they do not feel involved or supported in the NCRMD process. Use of the NCRMD defence can project misconceptions that justice has not been served, and the offender has not been held accountable for their crime(s). Offenders may be reluctant to claim NCRMD because of the ambiguity around the length of medical detention, which could mean more

offenders who need treatment are not receiving it. A defence for those suffering from mental illness and diversion from the criminal justice arena to a place of medical rehabilitation and treatment is a necessary function within the legal options.

The NCRMD process and suggestions for reform would benefit greatly from further research.

This thesis explored two suggestions for NCRMD reform: changing the name of NCRMD, and applying restorative justice to the practice of NCRMD.

Restorative justice measures through VOM and VOC may be an area of further research. Improving the system of NCRMD so that offenders needing medical treatment receive it, highlights the suggestion of implementing more concrete benchmarks for determining high-risk accused designations and discharge requirements.

Reform to the legal defence of NCRMD could be operationalized several ways, with research indicating that educating the public on NCRMD, setting more parameters around standardized criteria for NCRMD high-risk accused, and increasing victim involvement in the NCRMD system could modernize and reform the defence of NCRMD. Reform and modernization of the NCRMD system and defence seems a logical next step.

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