# Forensic Mental Health Assessments: Optimizing Input to the Courts

HYGIEA CASIANO[*]
AND SABRINA DEMETRIOFF[**]

## ABSTRACT

Growing numbers of individuals involved in the criminal justice system in Canada are diagnosed with a mental disorder. A proportion of these individuals are ordered by the court to undergo a forensic mental health evaluation. In the adult criminal justice system, accused persons are subject to these assessments primarily to determine fitness to stand trial and consider criminal responsibility. Additional evaluations are available in youth court, including recommendations regarding bail or sentencing. To date, there has been limited investigation into the decision-making process that leads to an assessment being ordered, and it is unclear which specific

[*] Hygiea Casiano, MD, FRCPC, is an Assistant Professor of Psychiatry at the University of Manitoba and Associate Medical Director for Adult Forensic Services. She completed her residency in Psychiatry at the University of Manitoba in 2009. She has Royal College subspecialty certification in both Child and Adolescent Psychiatry as well as Forensic Psychiatry. She is a past recipient of the Canadian Academy of Psychiatry and the Law (CAPL) Fellowship as well as the Rappaport Fellowship, provided by the American Academy of Psychiatry and the Law (AAPL). Her academic interests include the impact of media on youth health, Criminal Responsibility and Fitness to Stand Trial research, and self-harm behaviour in incarcerated youth.

[**] Sabrina Demetrioff, Ph.D., C. Psych., is a Clinical Psychologist and Assistant Professor in the Department of Clinical Health Psychology at the University of Manitoba. She completed her residency at St. Joseph's Healthcare in Hamilton, Ontario, and received her Ph.D. in Clinical Psychology from Dalhousie University. Her clinical work with the Adult Forensic Service involves consulting on court-ordered assessments of fitness to stand trial and criminal responsibility and completing violence risk assessments for individuals who come under the Criminal Code Review Board of Manitoba. Recent research interests include studying the trajectories of forensic mental health patients through the health and legal systems, surveying Canadian forensic psychologists about their clinical practice, and examining characteristics of individuals who are referred for assessments of criminal responsibility.

components of forensic evaluations are helpful to legal professionals. Published studies have been limited to jurisdictions outside of Canada, have not included youth court, and predate the implementation of therapeutic jurisprudence principles. We argue that feedback from legal personnel can potentially lead to improved provision of care and due process for a marginalized population, and we propose a study to examine these issues further.

## I. Introduction

In Canada, increasing numbers of individuals involved with the criminal justice system have been diagnosed with a mental disorder.[1] Many of these individuals simply proceed through the court process and remain involved solely with the criminal justice system. However, there is a subset of individuals who have been diagnosed with severe and persistent mental illness who receive a court order to undergo a forensic mental health evaluation. In general, forensic mental health assessments are conducted in accordance with the first two stipulations in the *Criminal Code of Canada* under section 672.11 that state:

> A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (a) whether the accused is unfit to stand trial;
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1).[2]

In adult court, accused persons can be ordered to undergo an assessment of fitness to stand trial (in an effort to ensure that they are able to participate in and understand court proceedings and participate in their defence by communicating with and instructing their lawyers) or criminal responsibility (an assessment of whether the individual should be excused from responsibility for their alleged offence(s) due to a mental disorder

---

1 Canada, Department of Justice, Research and Statistics Division, *The Mentally Ill: How They Became Enmeshed in the Criminal Justice System and How we Might Get Them Out* (Report), by Hon Richard D Schneider (Ottawa: DOJ, Research and Statistics Division, 2015), online: <www.justice.gc.ca/eng/rp-pr/jr/mental/mental.pdf> [perma.cc/A7T2-FE26].

2 *Criminal Code*, RSC 1985, c C-46, s 672.11 [*Criminal Code*].

which impacted their actions). Occasionally, both of these assessments are ordered simultaneously, which is referred to as a full or dual order. Evaluations of both fitness to stand trial and criminal responsibility can also be ordered in youth court. However, a much wider range of evaluations can also be ordered under the *Youth Criminal Justice Act*, including recommendations for bail or sentencing, release from custody, and opining on whether a youth should be provided with an adult or youth sentence.[3]

Although the *Criminal Code* has stipulated minimum types of assessments to be offered, jurisdictional differences exist with respect to additional types of adult forensic evaluations that can be ordered. Several provincial adult forensic mental health programs in Canada provide presentence reports (e.g. Ontario) and/or provide assessments in response to requests from probation services (e.g. Alberta). Other provinces across Canada have legal mechanisms for accused adults that allow the court to order a mental health assessment that is broader than an assessment of fitness or criminal responsibility. For example, under Ontario's Mental Health Act, "where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from mental disorder, the judge may order the person to attend a psychiatric facility for examination… [and] the senior physician shall report in writing to the judge as to the mental condition of the person"[4]. In other jurisdictions such as Manitoba, no such mechanism to request more general mental health assessment for adult accused persons is available. Thus, it is possible that these provinces and territories may, at times, order assessments of fitness to stand trial and criminal responsibility even when those specific issues are not the primary focus of the court. In particular, studies have shown that lawyers have reported ordering assessments of competency to stand trial or criminal responsibility as an alternative legal strategy when other types of assessment are not available.[5]

---

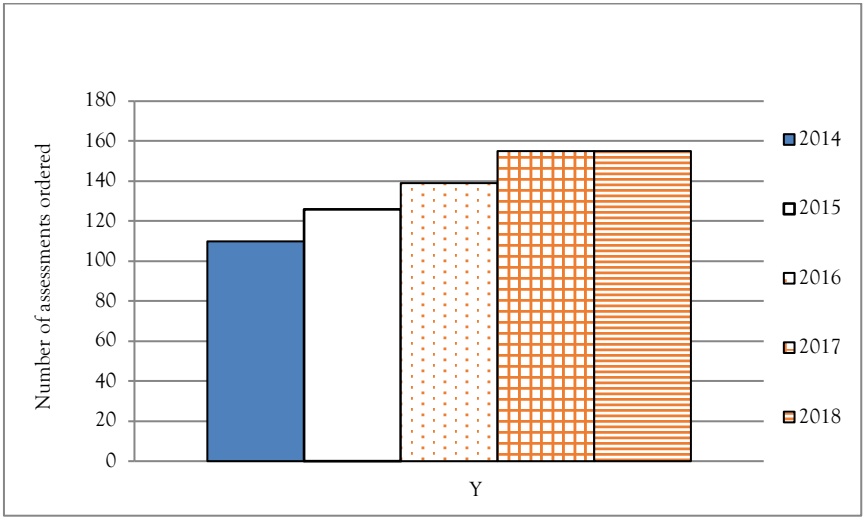
3 *Youth Criminal Justice Act*, SC 2002, c 1, ss 34 (1)–(2) [YCJA].

4 *Mental Health Act*, RSO 1990, c M7.

5 Lisa M Berman & Yvonne Hardaway, "Attorneys' Referrals for Competency to Stand Trial Evaluations: Comparisons of Referred and Nonreferred Clients" (1987) 5:3 Behav Sci & L 373; Lauren E Kois et al, "Defense Referral Patterns Associated with Competency to Stand Trial, Mental State at the Time of the Offense, and Combined Evaluations" (2019) 19:4 J Forensic Psychology Research & Practice 293, DOI: <10.1080/24732850.2019.1612215>; Danielle Laberge & Daphneè Morin, "Mental Illness and Criminal Justice Processing: The Strategies and Dilemmas of Defence Lawyers" (2001) 29 Intl J Soc L 149.

As forensic mental health professionals, we (the authors) are frequently involved in conducting the above-mentioned court-ordered assessments. In Manitoba, there is a sole location for the provision of adult forensic mental health assessments which are requested through the courts, namely, the Adult Forensic Psychiatry Program, located in Winnipeg, Manitoba. Our group has noted an approximate 30% increase in court-ordered assessment requests for adult patients in Manitoba between 2014 and 2018 (see Figure 1). We had approximately 150 assessments completed in both 2017 and 2018, and we have received 140 assessment requests from January to mid-October 2019.

*Figure 1. Yearly Court-Ordered Assessments to Manitoba Adult Forensic Mental Health Services from 2014 to 2018*




Since the mental health assessors are not present when evaluation orders are made in court, it is not always clear from a clinical perspective why certain assessments are requested. For example, the Adult Forensic Psychiatry Program has previously received requests to assess criminal responsibility when the accused person had no diagnosis of mental illness and was clearly intoxicated at the time of the index charges (R v Bouchard-Lebrun[6] specified that the voluntary ingestion of a substance that can cause disruptions in mental health functioning cannot be used to uphold a

6 2011 SCC 58 at para 69.

defence of not criminally responsible by reason of a mental disorder (NCRMD)). Although, ideally, every referred case would include a detailed conversation with the lawyers involved so as to explicitly understand the reason for referral, the small number of clinicians and increased rate of requests by the court for assessments has made it difficult to add that step to the process of evaluation. This is especially the case since the R v Jordan[7] ruling has increased the pressure to complete mental health evaluations as soon as possible in order for the case in its entirety to be completed within the 18-month specified timeframe.

We would like to gain a better understanding of why particular assessments are ordered by the court, as well as ways that communication with the court could be improved. We believe that increased collaboration between forensic mental health professionals and legal professionals can improve the delivery of therapeutic justice to individuals in the courtroom. The following review will describe what is known about defendants who have mental disorders and must navigate the intersection between mental health and justice systems. We will discuss the development of therapeutic jurisprudence principles and propose conducting a survey aimed at understanding how forensic mental health assessments are used in the courtroom. It is hoped that these first steps can begin to improve communication and collaboration between legal and forensic mental health professionals.

## A. Assessments of Fitness to Stand Trial and Criminal Responsibility

Before exploring the history of mental health and the justice system, it is important to define the most commonly ordered forensic mental health assessments. As mentioned above, the *Criminal Code* and the *Youth Criminal Justice Act* (YCJA) both include specific sections that provide direction for addressing potential mental health issues in accused persons. However, these directives are specific to certain situations and types of defences that may be used. In the *Criminal Code*, the primary focus is on fitness to stand trial and criminal responsibility. Subsection 16(1) states that "[n]o 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

7 2016 SCC 27.

that it was wrong",[8] while section 672 deals exclusively with mental disorders. This section states that an assessment can be ordered to provide evidence towards whether an accused is unfit to stand trial or was suffering from a mental disorder that would exempt them from criminal responsibility.[9]

Criteria for fitness to stand trial are outlined in section 2 of the *Criminal Code* as being "unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel"[10] Subsection 672.12(1) of the *Criminal Code* specifies when the assessment issue may be raised, stating "[t]he court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor."[11] Crown attorneys may only raise the issue under specific circumstances: if the accused raises the issue of fitness or puts his/her mental state into question, or if the Crown can show the court that there are reasonable grounds to doubt the accused's fitness to stand trial or criminal responsibility due to mental disorder.[12] The *YCJA* defers to the criteria outlined in the *Criminal Code* for assessing and determining fitness to stand trial and criminal responsibility, stating "[e]xcept to the extent that they are inconsistent with or excluded by this Act, section 16 (defence of mental disorder) and Part XX.1 (mental disorder) of the Criminal Code apply" to youth accused.[13]

There are specific guidelines about length of assessment orders (no longer than 30 days or 60 days in exceptional circumstances) and the existence of *Criminal Code* Review Boards who oversee individuals who are found unfit to stand trial or not criminally responsible. Once an assessment is ordered, it is carried out by, at minimum, a medical professional and often by a team of mental health professionals. These professionals then write a report that gets submitted to the court in order to assist in a decision

---

8 *Criminal Code*, *supra* note 2, s 16(1).
9 *Ibid*, ss 672.11(a)–(b).
10 *Ibid*, s 2.
11 *Ibid*, s 672.12(1).
12 *Ibid*, ss 672.12(1)–(3).
13 *YCJA*, *supra* note 3, s 141(1).

regarding fitness to stand trial and/or criminal responsibility. An assessment order can also request that a mental health professional provide evidence to the court to assist in determining:

> [W]hether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child…[,] the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused…[,] whether a finding that the accused is a high-risk accused should be revoked…[,] or… whether an order should be made… for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.[14]

However, in the authors' experience, assessments are rarely, if ever, ordered to inform these issues, and they will not be discussed further in this paper.

## II. Increased Contact Between Mental Health and Justice Systems

### A. Why This Occurred and the Phenomenon of Transinstitutionalization

Over the years, there has been an increase in contact in the criminal justice system in Canada among those diagnosed with mental illness. The deinstitutionalization movement that was initiated in the 1960s throughout North America led to the widespread discharge of patients from psychiatric facilities into the community over the following decades.[15] The increase in rates of the mentally ill becoming involved in the justice system has been attributed to a lack of community-based treatment options,[16] along with reductions in the number of available local psychiatric beds[17] while long-stay hospital beds continued to close.[18] This resulted in a shifting of the burden of care to various parties, including community agencies, family members, and the criminal justice system. The prevalence of diagnosed serious mental

---

14 *Criminal Code*, *supra* note 2, ss 672.11 (c)–(e).

15 Alain Lesage et al, "Downsizing Psychiatric Hospitals: Needs for Care and Services of Current and Discharged Long-Stay Inpatients" (2000) 45:6 Can J Psychiatry 532.

16 Jacques Baillargeon, Stephen Hoge & Joseph Penn, "Addressing the Challenge of Community Reentry Among Released Inmates with Serious Mental Illness" (2010) 46:3 American J Community Psychology 361.

17 H Richard Lamb & Linda Weinberger, "The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons" (2005) 33 J American Academy Psychiatry & L 529.

18 James Gilligan, "The Last Mental Hospital" (2001) 72 Psychiatric Q 45.

illness has been noted to range from approximately 5 to 7% in the community[19] compared with up to 16 to 24% in prisons in the United States.[20] In Canada, mentally ill offenders incarcerated in federal prisons grew as a population by 60% (or 84% when substance abuse was included as a mental disorder) between 1967 and 1999.[21] More recently, a Canadian study examining 1,110 male federal offenders who were entering federal custody found that 40% met criteria for at least one current mental disorder; this rose to over 70% when substance use and antisocial personality disorder diagnoses were included.[22] Some have criticized the movement of deinstitutionalization from mental hospitals to community living as being a punishment for mental illness, arguing that individuals who are diagnosed with mental illness are now remanded to prison more frequently, and are often kept in solitary confinement for much of their period of incarceration.[23]

Most notable of the negative outcomes of deinstitutionalization for individuals diagnosed with mental illness "was the sudden increase in their contact with the criminal justice system."[24] The term 'transinstitutionalization' refers to those individuals who moved from one institution (mental hospital asylum) to another (correctional facility) as community resources did not increase to meet the needs of a vulnerable

---

19 Ronald Kessler et al, "The Prevalence and Correlates of Untreated Serious Mental Illness" (2001) 36:6 Part I Health Services Research 987 at 992.

20 Pamela M Diamond et al, "The Prevalence of Mental Illness in Prison" (2001) 29:1 Administration & Policy in Mental Health & Mental Health Services Research 21 at 25–26.

21 Canada, Senate, Standing Senate Committee on Social Affairs, Science and Technology, "Morning Meeting" *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 38-1, No 19 (7 June 2005), online: <sencanada.ca/en/Content/Sen/committee/381/soci/19eva-e> [perma.cc/RH42-SA6E].

22 Correctional Service Canada, *National Prevalence of Mental Disorders Among Incoming Federally-Sentenced Men Offenders* (Report), No R-357, by JN Beaudette, J Power & LA Stewart (Ottawa, CSC, 2015).

23 See generally Keramet Reiter & Thomas Blair, "Punishing Mental Illness: Trans-institutionalization and Solitary Confinement in the United States" in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement* (London, UK: Palgrave Macmillan UK, 2015) 177.

24 Glen Luther & Mansfield Mela with Victoria J Bae, "Literature Review on Therapeutic Justice and Problem Solving Courts" (2013) at 2, online (pdf): *University of Saskatchewan* <www.usask.ca/cfbsjs/documents/Lit%20Review.pdf> [perma.cc/25SC-GMXT].

population.[25] When outpatient mental health services were inadequate, deinstitutionalization created risks for the chronically mentally ill to become poor and homeless[26] which increased their risk of contact with the justice system, either as a victim of crime or as an accused person. Raphael and Stoll found significant transinstitutionalization rates for all men and women in the United States over the 20-year period from 1980 to 2000, with a relatively large rate for men in comparison to women and the largest rate observed for White men.[27] Their study estimated that 4 to 7% of incarceration growth between 1980 and 2000 was attributable to deinstitutionalization.[28] These results "suggest that a sizable portion of the mentally ill behind bars would not have been incarcerated in years past."[29] Although the number of Canadians who have been affected by transinstitutionalization is unclear, the former Correctional Investigator of Canada noted that "federal penitentiaries are fast becoming our nation's largest psychiatric facilities and repositories for the mentally ill. As a society, we are criminalizing, incarcerating and warehousing the mentally disordered in large and alarming numbers."[30] Thus, the overincarceration of mentally ill individuals appears to be a significant issue in Canada as well as the United States.

## B. What is Known About Those Who Have Been Diagnosed With a Mental Disorder and Are Justice-Involved

Prisons and jails have been noted by some to be a stop gap of sorts, used to literally capture and house those who are diagnosed with mental illness and who lack adequate community supports. As noted by Sapers, "[t]he needs of mentally ill people are unfortunately not always being met in the

---

25 Steven Raphael & Michael A Stoll, "Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate" (2013) 42:1 J Leg Stud 187 at 189.

26 See generally Christopher Jencks, *The Homeless* (Cambridge, Mass: Harvard University Press, 1995); E Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis* (New York, NY: John Wiley & Sons, 1997).

27 Raphael & Stoll, *supra* note 25 at 189–90.

28 *Ibid* at 190.

29 *Ibid* at 187.

30 Canada, *Annual Report of the Office of the Correctional Investigator 2009–2010*, Catalogue No PS100-2010E-PDF (Ottawa: CIC, 2010) at 6, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20092010-eng.pdf> [perma.cc/7FZ9-TZPA].

community health and social welfare systems. As a result, the mentally ill are increasingly becoming deeply entangled in the criminal justice system."[31] The prevalence of all mental disorders is higher in prisoners than in the general population worldwide, and in some countries, more people who have been diagnosed with severe mental illness are in prisons than in psychiatric hospitals.[32] "One in seven prisoners has [a] major [depressive disorder] or psychosis, with little change in rates during the past three decades."[33] Prisoners are "at increased risk of all-cause mortality, suicide, self-harm, violence, and victimization", yet these issues are frequently under-identified and poorly treated.[34] In one study examining the time after release until return to prison in the United States, the median time for offenders with a diagnosed serious mental illness to return to prison was 385 days versus 743 days for non-mentally ill offenders, which is 358 days sooner.[35] Recidivism is a significant issue. Offenders with diagnosed mental illness repeatedly offend, possibly due to inadequate provision of care while they are involved with the justice system. Individuals who are released without adequate support may live in poor neighbourhoods and lack social supports. As well, the impoverished may turn to criminal behavior to satisfy basic needs of shelter and food, rather than engaging in such acts due to a criminal mindset.

In some cases, mentally disordered individuals with criminal charges may not be incarcerated, even though they have frequent contact with the legal system. Incarceration and crime rates do not always consistently rise and fall in synchrony with each other.[36] Problem-solving courts for those with mental disorder or substance use problems may divert the mentally ill

---

31 *Ibid.*

32 Seena Fazel et al, "Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions" (2016) 3:9 Lancet Psychiatry 871 at 871–72.

33 *Ibid* at 872. See also Seena Fazel & Katharina Seewald, "Severe Mental Illness in 33,588 Prisoners Worldwide: Systematic Review and Meta-Regression Analysis" (2012) 200:5 British J Psychiatry 364.

34 Fazel et al, *supra* note 32 at 871.

35 Kristin G Cloyes et al, "Time to Prison Return for Offenders with Serious Mental Illness Released from Prison: A Survival Analysis" (2010) 37:2 Crim J & Behav 175 at 175.

36 Correctional Service of Canada, Research Branch, *Comparing Crime and Imprisonment Trends in the United States, England, and Canada from 1981 to 2001* (Research Brief), No B-29, by Roger Boe (Ottawa: CSC, 2004) at 23–24, online: <www.csc-scc.gc.ca/research/b29-eng.shtml> [perma.cc/ZRW5-QCZN].

away from prisons[37] and prison alternatives (such as restorative justice and community service orders), also decreasing the rates of incarceration.[38] Research that considers a broader group of individuals involved in justice, but not limited to prison populations, is important as the profiles of those in versus out of custody may differ.

In considering the previous literature examining individuals who have participated in a forensic mental health assessment, several factors have been associated with being found unfit to stand trial or NCRMD. A meta-analysis of 68 studies on fitness to stand trial published between 1967 and 2008 was conducted that compared fit and unfit defendants on a number of demographic, psychiatric, and criminological variables.[39] The most robust findings were that defendants diagnosed with a psychotic disorder were approximately eight times more likely to be found unfit than defendants without a psychotic disorder diagnosis, and the likelihood of being found unfit was approximately double for unemployed defendants as compared to employed defendants.[40] The likelihood of being found unfit "was also double for defendants with a previous psychiatric hospitalization compared to those without a hospitalization history."[41]

In Canada, a large study known as the National Trajectory Project examined 1,800 individuals who had been found NCRMD in one of three provinces (British Columbia, Ontario, and Quebec) between 2000 and 2005.[42] The researchers gathered information about diagnoses and demographic variables, and tracked outcomes (e.g. rates of reoffending) up to 2008.[43] They found that individuals who were found NCRMD were most commonly diagnosed with a psychotic disorder, and approximately one-

---

37 See generally Roy D Schneider, "Mental Health Courts and Diversion Programs: A Global Survey" (2010) 33:4 Intl J L & Psychiatry 201.

38 See "Global Prison Trends 2018: The Rehabilitation and Reintegration of Offenders in the Era of Sustainable Development" (2018), online (pdf): *Penal Reform International* <www.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf> [perma.cc/NMT5-T2QK].

39 Gianni Pirelli, William H Gottdiener & Patricia A Zapf, "A Meta-Analytic Review of Competency to Stand Trial Research" (2011) 17:1 Psychol Pub Pol'y & L 1.

40 *Ibid* at 16–17, 31.

41 *Ibid* at 1.

42 Anne Crocker et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada, Part 2: The People Behind the Label" (2015) 60:3 Can J Psychiatry 106.

43 *Ibid* at 106.

third of individuals had a comorbid substance use disorder.[44] Almost three-quarters of individuals had at least one psychiatric hospitalization prior to their legal findings.[45] Close to 16% of the sample were female, and the average age was 36.56 years.[46] Almost half of the sample had at least one prior criminal conviction.[47] Only 17% of the sample had reoffended during a three-year follow up period, and those individuals with a severe index offence (i.e., causing or attempting to cause death or a sexual offence) were even less likely to reoffend (6% had committed a new offence during the three-year follow up).[48]

Fewer studies have considered groups of individuals who were referred for court-ordered forensic mental health assessment and compared those who were found NCRMD to those who were not found NCRMD. Results of a recent meta-analysis of 15 of these studies, which included 19,500 cases,[49] indicated that older age, female sex, educational attainment, and unemployment were associated with being found NCRMD and that such individuals more often had psychiatric histories and psychotic disorders.[50] Those that were found NCRMD were less likely to have criminal histories but more likely to have been opined unfit to stand trial in the past.[51] A related study comparing individuals who were referred for an assessment of fitness to stand trial to those who were referred for an assessment of NCRMD found that non-White accused persons, as well as individuals with a diagnosis of a psychotic, organic, or developmental disorder were more likely to be referred for an assessment of fitness to stand trial.[52] Individuals with violent charges were comparatively more likely to be referred for a NCRMD assessment.[53]

---

44 *Ibid.*

45 *Ibid.*

46 *Ibid* at 108.

47 *Ibid* at 112.

48 Yanick Charette et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada, Part 4: Criminal Recidivism" (2015) 60:3 Can J Psychiatry 127 at 127.

49 See Lauren E Kois & Preeti Chauhan, "Criminal Responsibility: Meta-Analysis and Study Space" (2018) 36:3 Behav Sci & L 276.

50 *Ibid* at iv.

51 *Ibid.*

52 Kois et al, *supra* note 5 at 301, 304.

53 *Ibid* at 304.

Recent research using population-level Canadian administrative data demonstrated that high numbers of individuals with diagnosed mental illness are also navigating the justice system.[54] This study accessed the Manitoba Centre for Health Policy data repository which connects multiple databases throughout the province to demonstrate the robust relationship between mental disorder and justice involvement as either an accused person or as an identified victim. For all Manitoba residents aged 18-64 between 2007 and 2012 (N=793,024), diagnosed mental disorders (determined by examining inpatient and outpatient healthcare data) were compared with overall and per person rates of justice involvement in the 2011/2012 fiscal year across mental disorder categories.[55] 24% of the Manitoba population had a diagnosed mental disorder over the five-year timeframe. Urban-dwelling residents with mental disorders often lived in poor neighbourhoods, especially those with psychotic (41.4%) or personality (44.2%) disorders.[56] The relative risk of criminal accusations in a one-year time period, after adjusting for demographics and presence of a substance use disorder, remained two to five times higher in those with mental disorders compared to the general population. Similarly, rates of victimization were also two to five times higher among those with mental disorders.[57] The risk of experiencing victimization in the same year as a criminal accusation was significantly increased among those with mental disorders.[58]

## III. The Evolution of Forensic Mental Health Assessments

### A. Historical Overview

A forensic mental health assessment (FMHA) is a specialized evaluation conducted for lawyers or the courts by mental health professionals.[59] The forensic clinician is invested with a great responsibility to present the

---

54 See Hygiea Casiano et al, "The Intersection Between Criminal Accusations, Victimization, and Mental Disorders: A Canadian Population-Based Study" 2020 65:7 Can J Psychiatry 492.

55 *Ibid* at 494.

56 *Ibid* at 495.

57 *Ibid* at 496.

58 *Ibid*.

59 Kirk Heilbrun, Stephanie Brooks Holliday & David DeMatteo, *Forensic Mental Health Assessment: A Casebook*, 2nd ed (New York, NY: Oxford University Press, 2002) at 1.

information gathered during an assessment, including diagnosis, treatment, and any other information that the judge requests (e.g. information regarding mitigating factors and/or evaluations of witness credibility).[60] These evaluations serve as tools to inform legal decision-making or assist in the representation of a client, and they have historically been used to address questions in civil, family, or criminal law contexts.[61] The testimony of mental health experts is often considered to be important evidence utilized "by criminal courts in determining issues arising throughout the adjudicative process."[62] As increasing numbers of individuals with a diagnosed mental illness are entering into the criminal justice system, court actors are more frequently tasked with identifying people who require an FMHA.

Both psychiatry and psychology have a lengthy history of involvement in legal issues. This involvement began with theoretical contributions, such as the development of tools to be used as part of the assessment process and research regarding legally relevant issues (e.g. jury decision making and accuracy of eyewitness testimony). It is only over the past few decades that forensic mental health professionals have become involved in providing expert evidence regarding issues such as fitness to stand trial and criminal responsibility. A seminal ruling by the United States Supreme Court resulted in criteria referred to as the Daubert standard.[63] This ruling specified five factors that can be used to determine whether the testimony of an expert witness is based on valid science and can be appropriately applied to the issue in question. These factors include: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a

---

60 Antonio Iudici et al, "The Clinical Assessment in the Legal Field: An Empirical Study of Bias and Limitations in Forensic Expertise" (2015) 6:1831 Frontiers Psychology 1 at 1–2.

61 Heilbrun, Holliday & DeMatteo, *supra* note 59 at 2.

62 Richard E Redding, Marnita Y Floyd & Gary L Hawk, "What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar" (2001) 19:4 Behav Sci & L 583 at 583.

63 *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993).

relevant scientific community.[64] These factors replaced a previously established and less stringent ruling, the Frye standard, [65] which stated only that scientific methods had to be generally accepted as being reliable by members of the scientific community. Despite the Daubert standard being widely adopted, some states still use the Frye standard to determine expertise.

In Canada, similar legal standards are used to determine whether expert witnesses are appropriately qualified to provide testimony. These standards were established in a case from the early 1990s, *R v Mohan*, and are referred to as the Mohan criteria.[66] These criteria state that expert evidence must be (a) necessary to assist the trier of fact; (b) relevant to the issue; (c) provided by a qualified individual; and (d) there must be no exclusionary rule. A ruling by the Supreme Court of Canada several years later[67] further specified that experts should be allowed to provide an opinion on the ultimate issue before the court (e.g. criminal responsibility of an individual), as long as the judge or jury makes the final decision on the issue. Although it is legally permissible for an expert to provide an opinion on the ultimate issue, this remains a topic of debate among psychological and psychiatric experts who conduct forensic mental health assessments.[68]

## B. Forensic Mental Health Assessments in Manitoba

In the adult forensic system in Manitoba, the majority of assessments are requested to assist the court in determining fitness to stand trial based on current mental health issues, and/or criminal responsibility based on the mental state of the individual at the time of the index offence. The most frequently-ordered assessments over the past six years were for fitness to stand trial (56%), followed by criminal responsibility (31%), and full assessments (13%).[69] Other Canadian researchers have reported a similar

---

64 *Ibid* at 593. See also MG Farrell "Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemiology and Legal Process" (1993) 15 Cardozo L Rev 2183.

65 *Frye v United States*, 293 F 1013 (DC Cir 1923).

66 *R v Mohan*, [1994] 2 SCR 9 at 10, 20–25, 114 DLR (4th) 419.

67 *R v R (D)*, [1996] 2 SCR 291 at para 39, 136 DLR (4th) 525.

68 See e.g. Ira K Packer, *Evaluation of Criminal Responsibility* (New York, NY: Oxford University Press, 2009)

69 Sabrina Demetrioff & Hygiea Casiano, "Forensic Mental Health Assessments: Characteristics of Individuals found Not Criminally Responsible by Reason of Mental Disorder (NCRMD) Versus Those Found Criminally Responsible" (2020) [unpublished].

proportion of full assessments ordered, although they reported that approximately 68% of requests in their sample were for fitness assessments, and 21% were for assessments of criminal responsibility.[70] In contrast, the *YCJA* allows the court to order assessments for a broader range of issues, including bail and sentencing considerations.[71] The sections of the *Criminal Code* that address mental disorder and court-ordered assessments of fitness and criminal responsibility apply to youth accused as well as adults, but the *YCJA* specifies additional requirements and considerations when conducting youth assessments (e.g. providing a copy of the assessment report to the parent of the youth accused).[72] An assessment of fitness to stand trial or criminal responsibility may be ordered at any point during court proceedings. It can be initiated by the court (i.e. the judge), the accused, or, provided certain conditions are met, by the prosecution. In order for the prosecutor to apply for an assessment order, the accused must have raised the issue of fitness or of mental capacity for criminal intent, or the prosecutor must be able to satisfy the court that there are reasonable grounds to consider the issue. Roughly 10 to 20% of individuals referred for an assessment of criminal responsibility are deemed eligible for the defence by the forensic mental health team in Manitoba every year.[73]

## C. Quality of Forensic Mental Health Assessments

The quality of forensic mental health reports is important for legal professionals, as well as accused persons. In addition, studies have shown that experts themselves are interested in becoming aware of potential biases in their work and improving their evidence to the court.[74] Multiple studies have examined the quality of forensic assessment reports, examining factors such as the inclusion of demographic information, sources of information, ethical considerations, use of psychological assessment measures, and highlighting the relationship between clinical evidence and the evaluator's opinion.[75] A recent study used statistical modeling to examine the accuracy of assessors' judgements regarding competency to stand trial and found that

---

70 Maurice M Ohayon et al, "Fitness, Responsibility, and Judicially Ordered Assessments" (1998) 43:5 Can J Psychiatry 491 at 492.

71 *YCJA*, *supra* note 3, s 34(2).

72 *Ibid*, s 34(7).

73 Demetrioff & Casiano, *supra* note 69.

74 See e.g. Iudici et al, *supra* note 60.

75 Kristen Fuger et al, "Quality of Criminal Responsibility Reports Submitted to the Hawaii Judiciary" (2014) 37 Intl J L & Psychiatry 272 at 273.

assessors were able to distinguish between competent and non-competent individuals with a high level of ability, although there were some limitations to these findings.[76]

Comparatively, little is known about how forensic mental health assessments are perceived by the lawyers who request these assessments and the judges who make final rulings on a defendant's case.[77] An early study in the United States surveyed defence lawyers regarding a number of issues related to not guilty by reason of insanity (NGRI) assessments and found that the lawyers were unsatisfied with the state hospital's NGRI assessment in 55% of cases.[78] Concerns included that the evaluators were reluctant to deem defendants "insane", that the evaluation was not comprehensive or that the assessor did not spend sufficient time with the defendant, and that reports contained contradictory statements.[79]

There have also been positive reviews of forensic mental health evaluations by legal professionals. In one study, the concordance between mental health professionals' opinions and court determinations of fitness to stand trial was high and there was a tendency to regard forensic examiners as experts who should make the determination of fitness rather than leave it to the court to make a legal determination.[80] In South Australia, magistrates were generally satisfied with the quality of expert reports and were interested in assessment of mental health history, brain impairment, and opinion regarding clinical diagnosis.[81] Another Australian study surveyed legal representatives (solicitors, barristers, and lawyers) regarding their opinions about using psychologists as experts and found that participants described good reports as being well-formatted with "a clear link between facts and opinions", containing detailed information about

---

76 See Douglas Mossman et al, "Quantifying the Accuracy of Forensic Examiners in the Absence of a 'Gold Standard'" (2010) 34 Law Hum Behav 402.

77 Amanda J White et al, "Fitness to Stand Trial: Views of Criminal Lawyers and Forensic Mental Health Experts Regarding the Role of Neuropsychological Assessment" (2015) 22:6 Psychiatry Psychol & L 880 at 881.

78 Richard A Pasewark & Paul L Craig, "Insanity Plea: Defense Attorneys' Views" (1980) 8:4 J of Psychiatry & L 413 at 432.

79 *Ibid* at 433.

80 Patricia A Zapf et al, "Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?" (2004) 4:1 J Forensic Psychol Prac 27 at 34, 35.

81 Andrew Day et al, "The Uses of Court-Ordered Psychiatric and Psychological Reports in South Australian Magistrates' Courts" (2000) 7:2 Psychiatry, Psychology & L 254 at 256.

client background, diagnosis, likely outcomes, and treatment plan.[82] In contrast, poor reports were described as lacking in these areas, as well as lacking objectivity and information about clinical observations.[83] Information from a nearly 20-year old study in the United States surveyed judges and lawyers and found that participants were primarily interested in clinical diagnosis, followed by an analysis of whether the condition met the relevant legal threshold and an ultimate opinion on the legal issue.[84] Notably, to our knowledge, none of the studies examining the opinions of judges and lawyers has included Canadian data.

## IV. THERAPEUTIC JURISPRUDENCE

As contact between the criminal justice system and those diagnosed with mental illness increased, the theory of therapeutic jurisprudence was developed. This framework posits that the law itself functions as a kind of therapeutic agent.[85] According to this theory, "[l]egal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces" that may produce either therapeutic or anti-therapeutic consequences.[86] It has become clear that actions taken by legal practitioners often have health consequences for defendants.[87] For example, behavioural contracts developed in the mental health arena have been used in some courts to increase the likelihood of offenders adhering to their conditions of probation.[88] A post-sentencing intake process that identifies needs and refers defendants to available services on a voluntary basis would be another example of the embodiment of such principles.[89] Although the concept of therapeutic jurisprudence can be applied whenever an individual with

---

82 Elena Gianvanni & Stefanie Sharman, "Legal Representatives' Opinions Regarding Psychologists Engaging in Expert Witness Services in Australian Courts and Tribunals" (2016) 24:2 Psychiatry, Psychology & L 223 at 228.

83 *Ibid* at 229.

84 See Redding, Floyd & Hawk, *supra* note 62.

85 David B Wexler, "An Orientation to Therapeutic Jurisprudence" (1994) 20:2 New Eng J Crim & Civ Confinement 259 at 259.

86 *Ibid*.

87 See William G Schma, "Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts" (2003) 82:1 Michigan Bar J 25.

88 David Wexler, "Therapeutic Jurisprudence: An Overview" (2000) 17 TM Cooley L Rev 125 at 131–32.

89 Pamela Casey & David B Rottman, "Therapeutic Jurisprudence in the Courts" (2000) 18:4 Behav Sci & L 445 at 449.

mental health issues becomes involved in the criminal justice system, the connection between the mental health and criminal justice systems becomes explicit in the context of court-ordered mental health assessments. It is unclear, at this point, how the development of therapeutic jurisprudence principles has affected Canadian courts and their use of forensic mental health systems.

The findings in the literature to date highlight the vulnerability of those who have a mental disorder and come into contact with the justice system. Now that it has been established that there is an increasing number of individuals in the community who have both a diagnosed mental illness and justice involvement, the question becomes: what can be done to truly help those who are the most vulnerable, the individuals who are caught at the nexus of the mental health and justice systems? How do the courts use forensic mental health assessments? Are they being appropriately accessed? Are the requests for forensic mental health assessments used as a means of getting help for the defendant, even if criminal responsibility or fitness to stand trial is not at issue? Could another mechanism provide support for these individuals?

## V. Proposed Analysis

Despite the paramount need, no concerted mental health strategy exists between the legal and medical sectors. Forensic mental health, with its target population of individuals with mental illness who are justice-involved, represents one of the most complex and challenging areas of mental health. Results from forensic assessments are heavily relied upon in legal proceedings and can be crucial in legal decision-making.[90] Research is needed on how mental health experts can most effectively communicate relevant information to the courts. Although there have been studies in the United States about potential reasons why forensic evaluations are ordered, there are no available Canadian studies for review. Furthermore, previous studies have been limited by their scope in only including adult offenders, and most predate the introduction of the therapeutic jurisprudence model.

In addition, problems exist within the current model of forensic evaluation orders. In the adult system in Manitoba, the assessment order form contains a series of checkboxes that only allows the clerk of the court

---

[90] See e.g. Luther, Mela & Bae, *supra* note 24; Julio Arboleda-Flórez, "Forensic Psychiatry: Contemporary Scope, Challenges and Controversies" (2006) 5:2 World Psychiatry 87.

to check off the type of evaluation requested. There is no room to note further information that ought to be considered, such as concerns for that particular defendant or any additional knowledge that the courts hope to gain from the assessment. There is generally little communication between judicial officials and mental health clinicians, so feedback about the reports is rarely given unless verbal testimony is required, even though the importance of feedback from the courts to improve report quality has been identified in the literature.[91] It is unclear whether the scope of evaluations is adequate for vulnerable adults with conditions such as Fetal Alcohol Spectrum Disorder. To date, no studies have been published to contrast how youth and adult court differ in their use of forensic evaluations.

Mental health clinicians are interested in improving the quality of their contribution to the justice system.[92] Our project aims to understand the elements that go into the request for forensic mental health evaluations by legal professionals and to explore the reasons that specific judicial assessment orders are made. In order to better understand the decision-making process that leads to the ordering of forensic mental health assessments, the authors plan to conduct a survey of legal professionals in Manitoba who work in different types of courts, including problem-solving courts (such as drug treatment court, domestic violence court, and mental health court), as well as traditional criminal law courts. The survey respondents will include judges, defence lawyers, and Crown attorneys who work with criminal cases and would like to share their opinions on forensic mental health assessments. It is hoped that the results of this survey will provide forensic mental health professionals with a better understanding of what their legal counterparts are hoping to learn from forensic assessment reports, what factors indicate to legal professionals that a forensic assessment might be helpful or necessary, and how legal professionals decide to request these assessments (in other words, what thought processes go into the requesting of assessments within the existing legislative framework that dictates when and why assessments can be ordered).

An additional goal of the proposed study is to increase communication and collaboration between legal and forensic mental health professionals (some researchers have even suggested approaches that combine legal and

---

91 See e.g. Richard Robinson & Marvin W Acklin, "Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary" (2010) 33 Intl J L & Psychiatry 131.

92 See e.g. Iudici et al, *supra* note 60 at 1.

mental health input into forensic mental health assessments).[93] To our knowledge, there is no existing data that summarizes these issues in the Manitoba justice system, and the proposed study would increase knowledge and understanding of legal procedures in our province.

## A. Project Activities

The authors propose to create a survey which will be available both online and on paper. Questions will focus on the factors that contribute to the decision to request a forensic assessment, feedback regarding the usefulness of those evaluations in judicial decision making, and suggestions for improvement of the evaluation reports. Survey questions will be developed by the authors, using information based on our knowledge and experience, literature searches, and consultation with legal professionals. Once the survey content is finalized and ethical approval for the study has been obtained, the survey will be administered both in person at a joint Crown and Defence Conference in Manitoba and through an online link. Judges will be canvassed to complete the survey at a conference that occurs the same week as the Crown and Defence Conference. There are 30 judges in Winnipeg and ten in rural Manitoba, as well as approximately 150 Crown attorneys and 115 defence lawyers in Manitoba.

The primary focus of our analyses of the results will be examining how decisions are currently being made regarding the ordering of forensic mental health evaluations, as well as satisfaction with forensic mental health reports. The content of the questionnaire will allow us to contrast processes and reasoning in youth and adult court, along with examining potential differences between rural and urban courts.

It is anticipated that the results will be of great interest to both legal and mental health professionals. In terms of knowledge translation, we plan to develop a workshop based on the survey results to help increase the knowledge of legal professionals regarding the nature and purpose of forensic assessments and foster increased communication between legal and forensic mental health systems. There is potential for the workshop to be delivered via webinar, as well as in person, so that legal professionals in rural communities will have access to this educational opportunity. The workshop and webinar will be delivered by the authors, and we will pursue

---

93 See e.g. Astrid Birgden & Don Thomson, "The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers" (1999) 6:2 Psychiatry, Psychology & L 207.

Continuing Professional Development accreditation. Individuals who are not able to attend the workshop will have the opportunity to access a recorded version.

Our primary goals for the proposed study are to:

1. Understand the factors that contribute to the decision by legal professionals to order a mental health assessment.
2. Improve the quality of reports provided to the courts by gaining a better understanding of what information legal professionals hope to obtain when ordering mental health evaluations.
3. Provide information to the courts about the specific issues that mental health assessments can address and the best situations in which to have them ordered.
4. Increase communication between forensic mental health professionals (psychiatrists and psychologists) and legal professionals (lawyers and judges).

The results of this study will help to advance legal knowledge with the development and subsequent communication of recommendations to guide legal professionals in their requests for mental health assessments. The study can foster excellence within the legal profession by aiding professionals to understand the optimal uses of mental health evaluations and helping them to consider therapeutic jurisprudence when interacting with defendants. In addition, the feedback received from legal professionals will help to improve the quality of forensic reports that the courts receive to assist them with decision-making. If legal professionals develop a clearer understanding of forensic mental health assessments, they can potentially improve their clients' understanding of these issues as well.

This project has the potential to increase appropriate access to resources if it identifies an unmet need for mentally ill individuals involved in the justice system. The results may instigate an evaluation of current legislation around forensic evaluations and encourage law reform to allow for greater access to mental health assessments. The potential exists with this project to advance procedural justice to defendants by increasing communication between the mental health and criminal justice systems. For legal professionals, this project can help them understand the best uses of forensic assessments. In turn, the information obtained from this study can help mental health clinicians to understand the rationale behind requests for evaluation orders so that they can improve the quality of reports.

Through increased communication, the project could help to enhance elements of procedural justice, including greater accountability for service providers and being more transparent. Greater procedural justice has been shown to lead to defendants seeing legal decisions as legitimate, incorporating the court's values and goals as their own, and reducing their recidivism rates.[94] It has been suggested that members of stigmatized groups, such as people who have been diagnosed with a mental illness, might be particularly sensitive to procedural fairness.[95]

In consultation with several judges, this project is timely. There has been some discussion about the potential need for expansion of mental health assessments to make the scope of evaluation requests broader in the adult criminal justice system. Vulnerable populations, such as adults with possible Fetal Alcohol Spectrum Disorder, often have multiple needs that may be identified through a mental health assessment, but the current legislation does not allow access to a forensic mental health assessment unless the situation meets the narrow confines of fitness to stand trial or criminal responsibility evaluations.

## VI. CONCLUSIONS

There are numerous benefits that can be derived from our proposed study of legal decision-making regarding the ordering of forensic mental health assessments. Understanding what legal professionals want in a forensic assessment is important for forensic psychiatrists and psychologists who do this work and aids in quality improvement endeavors seen in other areas of health care.[96] The proposed project will help to inform mental

---

94 Heathcote W Wales, Virginia Aldige Hiday & Bradley Ray, "Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism" (2010) 33:4 Intl J L & Psychiatry 265 at 265. See also Sarah Kopelovich et al, "Procedural Justice in Mental Health Courts: Judicial Practices, Participant Perceptions, and Outcomes Related to Mental Health Recovery" (2013) 36:2 Intl J L & Psychiatry 113.

95 Amy C Watson & Beth Angell, "Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness" (2007) 58:6 Psychiatric Services 787 at 789.

96 See e.g. Nils Duits et al, "Quality Improvement of Forensic Mental Health Evaluations and Reports of Youth in the Netherlands" (2012) 35:5/6 Intl J L & Psychiatry 440; Nicolas Combalbert et al, "Forensic Mental Health Assessment in France: Recommendations for Quality Improvement" (2014) 37:6 Intl J L & Psychiatry 628; Robert M Wettstein, "Quality and Quality Improvement in Forensic Mental Health Evaluations" (2005) 33:2 J Am Acad Psychiatry & L Online 158.

health assessors' clinical practice when conducting court-ordered assessments, and follows an evidence-based practice approach. "We can work toward improving report content, writing, exposition, and critical thinking,"[97] which, in turn, could help to improve the evidentiary basis for legal decision making. Legal education in Canada is in the process of undergoing reform.[98] In a field where consistent and fair decision-making is essential, therapeutic jurisprudence research makes a valuable contribution.[99] In order to improve services to those with mental disorders who interact with the law, Mulvey and Schubert have five key aspects to consider: "expand[ing] the reach of standard and innovative mental health services, divert[ing] mentally ill individuals early in the criminal justice process, enrich[ing] training of criminal justice personnel, us[ing]… data more effectively, and promot[ing]… interdisciplinary aftercare programs for people with mental illness when they are released from jails and prisons."[100]

Ultimately, the proposed study may facilitate the use of therapeutic jurisprudence principles to aid the clients we serve. A next step of this project would see the expansion of this survey among legal respondents nation-wide. Other future directions include more education about forensic evaluations among our legal counterparts and their ideal role in the court system, along with further identification of need and expansion of supports for those who have both criminal justice involvement and diagnosed mental health issues. This proposed study will be an important first step towards these goals.

---

97 Wettstein, *supra* note 96 at 167.

98 Brooke Bloom, "Jumping on The Bandwagon: How Canadian Lawyers Can & Should Get Involved in the Emerging Trend to Implement Therapeutic Jurisprudence Practices in Canadian Courts" (2006) bepress Legal Series 1559 at 3.

99 Carrie J Petrucci et al, "Therapeutic Jurisprudence: An Invitation to Social Scientists" (2003) Handbook of Psychology in Legal Contexts 579.

100 Edward P Mulvey & Carol A Schubert, "Mentally Ill Individuals in Jails and Prisons" (2017) 46:1 Crime & Justice 231 at 231.