Constructing Risk through Jurisdictional Talk: The Ontario Review Board Process under Part XX.1 of the Criminal Code*

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Abstract

The Ontario Review Board (ORB) makes and reviews dispositions that limit the freedoms of individuals found not criminally responsible (NCR) due to a "mental disorder." Their dispositions must be responsive to the risk NCR individuals pose to the public. To assess how risk is measured, the authors studied twenty-six publicly accessible court files pertaining to the appeal of ORB dispositions. The authors studied hospital reports, the ORB's dispositions, and transcripts of ORB hearings found in the court files. In this paper, the authors draw on institutional ethnography and critical legal theories of jurisdiction to analyze how certain citational practices—namely citation of closely related statutes and the ORB's procedures—participate in structuring the ORB's analysis of risk. The authors argue that risk becomes legible to participants in the NCR process through the intertextual mediation of these citations, which legitimize and naturalize the NCR individuals' dependence on forensic institutions.

Keywords: Critical legal theory, institutional ethnography, jurisdiction, legal technique, mental health law

Résumé

La Commission ontarienne d'examen (COE) prend, et aussi révise, des décisions qui limitent les libertés des personnes jugées non criminellement responsables (NCR) en raison de « troubles mentaux ». Ses décisions doivent tenir compte du risque que ces personnes peuvent représenter pour le public. Pour évaluer comment le risque est mesuré, les auteurs ont étudié vingt-six dossiers judiciaires d'appel à l'égard des décisions de la COE. Les auteurs ont étudié les rapports d'hôpitaux, les décisions de la COE et les transcriptions des audiences de la COE

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trouvées dans les dossiers judiciaires. Dans cet article, les auteurs s'appuient sur l'ethnographie institutionnelle et les théories juridiques critiques de la compétence pour analyser comment certaines pratiques citationnelles – à savoir les citations des procédures de la COE et de certaines lois étroitement liées – participent à la structuration de l'analyse du risque par la COE. Les auteurs soutiennent plus précisément que le risque devient compréhensible pour les participants aux procédures en lien avec la NCR par la médiation intertextuelle de ces citations, qui légitiment et naturalisent la dépendance des personnes non criminellement responsables à l'égard des institutions médico-légales.

Mots clés: Théorie critique du droit, ethnographie institutionnelle, compétence, technique juridique, droit de la santé mentale

Introduction

In Canada, an individual cannot be convicted of a criminal offence if, due to a "mental disorder," they were "incapable of appreciating the nature and quality of the act" for which they were charged, "or of knowing that [that act] was wrong" (*Criminal Code* 1985, s 16(1)). Instead, courts rely on a process described under Part XX.1 of the *Criminal Code* (1985) to reach a verdict that such an individual was "not criminally responsible" on account of a "mental disorder" (NCR or NCR-MD). The NCR verdict usually sets the occasion for another legal hearing, this time with a provincial administrative body known as a review board, which is tasked with deciding whether the individual poses a "significant threat to the safety of the public" (*Criminal Code* 1985, s 672.5401). If so, the individual may be lawfully detained at a secure psychiatric facility where they can receive treatment, although it is also possible that the individual may be released conditionally "into the community," due to progress made with managing their condition, or discharged absolutely from the review board's supervision, if they no longer pose a significant threat.

Some NCR individuals are discharged absolutely within a few years. But as Jeremy Cheng and colleagues (2022, 407) noted in a recent study that followed a cohort of 109 NCR individuals from between 2005 and 2010 to 2015, "approximately half" of their sample were under the provincial review board's supervision after ten years, a result that is consistent with other findings within and outside government (see e.g., Crocket et al 2015; Latimer and Lawrence 2006). For many NCR individuals, the process is excessive, often experienced as punishment in that dispositions entail deprivations of liberty (e.g., serious restrictions to movement, relationships, activities) and intrusions on autonomy (e.g., constant monitoring and reporting obligations) that last longer than the sentences they would have received had they been convicted (Livingston et al. 2016, 180). Non criminally responsible individuals also report that review boards disregard their views, place undue emphasis (if not complete deference) on the opinions of treatment teams, and are unpredictable (Livingston et al. 2016, 179–80). For some, the NCR process is an interminable sentence that totalizes punishment and administrative control in every domain of life, contrary to the stated purposes of rehabilitation. There are others, including NCR individuals, who view the NCR process in its design and

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implementation as legitimate (Livingston et al. 2016); however, our reading of the literature (and the statements of NCR individuals in dispositions and their supporting documents) suggests there are penumbral cases where risk is constructed in ways contrary to the law's purpose, that is, less about public safety and more about medico-legal visions of how a good, productive, and independent person appears and acts (also see Tyler et al. 2023; Kennedy et al. 2023).

Within this context we consider how review boards actually determine whether an individual poses a significant risk and, if they pose such a risk, how review boards in effect fashion their dispositions. Taking the Ontario Review Board (the "ORB") as a case-study, we collected and analysed the ORB dispositions, reasons, and associated supplementary material of twenty-six NCR files argued on appeal at the Ontario Court of Appeal in 2019.[1] Like the institutional ethnography practised in sociology (e.g., Smith 2005), social work (e.g., Herringer 1996), and critical health studies (e.g., Quinlan 2009), and, to a lesser extent, in sociolegal studies (Doll and Walby 2019; see e.g., Doll 2016; Smith 1988), we attend to the work done by texts within institutional processes (e.g., forensic hospital reports, past dispositions and reasons, transcripts of ORB hearings), looking past ruling narratives to account for how texts form part of and organize social action (Doll and Walby 2019). This paper focusses more narrowly on the contribution of legal citational practices across these documents—what we name "jurisdictional talk"—and how those citations participate in structuring the ORB's analysis of risk.

We observe that the ORB, witnesses, and parties to the NCR process often refer to and interpret "closely related statutes" in their legal analysis—"closely related statutes" is a term of art from the doctrinal study of administrative law that identifies legislation extrinsic to an administrative office (in the sense that the legislation does not create, nor confer direct powers to, an office) (Sossin and Flood 2018). But when the ORB considers closely related statutes in administrative decision-making, it does so in ways that defy how decision-makers might anticipate or understand themselves as behaving (and in ways that defy how jurists ordinarily orient to the topic, e.g., Sossin and Flood 2018). We observe that the ORB, witnesses, and the parties commonly referred to closely related statutes in their decisions, testimony, and arguments, not merely as background to inform decision-making, but actively in the construction and imagination of key determinations with which the ORB is tasked. Specifically, determinations of risk become legible to the ORB through the intertextual mediation (Doll and Walby 2019; Valverde 2015) of these citations, which legitimize and naturalize the NCR individuals' dependence on the forensic institutions involved in their ongoing control and treatment. Similar effects follow from citations of the ORB's own procedures. If these effects are not recognized and applied carefully, this textual work may lead to

[1] In 2019, there were fifty-two appeal decisions from the Ontario Court of Appeal pertaining to dispositions of the ORB. Materials were found in publicly accessible court files in the custody of the court registrar. Collection began in chronological order in September 2019, but paused halfway in February 2020. Due to significant interruptions caused by the COVID-19 pandemic, data collection was put on an indefinite pause and our focus shifted to data analysis. Upon completing data analysis on the twenty-six files, we determined we had reached saturation and did not need to resume data collection when COVID-19 safeguards were reduced.

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unintended, inequitable, and devastating consequences, such as prolonged or disproportionate forms of surveillance and control.

Our paper carries out the argument with the following structure: (1) we describe the NCR process, and law applicable to NCR individuals, having regard to the ruling narratives found in legislation and court decisions; (2) we briefly describe our approach to the materials collected, namely our focus on how texts contribute to decision-making and how that contribution interfaces with institutional ethnography; (3) we trace the work done by texts within the institutional processes of the board disposition, describing how these texts form part of the analysis of risk; and (4) we conclude by discussing generally the implications of these findings for sociolegal studies of governance, especially with regard to the concept of "jurisdiction" as *techne* or practice, and how the text work done by the ORB bears on recent theories.

Ruling Narratives of the NCR Process

Following an NCR verdict, courts have the power to issue orders—called dispositions—which limit the freedoms of the NCR individual if they continue to pose a significant threat to the safety of the public (*Criminal Code* 1985, s 672.45). Such decisions are ordinarily remitted to the provincial review board (such as the ORB), which also has that power according to the *Criminal Code* (1985, s 672.47). If the NCR individual continues to pose a significant threat, then an order will either release the NCR individual under certain conditions (a "conditional discharge") or direct for their detention at a hospital (a "detention order") (*Criminal Code* 1985, s 672.54). Conditions imposed under a conditional discharge or detention order must be responsive to "the need to protect the public from dangerous persons, together with the mental condition of the accused, [their] reintegration into society, and [their] other needs" (*Winko* 1999, para 47).

After a disposition is rendered, the ORB retains carriage of the individual's file indeterminately until they are absolutely discharged from the ORB's supervision. The ORB conducts annual reviews of dispositions (*Criminal Code* 1985, s 672.81), following "informal" hearings with the NCR individual and their counsel, the Crown, and the counsel for the hospital, where the ORB hears fresh submissions and evidence (*Criminal Code* 1985, s 672.5). The parties can request changes to the disposition, including the addition or removal of conditions and transitions between disposition types (e.g., detention order to conditional discharge; conditional discharge to detention order), or an absolute discharge. The disposition must also be reviewed in cases where the hospital significantly increases restrictions to liberties, such as when the individual violates a condition of their discharge and is detained as a result (*Criminal Code* 1985, s 672.81). Any changes to the disposition must be supported by the ORB's re-assessment of the individual's risk, which is based on the same test and kinds of factors as the original disposition (*Winko* 1999, 665).

The Ontario Court of Appeal (*Marmolejo (Re)* 2021, para 37) recently described the test of significant threat as a high threshold that requires the risk to be substantial and not merely speculative, pertaining to physical or psychological

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harm to the public, of a "serious criminal nature," and foreseeable. Considered elements "must be supported by evidence and be linked in a reasoned way to the finding that the NCR accused poses a significant threat to the public" (*Marmolejo (Re)* 2021, para 44). This includes situations that have yet to occur, such as predictions that an NCR individual may stop taking medication—often described medically as "decompensation," wherein one's functional capacities fail to overcome (compensate for) the "defects" of mental illness. In situations where the ORB must make such predictions, the Ontario Court of Appeal (*Muthulingam (Re)* 2020, para 18) clarified that the "[legal] test is *not* whether the appellant's behaviour *could* lead to decompensation and therefore the risk of serious harm" (emphasis in original). Rather, "[t]he test is whether there is evidence of a positive finding that there *is* a significant threat to public safety" (also see *Kassa (Re)* 2019, para 33–35; *Sheikh (Re)* 2019, paras 38–39). Again, the courts assert the necessity of evidence in the present, and reasoned analysis of such evidence in relation to the legal elements, to establish the particular risk.

In contexts of appeal, the Ontario Court of Appeal has ordered the ORB to reconsider its decisions on several occasions for want of "reasonable" analyses of whether the NCR individual poses a significant threat. For example, in *Kassa (Re)* (2019), the Court allowed the NCR individual's application and ordered the ORB to reconsider its decision, holding that the mere likelihood that the NCR individual might "fall away from psychiatric treatment" (*Kassa (Re)* 2019, para 10) does not show that the NCR individual is a significant threat to the public. The threat of physical or psychological harm must be "real" (*Kassa (Re)* 2019, para 35), and it must be criminal in nature in the sense of countenancing a serious offence under the *Criminal Code* (1985) (in other words, "not all criminal conduct will meet this standard") (*Kassa (Re)* 2019, para 31). The ORB ought to have, as the Court put it, analyzed together "the likelihood of a risk materializing and the seriousness of the harm that might occur" (*Wall (Re)* 2017, para 13; also see *Kassa (Re)* 2019, para 33).

The Court has also said that the ORB is required to consider closely related statutes in reaching its dispositions. For example, the *Mental Health Act* (1990) is often considered by the ORB alongside mechanisms under the *Criminal Code* (1985) that would return an NCR individual to hospital in the event of decompensation, such as a warrant of committal issued by the ORB under section 672.57 of the *Criminal Code* (1985) where the NCR individual is subject to a detention order (*R v Breitwieser* 2009, para 18) or "convening a new hearing under section 672.82(1)" (*Valdez (Re)* 2018, para 22). Specifically, the ORB considers those sections of the *Mental Health Act* (1990) that authorize the committal of an individual at hospital or the issuance of Community Treatment Orders. The Court (*Blake (Re)* 2021, para 37) further stated that where interpretations of the committal provisions under the *Mental Health Act* (1990) are disputed, "the [ORB], as an inquisitorial body, [must] require the parties to place a sufficient evidentiary and legal record before it, to enable it to determine the issue in the context of supporting its disposition as the least onerous and least restrictive." It is clear then that reference to closely related statutes—especially, although not exclusively, the

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Mental Health Act (1990)—is a requirement in the ORB process;[2] it is not a defect of decision-making but a mandatory form in which the assessment of risk must be cast.

The ORB's interpretation of those statutes alongside the *Criminal Code* (1985) (the latter of which enables and confers powers upon the ORB) is not itself a problem. Ostensibly, in considering closely related statutes, a tribunal or another administrative decision-maker can avoid absurdities or inequities that might result from interpreting their statute in isolation (Sossin and Flood 2018). Consideration of a closely related statute may also be necessary for a decision-maker to effect powers conferred on it under its enabling statute because the scheme provided under an enabling statute only partly addresses a social situation (Sossin and Flood 2018). Indeed, with regular exposure, a decision-maker's expertise regarding closely related statutes may become equivalent (or nearly so) to their knowledge of the enabling statute, affording them the same deference from a court when a decision is appealed (Sossin and Flood 2018). But what is unexplored is *how* consideration of closely related statutes factors in decision-making. It is the "how" of governance (as opposed to the legal theories that rationalize it) that matters most when it comes to the everyday experience of law. Having regard to the "how" of governance, our case study suggests that the process of citing closely related statutes does something more than avoid absurdities or inequities, or merely facilitate an office's mandate. Citation of closely related statutes can factor more deeply in administrative decision-making so that the task of administration fundamentally alters.

An Institutional Ethnographic Approach

The ruling narrative of the NCR process represents a linear pathway moving from the NCR verdict to absolute discharge, at which point the NCR individual is putatively rehabilitated and freed from the ORB's surveillance and control. That pathway relies on varied institutional actors—including courts, review boards, hospitals, treatment teams, legal counsel, etc.—each with varying contributions to the proper functioning of the NCR system. Notably for our purposes, having regard to the ORB's powers to make and review NCR dispositions, these institutional actors play a part in the assessment of risk which determines the very occasion for the disposition as well as the conditions applied to those under a disposition. The ruling narrative—drawn from legislation, case law, and policies—suggests this is an evidence-based determination, which is assisted in part by considering closely related statutes and the ORB's very procedures. Given the experiences of NCR individuals—who have complained of unpredictability, unfairness, and neglect (e.g., Livingston et al. 2016)—we found ourselves skeptical of the ruling narrative and endeavoured to trace the work actually done in the NCR process.

We adopt a sociolegal approach (Schiff 1976, 287) to study the work actually done in the NCR process, where: "the analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the

[2] Ontario's *Health Care Consent Act* (1996) has also been referenced as part of fashioning the least onerous disposition. See e.g., [2018] ORBD No. 25.

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perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation." More specifically, in line with critical and sociolegal theorists, we treat the contents and effects of the ORB processes as techniques—mediated by texts and practices with respect of those texts—that come together to fashion legal outcomes or effects (e.g., Rose and Valverde 1998). We think of our approach to sociolegal scholarship as compatible with, if not demonstrative of, institutional ethnography, where standpoint, textuality, and mapping are used to account for the actual effects of institutional forms on social action (Doll and Walby 2019). Our principal convergence with institutional ethnography lies in our shared attention to the work done by texts, which, as the late Dorothy Smith (2005, 166) defined, are "stretches of talk [and] what is inscribed in more or less permanent form" that "associa[tes] words and images with some definite material form that is capable of replication." Smith (2005, 166) continued:

> It is the *replicability of texts* that substructs the ruling relations; replicability is a condition of their existence. The capacity to coordinate people's doings translocally depends on the ability of the text, as a material thing, to turn up in identical form wherever the reader, hearer, or watcher may be in [their] bodily being. And when we are addressing institutions, as we are for the most part in institutional ethnography, we must be particularly aware of the role of texts in the generalization of social organization that we take for granted when we use the term.

Likewise, we understand the texts relied on in NCR processes, and practices with respect of those texts, as coming together and congealing in actual relations that subtend the performance and experience of law.

While we collected and analyzed twenty-six files, for this paper we focussed on documents from seven cases where the ORB explicitly cited and discussed closely related statutes, or the ORB's procedures. We refer to four by pseudonyms (Janessa, Marie, Robert, and Tomislav) since we foreground the details of their cases. In the next section, we report what we found in the files. We looked for references to closely related statutes or the ORB's procedures, identifying who cited them, how and where they cited them, and how those citations moved between and were taken up by other actors in the NCR process. That task of tracing the citational practices was aided by also noting where and how risk was described generally, actors imagined the NCR individuals' "re-offence" scenarios, and evidence was adduced and analyzed in the process.

Mapping the ORB's Text Work

As we identified and traced the texts at work in the ORB process, we observed three distinct practices which we explore in turn: the citation of closely related statutes by the ORB; the citation of closely related statutes by parties and witnesses; and the citation of ORB procedures.

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Citation of Closely Related Statutes by the ORB

The ORB often contemplates NCR individuals experiencing psychosocial "decompensation" and potentially "re-offending," absent effective admission to hospital. To address this, the ORB cites and contrasts statutes to determine the limit of lawful constraints (or the "envelope" as the Court of Appeal tends to refer to it) that will counteract and control the extent of decompensation with and without Board oversight. Ontario's *Mental Health Act* (1990) provides a few different pathways to involuntary admission, depending on the use of different forms corresponding to different situations. There are also Community Treatment Orders that a physician may issue or renew under the *Mental Health Act* (1990) to provide care without requiring custody at a psychiatric facility, which the ORB occasionally considers in determining the appropriate envelope, much like they do with committal provisions. This statutory context is often, although not always, cited in the ORB's reasoning, appearing to frame the ORB's understanding of its own powers under the *Criminal Code* (1985), determining whether a conditional discharge or a detention order is necessary. This legislative context can also factor into assessments of whether there is a significant risk to the public when assessing the suitability of an absolute discharge. But even where the ORB does not *cite* the *Mental Health Act* (1990) within their reasons, the transcripts can still reveal substantial discussion of the *Act* and its provisions in direct and cross examination of the NCR individual's treating physician.

Direct citation of closely related statutes is exemplified in the case of Janessa. Janessa had been under the ORB's supervision as an NCR individual since 2015, after she was arrested and charged with three counts of criminal harassment. Janessa was on a conditional discharge in 2017 when she had acute, manic episodes that resulted in her driving recklessly and directing outbursts of anger at healthcare providers, as well as being involuntarily admitted to hospital under the *Mental Health Act* (1990) "at least twice." In its 2017 reasons, the ORB concluded that detention in a secure forensic unit, with privileges to live in the community with the approval of the person in charge, ensured Janessa could "be returned to hospital quickly and the hospital will have the opportunity to review her living arrangements in the community." The Board relied on the attending physician's evidence in crafting the disposition. Janessa's prior experience under the *Mental Health Act* (1990) appeared to factor in her risk to the public, with the ORB noting the inadequacy or unworkability of the *Mental Health Act* (1990) in the circumstances to manage her potential for decompensation. Consistent with the joint submission of all the parties, a detention order was made by the ORB in 2017.

The *Mental Health Act* (1990) was discussed again during Janessa's 2018 annual review, although only at the hearing (the ORB subsequently made only a brief reference to the act in their 2018 reasons). At that hearing, Janessa initially sought a conditional discharge, arguing that detention was not the least onerous and least restrictive disposition to manage her risk. Due to a conflict of professional responsibility at an Ottawa hospital, the detention order in 2017 meant Janessa had to reside 196 kilometres away in the city of Kingston, where she had no friends or family supports, unless she progressively obtained privileges with the approval of

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the person in charge at the Kingston hospital. Janessa had gained many privileges and was on track to obtain permission from the person in charge to live in the community but for suspected neurological issues of unknown etiology that occurred two months prior to the Board's hearing and significantly affected her capacity to remember to take her medication, recall instructions, or function in other ways conducive to her release. Janessa's treatment team had not yet taken steps to confirm or treat her neurological decline. Nonetheless, Janessa, through her counsel, argued for a conditional discharge, which would allow greater freedom to reside in Ottawa (where she lived prior to the detention order that sent her to Kingston) and would grant that freedom without the connotation that it was a privilege to be "earned" from the hospital. Ultimately, at the end of the hearing, Janessa did not oppose continuation of the detention order given her recent neurological decline, but her counsel argued that the ORB should conduct an early review, within four months, to ensure she was obtaining appropriate care with respect to those neurological issues. During examination of the attending physician as a witness, the following exchange occurred between a panel member of the ORB and the witness:

> **Panel member:** If the Board were to order her, you know, on a conditional discharge or something like that, what's your — do you have concerns about that potential?
>
> **Physician:** I do have concerns at this time; she still requires to be given her medication regularly otherwise she will most definitely at this point in time forget to take her medication, and that would almost certainly lead to a manic relapse, and that has led to significant periods of chaos and would cause significant difficulty to public safety, in my opinion.

The panel member then asked whether the *Mental Health Act* (1990) could manage the risk, since it had been used with Janessa in previous years. The physician responded:

> **Physician:** In the case of a conditional — concerns — *I mean that has been tried in the past and I think while she had been on a conditional there was a significant delay in returning her back from Ottawa back to [Kingston] or even for her to get help under the Mental Health Act.* We still don't have any mechanism as to who would be following her up in the community over there. Not to say that that can't be organized, but, again, *it would lead to, I think, an unsafe delay in returning her back to hospital.* (emphasis added)

The *Mental Health Act* (1990) was viewed by the physician (and accepted by the ORB) as an inadequate means of managing the risk associated with Janessa's condition. The *Mental Health Act* (1990) was seen as introducing delay into what needed to be an efficient, mechanized process by which Janessa could be returned to the custody of the (specific) forensic health team. The delay resulted from higher thresholds under the *Mental Health Act* (1990) barring involuntary detention and the absence of a detention order, disempowering those involved in Janessa's care. Janessa's case thereby demonstrates how the ORB considered the powers authorised under the *Mental Health Act* (1990) in their assessments of risk and the least onerous and least restrictive disposition.

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In other files, the *Mental Health Act* (1990) was perceived as inadequate because the NCR individual had a prior history of leaving hospital against medical advice, which, in many situations, the *Act* could not prevent. Alternatively, the acute care provided under the *Mental Health Act* (1990) did not appear to prevent future decompensation; as one physician testified: "And the fact that [the NCR individual] was deemed not certifiable after just a brief period in, in hospital and then had significant events four days later shows that the Mental Health Act is not sufficient and cannot guarantee the safety of the public." This physician clearly related these deficits to the difference in thresholds empowering hospital and others to act: "The Mental Health Act, whether we like it or not, is certainly often interpreted with a, a higher threshold for readmission than a detention order under the Review Board." Relying on the higher threshold of involuntary hospitalisation under the *Mental Health Act* (1990), such as where someone is conditionally or absolutely discharged, risked decompensation because police and hospitals would not be authorized to intervene early or proactively in the NCR individual's care. Accordingly, detention orders or detention orders with community access privileges were preferable, as they allowed the ORB to authorize more powers for police and the hospital with respect to monitoring, controlling and restricting one's actions.

Reference to the *Mental Health Act* (1990) could be highly speculative, even when referring to past events. In the case of Marie, the ORB referred to the index offence (the offence connected to the individual's NCR verdict) when discussing the *Mental Health Act* (1990) noting that the physician was of the view that "the [Mental Health Act] [had] not prevent[ed] the index offence and [would] not be a useful tool to manage her risk now." However, a summary of Marie's index offence (uttering threats on a public bus)—which was taken from the hospital report and reproduced in the ORB's reasons—does not reference the *Mental Health Act* (1990) and does not describe a situation that could plausibly test its application (police arrived on scene and arrested her, triggering the process that would eventually result in the NCR verdict). The physician appears to have been referencing the "significant history of psychiatric admissions" under the *Mental Health Act* (1990) throughout Marie's life prior to the index offence, suggesting that, had the *Mental Health Act* (1990) worked in those instances, the index offence would have not occurred. Implicit to the physician's testimony is a causal relationship between the *Mental Health Act*'s (1990) perceived failings and the index offence; added and consistent measures were needed in Marie's life to avoid the offence or an equivalent risk to the public from occurring again. Consistent with that testimony, the hospital argued during Marie's annual review in 2017 that a "Detention Order [was] required to control her residence and facilitate rapid admission to hospital in the event of decompensation. […] The hospital require[d] the ability to control her residence and tools for rapid intervention."

In the instance of Marie, the ORB disagreed with the need to heighten the hospital's control and instead ordered a conditional discharge noting "[Marie] [had] maintained [a] good relationship with her treatment team and in fact [sought] them out, '[t]here [were] no issues of non-compliance,' and '[Marie's] residence [was] virtually on the hospital premises.'" The ORB's recognition of the proximity of Marie's residence and her willingness to work with the healthcare

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teams seem to counter and suppress the effect of the hospital's and physician's speculation about the *Mental Health Act* (1990). This effect is brought to the fore when contrasting the 2017 annual review with the 2018 annual review. Following the 2018 annual review, the ORB continued the conditional discharge disposition, having regard to Marie's progress and despite the hospital once again arguing, with support from the physician, for a detention order. But this time in 2018, the parties did not reference the *Mental Health Act* (1990). Perhaps reference was not made because the *Mental Health Act* (1990) no longer had purchase in describing the risk; Marie was near to care and willing to work with staff irrespective of what the ORB characterized as her "external" locus of motivation (thus deflating the hospital's argument that without *any* disposition under the ORB, Marie would decompensate). There appear then to be situations where reference to the *Mental Health Act* (1990) has no or limited analytical purchase, in that reference to closely related statutes speaks to some forms of conduct but not others.

Where "deviant" behaviour—such as substance use—is present, reference to the *Mental Health Act* (1990) appears to augment the risk attributed to it, inescapably enfolded into the "significant risk of public harm" that maintains the ORB's power over the individual. This is the case even where the substance use does not clearly relate to any harm or potential for harm at all. For example, in the case of Robert, the ORB noted in its reasons that, under the *Mental Health Act* (1990), a simple positive test for cannabis was not sufficient to return someone to hospital. One would have to wait until there was decompensation and that, in the NCR individual's case (as a class of person, not just Robert), this would pose a risk to the public. The ORB surfeits on delay; the mere act of waiting for decompensation with NCR individuals in the presence of undesirable behaviour, no matter how small, portends significant risk of harm. Similarly, in the transcript of Robert's annual review, the physician testified that the *Mental Health Act* (1990) was "entirely ineffective […] for substance use, save and except if you become sufficiently mentally unwell that you're an acute risk to yourself or others, which is unacceptable in terms of risk management." He continued, "simply testing positive will not get you, or cannot get you admitted to hospital. So [conditional discharge in place of a detention order] removes our tool for containing substance use." When asked to expand, he referred explicitly to features of the *Mental Health Act* (1990):

> **Physician:** [Robert] is competent to consent to [treatment], so Box B is off the table. It's not accessible to us. Box A would be the criterion. So we'd be looking at a Form 1 as the first route for admission, and as the Board members are well aware, that would be a risk to self, risk to others, substantial physical impairment; testing positive for substances, unless you meet those criteria, is irrelevant. So if [Robert], as an example, tested positive five sequential times and he told me he intended on continuing to use, I would have to wait essentially until such time as he became certifiable and reached [that] criterion, and in my opinion that's entirely unacceptable risk management to suggest you would move so far up the re-offence scenario to put the community members at risk.

Acceptable risk management from the perspective of the physician, by contrast, appeared to depend on the elimination of all conduct that could theoretically

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contribute to the creation of risk. This appeared vividly in the physician's testimony as he was asked by the ORB and counsel to imagine Robert's "likely" re-offence scenarios. On the basis of the physician's testimony, the ORB was "not confident that a Conditional Discharge would permit the Hospital to intervene quickly enough should there be deterioration in [Robert's] mental status." The physician's testimony, accepted by the ORB, thereby prioritized a detention order: the detention order that could empower earlier and more drastic action on the part of the forensic medical team where Robert tested positive for a substance even if his behaviour would not rise to a risk to self or others. Again, the citations to the *Mental Health Act* (1990), and their imagined application in hypothetical decompensation scenarios, seem to affect the determinations of risk reached.

Citation of Closely Related Statutes by Parties and Witnesses

Implicit to the above presentation is the involvement of the forensic treatment team; the ORB is not the only entity that participates in the citation of closely related statutes. The NCR individual's treatment team often draws on the *Mental Health Act* (1990) in its assessments, particularly the psychiatrists or other physicians involved in authoring the hospitals' forensic reports submitted as evidence to the ORB, and who testify during the ORB hearings. In their written reports, physicians consider the *Mental Health Act* (1990) in their assessment of whether a detention order or conditional discharge would be appropriate for managing the NCR individual's risk, having regard to the speed at which, and reliability with which, the individual can return to hospital. The physicians then testify with respect of these assessments and are often asked by the ORB and counsel to elaborate on the adequacy of the *Mental Health Act* (1990). This is demonstrated in the hospital's forensic report of one file where the psychiatrist stated:

> A detention order would allow the hospital to control the type of accommodation and the associated level of support that [the NCR individual] would have when returned to the community. A detention order would also permit the hospital to return [the NCR individual] to hospital in a timely manner should her clinical risk increase to the degree that was deemed unmanageable in the community, but at the same time, may not meet the relatively high threshold required under the Mental Health Act to deem her an involuntary patient. The ability to have more control of these factors is critical to effectively managing [the NCR individual's] risk.

In the verbatim transcript from that same file, counsel for the NCR individual cross-examined the psychiatrist, who reflected on the *Mental Health Act* (1990):

> **Counsel:** We all know that [the *Mental Health Act*] creates its own uncertainty.
>
> **Psychiatrist**: Yes, I think it's because the times, the thresholds for meeting the Mental Health Act requirements certainly are—lie heavily on her imminent significant threats sort of [at] the moment. However, often the, the risks that we are interested in or concerned about as well is, is maybe risk that doesn't quite reach Mental Health criteria but is sort of the increased risk with the potential of being a danger to the safety of the public. So those—sometimes those are, you see someone, risk maybe escalating or increasing

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> and doesn't quite meet the criteria of the Mental Health Act. And then it would be—if that was the only mechanism you had, you wouldn't be able to bring the person back in the hospital. Or there's sometimes a risk as such that you're concerned about it, you know, from, from a community standpoint, but again it wouldn't meet the, the risk from the Mental Health Act and, and then you're, you're left with not being able to bring the person in and just have to try to potentially monitor them more carefully in the community, which sometimes is impossible.

The citational work of physicians in the forensic reports and in their testimony is striking for two reasons. First, it suggests how immediate legal powers are to forensic physicians' self-understanding, particularly in the design and administration of NCR individuals' treatment plans. Reference to closely related statutes is not a mere formality to them; such statutes become active parts in a physician's conceptualization of risk (and accordingly in the ORB's conceptualization) due to the different powers the statutes authorize. For example, the higher threshold of the *Mental Health Act* (1990) might be inadequate at dealing with risk arising from an NCR individual's substance use, because its "deteriorating" effects are often cumulative, not episodic. Cumulative decline would not generally satisfy the select conditions under which a physician would be empowered to admit someone involuntarily. Physicians then suggest dispositions over absolute discharges, or detention orders instead of conditional discharges, so as to enlarge the assemblage of legal mechanisms available to them or the hospital to monitor, control, and restrict an NCR individual's behaviour, ensuring compliance with treatment plans.

The effects of physicians citing closely related statutes is apparent with the case of Tomislav, where Tomislav's physician stands out as an outlier among the cases we studied. Tomislav's attending physician sought to disentangle their clinical judgement from the language of Part XX.1 of the *Criminal Code* (1985), from the language of the ORB and NCR case law, and from the language of other statutes like the *Mental Health Act* (1990). Clinically, Tomislav presented the same as the year before when a detention order was sought and issued. But after release of a Court of Appeal decision with respect to a different NCR individual, the physician reconsidered the forensic evidence in the next reporting period and determined that, in their opinion, Tomislav did not present a significant risk. Accordingly, the physician testified in support of an absolute discharge even though their clinical judgement remained unchanged. In the alternative, if the ORB came to a different conclusion and determined Tomislav was a significant risk, the hospital argued that a detention order would be necessary and appropriate. When asked how the physician reconciled these "irreconcilable" positions, the physician testified that the argument in the alternative (the detention order) would be predicated on the ORB's determination of there being a significant risk in the present clinical situation. If the ORB made such a determination, the physician testified that a detention order would be necessary to address the ongoing substance use because that would be the basis of the ORB's determination.

The ORB took umbrage with the physician's suggestion that their clinical judgement could stand apart from the legal determination of risk. The ORB wrote:

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> The Panel […] does not accept the position […] that significant threat is purely a legal issue and therefore not an issue for the Hospital. This panel finds that the issue of significant threat is both a clinical and a legal issue. The Panel relies on the case of (Re) Campbell 2018 ONCA 140 which states at para. 59: "The hospital's decision making power is further constrained by the same legal considerations that bind the Board in arriving at an appropriate disposition."

Accordingly, the ORB insisted on the physician's participation in the textually mediated process, including citation of the *Mental Health Act* (1990) (which the physician was asked about during the hearing) as well as Part XX.1 of the *Criminal Code* (1985) (namely, whether Tomislav posed a significant risk).

The second reason it is striking that physicians cite closely related statutes is that the detail with which physicians describe risk in relation to such statutes shows how citation mediates different senses of temporality that pervade physicians', and presumably the ORB's, assessments of risk. For example, there is the emergent temporality of the *Mental Health Act* (1990), which authorizes acute interventions that cease at a prescribed point in time. Further, there is the temporality of the NCR disposition that responds to decompensation, or the risk of it, which is perceived as an intractable property of the NCR individual that is ideally managed through banishment. We will return to this temporal dimension in the general discussion, once we describe the final form of citation encountered in these files.

Citation of ORB Procedures

The final form of citation involves the ORB's own procedures, and provisions of Part XX.1 of the *Criminal Code* (1985), which the ORB references as they undertake assessments of the NCR individuals' risk. It is not surprising that the ORB refers to its authorizing statute (i.e. the *Criminal Code* 1985) and procedures when crafting dispositions: (1) Canadian administrative law requires transparency from an administrator, including the reasons for a decision that affects someone's legal rights; further, (2) administrative law requires administrative offices to operate *intra vires* with respect to the statutes or executive orders that authorize their existence (Sossin and Flood 2018). However, it was surprising how such sources appear to factor into the ORB's deliberations about the appropriate disposition, seeming to colour their assessments of risk. Risk to the public is not merely an object the ORB is tasked with assessing, but indeed depends on how the ORB and others are authorized to make such assessments.

The ORB acknowledged in one file that their procedures under the *Criminal Code* (1985) had the potential to alter the nature of their disposition. Early in the hearing, a board member asked about the date of the next annual disposition review having regard to the early review hearing they were having that day. According to the *Criminal Code* (1985), the annual review period resets on the date of that early review hearing, so that the early hearing in effect becomes the new scheduled annual review (s 672.81(2)). The effect of an early review is unlike the review of decisions to significantly increase the restrictions on the liberty where the annual review date remains unchanged (meaning the NCR individual may have more than one review within a year as a result) (*Criminal Code* 1985, ss 672.81(2.1),

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672.56(1)-(2)). The chairperson of the ORB noted then that, since the annual review would be a year from the date of this hearing and not the pre-set date in a few months, "that might have an impact upon how we view the nature of this disposition […] like if, if we knew there's going to be an automatic review in a half year, it might change our view as to where we ultimately go, but now knowing it's going to be a year in the future, then we'll just work on that, on that premise." In this way, friction between the ORB's procedures appears as generative in decision-making, authorizing different ways of relating to the NCR individual's risk. A longer interval between the present disposition and the next annual review increased the possibility of risk, while a shorter interval minimized it, and allowed for greater experimentation and play.

The case of Tomislav, mentioned earlier, also illustrates how the ORB's procedures can contribute to assessments of risk, albeit in a different sense. There, the ORB assessed whether the absolute discharge sought by the hospital was appropriate in relation to the fact that the hearing was triggered early because of the hospital; specifically, the hospital had notified the ORB that Tomislav's liberties were restricted to manage a temporary episode of deterioration following drug use. For the ORB, the hospital's position for absolute discharge was irreconcilable with restricting liberties (as well as its argument in the alternative for a detention order), as any such restriction (and a detention order) had to respond to the presence of risk. For the hospital and the physician, the restriction of liberties was available to the treatment team owing to the existence of a prior, valid disposition that determined Tomislav was a significant risk and had not yet been superseded by the ORB. The hospital, from the physician's view, was bound to operate *as if* the disposition were valid and true, affecting its interpretation of Tomislav's clinical presentation and irrespective of its re-assessment of Tomislav's legal risk, informing their request for an absolute discharge.

The ORB—by insisting in its reasons that the physician had to be an active participant in its textually-mediated process, drawing on *both* legal and clinical knowledge in their forensic assessment—sought to treat the procedure used by the hospital to initiate the hearing (i.e., review of a decision to increase restrictions to the NCR individual's liberties) as a referent or symbol standing in for and representing the individual's risk. The use of powers authorized under that procedure had to fold logically into a linear system where risk was a matter of degree or gradation that progressively improved or regressed, and where restrictions and liberties corresponding with that risk similarly attenuated or expanded according to this logic of gradation. When one (i.e., the ORB, the hospital) uses a power authorized by Part XX.1, they are asserting the existence of "actual" conditions that require and thereby authorize use of that power within this logic of gradation. If the hospital has restricted an individual's liberties, and the ORB agrees upon review it was lawful for the hospital to do so, the restriction of those liberties must make sense within this system of logic—the appropriateness of one power is shaped by its comity with another. Further, this comity of powers relies on its fusion with the NCR individual's clinical presentation; the individual's psyche is constructed according to a temporal structure parallel to the structure ordering the ORB's powers, where the NCR individual must progressively complete themselves as a

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responsibilized subject (see McWade 2015 on temporality and subjectivity) who has successfully "'rewire[d]' [their] brains" (Rose and Abi-Rached 2014, 16). Associating disposition-kinds, and the invocation of other powers, with the linear temporality of a responsibilized, somatized subjectivity appears to naturalize the NCR process as seamlessly corresponding to an individual's "actual" threat that is managed linearly from detention to absolute discharge. Physicians who attempt to break from this logic by distinguishing between clinical and legal judgement challenge that comity, exposing, in the fissures, the creative, literary or fictive workings of law in the assessment of risk and the particular notion of the human that the law supports.

General Discussion and Conclusions

Our mapping of the NCR process shows how actors—including the ORB and witnesses and parties to the adjudication—construct ideas and judgements about NCR individuals' risk: with interpretations made possible through the intertextual space of the NCR process. Namely, we have focussed on how citational practice within the forum of the ORB's review—including citation of civil legislation, such as the *Mental Health Act* (1990), and different procedures described under Part XX.1 of the *Criminal Code* (1985)—reframe analysis. Citations call upon and replicate the content of those statutes or regulations, becoming inextricably part of one's perception of the NCR individual's situation. Citations act on each other, mediating the meaning of each other, as their representations, references, and affects are activated in oral and written argument, and in writing the disposition. No doubt there are other texts (e.g., clinical and therapeutic, as well as other cultural scripts) contributing to the disposition process; but, drawing on the institutional ethnography of Smith (2005), we consider the citations of closely related statutes, or the ORB's own procedures, as "boss" texts which disproportionately frame the textual work. As Smith (2005, 191) wrote, the "[f]rames," formed in the collating of texts and "established from positions of power in the institutional regime, [are what] control facticity; they control and are specified as the categories and concepts that come into play at the front line of building institutional realities." This collation of texts itself is hierarchized, each text asymmetrically pulling on and transforming others, as they are differentially activated in the variegated field of social practice (Smith 2005).

The constitutive effect of "boss" texts in the disposition process may alternatively be thought of as authorizing certain decisions; in other words, the boss texts themselves reflect and are constituent parts of jurisdiction—the speaking into existence of the authority to act (or whatever sensation that is authorized) (Dorsett and McVeigh 2012). Critical legal scholars have lately described jurisdiction as technique just as law generally (Cowan and Wincott 2015). Shannaugh Dorsett and Shaun McVeigh (2012), for example, treat jurisdiction not as a status but as the creation of social practices that congeal as relations "lawfully authorized," as opposed to others which are not authorized or prohibited. Lawful relations thereby create, maintain, or transform conditions of social life (Dorsett and McVeigh 2012; Valverde 2009), including how situations are temporally, spatially

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and affectively ordered (Barr 2016; Valverde 2015). As Mariana Valverde (2015) reminds us, though, the spatiotemporal and affective inflections of social life mediated by the techniques of jurisdiction are intertextual; each is the product-effect of heterogeneous, and potentially conflictual, practices brought into relation with each other. While that move by critical legal theorists potentially radically reimagines jurisdiction with respect of social and physical forms not commonly treated as the proper subject of law, and with respect of practices distant from text or talk (e.g., Barr 2016; Davies 2022; Shaw 2020a), the approach has also been applied to make sense of the effects of legal forms on judicial or quasi-judicial reasoning, as well as in policy settings where text and talk dominate (see, e.g., Dietz 2020; Garland and Travis 2020; Pasternak 2014; Shaw 2020b). Drawing on theories of jurisdiction, we see the citational work done in the NCR process as a form of jurisdictional talk—"stretches of talk" (Smith 2005, 166), written and oral, that take on a metastable, replicable form, and accordingly authorize particular ways of encountering NCR individuals.

There are resonances between the critical legal theories of jurisdiction and institutional ethnography (see, e.g., Colgrove 2019), which significantly bear on our understanding of the ORB's disposition process.[3] But distinct from the ORB, and of potential value theoretically across institutional ethnography and critical legal theory, is that the jurisdictional talk appears like a property which can be called upon or possessed, with a seemingly modular character. The modular quality of the citational practice lends itself to the idea of jurisdiction as technique, indeed, but also a particular configuration of techniques that has evaded scholarly attention. Jurisdiction as property—as a modular quality someone can possess, dispossess, accumulate, attenuate, enlarge, re-arrange, trade, etc., as opposed to some power conferred exclusively by status—suggests creativity and dynamism in what judicial or quasi-judicial actors posit. For example, where citation of the *Mental Health Act* (1990) (and its contribution to jurisdictional talk) no longer helps in crafting the disposition, the ORB abandons reference to it or omits reference in its reasoning.

Citation may be modular, but that does not mean that actors can posit, freely, environmental codes or any other boss text haphazardly to justify whatever they please. Citation is modular allowing creative combinations of texts, but citations act relationally (Cooper and Renz 2016; Nedelsky 1990) in that citing the powers found under a civil statute delimits and is delimited by the very powers of Part XX.1 of the *Criminal Code* (1985) that authorize the ORB's expression at all —"the law governing the law," in Nikolas Rose and Mariana Valverde's (1998) formulation. It is delimited by the ORB's ruling regime—itself the product of authorizing boss texts—in that the ORB is required to come to an assessment of the NCR individual's risk to the public, which affects the nature and content of the disposition that the ORB is required to issue each year. References to the *Mental*

[3] While institutional ethnography puts emphasis on the standpoint of those affected by the textual work of institutions, critical legal theorists of jurisdiction tend to abandon standpoint, or critically de-centre it, with new materialist and post-phenomenological approaches that assist with their study of non-texts in addition to texts (see e.g., Shaw 2020b).

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Health Act (1990) or other laws are always tied back to the ORB's responsibility to determine the appropriate disposition—this is the less complicated part. But interestingly, the citation's relationality goes the other way, too. Citational work also appears in actors' understanding of the risk they are required to assess under Part XX.1 of the *Criminal Code* (1985); what the *Mental Health Act* (1990) authorizes physicians and police to do with respect to certain situations becomes a reference point. What is authorized becomes an anchor in legal reasoning, which shifts the understanding of risk that necessitates the ORB's involvement at all, in addition to the extent of involvement.

Importantly, the citational practices are relational to the NCR individual as well; in other words, the intertextuality of the NCR process incorporates the technique of citation *and* the NCR individual's body, which is subject to medico-legal surveillance and control. Sarah Keenan (2014) conceptualizes law as "carried with the body" so that legal performances are continuously re-enacted as the body moves and is encountered by other bodies in space (also see Barr 2016). Encounters with the body produce and regularize a sense of belonging, in the sense of places bodies can inhabit and how they experience those places (Keenan 2014). The *Mental Health Act* (1990) is commonly cited in forensic hospital reports and the hospital's submissions to the ORB, as well as in physicians' testimony. Such reports, submissions, and testimonies are based on assessments of the NCR individual's risk as reported by the physician or others in the healthcare team, so the citational practice appears close to the ground with healthcare providers' encounters with, and attempts to, surveil NCR individuals (see Tyler et al. 2023). The ORB may adopt the reasoning in its dispositions, but it principally takes effect and obtains meaning in the medico-legal context of forensic care, where it is fashioned to the body of NCR individuals, becoming part of their mental disorder, decompensation, and risk.

Citations of authorities extrinsic and intrinsic to the ORB's enabling statute are thereby actively folded into, and structure, the ORB's decision-making, with consequences on their assessment of risk owing to the "determinate relationship between those who exercise power [the Board, the hospital and the physicians] and those who undergo it [the NCR individual]" (Bourdieu 1979, 83). Within the structure of this determinate relationship, the modular, citational practice is inescapably relational, becoming the intertextual space from which the ORB's decision-making is made. The disposition that results: (1) affects apportionments of responsibility, and the authority to effect that responsibility, to others in the state's care (see e.g., Dietz 2020; Garland and Travis 2020); and (2) congeals in the prospective, speculative imaginaries of the ORB that are implicated in ongoing relationships of responsibility through their review and issuance of disposition orders. In other words, jurisdictional talk creates a way in which the ORB renders mental disorders legible to them and extends those modalities of governance into the context of forensic care. It is a rhetoric and "somatic" of jurisdiction, as Peter Goodrich (2001) might call it. The practice of citing plural legal texts excites the body of the board member, the lawyer, and, most importantly perhaps, the physician and the healthcare team, to orient to the NCR individual with careful, trained attention, which renders sense-able textual

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inscriptions (of the *Criminal Code* 1985, the *Mental Health Act* 1990, and the ORB's procedures) in the NCR individual's mental and behavioural state. It further demands NCR individuals' incorporation of this jurisdictional talk into their "'embrained' existence" or subjectivity: their absolute discharge depends on the incremental progress of rewiring one's brain through a regime of medication, insight into and managing one's desires for substances, and developing capacities to work and support oneself. As our files made clear, it includes the somatic performance of dressing oneself appropriately, appearing one's age, and having a good, normal odour and affect (see Kennedy et al. 2023). Each deviation from this idealized image is indicative of a lack of certain properties as a free human, and correspondingly greater legitimacy for the ORB's control. In these ways, texts participate in the naturalization of risk.

The performances of text favour a certain chronotope or space-time (Valverde 2015) that prioritizes internment and institutionalization (see, e.g., Garland and Travis 2020; Shaw 2020b). Internment and institutionalization are prioritized, in part, as an effect of the ORB's, the hospitals', and physicians' jurisdictional talk that complete and reify the envelope of the NCR disposition as an all-encompassing and inevitable frame for assessments of risk. As noted earlier, this practice appears to mediate different senses of temporality that pervade physicians' and the ORB's assessments of risk: (1) the emergent temporality of the *Mental Health Act* (1990), which authorizes acute interventions that cease at a prescribed point in time; (2) the temporality of the NCR disposition that responds to decompensation, or the risk of it, which is perceived as an intractable property of the NCR individual that is ideally managed through banishment; and (3) further, in addition to what has been described so far, the temporal register of structural reform, which is actively foreclosed and excluded from reference. These jurisdictional practices play the emergent temporality of the *Mental Health Act* (1990) off of the temporality of the NCR disposition, and vice versa, in the construction of risk so that all movements, all actions, associated with the NCR individual portend decompensation, which, in turn, portends a significant threat.

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