# Continuing the Conversation: Exploring Current Themes in Criminal Justice and the Law

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It is our great pleasure to bring you the latest volumes of the Criminal Law Special Edition of the Manitoba Law Journal. Academics, students, and the practicing bench and bar continue to access this publication and contribute to it their knowledge and experience in the criminal law. Publishing a triple volume is a testament to the quality of submissions received. We present 27 articles from 34 authors, highlighting the work of some of Canada's leading criminal law, criminal justice and criminological academics.

The Manitoba Law Journal remains one of the most important legal scholarship platforms in Canada with a rich history of hosting criminal law analyses.[1] With the help of our contributors, the Manitoba Law Journal was recently ranked second out of 31 entries in the Law, Government and Politics category of the Social Sciences and Humanities Research Council (SSHRC). We continue to be committed to open access scholarship and our readership grows with each Criminal Law Special Edition released.

Our content is accessible on robsoncrim.com, themanitobalawjournal.com, Academia.edu, CanLII Connects, Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. We have expanded to Amazon ebook platforms as well for those that want to consider print on demand options or who enjoy that format. Since our first edition in 2017, our Special Edition has ranked as high as the top 0.1% on Academia.edu and we have had approximately 6,000 downloads and close to 10,000 total views. Since 2016, our own website, robsoncrim.com, has

[1] David Ireland, "Bargaining for expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38:1 Man LJ 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37:2 Man LJ 365.

accumulated tens of thousands more engagements with the Special Edition, attracting hits from all over the world. Our readership engages with articles on subjects as diverse as the Tragically Hip and wrongful convictions,[2] bestiality law,[3] and the British Columbia courts sentencing response to fentanyl trafficking.[4]

Since launching in 2016, the Robsoncrim research cluster at the Faculty of Law, University of Manitoba, has continued to develop a unique interdisciplinary platform for the advancement of research and teaching in the criminal law. Robsoncrim.com has now hosted over 500 Blawgs,[5] with contributions from across the country and beyond. Our cluster has over 30,000 tweet impressions a month and our website has delivered approximately 12,000 reads in the past 12 months. We are as delighted as we are humbled to continue delivering quality academic content that embraces and unites academic discussion around the criminal law. Our team of collaborators extends from coast to coast and is comprised of top academics in their respective criminal justice fields.

The peer review process for the Special Edition in Criminal Law remains rigorously double blind, using up to five reviewers per submission. As has become our tradition, we would like to preview for our readers the contents of this year's special edition. The edition is divided into three volumes. The first volume represents the work of our SSHRC funded conference: *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* which took place in October of 2019 and attracted scholars from all over Canada and beyond. The second and third volumes are organized into a number of thematic sections.

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2 Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40:3 Man LJ 1.

3 James Gacek & Richard Jochelson, "Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40:3 Man LJ 337.

4 Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149.

5 Amar Khoday, "Against the Clock: Criminal Law & the Legal Value of Time" (17 June 2019), online (blog): *Robson Crim* <tinyurl.com/y3npys9g> [perma.cc/KKN6-6N8C]; L Campbell, "A Reasonable Expectation of Privacy and the *Criminal Code*: Two Cases, Two Different Definitions" (30 July 2019), online (blog): *Robson Crim* <robsoncrim.com/single-post/2019/07/30/A-Reasonable-Expectation-of-Privacy-and-the-Criminal-Code-Two-Cases-Two-Different-Definitions> [perma.cc/DG4U-E2FE]; T Sicotte, "The Supreme Court Needs to Clean up the Sex Offender Registry" (18 July 2019), online (blog): *Robson Crim* <tinyurl.com/y6p5cg27> [perma.cc/VPN9-KFQG].

## I. VOLUME 43(3)

This volume contains papers presented at the *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* conference, hosted at the Faculty of Law, University of Manitoba. The conference focussed on the evolution of the law of evidence and the sometimes radical transformations it has seen over the last ten years since the seminal decision of *R v Grant* in 2009, which reoriented the test for exclusion of evidence at trial. The conference explored questions of the conception of knowledge in modern criminal legal proceedings and the changes in the nature of knowing and constructing criminal responsibility over the last ten years as the information age continues to develop the law of evidence. Unparalleled connectivity, state surveillance capabilities, Canada's commitment to truth and reconciliation with Indigenous communities, and anxieties pertaining to large scale security calamities (like terror events), have altered the landscape in which crime is investigated, and in which evidence is subsequently discovered, and admitted. The conference discussed and unpacked these issues and developed a tremendous body of scholarship which we are proud to present in this volume.

Kent Roach leads the conference volume with his piece "Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition." This article examines the mechanisms of exclusion of evidence in four western democracies, finding similar origins for each mechanism: the protection of the individual. Professor Roach argues that this original rights protection rationale should be reclaimed in the form of *prima facie* rules of exclusion once used in Canada's fair trial test and in New Zealand and Ireland. Roach contends that the exclusionary rules should be subject to a more transparent and disciplined process where the state can justify proportionate limits on the exclusionary remedy based on the lack of the seriousness of the violation, the existence of adequate but less drastic alternative remedies, and, more controversially, the importance of the evidence to the ability to adjudicate the case on the merits.

Michael Nesbitt and Ian M. Wylie present a fascinating empirical study of expert opinion evidence in Canadian terrorism cases. The authors unpack the prevalence of expert testimony in these cases and offer a number of reasons why expert evidence will continue to play a crucial role in terrorism prosecutions in Canada. Following this, University of Alberta Law

Professor Lisa A. Silver dives into the complex world of social media evidence in "The Unclear Picture of Social Media Evidence." This article interrogates the uncomfortable relationship between our sometimes-archaic rules of evidence and the growth of social media evidence being presented in Canadian courts. Professor Silver takes a deep look at the construction of evidentiary categories and the preference for social media evidence to be viewed in the courtroom as documentary evidence. She then discusses the application of the relevant provisions of the *Canada Evidence Act* and offers a practical solution by discussing the enhanced admissibility approach used for expert evidence.

Professor David Milward's article, "Cree Law and the Duty to Assist in the Present Day" is an exploration of Indigenous legal orders through the lens of 'pastamowin' or the facet of Cree law dealing with laws against harming others. Milward juxtaposes this Indigenous legal principle with the absence of a general duty to help others in Canadian common law. He then uses this model as a platform to discuss Indigenous communities reviving past laws and developing current legal systems that embrace concepts of true self-governance. This impactful piece asks deep questions relating to reconciliation, the Calls to Action of the *Truth and Reconciliation Commission*, and the future of Indigenous self-governance.

"Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the Canadian Charter of Rights and Freedoms" by Ruby Dhand and Kerri Joffe discusses civil mental health laws and the involuntary detention of persons with disabilities. The authors apply a section 7 and section 15 *Charter* analysis to involuntary detention and involuntary treatment provisions in select Canadian jurisdictions. By unpacking the *Convention on the Rights of Persons with Disabilities* (CRPD), the authors draw upon Article 12 of the CRPD and argue that one way in which Canadian mental health laws violate the *Charter* is by prohibiting involuntarily detained persons from accessing supports for decision-making. The theme of mental health and the law is continued by Dr. Hygiea Casiano and Dr. Sabrina Demetrioff in their article "Forensic Mental Health Assessments: Optimizing Input to the Courts." Here, the authors argue that feedback from legal personnel in mental health assessments for fitness to stand trial and criminal responsibility can potentially lead to improved provision of care and due process for a marginalized population. They conclude by proposing further study into these issues.

James Gacek and Rosemary Ricciardelli unpack how changing drug management policies in Canadian federal prisons create new ways of thinking about responses (policy or otherwise) to drug use and the essence of intoxication in "Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons." The authors shed light on the complexities underpinning interpretations of intoxicants that are present yet 'managed' in prison spaces.

In "Mr. Big and the New Common Law Confessions Rule: Five Years in Review", Adelina Iftene and Vanessa L. Kinnear take a look at the judicial progeny of the seminal case of *R v Hart*. The authors review the last five years of judicial application of the new *Hart* framework and argue that the flexibility and discretion built into the *Hart* framework have resulted in an inconsistent application of the two-prong test. As the controversial police practice of Mr. Big stings continues in Canada, this article projects further light onto the propriety of this technique.

Alicia Dueck-Read deals with judicial constructions of responsibility in the area of non-consensual distribution of intimate images (NCDII). This article provides a discourse analysis of judicial decision-making on *Criminal Code* section 162.1 cases. Dueck-Read unpacks whether judges adjudicating cases under section 162.1 draw upon privacy frameworks and/or the rape myths common to sexual assault trials. Continuing this theme of harm in the digital age, Lauren Menzies and Taryn Hepburn explore the underlying logics and implementation of section 172.1 of the *Criminal Code* ("Luring a Child") and critique the current practice of governing child luring through proactive investigations by police. The authors argue proactive child luring investigations have been used to police marginalized sexualities and sex work communities and have inflicted substantial harms upon those who are wrongly caught up in investigations. They then question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases.

This conference volume concludes with an in-depth exploration of victim impact statements in the context of Canadian corporate sentencings. The recent SNC-Lavalin scandal and its political fallout have drawn public attention to an existing culture of impunity enjoyed by corporate criminal wrongdoers, despite the 2004 changes to the *Criminal Code of Canada* that were intended to make corporate prosecutions easier. Erin Sheley convincingly argues that the conceptual problems with corporate criminal liability may lie in the criminal justice system's general misapprehension of

the nature of corporate crime; especially of the distinct nature of the harm experienced by white collar victims. She also considers the challenges to a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement in Canada and offers a comparative analysis of how corporate criminal sentencings occur in Canada and the United States.

## II. VOLUME 43(4)

Volume 43(4) is divided into three sections. The first section is entitled *International Contributions* and highlights the work of two leading international scholars. The second thematic section is entitled *Current Issues in Criminal Law* and delves into issues as diverse as the use of victim impact statements and the Mr. Big investigatory process. The third and final section is a stand-alone *Year in Review* in which we present a paper summarizing the most recent Supreme Court of Canada and Manitoba Court of Appeal cases.

Leading off the *International Contributions* section is Hadar Aviram's work: "Making Sense of the Experiences of Bar Applicants with Criminal Records." This article offers insight into the bar admission process in the United States, seen through the lens of real-life experiences of the Bar takers themselves. The article provides a legal analysis of the California Bar's determination of moral character, relying on the Bar rules. The author then moves into an empirical examination of the Bar's policy through the eyes of ten California Bar applicants with criminal records, two ethics lawyers, and a Bar official. Aviram then makes recommendations for law schools and the Bar.

Following this piece is "Corporate Criminal Liability 2.0: Expansion Beyond Human Responsibility" by Eli Lederman who asks the question: is corporate criminal liability expanding beyond that of human responsibility? Lederman examines the expansion of criminal liability on non-human legal entities in the U.S. and U.K., reflecting on the possible directions in which corporate liability may be heading.

Elizabeth Janzen leads off our *Current Issues in Criminal Law* section with "The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the Victim Bill of Rights." This paper examines the Canadian regime governing the participation of victims in sentencing through the use of victim impact statements, with a focus on

the regime following the 2015 amendments implemented through the *Victims Bill of Rights Act*. The author argues that an approach to victim impact statements that focuses on their expressive and communicative uses best aligns with both Canadian sentencing principles and respect for victims.

Darcy L. MacPherson then presents a case comment on *9147-0732 Quebec Inc c Directeur Des Poursuites Criminelles et Penales* in which he argues the assumption that *Criminal Code* standards will and should apply to provincial offences is highly questionable. MacPherson, a notable expert in this area of the law, presents a cogent analysis of the complex jurisdictional issues brought forward by this case.

No current issues section would be complete without a look at "Criminal Law During (and After) COVID-19." Terry Skolnik delves into this most timely of issues by exploring the current and potential impacts of the pandemic on three specific areas of the criminal law: scope of crimes, bail, and punishment. Skolnik's analysis shows us why judges, policy makers, and justice system actors should seize on this unique opportunity in history to generate lasting positive changes to the criminal justice system. Following this timely piece comes an equally important analysis of the *Charter* and the defamatory libel provisions of the *Criminal Code*. In "If You Do Not Have Anything Nice to Say: Charter Issues with the Offence of Defamatory Libel (Section 301)", Dylan J. Williams outlines the existing debate and the *Charter* issues raised by section 301 by tracing relevant lower court decisions, each of which has ultimately struck this offence down. Williams argues that section 301 is unconstitutional because it infringes the freedom of expression found in section 2(b) of the *Charter* and is likely to fail at both the minimum impairment and proportionality stages of the *Oakes* test.

The *Current Issues in Criminal Law* section is concluded by Christopher Lutes "Hart Failure: Assessing the Mr. Big Confessions Framework Five Years Later." This piece compliments Adelina Iftene and Vanessa Kinnear's work in volume 43(3). While Iftene and Kinnear found that *Hart* had no substantial impact on the amount of confessions admitted in Mr. Big prosecutions post-*Hart*, Lutes reports that the admission rate of Mr. Big confessions have actually increased since the framework was implemented. Lutes argues this increase is indicative of police relying on Mr. Big type techniques because of increased protections for accused persons while in police custody.

Finally, we present our "Robson Crim Year in Review" by LL.M. student Brayden McDonald and J.D. student (now articling student) Kathleen Kerr-Donohue. This paper summarizes the leading criminal law cases from the Supreme Court of Canada and Manitoba Court of Appeal in 2019. The cases are presented with relevant statistics and divided by themes for ease of reference. The authors also add commentary on discernable themes in this recent case law. All in all, this article is an invaluable resource for students, professors, and the practicing bench and bar.

## III. VOLUME 43(5)

Our third volume of 2020 is also divided into three sections: *Corrections, Judicial Release, and Related Issues*; *Critical Approaches in Criminal Justice*; and *Placing Theory into Criminal Law Practice*. The first section contains two articles: Sarah Runyon's "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties" and Alana Hannaford's "Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions." Runyon's article interrogates the prevalence of administration of justice charges in the context of Indigenous offenders. She argues that continually charging Indigenous offenders with breaching court orders, so called system generated charges, can create and perpetuate a social hierarchy from which the state justifies continued discrimination and oppression of the Indigenous population. Runyon goes on to revisit the seminal cases of *Gladue* and *Ipeelee* in the context of community-based dispositions. The author argues that rather than ameliorating the crisis of over-incarceration, the imposition of a community-based disposition, which relies on an administrative court order as its enforcement mechanism, serves to exacerbate the social problem endured by Indigenous peoples in Canada. Hannaford's article on abstention clauses builds upon Sarah Runyon's piece. Hannaford describes the unfair operation of administration of justice charges on non-violent offenders suffering from addictions. The author argues that abstention conditions on bail orders effectively force people suffering from addictions to keep their use private, which increases the risk of overdose and decreases the likelihood that they will seek treatment independently out of fear of harsh legal consequences. In combination,

these articles highlight many of the issues concerning police overcharging and the inequitable operation of system generated charges.

Florence Ashley presents a feminist perspective on the voluntary intoxication defence to lead off our *Critical Approaches in Criminal Justice* section of this volume. Ashley looks to the Ontario Court of Appeal decision in *R v Sullivan*, a decision frequently decried as antifeminist, and presents a feminist view of the defence that is far more nuanced than has been previously suggested. The article concludes that a feminist analysis of the voluntary intoxication defence requires more nuanced policy discussions than those that have thus far prevailed in the public sphere.

Following this, Lauren Sapic has written "The Criminalization of Non-Assimilation and Property Rights in the Canadian Prairies." The killing of Colten Boushie in Saskatchewan and the eventual acquittal of Gerald Stanley has left an indelible mark on the relationship between Indigenous and non-Indigenous Canadians. Sapic uses this tragic case as a backdrop to a fascinating analysis of how policies in Canadian property law have privileged white settlers' property rights as a result of the subjugation of Indigenous human rights. Sapic proposes an overhaul of the Canadian property law system, with a focus on negating the abuse of Indigenous men and the abuse of the property law system itself. This important work situates property law in a settler dominant model that speaks of the ongoing and sustained inequities that exist between white settlers and the Indigenous peoples of Canada.

The third article in this section offers a critical perspective on Supreme Court *Charter* cases and the further disenfranchisement and marginalization of racialized communities in Canada. In "The Supreme Court of Canada's Justification of Charter Breaches and its Effect on Black and Indigenous Communities", Elsa Kaka employs Critical Race Theory to undertake an analysis of how Supreme Court of Canada decisions pertaining to *Charter* breaches have allowed for an expansion of police powers that exacerbate the maltreatment of racialized communities by our criminal justice system. This timely article speaks to the importance of the Black Lives Matter movement and the *Truth a Reconciliation Commissions*' Calls to Action in achieving real change to ensure that the *Charter* rights of all Canadians are respected.

Katy Stack's article "Moms in Prison: The Impact of Maternal Incarceration on Women and Children" closes out the *Critical Approaches in Criminal Justice* section of this volume. Stack examines the impact of incarceration on mothers and children through a case study format. The

author compares maternal incarceration in the U.S. and Canada, examining the impacts on both mothers and children when mothers are imprisoned.

The *Placing Theory into Criminal Law Practice* section contains two articles, "The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8" by Michelle Biddulph and "Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada" by Sarah Ferencz. Biddulph delves into the Supreme Court of Canada cases of *Marakah* and *Mills*, both of which deal with section 8 *Charter* protections. The author discusses how *Marakah* has created a 'privacy paradox' in that the rights protections are at once extremely broad and also illusory. The result in *Mills* is then cited as an example of this paradox. This in-depth discussion of section 8 jurisprudence is both academically insightful and also of practical use to lawyers. Finally, Sarah Ferencz's article deals with the incorporation of social, or non-commercial, drug trafficking within the Canadian legal context. The author recognizes the overly broad ambit of Canada's drug laws that focus on the inherent predatory nature of trafficking, for profit or otherwise. By unpacking the concept of social supply within this context, Ferencz proposes three avenues for law reform focussing on education and language.

## IV. Looking Forward

Our goal remains to provide a leading national and international forum for scholars of criminal law, criminology and criminal justice to engage in dialogue. Too often, these disciplines are siloed and apprehensive to engage in cross-disciplinary exchanges. We believe that high quality publications in these disciplines, and indeed, other cognate disciplines, ought to exist in dialogue. We view this as crucial to enhancing justice knowledge: theory and practice, policy and planning, and even, in resistance to injustice. We strive to break down the barriers that keep these works in disciplinary pigeon holes. This is, of course, an ambitious path to continue upon, but the three volumes we have released this year represent further incremental steps toward our goals.

The work of the Robson Crim research cluster at the University of Manitoba continues to advance criminal law and justice scholarship in Canada. In doing so, and we are fortunate to work with a tremendously talented group of scholars, students, and jurists from across the country. It

is this continued collaboration and free exchange of ideas that drives the publication of this Special Edition in Criminal Law and the rest of our work at Robson Crim. We thank our interdisciplinary collaborator team (https://www.robsoncrim.com/collaborators), our editorial team, our student editors, and all of the MLJ staff, without whom these volumes would not exist. We hope you enjoy these volumes and we look forward to our next publication in 2021.