University of Manitoba

ROBSON HALL FACULTY OF LAW

Criminal Justice and Evidentiary Thresholds in Canada: The last ten years.

October 26, 2019

Robson Hall Faculty of Law, Moot Courtroom
224 Dysart Road | Winnipeg, Manitoba, Canada

TRADITIONAL TERRITORIES ACKNOWLEDGEMENT

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We respect the Treaties that were made on these territories, we acknowledge the harms and mistakes of the past, and we dedicate ourselves to move forward in partnership with Indigenous communities in a spirit of reconciliation and collaboration.

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Conference Overview

'Legal knowledge' and 'knowing' in the courtroom, often referred to as the law of evidence, has undergone radical transformation over the last ten years. 2019 marks the ten year anniversary of the landmark case of R v Grant, which reoriented the test for exclusion of evidence at trial due to the state's Canadian Charter of Rights and Freedoms breaches as a balancing act in which the seriousness of the state conduct is measured, and on which the impact on the protected interest of accused persons were used to assess whether evidence should be excluded or included in a trial based on society's interests in the adjudication of the merits of the criminal matter.

What does the conception of knowledge mean in modern criminal legal proceedings? How has knowing and constructing criminal responsibility changed in the legal context over the last ten years in light of changes in evidence law, conceptions of vulnerability and enhanced digital and informational connectivity? How do we visualize criminality in the information age? This conference aims to discuss and unpack these questions.

Most persons resident in Canada understand that to be found criminally responsible when accused of a criminal offence, the Crown must prove the physical and mental elements of the offence against an accused person beyond a reasonable doubt. The corpus of that assessment is based on documents, testimony, objects and items that are admitted into the proceedings. Their relevance, materiality and inculpatory and exculpatory nature must be weighed and assessed. 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 discovery of evidence and its admission at trial are the building blocks of legal knowledge in the investigative and trial processes, and changes in these processes could well have dramatic effects in respect of the construction of criminal responsibility.

We welcome scholars, students and practitioners of criminal law (lawyers and judges) together for this conference about the latest knowledge developments in the criminal law and cognate disciplines.

PROGRAM

Morning - Saturday, October 26, 2019

Time	Presentation	Speaker/Location
7:00 a.m.	***Coffee and Muffins***	***Main Hall***
7:30 a.m.	Words of Welcome	Associate Dean Bruce Curran
8:00-8:30	*Considering "Cross-Over" Youth: Evidence Law's Intersection with a Vulnerable Group*	Rebecca Bromwich, Carleton, Law Legal Studies & Manager Diversity and Inclusion for Gowling WLG (Canada, Russia)
8:30-9:00	*Private Bodily Substances and Knowledge Making in Sexual Assaults*	John Burchill, Winnipeg Police Services
9:00-9:30	*Knowing Mr. Big and Criminal Responsibility R v Hart & the New Common Law Evidentiary Rule: A Five-Year Review*	Adelina Iftene, Schulich Law and Vanessa Kinnear
9:30-10:00	*Making Knowledge in Police Oversight: Reconciling the Right to Silence with the Duty to Cooperate in Police Oversight Investigations*	Michelle Lawrence, UVic Law
10:00-10:15	***Break***	***Main Hall***
10:15-10:45	*Cree Law and Canadian Criminal Law- Tales of Risk Assumption, Duties to Assist and Responsibility*	David Milward, UVic Law
10:45-11:15	*Knowing and Prosecuting Terrorism: Fairness in responsibility - An empirical and qualitative analysis of use of expert & social science evidence*	Michael Nesbitt, UCalgary Law
11:15-11:45	*You say you want a revolution? Justice McLachlin and the Admissibility of Illegally Obtained Evidence*	Nicole, O'Byrne, UNB Law Adam Baker
11:45-12:45 p.m.	***Lunch Break***	***On Own: please enjoy the variety of restaurants along Pembina Highway.***

PROGRAM

Afternoon - Saturday, October 26, 2019

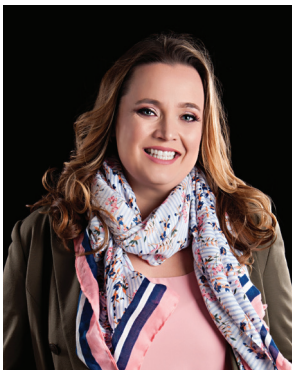
Time	Presentation	Speaker/Location
12:45-1:45	**Keynote Speaker** *Section 24(2) of the Charter: A Comparative Analysis*	**Kent Roach, UToronto Law**
1:45-2:15	*Forensic Evaluations and Input from the Legal Profession*	Hygiea Casiano (Forensic Psychiatrist & Child and Adolescent Psychiatrist, Manitoba Adolescent Treatment Centre) and Sabrina Demetrioff, (UM, Clinical Psychology)
2:15-2:45	*Making Knowledge for Corporate Responsibility: Victim Impact Statements at Corporate Sentencing*	Erin Sheley, UOklahoma Law
2:45-3:15	*Knowing from the Digital: The Unclear Picture of Social Media Evidence*	Lisa Silver, UCalgary Law
3:15-3:30	***Break***	***Main Hall***
3:30-4:00	*Involuntary Detentions and Treatment: Intersections of mental health and conceptions of equality and fundamental justice*	Ruby Dhand, TRU Law and Kerri Joffe (ARCH Disability Law Centre)
4:00-4:30	*Making Knowledge of Identity Count in Police Lineups: Do investigators use best practices?*	Michelle Bertrand, UWinnipeg Criminal Justice
4:30-5:00	*A Contraband Continuum: Correctional Officer Recruits' Experiences of Constructing, Assessing and Managing Contraband Risk*	James Gacek (Department of Justice Studies, University of Regina) and Rosemary Ricciardelli (Department of Sociology, MUN)
5:00-5:30	*Harm in the digital age: luring the vulnerable and other harm creations*	Lauren Menzie, UAlberta and Taryn Hepburn, CarletonU
5:30-6:00	*Judicial Constructions of Responsibility in Revenge Porn: Judicial Discourse in Non-Consensual Distribution of Intimate Images: A Feminist Analysis*	Alicia Dueck-Read, Robson Hall, University of Manitoba
6:00 p.m.	***Closing Remarks***	**Richard Jochelson, Robson Hall University of Manitoba**

Speaker Biographies and Abstracts (in order of scheduled presentation)

Bruce Curran

Associate Dean (Academic), Robson Hall, Faculty of Law

Associate Dean Curran holds a Law Degree from Western, an LL.M. from Osgoode Hall, and a Master of Industrial Relations and Human Resources from the University of Toronto. He earned a Ph.D. in Industrial Relations from the University of Toronto in 2015. He started at Robson Hall the next year, and became the Associate Dean of the J.D. program in 2018. Over his teaching career, he has won two faculty teaching awards. His areas of teaching and research interest include contracts, labour and employment law, dispute resolution, and negotiation.



Rebecca Bromwich

Carleton, Law Legal Studies & Manager, Diversity and Inclusion for Gowling WLG (Canada, Russia)

Rebecca Jaremko Bromwich is an adjunct with the Department of Law and Legal Studies at Carleton University. Her full-time role is as Manager, Diversity and Inclusion for the law firm Gowling WLG for their offices in Canada and Russia. Prior to taking on that position, she served as Program Director for the Graduate Diploma in Conflict Resolution program at Carleton. She is a member of the Alternative Dispute Resolution Institute of Ontario (ADRIO) and has a Certificate from the Program on Negotiation Master Class at Harvard University (2017). In 2018, Rebecca received a Certificate in Mediation from the Program on Negotiation at Harvard Law School. Rebecca received her Ph.D. in 2015 from the Carleton University Department of Law and Legal Studies, and was the first ever graduate of that program. She was awarded a Carleton Senate Medal as well as the 2015 CLSA Graduate Student Essay Prize for her graduate work. Rebecca also has an LL.M. and LL.B., received from Queen's University in 2002 and 2001 respectively, and holds a Graduate Certificate in Women's Studies from the University of Cincinnati.

In addition to her several years teaching at the University of Ottawa's Faculty of Law, Rebecca has taught at the University of Western Ontario's Faculty of Law, and at the University of Cincinnati. She has also been a columnist for the Lawyers Weekly and has authored and co-authored several legal textbooks for students and legal system practitioners, including lawyers, paralegals and police. Rebecca has been an Ontario lawyer since 2003. She worked in private practice from 2003 – 2009, starting at a large firm, doing a wide range of litigation work. She also worked for six years as Staff Lawyer, Law Reform and Equality, to the Canadian Bar Association, then as a Policy Counsel with the Federation of Law Societies of Canada. Subsequently, Rebecca did criminal prosecution work as a per diem Crown Attorney with the Ministry of the Attorney General in Ottawa. Rebecca is a co-editor of Robson Hall Law School's criminal law and justice blog: robsoncrim.com and is a research associate with the UK's Restorative Justice for All Institute. She is also Chair of the Canadian Association of Radiologists (CAR) Artificial Intelligence Working Group.

ABSTRACT

Considering "Cross-Over" Youth: Evidence Law's Intersection with a Vulnerable Group

Disproportionately racialized or Indigenous, system-involved youths are disproportionately criminalized relative to youth who are not "in care". This presentation will consider the particular impacts of evidence law on "cross-over" youth: adolescents under the supervision of provincial and territorial child welfare

authorities who come before the youth criminal justice courts as accused. This presentation will consider the Law Foundation funded research in which I am involved and discuss how demonstrates how the vulnerable group of adolescents who are "in care" as wards of the Crown, either in foster care or under child welfare supervision, are disproportionately also enmeshed in youth criminal justice proceedings.

John Burchill

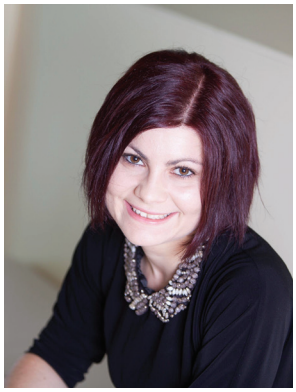
Winnipeg Police Services

John Burchill works with Winnipeg Police Services and served as the Vice-Chairperson, of the Manitoba Human Rights Commission. He is now Chief of staff with Winnipeg Police Service. He has a Bachelor of Arts in Criminal Justice from Athabasca University, an LL.B. from the University of Manitoba and an LL.M. from Osgoode Hall, York University. He was a police officer for 25 years. Prior to re-joining the Winnipeg Police Service John worked as a Crown Attorney with Manitoba Justice and a Risk Manager with the University of Manitoba. He has extensive knowledge of evidence collection practices and in proving guilt in the criminal trial.

ABSTRACT

Private Bodily Substances and Knowledge Making in Sexual Assaults

In 2008 the author conducted a five-year review of police case results, along with an academic and legal literature review surrounding the use of penile swabs obtained from suspects in sexual assault cases in Winnipeg. The results were published in Police Practice & Research in June 2010. In 2016 a five year review of case results from 2010-2015 was conducted where both penile swabs were taken from the suspect and vaginal swabs were taken from the victim. This article provides an update to the original research and any current academic or legal literature on the practice in Canada, the United States, England and Australia, including the subsequent decisions of the Supreme Court of Canada in *R. v. Saeed in 2016* and *R. v. Awer* in 2017.



Adeline Iftene

Schulich Law (presenting with Vanessa Kinnear)

Adelina Iftene is an Assistant Professor at the Schulich School of Law, where she teaches, conducts research, and publishes in areas related to criminal law, prison law, and evidence. Adelina's major research work explores issues related to prison health and access to justice for prisoners. Her book, "Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries," was published in August 2019 by University of Toronto Press.

During the past decade Adelina has also been actively engaged in prison policy and advocacy work. She has appeared before, and made submissions on vulnerable prison groups to the Standing Senate Committee for Human Rights, and she has partaken in various governmental consultation groups on criminal justice. Adelina is a member of the Prison Law Advisory Committee for Legal Aid Ontario, of the Executive Board for the Canadian Prison Law Association, and on the Regional Advocacy Committee for the East Coast Prison Justice Society.

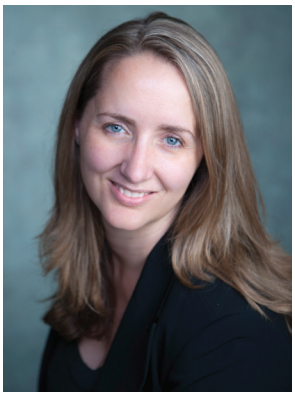
Vanessa Kinnear

Vanessa Kinnear is a recent graduate of Dalhousie University's Schulich School of Law, earning her Juris Doctor (JD) degree. Previously, she completed her Bachelor of Arts (Honours) in Criminal Justice and Public Policy at the University of Guelph. In May 2019 Vanessa began articling at a general practice firm in a small town in Nova Scotia. During law school, Vanessa competed in the McKelvey Cup Moot, the region's top criminal trial advocacy competition. Vanessa is a proud alumna of the Dalhousie Legal Aid Clinic. Vanessa began worked alongside Professor Adelina Iftene as her Research Assistant in the summer of 2018. Their collaborative research has continued, primarily focusing on Mr. Big police operations in Canada.

ABSTRACT

Knowing Mr. Big and Criminal Responsibility- R v Hart & the New Common Law Evidentiary Rule: A Five-Year Review

In 2014, in R v Hart, the Supreme Court of Canada (SCC) created a new common law evidentiary rule, as part of a new test to be applied to confessions obtained through Mr. Big operations. The new test was created to fill a legal void: until then, the evidence obtained during Mr. Big undercover operations, though problematic on many fronts, fell through the cracks of legal rules. Indeed, Mr. Big seemed to have been purposefully created to avoid all legal proscriptions. This presentation draws upon a quantitative and qualitative analysis of the 61 cases in which the new *Hart* test has been applied between August 1, 2014, and August 1, 2019. There are limitations to the analysis, resulting mostly from the scarce pre-*Hart* data available or comparison, incomplete information for some post-*Hart* cases, and the short period of time (5 years) reviewed. However, the data appears to strongly indicate that the new common law evidentiary rule had a neglected effect on the admission of Mr. Big confessions, and that the application of the factors described in the two-prong *Hart* test has been watered down. Overall, there is no evidence that the number of Mr. Big cases that are successfully tried, even where the confessions do not meet the *Hart* factors for admission, has decreased.



Michelle Lawrence

UVic Law

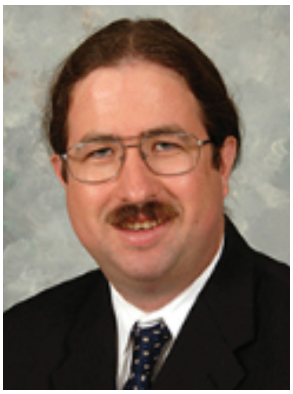
Michelle S. Lawrence is an Associate Professor with the Faculty of Law at the University of Victoria, where she is responsible for teaching and research in criminal law, sentencing, and evidence. She holds graduate degrees in law and criminology, including a LL.M. from the University of Cambridge and Ph.D. (Criminology) from Simon Fraser University. She completed her doctoral work as a Trudeau Scholar. Michelle previously practiced law in the Litigation Department of McCarthy Tétrault LLP.

ABSTRACT

Making Knowledge in Police Oversight: Reconciling the Right to Silence with the Duty to Cooperate in Police Oversight Investigations

The BC Independent Investigations Office is mandated by the Police Act to investigate incidents where a person may have died or suffered serious harm from police action. The Act provides that "an officer must cooperate fully" in those investigations. Curiously, it does not include a specific offence provision. Nor does it particularize the scope of the duty. Those particulars are instead set out in a 2013 Memorandum

of Understanding, and include significant limitations on the ability of investigators to compel notes and statements from subject officers. Under investigation is the question whether those limitations reflect a proper accommodation of the Charter right to silence, or whether they go too far and in doing so unnecessarily subvert the goals of the oversight regime. This paper will canvas the governing law and consider whether an exception to the right to silence should be recognized in the investigation of police.



David Milward

UVic Law

Dr. David Milward is a member of the Beardy's & Okemasis First Nation in Saskatchewan, is a Faculty Member at University of Victoria Law School, and was previously an Associate Professor of Law with the University of Manitoba. He has numerous publications in international and leading national law journals in the areas of criminal law, evidence, and Indigenous justice. He has also authored numerous reports. The Gladue Handbook, co-authored with Allard Hall Professor Debra Parkes, is well-received among both judges and lawyers. He assisted the Truth and Reconciliation Commission of Canada with completing portions of its Final Reports that focused on Indigenous Justice Issues.

ABSTRACT

Cree Law and Canadian Criminal Law- Tales of Risk Assumption, Duties to Assist and Responsibility

Self-determination over criminal justice remains an aspiration of Indigenous peoples. The dialogue remains fixated around perceived parallels between past Indigenous traditions of justice and restorative justice. The dialogue has gained more complexity and nuance since its genesis. Most notably, feminist authors have brought to our attention potential concerns around inequities of participant power, coercion against victims, and re-victimization of crime victims. Indigenous societies, like every other society, have had to grapple with questions of what is acceptable conduct and what is not. Much of Canadian criminal law is bound up with questions of defining criminal behaviour through the constituent components. Indigenous societies have also had to engage with the need to delineate what is sanctionable behaviour and what is not. Examples of these emerge from the traditional stories of Indigenous societies.

Michael Nesbitt

UCalgary Law

Michael Nesbitt teaches and researches in the areas of criminal law, national security law, and international organizations and human rights. He engages regularly with the media on his areas of research, including writing comments for the Globe & Mail and the National Post, providing TV and radio interviews for the CBC, CTV, and other local, national and international broadcasters, and interviews with local and national newspapers and legal publications. Before joining the Faculty of Law in July 2015 he practiced law and worked on Middle East policy, human rights, international sanctions and terrorism for Canada's Department of Foreign Affairs. Previously, he completed his articles and worked for Canada's Department of Justice, where his focus was criminal law. Michael has also worked internationally for the United Nations' International Criminal Tribunal for the Former Yugoslavia in the Appeals Chamber.

ABSTRACT

Knowing and Prosecuting Terrorism: Fairness in responsibility - An empirical and qualitative analysis of use of expert & social science evidence

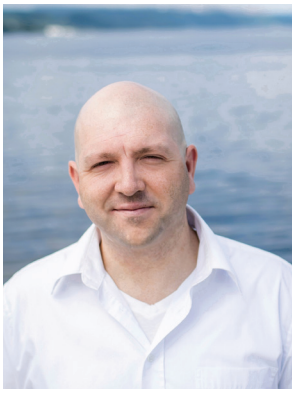
The complexities of modern terrorism cases require that experts be called to provide evidence and explain the intricacies of the case to the courts. Financial, technical, and psychological expertise are regularly called upon in the course of terrorism trials, as is evidence about religion, foreign groups, and the proper translation of texts. This expertise is needed at each stage of the trial, including to help determine whether technological evidence is sufficiently reliable to be admitted, whether a group should properly be labelled "terrorist", or the offender's prospects for rehabilitation. This paper offers the first empirical breakdown of all terrorism trials in Canada that have made use of expert evidence, the types of expert evidence used, who is using it and how, and whether it is ultimately relied upon by the judges. The result will provide a better understanding of terrorism trials in Canada and the role that expert evidence plays.

Nicole, O'Byrne

UNB Law (presenting with Adam Baker)

Dr. Nicole O'Byrne has a BSc (Queen's), BA Hons (Regina), LLB (Saskatchewan), LLM (McGill) and a PhD in Law and Society (UVic). Her research focuses on the history of Canadian federalism, public policy history and non-constitutionalized intergovernmental agreements, including the The British North America Act, 1930 (the Natural Resources Transfer Agreements) and Medicare. She has published articles about various aspects of Métis history and is currently writing a book on the history of Métis-state relations in Alberta, Saskatchewan and Manitoba (1870-1970).

She has published two co-authored articles on the history of Medicare and is working on an article about the history of Medicare in Nova Scotia, PEI and Newfoundland. Her research interests also include criminal law and evidence subjects such as criminal libel and the admissibility of illegally obtained evidence. She frequently does print, radio and television interviews with the Canadian Press, CTV Atlantic, CBC New Brunswick, Brunswick News and The Lawyer's Daily on constitutional topics such as judicial independence and criminal trial process. Nicole has served in professional executive roles at the national level, including vice-president of the Canadian Association of Law Teachers (CALT) and president of the Canadian Law and Society Association (CLSA) (president to 2020). She is currently serving her second term as an elected faculty representative of the University of New Brunswick's Board of Governors.



Adam Gerald Baker

Sole Practitioner

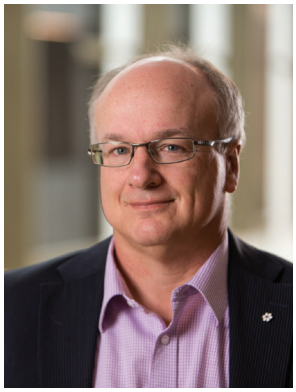
Adam Gerald Baker is a sole practitioner working in his home province of Newfoundland and Labrador at the City of Corner Brook, where he maintains a general practice including criminal litigation. He presently teaches an introductory course in "Canadian Business Law" at Memorial University, Grenfell Campus. Adam completed a Bachelor of Arts at the Memorial University of Newfoundland (2007), a Master of Arts at Queen's University (2008), and a Bachelor of Laws at the University of New Brunswick (2011). He is a member of the Law Society of Newfoundland and Labrador (admitted 2012), Past President and a current member of the board of directors of the Canadian Bar Association, Newfoundland and Labrador Branch (2011 – present), and also serves as a Resource Board Member for the Vine Place Community Centre at Corner Brook (2016 – present). On the rare day

that he is not sole praction-ing, he can typically be found entertaining his family, puttering around the house, hiking up and down the Bay of Islands, or patronizing local establishments.

ABSTRACT

You say you want a revolution? Justice McLachlin and the Admissibility of Illegally Obtained Evidence

Prior to the adoption of the Charter in 1982, illegally obtained evidence was generally deemed admissible in Canadian courts following a long established common law practice of inclusion. In the years following the adoption of Section 24(2), the Supreme Court moved away from a contextual approach by deciding that the threshold question was whether the admission of the illegally obtained evidence would lead to an unfair trial. In 2009, CJ McLachlin overturned the primacy of the fair trial requirement in R v Grant. She emphasized the various contextual factors that should be considered when determining the admissibility of illegally obtained evidence. By focussing on the original wording of 24(2), the SCC hit the reset button, reversed 25 years of jurisprudence and demoted fair trial rights to the status of one factor. We assess CJ McLachlin's legacy by analyzing the history/purpose of 24(2) of the Charter and related cases.



Kent Roach

Keynote Speaker, UToronto Law

Kent Roach is Professor of Law and Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law. He is a graduate of the University of Toronto and of Yale, and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. Professor Roach has been editor-in-chief of the Criminal Law Quarterly since 1998. In 2002, he was elected a Fellow of the Royal Society of Canada. In 2013, he was one of four academics awarded a Trudeau Fellowship in recognition of his research and social contributions. In 2015, he was appointed a Member of the Order of Canada. In 2016, named (with Craig Forcese) one of the top 25 influential lawyers in Canada (change-maker category) by Canadian Lawyer. He was awarded the Molson Prize for the social sciences and humanities in 2017. He is the author of 14 books including Constitutional Remedies in Canada (winner of the Owen best book Prize); Due Process and Victims' Rights (short listed for the Donner Prize), The Supreme Court on Trial (same); (with Robert J. Sharpe) Brian Dickson: A Judge's Journey (winner of the Dafoe Prize) and The 9/11 Effect: Comparative Counter-Terrorism (winner of the Mundell Medal) and (with Craig Forcese) False Security: The Radicalization of Canadian Anti-Terrorism (winner of the Canadian Law and Society Association best book prize).

ABSTRACT

Missed Opportunities: Towards a Two-Track and Dialogic Approach to Exclusion of Evidence

The decision of courts to accept or exclude evidence serves as a vital point of contact and communication between the legal system and the rest of the criminal justice system. Exclusion of improperly obtained evidence is the most discussed and litigated of all constitutional remedies not only in Canada, but many other countries. Following an approach informed by legal process and dialogic theories, it will be argued that courts should stick to what they do best- ensuring fair trials and effective remedies for violations of the rights of the specific litigants - but that they also need to be more active in asking the legislature and the executive including police services to take steps to prevent repetitive violations and if need should consider more intrusive remedies should similar violations persist. This would result in a very different and arguably smarter and more sustainable form of judicial activism than seen in the United States during the 1960's. The court should also use exclusion decisions to inform their own practices including addressing concerns that much of the law restraining police conduct is unclear.

Hygiea Casiano

Forensic Psychiatrist & Child and Adolescent Psychiatrist, Manitoba Adolescent Treatment Centre (presenting with Sabrina Demetrioff)

Dr. Casiano 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.

Dr. Casiano 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

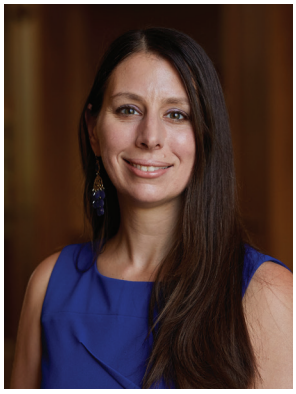
UM, Clinical Psychology

Dr. Sabrina Demetrioff 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 in 2014. Dr. Demetrioff's clinical work with the Adult Forensic Service at the Health Sciences Centre involves consulting on court-ordered assessments of fitness to stand trial and criminal responsibility, as well as completing violence risk assessments for individuals who come under the Criminal Code Review Board of Manitoba. She is involved in training psychology residents and medical students, and conducts research related to her work in forensic mental health. She has multiple peer-reviewed publications, and has presented her research at both national and international conferences. 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.

ABSTRACT

Forensic Evaluations and Input from the Legal Profession

Many individuals involved in the criminal justice system have a mental disorder and a proportion are subject to requests by the court to provide forensic mental health evaluations. In the adult criminal justice system, accused persons can generally be subject to these assessments in two circumstances: determining fitness to stand trial and considering criminal responsibility. In the youth system, there are additional evaluations that are available, including recommendations on bail or sentencing. Despite the existence of this legislation, little examination has been made of the decision-making process that goes into the ordering of these assessments. It is unclear which specific components of forensic evaluations are helpful to legal professionals. Published studies have been limited to jurisdictions outside of Canada and have not included youth court. We argue here that feedback from legal personnel can potentially lead to improved provision of care and due process for a marginalized population.



Erin Sheley
UOklahoma Law

Erin Sheley joined the University of Oklahoma College of Law in 2018. Before coming to the University of Oklahoma College of Law she was an Assistant Professor at the University of Calgary Faculty of Law. She has also served as a Visiting Associate Professor at the George Washington University Law School and an Olin-Searle Fellow at Georgetown University Law Center. Prior to academia she practiced for several years in the litigation group of the Washington, D.C. offices of Gibson, Dunn & Crutcher LLP. While in practice she was commended by the Humane Society of the United States for her pro bono work in the prosecution of dog fighting sponsors. She combines insights from the fields of psychology, narrative studies, and sociology to make the case that the narrative aspects of harm ought to play a more consistent role in shaping civil and criminal liability, procedure, evidentiary rules, and remedies.

ABSTRACT

Making Knowledge for Corporate Responsibility: Victim Impact Statements at Corporate Sentencing

The existence of corporate criminal liability is controversial, due in part to arguments that retributive punishment is theoretically incoherent when applied to non-human actors. This paper proposes that attention to victim narratives at sentencing renders corporate punishment more productive. I argue, first, that due to shared social intuitions about corporations as personified moral actors, the punishment of corporations along with their executives, if otherwise justified, serves an important expressive function. Evidence suggests that many people share moral intuitions about corporate personhood. Second, this expressive function will be better served where prosecutors present victim impact evidence at sentencing, allowing for the public to understand the victim's experience of harm and the aspects of it related to personified corporate identity. Third, I compare white collar enforcement in the Canada with that in the United States, where prosecutors have the option of using deferred prosecution agreements to avoid trial and/or formal sentencing hearings.

Lisa Silver
UCalgary Law

As a practicing lawyer, **Lisa Silver** has been involved, primarily as the principal lawyer, in more than 200 appeals before all levels of court in Ontario. She has been involved in Supreme Court of Canada cases, notably as co-counsel on the Lavogiannis case relating to the constitutionality of witnesses testifying behind a screen. As a research lawyer, Lisa has written numerous facta and opinion briefs for matters before all levels of the Alberta courts, including SCC leave applications. Her areas of expertise include Criminal law and policy; Criminal procedure (search warrants and privacy rights); and Evidence (admissibility and use of social media, issues of proof and expert evidence. Lisa Silver joined the Faculty of Law at the University of Calgary full-time in 2016, after spending two years as a sessional instructor.

ABSTRACT

Knowing from the Digital: The Unclear Picture of Social Media Evidence

The global use of social media is staggering. In 2017, there were 2.46 billion users worldwide with projections of 3 billion users in 2021. Yet, our courts struggle with this form of evidence. Admissibility

requirements are inconsistently applied as social media evidence defies traditional categorization. Where once evidential rules provided clarity, in the realm of social media those rules simply obscure. Not only are the rules in flux but the manner in which the evidence is given adds to the complexity. The uneven treatment brings into question whether our legal principles are robust enough for the digital age. How the courts apply these rules will impact the future of our criminal law and may challenge our conception of evidence. This presentation considers the unclear picture of social media evidence and offers a snapshot glimpse into the digitized world where modern trial narratives reside.

Ruby Dhand

TRU Law (presenting with Kerri Joffe)

Dr. Ruby Dhand has worked as a human rights lawyer, specializing in disability law in Ontario. In particular, she has advocated on behalf of people with mental health disabilities and on behalf of sexual assault victims and survivors of domestic abuse. She has been part of test-case litigation teams on major cases at the Supreme Court and Federal Court. Dr. Dhand has a number of refereed publications including joint authorship of a book in a distinguished series (Halsbury Laws of Canada for Mental Health Law). Her work examines the creation of criminal responsibility in the mental health context including mental health courts and therapeutic jurisprudence.

Kerri Joffe

ARCH Disability Law Centre

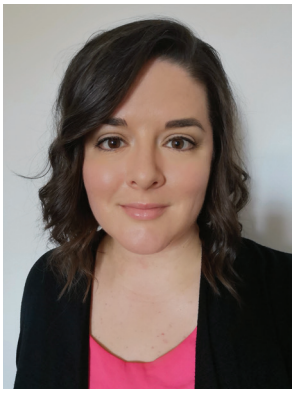
Kerri Joffe joined ARCH as a staff lawyer in 2007. She has been involved in disability rights litigation at various tribunals and courts, including the Supreme Court of Canada. Kerri has presented law reform and policy submissions to legislative committees, governments, administrative bodies and the United Nations Committee on the Rights of Persons with Disabilities. She has authored law reform reports for the Law Commission of Ontario, the Canadian Human Rights Commission and the Government of Canada. Kerri has delivered extensive public legal education to communities of persons with disabilities, and has guest lectured on disability rights issues. Before joining ARCH, Kerri worked at a community legal clinic where she provided legal advice and conducted community organizing on housing rights and social assistance programs. Kerri completed McGill University's joint program in law and social work and received her LL.B., B.C.L. and Master of Social Work degrees with great distinction. Before attending law school, Kerri worked with adults with mental health disabilities and children labelled with intellectual disabilities.

ABSTRACT

Involuntary Detentions and Treatment: Intersections of mental health and conceptions of equality and fundamental justice

Despite the hope that the *Canadian Charter of Rights and Freedoms* would serve to ensure greater recognition of the liberty and equality interests at stake for persons with mental health disabilities within mental health law, scholars argue this has not been fully realized. Thus, given the dearth of jurisprudence in this area, we apply a *Charter* analysis to the involuntary detention provisions and involuntary treatment provisions in various jurisdictions in Canada, through the lens of the *Charter's* section 7 and section 15 rights. This presentation applies a section 7 *Charter* analysis to the involuntary treatment provisions in British Columbia, Alberta and New Brunswick - three jurisdictions which reveal some of the most

extreme ways that civil mental health laws interfere with *Charter* rights. Secondly, we analyze two ways in which civil mental health laws violate substantive equality rights in regard to section 15 of the *Charter.* We conclude with a summary of our findings and recommendations from our research study including an analysis of the role of the *Convention on the Rights of Persons with Disabilities.*



Michelle Bertrand
UWinnipeg Criminal Justice

Michelle Bertrand completed her M.A. and Ph.D. at Queen's University in the Social-Personality Psychology program. Dr. Bertrand's research interests are in the general area of Psychology and Law, with specific interests in Canadian juries and eyewitness memory.

Her current research interests in eyewitness memory focus mainly on biases in police lineups, but also include methodological issues in lineup construction and administration as well as policy issues regarding lineups.

In her jury-related work, Dr. Bertrand looks at issues related to jury representativeness and comprehension of judicial charges. She is a co-investigator on an interdisciplinary SSHRC Insight Grant (2018 – 2023) investigating how well jury-eligible Canadians understand criminal charges and instructions that judges give to juries, as well as methods to improve juror understanding.

Dr. Bertrand is also the primary investigator on an interdisciplinary SSHRC Insight Grant (2019 – 2024) studying jury representativeness. Within this area, she studies how the public conceive of and understand representativeness both generally and as it pertains to persons with disabilities, and how such perceptions compare to existing case law and legislation.

ABSTRACT

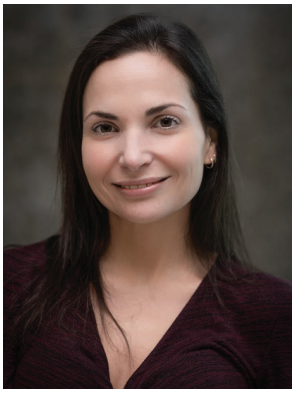
Making Knowledge of Identity Count in Police Lineups: Do investigators use best practices?

Canadian and US police officers completed a survey about their lineup construction and administration practices. We compared their responses to the respective national best-practice recommendations (BPRs) in place at that time. We predicted that if officers' lineup practices were to correspond with best-practice recommendations, officers' reports of their practices should be similar when national BPRs were similar, and differ in line with their country's BPRs when BPRs differed. We generally found the predicted pattern of results. Findings were especially striking when the BPRs differed. Some practices were largely in line with BPRs (e.g., double-blind testing), others corresponded to some extent (e.g., sequential lineups), and others were largely not followed (e.g., informing witnesses that it is as important to exonerate the innocent as it is to convict the guilty). There was considerable variation in practices that did not correspond with BPRs. We conclude that BPRs have some influence on practices.

James Gacek

University of Regina (presenting with Rosemary Ricciardelli)

Dr. James Gacek is an assistant professor at the University of Regina, Justice Studies Department and graduated with his Ph.D. in law from Edinburgh Law School, University of Edinburgh. Situated within broader research interests in prison sociology, critical criminology, and carceral geography, his PhD research focuses upon the socio-legal and geographical relationship between criminalized people and the territorial stigmatization of marginalized neighbourhoods in Canada. James is an American Sociological Association Student Paper Award winner (2014). His recent work focuses on establishing harms in the context of animal law, and is ascribing responsibility for animal harm.



Rosemary Ricciardelli

Department of Sociology, MUN

Dr. Rosemary Ricciardelli is a Professor is a Professor of Sociology, the Coordinator for Criminology, and Co-Coordinator for Police Studies at Memorial University. Her research is centered on evolving understandings of gender, vulnerabilities, risk, and experiences and issues within different facets of the criminal justice system. Beyond her work on the realities of penal living and community re-entry for federally incarcerated men in Canada, her current work includes a focus on the experiences of correctional officers and police officers given the potential for compromised psychological, physical, and social health inherent to the occupations. Her sources of active research funding include: Correctional Services Canada, the Social Sciences and Humanities Research Council of Canada, the Canadian Institute of Health Research (CIHR), Memorial University's Office of the Vice President Research and Harris Centre.

ABSTRACT

A Contraband Continuum: Correctional Officer Recruits' Experiences of Constructing, Assessing and Managing Contraband Risk

There is a need to weigh up the desirable and undesirable effects of constructing 'contraband'. By analyzing how the problem of 'contraband' is produced in prisoner management and risk discourses, we are reminded that ways of thinking about 'contraband' rely upon and reflect specific contexts. Thus, how correctional officers recruits are invoked to think about responses (policy or otherwise) will be dependent upon these conditions. As constructions of 'contraband' continue to evolve, we endeavour in this paper to open a space for contesting the meanings tied to 'contraband' and discuss the effects such constructions will have on prisoner and staff populations. Policy implications for training of correctional officer recruits will be discussed.

Lauren Menzie

UAlberta (presenting with Taryn Hepburn)

Lauren Menzie is a doctoral candidate in the Department of Sociology at the University of Alberta. Her work is broadly concerned with the evolution of Canadian criminal law and governance, including the legal regulation of sex and online engagements with law and sexual violence. Recently, she has co-authored and published Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt with Dr. Richard Jochelson and Dr. James Gacek.

Taryn Hepburn

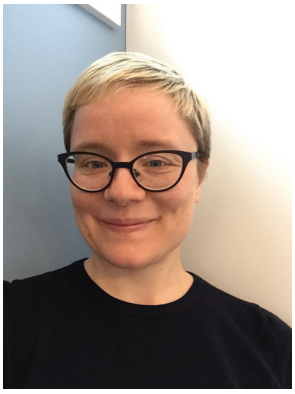
CarletonU

Taryn Hepburn is a PhD candidate at Carleton University in the Department of Law and Legal Studies. Her current research interests are youth criminal law and policing, theories of governance, carceral practices involving youth, intersectional concerns related to youth and criminality, and archival/genealogical methodologies. She is currently assisting on a Canada-wide inquiry of Indigenous adoption practices and on a study of the rural policing of youth. She has also developed experience in the making of knowledge and responsibility in the context of cyber-sexual crimes.

ABSTRACT

Harm in the digital age: luring the vulnerable and other harm creations

Representations of vulnerable person sexual abuse, whether through artistic renderings, online fantasy, or life-sized silicone constructions have been treated as indistinguishable from real and tangible harm. The representation of harmful acts should not be considered interchangeable with acts of harm, however in many cases the law views these as one and the same. This approach is risk averse and precautionary; in viewing a representation as akin to an act, the law makes a moralistic argument and attempts to characterize these offenses as posing both an ongoing moral harm and future risk of harm. This presentation exemplifies this logic by examining the proactive investigations of digital and modern iterations of sex crimes. Legal practitioners should be cautious of this, and attentive to the rapid shifts in common law. As innovation continues, it is likely that these legal challenges will grow along with the scope of what we consider to be harmful. This paper explores the proactive investigatory powers afforded to police under section 172.1 of the Canadian Criminal Code. Intended to address sexual offenses that target and harm youth, section 172.1 (Luring a Child) prohibits communicating with a person who is or is believed to be under 14, 16, or 18 years of age to facilitate the commission of another criminal offense. We suggest that the conventional imagining of the lurer and lured is suspended within this context: in a proactive investigatory policing context, the dyadic relationship between the two parties is destabilized where the offender is lured by adult police officers posing as underage youth; the would-be offender is far more vulnerable and, when speaking to an officer, poses no risk of victimizing youth. This process is considered and critiqued, both through individual cases, and systemic practice, as a form of entrapment.



Alicia Dueck-Read

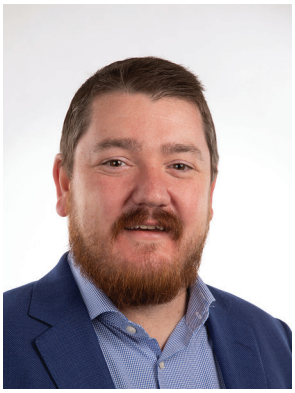
Robson Hall

Alicia Dueck-Read is a law student at the University of Manitoba. Previously, she completed her Bachelor of Arts (Honours) in History from the University of Winnipeg and her Masters of Arts in Peace, Development, Security, and International Conflict Transformation from the University of Innsbruck, Austria. Her Master's thesis on Lesbian, Gay, and Queer Mennonites was published in 2012 and won the Recognition Award for Women's and Gender-Specific Research at the University of Innsbruck in 2011. She has recently been researching the distribution of sexual digital images as a form of oppressive conduct in Canada.

ABSTRACT

Judicial Constructions of Responsibility in Revenge Porn: Judicial Discourse in Non-Consensual Distribution of Intimate Images: A Feminist Analysis

Women are increasingly enmeshed within virtual, digital worlds of communication. In the context of sexual relationships, these communications frequently include sharing nude or partially nude photos. Alongside this emergence of consensual image exchanges, so too has non-consensual distribution increased. This phenomenon, often labeled as 'revenge porn' or 'cyberbullying', has procured significant popular and legal attention, culminating in the passing of Bill C-13 and the enactment of section 162.1 of the Criminal Code. This paper will examine the phenomenon of the non-consensual distribution of intimate images (NCDII) and provide a feminist analysis of judicial discourse within cases dealing with charges under s.162.1. I will ask whether judges adjudicating cases under s. 162.1 draw upon privacy frameworks and/or the 'rape myths' common to sexual assault trials; I discuss whether judges shape the production of legal knowledge with, or without, an understanding of intersectional oppressions in a pursuit to establish criminal responsibility.



David Ireland

Robson Hall, Conference Organizer

David Ireland graduated from Robson Hall in 2010 and was called to the Manitoba Bar in 2011. He practiced criminal defence law at Gindin Wolson Simmonds Roitenberg and in August, 2011, was retained by the Department of Justice (Manitoba) as a member of the counsel team representing Steve Sinclair and Kim Edwards in the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair. In July 2012, while still in private practice, David was retained by the Department of Justice (Manitoba) as one of only a handful of special prosecutors to conduct prosecutions and provide opinions as requested by the Assistant Deputy Attorney General. In 2014, after completing his LL.M. graduate degree, David moved to the Department of Justice (Manitoba) as a full-time prosecutor. In 2016 David was appointed to the Faculty of Law at the University of Manitoba where he teaches and researches in the area of criminal law and procedure, evidence law, advocacy and preventing wrongful convictions.

Richard Jochelson

Robson Hall, Conference Organizer

Richard Jochelson is a professor at the Faculty of Law at the University of Manitoba and holds a Ph.D. in law from Osgoode Hall, an LL.M. from University of Toronto, and a J.D. from University of Calgary (Gold Medal). He is a former law clerk who served his articling year at the Alberta Court of Appeal and Court of Queen's Bench, before working at one of Canada's largest law firms. He worked for ten years teaching criminal and constitutional law at another Canadian university prior to joining Robson Hall. He has published peer-reviewed articles dealing with obscenity, indecency, judicial activism, police powers, criminal justice pedagogy and curriculum development, empiricism in criminal law, and conceptions of judicial and jury reasoning. He is a member of the Bar of Manitoba and has co-authored and co-edited several books. He co-authored Criminal Law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt (2018, Routledge).

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