

Robson Crim: A Vision for Multivalent Interrogations of Criminal Law

RICHARD JOCHELSON,^{*} AMAR KHODAY,^{**} AND DAVID IRELAND^{***}

It is an exciting time for Canadian criminal law scholarship. There are any number of critical matters to examine, from issues of legislative reform, serious concerns relating to the scope of police powers in conducting investigations and their impact on constitutional rights and values, to the scope of criminal offences and defences. To explore these and many other significant topics, there is a variety of excellent venues to publish within Canada for scholars and practitioners in our communities, including practitioner journals, short submission reviews, criminology journals, and traditional law journals. When we met with the editorial team at the *Manitoba Law Journal* (MLJ) we did notice that there was a lacuna in Canada's scholarly criminal law realms. We wanted to develop a venue where scholars of criminal law, criminal justice, and criminology could openly discuss legal issues of significant import - a space where scholars could debate criminal law practice, theory, philosophy, and, also, provide an intellectual home that would welcome cognate disciplines to engage in these debates. In short, we wanted to establish a leading location to host national and international conversations on criminal law and justice, while at the same time allowing for the progression of the MLJ's goal to provide interesting insights to the local and national bar.

This is neither the first, nor the last time that the MLJ has interrogated issues of criminal law. From jury work, plea bargaining, matters of

^{*} LL.B., LL.M. PhD

^{**} J.D., LL.M. D.C.L.

^{***} LL.B., LL.M.

substantive criminal law and the definition of crimes, to considering quasi criminal matters, the *MLJ* has a history of fostering criminal law scholarship in its generalist issues.¹ However, this is the first time that the *MLJ* has published a special edition on criminal law under the guidance of Robson Hall's criminal law research cluster, www.Robsoncrim.com. On the website, we endeavour to situate the role of www.Robsoncrim.com going forward:

Robson Hall, one of Canada's oldest law schools, has undergone a recent period of growth in its criminal law offerings. Robson Hall now offers a variety of opportunities for law students who want to study criminal law in Canada. The courses vary from standard criminal law & procedure courses and evidence courses through to courses on criminal law & the *Charter*, sexual regulation & the criminal law, and clinical courses on criminal law. As part of our commitment to education at Robson Hall and to legal education outside of the ivory tower, this space will provide reflections on current issues in criminal law. As part of our commitment to open access principles, these pages will be open and accessible to all. We will also consider submissions from readers and students at Robson Hall and beyond. Welcome to Robson Crim and stay tuned for regular updates, stories and blawg posts.²

Robson Crim started off as a venue to house law blog (blawg) posts penned by Robson Hall faculty members and students. The topics have run the gamut from revenge porn, to homelessness to prosecutorial misconduct.³ It quickly ballooned to well over 60 blawg submissions from various contributors across Canada and the world in under one year

¹ See for example Michelle Gallant, "An Empirical Glance of Manitoba Civil Forfeiture Regulation" (2014) 38 *Man LJ* 219; David Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38 *Man LJ* 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37-2 *Man LJ* 365; Amar Khoday, "R v Creighton Twenty Years Later: Harm versus Death Revisited" (2013) 37 *Man LJ* 162.

² See <https://www.robsoncrim.com/about>.

³ See for example Amar Khoday, "Lies, Damn Lies, and Prosecutorial Abuse" (7 June 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/06/07/Lies-Damn-Lies-and-Prosecutorial-Abuse>>; Richard Jochelson "Intimate Images and the Tyranny of Modern Love/Abuse" (9 January 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/01/09/Intimate-Images-and-the-Tyranny-of-Modern-Love/Abuse>>; David Ireland, "Joey" (30 August 2016), *Robsoncrim (blog)*, online <https://www.robsoncrim.com/single-post/2016/08/30/Joey>.

including academic collaborators,⁴ law students,⁵ practitioners,⁶ and many others. Over the course of several months, we assembled a team of 19 collaborators across various disciplines, who have agreed to contribute to Robsoncrim.com through blawg contributions and by serving as a peer review advisory and editorial committee for our inaugural criminal law special edition and collaboration with the *MLJ*.⁷ Our social media presence is also extremely encouraging. According to our Twitter and Facebook analytics we have received more than 50,000 digital hits.⁸ It became obvious that there was the demand, need and collaborative team available to issue a call for papers to assemble this special issue on criminal law. The *MLJ* has a top flight editorial staff ready to provide oversight and professional support. Working with the *MLJ* guarantees that this criminal edition is available on Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. We are extremely grateful for this support and for the support of the Dean of University of Manitoba's Faculty of Law, Dr. Jonathan Black-Branch.⁹

⁴ See for example Leon Laidlaw, "A Meagre Outlook for Bill C-16: The Case of Transgender University Students" (19 June 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/06/19/A-Meagre-Outlook-for-Bill-C-16-The-Case-of-Transgender-University-Students>>; James Gacek, "Judicial Dissensus is not a Disservice to Justice: The Importance of Dissent in the 'Court of Last Resort'" (5 June 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/06/05/Judicial-Dissensus-is-not-a-Disservice-to-Justice-The-Importance-of-Dissent-in-the-%E2%80%98Court-of-Last-Resort%E2%80%99>>; Rebecca Jaremkow Bromwich, "Sex, Women's Mental Illness, and Videotape" (26 September 2016), *Robsoncrim (blog)*, online <https://www.robsoncrim.com/single-post/2016/09/26/Sex-Women%E2%80%99s-Mental-Illness-and-Videotape>.

⁵ See for example Kasia Kieloch, "Judge Training on Sexual Assault: JUST may not be just" (12 May 2017), *Robsoncrim (blog)*, online <https://www.robsoncrim.com/single-post/2017/05/12/Judge-Training-on-Sexual-AssaultJUST-may-not-be-just>.

⁶ See for example John Burchill, "TALE OF THE TAPE: Policing Surreptitious Recordings in the Workplace" (29 May 2017), *Robsoncrim (blog)*, online <https://www.robsoncrim.com/single-post/2017/05/29/TALE-OF-THE-TAPE-Policing-Surreptitious-Recordings-in-the-Workplace>.

⁷ We thank our collaborators Steven Bittle, John Burchill, Erin Dej, Robert Diab, Ruby Dhand, James Gacek, Mandi Gray, Rebecca Bromwich, Lara Karaian, Ummni Kahn, Jennifer Kilty, Kyle Kirkup, Leon Laidlaw, Garret Lecoq, Laurn Menzie, Melanie Murchison, Michael Nesbitt, Debra Parkes, and Erin Sheley. See <https://www.robsoncrim.com/collaborators>.

⁸ See <https://twitter.com/robsoncrim> and <https://www.facebook.com/robsoncrim>.

⁹ We acknowledge the support, both material and collegial, of Dr. Bryan Schwartz, Professor Darcy MacPherson, and our student editors Kasia Kieloch and Stefanie Reece.

Following the release of our call for papers, we were overwhelmed with submissions. When we saw the quality of the work, we knew it would be appropriate to consider having an annual criminal law special edition of the *MLJ*. After a double blind peer review process, we accepted 13 scholarly papers for publication in this volume. After acceptance, we grouped the papers thematically. This special issue is broken down into five sections.

The first section is titled State Abuses and the Criminal Process. In the first paper, “Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip”, Professor Kent Roach merges resistance and media analyses to explore how the songs *38 Years Old* and *Wheat Kings* can be interpreted as a call to reform and resist issues of legal process injustice such as mandatory minimum sentencing and wrongful convictions. He makes a powerful case for the role of art in the resistance against injustice as a precursor to legal change. Professors Rod Lindsay, Michelle Bertrand and Andrew Smith continue the discussion of injustice in the criminal process by bringing a psychological analysis to bear in “The Importance of Knowing How a Person Became the Suspect in a Lineup: Multiple Eyewitness Identification Procedures Increase the Risk of Wrongful Conviction”. In this piece, the authors raise concerns about eyewitness identification and the potential impact on wrongful convictions. The paper uses psychological methods to raise concerns about testimony that is routine in the criminal trial, and answers the call of the editors to examine legal phenomenon through cognate lenses. Professor Marie Manikis and Peter Grbac, in the next paper, “Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process”, discuss the ways prosecutorial discretion remains relatively unconstrained. They argue that the balance must shift to favour procedural fairness over expedience, preferring the German model of managing prosecutorial discretion. In “Beyond Finality: *R v Hart* and the Ghosts of Convictions Past”, Professor Amar Khoday and Jonathan Avey continue the discussion of criminal process and injustice by examining Mr. Big sting operations. In *R v Hart* decided in 2014, the Supreme Court of Canada considered the admissibility of incriminating statements elicited through these tactics and has placed certain limitations on their use. Prior to *Hart*, most courts readily admitted incriminating statements into evidence. In light of the inherent dangers arising from such in producing wrongful convictions, Khoday and Avey

We also acknowledge support from the University of Manitoba Research Office, the Legal Research Institute, and the Manitoba Law Foundation.

argue that pre-*Hart* decisions should be revisited while applying the framework set out in *Hart*. In the next paper, Jeffery Couse returns to discussions of abuse of process which come up in the previous papers, to examine the doctrine in “Jackpot: The Hang-Up Holding Back the Residual Category of Abuse of Process”. In analyzing abuse of process jurisprudence and the remedy of the judicial stay, the author proposes an approach that considers the societal considerations inherent in the remedy, and minimizes unwarranted windfalls for criminal defendants.

The second section of this issue, Perspectives on Injustice: Corrections and Correcting Courts interrogates problems in the corrections system and when courts are actively involved in corrections work. Professor Rebecca Bromwich, in “Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies”, uses critical discourse analysis to unpack the Ashley Smith tragedy. She argues in favour of the need for fundamental changes in the criminal justice and correctional systems as a result. Joshua Watts and Professor Michael Weinrath, in “Manitoba’s Mental Health Court: A Consumer Perspective”, undertake a study of the diversion mechanism of mental health courts by interviewing the participants. Their multipronged results seem to indicate a preference and tendency towards procedural fairness in the program, but the coerciveness of the program was also referenced by participants, indicating that issues of punitivity may be still be alive in these diversionary approaches.

In the next section, Issues in Policing and the Criminal Process, the papers explore legal issues concerning investigation and data collection. John Burchill, in “Tale of the Tape: Policing Surreptitious Recordings in the Workplace”, explores secret recording of workplace activities and considers their use, in the policing workplace, in subsequent judicial proceedings and the implications for workplace dismissal. In “Supreme Court of Canada in *World Bank Group v Wallace*: On Production of Records, Immunities of International Organizations and the Global Fight Against Corruption”, Dmytro Galagan explores the protections that international organizations can use in preventing document production, and the role of international treaties in governing production in the context of international corruption cases. Both articles explore the evolving role of surveillance in spaces that we often do not examine in the day-to-day practice of criminal law.

The issue continues with a section dedicated to Criminal Sexualities and Sexual Expression. Professor Richard Jochelson and James Gacek, in “Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada”, examine recent Supreme Court of Canada jurisprudence and outline different approaches that the Court undertakes in giving meaning to older laws. In the context of bestiality law, the Court has given a conservative interpretation to the criminal law that falls well behind developments in other common law jurisdictions, such as New Zealand. Law student, Julie Yan, in a featured student paper, “Art in the Dichotomy of Freedom of Expression & Obscenity: An Anti-Censorship Perspective” makes a radical argument in favour of relatively unmitigated free speech in the context of the intersection of child pornography and art. She calls for an elimination of obscenity and indecency law (noting that other prevailing laws can address the harms) and grounds the policy recommendation in anti-censorship feminism.

The last section, The Constitution and Judicial Activism, contains two articles. The first, by Professor Michelle Lawrence, “Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*”, explores the legal bar against using the self-induced intoxication defence in the context of personal violence, and argues that due to its unconstitutionality, the impugned Code provisions should be struck; alternatively, Lawrence argues for an interpretation of the provision that builds into its application a minimal fault standard. Last, Professor Melanie Murchison, in “Making Numbers Count: An Empirical Analysis of Judicial Activism in Canada”, undertakes the establishment of a rigorous model for assessing activism using the Supreme Court’s own words. She uses the model to unpack judicial decisions in cases that interpret various constitutional protections against police powers in Canada and she concludes by making suggestions for future judicial activism research.

We thank each of the authors for their meaningful contributions to this volume and to their commitment to cutting edge research in the criminal law. At Robson Crim we believe passionately that criminal law in Canada must be studied from perspectives of multivalence. Black letter law analyses indeed have their place, as do complex theoretical interrogations of criminal law. Speaking across disciplines between law, criminology, sociology, psychology, and other disciplines is an ever-present challenge. We must never forget that good criminal law practice is informed well by the social sciences and humanities. Likely the cognate disciplines would also do well

to take doctrinal analysis seriously and to include rigorous legal analyses in their own interrogations. We hope that this special edition, and future special editions provide a national, perhaps international, space where these multiple perspectives and disciplines can intersect and thrive. Thank you for reading this issue. We look forward to publishing many more as we continue our mission of fostering innovative and engaging criminal law scholarship.