

# Towards a Crim Community – Here We Go Again

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**R**obson Crim, Robson Hall’s criminal law research cluster and Canada’s criminal law blog (Robsoncrim.com), is now in its third year of operation. With the publication of our latest peer-reviewed volumes we have published over 30 refereed articles in the areas of criminal law, criminal justice and criminology. Further, having now partnered with almost 40 academic peer collaborators at Canada’s top universities and law schools we have ensured a robust network of peer reviewers and have fostered a nationwide Crim community. This is a community that is evidenced by our publication of more than 250 blawgs,<sup>1</sup> with bloggers from across Canada, the USA and Europe.

Robson Crim has developed as a hub for national Crim research and now accepts many more submissions than we can accommodate. Further, we have recently tapped into the CanLII Connects system and are excited by the drive towards open access in legal scholarship and authorship. We have made connections with Emond Publishing who have graciously provided editorial assistance to us in these two latest volumes. Our commitment to open access publication, as well as our presence on the usual legal databases and Academia.edu contributes to making our resources easy

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<sup>1</sup> 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 Jaremko 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>.

to access. As part of our commitment to advancing legal research and disseminating knowledge in the fields of criminal law, criminal justice and criminology, we present you, this year, with two additional volumes of the Criminal Law Edition of the Manitoba Law Journal.

Thanks to extremely insightful and valuable contributions, last year's special edition Criminal Law volume of the Manitoba Law Journal achieved a ranking in the top 0.1 percent on Academia.edu, amassing over 2500 downloads there alone. Similarly, Robsoncrim.com received over 3000 paper reads on the journal pages and the journal received thousands more downloads on the paid legal databases. From articles as diverse as Mr. Big operations,<sup>2</sup> bestiality law,<sup>3</sup> and the Tragically Hip in the context of wrongful convictions,<sup>4</sup> we achieved more readership than we could have expected. As part of our commitment to open access fundamentals, these and future pages will remain open and accessible on Robsoncrim.com, themanibalawjournal.com, CanLII, Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. Additionally, submissions from academics, readers, practitioners and students will continue to be considered, as these offer unique and important insights into the field of criminal law and cognate disciplines.

Indeed, the Manitoba Law Journal has a rich history of hosting criminal law analyses.<sup>5</sup> Yet, following the release of our last call for papers, we were overwhelmed with the volume of submissions for a special edition on criminal law. When we saw the quality of the work, we knew it would be appropriate to consider publishing two volumes. This year, after a significant increase in the number of submissions and an arduous double-

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<sup>2</sup> Amar Khoday and Jonathan Avey, "Beyond Finality: R v Hart and the Ghosts of Convictions Past" (2017) 40(3) Man LJ 111.

<sup>3</sup> James Gacek and Richard Jochelson, "'Animal Justice' and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40(3) Man LJ 335.

<sup>4</sup> Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40(3) Man LJ 1.

<sup>5</sup> See for example 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.

blind peer review process, we accepted and put together twenty papers into two special volumes, each containing three to four thematically organized sections.

The first section in this volume is titled Investigations, Evidence, and Emerging Legal Tests.

In the opening paper of this volume, “Examining How Lineup Practices of Canadian and U.S. Police Officers Adhere to Their National Best Practice Recommendations”, Michelle Bertrand, Rod Lindsay, Jamal Mansour, Jennifer Beaudry, Natalie Kalmet, and Elisabeth Melsom discuss the construction and administration of police lineups. Using an online survey, the authors collected police officer responses on the degree to which police follow best-practice recommendations across Canada and the United States. They highlight differences between the best-practice recommendations and practice itself, offering suggestions to preserve the effectiveness of police lineups as a law enforcement technique.

Then Christopher Totten and Sutham Cobkit explore American police chief views on vehicle search practices and the legal norms that govern them, in “Police Vehicle Searches under the Fourth Amendment: Evaluating Chiefs’ Perceptions of Search Policies and Practices after *Arizona v Gant*”. Relying on data collected from a mail survey, they show that police search practices have changed in some parts of the U.S. following the United States Supreme Court’s decision in *Arizona v Gant*. Finally, they reflect on what this means for the police and the judiciary going forward.

In “*R v Jarvis*: An Argument for a Single Reasonable Expectation of Privacy Framework”, Ryan Mullins discusses the Ontario Court of Appeal’s interpretation of “reasonable expectation of privacy” in *R v Jarvis*. He argues that the Court’s approach, which distinguished between voyeurism and section 8 cases, should be replaced with a single framework that always considers the “totality of the circumstances” when determining the nature of the privacy interest at stake.

Finally, in “Alibi Evidence: Responsibility for Disclosure and Investigation”, John Burchill discusses the perils of defence counsel withholding alibi evidence and the adverse inference this may draw at trial. He highlights how U.S. and Australian alibi disclosure laws may provide guidelines for defence counsel in Canada to follow in order to preserve the alibi’s credibility at trial or avoid one altogether.

The second section, *Indigenous Peoples, Corrections and Justice*, features two articles.

Celeste McKay and David Milward in “Onashowewin and the Promise of Aboriginal Diversionary Programs” explore the effectiveness of the Onashowewin diversionary program in Winnipeg, MB. Across a sample of 100 Indigenous offenders, they found that the rate of recidivism was only 30%, noticeably lower than comparable studies of Indigenous recidivism. Highlighting Onashowewin’s focus on addressing the needs of Indigenous offenders, they discuss how programs like it may lead to cultural revitalization and offer a step towards Indigenous self-determination.

This section is rounded out by Leah Combs’ paper, “Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*”. She argues that the underlying goal of sections 81 and 84 of the *Corrections and Conditional Release Act*, to involve Aboriginal communities in corrections, has still not been realized twenty-five years after becoming law. While all Indigenous offenders have been impacted, she reveals how Indigenous women have suffered disproportionately.

The issue continues with a section dedicated to Youth and Beyond: Controversies of Accountability.

The section begins with Russell Smandych and Raymond Corrado’s detailed account of youth justice in Canada in ““Too Bad, So Sad”: Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015”. Reflecting on the evolution of youth justice policy over the past two decades, they reveal two ongoing problems: balancing youth rights and interests with criminal accountability and the regional disparities created by the implementation of youth justice policy.

Concluding this section, Scott Mair offers his critique of the *Criminal Code*’s infanticide provision in “Challenging Infanticide: Why Section 233 of Canada’s *Criminal Code* is Unconstitutional”. Arguing that the provision violates the equality rights of newborn children, he suggests how a constitutional challenge may be brought and offers a possible replacement.

The final section, *Sex Work: Court Responses and Discursive Analysis*, interrogates issues surrounding the enforcement and protection of sex worker rights.

In “Remedying the Remedy: *Bedford*’s Suspended Declaration of Invalidity”, Carolyn Mouland discusses the ways in which the Supreme Court of Canada’s remedy for *Charter* violations in *Canada v Bedford*

undermined remedial objectives. She contends that by preserving Canada's unconstitutional prostitution laws for another year, the law increased the risk of harm for sex workers. Proposing that the use of suspended declarations follow a "deliberative remedial procedure", she illustrates how suspended declarations may be granted while mitigating potential harms to rights-bearers.

The closing article of this volume is Leon Laidlaw's "Challenging Dominant Portrayals of the Trans Sex Worker: On Gender, Violence, and Protection". In light of new federal protections against discrimination of trans people and addressing a gap in social science research, Laidlaw investigates enduring challenges for trans sex workers.

Putting together a double volume was no small feat. We would like to thank our authors, who submitted highly relevant and thoughtful pieces of legal analysis, touching on fields of criminology, criminal justice and criminal law, amongst others. We would also like to thank our Robson Crim collaborators, and our peer reviewers,<sup>6</sup> all of whom helped put this project together for another round. The entire editorial team would like to extend an extra thank you to Rebecca Bromwich, Melanie Murchison, and James Gacek for their help and support, as well as to the Dean of the Faculty of Law, at the University of Manitoba, Dr. Jonathan Black-Branch.

Thank you for reading this special double volume of the Manitoba Law Journal's Criminal Law edition. We look forward to many more. We encourage you to peruse our latest call for papers in the pages that follow and at <https://www.robsoncrim.com/call-for-papers-mlj>.

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<sup>6</sup> Visit our collaborators at <https://www.robsoncrim.com/collaborators>. We thank our collaborators (new and old) including Sasha Baglay, Benjamin Berger, Michelle Bertrand, Steven Bittle, John Burchill, Erin Dej, Robert Diab, Ruby Dhand, James Gacek, Daphne Gilbert, Mandi Gray, Thomas S. Harrison, Chris Hunt, Adelina Iftene, Brock Jones, Rebecca Bromwich, Lara Karaian, Lisa Kelly, Lisa Kerr, Ummni Khan, Jennifer Kilty, Kyle Kirkup, Leon Laidlaw, Michelle Lawrence, Rick Linden, Garrett Lecoq, Lauren Menzie, Melanie Murchison, Michael Nesbitt, Debra Parkes, Nicole O'Byrne, Micah Rankin, Amar Khoday, David Ireland, David Milward, Richard Jochelson, Kristen Thomassen, and Erin Sheley. We also thank the many peer reviewers who assisted us through our digital peer review platform from across the world.