Towards Dialogue in the Crim Disciplines

DAVID IRELAND AND
RICHARD JOCHELSON

We are thrilled to bring you the latest edition 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. The fact that we have, once again, elected to publish a double volume is a testament to the quality of submissions we have received over the last twelve months. We present twenty-five articles from twenty-nine authors, highlighting the work of some of Canada's leading criminal law, criminological and criminal justice 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 thirty-one 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. Since our first edition in 2017, our Special Edition has ranked as high as the top 0.1% on Academia.edu where we have had 4,000 downloads and close to 7,000 total views. In the last twelve months, our own website, robsoncrim.com, has added almost 600 engagements with the Special Edition, attracting hits from Canada, the United States, United Kingdom, Australia and India.

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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.

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 350 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 almost 600 reads in the past twelve 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 crim fields.

The peer review process for the Special Edition in Criminal Law remains rigorously double blind, using up to five reviewers per submission, and has generated some truly wonderful articles for our readers. We are delighted to welcome long time contributors Dr. James Gacek and Dr. Rebecca Bromwich to our Robsoncrim.com online editorial team this year. James and Rebecca bring tremendous experience and an impressive body of law scholarship.[6] As editors, we know they will continue to provide their

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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].

6 Rebecca Bromwich, "Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies" (2017) 40:3 Man LJ 193; Rebecca Bromwich & Jennifer M Kilty, "Introduction: Law, Vulnerability, and Segregation: What Have We Learned from Ashley Smith's Carceral Death?" (2017) 23:2 CJLS 157; James Gacek, "Species Justice for Police Eagles: Analyzing the Dutch 'Flying Squad' and

collective wisdom to our publication and remain steadfastly committed to interdisciplinary and collaborative scholarship.

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 two volumes. Each volume contains a number of thematic sections. These sections host our articles.

I. VOLUME 42(3)

This volume is divided into two sections. The first section is entitled Sexual and Domestic Violence: Evidence, Critical Discussions and Law Reform. The second thematic section is entitled Injustice in Criminal Process: Legal and Socio-Legal Approaches. The first section engages timely discourse around topics of sexual violence, the criminalization of HIV, the charging of women in domestic violence matters and the complex world of sexual assault jury instructions.

Leading off the *Sexual and Domestic Violence: Evidence, Critical Discussions and Law Reform* section is Professor Lucinda Vandervort's engaging discussion of the *R v George* case in the context of errors that constitute judicial misconduct. *George* concerned the trial of a 35-year-old woman accused of sexually assaulting a 14-year-old boy. This fascinating case went to the Supreme Court of Canada in 2017 where Ms. George was finally acquitted after a frightening journey through the criminal justice system. Vandervort delves into the judicial reasons of the trial decision to interrogate themes of misogyny and entrenched attitudes towards sexual violence.

Paul M Alexander and Kelly De Luca delve into the complex world of jury instructions in sexual assault trials in "The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong." The authors argue that standard charges for the offence of sexual assault contain a legal error in that they identify knowledge of the complainant not consenting as an essential element of the offence. They further identify issues with the defence of honest but mistaken belief in consent as it concerns the *Mens Rea* of the offence. This is an intriguing discussion that takes the reader into a complicated world where practitioners must exhibit extreme caution.

Animal-Human Relations" (2018) 21:1 Contemporary Justice Rev 2; Richard Jochelson & James Gacek, "Ruff Justice: Canine Cases and Judicial Law Making as an Instrument of Change" (2018) 24:1 Animal L 171.

Professor Karen Busby and law student, Dr. Davinder Singh, co-author "Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law." This timely article looks at Supreme Court of Canada cases that effectively criminalize the non-disclosure of HIV status, arguing that a fundamental misunderstanding of the science has created flawed legal outcomes. The authors then discuss the implications of the recent directive of the Attorney-General of Canada to the Director of Public Prosecutions concerning HIV non-disclosure prosecutions.

In the article, "Elements of Superior Responsibility for Sexual Violence by Subordinates", Gurgen Petrossian interrogates the doctrine of superior responsibility to examine the circumstances in which a superior officer may be held liable for sexual violence perpetrated by his or her military subordinates. This article offers an international law perspective and identifies key issues around the use of the doctrine in an international war crimes context.

Following this, Anita Grace has authored a compelling piece looking at women charged with domestic violence in Ottawa, Ontario. Her empirical work draws on interviews with eighteen women charged in situations of intimate partner violence. These interviews highlight potential police misidentification of aggressors and thus inappropriate charging practices. Disturbingly, Grace highlights that some of the charged women would not turn to the police for protection given their negative experiences in the system.

Next, Kyle McCleary's article, "'Alluring Make-Up or a False Moustache': *Cuerrier* and Sexual Fraud Outside of HIV Non-Disclosure", presents an intriguing look at the seminal 1998 Supreme Court of Canada decision where it has been applied in cases not involving HIV non-disclosure. Here, we find a world where the *Cuerrier* standard is not operating as intended, in some cases shielding reprehensible acts from criminal liability.

The first section of this volume is closed out by Colton Fehr's article on "Consent and the Constitution". Fehr argues that any constitutional role for the consent principle in sexual assault law must derive from its purpose of protecting the morally innocent.

The second section of this volume, *Injustice in Criminal Process: Legal and Socio-Legal Approaches,* includes seven articles dealing with various issues in criminal process. Professor Kathryn M Campbell begins our journey with "Exoneration and Compensation for the Wrongfully Convicted: Enhancing

Procedural Justice?", a fascinating look at the post-conviction review and compensation processes in Canada. Campbell argues that these systems raise questions of legitimacy. This is an important discussion given the continued identification of wrongful convictions across the country.

Jonathan Avey examines the question of judicial delay in rendering a decision in the post-*Jordan* world. Avey uses the *K.G.K* case in Manitoba, where a judicial decision took nine months to come out, to highlight the tensions between the constitutional rights of an accused and the desirability of judges taking time to craft well-reasoned decisions. *K.G.K.* will provide the Supreme Court of Canada with the opportunity to address this tension and provide guidance to practitioners and judges on the correct balance to be struck in a post-*Jordan* environment, where expedience has become the watchword of the criminal process.

Maeve McMahon delves into the sphere of Canadian extradition law when she examines the shortcomings of the *Extradition Act* as highlighted by the case of Hassan Diab. Diab was arrested in 2008 for the 1980 bombing of a Paris Synagogue. Upon his extradition, Diab spent three years in a French jail despite the fact that he was never charged. McMahon offers us an engrossing look at the extradition and its aftermath, all while highlighting the problems of a low evidentiary threshold in these proceedings.

Paetrick Sakowski's timely look at Canadian remediation agreements, made so famous by the SNC-Lavalin affair, draws on a comparative analysis with other jurisdictions to highlight the potential benefits of deferred prosecutions when handled correctly. To maintain legitimacy and public trust, these controversial agreements must be fully understood as mechanisms to balance competing societal values.

Following this article, and continuing our theme of comparative legal analysis, law student Nathan Phelan delves into the world of Mr. Big in "Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to 'Mr. Big'". Phelan gives a detailed account of the admissibility requirements in Canada, New Zealand and Australia.

The final article in this volume sees Lauren Chancellor tackle the effect of media bias on wrongful convictions. Building on Professor Campbell's examination of the post-conviction review process, Chancellor investigates the role of news and social media in Canadian wrongful convictions. Using the well-known examples of Guy Paul Morin, Robert Baltovich and

James Driskell, the paper argues that the presumption of juror impartiality should be re-evaluated in the face of media coverage. Recommendations are made to address trial fairness and limit wrongful convictions.

II. VOLUME 42(4)

The second volume is divided into four sections: Reflections on Evidence, Critical Issues in National Security, Critical Approaches to Evidence and Knowledge and Animal Rights: Legal and Socio-Legal Approaches. Leading off our first section, *Reflections on Evidence*, is Heather Cave and Peter Sankoff's article, "What's Left of Marital Harmony in the Criminal Courts? The Marital Communications Privilege After the Demise of the Spousal Incompetence Rule." This article explores the 2015 amendments to the *Canada Evidence Act* that abolished the spousal incompetence rule and poses a reconsideration of spousal communication privilege in the wake of this change.

Professor Jason Chin, Michael Lutsky, and Itiel Dror explore "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges." These authors, each from a different continent, offer an intriguing case analysis both pre and post the seminal *White Burgess* case on expert witness impartiality. While they find that more experts were challenged for partiality after *White Burgess*, there was no significant increase in the number of experts excluded.

John Burchill, a frequent and valued contributor to the Criminal Law Special Edition, provides an update to his academic work on penile swabs used in sexual assault prosecutions. This review, looking at cases 2010-2015 where both a penile swab was taken from the accused and a vaginal swab taken from the complainant, highlights the evidentiary value of taking swabs from both parties. Burchill goes on to compare and contrast the approach to admitting this type of evidence in Canada, Australia and South Africa, determining that, though different regimes exist, the value of such evidence remains high across jurisdictions.

Chis Sewrattan provides an article for our "From the Practitioner's Desk" section, where he engages the reader in a detailed historical analysis of the origins of the hearsay rule in evidence. This comprehensive work draws on the author's practical courtroom experience working with the hearsay rule over the years as well as his academic research and will be of particular interest to litigators.

Our second section titled *Critical Issues in National Security* features two articles. Our 'Featured Article' by Professor Craig Forcese delves into the world of national security in "Threading the Needle: Structural Reform & Canada's Intelligent-to-Evidence Dilemma." Forcese deftly leads the reader through the clandestine world of Canadian intelligence agencies and the real issues surrounding disclosure and information security in the post-9/11 security environment. The article skillfully posits a hypothetical intelligence operation to highlight potential and actual difficulties that this area of the law presents to trial fairness and the rights of an accused.

Also, in this section on national security law, we present Nicolas Rosati's article, "Canadian National Security in Cyberspace" as a 'Critical Commentary'. The impact of legislative reform under Bill C-59 is discussed as it relates to operations under the current mandate of the Communications Security Establishment.

Our penultimate section: *Critical Approaches to Evidence and Knowledge* brings together four articles from prominent voices in legal scholarship. "Over Indebted Criminals in Canada" by Professor Stephanie Ben-Ishai and Arash Nayerahmadi offers an intriguing look at the often-overlooked issue of indebtedness arising from state punishment of criminal acts. This article explores 'justice debt' as a concept and offers ideas for future research and reform.

Professor Prashan Ranasinghe then explores the role of anxiety in the fear of crime. This article skillfully theorizes anxiety in socio-legal detail and engages Martin Heidegger's insightful analysis of fear and anxiety. The author then explores the 'risk-fear' paradox and concludes that this paradox is more apparent than real.

Dr. Rebecca Bromwich presents reasons for law reform in "Cross-Over Youth and Youth Criminal Justice Act Evidence Law: Discourse Analysis and Reasons for Law Reform." Youth in the child welfare system disproportionately 'cross-over' into the youth criminal justice system in Canada. Bromwich unpacks this reality and suggests that the use of evidence law in youth criminal justice further marginalizes 'cross-over' youth, setting them up for disproportionate criminalization and incarceration.

Alana Josey explores the tension between the trials' search for truth, protection of constitutional rights and the proper administration of justice by reference to the utilitarian philosophy and jurisprudential theory of Jeremy Bentham. This interesting examination of evidence law and

philosophy uses the example of a mistrial application to illustrate that Benthamite theory and the Canadian law can be reconciled.

Finally, the *Animal Rights: Legal and Socio-Legal Approaches* section unites two articles in this fast-developing area of legal scholarship. Dr. James Gacek contextualizes the Canadian animal cruelty law regime in "Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals." This critical take on the legislative regime in Canada examines our current understanding of 'animal cruelty' and frames arguments for and against advancing progressive animal welfare reforms.

Ryan Ziegler brings us our last article in this Special Edition: "The Constitutional Elephant in the Room: Section 8 *Charter* Issues with *The Animal Care Act*." Here, the author unpacks the legislation and applies a *Charter* analysis to the salient provisions of the legislation that authorize state intrusion on the privacy rights of the individual. Ziegler concludes the legislation should attract *Charter* protections with searches under the act being conducted under the *Hunter v Southam* framework.

III. WHAT'S NEXT?

The upcoming year holds a number of exciting developments for the Robsoncrim.com collective. On October 26, 2019 we will be holding a national conference entitled "Criminal Justice and Evidentiary Thresholds in Canada: the last ten years" which will feature fifteen nationally established experts in criminal law and criminology discussing their original research in respect of evidence and knowledge production, marking the anniversary of the *R v Grant*[7] decision from 2009. The conference will be free and will also go towards meeting the Law Society of Manitoba's continuing professional development requirement. The event will feature Professor Kent Roach as a keynote speaker. The event will culminate in a special edition of the Criminal Law Edition slated for publication for 2020 and is supported by a Connections Grant from SSHRC as well a grant provided by the office of the University of Manitoba's Vice President (Research and International). In addition, we will announce new membership to our editorial and collaborative team – visit Robsoncrim.com early and often for emerging details.

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7 *R v Grant*, 2009 SCC 32.

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 hide in silos, afraid 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 embark upon, but the two volumes we have released this year represent another incremental step towards our goals. We hope you enjoy these volumes, and we thank our interdisciplinary collaborator team (https://www.robsoncrim.com/collaborators), our editorial team, our student editors and all of the MLJ staff.