

Trudeau Scholars' Workshop

Criminal Law as Social Change: Intentions and Consequences

Tuesday 5 February 2013, 9:00am to 5:00pm

Free admission – registration compulsory
Register at coleenlisa@gmail.com

Centre for Ethics, University of Toronto, Room 200
Gerald Larkin Building, 2nd Floor
15 Devonshire Place, Toronto, ON M5S 1H8

In recent decades, social movements in Canada and beyond have turned to the criminal law as a vehicle for social change. Feminists, victims' rights advocates, law and order conservatives, and child protection groups have pursued criminal law reforms on several fronts and with a range of motives. In Canada, this turn to criminal regulation can be seen in the elevation of the age of sexual consent, amendments to young offender legislation, HIV-disclosure case law, domestic violence and sexual assault law reforms, anti-trafficking laws, the addition of mandatory minimum sentences to drug laws, and an enhanced role for victims in the criminal justice process.

Expanding criminal liability and lengthening prison sentences can be an effective means of appealing to popular sentiment, particularly on complex social problems that present few easy solutions. But the success of criminal law campaigns may come at the expense of other opportunities for social transformation. Greater emphasis on criminal law campaigns often coincides with shifts in resource allocation away from social welfare toward criminal justice – a turn some scholars have called a move from the “welfare state” to the “penal state.”

This Trudeau scholars' workshop takes as a starting point the sense that some actors in these social movements maintain a formalist view of criminal law, whereby black letter criminal prohibitions are presumed to lead more or less straightforwardly to the actual reduction or abolition of an impugned activity. This view elides the realities of under- and over-enforcement, disparities in criminal surveillance and punishment, and the sometimes counter-productive and unintended consequences of criminal prohibitions. The workshop aims to develop a more realist vision of both criminal law and processes of social change.

In the first two panels, participants will analyze the *intended and unintended consequences* of the criminal law in action. We first focus on two areas where competing social movements have advocated both for and against criminalization: prostitution and HIV-disclosure. How does criminal law and enforcement affect the bargaining power of parties to sexual encounters, paid and unpaid? What does social science evidence reveal about the efficacy of criminal law in achieving its official aims of public safety or crime

control? How can courts and legislatures balance the moral and expressive functions of crime and punishment, alongside evidence of its negative impacts? What other emancipatory or regulatory tools might criminalization be distracting us from, whether in labour law, public health law, welfare law, or tax law?

Next, we discuss contemporary “victims’ rights movements.” We will consider some of the cautionary lessons Canada might learn from the United States, where populist victims’ rights movements have played an important role in the rise of mass incarceration. Since the 1980s, the experiences and concerns of American crime victims have become central to penal legislation and decision-making. Some research suggests, however, that populist representations of victims’ needs are often at odds with the interests of actual crime victims and their communities. Until recently, Canadian governments had generally limited the influence of crime advocacy groups, relying instead on federal and provincial bureaucratic expertise for victim policy reform. We will discuss whether recent federal crime initiatives spell a sea change in this regard. We will conclude by considering the potential of other justice mechanisms to recognize and restore the losses incurred by victims of crime.

In the next two panels, we focus on *dysfunction* in criminal law outcomes, and *disparities* between particular populations when it comes to criminal law detection, enforcement, and punishment. First, we examine the prison system, and the question of how criminal sentences are administered. Is there a close relationship between the putative goals of the criminal justice system and the reality of punishment as it is delivered on the ground? How and why do conditions of imprisonment impact particular classes of prisoners differently? Do the front-end justifications for the use of criminal law match the back-end punishment outcomes? What impacts does the technique of imprisonment have on the individuals and communities most affected?

In the final panel, we consider how criminal law can subject particular communities to disproportionately intense criminal regulation and enforcement. The classical conception of criminal law is that it targets individual acts of intentional wrongdoing. But for those who are homeless or mentally ill, the application of criminal law can be triggered by a *status* rather than an *act*. Key questions here include: What factors contribute to the over-representation of certain groups – the homeless, mentally ill, Aboriginal and visible minority Canadians – in the criminal justice system? How do material and legal entitlements, such as privacy or the burden of proof in criminal trials, contribute to class and other disparities in detection, enforcement, and prosecution of offences? How do rates of conviction, and lengths and types of sentences, differ among classes of defendants? What reforms could resolve the puzzle of a society that is formally committed to substantive equality but that produces discriminatory outcomes in the application of criminal law?

This interdisciplinary workshop convenes Canadian scholars, advocates, and policymakers to analyze the criminal law in action, in an attempt to discern the social costs and benefits of using criminal law as a tool of social change. We hope to foster a

critical dialogue about the full range of legal and regulatory tools available for achieving social change.

Day's Program

9:00 – 9:15am

Introductory Remarks

Lisa Kelly, *Doctoral Candidate, Harvard University; 2010 Trudeau Scholar*

Lisa Kerr, *Doctoral Candidate, New York University; 2012 Trudeau Scholar*

9:15 – 10:45am

Sex, Risk, and the Criminal Law

Angela Campbell, *Associate Professor, McGill University, Faculty of Law*

Richard Elliott, *Executive Director, Canadian HIV/AIDS Legal Network*

Chanelle Gallant, *Maggie's: Toronto Sex Workers Action Project*

Katrina Pacey, *Litigation Director, Pivot Legal Society*

10:45– 11:00am: Break

11:00 – 12:30pm

Victims, Security, and the Meaning of Criminal Law

Anthony Doob, *Professor, Univ. of Toronto, Ctr. for Criminology & Sociolegal Studies*

Justice Catherine Kane, *Federal Court of Canada*

Kent Roach, *Professor, University of Toronto, Faculty of Law*

12:30 – 1:30pm: Lunch

1:30 – 3:00pm

Who is Punished, and How?

Cindy Blackstock, *Executive Director, First Nations Child and Family Caring Society of Canada; Associate Professor, University of Alberta; 2012 Trudeau Mentor*

Kelly Hannah-Moffatt, *Professor of Sociology, University of Toronto*

Karlan Modeste, *JD Candidate, Schulich School of Law, Dalhousie University; Nova Scotia Legal Aid*

Bernard Richard, *Ombudsman, Child and Youth Advocate and Right to Information & Privacy Commissioner for New Brunswick; 2012 Trudeau Mentor*

3:00 – 3:30pm: Break

3:30 – 5:00pm

De Facto Criminalization: Homelessness, Mental Illness, Addiction and Poverty

Benjamin Berger, *Associate Professor, Osgoode Hall Law School*

Lindsey Richardson, *Post-Doctoral Fellow, University of British Columbia; 2009 Trudeau Scholar*

Justice Richard Schneider, *Ontario Court of Justice; Chairman, Ontario Review Board*

5:00pm: Brief Concluding Comments

To register for the workshop, please contact Lisa Kerr: coleenlisa@gmail.com