Introduction

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Sometimes truth really is stranger than fiction. In 1975, a faculty position opened at Queen's Law, allowing Professor Don Stuart to begin his more than forty-year career teaching and writing about Criminal Law, Criminal Procedure, and Evidence at Queen's. It wasn't a run-of-the-mill retirement or lateral hire that created the opening. Professor Stuart's predecessor had been convicted of murdering his former business partner in Edmonton and sentenced to life in prison. True crime led to Queen's hiring a professor who would become, as Steve Coughlan donned him in this volume, "the Dean of Canadian criminal law academics".[1]

Educated at the University of Natal, South Africa, and at Cambridge and Oxford in the United Kingdom, Professor Stuart quickly established himself in Canada as a leading commentator on criminal law and evidence law. In 1982, he became Editor-in-Chief of the *Criminal Reports* (a national reporting and comment service), a role that he continues today. In 2000, he became Editor of the National Judicial Institute's Criminal Essentials e-letter—a biweekly publication that reaches over 1,000 judges. Professor Stuart's textbooks[2] and co-authored casebooks[3] have instructed generations of law students, practitioners, and judges in the doctrines and decisions of Canadian criminal and evidence law. For over twenty-five years, Professor Stuart also served as a board member and sometimes President of the John Howard Society of Kingston.

Professor Stuart began his career in the years preceding the enactment of the *Canadian Charter of Rights and Freedoms*. For those of us trained in law after the *Charter*, it can be difficult to appreciate just how much the *Charter* transformed criminal law and procedure. Policing is a case in point. Professor Stuart began work on policing during his graduate studies. As part of his thesis, he conducted a records review and participant observation study of police

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1. Steve Coughlan, "Why *De Minimis* Should Not Be a Defence" (2019) 44:2 Queen's LJ 262 at 263.

2. See Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014); Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Thomson Reuters, 2018).

3. See Don Stuart & Steve Coughlan, *Learning Canadian Criminal Law*, 14th ed (Toronto: Thomson Reuters, 2018); Don Stuart & Tim Quigley, *Learning Canadian Criminal Procedure*, 12th ed (Toronto: Thomson Reuters, 2016); Ronald Joseph Delisle et al, *Evidence: Principles and Problems*, 12th ed (Toronto: Thomson Reuters, 2018).

forces in rural, municipal, and urban England.[4] Later, while teaching at the University of Alberta, he participated in police ride-alongs and student visits to local police stations.

Prior to the enactment of the *Charter*, police in Canada enjoyed broad arrest, detention, and search powers.[5] Writs of assistance, for example, gave the federal Royal Canadian Mounted Police authority to conduct warrantless drugs and customs searches.[6] Throughout the twentieth century, police forces across the country also availed of new technologies with limited judicial or legislative oversight.[7] In 1969, then Minister of Justice John Turner warned in a speech to the Canadian Bar Association: "Our telephones can be tapped, our offices bugged, our files photographed, our physical movements monitored, and our communications recorded, all without our knowing anything about it or having any right of recourse or any protection under the law . . . The struggle for freedom is being mortgaged to the parabolic microphone."[8] Minister Turner's warning that the "open society ha[d] become the bugged society" spurred various legislative efforts to stipulate and codify police search and surveillance powers.[9] However, as Professor Stuart has noted, police organizations resisted these efforts. In a 1984 brief, the Canadian Association of Chiefs of Police rejected calls by the federal Law Reform Commission for Parliament to codify police powers.[10] The Chiefs insisted that the common law allowed for necessary flexibility and acceptable deviation to "serve the ends of equity and justice".[11] The Chiefs cast their lot with judges, not with Parliament.

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4. See Don Stuart, "Policing Under the Charter" in RC Macleod & David Schneiderman, eds, *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 75 at 77 [Stuart, "Policing"].

5. See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 39–41.

6. Four statutes authorized the use of writs of assistance until 1985: the *Customs Act*, the *Excise Act*, the *Food and Drugs Act*, and the *Narcotics Act*. See Law Reform Commission of Canada, *Report 19: Writs of Assistance and Telewarrants* (Ottawa: Minister of Supply and Services Canada, 1983) at 14.

7. For a discussion of these developments in a comparative analysis with the right to privacy in the United States, see Douglas Camp Chaffey, "The Right to Privacy in Canada" (1993) 108:1 PSQ 117.

8. Ralph Hyman, "Ottawa Will Amend Law to Curb Electronic Bugs", *The Globe and Mail* (3 September 1969) A1.

9. *Ibid*.

10. See Don Stuart, "The *Charter* and Criminal Justice" in Peter Oliver, Patrick Macklem & Natalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 795 at 799–800 [Stuart, "The *Charter* and Criminal Justice"].

11. Stuart, "Policing", *supra* note 4 at 76.

The *Charter*-era saw a flip in the politics of these institutional centres of power. As Kent Roach has written, "in the 1980s, the Supreme Court and Parliament switched roles, with the former taking a proactive due-process lead and Parliament being concerned with crime control and victims' rights, frequently in reaction to due-process court decisions".[12] Under the *Charter*, police powers have remained largely within the purview of courts and the ancillary police powers doctrine. However, unlike their predecessors, *Charter*-era judges have constitutionalized a series of checks on police powers, including in the area of search and seizure.[13]

Professor Stuart had an opportunity to see these institutional realignments up close when he served as a Crown prosecutor in Toronto from 1988 to 1989. During that time, he appeared in twenty appeals before the Court of Appeal for Ontario and worked at the trial level for six months. While he left the experience with a "great respect for the professionalism and integrity of most police officers", he also remained committed to police oversight and ensuring robust remedies for police wrongdoing.[14] A decade later, Professor Stuart once again had an opportunity to advance the law in this area when he appeared before the Supreme Court of Canada on behalf of the Canadian Civil Liberties Association in *R v Grant*.[15] That decision resulted in the availability of a robust section 24(2) exclusion of evidence remedy when evidence is obtained by a *Charter* breach.

Despite the progressive gains in policing that Professor Stuart witnessed throughout his career, he always showed himself to be an institutional pragmatist rather than a rights or judicial idealist. He has often lauded the Supreme Court of Canada as a necessary balance against "the expedient lure of 'law and order politics.'"[16] He has defended the Court against claims that it has been too activist in striking down laws restricting abortion,[17] prostitution,[18] medically assisted dying,[19] and supervised safe injection sites,[20] amongst others. "[T]hese major *Charter* victories have been firmly based in evidence tendered at the trial

12. Roach, *supra* note 6 at 38.

13. For a discussion of this case law, see Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25:1 Queen's LJ 65.

14. *Ibid* at 78.

15. 2009 SCC 32.

16. Stuart, "The *Charter* and Criminal Justice", *supra* note 10 at 795.

17. See *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

18. See *Canada (Attorney General) v Bedford*, 2013 SCC 72.

19. See *Carter v Canada (Attorney General)*, 2015 SCC 5.

20. See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

court and have provided salutary checks and balances against controversial and blunderbuss criminal prohibitions that politicians of all stripes were too timid to touch," Stuart wrote.[21] But more recently, he has also criticized the Supreme Court of Canada for "showing diminishing resolve in protecting the Charter rights of accused".[22] In other words, Professor Stuart has never blindly placed faith in any one institution or rights regime. Rather, he has worked steadfastly to foster a restrained criminal law that serves not the powerful few but the representative many.

On this note, it is worth returning to policing. While the *Charter* did indeed foster remarkable changes, in other respects it also changed remarkably little. Concerns about discriminatory policing persist to this day. If, as Max Weber argued, the modern state is defined as a political community that claims "a monopoly of the legitimate use of physical force", the police are the agents of that force.[23] Today, street checks and carding continue to operate as a disproportionate show of force against Indigenous persons, people of colour, and the poor.[24] In 2018, the Honorable Michael H. Tulloch released a 300-page "Report of the Independent Street Checks Review" in which he recommended police cease the practice of carding altogether.[25] Road stops are another area of continued concern. A new law allowing police officers to demand a breath sample from any driver they stop, even without sign of impairment, raises significant concerns about discriminatory stops. Professor Stuart testified before the Senate in opposition to this bill arguing that it raised "a real danger of racial profiling".[26] It remains to be seen whether the courts will step in as the constitutional checks on police that Professor Stuart has—at least some times—celebrated them for being in the past.

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21. Stuart, "The *Charter* and Criminal Justice", *supra* note 10 at 799.

22. Don Stuart, "Vagueness, Inconsistency and Less Respect for Charter Rights of Accused at the Supreme Court in 2012-2013" (2013) 63 SCLR 441 at 441 [footnotes omitted].

23. Max Weber, "Basic Categories of Social Organization" in WG Runciman, ed, *Max Weber: Selections in Translation*, translated by E Matthews (Cambridge: Cambridge University Press, 1978) 33 at 39.

24. See Dylan Mazur, "Unpacking the Public Dialogue on Discriminatory Street Checks in British Columbia" (30 August 2018), online: *British Columbia Civil Liberties Association* <bccla.org/2018/08/unpacking-the-public-dialogue-on-discriminatory-street-checks-in-british-columbia>.

25. (Toronto: Queen's Printer for Ontario, 2018), online (pdf): <www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf>.

26. John Ibbitson, "Reasonable or Unconstitutional? New Police Powers in Screening Drivers for Impairment Divides Experts", *The Globe and Mail* (19 January 2019).

This volume brings together three leading criminal law scholars—Professors Janine Benedet, Steve Coughlan, and Lisa Dufraimont—whose work bears the influence of Professor Stuart just as his does theirs. In recent years, few legal issues have provoked as much scholarly and public attention as sexual assault and, in particular, the sexual assault trial.[27] This collection sheds critical light on this area, two papers directly and one more obliquely. Together, these papers also provide a riveting account of the role of trial courts and their relationship to prosecutors, appellate courts, and defendants and complainants. In concert with Professor Stuart's scholarship, this volume illuminates the institutional players of the criminal justice system and the various incentives and limitations that structure their work.

For decades, feminist reformers worked to rid the law of discriminatory myths and stereotypes that deprived complainants of their just day in court.[28] Visions of the resistant rape victim or the chaste sexual assault survivor intermingled with the vengeful vixen and punitive prosecutrix to deprive the vast majority of sexual assault victims access to justice. Advocates, courts, and lawmakers have made immense strides in recent decades to vanquish these constructs from Canadian law. Still, as this collection discusses, myths die hard. They can also be extremely difficult to disentangle from legitimate paths of inquiry and logical inferences. Perhaps there is no more fitting tribute to Professor Stuart than the fact that these papers address exceptionally hard questions with care, rigour, and an eye to what matters.

In "Myth, Inference and Evidence in Sexual Assault Trials", Professor Lisa Dufraimont pursues a crucial and challenging line of inquiry: how should judges distinguish illegitimate uses of sexual history and intention evidence from legitimate and relevant uses? If courts of past took an over-inclusive approach

27. See e.g. Don Stuart, "*Barton*: Sexual Assault Trials Must be Fair not Fixed" (2017) 38 CR (7th) 438; Don Stuart, "*Ghomeshi*: Dangers in Overreacting to this High Profile Acquittal" (2016) 27 CR (7th) 45; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018); Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52:3 McGill LJ 515.

28. See e.g. Leah Cohen & Connie Backhouse, "Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments" (1980) 2:4 Can Women Studies 99; Gillean Chase, "An Analysis of the New Sexual Assault Laws" (1983) 4:4 Can Women Studies 53; Susan Estrich, *Real Rape* (Cambridge, Mass: Harvard University Press, 1987); Carole Goldberg-Ambrose, "Unfinished Business in Rape Law Reform" (1992) 48:1 J Soc Issues 173; Sherene Razack, "The Women's Legal Education and Action Fund" in FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 2nd ed (Calgary: University of Calgary Press, 1992) 242; Don Stuart, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1992) 35:2 Crim LQ 241.

to sexual history evidence by relying on myths and stereotypes, they run a risk today of being under-inclusive in excluding relevant evidence from which one can draw legitimate inferences. Professor Dufraimont urges judges to return to first principles by focusing on the *use* to which a particular piece of evidence is being put rather than simply on the *nature* of that evidence. Readers will detect Professor Stuart's influence in this compelling account of why focusing on the content of prohibited inferences may better ensure that finders of fact have a fulsome picture of relevant evidence in adjudicating sexual assault.

Professor Janine Benedet's paper "Sentencing for Sexual Offences against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" provides a much-needed analysis of mandatory minimum sentences in the context of sexual offences. As Professor Benedet notes, much of the litigation and commentary around mandatory minimums has focused on gun and drug offences. Critics of mandatory sentences, including Professor Stuart, have long raised concerns about hampering judicial discretion, over-incentivizing plea deals, and over-punishing offenders including Indigenous peoples. Professor Benedet asks whether the sexual abuse and assault context raises unique questions about mandatory minimums. In a fascinating account of dialogue between trial and appellate courts, this paper argues that mandatory minimum sentences may unintentionally restrict important dialogue on appellate review about the root causes and effects of sexual abuse.

Finally, Professor Steve Coughlan provides a rigorous argument against recognizing a *de minimis* defence in criminal law. In "Why *De Minimis* Should Not Be a Defence", Professor Coughlan argues that the idea the law does not concern itself with trifles should serve as a valid interpretive tool but not a standalone defence in criminal law. One of the examples he relies on is sexual assault. Would it make sense, he asks, to conceptualize of a sexual assault of only a trifling nature? With sexual assault once again playing a central role, this paper invites readers to think about why *de minimis* reasoning seems categorically inapt to sexual but not physical assaults. Professor Coughlan argues that *de minimis* intuitions may better serve to limit or reinterpret offences rather than function as defences in individual cases. Beyond its doctrinal significance, this paper also makes a central claim about the respective roles of judges and prosecutors, thereby contributing to an ongoing discussion of institutions for which Professor Don Stuart has long been a key interlocutor.

Throughout his remarkable career, Professor Stuart has exemplified the teacher-scholar who is committed to social and intellectual life in community. Publics and societies, as John Dewey argued, do not merely exist; they are created. Through intergenerational dialogue and learning, higher education can foster vital continuities and necessary ruptures. At its best, democratic education can be, in Dewey's words, a thoroughly "social process" that frees "individual capacity in a progressive growth to social aims".[29] The university

29. John Dewey, *Democracy and Education* (New York: MacMillan, 1916) at 78.

technocrat or scholarly monk may form part of an academic community, but they operate apart from larger political communities. Professor Stuart always rejected such siloes. In his scholarship, teaching, and mentorship, he demonstrated a daily commitment to bettering the institutions that shaped his world—from the classrooms of Queen's Law to the chambers of the Supreme Court of Canada, from the Houses of Parliament to jail cells across this country. His has been an extraordinary career of scholarly service in the deepest sense of those words. May Professor Stuart's office door long remain open to all.