Kent Roach

Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case. Montreal & Kingston: McGill-Queen's University Press, 2019. 307 pp.

Kent Roach's important book exploring the 2018 acquittal of Gerald Stanley for the killing of Colten Boushie, a twenty-two-year-old Cree man from the Red Pheasant First Nation in Saskatchewan, begins by asking, "Why write a book about this case?" His answer is that the "Stanley/Boushie case will not and should not go away" (3).

After an initial wave of broad and passionate concern, critique, and the inkling of a promise of systemic self-reflection, debates following the verdict swiftly and radically narrowed. They soon focused overwhelmingly on questions of reform of jury selection and, in particular, the contentious issue of legislative intervention to abolish peremptory challenges.[1] The case and its lessons are, however, much broader and more fundamental, raising issues about Indigenous justice within and against the Canadian criminal justice system that should trouble us deeply and command our collective attention.[2] The case shook the criminal justice system, but not as deeply and not for as long as it should have. This book is best seen as an attempt by a preeminent scholar of Canadian criminal and constitutional law to conscript his formidable knowledge, energy, and characteristic attention to both legal and sociological detail to deepen and sustain these tremors. Roach has produced a volume that is not only an excellent scholarly book from which students and academics alike can learn a great deal, but also an important historical document. Written in a style amenable to broad consumption by all those interested in the fairness and justice of our criminal process, it is also a crucial resource for academics and policy makers, offering itself as a foundation for systemic change. In this, it is a study that immediately takes its place alongside the report of the Royal Commission on the Donald Marshall, Jr. Prosecution (1989), the Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin (1998), and the report of the Inquiry into Pediatric Forensic Pathology in Ontario (2008). *Canadian Justice, Indigenous Injustice* is a genre-bridging book, at once a work of scholarly acumen and a kind of public report on the structural vulnerabilities of our system to miscarriages of justice for Indigenous peoples.

In this brief review, I point to certain features of this book that make it such a compelling contribution to the literature. The book is self-conscious about some of these features, with Roach having crafted the volume with these methodological stances and their fruits very much in mind. But the book's lasting and more profound importance lies in dimensions that, though left largely tacit in the

[1] Parliament, indeed, repealed peremptory challenges in 2019.

[2] An example of one effort to capture this broader significance of the case is the Project Fact(a) initiative, convened by my colleague at Osgoode, Professor Signa Daum Shanks, which brought a group of scholars and lawyers together to think more deeply about the issues raised by the Stanley/Boushie case. The initiative resulted in a series published in *Policy Options* (https://policyoptions.irpp.org/magazines/september-2018/what-can-we-learn-from-the-stanley-trial/).

volume, offer fundamental lessons about what we must be clear-eyed and brave enough to face if the pursuit of justice for Indigenous peoples in the criminal process is to be more than a superficial and comforting commitment (comforting precisely in its superficiality) to marginal reform. First, to those overt features of the book.

Readers seeking a detailed account and diagnosis of all parts of the investigation, prosecution, and trial of Stanley for the killing of Colton Boushie will not be disappointed. Roach offers a critical accounting of the RCMP investigation, including media coverage and political responses to the investigation (71–79), as well as the bail process and preliminary inquiry (79–89). His analysis of the jury selection process that resulted in the absence of any visibly Indigenous jurors, and his arguments for the abolition of the peremptory challenges that facilitated this (Chapter 5), are the best known and most contentious part of his writing on the case, here and elsewhere.[3] Roach's treatment of the crucial evidence regarding a possible "hang fire" defence is another powerful example of the risks of expert opinion evidence and the perils of forensic science (Chapter 6), dangers that are very much front-of-mind for criminal justice scholars and courts alike. Informed by his customarily savvy and realist engagement with substantive criminal law, Roach's description of the "phantom self defence" claim at work in the trial (Chapter 8) is particularly engaging and vividly illustrates the paradoxes involved in complex jury trials.[4] In all of this, *Canadian Justice, Indigenous Injustice* is an outstanding resource on the frailties and risks of the criminal process. The book has substantial methodological echoes with the wrongful conviction literature, suggesting that we need a common toolkit for examining all instances of "miscarriages of justice," whatever form they might take. Indeed, Roach notes that "[o]ne of the messages of this book is that it may be helpful to look to growing research on wrongful convictions, notably the literature on errors… in forensic science, the role of racism and systemic discrimination, the problems of incentivized witnesses, and the role of fact-finding, in understanding the Stanley trial" (237).

As all this suggests, those seeking a work of legal process scholarship of the sort for which Roach is widely known will also certainly find it in *Canadian Justice, Indigenous Injustice.* Perhaps the defining feature of Roach's contributions to the literature on the criminal justice system has been his commitment to systemic reflection on "the role of the police, forensic experts, prosecutors, defence lawyers, trial judge [sic], the media, and the jury," always shaped by an understanding of this criminal process as "part of a larger legal process approach to scholarship that is attentive to the respective roles of courts and legislatures" (11). Time and again,

[3] It should be noted that Roach is realistic about the promise and costs of such reform. He states that "[i]t is difficult to be optimistic about jury reform," explaining that "[i]t will require political energy and capital that is also needed for many other reforms to increase Indigenous and minority representation on juries, let alone to combat the greater problems of systemic discrimination and colonialism in our law, politics, and socio-economic relations" (213–14). I explore the larger vision informing this position—an important dimension of the book—below.

[4] In particular, Roach insightfully points out that not putting self-defence to the jury in Stanley's trial, paradoxically, could have made self-defence more available to him.

Roach has shown his ability to hold this complex breadth in his hands,[5] equipping him to present a picture of criminal justice in which criminal law and process are kept "in their place," always carefully positioned within a broader legal, sociological, and political frame. We see this in his treatment of the Stanley/Boushie case through Roach's sensitive attention to dynamics surrounding rural crime in Saskatchewan (Chapter 3) and to the politics involved in reform of the law of self-defence, and in his "roots to branch" assessment of the preconditions, details, and aftermath of the killing, investigation, and trial. Indeed, the book could and should be used as a case study in criminal law process, with each chapter offering the foundation for a thick introduction to criminal law. This book is manifestly committed to understanding criminal (in)justice as an institutional process. However, it also warns of the dangers of focusing on the institutions and operations of the criminal justice system to the exclusion of other social and political processes and possibilities—a risk that Roach has elsewhere referred to as the "criminalization of politics" (238).[6]

This commitment to a legal process analysis, and the detailed legal accounting and diagnosis of the case, are overt and valuable features of the book. They advance our understanding of the Stanley/Boushie case and its larger significance. There are, however, two implicit arguments that I regard as even more important to the enduring force of this book.

The first is a sustained claim that criminal justice must fundamentally be understood as a species of constitutional relationship.[7] This argument is manifest in the most notable feature of this book, which is that Roach's starting point is Treaty 6 and the constituting relationship between the Crown and Indigenous Nations. Though introduced as historical background to the case, Roach's illuminating discussion of what the terms of Treaty 6 suggest about policing, criminal law, and the rule of law emerges as the normative touchstone for assessing the injustices that continue in the contemporary Canadian criminal justice system. The very structure of this book asserts that discussion of criminal justice cannot be tugged free from the soil of broader constitutional reflection. And so, when Roach addresses the RCMP investigation in this case, he reaches back to test it (unfavourably, to be sure) against the peace and order clause in the Treaty. In one of the most potent passages in the book, in which Roach reflects on the absence of Indigenous persons on the jury, his indictment is the following: "That the trial proceeded without the assistance of any Indigenous persons was… a violation of the Treaty" (26). Debate over the effects and merits of peremptory challenges is a far more comfortable terrain for conversation than the fundamental and fundamentally "unsettling" constitutional problem to which Roach is pointing us here.

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5 See, e.g., Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999); Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011).

6 Roach, *Due Process and Victims' Rights, supra* note 5, 312–13.

7 I have argued for this claim in Benjamin L. Berger, "Constitutional Principles," in *Oxford Handbook of Criminal Law*, ed. Markus Dubber and Tatjana Hoernle (Oxford: Oxford University Press, 2014), 422–44.

Canadian Justice, Indigenous Injustice is thus also a Treaty-informed constitutional broadside on the thinking displayed by the majority in *R v Kokopenace*,[8] which I regard as among the most troubling sets of reasons in the recent history of the Supreme Court of Canada. Whereas Justice Moldaver held that the Constitution demanded nothing more than that the state make reasonable efforts to provide "a fair opportunity for a broad cross-section of society to participate in the jury process,"[9] Roach (aligning with Justice Cromwell's prescient dissent[10]) views the realization of meaningful Indigenous participation in juries as a constitutional imperative. Importantly, Roach argues that treaties not only provide a ground for understanding constitutional injustices, but also resources for building more just futures (27). In this way, Roach's detailed case study is in provocative conversation with ideas of treaty constitutionalism advanced by scholars like Tully[11] and Borrows.[12]

Roach's treatment of jury representation and Treaty obligations is also the wellspring of the second, deeper, and more enduring, lesson of this study: the importance of pluralist thinking to criminal justice. One of the most engaging threads in this book is Roach's exploration of the possibility of a Treaty-based claim to a "mixed jury" comprised of six Indigenous and six non-Indigenous people (104–11). Building on the work of Marianne Constable,[13] Roach provides a history of the mixed jury at common law and in Canada, and its contemporary use in some parts of the world to ensure that women and Indigenous peoples are represented on juries (108). Roach sometimes casts his proposal for the use of mixed juries as a recognition "that jurors inevitably bring their life experiences to their deliberations" (105). But the suggestion here is, as I read it, much deeper and more specific than simply investing the jury with a larger store of experiences and perspectives: it is part of a line of argument in this book that we cannot think through Indigenous justice and the criminal law without meaningfully reckoning with law, sovereignty, and the implications of both for legal pluralism. As I am exploring in my own work, juries can be thought of precisely as sites for legal pluralism (for good and for ill), and Roach's arguments about the mixed jury are coloured by this sensibility. But we also see his attentiveness to this foundational pluralist problematic in his discussion of the ways in which Indigenous witnesses were treated during the *Stanley* trial. A witness saw a photo of the deceased, Mr. Boushie, in "violation of Cree law with

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8 2015 SCC 28.

9 At para 2.

10 At para 304, and in language that almost seemed to anticipate the *Stanley* trial, Justice Cromwell observed that "[t]he unintentional yet substantial under-representation of members of that race from the jury roll inevitably, in my view, casts a long shadow over the appearance that justice has been done. It seems to me that the Court should not, on one hand, direct other courts to take these social realities into account while, on the other, choosing to ignore these same realities when they confront us in an awkward context."

11 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, New York: Cambridge University Press, 1995).

12 In his excellent introduction to this book, Borrows describes treaties as "a key to our future in the criminal justice system because they speak to the need for mutual respect, aid and assistance in maintaining peace and harmony among peoples in Canada" (ix). See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

13 Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago and London: University of Chicago Press, 1994).

respect to a deceased's journey after death" (156), Roach explains, and Chief Justice Popescul's management of the presence and use of an eagle feather in the courtroom similarly displayed friction between state and Indigenous normative orders (161-62).

Roach hereby reminds us of a truth too often occluded by discussions of the details of criminal law doctrine, or lost sight of from the comfortable heights of ideal theory: that the criminal justice system is, at its very heart, the use of violence to enforce one normative order (and, with it, defend a claim of sovereignty) at the expense of others. This violence is not metaphorical. As Robert Cover famously and vividly put it, "I think it is unquestionably the case… that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk. They do not organize force against being dragged because they know that if they wage this kind of battle they will lose—very possibly lose their lives."[14] Cover's example focuses on the real violence that underwrites the criminal law when it decides to punish; Roach's book reminds us of the real violence involved in a normative system that unjustly refuses to do so. Indigenous peoples in Canada have experienced both faces of this violence far more than most. The criminal justice system's narrative of itself is not one that acknowledges its own violence and the suffering it inflicts. And, to our shame, it is rarely the legal academic's description. This is so despite the fact that it is an accurate account of the day-to-day experience of many of those subject to the criminal law. Through its treatment of the Stanley/Boushie case, I read *Canadian Justice, Indigenous Justice* as a forceful call to reckon with this truth.[15]

These two deeper features of *Canadian Justice, Indigenous Injustice*—the insistence on reading criminal justice in a historical and constitutional register and Roach's gestures to the pluralist problematic at the heart of the case—are linked in producing what I take to be a central take-away of this book. This volume forcefully troubles the tendency to invoke *Gladue*[16] or "*Gladue* principles" as a shorthand for seeking Indigenous justice in the Canadian criminal justice system. We have seen this conscription of *Gladue* beyond the sentencing environment that produced it: in cases about jury selection[17] and prosecutorial discretion,[18] to name but two examples. Such invocations might be strategically wise in a given case. But as synecdoche for Indigenous justice in relation to the Canadian criminal justice system, "*Gladue*" fails. It fails, it seems to me, because it is unable to wholly shake free from the imaginative constraints imposed by the context in which it was generated, namely a set of (albeit important) questions about how Canadian law, fundamentally committed to its own sovereignty and despite constitutional history, should punish Indigenous peoples. In his analysis of the Stanley/Boushie case, Roach is structurally and methodologically insistent that we need more: criminal

14 Robert M. Cover, "Violence and the Word," *Yale Law Journal* 95, no. 8 (1986): 1607–8.
15 Roach also provides an important reflection on the Peter Khill/Jon Styres Case in a section entitled "Stanley II?" (198–205).
16 [1999] 1 SCR 679.
17 *Kokopenace*, *supra* note 8.
18 *R v Anderson*, 2014 SCC 41.

justice for Indigenous peoples must be formatted on something like treaty constitutionalism and on the humility of a historically-educated pluralism, not on the kind of marginal discretion that judges exercise in sentencing or other modest reforms to the system as we have it. Roach clearly sounds this note in the conclusion to the book:

> Convicting Gerald Stanley or Peter Khill would not have brought Colten Boushie and Jon Styres back to life. It would not have changed the circumstances caused by colonialism and socio-economic conditions that had made them vulnerable to a violent death. It would not have recognized the endurance and wisdom of Indigenous laws and justice systems. Doing better in a way that is not superficial will be very difficult. (208)

This message, it seems to me, is the ultimate source of the power and urgency of *Canadian Justice, Indigenous Injustice.*

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