Belief and Reason in our Courts

Gary Bauslaugh

The Gerald Stanley trial, about his criminal liability in the death of Colten Bouchie, ended on February 10, 2018, with a not-guilty verdict by the jury. This was a highly controversial decision that indeed was troubling and problematic in three particular ways – two of which have been widely, though not always insightfully, commented upon.

The first, and most glaring and obvious matters were the unseemly comments made by Justice Minister Wilson-Raybould and Prime Minister Trudeau – comments to the effect that "we need to do better," presumably meaning that the jury's decision was a bad one. Although the comments were praised by some who were distressed by the jury's decision, such intervention by politicians is not how our justice system is meant to work. The role of politicians in regard to justice – the proper role – is to debate and pass legislation that represents general agreement on community standards of justice, not to become involved in particular cases.

Why not, some may ask? Because guilt or innocence of a defendant should be judged on the merits of the case, not on political interference. If it were otherwise, one can imagine questions of guilt or innocence being determined by party affiliation, rather than by objective assessment of evidence. Such objectivity, of course, can be and is compromised in many different ways, but interference by politicians is perhaps the worst way, as well as being the most easily avoidable.

Wilson-Raybould and Trudeau undoubtedly thought they were justified because they viewed the case as being another injustice inflicted upon the indigenous community. But it is not up to them to make such judgments. Donald Trump is wreaking havoc in the American justice system because he thinks he is right too. The tweeted comments by our politicians in this case are eerily Trumpian.

The remedy for this one is easy – we must not tolerate political influence in our trials, and politicians must be censured if they stray into illegitimate territory.

The second issue arising from the Stanley trial concerns jury selection, but many commentaries on this seemed, as well, to be less than clear-headed. For example, on February 18, 2018, the CBC's Sunday Edition program hosted by Michael Enright featured three prominent Canadian jurists – Frank Iacobucci, Annamaria Enenajor and Nader Hasan – speaking about the need to reform our jury system. They correctly decried the political interference but then turned to the issue of jury selection, where their comments were inconsistent and troubling.

The central issue is the use of peremptory challenges in jury selection. These are different from challenges for cause, which are used to eliminate candidates for sound reasons, such as conflict of interest. It would be inappropriate, say, to have your mother-in-law sitting in judgment, because she might be biased in your favour or, indeed, against you! But some peremptory challenges are allowed each side, challenges for which no reason is given. They are based solely on the candidate's name and occupation, and appearance. Essentially, then,

such challenges are a tool for racial discrimination in selecting juries, and it appears they were used as such in selecting Stanley's jurors. No visible minorities made the cut.

We can't really blame the defense lawyers for this – they see their role as giving their client the best chance to win the case. If they are allowed to help their client by being discriminatory, through peremptory challenges, they will do so. But such discrimination would be considered illegal in all other circumstances. Why do we allow it in jury selection?

Clearly this needs to be changed, but the panelists – the experienced jurists on the CBC show – resisted the obvious choice: eliminating peremptory challenges and replacing them with a simple random selection process based upon a representative sampling of the population. They talked about how it is desirable for the accused to feel they have "a modicum of control" over the situation by having their lawyers make peremptory challenges of jury candidates. But that makes no sense. Ms. Enenajor admitted that such challenges are based mainly on discriminatory stereotypes. The "modicum of control" they want to continue to offer to defendants and their lawyers, then, amounts to permitting such stereotyping. Is there some reason defendants should be permitted to indulge in such a discriminatory practice?

And why not random selection? The panelists mentioned the problem of needing to eliminate those with a vested interest in the trial outcome, but this could easily (and more effectively) be avoided by using a simple administrative screening process, independent of the defense lawyers and prosecutors, with their goal of wanting to shape the jury to suit their interests.

The third problem with our jury system, evident in the Stanley trial, concerns the behavior of the judge, and this was not addressed by the CBC panel or by any other commentary that I have come across. It concerns the instruction the judge gave to the jury. The Canadian Press reported that Justice Martel Popescul told the Stanley jury that, "In this trial, I am the judge of the law. You are the judges of the facts. . . It is important that you accept the law without question."

This wording is common in such judicial instructions, but it is highly misleading. Yes, the judge interprets the law, and yes, juries are expected to judge the facts. But the implication that, in our legal system, juries must make decisions according to the law is simply false, and Justice Popescul, like other judges who make similar proclamations, knows that. He hedges by using the term "it is important that" rather than "you must," but most jury members will hear the former as meaning the latter.

In fact, in Canadian law, juries have always had the unquestioned power to disregard the law, and have done so in a number of important trials, including four of them for Henry Morgentaler, charged with carrying out illegal abortions. Morgentaler did carry out illegal abortions – a lot of them – and he openly admitted it. There was no question about his guilt, according to the law, but all of his juries refused to convict him.

This was a shining moment in jurisprudence in this country, because the people – the juries – intervened and said, in effect, that the law did not conform to Canadian standards of justice. As a direct result of Morgentaler's courage, and the lawful independence of his juries, the Canadian law prohibiting abortion was, in 1988, struck down. And ever since, Canadian women have had this signal, fundamental right of control over their own bodies.

The action taken by Morgentaler's juries is called "jury nullification" and it has been a cornerstone of legal systems based on English law since the trial of William Penn in Britain in 1670. Judges may not wish to mention this power to nullify the law (and there is an argument that they may be legally prohibited from doing so), but they certainly should not mislead juries about it. Judges all know they cannot say juries must follow the law, because that is untrue. But neither should they use words that make it sound like it is true.

Juries can be intimidated by the forceful statements judges make about strict compliance with the law. They may even fear legal reper-

cussions for themselves if they fall short; no one tells them otherwise. This can and does distort jury deliberations, with concern about the law overriding the search for fairness and justice.

Mr. Hasan and Ms. Enenajor, on the CBC panel, both allowed that juries are an important check against state power. But they appeared to be unconcerned about judges' suppression of nullification. How, exactly, do they think juries can check state power if they feel obliged to simply follow the law, whatever the circumstances? Juries check state power by refusing to enforce unjust laws, as in the Morgentaler trials, when the state's oppressive abortion laws were deemed, by his juries, unacceptable to the larger community. A jury unable to act independently, or which thinks it does not have the power to act independently, would surely be an ineffective obstacle to the abuse of state power.

It is possible that Justice Popescul's instructions to the Stanley jury may have contributed to the questionable verdict in the Stanley trial. According to strict reading of the law, it could well have been argued by some jurors that Stanley was not guilty beyond any reasonable doubt. By such a reading, the verdict may well have been correct, legally, and the jury may simply have acted as they thought the judge had instructed them to.

But juries should have the scope to apply a little common sense to their deliberations. Angrily waving a gun around and firing warning shots and then killing someone would seem at least to be manslaughter. I wonder if the jury, if not influenced by the judge's misleading exhortations about strict compliance, might have come to a different and less controversial decision.

It must be acknowledged, on the other hand, that this could simply have been a racist jury, given how it was selected, and it would have found a verdict of not guilty, whatever the facts. The remedy for such miscarriages of justice lies not in giving misleading instructions about fealty to the law, which racist juries will ignore anyway, just as all-white juries regularly used to do in order to convict black defendants and refuse to convict while ones in the American South. The remedy lies in creating a fair and representative selection process, whereby those chosen to sit on juries represent a real cross-section of the whole community, not just ones who look like the accused.

Toward the end of the CBC panel discussion, Michael Enright referred to jury nullification as simply a jury "doing whatever the hell it wants to do." This reductionist statement was bad enough, but Ms. Enenajor seemed to agree with him, and the other panelists did not object. This was unworthy of all of them. We need more thoughtful reflections on how to fix our jury system, and a better recognition of the important role jury nullification plays, or should play, in our justice system.

The members of Morgentaler's juries were not doing "whatever the hell they wanted to do." They were following their consciences and exercising their right to stand up against unjust laws.

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Our legal system operates according to legislated statutes appearing in the Criminal Code, as well as by case law, consisting of precedents established by previous judicial decisions. But it also is subject to extra-legal beliefs that govern behavior in the courtroom. One of these is a good one: that politicians should not comment upon any particular trials. But the two other beliefs that are discussed in this essay are not so good. Courts have assumed that peremptory challenges of prospective jury members should continue to be allowed, and judges feel justified in the right of suppressing jury independence, even to the extent of lying about it.

It is difficult to know if or how these beliefs affected the Stanley verdict of not guilty, or even if the verdict was a just one. But we do know that there were serious problems with how the system worked in this case, and that should be of concern to all Canadians.•

Gary Bauslaugh *is a writer and editor who has written several books in recent years, including* The Secret Power of Juries *published in 2013 by James Lorimer and Co., Toronto. He is guest editor of this issue of* HP *and was editor from 2003 to 2008.*