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## **An Ethical Jury? Reflections on the Acquittal of Gerald Stanley for the Murder/Manslaughter of Colten Boushie**

**By:** Alice Woolley

We understand the ethical duties of lawyers and judges in a criminal trial – what they ought to do, what their office requires of them. Sure, we argue about the details (e.g., [me on prosecutors](#)), but in general we know what defence lawyers, prosecutors and judges ought to do. Yet as shown by Gerald Stanley’s acquittal by a jury on charges of murder and manslaughter after his admitted killing of Colten Boushie, lawyers and judges are not the only people relevant to the functioning of a criminal trial. Juries also hear evidence and decide outcomes.

So what of jurors? Do they have ethical duties? What are they? Under what circumstances might we say that a juror acted “unethically”? And does our system do enough to ensure that jurors do what they ought?

Critics of Stanley’s acquittal make, I think, two central claims. First, they claim that the outcome in the case was simply not defensible given his admission that he killed Boushie, the weak evidence presented by the defence ([National Post](#), February 14, 2018) and the relevant law, particularly in relation to manslaughter. Critics also note the all-white jury that tried Stanley, a jury resulting in part from defence counsel’s use of peremptory challenge to exclude indigenous jurors ([National Post](#), February 9, 2018). This leads to the second claim – either [implicit](#) or [explicit](#) – that Stanley was acquitted for improper reasons, most obviously racial bias. Critics claim, in short, that Stanley’s acquittal was wrong in fact and law, and reached for improper reasons.

This arguably leads, though, to a third claim: that the Stanley jury acted wrongfully – that it did not act as a jury “ought to act”, that it was unethical. But assessing *that* claim requires answering the questions posed above – what duties did the Stanley jurors owe (if any), did they violate those duties and, if so, to what extent is there systemic responsibility for that failure?

Jurors obviously have ethical duties. They exercise a “[civic duty](#)” defined by law and discharge a public function within the legal system akin to that of lawyers and judges. We can reasonably claim that they have ethical obligations in relation to their job, and that they act wrongfully if they fail to satisfy those obligations.

But what are those obligations? What does it mean to be an “ethical juror”? This is a surprisingly hard question to answer. To a significant extent we understand the ethics of an actor in the legal system by virtue of understanding the role that actor plays in the legal system. Lawyers have a duty to clients bounded by legality because lawyers work at the intersection between the person and the system of laws. Lawyers help people access their rights and entitlements within the legal system. As a result, (1) helping clients (2) within the legal system constitutes the lawyer’s role as

well as defining the lawyer's two primary ethical obligations. Similarly, judges adjudicate claims, and their duties are those necessary for lawful and proper adjudication, most obviously independence, integrity, impartiality, diligence and respect for equality ([Canadian Judicial Council's Ethical Principles for Judges](#)). What lawyers and judges ought to do follows in significant part from the role they play.

The problem with jurors, however, is that they play a strange role in the legal system. On the one hand, as set out by the judge in his [charge](#) in the Stanley trial, jurors are limited to assessing the evidence and applying the law as set out by the trial judge. A juror must not exercise independent judgment about what the law requires:

In this trial, I am the judge of the law. You are the judges of the facts. As a judge of the law, it is my duty to preside over this trial. I am the sole judge of the law and it is your duty to accept the law as I explain it to you. If I am wrong about the law my error can be corrected by the Court of Appeal because my instructions are recorded and will be available if there is an appeal. However, your deliberations are secret. If you wrongly apply the law there will be no record for the Court of Appeal to review. Therefore, it is important that you accept the law from me without question. You must not use your own ideas about what the law is or should be. It is your duty to decide whether the Crown has proved Gerald Stanley's guilt beyond a reasonable doubt. (Stanley trial, Charge to the Jury).

Courts “view jury nullification as a pernicious element in the criminal justice system... the jury's official role in court proceedings is limited solely to judging the facts of the case and applying the law as given by the judge to those facts” (Travis Hreno, “Necessity and Jury Nullification” (2007) 20 C.J.L.J. 351 at para 2).

On the other hand, jurors have the power and even the responsibility to review and sometimes ignore what the law requires. They are the “conscience of the community” and the “bulwark against oppressive laws or their enforcement” (*R v Sherratt*, [1991] 1 SCR 509, [1991 CanLII 86 \(SCC\)](#)). While courts do not acknowledge or encourage jury nullification, judges take “no steps...to prevent jurors from nullifying, jurors are not subject to legal sanction for nullifying, and verdicts that are the result of nullification are not subject to review” (Hreno at para 2).

In his 2013 [Report](#) on First Nations Representation on Ontario Juries, Justice Iacobucci noted that historically juries could be fined for reaching results “contrary to the evidence and contrary to [the judge's] instructions” (para 75). That is no longer the case, however. Today jurors have the privilege of reaching a “perverse verdict”, and while a judge can direct an acquittal, a judge has no power to direct conviction even if the evidence warrants it (Benjamin Berger, “The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination” (2011) 61 UTLJ 579 at 600). As the Supreme Court has also recognized, “It has since then been well established that under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply the law — but they do have the *power* to do so when their consciences permit of no other course” (*R v Krieger* 2006 SCC 47 at para 27, emphasis in original).

In light of this brief summary, and paraphrasing Justice Fish’s point from *Krieger*, one could perhaps say that jurors have the responsibility as a matter of right to assess evidence and apply the law as set out by the trial judge, but also enjoy the power to refuse to apply the law “when their consciences permit of no other course”.

But putting it this way indicates why the ethical duties of a juror are so hard to explain. If jurors only had the official responsibility set out by the trial judge in Stanley, their ethical duties would be straightforward, and very similar to those of a judge – to be impartial, diligent, principled, respectful of equality, and fair in their assessment of the evidence in light of the law set out by the trial judge. But the power jurors enjoy, their role as the conscience of the community and as a bulwark against the enforcement of oppressive laws, means that their duties cannot be expressed purely in adjudicative terms. Jurors are, arguably, the only actors in the courtroom not bound by legality, empowered instead to follow the dictates of conscience and morality apart from legality.

That suggestion raises, however, some obvious and significant problems. Why would we create a system of laws to settle our moral disagreements only to have that settlement altered because 12 folks in a room reject it as a matter of “conscience”? To put it in terms that may plausibly relate to the Stanley trial, why would we allow our collective decision to prohibit killing people even when they threaten our property not to apply in a particular case because the jurors in that case think the rules should be different? Mere disagreement with the law seems an insufficient basis for refusing to apply it.

The response may be that we do not in fact accept the legitimacy of jurors refusing to apply the law just because they don’t agree with it. A jury that does so acts improperly. Rather, we ask jurors to assess the evidence in light of the law set out by the trial judge. However, in exceptional cases, when acting as the conscience of the community and as a bulwark against oppressive laws and their enforcement, jurors may properly refuse to apply the law as written.

That response suggests two components to the juror’s ethical duty. The first attaches to the juror’s quasi-judicial adjudicative role, and requires the juror to impartially and fairly assess the evidence respecting the law as set out by the trial judge. The second attaches to the juror’s quasi-legislative role exercising the community conscience. It requires the juror to respect the legitimacy and authority of the law, and to only refuse to apply the law in the exceptional case where, assessed as a representative for the community as a whole, such a refusal is essential for justice (with justice defined in light of our laws and constitution).

If this explanation of the juror’s ethical duties is right, however, it leads to the question of whether we structure the process of jury decision-making in a way that encourages jurors to act ethically. The Stanley trial, as well as other features of criminal justice that I have observed, make me worry that we do not.

For starters, I find it remarkable that courts and judges essentially lie to jurors about what they are empowered to do. The judge in the Stanley case – and in this he acted in a completely normal way – told the jurors that it would be improper for them to do anything other than apply the law as he described it. Yet the Supreme Court has explicitly recognized that jurors have the power to refuse to apply the law, are the conscience of their community, and serve as a bulwark against oppressive laws and their enforcement. It may be that the best way to ensure jurors exercise their

power ethically is to pretend they don't have it rather than telling them when and how they ought to exercise it— because of the fear that if you tell them they have it they will inevitably choose to exercise it more than they ought – but it's certainly not *obvious* that that's the case. Indeed, it is the judicial equivalent of abstinence education.

Further, if juries act as the conscience of the community, it is wrong to have juries that so obviously – as in the Stanley case – do not represent the demographics of their community (in [2011](#), 18% of Saskatchewan's population was Indigenous). I am not challenging the existence of peremptory challenges given their support in the [criminal bar](#), and nor do I accept the position that a defence lawyer has any duty in relation to the exercise of such challenges beyond ensuring the best interests of her client. However, peremptory challenges do create the risk – a risk that materialized in the Stanley trial – that a jury will be troublingly unrepresentative. In 1980 the Law Reform Commission of Canada said:

[T]he peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.

However, the Inquiry found that this power to exclude potential jurors for 'illogical or irrational' reasons has undesirable effects on the racial make-up of jury panels (Iacobucci Report, paragraph 1560).

From my own perspective, I do not see how a jury that as obviously does not represent the community as did the Stanley jury can legitimately serve as its conscience. Whatever they do in relation to peremptory challenges, every level of government in Canada should take seriously the recommendations set out by Justice Iacobucci in his 2013 Report to increase Indigenous representation on juries (summarized at para 44 and paras 374-387).

Our jury system also lacks transparency. We do not know why the Stanley jurors decided as they did because they can't tell us. The sort of power the Supreme Court has acknowledged juries have – to be the one official actor in the legal system able to ignore the law in favour of conscience – ought to at least be subject to the scrutiny that results from a public conversation about why and how the jury decided as it did.

Finally, I am troubled by us asking so much of our jurors when we treat them so badly. We disrupt jurors' lives – sometimes [significantly](#) – we pay them badly or not at all (Saskatchewan is amongst the more generous at [\\$80/day](#) for a criminal trial), and we ask them to occupy a central position in a criminal trial and subject them to public scrutiny, while denying them the ability to explain themselves. It is perhaps unsurprising that there is a thread on "Wikihow" devoted to "[How to Get Out of Jury Duty](#)". I wonder whether we can realistically expect people to carefully discharge a serious legal and ethical responsibility while treating their own time and interests as of no real value.

Did the Stanley jurors act unethically? On the one hand, there is reason to be concerned that they may have done. The evidence against Stanley was so significant, and the evidence for this having

been an accident that occurred despite his proper handling of the firearm so weak, the decision to acquit of manslaughter seems on its face unreasonable. One can speculate about the role of racial bias and stereotypes in the jury's reasoning, and whether it simply refused to apply the law, preferring instead the position that killing is justified when people come on your property and make you afraid – i.e., that they refused to apply the law not as the conscience of their community, but because they disagreed with applying it here.

On the other hand, the lawyer for the Boushie family, Chris Murphy, has [said](#) "...the jurors took an oath to render a fair and just verdict. Based on the evidence they heard, the submissions made and the charges that the judge gave to the jury, a route of acquittal was a possibility." If the evidence admitted raised a reasonable doubt in the jury's mind, and the jury acquitted on that basis, their decision was proper, whether or not we agree with it.

In my view it's simply impossible to know whether the Stanley jurors acted unethically. But the certain lesson to be learned here is that we need to ensure our juries are representative of the community, that we provide them proper instructions so that they understand their powers and how to exercise them, that we allow them to explain themselves, and that we treat them with the respect and consideration they deserve. Jurors do have ethical duties; it's our job to help ensure they satisfy them.

*This post originally appeared on [Slaw](#).*

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