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BOOK REVIEW

Due Process and Victims' Rights: The New Law and Politics of Criminal Justice

BY KENT ROACH

(Toronto: University of Toronto Press, 1999)¹ 391 pages.

Kent Roach's book makes a significant contribution to the "legal process" literature through the introduction of a fresh perspective on criminal justice. He argues, borrowing from political science methodology, that legal processes are often shaped and marshalled for larger political ends such as crime control or the victims' rights agenda. Not only does Roach identify these influences, but he also describes how they have influenced the development of criminal justice policies in Canada. The book represents a sorely needed overview and synthesis of several recent developments in Canadian criminal justice. Its particular strength is that Roach situates his discussion in the context of the relationship between law and the Canadian state.

Roach proposes that "[t]he traditional models of crime control and due process can no longer explain the law and politics of criminal justice."² He asserts that victims' rights have had a significant impact on the dimensions of criminal justice policy.³ He argues further that criminal justice reforms have come to dominate the political agenda because of their symbolic weight and because they are "relatively inexpensive compared with other [more structural] reforms."⁴

After extensive discussion of Herbert L. Packer's two models of criminal justice (the crime-control and due process models)⁵ and an examination of critiques of Packer's work, Roach proposes grounds for new models of criminal justice. These include the rise of victims' rights discourses, accounting for unreported crimes, and the development of restorative justice practices.

¹ [hereinafter *Roach*].

² *Ibid.* at 5.

³ *Ibid.* at 4. Victim's rights are defined as "not only the claims made by crime victims that they were inadequately protected from crime and/or mistreated during the investigation and prosecution of crimes, but also similar claims made by disadvantaged groups disproportionately subject to some crimes."

⁴ Roach writes, *ibid.* at 8, "[m]any of the interventions examined in this book were relatively cheap and symbolic. They reflected a politics that was criminalized in the sense that criminal justice reform was offered as the primary response to broader problems."

⁵ H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

The first of Roach's new models fuses Packer's two descriptive models into a single punitive approach. It is characterized by the twin polarities of "assembly-line justice" (the crime-control model), and due process, characterized as an "obstacle course" of rights-based criteria. These criteria must be satisfied to ensure the legitimacy of process and conviction of the accused. As Roach contends, this new model is frequently premised on the questionable assumption that criminal law can control crime. He notes that it can be more aptly articulated as "due process for crime control" ends.⁶ But the new model now incorporates a role for the victim. It asserts "victims' rights" in contest with the rights of the accused, and challenges assertions of "victimless" crimes. This new component has the potential to derail the well-oiled process embraced by all traditional participants alike.

Roach's subsequent chapters trace developments in criminal law and enforcement practices. These legal and policy shifts substantiate his claim that the criminal justice system lurches from due process developments, such as expansions of the *Charter*⁷ rights of accuseds and pre-accuseds such as drunk drivers, to crime control accommodations such as tele-warrants. Roach builds additional layers to his argument by describing how public perception of crime is shaped and often mobilized through media reporting on selected leading Canadian cases, the publicity attracted by each, and media statements by legislators. His analysis would have been strengthened, however, if he had more precisely traced the relationship between agenda-setting and decision-making,⁸ as his account risks shifting from public perception to crime-control policy without clearly differentiating among agenda-setting, decision-making and implementation.⁹

The book also discusses the relatively new model of restorative justice. According to Roach, this model better captures "shadow" crime

⁶ Roach writes, *supra* note 1 at 8, "[t]hese chapters also reveal significant support for the critical thesis that due-process decisions produced crime-control responses from legislatures and administrators." See also, *supra* note 1 at 21, citing numerous other criminological observers, and at 22, 42, 50, 75, 76, 82, 83, 84, 93, *passim*.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁸ D. Szabo, *Concepts on Policy Evaluation in Criminal Justice: Preliminary Review*, trans. D. Crelinsten (Montreal: International Centre for Comparative Criminology, Université de Montréal, 1980).

⁹ For a discussion of these functions and the relationship among them, see P. Solomon, Jr., "The Policy Process in Canadian Criminal Justice: A Perspective and Research Agenda," in T. Hartnagel, ed., *Canadian Crime Control Policy* (Toronto: Harcourt Brace, 1998) 8 at 9.

frequencies, the often overlooked and under-reported crimes dealt with by informal and extra-legal measures. He contends that people deal (and could deal) with criminal violations through extra-legal processes, such as confrontation, shaming, community involvement, insurance claims, and informal reconciliation. This model contextualizes responsibility for crime and individual criminal acts within the larger frameworks of family, community, school, work, social service, and public health. While concerned with crime prevention, the model is non-punitive, and often diffuses decision-making to victims, offenders, and various interveners. Thus, in theory, it restores to victims an autonomy which is absent in a state-based regime.

Distinctively, restorative justice models emphasize a concern for fairness for all parties and often circumvent due process in favour of the accused "taking responsibility" for the crime.¹⁰ However, this does not appear to temper Roach's enthusiasm for the restorative model. Roach posits that, as many accused enter a guilty plea in the formal system, they should be more willing to do so in a less punitive system.¹¹ However, the restorative justice approach represents a genuine alternative to the punitive and due process models, and Roach argues that victims' rights can be advanced outside of a punitive approach. In particular, he refers to some feminist literature which contends that women may be disadvantaged through crime-control strategies which empower police and prosecutors and disempower women through assigned status as victims. Additionally, restorative justice discourse and practices may provide a "way out" of victim status through their focus on empowerment and reconciliation.

Roach's book contextualizes the theoretical claims in the criminological literature that criminal justice processes can be located within larger yet distinctive approaches (for example, a "law and order" model) to crime control and treatment of the accused and of victims. He maps the ebb and flow of expanding recognition, predominantly through court decisions, but also via legislative reform, of rights to due process and new rights for non-traditional parties, such as victims and media representatives. These observations substantiate his thesis that expansion of due process concerns often justifies or fortifies crime-control ends.

¹⁰ See my arguments in R. Langer, "The Juridification and Technicization of Alternate Dispute Resolution Practices," (1998) 13 Can. J. of L. & Soc. 169 at 178-179 where, in examining diversion processes available to youth through the application of the *Young Offenders Act* (1984) R.S.C. 1935, c. Y-1, I contend that the process strategically appropriates relationships meaningful to a young offender for systems-based goals or ends. I question to what extent the shift from discretion to culpability represents a genuine empowerment for the accused.

¹¹ *Supra* note 1 at 35.

However extensive Roach's analysis (and this is a choice, not a failing), his work is located at the levels of policy and practice. As a result, it does not often capture the impact of these developments on the parties themselves, except occasionally in aggregate or through media accounts. Roach is to be congratulated for the occasions where he does manage to personalize these decisions, as in a discussion of victim's concerns about screening of sexual assault videotapes in the *Bernardo* trial.¹² Significantly, Roach shows an awareness of the limits of such an approach where he comments, "[t]he Courts' mediation of due-process and crime-control values was an elite professional discourse that made a minimal difference in the lives of those it was intended to protect."¹³ He thus finds more salience in restorative justice initiatives such as restitution programmes and victim-offender reconciliation programmes and crime prevention models, although he cautions that responses, particularly from crime victims, have been mixed. He observes that increased crime-control initiatives, which usually incorporate an expanded role for police, prosecutors, and courts, often spring from the articulation of victims' rights. Ironically, these developments only marginally expanded the role of victims, and not necessarily in the direction they would have chosen.¹⁴ This observation ultimately underscores his "pessimistic" conclusion¹⁵ that victims' rights have provided a vehicle for the expansion of the crime-control model in the same way that due process developments had historically before them. Roach's book is a useful antidote both to recent prurient accounts (such as docu-drama adaptations of the *Bernardo* case) and polemics (get tough-on-crime editorials).

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¹² *Ibid.* at 101-103. The impact on victims' families is detailed in *R. v. Bernardo*, [1995] O.J. No. 1472 (Gen. Div.), online: QL (OJ) [hereinafter *Bernardo*].

¹³ *Supra* note 1 at 104.

¹⁴ *Ibid.* at 315.

¹⁵ *Ibid.* at 318.