Local Code: Subsidiarity and the Canadian Criminal Jury

Michael Plaxton*

Courts and legal commentators have increasingly recognized subsidiarity as an unwritten constitutional principle in Canada. In this paper, the author argues that the principle of subsidiarity can do much to explain the importance of the institution of trial-by-jury in criminal cases. Understood as nothing more than a fact-finding and verdict-generating body, the jury is a curiosity. But the jury is much more than that. The local nature of the jury serves to ensure that local customs, values, and practices are not steamrolled by a remote central legislature, and strengthens the sense of accountability that we have to each other as citizens. When we scrutinize the criminal jury through the lens of subsidiarity, we better appreciate its role in the criminal justice system and Canadian federalism.

* Professor of Law, University of Saskatchewan. Many thanks to Sarah Burningham, Richard Ekins, Jeff Hetzel, Carissima Mathen, Xavier Foccroulle Ménard, Dwight Newman, Geoff Sigalet, and two anonymous reviewers for comments and suggestions. The usual disclaimer applies.

Introduction

The jury is a curiosity. Understood as an institutional mechanism for finding facts and reaching verdicts according to law,[1] it has long struck observers as almost laughably ill-suited for the task—or at least less well-suited than professional judges.[2] More than a hundred years ago, James Fitzjames Stephen remarked: "[Jury verdicts] are just in the very great majority of instances, but . . . the exceptions are more numerous than in the case of trials by judges without juries."[3] Though he conceded that there may be advantages in having cases decided by groups rather than individuals,[4] Stephen complained that lay jurors often paid inadequate attention to the evidence and frequently lacked the capacity to weigh it.[5] He concluded: "[A] judge without a jury would be a stronger tribunal than a judge and an average common jury."[6] More recently, in his historical account of the jury in nineteenth-century British North America, R Blake Brown observed that juries were often regarded as biased and uneducated.[7]

1. See *R v Shipley* (1784), 4 Doug 73, 99 ER 774.

2. See Neil Vidmar, "A Historical and Comparative Perspective on the Common Law Jury" in Vidmar, ed, *World Jury Systems* (Oxford, UK & New York: Oxford University Press, 2000) 1 at 2–3. See generally the various contributions in Mark Findlay & Peter Duff, eds, *The Jury Under Attack* (London, UK: Butterworths, 1988); Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949).

3. Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (London, UK: Macmillan, 1883) at 569.

4. See *ibid* at 571.

5. See *ibid* (Stephen made an exception for special juries).

6. *Ibid* at 572.

7. See R Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 2009) [Brown, *Trying Question*]. See e.g. *ibid* at 133–34, 155, 222.

The strangeness of lay juries does not end there. Their role is ostensibly to find the facts and not the law,[8] and the Supreme Court of Canada has held that defendants may not invite juries to engage in "nullification".[9] But trial judges may not direct a verdict of guilty even if the defendant does not dispute that the essential elements of the offences have been satisfied.[10] Furthermore, juries do not provide reasons, and jurors are prohibited from discussing their deliberations except in extraordinary circumstances.[11] There is, therefore, nothing to stop juries from occasionally using their power to nullify the law: to acquit defendants in cases where the elements of the criminal offence in issue have been satisfied and no defence is available. It was for this reason that Ben Berger argued that the institution of trial by jury is in grave tension with the rule of law.[12] It also underpins proposals to reform jury empanelling procedures—to make them more diverse, and therefore more effective, fact-finders.[13]

Yet perhaps this emphasis on the merits of the jury as a fact-finder and verdict-generator is misplaced to some extent. The jury, after all, does not serve merely as a procedural safeguard for the benefit of individual defendants. It serves broader societal interests. Stephen argued that it "interests large numbers of people in the administration of justice *and makes them responsible for it*".[14] The Law Reform Commission of Canada agreed.[15] The Supreme Court of Canada has cited these remarks with approval, albeit without suggesting that the societal interests served by the jury were protected by the *Canadian Charter of Rights and Freedoms* (the *Charter*).[16] Justice L'Heureux-Dubé, in

8. See *R v Shipley*, *supra* note 1.

9. See *R v Latimer*, 2001 SCC 1; *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

10. See *R v Krieger*, 2006 SCC 47.

11. See *Criminal Code*, RSC 1985, c C-46, s 649. See also *R v Pan; R v Sawyer*, 2001 SCC 42.

12. See Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 UTLJ 579 at 603.

13. See e.g. Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 338–40. The Supreme Court of Canada upheld the constitutionality of these reforms in *R v Chouhan*, 2021 SCC 26. Significantly, all but one member of the Supreme Court of Canada in *Chouhan* treated changes to jury empanelling rules as procedural rather than substantive in nature, making it constitutionally acceptable for those changes to have retroactive effect.

14. Stephen, *supra* note 3 at 573 [emphasis added].

15. Francis C Muldoon et al, "The Jury in Criminal Trials" (1980) Law Reform Commission of Canada Working Paper No 27 at 15.

16. See *R v Turpin*, [1989] 1 SCR 1296 at 1309–10, 96 NR 115.

R v Sherratt, claimed that the jury "acts as the conscience of the community", "provides a means whereby the public increases its knowledge of the criminal justice system", and "increases, through the involvement of the public, societal trust in the system as a whole."[17] And in *R v Stillman*, the Supreme Court of Canada observed: "[A]t the societal level, [trial by jury] provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts."[18]

If we shift our focus away from the jury as an aspect of procedural fairness and instead dwell on its contribution to the broader political community, some aspects of the institution that we tend to regard as "bugs" may turn out to be features. For example, the locality of the jury—the fact that juries are by and large drawn from the local communities in which the alleged offence took place—may take on new significance. Understood as an institution designed to yield consistent verdicts, in which the *Criminal Code* of Canada is applied uniformly across the country, the locality of the jury would appear hopeless. If, however, we view the jury as an institution intended to strengthen bonds of citizenship by giving recognition to local relationships, customs, practices, and attachments, then the locality of the jury begins to appear not just desirable but necessary. This is indeed what I argue here: that the jury, because of its local character, lends a degree of legitimacy to the criminal justice system, ensuring that local values are not swept aside by a remote federal legislature. Thus, I suggest that the jury may properly be understood through the lens of the "principle of subsidiarity".

The roadmap is as follows. In Part I, I set out the principle of subsidiarity and its various justifications. Part II sets out the significance of subsidiarity as an unwritten constitutional principle in Canada. The Supreme Court of Canada has, in a number of cases, recognized the principle as an important interpretive aid in making sense of Canadian federalism. At the same time, the fact that the *Constitution Act, 1867* allocates the criminal law power to the federal Parliament, and not the provincial legislatures, might give us pause: why view the criminal jury as a manifestation of the principle of subsidiarity if the Constitution treats the criminal law as a federal concern? I will suggest that any inconsistency is more apparent than real. Though the *Constitution Act, 1867* gives exclusive power to the federal Parliament to legislate on matters of substantive criminal law and criminal procedure, it has always been understood that there is a heavy emphasis on local decision-making in the application of that legislation.

17. [1991] 1 SCR 509 at 523–24, 122 NR 241.

18. *R v Stillman*, 2019 SCC 40 at para 28.

In Part III, I consider why we might want to give local communities some control over whether and how to apply criminal legislation. The jury provides a degree of assurance that local customs, values, and ways of life will be protected from remote, central legislatures. If we understand the criminal trial as a forum in which we are accountable to one another as citizens rather than subjects, it makes sense to give decision-making authority to local people applying local norms. Admittedly, reimagining the criminal jury in this way means attributing a kind of law-finding function to it. But this would not be anything new. As I explain in Part IV, there is a long, if unofficial, history of thinking about the criminal jury as trier of both fact and law. Finally, in Part V, I observe that liberal concerns about the criminal jury, if anything, give us more reason to view the institution through the lens of the principle of subsidiarity.

I. The Principle of Subsidiarity

According to Peter Hogg, "[s]ubsidiarity is a principle of social organization that prescribes that decisions affecting individuals should be taken as close to the individuals affected as is reasonably possible."[19] The principle "regulates authority within a political order, directing that powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level[20] central unit would ensure higher comparative efficiency or effectiveness in achieving them".[21] It is distinct from federalism because it may require the allocation of decision-making to units that are more local or intimate than the provincial level.[22] In fact, it may require some decisions to be

19. Peter W Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 NJCL 341 at 341. See also *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3 [*Spraytech*].

20. Though this language of "higher" and "lower" levels of decision-making is somewhat misleading. See Maria Cahill, "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2017) 15:1 NYU Intl J Cont L 201 at 207–12.

21. Andreas Føllesdal, "Survey Article: Subsidiarity" (1998) 6:2 J Political Philosophy 190 at 190. See also Trevor Latimer, "Against Subsidiarity" (2018) 26:3 J Political Philosophy 282 at 282.

22. See Daniel Weinstock, "Cities and Federalism" in James E Fleming & Jacob T Levy, eds, *Nomos LV: Federalism and Subsidiarity* (New York: New York University Press, 2014); NW Barber, *The Principles of Constitutionalism* (New York: Oxford University Press, 2018) at 209 [Barber, *Principles*]. See also Heather K Gerken, "Foreword: Federalism All the Way Down" (2010) 124:1 Harv L Rev 4 at 23–24 (though not expressly linking her analysis to the principle of subsidiarity).

made by the household or other associations in civil society that are, strictly speaking, non-public.[23] At the same time, there is some truth in the proposition that "[s]ubsidiarity is, in a very real sense, the soul of federalism."[24]

In *The Principles of Constitutionalism*, Nick Barber offers a number of possible justifications for the principle of subsidiarity. First, and least satisfactorily, the principle may be based on the desirability of diffusing power across political subunits, and thereby ensuring that the central government cannot dominate subunits.[25] This is coherent as far as it goes, but it is inadequate without more. After all, the principle of subsidiarity does not stand for the proposition that central governments or legislatures should *never* override the decisions of subunits.[26] Nor does it stand for the proposition that decision-making should only be allocated to the most local units. Yet the diffusion-of-power rationale, taken on its own, says nothing about when central governments should intervene at the local level, nor how powers should be allocated.[27]

A second, more plausible rationale takes its cues from European Union law, treating the principle of subsidiarity as a basis for structuring the democratic process.[28] On this view, subsidiarity demands that democratic institutions be designed in such a way that people who are most affected by certain decisions will be appropriately represented, and that democratic units are appropriately scaled and underpinned by social solidarity,[29] such that effective deliberation is possible. There is a great deal of merit in this way of thinking about the principle of subsidiarity, and it will hopefully be apparent from what follows that concerns about democratic legitimacy arguably ground the institution of trial by jury (as well as Canadian federalism more generally). Nonetheless, a third rationale is worth considering—if only to underscore the importance of subsidiarity for ordinary citizens.

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23. Barber, *Principles*, *supra* note 22 at 188 (noting the connection between the Catholic understanding of subsidiarity and civil society); Hogg, *supra* note 19 at n 23 (noting its "deregulatory bias" at 342).

24. Jenna Bednar, "Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems" in James E Fleming and Jacob T Levy, eds, *Nomos LV: Federalism and Subsidiarity* (New York: New York University Press, 2014) 231 at 232.

25. See Barber, *Principles*, *supra* note 22.

26. See *ibid* at 190–91.

27. See *ibid* at 191.

28. See *ibid*; NW Barber, "The Limited Modesty of Subsidiarity" (2005) 11:3 Eur LJ 308 at 315–16; Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, UK: Oxford University Press, 2002) at 137–56.

29. See Barber, *Principles*, *supra* note 22 at 191–98 (where the author draws upon Sarah Song, "The Boundary Problem in Democratic Theory: Why the Demos Should be Bounded by the

A more—Barber might say "too"[30]—ambitious justification for the principle would emphasize the distinct contributions that central governments, local governments, and small-scale associations respectively make to human flourishing, each exercising authority in different ways and over different spheres of life.[31] According to this rationale, local relationships, communities, associations, and institutions have presumptive or intrinsic significance to individuals' understanding of themselves and their place in the world, and there is a need for local associations to exercise a kind of authority over members if human beings are to flourish as human beings.[32] At bottom, this rationale trades on the intuition that our deepest, most personal and fulfilling commitments are to the people, institutions, and values that surround us every day, and that ways of life should not be trampled upon by remote lawmakers in the absence of some genuine urgency. As Nicholas Aroney has observed:

> For good reasons we have an inclination to treat familial, personal and local relationships as not only autobiographically prior, but also as morally prior—as binding us with ties that are richer, deeper and stronger than the more distant relationships that we have with persons whom we regard as mere acquaintances, let alone those whom we do not know personally and yet regard as fellow human beings entitled to concern and respect. Local attachments are constituted

State" (2012) 4:1 Intl Theory 39 at 47–48); David Miller, "Boundaries, Democracy, and Territory" (2016) 61:1 Am J Juris 33 at 40–44.

30. See Barber, *Principles*, *supra* note 22 at 198–205.

31. See John Finnis, "Subsidiarity's Roots and History: Some Observations" (2016) 61:1 Am J Juris 133; John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford, UK: Oxford University Press, 2011); Nicholas Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Dordrecht: Springer, 2014) 9 at 23–24; Andrew Willard Jones, "The End of Sovereignty: An Essay in Christian Postliberalism" (2018) 45:1 Communio 408; Andrew Willard Jones, "What States Can't Do"(24 July 2020), online (blog): *New Polity* <newpolity.com/blog/what-states-cant-do>; Xavier Foccroulle Ménard & Anna Su, "Liberalism, Catholic Integralism, and the Question of Religious Freedom", BYUL Rev [forthcoming in 2022], online: *SSRN* <ssrn.com/abstract=3768764>; Maria Cahill, "Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity" (2016) 61:1 Am J Juris 109 [Cahill, "Attraction to Subsidiarity"]; Adrian Vermeule, "Echoes of the *Ius Commune*" (2021) 66:1 Am J Juris 85; Richard Ekins, "The State and its People" (2021) 66:1 Am J Juris 49.

32. See Aroney, *supra* note 31 at 19–20; Cahill, "Attraction to Subsidiarity", *supra* note 31.

> by an array of related affections, practices and duties, while our aspirations for wider, even universal, relations of mutual regard are constituted by an array of thinner, but fundamental, duties grounded in the common dignity of all human beings. We are, as such, bound primarily by local attachments[.][33]

Because the principle of subsidiarity requires us to think about the authority of actors at the sub-provincial or even municipal level, it also encourages a deflationary approach to sovereignty, with all that entails.[34] Rather than focus on division of powers—on who, as between the federal Parliament and the provincial legislatures, can do what—subsidiarity leads us to consider the power that subunits have to effectively influence policy in the absence of sovereign law-making authority.[35] As Heather Gerken notes, we will be better able to see how "the center and periphery interact".[36]

II. Subsidiarity, the Canadian Constitution, and the Criminal Law Power

There are good reasons to read the *Constitution Act, 1867*, in light of the principle of subsidiarity. First and foremost, there is a heavy presumption that legislative powers affecting the day-to-day lives of Canadians would be presumptively allocated to provincial legislatures. Hogg observed:

> The distribution of powers at least partially reflected a principle of subsidiarity. Powers over customs and excise, trade and commerce, banking and currency, international and interprovincial transportation and communications, which were necessary to convert the provinces into an economic union, were vested in the federal Parliament. Powers that affected the daily life of individuals were mostly vested in the provincial Legislatures, which had jurisdiction over property

33. Nicholas Aroney, "The Federal Condition: Towards a Normative Theory" (2016) 61:1 Am J Juris 13 at 17.

34. See Gerken, *supra* note 22; Cahill, "Attraction to Subsidiarity", *supra* note 31.

35. See Gerken, *supra* note 22 at 7–8. The language of "exit", "voice", and "loyalty" is drawn from Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

36. Gerken, *supra* note 22 at 8.

> and civil rights, the courts and the police, municipal institutions, hospitals and education.[37]

Historians have tended to agree that the *Constitution Act, 1867* reflects a deep concern that the local values, cultures, and traditions would not be trampled upon by the federal Parliament.[38] This was certainly a priority for French Canadians in what would become the Province of Quebec,[39] but it was also a matter of heavy significance for those in Nova Scotia and New Brunswick—who already had Legislatures of their own and would have been reluctant to see their powers over local matters diminished or diluted.[40] Janet Ajzenstat, writing about the views of one of the founders, has remarked:

> The general government, Parliament, was assigned the tractable matters, those on which reasonable people may reasonably disagree, those on which legislators can compromise, those that allow prudence and pragmatism; or if you like, Parliament was assigned the matters that allow statesmanship. The provincial legislatures were assigned the less tractable matters, those dear to the individual heart, those on which even reasonable men and women may refuse to compromise, the deep attachments of family, ethnicity, and religion, those that sometimes lead to outright hostilities. In other words, the provinces were to get the matters that cannot be counted, divided, shared, pork-barrelled.[41]

This emphasis on localism in the *Constitution Act, 1867* can be overstated: it is arguably in those matters where policy disputes are at their most intractable that the federal Parliament has the greatest power to step in and coordinate a single nationwide solution for the sake of the common good.

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37. Hogg, *supra* note 19 at 346.

38. See Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal & Kingston, ON: McGill-Queen's University Press, 2007) at 88–104.

39. See Hoi L Kong, "Subsidiarity, Republicanism, and the Division of Powers in Canada" (2015) 45:1 RDUS 13 at 24–27; Alan C Cairns, "The Judicial Committee and Its Critics" (1971) 4:3 Can J Political Science 301 at 320–21.

40. See Hogg, *supra* note 19 at 345–46.

41. Ajzenstat, *supra* note 38 at 95. But see PB Waite, *The Life and Times of Confederation 1864–1867* (Toronto, University of Toronto Press, 1962) at ch 8; WPM Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (Don Mills: Oxford University Press, 2014) at ch 19 (emphasizing the centralizing tendencies of the *Constitution Act, 1867*).

Nonetheless, it captures a highly important structural principle in the Canadian Constitution.

The Supreme Court of Canada has, on a number of occasions, suggested that Canada's constitutional arrangements reflect the importance of subsidiarity.[42] In *Spraytech*, L'Heureux-Dubé J explicitly referenced the principle of subsidiarity, describing it as "the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity".[43] In *Canadian Western Bank v Alberta*, Binnie and LeBel JJ expressly construed the doctrine of interjurisdictional immunity in light of the principle of subsidiarity.[44] Likewise, though the Supreme Court of Canada was divided on the precise significance of the principle of subsidiarity in making sense of the limits of the criminal law power, four judges described the former as "an interpretive principle that derives . . . from the structure of Canadian federalism and that serves as a basis for connecting provisions [of the *Constitution Act, 1867*] with an exclusive legislative power."[45] One can also look for support to Deschamps J's dissenting opinion in *Quebec (Attorney General) v Lacombe*[46] as well as Gascon J's concurring opinion in *Rogers Communication Inc v Chateauguay*,[47] and Rowe J's dissent in the *Carbon Tax Reference*.[48]

One can also find implicit support for the principle of subsidiarity in the Supreme Court of Canada's development of various federalism doctrines. For example, the national concern and temporary emergency branches of the peace, order, and good governance (POGG) power both reflect a strong preference for the exercise of power "at the provincial level, which is nearest to the people". It is only where "the provinces are unable to deal effectively with the issue" that

42. See Eugenie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54:1 SCLR (2d) 601 at 618–26; Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask L Rev 21 at 26; Kong, *supra* note 39; Hugo Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 Const Forum 20 at 26–30; Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187; Dennis Baker, "The Provincial Power to (Not) Prosecute Criminal Code Offences" (2017) 48:2 Ottawa L Rev 419.

43. *Supra* note 19 at para 3.

44. 2007 SCC 22 at paras 42–47.

45. *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 273 [*AHRA Reference*].

46. 2010 SCC 38.

47. 2016 SCC 23 at paras 84, 110.

48. See *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 467.

"action [may] be taken at the more distant national level".[49] Likewise, in the context of the trade and commerce power, "[t]he capacity of the provinces to act within their jurisdictions is presumed, and it is up to Parliament to make the exceptional demonstration otherwise."[50] The ancillary powers doctrine can also be read as grounded in the principle of subsidiarity.[51]

In raising the principle of subsidiarity, and tying it into Canadian federalism jurisprudence, I do not want to claim that the *Constitution Act, 1867* gives perfect expression to the former. If it did, one might expect to see the criminal law power allocated to the provinces.[52] It is, after all, difficult to imagine a more profound interference with local values, customs, norms, practices, and institutions than a statute declaring them "criminal", and effectively threatening those who continue to live according to pre-existing local understandings with a fine or incarceration.[53] Ajzenstat, though she did not frame the issue in these terms, saw the potential problem with treating the principle of subsidiarity as a Rosetta Stone for reading the Canadian Constitution:

> I see no particular reason for suggesting that criminal law (a federal matter) should be considered tractable, while the establishment of courts of criminal jurisdiction (assigned to the provinces) is intractable. Of course, there is good reason to put criminal law beyond the reach of particular groups and interests. It is an honoured principle of British justice that criminal law should be inclusive in the strictest sense and thus be immune to pleas on behalf of birth or race, wealth or poverty. But why, then, give the administration of justice to the other level?[54]

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49. See Hogg, *supra* note 19 at 349. See also Cyr, *supra* note 42 at 28; Brouillet, *supra* note 42 at 618–22. See generally *Reference re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 432–33, 49 DLR (4th) 161.

50. See Cyr, *supra* note 42 at 28, citing *Reference re Securities Act*, 2011 SCC 66 at paras 71–73. See also Hogg, *supra* note 19 at 350–51; Brouillet, *supra* note 42 at 624–25.

51. See Brouillet, *supra* note 42 at 622–24, citing *Lacombe*. See also Cyr, *supra* note 42 at 29.

52. See Hogg, *supra* note 19 at 346; Ajzenstat, *supra* note 38 at 95. On the unusual treatment of the criminal law, relative to other powers, see Herman Bavkis et al, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Don Mills: Oxford, 2009) at 11.

53. See Michael Plaxton, *Sovereignty, Restraint & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019) at 55–56.

54. Ajzenstat, *supra* note 38 at 95.

Hogg made a similar point in observing that the principle of subsidiarity could not easily explain the allocation of the criminal law power to the federal Parliament.[55] Arguably, it was for this reason that McLachlin CJ felt it necessary to object to the idea that the principle of subsidiarity could "override the division of powers in the *Constitution Act, 1867*"—and in particular the division of powers concerning the criminal law—because it is exceedingly difficult to square the two.[56]

Yet there may be ways of giving due weight to section 91(27) that do not obliterate the principle of subsidiarity and the values it protects. Consider the suggestion by Deschamps and LeBel JJ, in *Reference re Assisted Human Reproduction Act*, that the criminal law power could only be exercised for certain purposes—namely, to "suppress an evil". They were clear that, for the federal Parliament to create a valid criminal offence, there must be "a concrete basis and a reasoned apprehension of harm". Furthermore, the offence must address conduct that is "inherently harmful".[57] Hoi Kong has argued that the practical effect of such a test would be to narrow the circumstances under which the federal Parliament could enact criminal legislation that tramples relationships, upon local values, practices, and institutions—for the simple reason that it would narrow the federal Parliament's power to enact criminal legislation at all.[58] In this way, he argues, Deschamps and LeBel JJ's approach would give recognition to the principle of subsidiarity and go some way toward ensuring that local cultures cannot be "dominated" by the central legislature.[59]

Consider, too, the "decentralized nature of prosecutions" in Canada.[60] Prior to 1857, prosecutions were treated as private—and therefore principally local—affairs.[61] This changed with the *County Attorney's Act*, when prosecutions

55. See Hogg, *supra* note 19 at 346.

56. *AHRA Reference*, *supra* note 45 at para 72.

57. *Ibid* at paras 238, 251.

58. How true this is arguably depends on the extent to which the idea of "harm" poses any sort of meaningful hurdle for legislatures. There is room for skepticism on this point. See Bernard Harcourt, "The Collapse of the Harm Principle" (1999) 90:3 J Crim L & Criminology 109; *R v Malmo-Levine*, 2003 SCC 74 (in which the Supreme Court of Canada rejected the claim that Mill's harm principle is a principle of fundamental justice for the purposes of section 7 of the *Charter*).

59. See Kong, *supra* note 39 at 41–44. See also John D Whyte, "Federalism and Moral Regulation: A Comment on Reference Re Assisted Human Reproduction Act" (2011) 74 Sask L Rev 45.

60. Baker, *supra* note 42 at 428.

61. See Philip C Stenning, *Appearing for the Crown* (Cowansville, QC: Brown, 1986), chs 1–2.

"became a . . . matter for the state".[62] But the idea that prosecutorial decisions should remain in the hands of local actors, responsive to local conditions and concerns, remained—and was expressly articulated in Confederation debates.[63] As Dennis Baker points out, this preference for prosecutorial decision-making at the local level did not translate into the view that criminal offences should be crafted at the local (provincial) level.[64] Still, the emphasis on locality—even in the context of the criminal law power—should not be underestimated. In *R v Hauser*, Dickson J stated:

> [I]n enacting ss. 91(27) and 92(14) of the British North America Act, an attempt was made to achieve a "subtle balance" between national and local needs in the area of crime prevention and control. Constitutional authority to enact substantive criminal laws—the determination of what was a crime and how it should be punished—was vested in the federal government, but the administration of the criminal law remained in the local or provincial hands where it could be more flexibly administered . . .. The position of decentralized control, which had obtained in England from time immemorial, and in Canada prior to Confederation, with local administration of justice, local police forces, local juries, and local prosecutors, was perpetuated and carried forward into the Constitution through s. 92(14). The administration of criminal justice was to be kept in local hands and out of the control of the central government.[65]

On the basis of this argument, Baker has argued that the provinces have the constitutional authority to refuse to prosecute criminal offences to which they have a principled objection—for example, the new offences dealing with sex work.[66] Here, too, we can see how the division of powers over the criminal law can be read in such a way that the principle of subsidiarity, and the values it

62. Baker, *supra* note 42 at 428. See generally Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: University of Toronto Press, 1986), ch 5.

63. See Romney, *supra* note 62 at 221; Baker, *supra* note 42 at 428.

64. See Baker, *supra* note 42 at 429. See generally Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 59–60 [Brown, *The Genesis*].

65. [1979] 1 SCR 984 at 1032, 98 DLR (3d) 193, dissenting.

66. See Baker, *supra* note 42.

protects, may be preserved. In Part III, I argue that a similar point can be made about the criminal jury.

III. Juries and Subsidiarity

In claiming that the criminal jury can best be appreciated as a manifestation of the principle of subsidiarity, I want to start with the observation that the jury has an irreducibly local character. Though jury rolls are assembled in different ways across different jurisdictions, they are invariably intended to ensure that jurors are from the community in which the alleged offence occurred.[67] Changes of venue are, of course, possible,[68] but there is a presumption that the trial will take place locally—that communities within the province, much less the country, are not interchangeable for the purposes of a criminal trial. It is anticipated that jurors will have, in a loose sense, a stake in criminal proceedings to the extent that it relates to a matter of public concern transpiring in their community,[69] and involving allegations of wrongdoing perpetrated by or against (or both) those who live in it.

The local nature of juries is linked to the idea that, although we are accountable to our fellow citizens generally for allegedly engaging in public wrongs, we are particularly accountable to the people who live in the communities in which those wrongs are said to have taken place.[70] As Antony Duff and others have argued, criminal trials are, at their core, venues for holding defendants accountable for what they have done or are believed to have done.[71] And accountability is relational, in the sense that it presupposes some sort of relationship between the person who gives an account of him- or herself and the person(s) to whom the account is owed.[72] We are accountable to different people for different alleged deficiencies or inadequacies. As a teacher, one is accountable to his or her students, colleagues, and employer—but not to one's

67. See Vidmar, *supra* note 2.

68. See *Criminal Code*, *supra* note 11, s 599.

69. See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford, UK: Hart, 2009), ch 2 (on the public nature of criminal wrongs) [Duff, *Answering for Crime*].

70. Matt Matravers gestures towards this argument in "'More Than Just Illogical': Truth and Jury Nullification" in Duff et al, eds, *The Trial on Trial (Volume 1): Truth and Due Process* (Oxford, UK: Hart, 2004) at 80–83.

71. See Duff, *Answering for Crime*, *supra* note 69.

72. See *ibid* at 23–30. See also Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard University Press, 2009).

mother, one's teammates on an amateur sports club, or to the cashier at the supermarket. As a hockey player, one is accountable to his or her teammates and coaches, but not to his or her professional colleagues.[73]

Criminal defendants are accountable to juries—at least in part—because they are fellow citizens;[74] i.e., members of the same political community.[75] But if that was a sufficient basis for serving as a juror, we would not care where jurors came from or where trials were held. We do, and not only because of the logistical challenges that would arise if juries were populated with citizens drawn from across the country.[76]

In a liberal political community, citizenship is experienced as a weak set of abstract procedural commitments, and not as a set of thick, substantive attachments.[77] Different members of such a community may hold comprehensive conceptions of the good life that are foreign and deeply threatening to each other. This is particularly true when the community is diffused across a vast geographical territory. In that context, the idea that the defendant's alleged wrongdoing is the business of jurors just because they are fellow citizens has an unreal, ephemeral quality. There is, on the other hand, a

73. See Duff, *Answering for Crime*, *supra* note 69 at 26.

74. This point is worth emphasizing since it explains to some extent why lay juries may be better than professional judges. The latter also live and serve in the local community, and so may be thought just as capable of representing it. But the very fact that judges are part of the state's criminal justice apparatus means that their status as fellow citizens—rather than representatives of the state—is easily obscured. Indeed, judges have historically been thought too closely aligned with the government, and more likely to ignore the local customs of the community. See Thomas A Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (Chicago: University of Chicago Press, 1985).

75. See Duff, *Answering for Crime*, *supra* note 69 at 50.

76. There are, of course, provisions in the *Criminal Code*, *supra* note 11, that allow for a change of venue: s 599. This in itself is unproblematic for my argument. First, note that the clear presumption is that trials will be held in the territory where the offence took place. Second, there are occasions when the usual reasons for holding trials in the territory where the offence took place may be absent or outweighed by countervailing considerations. For example, it may be that a victim or witness will be put in significant physical jeopardy if the trial takes place locally. In that case, there is a compelling reason to hold the trial elsewhere. Furthermore, it may be that, for whatever reason, it is not possible to assemble a jury in the usual venue but it is possible to assemble one elsewhere in the province. In that case, the typical reasons for holding a trial locally largely disappear.

77. See Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, MA: Harvard University Press, 2013); Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

concreteness in one's accountability to the people with whom the defendant (to say nothing of his or her alleged victims) lives, works, raises families, goes to church, eats, shops, and plays on a day-to-day basis. They are still one's fellow citizens, but they are also more than that.[78] The locality of the jury makes it possible for us to see our neighbours as citizens and citizens as our neighbours, thereby strengthening our sense of accountability to one another.

The locality of the jury is therefore significant in how citizens relate to one another. But it is also significant in how both defendants and jurors relate to the state—i.e., as citizens who have a degree of ownership over the criminal law, rather than mere subjects.[79] In making this point, I do not deny that an important way in which people take ownership over the laws applicable to them is through statutes enacted by their democratically elected representatives.[80] We should not, however, make the mistake of assuming that this is the only, or even the best, way of doing so. After all, people may also take ownership over the law insofar as they see the unwritten norms and usages, according to which they live each day—the common law in the early-modern sense of customary law—codified in it.[81] And the sense of ownership generated through democratic processes should not be exaggerated. Legislation that fails to track the moral experience and customs of ordinary people,[82] perhaps because it is crafted by remote or disconnected legislators, may well lead citizens to conclude that their values and practices have not truly been taken into account and that they are, for all practical purposes, mere subjects.[83] Indeed, it has often been suggested that the legal authority of monarchs and legislatures depends

78. Duff stresses that our accountability as citizens is compatible with accountability in other capacities. See Duff, *Answering for Crime*, *supra* note 69 at 50.

79. See *ibid* at 46.

80. See Waldron, *supra* note 77 at 64–65.

81. See Gerald Postema, *Bentham and the Common Law Tradition*, 2nd ed (Oxford, UK: Oxford University Press, 2019), chs 1–2, cited in Duff, *Answering for Crime*, *supra* note 69. See also Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579.

82. For the view that the substantive criminal law should broadly track the moral intuitions of ordinary citizens, see e.g. Douglas Husak, "The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility" (2009) 3:1 Crim L & Philosophy 51 at 64; Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Cambridge, MA: Harvard University Press, 2012) at 53; CMV Clarkson, "Theft and Fair Labelling" (1993) 56:4 Mod L Rev 554 at 555; Stephen Shute & Jeremy Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56:4 Mod L Rev 548 at 553; PR Glazebrook, "Thief or Swindler: Who Cares?" (1991) 50:3 Cambridge LJ 389; Paul H Robinson & John M Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy" (2007) 81:1 S Cal L Rev 1 at 21.

83. See e.g. EP Thompson, *Customs in Common* (New York: New Press, 1993).

upon their conformity with the customs of the realm[84] and that purely formal enactment of legislation could not be enough to give it the force of law unless and until the public recognized it in their day-to-day lives.[85]

Duff has articulated something like this point. For defendants to be accountable as citizens to citizens, he argues, legal language should be "accessible"—if only with the assistance of lawyers and judges—to defendants, jurors, and public at large.[86] Duff explains:

> If the criminal law is to be a common law rather than an alien imposition, it must express the public values of the political community. It must speak to members of that polity in a language that they can understand as expressing values that are, or could be, theirs. It must speak to them, not merely of demands that they are to be coerced into obeying, but of requirements or obligations that flow from those values, and its language must be one that they can speak for and to themselves . . .. The jurors . . . must . . . be able to understand that what they have to determine is whether a charge of wrongdoing has been proved; and since in convicting the defendant they will be censuring her for a wrong that has been proved against her . . . they must be able to speak that conviction *in the first-person voice of those who accept the law and the values it embodies*. They are meant to speak and act on behalf of and in the name of the whole political community.[87]

Admittedly, Duff suggests that it is enough if jurors understand that the legal language expresses values that "could be" theirs. That proposition, however, should be taken with a large grain of salt. There will be many occasions when members of the public can appreciate that local values and norms have been taken into account in the crafting of legislation, even where they are not expressly codified—indeed, even when they have been expressly swept aside.

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84. See Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1990) at 180–83; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, UK: Cambridge University Press, 1989) at 41.

85. See Postema, *supra* note 81 at 25–26.

86. RA Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001) at 189 [Duff, *Punishment*]. See also RA Duff, "Legal Reasoning, Good Citizens, and the Criminal Law" (2018) 9:1 Jurisprudence 120 [Duff, "Legal Reasoning"].

87. Duff, *Punishment*, *supra* note 86 at 190 [emphasis added].

But (surely) not always. Sometimes, the remoteness of the enacting legislature from the local community—whether real or perceived—and the apparent "foreign-ness" of the norms articulated in the criminal offence in question, can be expected to undermine the sense of ownership. Significantly, based on his argument from legal language, Duff expresses some sympathy for the idea of jury nullification.[88]

This is not to say that legislatures necessarily do anything wrong or improper when they use the criminal law to change social norms.[89] My point is only that, insofar as criminal legislation is seen as a top-down imposition by remote legislators, the notion that we are accountable to one another as citizens is arguably obscured. That being the case, there are compelling reasons to ensure that criminal statutes are interpreted and applied at the local level—giving local communities an opportunity to take ownership over them.[90] As Heather Gerken has noted:

> Juries' decisions would give us a more fine-grained read on where the People stand. Legislatures make law at some distance from individual cases. When jurors decide, they do so in a context where neither the defendant nor the victim is a cipher. And they come to those decisions through an entirely different process, one involving face-to-face interactions unmediated by political parties or electoral politics. Verdicts can thus offer a perspective on the People's view that is usefully different from the legislative one.[91]

Seen in this light, juries do not function merely as "atomized verdict generators, but as parts of a larger system of democratic feedback; not just as administrative units, but as sites of minority rule".[92] Without undermining parliamentary sovereignty, they give local communities a fresh opportunity to be heard.

On this view, the criminal jury is more than a passive recipient of the "law" set out by the trial judge.[93] And, as strange as it may seem to twenty-first-century

88. See Duff, "Legal Reasoning", *supra* note 86 at 129.

89. See Roseanna Sommers, "Commonsense Consent" (2020) 129:8 Yale LJ 2232 at 2298–302.

90. With this in mind, it is deeply troubling that many people in Indigenous communities may be effectively unable to participate as jurors even where the offence occurred on a reserve. See *R v Kokopenace*, 2015 SCC 28.

91. Gerken, *supra* note 22 at 32.

92. *Ibid* at 31.

93. *Ibid*.

commentators, there is historical evidence that, well into the 1800s, the jury possessed something like a law-finding role in England, the US, and Canada.

IV. The Jury as Law-Finder

If we reach back to medieval England, when there was not yet a strong centralized state and judiciary, it is reasonably clear that the criminal jury was subject to few constraints on its power to make findings of both fact and law.[94] Indeed, Marianne Constable has claimed that medieval rules concerning jury composition only make sense if we suppose that juries were expected to decide cases in light of unwritten customary law.[95] This view of the role of juries would change, at least among officials, in the sixteenth century. For several centuries thereafter, though, the idea of the jury as a law-finding body would continue to resonate.[96] Both the Levellers and Quakers argued that the jury possessed such a role.[97] Thus, John Lilburne, on trial for high treason in 1649, stated: "The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law . . . in deed and in truth, if the jury please, are no more but ciphers, to pronounce their verdict".[98] His acquittal was widely understood as a vindication of this view.[99] The point was subsequently developed by others in public writings.[100] When Lilburne was tried and acquitted again, several jurors indicated that they regarded themselves as triers of law.[101] Thomas Andrew Green noted: "[B]y 1670 the argument that the petty jury had a duty to

94. See Green, *supra* note 74, chs 2–3.

95. See Marianne Constable, *Law and the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago: University of Chicago Press, 1994). See also Charles Howard McIlwain, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages* (London, UK: Macmillan, 1932) at 193–94. They were also expected to apply local knowledge of the "facts"—i.e., to serve in a sense as both adjudicators and witnesses. See also Green, *supra* note 74 at 52.

96. See Green, *supra* note 74, chs 5–6.

97. See *ibid*.

98. Clement Walker, ed, *The Triall of Lieut. Collonell John Lilburne* (London, 1649), cited in Green, *supra* note 74 at 173.

99. See *ibid* at 175–76.

100. See e.g. *ibid* at 177–92.

101. See *ibid* at 197.

scrutinize both the law and the indictment upon which the prosecution was based had attained widespread currency".[102]

Later, when the Quakers were prosecuted under the *Conventicles Act*, it was often argued that juries were entitled to adopt their own interpretations of seditious intent, unbound by judicial interpretation.[103] The acquittal of William Penn and William Mead was often taken as an indication that the jury had acted on its own interpretation of the law—and defended on that basis.[104] And Vaughan CJ's decision in *Bushell's Case*[105]—though it stands for the modest proposition that juries cannot be coerced into following the instructions of the trial judge as to the law—was frequently given a far more ambitious reading. In particular, John Hawles, in *The Englishman's Right*, construed *Bushell's Case* in light of the arguments made by the Levellers and Quakers. Hawles argued that the jury, before it could convict, had a duty to decide "not only that the fact has been proved but also that the fact constitutes an offense under the law".[106] The *Seven Bishops' Case*, in which the jury was expressly permitted to decide questions that were regarded at the time as questions of law, lent credence to the notion that the jury was entitled to act as the trier of law.[107]

Hawles' understanding of *Bushell's Case* was highly influential in both the US and England.[108] *The Englishman's Right* was cited in *Zenger's Case*, in which it was expressly argued that the jury should draw its own conclusions about the law.[109] The defendant was acquitted, and the report of the case was widely published in England. Throughout the 1700s, seditious libel laws were frequently assailed on the basis that they perverted the role of the jury, preventing them from deciding matters of law. Such arguments tended to rely

102. *Ibid* at 202.

103. See *ibid* at 202–08.

104. See *ibid* at 225–26.

105. (1670), 124 ER 1006 (Court of Common Pleas).

106. Green, *supra* note 74 at 257. For a somewhat different interpretation of Hawles, see James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008) at 181–84.

107. See Green, *supra* note 74 at 262–63.

108. See *ibid* at 252, 322. See also Simon Stern, "Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After *Bushell's Case*" (2002) 111:7 Yale LJ 1815.

109. See Jeff Hetzel, "The Original Criminal Jury" at 25–27 [forthcoming], online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3953880>; Livingston Rutherford, *John Peter Zenger: His Press, His Trial, and a Bibliography of Zenger Imprints* (New York: Dodd, Mead & Company, 1904) at 93, 113. See also Jill Lepore, *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan* (New York: Vintage Books, 2005) at 72–77.

upon the arguments made by Hawles and did not end with Lord Mansfield's ruling in *R v Shipley*.[110]

The US also had a strong influence over British North America in the latter's formative years, and so it is worth considering the early American understanding of the jury.[111] Jamal Greene has argued that the prominent place of the jury in the *Bill of Rights* reflected the view that "[t]he rights of the people were thought best protected by legislatures, juries, and other *local* institutions."[112] This reflects the persistent concern of the Framers that the people's liberties were vulnerable to power-grabs by the central government, and that they would be best protected by an institution—the jury—that would interpret and apply the law according to local norms and customs:

> [W]ithin Founding-era political thought, the institutions best suited to reconcile the competing demands of rights bearers were not courts but local representative bodies: legislatures and juries. Indeed, juries were considered a vital democratic body on a par with the assembly. Every one of the twelve states that had a written constitution at the time the Bill of Rights was ratified protected the right to trial by jury . . . The legislature and jury together, wrote John Adams twenty-five years earlier, in 1766, hold "wholly, the liberty and security of the people." Comprising ordinary citizens who, through their votes, had the power to nullify executive actions *by construing the law or the facts in line with community norms, juries were a people's congress*.[113]

There is considerable evidence that, until the Supreme Court of the United States' ruling in *Sparf and Hansen v United States*,[114] American juries were

110. See *supra* note 1 at 824.

111. See Jane Errington, *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology* (Montreal & Kingston, ON: McGill-Queen's University Press, 1987); Gerald M Craig, *Upper Canada: The Formative Years, 1784-1841* (Don Mills: Oxford University Press, 2013).

112. Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Boston: Houghton Mifflin Harcourt, 2021) at 27 [emphasis added]. See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998) at 88–95; Albert W Alschuler & Andrew G Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61:3 U Chicago L Rev 867.

113. Greene, *supra* note 112 at 12 [emphasis added].

114. 156 US 51 (1895). The dissenting opinion in *Sparf* relied on a paper by Samuel L Quincy, "Powers and Rights of Juries" in Josiah Quincy Jr, *Reports of Cases Argued and Adjudged*

regarded as triers of law as well as fact.[115] Judges frequently instructed juries that it was their responsibility to decide questions of law, and counsel would often direct legal arguments at them. Both Alexander Hamilton and John Marshall proceeded on this basis.[116] Insofar as juries were told to follow the trial judge's instructions on the law, and convicted on this basis, appellate courts sometimes took the view that this was reversible error.[117]

It is less obvious that nineteenth-century Canadian criminal juries were thought entitled to make findings of law. The historical record simply is not all that clear on the point.[118] Unofficially, though, there are signs. Paul Romney has observed that defense counsel in *Milne v Tisdale* argued that "the jury was judge both of law and fact".[119] Later, Charles Fothergill published a new edition of Hawles' *The Englishman's Right*—retitled as *The Canadian's Right the Same as the Englishman's*. That tract, recall, propounded the view that juries functioned as triers of fact and law.[120] One should remember, too, that much of the population of British North America was comprised of people who had emigrated from America after the Revolution.[121] Many would have been familiar with the idea of the jury as law-finder.

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in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772 (Boston: Little, Brown and Company, 1865) at 558–72 [*Sparf*].

115. See Mark DeWolfe Howe, "Juries as Judges of Criminal Law" (1939) 52:4 Harv L Rev 582. But see Stanton D Krauss, "An Inquiry Into the Right of Criminal Juries to Determine the Law in Colonial America" (1998) 89:1 J Crim L & Criminology 111 (surveying the available sources from Colonial America and concluding that they are ambiguous as to the jury's right to making findings of law).

116. See *People v Croswell*, 3 Johns Cas, 337 NY 1804 at 355; Hetzel, *supra* note 109 at 29–30, (drawing upon David Robertson, ed, *Trial of Aaron Burr for Treason* (New York: James Cockcroft & Company, 1875); *United States v Chapels*, 25 F Cas 399 at 403 (Va Cir 1819).

117. See Hetzel, *supra* note 109 at 25–26.

118. Indeed, the 1792 Act establishing trial by jury in Upper Canada expressly stated that the jury was to serve as a "trier of fact". See *An Act to Establish Trial by Jury*, 1791 (32 Geo III), c 2, reprinted in WPM Kennedy, ed, *Statutes, Treaties, and Documents of the Canadian Constitution 1713–1929* (Toronto: Oxford University Press, 1930) at 212.

119. See Paul Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture" (1989) 7:1 L & Hist Rev at 132–33 [Romney, "Constitutionalism"].

120. See *ibid* at 133; Sir John Hawles, *The Canadian's Right the Same as the Englishman's* (York, Upper Canada: Charles Fothergill, 1823); Brown, *Trying Question*, *supra* note 7 at 48.

121. On the influence of America on Upper Canada, see Craig, *supra* note 111; Errington, *supra* note 111.

Indeed, some contemporary commentators in Canada claim that certain, now-defunct aspects of the institution—aspects that arguably find their roots in a conception of the jury as a law-finding body[122]—should be resuscitated. The "mixed jury"—or jury *de medietate linguae*—was once used to settle disputes between Englishmen and foreigners.[123] In such cases, half of the jury would be English and half would be drawn from the community of the foreign litigant. Insofar as these were employed in Canada, it was ostensibly to ensure that jurors could understand the testimony and submissions of the parties.[124] But the roots of the mixed jury, as Constable has noted, reach back to the medieval era, when the jury's role of law-finder was well accepted.[125] Following the highly controversial acquittal of Gerald Stanley in 2018, Kent Roach suggested that Canada employ mixed juries in cases involving Indigenous and non-Indigenous persons, arguing that they would ensure that such cases would be resolved, at least in part, with reference to Indigenous law.[126] Where the alleged crime occurred on a reserve, he further argued, the trial should be held in the local community.[127] The clear suggestion is that juries should reflect the local customs and norms of juries.[128]

As the experience in the US suggests, the idea of the jury as law-finder is not terribly strange as a matter of historical fact. At the same time, we are unlikely to find in Canada anything like an official endorsement of the jury as trier of law. That is not because the jury was thought less important to legislatures or rulers in British North America as opposed to the post-revolutionary US. Nothing could be further from the truth. Those in power had a considerable interest in extolling the merits of the English Constitution—of which the institution of trial by jury occupied a central and prominent place—as a guarantee of the liberty of the people that was, if anything, superior to the republican system of

122. See Constable, *supra* note 95.

123. See *ibid*; Deborah A Ramirez, "The Mixed Jury and the Ancient Custom of Trial by Jury *De Medietate Linguae*: A History and a Proposal for Change" (1994) 74:5 BUL Rev 777 at 783–86; James C Oldham, "The Origins of the Special Jury" (1983) 50:1 U Chicago L Rev 137 at 168; Vidmar, *supra* note 2 at 24–25.

124. See *Veuillette v The King* (1919), 58 SCR 414, 48 DLR 158; *MacDonald v City of Montreal*, [1986] 1 SCR 460 at 504, 27 DLR (4th) 321, Wilson J, dissenting; *Cyr v Saskatchewan (Attorney General)*, 2014 SKQB 61.

125. See Constable, *supra* note 95.

126. See Roach, *supra* note 13 at 338–40.

127. See *ibid* at 337.

128. See *ibid* at 337–40.

government devised in America.[129] Yet it was difficult to reconcile the official ideology with the on-the-ground reality of British North America. The point of the jury, so far as official ideology was concerned, was not to give complete control of law and order to the masses. The advantage of the eighteenth- and early nineteenth-century English Constitution, as conceived at the time, was that it was mixed—that it gave a voice to the monarchy, the aristocracy, and the people.[130] This ostensibly lent the British system of government a stability that was thought lacking in post-revolutionary America.[131] It was the influence of the aristocracy and local elites, the fact that juries would be populated by individuals sympathetic to monarchical and aristocratic interests, which made the jury constitutionally palatable in England even after *Bushell's Case*.[132]

In British North America, there was no established aristocracy.[133] And so there was an ingrained suspicion of trial by jury in colonial Canada going well beyond anything in Britain—which, keep in mind, did not itself officially accept the idea of jury law-finding, relying upon judges as a further check on the democratic impulses of the jury.[134] Notably, in America, part of the point of conferring broad powers upon local juries was to constrain the power of judges, who were often thought too sympathetic to centralized authority.[135] Throughout the nineteenth century, this suspicion manifested itself in efforts

129. See Craig, *supra* note 111, ch 2 (on Simcoe's vision for Upper Canada); Errington, *supra* note 111, ch 6; Brown, *Trying Question*, *supra* note 7 at 47; Brown, *The Genesis*, *supra* note 64, at ch 3.

130. See MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford, UK: Clarendon Press, 1967), ch 3.

131. See Waite, *supra* note 41, ch 8.

132. See Romney, "Constitutionalism", *supra* note 119 at 131.

133. See *ibid* at 151–52. The same was true in Colonial America, and this also gave rise to debates concerning whether and how the mixed constitution could or should be transplanted. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967) at 275–77; JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975) at 514–15.

134. See JM Beattie, *Crime and the Courts in England*, *1660–1800* (Princeton: Princeton University Press, 1986) at 378–89, 408; Douglas Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century" in JS Cockburn & Thomas A Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (Princeton: Princeton University Press, 1988) 305; John H Langbein, "The Criminal Trial before the Lawyers" (1978) 45:2 U Chicago L Rev 263.

135. See Greene, *supra* note 112 at 12; Green, *supra* note 74.

to manipulate and influence the composition of juries—and, at times, to resist legislative attempts at reform.[136]

Ultimately, reform came.[137] By the time it did, however, the rise of Responsible Government had made the jury appear somewhat unnecessary and even anachronistic. The case for the jury, as a means of protecting liberty from corrupt government officials, was at its zenith when the government was not directly accountable to the people or to its legislative representatives. When those basic political conditions changed, it was less obvious whether or how jury nullification of the law could possibly be justified.[138]

V. The Not-Quite-Liberal Jury

There were additional—and now familiar—complaints about the use of juries as a result of the liberalization of Canadian political culture.[139] Juries were expensive and inefficient. They yielded inconsistent verdicts and were therefore thought incompatible with the rule of law.[140] The momentum in the nineteenth century was towards greater professionalization in the criminal justice system. Indeed, when the first *Criminal Code* was enacted, it did something that would have been—and still would be—unthinkable in other parts of the Commonwealth: it allowed for appeals against jury *acquittals* on questions of law.[141] Such a means of constraining the power of juries had long been recognized in England in civil cases, but never in the criminal sphere. In Canada, by contrast, the criminal jury's power to acquit on the basis of its own understanding of the law was (officially, at least) given short shrift.[142]

The jury disturbs liberal sensibilities, of course, because it presents the risk that cases will be decided on the basis of factors that are irrelevant according to the text of the statutory offence.[143] It interposes itself between the individual

136. See Romney, "Constitutionalism", *supra* note 119 at 130–31; David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791–1849* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002) at 52–64.

137. See Brown, *Trying Question*, *supra* note 7.

138. See *ibid* at 157.

139. See *ibid* at 114–19, 154–57, 196; Romney, "Constitutionalism", *supra* note 119.

140. See Berger, *supra* note 12.

141. See Romney, "Constitutionalism", *supra* note 119.

142. See *ibid* at 132–36.

143. See e.g. Tatjana Hörnle, "Democratic Accountability and Lay Participation in Criminal Trials" in Antony Duff et al, eds, *The Trial on Trial (Volume 2): Judgment and Calling to Account* (London, UK: Hart, 2006) 135 at 149.

and the sovereign legislature, treating local customs and values—and not, or not only, the norms identified by the legislature—as authoritative. The jury therefore pushes against liberal values of consistency and uniformity, challenging the notion that a given statutory provision should be applied identically across different communities. It also rejects, or at least qualifies, a very modern conception of the rule of law, according to which public decisions are legitimate if and only if they are authorized by statute.[144] As Ben Berger has noted: "Modern liberal constitutionalism carries a strong aspiration to contain every decision within the rule of law."[145] This is, he continues, hard to square with several parts of the criminal justice system, including trial by jury.[146] The power of the jury to acquit the defendant contrary to statute, Berger claims, demonstrates the role of conscience in the criminal justice system. The jury thus harkens back to an age when it was widely appreciated that justice is not, and cannot be, reduced to mere rule-following.[147]

Here, I want to urge a somewhat different understanding of the jury; not as an institution that, strictly speaking, *nullifies* law when it acquits contrary to statutory language—that opposes reason to conscience—but that gives recognition to another, much older conception of law as custom (or *lex non scripta*).[148] In doing so, we begin to see that juries that acquit contrary to statute may be engaged in more than sheer lawlessness; that, on the contrary, they are speaking on behalf of local communities to Parliament. To reimagine such exercises of power as legitimate, however, one must re-examine them in light of the principle of subsidiarity. As Maria Cahill has observed, the principle is in important respects an answer to liberalism.[149] By recognizing the independent authority of groups and local communities, taking seriously political relationships that are thicker than those between the individual and the state, the principle of subsidiarity resists liberal tendencies to emphasize state sovereignty to the exclusion of other intermediate sources of authority

144. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed (London, UK: Macmillan, 1893).

145. Berger, *supra* note 12 at 581.

146. Berger also points to prosecutorial discretion and the prerogative of mercy as inconsistent with the "modern constitutional imagination". It is telling that prosecutorial discretion, like the jury trial, is exercised at a distinctly *local* level.

147. See Berger, *supra* note 12 at 582.

148. Postema, *supra* note 81 at 23–27.

149. See Cahill, "Attraction to Subsidiarity", *supra* note 31. For a masterful discussion of the competing strains within liberalism—between, on one hand, its emphasis on centralizing and rationalizing authority and, on the other, its emphasis on pluralism and group rights—see Jacob T Levy, *Rationalism, Pluralism, and Freedom* (Oxford, UK: Oxford University Press, 2015).

and power.[150] In short, we have more, not less, reason to tie the jury to the principle of subsidiarity insofar as the former strikes us as opposed to liberal currents of thought.

The very idea of juries acting upon local values will give rise to concerns. Tatjana Hörnle has expressed doubts: "Central principles like gender equality, equal treatment of different religions . . . autonomy and personal responsibility, etc., should not be challenged with reference to 'local values'."[151] The experience of the American South demonstrates the dangers of leaving racial minorities at the mercy of local majorities.[152] The concerns are real. They can, however, be overstated. Local communities are not entitled to ignore morality or fundamental values at the expense of local minorities. But nor are federal legislatures entitled to ignore the values and customs of local communities, treating them as irrelevant.[153] The principle of subsidiarity may require Parliament to do more by way of educating or persuading local communities, or entail greater clarification of the language in criminal offences. In these and other ways, federal legislatures may engage in a sort of dialogue with local communities.[154] One can, however, accept the idea of subsidiarity without abandoning citizens to local tyrants.

Moreover, and for the avoidance of doubt, the principle of subsidiarity does not require juries to have the power to *convict* defendants contrary to statute. Subsidiarity guarantees that local communities can help shape the values and norms codified by the central legislature. It does not entitle local communities to circumvent the legislature completely. The point of the principle of subsidiarity is not to render central institutions superfluous or irrelevant. On the contrary, it presupposes that local communities, and the people who live in them, will often *need* central institutions for support. As we have seen, much of the value of the jury lies in the fact that it strengthens relationships of national citizenship such that they are experienced as more than bloodless, empty abstractions. Its value would, in an important sense, be undercut if the jury could sidestep the statutory constraints imposed by the elected legislature, since this would effectively send the message that there are no bonds of citizenship beyond the local. For this reason, my analysis sits happily alongside a judicial power to direct verdicts of acquittal.[155]

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150. See Cahill, "Attraction to Subsidiarity", *supra* note 31 at 113–15, 126–27.

151. Hörnle, *supra* note 143 at 149.

152. See Greene, *supra* note 112 at 32. See also William H Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964) at 24.

153. See Matravers, *supra* note 70 at 82.

154. See Gerken, *supra* note 22 at 9–10; Matravers, *supra* note 70 at 82.

155. See *R v Arcuri*, 2001 SCC 54.

Finally, it is worth stressing that the jury need not be regarded as the only way to protect or give expression to local customs and norms.[156] I agree with Baker that prosecutorial discretion may also be effective in this role, and may also be defended on subsidiarity grounds.[157] To some extent, this means of protecting local values was more palatable for nineteenth-century politicians; in principle, it made provincial ministers accountable to their respective legislatures for charging decisions, and could therefore be more easily reconciled with sovereignty.[158] But for that same reason, prosecutorial discretion is arguably an imperfect mechanism for ensuring that local values are given expression in the criminal justice system. One would expect the provincial legislature to be somewhat less remote than the federal Parliament, however, this is not obviously the sort of direct engagement with the local community that one finds with the criminal jury. Furthermore, precisely because prosecutorial discretion may be used to weed out cases before they ever get to a public hearing, it may well stifle the voice of the local community. Thus, prosecutorial discretion, though it can be defended on subsidiarity grounds, arguably represents a far less radical manifestation of the principle of subsidiarity than the jury.

Conclusion

Many will instinctively recoil at the notion of the jury serving in anything like a law-finding capacity, giving expression to local values, resisting the centralizing tendencies of the constitution and the *Criminal Code*. But the jury is far older than Canada, or Responsible Government, or liberalism, or modern conceptions of sovereignty. It recalls an era when the law was not dominated by professional judges and powerful central legislatures. As a legal and cultural inheritance from a long-ago age, we should not expect the jury to reflect modern sensibilities. And, as I have tried to show, this picture of the jury as a local institution is consistent with other dimensions of Canada's constitutional system of arrangements. Indeed, there is increasing recognition that Canadian

156. John Milton, having backed away from arguments that the jury should assume something like this role, proceeded to claim instead that judges should be locally chosen by the community. See Alison A Chapman, *Courts, Jurisdiction, and Law in John Milton and His Contemporaries* (Chicago: University of Chicago Press, 2020), ch 7.

157. See *supra* notes 42 and accompanying text.

158. See Romney, *Constitutionalism*, *supra* note 119 at 163–64. Whether, and to what extent, such a position could now be true in light of the Shawcross doctrine, is a point I set aside for now.

federalism cannot be fully appreciated except through the lens of the principle of subsidiarity. That is certainly no less true in the criminal context, where highly contested questions about moral blameworthiness are in play, leading local communities to occasionally clash with federal statutes. That being the case, it may make sense, as we (re-) evaluate the role of the jury in the Canadian criminal justice system, to consider not only its role as a fact-finder, but its role in local communities and in our national political landscape.