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Should We Reform the Jury? An Australian Perspective

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SHOULD WE REFORM THE JURY? AN AUSTRALIAN PERSPECTIVE

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Abstract: Jury trials are a necessary part of American and Australian jurisprudence. However, critics question whether both jurisdictions should consider eliminating or reforming jury trials. High-profile jury cases in Australia and the United States elicit criticism regarding the ongoing relevance of the institution. Jury trials function differently in both countries and hold different levels of public trust in the institution. Despite the criticisms of jury trials, neither country has engaged in serious conversations to abolition this ancient institution. This article discusses the trials of Lindy Chamberlain and Cardinal George Pell, placing the use of criminal jury trial in their ancient English historical perspective demonstrating the evolutionary nature of criminal jury trials. Despite the recognized importance of citizen participation in the criminal justice system, there have been constant changes to the jury trial as Anglo-American societies try to mitigate unjust results in criminal jury trials. Some injustices seem to flow from media involvement for or against the accused. Judges may make an active effort to protect juries and by proxy defendants. Jury trials are the preferred Anglo-American means of deciding criminal cases since jurors are viewed as a democratic representation of society. However, does that mean the decisions of jury trials should be treated as inviolable? Due to issues of mistrial by actions of the jury, appeals against their verdicts have been allowed in Australia since 1912; however, appellate judges have been reluctant to upset jury verdicts. This article addresses whether jury practice should be reformed to reduce verdicts that convict the innocent and how the jury process should be reformed. This article's primary recommendation is that jury panels receive additional education before they begin criminal trials.

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I. INTRODUCTION

This article addresses whether jury verdicts should be non-appealable in four parts. Part I analyzes the *Chamberlain* and *Pell* Cases, as well as reviews the facts and decision in *M v. The Queen,* which is widely considered as the High Court correcting its error in *Chamberlain.*

Part II discusses the history and main arguments for the non-appealability legal theory that decisions made by judges are safer because judges are less susceptible to misinformation. This section also identifies two periods of rapid development in the jury as an institution. First, this article identifies the adaptation of the European inquisitorial jury, otherwise known as a presenting jury. And explains how Pope Innocent III prompted the English jury system to utilize juries in criminal cases because Pope Innocent III outlawed clerical involvement in criminal trials in the Fourth Lateran Council. This history refutes the view that *Magna Carta* guaranteed jury trials in criminal cases six months earlier.[1] Second, Part II discusses Queen Mary's efforts to identify and prosecute defendants accused of murdering unpopular officers. Her innovation in appointing Justices of the Peace to identify and prosecute defendants provided insight on a new method of criminal process and thereafter subjected juries to the oversight of judges.

Part III discusses judicial concerns about the risk of unsafe verdicts in criminal cases because technology may increase the risk of verdicts tainted by misinformation. Using the decision in *Hinch,*[2] this article identifies the law relating to criminal contempt and notes that although

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[1] G.R.C. Davis, *The Magna Carta*, LONDON: BRITISH MUSEUM (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation (showing that the first version of Magna Carta was signed six months before the Fourth Lateran Council, with clause 39 stating that "no free man [could] be seized or imprisoned, stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way…except by the lawful judgment of his equals or by the law of the land"); John Cannon & Robert Crowcroft, *Trial by Ordeal*, A DICTIONARY OF BRITISH HISTORY, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803105644353#:~:text=In%20ordeal%20by%20accursed%20morsel,eventually%20replaced%20by%20jury%20trial) (last visited Nov. 1, 2023) (discussing how the criminal jury trial was developed after the Fourth Lateran Council forbade clergy involvement in ordeal trials after November 1215).

[2] Hinch v A-G (1987) 164 CLR 15 (Austl.).

that law applies to publications on social media, it is unlikely to be enforced against most social media breaches. Part II also discusses the increased risk of deliberate breaches since the 2016 presidential election in the United States when the candidates used data harvesting consultancies to increase their votes by the spread of misinformation about their opponents. The article proposes that the deliberate spread of misinformation and prejudicial material may have been a factor in the wrongful conviction of Cardinal Pell in Australia.

Part IV considers the tools that may be used to reduce the risk of tainted verdicts and suggests how the jury could be reformed so that it better accomplishes its purpose. And concludes, that the judiciary should prioritize jury education, in addition to traditional judicial tools for reducing media bias such as adjournment, change of venue, trial severance in cases with multiple defendants, express directions to the jury, and allowing challenges for cause.

II. PART ONE: FAMOUS AUSTRALIAN JURY MISTRIALS—CHAMBERLAIN AND PELL THE CHAMBERLAIN CASE

Lindy Chamberlain was convicted of the murder of her daughter Azaria on August 17, 1980, at a campsite near Ayers Rock in Central Australia. At the first coroner's inquest in December 1980, the magistrate and coroner determined that Lindy told the truth when stating that a dingo took and killed her baby, and that neither parent was involved in nor responsible for Azaria's death.[3] In November 1981, the Supreme Court of the Northern Territory quashed the findings of the first inquest.[4] A second inquest was ordered because a forensic expert, believed that the tear on Azaria's jump suit was more consistent with a cut by scissors than a dingo bite. At that second inquest, a biologist testified that she had found fetal blood beneath the passenger seat in the Chamberlain's car. Though the second coronial inquest in December

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[3] Douglas O, Linder, *The Trial of Lindy and Michael Chamberlain ("The Dingo Trial")*, FAMOUS TRIALS, https://www.famous-trials.com/dingo/457-home (last visited Nov. 1, 2023).

[4] John Lowndes, *The Need for a Further Inquest into the Death of Azaria Chamberlain* (Dec. 13, 1995), https://justice.nt.gov.au/__data/assets/pdf_file/0008/206675/azaria-chamberlain3.pdf.

1981 by Coroner Gerry P. Galvin was not formally completed, Coroner Galvin found that Azaria's death was a homicide. On the strength of those findings, both Chamberlains were committed for criminal trial in the Supreme Court of the Northern Territory.

Justice Muirhead presided over an all-white jury chosen from 123 territorians.[5] The trial began on September 13, 1982, and the jury announced its guilty verdict on October 29, 1992.[6] Because Northern Territory jurors were not prohibited from talking about their deliberations, some discussed the case with media representatives.[7] One juror stated that "the jury was initially considerably more divided that its verdict indicated, having first split four for conviction, four for acquittal, and four undecided."[8] Ultimately, the jury's decision hinged on whether they believed a dingo murdered the baby.[9]

Justice Muirhead sentenced Lindy to life imprisonment, but suspended Michael's accessory after the fact conviction.[10] Lindy gave birth to their second daughter one month after she began her sentence, and appealed to the Full Federal Court on the grounds that "a miscarriage of justice ha[d] occurred or that it was otherwise unsafe or dangerous to allow the verdict to stand."[11] The court dismissed Lindy's appeal in a unanimous vote.[12] After leave was granted to further appeal to the High Court of Australia, that appeal was dismissed 3-2.[13]

Chief Justice Gibbs and Justice Mason explained the basis upon which the judges who dismissed the appeal interpreted their obligations. First, the standard applied is "whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal…"[14] Moreover, when the Court of Criminal

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5 Linder, *supra* note 3.
6 *Id.*
7 *Id.*
8 *Id*.
9 *Id*.
10 *Id.*
11 Chamberlain v The Queen [No. 2] (1984) 153 CLR 52134 (Austl.) (Gibbs CJ and Mason J).
12 *Id.* at 523.
13 *Id.* at 521–22.
14 *Id.* at 534.

Appeal states "that it was unsafe or dangerous to convict" they are otherwise saying "that a reasonable jury should have entertained such a doubt."[15] The High Court continues:

> The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion.[16]

Justices Gibbs and Mason said that they would not disturb a jury verdict unless they considered themselves specifically directed by a statute to do so. But they explained further. They said that whether an appellate court disagreed with a jury verdict did not matter much in practice because the jury always had an advantage over an appellate court because it could see and assess the credibility of witnesses at trial:

> [t]hat will not generally be the case where questions of credibility are decisive. However, whether it matters from a practical point of view or not in a particular case, it is not unimportant to observe the distinction - *the trial is by jury, and (absent other sources of error) the jury's verdict should not be interfered with unless the Court of Criminal Appeal concludes that a reasonable jury ought to have had a reasonable doubt*.[17]

However, both justices still acknowledged that the words of the existing statute obliged the appellate court to "interfere" with a jury verdict if a "reasonable jury ought to have had a reasonable doubt. It is difficult to understand what more "express statutory provisions" they thought would have justified them in interfering with the verdict in the *Chamberlain Case*.

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15 *Id.*
16 *Id.* (emphasis added).
17 *Id.* (emphasis added).

Justice Gerard Brennan of the Australian High Court majority separately defended the jury in the *Chamberlain* trial at length. His defense of the jury is summarized in the following passage:

> An appellate court cannot speculate upon what facts were found; it cannot interfere with a verdict if an inference could safely have been drawn from primary facts which the jury were entitled to find beyond reasonable doubt…An appellate court will give more anxious consideration to a verdict of guilty where the basis of primary fact is thin and the room for inference is large, but the test for determining whether the inference was lawfully drawn is constant: upon the facts which the jury were entitled to find beyond a reasonable doubt, could a reasonable jury, employing their critical judgment of men and affairs, have been satisfied that the inference of guilt was the only inference to be drawn.[18]

Justice Brennan thus found it unlikely that an appellate court would unsettle a jury verdict and in *Chamberlain* he did not consider there was any basis to do so.

Though Justice Lionel Murphy in dissent considered that the appeal should be allowed because he considered it was "unsafe to conclude there was fetal blood in the car."[19] He defended the jury system overall. He said:

> The jury is a strong antidote to the elitist tendencies of the legal system. It is "the means by which the people participate in the administration of justice"…The greatest respect should be given by appeal courts to jury verdicts and any attempt to downgrade the jury to a mere nominal or symbolic role should be restricted.[20]

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18 *Id.* at 600 (Brennan J).
19 *See id*. at 576 (Murphy J) (internal citation omitted).
20 *Id*. at 569.

While Justice Murphy thought the High Court should have interfered with the jury verdict in *Chamberlain*, he did not think the jury's error in that case was any reason to criticize the jury system overall.

Justice Lionel Murphy's concern about the possibility of jury error has greater significance because that possibility was recognized by the unanimous High Court in the *Pell Case*. Justice Murphy explained that since, juries will occasionally make mistakes,[21] the power of criminal appellate courts to set aside convictions extends to instances "not only where the judge wrongly admitted or rejected evidence, or misdirected the jury, but also where although there was evidence which could justify the verdict, the appeal court considered it unsafe."[22] Thus, criminal appellate courts serve as a "further safeguard against mistaken conviction of the innocent."[23]

In his separate dissent, Justice Deane observed that the High Court of Australia's consideration of appeals from jury verdicts in criminal cases allowed two different approaches. He noted in the 1922 *Ross* case, that the High Court said:

> "if there [was] evidence on which reasonable men could find a verdict of guilty, the determination of the guilt or innocence of an accused [wa]s a matter for the jury and … no Court or Judge ha[d] any right or power to intervene."[24]

In a different line of cases, the High Court held:

> that the appropriate question for the appellate court is not whether the appellate court can say that no reasonable jury could properly have reached a finding that the accused was guilty but whether the appellate court is persuaded that the verdict of guilty is unsafe and unsatisfactory or "dangerous in the administration of justice" for the reason that there is a significant and not fanciful possibility that an innocent person

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21 *Id.*
22 *Id.*
23 *Id.*
24 *Id*. at 618 (Deane J) (quoting Ross v The King (1922) 30 CLR 246, at 255–56 (Austl.)).

> has been convicted in that, notwithstanding that the jury which saw and heard the witnesses give their evidence was persuaded of guilt beyond reasonable doubt….[25]

He preferred this latter view, as expressed by Chief Justice Barwick in *Ratten*,[26] with the unqualified agreement of two of his colleagues on the High Court Bench, McTiernan and Jacobs JJ.[27]

It is evident from these results, a contrary jury verdict, and two unsuccessful appeals to Australia's highest courts, that the legal system did not provide Lindy Chamberlain with justice between 1982 and 1986 despite the contrary views of Coroner Barrit, and Justices Murphy and Deane in the High Court. However, the unfortunate death of David Brett, an English tourist, while climbing Uluru in January 1986 led to Lindy's immediate release from prison. That was because, in the words of Douglas Linder:

> Eight days after his accident, Brett's body was discovered below the bluff where he had lost his footing, in an area full of dingo lairs. As police scoured the area, looking for missing bones that might have been carried off by dingoes, they discovered a once white jacket of a baby: Azaria's missing matinee jacket.[28]

Lindy's assertions that Azaria was wearing this matinee jacket on the night of her disappearance had screened on every television and in every newspaper in Australia. The Chief Minister of the Northern Territory ordered her immediate release from prison. "Lindy climbed into a limousine at the gates of Berrimah prison on February 7, 1986, and tried to begin a second life."[29]

Justice Trevor Morling was then appointed to head an independent judicial inquiry and in May 1987 he handed down his 379-page report.[30]

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25 *Id.* at 618–19.
26 *Id.* at 622.
27 *Id.* at 619.
28 Linder, *supra* note 9.
29 *Id.*
30 *Id.*

He was particularly critical of the investigatory and forensic techniques of Joy Kuhl and James Cameron that were displayed to the jury at the trial. There was no reason why the credible accounts of Chamberlain's fellow campers at Uluru that night should not have convinced the jury, nor was there any reason why Lindy should not have been believed since no one suggested any compelling reason why she would suddenly kill her daughter.[31] Nonetheless, on September 15, 1988, the Northern Territory Court of Criminal Appeals unanimously quashed both convictions. Lindy later received $1.3A from the Northern Territory government in 1996 as compensation for wrongful imprisonment.[32]

In addition, the High Court of Australia said nothing directly about the matter despite the fact that it had upheld the conviction by a 3-2 majority in 1984.[33] However, its decisions in two subsequent cases are widely considered as a corrective.[34] When appeals are lodged against jury verdicts in criminal cases in Australia, both the common law and criminal appeals statutes around the nation require the appellate court to consider the evidence the jury heard objectively when they decide the appeal. In the dissenting words of Justice Deane in the Chamberlain's second and final appeal, the task of the appellate court was not to decide "whether [any]…reasonable jury could properly have reached a finding that the accused was guilty," but whether – "the evidence…establish[ed] the guilt of the accused" beyond reasonable doubt.[35]

The two subsequent cases where the High Court is considered to have corrected itself though it did not expressly say so are *Chidiac* (1991) and *M* (1994).

A. Chidiac v. The Queen (1991)

In *Chidiac* in 1991, two persons convicted by a jury of importing heroin into Australia from Malaysia via the Solomon Islands had their

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31 *Id.*
32 *Id.*
33 *Chamberlain, supra* note 11, at 521–22.
34 R v Chidiac (1991) 171 CLR 432 (Austl.); M v The Queen (1994) 181 CLR 487 (Austl.).
35 *Chamberlain, supra* note 11, at 618 (Deane J).

appeals unanimously rejected by both the New South Wales Court of Criminal Appeal and the High Court of Australia.[36] They appealed on two grounds: first, that the trial judge had not adequately instructed the jury about the need for corroboration of the testimony of accomplice witnesses; and second, in light of the accomplice testimony, no reasonable jury could have found them guilty of the crimes charged beyond reasonable doubt. The warning that Judge Smyth gave the jury about the witness testimony which the jury accepted at the original trial, was as follows:

> You as judges of fact have got to decide whether these two self-confessed liars have told the truth or not. What I am bound to tell you is that being accomplices as they are that it is dangerous to convict on their evidence unless it is corroborated. Not only are they accomplices, not only are they down and out villains, not only are they drug smugglers themselves but they are self-confessed perjurers and liars. I have been sitting on these courts for something like eight years and I have never heard two witnesses so readily admit they have lied on oath. Now, that does not mean to say that they may not be telling the truth, but what I am saying to you is you will look very carefully at what they said before you would hang a dog on their evidence. Really, it is really appalling and you heard it all as much as I did.[37]

It is difficult to imagine how Judge Smyth could have better tailored his warning about the risks involved in believing the unreliable evidence which the prosecution had called. The defense none-the-less asserted that the corroboration warnings Judge Smyth gave were unsatisfactory. None of the appellate judges agreed. There had been ample corroboration and though Judge Smyth had not said that each of the items he mentioned required corroboration, the jury still convicted the defendant despite the strength of the judicial warning.

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36 *Chidiac*, *supra* note 34.
37 *Id.* at 434.

Three of the five High Court judges in the *Chidiac* appeal were involved in the *Chamberlain (No 2) Case*, [38] Mason and Dawson JJ served on the court, and McHugh KC was counsel for Lindy Chamberlain. In the *Chidiac* appeal, now-Chief Justice Mason explained the role of appellate judges in an appeal against a jury verdict referencing the words of his dissenting colleague Deane J in the *Chamberlain (No 2) Case*:

> "[i]t is not the function of the court to substitute itself for the jury and re-try the case…Rather …the court [must] determine whether there is a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof."

While,

> "issues of credibility and reliability or oral testimony [we]re for the jury …occasions do arise when a jury proceeds to conviction when the Crown rests upon oral testimony which is so unreliable or wanting in credibility, that no jury, acting reasonably, could be satisfied of the accused's guilt to the requisite degree…When that happens the court [wa]s not substituting its view of credibility for that of the jury."[39]

Justice Dawson confirmed that "the test [wa]s whether it was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the accused was guilty." And then citing the *Whitehorn Case* he added that even though the powers of an Australian court of appeal were wide, "they d[id] not…empower a court to set aside a verdict upon any speculative or intuitive basis."[40] He said "[t]he test [wa]s not whether the court itself entertain[ed] a reasonable doubt…but whether a reasonable jury was bound to do so."[41] It was

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[38] *Chamberlain*, *supra* note 11, at 521.

[39] *Id*. at 443–44.

[40] *Id.* at 451–52 (citing Whitehorn v The Queen (1983) 152 CLR 657, 689 (Austl.); Carr v The Queen (1988) 165 CLR 314, 331 (Austl.)).

[41] *Id.*

not for the appellate court [to] substitute its assessment … for the assessment which the jury."[42]

Newly appointed High Court Justice McHugh added:

> the Court must make an assessment of what it thinks a reasonable jury would have made of the evidence…the Court must itself examine the nature and quality of the evidence for the purpose of determining whether a hypothetical reasonable jury would have accepted sufficient of the evidence to be satisfied beyond reasonable doubt of the guilt of the accused… the Court is entitled to hold that, despite the jury's verdict, a reasonable jury would not have accepted the evidence.[43]

All three of these High Court judges went to some trouble to explain the role of judges required to consider an appeal against a jury verdict. In such appeals, judges do not put themselves in the shoes of the jurors and decide whether their verdict was reasonable. The task of an appellate judge considering an appeal against a jury verdict under the statute authorizing such appeals is to objectively consider whether this jury should have made this beyond reasonable doubt decision given all the evidence they heard. If reasonable doubt remained, then the appellate panel must acquit.

B. M v. The Queen (1994)

M v. Queen in 1994 was an appeal following an incest conviction by a jury.[44] Five of the seven judges sitting in the High Court of Australia held that the appellate court must ask whether it thinks that on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[45] In that assessment, they had to remember and consider that the jury had the benefit of seeing the

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42 *Id.*
43 *Id*. at 461–62.
44 M v The Queen (1994) 181 CLR 487, at 488 (Austl.).
45 *Id.* at 487.

witnesses. In most cases, a doubt experienced by an appellate court would be a doubt the jury should also have experienced. In their joint judgment, Chief Justice Mason and Justices Deane, Dawson and Toohey said that "the question the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[46] This jury should have experienced reasonable doubt, because neither doctor found evidence of rape.[47] Neither doctor found rape because (1) the complainant's hymen was intact; (2) the accused's wife was in the next room on the other side of an unlocked door watching television; and (3) the bed on which the rape was said to have taken place was very squeaky.[48] Thus, the accused's denials were not discredited. There were large inconsistencies in the complainant's evidence, and she had not complained about this assault at the time even though she had experienced no difficulty in complaining about other alleged assaults immediately.[49]

C. Pell v The Queen (2020)

On December 11, 2018, Cardinal Pell was convicted of various counts of abuse of a male minor on dates between July 1996 and February 1997 in St. Patrick's Cathedral in Melbourne.[50] An earlier jury was unable to reach a verdict three months previously.[51] After the second jury trial, Cardinal Pell appealed to the Victoria Court of Appeal. The appeal was heard by the Chief Justice of Victoria, Christine Ferguson, the President of that Court of Appeal, Chris Maxwell, and Justice Mark Weinberg who has been credited as one of Australia's most experienced criminal law jurists.[52] The jury

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46 *Id.* at 493.

47 *Id.* at 495; *see also id.* at 509.

48 *Id.* at 495; *see also id.* at 509.

49 *Id*. at 495–500.

50 Pell v The Queen (2020) 268 CLR 123, at 136 (Austl.). The counts were one charge of sexual penetration of a child under the age of 16 and four counts of committing an act of indecency with or in the presence of a child under the age of 16.

51 *Id.* at 136.

52 Pell v The Queen (2020) 268 CLR 123 (Austl.); Jeremy Gans, *Pell's judges*, INSIDE STORY (Jun. 3, 2019), https://insidestory.org.au/pells-judges/.

conviction was upheld on that first appeal 2-1 with Justice Weinberg dissenting.[53]

On further appeal, all seven judges of the High Court of Australia unanimously overturned Pell's conviction. The court described the standard for determining whether the verdict of the jury may be overturned:

> The function of the court of criminal appeal in determining a ground that contends that the verdict of a jury is unreasonable or cannot be supported having regard to the evidence…proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether…[it] is satisfied that the jury, acting rationally, ought…to have entertained a reasonable doubt as to proof of guilt.[54]

They continued:

> [T]he issue for the Court of Appeal was whether the compounding improbabilities caused by…unchallenged evidence…required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt…Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to charges one to four that an innocent person has been convicted.[55]

There was also "evidence which ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant's guilt of the offence charged in the second incident."[56]

The Court of Appeal below had erred by engaging in possibility analysis, which did not engage with its statutory task of determining whether there was reasonable doubt as to the applicant's guilt.[57]

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53 *Id.*
54 *Id*. at 145.
55 *Id.* at 164–65.
56 *Id*. at 166.
57 *Id.* at 162–63.

D. Summary of Australian Case Law on Appeals from Jury Verdicts

The High Court's reasoning in the *Pell Case* summarized how appellate courts should proceed when they hear appeals from jury verdicts. Jury verdicts are not inviolable–they make mistakes. Appellate courts in Australia must overrule jury verdicts when the jurors should have entertained a reasonable doubt regarding the defendant's guilt considering all the evidence that they heard.

A natural sequitur to this recognition that juries make mistakes is to infer that judge-alone decisions are safer because judges are more experienced in identifying reasonable doubt. However, the record provided in these Australia cases suggests that appellate judges are no better at identifying reasonable doubt than lay jurors. Certainly, the High Court was unanimous in the final *Pell* appeal in 2020.[58] However, it is now accepted in Australia that six of the eight appellate judges who heard Lindy Chamberlain's case and two thirds of the appellate judges who heard Cardinal Pell's appeal in the Victorian Court of Appeal misapplied that law.[59] Ian Barker QC was the successful prosecutor in the Lindy Chamberlain case. Twenty years after his success in that prosecution, he gave a public lecture in which he defended the Australian jury. He said:

> The administration of justice is poorer for exclusion from it of the people it serves. Unchecked by juries, judges lose a connection with their community. Unrefreshed by juries, presentation of judicial decisions as reflective of community standards may depend on a legal fiction that judges are representative of the community. Unaided and unprotected by juries, judges are easy prey to crusaders in the mass media,

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[58] *Id.*

[59] See e.g., *George Pell, Lindy Chamberlain: Injustices like these must not be allowed to happen again*, Rule of Law Institute of Australia, https://ruleoflawaustralia.com.au/commentary/george-pell-lindy-chamberlain-injustices-like-these-must-not-be-allowed-to-happen-again/ (last visited Nov. 1, 2023).

> including arbiters of public opinion on talkback radio and judge-bashing politicians.[60]

In the U.S., John Gleeson, a former district court judge in the Eastern District of New York and a prosecutor in the *Gotti* case said:

> A juror's world is not in the courtroom, but when people are selected for jury service, they take their roles seriously, listen to the judge, and respect the process…If I ever find myself on trial, I'd take 12 jurors over just one of my colleagues any day of the week. Not because I don't trust judges to do right by the law, but because I believe in the process. Jurors are just as good as judges at resolving disputes of facts. Plus there are 12 of them. Each one brings his or her own unique human experience and perspective, and working together they deliver the best form of justice.[61]

Judge Gleeson expressed the same confidence in the criminal jury system that Ian Barker QC expressed in Australia. While juries make mistakes, there is more protection for those accused of crime when juries decide their cases than when judges hear their appeals. In part that greater protection is the product of the unanimity requirement. Even when majority jury verdicts are allowed, that majority requirement is greater than the simple majority requirement that applies when an appellate panel of judges decides the case.

Part Two closely reviews aspects of the history of the English jury and the arguments that have been advanced for and against its abolition. The purpose of this historical analysis is to show that the English jury inherited in Australia has not been a stationary institution. It was originally developed for criminal use in England when the Pope effectively abolished ordeal trials by forbidding priests to be involved

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[60] Ian Barker, *Sorely Tried, Democracy and Trial by Jury in New South Wales*, FRANCIS FORBES LECTURES 1, 23 (2002) https://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/trial_jury.pdf.

[61] *How Courts Care for Jurors in High Profile Cases*, U.S. Courts (Jan. 24, 2020) https://www.uscourts.gov/news/2020/01/24/how-courts-care-jurors-high-profile-cases.

in them after 1215 A.D.[62] In those earliest days of its existence, the jury did its own fact gathering work. However, because of other developments in English society, it became independent and impartial. Unjust convictions in Australia led to legislation in all states in the early twentieth century,[63] which required appellate courts to consider overturning jury guilty verdicts where there was objective reasonable doubt and the possibility that an innocent person had been convicted.

III. PART TWO: ARGUMENTS FOR AND AGAINST THE ABOLITION OF THE JURY

The English jury has never stood still. There have been periods when change was faster, but the pace of change in medieval times suggests less need for caution than we are apt to exercise in the present. That is, legislators in Australia were not afraid to pass legislation to change the functions of the jury to meet other practical needs, despite natural human deference to history. The period between the Norman conquest in 1066 and the abolition of ordeal trials[64] throughout Europe from 1215 demonstrates the legislature's willingness to change the function of the jury trial. Another period of rapid development occurred during Queen Mary's reign in the 1550s. Her aim was to ensure that cases were brought against those who killed officials administering her laws. Those periods of rapid jury development are briefly discussed before modern arguments for and against the abolition of the jury.

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[62] Ordeal trials were ordered by ancient judicial authorities to determine the guilt of the accused. Such trials took various forms, but the common principle was that the accused would be subject to serious injury, for example, being forced to hold a hot coal till it burned their hand. The hand would then be bandaged and if it healed cleanly, the accused was adjudged innocent. It is festered, the court found the accused guilty, and they were further punished by death or exile. *See also* Theodore F.T. Plucknett, *A Concise History of the Common Law,* BOSTON: LITTLE BROWN & CO 5TH ED, at 113–15 (1956).

[63] *See Criminal Appeals Act 1912* (NSW) (Austl.); *see also Criminal Procedure Act 2009* (Vic) (Austl.).

[64] Theodore F.T. Plucknett, *A Concise History of the Common Law,* BOSTON: LITTLE BROWN & CO 5TH ED, at 113–15 (1956). Before the advent of criminal jury trials, the principal method of determining the guilt or innocence in medieval Europe, including England, involved subjecting them to an ordeal. For example, the court could require them to hold a hot coal which would burn their hand. If the wound healed cleanly, God had spoken, and they were innocent. If the wound festered, they were guilty and savage punishment would follow.

A. Church and State in Europe and England in the Twelfth and Thirteenth Centuries

After William the Conqueror defeated King Harold at Hastings in 1066 A.D and invaded England, he adapted the jury institution he found there to his own administrative purposes in compiling the Domesday Book in England.[65] While there is still uncertainty whether the jury he so adapted was a Scandinavian or a Frankish institution or, more likely, an existing modification of both,[66] it is clear from the analysis that follows that the Norman jury was further adapted after it was introduced into England to enable the identification of those suspected of crime during the eleventh and twelfth centuries. The development of pre-existing forms of the jury was part of the idea of the rule of law and how it continued to develop in England.

At the Fourth Lateran Council in 1215, Pope Innocent III's directed that ordained priests should no longer participate in non-ecclesiastical trials anywhere in the empire.[67] That exclusion was especially important where capital crimes were charged.[68] And the exclusion has been recognized as a cause of the further adaptation of the Norman jury to its fact-finding role in English criminal trials in the early thirteenth century.[69] The decrees of the Fourth Lateran Council expressed grand designs in keeping with the spirit of Pope Innocent III's vision of a righteous world empire: (1) the laws of God's kingdom must be purified; (2) the laws of the kingdoms which comprised God's empire on earth must conform to the doctrine of the church; (3) criminal law and practice must conform to the dictates of holy writ; and (4) priests

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65 *Id.*, at 111.

66 *See* James B. Thayer, *The Jury and Its Development I*, 5 HARV. L. REV. 249 (1892) (tracing the origins of the English jury to the inquisition processes of the Carolingian kings in Germanic law); s*ee also* William Forsyth, *History of Trial by Jury*, JOHN W. PARKER & SON, LONDON 68, 193–94 (1852) (tracing the jury into Anglo-Saxon practices); *see also* Ralph V. Turner, *The Origins of the Medieval English Jury: Frankish, English or Scandinavian?*, 7 J. OF BRIT. STUD. 1, 1, 3, 4 (1969) (noting the Scandinavian origin proposals of Maitland and Vinogradoff, and Hurnard's dismissal of those ideas).

67 Finnbar McAuley, *Canon Law and the End of the Ordeal*, 26 OXFORD J. OF LEGAL STUDIES 3 (2006), at 473, 474–475.

68 *Id.* at 501–04.

69 *Id.* at 474.

and others set apart for sacred religious service must not have blood on their hands.[70] But the Pope did not outlaw ordeal trial directly. He simply banned priestly involvement in ordeal trials. McAuley explains that Pope Innocent III was correcting a vulgar, superstitious, and unscriptural practice which had involved the clergy in all manner of corruption.[71]

Pope Innocent III intended for inquisitorial procedures to "probe the veracity of the accused's protestations of innocence."[72] In England, where King Henry II developed the ancient jury idea in the Constitutions and Assize of Clarendon in 1166 and the Assize of Northampton in 1176,[73] it was not necessary to move to the inquisitorial process the Pope had recommended in Europe in 1206 and 1207.[74] But because the Pope's direction "robbed the ordeal of all religious sanction," Henry III's government directed his justices in England "to make such experiments as they saw fit" to deal with persons charged with crime who previously had been tried by ordeal.[75] Plucknett says that because some English juries had previously been asked to decide whether an ordeal trial should be required and whether an accusation had been brought "maliciously and out of hate and spite," the justices reasoned that they might now ask these presenting or grand juries "the straight question whether the prisoner was guilty or innocent."[76] The English jury system adapted to a new criminal function in the wake of the effective papal ban on ordeal trials in 1215. That adaptation confirms that the English jury inherited in both Australia and the United

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[70] Finnbar McAuley, *Canon Law and the End of the* Ordeal, 26(3) J. OF LEGAL STUD. 473, 484, 491, 498, 507 (2006) (confirming that the Fourth Lateran Council reforms were part of Pope Innocent III's drive for clerical integrity but explains that the blood the Council sought to remove from clerical hands was probably not the bloodshed in legal capital cases, but rather that shed in soldiery).

[71] *Id.* at 477–483, 493.

[72] *Id.* at 496.

[73] Naomi D. Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 THE ENG. HIST. REV. 374, 377–90 (1941) (explaining that the English presentment jury had been borrowed from France and had antecedents in the practice of Ethelred in the 10th century but had been adapted by the Normans who added community fines to ensure the apprehension of those who murdered occupying soldiers).

[74] McAuley, *supra* note 67, at 490, 496–97.

[75] Plucknett, *supra* note 64, at 118–19.

[76] *Id.* at 120.

States has been continuously adapted to social need since Anglo-Saxon and medieval times. The changes that followed the Fourth Lateran Council's exclusion of priests from criminal trial functions in 1215 introduced a completely new role for juries in England and it appears to have caught on within a five year period.[77] The speed of the changes implemented in the jury system shows that jury procedures have been adjusted quickly in some periods of English history and confirms that the Australia legislature should not fear changes to criminal procedures in the future if reform is necessary to improve criminal justice outcomes.

B. Adaptation of the Norman Jury to Criminal Presentation and Fact-finding in the Twelfth and Thirteenth Centuries

Criminal processes were different in England than in the rest of Europe, particularly after the Norman conquest. In England, the population became accustomed to the idea that their peers should be involved in trial process.[78] In the European part of the Holy Roman Empire, trial processes and interrogations were mostly left to the king's officials and judges.[79] Thus, Pope Innocent III's decretals authorizing inquisitorial methods to deal with criminal cases did not provide an obvious and attractive alternative criminal process in England when ordeal trials were practically outlawed.[80]

Under Norman standards, senior locals were not viewed as a reliable source of criminal intelligence. Forsyth states, that accusations had been made by predecessors of grand juries in criminal trials under the laws of the Anglo-Saxon King, Ethelred (reigned 978-1013 and 1014-1016).[81] During his reign, twelve senior thanes were required to act as

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77 *Id.* at 121.

78 *See Davis*, *supra* note 1, at 23–33 (showing that clause 39 of the original 1215 version of *Magna Carta* stated that "no free man [could] be seized or imprisoned, stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way…except by the lawful judgment of his equals or by the law of the land").

79 McAuley, *supra* note 67, at 490–93.

80 Plucknett*, supra* note 64, at 118–19.

81 Erik Gregersen, *Ethelred the Unready*, ENCYCLOPAEDIA BRITANNICA (2016), https://www.britannica.com/biography/Ethelred-the-Unready.

public prosecutors with "the duty of discovering and presenting the perpetrators of all crimes within their district."[82] But Forsyth doubted whether this duty in Ethelred's law counted as proof that the origins of the jury might be found in Anglo-Saxon practice.[83] However, if Ethelred's law does prove that the English jury had Anglo-Saxon as well as Norman antecedents, then the Norman innovation was to use the Anglo-Saxon presentment jury for administrative purposes.[84] While the Anglo-Saxon jury institution appeared to be popular because it captured community sentiment, it was still subject to abuse since it was susceptible to rumors and vendettas.[85] The Norman introduction of trial by battle in criminal cases appeared to be less popular because it discouraged neighborhood communication, which was the foundation of the Anglo-Saxon presentment jury, and accusers were not keen on fighting notorious criminals.[86]

Due to the unpopularity of trial by battle in criminal cases, Henry II (reigned 1154-1189) began to reform criminal law in the *Assize* and *Constitutions of Clarendon* in 1164 and 1166 and again in the *Assize of*

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[82] Forsyth, *supra* note 66, at 193–194.

[83] *See id*. at 67–68 (showing that Sir Francis Palgrave thought the connection was obvious); *see also* Hurnard, *supra* note 73, at 374, 376–78 (noting further that while the "Saxon, Danish, and Norman kings all took measures to secure the arrest and punishment of criminals" and that Ethelred's system of presentment remained unchanged through into Norman times, the Saxon kings probably "borrowed this practice of communal accusation from France" "[w]ithout adopting the whole system of inquest and recognition"); *see also Forsyth*, supra note 66, at 194 (manifesting his own uncertainty about the Anglo-Saxon origin of the jury as it developed from Norman times when he stated, "[t]his office, however, seems to have fallen into abeyance, at all events after the invasion of the Normans; and accusations of crime were left to the general voice of the neighbourhood denouncing the guilt of the suspected person.")

[84] Thayer, *supra* note 66, at 249, 251–252; *see also* Clarance Ray Jeffery, *The Dev. of Crime in Early English Soc'y*, 47 THE J. OF CRIM. L., CRIMINOLOGY, & POLICE SCI. 647, 653, 659 (1957).

[85] *See e.g.*, Thomas A. Green, *The Transformation of Jury Trial in Early Modern England*, in VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVE ON THE ENGLISH CRIM. JURY TRIAL 1200-1800 1, at 65–6 (U.Chi. Press 1985) (noting corruption plagued Norman juries after 1200); *see also* Forsyth, *supra* note 66, at 83–110 (discussing the nature of Anglo-Saxon criminal indictment processes).

[86] The Normans introduced trial by battle almost immediately after the conquest. Trial by battle in land matters only lasted till 1179 when King Henry II abolished it in the Council of Windsor. Peter T. Leeson, *Trial by Battle*, 3 J. OF LEGAL ANALYSIS 341, 369 (2011) (internal citation omitted); *see also* Thayer, *supra* note 66 at 263–64, 267. Trial by battle endured an alternative way of settling some criminal disputes until at least the fifteenth century; *see also* Jeffery, *supra* note 84, at 659, 661.

Northampton in 1176. While it is difficult to separate out the nature of each of his innovations in those three separate legislative acts, Peter Leeson's insight helps. Leeson proposes that the inquisitorial jury which William the Conqueror used after 1066 to work out property values for taxation purposes, was adapted to determine land disputes following the Council of Windsor in 1179 and practically ended trial by battle. That insight confirms the popularity and utility of the inquisitorial jury as a late twelfth century dispute resolution mechanism fifty years before Pope Innocent III removed the ordeal from all European criminal jurisdictions.[87]

Naomi Hurnard carefully analyzed Henry II's jury reforms between 1164 and 1176.[88] She began by assessing the existing scholarship as to whether the jury had Anglo-Saxon, Scandinavian or Frankish origins and concluded that the Presentment Jury, had been used in criminal matters during the reign of Ethelred as early as the tenth century. However, as Thayer had explained at the end of the nineteenth century, the Normans had used the Presentment Jury for administrative purposes in a manner reminiscent of the European inquisition when they compiled the Domesday Book in the eleventh century.[89] Thayer said Henry II organized the previous irregular use of the jury as an inquisition tool in "the text of certain of his ordinances (assizes)"[90] and

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87 Leeson, *supra* note 86, at 369 (stating "[t]hat council introduced the grand assize as an alternative to trial by battle in real property cases. The new law gave tenants an option: a tenant who didn't want judicial combat to decide his land dispute could put himself on the judgment of his countrymen instead. The grand assize consisted of twelve knights of the shire. It replaced trial by battle with trial by jury.") The overall tenor of Leeson's argument is that trial by battle was an economically efficient way of disposing of disputes about land ownership until a more efficient new method was developed. Trial by battle was efficient before trial by jury because it allocated "contested property to the higher bidder in an all-pay auction" and provided an acceptable spectacle to neighbours when true ownership was unclear. *Id.* at 341–42.

88 Note Ralph V. Turner's deference to her scholarship summarising jury origins in 1968. Turner preferred her reasoning over various other legal historians including Haskins and Maitland and said her analysis was "convincing." Turner, *supra* note 66, at 1, 3–5, 7–10. Helmholz discusses the prevalence of Hurnard's view and Van Caenegem's criticisms but ultimately concludes that the disagreement is only about emphasis and whether Henry II's law and order measures from 1166 should be seen as innovative or mere continuations of existing Anglo-Saxon institutions. R. H. Helmholz, *The Early History of the Grand Jury and Canon Law*, 50 U.CHI. L. REV. 613, 614–616, 626).

89 Thayer, *supra* note 66, at 251–52.

90 *Id.* at 254.

shows how a jury was used to determine whether the towns of Wallingford/Oxford or Abingdon had the prior right to hold a market.[91] However, Hurnard explains Henry II's legislative innovations in much more detail.

Hurnard explained that the Normans had introduced a system of fining the hundred, if a Norman was killed and the institutionalized Anglo-Saxon presentment jury had not accused anyone of the crime.[92] There was no fine in the case of the murder of a proven Englishman; however, there were also practices that allowed persons of well-known bad character to be sent directly to an ordeal trial when they were accused of serious crime.[93] Persons of better character could avoid the ordeal by compurgation[94], unless there were three or more accusers in accordance with the old biblical rules.[95] But Henry II modified the rules in his assizes and insisted that jury accusations should result in ordeal trials in every case, unless there was no question of guilt.[96] In those cases, he provided that punishment should follow without further ado.[97] And those accused by the presentment jury who succeeded at the ordeal, must abjure the realm.[98] These were the innovations of a king pursuing a law-and-order agenda with a vengeance. In the words of Naomi Hurnard:

> at every point the assize [of Clarendon 1166] tightens up the procedure for dealing with robbers, murderers, and thieves; where before no more severe proof than compurgation has been required, now there will be ordeal; and even success at the ordeal is not to bring complete impunity; where there has

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91 *Id*. at 254–55.

92 Hurnard, *supra* note 73, at 385, 390. The hundred was an Anglo-Saxon division of the population for administrative purposes and enclosed enough land to sustain a hundred households. See also Plucknett, *supra* note 64, at 87–89.

93 *E.g.,* appropriation of treasure trove and homicide. *Id.* at 391–97.

94 Compurgation was akin to calling a character witness.

95 *Id.* at 393–4. Mosaic Law in the Old Testament, Deuteronomy 17:5, 6 and 19:15, was reiterated in the New Testament. *See e.g*., Matthew 18:16; 2 *Corinthians* 13:1; 1 *Timothy* 5:19; *Hebrews* 10:28.

96 Hurnard, *supra* note 73, at 396.

97 *Id*.

98 *Id*. at 397.

> been ordeal the testimony of jurors is now to be accepted as final.[99]

Henry II was a law-and-order reformer. He tightened up the law to answer community concern that people accused of crime were avoiding punishment too easily.

In his law reforms, Henry II also sought to deny exemption on grounds of clerical status to those accused of crime.[100] Archbishop Thomas Becket opposed the assertion of jurisdiction over clerics by the King on double jeopardy grounds.[101] Ten years later, perhaps because of the success of his tougher stance on serious crime, King Henry II made further retrospective rule changes, applying the Clarendon rules to lesser crimes—lesser criminals were allowed to stay in England if they successfully negotiated their way through an ordeal trial, but not without losing a member of the body as punishment.[102]

The bottom line for King Henry II thus seems—if it was sufficient for a jury to accuse of a crime, it was sufficient for him. The seemingly automatic referral of those accused by presenting juries to ordeal after 1166 also provides English context for the changes that followed the abolition of ordeal by Pope Innocent III at the Fourth Lateran Council in 1215. Although the Pope had established an alternative proof procedure in criminal matters in Europe between 1206 and 1207,[103] King Henry II in England had given the presenting jury his approval as a fact-finding institution from 1166, and increased its jurisdiction in 1176.[104] Hurnard has summarized that although Henry II's reforms

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99 *Id.*

100 *Id*. at 399.

101 HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 185–86 (Harv U. Press 1983).

102 Hurnard, *supra* note 73, at 396.

103 McAuley, *supra* note 70.

104 *See* R. H. Helmholz, *Compurgation and the Courts of the Medieval* Church, 1 L. & HIST. REV. 1, 11, 23-24 (1983) (stating that King Henry II's effort to take control of all criminal jurisdiction through his Assizes of Clarendon and Northampton in 1166 and 1176 were not immediately successful. The ecclesiastical courts retained criminal jurisdiction in many matters of crime for a variety of reasons including the royal courts provided an inadequate forum or remedy, and when some form of private settlement remained desirable).

seem to have been targeted at "professional thievery and brigandage"[105] and proceeded on simple suspicion,[106] they succeeded because they were "based on the traditional system of communal accusation."[107]

However, there was another element to Henry II's development of the jury before his death at the end of the twelfth century. American historians see in this early development, the differentiation they retain to this day between the grand jury and the petty jury.[108] In this medieval time period, there were two different juries—the jury that accused people of crime, and the jury that decided whether they were guilty or not.[109] It is not clear how and when this differentiation happened.[110] That is, it is not clear at what point courts began to be ask the jury not just who was suspected of crime in their hundred, but whether they were guilty or not.[111] The Encyclopedia Britannica attributes this change to the English Articles of Visitation in 1194 but does not provide references or explain what those Articles said and how that direction changed the function of the jury.[112] Thomas A. Green, mostly relies on the Frederic William Maitland and Roger D. Groot to describe the historical origins of the jury:

> Our best guess is that the hundredmen made presentments…and then exercised discretionary power in the subsequent task of stating who they truly suspected…In private law the grand and petty juries came to dominate; on the criminal side, the jury of presentment was in frequent use. All of these juries, save for the presenting jury, rendered

105 Hurnard, *supra* note 73, at 405.

106 *Id*. at 408.

107 *Id*. at 410.

108 *See* Michael Tigar & Madeleine R. Levy, *The Grand Jury and the New Inquisition*, 50 MICH. STATE BAR J. 693, 695–96 (1971) (noting that the ideological source of the Fifth Amendment guarantees that "no person shall be held to answer for a capital or otherwise infamous crime except upon presentment or indictment of a grand jury.") *See also* Pat Bauer, *Petit* Jury, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/petit-jury#ref181484.

109 *See* Plucknett*, supra* note 64, at 112–13, 120–21; *see also* Thomas A. Green, *The Transformation of Jury Trial in Early Modern England*, in VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVE ON THE ENGLISH CRIM. JURY TRIAL 1200-1800 1, at 5–20 (U.Chi. Press 1985).

110 Green, *supra* note 109, at 10; *see also* Plucknett, *supra* note 64, at 120.

111 Plucknett*, supra* note 64, at 120.

112 Pat Bauer, *supra* note 108.

> verdicts on the subject of guilt or innocence, or on some other dispositive question of fact…By 1215…there was ample precedent for putting substantial laymen on oath to say whether or not a suspect was guilty of felony.[113]

For Groot and Green, innovative use of the jury "harnessed the prestige and knowledge of the most respected members of local communities"[114] and avoided the inquisition in place of the ordeal which came to rely on tortured confessions as the primary proof of guilt in criminal cases in Europe after 1215.[115]

Green suggested that "the divine aspect of the ordeal . . . [may] have attached to the [jury and its decisions] when it replaced the ordeal after 1215."[116] Whether jury verdicts were ever regarded as the declaration of the will of God is a question beyond the scope of this article. However, it was a small step for the king's justices to ask juries to adjudicate guilt or innocence instead of having a priest administer an ordeal when they were instructed "to make such experiments as they saw fit and gradually feel their way towards a solution."[117] And, in due course, official recognition of jury decisions in criminal cases, made their decisions close to invincible for several hundred years, but that is a different story. In the next section I explain how juries lost their invincibility due to procedural changes that were made during the reign of Queen Mary in the sixteenth century. Once again, this history demonstrates that the jury has never been a stationary institution. The jury inherited from England by both the U.S. and Australia has evolved

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[113] Green, *supra* note 109, at 10–3 (noting that the hundred was a unit of government and taxation in English medieval government between the village and the shire or county, and originally appears to have included one hundred peasant families. The hundredmen were those responsible for the administration of law and order within the hundreds); *see also Anglo-Saxon and Norman society pre-1066*, BBC, https://www.bbc.co.uk/bitesize/guides/zq38tyc/revision/1 (last visited Nov. 1. 2023).

[114] Green, *supra* note 109, at 10.

[115] Roger D. Groot, *The Jury of Presentment before 1215*, 26(1) AM. J. OF LEGAL HIST. 1 (1983) (citing JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF ENGLAND AND EUROPE IN THE ANCIENT REGIME 5–8 (U. of Chi. Press 1976)).

[116] Green, *supra* note 109, at 19; *see also* Larry T. Bates, *Trial by Jury after Williams v Florida*, 10 HAMLINE L. REV. 53, 62 (1987); *see also* Hurnard, *supra* note 73, at 408.

[117] Plucknett, *supra* note 64, at 119.

to meet the changing demands of criminal justice. The thesis of this paper is that jury evolution should continue, and our legislators should not be afraid to pass laws amending the way juries operate just as they have done in the past.

C. Queen Mary's Innovation with Prosecutors and Public Review of Criminal Facts

John H. Langbein suggests that it is unclear how medieval juries became "passive courtroom triers,"[118] but in the light of Langbein's insights, Green is confident that transformation hinged on the rise of public prosecutors in the late sixteenth century.[119] Though previous statutory and judicial attempts to control self-informing juries had utterly failed, the appointment of officials to back up presenting juries in the accusation of suspected criminals was an innovation with unexpected consequences.[120] For the first time in English legal history, it necessitated the public communication of criminal facts in court which jurors did not know beforehand. It is no coincidence that these reforms took place by statute during the reign of Henry VIII's oldest daughter Mary. As is well known, she moved rapidly to reinstate the Roman Catholic Church as the established Church of the State, and she presided over the execution of Thomas Cranmer, the Archbishop of Canterbury for heresy.[121] She became hugely unpopular and the accusations of criminals by presenting juries dried up during her reign.[122] She had to defend her administration and the officials she had appointed to run her government, and so she passed the *Marian bail statute*[123] and *Marian committal statute*.[124] Presenting juries could still initiate criminal prosecutions, but if they did not, these statutes imposed

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118 John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 THE AM. J. OF LEGAL HIST. 313, 314 (1973).

119 Thomas A. Green, *The Transformation of Jury Trial in Early Modern England*, in VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVE ON THE ENGLISH CRIM. JURY TRIAL 1200-1800 105, 106 (U.Chi. Press 1985).

120 *Id*. at 182.

121 DIARMAID MACCULLOCH, THOMAS CRANMER, A LIFE 604 (Yale U. Press, 1998).

122 Langbein, *supra* note 118, at 320–21; *see also* Green, *supra* note 119, at 109–11.

123 1 & 2 Phil. & M. c. 13 (1554-1555) (Eng.).

124 2 & 3 Phil. & M. c. 10 (1555) (Eng.).

obligations on Justices of the Peace (JPs) to investigate and imprison suspects if there was a chance they would turn fugitive.[125]

Langbein says the statutes were a response to growing jury passivity.[126] The new bail procedure required two JPs to examine prisoners, decide whether there was a flight risk and record their findings in writing for the assize judges when they came to town to run formal trials. There were fewer procedural issues if bail was not granted.[127] While JPs had been deciding bail cases previously, the new process required two JPs to officiate in all cases in future and the record required they were now required to make, subjected them to the oversight of the King's Justices.[128] The new committal statute further required the JPs officiating at bail hearings, to require informants and potential witnesses to attend the expected trials with bonds that could be forfeited if they did not appear. Langbein described the process for gathering evidence for trial and bail procedures:

> The examining JP was being formally instructed to gather evidence for trial and to bind witnesses. The Marian committal statute was employing the procedure of the bail statute to a radically different end. The bail statute intended to deter or to detect and punish a corrupt practice among a relative handful of JPs. The committal statute turned the pretrial investigation into a device for the prosecution at trial in every case of felony in the realm.[129]

JPs were chosen as Queen Mary's prosecutors because "well before the Marian statutes the justices of the peace were the officers to whom

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[125] Langbein, *supra* note 118, at 320. It is interesting to ponder whether Queen Mary and her advisors considered reinstating the fines on hundreds by which the Norman conquerors had forced presenting juries to identify those who murdered Norman officials during the eleventh and twelfth centuries. As it turned out, the establishment of official government prosecutors yielded unexpected collateral benefits in enabling judicial control of juries that had been close to a law unto themselves since they were officially confirmed as finders of fact during the reign of Henry III in the thirteenth century.

[126] *Id*. at 317.

[127] Green, *supra* note 119, at 110.

[128] Langbein, *supra* note 118, at 320–21; *see also* Green, *supra* note 119, at 109–11.

[129] Langbein, *supra* note 118, at 321.

aggrieved citizens would make complaint of serious crime."[130] But though the JPs were only made back-up prosecutors if presenting juries did not act, the new statutes enabled Mary's officials to force her JPs to "investigate, bind witnesses, and appear at assizes to orchestrate prosecution."[131] At those trials, JPs would testify about their investigations and cross-examine the accused before the jury.[132] The obligation pressed upon JPs to perform these duties was effective because the early Tudors "employed the Council and the court [sic] of Star Chamber to monitor the actions of royal officials" and to discipline abuse.[133] Individual jurors and even whole juries could be disciplined in the same manner.[134] Thus, for the first time in English history, judges were armed with a complete evidentiary record and because of a more transparent process could recommend the discipline of juries if they made decisions against the weight of the evidence, however popular those verdicts may have been. Again, the jury the U.S. and Australia inherited from the English was an evolved and evolving institution. The consequences of the Marian committal and bail statutes enabled judicial control of juries and ultimately led to the development of the law of evidence as the law of jury control.[135]

This development of the role of public prosecutor reduced jury discretion.[136] The jury became passive in part because it was not informed about all crimes perpetrated by roving gangs of professional thieves.[137] As Crown officials took "responsibility for initiation and prosecution of criminal cases and for the management of the trial itself",[138] juries retreated to their role as deciders of the facts of the cases they heard.[139] Because more and more evidence was heard in open

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130 *Id*. at 319.
131 *Id.*
132 *Id.*
133 Green *supra* notes 119, at 113.
134 Green *supra* notes 119, at 113–14.
135 James B. Thayer, *The Jury and Its Development III*, 5 HAR. L. REV. 357, 387–88 (1892); *see also* Langbein, *supra* note 118, at 317.
136 Robert C. Palmer, *Review: Conscience and the Law: The English Criminal Jury*, 84 MICH. L. REV. 787, 789 (1986).
137 Green, *supra* note 119, at 126.
138 *Id.* at 106.
139 *Id*. at 108–09.

court, juries lacked the power to "manipulate the evidence"[140] and they could be disciplined if they tried to do so on judicial referral.

The establishment of an official prosecution thus changed the balance of power between the jury and the judge. Because much more evidence was heard in open court, "[t]he judge was armed with evidence that he could use to challenge the accused" and the jury.[141] Because the jury lost control of the evidence, it could no longer conceal or alter it.[142] Similarly, because all the facts were discussed in the presence of the judge in open court, the judge was in a better position to oversee the verdict and how or if it was consistent with the evidence.[143] In a sense, the Marian bail and committal statutes thus heralded the advent of the modern law of evidence—the law of jury control.[144]

Green says that English juries were previously regarded as a protection of liberty because they "prevented the imposition of sanctions they deemed too harsh."[145] English juries continued to moderate executive power and perverse verdicts continued to exert criminal law reform pressure long after these Marian criminal law innovations.[146] However, it is doubtful that the institutional jury has

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140 *Id*. at 106.

141 *Id*. at 110.

142 Palmer, *supra* note 136, at 789.

143 Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 490 (1976).

144 Langbein, *supra* note 118, at 317; *see also* Thayer, *supra* note 135 ("the greatest and most characteristic offshoot of the jury was that body of excluding rules which chiefly constitutes the English 'Law of Evidence'. If we imagine what would have happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does at the present day [in the United States], - if, instead of hearing witness publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence would never have grown up. This it is, - this judicial oversight and control of the process of introducing evidence to the jury, that gave it birth; and he who would understand it must keep this fact constantly in mind.")

145 Green, *supra* note 119, at 105.

146 For example, Nicholas Throckmorton was acquitted of treason against the weight of the evidence in 1554 during the period when the Marian bail and committal statutes were being passed. Amy Tikkanen, *Sir Nicholas Throckmorton*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/biography/Nicholas-Throckmorton; *see also*, The Editors of the Encyclopedia Britannica, *John Lilburne*, https://www.britannica.com/biography/John-Lilburne (noting that the same thing happened a century later in the trial of John Lilburne during Oliver Cromwell's regime, in these cases the juries were punished, however their verdicts stood).

been as significant an influence in the democratization of criminal justice since those changes in the sixteenth century.[147] Queen Mary's bail and committal statutes thus present as another watershed event in the evolution of the jury inherited from England by both the U.S. and Australia. Her legislation in 1554 and 1555 increased the transparency of English criminal trials and enabled judges to exercise greater control over trial process and jury decision making. As with rapid adaptation of the jury to criminal decision-making between 1215 and 1220, these Marian changes show that the modern criminal jury does not require almost sacred respect. Australia's passage of legislation allowing appeals from criminal jury verdicts thus has long historical context.

The point of this discussion is to discredit the idea that the current jury function is sacred, and to affirm instead, that legislators may adjust the functions and operation of criminal juries without irreparably damaging the delivery of justice in modern society. Indeed, history indicates that legislators should experiment more with criminal jury practice in Australia and that perhaps, the United States ought to consider such experimentation as well. New ideas about jury reform include whether unanimity is necessary; whether juries should have to give more than yes or no answers, and whether we would irreparably damage the delivery of criminal justice if we professionalized and paid smaller lay juries. Additional questions include whether jury decision making should be reviewable on grounds other than the possibility that an innocent person has been wrongly convicted.

However, this article is not suggesting that Australia completely do away with the jury or that because judges and other public officials are more efficient, they deliver better justice. The primary reason that the jury has endured as an Anglo-American trial institution, despite official inquisitorial alternatives, seems to lie in its democratization of the criminal process. Nonetheless, we may need additional measures to prevent the corruption of jury objectivity by the public and social media.

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147 Green, *supra* note 119, at 105–6.

D. Modern Arguments for and against the Abolition of the Jury

As previously noted, despite the miscarriage of justice that was affirmed by the Northern Territory government when it pardoned the Chamberlains in 1987,[148] when later invited to consider the merits of jury trial in criminal cases the prosecutor in the *Chamberlain Case*, still considered that jury trial was preferable to any alternative. Barker stated:

> The institution of the jury should not only be defended, but the use of juries should be substantially increased…Arguments that a judge sitting in civil matters without a jury is more "efficient" or "cheaper" than a jury trial, ignore the crucial community contribution to the judicial system.[149]

As indicated above, Barker considered that judges were just as susceptible to media campaigning against unpopular people accused of crime as jurors.[150] Further, Barker stated that the robust independence of juries calls all the branches of government to account,[151] including even "democratically elected parliaments [which] have seen fit to curtail 'the sacred right' of trial by jury in pursuit of 'efficiency' or one type or another."[152]

Barker's commitment to the jury calls to mind Justice William Deane's quotation of Professor Story in his dissenting defense of jury trial in *Kingswell v The Queen* in 1985.[153] Justice Story, wrote:

> The great object of a trial by jury in criminal cases, is to guard against a spirit of oppression and tyranny on the part of rulers,

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148 Roberty Cavanagh, *The Shameful Tale of What Happened to Lindy Chamberlain*, THE INJUSTICE PROJECT (July 5, 2021), https://www.injustice.law/2021/07/05/the-shameful-tale-of-what-happened-to-lindy-chamberlain/.

149 Barker, *supra* note 60, at 11–12, 23.

150 *Id.*

151 Barker, *supra* note 60, at 23.

152 *Id*. at 22–3.

153 Kingswell v The Queen (1985) 159 CLR 264 (per Deane, J) (Austl.).

> and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter, than the former. … But how difficult is it to escape from the vengeance of an indignant people, roused into hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies? The appeal for safety can, under such circumstances, scarcely be made by innocence in any manner, than by the severe control of courts of justice, and by the first and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is double security against the prejudices of judges, who may partake of the wishes and opinions of the government and against the passions of the multitude, who may demand their victim with a clamorous precipitancy.[154]

Justice Deane handed down his dissent in *Kingswell* just a year after he had handed down his dissenting judgment in the *Chamberlain Case*. He chose Justice Story's words for their relevance to the passions which had been raised against Lindy Chamberlain in her trial. Justice Story identifies the dangers of mob's passion in America including his personal knowledge of the persecution that flowed against those who were unpopular on grounds of their Catholicism and their race.[155]

Arguments in favor of preserving juries include, juries:

1) Are more objective than judges because judges can become cynical and captive to the view of law enforcement agencies;
2) Balance out the potential prejudice of individuals including judges since juries normally comprise twelve persons;

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[154] *Id*. at 302 (Deane, J) (quoting Volume III of the 1970 reprint of Professor Joseph Story's text). Professor Story served as an Associate Justice of the US Supreme Court from 1812 to 1845 which included the period when he wrote this seminal commentary on the US Constitution.

[155] *Id.*; U.S. v. Amistad, 40 U.S. 518 (1841). The judgment was made famous by Amistad, a 1997 movie by Steven Spielberg where retired Justice Harry Blackmun of the US Supreme Court portrayed Justice Story when reading the judgment—the only time when one US Supreme Court justice portrayed another.

3) Mostly immune from criticism since juries are popular and they are said to be democratically representative of the community;
4) Protect the "beyond reasonable doubt" principle when unanimous verdicts are required;
5) Protect the perception that all parties are equal when they are the triers of fact;
6) Serve as an antidote to the perceived technicality of the law; and
7) Remove some perceptions of community bias

However, the suggestion that jury trial dilutes or removes the possibility of community bias is partly inconsistent with Justice Story's view that communities can feature just as much violence and vindictiveness as tyrannical rulers. Despite his belief that juries charged with doing objective justice can protect against that "spirit," he does not explain why juries would lack a mob spirit, and it does not follow that juror oaths would remove racial or religious prejudice from the mind of any juror.

Arguments against the supposed virtues of jury trial include:

1) Juries are corrupted when parties can challenge individual jurors;
2) Prosecution challenges for cause when jurors have criminal histories,
3) Bias juries against the accused dilute the democratic and representative nature of juries;
4) State jury vetting cannot be detected and likely prejudices trial outcomes against the accused contrary to the demands of social justice;
5) Peremptory challenges by either party can be exercised for immoral and discriminatory reasons without detection;
6) Indigenous groups and other minorities are underrepresented on jury panels; and
7) Minority viewpoints may still be excluded in the jury room because of peer pressure

Arguments regarding the continued use of the traditional Anglo-American jury as the fact finder in criminal trials are not conclusive for or against its continuation. However, these arguments and common law history demonstrate that the criminal jury is not an immutable institution. The criminal jury has historically evolved in response to the demands of justice, and such history justifies an expectation that the criminal jury may continue to evolve in response to contemporary demands.[156] Next, I turn to a problem that looms large in ensuring jury trials deliver justice in modern society. Justice Story warned that protecting the jury trial from "a spirit of violence and vindictiveness on the part of the people"[157] is more difficult than protecting it "against a spirit of oppression and tyranny on the part of rulers."[158] Because, jury members may be easily aroused to feelings of revenge, vindictiveness, hatred and violence.[159] Part three therefore discusses principles developed by the High Court of Australia to mitigate deliberate or reckless efforts to arouse feelings of vindictiveness and vengeance that could pervert the course of justice in a jury trial. I also identify how modern social media poses as a challenge to courts in preventing contamination of potential jury pools.

IV. PART THREE: HOW CAN THE MODERN JURY BE INSULATED FROM ADVERSE MEDIA INFLUENCE?

Perhaps the most thorough contemporary treatment of adverse media influence in jury trials came in the 1987 appeal against the contempt conviction of then Melbourne shock jock Derryn Hinch, and his employer, Macquarie Broadcasting.[160]

The Police from the State of Victoria charged a Catholic priest with nine counts of indecent assault, buggery, and two counts of assault with

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156 Kingswell v The Queen (1985) 159 CLR 264, at 303 (per Deane, J) (Austl.).

157 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774 (Da Capo Press 1970) (1833).

158 *Id.*

159 *Id.*

160 Hinch v AG (Vic) (1987) 164 CLR 15 (Austl.).

intent to commit buggery.[161] Fr. Glennon worked as the governing director of the Peaceful Hand Youth Foundation (Foundation) "which conducted children's camps and other activities for children."[162] Hinch was appalled that Fr. Glennon had not been removed from his work at the Foundation pending the outcome of the trial. However, in the three radio broadcasts he made in relation to the pending trial, he did not leave it there. Hinch made several radio broadcasts in relation to the pending trial and discussed Fr. Glennon's previous offenses and suggested that he was guilty of the offenses in the ongoing litigation.[163]

The Victorian Attorney-General filed two suits alleging contempt of court by Hinch. Justice Murphy imposed a $25,000 fine on both parties in response to the Attorney-General's first charge. Justice Murphy also imposed a 42-day imprisonment on Hinch in relation to the Attorney-General's second charge and a fine of $30,000 on his employer.[164] The Victorian Court of Appeal dismissed the appeals but reduced Hinch's sentence to 28 days and the first fine from $25,000 to $15,000.[165] Hinch and Macquarie further appealed to the High Court and that Court unanimously dismissed those appeals.[166]

The High considered the application of the contempt law expressed in the *Bread Manufacturer*.[167] In that case, the Court balanced a competing public interest in a fair trial and the freedom to discuss matters of vital public interest. Chief Justice Jordan held the public interest in a fair trial does not always trump the public interest in public discussion of matters of vital importance.[168]

Hinch and Macquarie argued that the public interest in protecting children from a possible child abuser was so important that there had

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161 *Id*. at 16.

162 *Id*.

163 *Id.* at 29 (per Mason CJ).

164 *Id.* at 17.

165 *Id.*

166 *Id.*

167 *Ex parte* Bread Manufacturers Ltd: Re Truth & Sportsman Ltd (1937) (NSW) 37 SR 242 (Austl.).

168 Hinch v AG (Vic) (1987) 164 CLR 15, 19 (Austl.) (per Mason CJ) (discussing '[t]he critical passage' from *ex parte* Bread Manufacturers, 37 SR 242, 249–50 (per Jordan CJ)).

been no contempt committed by Hinch.[169] In response, Chief Justice Mason said "[t]here were repeated disclosures of Fr. Glennon's prior convictions in a context which unquestionably suggested that he was a sexual predator on children committed to his care."[170] Chief Justice Mason also noted "that the three broadcasts had an audience of 200,000 listeners, of whom approximately 100,000 were in the Melbourne area from which the jurors at Fr. Glennon's trial would be drawn."[171]

Justice Wilson said "a publication which would prima facie constitute a contempt of court deserving of punishment will escape" if the public interest in the "due administration of justice…is outweighed by the public interest in the public ventilation and discussion of a matter of public concern."[172] But he was satisfied that there was an intention to prejudge the issues to be litigated in this case and "to engage in trial by media."[173] That intention was not mitigated by a "likely lapse of ten months between the broadcasts and the trial of Fr. Glennon."[174]

Justice Deane was more direct from the outset.

> The publication of material…where the clear tendency…is to preclude or prejudice the fair and effective administration of justice…constitutes contempt of court unless,…the detriment is outweighed by…factors such as the public interest served by freedom of discussion of matters of public importance.[175]

Here there was clear prejudicial intent.[176] Such an "intended…interference with the administration of justice . . . could never be excused by other public interest considerations."[177] "The[se] publications had an obvious tendency to influence prospective jurors and witnesses in respect of the very issue involved in the pending

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169 *Id.* at 18, 21, 27, 41, 45, 56–59, 67, 85–86.
170 Hinch, 164 CLR 15, 31 (per Mason CJ).
171 *Id*. at 30.
172 *Id.* at 41.
173 *Id*. at 43.
174 *Id.* at 44.
175 *Id.* at 46.
176 *Id.* at 46–7.
177 *Id.* at 53 and 58–9 (internal quotations omitted).

committal proceedings and any trial."[178] Nor would "the likely lapse of time before any ultimate trial . . . avoid the very real possibility that the publications would adversely interfere with the administration of justice."[179] If Hinch had only expressed his opinion that it was inappropriate "that a person awaiting trial on charges involving alleged sexual assault of children, should continue . . . to act in a position of trust and confidence involving the care and control of the young," that would not have constituted contempt because it would have "carrie[d] no implication of prejudgment of guilt."[180] But Hinch's publications had a clear tendency to prejudice the outcome of the trial.

Justice Toohey said "that the absence of intention to interfere with the due administration of justice w[ould] not necessarily lead to a conclusion that there was no contempt of court."[181] But here "the broadcasts [did] not merely alert listeners to Glennon's unfitness for the position of governing director of the Foundation . . . they prejudiced his chances of obtaining a fair trial by their thinly veiled assertions of guilt."[182] Justice Toohey also considered Justice Nicholson's dissenting view in the Victorian Court of Appeal. There, Justice Nicholson considered whether the elapse of time between the broadcasts and trial would mitigate the risk of an unfair trial:[183]

> Justice Gaudron said Hinch's broadcasts went "directly to the question of guilt" and that "trenche[d] at the very heart of the public interest in ensuring that no person is convicted of a criminal offence save by verdict given at a fair trial."[184] Hinch had revealed the previous conviction to induce the view that Fr. Glennon was likely to have committed the offences the subject of the pending charges, [and] that likelihood was

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178 *Id*. at 55.
179 *Id.*
180 *Id.* at 57–8.
181 *Id.* at 70.
182 *Id*. at 76.
183 *Id.* at 74.
184 *Id.* at 88.

> reinforced by the insinuated suggestion that Fr. Glennon was guilty of other like offences.[185]

Each of these five High Court justices determined it was criminal contempt for anyone to publish material that might suggest the defendant was guilty during a trial.[186] Irrespective of whether the suggestion was accidental or intentional, such publication was criminal contempt. Though Justice Nicholson determined the damage to the future fairness of Fr. Glennon's criminal trial was mitigated by the nine months before that trial took place, none of the High Court justices agreed.[187] The High Court found Hinch was in contempt because half of the broadcast's listeners lived in Melbourne, where Fr. Glennon's jury would be drawn.[188]

A. Media Influence on Courts in the Twenty-first Century

In *Hinch*, the broadcasts thought likely to prejudice Fr. Glennon's jury were public and obvious. The advent of social media enables people to publish material that could prejudice a modern jury. Such material may be published on any number of social media platforms. The crime identified in *Hinch* is publishing material in advance of or during a jury trial that could cause a juror to lose objectivity. Where a criminal jury trial is pending, discussing that case in a way that insinuates guilt is criminal contempt, whether it was incidental or intentional. However, unless an Attorney-General, as chief legal officer of the state, whose duties include ensuring criminal trials are conducted fairly and without bias or his informants have staff assigned to scan social media, it is unlikely that material which may prejudice the jury would come to the Attorney-General's attention. Moreover, if such material is deliberately disseminated for prejudicial purposes, it is

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185 *Id.*

186 *Id*. at 28–9 (per Mason CJ); *id.* at 34, 42–3 (per Wilson J); *id.* at 46–7, 49–53 (per Deane J); *id.* at 70, 76–7 (per Toohey J); *id.* at 87–8 (per Gaudron J).

187 *Id.* at 31–2 (per Mason CJ); *id.* at 34, 44–5 (per Wilson J); *id.* at 55–6 (per Deane J); *id.* at 73–4 (per Toohey J); *id.* at 87–8 (per Gaudron J).

188 *Id.* at 30–1 (per Mason CJ); *id.* at 35 (per Wilson J); *id.* at 55 (per Deane J); *id.* at 63, 74 (per Toohey J).

less likely that the material would come to the Attorney-General's attention since such material may be both subtle and closely targeted. That is, the advent and volume of social media makes it difficult for law enforcement to identify all material which may prejudice the outcome of a criminal trial.

When the Attorney-General of Victoria prosecuted radio talk-back host Derryn Hinch for criminal contempt of court in relation to the prosecution of Father Glennon for child abuse offences, the Attorney-General was concerned that Derryn Hinch's statements on the radio were either intended to or likely to prejudice the outcome of trial. Hinch and his employer argued that the public interest demanded they be able to draw this matter to public attention. The High Court justices agreed with the Attorney-General. While there was a great public interest in bringing institutional child abuse to public attention, there is a greater public interest in ensuring that those charged with serious crime should have a fair trial. Derryn Hinch knowingly set out to inflame emotion during a pending criminal trial. Discussion and publication in social media now allow many people and institutions beyond the traditional media to publish material or intended to cause prejudice when a criminal trial is pending. That social media influence is invisible, but it can be just as prejudicial to a modern criminal jury trial. The prejudice enabled by technology was highlighted during the 2016 U.S. presidential election.

Donald Trump engaged Cambridge Analytica to persuade voters to vote for him during the presidential election. Some believe Trump utilized personality profiling tools with data obtained from Facebook.[189] Allegedly, Hillary Clinton's campaign also used a consulting firm to appeal to voters on social media platforms.[190]

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[189] Scott Detrow, *What Did Cambridge Analytica Do During the 2016 Election*, NATIONAL PUBLIC RADIO, (Mar. 20, 2018, 7:22 PM), https://www.npr.org/2018/03/20/595338116/what-did-cambridge-analytica-do-during-the-2016-election.

[190] Paul Sperry, *'Clinton tech' Rodney Joffe had a shady past before he targeted Trump*, NEW YORK POST, (Feb. 21, 2022, 9:16 PM), https://nypost.com/2022/02/21/the-shady-past-of-clinton-tech-joffe-who-targeted-trump/.

In *Katsuno,* the High Court considered corruption in the jury process.[191] The High Court heard the case due to a concern that the police in that state had subverted the integrity of criminal jury trial process by providing the prosecution with information about potential jurors that had not been provided to the defense. While the High Court justices in *Katsuno* decided 3-2 that the jury interference in that case did not go so far as to corrupt the process outlined in the legislation governing jury trials in the State of Victoria, legislation was amended within a year to make jury selection processes more transparent and avoid the practices that had led to the *Katsuno*. But corruption in the Victorian Police revealed since *Katsuno* was decided,[192] and the negative media interest in *Pell* raised more questions than *Katsuno* answered.[193] While the Justices in *Katsuno* deplored the suggestion that anyone should take steps to interfere with an independent and impartial outcome, the concerns expressed by the comprehensive dissents

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[191] Katsuno v The Queen (1999) (Vic) 199 CLR 40 (Austl.).

[192] *See e.g.*, DPP v Preece [2011] (Vic) 219 VSCA 355 (Austl.) evidence had been obtained by execution of search warrants that had been signed and not sworn as affidavits as required under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 81 (Austl.). The trial judge found the warrants were invalid and the searches a trespass. The DPP sought to have the evidence admitted under the *Evidence Act 2008* (Vic) s 138 (Austl.), however the trial judge refused. The DPP appealed judgement. The Court of Appeal noted the practice of not swearing affidavits was endemic in the Victorian police force. Stating, that obtaining such material without an affidavit "ha[d] a tendency to subvert a fundamental principle of our law." Though there were no deliberate misstatements in the facts asserted in the signed but not sworn affidavits, and though the hierarchy of the Victoria police had taken steps to prevent recurrence, the contraventions were not technical only as asserted by the prosecution. "[T]he deception 'whether intentional or reckless undermined the whole process.'" Subsequent revelations that the Victoria Police encouraged defence lawyer Nicola Gobbo to inform on her clients has subjected more than a thousand reviews. Calla Wahlquist, *Lawyer X: How Victoria police got it 'profoundly wrong' with Nicola Gobbo*, THE GUARDIAN, (Sept. 5, 2020, 4:00 PM), https://www.theguardian.com/australia-news/2020/sep/05/lawyer-x-how-victoria-police-got-it-profoundly-wrong-with-informant-nicola-gobbo.

[193] The Australian Broadcasting Corporation (ABC) was accused of conducting a crusade against Cardinal Pell before the trial. *See e.g.*, State *institutions were 'very cosy' during the Cardinal Pell lawsuit*, BOLT REPORT, SKY NEWS AUSTRALIA (Apr. 7, 2020), https://www.youtube.com/watch?v=bQrwmid1KTE. After the unanimous High Court acquitted the Cardinal, the ABC continued its broadcasts asserting Pell's guilt with a three-part series entitled "Revelation" by Sarah Ferguson. The series followed the trials of two other Catholic Priests, which culminated with a detailed interview of "Bernie" who Detective Chris Reed of the Victorian Police had sought by advertising and from whom he then drew an account of abuse by Pell from his deep subconscious after a series of interviews. *Revelation: Episode 3, Goliath*, (Apr. 2, 2020), https://iview.abc.net.au/video/DO1804H003S00.

provide eloquent expression of the need for vigilance against corruption of jury process in the age of technology.

B. The Katsuno Case

In *Katsuno*, Katsuno and five other Japanese nationals were convicted of heroin importation in the Australian State of Victoria.[194] All of the accused appealed, but only Katsuno was successful.[195] In that first appeal, all the applicants unsuccessfully argued that the jury vetting conducted by the police and prosecution offended the State legislation.[196] During his retrial, Katsuno asked the trial judge to prevent jury vetting by the prosecution, as had occurred during the first trial. The trial judge refused that request because of precedential decisions.[197]

As Justice Kirby noted in Katsuno's further High Court appeal,

> In most cases it would be impossible, or at least extremely difficult, for an accused person … to discover the bases (if any) upon which the prosecutor at the trial had exercised the right to require jurors to "stand aside" or "stand by"(where they still exist) or rights of peremptory challenge before the juror entered upon his or her duties as such. However, in the present matter, it appears that the DPP was desirous of having an issue resolved which had been a matter of controversy in Victorian courts over the past decade.[198]

Because a decision in this Victorian case could affect all the other states and the Commonwealth because they used jury trials in criminal cases and jury trials were required under the Australian Constitution in

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[194] Katsuno v The Queen (1999) (Vic) 199 CLR 40 ¶ 11 (Gaudron, Gummow and Callinan JJ); *id.* at ¶ 69 (Kirby J). Note that there is a discrepancy between these two judgments as to whether Katsuno was charged with four of five co-defendants.

[195] *Id.* at ¶69.

[196] *Id.*

[197] *Id.* at 71.

[198] *Id.* at 74.

Commonwealth criminal cases, all jurisdictions were notified of the issues in the case.

The Commonwealth, plus the states of New South Wales, Victoria, South Australia, and West Australia chose to intervene.[199] Jury processes in Australia are significantly different than those which occur in the United States. For example, in Australia, there is no *voir dire* process where jurors may be questioned about potential bias, but jury empanelment rules in legislation do include provisions which exclude people from juries if they have been found guilty of recent serious crime.

In Katsuno's second trial, the prosecution excluded a juror due to a minor conviction 25 years earlier and a trespass offense 21 years earlier in another state.[200] Justice Kirby noted that the prosecution had been provided with information about other jurors who had been charged, but not convicted or where the charges had been dropped. However, the Prosecutor did not use that information to stand aside jurors in Katsuno's second trial.[201] But he made no further comment as to whether the failure to exclude other jurors who had been charged and not convicted was arbitrary or inconsistent or not.

As three of the Justices reasoned in *Katsuno*, the question is "whether the Chief Commissioner's practice is…lawful, and if it is not, what consequences should follow."[202] To select the jurors, the Chief Commissioner forwarded the Sheriff and the prosecution a list of potential jurors who had a criminal history.[203] Subsequently, the Sheriff disqualified the potential jurors based on their convictions.[204] The list was also shared with solicitors for the OPP and solicitors for the Commonwealth Director of Public Prosecution.[205] Counsel for the applicant petitioned the trial judge to deny the prosecutor the ability to

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199 *Id*. at 73.
200 *Id.* at 14 (Gaudron, Gummow and Callinan JJ); *id.* at 75 (Kirby J).
201 *Id.* at 76.
202 *Id.* at 13.
203 *Id,*
204 *Id.*
205 *Id.*

use the list or alternatively required that the list be supplied to the defense.[206] The trial judge denied the defense's petition.[207]

C. Jury Vetting in Australia—the Law

Katsuno submitted that the jury vetting practices revealed in the agreed statement of facts were "impliedly prohibited by the Juries Act."[208] The justices unanimously agreed the jury vetting practices constituted a breach of s 21(3).[209] That was because, s 21(3) allows the Chief Commissioner to provide the list of disqualified persons due to criminal convictions to the sheriff, not the prosecution. However, the justices disagreed as to the consequences. The plurality did not consider that this breach constituted "a fundamental failure to observe the requirements of the criminal process."[210] "The jury in this case was not unrepresentative" and the accused had not been denied "his constitutional right to trial by jury."[211] Chief Justice Gleeson regarded the breach as somewhat technical[212] and said, "the appellant's trial . . . did not involve a miscarriage of justice requiring the conviction to be set aside."[213] But Justices McHugh and Kirby disagreed. Justice McHugh thought there had been "a failure to observe the requirements of the criminal process in a fundamental respect."[214] He reasoned that the information illegally conveyed to the prosecution had been used to "subvert […the legislative scheme for selecting an impartial jury. It ha[d] sought to give itself an advantage…us[ing] information that was not available to the accused,"[215] . . . " for a purpose that the legislation was designed to prevent."[216]

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206 *Id*.
207 *Id.* at 14.
208 *Id.* at 15 (Gaudron, Gummow and Callinan JJ) (citing Juries *Act 1967* (Vic)).
209 *Id.* at 2 (Gleeson CJ); *id.* at 25 (Gaudron, Gummow and Callinan JJ); *id*. at 55 (McHugh J); *id.* at 108, 109, 113, 120 (Kirby J).
210 *Id*. at 41; *See also id.* at 52.
211 *Id.* at 52.
212 *Id.* at 6.
213 *Id.* at 7.
214 *Id.* at 56, 62.
215 *Id.* at 59.
216 *Id.* at 62.

Because Justice Kirby thought "that a differently composed jury might have reached a different result so that the 'anatomy of the trial' was affected,"[217] "the trial was flawed because the constitutional tribunal which conducted it was shown not to have been lawfully chosen."[218]

The result of the conviction turned on the plurality's observation that Katsuno's complaint affected only one juror and that could have been legally excluded by peremptory challenge.[219] That observation is the reason Chief Justice Gleeson did not believe that there had been a miscarriage of justice. Though Justices McHugh and Kirby were concerned about the potential for the corruption of the jury trial process which Crown jury vetting across Australia revealed in the *Katsuno Case*, there was no suggestion that criminal jury trial should be abandoned. And indeed, the plurality "emphasised the importance of the representative nature of jury in modern times."[220]

Despite occasional media criticism of individual jury verdicts, it does not seem that there is an enduring public or political appetite to replace the criminal jury with bench trials.[221] What reform options remain?

V. PART FOUR: SHOULD THE LEGISLATURE REFORM THE MODERN AUSTRALIAN JURY TO IMPROVE ITS PERFORMANCE IN CASES WITH A HIGH MEDIA PROFILE?

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217 *Id.* at 133.

218 *Id.* at 137.

219 *Id.* at 43–44.

220 *Id.* at 50.

221 Note that the legislation governing jury trial in Victoria was replaced the year after the High Court appeal in *Katsuno*, and a report by the Victoria Law Reform Commission in May of 2014 noted six reviews of "jury selection and empanelment processes" since 2000 including in Law Reform Commissions in four Australian states and territories. Since the Victorian Law Reform Commission Report recommended very few changes to the new Victorian system, it may be inferred those commissioners considered that the jury selection and empanelment processes operating in Victoria as of 2014 were providing fair and representative justice. VICTORIAN LAW REFORM COMM'N, JURY EMPANELMENT (2014). They noted that the DPP's February 2014 Guidelines on the exercise of Crown 'stand asides' insisted that "the Crown must not be seen to select a jury favourable to the Crown." *Id.* at 21.

In *Kingswell*, Justice Deane suggested the introduction of specialized assessors for jury trials in cases involving white collar and computer crime.[222] State parliaments may tighten the rules governing juror empanelment. Ensuring, both parties have access to the same material, as Justice Kirby noted had been recommended by the Victorian Law Reform Commission three years before the High Court heard *Katsuno*.[223] An emphasis on balance and equality may also lead to reforms that prevent the Crown from retrying cases in the event of a hung jury. In the same spirit of respect for democratic jury decision making, the legislator may also pass laws that prevent trial judges from demanding that juries reach unanimous verdicts. Legislators could instead impose a time restriction on juries requiring trial judges to declare a hung jury if there is no clear outcome after approximately two days of deliberation.

The High Court in *Murphy* noted:

> the courts ha[d] used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the machinery of challenge for cause.[224]

The present state of the jury is not and should not be inviolable. Social media has exacerbated the well-known adverse influence of media on criminal juries. Thus, consideration must be given as to how the integrity of criminal jury trials in Australia may be reinstated.

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[222] Kingswell (1985) 159 CLR 264 (Austl.).

[223] Katsuno v The Queen (1999) (Vic) 199 CLR 40 ¶ 97, n. 116, 117 (Kirby J) (citing Victorian Law Reform Commission Final Report (1996) (Vic) Vol 1 and Issues paper No 2 (1995), noting that while the Queensland Law Reform Commission recommended "jury vetting be forbidden," the Victorian Commission recommended it continue "with provision of the same information to the trial judge and to the defence" and without the involvement of the Chief Commissioner of Police. The Victorian Law Reform Commission recommendation has been superseded by its May 2014 report on Jury Empanelment.

[224] Murphy v The Queen (1989) 167 CLR 94, 99 (Mason CJ and Toohey J).

The High Court decided *Hinch* before the advent of social media. Yet, the principles the High Court judges extracted from *Bread Manufacturer* and *Hinch* still guide the High Court in determining whether published comments with the potential to prejudice the outcome of a criminal trial constitute criminal contempt. In the age of social media, how can jurors be insulated from views likely to prejudice their judgement? Moreover, if jurors cannot be insulated, could they be trained to recognize and discard prejudiced opinions?

While the original jury trials of Cardinal Pell included judicial gag orders that applied to the parties and prohibited any media reporting of the trial, those orders do not prevent overseas discussions accessible to Australian internet users. Nor do those orders prevent a media and political pile-on before and after trial.[225] Undoubtedly, *Pell* was discussed on social media while the trials were running, despite the gag orders . Social media posts were replete with comments by people who were both aware and unaware of the gag orders. Some believed judicial gag orders did not apply to social media publication or thought they would not be prosecuted for contempt.

It would be impractical to require Australian law enforcement to screen all media platforms to detect breaches of judicial gag orders in cases where media interest is high. Additionally, there is no political appetite to create a new Australian enforcement agency tasked with such enforcement. Such an agency would face opposition from existing media campaigns advocating for easier convictions of alleged offenders and stronger penalties.[226] Efforts to deter those who offend judicial gag orders by prosecuting high-profile law breakers, like Derryn Hinch, may continue. However, additional, and specific training of jury panels before they commence their duties, has the potential to override media

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[225] GERARD HENDERSON, CARDINAL PELL, THE MEDIA PILE-ON & COLLECTIVE GUILT (Connor Court Publishing 2021).

[226] *See, e.g.*, Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Right*, 81 N.Y.U. L. REV. 1101 (2006); David Baker, *Tough on crime: The rhetoric and reality of property crime and feeling safe in Australia*, THE AUSTL. INST., POLICY BRIEF NO. 56 (2013), https://melbourneinstitute.unimelb.edu.au/assets/documents/hilda-bibliography/other-publications/2013/Baker_PolicyBrief-56_Tough_on_crime.pdf*; see also* Tim Newburn, *Tough on Crime: Penal Policy in England and Wales,* 36 CRIM. & JUST. 425 (2007).

influence, if that training is supervised by trial judges and followed by question-and-answer sessions.

One approach would be for the Australian government to prepare a five-to-ten-minute training video for criminal juries in addition to the instructions that trial judges give to all juries in criminal cases. The training video could briefly outline the history and importance of representative juries in modern society. In addition, the video would explain the beyond reasonable standard in language approved by relevant law reform commissioners and judges. The training video would conclude with accounts of the injustices that occurred in *Chamberlain* and *Pell.* It would explain that those injustices occurred because of disregard of the beyond reasonable doubt standard of proof by the jury.[227]

However, some change is required prior to the implementation of jury education. Some current and accepted practices in Australian criminal trials are inconsistent with the continuing authority of the representative criminal jury. For example, Australian trial judges should not pressure jurors to issue a verdict despite extended deliberation, when some jurors believe there is reasonable doubt. In addition, prosecutors should not retry cases when a jury fails to reach a unanimous verdict despite lengthy deliberation. In these cases, the persons accused should be acquitted, and retrials should be prohibited when there was an inconclusive jury result.

A full discussion of how it detracts from the integrity of a modern criminal jury for a judge to pressure a jury to come to a verdict, or for a prosecutor to retry a case when a jury has not been able to decide on a guilty verdict despite ample consideration is beyond the scope the current article. If juries are assigned the duty of adjudicating criminal guilt beyond reasonable doubt as enumerated by the *Australian Constitution* and by statute, then it is inappropriate for the judiciary to press a jury to continue deliberating until they reach a unanimous

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[227] Pell v The Queen (2020) 268 CLR 123, 137 (Austl.) (citing Chidiac v The Queen (1991) 171 CLR 432, 444) (Mason CJ); Chamberlain v The Queen [No 2] (1984) 153 CLR 521, 618–9 (Austl.) (per Deane J); M v The Queen (1994) 181 CLR 487, 494 (Austl.) (per Mason CJ, Deane, Dawson and Toohey JJ).

finding. If a member of the jury doubts the accused's guilt, then that should constitute reasonable doubt for the purposes of the criminal process. In a system where the resources of the state exceed the resources of the accused, there should not be retrials, absent proven abuse of the criminal process by the defense or the jury.

VI. CONCLUSION

The twenty-first century Australian jury is not done evolving. Though it has a long and illustrious history, the Australian jury has undergone a great deal of evolutionary development designed to improve its independence, impartiality, and competence to achieve its mostly well-respected reputation. Because of that evolutionary history, we should not look at the Australian criminal jury as the polished and finished product of a sacrosanct tradition, but as an institution that must move and further develop.

Six Australian law reform commissions have considered jury empanelment processes within the last two decades due to concerns that the traditional processes lead to unjust trial results.[228] Each of those commissions has made jury improvement recommendations. The Victorian Law Reform Commission recommended the reduction of Crown "stand asides" and defense peremptory challenges to three in criminal trials.[229] The Commission made such recommendations after consulting with both prosecutors and defense attorneys, while discussing the abolition of such challenges in the United Kingdom.[230]

The focus of this article rather is that traditional judicial approaches to the management of possible prejudice and criminal contempt in the interests of fair trials are insufficient to ensure fair criminal trials given the advent of social media. Social media increases the risk to the fairness of modern Australian criminal trials–not just because of its mostly invisible reach–but also because it may be used to manipulate

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228 VICTORIAN LAW REFORM COMM'N, JURY EMPANELMENT, at 3 (2014).
229 *Id*. at xv.
230 *Id.* at 24 (citing Criminal Justice Act 1988, c. 33, § 118 (Eng.)).

juror opinion just as voters' opinions were manipulated by both candidates in the 2016 U.S. presidential election.

Perhaps, the unjust convictions of Lindy Chamberlain and Cardinal Pell would not have been avoided even if their juries were specifically educated on the essentiality of jury impartiality and the risks of subliminal prejudice. However, such training presents a reasonable modern way to inoculate jurors against viral social media commentary, including commentary and misinformation created for misinformation purposes.