"THE PRISONERS COULD NOT HAVE THAT FAIR AND IMPARTIAL TRIAL WHICH JUSTICE DEMANDS": A FAIR CRIMINAL TRIAL IN 19TH CENTURY AUSTRALIA

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Abstract

The notion of a "fair and impartial trial which justice demands" requires jurors to have regard only to the evidence presented at trial and discount anything they may hear or read outside court. Prejudicial publicity and prejudgement challenging an impartial jury is not a new problem, but have proved problematic since at least the 1800s. This article considers how trial by media was a recurring 19th-century concern in both sensational and routine criminal cases in England and Australia. The authors draw on the extensive press archives of the period and through examples of 19th-century Australian case studies (reinforced by English examples) examine the problem of prejudicial pre-trial publicity and the various 19th-century remedies to address publicity and bias. It is argued that these remedies were of little utility and trust was placed in the ability of 19th-century jurors to heed judicial directions to have regard to only the evidence led at trial. Though this premise was (and remains) questioned, 19th-century juries proved capable of ignoring even the most hostile pre-trial publicity and an impartial jury was not an ignorant jury. It is argued that 19th-century jurors ultimately had to be trusted to follow judicial directions. This premise remains but its continued validity is now further challenged by the internet and social media.

I. Introduction

> … the public mind has been considerably prejudiced. At present, I am afraid the prisoners could not have that fair and impartial trial which justice demands. I never

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> knew a case in this colony in which the privilege of the press has been so much abused as in this. Every newspaper in the colony has given a very one-sided account of the whole matter.[1]

These strong comments were offered by the New South Wales Attorney-General in 1865 in deploring the pre-trial publicity and its implications for a fair trial in the salacious case of Maria Kinder and her married lover, Henry Bertrand, accused of murder by poisoning and then shooting Henry Kinder, Maria's inconvenient husband. The case and the "immorality" of the defendants attracted intense and hostile press coverage: "a case more atrocious, more unreal, and more disgusting in its horrible details than any before recorded in the annals of crime".[2] Cheek J expressed his agreement with the Attorney-General and adjourned the trial for two months "to give the public excitement time to subside and to secure a calmer and fairer trial".[3]

Such cases as *Kinder and Bertrand* were not unusual in the 19th century, notably in colonial Australia. In 1856, a notorious convict, George Nixon, "the most malignant fiend that ever hissed at the Almighty",[4] stood trial in Hobart before the Supreme Court accused of the sexually motivated murder of a 14-year-old boy, Henry Chamberlayne. Nixon was convicted and promptly executed for his crimes and confidence was widely expressed that justice had been done. Yet, such was the public passion and intense and hostile pre-trial press coverage aroused in the case, that concerns were raised by defence counsel and a handful of commentators as to whether a fair trial before an impartial jury had been possible. As one columnist observed: "Between accusation and guilty there is an awful distinction, which a prejudged or biased intellect is certain to confound".[5]

The "fair and impartial trial which justice demands", integral to the adversarial 19th-century criminal trial, required a fair trial before an impartial jury.[6] It was a central premise for jurors, as Innes J instructed an 1893 jury:[7]

1 "Alleged Murder of Mr Kinder" *Empire* (Sydney, 19 December 1865) at 3.

2 "The Kinder Tragedy" *Illustrated Sydney News* (Sydney, 16 December 1865) at 3. Despite this coverage and Bertrand's conviction for murder, the prosecution, owing to a lack of "hard" evidence, ultimately withdrew proceedings against Mrs Kinder. See *Empire* (Sydney, 26 February 1866) at 5.

3 *Sydney Mail* (Sydney, 23 December 1865) at 4. The effectiveness of this measure is debatable. This is discussed further in Part V.

4 "The Daily News in Convulsions" *The Courier* (Hobart, 24 November 1856) at 2.

5 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3.

6 This remains a present theme. See Mirko Bagaric "The Community Interest in Bringing Suspects to Trial Trumps the Right to an Impartial Decision Maker — at least in Victoria" (2010) 34 Crim LJ 5.

7 "R v Reid and Rich" *Sydney Morning Herald* (Sydney, 11 August 1893) at 3. See also *Daily Telegraph* (Sydney, 11 August 1893) at 3.

> … not to allow anything in the shape of a preconceived notion of the case to influence their judgment; they must be guided entirely by the evidence that had been placed before them.

The 19th-century criminal justice system operated on the basis (though sometimes questioned),[8] that such directions would serve as an effective remedy to potential bias or prejudgement and jurors would faithfully act upon any such directions.[9]

Though the issue has gained particular impetus and discussion with the advent of first, the 24 hour news cycle[10] and, secondly, the internet and social media,[11] this article highlights the often overlooked fact that concern about prejudicial publicity challenging the impartiality of a jury and the prospects of a fair trial is not a recent development.[12] This article draws on the extensive press archives of the period[13] and, through case studies from 19th century-Australia, and reinforced by examples from England, shows that protecting an accused's right to a fair trial before an impartial jury was a regular 19th-century concern for lawyers and the judiciary alike. There was recurring concern throughout the 19th century in England and Australia at prejudicial publicity or prejudgement challenging jury impartiality. Such concerns were not confined to only high-profile criminal cases but extended to "routine"

8 See, for example, "The Late Murder" *Sydney Gazette* (Sydney, 14 June 1834) at 2; "The Kingston Tragedy" *Launceston Examiner* (Launceston, 22 November 1856) at 2–3; and "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3.

9 See, for example, *R v Kilmeister (No 1)* [1838] NSWSC 105; *Sydney Gazette* (Sydney, 20 November 1838) at 3; *R v Kilmeister (No 2)* [1838] NSWSC 110; *The Australian* (Sydney, 27 November 1838) at 2; see also, *Sydney Gazette* (Sydney), 29 November 1838, 3; and "R v Deeming" *The Argus* (Melbourne, 23 April 1892) at 3. Indeed, this premise remains valid. See, for example, *R v Glennon* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J, 614–615 per Brennan J; *R v Yuill* (1993) 69 A Crim R 450 (NSWCCA) at 453–454 per Kirby ACJ; *R v West* [1996] 2 Cr App R 374 (EWCA Crim) at 385–386 per Lord Taylor CJ; *R v Stone* [2001] EWCA Crim 297 at [48], [50]; *R v Abu-Hamza* [2007] QB 659 at 682, 685–686 per Lord Phillips CJ; and *Dupas v The Queen* (2010) 241 CLR 237 at [26]–[29].

10 See, for example, Joseph Flynn "Prejudicial Publicity in Criminal Trials: Bringing *Shepherd v Maxwell* into the Nineties" (1992) 27 New England Law Review 857; and Michael Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases tried by Jury is dealt with in Australia and America" (1997) 45 Am J Comp L 109.

11 See, for example, Caren Myers Morrison "Can the Jury Trial Survive Google?" (2011) 25 Criminal Justice 4; and Roxanne Burd and Jacqueline Horan "Protecting the Right to a Fair Trial in the 21st century: Has Trial by Jury Been Caught in the World Wide Web?" (2012) 36 Crim LJ 103.

12 *Roach v Garvan* [1740] 2 Atk 469 (EWHC Ch) at 472. See also David Bentley *English Criminal Justice in the Nineteenth Century* (The Hambledon Press, London, 1998) at 43–50.

13 Criminal proceedings of the period were typically reported at some length, often almost verbatim, in the newspapers ranging from the most sensational such as murder (see Clive Emsley *Crime and Society in England 1750–1900* (2nd ed, Longman, London, 1996) at 44) to even the routine.

cases. Indeed, the challenge to secure a fair trial before an impartial jury was compounded in 19th-century Australia, given the small size of the jury pools for much of the century compared with England.[14]

Part I of this article examines the pivotal role of the 19th-century jury and how integral to trial by jury was the notion of an impartial jury who would discard any pre-trial prejudice and have regard to only the evidence presented at trial. Part II discusses the role and influence of the print press and highlights that a sensational focus on crime and criminal proceedings is not a recent development but was also an established feature of 19th-century press reporting in both England and Australia. Part III examines Australian cases of the period, predominantly the Tasmanian case of *Nixon,* and the implications for a fair trial before an impartial jury in light of the intensive and generally hostile pre-trial publicity. Part III also examines the effect of pre-trial publicity in even routine criminal cases. Part IV discusses the challenges in securing an impartial jury in 19th-century Australia.

Part V explores the effectiveness of the various 19th-century remedies to prevent a partial jury, such as delaying the trial until the publicity had subsided (as happened in *Kinder and Bertrand*) and ordering a change of venue (as was raised in *Nixon*). Part VI examines the role and effect of directions from the trial judge (reinforced by exhortations from counsel) for the jury to have regard to only the evidence adduced at trial. It is noted that confidence was typically expressed that jurors would act on such directions and discount any external reports. Part VI examines that this confidence, though sometimes doubted, may not be misplaced as 19th-century juries proved capable of disregarding even the most intensive and prejudicial pre-trial publicity. The ability of the jury to reach a considered verdict at odds with prejudicial pre-trial discussion should not be discounted. It is also relevant that an impartial jury is not the same thing as an ignorant jury.

It is argued that, ultimately trust was, and had to be, placed in the ability of 19th-century jurors to heed directions to act only on the evidence led at trial and to disregard anything from outside court. This 19th-century confidence in the ability of jurors has been reaffirmed by modern courts.[15] In 2012, the High Court of Australia went as far as to declare it is a "constitutional fact" that, even in the most sensational and highly publicised of criminal cases, jurors could be relied upon to act only on the evidence presented at trial and act in accordance with the trial judge's instructions.[16] Indeed, the jury system ultimately depends on this premise. The authors raise that the confidence expressed in 19th-century juries, whilst arguably justified in this period, may

14 See below, Part IV.

15 See, for example, *R v Yuill*, above n 9, at 450, 453–454.

16 *Dupas v The Queen*, above n 9, at [28]. "The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgement arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial by thorough and appropriate directions to the jury": at [38].

need to be reconsidered in the 21st century with the advent of the internet and social media.

A. Trial by an Impartial Jury in the 19th Century

Trial by jury has long commanded wide, [17] even fulsome,[18] support.[19] As one parliamentarian declared of the jury: "For centuries it has been the sacred cornerstone of our criminal justice system."[20] Blackstone famously asserted that the jury was the "palladium" of English justice and the "grand bulwark" of liberty.[21] He declared:[22]

> The trial by jury has ever been, and I trust ever will be, looked upon as the glory of the English law. And it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases … it is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals.

This faith was transplanted to colonial Australia where trial by a civil jury (as opposed to the original military jury)[23] was only progressively introduced

17 Penny Darbyshire "'British Justice is the Finest in the World': An examination of Anglo-American Boasting" (paper presented to Society of Legal Scholars Annual Conference, York, 2015) at 3–12. Darbyshire describes much of the historical support for trial by jury as "hyperbole": at 7; "extravagant": at 8; "rhetoric": at 7 and 10; and "propaganda": at 17.

18 See Sir Patrick Devlin *Trial by Jury* (Stevens and Son Ltd, London, 1956) at 164. See, generally, James Stellios "The Constitutional Jury: 'A Bulwark of Liberty'" (2005) 27 Syd LR 113.

19 Whether the praise is justified is much debated (and beyond the scope of this article to examine). Trial by jury "evokes passionate and often extreme views" by its critics and defenders alike: Sally Lloyd-Bostock and Cheryl Thomas "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales" (1999) 62(2) LCP 7 at 7. Despite this debate, trial by jury is highly unlikely to be discarded any time soon in either England or Australia. The spirit of trial by jury "is burnt into the consciousness of every Englishman [and Australian] — to such an extent that the jury's detractors might as well attempt to do away with Parliamentary democracy as trial by jury": Roy Amlot "Leave the Jury Alone" (1998) 38 Med Sci Law 123 at 42, quoted in Lloyd-Bostock and Thomas at 10.

20 South Australia *Parliamentary Debates* Legislative Council (24 March 2015) (Juries (Prejudicial Publicity) Amendment Bill – Second Reading, Andrew McLachlan).

21 William Blackstone *Commentaries on the Laws of England* (The Clarendon Press, Oxford, 1769) vol 4 at 342–343.

22 William Blackstone *Commentaries on the Laws of England in Four Books with an Analysis of the Work* (WE Dean, New York, 1832) at 294 [379].

23 See *R v Smith (No 1)* [1839] NSWSC 56; and *The Australian* (Sydney, 3 August 1839) at 2.

in New South Wales (and Tasmania) from 1828, after 40 years of agitation and contention dating back to the First Fleet.[24] As Deane J observed: [25]

> Trial by jury in criminal matters was claimed as a "birthright and inheritance" under the common law and as an institution to be established and safeguarded to the extent that local circumstances would permit.

Many commentators,[26] lawyers[27] and judges[28] of the period can be found propounding the virtues of trial by jury.[29] Willis J told a New South Wales

24 See JM Bennett "The Establishment of Jury Trial in New South Wales" (1961) 3 Syd LR 463; Ian Barker "Sorely Tried: Democracy and Trial by Jury in New South Wales" (Francis Forde Lectures, Supreme Court of New South Wales, 28 November 2002); Michael Chesterman "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy (1999) 62 LCP 69; HV Evatt "The Jury System in Australia" (1936) 10 (Supplement) Australian Law Journal 49; David Neal "Law and Authority: The Campaign for Trial by Jury in New South Wales" (1987) 8 Journal of Legal History 107; and Gregory Woods *A History of the Criminal Law in New South Wales: the Colonial Period, 1788–1900* (The Federation Press, Sydney, 2002) at 18–19, 46, 56–59, 61–72. The military jury was criticised in 1840 by Dowling CJ as "an anti-British anomaly": Bennett, above n 24, at 477. See also the criticisms reported at "Public Meeting" *The Australian* (Sydney, 10 February 1830) at 2.

25 *Kingswell v R* (1985) 159 CLR 264 at 300.

26 See, for example, Editorial *The Australian* (Sydney, 1 September 1825) at 2; "Public Meeting" *Colonial Times* (Hobart 15 June 1834) at 2–3; Editorial *The Australian* (Sydney, 2 June 1829) at 2; A Denzien "Letter to Editor" *Sydney Gazette* (Sydney, 28 November 1839) at 2; "New South Wales Juries" *Sydney Morning Herald* (Sydney, 22 March 1845) at 2; "Judges and Juries" *Port Phillip Patriot* (Melbourne, 5 August 1845) at 2; "The State Trials" *South Australia Register* (Adelaide, 7 March 1855) at 2; "Editorial" *Perth Gazette* (Perth, 31 January 1873) at 2; "Trial by Jury in England" *Maitland Mercury* (Newcastle, 27 May 1873) at 2; "Of Jurymen and their Duties" *Ovens and Murray Advertiser* (Beechworth, 5 September 1874) at 4; "Judges and Juries" *Protestant Standard* (Sydney, 16 December 1876) at 5; and "Our Jury System" *Daily Northern Argus* (Rockhampton, 25 April 1890) at 2.

27 See, for example, the fulsome remarks of the Attorney-General in *R v Tibbs* [1824] TASSC 1. See also *Hobart Town Gazette* (Hobart, 28 May 1824) at 2; John Stephen (subsequently Stephen J) quoted in "Quarter Sessions" *Sydney Gazette* (Sydney, 4 November 1824) at 2; the joint views of the Attorney-General and Solicitor-General quoted in "Colonial Statistics" *The Colonist* (Sydney, 9 June 1836) at 3–4; and James Stephen *A General View of the Criminal Law of England* (Macmillan and Co, London, 1863) at 209.

28 *R v Cordell* [1838] NSWSC 39 per Willis J; *The Australian* (Sydney, 4 May 1838) at 3; "R v M'Gee" *The Australian* (Sydney, 4 May 1839) at 2, *Sydney Gazette* (Sydney, 4 May 1839) at 2; *R v Smith (No 1)* [1839] NSWSC 56; *The Australian* (Sydney, 3 August 1839) at 2; "Trial by Jury" *Sydney Herald* (Sydney, 16 September 1839); and Coleridge J quoted in "On the Importance of Trial by Jury" *South Australian Advertiser* (Adelaide, 4 January 1860) at 3. In a report to the NSW Governor, Forbes CJ, Dowling J and the Attorney-General and Solicitor-General all expressed their satisfaction with the jury system in NSW (Burton J disagreed): "The Jury System" *Sydney Gazette* (Sydney, 9 June 1836) at 2.

29 See, for example, "Law Reports" *Sydney Gazette* (Sydney, 31 December 1829) at 2; "Yesterday's Public Meeting" *The Australian* (Sydney, 10 February 1830) 2–3; "Trial by Jury" *Colonial Times* (Hobart, 24 January 1837) at 4; "The Advantages of Trial by Jury" *Sydney Herald* (Sydney, 8 May 1839) at 2; and HMJ "Letter to the Editor" *The West Australian* (Perth, 7 October 1890) at 3.

jury in 1838 that "the wisdom of man has not devised a happier institution than that of Juries, or one founded in a juster knowledge of human life, or of human capacity."[30] In 1839, Willis J declared to another jury of "that glory of the English law, the inestimable advantage of trial by jury, mode of trial infinitely superior to that prescribed by the civil law".[31] As one editor declared in 1873, since the signing of Magna Carta:[32]

> Trial by Jury has been regarded by all orthodox Englishmen as the great palladium of British liberty. That a man should be tried by his peers and pronounced guilty or innocent by the united voices of 12 "good men" has been regarded by most minds as the *summum bonum* of human justice.

Such confidence was not necessarily universally shared in a 19th century context,[33] but "for all the inefficiency and uncertainty it was said to spawn, trial by jury remained, as [James] Stephen noted in 1863, 'the most popular

30 *R v Cordell* [1838] NSWSC 39; *The Australian* (Sydney, 4 May 1838) at 3. See also *Sydney Gazette* (Sydney, 5 May 1838) at 2.

31 "Trial by Jury" *Sydney Herald* (Sydney, 8 May 1839) at 2. There was a wide and longstanding belief that trial by jury in an English court was superior to any alternative forms of justice. This faith lasted well into the 20th century. As Lord Bingham noted: "When I started practice [in 1959], it was an almost universal article of faith that English law and legal institutions were without peer in the world, with very little to be usefully learned from others": Tom Bingham "'There is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 International and Comparative Law Quarterly 513 at 514.

32 "Editorial" *Wagga Wagga Advertiser* (Wagga Wagga, 5 February 1873) at 2. Indeed, the concept of trial by jury (at least in serious criminal cases) continues to command resolute support to the present day. See, for example, *Kingswell v R* (1985) 159 CLR 264 at 298–303 per Deane J; *Cheng v The Queen* (2000) 203 CLR 248 at [80]–[82] per Gaudron J; *R v Wang* [2005] 1 WLR 661 (UKHL) at [15]–[16]; *Alduqsi v The Queen* [2016] HCA 24, (2016) 90 ALJR 711 at [127]–[141] per Gaegeler J; and *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128 at [146]–[148] per Hinton J. See further The Hon TF Bathurst "Community Participation in Criminal Justice" (Speech given at Opening of Law Term Dinner 2012, Law Society of New South Wales, 30 January 2012); and The Rt Hon Dominic Grieve, Attorney-General of the United Kingdom, "In defence of the jury trial" (Speech given at Politeia Forum, 11 December 2013). Whether this support is justified is another issue. The right to trial by jury is often said to date back to *Magna Carta*. However, whether *Magna Carta* confers such a right is debatable. As Lord Justice Auld noted: "… [i]t is often claimed that *Magna Carta*, traditionally regarded as the foundation of our liberties, established such a right. The claim is incorrect. Certainly *Magna Carta* is no basis for jury trials as we know it today": Sir Robin Auld *Review of the Criminal Courts of England and Wales* (Lord Chancellor's Department, Report, September 2001) at Ch 5 [7]. See also John H Hatcher "Magna Carta and the Jury System" (1938) 24 ABAJ 555.

of all our institutions'".[34] As Quinalut observes, "The Victorians were inordinately proud of the English common law system of trial by jury".[35]

The historical rationale of trial by jury allowed, and even compelled, jurors to act on their local or personal knowledge.[36] This premise "was not rooted out of the law until the early 19th century, the evidence of the witnesses was the material upon which jury verdicts were based".[37] By the early 1800s, in England (as was subsequently transplanted to Australia), it had become accepted that jurors should not draw on their local or personal knowledge.[38] An impartial jury was integral to the fairness of any criminal trial: [39]

> The right to unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury … it necessarily includes the guarantee that the trial shall be had before an impartial jury.

It was often declared in 19th-century trials that it was incumbent for the jury to reach its verdict by reference only to the evidence and arguments adduced at the trial and not by reference to facts, reports or rumours gained

33 See, for example, "Strictures on a Jury" *Sydney Mail* (Sydney, 15 June 1867) at 2; "Judge and Jury" *Maitland Mercury* (Newcastle, 28 March 1868) at 2; "Justice Blindfolded" *Freeman's Journal* (Sydney, 13 August 1870) at 8–9; "Juries and their Verdicts" *Darling Downs Gazette* (Toowoomba, 19 June 1872) at 4; "Editorial" *The Telegraph* (Brisbane, 21 December 1872) at 2; "Editorial" *The Herald* (Fremantle, 25 January 1873) at 2; "The Roma Juries' Case" *Toowoomba Chronicle* (Toowoomba, 21 June 1873) at 3; "Jury 'Eccentricities'" *The Telegraph* (St Kilda, 29 November 1873) at 2; "Editorial" *The Age* (Melbourne, 14 August 1879) at 2; "The Jury System" *Warragul Guardian* (Warragul, 5 April 1895) at 3; "Editorial" *Sydney Morning Herald* (Sydney, 4 September 1895) at 6–7; "Juries' Justice" *Evening News* (Sydney, 4 September 1895) at 4; and *The Australasian* (Sydney, 12 September 1895) at 14.

34 Martin Wiener "Judges vs Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England" (1999) 17 LHR 467 at 478–479 quoting James Stephen, above n 27, at 209.

35 Roland Quinault "Victorian Juries" (2009) 59(5) History Today 47.

36 "Initially jurors were selected for their prior knowledge of the matter in dispute. A judge summoned a group of worthy citizens to decide between rival claims based on their local knowledge. However, the principle gradually emerged that jurors should be uninvolved in the case, and by the eighteenth century a juror with personal knowledge was required to excuse himself from serving on the jury": Lloyd-Bostock and Thomas, above n 19, at 8–9. See also Joseph Hassett "A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction between Pre-Trial Information and 'Prejudicial' Publicity" (1980) 43 LCP 155 at 157–160.

37 Bentley, above n 12, at xii. See further John Mitnick "From Neighbour Witness to Judge of Proofs: The Transformation of the English Civil Juror" (1988) 32 Am J Legal Hist 201.

38 See *R v Sutton* (1816) 4 M & S 532; and *R v Rosser* (1836) 7 C & P 648.

39 C La Rue Munson "Selecting the Jury" (1895) 4 Yale LJ 173 at 184.

from the press or some other external source.[40] "The theory of our system", as Holmes J explained: [41]

> … is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether or private talk or public print.

As one author declared in 1895, the juror's mind before coming into court "should be as white paper".[42]

This premise was explained by Burton J at the first Myall Creek trial in November 1838 of several white men for the murder of 28 Aboriginal men, women and children. Burton J noted the "considerable interest" in the case and reminded the jury "to throw aside any impressions which may have been formed by hearing or reading descriptions of this affair".[43] Burton J elaborated:[44]

> I hope you will not be offended when I recall to your minds, that each of you when entering that box invoked God to witness that he would be determined by the evidence, and return a verdict according to the substance of that evidence; if that were not so; if it were possible a jury could be biased [sic] by out-door impressions

40 See, for example, *R v Kilmeister (No 1)* [1838] NSWSC 105; *Sydney Gazette* (Sydney, 20 November 1838) at 3; *R v Kilmeister (No 2)* [1838] NSWSC 110; and *The Australian* (Sydney, 27 November 1838) at 2. See also *Sydney Gazette* (Sydney, 29 November 1838) at 3. This remains the situation. "It is fundamental that, for an accused to receive a fair trial, the jury should reach its verdict only by the evidence admitted at the trial and not by reference to facts or alleged facts gathered from the media or some outside source": *Murphy v R* (1989) 167 CLR 94 at 98–99 per Mason CJ and Toohey J.

41 *Patterson v Colorado* 205 US 454 (1907) at 462. The requirement that all evidence should be led and tested in court is, and remains, a vital feature of an adversarial system: *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [88]–[89] per Lord Brown JSC.

42 Munson, above n 39, at 184.

43 *R v Kilmeister (No 1)*; and *Sydney Gazette* (Sydney, 20 November 1838) at 3.

44 *R v Kilmeister (No 1)*, and *Sydney Gazette*, above n 43. The focus of this article is upon the "petty" jurors at trial as opposed to role of grand jurors. The 19th century grand jury decided if there was sufficient evidence in a case to put a defendant on trial. They would examine the indictment and statements and hear evidence from the prosecution witnesses, but not defendants. If a grand jury believed that the evidence was sufficient to warrant trial, the case was approved as a "true bill"; if "no bill" was returned the case was dropped. See Bentley, above n 12, at 129–132. The role of the grand jury compounded, in England at least, the problems in securing an unbiased trial jury, given that the same individuals often served as grand jurors and then as petty or trial jurors in the same case. However, the grand jury, though a feature of 19th English criminal procedure, never acquired the same prominence in Australia. See *R v Grassby* (1989) 168 CLR 1 at 10–14 per Dawson J and; J Bennet "The Establishment of Juries in New South Wales" (1961) 3 Syd LR 462 at 482–485.

> and return a verdict not according to the evidence, our dearest rights were at stake and public justice was a farce.

II. The Role of the 19th-Century Press

As the 19th century progressed, with the removal of taxes on newspapers, increasing literacy and technological advances, the circulation and impact of newspapers greatly expanded.[45] The role and impact of the print media in the 19th century is telling (especially in a modern digital world with the ever decreasing impact and circulation of traditional newspapers).[46] In England, a large proportion of the population by the late 1700s gained most of their information about crime and criminal cases from newspapers or other printed sources.[47] At least 20 people read each copy or had some of the contents of each copy read to them.[48] The news and ideas that newspapers conveyed "were carried by word of mouth far beyond the original reading".[49]

The prominence of crime and criminal cases in 19th-century press reporting was notable. Both in London and in the provinces, items of news about crime, court hearings and other aspects of the criminal justice process "had been the staples of newspaper production since its inception".[50] This continued and increased throughout the 19th century. Reports of crime and

45 Lucy Brown *Victorian News and Newspapers* (Oxford: Clarendon Press, New York, 1985); Andrew Hobbs "The deleterious dominance of The Times in nineteenth century historiography" (2013) 18(4) Journal of Victorian Culture 1 at 19; and Christopher Kent "The Editor and the Law" in JH Wiener (ed) *Innovators and Preachers: The Role of the Editor in Victorian England* (Greenwood Press, London, 1985) 99 at 119. See generally Aled Jones *Powers of the Press: Newspapers, Power and the Public in Nineteenth-Century England* (Routledge, Abingdon, 2016).

46 See, for example, Eric Beecher "The Death of Fairfax and the End of Newspapers" *The Monthly* (online ed, Australia, July 2013); John Plunkett "Murdoch Predicts Gloomy Future for Press" *The Guardian* (online ed, United Kingdom, 24 November 2005); and Keith Herndon *The Decline of the Daily Newspaper: How an American Institution lost the Online Revolution* (Peter Lang, New York, 2012).

47 Peter King "Newspaper Reporting and Attitudes to Crime and Justice in late 18th and early 19th century London" (2007) 22 Continuity and Change 73 at 73–74.

48 At 74. "People who could read and could afford to purchase a newspaper shared its content with relatives, friends and neighbours who could not, and as a result the number of people exposed to the newspaper's version of events was much larger than an individual paper's circulation": Jill Ainsley "The Ordeal of Sarah Chesham" (Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Masters of Arts, University of Victoria) at 15.

49 Alan Atkinson and Marian Aveling (eds) *Australians 1838* (Fairfax, Syme and Weldon Associates, Broadway NSW, 1987) at 201. See also Brown, above n 45, 49–50.

50 King, above n 47, at 74.

criminal cases, "often accompanied by scare mongering rhetoric, was a major feature of the Victorian press",[51] and appealed across class and gender:[52]

> The criminal trial became an arena of entertainment for the masses; by extension, newspaper reports of trials were closely followed by increasing numbers of people, facilitated by higher levels of literacy.

Reports were not confined to accounts of notable criminal trials. The evidence adduced in pre-trial proceedings, such as the committal hearing or at the Inquest (if it was a murder)[53], were also widely reported.[54] It is telling that even routine and mundane cases were reported at length: "The press proffered for public appraisal, a daily diet of reports of cases and from primarily the summary courts but also the higher courts".[55]

In a high profile or sensational case, no shred of information or rumour was deemed irrelevant or unduly prejudicial for publication.[56] The implications of such unrestrained publicity did not go unnoticed. The 1823 English case of *Thurtell and Hunt* for a gambling murder attracted intense and prejudicial press coverage, including all the evidence adduced at the Inquest,[57] (even a fictional confession) and numerous articles, a book and a play all conveyed the

51 Judith Rowbotham and Kim Stevenson (eds) *Criminal Conversations: Victorian Crimes, Social Panic and Moral Outrage* (Ohio State University Press, Columbus, 2005) at xxiii–xxiv. See further Judith Flanders *The Invention of Murder: How the Victorians Revelled in Death and Detection and Created Modern Crime* (HarperPress, London, 2011).

52 Victoria Nagy *Nineteenth-Century Female Poisoners: Three English Women Who Used Arsenic to Kill* (Palgrave Macmillan, London, 2015) at 88. See also Judith Rowbotham, Kim Stevenson and Samantha Pegg *Crime News in Modern Britain: Press Reporting and Responsibility, 1829–2010* (Palgrave Macmillan, London, 2013) at 14–59.

53 The Coroner's Inquest into suspicious deaths played a significant role in the 19th century. The Inquest preceded any formal criminal proceedings in relation to any homicide. The Coroner's jury returned a verdict as to the cause of death and could return a verdict of "wilful murder" and also commit for trial the individual they held responsible for the death. The proceedings and findings of Inquests were often highly publicised. "Murder always commanded interest": Rowbotham, Stevenson and Pegg, above n 52, at 16. See generally Ian Burney *Bodies of Evidence: Medicine and the Politics of the English Inquest, 1830–1926* (John Hopkins University Press, Baltimore, 2000).

54 Bentley, above n 12, 43. The accounts were reproduced almost verbatim.

55 Rowbotham and Stevenson, above n 51 at xxiii. "Even a sitting of the summary courts could produce several items likely to entertain and engage readers": Rowbotham, Stevenson, and Pegg, above n 52, at 16.

56 Bentley, above n 12, at 43.

57 John Thurtell, Joseph Hunt and William Probert *A Complete History and Development of all the Extraordinary Circumstances and Events Connected with the Murder of Mr Weare* (Jones and Co, London, 1824) at 12–15; and James Stephen *A History of the Criminal Law of England* (Macmillan and Co, London, 1883) vol 1 at 227–228. This was to prove a recurring 19th century concern for the prospects of a fair trial. See also below at nn 160–162.

guilt of the accused.[58] Park J expressed his deep concern for the implications for trial by jury, the "palladium of British liberty", of such publicity:[59]

> … [if] these statements of evidence before trial which corrupt the purity of the administration of justice in its source … are not checked, I tremble for the fate of our country.

In 1828, the similar "pre-trial media feeding frenzy"[60] in the case of *Corder* (or the "Red Barn Murder") involving the son of a Suffolk squire ultimately convicted of the murder of his lover was described by Lord Cockburn CJ at trial as thoroughly "unfair" and to "the most manifest detriment of the prisoner at the bar".[61] The detailed pre-trial reporting of the evidence adduced at the Inquest was deplored by Lord Cockburn as "mischievous and injurious".[62] Such cases were far from unique in the 19th century.[63]

Bentley notes the damaging effects of pre-trial 19th-century publicity (which was not confined to sensational cases) and cites an 1806 murder trial at the Old Bailey before Grose J, where the jury after a direction to acquit surprised everyone and remained outside for several hours (in itself an unusual event) and on their return informed Grose J that the cause of their difficulty was their struggle to keep clear in their minds what they had heard in evidence and what they had heard in the media.[64]

A. The Press in 19th-Century Australia

The English experience of both the role and impact of the press and its focus on crime and criminal cases was transplanted in 19th-century Australia. The

58 Thurtell, Hunt and Probert, above n 57, at 23–39.

59 At 173–174. See further at 12–15, 52–53; and Flanders, above n 51, 20–30, 35–41. See also below at nn 160–162.

60 Martin Weiner *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge University Press, Cambridge, 2004) 138.

61 "R v Corder" *The Times* (London, 9 August 1828). See also James Curtis *An Authentic and Faithful History of the Mysterious Murder of Maria Marten* (Thomas Kelly, London, 1828) at 229. The intense coverage even included an inflammatory sermon.

62 Curtis, above n 61, at 229.

63 See, for example, *R v Fisher* (1811) 2 Camp 563. The case of Palmer, the notorious poisoner, attracted such pervasive and intense publicity that a special Act of Parliament had to be passed to enable the trial to be moved to London. See Flanders, above n 51, at 262–264; and Soren Frederiksen "Case Comment: The Trial of William Palmer, a Mid-Nineteenth Century English Scientific Evidence Case" (2011) 21(1) Journal of Law, Information and Science 112. In 1886, Adelaide Bartlett was accused of the murder of her husband. Defence counsel, Edward Clark QC, noted the "great public interest" in the case, observing: "I have never known a case, or at all events not more than one, which had in itself so strong a dramatic interest": Edward Beal *The Trial of Adelaide Bartlett for Murder* (Stevens and Haynes, London, 1886) at vii. See further below at n 248.

64 Bentley, above n 12, at 44, n 8.

impact and influence of the colonial press is notable.[65] As Wood explains:[66]

> It would be hard to exaggerate the importance of the press in this period… Contemporary visitors to the colony were struck by the avid consumption of newspapers by the colonists. The day's papers would be widely available and heavily thumbed in public houses throughout the colony, where they would also be read aloud to both the literate and the illiterate.

In both Tasmania[67] and New South Wales,[68] the number of newspapers (many of short duration)[69] for such a comparatively small population is notable. In 1824, there was only one Tasmanian newspaper, the *Hobart Town Gazette* (though the *Colonial Times* and the short-lived *Tasmanian Advertiser* started the following year).[70] By 1842, Tasmania boasted eight newspapers.[71] In 1824, Sydney had only one newspaper, the *Sydney Gazette* (though *The*

65 See, for example, RB Walker *The Newspaper Press in New South Wales, 18031920* (Sydney University Press, Sydney, 1976) at 56–57.

66 Rebecca Wood "Frontier Violence and the Bush Legend: The *Sydney Herald*'s Response to the Myall Creek Massacre Trials and the Creation of Colonial Identity" (2009) 6 History Australia 67.1 at 67.5.

67 In 1825, Tasmania's non-Aboriginal population was 13,600: 6,800 convicts and 6,800 "free". In 1838, there were 13,000 convicts and 10,000 "free" inhabitants and in 1835, 22,000 to 17,000: James Bonwick *The Bushrangers: Illustrating the Early Days of Van Diemen's Land* (George Robertson, Melbourne, 1856) at 8.

68 In 1820, the NSW population was 28,024 (of whom 38.8 per cent were convicts). In 1826, the NSW population was 38,890 (of whom 41.9 per cent were convicts). In 1840, the population of New South Wales was 127,468 (of whom 30.1 per cent were convicts): Peter Grabosky *Sydney in Ferment: Crime, Dissent and Official Reaction, 1788 to 1973* (Australian National University Press, Canberra, 1977) at 9. In 1840, another 30 per cent of the NSW population were former convicts and only 13 per cent were free emigrants: David Neal *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, Cambridge, 1991) at 200–201.

69 In Sydney, for example, the *Weekly Register* ran from 1843 to 1845, *John Bull* in 1843, *The Dispatch* 1843 to 1844, *The Bee* 1844 to 1845, *Sydney Weekly* 1846, *Star and Working Man's Guardian* 1843 to 1844 and the *Citizen* 1846 to 1847: Victor Issacs and Rod Kirkpatrick *Two Hundred Years of Sydney's Newspapers: A Short History* (Rural Press Lt, North Richmond NSW, 2003) at 5–6.

70 The *Derwent Star* (1810 to 1812) was Tasmania's first newspaper.

71 The *Austral-Asiatic Review* (Hobart), *Colonial Times* (Hobart), *Cornwall Chronicle* (Launceston), *The Courier* (Hobart), *The True Colonist* (Hobart), *Launceston Advertiser*, *Launceston Courier* and *Launceston Examiner*. In 1856, Tasmania still boasted the *Britannia and Trades Advocate* (Hobart), *Colonial Times* (Hobart), *Cornwall Chronicle* (Launceston), *The Courier* (Hobart), the *Hobarton Mercury* (Hobart), *Launceston Examiner, Tasmanian Daily News* (Hobart) and *The People's Advocate* (Launceston).

Australian started the following year).[72] By 1842, Sydney had a total of 11 newspapers.[73]

As with 19th-century British newspapers, crime and criminal cases were a staple of 19th-century Australian press reporting. The implications of such reporting upon the prospects of a fair trial did not go unnoticed[74] and, indeed, were compounded by the often small size of colonial jury pools.[75] As in England, even routine criminal cases were reported at length and with a high-profile or sensational case such as *Maria Kinder* or *Nixon*, no shred of information or rumour was deemed irrelevant or unduly prejudicial.[76]

The case of Martha Needle in Melbourne in 1894 provides a vivid example.[77] Mrs Needle was ultimately charged with the murder of her fiancé's brother, Louis Juncken, who had died in suspicious circumstances after objecting to his brother Otto's engagement. There was strong evidence that Mrs Needle had also killed her husband, Henry Needle, and their three young children and had attempted to murder another brother, Herman, who had also objected to Otto's marriage to Mrs Needle. All the crimes were committed with arsenic.[78]

The case was reported at great length, including the exhumation of Needle and the children to test for the presence of arsenic and it was suggested Mrs Needle had murdered Louis Juncken, Henry Needle, and her three young children and even an alleged lover called Thomas Gilroy. No shred of information about the case or Mrs Needle was deemed irrelevant.[79] Mrs Needle was described as having a "flighty disposition fond of company" and a "weakness for the admiration of the sterner sex".[80] Not only had Mrs Needle been involved with Otto, several media reports wrongly stated (much to

72 The first edition of the *Sydney Gazette* was on 5 March 1803.

73 The *Australasian Chronicle*, *The Australian*, *Colonial Observer*, *Commercial Journal and Advertiser, New South Wales Examiner*, *The Omnibus and Sydney Spectator*, *Sydney Free Press*, *Sydney Gazette*, *Sydney General Trade List*, *Sydney Herald* and the *Teetotaller and General Newspaper*. In 1856, Sydney boasted the *Australian Band of Hope Review*, *Bell's Life in Sydney and Sporting Chronicle*, the *Empire*, *Freeman's Journal*, *Illustrated Sydney News*, *People's Advocate*, *Shipping Gazette and Sydney General Trade List* and *Sydney Morning Herald*.

74 See above at n 8.

75 "Jurors" *Ovens and Murray Advertiser* (Beechworth), 17 June 1876 at 2. See further below Part IV.

76 See, for example, "Alleged Murder of Mr Kinder" *Empire* (Sydney, 19 December 1865) at 3.

77 See generally Brian Williams *Martha Needle* (New Holland Publishers, Sydney, 2018); and Samantha Battams *The Secret Art of Poisoning: The True Crimes of Martha Needle, The Richmond Poisoner* (Samantha Battams, Adelaide, 2019).

78 See, for example, "A Sensational Poisoning Story" *The Argus* (Melbourne, 14 June 1894) at 5; "The Richmond Poisoning Case: a Sensational Development" *The Argus* (Melbourne, 15 June 1894) at 5; and "The Richmond Poisoning Case" *The Argus* (Melbourne, 30 June 1894) at 7.

79 Mrs Needle's mother, Mary Foran, described Martha as "cruel" and "headstrong" with an "unforgiveable temper" and Martha would also convince her half-brother to join her in treating their mother cruelly: "The Richmond Poisoning Case" *The Argus* (Melbourne, 20 June 1894) at 5.

80 "Some Strange Stories" *The Advertiser* (Adelaide, 16 June 1894) at 5.

the horror of the Juncken family)[81] that Mrs Needle had also been on "very intimate terms" with Louis Juncken and they had been engaged before an acrimonious break up.[82] It was also reported that Mrs Needle had been on "intimate terms" with a young man named Gilroy, who had promised to marry her when her husband died.[83] After their relationship became strained, it was asserted that Gilroy had died in suspicious circumstances after having "severe abdominal pains".[84] These various reports highlighted Martha Needle's sexual "immorality"[85] and depicted her as a vengeful and coldblooded killer. It was even stated that her own mother, Mary Foran, believed Martha Needle had poisoned her husband and children.[86]

The effect of such damning pre-trial publicity was noted by the defence. Mr Gaunson, representing Mrs Needle, in unsuccessfully applying for bail expressed his belief that the press "had engaged in a conspiracy to hang her and that it was unfair not to allow her bail".[87] The intense and often hostile publicity was such that one report noted that the eventual guilty verdict received "universal favour" and Needle had been adjudged guilty in the public mind long before she had been arraigned and a jury sworn.[88]

The antidote to such prejudicial media reports was to rely upon the jury's ability to put aside pre-trial reports and to act only on the evidence adduced at trial. In *Corder*, for example, the trial judge urged the jurors to "dismiss from your minds, every consideration, every impression, which you may have derived relative to the case"[89] and to act only on the evidence led at trial.[90] Such exhortations to the jury to discount external reports and have regard to

81 "Supposed Murder" *The Advertiser* (Adelaide, 14 June 1894) at 5. The Juncken family wrote to the press disclaiming any such "attachment", insisting "there is not the slightest foundation for such a report": "The Parties in South Australia" *The Advertiser* (Adelaide, 16 June 1894) at 5.

82 See "A Melbourne Sensation" *The Daily Telegraph* (Sydney, 14 June 1894) at 4; "A Sensational Case" *Bendigo Advertiser* (Bendigo, 14 June 1894) at 2; "A Victorian Sensation" *Newcastle Morning Herald and Miners' Advocate* (Newcastle, 14 June 1894) at 5; and "The Parties in South Australia" *The Advertiser* (Adelaide, 16 June 1894) at 5.

83 "The Needle Murder Case" *Barrier Miner* (Broken Hill, 16 July 1894) at 4; and "The Richmond Sensation" *Evening News* (Sydney, 17 July 1894) at 5.

84 "The Needle Murder Case" *Barrier Miner* (Broken Hill, 16 July 1894) at 4; "The Richmond Sensation" *Evening News* (Sydney, 17 July 1894) at 5; and "A Remarkable Coincidence" *Weekly Times* (Melbourne, 21 July 1894) at 21.

85 See David Plater, Joanna Duncan and Sue Milne "'Innocent Victim of Circumstance' or 'a very Devil Incarnate': The Trial and Execution of Elizabeth Woolcock in South Australia in 1873" (2013) 15 Flinders Law Journal 315 at 373–378. See generally Williams above n 77.

86 "Mrs Needle's Career" *The Advertiser* (Adelaide, 16 June 1894) at 5.

87 "The Alleged Poisoning" *Barrier Miner* (Broken Hill, 16 June 1894) at 4. This application was refused because the police feared she would commit suicide.

88 "Mrs Needle Found Guilty" *Kapunda Herald* (Kapunda, 5 October 1894) at 2–3.

89 Curtis, above n 61, at 231.

90 At 232.

only the evidence at trial were customary in 19th-century Australia in both sensational[91] and "routine" cases.[92]

III. Trials in 19th-Century Australia, R v Nixon

In 1824, the notorious convict Alexander Pearce was one of the first defendants to stand trial before the newly established Supreme Court of Tasmania.[93] Pearce was accused of the murder of a fellow convict called Cox, whom he had killed and then roasted and consumed during an ill-fated effort to escape from Macquarie Harbour.[94] The *Hobart Town Gazette* noted that the circumstances which were understood to have accompanied this crime: [95]

> … had long been considered with extreme horror. Report had associated the prisoner with cannibals; and recollecting as we did, the vampire legends of modern

91 See, for example, "R v Thomas Whitton" *The Colonist* (Sydney, 26 February 1840) at 2 (brutal murder by bushranger); "R v Lynch" *Australasian Chronicle* (Sydney, 26 March 1842) at 2 (murder); "R v Knatchbull" *Sydney Morning Herald* (Sydney, 25 January 1844) at 2; *Morning Chronicle* (Sydney, 27 January 1844) at 2–3 (brutal murder by notorious convict); "R v Gardiner" *Sydney Morning Herald* (Sydney, 21 May 1864) at 13; *Sydney Morning Herald* (Sydney, 23 May 1864) at 5 (robbery by notorious bushranger); "R v Hugh Miller and Others" *Daily Telegraph* (Sydney, 23 November 1886) at 3, *Sydney Morning Herald* (Sydney, 23 November 1886) at 4; *Sydney Morning Herald* (Sydney, 29 November 1886) at 4 (the Mount Rennie Gang rape case); "R v Thornton and Others" *Sydney Morning Herald* (Sydney, 7 March 1884) at 3; *Sydney Morning Herald* (Sydney, 11 March 1884) at 5; *Daily Telegraph* (Sydney, 11 March 1884) at 6 (murder and rape); and "The Glenbrook Murders" *The Age* (Melbourne, 15 June 1897) at 5 (the sensational case of Frank Butler for the murder of a Captain Weller).

92 See, for example, "R v Lord" *Colonial Times* (Hobart, 10 June 1834) at 7 (theft of Government property by Army major); "R v Parrott" *Colonial Times* (Hobart, 8 September 1841) at 3 (fraud); "Henry Belfield" *Colonial Times* (Hobart, 25 January 1842) at 3 (murder of convict at Port Arthur); "R v Sim Lac" *Sydney Morning Herald* (Sydney, 6 April 1853) at 2 (during the trial of a Chinese man for an "unnatural offence" upon a boy, the prosecutor urged the jury to put aside any prejudices arising from either the nature of the crime or the background of the accused); "R v Campbell" *Maitland Mercury* (Newcastle, 11 October 1870) at 4 (murder); and "R v Costelloe" *Mt Alexander Mail* (Castlemaine, 9 August 1899) at 2 (indecent assault of a school girl).

93 *R v Pearce* [1824] TASSC 11; *Hobart Town Gazette* (Hobart, 25 June 1824) at 2; see also "Alexander Pearce" *Hobart Town Gazette* (Hobart, 6 August 1824) at 3.

94 Not only had Pearce murdered and consumed Cox, it transpired that on an earlier escape he had also killed and eaten several of his companions. See further "Alexander Pearce" *Hobart Town Gazette* (Hobart, 6 August 1824) at 3; Robert Hughes *The Fatal Shore: A History of Transportation of Convicts to Australia, 1788–1868* (Collins Harvill, London, 1987) at 219–226; and Dan Sprod *Alexander Pearce of Macquarie Harbour: Convict – Bushranger – Cannibal* (Cat and Fiddle Press, Hobart, 1977).

95 "Alexander Pearce" *Hobart Town Gazette* (Hobart, 25 June 1824) at 2.

> Greece … laden with the weight of human blood, and believed to have banqueted on human flesh.

The Attorney-General entreated the military jury: [96]

> … to dismiss from their minds all previous impressions against the prisoner: as however justly their hearts must execrate the fell enormities imputed to him, they should duteously [sic] judge him, not by rumours – but by indisputable evidence.

The effectiveness of such exhortations and the challenge of securing a fair trial before an impartial 19th century jury in a sensational case with public and press clamour, especially in a small jurisdiction, is illustrated by the 1856 Tasmanian case of *Nixon*. A 14-year-old boy, Henry Chamberlayne, was murdered outside Hobart on 13 November 1856. Henry had gone missing on his way to school in Kingston from Blackman's Bay. He was the 14-year-old son of Captain Chamberlayne, a respected member of colonial society. The crime was particularly horrific. The boy was stabbed to death[97] and had also been raped (or to use the language of the period the victim of an "unnatural crime").[98] To compound the heinousness of the crime, it was elaborated in the press coverage that the deceased had been subjected to an "unnatural crime", both before and after his death.[99]

George Nixon, a local convict[100] holding a ticket of leave was arrested in relation to Henry's murder. The local Coroner, a Mr Kirwan, in accordance with 19th-century practice[101] assembled a jury on 14 November 1856 to investigate the circumstances of Henry's death.[102] The Coroner noted the "barbarous" nature of the crime and requested the Inquest jury to: [103]

96 At 2. See also "Alexander Pearce" *Hobart Town Gazette* (Hobart, 6 August 1824) at 3.

97 The murder weapon had once been the property of a bushranger called Connolly, an accomplice of the notorious Rocky Whelan. See "The Kingston Murder" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2.

98 "The Appalling Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 19 November 1856) at 3; and *Colonial Times* (Hobart, 7 February 1857) at 2. It was also noted that the victim had been subjected to an "unmentionable crime": "Barbarous Murder" *Peoples' Advocate* (Launceston, 20 November 1856) at 3, or "a nameless crime": "Kingston: The Late Appalling Murder" *The Courier* (Hobart, 18 November 1856) at 2.

99 "The Inquest" *Tasmanian Daily News* (Hobart, 18 November 1856) at 2; and "The Appalling Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 19 November 1856) at 2–3.

100 Nixon arrived in Tasmania in 1841 aboard the *Westmoreland* following his transportation for manslaughter.

101 See generally Mary Beth Emmerichs "Getting Away with Murder" (2001) 25 Social Science History at 93–100.

102 "The Inquest" *Tasmanian Daily News* (Hobart, 18 November 1856) at 2.

103 At 2. See also "The Appalling Murder of Henry Chamberlayne" Hobarton Mercury (Hobart, 19 November 1856) at 3.

> … dismiss from their minds any prejudices they might have formed either for or against the prisoner and to consider the evidence fairly, calmly and dispassionately … to discard every prejudice and to form their judgment, conscientiously … upon the evidence brought before them.

There was strong circumstantial evidence to connect Nixon to the crime. The Inquest jury after "a long and patient investigation"[104] spanning five days of testimony, on 20 November 1856 returned a verdict of "wilful murder, under the most revolting circumstances, against the prisoner George Nixon" who was committed for trial to Hobart.[105] The circumstances of the death and the evidence adduced at the Inquest were reported at great length in the local press,[106] an issue that was to pose concern both in this case[107] and in the 19th century.[108] The "atrocious deed" produced "very great and general excitement; it is felt that there is no security for any one in a country where such crimes are possible".[109] The powerful comments of Captain Chamberlayne at his son's funeral (subsequently reiterated at an audience with the Governor),[110] denouncing Nixon and also the Imperial and colonial Governments for letting loose such miscreants upon an unsuspecting society were highlighted.[111]

104 "Visit of Mr Chamberlayne to the Governor" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2. It was noted the Inquest was "characterised by careful deliberation, patient research, and an anxious desire to satisfy the ends of justice and the expectations of the country": "Tasmania" *Empire* (Sydney, 2 December 1856) at 3.

105 "The Kingston Murder" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2. See also "The Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 21 November 1856) at 3. The Inquest also formally recorded that Nixon "did commit the abominable crime of … not to be named amongst Christians": "The Inquest" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2.

106 See, for example, "The Inquest" *Tasmanian Daily News* (Hobart, 18 November 1856) at 2; "The Kingston Murder" *Tasmanian Daily News* (Hobart, 19 November 1856) at 2; "The Kingston Murder" *Tasmanian Daily News* (Hobart, 20 November 1856) at 2; and "The Inquest" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2.

107 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3.

108 See also Thurtell, Hunt and Probert, above n 57; and further discussion below at nn 160–162.

109 *Tasmanian Daily News* (Hobart, 22 November 1856) at 2. See also "The Kingston Murder" *Tasmanian Daily News* (Hobart, 21 November 1856) 2. The Inquest jury also found that Nixon had committed "the unnatural offence upon the body of the victim": "The Inquest" *Tasmanian Daily News* (Hobart, 22 November 1856) at 2.

110 "Visit of Mr Chamberlayne to the Governor" *Tasmanian Daily News* (Hobart, 21 November 1856) at 2.

111 "Henry Chamberlayne's Funeral" *Hobarton Mercury* (Hobart, 19 November 1856) at 2. For similar criticisms, see "Editorial" *Tasmanian Daily News* (Hobart, 20 November 1856) at 2; "Editorial" *The Courier* (Hobart, 21 November 1856) at 2; Civis "The Atrocity at Kingston" *Colonial Times* (Hobart, 26 November 1856) at 2; Letter to Editor "Norfolk Islanders" *Tasmanian Daily News* (Hobart, 26 November 1856) at 3; "The Recent Atrocity" *Cornwall Chronicle* (Launceston, 26 November 1856) at 4; and "Norfolk Islanders" *Colonial Times* (Hobart, 17 February 1857) at 2.

Nixon was labelled a "monster",[112] "vile murderer"[113] and "unnatural wretch"[114] in the run up to his trial. Nixon's past convictions for manslaughter (or murder as it was often misreported)[115] and a "nameless crime"[116] were also emphasised.[117]

The case unsurprisingly attracted "very strong"[118] popular feeling and hostile press coverage,[119] including calls for vengeance and summary justice.[120] There were even demands for "the wretch be taken to Port Arthur and hung before his brother wretches".[121]

The *Courier* declared its forthright view of Nixon's guilt and that it was unnecessary to wait for any trial: "We record our opinion of his guilt, and that opinion we should entertain if 50 juries in the Supreme Court brought in a verdict of not guilty".[122] *The Courier* asserted that the "ordinary forms of the law are generally considered too dilatory to mark the deep abhorrence which prevails throughout the island at the acts of this unparalleled monster".[123] The editor asserted that "public safety" and "colonial honour" demanded resort to "extraordinary measures" which would serve as: [124]

> … a precedent which will strike terror to the hearts of the ruffians who may yet remain among us, and take a

112 "The Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 21 November 1856) at 3. See also "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2.

113 "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2. See also "The Murderer Nixon" *Cornwall Chronicle* (Launceston, 26 November 1856) at 5.

114 "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2.

115 "The Daily News in Convulsions" *The Courier* (Hobart, 24 November 1856) at 2.

116 "Barbarous Murder" *People's Advocate* (Launceston, 20 November 1856) at 3.

117 "The Kingston Tragedy" *Colonial Times* (Hobart, 17 November 1856) at 3. "The Murderer Nixon" *Cornwall Chronicle* (Launceston, 26 November 1857) at 4.

118 "The Murderer Nixon" *Cornwall Chronicle* (Launceston, 26 November 1856) at 5.

119 See, for example, "The Kingston Murder" *Tasmanian Daily News* (Hobart, 18 November 1856) at 2; "Henry Chamberlayne's Funeral" *Hobarton Mercury* (Hobart, 19 November 1856) at 2; "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2; "The Appalling Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 19 November 1856) at 2–3; Editorial *The Courier* (Hobart, 21 November 1856) at 2; "The Kingston Tragedy" *Colonial Times* (Hobart, 21 November 1856) at 2; "The Daily News in Convulsions" *The Courier* (Hobart, 24 November 1856) at 2; Pater in Rure "The Kingston Murder" *The Courier* (Hobart, 24 November 1856) at 3; "The Murderer Nixon" *Cornwall Chronicle* (Launceston, 26 November 1857) at 4; and "The Recent Atrocity" *Cornwall Chronicle* (Launceston, 26 November 1856) at 4.

120 "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2; Editorial *The Courier* (Hobart, 21 November 1856) at 2; "The Daily News in Convulsions" *The Courier* (Hobart, 24 November 1856) at 2; and Pater in Rure "The Kingston Murder" *The Courier* (Hobart, 24 November 1856) at 3.

121 See *Colonial Times* (Hobart, 7 February 1857) at 3.

122 "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2.

123 At 2.

124 "Editorial" *The Courier* (Hobart, 21 November 1856) at 2.

> determined attitude towards maintaining the Christian and moral standing of the free community of this island.

The Courier proposed the immediate establishment of a "Special Commission" to swiftly hear the case and for Nixon to answer his crimes at either the scene of the crime or at Port Arthur.[125]

A letter by the victim of an attempted murder by a Norfolk Island convict deplored "wishy washy writing" on the subject and applauded the stance of *The Courier*.[126] The writer declared:[127]

> In the case of the prisoner Nixon, no earthly punishment can meet it, none that we know of sufficiently severe, none among Christians and Heathens too excruciating for him to suffer. Therefore, the breath of this convict taints the air so long as he is alive, a responsibility towards God and man rests on the Executive to order his immediate trial and execution; let that be done.

It is unsurprising that defence counsel at trial noted his sincere belief that, such was the strength of the "public prejudice against the prisoner",[128] Nixon had been at high risk of literally being "torn piece to piece" prior to any trial without even the semblance of the show trial permitted by the Vigilance Committees in California.[129]

Nixon came up for mention before the Supreme Court in Hobart on 4 December 1856,[130] but the case was remanded to the next session.[131] The "strong feeling" existing against Nixon was reported as a reason the Attorney-General had sought postponement of the trial.[132] Nixon's case was listed for trial in Hobart before the Chief Justice on 4 February 1857 and an effort was made by the defence to move the trial to "the north side of the island" (presumably Oatlands or Launceston), "on account of the strong public

125 "The Monster Nixon" *The Courier* (Hobart, 20 November 1856) at 2.

126 Pater in Rure "The Kingston Murder" *The Courier* (Hobart, 24 November 1856) at 3. See also Justitia "The Late Murder" *Colonial Times* (Hobart, 26 November 1856) at 2.

127 Pater in Rure "The Kingston Murder" *The Courier* (Hobart, 24 November 1856) at 3.

128 *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

129 *Colonial Times* (Hobart, 7 February 1857) at 3. See also *Hobart Town Mercury* (Hobart, 9 February 1857) at 3; and *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

130 Criminal justice in the 19th century moved far faster than now. Park J in *Thurtell and Hunt* cited one English murder case where the death happened on a Monday and on the following Monday, the offender was executed. See Thurtell, Hunt and Probert, above n 57, at 52.

131 *Tasmanian Daily News* (Hobart, 5 December 1856) at 3.

132 "The Murder of Henry Chamberlayne" *Hobarton Mercury* (Hobart, 3 December 1856) at 3.

feeling existing on this side".[133] The Chief Justice determined that the trial should proceed, noting that it was now too late to change the venue.[134]

Nixon at the trial[135] pleaded not guilty and denied any role in the death. The Chief Justice, prosecutor and defence counsel, Mr Macdowell, at the trial urged the jury to discount any prior publicity or prejudgement and to have regard only to the evidence presented at trial.[136] The Attorney-General as prosecutor was conspicuous in this regard.[137] Notwithstanding the gravity and "notorious" circumstances of the crime, the Attorney-General entreated the jury in "a most serious and feeling manner"[138] in his opening address that it was crucial for the jury to keep their minds free of any prejudice or prejudgement. They should act only on the evidence as presented at trial and discount the hostile press coverage and forget all that they had heard or seen outside court.[139] This exhortation was repeated by the Attorney in his closing address.[140] The Attorney-General having noted the "more extravagant" press comments: [141]

> … felt, that he should shrink from the performance of his duty, if he did not openly here condemn the highly improper tone adopted by the writers, as utterly subversive of all justice, and the fair and impartial administration of the law, for if the course, recommended by those journals, was carried out, no man could expect a fair trial, his case being emphatically prejudged: this was worse than the proceedings of the Vigilance Committee at California, as they did award the culprit a trial of some sort.

133 "R v Nixon" *Tasmanian Daily News* (Hobart, 6 February 1857) at 2. See also *Colonial Times* (Hobart, 7 February 1857) at 2.

134 *Colonial Times* (Hobart, 7 February 1857) at 2.

135 "R v Nixon" *Tasmanian Daily News* (Hobart, 6 February 1857) at 2; *Hobart Town Mercury* (Hobart, 6 February 1857) at 2–3; *Colonial Times* (Hobart, 7 February 1857) at 2–3 (day 1); *The Courier* (Hobart, 7 February 1857) at 3; *Tasmanian Daily News* (Hobart, 7 February 1857) at 3; and *Hobart Town Mercury* (Hobart, 9 February 1857) at 2.

136 The same exhortation had been given at the Inquest that had unsurprisingly pronounced Nixon's culpability.

137 Editorial "Nixon's Trial" *Hobart Town Mercury* (Hobart, 9 February 1857) at 2. The prosecutor's restraint was in accordance with the notion of the prosecutor as a "minister of justice" as opposed to the zealous advocate. See David Plater and Sangeetha Royan "The Development and Application in Nineteenth Century Australia of the Prosecutor's Role as a Minister of Justice: Rhetoric or Reality?" (2012) 31 U Tas LR 78.

138 Tas*manian Daily News* (Hobart, 6 February 1857) at 2.

139 *Colonial Times* (Hobart, 7 February 1857) at 2; and Tas*manian Daily News* (Hobart, 6 February 1857) at 2.

140 *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

141 *Hobart Town Mercury* (Hobart, 9 February 1857) at 2. See also *Colonial Times* (Hobart, 7 February 1857) at 2; and *Tasmanian Daily News* (Hobart, 6 February 1857) at 2. This is a reference to the vigilante style justice and "kangaroo courts" of California after the 1849 Gold Rush.

Defence counsel,[142] deploring the "mendacious, malicious, unfair and un-English"[143] nature of much of the reporting, and the Chief Justice,[144] repeated these strong comments, also urging the jury to discount the reports they would have heard or read outside court. Mr Macdowell, on behalf of Nixon, urged the jury to consider what was said to be the weaknesses in the prosecution's circumstantial case.[145] Even Nixon was allowed to adduce a statement at the trial in which he: [146]

> … also censured the conduct of the writers in *The Courier,* and in the other Journals, who had prejudiced the public mind against him, and implored the Jury to place no confidence, in a case of life and death, on circumstantial evidence …

It is significant that, notwithstanding the nature of the crime and the extensive and emotive nature of the pre-trial publicity, the Chief Justice, prosecutor and defence all expressed their confidence at trial in the jury's ability to act only on the evidence.[147]

Nixon was found guilty of murder. The Chief Justice noted his concurrence with the jury's verdict and that Nixon had had the benefit "of a very able, eloquent, experienced and learned counsel" who had made an "able defence".[148] The Chief Justice emphasised the gravity of the crime and Nixon's character, noting that he had been transported to Tasmania for manslaughter in 1841, having pushed a man down a well,[149] and had then been guilty of a "continued series of offences"[150] and had absconded from custody "times without number".[151] The Chief Justice noted that he was left with "no doubt" that Nixon had also "committed a nameless offence with a fellow prisoner at

142 *Colonial Times* (Hobart, 7 February 1857) at 3; and *Hobart Town Mercury* (Hobart, 9 February 1857) at 2.

143 *Colonial Times* (Hobart, 7 February 1857) at 3.

144 *Hobart Town Mercury* (Hobart, 9 February 1857) at 2.

145 *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

146 *Hobart Town Mercury* (Hobart, 9 February 1857) at 2.

147 "Nixon's Trial" *Hobart Town Mercury* (Hobart, 9 February 1857) at 2. Mr MacDowell was less than fulsome in this regard, noting the prejudicial views articulated in the press were such that no appeal from the prosecutor or trial judge to the jury to act only on the evidence would have proved effective had the trial being held immediately after the murder. "The prisoner would have been utterly denied a fair trial according to constitutional practice": *Tasmanian Daily News* (Hobart, 7 February 1857) at 3. See also *Colonial Times* (Hobart, 7 February 1857) at 3.

148 *Tasmanian Daily News* (Hobart, 7 February 1857) at 3. See also *The Courier* (Hobart, 7 February 1857) at 3.

149 *The Courier*, above n 135, at 3. Nixon said he had pushed the man under a wheel.

150 *Colonial Times* (Hobart, 7 February 1857) at 3. See also *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

151 *The Courier* (Hobart, 7 February 1957) at 3.

Port Arthur".[152] Nixon was sentenced to death without hope of mercy and was hanged, still protesting his innocence.[153]

Whether the exhortations to act only on the evidence were effective and to discount the prejudicial publicity will never be known. There seems to have been little doubt as to Nixon's guilt.[154] Even the cautious *Launceston Examiner* considered:[155]

> … the chain of evidence against Nixon which point him out as the perpetrator of a duplex crime more loathsome and diabolical than any that darken the annals of even Norfolk Island or Van Diemen's Land.

The jury took 95 minutes to arrive at a guilty verdict (a relatively long time in this period) and asked two pertinent questions,[156] suggesting the jury gave the case its serious consideration and perhaps Nixon's guilt had not been the foregone conclusion as may have been feared.

However, the intense and hostile pre-trial coverage did not go unnoticed. The Launceston Examiner questioned Nixon's prospects of a fair trial before an impartial jury:[157]

> The state of popular feeling in the vicinity, and the foregone conclusions as to the prisoner's guilt which appear to be prevalent near the scene of the murder, seem to suggest to the Executive the propriety of considering whether the requisite legal steps should not be taken to have Nixon tried at the sitting of the Supreme Court at Oatlands or Launceston, for reasons analogous to those

152 At 3.

153 "Execution" *Hobart Town Mercury* (Hobart, 4 March 1857) at 3; and RW Wilson "The Kingston Murder" *The Courier* (Hobart, 7 March 1857) at 2.

154 The *Hobart Town Mercury*, for example, pronounced its confidence that Nixon had received a fair trial, noting the careful police investigation, the Attorney-General's restraint and "strict impartiality", the skilled conduct of the defence case by "one of the most able and experienced counsel at our Bar" and the careful and precise summing up by the Chief Justice: "Trial of George Nixon" *Hobart Town Mercury* (Hobart, 11 February 1857) at 2.

155 "The Kingston Tragedy", *Launceston Examiner* (Launceston, 20 November 1856) at 3. However, the Roman Catholic Bishop of Hobart, Dr RW Wilson, wrote to the press about his unease over Nixon's conviction and explained that, despite his repeated efforts to convince Nixon of the need to reveal the truth, Nixon had persisted till the end in maintaining his innocence. "The only conclusion I have come to is this – that either Satan has obtained a power over this man, which makes one's flesh creep to think of – or a grave error has been fallen into, and the fiend in human form who committed the appalling crime is still at large. I am, I must confess, quite incapable of forming an opinion at all satisfactory to myself which of the two is the fact": RW Wilson "The Kingston Murder" *The Courier* (Hobart, 7 March 1857) at 2.

156 *Colonial Times* (Hobart, 7 February 1857) at 3; *Tasmanian Daily News* (Hobart, 7 February 1857) at 3.

157 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 22 November 1856) at 3.

> for which the trial of Palmer was removed from Stafford to London.

The implications of the unrestrained coverage of the damning evidence led at the Inquest on the prospects of a fair trial and impartial jury were highlighted. The Launceston Examiner was critical of the prejudicial pre-trial reporting and singled out The Courier for particular censure.[158] The Launceston Examiner noted that it refrained from reporting the evidence led at an Inquest and was critical of the "imprudence of the southern press in giving publicity to all the shocking details connected with the murder of poor young Chamberlayne".[159] The editor raised whether such proceedings should be open to the public and limits placed on what could be reported.[160] The editor noted that the English argument in favour of open justice in such proceedings "loses much of its force in a small society" as in Tasmania.[161] The editor argued such detailed pre-trial reports of the evidence in the case led to inevitable prejudice:[162]

> By this means they not only anticipate but almost fabricate the verdict of the Coroner's jury. In a crime so foul the Nemesis of justice can never be appeased until the life of the perpetrator has been forfeited; but let us be careful that we do not add murder to murder by hanging the innocent. Between accusation and guilty there is an awful distinction, which a prejudged or biased intellect is certain to confound.

The concern over prejudicial publicity (including the pre-trial reporting of the evidence) extended to more routine trials. In 1842, a convict at Port Arthur called Belfield murdered a fellow convict called Broadman (an all too routine crime in Tasmania in this period). The murder was without apparent motive and attracted comment in the colonial press.[163] One report declared:[164]

158 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3; and "The Kingston Tragedy" *Launceston Examiner* (Launceston, 22 November 1856) at 2–3.

159 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 22 November 1856) at 2–3. See also "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3.

160 This was a regular theme. See Bentley, above n 12, 44–47. See, for example, *The Times* (London, 14 July 1827); *The Times* (London, 16 July 1827); "R v Fenn" *The Times* (London, 11 September 1828); "The Late Murder" *Sydney Gazette* (Sydney, 13 June 1834) at 2; and "Alleged Murder of Mr Kinder" *Empire* (Sydney, 19 December 1865) at 3. See also above n 59.

161 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 22 November 1856) at 2–3.

162 "The Kingston Tragedy" *Launceston Examiner* (Launceston, 20 November 1856) at 3.

163 See, for example, "Murder at Port Arthur" *The Courier* (Hobart, 14 January 1842) at 2.

164 "Horrible Murder at Port Arthur" *Launceston Courier* (Launceston, 17 January 1842) at 2.

> Port Arthur has again been the scene of a horrid cold-blooded and motiveless murder. The annals of crime in this or in any other country may perhaps be searched in vain for an instance of the destruction of a fellow creature equally cold blooded and altogether unprovoked as the one it is now our painful duty to record.

Belfield was legally unrepresented at the trial.[165] In his opening address, the Attorney-General stressed to the jury the need to ignore anything that they may have heard or read about the case and to act only upon the evidence presented at trial. The Attorney-General commented that he had seen a detailed report of the case in the local press and that he would be failing in his duty as a public prosecutor if he did not deplore such accounts, as they undermined the "well known maxim in British jurisprudence that every man must be believed to be innocent till he was proved to be guilty".[166] Belfield offered no defence and was unsurprisingly convicted. The Chief Justice expressed his agreement with the jury's verdict and sentence of death was passed. Mercy was refused and Belfield was hanged.[167]

IV. An Impartial Jury in 19th-Century Australia

The problems of implementing the English jury system in a colony with a small population soon became evident. The challenge of securing a fair and impartial jury was compounded in a colony with a small population and an even smaller pool of eligible male jurors.[168] Only a restricted pool of men who owned substantial property could sit as 19th-century jurors[169], thus undermining the rationale of trial by one's peers, or at least a representative

165 "R v Belfield" *Colonial Times* (Hobart, 25 January 1842) at 3; *The Courier* (Hobart, 21 January 1842) at 2–3; and *Launceston Courier* (Launceston, 31 January 1842) at 2–3.

166 *Colonial Times* (Hobart, 25 January 1842) at 3.

167 See "Hobart Town: Execution of Henry Belfield" *The Courier* (Hobart, 4 February 1842) at 4.

168 On more than one occasion, judges expressed their exasperation at the lack of an impartial jury in country towns. See, for example, "Dalby" *The Queenslander* (Brisbane, 17 July 1869) at 6.

169 See, for example, Juries Act 1832 (WA) 2 Will IV 4 No 3 which provided that jurors had to be male, aged between 21 and 60, and own real estate worth £50 or personal estate worth £100, but court officers, civil servants, clergy, legal practitioners, medical men, aliens, criminals, JPs and various other groups were excluded. See also Barker, above n 24, at 140–147 for the 1800s NSW position.

part of the community.[170] The same persons could be repeatedly called upon for jury service.[171]

Montagu J, for example, was unimpressed when an 1842 Launceston jury found in favour of the plaintiff, "contrary to the evidence and in complete opposition" to the judge's directions.[172] Montagu J lamented in an earlier case:[173]

> It was very difficult in these Colonies to obtain a really impartial jury who enter the box totally ignorant of the case to be brought before them, and who will be guided solely by what will appear in evidence; more particularly so in Launceston, where the community is small, where the smallest transaction is known, and where the merchants, who principally compose the juries, know more of the case before entering the Court than the Judge does. I have repeatedly seen jurors enter upon a case, their minds already fixed as to the verdict.

It also seems clear that jurors in such a small society must often have had personal knowledge of the parties and/or cases.[174] In a report of a West Australian trial in January 1833 of a man called Vlelvick, "charged with assaulting a black man named Samud Ali", it was noted that several of the jurors shared "what they knew of the transaction".[175] The reporter described this as "highly improper".[176] The reporter elaborated:[177]

> We will allow it is extremely difficult in so small a Community as our own to select a Jury unacquainted with the circumstances of a Case, previously to their entering the Box, or to divest themselves of the impression this knowledge has left upon their minds; but there cannot be much difficulty in refraining from a public declaration of it.

170 "The hallmark of jury trials in the 19th century was their wholly unrepresentative character. The only persons eligible to serve were men aged between 21 and 60 and possessed of the requisite property qualification": Bentley, above n 12, at 89. See also Woods, above n 24, at 18–19.

171 Peter Handford "Criminal Prosecutions in Western Australia: A View from the Nineteenth Century" (2018) 43(1) University of Western Australia Law Review 143 at 156.

172 "Tetley v Sherwin", *Launceston Courier* (Launceston, 21 February 1842) at 2.

173 "Pitcher v Sinclair" *Launceston Advertiser* (Launceston, 27 May 1841) at 3.

174 Handford, above n 171, at 156. This is similar to the situation of the medieval English jury. See John Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, New York, 2003) at 64.

175 "R v Velvick" *Perth Gazette* (Perth, 5 January 1833) at 4.

176 At 4.

177 At 4.

Another report the following year lamented:[178]

> Trial by Jury has justly been called the glory of English law … but I am afraid that its introduction into a young community is not productive of those advantages which are attended in its operation in an extensive and populous society. Our numbers are so few, and our society, I am sorry to state, so divided into hostile parties, that it is impossible to procure a Jury, either in Civil or Criminal matters, totally impartial … In England, the Jury that tries a prisoner, in nine cases out of ten, perhaps never before heard of his name or existence. Here, our community is, as it were, a large family, every member of which is intimately known to the other; and therefore the present system of trial by Jury assumes the likeness of a child clothed in man's attire.

On more than one occasion, 19th-century judges expressed their exasperation at the lack of an impartial jury in country Australian towns and what was perceived as partiality for the defence, even in the face of overwhelming evidence.[179]

V. 19th-Century Remedies to Ensure a Fair Trial

It was rare to find a potential juror as frank as one at the retrial of a Melbourne surgeon for abortion who "said he was not a fit person to sit on the trial, as he had read the whole of the evidence of the previous trial, and had formed an opinion against the prisoner".[180] However, the remedies to deal with concerns over prejudicial publicity in the 19th century were limited.[181]

The options included the use of pre-emptory challenges,[182] questioning of potential jurors to determine if bias or other sufficient cause existed to

178 Comment "Trial by Jury" *Perth Gazette* (Perth, 11 October 1834) at 11.

179 See, for example, "Dalby" *The Queenslander* (Brisbane, 17 July 1869) at 6; "The Roma Juries' Case" *Toowoomba Chronicle* (Toowoomba, 21 June 1873) at 3; and "Jurors" *Ovens and Murray Advertiser* (Beechworth, 17 June 1876) at 2.

180 "R v Beaney" *The Age* (Melbourne, 19 June 1866) at 6.

181 Indeed, this remains the situation.

182 This enables both sides to object without any reasons to a potential juror. In England, an accused could exercise 20 such challenges; Bentley, above n 12, at 95. However, given the very limited information available to the lawyers (which would extend at most to the name, address and occupation), such challenges to detect potential bias were guided (and indeed still are) more by amateur psychology than any hard facts. "The process may have some symbolic value … but it is anything but scientific": Chesterman, above n 24, at 83. Once the challenges are exhausted, the party can only challenge a potential juror on the ground of demonstrated bias or other good cause.

challenge them,[183] or orders restricting publication of the evidence led in preliminary proceedings or other material.[184] The option of a "special jury"[185] was also employed on rare occasion,[186] though the notion of a "special jury" undermines the concept of trial by your peers, of 12 random members of the community.

One longstanding remedy was for the court to postpone a highly publicised trial to allow public and press passion to subside. The salacious murder case (including the pre-trial reporting of all the evidence in the case)

183 The option of allowing counsel to question potential jurors about potential bias such as their knowledge of prejudicial reports was raised on occasion (see, for example, *R v Fletcher, Welsh and Lang* Empire (Sydney, 11 August 1874) at 3). However, any such practice was rejected in *R v Dowling* (1848) 3 Cox CC 509; *R v Lacey* (1843) 3 Cox CC 517 and *R v Edmonds* (1828) 4 B & Ad 471 and any such questioning was extremely limited in England. See Bentley, above n 12, at 96. It remains a "wholly exceptional" remedy: *R v Kray* (1969) 53 Cr App R 412, at 416. See also *R v Andrews* [1999] Crim LR 156; and *R v Bunting and Wagner* [2003] SASC 257, at [14]. The contrast with the approach in the United States where such questioning is routine is "very striking": Chesterman, above n 24, at 91. See also Jay Spears "Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges" (1975) 27 Stanford Law Review 1493. The effectiveness of such questioning to detect juror prejudice has been doubted. See, for example, *Murphy v R*, above n 40, at 103, 123–124.

184 The value of such orders was limited. Any such orders were routinely flouted. See Bentley, above n 12, at 44–46. As with modern suppression orders, the enforceability of orders banning publication was, even in the 19th century, forlorn: at 46. Such orders were also at odds with the general right and public interest to freely report legal proceedings (including preliminary proceedings where evidence is led) and the importance of open justice: at 47–48. See also *Usill v Hayes* (1878) 14 Cox CC 61. As one Sydney editor declared: "reports of examinations before the committing Magistrates, for capital felonies, if full and fair, were, on the whole, beneficial to public justice, including the well-being of the party committed … we … shall always feel it our duty to publish full and fair reports of Police examinations, not only in misdemeanours and common felonies, but also of all capital felonies": "The Late Murder" *Sydney Monitor* (Sydney, 25 June 1834) at 2.

185 Even though ordinary jurors were men who owned property, "'special jurors' were an even more refined category of people. Special jurors were the minor gentry who might be designated 'Esquire' and successful commercial people such as bankers and merchants of means … Special jurors were more likely to be conservative than ordinary jurors": Woods, above n 24, at 51–52. However, "it was practically impossible to establish a special jury system in New South Wales": at 66, n 8. "The subject of special juries is matter of obscurity, complexity and apparent practical unimportance in the colony and is not pursued here": at 65–66. See also at 69. This article follows the same approach. See generally James Oldham "Special Juries in England: Nineteenth Century Usage and Reform" (1987) 8(2) Journal of Legal History 148.

186 See, for example, "R v Beaney" *The Age* (Melbourne, 18 April 1866) at 7. See also "R v Lancefield" *Brisbane Courier* (Brisbane, 8 September 1876) at 3; *Darling Downs Gazette* (Toowoomba, 9 September 19876) at 3, where a "special jury" was ordered for the retrial of a wife accused of the murder of her husband by poison owing to the "considerable" discussion and the "excitement" the case had generated, which had been increased by the press reports appearing of the proceedings in the district where the retrial was to be held: *Brisbane Courier* (Brisbane, 8 September 1876) at 3. A special jury was a power conferred by s 26 of the then Jury Act (Qld) "in cases presenting great difficulty, and requiring some special scientific or other knowledge in order to try it properly".

involving Maria Kinder and her married lover, Bertrand, "excited a very deep sensation in the community"[187] and was adjourned in December 1865 for two months to allow public and press passion to subside, after Cheeke J had been left in "no doubt [that] the public mind has been very much biased by the indiscreet and wrongful publication of the evidence taken at the preliminary investigation".[188]

However, in practice, courts were reluctant to postpone criminal trials on this ground.[189] Courts were anxious to ensure that, at least, criminal cases were progressed and concluded in a timely manner.[190] Bentley notes that it was "rare" for a court to agree to postpone a criminal trial.[191]

This reluctance to delay a trial is demonstrated by the 1844 New South Wales case of *R v Knatchbull.*[192] Knatchbull was an unlikely defendant. He was a former naval officer and came from a "respectable" background.[193] However, Knatchbull had been a notorious convict[194] who had enjoyed a "charmed life"

187 "The Alleged Murder of Mr Kinder" *Empire* (Sydney, 21 December 1865) at 2.

188 At 2. See also "Alleged Murder of Mr Kinder" *Empire* (Sydney, 19 December 1865) at 3.

189 See, for example, *R v Geach* (1840) 9 C & P 499, 173 ER 929; and "R v Graham" *The Times* (London, 7 August 1845).

190 "As I understand the criminal law the principle on which it should be governed, and which should never be lost sight of is that justice must be sure and it must be speedy. It is of the highest importance that punishment should be as early as possible after the offence or the accused, if innocent, as soon as possible discharged": "R v Demming" *The Argus* (Melbourne, 23 April 1892) at 9 per Williams J.

191 Bentley, above n 12, at 47. The refusal to adjourn the famous English case of Oscar Wilde for "charges of an abominable nature" ("The Wilde Scandal: Postponement of Trial Refused" *The Australian Star* (Sydney, 26 April 1896) at 6) shows how strictly this was applied. See H Montgomery Hyde *The Trials of Oscar Wide* (Dover Publications, New York, 1962) at 158, 164. Though the 1823 English case of *Thurtell and Hunt* was adjourned for a month by Park J to allow the publicity to subside. See also *R v Bolam* (1839) 2 M & Rob 192, 174 ER 259.

192 See the reports of the trial in *The Australian* (Sydney, 25 January 1844) at 3; *Sydney Morning Herald* (Sydney, 25 January 1844) at 2–3; *Morning Chronicle* (Sydney, 27 January 1844) at 3; and *Sydney Record* (Sydney, 27 January 1844) at 131–132.

193 His brother, Sir Edward Knatchbull, was a Minister at the time in the British Cabinet. See "Knatchbull" *Parramatta Chronicle* (Parramatta, 17 February 1844) at 2–3. See further Colin Roderick *John Knatchbull: From Quarterdeck to Gallows* (Angus and Robertson, Sydney, 1963); National Centre of Biography "Knatchbull, John (1792–1844)" in *Australian Dictionary of Biography, Volume 2* (Melbourne University Press, Melbourne, 1979).

194 Knatchbull had committed further crimes in the colony that had led him to being transported to Norfolk Island. See the hostile descriptions of him in Roger Therry *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (S Low Son and Co, London, 1863) at 100–104; "The Erskine Street Outrage" *The Dispatch* (Sydney, 13 January 1844) at 3; and "Shocking Attempt at Murder" *Colonial Times* (Hobart, 6 February 1844) at 3.

in the colonies after his transportation from England.[195] Knatchbull was arrested in Sydney on 6 January 1844 after a brutal robbery and attack with a tomahawk left a widow, Ellen Jamieson, mortally wounded. Knatchbull was literally caught red-handed at the scene of the crime and the evidence against him was overwhelming. Mrs Jamieson died on 18 January 1844, leaving two young orphaned children.[196] The case attracted "intense interest".[197] Knatchbull was denounced as a "monster whose character disgraced our common nature"[198] and there was a strong public and press reaction:[199] "The public bayed for the rope".[200]

The Inquest into Mrs Jamieson's death was held on 18 January 1844 and the evidence (to the Attorney General's subsequent regret at trial) was reported at length.[201] Knatchbull when called on for his defence, stated to the Inquest his particular request for the jury:[202]

> … not to be led away by anything they had heard out of doors; as a jury of free-born Englishmen he trusted they would give him a fair trial, of which it was the right of every one circumstanced as he was to demand at their hands: for if they were guided by anything that they had heard, or which they had read in the newspapers about

195 Knatchbull had been implicated not only in a plot to poison the crew of the ship taking him to Norfolk Island but also as a party to the bloody 1834 convict mutiny at Norfolk Island that ultimately resulted in the conviction and execution of 13 convicts (see also *R v Douglas & Ors* [1834] NSWSC 81, *Sydney Gazette* (Sydney, 13 September 1834) at S1–S2) when he acted as an informer and provided a deposition to the island's Commandant. Knatchbull, much to the regret of Burton J (the trial judge in both the 1834 mutiny and *Knatchbull*) was not charged for his role in the affair. See Therry, above n 194, at 101; *Australian Dictionary of Biography*, above n 193.

196 Ironically, Knatchbull's lawyer, Robert Lowe (subsequently Viscount Sherbrooke, British Chancellor of the Exchequer and Home Secretary) later adopted the two children.

197 "Inquests" *Sydney Morning Herald* (Sydney, 19 January 1844) at 2.

198 "Shocking Attempt at Murder" *Sydney Record* (Sydney, 13 January 1844) at 15.

199 "The resentment felt by the mass of New South Welshmen against their lords and masters in the British caste system was usually stifled or diverted; however, in Knatchbull, the man in the street had a living symbol of the arrogance of the ruling classes. He was a 'toff' who had treated a working class woman with the ultimate contempt and disregard": Woods, above n 24, at 159–160. See also, for example, "Shocking Attempt at Murder" Sydney Record (Sydney, 13 January 1844) at 15; "The Esrkine Street Outrage" The Dispatch (Sydney, 13 January 1844) at 3; and "Knatchbull the Murderer" Parramatta Chronicle (Parramatta, 20 January 1844) at 3.

200 Woods, above n 24, at 159. Knatchbull had to be conveyed to the prison in a coach under police escort after the Inquest "to protect him from the fury of the populace, who had surrounded the place … and expressed their determination to tear him to pieces": "Knatchbull the Murderer" *Parramatta Chronicle* (Parramata 20 January 1844) at 3. See also "Inquests" *Sydney Morning Herald* (Sydney, 19 January 1844) at 3.

201 *Sydney Morning Herald*, above n 200, at 2–3. This was a recurring 19th century concern. See also above at nn 57, 160–162.

202 "Inquests" *Sydney Morning Herald* (Sydney, 19 January 1844) at 3.

> him, he would not be receiving that justice he had a right to expect at their hands.

The Inquest jury after only a minute's consultation returned a verdict of "wilful murder" against Knatchbull and he was committed for trial.

The case was listed for trial on 24 January 1844. Defence counsel, Mr Lowe, sought an adjournment of the trial to better prepare the defence case and: [203]

> … on the ground that the public mind was in a state of undue excitement, from the impression which had been created by the recent occurrence of the transaction, and the opinions which had gone forth respecting it …

He argued that the defence case "must be highly prejudiced by an immediate trial, which could not under these circumstances be an impartial one".[204] The Attorney-General opposed such an adjournment, arguing that "the admission of such a plea might tend greatly to the embarrassment of the administration of justice".[205] Burton J saw no reason why the course of justice should be delayed on account of the publicity.[206] He could not listen to such an application "unless some facts were stated upon affidavit to show that this excitement prevailed, and that it would have tendency to hinder the prisoner from being fairly tried".[207]

Even if a highly charged case such as *Knatchbull* (or *Nixon*) had been adjourned, this remedy would have been of limited utility.[208] To postpone the trial may be seen as merely delaying the inevitable as "whenever the trial commenced, the excitement would revive".[209] The sensational case of *Bertrand and Kinder*, for example, was adjourned but the "considerable excitement" merely revived when the trial was heard.[210] Alternatively it may be unlikely

203 "R v Knatchbull" *Sydney Record* (Sydney, 27 January 1844) at 131.

204 "R v Knatchbull" *Sydney Morning Herald* (Sydney, 25 January 1844) at 2. See also *Morning Chronicle* (Sydney, 24 January 1844) at 3.

205 *Sydney Morning Herald* (Sydney, 25 January 1844) at 2.

206 *The Australian* (Sydney, 25 January 1844) at 3.

207 *Sydney Morning Herald* (Sydney, 25 January 1844) at 2. Knatchbull raised a novel defence of insanity based on "irresistible impulse". He was unsurprisingly convicted and executed.

208 A temporary stay is more likely to be granted when the accused faces an immediate, and short-lived, publicity blitz. See, for example, *Murphy v R*, above n 42, at 98; *Re: K* [2002] NSWCCA 374; and *R v Long, ex parte Attorney-General (Qld)* (2003) 138 A Crim R 103, at 106–107 [9] per McMurdo P, 144 [173]. See further Jacqueline Horan "Prejudicial Publicity and the Jury" in Jacqueline Horan (ed) *Juries in the 21st Century* (Federation Press, Sydney, 2012) 173 at 184.

209 "R v Deeming" *The Age* (Melbourne, 23 April 1892) at 7; *Traralgon Record* (Traralgon VIC, 26 April 1892) at 3. See also *Murphy v R*, above n 40, at 99.

210 "R v Bertrand" *Sydney Morning Herald* (Sydney, 15 February 1866) at 2. The same also happened after the one-month delay of the trial in *Thurtell and Hunt*. See Flanders, above n 51, at 36.

that the passage of, say three months, would overcome the prejudice of a particular item.[211]

Another option open to a court was to change the venue of the trial[212] (as the defence sought to do in *Nixon*). This could be to address bias, either hostile or in favour of the accused. In the 19th-century English case of *Palmer*, the notorious poisoner and murderer, the trial was moved from Staffordshire, where the crime had taken place, on account of local passion and prejudicial press coverage, to the Central Criminal Court in London.[213] The option to change the venue was likely (as now) to be most beneficial where a trial is to be heard in a small town or remote area, the accused is known to other residents and the publicity is confined to local media.[214]

It is notable that examples of a court allowing a change of venue on the basis of jury bias or prejudicial publicity were relatively few and far between in this period in Australia[215] or England.[216] The 19th-century courts were very reluctant to order a change of venue.[217] To have any prospect of a change of venue, "an applicant had to make out a very strong case".[218]

211 "R v Samuel Fletcher" *Sydney Morning Herald* (Sydney, 11 August 1874) at 2.

212 See, for example, *R v Thomas* (1815) 4 M & S 442, 105 ER 897; *R v Holden* (1833) 5 B & A 347, 355, 11 ER 819; and *R v Patterson* (1867) 4 W W & A'B 43.

213 The Central Criminal Court Act 1856 (UK) 19 Vict c 16 or "Palmer's Act" was passed to allow the famous trial in *Palmer* for murder by poisoning to take place at the Central Criminal Court in London rather than Staffordshire. See Bentley, above n 12, at 47; Flanders, above n 51, at 264; and Ian Burney "A Poisoning of no Substance: The Trials of Medico-Legal Proof in mid-Victorian England" (1999) 38 Journal of British Studies 59 at 67.

214 Burd and Horan, above n 11, at 105; Horan, above n 208, at 184.

215 "R v Costello" *The Age* (Melbourne, 18 September 1861) at 7 (trial moved from Melbourne to Ballarat). See, for example, the defence complaint in: "R v Young" *Mt Alexander Mail* (Castlemaine, 29 July 1865) at 2–3 (about a murder trial not been shifted). See also, for example, *R v Hall* in 1892 when a fraud trial was shifted from Horsham to Melbourne on account of the "excited state of public opinion": "A Fairer Trial can be held in Melbourne than Horsham" *The Herald* (Melbourne, 2 June 1890) at 2.

216 Bentley, above n 12, at 47. The policy was it is "'a very fundamental principle at common law' that an accused should be tried within the locality where the alleged offence was committed and that the venue should not lightly be changed and the trial moved elsewhere; the Court's discretion should be exercised with great caution and only on strong grounds [and] the onus is on the applicant to satisfy the court that this principle should be displaced by the exercise of the Court's discretion": *R v Bryant* (1981) 54 CCC (2d) 54, at 56–57.

217 See, for example, *R v Rushton* (1862) 26 JP 773; "R v Rudge Baker and Martin" *The Times* (London, 19–21 January 1886); and "R v Fletcher, Welsh and Lang" *Empire* (Sydney, 11 August 1874) at 3.

218 Bentley, above n 12, at 47. "The English and Irish authorities… make it clear, in my judgment, that there is no rule better established than that all causes shall be tried in the county where the crime is supposed to have been committed and that the rule ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county. It will not do to swear generally to apprehension and belief, opinion evidence is not to be relied on; there should be such facts shewn as will satisfy the conscience of the Court or Judge": *R v Ponton* (1898) 2 CCC 192, at 197 per Robertson J. Modern courts remain reluctant to order a change of venue even if there is significant pre-trial publicity. See, for example, *R v Duvoric* (1994) 4 Tas R 113.

The strictness of the 19th-century approach is illustrated by the 1885 New South Wales case of Mary Ann Burton and her stepdaughter, Sarah Keep, who were accused of the murder of Sarah's husband by poisoning him with strychnine. Such a crime attracted particular revulsion in the 1800s.[219] The defence petitioned the Supreme Court to move the venue of the trial to Sydney,[220] and argued "the ground that strong feeling and prejudice against the prisoners exist at Maitland and district, which are likely to prevent their having a fair and impartial trial".[221] There had been calls within a 40-mile radius of Newcastle for the hanging of both women, on the evidence as reported in the local press.[222] The Full Court noted that such crimes "were calculated to excite general attention on the part of the public" but strong and specific evidence, not "common rumour" was required to justify moving the venue of trial.[223] The Full Court declined to shift the trial's venue, observing that to move the trial on account of publicity would serve as an unwelcome precedent and be "dangerous and open to abuse".[224]

The option to shift the trial's venue was of limited utility. The remedy was (and indeed remains)[225] of little use where a case is of such notoriety that the prejudicial effect will remain wherever it is heard.[226] In *Nixon*, for example, "great excitement has been occasioned throughout the entire Colony".[227] The news reports of the case would have been well known throughout Tasmania: "There was hardly a single glenn or remote valley [in Tasmania] where the death of young Chamberlayne had not been mourned as that of one of the house."[228]

In a similar vein today, as a result of the pervasive nature of the internet, and its wide availability, publicity is rarely confined to only local media.[229]

219 Plater, Duncan and Milne, above n 85, at 370–373.

220 "The Suspected Poisoning Case" *Maitland Mercury* (Newcastle, 26 February 1884) at 2.

221 *Maitland Mercury* (Newcastle, 23 February 1884) at 4. See also *Maitland Mercury*, above n 220, at 2.

222 "The Suspected Poisoning Case" *Maitland Mercury* (Newcastle, 26 February 1884) at 2.

223 At 2.

224 *Sydney Mail* (Sydney, 1 March 1884) at 414. See also "The Suspected Poisoning Case" *Maitland Mercury* (Newcastle, 26 February 1884) at 2.

225 The notorious 1982 trial of Lindy Chamberlain for murder was relocated from Alice Springs to Darwin due to the prejudicial local publicity. See Chesterman, above n 24, at 123. However, given the prevalence of the internet and social media, shifting the venue of a high-profile trial to address jury bias is likely to have little effect. See Jane Johnston et al *Juries and Social Media* (Victorian Department of Justice, 2013) at 20 [4.20].

226 As early as 1823, in the English case of *Thurtell and Hunt*, defence counsel at the prospect of an unbiased jury by shifting the trial argued: "the influence of these publications was not confined to any one spot but extended to the whole kingdom. If the [local] neighbourhood were poisoned by them, so must the whole county be, and thence must carry their reasoning to the whole kingdom": Thurtell, Hunt and Probert, above n 57, at 49. See also the similar comments in *Corder*: Curtis, above n 61, at 228.

227 "Tasmania" *Illawarra Mercury* (Wollongong NSW, 1 December 1856) at 3.

228 *Colonial Times* (Hobart, 7 February 1857) at 3.

229 Horan, above n 208, at 184.

Rather information can be widely reported,[230] making a change of venue an ill remedy to cure the effects of a biased jury. Consequently, the already existing challenges from the 19th-century are exacerbated by the rise and immediacy of the internet,[231] the notion that anyone can be a journalist[232] and that information is available at the click of a button.

VI. The Role and Effect of Judicial Directions

Judicial directions to address potential bias on the part of jurors were customary in the 1800s. Bentley notes that:[233]

> … in the vast majority of cases the only antidote to prejudicial publicity which the law could offer was a direction to the jury in the summing up (often reinforced by observations from Crown counsel in his speech) to put all that they had heard and read about the case out of their minds.

A regular exhortation in a 19th-century criminal trial was for the parties and/or the trial judge to urge the jury to ignore anything that they may have read or heard about the case outside court and to have regard only to the evidence presented at trial.[234]

The effectiveness of such directions may be questionable.[235] However, it should not be too readily assumed that jurors in even the most highly charged 19th-century criminal cases with prejudicial pre-trial publicity were bound

230 Chesterman, above n 24, at 118.

231 At 105.

232 Marilyn Warren "Open Justice in the Technological Age" (2014) 40 Mon LR 45 at 48.

233 Bentley, above n 12, at 47.

234 See, for example, *R v Kilmeister (No 1)*, above n 9; *The Australian* (Sydney, 17 November 1838) at 2, *Sydney Gazette* (Sydney, 20 November 1838) at 2; *R v Kilmeister (No 2)*, above n 9; *The Australian* (Sydney, 1 December 1838); *Sydney Gazette* (1 December 1838) at 2 (prosecutor), 3 (trial judge); "R v Cash and Kavanagh" *The Courier* (Hobart, 8 September 1843) at 2; *Colonial Times* (Hobart, 12 September 1843) at 2–3; and *Austral-Australia Review* (Hobart, 15 September 1843) at 4–5. One of two "notorious bushrangers" who had escaped from Port Arthur, Cash was said to have murdered a special constable during his arrest; see "Domestic Intelligence" *Launceston Examiner* (Launceston, 7 May 1842) at 2. See also above at nn 91–92.

235 See, for example, "The Late Murder" *Sydney Gazette* (Sydney, 13 June 1834) at 2. The hostile and intense publicity in the English case of Oscar Wilde was notable. The parties and Charles J exhorted the jury to act according only to the evidence led at trial and to discount the extensive publicity. Hyde categorises this as "asking the jury to do the impossible": Hyde, above n 191, at 168. However, the first jury was unable to reach a verdict: at 218–219.

to return a guilty verdict. The acquittal rate in the period was significant.[236] It is telling that, reflecting a modern finding,[237] even the most intense and prejudicial 19th-century pre-trial reporting did not necessarily result in a guilty verdict.

Sarah Chesham, for example, was accused in 1847 of the murder of her three young children by poison.[238] The case fell in the middle of the "poisoning panic" of the mid-century.[239] The case aroused "intense media interest"[240] and Chesham was portrayed by both the press and public in a hostile and unfavourable light.[241] She was labelled a "professional poisoner"[242] and was painted by a number of newspapers "as behaving in a diabolical, even witch-like manner".[243] Even before her first trial, her guilt was assumed.[244] *The Times* stated that "it is beyond a question that an accepted and reputed murderess walked abroad in a village unchallenged and unaccused" and claimed "she makes her appearance at the abode of her victim, and her errand is at once understood".[245] Defence counsel at Chesham's first trial implored the jury to "not to let yourselves be biased by the newspaper reports, by the idle and I fear in some instances the wicked rumours which have passed".[246] Despite the gravity of her alleged crimes, much suspicion, local feeling and

236 Cairns quotes a survey of English criminal trials on indictment in the period between 1805 and 1834 that reveals an acquittal rate of between 28 per cent to 43 per cent, see David Cairns *Advocacy and the Making of the Adversarial Trial, 1800–1865* (Clarendon Press, Oxford, 1998) at 184. Even in Australia in the convict period, between a quarter and a third of convicts prosecuted before the colony's criminal courts were acquitted. See JB Hirst *Convict Society and Its Enemies: A History of Early New South Wales* (George Allen and Unwin, Sydney, 1983) at 113.

237 There have been any number of modern high profile cases that illustrate the point "that it should not be too readily assumed that juries find it 'impossible' … to discharge their responsibilities in accordance with their oath": *R v Dupas* (2009) 28 VR 380, 442 [250] per Weinberg JA. See also at [243]–[249]; and William Brown, James Duane and Benson Fraser "Media Coverage and Public Opinion of the OJ Simpson Trial: Implications for the Criminal Justice System" (1997) 2 Communication Law and Policy 261 at 265–266.

238 See Flanders, above n 51, at 239–245; and Victoria Nagy "Narratives in the Courtroom: Female Poisoners in mid-nineteenth century England" (2014) 11 European Journal of Criminology 213 at 216–217.

239 See, for example, Judith Knelman "The Amendment of the Sale of Arsenic Bill" (1991) 17 Victoria Review 1; and Peter Bartrip "A 'Pennruth of Arsenic for Rat Poison', The Arsenic Act, 1851, and the Prevention of Secret Poisoning" (1992) 36 Medical History 53.

240 Nagy, above n 52, at 80. More than 35 separate newspapers published reports about the alleged poisonings, making the story notorious throughout the United Kingdom.

241 At 54, 89–98, 102–108, 111–113.

242 At 102.

243 At 95.

244 At 86.

245 At 86. "Though the deeds actually detected were frightfully numerous, it was reasonably conjectured that many more remained behind, and suspicions were multiplied almost without limit": at 102.

246 At 91.

the hostile reporting; the lack of firm evidence incriminating Chesham was noted and she was acquitted at three successive trials.[247]

Similarly, in 1886, Adelaide Bartlett was accused of the murder by liquid chloroform of her husband.[248] Adelaide was said to have enjoyed "a shocking level of intimacy" with a clergyman called Dyson who lived with the couple and also to have had an affair with her brother-in-law.[249] The case was keenly followed by the press. Defence counsel, Edward Clark QC, noted the "great public interest" in the case. Adelaide was painted by the prosecution at trial as a "liar and a hussy".[250] Despite the extensive publicity, the "formidable"[251] prosecution case and Adelaide's "immorality",[252] she was acquitted by a London jury to "rapturous applause"[253] amidst doubts as to how the fatal poison had been administered.[254]

Such cases were not confined to England.[255] In the 1873 South Australian case of Sarah Winch and Susan Appleby, the two "respectable" defendants were a mother and her daughter charged with murder and manslaughter in relation to the death of the young illegitimate child of the 14-year-old

247 Flanders, above n 51, at 239–241. She was subsequently accused of the murder by poison of her husband in May 1850 and this time was convicted and hanged. See Nagy, above n 238, at 215–219; Nagy, above n 52, at 77–113; and Flanders, above n 51, at 241–245.

248 "An Extraordinary Poisoning Case" Sydney Morning Herald (Sydney, 5 April 1886) at 11. See further Yseult Bridges Poison and Adelaide Bartlett: The Pimlico Poisoning Case (Macmillan Publishers Limited, London, 1970); Kate Clarke In the Interests of Science: Adelaide Bartlett and the Pimlico Poisoning (3rd ed, Mango Books, London, 2015); Flanders, above n 51, at 311–319; and Beal, above n 63.

249 Flanders, above n 51, at 312.

250 At 313.

251 At 313.

252 At 315.

253 Michael Farrell "Adelaide Bartlett and the Pimlico Mystery" (1994) 309 British Medical Journal 1720 at 1722. See "The Last Act of the Drama of the Pimlico Poisoning Case" *The Telegraph* (Brisbane, 14 June 1886) at 3, for a melodramatic account of the circumstances of the verdict.

254 Farrell, above n 254, at 1720–1723. See also *Sydney Morning Herald* (Sydney, 5 June 1886) at 13; and G Arthur Martin "Closing Argument to the Jury for the Defence in Criminal Cases" (1967) 58(1) Journal of Criminal Law, Criminology and Police Science 2 at 4; the refusal of a Scottish jury to convict Madeleine Smith for poisoning her "sweetheart" despite the intense publicity and the apparent strength of the prosecution case: "Sympathy for Criminals" *Empire* (Sydney, 28 March 1866) at 3; and Flanders, above n 51, at 281–288. Christina Gregg was tried in 1859 in New Zealand for the murder by poisoning of her husband. She was acquitted despite copious press interest and the nature of the crime and claims of an affair with a servant as motive and "though the evidence was very black against her": *Moreton Bay Courier* (Brisbane, 19 January 1860) at 2. See also Jeremy Finn and Charlotte Wilson "'Not Having Fear of God Before their Eyes': Enforcement of the Criminal Law in the Supreme Court in Canterbury 1852–1872" (2005) 11 Canta LR 250, Part IV.

255 Even the maligned military juries might refuse to convict in a highly publicised case involving no less than the Governor and in the face of official pressure to convict as in the failure of two prosecutions against Wardell, a colonial barrister, for criminal libel against Governor Darling. See Woods, above n 24, at 50–51, 53–55, 61–72.

daughter of Mrs Winch and sister of Mrs Appleby.[256] The case attracted, in the words of Mr Stow QC, defence counsel at trial, "unusual excitement" and "much feeling had been incited by public representation of what was known as baby farming".[257] The trial judge, prosecutor and defence counsel all urged the jury to discount the rumours and publicity relating to the case and have regard to only the evidence adduced at trial.[258] Both defendants were acquitted.[259]

Other less "deserving" Australian defendants also benefitted from the critical scrutiny of jurors and acquitting in the face of press and public clamour.[260] In 1864, the notorious bushranger Frank Gardiner, "one of the most determined scoundrels in all Australia"[261] was contentiously acquitted in New South Wales, in the face of press and public hostility,[262] of a capital count of wounding with intent to murder a police officer called Middleton.[263] This was in the course of a perceived "law and order crisis in the more remote areas of the colony".[264] The verdict was attacked, the jurors "stigmatised

256 "The Baby Farming Case" *South Australian Chronicle and Weekly Mail* (Adelaide, 24 May 1873) at 8. See also *Adelaide Observer* (Adelaide, 24 May 1873) at 13.

257 *Adelaide Observer* (Adelaide, 24 May 1873) at 13.

258 At 12–13. See also *South Australian Register* (Adelaide, 22 May 1873) at 3; *Express and Telegraph* (Adelaide, 21 May 1873) at 2; and *Express and Telegraph* (Adelaide, 22 May 1873) at 2–3.

259 In this the defendants were assisted by the "marked ability" of defence counsel, Mr Stow: "The Baby Farming Case" *South Australian Chronicle and Weekly Mail* (Adelaide, 24 May 1873) at 8.

260 Ellias Birch and Joseph Thompson were accused of the brutal murder of PC Hird, a "highly respected" ("The Canterbury Murder" *Sydney Morning Herald* (Sydney, 2 September 1885) at 7) police officer who left a widow and five young children: "Brutal Murder of a Police Constable" *Freeman's Journal* (Sydney, 15 August 1885) at 10. The Attorney-General at trial branded the crime "a very savage one – a murder which made peoples' blood run cold to think of": "The Canterbury Murder" *Sydney Morning Herald* (Sydney, 2 September 1885) at 7. Thompson had even tried to plead guilty to murder. See *Sydney Morning Herald* (Sydney, 1 September 1885) at 4. Despite the apparent strength of the prosecution case (Editorial, *Sydney Morning Herald* (Sydney, 4 September 1895) at 6–7) and the strong press coverage, both were acquitted of murder, and found guilty of manslaughter: "The Canterbury Murder" *Sydney Morning Herald* (Sydney, 2 September 1885) at 7. See also "The Canterbury Tragedy" *Evening News* (Sydney, 2 September 1885) at 2.

261 *The Argus* (Melbourne, 28 May 1864) at 4.

262 Defence counsel complained that Gardiner's treatment had been "unprecedented in the annals of criminal justice" and he had been "the subject of slanderous vituperation throughout this and the neighbouring colonies": *Sydney Morning Herald* (Sydney, 9 July 1864) at 4.

263 "R v Gardiner" *Sydney Morning Herald* (Sydney, 23 May 1864) at 5.

264 Michael Eburn "Outlawry in Australia: The Felons Apprehension Acts 1865–1899" [2005] Australian and New Zealand Legal History Electronic Journal 80. Of the real menace posed by bushrangers in 19th century Australia, see David Plater and Penny Crofts "Bushrangers, the Exercise of Mercy and the 'Last Penalty of the Law' in New South Wales and Tasmania 1824–1865" (2013) 32 University of Tasmania Law Review 294.

as friends of assassins and murderers".[265] Yet the jury were also praised for ignoring "the demand for blood" and the "unreasoning clamour" outside court and for looking carefully at the evidence that did not sustain conviction on the capital count.[266]

In 1834, Julia Chapman was alleged to have aided her then lover and later second husband, William Chapman, and Henry Mills, in the murder in November 1831 of Samuel Priest (also known as Chapman), her first husband and William Chapman's brother. Priest was killed by a blow to the head with an iron bar and his head then severed from his body. Julia was a convict. A man called Wilkes was originally accused of the crime and ordered to stand trial before the prosecution withdrew the charge.[267] Wilkes later came forward and, on his evidence, Julia, Chapman and Mills were charged with murder.[268] The "atrocious and inhuman deed"[269] attracted strong press and public interest. One report noted that the "peculiar circumstances of the case … having given to the melancholy affair an unusual degree of interest".[270] The damning evidence led at committal was reported "in a very copious manner",[271] a course of action denounced by the *Sydney Gazette* as "most improper" and as almost inevitable to prejudice any prospect of a fair trial.[272] The trial took place "in the hearing of the most crowded Court ever remembered since the foundation of the Colony".[273] Mills and Chapman were convicted and sentenced to death and their bodies ordered for dissection.

265 *Empire* (Sydney, 25 July 1864) at 4. See also "Criminal Jurors" *Sydney Morning Herald* (Sydney, 12 July 1864) at 3. One Melbourne editor even went as far as blame the legacy of NSW's convict background for the verdict, "the taint is in the blood – the poison is in the brain": *The Argus* (Melbourne, 28 May 1864) at 4.

266 *Empire* (Sydney, 25 July 1864) at 4. See also "The Bushrangers and the Police" *Empire* (Sydney, 21 July 1864) at 2. Gardiner was ultimately convicted by a second jury of a non-capital count of wounding in relation to a second police officer, Hosie, and pleaded guilty to two armed robberies and received a cumulative sentence of 32 years imprisonment for the three crimes.

267 "Murder" *Sydney Monitor* (Sydney, 11 June 1834) at 2; and "Atrocious Murder" *Sydney Herald* (Sydney, 12 June 1834) at 4.

268 "Murder" *Sydney Monitor* (Sydney, 11 June 1834) at 2; and "Atrocious Murder" *Sydney Herald* (Sydney, 12 June 1834) at 4.

269 *Sydney Gazette* (Sydney, 16 August 1834) at 3. Dowling CJ observed that "a murder so horrid in its circumstances had never come under his observation. The recital was so appalling, it was enough to freeze one's blood and make one shudder to think there were such monsters in existence": *The Australian* (Sydney, 19 August 1834) at 3.

270 *Sydney Herald* (Sydney, 18 August 1834) at 3.

271 "The Late Murder" *Sydney Gazette* (Sydney, June 1834) at 2. For the reports of the committal see *Sydney Monitor* (Sydney, 11 June 1834) at 2; "Atrocious Murder" *Sydney Herald* (Sydney, 12 June 1834) at 4; and "Further Particulars" *Sydney Herald* (Sydney, 21 June 1834) at 2.

272 "The Late Murder" *Sydney Gazette* (Sydney, June 1834) at 2. See also discussion above at nn 57, 160–162.

273 *Sydney Herald* (Sydney, 18 August 1834) at 3. "The Court was densely crowded, and during the day it was surrounded by a multitude of people anxiously awaiting the result": and *Sydney Gazette* (Sydney, 16 August 1834) at 3.

However, despite the nature of the case, the press coverage and the public interest and hostility, Julia was acquitted by the jury at trial after the defence had raised doubts in the strength of the prosecution case.[274]

In 1884, five men were contentiously acquitted in Sydney of the murder of a woman who had also been raped. The case attracted strong public and press feeling. Defence counsel at trial noted:[275]

> … the feelings of indignation and horror excited throughout the community by the perpetration of the crime, feelings which had been intensified by the articles and references in the press of the colony …

The Attorney-General at trial in a strong address referred to “a case which equalled in the cruelty and brutality of its main characteristics any loathsome sting of revolting crime of which they had ever read or heard” and it “was impossible to give expression to one’s indignation and horror that in a Christian country such unspeakable atrocities should be perpetrated”.[276] The prosecutor relied, in part, on the evidence of an accomplice who turned Queen’s Evidence. The jury returned verdicts of not guilty after just 10 minutes of deliberation explaining: “The jury have unanimously agreed that the evidence is so unreliable that they do not feel justified in convicting any of the prisoners at the bar of the charge”.[277]

Likewise, a jury may well disregard strong press and public pressure to acquit and return a guilty verdict.[278] The infamous 1838 Myall Creek case, in

274 “R v Chapman, Chapman and Mills” *Sydney Gazette* (Sydney, 16 August 1834) at 2–3; *Sydney Herald* (Sydney, 18 August 1834) at 3; *The Australian*, above n 269, at 3; *Sydney Monitor* (Sydney, 20 August 1834) at 4. It was reported Julia after her acquittal and outside court “she was very roughly handed by the crowd, and was obliged to take shelter in an adjoining house”: and *The Australian*, above n 269, at 3.

275 “R v Thornton and Others” *Sydney Morning Herald* (Sydney, 11 March 1884) at 5; see also *Daily Telegraph* (Sydney, 11 March 1884) at 6.

276 “R v Thornton and Others” *Sydney Morning Herald* (Sydney, 7 March 1884) at 3; see also *Sydney Morning Herald* (Sydney, 11 March 1884) at 5; and *Daily Telegraph* (Sydney, 11 March 1884) at 6.

277 *Daily Telegraph* (Sydney, 11 March 1884) at 6; see also “The Waterloo Outrage” *Sydney Mail* (Sydney, 15 March 1884) at 512.

278 In 1864, George Hall shot to death his new wife who had left him for another man, and then gave himself up. There was a massive outpouring of sympathy for Hall from the Birmingham public and press. One reporter observed “the popular feeling was that, although he had certainly committed a murder, the dead woman had got nothing more than she deserved”: *Birmingham Daily Gazette*, 15 March 1864, quoted by Martin Weiner “Adultery, Murder and the Politics of Mercy in mid-Victorian England” (1999) 249(2) Social History 174 at 176, n 11. “The jury felt the strongest sympathy with the prisoner”: James Stephen “Capital Punishments” *Fraser’s Magazine* (London, June 1864) at 757. However, the jury returned a guilty verdict to murder, albeit with a strong recommendation of mercy of account of the deceased’s “provocation”. Hall was eventually reprieved the night before his scheduled execution to public approval. See Weiner, above n 278, at 176.

relation to the massacre of 28 Aboriginal men, women and children in New South Wales, is a notable example. A number of white men were charged with murder. The first jury returned a not guilty verdict in relation to the case.[279] The second jury[280] remained resolute and returned guilty verdicts in November 1838 on seven white men, for the murder of an unknown Aboriginal child in the face of strong public and press pressure,[281] notably a "virulent" campaign by the *Sydney Herald* which "had exhorted acquittals, no matter what the evidence".[282] The pressure to acquit had been particularly strong after the first jury had returned a not guilty verdict in relation to the case.[283]

Burton J's confidence at the second trial in the jury's ability to discount this "virulent" campaign is significant:[284]

> For in his [Burton J's] opinion, he thought, and he said so with confidence, that the course of public justice would never be perverted when a case came before a Jury and Judge of New South Wales. He thought there was too much honour in the Supreme Court of New South Wales, to ever bias a case that might come before the Court. He hoped, and not only hoped, but could assert,

279 *R v Kilmeister (No 1)*, above n 9; *The Australian* (Sydney, 17 November 1838) at 2; and *Sydney Gazette* (Sydney, 20 November 1838) at 2–3. See generally Mark Tedeschi *Murder at Myall Creek: The Trial that Defined a Nation* (Simon & Schuster, Sydney, 2017).

280 *R v Kilmeister (No 2)*, above n 9; *The Australian* (Sydney, 1 December 1838) at 2; and *Sydney Gazette* (Sydney, 1 December 1838) at 2–3.

281 Wood, above n 66. Such was the publicity and bias shown by the press, notably the dominant *Sydney Herald* that the prosecution, after the first trial, raised seeking an order preventing the press from publishing anything further relating to the proceedings. See *The Australian* (Sydney, 27 November 1838) at 2; and *Sydney Gazette* (Sydney, 29 November 1838) at 2.

282 Barker, above n 24, at 130. See also Wood, above n 66, at 61.5–61.15. One should not overstate the wider significance of the guilty verdict in Myall Creek. No charges were laid (either before or after Myall Creek) in such an "infamous example" as the massacre of a large number of Aboriginal people by Major Nunn at Waterloo Creek after the colonial Attorney-General recognised there was no prospect of a white jury convicting after the public controversy at the hanging of the Myall Creek killers: Barker, above n 24, at 134. See also Woods, above n 24, at 96. As Chief Justice Bathurst observes: "it is important to remember that the jury trial was not quite a 'palladium of liberty' for all the inhabitants of the colony. The jury system certainly did the Indigenous inhabitants of New South Wales no favours ... In the decades that followed [Myall Creek], a number of indiscriminate killings and massacres went by entirely unpunished, as for a long time no New South Wales jury was entrusted to try the murder of Indigenous people": The Hon TF Bathurst "The History of the Criminal Law" (Francis Forbes Society Australian Legal History Tutorials, Sydney, 18 October 2017) at [53]. See further Roger Milliss *Waterloo Creek: The Australia Day Massacre of 1838 and George Gipps and the British Conquest of New South Wales* (Penguin Books, New York, 1992).

283 "Editorial" *Sydney Herald* (Sydney, 26 November 1838) at 2.

284 *The Australian* (Sydney, 27 November 1838) at 2. See also "R v Deeming" *The Argus* (Melbourne, 23 April 1892) at 3.

> that the Judges, as well as the juries, were never biased by anything that occurred out of doors in the decision of a case, and he felt with pleasure that the administration of justice was safe in the bench and Jury of New South Wales. However, wicked persons might attempt by their writings to sway the course of justice, he would never admit that the moral state of the Colony was so bad as had been represented, and that the course of justice could be perverted by anything that was said out of court.

This confidence in the capacity of jurors was doubted on more than one occasion in the 19th century,[285] but it appears supported by the many 19th-century cases in which the jury proved capable of disregarding even the most prejudicial reports and hostile press and public opinion.

Furthermore, the reality of 19th-century society meant that jurors could not be expected to come into court as a "blank slate". It was accepted that the notion of an impartial 19th-century jury did not require an ignorant jury.[286] Even in the 1800s, the notion of ignorant and uninformed jurors was unrealistic:[287]

> In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

It is sometimes overlooked that the notion of an "impartial" jury is a

285 See, for example, "The Late Murder" *Sydney Gazette* (Sydney, 13 June 1834) at 2; and "Alleged Murder of Mr Kinder" *Empire* (Sydney, 13 June 1834) at 3. The hostile and intense publicity in the English case of Oscar Wilde was notable. The parties and Charles J exhorted the jury to act according only to the evidence led at trial and to discount the extensive publicity. Hyde categorises this as "asking the jury to do the impossible": Hyde, above n 191, at 168. However, the first jury was unable to reach a verdict: at 218–219.

286 Hassett, above n 36, at 163. As early as 1803, Marshall CJ in the highly publicised case of *US v Burr* held the impartiality of a juror is not precluded by "mere knowledge of the case or even by an opinion or predisposition": at 162. "Those strong and deep impressions which close the mind against the testimony which may be offered in opposition to them – which will combat that testimony and resist its force": *US v Burr* 25 F 49 (1807) at 51 per Marshall CJ.

287 *Reynolds v United States* 98 US 145 (1878) at 155–156 per Waite CJ. This proposition is now even more valid. "In a world of 24 hour news channels, tabloid press and internet access, finding an ignorant jury, particularly in a highly prejudicial case is neither likely nor desirable": Les McCrimmon "Challenging a Potential Juror for Cause: Resuscitation or Requiem?" (2000) 23 University of New South Wales Law Journal 127 at 141, See also *Murphy v R*, above n 40, at 99; *R v Glennon*, above n 9, at 603 per Mason CJ and Toohey J; and Michael Chesterman, above n 10, at 112. See also Munson, above n 39, at 184.

"flexible concept".[288] Impartiality is not tantamount to ignorance. Juror impartiality in the 19th century, as remains the case, did "not mean uninformed or unopinionated," and it did "not require an unrealistic, undesirable and unobtainable robot like ability to disregard prior knowledge, whether obtained through the media or through firsthand experience".[289] Rather, impartiality meant a willingness to hear and evaluate the facts and arguments as presented in court in light of experience and common sense: "Impartial jurors make a conscious effort to hear and evaluate fairly".[290]

VII. Conclusion

The notion of a "fair and impartial trial which justice demands" was integral to the 19th-century criminal trial. The notion of a fair trial before an impartial jury was, and remains, dependent upon the premise that that jurors will have regard only to the evidence presented at trial and discount anything gained from outside court. The prospects of such an impartial jury were often challenged in both 19th-century England and Australia by prejudicial publicity and prejudgment in both sensational cases such as *Nixon* and routine cases.

The various 19th-century remedies to address potential bias and provide for an impartial jury, notably delaying the trial or shifting the venue of trial, were of little utility. The main remedy was (and remains) judicial directions, supported by exhortations from the parties, to "to dismiss from their minds all previous impressions against the prisoner … they should duteously [sic] judge him, not by rumours – but by indisputable evidence".[291] Judicial directions are one of the most significant and utilised ways in which a judge can safeguard the right to a fair trial.[292]

Though doubts were (and are now increasingly) expressed[293] as to the effectiveness of such directions, the 19th-century system in both sensational cases such as *Nixon*, and routine cases, ultimately relied upon this premise. As prosecution counsel argued in the sensational Melbourne case of *Deeming*[294] in 1892:[295]

288 Spears, above n 183, at 1495.

289 Newton Minew and Fred Cate "Who is an Impartial Juror in an Age of Mass Media" (1991) 40 American University Law Review 631, at 658. See also at 637.

290 At 658.

291 *Hobart Town Gazette* (Hobart, 25 June 1824) at 2.

292 *Jago v District Court of NSW* (1989) 168 CLR 23 at 47; *RPS v The Queen* (2000) 199 CLR 620 at 637 per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

293 See, for example, Craig Burgess "Prejudicial Publicity: Will it Ever Result in a Permanent Stay of Proceedings?" (2009) 28 U Tas LR 63 at 73–76; and Morrison, above n 11.

294 Deeming was a serial killer who murdered his wife and children in England before murdering his second wife in Melbourne. He was even suspected of being Jack the Ripper.

295 *The Argus* (Melbourne, 23 April 1892) at 9.

> … His Honour from experience of the jurymen likely to be called, would have every confidence in their being influenced solely by what transpired in the court, and not by what they heard outside.

This confidence remains. In 2010, the High Court of Australia in *Dupas*, declared that jurors will understand and comply with judicial directions.[296] This assumption remains but its continued validity is now further challenged by the rise of the internet and social media.[297] The confidence expressed in 19th-century juries, whilst arguably justified in this period, may need to be reconsidered in the 21st-century context.

Ultimately to secure a fair trial before an impartial 19th-century jury, trust was, and had to be, placed in the willingness and ability of jurors to heed judicial directions to discount external reports and have to regard to only the evidence led at trial. This premise may be questioned, but it is relevant that 19th-century juries proved capable of ignoring hostile pre-trial publicity in even the most sensational case, and an impartial jury is not an ignorant jury. Jurors in 19th-century criminal trials ultimately had to be trusted to have regard to only the evidence led at trial. This accords with the rationale of trial by jury. Arguably, things have not changed much. The law operates on the assumption that if a trial judge gives a direction, the jury will understand and follow that direction. As Windeyer J said in *Gammage v R*, the jury "must be assumed to have been faithful to their duty".[298] McHugh J of the High Court aptly put it in plain terms:[299]

> Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.

296 *Dupas v The Queen*, above n 9, at 247–249 [26]–[29]. See also *John Fairfax Publications v District Court (NSW)* (2004) 61 NSWLR 344 at 366 [103] per Spiegelman CJ.

297 Isaac Frawley Buckley "Pre-Trial Publicity, Social Media and the "Fair Trial": Protecting Impartiality in the Queensland Criminal Justice System" (2013) 33 QL 38 at 46.

298 *Gammage v R* (1969) 122 CLR 444 at 463.

299 *Gilbert v The Queen* (2000) 201 CLR 414 at 425 [31].