
The Inclusion of Ex-prisoners on Juries

Anthony Gray*

This article considers legislation in each Australian State and Territory which bans or restricts ex-prisoners from serving on juries. While there are some arguments in favour of such restrictions, the counter-argument is that such restrictions undermine the notion that juries are “representative” of society, and contradict our notions of rehabilitation and that a person who has been released from prison has “served their debt to society”. The High Court has found that a restriction on prisoners from voting may in some cases be unconstitutional, because it interferes with the constitutionally required system of representative government. This article asks whether, by way of analogy, restrictions on ex-prisoners from participating on juries may be unconstitutional, because they interfere with the constitutionally required system of representative juries. There are real analogies between the act of voting and the act of jury service in a democratic system of government, making that comparison apposite.

INTRODUCTION

Various jury legislation in Australian States and Territories restrict the extent to which those previously convicted of offences and sentenced to imprisonment can participate as members of a jury. The argument tends to be that those who have been jailed may not have an objective view of an allegation of criminality against another, or may not be morally suitable to cast judgment on others, given that person’s background.¹ Or alternatively, that the presence of those with convictions (of the criminal variety) on the jury would undermine public confidence in the carrying out of its responsibilities.² On the other hand, such sentiments can seem contradictory to the notion that once a person has served the punishment they were given for an offence, their debt to society is considered paid, and that their lives should not continue to be blighted by the fact of a prior conviction.³ The law is careful elsewhere not to assume that because a person is convicted of wrongdoing in the past, this points to the likelihood of continued wrongdoing. Specifically, as a general rule any past convictions of an accused either are not, or may not, be admissible in evidence to suggest that the person is guilty of a further crime with which they have been charged.⁴

Numerous scholars have compared the right to vote with a person’s participation on a jury. The two are linked in terms of a person’s participation in the democratic governance of the society in

* Professor of Law, University of Southern Queensland. Thanks to the Editorial Team for a very efficient and professional process.

¹ “The first (reason for excluding a person with a criminal conviction from jury participation) is the possibility that their past criminal behaviour, and its consequences as a result of their involvement in the justice system, may impact upon their ability to be impartial, or make them amenable to improper influence from criminal associates”: New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007) 2; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors Final Report*, Project No 99 (2010) 82: “there is a real risk that (persons with significant criminal histories) may not be able to act impartially”.

² “The second (reason) concerns the importance of preserving the public confidence in the jury system, which might potentially be threatened if it became publicly known that people with the requisite criminal records, or facing trial, had been allowed to serve on a jury”: New South Wales Law Reform Commission, n 1, 3; Law Reform Commission of Western Australia, n 1, 82: “the principal justification ... is the need to maintain public confidence in the criminal justice system – people with significant criminal histories are likely to be perceived as biased against the state”.

³ “As a matter of public policy, it is also necessary to recognise the principle of rehabilitation and therefore reformed offenders should be allowed to participate in ordinary civic duties”: Law Reform Commission of Western Australia, n 1, 82.

⁴ *Evidence Act 1995* (Cth) s 97; *Evidence Act 1995* (NSW) s 97; *Evidence Act 2008* (Vic) s 97; *Evidence Act 1977* (Qld) s 15(2); *Evidence Act 1929* (SA) s 34P; *Evidence Act 1906* (WA) s 8(1)(e); *Evidence Act 2001* (Tas) s 97; *Evidence Act 2011* (ACT) s 97.

which they live. Potential jurors are chosen from those on the electoral roll. This may be seen to reflect notions of the sovereignty of the people, that members of a society vote in democratic elections to determine who the lawmakers should be, and that a person should not be jailed, or at least not be jailed for a serious offence, unless the citizens of the society of which that person is a member have found them to be guilty. In this way, citizens have an important role in the administration and application of the laws by which their society is governed. Notions of representation are common to the context of juries and the context of voting – Australia has adopted a system of representative government, in which voting plays a pivotal role, and Australian courts have confirmed that juries must be representative, to some extent at least, of the community.

In a 2007 decision, a majority of the High Court found that the Australian *Constitution* had come to reflect a constitutional right to vote.⁵ This occurred in the specific context of a law which denied the right to vote to those who were currently imprisoned. The Court found that such laws were constitutionally invalid, undermining the right of a citizen to cast a vote which was constitutionally required, reflecting the system of representative government enshrined by the *Constitution*. Elsewhere, the High Court has found that the representativeness of a jury is one of its essential features.⁶

The question for this article is whether, given the High Court has found that it is unconstitutional to deny at least some prisoners a right to vote, due to the constitutional conception of representative government, the High Court might also find it unconstitutional to deny some ex-prisoners the right to serve on a jury, due to the constitutional conception of a jury as being representative of the community. And at least in the United States, where questions of representativeness of juries have been live constitutional issues, we will see that exclusion of distinct groups from jury service, where such exclusion is not fair and reasonable, has been the trigger for findings of unconstitutionality, even if specific exclusion of ex-prisoners has not, as yet, been found unconstitutional in that jurisdiction. As the author has discussed elsewhere,⁷ there are strong links between the American jury provision and that in Australia, making the American precedents of particular interest.

STATE AND TERRITORY LEGISLATION EXCLUDING THOSE CONVICTED OF CRIME FROM JURY SERVICE

There are a range of provisions limiting the ability of those convicted of crime from serving on juries. Unless otherwise indicated, it is irrelevant, for the purposes of the operation of the legislation which appears following, whether the relevant offence/s were committed within the jurisdiction or outside it. Further, offences that were later quashed, or where a pardon was given, do not count. The most comprehensive provisions appear in Schedule 1 to the *Jury Act 1977* (NSW). Those provisions permanently exclude from jury service those convicted of the most serious crimes, including those attracting a maximum life jail term, terrorism, public justice offences, and sexual offences.⁸ A person who served a jail term (anywhere) of at least three months' duration is excluded from jury service for 10 years after completing such service.⁹ A person who served a jail term (anywhere) of less than three months' duration is excluded from jury service for seven years after completing such service.¹⁰ This does not include a jail term based on non-payment of a fine. However, the concept of serving a jail term includes those subject to either home detention or a suspended sentence.¹¹

The Victorian legislation provides that a person is excluded from jury service within 10 years of having been sentenced (anywhere) to a term of imprisonment of at least three months' duration.¹² This

⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162; 81 ALJR 1830; [2007] HCA 43.

⁶ *Cheatle v The Queen* (1993) 177 CLR 541; 66 A Crim R 484; 67 ALJR 760.

⁷ Anthony Gray, "Is the Representative Nature of Juries Justiciable?" (2016) 26 JJA 31.

⁸ *Jury Act 1977* (NSW) Sch 1 cl 1(1)(a)–(d).

⁹ *Jury Act 1977* (NSW) Sch 1 cl 2(3)(b).

¹⁰ *Jury Act 1977* (NSW) Sch 1 cl 2(3)(a).

¹¹ *Jury Act 1977* (NSW) Sch 1 cl 2(5)(a) and (b).

¹² *Juries Act 2000* (Vic) Sch 1 cl 2.

excludes suspended sentences. A person is also excluded from jury service within five years of having been sentenced (anywhere) to a term of imprisonment of less than three months' duration.¹³ This includes suspended sentences.¹⁴ Note that the time commences to run in Victoria from the time of sentencing, as opposed to when the sentence is completed, as in New South Wales. A person who has been the subject of a community correction order within the past five years is also ineligible.¹⁵ A person who was released upon giving a good behaviour undertaking is not eligible within two years of that undertaking.¹⁶

The South Australian juries legislation provides that each of the following are excluded from jury service:

- (1) those convicted of an offence which carries a maximum life sentence;
- (2) those sentenced to a term of imprisonment of at least two years;
- (3) those who, within the past 10 years, have served a term of imprisonment or have been on probation or parole; or
- (4) those who, within the past five years, have been convicted of an offence for which imprisonment was a possible consequence, or have had their driving licence disqualified for at least six months.¹⁷

In Western Australia a person is excluded from jury service if they have been sentenced to a term of imprisonment of at least two years, or in the past five years has (a) been the subject of any term of imprisonment or parole, (b) been the subject of a probation or community order, or (c) been convicted of at least two offences against Western Australian law punishable by a possible jail term or at least three offences against Western Australian road legislation punishable by a possible jail term.¹⁸

In Tasmania, a person sentenced to a term of at least three years' imprisonment is permanently excluded from jury service. A person sentenced to at least three months' imprisonment is excluded for five years following the service of the imprisonment.¹⁹ Provisions in the other jurisdictions are relatively simple – in Queensland any person convicted of an indictable offence or sentenced to a term of imprisonment is permanently excluded.²⁰ In the Australian Capital Territory a person convicted of an offence punishable by at least 12 months' imprisonment is excluded.²¹ In the Northern Territory a person who served a jail term cannot serve on a jury until at least seven years after they completed their sentence.²²

For ease of reference, the article will subsequently refer to these kinds of provisions as “bans and restrictions” on the ability of ex-prisoners to serve on juries.

THE AUSTRALIAN CONSTITUTION AND “REPRESENTATIVENESS”

The concept of “representativeness” can be applied to the Australian *Constitution* in at least two ways. Firstly, the fact that it prescribes jury trial for certain Commonwealth offences, and juries are typically characterised by their “representativeness” of the broader community, and secondly the fact that it prescribes a system of representative government. Each of these should be explored in some more depth.

¹³ *Juries Act 2000* (Vic) Sch 1 cl 3.

¹⁴ *Juries Act 2000* (Vic) Sch 1 cl 3(d).

¹⁵ *Juries Act 2000* (Vic) Sch 1 cl 4A.

¹⁶ *Juries Act 2000* (Vic) Sch 1 cl 5.

¹⁷ *Juries Act 1927* (SA) s 12(1)(a)–(d).

¹⁸ *Juries Act 1957* (WA) s 5(3)(I), (II), (III), (IV).

¹⁹ *Juries Act 2003* (Tas) Sch 1 cl 1(1) and (3).

²⁰ *Jury Act 1995* (Qld) s 4(3)(m) and (n).

²¹ *Juries Act 1967* (ACT) s 10.

²² *Juries Act 1963* (NT) s 10(3) (excluding those convicted of murder). The *Jury Exemption Act 1965* (Cth) makes no provision with respect to a person convicted of an offence.

The author has written another article which was recently published in the *Journal of Judicial Administration* on the question of “representativeness” of juries, and will not repeat that discussion here.²³ Suffice it to say that the High Court has on past occasions, and most recently again in 2016, emphasised that the characteristic of a jury as being representative of the broader community is one of its “essential attributes”.²⁴ It is these “essential features of the institution (of jury) which have what might be called a constitutionally entrenched status”.²⁵

Just as representativeness characterises an aspect of the application of law pursuant to the *Constitution*, it also characterises the relation between the sovereign people and lawmakers. The leading theorist on the concept of representative government was John Stuart Mill. He opined that:

The ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community, every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government by the personal discharge of some public functions.²⁶

Mill lamented any system whereby an individual was excluded from political decision-making. While most of his book is directed to representative government in relation to the legislature, he also refers to the concept with respect to other arms of government. He lauded the practices of the *dicastery* and *ecclesia* in Ancient Greece, respectively a popular court and assembly in which all Athenians could participate. He said they substantially raised the intellectual standard of an average Athenian, and their effect was evident in the quality of the public addresses made in that society. Mill specifically compared this effect with jury service:

A benefit of the same kind, though far less in degree, is produced on Englishmen of the lower middle class by their liability to be placed on juries (admittedly not as great) as to admit of comparison with the public education which every citizen of Athens obtained from her democratic institutions, must make them nevertheless very different beings, in range of ideas and development of faculties, from those who have done nothing (but work at menial jobs). Still more salutary is the moral part of the instruction afforded by the participation of the private citizen, if even rarely, in public functions.²⁷

Mill concluded that:

The only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate; that any participation, even in the smallest public function, is useful; that the participation should everywhere be as great as the general degree of improvement in the community will allow; and that nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state.²⁸

The High Court has repeatedly stated that the Australian *Constitution* reflects a system of representative government.²⁹ The typical context in which this is raised is in the description of the Parliament, that members of Parliament act as representatives of the people. This is often combined

²³ Gray, n 7.

²⁴ *Cheatle v The Queen* (1993) 177 CLR 541, 560; 66 A Crim R 484; 67 ALJR 760: “the relevant essential feature or requirement of the institution (of a jury) was, and is, that the jury be a body of persons representative of the wider community”; *R v Baden-Clay* (2016) 90 ALJR 1013; [2016] HCA 35, where a unanimous court referred to the “abiding importance of the role of the jury as representative of the community” (French CJ, Kiefel, Bell, Keane and Gordon JJ): [65].

²⁵ *Ng v The Queen* (2003) 217 CLR 521, 526; 77 ALJR 967; [2003] HCA 20 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); referred to in *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24, [193] (Nettle and Gordon JJ).

²⁶ John Stuart Mill, *Considerations on Representative Government* (Curran Shields Ed, 1958) 42.

²⁷ Mill, n 26, 54.

²⁸ Mill, n 26, 55.

²⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ), 168 (Deane and Toohey JJ), 210 (Gaudron J), 228–229 (McHugh J); 66 ALJR 695; *Nationwide News v Wills* (1992) 177 CLR 1, 48 (Brennan J), 70 (Deane and Toohey JJ); 66 ALJR 658; 44 IR 282; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 121 (Mason CJ, Toohey and Gaudron JJ), 147 (Brennan J), 163 (Deane J), 199 (McHugh J); 68 ALJR 713; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 46 (Gummow and Bell JJ), 67 (Hayne J), 106 (Crennan J), 128 (Kiefel J); 85 ALJR 213; [2010] HCA 46.

with an idea of popular sovereignty, that ultimate sovereignty resides in the people, and that this sovereignty is expressed through the members of Parliament as representatives of the people.³⁰

The concept of representative government as it related to the voting rights of prisoners was considered by the High Court in *Roach v Electoral Commissioner*.³¹ Amendments to voting legislation there prevented those who were serving terms of imprisonment, regardless of the duration of their sentence, from voting while they were incarcerated. A majority of the Court struck out the amendments as unconstitutional, being contrary to the system of representative government enshrined in the *Constitution*.³²

Gleeson CJ concluded that ss 7 and 24 of the *Constitution* had, through a process of constitutional evolution, “come to be a constitutional protection of the right to vote”.³³ He added that:

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.³⁴

Gleeson CJ added that exclusion from the franchise would have to be based on a rational connection between the ban on voting and the class of individual being banned. He suggested that the rationale for excluding prisoners from the right to vote might be that serious offending is considered to be so civically irresponsible so as to mark the behaviour as criminal and direct that it be met with both physical separation from the community as well as “symbolic separation” in the form of loss of a right to vote.³⁵ He conceded that temporary suspension of the right to vote might be justifiable in the case of serious offenders,³⁶ but a blanket ban on all of those serving a sentence of imprisonment could not be justified or rationalised on the basis that such individuals had severed their community links. It was arbitrary and unconstitutional.³⁷

Gummow, Kirby and Crennan JJ stated that:

The existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic. Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.³⁸

The joint reasons acknowledged that Australia had, to some extent, picked up British concepts of attain and infamous crimes as a basis for disqualifying a person from voting. They reflected an idea that someone who committed such crimes lacked the necessary “fitness and probity of character” seen as being required in order to have the right to participate in politics and governance.³⁹ However, that history did not support this law, which denied a person the right to vote without regard to their general culpability.⁴⁰ The law stigmatised offenders by imposing a civil disability on them which was not compatible with notions of representative government.⁴¹

³⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–138 (Mason CJ); 66 ALJR 695.

³¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162; 81 ALJR 1830; [2007] HCA 43.

³² Gleeson CJ, Gummow, Kirby and Crennan JJ; Hayne and Heydon JJ dissenting.

³³ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174; 81 ALJR 1830; [2007] HCA 43.

³⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174; 81 ALJR 1830; [2007] HCA 43.

³⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 177; 81 ALJR 1830; [2007] HCA 43.

³⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 179; 81 ALJR 1830; [2007] HCA 43.

³⁷ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 182; 81 ALJR 1830; [2007] HCA 43.

³⁸ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199; 81 ALJR 1830; [2007] HCA 43.

³⁹ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 192; 81 ALJR 1830; [2007] HCA 43.

⁴⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 201; 81 ALJR 1830; [2007] HCA 43.

⁴¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202; 81 ALJR 1830; [2007] HCA 43.

The strongly democratic nature of Australia's *Constitution* was referred to by Gummow J in *McGinty v Commonwealth*.⁴² In some respects, the Australian *Constitution* was considered to be even more democratic than that of the United States. In *Rowe v Electoral Commissioner*, Crennan J referred to the democratic movement in the mid-19th century in the colonies that would unite to become Australia, a movement that "transcended questions of qualifications for the franchise. Democracy was seen as an active and continuing process in which all legally eligible citizens had an equal share in the political life of the community".⁴³

It should also be noted that, at times, the High Court has referred to the concept of "representative democracy" in describing Australia's constitutional arrangements,⁴⁴ in contrast to notions of "representative government". It is sometimes said that the concept of representative democracy is broader than the concept of representative government,⁴⁵ though others use the terms interchangeably.⁴⁶ And the precise meaning of representative democracy is itself contested, some meanings incorporating concepts of participatory democracy⁴⁷ which would obviously embrace contributions to jury decision-making.

So given the Australian *Constitution* embraces thoroughly the notion of "representativeness" in relation to participation in government functions, and the High Court has said that such notions are constitutionally protected, the question arises as to the constitutional status of the State and Territory laws which effect bans on restrictions on the ability of ex-prisoners to participate on jury service. This is particularly so since the High Court clearly did not approve of bans on all current prisoners from participating in representative government. It begs the question of whether, if asked, they would approve of bans on participation in the representative-natured jury, most especially bans operating post-incarceration. This subject will be revisited below.

HISTORY OF "CIVIL DEATH" IN ANCIENT TIMES AND THE COMMON LAW

Both Grecian and Roman law recognised the denial of a person's status in society as a legitimate state response to criminality. This was through the doctrines of *atimia* and *infamia* respectively, whereby a person's rights and privileges would be revoked, and the person's status and honour tainted. The

⁴² *McGinty v Commonwealth* (1996) 186 CLR 140, 271; 70 ALJR 200: "learned commentators observing the situation from a vantage point outside Australia wrote of the extremely 'democratic' nature of the new *Constitution*, representing the 'high-water mark of popular government'" (citing James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901)).

⁴³ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 111–112; 85 ALJR 213; [2010] HCA 46.

⁴⁴ *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J); 50 ALJR 279; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ) ("representative government and representative democracy"), 159 (Brennan J) ("freedom of political communication is essential to the maintenance of a representative democracy"), 185 (Dawson J) ("much is left to the parliament concerning the details of the electoral system to be employed in achieving representative democracy"), 210 (Gaudron J) ("representative parliamentary democracy is a fundamental part of the *Constitution*") and 229 (McHugh J) ("the *Constitution* gives effect to a system of representative democracy"); 66 ALJR 695; *McGinty v Western Australia* (1996) 186 CLR 140, 198–199 (Toohey J) (with whom Gaudron J agreed (216)); 70 ALJR 200; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 (Gleeson CJ), 214 (Hayne J); 81 ALJR 1830; [2007] HCA 43; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 46 (where Gummow and Bell JJ referred to the fact the *Constitution* "was drawn from an appreciation of both past and future development of a democratic system of government representative of, and reflective of the wishes of, 'the people'"), 106 (Crennan J) ("the *Constitution* directs and gives effect to a system of representative government (sometimes called representative democracy)"; 130 (Kiefel J referring with evident approval to notions of representative democracy contained in the judgment of Stephen J in *McKinlay*); 85 ALJR 213; [2010] HCA 46; cf McHugh J in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 199–200; 68 ALJR 713: "the *Constitution* does not adopt or guarantee the maintenance of the institution of representative government or representative democracy except to the extent that certain sections of the *Constitution* embody it ... it is not surprising that the makers of our *Constitution* failed to make representative democracy a constitutional role enforceable by the courts".

⁴⁵ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 199 (McHugh J); 68 ALJR 713.

⁴⁶ *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 106 (Crennan J); 85 ALJR 213; [2010] HCA 46; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ); 66 ALJR 695.

⁴⁷ James Binnall, "Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service" (2010) 17 *Virginia Journal of Social Policy and Law* 1, 22–23; Karen Syma Czapskiy and Rashida Manjoo, "The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of This Right" (2008) 19 *Duke Journal of Comparative and International Law* 1.

person could not appear in court, or vote in the assembly. Later in middle-age Europe the concept of “outlawry” was recognised, with similar consequences of the original *atimia* and *infamia*. An outlaw could be killed with impunity. The designated outlaw would have few, if any, civil and political rights.⁴⁸

English law adapted the concept of outlawry to attainder, or civil death. Normally attainder was reserved for those convicted of crimes such as treason or other felony. Such a person was invisible to the law. Specifically, a person so attainted could not leave property to others due to the “corruption” of their blood; their property was confiscated by the Crown at the time of conviction and upon their death. Any property left to them would also be confiscated. They could not sue because they had no recognised legal status.⁴⁹ This meant they could not vote.

On the specific question of convicted criminals participating as jurors, their exclusion is often traced to the *Assize of Clarendon* in 1166, and a 1410 statute of Henry IV.⁵⁰ The *Assize of Clarendon* stated that juries were to comprise the “more lawful men” of the town. The 1410 statute clarified that no outlaw could serve on a jury. In the early 1600s, Coke stated that those who were “attainted or convicted of treason, or felony, or for any offence to life or member, or in attain for a false verdict, or for perjury as a witness” were “not legalis homo” and could be challenged as jurors “*propter delictum*” (because of crime).⁵¹ Blackstone would later explain that “challenges *propter delictum* are for some crime or misdemeanour that affects the juror’s credit, and renders him infamous. As for a conviction of treason, felony, perjury or conspiracy; or if for some infamous offence ... or if he be outlawed or excommunicated”.⁵² In relation to territory that was at least at one time a British colony, the United States accepted “civil death” only to a limited extent, permitting some withdrawal of civil rights of an ex-criminal, but not corruption of blood or forfeiture beyond a person’s lifetime.⁵³ Today in the United States, some states continue to deny ex-prisoners the right to vote,⁵⁴ and a substantial majority prohibit ex-prisoners (felons) from serving on juries.⁵⁵ These are the practical continuing aspects of the concept of “civil death” in the United States;⁵⁶ it is estimated that about 16 million people in that country have felony convictions.⁵⁷ The High Court of Australia recognised that the English common law concept of “civil death” was part of the English law received into New South Wales law by the *Australian Courts Act 1828* (UK), and so prevented a person attainted from

⁴⁸ Harry Saunders, “Civil Death – A New Look at an Ancient Doctrine” (1970) 11 *William and Mary Law Review* 988; Alec Ewald, “‘Civil Death’: The Ideological Paradox of Criminal Disenfranchisement Law in the United States” [2002] *Wisconsin Law Review* 1045; Sarah Grady, “Civil Death is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement under the Eighth Amendment” (2012) 102 *Journal of Criminal Law and Criminology* 441.

⁴⁹ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 602 (Jacobs J), 606 (Murphy J); 53 ALJR 166.

⁵⁰ Brian Kalt, “The Exclusion of Felons from Jury Service” (2004) 53 *American University Law Review* 65, 100.

⁵¹ Kalt, n 50, 173–174.

⁵² Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–1769) 363–364.

⁵³ *United States Constitution* (1789) Art 3 § 3 cl 2.

⁵⁴ The states of Florida, Iowa, Kentucky and Virginia deny the vote to all convicted felons upon release; eight other states disenfranchise some categories of past offenders once released from jail: see The Sentencing Project, *Felony Disenfranchisement: A Primer* (10 May 2016) <<http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer>> for details of the law of each state. The Sentencing Project estimates that such laws disenfranchise about six million Americans, 45% of whom have served their assigned term of imprisonment <www.sentencingproject.org>; Anthony Gray “Securing the Voting Rights of Felons” (2016) 16 *Berkeley Journal of African-American Law and Policy* 3–31.>.

⁵⁵ “Thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion”: Kalt, n 50, 67.

⁵⁶ A challenge to felon disenfranchisement laws on equal protection grounds was rejected: *Richardson v Ramirez*, 418 US 24 (1974), and the decision, though criticised, has never been overruled. There has not been a Supreme Court decision finding that denial of jury service due to a person’s past criminal record is unconstitutional, though rules which, as applied, denied African-American people (*Strauder v West Virginia*, 100 US 303 (1880)), women (*Glasser v United States*, 315 US 60 (1942)) or those of certain classes (*Thiel v Southern Pacific Co*, 328 US 217 (1946)) from serving on juries have been the subject of successful constitutional challenge.

⁵⁷ James Binnall, “EG1900: The Number They Gave Me When They Revoked my Citizenship: Perverse Consequences of Ex-Felon Civil Exile” (2008) 44 *Willamette Law Review* 667, 668. This is estimated to reduce the representation of African-American men on juries by about 30%: Kalt, n 50, 113. Elsewhere it was estimated that about 33% of

commencing a legal action in court.⁵⁸ Today, the most significant remnant of the concept of civil death on an ex-prisoner is their right to participate in a jury. Voting restrictions tend to apply only while the person is incarcerated,⁵⁹ if at all, raising fewer objections in terms of interference with civil liberties.

VOTING AND JURY SERVICE

Participation in voting processes and participation on a jury can be seen as related. They are both examples of situations where members of a society participate in the governance of that society, albeit in a minor way. Participation in a voting process can be seen as a citizen's contribution to law-making, by selecting representatives considered worthy to participate in the formulation and amendment of legislation. And participation on a jury can be seen as a citizen's contribution to the application of the law to real cases, to determine whether an individual member has breached the rules by which that society has agreed to be governed, or the social compact. As examples of a citizen's participation in either the making or the application of law in relation to a society, they are examples of participatory democracy.⁶⁰ Jury legislation around Australia which establishes who is entitled to participate on a jury typically uses those on the electoral roll as at least a starting point for selection.⁶¹ This evidences links between participation in the electoral process, and participation in the jury process, in terms of democracy.⁶²

Recently in *Alqudsi v The Queen*,⁶³ Gageler J discussed the history of the introduction of jury trials to the colony of New South Wales. He noted that "it was much less about the civil right of a member of the populace to be tried by jury than it was about the political right of a section or enlarged section of the populace to sit on a jury". Gageler J stated that:

The conception of the institution of trial by jury as serving to ensure a measure of democratic participation in the administration of criminal law cannot be taken to have been overlooked by the framers of the *Constitution* when, rejecting the suggestion of Henry Bourne Higgins that the earlier impetus to ensure trial by jury had been overtaken by the advent of parliamentary democracy in the second half of the nineteenth century, they voted to adopt the text of what was to become s 80 of the *Constitution* ... more importantly, the democratic participation in the administration of criminal justice which had come by the nineteenth century to be connoted by trial by jury within the Australian colonies cannot be taken to have been lost on the Australian people (when they voted to accept the *Constitution*).⁶⁴

African-American men have felony convictions: Christopher Uggan, Jeff Manza and Melissa Thompson, "Citizenship, Democracy and the Civil Reintegration of Criminal Offenders" (2006) 605 *Annals of American Academic Politics and Social Science* 281, 290.

⁵⁸ *Dugan v Mirror Newspapers Limited* (1978) 142 CLR 583 (Barwick CJ, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting); 53 ALJR 166.

⁵⁹ See, eg, *Commonwealth Electoral Act 1918* (Cth) s 93(8AA) (person serving a jail term of at least three years' imprisonment denied the right to vote) (this also applied in the Northern Territory due to the *Northern Territory (Self-Government) Act 1978* (Cth) s 14(1)); *Parliamentary Electorates and Elections Act 1912* (NSW) s 25 (serving a sentence of at least 12 months' imprisonment); *Electoral Act 1992* (Qld) s 106 (person serving a sentence of imprisonment cannot vote); *Electoral Act 1907* (WA) s 18(1) excludes a small number of categories of offender from voting; *Electoral Act 2004* (Tas) s 31 (prisoners serving a term of imprisonment of at least three years excluded from voting); in contrast the *Electoral Act 2002* (Vic) s 22(2) contemplates prisoner voting, as does the *Electoral Act 1985* (SA) s 29(5) and *Electoral Act 1992* (ACT) s 71A.

⁶⁰ Kalt, n 50, 129: "jury service is the pinnacle of democratic participation: by serving on a jury, an individual is a citizen in the most direct way".

⁶¹ *Jury Act 1977* (NSW) s 5; *Juries Act 2000* (Vic) s 5(1); *Jury Act 1995* (Qld) s 4(1)(a); *Juries Act 1927* (SA) s 11; *Juries Act 1957* (WA) s 4(1); *Juries Act 2003* (Tas) s 6(1); *Juries Act 1967* (ACT) s 9; *Juries Act 1963* (NT) s 9(1).

⁶² This was noted in *Powers v Ohio*, 499 US 400, 407 (1991) where Kennedy J (for White, Blackmun, Marshall, Stevens, O'Connor and Souter JJ) noted that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process".

⁶³ *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24.

⁶⁴ *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24, [133]–[134]; in *Kingswell v The Queen* (1985) 159 CLR 264, Deane J stated that "in the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government" (298–299).

The democratic nature of the jury is also reflected in the writings of former High Court Justice Evatt,⁶⁵ Lord Devlin,⁶⁶ other scholars,⁶⁷ and a book published by the Australian Institute of Judicial Administration.⁶⁸

Others have reflected at some length on the part that juries play in broader conceptions of American democracy. Use of a jury is referred to in the American *Constitution* in Art III § 2 and the *Sixth Amendment*. It is enshrined against the states pursuant to the *Fourteenth Amendment*.⁶⁹ The American material is considered highly relevant to Australia's constitutional provisions. Of course, the Australian founding fathers were highly influenced by the American model generally.⁷⁰ Specifically regarding jury trial, enshrined in the Australian *Constitution* by s 80 with respect to proceedings for offences against Commonwealth law triable upon indictment, the s 80 case law from the earliest days indicates the extent to which s 80 of the Australian *Constitution* was derived from the United States equivalent.⁷¹ For instance, in *R v Snow*, Isaacs J noted s 80 was "reproduced from the American *Constitution*".⁷² In *R v Federal Court of Bankruptcy; Ex Parte Lowenstein*, Dixon and Evatt JJ (dissenting) described s 80 as being an "adaptation" from the United States provisions.⁷³ In *Brown v The Queen*,⁷⁴ Brennan J said s 80 was "modelled on" Art III of the United States *Constitution*,⁷⁵ Deane J said it was "based upon" it,⁷⁶ and Dawson J said s 80 was drafted with Art III "in mind".⁷⁷ In *Cheatle v The Queen* a unanimous Court found that s 80 was "modelled upon" Art III and the central command of the sections was largely framed in identical words.⁷⁸

Writing of the American *Constitution*, Alexis de Tocqueville stated that:

⁶⁵ Herbert Vere Evatt, "The Jury System in Australia" (1936) 10 ALJ 49S, 67: "it would seem that in modern times the jury system is to be regarded as an essential feature of real democracy ... the mere right (or duty) to put a piece of paper in a ballot box every three years is not proof of the reality of self-government".

⁶⁶ Patrick Devlin, *The Judge* (Oxford University Press, 1979) 127: "constitutionally, (the jury) is an invaluable achievement that popular consent should be at the root not only of the making but also of the application of the law. It is one of the significant causes of our political stability". See also Patrick Devlin, *Trial by Jury* (Stevens, 1966) 164, where he reflects on juries as part of the democratic process.

⁶⁷ Jacqueline Horan and David Tait, "Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria" (2007) 16 JJA 179, 185: "juries are a form of direct democracy where citizens act directly to make decisions about life, liberty and property".

⁶⁸ Mark Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 1: "the jury involves community participation and lay involvement; the verdict arises out of a democratic understanding between judge and jury, between populism and demagoguery; the jury ensures the application of the law consonant with the community conscience; the democracy of the legislative process is maintained in its courtroom application through the jury; and this protects the body politic".

⁶⁹ *Duncan v Louisiana*, 391 US 145 (1968).

⁷⁰ Sir Owen Dixon, *Jesting Pilate* (Lawbook Co., 1965) 102: "our *Constitution* makers followed with remarkable fidelity the model of the American instrument of government. Indeed it may be said that, roughly speaking, the Australian *Constitution* is a redraft of the American *Constitution* of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions".

⁷¹ Article III § 2 of the *United States Constitution* states that "the trial of all crimes, except in cases of impeachment, shall be by jury", and the *Sixth Amendment* states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state".

⁷² *R v Snow* (1915) 20 CLR 315, 352.

⁷³ *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556, 581.

⁷⁴ *Brown v The Queen* (1986) 160 CLR 171; 19 A Crim R 136; 60 ALJR 257.

⁷⁵ *Brown v The Queen* (1986) 160 CLR 171, 194; 19 A Crim R 136; 60 ALJR 257.

⁷⁶ *Brown v The Queen* (1986) 160 CLR 171, 204; 19 A Crim R 136; 60 ALJR 257.

⁷⁷ *Brown v The Queen* (1986) 160 CLR 171, 11; 19 A Crim R 136; 60 ALJR 257.

⁷⁸ *Cheatle v The Queen* (1993) 177 CLR 541, 555 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 66 A Crim R 484; 67 ALJR 760; see subsequently *Cheng v The Queen* (2000) 203 CLR 248, 281 (Gaudron J); 115 A Crim R 224; 74 ALJR 1482; [2000] HCA 53, and *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24, [37]–[45] (French CJ).

(The jury) puts the real control of affairs into the hands of the ruled ... rather than into those of the rulers ... the jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail ... the jury is above all a political institution ... (and) should be made to harmonise with the other laws establishing that sovereignty ... for society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters.⁷⁹

Thomas Jefferson reflected these ideas of democracy. In a letter he indicated that “it is necessary to introduce the people into every department of government ... (but w)ere I called upon to decide whether the people had best be omitted from the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative”.⁸⁰ This sentiment of the time is also reflected in anti-federalist essays of the time, one stating that “the trial by jury is ... more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks”;⁸¹ another that jury trials preserve “in the hands of the people that share which they ought to have in the administration of justice”.⁸²

Reflecting the views of Locke, de Tocqueville and others regarding the role of juries in democracy, Amar concludes that “the jury was an essential democratic institution because it was a means by which citizens could engage in self-government”.⁸³

ARGUMENTS AGAINST BANNING EX-PRISONERS FROM JURY SERVICE

The Constitutional Arguments

There are at least two constitutional arguments against legislation banning or restricting ex-prisoners from jury service. One focuses on the links between voting and jury service, and argues that if the High Court had constitutional difficulty with preventing prisoners from voting, it might have constitutional difficulty with preventing ex-prisoners from performing jury service. The other focuses on the fact the High Court has found the representative nature of juries to be fundamental and part of its essential nature, attracting constitutional protection. These arguments will be considered in turn.

Firstly, if the close links between voting rights and jury service are accepted, and both are recognised as important pillars of participatory, democratic government, then a question arises. The Australian High Court has stated that, at least to some extent, denial of the franchise to those who are imprisoned so undermines the system of representative government enshrined in our *Constitution* that such laws are, or may be (depending on their extent), unconstitutional. And we know that blanket disenfranchisement of all those in jail for any length of time is unconstitutional, according to the High Court.⁸⁴

This places question marks, at the very least, over laws that deny the ability of those who were, but are no longer, in prison after being convicted of an offence. We saw above that several Australian jurisdictions ban or restrict those convicted of a broad range of offences from serving on a jury. These bans or restrictions operate well after the person has been jailed, and/or has completed their term, and

⁷⁹ Alexis de Tocqueville, *Democracy in America* (1840) 250–251. De Tocqueville’s musings on the importance of juries as political institutions were cited with evident approval by the High Court of Australia recently in *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24, [2] (French CJ), and [129] (Gageler J).

⁸⁰ Letter from Thomas Jefferson to Abbe Arnoux (19 July 1789), in 15 *The Papers of Thomas Jefferson* 282–283 (Julian P Boyd ed, 1959).

⁸¹ “Letters from the Federal Farmer” (IV), reprinted in 2 *The Complete Anti-Federalist* 36–38 (Herbert V Storing ed, 1981).

⁸² “Letters of Sentinel”, reprinted in 2 *The Complete Anti-Federalist* 149 (Herbert V Storing ed, 1981).

⁸³ Vikram David Amar, “Jury Service as Political Participation Akin to Voting” (1995) 80 *Cornell Law Review* 203, 218; Akhil Amar, “Bill of Rights as a Constitution” (1991) 100 *Yale Law Journal* 1131; Herbert Storing, *What the Anti-Federalists Were For* (University of Chicago Press, 1981) 19: “the question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of that people in the administration of government”.

⁸⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162; 81 ALJR 1830; [2007] HCA 43.

in some cases are permanent in nature. Now, if the High Court has said that bans on prisoners currently in jail from voting may be unconstitutional as being inconsistent with constitutionally prescribed representative government, it is at least arguable than bans on those previously jailed from participating on juries is also unconstitutional, because it affects their essential “representative” nature, and undermines another pillar of the kind of democratic system of government intended by the founding fathers.

Secondly, we know that the High Court emphasised in the unanimous decision of *Cheatle v The Queen*⁸⁵ the “representative character of the jury”⁸⁶ and the “relevant *essential feature* (my emphasis) of the institution of trial by jury in 1900 ... was *and is* (my emphasis) that ... the jury be a body of persons representative of the wider community”.⁸⁷ This sentiment has been repeated in later cases.⁸⁸ It has been observed that “it is the essential features of the institution (of jury) which have what might be called a constitutionally entrenched status”.⁸⁹

The question is whether the bans and restrictions on ex-prisoners from performing jury service in all Australian States and Territories offend the “representative character” of the jury. Now, it is difficult to know precisely the number of individuals who are affected by these bans. It is not possible to know precise numbers of individuals sentenced, for example, to particular sentences or for particular crimes in each State and Territory, which the legislation outlining the extent of bans or restrictions uses in determining who may undertake jury service.

However, some useful data is available from the Australian Bureau of Statistics. According to its most recent figures from the June Quarter 2016, 38,685 individuals were detained in a prison in Australia at that time. This represents an imprisonment rate of 208 per 100,000 population. Indigenous offenders are seriously over-represented in these figures, comprising 28% of the prisoner population, and 2% of the general population.⁹⁰ According to its 2014–2015 data, the median sentence length that a person detained in prison is serving is seven months’ imprisonment.⁹¹ The New South Wales Bureau of Crime Statistics and Research in its June 2016 Quarterly Update found of those released during that quarter, the average term of their imprisonment post-sentencing was about seven-and-a-half months.⁹² As indicated above, jury legislation in New South Wales, Victoria and Tasmania requires an even longer period to elapse between a person’s engagement with the corrective services system and when they are eligible for jury service when the person is sentenced to more than three months’ imprisonment.

⁸⁵ *Cheatle v The Queen* (1993) 177 CLR 541; 66 A Crim R 484; 67 ALJR 760.

⁸⁶ *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 66 A Crim R 484; 67 ALJR 760.

⁸⁷ *Cheatle v The Queen* (1993) 177 CLR 541, 560; 66 A Crim R 484; 67 ALJR 760.

⁸⁸ *Brownlee v The Queen* (2001) 207 CLR 278, 330 (Kirby J) and 341 (Callinan J); 75 ALJR 1180; [2001] HCA 36; *Katsuno v The Queen* (1999) 199 CLR 40, 59 (Kirby J); 109 A Crim R 66; 73 ALJR 1458; [1999] HCA 50; *Wu v The Queen* (1999) 199 CLR 99, 114 (Kirby J); 108 A Crim R 252; 73 ALJR 1497; [1999] HCA 52; *R v Baden-Clay* (2016) 90 ALJR 1013; [2016] HCA 35, where a unanimous Court referred to the “abiding importance of the role of the jury as representative of the community” (French CJ, Kiefel, Bell, Keane and Gordon JJ): [65]. Having said that, it must also be acknowledged that juries at the time of federation lacked key aspects of what we would consider “representativeness” today – women would not have served on juries at this time, there was a minimum property qualification which would exclude many men, and Aboriginal people would not have been considered. It was not until the mid-20th century that minimum property requirements to be a juror were abandoned. Women began to be entitled to serve on juries in New South Wales in the mid-20th century, but restrictions in this area persisted in other States. An automatic exemption of women from jury service was only removed in Victoria in 1975; in other States, there existed grounds for a woman to be excused from jury service due to her gender until the mid 80s (South Australia and Western Australia) or 90s (Queensland and Tasmania): Horan and Tait, n 67, 182. South Australian legislation still permits a judge to order that a jury be comprised of a particular gender only.

⁸⁹ *Ng v The Queen* (2003) 217 CLR 521, 526 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); 77 ALJR 967; [2003] HCA 20; referred to in *Alqudsi v The Queen* (2016) 90 ALJR 711; [2016] HCA 24, [193] (Nettle and Gordon JJ).

⁹⁰ Australian Bureau of Statistics Catalogue 4512.0, *Corrective Services, Australia*.

⁹¹ Australian Bureau of Statistics Catalogue 4513.0, *Criminal Courts, Australia*.

⁹² *New South Wales Custody Statistics* (June 2016).

At least three points emerge from these statistics: the first is high and growing rates of incarceration in Australia. The second is the fact that Indigenous Australians are seriously over-represented in Australian jails, so that banning or restricting ex-prisoners from participating on juries has a disproportionate effect on the ability of Indigenous Australians to perform jury service. And the third is that legislation in New South Wales, Victoria and Tasmania which subjects those sentenced to at least three months' imprisonment to longer wait times before they are eligible for jury service, must be considered in the light that the average prisoner is sentenced to more than three months' jail, and so would be subject to the longer wait times in these States.

The constitutional question is whether bans or restrictions on all of these individuals from performing jury service upon their release from prison is valid, or whether it is invalid, because it undermines the "representative" nature of the jury which the High Court has found to be constitutionally mandated. The author has considered the question of whether the representative nature of a jury is a justiciable issue in a previous article, and will avoid repetition here.⁹³ It might be sufficient in that light to note that cases subsequent to *Cheatle* have not outlined whether, and to what extent, the concept of a jury being representative is justiciable. No case of which the author is aware has set aside the verdict of a jury, or declared jury legislation to be invalid, because it is not considered representative. The concept of representativeness could only be applied in a very broad manner; no-one seriously suggests that a particular jury must be a replica of the general population; that would be an impossible task.

However, the United States Supreme Court has provided some parameters which might be useful for an Australian court considering development in this area. That Court settled upon a three-stage test to determine whether the "fair cross-section requirement" had been violated:⁹⁴

- (1) the group alleged to be excluded was a "distinctive" group in the community;⁹⁵
- (2) the representative of this group in the pool from which jurors are chosen is not fair and reasonable given the number of such individuals in the community;⁹⁶ and
- (3) this under-representation is due to the systematic exclusion of the group in the jury selection process.⁹⁷

Applying these principles to ex-prisoners, there is a reasonable argument that this group is a distinctive group in the community. The statistics above suggest large prisoner numbers, comprising 208 per 100,000 population. Their exclusion or restriction from jury service may be argued as not being fair and reasonable given their numbers. On the third element, there is no doubt that their under-representation is due to systematic exclusion – that is clear on the face of the jury legislation in each State and Territory in Australia. Now, it should be acknowledged that in no American case of which the author is aware has the court struck out jury legislation prohibiting ex-prisoners from serving on juries.⁹⁸ While exclusions on the basis of gender, race and employment have been struck out, exclusions based on past criminal behaviour have not, at least as yet, been found to be unconstitutional.⁹⁹ However, on the other hand, that great democracy has constitutionally upheld

⁹³ Gray, n 7.

⁹⁴ *Duren v Missouri*, 439 US 357 (1979).

⁹⁵ This test has been subject to trenchant criticism on the basis that it raises contestable issues of group identity, inviting the court to adopt stereotypes and make dangerous assumptions: Richard Re, "Re-justifying the Fair Cross-section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury" (2007) 116 *Yale Law Journal* 1568, 1593–1594.

⁹⁶ It has been observed that the Supreme Court has not (and, perhaps cannot or should not) identified the precise time at which under-representation becomes constitutionally problematic: David Kairys, "Juror Selection: The Law, a Mathematical Method of Analysis, and a Case Study" (1972) 10 *American Criminal Law Review* 771, 786.

⁹⁷ *Duren v Missouri*, 439 US 357 (1979), 364 (White J, for Burger CJ, Brennan, Stewart, Marshall, Blackmun, Powell and Stevens JJ).

⁹⁸ Kalt, n 50, 75 documents numerous cases where this argument has been unsuccessfully made.

⁹⁹ However the possibility has certainly been canvassed: "several constitutional challenges to felon exclusion suggest themselves, mainly because felon exclusion produces juries that are less representative and much more white": Kalt, n 50, 99.

legislation denying ex-prisoners the right to vote.¹⁰⁰ In contrast, our Australian High Court has found that legislation prohibiting current prisoners from voting was unconstitutional. In that light, the fact the United States Supreme Court has not (yet) found restrictions on ex-prisoners serving on juries to be unconstitutional does not necessarily mean such bans and restrictions are constitutionally valid here.

In relation to (2) above, namely whether the restriction is “fair and reasonable”, this invites some consideration of such bans and restrictions on a policy basis, to which the article now turns.

Policy Arguments

Typically, restrictions on the ability of ex-prisoners to serve on juries are justified on the basis that to allow such individuals to so serve would undermine public confidence in the justice system.¹⁰¹ Relatedly, there may be concern that such a person may lack the impartiality expected of a juror,¹⁰² specifically, that their experience as a prisoner might colour their attitude towards law enforcement authorities.¹⁰³

On the other hand, typically when a person is sentenced in Australia, an important consideration in determining the appropriate sentence is the prospect that the offender will be rehabilitated during their period of incarceration.¹⁰⁴ At least notionally then, someone who has been released from custody has been rehabilitated. Certainly, if they have been granted parole, the relevant parole board would have been sufficiently satisfied of their rehabilitation. It can be difficult to reconcile with our notion that a person released from prison has been rehabilitated, the idea that we should prevent them from serving the community via jury service on the basis of their lack of impartiality or integrity.¹⁰⁵ The law generally allows such individuals to start again with a “clean slate” on the basis that the debt they owed to society for the crime (breach of social contract) has been repaid.¹⁰⁶ Elsewhere in the law, the

¹⁰⁰ *Richardson v Ramirez*, 418 US 24 (1974).

¹⁰¹ New South Wales Law Reform Commission, n 1, 42.

¹⁰² “The public at large would be concerned if people with significant criminal histories were permitted to serve as jurors on the basis that there is a real risk that such persons may not be able to act impartially”: Law Reform Commission of Western Australia, n 1, 82.

¹⁰³ “The legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state – a conviction of felony and punishment therefor – might well harbor a continuing resentment against ‘the system’ that punished him and an equally unthinking bias in favour of the defendant on trial, who is seen as a fellow underdog caught in its toils”: *Rubio v Superior Court*, 593 P 2d 595, 600 (Cal, 1979) (en banc).

¹⁰⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1988* (SA) s 10; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act* (NT) s 5.

¹⁰⁵ This was recognised by both Law Reform Commission Reports that considered the issue in depth – “as a matter of public policy, it is also necessary to recognise the principle of rehabilitation and therefore reformed offenders should be allowed to participate in ordinary civic duties”: Law Reform Commission of Western Australia, n 1, 82; New South Wales Law Reform Commission, n 1, acknowledges the principle of “allowing people who have served their time, undertaken rehabilitation, and become eligible voters once again to become fully functioning members of society”. Other scholars have developed this argument: see Nora Demleitner, “Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences” (2000) 11 *Stanford Law and Policy Review* 153, 154: “exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated”. See also Kalt, n 7, 132–134: “felon exclusion does not aid in rehabilitation ... declaring felons unfit for jury service for life amounts to a societal admission that prison rehabilitation is futile ... on the flip side ... when a felon is allowed to serve on a jury, it contributes positively to engagement in the community, which is an important part of rehabilitation”.

¹⁰⁶ Kalt, n 7, 123: “a felon who has served his sentence – who has paid his debt to society – could just as easily be deemed to have re-contracted with society”; George Fletcher, “Disenfranchisement as Punishment: Reflections on the Racial Use of Infamia” (1999) 46 *UCLA Law Review* 1895, 1907: “there is no point to the metaphor of paying one’s debt to society unless the serving of the punishment actually cancels out the fact of having committed the crime”. In contrast, the view of Judge Friendly of the Second Circuit that “a man who breaks the laws he has authorised his agent to make for his own governance could fairly be thought to have abandoned the right to participate in further administering the compact”: *Green v Board of Elections*, 380 F 2d 445, 451 (2d Cir, 1967) and Roger Clegg, “Who Should Vote?” (2001) 6 *Texas Review of Law and Policy* 159, 172: “while serving a sentence discharges a felon’s debt to society in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making judgments regarding his trustworthiness”.

fact of a person's prior convictions cannot generally be used to prove they committed a particular offence with which they have been charged. No Australian Parliament prohibits ex-prisoners from voting on the basis that they lack impartiality or would undermine public confidence in the election system.¹⁰⁷

It seems highly speculative to claim that a person's experience as an ex-prisoner might colour their attitude towards law enforcement authorities.¹⁰⁸ Who knows how that experience might play out? Would it make the individual tougher on alleged offenders, on the basis of some residual bitterness to the system, or seek to inflict the same kind of pain that the ex-prisoner suffered? Would it make the ex-prisoner more aware of the serious consequences of finding that a person is guilty? Would it make them consider the evidence more carefully, if for instance they believed they had been wrongly convicted? It is considered very difficult to draw generalised conclusions as to how experience as a prisoner might affect a possible juror. We are all a product of our life experiences. We all have idiosyncrasies and prejudices. It seems somewhat simplistic to single out the fact a person has been jailed in the past to suggest that that particular life experience renders them unfit to judge the guilt or innocence of others, either forever, or after a long period.¹⁰⁹ In contrast, there is empirical evidence to suggest that someone who has been through the criminal justice system is significantly influenced in their feelings about such a system by their experience of it being fair,¹¹⁰ as opposed to simply whether it resulted in their conviction.

Further, many have noted the challenges that those who have been in prison face upon release. Primary among these challenges is their successful re-integration into society. We know that punishment for crime in medieval times included concepts such as banishment, where the person literally was "outcast" from society. We don't wish to relive those days in a modified way. The failure of a formerly incarcerated person to re-integrate into society has very significant costs, for the person concerned and their families. It may lead to their further commission of crimes, imposing further costs on society. Certainly, denial of the ability to participate in juries would be just one example of a failure to re-integrate into society; others, including potential difficulties in obtaining employment,¹¹¹ and estrangement from loved ones, and general stigma,¹¹² are likely to be much more important. However, it is argued that the legal system can play its part, small though it may be, in the overall scheme of

¹⁰⁷ Yet the same logic is applied to the context of voting in the United States: "the logic underlying felon disenfranchisement is that former felons are morally suspect and will undermine the integrity of the democratic process with their votes": Shadman Zaman, "Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery" (2015) 46 *Columbia Human Rights Law Review* 233, 238.

¹⁰⁸ Binnall, n 57, 675: "there is also no empirical evidence to support the contention that an ex-felon juror would threaten the probity of a jury through general defect of character or through inherent bias"; Kalt, n 7, 105–108; Binnall, n 47, 16: "no current research supports the notion that the prospective felon-juror population is more biased against the government or lacks probity to a greater degree than their non-felon-juror counterparts".

¹⁰⁹ "Jury service is a messy business. Jurors are not angelic; juries are not sacrosanct. Rather, jurors are humans, and they misbehave. For example, the electronic age has given them boundless opportunities to Google or tweet their way into disgrace. In addition, study after study indicates that jurors assume guilt, often in racialized ways, and put unjustifiable stock in the credibility of government employees. Perhaps the best that can be hoped is that if enough biases and backgrounds are thrown together, the biases of the various jurors will cancel each other out and that diversity will beget impartiality": Anna Roberts, "Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions" (2013) 98 *Minnesota Law Review* 592, 627–628.

¹¹⁰ Tom Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation With the Police and Courts* (Russell Sage Foundation, 2002) 53; Jonathan Casper et al, "Procedural Justice in Felony Cases" (1988) 22 *Law and Society Review* 483, 494 (procedural justice made a "significant and independent contribution" to measures of litigant satisfaction, including convicted felons); Tom Tyler, "The Psychology of Procedural Justice: A Test of the Group Value Model" (1989) 57 *Journal of Personality and Social Psychology* 830, 837; Anna Roberts, "Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions" (2013) 98 *Minnesota Law Review* 592, 629–634.

¹¹¹ Joseph Graffam et al, *Attitudes of Employers, Corrective Services Workers, Employment Support Workers, and Prisoners and Offenders Towards Employing Ex-prisoners and Ex-offenders: Report to the Criminology Research Council*, Grant 26/02-03 (April 2004); Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 21.

¹¹² Terri Winnick and Mark Bodkin, "Anticipated Stigma and Stigma Management Among Those to be Labeled 'Ex-Con'" (2008) 29 *Deviant Behavior* 295; Thomas LeBel, "'If One Doesn't Get You Another One Will': Formerly Incarcerated Persons"

things, in assisting with an ex-prisoner's re-integration into society.¹¹³ As well as simply helping a damaged human being and their family, it may assist in preventing future wrongdoing down the track, which would impose further cost on society.

Some serious philosophical debate can be raised regarding the nature of criminal behaviour. Is a criminal inherently, and permanently, bad? Or was/is their wrongdoing situational, affected by other issues, including their environment, people with whom they associate, drug-taking etc? Does the fact a person committed wrong in the past indicate an inherent predisposition to criminal behaviour, or not? Those who believed that those guilty of criminal behaviour in the past were inherently bad, as opposed to "situationally bad", would be more likely to support permanent bans on the ability of an ex-offender to participate on a jury. Aristotle, for instance, noted that "every person chooses to develop good and bad character through autonomous actions. Once a person chooses their character ... he or she was not free to simply undo the choice".¹¹⁴

On the other hand, most of the current literature focuses on contextual factors, rather than assume that a person is inherently evil.¹¹⁵ For instance, the leading model to determine whether a given person will commit violent crime in future (the HCR-20 risk assessment scheme)¹¹⁶ uses three factors to predict future criminal violence – historical factors (previous violence, unstable relationships, lack of employment, drug abuse, mental illness, psychopathy, personality disorder), clinical factors (impulsive behaviour, lack of response to treatment, mental illness, negativity, lack of insight), and risk management factors (opportunities to commit crime, personal networks, failure to take medication, stress). Other models discuss offender rehabilitation in terms of risk of re-offending, need (dynamic risk factors, criminogenic needs) and responsivity.¹¹⁷ Obviously, these types of models emphasise the fact that much criminal behaviour is situational, rather than because a person is inherently "evil".¹¹⁸ Criminal legislation in every Australian State and Territory includes as one of its objectives the

Perceptions of Discrimination" (2012) 92 *The Prison Journal* 63; Maria Borzycki and Eileen Baldry, "Promoting Integration: The Provision of Prisoner Post-Release Services" [2003] 262 *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice*.

¹¹³ Binnall, n 57, 668: "removing civil freedoms can lead to re-offending by first contributing to the stigma of being an ex-felon and then by reducing an ex-felon's moral desire to remain lawful"; Zaman, n 107, 239; Roberts, n 110, 611: "reentry has gained recent prominence as a focus of criminal justice policy. One of the types of activity that has been found to aid the possibility of re-entry is civic participation"; Binnall, n 47, 39–40: "while preventing felons from sitting on a jury assuredly does not alone lead to criminal activity, its effect on the formerly incarcerated should not be underestimated". Aggregately, statutes that isolate felons from the rest of society by locking them out of democratic processes hinder reintegration by undermining allegiance to authority and delegitimizing the law. As one scholar explains, "one barrier may not be that big a deal ... you can't get housing ... you can't get ID and no one will hire you. Cumulatively, that sends a signal: 'you're not wanted'" (quoting Debbie Mukamal, Director of the Prisoner Reentry Institute at John Jay College of Criminal Justice, in Gary Fields *Arrested Development: After Prison Boom, a Focus on Hurdles Faced by Ex-Cons*, Wall Street Journal, 24 May 2005).

¹¹⁴ "The Nichomachean Ethics" in Richard McKeon (ed), *The Basic Works of Aristotle* (Random House, 1941) 972–973: "it does not follow that if he wishes he will cease to be unjust and will be just ... so too to the unjust and to the self-indulgent ... they are unjust and self-indulgent voluntarily; but now that they have become so it is not possible for them not to be so".

¹¹⁵ Ekow Yankah, "Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment" (2004) 25 *Cardozo Law Review* 1019.

¹¹⁶ Kevin Douglas et al, "Assessing Risk for Violence Among Psychiatric Patients: The HCR-20 Violence Risk Assessment Scheme and Psychopathy Checklist: Screening Version" (1999) 67 *Journal of Consulting Clinical Psychology* 917.

¹¹⁷ DA Andrews, James Bonta and Alexander M Holsinger, *The Psychology of Criminal Conduct* (Taylor and Francis Inc, 2010); DA Andrews, James Bonta and RD Hoge, "Classification for Effective Rehabilitation: Rediscovering Psychology" (1990) 17(1) *Criminal Justice and Behavior* 19; and the "good lives model" which similarly identifies social and psychological aspects of individuals' offending: Tony Ward and Claire Stewart, "The Treatment of Sex Offenders: Risk Management and Good Lives" (2003) 34(4) *Professional Psychology: Research and Practice* 353; Tony Ward and Mark Brown, "The Good Lives Model and Conceptual Issues in Offender Rehabilitation" (2004) 10(3) *Psychology, Crime and Law* 243; Clare-Ann Fortune, Tony Ward and Gwenda Willis, "The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives" (2012) 19(5) *Psychiatry, Psychology and Law* 646.

¹¹⁸ Binnall, n 47, 30: "jury disqualifications that suggest that all felons lack probity are overinclusive in that they presume that the commission of a crime uniformly indicates an inherent character flaw ... modern criminal theorists contend that contextual factors play a far greater role in one's decision to engage in criminal activity ... it is highly unlikely that each of the approximately sixteen million Americans living with a felony possesses a character defect so severe that it warrants exclusion from jury service".

rehabilitation of offenders.¹¹⁹ A leading Australian criminal law academic states “there is no question that people can change their attitudes and behaviour to become law-abiding. Few people commit offences for the duration of their lives. Thus the process of self-reform is not only possible, but typical”.¹²⁰

In a thorough critique of the Aristotelian view of criminality, Yankah notes that:

Criminal punishment is an ill-conceived proxy for punishing character ... the epistemic difficulties in discerning character may be insurmountable. More fundamentally, punishing for immoral character is illegitimate and in tension with the ideals of equality in the liberal state ... behaviour is affected by both psychological (internal) and situational (external) factors. Hence it may be impossible to confidently estimate a person’s character from their behaviour.¹²¹

The Australian Law Reform Commission also considered the issue in the context of its review of evidence laws, including questions regarding whether prior convictions should be able to be used in determining whether an accused is guilty of an offence with which they have been currently charged. The Commission entered the debate about inherent versus situational criminality in this passage:

The common law generally assumes that the character of a person is indivisible – in other words, a person with bad character traits is likely to be a bad person generally and a person with good character traits is likely to be a good person generally. Underlying this assumption is the belief that people act consistently according to the character traits they exhibit, whatever the circumstances. Psychological research confirms that such assumptions are commonly made, although incorrectly, as in reality, a person’s behaviour will vary depending on the context ... originally, psychological theory assumed that the mental organisation of each individual embodied a predisposition towards either truthful or untruthful behaviour. It is now accepted that moral disposition is not so highly integrated as to cause consistency of behaviour in different situations ... in sum the psychological research shows that behaviour tends to be highly dependent on situational factors, and not, as previously postulated, on personality traits ... (but) people tend to attribute the behaviour of others to enduring personality traits and underestimate the role of situational factors in determining behaviour in any given situation.¹²²

The question of the eligibility of past criminal offenders to serve on juries has been the subject of various Law Reform Commission Reports in the broader context of jury eligibility. For example, the Queensland Law Reform Commission found that the existing Queensland provisions, excluding anyone convicted of an indictable offence or sentenced to jail, was too broad and recommended it be narrowed:

In recognition of the principles of offender rehabilitation and non-discrimination, and the desirability of maintaining representative juries, the grounds on which a person is excluded from jury service by reference to the person’s previous criminal history should not be unduly broad; further, the grounds should differentiate between serious and less serious offending. The breadth of the existing provisions is such that many people who have engaged in even relatively minor criminal behaviour, and many indigenous people who are over-represented as criminal defendants will be permanently excluded from the jury pool.¹²³

The current New South Wales provisions are relatively nuanced, and were introduced following recommendations by the New South Wales Law Commission in 2007.¹²⁴ The Law Reform Commission of Western Australia recommended that greater account should be taken, in assessing

¹¹⁹ *Crimes Act 1914* (Cth) s 16A(2)(n); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(1); *Sentencing Act 1991* (Vic) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing Act) 1988* (SA) s 10(1)(m); *Sentencing Act 1997* (Tas) s 3(e)(ii); *Crimes (Sentencing) Act 2005* (ACT); *Sentencing Act 1995* (NT) s 5(1)(b). The *Sentencing Act 1995* (WA) does not refer to the concept of rehabilitation.

¹²⁰ Mirko Bagaric and Theo Alexander, “The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing” (2012) 36 *Crim LJ* 159, 160.

¹²¹ Yankah, n 115, 1037–1038.

¹²² Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [3.10]–[3.14].

¹²³ Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 112. The Commission specifically recommended that the exclusion apply only to convictions that occurred upon indictment, and that the ban should be lifted once the rehabilitation period for the particular offender had expired. The Government did not act on these recommendations.

¹²⁴ New South Wales Law Reform Commission, n 1, 39–44.

temporary disqualification from jury service, of the nature of the offence committed by that person, as opposed to a blanket rule preventing the person's serving for a given number of years regardless of circumstance.¹²⁵

In sum, the suggestion is that bans or restrictions on the ability of ex-prisoners to serve on juries is bad public policy. It undermines the concept of rehabilitation, which is central to the criminal justice system and sentencing regime to which all Australian jurisdictions subscribe. It contradicts the idea that a person who has been released from prison has served their "debt to society", and is entitled to a clean slate. It adds to the other problems such an individual is likely to encounter in attempting re-integration into society, and may fuel feelings of disengagement and worthlessness which might exacerbate the risk of future offending. It makes dangerously simplistic assumptions as to how a person subject to imprisonment might respond when they are the ones deciding the guilt of someone else, assumptions not borne out by empirical evidence. And it seems to imply a "once a bad person, always a bad person" mentality, which most of the current criminology literature thoroughly discredits.

CONCLUSION

This article has considered current laws in each State and Territory which either ban or restrict ex-prisoners from participating as jurors. It has suggested there are constitutional question marks over such bans. Australia's *Constitution* clearly reflects a democracy. Essential to democracy is the participation of individual members of society in government, at least to some extent. As a result, the High Court has found that notions of representative government are enshrined in the *Constitution*. This led to a finding that Commonwealth legislation preventing those currently in prison was unconstitutional, because it attacked the constitutionally enshrined system of representative government. The article has drawn analogies between the act of voting, and the act of participating as a jury member, both ways in which members of society play their part in our democratic system of government.

Now if the High Court held to be unconstitutional a ban on current prisoners voting, because it undermined constitutionally required representative government, there is at least an argument that a ban on ex-prisoners participating on juries is also constitutionally suspect, because it undermines constitutionally required representative juries. If the High Court were to consider such an argument, it could utilise some of the American jurisprudence here, which suggests that laws which target and restrict identified groups from participating on juries is constitutionally suspect, unless such restrictions are fair and reasonable and can be justified.

Here, it is difficult to justify blanket bans or restrictions on ex-prisoner participation on juries. It flies in the face of our theories on rehabilitation, and that once a person has paid their debt to society, they are given a second chance. It is another roadblock in the path of such a person to reintegration and acceptance into society. It makes simplistic assumptions about how an ex-prisoner would approach their responsibilities as jurors. And it relies on outdated notions of "once a bad person, always a bad person", that is countered by most of the criminological literature in this field, which emphasises the situational, rather than inherent, nature of most criminal activity. While the fact that a law is bad social policy does not necessarily mean that it is unconstitutional, it is considered relevant, in assessing whether a law breaches constitutional requirements, whether the law can be justified on rational grounds. Blanket bans and restrictions on ex-prisoners from participating on juries are difficult to justify on such grounds.

¹²⁵ Law Reform Commission of Western Australia, n 1, 86–87.