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Public Duty Versus Private Information: Jury Privacy in the Information Age

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Abstract

The lay-jury remains a central feature of justice systems in many common law countries. Underpinning the nature of jury trials are two fundamental principles: representativeness and impartiality. In order to satisfy these principles, jurors will typically be asked to provide personal information. This disclosure presents the possibility that a juror's private information may be misused. While such concerns have existed for some time, the advent of Information Communication Technologies has given them increased urgency. Surveys reveal that a significant number of jurors are concerned for their privacy and safety, presenting a conflict between the public duty of jury service and their personal right of privacy. This article considers the extent to which the state can and should protect the privacy of individuals called for jury service. Focusing on examples from Australia, Canada, the United Kingdom and the United States, it begins with a discussion of the extent to which jurors are required to disclose personal information. It then discusses various concerns that may arise as a result of that disclosure, particularly personal safety and public embarrassment. Finally, suggestions for reform are provided in an attempt to address these concerns.

I Introduction

> 'Everyone gets to know everything about you — where you live, where you work, where your kids go to school. Even criminals get to know that information. You're not allowed to keep anything private.'[1]

Jury service is one of the most important yet onerous obligations that citizens may be asked to perform by the state.[2] Regarded in many common law countries as a core citizenship duty,[3] and an important example of

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1 Paula L Hannaford, 'Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures' (2001) 85(1) *Judicature* 18, 18.

2 As to the 'onerous' nature of jury service, see Sanford Levinson, *An Argument Open to All: Reading The Federalist in the 21st Century* (Yale University Books, 2015) 318; Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (1996) [1.21] ('*Jury Service in Victoria*').

3 This is true in Australia (Michael Klapdor, Moira Coombs and Catherine Bohm, *Australian Citizenship: A Chronology of Major Developments in Policy and Law* (Parliamentary Library,

participatory democracy, jury service typically requires members of the community to sit in judgement on their peers, often for the most serious of crimes.[4] For prospective jurors, attending jury service is likely to cause anxiety about a range of issues, including disruption to their daily lives, uncertainty about the task ahead, potential conflicts with other jurors and concerns about the verdict and its consequences.[5]

Until relatively recently, few jurors would have seen jury service as a potentially *serious* intrusion on their personal privacy. While disclosure of a juror's identity in open court could raise concerns about the potential for the accused, or their associates, to contact the juror, the scope for this to occur was relatively limited. Today, however, the proliferation of Information and Communication Technologies ('ICTs'), the ubiquitous nature of social media, and an environment where identify theft is heralded as the 'fastest growing crime of this century'[6], provide new and varied opportunities for a juror's privacy to be violated.

While it may be assumed that such concerns are most acute in 'high profile cases', juror concerns in relation to privacy are not so limited. For example, in Victoria — where until very recently jurors were identified by name and occupation[7] — a key concern noted in a survey of jurors was that the disclosure of their name in court meant that they could easily be identified and located. Many jurors and prospective jurors believe that their details, including their names, should only be available on a need-to-know basis, and that private information ought only be provided to the state confidentially.[8] In the United States, similar observations have been made about the stress experienced by jurors when answering questions during empanelment:

> I don't think the defendant and his friend and family have to know what my name is, where I live and where I work. We could have kept some of that information confidential. This information was all given to anyone in that courtroom.[9]

2009) 1); Canada (Jane Jenson and Martin Papillon, *The Changing Boundaries of Citizenship: A Review and a Research Agenda* (2000) 10 <http://www.cccg.umontreal.ca/pdf/CPRN/CPRN_Chnaging%20Boundaries.pdf>), and the United States of America (Susan Rose-Ackerman, 'Inalienability and the Theory of Property Rights' (1985) 85 *Columbia Law Review* 931, 936). In the United Kingdom, eligibility to serve on a jury further extends to permanent residents (Home Office, *Life in the United Kingdom: A Journey to Citizenship* (TSO, 2006) 73).

4 Although similar issues may arise in the context of civil jury trials, their use is greatly restricted in most common law countries, and therefore the focus of this article is on the particular challenges that arise in criminal trials.

5 See, eg, National Center for State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (National Center for State Courts, 1998) 1.

6 Lauren A Rosseau, 'Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive *Voir Dire* Questions' (2006) 3(2) *Rutgers Journals of Law and Urban Policy* 287, 287.

7 *Juries Act 2000* (Vic), ss 33, 36.

8 Victorian Law Reform Commission, *Jury Empanelment*, Report No 27 (2014) [4.66] ('*Jury Empanelment*').

9 National Center for State Courts, above n 5, 18.

These statements are particularly apt at a time when technology challenges the very concept of privacy itself. In the past, while it would have been possible to obtain further information when in possession of a person's name, address or occupation, doing so generally required significant effort. Today, the prevalence of social media, coupled with many ordinary citizens having a significant online presence, means that the disclosure of a name alone can result in greater access to private information by lawyers, the accused and any other persons made privy to that information.

This article discusses these threats to juror privacy, and provides a number of avenues to address, or overcome, these challenges. The specific focus is on the disclosure of private information during the empanelment process. In particular, it addresses the following questions: is disclosure of a juror's private information necessary; who should be privy to such information; and, what safeguards can be put in place to protect juror privacy? Although these questions existed prior to the internet,[10] they have become more pronounced with the ready availability of private information online. Given that the impacts of ICTs on privacy generally are well-known,[11] it is argued that this issue should be addressed proactively rather than waiting for the inevitable intrusions to occur.

The article begins with a consideration of two key concepts, which underpin the modern jury: representativeness and impartiality. This is followed by an examination of the jury selection process, with a particular emphasis on empanelment. The second part of the article considers what type of private information may be disclosed about a juror during empanelment, and how this may raise privacy concerns. The article concludes with possible mechanisms for addressing or overcoming the challenges inherent in the disclosure of a juror's private information.

When examining these issues, this article will draw upon the practice of jury empanelment in four common law jurisdictions: the Australian State of Victoria, Canada, England and Wales, and the United States.[12] While these jurisdictions share many similarities in the jury empanelment process, there are some notable differences, which help to illuminate the issues raised in this article.

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[10] See, eg, Michael R Glover, 'The Right to Privacy of Prospective Jurors during *Voir Dire*' (1982) 70(3) *California Law Review* 708, 708–23.

[11] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era,* Report No 123 (2014) [13.38].

[12] It should be noted that the focus of this article, when discussing the United States, is on petit juries rather than grand juries.

II The Nature of the Jury

From its origins in England,[13] in the *Magna Carta*,[14] the importance of the modern jury is such that it is accorded constitutional protection in Australia,[15] Canada,[16] and the United States.[17] Its role has been described as:

> safeguarding the rights of an accused by limiting the power of the state; ensuring justice is administered in line with the community's standards … and enabling the community to participate directly in the administration of the justice thereby ensuring public confidence in the criminal justice system.[18]

In the United Kingdom, the right to trial by jury has been described as the 'lamp that shows that freedom lives',[19] and in the United States it has been said to provide an accused with 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant or biased or eccentric judge'.[20]

While not all commentary on the jury's role has been so favourable, with some expressing concern about entrusting such an important role to untrained men and women,[21] there appears to be no political appetite to abolish trial by jury for serious criminal offences in any of the jurisdictions being considered. Consequently, our focus ought to be on bettering the process, rather than debating the existence of the jury trial.[22]

In most common law jurisdictions, jury trials represent a small percentage of criminal cases. For example, in Victoria there were a total of 548 Supreme and County Court jury trials in 2012–2013.[23] This may be contrasted with the 188 537 criminal matters finalised in the Magistrates' Court in the same period.[24] In the United Kingdom, estimates of the

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13 There is no constitutional right of trial by jury in England and 'there is only a general obligation to submit indicatable cases to trial by jury and judge.' See Nazim Ziyadov, *Choosing for Juries: Application and Development of Juries in Old and New Jury Trial Countries* (Maklu Publishers, 2013) 41.

14 Thomas J McSweeney, 'Magna Carta and the Right to Trial by Jury' in Randy J Holland (ed), *Magna Carta: Muse and Mentor*, (Thomson Rueters, 2014) 139–141. In the United Kingdom, the right to a trial by jury has no modern constitutional protection.

15 In Australia, jury trials are given constitutional protection in specific circumstances. Pursuant to s 80 of the *Commonwealth of Australia Constitution 1900* (Imp) ('*Constitution Act 1900* '), where the prosecution of a federal offence proceeds by way of indictment, the defendant is guaranteed a trial by jury. However, this provision has been interpreted narrowly and at the state level there is no constitutional protection accorded to a jury trial. See Anthony Gray, 'A Guaranteed Right to Trial by Jury at State Level?' 15(1) *Australian Journal of Human Rights* 97, 97.

16 *Canada Act 1982* (UK) c 11, sch B pt 1('*Canadian Charter of Rights and Freedoms* ') s 11(f).

17 *United States Constitution* amend VI.

18 Victorian Law Reform Commission, *Jury Empanelment*, above n 8, [2.5]. See also Mark Findlay, 'Juries Reborn' (2007) 90 *Reform* 9; *Kingswell v R* (1985) 159 CLR 264, 268 (Deane J).

19 Patrick Arthur Devlin, *Trial by Jury* (Stevens, 1956) 164.

20 *Duncan v Louisiana*, 391 US 145, 561 (1968).

21 See the references cited by Lord Justice Moses, 'Annual Law Lecture: Summing Down the Summing-Up' (speech delivered at The Hall, Inner Temple, 23 November 2010) 2.

22 Ibid.

23 Victorian Law Reform Commission, *Jury Empanelment*, above n 8, [2.26].

24 The Magistrates' Court of Victoria, *Annual Report 2012–13,* Annual Report (2013) 3.

percentage of jury trials range from less than 1 per cent of criminal cases to between 1 and 2 per cent of criminal cases.[25] In the United States, jury trials are also relatively rare. For example, one recent study suggests that there are approximately 149 000 jury trials per year, of which 66 per cent are criminal trials.[26]

Although jury trials may represent a small proportion of criminal trials, they are typically reserved for the most serious, which are also often the most complex, cases.[27] In addition, many non-common law countries are moving towards lay forms of representation in their criminal justice systems,[28] potentially giving rise to similar concerns about juror privacy.

The role of the common law jury in a criminal trial is to determine questions of fact, and to apply the law as stated by the judge in order to determine a verdict of guilty or not guilty.[29] In some jurisdictions, the jury may also play a role in the sentencing of an offender, either by making recommendations for sentencing periods,[30] or being charged with assessing and fixing sentences.[31]

While acknowledging the differences between the four jurisdictions considered in this article, their common law heritage means that they maintain many similarities. In particular, two concepts that underpin jury trials in each of these jurisdictions are representativeness and impartiality. These key principles provide context for the disclosure of private information during empanelment and are an important measure against which a juror's privacy rights must be balanced.

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25 Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (Oxford University Press, 4th ed, 2010) 554; Cheryl Thomas, 'The Continuing Decline of the English Jury' in Neil Vidmar (ed), *World Jury Systems* (Oxford University Press, 2000) 61.

26 It has been suggested that this may be in part because of the tendency for defendants to agree to plea bargain thereby avoiding a jury trial: Lisa Smith and John Bond, *Criminal Justice and Forensic Science* (Palgrave, 2015) 37. For a summary of jury trials versus bench trials in the United States of America, see, T Ward Frampton, 'The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State, (2012) 100(1) *California Law Review* 183, 192.

27 Smith and Bond, above n 26, 37.

28 Valerie P Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law and Social Science* 276, 276-8. For example, in 2009, Japan instituted jury trials for serious crimes: Robert M Bloom, 'Jury Trials in Japan' (2006) 35 *Loyola of Los Angeles International and Comparative Law Review* Papers 35, 37.

29 However, it should be noted that not every jurisdiction limits verdicts to these two options. For example, in Scotland a jury may also bring a verdict of 'not proven': see, eg, Samuel L Bray, 'Not Proven: Introducing a Third Verdict' (2005) 75 *University of Chicago Law Review* 1299, 1299–1300.

30 Julian V Roberts, 'Determining Parole Eligibility Dates for Life Prisoners: Lessons from Jury Hearings in Canada' (2002) 4(1) *Punishment and Society* 103–113.

31 In the United States, juries have had a role in sentencing since Independence in 1776. Today, the vast majority have abandoned the practice of jury sentencing for non-capital offences, leaving the current number of jury sentencing states at six: Nancy J King, 'The Origins of Felony Jury Sentencing in the United States' (2003) 78 *Chicago-Kent Law Review* 937, 937. See also *Apprendi v New Jersey*, 530 US 466 (2000); *Blakely v Washington*, 542 US 296 (2004).

A *Representativeness*

Central to the development of trial by jury is the idea that criminal liability ought to be determined through a 'trial by one's peers'. Historically, this was largely true if the accused was a property owning male, this being the key qualification for jury service for many years.[32] Only relatively recently have women been able to sit on juries.[33] Although today juries are far more representative of the general community, there is still debate as to precisely what representativeness means[34] — whether it is representative of the accused's particular community, or the community at large.

Overwhelmingly, it is the latter view that has prevailed.[35] However, difficulties have been expressed about the ability to ensure that juries are representative of the whole community,[36] if 'representativeness' is taken to mean 'an accurate reflection of the composition of society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc.).'[37] Given that it is 'logically and administratively impossible' to ensure that juries be truly representative of the whole community, however, 'representativeness' in this sense is more of a guiding principle than a formal requirement.[38]

For example, in Victoria, this concept of representativeness is expressly reflected in the purpose of the *Juries Act 2000* (Vic), which is to make 'juries *more* representative of the community.'[39] Similarly, in Canada, the Supreme Court has recognised that '[t]he *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, *as far as is possible and appropriate in the circumstances*, the larger community.'[40] In the United States, Congress has indicated that it is the 'policy of the United States [that] an accused faces a jury from *a fair section* of the community.'[41]

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32 Colin Davies and Christopher Edwards, 'A Jury of Peers': A Comparative Analysis' (2008) 68 *Journal of Criminal Law* 150, 152.

33 See Judy M Cornett, 'Hoodwinked by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature' (1997–1998) 4 *William and Mary J Women and the Law* 1.

34 See, eg, G Thomas Munsterman and Janice T Munsterman, 'The Search for Jury Representativeness' (1986) 11(1) *The Justice System Journal* 59, 59–78; Cynthia A Williams, 'Jury Source Representativeness and the Use of Voter Registration Lists' (1990) 65 *New York University Law Review* 590, 590–3.

35 See below nn 41–43.

36 *Jury Service in Victoria*, above n 2, 20.

37 Ibid 7.

38 Victoria, Parliamentary Debates, Legislative Assembly, 16 December 1999, 1246 (the Honourable Rob Hulls, Attorney-General).

39 *Juries Act 2000* (Vic) s 1(b) (emphasis added).

40 *R v Sherratt* [1991] 1 SCR 509, [35] (L'Heureux-Dube J) (emphasis added).

41 28 USC § 1861, 1993 (emphasis added); Hiroshi Fukuri, 'The Representative Jury Requirement: Jury Representativeness and Cross-Sectional Participation from the Beginning to the End of the Jury Selection Process' (1999) 23(1) *International Journal of Comparative and Applied Criminal Justice* 1, 1–2. For the experience in the United Kingdom, see, Cheryl Thomas and Nigel Balmer, *Diversity and Fairness in the Jury System*, (Ministry of Justice Research Series, 2007); Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series, 2010).

To achieve representativeness, the jury selection and empanelment process is as random as possible. However, certain rules during this process may apply to filter out specific groups thereby reducing representativeness. For example, criteria that determine a juror's eligibility and qualification can operate to filter out certain professional groups (such as legal professionals) and other sections of the community (such as those convicted of certain offences).[42] Similarly, there are recognised grounds for jurors to seek exemption from jury service, and these may operate to exclude certain sections of the community. For example, responsibility as a caregiver may impact particularly on mothers or those responsible for elderly parents, while substantial financial impacts may disproportionately apply to the self-employed.[43]

Recognising these challenges, some jurisdictions have implemented initiatives to increase representativeness.[44] These may be broadly divided into two categories. The first is concerned with improving data collection and targeting specific demographics. For example, in Canada, specific attention has been accorded to the issue of the underrepresentation of First Nation community members on jury rolls. Attempts have been focussed on the selection of individuals to serve on the jury,[45] and developing a separate process for the inclusion of 'on-reserve residents in the jury roll'.[46] In the United States, the Jury Management Committee of the American Bar Association's National Conference of State Trial Judges and the National State Center for State Courts has compiled a series of suggestions for judges and administrators in an effort to improve the representativeness of the jury and, specifically, racial representativeness. These suggestions include 'accurately documenting jury pool demographics', 'maximizing the inclusiveness of the master jury list' and 'keeping the master jury list current.'[47]

The second category of initiative to increase representativeness relates to citizen outreach and improving conditions of jury service in the hope that doing so will encourage jury service and limit applications for exemptions.[48] This includes educating the community about jury service and laying down the foundations of citizenship and social responsibility within the school education system. For example, in Victoria, a joint initiative between the Juries Commissioner's Office and the Victoria Law

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42 For example, see, *Juries Act 2000* (Vic) s 8(3)(h).

43 *Juries Act 2000* (Vic) s 8(3). For a US discussion, see *Model Jury Patriotism Act* s 4b(3)(i)–(iii). See also K B Battaglini, Mark A Behrens and Cary Silverman, 'Jury Patriotism: The Jury System Should be Improved for Texans Called to Serve' (20032004) 35 *St Mary's Law Journal* 117, 122.

44 Interestingly, research in England and Wales suggests that concerns about the representativeness of the jury in general, and more specifically about black ethnic minorities, are not borne out: Thomas and Balmer, *Diversity and Fairness in the Jury System*, above n 41, 194–5.

45 See, eg, *R v Nahdee* (1994) 21 CRR (2d) 81 and *R v Ransley* [1993] OJ No 2828 (Sup Ct).

46 *Juries Act*, RSO 1990, c J3, s 6(8).

47 Judge William Caprathe (ret), Paula Hannaford-Agor, Stephanie McCoy Loquvam and Shari Seidman Diamond, 'Assessing and Achieving Jury Pool Representativeness' (2016) 55(2) *Judges' Journal* 16, 17–18.

48 National Center for State Courts, above n 5, 3.

Foundation developed educational materials for students in Years 9 to 12 that addressed issues concerning the duties and responsibilities of jury service.[49]

It can therefore be seen that, in the context of juror privacy, the principle of representativeness is important in two respects. First, there is a need to collect private information about jurors in an effort to improve representativeness. Increased data collection may give rise to greater privacy concerns. Secondly, juror concerns about privacy, including their personal safety, may undermine efforts to encourage juror participation.

B *Impartiality*

The second key concept that underpins jury trials is that of impartiality. In this context, impartiality refers to jurors being, as far as possible, free of biases or preconceived notions that may influence their ability to exercise their functions fairly in a given case. This principle is therefore central to the concept of a fair trial. However, it has been recognised that 'there has always been some tension between the objective of obtaining a jury which is randomly selected and representative of the community on the one hand, and the desire to ensure that such a jury is impartial and indifferent to the cause on the other.'[50] Where there is a tension between impartiality and representativeness, it appears that impartiality must prevail as it is fundamental to the fair trial of the accused.[51] As Deane J put it, the principle that the 'trial of an accused person be "fair and impartial" is "deeply rooted in our system of law."'[52]

In Canada, the right to an impartial jury is protected by the *Canadian Charter of Rights and Freedoms*,[53] while in the United States the VI Amendment to the *United States Constitution* guarantees an accused the right to an impartial jury.[54]

While fundamental, the courts provide no further guidance as to how impartiality is to be defined, measured or applied in practice. The impartiality of an individual juror necessarily depends on the facts of the case before them. There is no such thing as the 'objective' juror for all cases. The impartiality of an individual juror must therefore be determined based on information provided. In some cases, bias may be inferred from a fact known about the juror. For example, in a sexual offence case involving a teacher offending against a pupil, it might be inferred that a juror who is also a teacher is biased in some way (whether towards or against the teacher)

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49 As cited in Jane Goodman-Delahunty, Neil Brewer, Jonathan Clough, Jacqueline Horan, James RP Ogloff, David Tait, Jessica Pratley, 'Practices, Policies and Procedures that Influence Juror Satisfaction in Australia' (Report to the Criminology Research Council) July 2007, Australian Institute of Criminology, 81.

50 *R v Su* (1997) 1 VR 1, 18 (Victorian Court of Appeal).

51 Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 69(2) *Law and Contemporary Problems* 69, 84–5.

52 *Dietrich v R* (1992) 177 CLR 292, 326–7 (Deane J), citing *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541 (Isaacs J).

53 *Canadian Charter of Rights and Freedom*, s 11(d).

54 *United States v Aguon*, 813 F 2d 1413 (9th Cir, 1987).

that other jurors are not. Beyond such limited examples, a juror's possible biases can only be determined through questioning. The only opportunity for the accused and their counsel to make such determinations occurs during the empanelment process. It is at this point that private information about jurors may be disclosed and the opportunity to challenge exercised.

The empanelment process is discussed in more detail in Part III. As will be seen, jurisdictional approaches to empanelment can be broadly divided into one of two groups. The first group, which comprises Australia, Canada, England and Wales, adopts a minimalist model of juror information. Little information is provided, and limited challenges can be made. These jurisdictions are referred to as 'Limited Disclosure Jurisdictions'. In contrast, American jurisdictions — the second group — typically adopt an extensive *voir dire* process, which is more intrusive, but which also provides clearer foundations for challenging a juror.

III Disclosure of Juror Information

A *Pre Trial Disclosure*

In most jurisdictions, the first stage at which the state requests private information from a juror is during what is described here as a 'pre-trial selection process'. During the process, jurors are randomly selected from the community, commonly through the use of electoral rolls. Although the State of Victoria will be used as an example, the process is similar in other Australian jurisdictions, Canada,[55] England and Wales,[56] and the United States.[57]

In Victoria, the Juries Commissioner requests the Victorian Electoral Commission to randomly select a required number of persons from each of the 14 jury districts.[58] At this point some individuals may be deemed *ineligible* for jury service, such as lawyers and those involved in the administration of the justice system.[59] Others may be eligible but disqualified for jury duty — usually for a limited period of time — such as those who have been convicted or found guilty of certain serious offences, or are on bail, remand or are undischarged bankrupts.[60]

Once the jury roll is generated, the Juries Commissioner sends out a jury questionnaire. The purpose of the questionnaire is to obtain information from prospective jurors, which forms the basis for the assessment of the individual's eligibility and qualification to serve on a

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55 See, eg, Ministry of the Attorney-General Ontario, *Jury Roll Process*, (24 August 2016) <https://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/jury_selection_process.php>.

56 *Juries Act 1974* (UK) c 23, s 3. See also The Crown Prosecution Service, *Jury Service* (10 July 2018) <http://www.cps.gov.uk/legal/h_to_k/jury_vetting/>.

57 See, eg, Alexander E Preller, 'Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service' (2012) 46(1) *Columbia Journal of Law and Social Problems* 1, 1–48.

58 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [2.34]–[2.36].

59 *Juries Act 2000* (Vic) sch 2.

60 Ibid sch 1.

jury.[61] Information here can be of quite a broad nature, but in most jurisdictions includes information that is relevant to determining eligibility, such as occupation, a relevant disability or language capabilities.[62] The Juries Commissioner then creates a jury list, which includes the name, address, date of birth and, where appropriate, occupation of the prospective juror.[63] This list is subsequently provided to the Police Commissioner to determine whether any individuals ought to be disqualified because of any relevant convictions or findings of guilt.[64]

Although the disclosure of such information may give rise to privacy concerns, it is not the subject of this article for two reasons. First, such disclosures are essential for the Juries Commissioner to discharge his or her responsibilities under the *Juries Act 2000* (Vic). Secondly, the collection and use of such information is typically governed by privacy legislation regulating government entities. For example, in Victoria, when the Juries Commissioner Office obtains private information from a prospective juror, that information is strictly confidential and is subject to the privacy principles established by the *Privacy and Data Protection Act 2014* (Vic).

The same cannot necessarily be said for the disclosure of personal information during the empanelment process. In each jurisdiction, both prosecution and defence have an opportunity to challenge the composition of the jury. These challenges typically take one of two forms — 'for cause' and 'peremptory'. In general terms, a challenge for cause is where either the prosecution or defence can challenge a prospective juror on the grounds that the juror is either ineligible, ought to be disqualified, or is reasonably suspected of being biased. A peremptory challenge may be exercised without providing any reason.[65]

In broad terms, these challenges are intended to help ensure the jury's impartiality and representativeness, and to provide the accused with some control over the composition of the jury. However, in order for these challenges to be exercised effectively, parties must arguably have access to information about the prospective jurors. The availability of these challenges, and the information disclosed, varies between jurisdictions, and also between prosecution and defence. For this reason, a brief overview of the challenge process in each jurisdiction is necessary before examining the privacy concerns that may arise.

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61 Ibid s 21.

62 Ibid sch 2.

63 Ibid s 25(3).

64 Ibid sch 1.

65 A peremptory challenge exercised by the Crown is commonly referred to as the 'right to stand aside'. See Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, xi. See also Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167, 167–86 ('*Challenging the Peremptory Challenge System in Australia*')

B *Disclosure During Empanelment*

In all jurisdictions, both prosecution and defence have unlimited challenges for cause. In Limited Disclosure Jurisdictions, however, these challenges are rarely used.[66] In Australia and Canada, this may be partially explained by the ready availability of peremptory challenges, but it may also be due to the limited understanding among practitioners as to the grounds and process for challenge for cause and the limited information provided on which counsel can base their challenges.[67]

Peremptory challenges are commonly used to challenge prospective jurors who display behavior that may indicate bias; are known to one of the parties; or who appear to be incapable of fulfilling the task of a juror.[68] However, it may be argued that these challenges should not to be used to exclude people with specific characteristics — for example, race — on the basis of assumptions about how those people will decide the case before them.[69] This issue is of particular significance in the United States, where the use of peremptory challenges by prosecutors to remove jurors based on race, ethnicity or gender has been held to be unconstitutional.[70]

Each jurisdiction is governed by specific rules as to the availability of peremptory challenges. In Victoria, in a criminal trial that involves one accused, there are three peremptory challenges available for the accused and three 'stand asides' (peremptory challenges) for the Crown.[71] The number of peremptory challenges and stand asides decreases with additional defendants. A different approach is adopted in Canada and the United States, where the number of peremptory challenges available is linked to the offence charged. For example, in Canada, pursuant to s 634(2) of the Canadian *Criminal Code*, for a first-degree murder charge, both the prosecution and the accused are entitled to 20 challenges.[72]

However, not all jurisdictions have peremptory challenges. In the United Kingdom, historically, the maximum number of peremptory challenges allowed was thirty-five.[73] By 1977 this number was reduced to three. Eventually, the right to peremptory challenges was abolished first in England and Wales in 1988, in Scotland in 1995, and finally Northern Ireland in 2007.[74] The rationale for the abolition of the peremptory challenge was that they were seen as a derogation from the principle of representativeness, and it was felt that this removal would increase the fairness of the jury system.

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66 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.201]. See also Horan and Goodman-Delahunty, above n 65, 171–72.
67 Ibid [3.36]; [3.138].
68 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.6]–[3.8].
69 Ibid xi.
70 See *Batson v Kentucky* 476 US 79 (1986).
71 *Juries Act 2000* (Vic) s 39.
72 *Criminal Code*, RSC 1985, c C-46.
73 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.9].
74 *Criminal Justice Act 1988* (UK) c 33, s 118.

IV What Information is Disclosed?

As noted in Part III B, above, the ability to effectively exercise a right to challenge depends on the information available to the parties. This is the key justification for requiring the disclosure of personal information by prospective jurors. Although the type and detail of information required varies among jurisdictions, in broad terms the requirements are similar in the Limited Disclosure Jurisdictions. In contrast, the disclosure of private jury information in the United States is typically far more extensive.

A *Limited Disclosure Jurisdictions*

In Australia, the private information a juror is required to disclose varies between states. For example, until very recently in Victoria, legislation required that the juror's name and occupation be called out in the courtroom during empanelment.[75] In other Australian states, such as South Australia, Tasmania and Western Australia, the private information about the juror that must be disclosed is name, occupation and address.[76] In these jurisdictions, a list containing this information is typically provided to counsel 'long enough before the jury is empanelled to enable counsel to take instructions to challenge.'[77]

In order to protect juror privacy, there has been an increase in the practice of empanelling jurors by number in Australia. [78] For example, in New South Wales, the standard practice is now for juries to be empanelled by number only.[79] Jurors are provided with a card that allocates them with a number and 'personal details including name and address, are not used during selection or in court.'[80] In Victoria, amending legislation in 2017[81] changed the procedure to one where jurors are now empanelled by number and occupation.[82]

In Canada, under s 631 of the *Criminal Code*, a juror's name, panel number and address may be disclosed during the empanelment process.[83] Similarly, in England and Wales, a juror's name, panel number, occupation or address, may be disclosed during empanelment in open court.[84]

It should be noted that in each jurisdiction there are provisions that allow a juror's anonymity to be preserved. For example, under s 631(6) of

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75 *Juries Act 2000* (Vic) s 36 (now amended).

76 *Juries Act 1927* (SA), ss 42, 46; *Juries Act 2003* (Tas) s 29; *Juries Act 1957* (WA) s 26. See also Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, app F.

77 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, app F.

78 New South Wales Government, *How a Jury is Selected* (21 December 2016) <http://www.courts.justice.nsw.gov.au/Pages/cats/jury_service/selection.aspx>.

79 *Jury Act 1977* (NSW) s 48.

80 Ibid.

81 *Juries Legislation Amendment (Court Security, Juries and Other Matters)* Act 2017 (Vic) pt 2.

82 *Juries Act 2000* (Vic) s 36.

83 *Criminal Code*, RSC 1985, c C-46, ss 631(3)–(3.1). See also Izabela Szydlo, 'The Truth about Jury Duty in Ontario' on The Business School Blog, *Centenial College* (16 October 2017) <https://www.centennialcollege.ca/the-business-school-blog/2017/october/16/the-truth-about-jury-duty-in-ontario/>.

84 *Juries Act 1974* (UK), c 23, s 12(3).

the Canadian *Criminal Code*, on an application by the prosecutor, or on its own motion, the court may order that a juror's identifying information ought not to 'be published in any document or broadcast or transmitted in any way' or limit the access or use of such information.[85]

Similar provisions are found in Australia.[86] However, those provisions appear to be aimed at threats to jurors, or to the administration of justice, where jurors may be intimidated or interfered with.[87] For example, in *R v Strawhorn*,[88] the Crown applied for prospective jurors to be anonymous 'on the grounds that jurors may be concerned about their security because the case involved evidence about high-profile gangland members and their activities.'[89] Such provisions do not necessarily address the broader privacy concerns that are the subject of this article.

B *United States*

In contrast to the Limited Disclosure Jurisdictions, United States' courts typically require extensive disclosure of private information through the use of a *voir dire* — a process designed to establish that a juror is as impartial and representative as possible. The *voir dire* process varies both federally and between states, but typically — in addition to having his or her name, occupation, and address disclosed — a juror may also be asked personal and private questions about their backgrounds and potential biases.[90]

Prior to the *voir dire*, a juror is typically required to complete a juror qualification questionnaire, the purpose of which is to obtain as much information as possible.[91] In addition to questions about the general nature of the criminal justice system, and principles that the juror may be required to apply, the questionnaires commonly ask the juror about biographical information. For example, in New Jersey, the information required includes:

> the type of work they do, whether they have done any type of work which is substantially different for what they do now; whether they have served in the military; what is their educational history; who else lives in their household and the type of work they do; whether they have any children living elsewhere and the type of work they do' which television shows they watch; any sources from which they learn the news, i.e., newspapers or radio or TV; if they have a bumper sticker that does not pertain to a political candidate, what does it say; what they do in their spare time and anything else they feel is important.[92]

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85 *Criminal Code*, RSC 1985, c C-46.

86 See, eg, *Juries Act 2000* (Vic) s 31(3); *R v Goldman* (2004) A Crim R 40.

87 National Center for State Courts, above n 5, [3.2.1].

88 [2006] VSC 251.

89 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [4.19], citing *R v Strawhorn* [2006] VSC 251.

90 See, eg, Joel D Lieberman and Bruce D Sales, *Scientific Jury Selection* (American Psychological Association, 2007) 104–105.

91 Ibid.

92 New Jersey, *Model Jury Selection Questions: Standard Jury Voir Dire Criminal* (24 September 2018) New Jersey Courts, 5 <https://www.njcourts.gov/attorneys/assets/attyresources/jurorselectionquestionscrim.pdf?cacheID=ZbFoPR6>. See also United States District Court

Information from these questionnaires may then be compiled into a list, which includes the juror's name, home address, place and nature of work, and the occupation of the juror's spouse. This list is typically provided to counsel for the prosecution and defence prior to the *voir dire*, in order to facilitate a rapid and smooth examination of the jurors, and to facilitate the parties' exercise of challenges.[93]

In summary, it is evident that in each of the jurisdictions discussed, private information of jurors is disclosed, albeit to varying degrees. While jurors may have concerns as to their privacy as a result of these processes, it is first necessary to consider how such concerns fit within established notions of privacy.

V Privacy

A *The Meaning of Privacy*

The ability to enjoy privacy is an important concept that is central to enabling individuals to live 'a dignified, fulfilled, safe and autonomous life. It is fundamental to our understanding and appreciation of identity and freedom'.[94] Indeed, the right to privacy is so crucial that it is recognised as a human right in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* ('*ICCPR*'), and in other international instruments and treaties.[95] For example, art 17 of the *ICCPR* states that:

1. No one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. Everyone has the right to protection of the law against such interference or attacks.[96]

It is evident that the processes described above, to the extent that they interfere with juror privacy, are lawful. However, the process of jury

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Southern District of New York, *Juror Questionnaire* (24 September 2018) Federal Judicial Center <https://www.fjc.gov/sites/default/files/2012/dpen0022.pdf>; United States District Court of Northern District of California, *Sample Criminal Jury Questionnaire* (18 September 2012) <http://www.cand.uscourts.gov/samplejury>.

93 Gordon Bermant, *Jury Selection Procedures in the United States District Courts* (Federal Judicial Center, 1982), 8 <https://www.fjc.gov/sites/default/files/2012/JurSelPro.pdf>.

94 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 11, [2.6]. See also Jon L Mills, *Privacy: The Lost Right* (Oxford University Press, 2008) 13.

95 See, eg, Organisation for Economic Co-Operation and Development, *OECD Privacy Guidelines* (2013); *Council of Europe Convention For the Protection of Individuals with regard to Automatic Processing of Personal Data* (1981) ETS No.108; *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data; Guidelines for the Regulation of Computerised Personal Data Files* [1990] OJ L 281/31; Asia-Pacific Economic Cooperation, 'APEC Privacy Framework' (2005).

96 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See also *Universal Declaration of Human Rights,* GA Res 217A (III) UN GOAR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 8.

empanelment does raise questions about whether or not jurors are being subjected to an arbitrary interference with their privacy;[97] that is, whether the disclosure of private information during the empanelment process lacks sufficient justification. It is not suggested that the state's authority to obtain confidential personal information from jurors is arbitrary. The state undoubtedly has the authority to obtain private information about jurors to determine eligibility and qualification. However, whether or not that private information ought to be disclosed publicly in the courtroom presents a tension between the broader public interest of a jury trial and the recognition that privacy is also a vital public interest in and of itself.

Although widely recognised as a fundamental right, the concept of privacy is notoriously complex and difficult to define. It has been described as lacking in precision, and is perhaps better understood as a 'bundle of rights'.[98] The concept of privacy is also not static, particularly in the face of rapid, technological change.[99] Importantly, the conceptual foundations of privacy vary between jurisdictions. For example, in the United States, the evolution of privacy is closely connected with the protection of autonomy and personal liberties, [100] and was famously described as the 'right to be let alone'.[101] In contrast, the concept of privacy in European systems is traditionally focussed on the dignity of the individual. [102]

However, for most of the jurisdictions with which this article is concerned, a common starting position for the legal analysis of privacy is the argument advocated by Warren and Brandeis in 1890 for the development of tort law in such a way that would allow for individuals to protect their privacy.[103] At that time, Warren and Brandeis's concept of privacy could have been described as reactionary; the arguments proposed in favor of laws relating to privacy emerged as a reaction to the introduction of new technologies, which were capable of eroding an individual's privacy.[104] Beginning with a recognition that all persons ought to be able to fully protect themselves and their property, Warren and Brandeis examined mechanisms existing at the time for protecting an individual's privacy. In particular, they considered the law of slander and libel, and intellectual property law, to determine whether these laws had the capacity to adequately protected the privacy of an individual and, if so, what that protection ought to look like.[105] It is within this context that Warren and Brandeis coined the definition of privacy as 'the right to be let alone'.[106]

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97 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 25.

98 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 11, [2.9].

99 Ibid [2.30]–[2.32].

100 Ibid [2.10]–[2.14].

101 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 193.

102 See generally James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151.

103 Janice Richardson, *Law and the Philosophy of Privacy* (Taylor and Francis, 2014) 33.

104 Warren and Brandeis, above n 101, 193–195.

105 Ibid 197.

106 Ibid 193.

The arguments advocated by Warren and Brandeis, and their concept of privacy, has since been described as 'perhaps the most famous and certainly the most influential law review article ever written'.[107] Further, Warren and Brandeis' definition provided the foundation for the way in which privacy has been recognized at common law in a number of jurisdictions. In the United States, in particular, this definition has been recognised by over 15 state courts and has become a common definition entrenched in common law.[108] In particular, this view of privacy is intertwined with the view that each individual ought to be protected from state intrusion.

Notwithstanding the importance of Warren and Brandeis' definition, the concept of privacy continues to be a fluid concept. In part, this may be attributed to the fact that there are a number of privacy theorists, including Locke, Kant, Mill, Fried and Thomson. Although these theorists all draw upon contemporary liberal political theories, they approach those theories from differing perspectives, which in turn influences the definition of privacy that they embrace. Fried and Thomson, for example, appropriate Locke's 'property in the person' view — that is, the view that individuals have ownership over themselves. Thomson, in particular, draws upon this concept to suggest that privacy rights are moral concepts. Further, Thomson's view of privacy creates an image of an 'individual who has property in the person, who is viewed as owning his or her abilities, legal rights and, in this case, moral rights as if they were property.'[109] Fried, on the other hand, envisages persons as right-holders,[110] and these rights are 'comprised of all human attributes and abilities'.[111]

Philosophical debates on the concept of privacy have permeated legal discourse on privacy. In Australia, for example, where there is no constitutionally protected right to privacy, courts have debated whether the concept of privacy is best conceptualised as a value, a right or an interest.[112] As Gleeson CJ explained in *ABC v Lenah Games Meats* :

> talk of rights may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the Human Rights Act 1998 of the United Kingdom. The categories that have been developed in the United States for the purpose of giving greater specificity to the kinds of interest protected by a 'right to privacy' illustrate the problem.[113]

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107 Melville B Nimmer, 'The Right of Publicity' (1954) 19 *Law and Contemporary Problems* 203, 203.

108 It should be noted that there are many definitions of privacy other than that proffered by Warren and Brandeis. See, eg, Richardson, above n 103, 4.

109 Richardson, above n 103, 14.

110 Charles Fried, 'Privacy' in Ferdinand David in *Philosophical Dimensions of Privacy* (1984, Cambridge University Press) 211.

111 Richardson, above n 103, 15. See also Charles Fried, ibid; Priscilla M Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press, 2009) 217–218; Daniel J Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2008); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2009).

112 *Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199 [41] (Gleeson CJ). See also [118]–[124] (Gummow and Hayne JJ).

113 Ibid.

If privacy is a right or an interest, then it is not absolute. Courts generally accept that the right to privacy ought to be balanced against other interests, most commonly some other matter of broader public interest.[114] However, it should be noted that the protection of an individual's privacy, in and of itself, is nevertheless considered a 'vital public interest'.[115] It is therefore not sufficient to simply state that there is a public interest in 'communal interest, such as, the proper administration of government or the proper administration of justice.'[116] This is because the protection of private freedoms, rights and interests is also considered to be a 'public interest'. In the case of juror privacy, the onus is therefore on the state to justify why the balance lies in favour of the disclosure of private information during empanelment.[117] Before that balance can be undertaken, it is first necessary to identify the privacy interest that is being sought to be protected.

While a detailed discussion of the notion of privacy is beyond the scope of this article, a brief discussion of the legal constructs of privacy from the jurisdictions with which this article is concerned is necessary to facilitate the recognition of the privacy interests of jurors. One of the early attempts at clarifying the meaning of privacy was William Prosser's categorisation of harms to privacy under the following headings:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye; or
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[118]

Prosser's framework is largely concerned with protecting rights, including 'freedom from mental distress; interests in reputation and proprietary interests in name and likeness'.[119] This focus on the protection of rights has not been readily welcomed by others who, favouring Warren and Brandeis' discussion and definition of privacy, argue that privacy rights ought not to be connected with consequences, such as destruction of character, mental distress or misappropriation of value. In particular, Bloustein comments that a person's 'reputation could have been completely unaffected; her equanimity completely unruffled and her fortune wholly undisturbed; the publicity about her … would nevertheless be wrongful, nevertheless be a violation of an interest which the law should protect.'[120]

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114 Ibid.

115 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 11, [2.16].

116 Ibid [2.16].

117 Ibid [2.22]–[2.23].

118 William L Prosser, 'Privacy' (1960) 48(3) *California Law Review* 383, 389.

119 Richardson, above n 103, 24.

120 Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *NYU Law Review* 962, 970.

From a practical perspective, Prosser's categorisation of harmful activities — though useful as a starting position for the construction of a framework — is arguably too narrow as its focus is only on tort law.[121] Further, this categorisation was formulated before the introduction of ICTs, which have given rise to different threats to privacy not anticipated in the 1960s.[122] More recently, Solove developed a *Taxonomy of Privacy* ('Solove's Taxonomy'), which builds on the harms identified by Prosser, but which also attempts to address its deficiencies. According to Solove, there are four basic activities which may be harmful to privacy:

1. Information Collection;
2. Information Processing;
3. Information Dissemination; and
4. Invasion.[123]

'Information Collection' refers to the process of personal information collection by various entities.[124] In the jury context, the simple act of collecting data may constitute a harmful activity. Once collected, the data is subject to 'Information Processing'. Here, the entity that collected the data can store, combine, manipulate, search and use the information.[125] This describes the process of jury exclusion or disqualification. The next step is concerned with 'Information Dissemination' and occurs where the data holder publishes, releases, or transfers the information to others.[126] It is this phase that describes the disclosure of a juror's private information during the empanelment process.

These first three steps are concerned with shifting control over data away from the individual.[127] In contrast, the final heading, invasion, focusses on the direct infringements on an individual's privacy.[128] For example, the use of a juror's private information to harass a juror would fall under the heading of Invasion.

The strength of Solove's Taxonomy lies in its ability to identify and understand the various kinds of socially recognised privacy violations, and importantly, draws on the law as a source for determining what forms of privacy harms society is prepared to recognise and protect.[129] Of course, not every harm that eventuates from a violation of privacy requires legal

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121 See generally, Neil M Richards and Daniel J Solove, 'Posser's Privacy Law: A Mixed Legacy' (2010) 98(6) *California Law Review* 1887, 1887–9. See also Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, 1997).

122 See, eg, Richards and Solove, above n 121, 1889; Daniel J Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York University Press, 2004) 57–62; Daniel J Solove, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477, 477–479 ('*A Taxonomy of Privacy*').

123 Solove, *A Taxonomy of Privacy,* above n 122, 488.

124 Ibid 488–9.

125 Solove, *A Taxonomy of Privacy,* above n 122, 488–9.

126 Ibid.

127 Ibid.

128 Ibid 489.

129 See, eg, Andrew J DeFilippis, 'Securing Informationships: Recognising a Right to Privity in Fourth Amendment Jurisprudence' (1996) 115 *The Yale Law Journal* 1086, 1086–1121; Solove, *A Taxonomy of Privacy,* above n 122, 483.

redress. As discussed below, jurors will be lawfully and appropriately required to provide personal information. However, Solove's Taxonomy facilitates defining activities that may affect privacy, and whether that interference may be justified.

As identified in Part 1, information collection typically occurs at first instance by the state in the form of collecting juror details via a questionnaire that assists the relevant Juries Commissioner Office to determine the eligibility qualification of a juror. While this intrudes upon a juror's privacy it is a necessary function of the Juries Commissioner's lawful role. This process does not, in and of itself, violate a juror's right to privacy.

Similarly, it is argued that the application of the second limb, Information Processing, does not undermine a juror's privacy. The state makes use of the data obtained from an individual juror and stores, manipulates, searches and uses it primarily for the purpose of determining whether an individual is eligible for jury service. Typically, as outlined above, states' dealings with such information are governed by relevant privacy legislation. For example, under the *Privacy and Data Protection Act 2014* (Vic), 'sensitive information' is defined as 'information or an opinion … that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can be reasonably be ascertained, from the information or opinion…'[130] This includes an individual's name, address, telephone number, date of birth, and commentary or opinion about a person. Broadly, such legislation is designed to ensure that an individual can exercise control over his or her personal information, and can be assured that the information is secure.

Information Dissemination is a particularly broad heading that encompasses a number of different harms, including 'breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation and distortion'.[131] For a juror, during empanelment, the harms that may be most relevant are disclosure, exposure, increased accessibility and distortion. Once disclosed, harms such as blackmail and appropriation (for example, identity theft) may also arise.

'Disclosure' refers to circumstances where personal information is disclosed but there is no violation of trust in a relationship.[132] In this scenario, there is no allegation that the information being disclosed and disseminated is untruthful. Rather, the focus is on the damage to reputation that may arise out of that dissemination.[133] Further, unlike breach of confidentiality, disclosure can still be harmful even if it is perpetuated by a stranger. In the context of jury empanelment, the juror's personal

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130 *Privacy and Data Protection Act 2014* (Vic) s 3.

131 Solove, *A Taxonomy of Privacy,* above n 122, 523.

132 Ibid 527–528. Daniel J Solove, 'The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure' 53 *Duke Law Journal* 967, 990–2 ('*The Virtues of Knowing Less*').

133 Solove, *A Taxonomy of Privacy,* above n 122, 527–528. See also, Solove, *The Virtues of Knowing Less*, above n 132, 990–2.

information is disclosed in open court, but there is no relationship between the juror and the state akin to a fiduciary relationship.

'Exposure' is a harm that significantly overlaps with disclosure, but there is an important distinction between these concepts. Whereas exposure relates to the dissemination of truthful information, information that is disseminated is 'not revealing of anything we typically use to judge people's character.'[134] Rather, the information that is being exposed are personal attributes, including 'grief, suffering, trauma, injury…'. [135] Exposure of these may cause an individual to feel embarrassed, uncomfortable, and suffer from a loss of self-esteem. [136] For a juror, exposure may prevent him or her from participating fully in jury deliberation.

A good example of exposure in practice was the media reporting on Ruth B Jordan, Juror No 4, in a trial of two former Tyco executives in 2004. It was believed that Jordan had appeared sympathetic in her demeanour towards the defendants, and had allegedly made a signal of 'OK' towards the defence lawyers. This would be an example of a juror demonstrating a personal attribute, displaying emotion or sympathy. This resulted in *The New York Post*,[137] and *The Washington Post*,[138] publishing information pertaining to Juror No 4, including her name and the fact that she was a 'retired schoolteacher and law school graduate who lives in a luxury cooperative building on Manhattan's Upper East Side.'[139]

'Increased accessibility' focusses on the extent to which a person's private information may be accessed. This is of increasing concern given the amount of private information that is progressively being made available in digital form. This may be of specific concern in the United States, where jury questionnaires may be made available digitally on the Internet to the wider community. On the one hand, this may not seem inherently problematic as arguably the information contained in the questionnaires may already be publicly available. However, digitisation can result in increased accessibility, which may exacerbate the harms associated with disclosure. In particular, it may expose information to potential exploitation — such as blackmail, appropriation or identity theft — in contradiction to the original purpose for which the information is obtained. An example of this is the New Zealand incident involving George

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134 Solove, *A Taxonomy of Privacy,* above n 122, 533.

135 Ibid.

136 Ibid 535. For a critique of protecting exposure, see Eugene Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You' (2000) 52 *Stanford Law Review* 1049, 1050–1.

137 Jonathan D Glater, 'The Tyco Mistrial: The Jurors; So Close, Jurors See Long Effort End in Nothing', *The New York Times* (online), 3 April 2004, <http://www.nytimes.com/2004/04/03/business/the-tyco-mistrial-the-jurors-so-close-jurors-see-long-effort-end-in-nothing.html>.

138 See, eg, Brooke A Masters, 'Tyco Case Raises Issues of Jurors' Anonymity', *The Washington Post* (online), 3 April 2004, <https://www.washingtonpost.com/archive/business/2004/04/03/tyco-case-raises-issue-of-jurors-anonymity/f81c47d3-6096-4f06-8684-c805b9e02cdd/?utm_term=.dc17d56aa89a>.

139 Glater, above n 137, 1.

Baker, a notorious killer who contacted a female juror during a trial for kidnapping, threatening to kill and assault her with an offensive weapon.[140] Baker obtained access to the juror's details because 'anyone facing a trial was given a list of around 200 names of potential jurors to look through in case they knew someone on it or lived in the same neighbourhood.'[141]

Finally, the disclosure of private juror information may render that information susceptible to distortion. Distortion refers to the manipulation of information to provide an inaccurate portrayal of an individual. Although this harm is similar to disclosure, it has the added element of manipulating the information in a specific way that may embarrass, humiliate, and cause reputational harm.[142] Importantly, both disclosure and distortion undermine an individual's control over his or her information and dominion in the way that they are portrayed in society.

Under the second heading — invasion — there are two subcategories of harm: intrusion and decisional interference. Decisional interference is a reference to 'governmental interference with people's decisions regarding certain matters of their lives.'[143] This particular limb of privacy harm is not relevant to juror privacy.

Intrusion is understood as referring to circumstances that disturb an individual's private realm. Protecting against intrusion protects 'the individual from unwanted social invasions, affording people … 'the right to be let alone.'[144] The harm that flows from Intrusion is the disruption to an individual's activities through the undesirable presence of another.

The disclosure of a juror's private information may facilitate intrusion into his or her life in a number of ways, such as, for example, the use of a juror's name by lawyers to investigate a juror online prior to empanelment. Even in jurisdictions such as the United States, where there is significant research conducted into a juror's background by attorneys, the use of technology to investigate jurors has been significantly criticised. '*Voir Google*' has been described as an intrusion into 'safety, privacy, and protection against harassment' to which jurors are entitled.[145] Further, it has been described as 'unnecessarily chilling' on the willingness of jurors to participate in the democratic system of justice.[146]

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140 Vaimoana Tapaleao, 'Alarm as Notorious Killer Writes to Juror', *New Zealand Herald* (online), 16 August 2010, <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10666343>. It should be noted that George Baker was self-represented. However, it was felt that best practice ought to ensure that there should be 'a middle-man – between the client and the jury – to make sure nothing like this happens and so they can't see the [jury] list.'

141 Ibid.

142 Solove, *A Taxonomy of Privacy,* above n 122, 547.

143 Ibid 554.

144 Warren and Brandeis, above n 101, 193. See also Solove, *A Taxonomy of Privacy,* above n 122, 549.

145 See, eg, John G Browning, 'As Voir Dire Becomes Voir Google, Where are the Ethical Lines Drawn (2013) 25(3) *The Jury Expert* 1,4*; United States v Kilpatrick* (ED Mich, WL 3133939, August 1 2012) [19] (rejecting the arguments made against the empaneling of an anonymous jury, because an anonymous jury would prevent the lawyers from monitoring the jurors' use of social media during the trial in order to determine if the jurors were engaging in online misconduct).

146 Ibid.

While it is acknowledged that, to date, there appear to be no specific examples of threats to juror privacy involving ICTs, it is surely only a matter of time. As noted above, the widespread use of social media and ready availability of online information can only exacerbate the risks that have been identified. As we have learnt from other examples of digital disruption it is surely prudent to anticipate these challenges rather than react when they inevitably occur.

B *Privacy versus Security*

It should be noted that, although the concepts of safety and privacy are typically considered to be distinct, they can be overlapping.[147] For example, as discussed above in Part IV(A) in most jurisdictions there are exceptions that allow trial judges to anonymise a juror's personal information during the empanelment process where there are security concerns. Of course, actual threats to security and the perception of security are two different things. Where there is evidence of an actual breach of a juror's security, courts are empowered to react. However, a juror who perceives a threat to his or her security is provided with no avenue for redress. A juror may therefore feel anxiety throughout the trial as to their personal safety. Not only is this hardly conducive to them performing their task, it may make others reluctant to serve on a jury. As noted by one Victorian Member of Parliament:

> Many jurors have made the comment to me and to other members of Parliament that they feel as though what they consider to be private information is made public in a way that may in some cases not be in their own best interests. We want jurors to feel safe and secure and to know that their privacy will be protected. We want to encourage more people to serve on juries.[148]

However, it is suggested that the law should not require that a juror must feel concerned for their safety, or otherwise be able to articulate a basis for their desire to be anonymous. As the Solove Taxonomy illustrates, privacy in isolation, even without the additional element of a threat to an individual's security, deserves protection. In this regard, a juror may very well wish to have his or her private information protected without there necessarily being grounds to fear for his or her safety.

Further, a juror's privacy can continue to be at risk of violation even after the empanelment process.[149] Privacy concerns do not cease once a verdict has been returned. Media coverage, or just general anxiety as to the accused's or victim's reactions to the verdict, may raise concerns in the minds of jurors.

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147 National Center for State Courts, above n 5, [3.2.1.1].

148 Victoria, *Parliamentary Debates*, Legislative Council, 8 October 2002, 222 (Peter Katsambanis).

149 Daniel Solove, *Being a Juror Can Result in a Huge Loss of Privacy* (20 June 2014) Teach Privacy <https://www.teachprivacy.com/juror-can-result-huge-loss-privacy/> ('*Being a Juror*').

This is most graphically illustrated in the United States where juror questionnaires may be made accessible to the public. As indicated above, these questionnaires can contain significant levels of private information, and although jurors are often assured that they are confidential, this may not necessarily be the case. For example, a number of courts have held that the First Amendment provides for a public right to access jury trials, and this includes the information obtained during the juror empanelment process.[150]

In the decision of *In Re Access to Juror Questionnaires; The Washington Post*,[151] the Washington Post applied to the court to access juror questionnaires in the murder trial of Ingmar Guandique. The trial obtained significant media coverage.[152] Although the jury was assured that their questionnaires would be confidential, the court held that, with regard to the application for their disclosure, while jurors would be given an 'opportunity to raise any concerns', the ultimate decision would lie with the trial judge.[153]

A powerful example of how disclosure of juror names alone can lead to a serious invasion of privacy post-verdict was the notorious trial of Casey Anthony in Florida, USA in 2011. Casey Anthony was accused of murdering her two-year old daughter and disposing of her body in July 2008.[154] The case provoked an intense emotional reaction in the American public,[155] and when Anthony was acquitted, these emotions were largely directed at those who brought about the verdict — the jury.[156]

Initially, the trial judge had 'empanelled by number' to facilitate juror anonymity, and refused to release the names of the jurors during a 'cooling off' period of three months.[157] During the hearing of a subsequent publication motion in the Casey Anthony matter, Chief Judge Perry articulated the central problem with allowing the jurors' identifying information to be published by various media organisations: '[m]any, if not all, were outraged and distressed by the verdict, and were not hesitant to show their contempt for the jurors.'[158] To identify the juror's by name would exacerbate this.

Judge Perry also commented that the jurors were essentially 'voiceless': '[n]o one spoke for the jurors and no one provided evidence concerning the jurors' safety or privacy concerns…[n]o one argued the public policy

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150 Ibid.

151 7 A 3d 879, 889 (DC Cir, 2012).

152 Solove, *Being a Juror*, above n 149.

153 *Re Access to Juror Questionnaires; The Washington Post*, 7 A 3d 879, 889 (DC Cir, 2012). See also Solove, *Being a Juror*, above n 149.

154 Scott Ritter, 'Beyond the Verdict: Why Courts Must Protect Jurors from the Public Before, During, and After High-Profile Cases' (2014) 89 *Indiana Law Journal* 911, 911.

155 Ibid.

156 Ibid. See also Greg Botelho, 'Emotional, Unsatisfying Ending for Many Tracking Anthony Case', *CNN* (online), 5 July 2011, <http://www.cnn.com/2011/CRIME/07/05/florida.casey.anthony.reaction/index.html>.

157 Ritter, above n 154, 911–14.

158 *Florida v Anthony* (Fla 9th Cir, 48-2008-CF-015606-AO, 26 July 2011) 4.

consequences of releasing juror information.'[159] However, due to the significant level of public interest, and because of Florida's *Public Records Law*,[160] the names of the jurors were eventually released, three months after the trial ended.

Initial reporting during the three-month embargo was critical of the jurors as a group. Certain sections of the media reported on the jurors broadly but extensively, with headlines like 'Jurors 1-12 Guilty of Murder' and 'Somewhere a Village is Missing 12 Idiots'.[161] When the names of the jurors were released, the previous criticisms of a broad nature evolved into personal threats. For example, in an article entitled 'Casey Anthony Juror: 'Sick to Our Stomachs' Over Not Guilty Verdict', published in July 2011, Casey Anthony Juror No 3, who was identified by name, 'reportedly quit her job and moved out of the state to avoid the animosity she was receiving.'[162] Other jurors reported threats personal to them and their family to the Sherriff's office.[163] While possibly an extreme example, this case serves to illustrate the level of public and private interests in criminal proceedings that may persist post-verdict. Even without an identifiable harm, jurors may nonetheless feel a level of concern that they may be identified even after they have discharged their duty.

VI Justifications for the Disclosure of Private Information

The discussion in Part V illustrates the potential infringements of a juror's privacy that may occur as a result of the disclosure of personal information during empanelment. However, there may be important countervailing rationales for the availability of such information. The justification most commonly cited in favour of disclosure is the need for an accused to be able to exercise control over the composition of the jury so 'that the accused perceives his or her trial to be fair.'[164] Here, as outlined in Part II, the elements that are particularly relevant to ensuring a fair trial are that the jury ought to be both representative and impartial.

In relation to representativeness, the disclosure of a juror's private information is arguably irrelevant. The task of ensuring that juries are as representative as possible is determined by legislation and carried out by the relevant Juries Commissioner Office in each jurisdiction. In particular, rather than entrusting jury representativeness to an individual accused, jurors are selected as randomly as possible from the electoral roll, and their allocation to a particular trial is also as random as possible.

Nonetheless, it may be argued that the accused's ability to influence the composition of the jury is important in his or her *perceiving* the trial to be

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159 Ibid 2. See also 'Judge Delays Release of Casey Anthony Juror Names', *NBC News* (Online), 26 July 2011 <http://www.nbcnews.com/id/43902555/ns/us_news-crime_and_courts/t/judge-delays-release-casey-anthony-juror-names/#.WHfnnbHMx8c>.

160 Fla Stat ch 119 (2018).

161 Ritter, above n 154, 912.

162 Ibid.

163 Ritter, above n 154, 912.

164 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [4.29].

fair. However, the number of peremptory challenges, where available, is deliberately limited so as not to interfere with the representativeness of the jury. As the Victorian Law Reform Commission explains, 'the availability of six peremptory challenges does not substantially alter the representativeness of the jury or undermine the randomised selection process.'[165] The use of peremptory challenges, for example, may affect the gender or racial composition of juries.[166] However, this information is observable to the accused, and does not require the disclosure of private information.

In Limited Disclosure Jurisdictions, the personal information provided is so limited that peremptory challenge are commonly based on assumptions rather than fact.[167] In particular, certain occupations such as teachers and nurses are routinely challenged because of assumptions about their views.[168] While it may be argued that the process could be improved if jurors were required to disclose additional personal information beyond generic descriptions of their occupation,[169] it is argued that the provision of this additional information does not necessarily address the fundamental flaw in such challenges. First, if a juror who holds a certain occupation is permitted to serve on the jury pursuant to requisite legislation, the justification for challenge should require more than vague assumptions about the views of those in such occupations.[170] The public — as much as the accused — has an interest in juries being representative. Secondly, if a coherent reason for challenging a juror on the basis of occupation can be articulated in a specific case, then it should be made as a challenge for cause.[171]

The preceding observations notwithstanding, even if occupation continues to be disclosed during empanelment, an accused does not require personal information such as the juror's name and address to facilitate the exercise of the peremptory challenge. Arguably, without this additional information the disclosure of an individual's occupation may not violate a juror's privacy.

This may be contrasted with the *voir dire* approach undertaken in the United States which, as discussed above, is far more extensive. The information provided during the *voir dire* process offers a greater source of information upon which a lawyer can exercise his or her party's peremptory challenges, or for cause challenges. However, for reasons discussed below, it is suggested that the *voir dire* process should not require a juror to disclose private identifying information such as his or her name.

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165 Ibid [3.93].

166 Horan, *Juries in the 21st Century*, above n 97, 42–43. Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.97].

167 See Horan and Goodman-Delahunty, *Challenging the Peremptory Challenge System in Australia*, above n 65, 179–81.

168 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.113].

169 Ibid [3.110].

170 Horan and Goodman-Delahunty, *Challenging the Peremptory Challenge System in Australia*, above n 65, 181.

171 Ibid 179–81.

The second concept, impartiality, is also designed to ensure that an accused has a fair trial. This is much more difficult for the state to achieve during the process of juror recruitment. Accordingly, challenges to the jury are more significant in this context.

Specifically, in Limited Disclosure Jurisdictions, peremptory challenges are considered to be 'one of the fundamental safeguards against a jury trial that is, or is perceived to be, biased or unfairly constituted.'[172] However, in these jurisdictions peremptory challenges can only be based on observable characteristics of an individual — such as gender, race, and age — and the personal information which is provided. Although equally open to flawed interpretation, observable characteristics are an unavoidable component of the selection process and it is conceivable that such characteristics might provide a rational basis for challenge. [173] For example, a juror wearing religious clothing would suggest an active involvement with a particular faith, and this fact may be considered relevant to impartiality in certain trials.

The disclosure of personal information, on the other hand, should be clearly justified as likely to provide a rational basis for the exercise of a challenge. In this regard it may be argued, for example, that a juror's name may provide the accused with information about ethnicity that may be relevant in ensuring an impartial jury.[174] In this example, the name of a juror is arguably relevant as a source of information in and of itself. However, relying on a juror's name to determine his or her ethnicity is inherently flawed and potentially discriminatory.[175] Even assuming that an accused can make an accurate assessment of the ethnic origin of a particular name, the individual's association with that ethnicity may be historic or through marriage. That juror may not have any real personal connection with the ethnicity in question that would influence their decision making.

Further, it should be acknowledged that the exercise of challenges in this way encourages inaccurate and prejudicial stereotypes and 'a person's capacity to serve on a jury or ability to be impartial cannot be discerned from a person's gender, race, age, disability or physical feature[s]…'.[176] Equally, a juror's address may lead to false assumptions about the person's race and class.[177] These discriminatory concerns were expressly recognised by the Victorian State Government, which identified a 'consistent empanelment practice' and reduction in 'the potential for discrimination during the empanelment process' as motivation for the move towards empanelling by number as standard practice.[178]

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172 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [3.118].
173 Ibid.
174 Ibid [4.29].
175 Ibid.
176 Ibid [3.126].
177 Horan and Goodman-Delahunty, *Challenging the Peremptory Challenge System in Australia*, above n 65, 181.
178 Victoria, *Parliamentary Debates,* 25 May 2017, 53 (Martin Pakula, Attorney-General, second reading).

In Limited Disclosure Jurisdictions, matters of race and gender are typically protected under federal and state anti-discrimination legislation.[179] Exercising a challenge therefore requires more than a vague assumption to deny an individual the opportunity to serve on a jury based on those characteristics. If such a reason can be articulated, then it can be made appropriately as a challenge for cause.

Finally, it is commonly argued that the disclosure of a juror's name is necessary as it can assist a party, or a party's lawyer, to determine whether they know a juror.[180] This argument is spurious, as there are a number of options to address this concern. For example, trial judges in Victoria who exercise their discretion to empanel by number, require the accused to stand and face the panel, and others provide a written list including the names of the lawyers and parties to the jury panel prior to empanelment to allow for the jurors to come forward if they know of any parties to the proceeding.[181]

In that situation, the objection to empanelling by number assumes that neither the juror nor the accused recognise each other by sight, and that the juror does not recognise the accused by name. It is suggested, though, that it is the juror's memory that is relevant to impartiality. Therefore, even if the accused's memory of the juror could be enlivened by the name, where the juror has no recollection of the accused, no challenge to impartiality can be maintained. The connection is so remote that it does not justify the disclosure of private information.

VII Possible Responses

The preceding discussion illustrates the potential infringements of a juror's privacy that can flow from the disclosure of private information during empanelment. This Part considers a number of responses to these concerns, which aim to balance the public duty of jury service and the privacy of individual jurors, and which can be adopted by each jurisdiction to the extent possible and appropriate. The first response is to impose restrictions on publishing names or identifying information about jurors. The second response is to restrict the disclosure of a juror's private information. The third response is to empanel by number as standard practice. For the reasons discussed below, it is suggested that the third response is the most appropriate and should be adopted by all jurisdictions where possible.

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179 See, eg, *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1981* (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas). By way of contrast, there are ongoing calls for reform to address disability discrimination in jury service: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [7.159]–[7.163].

180 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [4.31]; Victorian Law Reform Commission, *Jury Empanelment*, Consultation Paper No 18 (2013) [4.32]–[4.34] ('*Jury Empanelment Consultation Paper*').

181 Victorian Law Reform Commission, *Jury Empanelment Consultation Paper*, above n 180, [4.31]–[4.32].

A *Restrictions on Publishing*

The first suggestion for reform is to preclude the publication of a juror's name, or any information that is capable of identifying the juror. In Victoria, for example, s 77 of the *Juries Act 2000* (Vic) stipulates that 'a person must not publish, or cause to be published, any information or image that identifies or is capable of identifying a person attending for jury service.'[182] A contravention of this provision is an indictable offence,[183] with a maximum penalty of five years' imprisonment. The enactment of such a provision is relatively straightforward in countries such as Australia, where there is no explicit constitutional protection for the right to freedom of speech.[184]

However, that is not to say that in countries where freedom of speech is protected constitutionally a similar prohibition cannot exist. For example, in Canada, freedom of speech is enshrined in s 2(b) of the *Canadian Charter of Rights and Freedoms*.[185] However, a jury identification ban is found in s 631(6) the Canadian *Criminal Code*, which provides that on an application by the prosecutor, the court may, for the proper administration of justice, make an order that directs that the identity of a juror or any information capable of identifying the jury shall not be published in any document, broadcast or transmitted in any way.[186] Alternatively, the court may limit access to, or the use of, such information.

It appears, therefore, that in jurisdictions where freedom of speech is explicitly protected by a constitution or declaration of rights, a balance must be struck between facilitating freedom of speech and the importance of ensuring that the justice system is transparent on the one hand, and ensuring that an individual's privacy is protected on the other. This balance is evident in the *Canadian Charter of Rights and Freedoms*, s 1 of which provides that the rights and freedoms are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' In this instance, the limited value of juror information to the fair trial of an accused is arguably outweighed by the significant privacy interests of jurors themselves. This is not to say that such a balance need not be struck in jurisdictions without constitutionally protected rights — although in such jurisdictions the opportunity to challenge are more limited.

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182 *Juries Act 2000* (Vic) s 77(1). In addition, the penalty for contravention of this provision can include a punishment of 300 penalty units if the accused is a body corporate, otherwise a punishment of 600 penalty units.

183 Ibid s 77(4).

184 In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106, the High Court held (in both instances by majority) that an implied freedom of political communication exists as an incident of the system of representative government established by the Constitution. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

185 'Everyone has the following fundamental freedoms … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication': *Canadian Charter of Rights and Freedom*, s 2(b).

186 *Criminal Code*, RSC 1985, c C-46.

Further, it is not suggested that publishing information about the jury trial *process* ought to be banned. However, for the reasons discussed above in Part VI, it appears that there is limited, if any, inherent value in publishing a juror's name, or identifying information. Typically, debates about balancing the privacy of a juror and the importance of publishing focus on considerations of transparency and accountability in the administration of justice. Arguably, simply referring to a juror by a number, rather than by name, does not affect the publication of relevant information about the trial process, or scrutiny of the administration of justice. It would still allow, for example, journalists in the United States to interview jurors after the trial, but it would be for the juror to determine if he or she wishes to maintain anonymity or not. The restriction on publishing advocated for is therefore only limited to a restriction on identifying information about jurors rather than a general ban on publishing about jury trials.

B *Restrictions on Disclosure*

A restriction on publishing a juror's name or identifying information does not necessarily address all of the privacy harms discussed above. While such a ban will protect a juror, it will not protect a juror from other harms such as appropriation, blackmail, distortion or invasion.

The second avenue for reform is that of a trial judge ordering that the disclosure of certain information be restricted. Such an order would impose restrictions on counsel and would relate to the nature of information that could be disclosed whether it is provided in written form; to whom it may be disclosed; and whether it may be copied.

An example of such an order is that made by Ferguson J in the Canadian decision of *R v Jacobson*.[187] Her Honour made a comprehensive order that attempted to provide maximum anonymity to the jury, without undermining the empaneling of an impartial jury, by addressing issues such as prohibiting general disclosure; allowing for limited disclosure to counsel subject to including circumstances of disclosure; undertakings of non-disclosure by counsel; and secure destruction of information.

However, the full text of the order[188] illustrates the complexity of restricting disclosure in this way. It may be particularly challenging to predict and address the various permutations in which a juror's privacy may be infringed. In addition, the enforceability of such an order may be problematic. For example, the accused, or others present, could still verbally disseminate a juror's private information. In addition, in an age of information technology, dissemination of information may be rapid and anonymous, and this may further undermine policing efforts. Even if an effective order could be made, it may not alleviate a juror's subjective concern that the information may be disclosed. It therefore appears that attempting to restrict disclosure — although commendable — may not comprehensively protect a juror's privacy.

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187 [2004] 196 CCC (3d) 65 [68].

188 Ibid. See National Center for State Courts, above n 5, [3.2.1].

C *Empanel by Number*

The final avenue for reform is to move towards empanelling jurors by a number as standard practice. The literature suggests that this approach is preferred by jurors, who cite the following reasons in its favour: (1) there is no reason for the accused or parties to know your name; and (2) it is very easy for someone to find out where you live from your name, particularly in regional areas.[189]

For example, in one of the leading surveys of jurors in criminal trials conducted by the Victorian Law Reform Commission, 76 per cent of the jurors indicated that they wished to be identified by number only. The reasons provided included that: 'number preserves privacy/anonymity; number enhances juror security; and number avoids assumptions being made about ethnic backgrounds.'[190] Only 14.2 per cent stated that they would prefer to be identified by name during the empanelment process for reasons that doing so is 'more polite' and 'more personal'.[191]

As discussed above, in Victoria, the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic) recently amended the jury empanelment procedure to ensure that jurors are now empanelled by number and occupation only. Prior to this amendment, the use of numbers as an identifier for jurors was at the discretion of the trial judge. Those who had adopted this practice as standard had done so as a conscious response to reports by the Juries Commissioner that number identification was the strong preference of jurors and prospective jurors. Those particular trial judges had noted that the use of numbers helped alleviate any concerns jurors may have had about their privacy and security, and helped them to concentrate on the task at hand. Those who adopted the practice observed a drop in the number of excuse applications.[192] It is therefore recommended that, particularly in Limited Disclosure Jurisdictions, it would be preferable to move towards the standard practice of empanelling by numbers.

In the United States, where the *voir dire* is more extensive, reforms can still be made to facilitate greater juror privacy. For example, trial judges in a number of American states have attempted to lessen the intrusiveness of *voir* dire questions to jurors, through the routine use of anonymous juries.[193] This initiative involves withholding prospective jurors' names and addresses from the parties, their counsel, and the public. If jurors understand that names are routinely withheld they will not infer from the use of anonymity that a particular accused is dangerous — a concern commonly voiced when anonymous juries are used selectively. Further, anonymity may lessen the stress felt by some jurors when required to reveal private information.

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189 Victorian Law Reform Commission, *Jury Empanelment Report*, above n 8, [4.66]–[4.67].
190 Ibid [4.68].
191 Ibid.
192 Ibid.
193 See, eg, Seth A Fersko, 'United States V. Wecht: When Anonymous Juries, the Right of Access, and Judicial Discretion Collide' (2010) 40 *Seton Hall Law Review* 763, 769–72.

Although it is acknowledged that in the United States there is a strong culture of reporting on jury trials, it is suggested, for the reasons discussed above in Part V, that anonymous juries do not undermine an individual or organisation's ability to report on the jury trial process. In addition, if there are allegations of wrongdoing by the jury, then the state continues to have in its possession a juror's private information, including name and address, and the state may conduct investigations where necessary. Further, the importance of ensuring that anonymous juries are adopted as standard practice would ensure that no adverse inferences are drawn against a particular accused.

Finally, it should be recognised that the suggested reform of empanelling by number, or anonymous juries, as standard practice does not mean that the state or the courts cannot depart from that practice. It is argued that the protection of a juror's privacy should be considered as a balancing exercise against the public duty of jury service.

A residual discretion could be maintained to allow a court to request a juror to disclose his or her name where the interests of justice requires it. For example, where the accused believes that they have recognised a juror by sight, they may seek confirmation of their identity by name. However, such information could be provided discreetly through counsel. Such limited circumstances do not undermine the general presumption that the empanelment process should be anonymous. It is therefore suggested that it falls for the courts or the state to justify the disclosure, rather than upholding the status quo, which conversely requires the courts or the state to justify its decision to protect a juror's privacy.

VIII Conclusion

The wide availably of personal information online has brought into sharp relief jury concerns about the disclosure of their private information during the empanelment process. Whether actual or perceived, for some jurors the concerns are real, and may impact on the willingness of those in the community that we call upon to perform this vital public duty. This article has sought to bring to the forefront the issue of juror privacy and examples of risks to juror privacy in practice, and has proposed possible reforms that will appropriately balance the public duty of jury service and the privacy of individual jurors.