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The Criminal Justice and Courts Act 2015 creates several new offences relating to juror misconduct, which have generally been considered pragmatic responses to the immediate problem of jurors using the internet to find additional “evidence”. Taking as its starting point the possibility of jury studies being written from an “interdisciplinary” perspective situated between mainstream legal scholarship and legal history, this article argues that after the practical abolition of juror punishment in 1670 the judge-jury relationship has usually been focused on juror guidance, not on juror punishment. This has had important consequences for the institution’s civic function, meaning any move in the direction of juror punishment has to be considered not simply as a pragmatic response to an immediate, isolated problem, but also as an important part of the jury’s continuing history as a political institution.

* Lecturer in Law, Newcastle University. An earlier version of this article was presented at the UKIVR conference at Queen Mary, University of London in April 2013. I am grateful for the comments I received at this conference, particularly those of Phil Handler and Arlie Loughnan, I also explored several of the issues discussed here in my PhD thesis, and I am therefore grateful to Steven Cammiss, Sally Kyd Cunningham and Cheryl Thomas for their support and guidance. I would also like to thank the Criminal Law Review’s two anonymous reviewers for their helpful comments on an earlier draft of this article.
Following growing unease about jurors researching their cases (and occasionally contacting defendants) online, the Criminal Justice and Courts Act 2015 has created several indictable offences of juror misconduct. These offences focus, in particular, on evidence found by jurors independently, and not presented at trial.¹ The Act makes it an offence for jurors to ‘research the case during the trial period’,² to ‘disclose [improper] information to another member of the jury during the trial period’,³ and to engage in ‘conduct from which it may reasonably be concluded that the [juror] intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue’.⁴ Those found guilty of one of the new offences will be liable to imprisonment for up to two years, and will be disqualified from further service for a decade.⁵ What distinguishes these new offences from the existing option of using contempt proceedings is the fact jurors would now be proceeded against on indictment: that they would be tried by their peers for alleged misconduct. This represents a significant change in juror management techniques, as it is probable that criminal trial jurors accused of misconduct have never been tried in this way.

The new offences have been drafted in the context of jurors using the internet in a way which undermines their oath to ‘give a true verdict according to the evidence’.⁶ While legal historians have been unable to paint a complete picture of the ‘self-informing’ jury’s decline,⁷ it is clear that for the past few centuries criminal trial jurors have been expected to come to

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¹ This has not only been a problem in England and Wales. See, for example, the recent New Zealand case in which evidence marked with official stamps but not formally introduced as evidence was found in the jury room: Guy v R [2014] NZSC 165; and more generally Law Commission, Contempt of Court: a consultation paper (HMSO 2012), Law Com. Consultation Paper No.209, paras 4.36-4.37.
³ Criminal Justice and Courts Act 2015 s.72, creating a new s.20B of the Juries Act 1974.
⁴ Criminal Justice and Courts Act 2015 s.73, creating a new s.20C of the Juries Act 1974. The Act also creates the indictable offence of disclosing a jury’s deliberations: Criminal Justice and Courts Act 2014 s.74, creating new ss.20D-G of the Juries Act 1974 and repealing Contempt of Court Act 1981, s.8 in England and Wales.
⁵ Criminal Justice and Courts Act 2015 s.77(1), creating a new s.6A of the Juries Act 1974.
court as a kind of juridical *tabula rasa*, without detailed knowledge either of the facts or of the law involved in a particular case. The growing normality of internet communications being used as a primary source of information has undermined this presumption; and when he was the Chief Justice Lord Judge made a point of emphasising the need to maintain the jury’s neutrality and therefore its central role as independent arbiter of the competing accounts given by the prosecution and defence. Given the importance of maintaining the jury’s role as the independent lynchpin in the modern adversarial trial system, various strategies have been tried in order to dissuade jurors from looking for additional evidence. In this way, the eighteenth-century’s passive jury is being defended against a potential return towards the more ancient jury of community suspicion.

Initial judicial responses to the problem of juror research focused on directing the jury in a way which could either prevent illicit research in the first place or, at the very least, ensure it did not affect any particular verdict. In more recent years, there have been several jurors convicted of contempt following evidence of online misconduct; and in the 2012 consultation paper which ultimately led to the drafting of the new Act, the Law Commission

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8 The presumed legal ignorance of jurors has been partially reduced by the Criminal Justice Act 2003, which lifted the prohibition on judges, lawyers and police officers serving on juries; and as recently as 2010 the Court of Appeal had to consider whether jury research into the law affecting their trial automatically rendered a jury’s verdict unsafe (the Court of Appeal held that it did not): *R v Thompson* [2010] EWCA Crim 1623; [2011] 1 WLR 200, 207-208.


13 Cheryl Thomas has been working with the judiciary in order to find effective ways of making this happen: C Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] Crim LR 483. Ashworth, meanwhile, has argued that jurors should be required to sign a document committing them to the standards expected of jurors: A Ashworth, ‘Editorial: Contempt of court: juror misconduct and internet publications’ [2014] Crim LR 169.

14 See Law Commission (n.9), paras 3.2-3.6.
noted the need to have a punitive response in place ‘where preventative measures fail’.\footnote{Law Commission (n.1), para 4.33.} Despite the Contempt of Court Act 1981,\footnote{Contempt of Court Act 1981.} contempt proceedings are ultimately governed by common law;\footnote{See D Eady and ATH Smith, Arlidge, Eady and Smith on Contempt 4\textsuperscript{th} edn (London: Sweet & Maxwell, 2011), paras 1-119-1-1-123; and Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339 (HL).} and the House of Lords has held that contempt should not be tried on indictment.\footnote{R v D [1984] AC 778 (HL).} The Law Commission, however, was concerned that traditional contempt proceedings denied jurors some of the procedural guarantees associated with a Crown Court trial.\footnote{Law Commission (n.1) para 4.67. Although see Eady and Smith (n 17), paras 2-24: ‘Such safeguards have been built into the rules that it is difficult to identify any injustice to alleged contemnors, and in effect the only advantage that they do not have which is associated with criminal proceedings generally is that of jury trial.’} It also felt that

‘a discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded. It could also … provid[e] greater clarity about what is and is not permitted’.\footnote{Law Commission (n.1), para 4.38.}

For these reasons, in 2013 the Law Commission recommended the creation of the new indictable offences.\footnote{Law Commission (n.9), paras 3.57-3.100. In fact, the Law Commission only recommended one offence, but Law Commissioner Professor David Ormerod QC, giving evidence to the Commons, has confirmed that all the offences broadly conform with the underlying philosophy of the Law Commission’s recommendations: Criminal Justice and Courts Bill Deb 11 Mar 2014, col 68.}

In this article, I shall argue that understanding – and critiquing – this move towards punishment needs more than an awareness of present trends in the criminal trial. As the Act went through Parliament, most comments on the juror punishment provisions were broadly supportive, and tended only to query specific, detailed points,\footnote{See, e.g., Criminal Justice and Court Bill Deb 25 Mar 2014, cols 402-406.} not points of broader principle. Despite the advances made by legal historians over the past few decades with
regard to our understanding of the criminal justice system,\textsuperscript{23} in England at least this literature is rarely taken seriously in mainstream studies of the jury. If it is used at all in such studies, history is generally treated as interesting background information or, at most, as a way of giving context to a particular feature of the system. History is, in this context, generally understood as a way of answering questions, but is rarely used as a way of asking them. In this article I shall attempt to correct this imbalance, suggesting that legal history can be a useful way of opening up, or furthering thought about the institution. My suggestion, in short, is that students of the English jury would do well to learn to think through history.

The idea that history can be a useful way of widening legal horizons is far from new. In 1986, for example, the social historian EP Thompson criticised the Roskill Committee for recommending the abolition of the defence’s right to peremptory challenges without consulting any historians (excepting Lord Devlin, who Thompson was happy to regard as a legal historian but who the Committee failed to reference). Not taking history into account, Thompson argued, left the Committee blind to ‘the long-established rights, practices and traditions of the English and Welsh peoples’.\textsuperscript{24} But it should be noted that even if the Committee had included a historian they may have recommended the abolition of peremptory challenges anyway. Including a historical element in legal thought does not require the adoption of something like Hay’s assertion that property and authority are closely combined in the criminal law (or indeed Beattie’s argument that levels of prosecution are best explained by reference to social factors such as food prices, war and perceptions of gender).\textsuperscript{25} It does,

\textsuperscript{23} See generally ‘Punishment and Guidance in the History of the Criminal Trial Jury’, below.


however, mean opening up legal thought to the wider range of issues explored in these and other works of legal history.

The biggest danger when encouraging lawyers to engage with history is that they will fail to appreciate historical difference. Holmes once argued the training of lawyers was insufficiently concerned with context,\(^\text{26}\) and at the same time Maitland contended that a lawyer’s training made her inattentive to history as anything other than a source of authority.\(^\text{27}\) Turning to history can, however, be a useful way for lawyers to expand their arguments beyond those which their training encourages them to deem relevant. John Langbein, for example, has encouraged lawyers to appreciate what he considers the inherent disadvantages of adversarial trials, and he has primarily made this argument through historical analyses of eighteenth-century trial records.\(^\text{28}\) What all this means is that lawyers should continue to use history, but that the use they put it to should not be the kind of use which simply provides clear-cut, authoritative answers. Rather, legal scholars should learn to use history as a way of opening up conceptual problems to fresh analysis, as Whitman has done for the standard of proof in criminal trials and as Mulcahy has done for the architecture of courtrooms and courthouses.\(^\text{29}\) This kind of ‘use’ also poses wider questions, such as the law’s role in wider political or cultural processes. Legal history, then, has the potential to become an important, imaginative part of legal thought.

\textbf{Punishment and guidance in the history of the criminal trial jury}

\(^{26}\) OW Holmes Jr, ‘The Path of the Law’ (1897) 10 Harv LR 61, 465-466.


In this section, I shall pull together several threads in the jury’s history which might throw new light on the offences created by the Courts Act. The jury’s recent history (in the period since the Criminal Justice Act 2003 was passed) has been characterised by two somewhat related problems. First, there has been the question of “trust” in the jury: after the House of Lords vetoed attempts to create juryless trials in complex cases, attention turned to the question of trusting the jury to understand the evidence in such situations. A major development here has been the growth of written directions and particularly routes to verdict. The adoption of such directions was advocated in the 2010 Crown Court Bench Book and, while Penny Derbyshire reported the following year that their use appeared to be exceptional, Thomas has since found that seventy per cent of juries, in a study of twenty trials held in Greater London between 2012 and 2013, received written directions of some kind. Second, there has been the problem of jurors accessing illicit information online, effectively becoming, in the legal-historical jargon, “self-informing”. The official response here has involved a tension between guiding jurors away from improper conduct and punishing those who act improperly anyway. While the two problems have overlapped, at least inasmuch as both involve the question of how best to guide a jury towards a proper

30 The Criminal Justice Act 2003, among many other things, made juryless trial in the Crown Court possible where jury tampering had taken place and it would be too difficult (for, e.g., cost reasons) to empanel another jury; and it also carried out significant reforms in the laws of evidence, greatly increasing the likelihood of a jury receiving evidence of, for example, a defendant’s previous bad character. For a discussion of the 2003 Act in its own historical context, see P Thornton, ‘Trial by Jury: 50 years of change’ [2004] Crim LR 119.
32 Lord Judge, ‘Trusting the Jury’ (2007) <http://www.judiciary.gov.uk/speech-lcj-23102007/> accessed November 2014. The full text of the speech is no longer available online, but the abstract (which is still available) gives a good sense of what Lord Judge said.
34 Judicial Studies Board, Crown Court Bench Book: directing the jury (March 2010), p.3.
35 Darbyshire (n.34), p.216.
36 Thomas (n.13), 497-498.
37 Oldham (n.7).
38 See generally ‘Guidance and Punishment in Early-Twenty-First-Century Jury Trial’, below.
conclusion, the new offences sit firmly within the second problem. For this reason, I shall focus here on punishment and guidance in the history of the criminal trial jury.

The first major form of juror punishment was the “attaint”, although it only appears to have applied to civil jurors. If a verdict’s accuracy was doubted, twenty-four jurors could be assembled to rehear the evidence (as well as evidence the jurors claimed to have relied on but which was not presented at the original trial) and determine whether the impugned verdict was accurate. Blackstone stated that the common law attaint stripped jurors of their ‘liberam legem’, their goods, their chattels, and their lands; that their houses would be razed, their trees rooted up, and their meadows ploughed; and that they would also be imprisoned. Two sixteenth-century statutes reduced the punishment to mere ‘perpetual infamy’ and a fine, but even this lesser punishment retained strong overtones of civil death. This system fell into disuse in the early modern period and was abolished in the nineteenth century, with the proviso that those seeking to influence a jury’s decision, as well as corrupt jurors, could still be fined and imprisoned. Such prosecutions were to proceed by indictment or information (i.e. proceedings instituted by the Crown without the use of a grand jury); although it is unclear how frequently these embracery provisions were used.

39 Or, as Thomas has put it, how to ‘achieve behavioural change’: Criminal Justice and Courts Bill Deb 13 Mar 2014, col 128.
43 Blackstone (n.42), pp.403-404.
45 Zane (n.41), 141-147.
46 Juries Act 1825 ss.60-61. In other words, the abolition of the attaint was coupled with a clear statement that embracery was not also abolished.
47 Blackstone (n.42), pp.303-308.
48 I am currently carrying out archival research on this and related questions.
It is unlikely that the attaint ever applied to criminal juries. In its 1670 decision in *Bushell’s Case*, the Court of Common Pleas was asked to assess the legality of judges fining and imprisoning jurors for delivering a “false” verdict.\(^{49}\) Chief Justice Vaughan, delivering the judgment of the court, held that this was not permissible without clear evidence of misconduct. Vaughan, a judge sitting in a primarily civil court, emphasised the importance of the attaint in guaranteeing the independence of the jury: the attaint system ensured that questions of fact remained in the hands of jurors, not of judges.\(^{50}\) One of the major reasons for Vaughan’s rejection of judges fining jurors for delivering false verdicts was that the practice undermined this structural separation. He probably would have preferred a system of criminal attaint, but could find virtually no precedent for such a system.\(^{51}\) Modern legal historians have also failed to find evidence of attaint for criminal juries,\(^{52}\) and have suggested that several key features of the criminal trial and appeal system in England and Wales can be attributed to the need to find other ways of guaranteeing the accuracy of a jury’s verdict.\(^{53}\)

This does not mean that criminal trial juries had never been punished, however: the decision in *Bushell’s Case* took place against a backdrop of an increasingly penal judicial approach towards jury management. During the mass prosecution of Quakers in the 1660s,\(^{54}\) some judges had sternly instructed their jurors to take the law from the Bench. In one of the Quaker

\(^{49}\) *Bushell’s Case* (1670) 124 ER 1006; (1670) Vaughan 135.

\(^{50}\) *Ibid*, 143-145.


\(^{53}\) See in particular Whitman (n.30). Langbein has urged caution, however, describing an earlier attempt at presenting the law of evidence as a product of the jury as ‘awkward, because the jury system originated in the twelfth century, whereas the law of evidence is much more recent’: JH Langbein, ‘Historical Foundations of the Law of Evidence: a view from the Ryder sources’ (1996) 96 Colum L Rev 1168, 1169-1170. For a full elaboration of Langbein’s argument regarding the relationship between the law of evidence and the development of the adversarial trial, see Langbein (n.11).

\(^{54}\) See generally WC Braithwaite, *The Second Period of Quakerism*, HJ Cadbury (ed), 2\(^{nd}\) edn (Cambridge: CUP, 1961), pp.21-54. Although Braithwaite notes that few Quakers were actually deported: *ibid*, pp.44-51.
pamphlets of 1664 detailing their trials, it was reported that a juror, having overheard a witness confessing perjury, asked the trial judge

‘Is this good Evidence? [The judge] was angry and threatened him for undervaluing the Evidence, and said, he should know that the Court had power to punish him, and would do it.’\(^{55}\)

Three years later, in 1667, the judge most notorious for punishing juries (Kelyng, the then Chief Justice) was brought before the Commons to explain himself. Having heard his evidence, the Commons decided not to proceed further against Kelyng; but they did resolve that ‘the precedents and practice of fining or imprisoning jurors is illegal’, \(^{56}\) and planned to bring in a Bill to that effect. The 1670 decision in Bushell’s Case simply formed one part of this wider debate about the punishment and guidance of criminal trial juries.\(^{57}\)

So after 1670 judges were only able to imprison criminal jurors if they had proof of misconduct, and they were therefore compelled to focus on jury guidance. A focus on guidance was not entirely new, however: there is evidence that Kelyng punished jurors only as a last resort, where they had refused to follow his advice.\(^{58}\) After Bushell’s Case, as Langbein has emphasised, questions of guidance simply became more important. ‘As the judges lost their ability to detect and correct what they perceived to be jury error, they developed a new system of jury control, whose emphasis was on preventing jury error’;\(^{59}\) although Langbein also argues that the eighteenth-century ‘lawyerization’ of the criminal


\(^{57}\) See generally K Crosby, ‘Bushell’s Case and the Juror’s Soul’ (2012) 33 JLH 251; and Green (n.53), pp.200-264.

\(^{58}\) See in particular *Hood’s Case* 84 ER 1077, Kel J 50, where Kelyng fined members of a jury only after repeatedly trying to persuade them to adopt his legal directions as controlling.

\(^{59}\) Langbein (n.11), p.330. For an excellent example of an eighteenth-century debate on the interplay between jury verdicts, jury obedience and judicial directions, see *R v Shipley* (1784) 99 ER 774.
trial, with the accompanying prioritisation of judicial passivity, made it more difficult for this control to be exercised. In the adversarial system, evidence and judicial directions became crucial techniques for managing juries; and as Whitman has shown, even the “reasonable doubt” standard of proof in criminal trials originated in the need to persuade jurors that convictions were spiritually acceptable. In post-revolutionary America, the question whether a juror must obey judicial directions remained a pressing problem until at least 1895. Without widespread punishment, jury management became increasingly important.

While judges may have been forced to rethink their approach to the jury after 1670, they still had to operate within the context of the jury’s perceived advantages as a popular, republican institution. The idea of the jury as a means of civic engagement had two major aspects. First, that jurors are required to make decisions for themselves, rather than simply following judicial instructions. This claim formed an important part of the context of the debates about the “verdict according to conscience” at least between the seventeenth and nineteenth centuries. Following the decision in Bushell’s Case, English pamphleteers vigorously debated the precise meaning of the judgment, with several arguing that it was a necessary precondition of jury trial that jurors approach their task with a robust sense of their own independence, and that a servile jury was by definition no jury at all. These arguments,

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60 Langbein (n.11), p.331. Although Howlin has recently argued that this cannot be a complete explanation for English juror passivity, as Irish jurors remained active long after “lawyerization”: N Howlin, ‘Passive Observers or Active Participants? Jurors in civil and criminal trials’ (2014) 35 JLH 143.
61 Whitman (n.30).
63 See Green (n.53), pp.349-355.
which relied on a particular vision of the robust republican citizen,\textsuperscript{65} persisted throughout the eighteenth century and appear to have survived the voyage to America.\textsuperscript{66}

This first image of the jury as a political institution was only possible on condition that the people who constituted the jury went into court with a fully-elaborated sense of what the criminal justice system should and should not do. This, however, has not always been an easy requirement either to satisfy or to justify. Discussing the law of seditious libel in 1771, Burke argued that the varied characters of the people called to serve on juries was incompatible with the certainty required of a legal system, if jurors are permitted to engage in jury “equity”.\textsuperscript{67} He also doubted whether the empanelling of a sufficiently independent jury could, as a matter of fact, be relied upon in any particular case, noting

‘[a] timid jury will give way to an awful judge delivering oracularly the law, and charging them on their oaths, and putting it home to their consciences, to beware of judging, where the law had given them no competence’.\textsuperscript{68}

This first vision of the jury as a means of civic engagement, then, must be called into question to the extent that a quasi-random sample of the population are not sufficiently independent, and do not place great emphasis on principles of self-governance.

\textsuperscript{65} Republican in Skinner’s and Pettit’s sense of not being subject to the will of another: see generally P Pettit, 
Republicanism: a theory of freedom and government (Oxford: OUP, 1997); and Q Skinner, Liberty before Liberalism (Cambridge: CUP, 1998), particularly at p.84, where Skinner draws a clear distinction between ‘neo-roman’ (i.e. republican) and liberal conceptions of liberty.

\textsuperscript{66} See in particular Stern (n.73), 1851-1857. The common law did not simply land with the settlers, however, but was gradually adopted (and adapted) in order to suit local needs. See WE Nelson, The Common Law in Colonial America, vol 1 (Oxford: OUP, 2008); and WE Nelson, The Common Law in Colonial America, vol 2 (Oxford: OUP, 2013).

\textsuperscript{67} E Burke, ‘Speech: on a motion, made by the Right Hon Wm Dowdeswell, for leave to bring in a Bill for explaining the power of juries in prosecutions for libels’ in The Works of the Right Hon Edmund Burke, vol 2 (Holdsworth and Ball 1834), pp.492-493.

\textsuperscript{68} Ibid, p.493.
The second way in which the jury was considered to be a crucial civic institution was through the claim that jury trial educated members of the community, ensuring they understood how their society was governed and ultimately creating a better-educated citizenry. This jury was political not in its character as the setting where ‘the people come into the court’ according to Tocqueville, who suggested that the jury should be understood not only as a legal but also as a political institution. Having conceded that the jury might not be the best means of settling complex questions of fact, Tocqueville nonetheless insisted that overlooking its political value would be a grave error. The jury, he argued,

‘must be looked upon as a free and ever-open classroom in which each juror learns his rights … and is taught the law in a manner both practical and within his intellectual grasp by the efforts of advocates, the opinions of judges and the very passions of the litigants.’

Implicit in this quotation from Tocqueville is the claim that the jury’s role as republican schoolhouse is structurally connected to certain methods of what Frank called ‘courthouse government’: that it flows out of and is not opposed to the practice which later generations would know as “adversarialism”. Tocqueville’s argument was not simply that the experience of deliberating would imbue jurors with a habit of mind necessary for the persistence of a

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70 Ibid. See also N Taylor and R Denyer, ‘Judicial Management of Juror Impropriety’ (2014) 78 JCL 43, 45.
72 Ibid., pp.320-321. By citing Tocqueville I do not mean to imply that I entirely agree with his assessment, or the elitism it presupposes: as Dzur has recently argued, the “civic schoolhouse” model of jury service should emphasise the civic value of deliberation as much as, if not more than, judicial guidance on specific legal rules. AW Dzur, Punishment, Participatory Democracy, and the Jury (Oxford: OUP, 2012), pp.63-83.
functioning participatory democracy. In addition, his jurors were expected to benefit from the advice of counsel and of the trial judge, and from the energies of the parties in their competition with one another. While this combination of factors does not necessarily imply the whole ideological structure Damaška set out in his definitive writings on the subject, what Tocqueville is describing here is adversarialism, and the associated claim that the judicial task is properly limited to presiding over a dispute and ensuring the jury understands its task. So in this concept of the jury as a republican schoolhouse, there are several conditions which no doubt accidentally made this vision of the jury’s purpose possible. Central among these was a judicial sense that juries must be managed rather than punished.

After 1670, it was difficult for judges to justify punishing jurors; and while it remained possible in limited circumstances for jurors to be proceeded against for contempt or embracery, it is unclear how frequently these powers were used. This does not mean that judges abandoned all hope of guaranteeing good behaviour from their juries, however: they simply had to develop more sophisticated techniques, recognising the central role of directions in guiding jurors towards legally-acceptable conclusions. This shift away from punishment and towards guidance made possible the idea that jury trial was not simply about community representatives bringing their local expertise (factual, moral and political) into the courtroom. It was seen that jury service could also be about education, in the direct sense that it was the judge’s responsibility to ensure each jury understood the law well enough to be able to reach an accurate verdict, but also in the indirect sense that jury service meant civic engagement, which in turn ensured a community’s citizens would become more virtuous.

And this whole movement was made possible because of a shift in perceptions about the

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74 Although this idea was certainly present in Tocqueville’s remarks: de Tocqueville (n.85), pp.319-322.
76 On jury service as civic education more generally, see Dzur (n.73).
proper relationship between judges and juries: that the relationship is fundamentally about guidance, not about censure.

**Guidance and punishment in early twentieth-century jury trial**

In this final substantive section, I shall explore the relationship between guidance and punishment in the recent history of English juries. Faced with the recurring problem of jurors using the internet to find improper “evidence”, judges initially developed techniques of jury guidance designed to guarantee the accuracy and legality of each jury’s verdict.\(^77\) This is problematic from the perspective of a theory of the jury which focuses on “jury equity”, of the jury’s potential to escape judicial control. But the development of judicial techniques of jury management can from another angle be viewed as a continuation of the history sketched out above: of the idea that the judge’s two key tasks are to police the evidence the jury sees, and to educate the jury about the correct legal response to this evidence.\(^78\) As was discussed above, this image of the judge-jury relationship can be situated within a model of the jury’s political function which focuses on jury service as a civic schoolhouse. This second model of the jury’s political function is, however, undermined by a return to jury punishment. That this critique has not been made is, I contend, symptomatic of a general failure to take the jury’s history seriously.

In the decade since the last major statutory changes to jury trial,\(^79\) online misconduct has made questions of punishment and control central to jury debates once again. A recently as 2005, in an episode of ‘Peep Show’ which explored issues of jury misconduct, there was no

\(^{77}\) As Taylor and Denyer have observed, discussing Thakrar [2008] EWCA Crim 2359; [2009] Crim LR 357 and McDonnell [2010] EWCA Crim 2352; [2011] 1 Cr App R 28, directions alone will usually be considered sufficient where there is ‘no evidence to suggest that new directions from the judge would not be followed’. Taylor and Denyer (n.71), 53.

\(^{78}\) See Taylor and Denyer (n.71), 47-48, where it is argued that such techniques are an essential part of the procedural safeguards which, following the decision in Taxquet v Belgium (App No 926/05, 16 November 2010), must form part of the background to an unreasoned jury verdict.

\(^{79}\) In the Criminal Justice Act 2003.
indication that the internet might encourage misbehaviour (although there were scenes in which the juror and defendant communicated using text messages).\textsuperscript{80} But despite the lack of lay awareness regarding the potential for online misconduct, the first major example of such behaviour had actually come two years earlier. In 2003, a rape conviction had been partially informed by online jury research, the jurors having gone online and found an article advocating a feminist perspective on rape.\textsuperscript{81} The conviction was quashed on appeal in 2005 (the same year that the ‘Peep Show’ episode was first aired), but no further action was taken against the jurors. This is not the only high profile example of jurors turning to the internet in order either to supplement the evidence presented to them at court or to contact a defendant.\textsuperscript{82} Several cases of this sort have received large amounts of media coverage, leading to widespread calls for an effective solution.

The primary judicial response to this problem has been to attempt to steer jurors away from misconduct. Jurors are now routinely directed at the start of a trial not to use the internet to carry out independent research, and not to use Facebook or Twitter to discuss their case.\textsuperscript{83} This points to a judicial preference for educating jurors about their role, rather than punishing them for breaches;\textsuperscript{84} and a 2004 practice direction explicitly stated that the threat of contempt proceedings should only be resorted to as a last option.\textsuperscript{85} Nonetheless, the problem of juror misconduct has continued, and the correct procedure for dealing with suspected misconduct has been re-examined judicially on a number of occasions. The current edition of the relevant practice direction instructs trial judges confronted with suspected misconduct to speak to the affected jurors in order to ascertain whether they can be trusted to ‘continue and remain

\textsuperscript{80} ‘Peep Show: Jurying’ (first broadcast 2005).
\textsuperscript{81} \textit{R v Karakaya} [2005] EWCA Crim 346; [2005] 2 Cr App R 5.
\textsuperscript{82} See Law Commission (n.9), paras 3.2-3.6.
\textsuperscript{83} \textit{Practice Direction (Criminal Proceedings: Senior Courts)} [2013] EWCA Crim 1631; [2013] 1 WLR 3164, para 39G.3. This approach was also endorsed in Ed, ‘Editorial: Jurors and the Internet’ [2011] Crim LR 591.
\textsuperscript{84} See, e.g., G Asquith, ‘Case Comment: \textit{R v Thompson (Benjamin)}’ [2011] Cov LJ 67, 72.
\textsuperscript{85} \textit{Practice Direction (Crown Court: Guidance to Jurors)} [2004] 1 WLR 665.
faithful to their oath or affirmation; 86 discharging either an individual juror or the whole jury if the answer to this question is “no”. 87 Judges, faced with growing evidence of jury misconduct, have tried to improve existing managerial techniques rather than jumping straight to the much more dramatic solution of contempt.

Given the history of jury trial since 1670, it is not surprising to see the judiciary responding to this kind of problem by re-examining the question of judicial directions: the idea of judges guiding their juries has been central to jury trial for centuries. This does not mean that the project has been without its difficulties, however. In Thompson, Lord Judge stressed the need for jurors to report suspected misconduct as early as possible; 88 but in her 2010 study on jury trials Thomas found that many jurors were still unsure how to report such irregularities. 89 Thomas’ findings suggested that the ideal of a judge educating a jury about the relevant law needed to be reassessed, inasmuch as judges were failing to convey to jurors the essential points regarding the prevention of misbehaviour; and Thomas is currently working on a project aimed at improving the comprehensibility of judicial directions. 90 But this project should not be taken to mean that judges must be reminded to educate their juries: the existence of Thomas’ project suggests this ideal still has much purchase, and that in the domain of the jury at least we still live in a world established towards the end of the eighteenth century. 91

Following several high-profile cases in which the judicial preference for guiding and educating jurors failed to prevent misconduct, the Attorney General asked the Law

87 Ibid, para 39M.11.
90 Thomas (n.13).
91 I.e. a world in which judge-jury relations are premised on guidance rather than on punishment, and one set against a backdrop of an adversarial approach to the collection and presentation of evidence.
Commission to expedite the jury-centric aspects of its review of the law of contempt.92 In December 2013, the Law Commission recommended the creation of a new indictable offence ‘for a sworn juror in a case deliberately searching for extraneous information related to the case that he or she is trying’;93 and in February the following year the government introduced legislation to that effect. The Bill did not, however, reflect several other recommendations, such as having the Department for Education ‘encourage schools to deliver teaching about the role and importance of jury service’.94 The government’s response focused on shoring up juror punishment but, as Cheryl Thomas has noted, ‘if people believe that simply by making it a statutory offence that will eliminate any inappropriate use of the internet by jurors, they are mistaken.’95 While there was some attempt in the Public Bill Committee at revisiting the Law Commission’s recommendation regarding citizenship education,96 the preponderance of parliamentary comment on the new offences was positive, with critique going more to practical detail than to wider points of principle.

One of the most striking features of the new offences is the subjection of criminal jurors suspected of misconduct to a jury trial. As we have already seen, the attaint never appears to have applied to criminal jurors, and it is unclear whether a criminal juror has ever been proceeded against for embracery. The Courts Act creates four new indictable offences, and the expectation is that unlike embracery jurors will be prosecuted for these crimes.97 According to the Law Commission’s 2013 proposals, the senior judiciary supported the move from contempt to indictment;98 and the Law Commission itself has argued that proceeding against jurors through the Crown Court will emphasise just how seriously juror misconduct is

92 Law Commission (n.9), para 1.5.
96 On this point, see below, at nn.113-121.
97 Law Commission (n.9), paras 3.68-3.69.
98 Ibid, para 3.46.
now being taken.\footnote{Law Commission (n.1), para 4.38.} It remains to be seen whether juror punishment will, as the judiciary declared a decade ago, still be considered a last resort. But indictable offences are under much less judicial control than proceedings for criminal contempt,\footnote{Eady and Smith (n.17), paras 3-176, 3-180, and generally ch.15. Minor contempts may be dealt with immediately by the court, although major contempts must still be channelled through the executive, in the person of the Attorney-General: \textit{Ibid}, paras 2-184-2-207. The fact contempt is dealt with summarily also gives the judiciary a much greater degree of control than they have in trials on indictment, where responsibility for the outcome is shared with a jury.} and so it is unclear to what extent judicial feelings about misconduct will predict the relative frequency of punishment and of simple corrective guidance (such as a direction to disregard improperly obtained evidence).

One of the central arguments put forward in the previous section was that the end of regularised juror punishment during the Restoration shifted the judge-jury relationship, with the judge’s role becoming more about educating a jury than about using the threat of punishment to avoid perceived misconduct. As the law previously stood (before the new Act), the judge had to explain the jury’s role at the start of each trial; and misconduct was framed in terms of this individualised definition of good conduct.\footnote{Law Commissioner Professor David Ormerod QC, giving evidence to the Public Bill Committee, explained that this potentially ‘destroyed the rapport that they were trying to build with the jury, whereas if the offences existed as normal criminal offences defined by Parliament, judges would be able to say, “This is not a matter for me. Parliament has decided that this should be criminal and it has already been explained to you.” So they would be relieved of that specific obligation.’ \textit{Criminal Justice and Courts Bill Deb 11 Mar 2014, col 70.}}

\footnote{See Law Commission (n.9), para 3.13, discussing \textit{A-G v Dallas} [2012] EWHC 156 (Admin); [2012] 1 WLR 991; and \textit{A-G v Davey and Beard} [2013] EWHC 2137 (Admin); [2014] 1 Cr App R 1.}
But by regularising the threat of punishment in this way, the judge is relieved of part of her obligation to ensure the jurors understand their task. The judge takes a significant step away from her historic role of guiding the jury.

On the other hand, it must be remembered that the judgment in *Bushell’s Case* was largely motivated by a perception that it was not appropriate to have judges punish jurors for whatever they considered to be misconduct. Vaughan CJ cast around for evidence of the attaint in criminal cases, and failed to find any; but it is inherent in the logic of *Bushell’s Case* that jurors are necessarily better placed than judges to assess alleged impropriety. This argument should not be underestimated: it may be that taking the process out of the hands of the judges, leaving any conviction in the hands of a second jury, brings with it not only the procedural protections of a trial on indictment, but also the added legitimacy of making questions about a jury questions for a jury. 103 In this sense, the new offences in the Courts Act cannot fully be understood in the context of the criminal jury’s modern history, and should be read in light of the central distinction in *Bushell’s Case* between judge-centric contempt and jury-centric attaint. If this is the proper context of the reforms, commentators should consider exploring the attaint’s history in civil trials. 104

A second significant feature of the juror punishment provisions in the Courts Act is the partial disenfranchisement it entails for misbehaving jurors. As well as permanently disqualifying anyone who has ever been imprisoned for five years or more, 105 the Juries Act also disqualifies for ten years anyone sentenced to imprisonment (including a suspended sentence of imprisonment), 106 and anyone sentenced to a community order (including

103 For similar arguments, see Law Commission (n.9), p.73-80.
104 Zane made much the same argument in relation to reform of civil law in America as long ago as 1916: Zane (n.51), 147-148.
105 Juries Act 1974 sch.1 para.6.
106 Juries Act 1974 sch.1 para.7(a).
community punishment and rehabilitation orders, drug treatment and testing orders, etc.).

As the law previously stood, juror misconduct was considered contempt, and so was punishable either by fine or by imprisonment. Not all jurors found guilty of misconduct would, therefore, be disqualified. The Courts Act, however, has amended the 1974 Act so as to exclude from jury service anyone convicted under the new offences within the last ten years. As well as the simple fact of criminalising such activities, the Courts Act also excludes those who carry them out from participating in what is widely regarded as an important part of an active citizen’s civic engagement. By coupling the punishment of jurors deemed (by other jurors) to have acted improperly with partial disenfranchisement, the new offences can be analogised to the excessive punishment of the attaint.

I argued in the previous section that the move away from juror punishment and towards juror guidance was a necessary precondition of the idea of jury service as a civic schoolhouse; and that this approach to jury management could be contrasted to the interrelated images of a hostile judge punishing a jury and of a jury coming into court with the preconceived ideas of justice implicit in the concept of jury equity. In the first model, the juror’s training more completely integrates her into the political life of the community; in the second, judge and jury must necessarily come into conflict over the true nature of a contested common-law tradition. Ferguson has recently described jury service as a ‘constitutional teaching moment’; and several other academics have demonstrated how, in the United States at least, the deliberative experience which comes with serving on a jury strongly correlates to an increase

107 Juries Act 1974 sch.1 para.7(b).
108 Eady and Smith (n 17) 3-183, and generally chapter 14. For examples of penalties imposed, see Eady and Smith (n.17), ch.19. I am currently conducting archival research into practices of juror punishment in England after the 1825 abolition of the attaint.
in civic participation generally.\textsuperscript{111} It is not only by excluding misbehaving jurors from future service that the new offences potentially undermine the political value of the jury system. By moving towards a more antagonistic model, the new legislation downplays the importance of the judge in a past juror’s future political life.

The Law Commission’s recommendations regarding jurors and the internet included a recommendation that schools should place greater emphasis on the nature of jury service.\textsuperscript{112} But while the government was enthusiastic about juror punishment,\textsuperscript{113} the recommendation regarding citizenship education does not feature in the Act. When Law Commissioner David Ormerod QC was asked about ‘the education of jurors’,\textsuperscript{114} he confirmed he would like to see this point ‘taken forward, whether in the Bill or otherwise’.\textsuperscript{115} Cheryl Thomas’ answers on this point focused more on court-based measures designed to ‘achieve behavioural change’,\textsuperscript{116} rather than on any wider points about the national curriculum. Andy Slaughter MP proposed an amendment which would place a duty on the Ministry of Justice to ‘develop a public education programme on the role and responsibilities of jurors’;\textsuperscript{117} but he was persuaded to withdraw the amendment by ministerial assurances that it would be better to implement such any such scheme ‘administratively [rather] than through legislation’.\textsuperscript{118} It remains to be seen whether the Law Commission’s education-based proposals will actually be taken up by government; but as things stand the focus is squarely on educating jurors at

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\textsuperscript{111} See generally J Gastil, EP Deess, PJ Weiser and C Simmons, The Jury and Democracy: how jury deliberation promotes civic engagement and political participation (Oxford: OUP 2010); and Dzur (n.73).

\textsuperscript{112} Law Commission (n.1), para 5.16.


\textsuperscript{114} Criminal Justice and Courts Bill Deb 11 Mar 2014, col 71.

\textsuperscript{115} Criminal Justice and Courts Bill Deb 11 Mar 2014, col 71.

\textsuperscript{116} Criminal Justice and Courts Bill Deb 13 Mar 2014, col 128.

\textsuperscript{117} Criminal Justice and Courts Bill Deb 27 Mar 2014, col 420.

\textsuperscript{118} Criminal Justice and Courts Bill Deb 27 Mar 2014, col 423. Lords Kennedy and Beecham tried to introduce a similar amendment in the Lords, but were persuaded by Lord Faulks to withdraw the proposed amendment, again on the grounds that such a scheme would be more easily achieved administratively than legislatively: HL Deb 28 Jul 2014, col 1427, cols 1430-31.
court, rather than on ‘encourag[ing] schools to deliver teaching about the role and importance of jury service’.  

There is a tension in the new juror offences between an educational and a punitive approach, with continued judicial efforts aimed at guiding juries towards good behaviour sitting awkwardly with the government’s resistance to anything other than punishment. In some respects, these divergent approaches may be seen as two sides of the same coin: the judges will try to guarantee compliance, and if that fails the executive will initiate proceedings against individual jurors. The threat of a jury trial may help keep jurors in check, but any regularisation of punishment represents a significant departure from historic practice. This must, from one perspective, constitute success: a notorious problem, which in recent years has denied several defendants a fair trial, is being taken seriously in a clear, visible way. What is less visible is the potential this reform has to undermine the jury’s role as a civic institution. Seen from a wider perspective, one which takes the institution’s history seriously, the proposed offences risk undermining the jury’s potential to be, as the American political scientist Albert Dzur has recently put it, a ‘deliberation machine for critically attuning public reflections on law and order and ultimately for helping to create a justice system in which citizens can take pride’.

Conclusions

Over the last ten years, the standard response to juror misconduct has shifted, from an educational paradigm to one which presents punishment as an unproblematic part of juror management. There is in this shift a move away from the old idea that serving on a jury can

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119 Law Commission (n.9), para 5.16.
120 Dzur (n.73), p.82.
be a formative experience, and that trial by jury is therefore a key way to maintain an active citizenry. This idea is being edged out by a close cousin of the older notion that juries are the place where an already-formed citizenry comes into court in order to judge the justice of the law. Because the trial is not a formative experience, judges can ultimately be absolved of their responsibility to ensure their juries fully understand their role. If the attempt at educating a juror fails, criminal sanctions are the most rational response. This change in emphasis suggests a change in the jury’s role as civic schoolroom; but this critique has not been made, and this aspect of the new offences has passed largely without comment. My argument is that this failure to see the significance of this change in emphasis is directly related to a general failure to see the jury historically.

I have argued that history offers a way of opening up conceptual problems which are necessarily obscured by too close a focus on finding immediate solutions to immediate problems. Despite Thomas’ scepticism, it is possible that the threat of juror punishment will “eliminate any inappropriate use of the internet by jurors”. But whether it will actually do so is not the point of this article: rather the point has been to argue that ‘the merit of history lies in opening rather than in closing questions – in revealing options rather than insisting on answers.’121 And it may be that Darbyshire was correct to argue that insufficient theoretical attention has been paid to interrogating what one journalist has recently praised as ‘the most ancient form of democracy’.122 An interdisciplinary link between legal history and the mainstream of jury studies can help explore such issues by reframing the problem within historical ambiguity rather than legalistic certainty.

Ultimately, the use of legal history in contemporary debates about the future direction either of the criminal trial jury specifically, or of the legal system generally, cannot be prescriptive: it must be about a broadening of perspective, such that questions and problems which might otherwise go unnoticed can be brought into focus. As John Tosh has put it,

‘[t]hinking historically – or “thinking with history” – means employing historical perspective to illuminate current issues. It means identifying what is distinctive about the present, enlarging our awareness of the possibilities inherent in the present, and situating the present in the temporal flows which link it with the past and the future.’\(^{123}\)

If the new offences in the Criminal Justice and Courts Act have passed largely without comment, this must in large part be because of a failure to think through history, to see the current crisis in jurors accessing improper materials as something not only flowing out of the exigencies of a period in time when information has generally become readily available, and people have become used to accessing it almost instantly. In order to properly understand this crisis, and the possible range of solutions, we must learn to see the jury historically.

\(^{123}\) Tosh (n.122), p.121.