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Before the Criminal Justice and Courts Act 2015: Juror Punishment in Nineteenth- and Twentieth-Century England

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The Criminal Justice and Courts Act 2015 has created several new offences regarding juror misconduct. While this legislation has been passed in response to jurors accessing improper ‘evidence’ online, it is wrong to treat juror misconduct as a new problem. The most famous case on this topic (Bushell’s Case) did not completely prohibit juror punishment, but the rhetorical force of the decision was such that penal practices have until recently been overlooked in the academic literature. This article argues that assessing the new offences is greatly helped by understanding how juror misconduct has been responded to in the past. Drawing on the language of Bushell’s Case itself, as well as new archival research, it argues that previous practices of juror punishment have largely depended on whether particular instances of misconduct related to the juror’s ‘ministerial’ or ‘judicial’ functions; and that ‘judicial’ offences (those relating to verdict formation) have been much less likely to be punished. Rather, such offences have tended to be managed away. If today’s judges continue acting in this way, the new offences are unlikely to be resorted to very often, with the judiciary being much more likely to focus on techniques for avoiding misconduct in the first place.

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In recent years, juror misconduct has become an increasingly urgent problem. In 2011, a juror was imprisoned for eight months for using Facebook to contact a defendant in a case she was trying.\(^1\) In January the following year, a second juror was imprisoned for six months, having gone online to research a defendant’s previous convictions.\(^2\) In 2013, a third juror was imprisoned for two months for announcing on Facebook his intent to find a defendant guilty, and thereby do harm to a paedophile; a fourth juror was given an identical sentence for taking to Google in order to learn about a fraud case being tried by a jury of which he was a part.\(^3\) Five months later the Law Commission, having been asked to expedite its review of contempt in light of the 2011 and 2012 instances of juror misconduct, proposed that ‘a discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded’.\(^4\) The government adopted this proposal, including it within the omnibus Criminal Justice and Courts Act 2015. This article argues that the new juror misconduct offences – which make such misconduct an indictable offence – are unlikely to result in many more convictions. Drawing on previously-unexplored archival evidence held at the National Archives, as well as newspapers available through the British Newspaper Archive,\(^5\) it argues that while jurors have often been punished for offences touching their ‘ministerial’ duties, judges have historically been reluctant to proceed against jurors guilty of breaching their duties as ‘judicial’ officers.

The idea of distinguishing between the ‘ministerial’ and ‘judicial’ aspects of a juror’s duty is explored in detail in section one, below. The basic difference between the two parts of the juror’s office is that ministerial duties are those, such as attending court when summoned, which do not involve the exercise of discretion, while judicial duties are those, principally

concerning deliberation, which involve the use of judgment. The archival evidence surveyed in this article shows a reluctance to punish jurors guilty of judicial offences, but that prosecutions have historically been more likely where the misconduct in question can be characterised as ministerial. There is, at one extreme, no evidence of formal punishments for jurors simply on account of judicial disagreements with their verdicts, while at the other end of the spectrum fines for failing to respond to summonses or for arriving late were unexceptional. This, I argue, maps perfectly onto the conceptual ground set out in *Bushell’s Case* in 1670, discussed in detail below. Where jurors have offended in a way which must be situated somewhere between the ministerial and the judicial (succumbing to bribes, for example), prosecutions have been very unusual, but they have happened. An important general conclusion in this article is, therefore, that the more a particular species of jury misconduct has tended towards the judicial, the less likely it has been that it will actually result in punishment.

The new offences are at least partially concerned with the judicial part of the juror’s office and are, therefore, likely to be resorted to only very rarely.

The Criminal Justice and Courts Act 2015 significantly changes the law governing English and Welsh juries. The relevant sections of the Act extend the upper limit for jury service to 756 and take various steps to tackle the growing problem of jurors accessing improper ‘evidence’ online. Sections 69 and 70 give trial judges the power to order jurors to surrender their electronic communications devices, and give court security officers the power to search for devices subject to such orders.7 Sections 71 to 74 create various indictable offences relating to jurors independently researching their cases,8 communicating the product of such research,9

6 Criminal Justice and Courts Act 2015, s 68.
7 Ibid, ss 69-70.
8 Ibid, s 71.
9 Ibid, s 72.
neglecting the juror’s duty to ‘try the issue ... on the basis of the evidence presented in the proceedings’,\textsuperscript{10} or disclosing the basis of their deliberations.\textsuperscript{11} The fact jurors are now to be proceeded against on indictment – the first time English criminal trial jurors will have been routinely proceeded against in this way – raises two broad issues. First, does this signal a principled shift towards a punitive approach to juror management? Second, is it likely that the new offences will actually change the way juror misconduct is managed? This article is concerned with the second, more practical of these questions.

Cheryl Thomas, giving evidence during the Act’s passage through Parliament, argued that ‘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’.\textsuperscript{12} Thomas’ argument was based on her extensive research into juror management, including ongoing work with the judiciary aimed at finding less intrusive ways of discouraging and policing juror misconduct.\textsuperscript{13} This article is also sceptical about the extent to which the 2015 Act will change judicial responses to juror misconduct, and takes as its starting point the claim that exploring previously underutilised records at the National Archives regarding juror misconduct will help to shed light on how judges historically have responded to this difficult problem. Until very recently, juror punishment has not been a particularly pressing issue. This does not mean that judges did not have to deal with errant jurors, however, and nor did it mean that government did not have to oversee the actions of such judges. Exploring this history helps raise possibilities – not least of all the crucial distinction between ministerial and judicial offences – regarding both useful and likely approaches to misbehaving jurors, shedding light on an increasingly important debate.

\textsuperscript{10} Ibid, s 73.
\textsuperscript{11} Ibid, s 74.
\textsuperscript{12} Criminal Justice and Courts Bill Deb 13 Mar 2014, col 128.
\textsuperscript{13} See in particular Cheryl Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] Crim LR 483.
In 1670, in *Bushell’s Case*, Vaughan CJ held that jurors could not be punished for acquitting in the face of a judicial instruction to convict.\(^\text{14}\) At a time of severe governmental hostility towards religious dissent (particularly regarding those, like the Quakers, whose theology would not permit them to swear an oath), a jury refused to convict two Quaker leaders for an unlawful religious assembly.\(^\text{15}\) The jurors were imprisoned for their failure to convict, but were eventually able to persuade the Court of Common Pleas to order their release, with Vaughan CJ famously holding that their imprisonment had been unlawful. But Juror punishment, it should be noted, was only partially prohibited. This fact was easily lost, however, amid the energetic debate which followed Vaughan's decision.\(^\text{16}\) In dialogues like Hawles' in 1680,\(^\text{17}\) much was made of the 'qualified impossibility'\(^\text{18}\) of juror punishment: that judicial browbeating might happen, but was legally insignificant. Stern, in particular, has shown how this debate can be traced through at least a century of Anglo-American politics.\(^\text{19}\) But the fact the discussion after 1670 shifted towards the legitimacy of jury power has had the consequence of downplaying the subsequent history of juror punishment. In fact, Vaughan's judgment did not outlaw juror punishment in its entirety; but this fact has generally been overlooked, and as a result the history of juror punishment after 1670 has not yet been written. But given recent moves in certain common-law countries towards a regularisation of juror punishment,\(^\text{20}\) this history must be taken seriously. This article adds to the debate regarding the propriety and

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\(^{14}\) *Bushell’s Case* (1670) Vaughan 135, 124 ER 1006. In *Bushell’s Case*, the eponymous juror is consistently referred to as 'Bushel'. For this reason, references to the juror in what follows have a slightly different spelling from references to the case.

\(^{15}\) The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly (1670) 6 Cobbett’s State Trials 951.


\(^{18}\) Kevin Crosby, ‘*Bushell’s Case* and the Juror’s Soul’ (2012) 33 JLH 251, 286.

\(^{19}\) Stern, above n 16.

\(^{20}\) Law Commission, above n 4, paras 4.36-4.37.
practicality of juror punishment by exploring archival evidence of such punishment in England and Wales after 1825, when the abolition of the attaint removed the most significant doctrinal difference between punishment for civil and for criminal jurors.\footnote{On the recent debate generally, see ibid, paras 4.36-4.37. Questions of juror misconduct have, in their most dramatic forms, been long associated with practices of ‘jury nullification’ or of ‘jury equity’, and this political dimension in jury trial has not only been an English story. Nineteenth-century French juries, for example, were notorious for acquitting against the evidence, as were Irish juries throughout the nineteenth century and, during the second half of the twentieth century in particular, there were similar concerns regarding juries in Northern Ireland. But while a comparative discussion exploring the relationship between nullification and punishment in these jurisdictions would doubtless be a fruitful way of furthering the current debate regarding juror misconduct and punishment, such a discussion would be well beyond the scope of this article. On jury ‘equity’ and ‘nullification’, see generally Green, above n 16, and P Butler, Let’s Get Free: a hip-hop theory of justice (New York: The New Press, 2009) pp 57-78. On nineteenth-century French juries, see W Savitt, ‘Villainous Verdicts? Rethinking the nineteenth-century French jury’ (1996) 96 Colum L Rev 1019; and JM Donovan, ‘Magistrates and Juries in France, 1791-1952’ (1999) 22 French Historical Studies 379. On Irish juries, see N Howlin, ‘The Terror of their Lives: Irish jurors experiences’ (2011) 29 LHR 703; D Johnson, ‘Trial by Jury in Ireland 1860-1914’ (1996) 17 JLH 270; and J Jackson and S Doran, Judge without Jury: Diplock trials in the adversary system (Oxford: OUP, 1995). On the attaint, see below at nn 30-41.}

Such is the significance of Bushell’s Case that very little has been written specifically about the legal history of juror punishment. In his 2003 book exploring the eighteenth-century development of modern adversarialism, John Langbein stressed the insignificance of Bushell’s Case, noting that ‘the judges retained the power to fine jurors for misbehavior’.\footnote{John H Langbein, The Origins of Adversary Criminal Trial (Oxford: OUP, 2003) p 324 n 346.} Langbein gave as an example a 1680 report from the Old Bailey, where a man was tried for the theft of a watch. Both the judge and all but one of the jury thought there was ‘very convincing Evidence’ and, when the judge questioned the juror, he explained that ‘he was not satisfied in his Conscience; for the watch might be found with the man, and yet he not steal it’. The other jurors, however, explained that their dissentient had earlier expressed annoyance with having been made to serve, and had declared ‘If I must be on [the jury], I’ll cross, or plague them’. The juror denied the charge, but the Court was convinced of his guilt and summarily fined him
fifty pounds.\textsuperscript{23} Before the 2015 Act changed the law on juror punishment, most jurors punished for misconduct seem to have been dealt with in this summary way.\textsuperscript{24}

Following the changes in juror punishment brought about by the Criminal Justice and Courts Act 2015, such misconduct is no longer to be tried summarily as contempt. Given the publicity of the recent trials outlined above, the judiciary, the Law Commission and the government all concluded that jurors had to be given the procedural protections of a Crown Court trial before they could be fined or imprisoned.\textsuperscript{25} In some ways, this makes the history of juror punishment after 1670 irrelevant: the procedure used to discipline criminal trial jurors for the past three-and-a-half centuries has now been replaced by a new series of indictable offences. This article argues, however, that the growing importance of juror punishment makes it particularly important to gain a solid understanding of how such punishment has functioned in the period between Bushell’s Case and today.

This article does not seek to draw a sharp distinction between civil and criminal juries. For much of the period under discussion, the primary statute governing qualification for jury service was the Juries Act 1825, which did not draw a distinction between the two.\textsuperscript{26} While the nineteenth century saw a steady decline in the use of civil juries, the law in the books generally treated the two institutions as broadly equivalent to one another. The major doctrinal difference between the punishment of civil and criminal jurors was that the attaint – which, like the new provisions under the 2015 Act, subjected jurors suspected of bringing in a false verdict to a jury trial – does not seem to have applied to criminal jurors. This article is concerned with the

\textsuperscript{23} Unnamed defendant, 26 May 1680, \textit{OBP}, t16800526-1.
\textsuperscript{24} See generally David Eady and ATH Smith, \textit{Arlidge, Eady and Smith on Contempt} (4\textsuperscript{th} edn, London: Sweet & Maxwell, 2011) pp 849-854.
\textsuperscript{26} Juries Act 1825, s 1.
period after the 1825 abolition of the attaint, however, at which point the law of juror punishment applied equally to both types of petit jury. A major difference between the two systems regarding alternatives to punishment was the fact that, in a civil case, a verdict deemed to be against the evidence could be replaced with a second verdict from a new jury. In this way the attaint’s corrective role was retained beyond 1825, and so it is possible that some judges might have been inclined to treat civil jurors more leniently than their colleagues in the criminal courts, whose faulty verdicts could not be so easily corrected. It has not been possible, however, to conclusively state on the basis of the surviving evidence whether, and if so to what extent, this actually resulted in civil and criminal juries being treated differently.

The focus here is not on the records kept at local archives throughout England and Wales, but rather on those kept at the National Archives in Kew, with support where appropriate from the local newspaper reports available via the British Newspaper Archive. The reason for proceeding in this way is twofold. First, given the recent move towards a consistent, centralised approach to juror misconduct and punishment, it is important to understand how such misconduct has previously been addressed and experienced by government. Second, given that juror punishment has not traditionally been regarded as a very important problem, many records have not survived, and those that have are not bundled together in large files. Given the difficulty of pulling together surviving archival evidence, this article primarily focuses on centrally-held records. This has enabled the development of a significant new analysis which could in future be used as a starting-point for exploring local responses to juror misconduct. This analysis shows that the files at the National Archives can best be understood by reading them in the context of a conceptual distinction set out in Bushell’s Case itself. This distinction

– between “ministerial” and “judicial” functions – originated in England but has subsequently been exported to other common-law jurisdictions. It is to this distinction that this article now turns.

1. The terminology of juror punishment: ‘ministerial’ and ‘judicial’ offences

In this first substantive section, I will set out a framework for understanding the post-1825 instances of juror punishment which will be explored below. Given that such punishment has only recently become a major governmental concern, it is not surprising that the task of categorising particular types of punishment or misconduct has not yet been completed. While some important juror-related issues, such as the position of women after 1919, have been collated at the National Archives into convenient bundles, evidence of juror punishment has to be collected from individual records which have often been destroyed. It is difficult to find evidence of juror punishment, and it is equally difficult to find discussions of the concepts involved. This may well be a product of Restoration pamphleteers’ success in popularising the idea that Bushell’s Case meant jurors were immune to punishment. If so, the best place to look for a well thought-out idea of the conceptual bases of juror punishment may well be the period in which these pamphleteers were writing, when it was still considered an issue suitable for serious political contestation. But first, it will be important to briefly explain what charges an errant juror might find herself facing.

28 There are two large bundles on women and jury service held at the National Archives: National Archives HO 45/13321 (covering the period 1913-1929; originally contained 100 subfiles, of which thirty-three are still extant); and National Archives HO 45/24917 (covering the period 1929-1953; originally contained thirty-four subfiles, of which twenty-three are still extant). Even here not much has been written: the most substantial account is Anne Logan, “Building a New and Better Order”? Women and jury service in England and Wales, c.1920-1970’ (2013) 22 Women’s History Review 701.
29 In 1963, the Home Office bundled together several files on juror misconduct into a file internally labelled P.130345. This file – referenced in Home Office precedent book, ‘Witnesses, Evidence and Juries’, 1890-1966 (National Archives: HO 384/16) p 385 – appears to have been subsequently destroyed. It is in response to such gaps in the central archives that I have turned to the British Newspaper Archives for supporting information.
The first major juror offence was the ‘attaint’, which involved ‘tainting’ the character of jurors suspected of delivering a false verdict by subjecting their verdict to a new jury trial. The attain procedure consisted of a jury of 24 higher-status persons enquiring ‘whether the firste Jurie gave true verdict or noo’; and those found guilty under this procedure would have their home and lands destroyed, as well as being imprisoned. Despite Zane’s argument that medieval attain was grounded simply in a claim of inaccuracy (rather than also impugning the jurors’ honesty), Giles Duncombe, in his 1665 book on jury law, explained that the purpose of attain proceedings was ‘to punish all offenders, who would endeavour to ... corrupt the Jury; and to punish the juries themselves, if they receive money to give their verdict, or any otherwise pre-ingage themselves to any of the parties’. By this time, however, punishment for attain was much less severe than it had once been: a succession of sixteenth-century statutes had lowered the punishment to perpetual infamy and a fine of either £20 or £5, depending on whether the value of the initial suit had been more or less than £40. Attaint, in practice, seems to have been rarely used after the sixteenth century and, despite an attempt at reviving it through legislation in the late-seventeenth century, this form of juror punishment was dismissed by Lord Mansfield in 1757 as ‘a mere Sound, in every Case’, replaced in practice by the ability of

30 (1531-2) 23 Hen VIII c 3.
33 For a discussion on the authorship of Tryals per Pais, see JC Oldham, ‘The Origins of the Special Jury’ (1983) 50 U Chi L Rev 137, 144 n 50.
35 (1495) 11 Hen VII c 24; (1531-2) 23 Hen VIII c 3; (1571) 13 Eliz I c 25.
36 Holdsworth, above n 34, p342.
the courts in civil cases to simply order a new trial. When, in 1825, Robert Peel introduced the Bill abolishing the attaint, he expressed his hope that ‘[i]n these days … there was a better pledge for the integrity of jurors, than any penal statute of this revolting description’. In fact, an important problem for eighteenth-century English judges had been how, in the wake of Bushell’s Case, to find ‘a better pledge for the integrity of jurors’ when it was unlawful to punish them for their verdicts. In his famous decision of 1670, Vaughan CJ had concluded that there was little evidence for the attaint in the context of criminal trials; and modern legal historians have also struggled to find evidence of criminal attaint. After 1670, English judges could no longer punish criminal jurors simply for delivering the ‘wrong’ verdict; and after 1825, this power was also denied to judges sitting in civil courts.

A second juror offence was ‘embracery’, or the attempt at using threats or rewards to secure a favourable jury verdict. Historically, this crime was closely connected to the attaint, with one fourteenth-century statute for example discussing the punishment for a ‘Jurro ou embraceour ... atteintz’. Several months before he delivered his judgment in Bushell’s Case, Vaughan CJ had punished several jurors for being embraced. In 1669, a party to a plea of trespass ‘contrived [that two people,] for divers sums of money, should procure themselves to be sworn de circumstandibus for the trial of the issue’. The jury (including the two bribed talesmen) delivered its verdict, and when the scheme was discovered all three men were charged with

37 Bright v Enyon (1757) 1 Burr 390, 393.
38 HC Deb 9 Mar 1825, vol 12, col 967. Juries Act 1825, s 60.
39 See generally Langbein, above n 22, pp 318-331, on judicial attempts at controlling jurors after Bushell’s Case.
40 Bushell’s Case, above n 14, 1011.
42 On embracery generally, see Seymour D Thompson, ‘Tampering with the Jury’ (1881) 13 Cent LJ 242.
43 (1363-4) 38 Edw III c 12.
44 R v Opie, Dodge and Others (1669) 1 WMS Saunders 301, 85 ER 419, p 419. The fact the men were sworn ‘de circumstandibus’ refers to the practice of swearing ‘talesmen’ – other qualified people found in the vicinity of the court – when an insufficient number of the jurors originally summoned have actually attended court. This power is currently contained in Juries Act 1974, s 6.
embracery. They were convicted by Vaughan, and Hale CJ refused on appeal to countenance their objections. The reporter noted that ‘although there was no matter of law determined in this case ... I have taken notice of it for the enormity of the offence in such bad practices to corrupt the very fountain of justice, which are worthy of severe punishment.’ Peel’s 1825 Juries Act explicitly preserved the crime of embracery, but it nonetheless seems to have been considered an extraordinary offence. When James Baker was tried for embracery in 1891, for example, his trial broke down owing to uncertainty about the form such a prosecution should take; and when Norman Owen was convicted of the offence in 1975, the Court of Appeal complained that a simple charge of contempt would have sufficed. This informal desuetude was formalised when, in 2010, the Bribery Act abolished the offence.

The third major juror offence is contempt of court. There is evidence of English courts exercising contempt jurisdiction from the thirteenth century, with Bracton noting there is ‘no greater crime than Contempt and Disobedience, for all persons within the Realm ought to be obedient to the King and within his peace’. While many contemnors were certainly tried by jury up to at least the fourteenth century, by the eighteenth century the ordinary procedure

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45 A 1652 practice book reports the standard fee for a civil juror to be eight shillings, with the fee for a talesman set at four shillings: Anon, *The Practick Part of the Law: shewing the office of a compleat attorney* (London 1652) p 33 (EEBO image 172378:19). On juror payment prior to the formal establishment of special juries (who were paid a higher rate) in 1730, see Oldham, above n 33, 144-148 and Howlin, above n 21, 748-752. Payment of jurors in civil cases was the responsibility of the parties, and criminal jurors were not entitled to payment, until the Juries Act 1949 made payment for all jurors the responsibility of the state: see HC Deb 8 Apr 1875, vol 223, col 494. The issue in *Opie, Dodge and Others* was not that the jurors were paid by the parties, but rather that they were bribed to attend court, in order that they might be summoned as talesmen and therefore be in a position to deliver a verdict favourable to the defendant.

46 *Opie, Dodge and Others*, above n 44, p 420.

47 Juries Act 1825, s 61.

48 James Baker, 9 Mar 1891, *OBP*, t18910309-302. See also ‘Alleged Attempt to Influence a Jury’ *Bury and Norwich Post* (20 Jan 1891), where Baker is erroneously referred to as James Parker.

49 *R v Owen* [1976] 1 WLR 840, p 841 (per Lawton LJ).

50 Bribery Act 2010, s 17(1).

51 Quoted from in Eady and Smith, above n 24, p 1.

52 Ibid, p 7.
was the summary one known to us today.\(^53\) With the decline and then abolition of the attaint and of embracery, contempt has come to be seen until very recently as the most natural way of punishing errant jurors. While jurors cannot be punished simply for delivering the wrong verdict, Arlidge, Eady and Smith explain that it would be contempt for a juror to refuse to participate in the verdict; to wilfully misrepresent the other jurors’ decision when acting as a foreman; to convict against a direction to acquit; to reach a verdict by flipping a coin, etc.; to discuss the verdict or deliberations with non-jurors; or to separate from the other jurors during deliberations without the judge’s consent.\(^54\) Contempt covers a wide range of juror misconduct.

Having very briefly surveyed the three main types of juror punishment, it is clear that contempt is by far the most significant in principle, and that after Owen it is the only plausible option for disciplining jurors who fail to behave appropriately. But examining evidence of juror punishment through a purely doctrinal lens would shed little light on the practices under discussion. Employing the framework suggested by Vaughan CJ in Bushell’s Case is far more illuminating, for two reasons. First, simply identifying examples of contempt (or embracery) would be unduly restrictive, as it would mean overlooking those cases where misconduct was identified but was not acted upon in a formal way. Second, as we have already seen above, the judiciary, the Law Commission and the government have all expressed their desire to get away from the tradition of using contempt to punish errant jurors, as they are concerned that summary proceedings lack adequate due process guarantees. Therefore any useful analysis of juror punishment must now be able to look past the doctrinal constraints of traditional contempt.

\(^{53}\) Ibid, pp 17-19. For a discussion of the desuetude of contempt as an indictable offence, see Dallas, above n 2, 992-994.

\(^{54}\) Eady and Smith, above n 24, pp 850-854.
proceedings. But if counting instances of contempt, embracery, etc. is insufficient, what other means might be used to analyse archival evidence of responses to juror misconduct?

In his 1670 judgment against juror punishment, Vaughan distinguished the (discretionary) ‘judicial’ task of reaching a verdict, ‘for which [jurors] are not fineable, nor to be punisht, but by attaint’, from the juror’s various (non-discretionary) ‘ministerial’ functions, breach of which could be punished:

‘Much of the office of jurors, in order to their verdict, is ministerial, as not withdrawing from their fellows, after they are sworn, not withdrawing after challenge, and being tried in before they take their oath; not receiving from either side evidence after their oath not given in Court, not eating and drinking before their verdict, refusing to give a verdict, and the like; wherein if they transgress, they are fineable’.

This ministerial-judicial distinction was in use in England by the end of the sixteenth century, and is still used in some American administrative law today. Vaughan’s use of the distinction was unusual in acting as a criterion for determining the legitimacy of juror punishment; but it was not expanded upon beyond the passage quoted above. Understanding this distinction is essential, however, both for understanding Vaughan’s judgment and for situating the 2015 reforms in a critical, historical context, one which will raise serious doubts about their practicality.

55 Bushell’s Case, above n 14, 1014. It should be noted that Vaughan’s list here is very similar to Duncombe’s penultimate chapter on juror misconduct: Duncombe, above n 34, pp 210-223.
56 Ibid, p 1014.
57 See below, nn 59-66.
Ministerial officials were understood to lack discretion. Nonetheless, they did occasionally have greater freedom of action than those acting judicially, as in Mackalley’s case, where a Sunday arrest (arrest being a ministerial activity) was deemed lawful, even though Sundays were not diesjuridicus. The fact judicial activities were impermissible on the Sabbath did not preclude ministerial tasks relating to a criminal trial, for example, from being carried out. In one case, the judges of King’s Bench were asked to consider the legality of a proceeding which would reduce a judge to a mere minister of the City of London, applying a certificate from the mayor and aldermen regarding customary duties at the city’s docks and wharves rather than submitting the question to a jury trial. The mayor and aldermen claimed to have statutory authorisation for the procedure; but the judges were keen to circumvent it, noting that even if ‘the custom of certificate … is confirmed by Parliament … even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself’. Ministerial actions are automatic processes, and as such lack the due process guarantees of judicial determinations.

Vaughan’s position was not that a juror was a judicial officer and therefore immune to punishment; rather, jurors were immune to punishment only when they were acting in their judicial capacity. And the jury was not alone in being assigned this split office. The auditors of the Court of Wards, for example, had the ministerial task of auditing accounts as well as a judicial ‘voice in every cause depending in the … Court’. Another group who regularly appeared in the seventeenth-century cases as holders of a partially judicial, partially ministerial

59 Mackalley’s Case (1611) 9 Co Rep 65b, 77 ER 828, 831.
60 Day v Savadge (1614) Hobart 85, 80 ER 235, 237.
61 Auditor Curle’s Case (1609) 11 Co Rep 2b, 77 ER 1147, 1147. Coke’s report of this case repeatedly makes the distinction between a ministerial ‘office’ and a judicial ‘voice’ (although Coke does also refer to a ‘judicial office’ on several occasions). In Day v Savadge, the court noted that the certification procedure would make ‘the recorder … but their [ie the mayor and aldermen’s] mouth to speak for them, as they command him’. Day v Savadge, above n 60, 237.
office, were sheriffs. ‘[A]nd some times [a sheriff] exercises both together, as in redisseisin, for of that he is Judge, and also is minister to the Court of the King, and yet he is but one man’ 62 But what these cases emphasise is the impermissibility of delegating a judicial, as opposed to a ministerial function: a sheriff may appoint an undersheriff to execute his ministerial functions, but nonetheless ‘the law doth not take any notice of [an] undersheriff’, 63 meaning that the sheriff must accept responsibility for exercises of his judicial discretion. And this meant, by Vaughan’s analogy, that jurors must not be punished for their strictly judicial actions.

The perceived importance of respecting the decisions of people acting judicially is further demonstrated in the attempt by Bushel and his co-jurors to seek legal redress against the judges who had had them imprisoned. Their case failed because of the need to protect judicial officers (in this case judges) from being punished for their decisions, even if their decisions had been found to be incorrect. 64 The fullest report explained that ‘[t]hough the defendants [ie the judges] here acted erroneously … the contrary opinion carried great colour with [them] … so that though they were mistaken, yet they acted judicially, and for that reason no action will lie against the defendant.’ 65 But none of this means, of course, that jurors were immune to punishment: only that they could not be punished in their judicial capacity. So it was that when a juror was fined in 1680 he was punished in his ministerial capacity, having declared he would ‘plague them’ with obstructions if he was forced to serve. ‘For though Jury-men … are not by

62 Bryan Chamberlain’s v Goldsmith (1609) 2 Brownl 280, 123 ER 942, 943.
63 Ibid, p 943. See also Phelps v Winchcombe (1615) 3 Bulst 77, 81 ER 66; Norton v Sims (1623) 1 Brownl 63, 123 ER 667; and Leonard’s Case (1623) Godb 355, 78 ER 209.
64 Bushel v Starling (1673) 3 Kebl 322, 84 ER 774; Bushel v Howel (1673) 3 Kebl 359, 84 ER 765; Bushell’s Case (1674) 1 Mod 119, 86 ER 777; Hamond v Howell (1674) 1 Mod 184, 86 ER 816; Hamond v Howell, Recorder of London (1677) 2 Mod 218, 86 ER 1035.
65 Hamond v Howell, Recorder of London (1677) 2 Mod 218, 86 ER 1035, 1037.
Law to be punished … for giving Verdicts according to there Consciences, yet it seems both just and necessary that such misdemeanours of resolved stubbornness be restrained.66

Further evidence for a ministerial-judicial concept in juror punishment comes from Nelson’s work on colonial American law. One early Pennsylania jury, Nelson reports, had decided to resolve a deadlock situation by drawing lots; and they and the constable were fined £50 for their impropriety.67 But given Bushell’s Case arose from a judge-jury dispute in the trial of Penn and Mead, it is important to establish why juror punishment was acceptable in Penn’s colony. Nelson argues Pennsylvania’s Quaker elite simply decided ‘to resolve the conflict between judicial authority and the power of local communities represented on juries’68 by empowering equitable courts to “mitigate, alter, or reverse” jury verdicts’.69 While this argument accounts for the general disempowerment of juries in Penn’s Pennsylvania, it does not explain how the ruling elite concluded that juror punishment was acceptable despite Bushell’s Case. This problem is easily explicable, however, when cast in terms of Vaughan’s ministerial-judicial dichotomy. Jurors casting lots were not acting ‘judicially’: the jurors in this case had designed an ad hoc procedure which stood in for the ‘judicial’ power which Vaughan’s prohibition of juror punishment was premised upon. They were, therefore, punished for the ministerial offence of refusing to exercise their judicial power.

66 Unnamed defendant, above n 23.
69 Ibid, p 109. See also the French moves towards ‘correctionalization’ and ‘échevinage’ in France a century later, discussed in Donovan, above n 21.
Modern practices of juror punishment, then, should not simply be classified in doctrinal terms. Given that until 2015 most juror misconduct could be characterised as contempt, and given the government’s desire to eradicate contempt as the ordinary mechanism for punishing jurors who have, for example, used Facebook to contact a defendant, any analysis which centres on the purely doctrinal question of the offence which misbehaving jurors historically faced will be particularly unhelpful today. An analysis which considers juror misconduct in terms of the juror’s split function – half-ministerial, half-judicial – is a more promising way of understanding the recent history of juror punishment, as this classification reaches past the boundaries of doctrinal history. In what follows, I will look at three categories of juror offence: judicial, ministerial and quasi-ministerial. First, I will explore the limited evidence of judicial offences in nineteenth- and twentieth-century England. Given that the whole point of Bushell’s Case was to protect jurors acting in their judicial capacity, it is unsurprising that the evidence here is sparse. But as the 2015 Act transforms quasi-judicial problems into offences cast in ministerial terms, it will be important to understand how this kind of transformation has been achieved in the past.

2. ‘Judicial’ offences

In the sixteenth- and seventeenth-century cases concerning the ‘ministerial’ and ‘judicial’ functions of various administrative officers, ‘judicial’ functions were those which concerned the use of discretion. In Bushell’s Case, Vaughan CJ was very clear what he counted as a ‘judicial’ part of the juror’s office: ‘the verdict it self, when given, is not an act ministerial, but judicial’. While it is clear that verdicts, and therefore deliberations, form part of the juror’s judicial function, the surviving archival records require matters concerning verdicts to be

70 Bushell’s Case, above n 14, 1014.
evaluated in two stages. First, may jurors delivering a ‘wrong’ verdict be punished simply because the judge disagreed with the outcome? *Bushell’s Case* is unequivocal that they cannot, and broadly speaking this seems to have been the practice of the courts. Second, may fresh information be used in order to challenge the jurors’ bona fides, demonstrating that they were in breach of their judicial duties? *Bushell’s Case* is less clear on this point, and in fact judges seem always during the period under discussion to have been uncomfortable with reopening the conclusions of a jury acting judicially. The solution to this problem was, as we shall see, to make the disclosure of deliberations a ministerial offence.

In September 1917, two youths aged sixteen were tried for arson. At the pre-trial hearing at the Middlesex Sessions, both boys had confessed, but in their trial at Westminster Guildhall they entered pleas of ‘not guilty’. The jurors returned verdicts of ‘not guilty’ for both defendants, and were severely rebuked by Montagu Sharpe, the Chairman of the Assizes: ‘All I can say, gentlemen of the Jury, is that you have been absolutely regardless of your oath. These men have pleaded guilty, and the evidence is of the clearest possible nature. You are none of you fit to sit on a Jury, but you will remain here until the end of the Sessions.’ The foreman, George Lathan, objected to being ‘subjected to any such observations’, but Sharpe continued: ‘I will report you to the Home Office, because the evidence is so clear that you have absolutely, in my

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71 Examination of Frederick Charles Parker and Sidney Thompson, Court House Tottenham and Court House Wood Green, 26 Jul and 3 Aug 1917 (National Archives: HO 45/10886/348754/3) pp 4-6. It should be noted that their confessions relate to a fire which they admitted causing accidentally. A Home Office minute suggested that this may help to explain the jury’s verdict: ‘It is possible that the jury not being properly versed in the common law doctrine of ‘malice’ may have come to the conclusion that though the lads set fire to the pavilion, they did not do so ‘maliciously’, or they may have thought that apparently it is still law that ‘malice’ cannot be presumed but must be proved affirmatively in the case of offender under 14, that benefit may be extended to youthful offenders over 14.’ Note signed ‘HBS’ [I assume that this is HB Simpson: Jill Pellew, *The Home Office 1848-1914: from clerks to bureaucrats* (London: Heinemann, 1982) p 211], 3 Oct 1917 (National Archives: HO 45/10886/348754/3).

72 Transcript of the trial of *R v Parker and Thompson*, Westminster Guildhall, 22 Sep 1917 (National Archives: HO 45/10886/348754/3) p 18.

73 Ibid, p 18.

74 Ibid, p 19.
opinion, gone against your oaths. Go away.’\textsuperscript{75} Lathan, a trade union leader,\textsuperscript{76} sent Sharpe a letter demanding the jurors’ release,\textsuperscript{77} and contacted the press and the Home Office about the situation.\textsuperscript{78} Lathan argued that either the judge had been wrong to describe the jurors as unfit, meaning they should receive an apology and be used for future trials, or the jurors really were unfit, and were therefore being required to attend court despite lacking the qualifications to serve (meaning they could face criminal sanctions for failing to attend, despite knowing their attendance would be completely futile). As he put it in the statement of facts he sent to the Home Office, ‘the Chairman of the Sessions had committed a grave abuse of the power his position gives him in censuring the Jury in respect of their verdict, and ... they have been illegally detained in accordance with his threat’.\textsuperscript{79} Lathan, in short, saw his predicament as a form of imprisonment. But while the Home Office seems to have been sympathetic to Lathan’s predicament, it nonetheless took almost a month for the situation to be resolved.

The file regarding Lathan’s complaint shows the government was unsure what it could do to help. The Lord Chancellor’s Office noted that even ‘[a]ssuming, as I think we may, that

\begin{footnotes}
\footnote{Ibid, p 19.}
\footnote{Lathan was Chief Assistant Secretary of the Railway Clerks Association.}
\footnote{Letter from George Lathan to Montagu Sharpe, 25 Sep 1917 (National Archives: HO 45/10886/348754).}
\footnote{For press coverage of the Sharpe-Lathan dispute, see ‘Jury “Kept In”: punished because they found two youths “not guilty”’ \textit{Sunday Mirror} (23 Sep 1917); ‘Angry Court Scene: magistrate to report jury to Home Secretary’ \textit{Evening Despatch} (24 Sep 1917); ‘Court Scene: jurors to be reported to Home Secretary’ \textit{Liverpool Daily Post} (24 Sep 1917); ‘Magistrate and Jury: a shameful miscarriage of justice’ \textit{Birmingham Daily Post} (24 Sep 1917); ‘A Jury Rebuked: “most shameful miscarriage of justice”’ \textit{Western Daily Times} (25 Sep 1917); “Miscarriage of Justice”: sessions chairman and a jury’s verdict’ \textit{Western Mail} (25 Sep 1917); ‘The Obdurate Jury: chairman refuses to hear explanation’ \textit{Aberdeen Evening Express} (25 Sep 1917); “The Obdurate Jury”: Mr Sharpe’s reply to foreman’s letter’ \textit{Aberdeen Evening Press} (26 Sep 1917); ‘Obdurate Jury: sessions chairman climbs down’ \textit{Evening Despatch} (26 Sep 1917); “‘In the Public Interest”: sessions chairman and jury’ \textit{Sunderland Daily Echo and Shipping Gazette} (26 Sep 1917); ‘Obdurate Jury: sessions chairman climbs down’ \textit{Birmingham Gazette} 26 Sep 1917; ‘Censured Jury: all but four allowed to go’ \textit{Liverpool Daily Post} (27 Sep 1917); ‘Jury Rebuked at Sessions’ \textit{Middlesex Chronicle} (29 Sep 1917); ‘A Jury’s Grievance’ \textit{Manchester Evening News} (8 Oct 1917); ‘The Aggrieved Jury: discharged, but talk of taking fresh action’ \textit{Aberdeen Evening News} (9 Oct 1917); “‘Penalised Jury” Discharged’ \textit{Birmingham Daily Mail} (9 Oct 1917). While none of these reports add anything beyond the information gathered together in the exhaustive Home Office file, the extent of press reporting of Sharpe’s jury suggests this was widely understood to be a serious – and unusual – matter.\footnote{‘Attempted Intimidation of a Jury, Middlesex Sessions, September, 1917’, 2 Oct 1917 (National Archives: HO 45/10886/348754/4) 6.}}
Sharpe’s conduct was ill judged and arbitrary, he did not, so far as I can see, do any act which would justify the Lord Chancellor in removing him from the Bench.\textsuperscript{80} When Sharpe threatened the jurors that they would be called for service in the October sessions (but without removing the bar on their actually serving), the Home Office were unable to do anything other than write a strongly-worded letter advising the judge against this action, noting that doing so would only confirm the perception that his actions ‘would be impossible for the Secretary of State to defend as constitutional or right’.\textsuperscript{81} Four days earlier, when Lathan had visited the Home Office ‘in an extremely distraught frame of mind’,\textsuperscript{82} one official ‘promised him that if he and the other jurors were sent to prison for refusing to serve I personally would do my best to get them out’; but the hand-written note continued, somewhat less optimistically, to observe that ‘this would be worth very little and I was not sure that S of S had power to release them!’\textsuperscript{83}

The punishment of Lathan and his co-jurors is as close as the surviving governmental records come to a clear example of a jury being punished for a verdict according to conscience. The size of the file, at almost one hundred pages, suggests the Home Office were not used to dealing with such cases, and it is doubtful that any other instances of the quasi-imprisonment of a juror would not have been scrutinised by government. But while Sharpe’s actions were considered unconstitutional by the Home Office, there are some references in the file to a perception that judges frequently held unsatisfactory jurors in the state of quasi-imprisonment in which the jurors here found themselves.\textsuperscript{84} This raises the possibility that juror punishment was still a

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\textsuperscript{80} Letter from Claud Schuster to Edward Troup, 17 Oct 1917 (National Archives: HO 45/10886/348754) p 1.
\textsuperscript{81} Letter to Montagu Sharpe, 6 Oct 1917 (National Archives: HO 45/10886/348754). See also Sir Edward Troup’s general comments on the limited role of the Home Office with regard to ongoing court proceedings: Edward Troup, \textit{The Home Office} (2\textsuperscript{nd} edn, London: GP Putnam’s Sons, 1926) p 73.
\textsuperscript{82} Note signed ‘HBS’, 4 Oct 1917 (National Archives: HO 45/10886/348754/3).
\textsuperscript{83} Ibid.
\textsuperscript{84} See, eg, note signed ‘HBS’, 1 Oct 1917 (National Archives: HO 45/10886/348754/2).
reasonably regular occurrence in the early twentieth century, but that it was managed in such a way as would keep it off the books and, therefore, out of the archives.

Local newspapers occasionally reported informal punishments similar to that suffered by Lathan. In 1929, for example, Horridge J sternly rebuked two female jurors for returning late from lunch. He refused to allow them to return to the jury box, adding however that ‘they must attend in court every day for the rest of the week’. But while this punishment was the same as that prescribed by Sharpe a decade earlier, here it was meted out for a ministerial failure to attend on time rather than for a judicial failure to reach the correct verdict. A more obviously judicial punishment came in 1870, when the foreman of a Norwich County Court jury was briefly imprisoned for challenging the trial judge’s right to issue binding directions of law. But while the punishment here was certainly more dramatic, it is still not quite right to characterise this as a juror being punished for delivering the wrong verdict: rather, the issue seems to have been the direct challenge to the judge’s authority. There are also several examples in local newspapers of jurors being discharged on account of their verdicts, and of judges instructing local officials to summon better jurors next time. But this all hints at a judicial preference for managing the composition of a jury panel over more drastic responses to perceived impropriety. So it was, for example, that in 1928 Montagu Sharpe, once again dissatisfied with a jury’s verdict, complained that it was not possible for him to actually punish his jurors: ‘I don’t think you have done your duty ... I am ashamed of you. I can only regret your decision.

85 ‘Women Jurors: Reproved for late return from lunch’ Yorkshire Post and Leeds Intelligencer (5 Jun 1929).
I cannot do anything.’

Despite the Home Office’s impression that Sharpe’s treatment of Lathan was not unique in the history of judge-jury relations, it is difficult to find other clear-cut examples.

While the Contempt of Court Act 1981 ultimately limited the extent to which newspapers could explore the basis of a verdict, it seems to have been common for nineteenth-century newspapers to criticise jurors for the discharge of their judicial function. For one 1862 juror, the resulting damage to his reputation was so great that he asked a local newspaper to publish a letter explaining his jury’s deliberative processes. Judges too were occasionally criticised for expressing displeasure at a jury’s verdict, although censure from the Bench seems to have generally been considered more legitimate than denunciations from the press. When, in 1875, Benjamin Disraeli refused to introduce legislation prohibiting such reprimands from the judiciary, several newspapers published editorials praising the practice as ‘preferable to the gibbeting’ certain jurors have received ‘week after week’ in the press, as well as being a practice likely to give ‘encouragement to the witnesses’ and ‘stimul[ate] other juries to do their duty’. So while it was not acceptable for judges to actually punish their jurors for judicial offences, a stern rebuke was seen as a way of giving voice to legitimate concerns without

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89 Contempt of Court Act 1981, s 8.
90 ‘A Jury on their Defence’ Worcestershire Chronicle (21 May 1862).
91 ‘Miscellaneous: Insulting Treatment of a Jury’ Worcestershire Chronicle (17 Jan 1849); ‘A Sessions Chairman and a Sessions Jury’ Bell’s Life in London and Sporting Chronicle (7 Jan 1849).
92 HC Deb 8 Apr 1875, vol 223, col 494.
93 Untitled editorial Staffordshire Sentinel (24 Mar 1875) 2. For a similar argument, see Atkin LJ in Ellis v Deheer [1922] 2 KB 113, 121.
94 ‘Judges and Juries’ Western Daily Press (17 Apr 1875) 7. But see ‘Working Men on Juries’ Reynold’s Newspaper (3 Nov 1878) for an argument that censure from the Bench undermines the jury’s judicial function. Donovan has argued that the high acquittal rates of nineteenth-century French juries can, conversely, be partially attributed to the perceived partiality of judicial interrogatoires: Donovan, above n 22, 386.
exposing any particular set of jurors to the long-term ignominy of denunciations in print, which would only cease at the whim of the press.95

It is not, then, altogether clear that jurors were very frequently punished for judicial offences (except to the extent that the partial disenfranchisement of persons deemed unsuitable for further service can be considered a punishment); although it was clearly common for judges to deliver their jurors a stern rebuke. Another possibility was that the jurors themselves might inadvertently bring their verdicts into disrepute, particularly by calling either for leniency or for a pardon.96 Sometimes jurors were pressured into doing so by people connected to the defendant.97 Particularly heavy pressure was exerted on the jury in a robbery case in 1827, where the defendants, convicted of a felony, potentially faced execution. The foreman of the jury, Joseph Dofsell, was visited by a friend of the prisoners, and asked to sign a petition stating the verdict was delivered against the evidence. When Dofsell refused, his visitor started shouting, and was therefore asked to leave. Dofsell was later called to a local pub for a meeting of the jurors, where the prisoners’ friend induced the whole jury (including Dofsell) to sign. When this case came before the Attorney and Solicitor General, they concluded that nothing could be done to prevent this sort of thing from happening: it was ‘reprehensible yet as no personal violence was used and no such threats employed as would amount to intimidation …

95 Such rebukes also served to make clear that the problem was this particular juror or jury, rather than the jury system as a whole. There were also at this time, however, attacks on the civil jury system as a whole: C Hanly, ‘The Decline of Civil Jury Trial in Nineteenth-Century England’ (2005) 26 JLH 253. See also the nineteenth-century French judicial attacks on the jury system Savitt, above n 22, 1029-1030. Although Savitt also notes that, despite judicial attacks on the lenience of French juries, it seems that the judiciary was no less lenient in practice: ibid, 1056-1060.

96 The sheer volume of such records on file at the National Archives suggest that such petitions were still a reasonably common part of the criminal process. Sir Edward Troup, Permanent Under-Secretary of State in the Home Office during the second decade of the twentieth century, wrote shortly after his retirement in 1922 that ‘Great weight is always given by the Home Secretary to a recommendation by a jury if some sufficient reason be given for it.’ Troup, above n 96, p 68.

97 This was not, of course, simply an English phenomenon: see, e.g., Donovan, above n 21, 380-381.
we cannot … recommend a prosecution’.  
98 Interference with a jury after a verdict was returned was not easily prevented, perhaps in part because by this stage the ‘jurors’ had formally left their temporary judicial offices.  
99 It is well known that the appellate courts of England and Wales have periodically struggled with the question of when they should be permitted to take judicial notice of evidence regarding a jury’s deliberations. In 1922, the Court of Appeal admitted evidence from a juror who claimed to have been unable to hear the foreman’s verdict when it was delivered, and that if he had heard it being delivered he would not have given his assent. The Court, however, made it clear that it would not be willing to hear evidence of what had actually been discussed during the jury’s deliberations.  
100 Seven decades later, the Court only permitted itself to take notice of a jury’s use of a Ouija board because the board had not technically been used during deliberations.  
101 In 2004, the House of Lords held that the secrecy of deliberations was an important part of the jury system, and that all judicial tribunals should be presumed to be impartial: if allegations were going to be made by jurors about their colleagues, they must be made before the verdict is in.  
102 As the following discussion will show, this strict prohibition on revealing the basis of a jury’s deliberations (explicitly made a contempt in 1981 and converted into an indictable offence by the 2015 Act) was prompted by the increasing frequency during the twentieth century of attempts to undermine a jury’s verdict by providing information about its deliberations. Rather than accepting evidence suggesting jurors may have

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99 See also Howlin, above n 21, 752-754.  
100 Ellis v Deheer [1922] 2 KB 113. See also R v Wooler (1817) 2 Starkie 111, (1817) 171 ER 589. This kind of disclosure still occasionally occurs: R v Vanegas [2014] EWCA Crim 2911.  
committed judicial offences, non-disclosure of deliberations was eventually made one of the ministerial (ie non-discretionary) parts of a juror’s duty.

In 1911, the doctor Sidney Lightfoot was convicted for carrying out an abortion. Lightfoot had argued at his trial that the abortion was simply the unfortunate byproduct of a medically necessary procedure; and when a guilty verdict was returned the trial judge expressed his disappointment. Lightfoot’s wife, Lillie, contacted two jurors who had signed a petition of mercy regarding her husband; and these jurors claimed several others had voted ‘guilty’ simply to avoid missing the last train home. She then requested that the Home Office look into the alleged juror misconduct. The Home Office asked the Court of Criminal Appeal for guidance, noting that the Home Secretary ‘would desire to use every possible means of discouraging’ the ‘objectionable and dangerous … practice’ of interviewing jurors regarding their verdicts; and Lord Alverstone replied that the Court would continue its practice of ‘declin[ing] to receive’ such statements. Despite at least one juror having confessed before a magistrate to putting his convenience before his oath, there was no suggestion that any of the jurors should be punished for misconduct: Lord Alverstone, for one, was convinced of

104 Ibid.
105 See generally divider 29 of the Lightfoot file (National Archives: HO 144/1122/204340/29). The petition was signed by over 36,000 people (National Archives: HO 144/1122/204340/14).
106 ‘Mrs Lightfoot’s report on her first visit to Mr Harry Cox’, received 21 Nov 1911 (National Archives: HO 144/1122/204340/29); ‘Questions sent to Mr Harry Cox by Mrs Lightfoot and his replies thereto’, received 21 Nov 1911 (National Archives: HO 144/1122/204340/29); Declaration of Harry Cox, received 21 Nov 1911 (National Archives: HO 144/1122/204340/29); Declaration of Alfred Simmons, received 21 Nov 1911 (National Archives: HO 144/1122/204340/29). Although a later investigation showed that most of the other jurors either disagreed with this assessment or were simply unwilling to divulge what had happened during their deliberations (National Archives: HO 144/1122/204340/37).
107 Letter from Edward Troup to the Registrar of the Court of Criminal Appeal, 27 Nov 1911 (National Archives: HO 144/1122/204340/31).
108 Letter from Lord Alverstone, 5 Dec 1911 (National Archives: HO 144/1122/204340/31).
Lightfoot’s guilt,\textsuperscript{109} so felt the conviction should not be interfered with (including by interfering with the former jurors).

A Home Office precedent book suggests a possible change during the twentieth century regarding the desirability of governmental intervention in these circumstances. In 1924, a ‘Judge asked HO to administer a rebuke’ to a juror who expressed sympathy to the organiser of a petition of mercy; but ‘HO did not consider it objectionable’, as the juror had not expressed doubts about the verdict itself.\textsuperscript{110} In 1928, when jurors commented on a case ‘between giving of verdict and execution of sentence’, it was felt that this was ‘Improper, but practice very rare and introduction of legislation therefore not necessary’.\textsuperscript{111} In 1949, following a murder trial, one juror wrote to defence counsel expressing doubts about the jury’s guilty verdict. ‘It turned out that the juryman [sic] in question was a very kindly and respectable old lady and no action was taken as regards her.’\textsuperscript{112} The fact that specific legislation on the issue was even considered, and that no action was taken against the 1949 ‘juryman’ because he was in fact ‘a very kindly and respectable old lady’ suggests a developing sense that, despite the relatively low numbers involved, a way had to be found to stop jurors bringing their verdicts into disrepute.

During the second half of the twentieth century, the general feeling that disclosure of deliberations should be avoided, and should not be taken into account in appeals, shifted to a specific argument that steps were needed to positively prevent disclosure. In 1951, the Lord Chancellor and Lord Chief Justice agreed that notices should be displayed in all jury rooms affirming the need to keep deliberations secret.\textsuperscript{113} Eight years later, it was decided that any

\textsuperscript{109} A Home Office minute dated 20 Dec 1911 states ‘I have seen the LCJ. He is firmly convinced of Lightfoot’s guilt’ (National Archives: HO 144/1122/204340/31).

\textsuperscript{110} Home Office, above n 29, p408 (original file destroyed).

\textsuperscript{111} Ibid, p 408.

\textsuperscript{112} Ibid, p 408; original file (National Archives: HO 45/23964) closed until 2025.

\textsuperscript{113} Ibid, p 386 (original file destroyed).
future departmental committee on juries should explore ways of keeping deliberations secret;\textsuperscript{114}
and in 1966 the Lord Chief Justice, in a letter to the Home Office, recommended the creation
of a criminal sanction for juror disclosure.\textsuperscript{115} The Home Office resisted this proposal (also
made by Lord Brooke in the Lords debates on the Criminal Justice Bill of that year),\textsuperscript{116} on the
ground that it needed more thought. ‘The possibility of a specific sanction for a breach of
secrecy by a juror does not seem to have been fully examined on Home Office files’;\textsuperscript{117} so the
Home Office sent the proposal to the Criminal Law Revision Committee for their full
consideration.\textsuperscript{118} In 1981, it finally became contempt to disclose or solicit the specifics of a
jury’s deliberations, following Lord Widgery CJ’s ruling in the Divisional Court that, despite
several recent examples of juror disclosures, such disclosures would only amount to contempt
at common law if they actually interfered with the administration of justice.\textsuperscript{119}

Contempt has, for the past thirty years, been the most visible tool for disciplining errant jurors.
But while punishment in this context is related to jurors’ verdicts, legal reform on this matter
was not justified by reference to a desire to punish jurors for acquitting in the face of what the
judge considered overwhelming evidence. In this way, the sort of juror punishment undermined
by the decision in \textit{Bushell’s Case} seems (with the notable exception of Lathan’s informal
punishment) an unusual response to misconduct. Far from punishing jurors for failing to apply

\begin{footnotes}
\item[114] Ibid, p 386.
\item[115] Lord Parker was specifically concerned about a recent case in which \textit{The Daily Mail} had attempted to secure
an interview with a person who had recently served as a juror at the Old Bailey, and he wondered whether ‘it
might be better to make it an offence for anyone to approach a juror not only during a trial but after a trial with a
view to obtaining information’. Letter from Lord Parker of Waddington to Philip Allen, 1 Nov 1966 (National
Archives: HO 291/1482).
\item[118] This ‘delighted’ the Lord Chief Justice: Letter from Lord Parker of Waddington to Philip Allen, 31 Jul 1967
(National Archives: HO 291/1482). The Committee, in a report which closely mirrored the earlier discussion
within the Home Office, recommended no changes to the law: Criminal Law Revision Committee, \textit{Secrecy of
\item[119] \textit{A-G v New Statesman and Nation Publishing} [1981] QB 1; Contempt of Court Act 1981, s 8.
\end{footnotes}
law to fact correctly, judges have been empowered since 1981 to imprison jurors for giving any information about this matter: it is not an offence to deliver an inaccurate verdict, but it is an offence to tell anyone you were part of a jury which did so. Clearly, as Lathan’s punishment shows, as late as 1917 it was still possible (although ill-advised when faced with a juror seised of his or her rights) for a judge to punish a juror for a purely judicial offence. But in order for jury verdicts to remain above reproach it was considered necessary to create what amounted to a new ministerial offence.

3. Quasi-‘ministerial’ offences

In Bushell’s Case, Vaughan CJ failed to fully define his ‘ministerial’ offences, only giving a series of examples such as refusing to give a verdict or not withdrawing after a valid challenge. This leaves embracery in an ambiguous position. Should it be considered ‘judicial’, as misconduct directly impacting upon a verdict’s bona fides? Or should it be considered ‘ministerial’, despite not falling squarely within any of the examples given by Vaughan? The OED defines the relevant sense of ‘ministerial’ as ‘designating an action which is a necessary part of a person’s official duty … so that the agent is not responsible for its ethicality or consequences’; and it would appear therefore to include any part of the juror’s task other than the conscientious problem of reaching a verdict. Despite Bushell’s Case having been attacked by several historians for the anachronistic argument that a jury might rely on its independent knowledge, Vaughan did include receiving evidence out of court after being

120 This is listed as a specific meaning under definition 1b. When, in 1879, the Criminal Code Bill Commission published its Draft Code – ‘Draft Code’ in Criminal Code Bill Commission, Report (C (2nd Series) 2345, 1879) – jury offences were contained neither within the category of judicial corruption (s 111) nor within the category of ministerial corruption (s 112); rather, s 129 provided for an offence of ‘corruptly influencing juries and witnesses’, and thereby put the juror in a special category, being neither judicial nor ministerial in nature.

121 See in particular Langbein, above n 22, p 324 n 346 and Stern, above n 17, 1816; although see Whitman, above n 41, pp 177-178 arguing that if the argument was truly anachronistic it could not possibly have been as well-received as it was at the time.
sworn in in his set of ministerial offences. To the extent that embracery involved an attempt at influencing a jury’s verdict after the jury had been sworn in, embracery must therefore fall at least within the spirit of Vaughan’s ministerial offences.

Embracery, then, should be considered a quasi-ministerial offence, and its ambiguity within the classification of juror offences proposed in Bushell’s Case also extends to the fact it was not only jurors who could be proceeded against for the offence. Both the jurors themselves and the people who had attempted to influence their verdicts (a feature of embracery which makes the offence also quasi-judicial in nature) could be prosecuted for the offence. Nonetheless, prosecutions were uncommon enough that even trials at the Old Bailey failed on procedural grounds. In January 1891, for example, one James Baker was indicted for embracery and perverting the course of justice, having attempted ‘to incline the … jury to be more favourable … by persuasions, entertainments, and other unlawful means’. Baker’s counsel successfully argued the indictment was faulty, as embracery must relate to specific jurors rather than to ‘a jury’ generally. This only delayed matters, however, as in March he was indicted again; and this time the indictment named the jurors. They were examined at trial, and Baker was convicted; but it should be noted that, despite the impropriety of the jurors’ actions in Baker’s case, there was no suggestion that they should also be indicted.

A year after James Baker’s successful second trial for embracery at the Old Bailey, one James Asplin was called upon to serve as a juror in a murder trial at the Northampton Assizes. During

\[\text{\textsuperscript{122} James Baker, above n 48.}\]
\[\text{\textsuperscript{123} This argument was based on 32 Hen VIII c 9, s 3; unspecified parts of Blackstone’s Commentaries, Stephen’s Digest and Hawkins’ Pleas of the Crown; and ‘Draft Code’ in Criminal Code Bill Commission, Report (C (2nd Series) 2345, 1879) s 129. Although the prosecution argued unsuccessfully that R v Fuller (1797) 168 ER 495 established that these details were not necessary.}\]
\[\text{\textsuperscript{124} James Baker, above n 48.}\]
\[\text{\textsuperscript{125} Baker had taken several jurors out for drinks. It should, however, be noted that one of the jurors expressed regret at having met with the defendant: ‘I had never heard of embracery before; I did not know I was embraced, and I am very sorry I was’. Ibid.}\]
an adjournment, Asplin left the court in order to post a letter. The trial judge considered this ‘a gross contempt of Court’, which had exposed the whole jury to the danger of external ‘influence’.

He fined Asplin £50 and discharged the jury. Asplin was not prosecuted for embracery, but was instead convicted of contempt for exposing the jury to the risk of embracery. The judge’s reaction suggests he considered interference to be a danger to be protected against, and this is a danger which continued into the early decades of the twentieth century. But the onus generally seems to have been on embracers not to embrace, rather than on jurors not to be embraced, and there is no record of a juror being proceeded against for embracery during the period covered by this article until 1934. Asplin’s contempt conviction was an unusual judicial response.

Even where there was clear evidence of embracery, the official response was more likely to be an increase in security than prosecutions. In 1910, two Chief Constables reported several recent instances of embracery. The Chief Constable of St Helens described a 1904 trial at Margate, where several jurors came back from adjournment drunk and hostile towards the prosecution. The trial judge gave a ‘very lucid and strong summing up’, and a conviction.

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126 ‘The Assizes: Midland circuit, the Althorp murder’ The Times (19 Nov 1892); see generally the Home Office file on McRae’s trial (National Archives: HO 144/246/A54448B).
127 Ibid; see generally the Home Office file on McRae’s trial (National Archives: HO 144/246/A54448B). Jurors, prior to 1897, were not usually permitted to separate during a trial. As Howlin has demonstrated, however, from the late eighteenth century this rule started, in practice, to be interpreted liberally by the judiciaries both of England and of Ireland: Howlin, above n 21, 733-735.
128 Eady and Smith, discussing two similar cases where jurors were not punished (R v Ward (1867) 17 (NS) LT 220 and R v Ketteridge [1915] 1 KB 467 (CA), concluded ‘there can be little doubt that such conduct would at least be capable of constituting the actus reus of contempt’: Eady and Smith, above n 24, p 852. See also (National Archives: HO 45/13321/93), where in 1926 two female jurors were discharged after admitting to having spoken to the plaintiff. As Howlin has observed, from the eighteenth century onwards the general rule against jurors separating tended to be relaxed, and on both sides of the Irish Sea there was developed ‘a more humane approach toward the confinement of jurors, evident from the early nineteenth century’. Howlin, above n 21, 735.
129 Howlin has explored the problem of embracery in nineteenth-century Ireland, and has concluded that ‘[m]ore often, the juror would be fined’. Ibid, 723. This is quite different to the apparent practice in England, and could be explained by the widespread nature of the threats and intimidation often faced by nineteenth-century Irish jurors.
130 Letter from AR Ellerington to Thomas W Byrne, 28 Jul 1910 (National Archives: HO 45/10622/196419).
was secured despite the protest of several jurors, ‘whom I afterwards learnt were accused by
the other jurymen of having been bribed by the friends of the prisoners’. Accrington’s Chief
Constable reported that a ‘tout for solicitors’ and former publican had accurately predicted
when several juries would fail to reach a verdict, and that it was ‘a common occurrence to hear
jurymen discussing cases … with the public at luncheon in the hotels near to the Courts at
Manchester, Liverpool and Preston’. When a judge ordered a jury subject to one such
prediction to stay in court, ‘the jurymen were only five minutes in giving their verdict’. The
Chief Constables did not, however, indicate any desire on their part to proceed against such
jurors. Reports from local newspapers also confirm the impression that jurors tended not to be
punished for embracery, with the most likely consequence being either a stern rebuke or a
discharge. Judges might, however, occasionally put jurors ‘on their guard against the attempt
of any person to try to reason, cajole, or even bribe them’. As we have already seen above,
jurors did occasionally discuss their cases outside court, but judges do not seem to have been
keen to punish such jurors, with one such judge simply noting that ‘I don’t know which member
of the jury was responsible and it is not for me to find out, but I am deeply disturbed’. Embracery was an issue, then, but it was not one which was generally responded to with juror
punishment. This echoes the more recent reported cases of trials on indictment for perverting


131 Ibid. Ellerington suggested that this was quite a common occurrence.
132 Letter from George Sinclair to Thomas W Byrne, 2 Aug 1910 (National Archives: HO 45/10622/196419).
133 Ibid.
134 Ibid.
135 ‘Hooley Trial: Judge’s rebuke at the Old Bailey’ Western Times (10 Feb 1912).
Told to go away from Old Bailey’ Hull Daily Mail (6 May 1932).
the course of justice by interfering with a juror: while those doing the perverting have been prosecuted, the affected jurors seem generally to have simply been discharged.\textsuperscript{137}

Following the reports of Accrington’s and St Helens’ Chief Constables, the Lord Chief Justice agreed that trial judges should be reminded that they did not \textit{have} to let jurors separate (thereby exposing them to the danger of embracery): that the Juries Detention Act 1897 actually gave them discretion on this issue.\textsuperscript{138} During the following few decades there was growing pressure to alter the law, and again this pressure consisted not of calls for more rigorous enforcement of the law concerning juror misconduct but, rather, consisted of calls for a stricter management of the space occupied by the jurors. Misconduct was to be managed away, but not prosecuted. In 1928, for example, when the Home Office considered extending the 1897 Act so as to allow the jurors to separate even when trying ‘murder, treason and treason-felony’, it was noted that the ‘[g]eneral view of the judges was against alteration of the law’.\textsuperscript{139} In 1948, the law was finally altered so as to allow for separation in all cases.\textsuperscript{140} What is notable in all this is that embracery was viewed as a problem to be managed, rather than as a criminal offence to be prosecuted. Juror punishment for embracery was technically possible, but practically speaking it seems rarely to have been used.

There is, however, some limited evidence of jurors having been punished for embracery. A Home Office precedent book reports in 1934 a ‘Jury foreman convicted of embracery

\begin{footnotes}
\textsuperscript{138} Letter from Lord Alverstone to Winston Churchill, 17 Oct 1910 (National Archives: HO 45/10622/196419/2). The power to permit jurors to separate at all can be contrasted to the famous image of the medieval jury being carried about on the back of a cart, unable to separate until they had reached a verdict: discussed in, e.g., Duncombe, above n 34, p 218 (EEBO image 109502:122).
\textsuperscript{139} Home Office, above n 29, p385 (original file destroyed).
\textsuperscript{140} Criminal Justice Act 1948, s 35(4). See also Criminal Justice and Public Order Act 1994, s43.
\end{footnotes}
(accepting bribe to influence jury), and contemporaneous newspaper reports offer a fuller account of what had happened. Three men had been on trial at the Old Bailey for conspiring to defraud their creditors, and obtaining goods by deception, when they found that the foreman of their jury was also their accountant, Walter Ramsey. The four men met over dinner, and Ramsey offered them a verdict for £50. After a brief period of haggling, they eventually agreed on an acceptable price. When the scheme was discovered, Ramsey and one of the three defendants, a Mr Kreditor, ‘were charged with conspiring together to obtain a false verdict ... and Ramsey was further charged with being a juryman empanelled at the Old Bailey, [who] accepted a bribe of £7 10s.’ Prosecuting counsel noted that ‘the charge against Ramsey ... was, if true, the offence of embracery,’ and went on to explain that ‘[a] prosecution of this kind has not taken place for many years’. The Recorder held at the end of the trial that there was insufficient evidence for the conspiracy charge, but left the jury to reach a verdict on the question of the bribery. When the jury convicted Ramsey, the Recorder noted that ‘It is very difficult to bring such matters as these to justice, and I have very grave doubt if it is not my duty to pass upon you a maximum sentence ... However, you will go to prison for 18 months’. In another undated case (probably no later than 1963), a prosecutor ‘refused permission to bring a criminal action of “Embracery” against the foreman of the jury at his trial’. A 1963 file containing correspondence between the Home Office and the Lord Chief Justice (which has not survived) also contained a ‘note of other reported cases of misconduct involving jury

141 Home Office, above n 29, p 385.
143 ‘Foreman of Jury who took Bribe: First case for many years’ Gloucester Citizen (25 Jul 1933).
144 ‘Jury Foreman in Dock’, above n 142.
145 Ibid.
146 The internal reference given in the precedent book shows it was bundled together with the 1963 file referred to below.
147 Home Office, above n 29, p 385.
The fact two of these records either define embracery or put it in inverted commas suggests the crime was not one which officials were used to dealing with as a criminal offence. This makes the 1934 conviction of the foreman particularly important: what was so unusual about this case which meant a conviction was sought? There are two probable factors. First, the evidence here pointed to a clear link between the embracer and the embracee, in a way which must have been generally difficult to establish beyond reasonable doubt (and the Recorder explicitly alluded to this factor). Second, the fact Ramsey had instigated the offence by proposing a price of £50 clearly made this case more egregious than a previously innocent juror having been approached in a pub. Both of these factors must make Ramsey’s imprisonment genuinely unusual.

It is well known that the creation of majority verdicts in 1967 was largely motivated by police concerns about the problem of corrupted jurors.\(^{149}\) Sanders, Young and Burton have argued that ‘a more appropriate response’ would have been ‘effective protection for … jurors.’\(^{150}\) In fact, the cost of such protection was one of the police’s chief concerns. A note written on a December 1966 Home Office document asks ‘why are there so few prosecutions for embracery if there is so much of it’;\(^{151}\) and representatives of the Metropolitan Police were accordingly asked for their reply. Two contemporaneous prosecutions were identified during the Home Office’s enquiries, as well as three cases where the Director of Public Prosecutions had decided

\(^{148}\) Ibid, p 385.
\(^{149}\) Sean Enright and James Morton, *Taking Liberties: the criminal jury in the 1990s* (London: Weidenfeld and Nicholson, 1990) pp 69-76. Although as late as 1954 the Metropolitan Police described its own decision to have twelve police officers ‘engaged on observation of jurymen’ in a retrial, after the first trial collapsed due to jury tampering, as ‘extreme measures’ (National Archives: MEPO 2/9632).
\(^{151}\) Note on Letter from AJE Brennan to JA Chilcot, 20 Dec 1966 (National Archives: HO 291/1480). Questions to this effect were also being asked by the press and in Parliament at this time: discussed in Letter from DEJ Dowler to AJE Brennan, 28 Dec 1966 (National Archives: HO 291/1480).
there was insufficient evidence for a prosecution.\(^{152}\) The police were, however, very concerned about the existing cost of protecting jurors from corruption: ‘I think you already know that it takes the services of 72 police officers during each period of 24 hours to look after one team of jurymen’.\(^{153}\) The choice, as far as the Metropolitan Police were concerned, seems to have been between preventing embracery at great expense, or ensuring a couple of bribed jurors could simply (and cheaply) be outvoted.

Embracery, of course, tainted a verdict’s reliability; but it was difficult for a verdict so tainted to be dealt with adequately. Today, the Criminal Justice Act 2003 provides that a jury may be discharged if it has been tampered with,\(^{154}\) and that in certain circumstances the danger of tampering can result in a new trial before a judge sitting without a jury.\(^{155}\) If tampering is not discovered until after an acquittal, it is also possible that the defendant might be retried in certain circumstances.\(^{156}\) This technical limitation on double jeopardy\(^{157}\) is, however, still relatively new. When the Home Office were considering how to respond to police fears regarding embracery in 1966, one suggestion was that double jeopardy should be specifically relaxed in this way for those found guilty of the offence.\(^{158}\) The response this proposal received emphasises how rarely embracery was actually prosecuted:

\(^{152}\) Letter from AJE Brennan to DEJ Dowler, 10 Jan 1967 (National Archives: HO 291/1480). The Home Office’s request for information had also acknowledged it was usually ‘impossible to get the evidence to support prosecutions’: Letter from AJE Brennan to PE Brodie, 29 Dec 1966 (National Archives: HO 291/1480).

\(^{153}\) Letter from PE Brodie to AJE Brennan, 2 Jan 1967 (National Archives: HO 291/1480).

\(^{154}\) Criminal Justice Act 2003, s 46.

\(^{155}\) Ibid, s 44.

\(^{156}\) Ibid where the requirements of ibid, ss 76-80 are met; and if the acquitted person had been originally tried for one of the offences listed in ibid, sch 5.

\(^{157}\) For a discussion of the limited circumstances in which the power has actually been used, see Keir Starmer, ‘Finality in Criminal Justice: when should the CPS reopen a case?’ [2012] Crim LR 526; and I Dennis, ‘Quashing Acquittals: applying the “new and compelling evidence” exception to double jeopardy’ [2014] Crim LR 247.

\(^{158}\) Letter from JA Chilcot to AJE Brennan, 15 Dec 1966 (National Archives: HO 291/484).
‘In general it is so difficult to get evidence of embracery, particularly of successful attempts, that the proposed … provision could be invoked extremely rarely. Its practical value, if any, in preventing the occasional criminal from getting away with corruption could hardly compensate for the trouble it could be expected to cause during the passage of the Bill.’

Despite the active discussion between Home Office and Metropolitan Police officials in the 1960s regarding embracery, by the 1970s the Court of Appeal had for all practical purposes abolished the offence, and in 2010 this abolition was formalised. But even when government still considered embracery an extant common law offence, there was little indication that it was likely to be regularly used as a way of punishing errant jurors.

Owing to the ambivalence inherent in Vaughan’s explanation of the judicial-ministerial distinction as regards juror punishment, it is difficult to precisely identify embracery either as a judicial or as a ministerial offence. A juror guilty of embracery, it could be said, has committed a ministerial offence in the same way as the Pennsylvania jurors who cast lots rather than deliberate: she has acted in a way which undermines the jurors’ ability to act judicially. Any punishment meted out to such a juror will therefore refer to this failure in the non-discretionary, ministerial, part of the juror’s task, rather than the truly judicial task of honest deliberation. It is, nonetheless, clear that this kind of quasi-ministerial offence has very rarely resulted in jurors being tried and punished. This is so despite the fact that a juror being successfully embraced was no less a crime than a defendant attempting to embrace. Indeed, on several occasions juror punishment following embracery was seriously considered; and in 1933

159 Letter from AJE Brennan to JA Chilcot, 20 Dec 1966 (National Archives: HO 291/484).
160 Owen, above n 49.
161 Bribery Act 2010, s 17(1).
a foreman was convicted for being embraced. But despite the decision in 1825 to preserve the offence, embracery seems in general to have been considered a problem to be managed rather than an offence to be prosecuted.

4. ‘Ministerial’ offences

There is little evidence of jurors in nineteenth- and twentieth-century England having been punished for judicial or quasi-ministerial offences. Even when jurors were punished for activities relating to a verdict, it was the act of publicising a verdict’s flaws, rather than the fact the flaws existed, which was most likely to have been the problem. As it was in 1670, so too in 1870 or 1970: jurors could only be punished for ministerial offences. But ministerial offences have not only concerned the relatively dramatic problem of a juror disavowing her own verdict; they have also concerned lesser matters such as a juror failing to attend because she never received her summons, or a juror leaving court in order to post a letter. Given that a rather large number of people called to serve must have acted in ways which might fall into this fairly broad category of ministerial offences, it will be important to try to understand who was and was not punished, and why. In this way, Vaughan’s bare conceptual dichotomy of judicial and ministerial offences can be fleshed out with practical details. And by fleshing out the concepts, we might proceed a step or two closer to understanding the practices of juror punishment.

Giles Duncombe ended his 1665 *Tryalls per Pais* with a discussion of juror misconduct, separated roughly into a first half on ministerial offences and a second half on judicial offences. Duncombe lists the following as those things which a jury, acting in its ministerial capacity, must not do: eating and drinking after being sworn (except with the assent of the parties); receiving evidence (particularly from the parties) after the trial has ended; and leaving

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162 Duncombe, unlike Vaughan in *Bushell’s Case*, does not use this language.
court after having been sworn. Duncombe’s focus here was on the circumstances which could void a verdict, rather than those for which jurors might be punished, but he did specifically state that ‘If the Jury after their Evidence given unto them at the Barre, do at their own Charges eat or drink ... it is finable, but it shall not avoid the Verdict.’ This suggests that the other ministerial offences, which could void verdicts, also carried for those jurors guilty of them the threat of a fine. Howlin has identified a number of nineteenth-century cases in which jurors were rebuked for having acquired refreshments, but in none of these cases were the jurors actually fined, and by 1870 the rule was formally abolished in England.

The most common kind of ministerial offence in the period under discussion was a failure to respond to jury summonses, or a failure to attend on time. While there is evidence that it was considered acceptable to punish non-attending jurors in some circumstances, the picture was still reasonably equivocal. When, in 1866, the Treasury Solicitor was asked when he would exercise his discretion to remit such fines, he explained he would only do so extraordinarily. This was still the case almost a century later when, in 1952, the Treasury Solicitor ruled that a soldier stationed in Germany and a man who had not received his summons on account of having moved house each had sufficiently exceptional excuses for their fines to be waived.

One particularly clear example of Treasury ruthlessness is the 1861 decision that jurors ineligible due to old age should still be fined for not attending, as it was their own fault if they

163 Duncombe, above n 34, p 212 (EEBO image 109502:119).
164 Howlin, above n 21, 735-739.
165 Juries Act 1870, s 23.
166 Case as to the Remission of Jury Fines, 23 Mar 1866 (National Archives: TS 25/1468). It is, of course, perfectly possible that even those who were fined would not necessarily be made to actually pay. All the Treasury Solicitor was competent to comment on was his own willingness to officially remit such fines, not the willingness of local officials to enforce them.
167 R v Humphreys; R v Burton, Sep-Oct 1952 (National Archives: T 221/145). See also Letter from RS Meiklejohn to Messrs Hand & Company, 10 Jul 1926 (National Archives: T 161/267).
had not removed themselves from the register. These rulings give little sense of how frequently fines were remitted by forgiving trial judges, however, and so should be treated with caution. So the next question we must ask is how trial judges treated jurors guilty of ministerial offences: did such jurors, in practice, tend to be punished?

Local newspapers occasionally reported on late or absent jurors and, while the evidence of a handful of instances cannot be used in order to establish any sort of clear trend, it does appear that the consequences for such jurors became steadily less serious. One early report (from 1830) describes a juror being fined £100 for leaving court in search of a snack, and thereby missing his jury’s deliberations and verdict. ‘The Court said the case was unprecedented’, and we should therefore avoid drawing too strong a conclusion from the response to this particular juror’s misconduct. Forty years later, a Manchester juror who was thirty minutes late returning from lunch was fined £5, a penalty probably more closely connected to his ‘not offering any excuse’ than to the inconvenience he caused. In 1880, Field J announced he would fine Staffordshire special jurors £10 for each day of court they missed; but a decade later two common jurors were only fined 40s for failing to attend Coventry Quarter Sessions. During the early twentieth century, there are several further reports of jurors being rebuked for being late or absent, but fines appear to have been less common. This does not, of course, mean that the threat of fines stopped being part of a trial judge’s managerial arsenal, however, as two

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171 ‘News Notes’ Tamworth Herald (26 Jun 1880).
172 ‘Coventry: Absent jurors’ Coventry Herald (18 Oct 1889).
173 See, for example, ‘Grand Jurors Reubked: Late at the Notts Quarter Sessions’ Nottingham Evening Post (3 Jan 1916); ‘Grand Juryman Reubked’ Burnley Express (27 Oct 1928); ‘Grand Jurors Reubked’ Lancashire Evening Post (3 Jan 1931); ‘Court Waits for Absent Woman Juror’ Gloucester Citizen (15 Apr 1931); and ‘Jurors Reubked at Derby: Recorder’s comments on late-comers’ excuses’ Derby Daily Telegraph (16 Apr 1931).
Devon jurors learned when they received the following caution in 1934: ‘The administration of justice cannot go on if jurymen and jurywomen forget their summonses ... I could fine you heavily, but I do not propose to do so this time.’\textsuperscript{174} People who lacked a good reason for attending on time could still, well into the last century, be subjected at least to the threat of punishment for their ministerial failings.\textsuperscript{175}

Government records are less clear when it comes to those with a legal exemption from jury service, however. As late as 1930, the Treasury had to be asked whether an undischarged bankrupt could be imprisoned in lieu of a fine for non-attendance;\textsuperscript{176} and during the nineteenth century the liability of diplomats was also unclear (or at least variable). In 1854, when a member of Dutch consular staff contacted the Foreign Office in order to object to being threatened with a fine and imprisonment for non-attendance on a City of London jury,\textsuperscript{177} the Foreign Secretary came to the Dutch official’s aid, reminding the Lord Mayor’s Office of statutory provisions making it an offence to threaten foreign diplomats with imprisonment.\textsuperscript{178}

Thirty years later, when a Belgian official politely asked whether he should have been ‘amerced’ (ie fined) for non-attendance,\textsuperscript{179} the Home Office simply noted statutory provisions which did not include foreign diplomats in their list of excusable persons.\textsuperscript{180} This problem

\textsuperscript{174} ‘Late Jurors: Rebuked by Recorder at Devon Quarter Sessions’ \textit{Western Morning News} (6 Apr 1934).
\textsuperscript{175} As Howlin has demonstrated, nineteenth-century Irish jurors were very frequently fined large sums for non-attendance: Howlin, above n 21, 723-728. This, however, must be understood as part of the very different pressures facing jurors in this context.
\textsuperscript{176} While the Treasury ultimately concluded that he could lawfully be imprisoned for non-payment of his fine, it is worth noting that the Auditor of Sheriff’s Accounts described the juror’s punishment as ‘the first case of a fine of a Bankrupt within our recollection’. Note written by T Chadwick, 5 Feb 1930 (National Archives: T 162/148). Presumably the case reached the Treasury Solicitor’s office in part because of a lack of understanding about how juror punishment in such circumstances should properly be conducted.
\textsuperscript{177} Letter from Baron Bentick to the Earl of Clarendon, 5 Jan 1854 (National Archives: HO 45/5732).
\textsuperscript{178} Letter from Lord Wodehouse to H Waddington, 12 Jan 1854 (National Archives: HO 45/5732), citing 7 Ann c 12, s 4.
\textsuperscript{179} Letter from John W Foster to William Vernon Harcourt, 29 Apr 1885 (National Archives: HO 45/9653/A39468).
\textsuperscript{180} Note, 30 Apr 1885 (National Archives: HO 45/9653/A39468), citing 33 & 34 Vic c 77.
would eventually be resolved when, in the early 1920s, legislation was passed restricting the jury franchise to propertied voters (and therefore Englishmen);¹⁸¹ but the variable treatment of these Dutch and Belgian jurors in the nineteenth century hints at the possibility of a wider lack of principle in governmental approaches to juror punishment.

Women of the mid-twentieth century were, to borrow from TH Marshall, another class of potential jurors with a ‘peculiar’ legal status.¹⁸² Their liability to serve, and therefore their exposure to punishment, was complex. They were completely ineligible for jury service until 1920¹⁸³ and, as Logan has shown, there was over the following half-century a concerted effort among lawyers and judges to take advantage of rules enabling the exclusion of women from jury service.¹⁸⁴ The question of the punishment of women who chose not to serve still merits attention, however. In 1921, a Newquay woman was fined £5 for non-attendance;¹⁸⁵ although the preponderance of the evidence suggests women were generally permitted to excuse themselves. One judge, writing extra-judicially in 1921, claimed no jurors had been fined for non-attendance at London’s High Court for many years, and that with a little tact judges could protect the sensibilities of the ‘Victorian woman who has all her life protested against

¹⁸¹ Aliens of ten years’ residence were qualified (and therefore liable) to serve under Juries Act 1870, s 8, which stated that in this respect they should be treated ‘as if they had been natural-born subjects of the Queen’. The qualification of resident aliens was eliminated by the Juries Act 1922, s 1(2), which required juror lists to be constructed on the basis of electors lists. I am currently undertaking archival research into the role of the 1920s legislation in ensuring that a jury was composed predominantly of Englishmen. The Belgian official (John Foster) may have been English, although the tenor of his letter suggested he considered himself to be Belgian. Either way, Foster noted that ‘still the question of consular exemptions has never been settled’ (although the Home Office’s response suggests they disagreed); and between 1870 and 1922 propertied aliens resident in England for at least ten years were generally liable for jury service.


¹⁸³ The Sex Disqualification (Removal) Act 1919 was passed in December 1919, and so no summonses were able to be sent out to women until the following year.

¹⁸⁴ Logan, above n 28. The legal techniques adopted in England were more convolutedly legalistic than those used in New Zealand, for example, where women only became eligible for jury service if they took the positive step of registering their interest. See (National Archives: HO 45/24917/31).

¹⁸⁵ ‘Women Jurors’ The Times (1 Feb 1921). See also ‘Women and Jury Service’ The Times (5 Mar 1921), where two women applied ‘to have their names removed from the voting register in order that they might not be included in the jury list’. They were advised that this was not possible.
enfranchisement’. But in a 1928 trial where all three female jurors had asked to be excused, the Recorder characterised their request as ‘very deplorable’ and contrary to their ‘duty as citizens’. They were excused, however, and were subjected neither to fines nor to imprisonment.

The Newquay woman fined in 1921 for non-attendance had apparently explained that she ‘was not in agreement with the change in the law’, but this is the only evidence I have been able to find of punishment for ministerial offences motivated by conscience. The following year, a woman called to serve on a London grand jury claimed she would ‘not guilty’ everyone if she was forced to serve; and the Lord Mayor, having attempted to persuade her that ‘it would be an experience for you’, eventually relented. In 1923, the suffragists Eva Gore-Booth and Esther Roper refused to serve due to conscientious objections to participating in criminal punishment; and while their decision was attacked in the press, there is no evidence that they were formally punished. But judicial resistance to punishing these jurors was not only a reflection of unease about having female jurors: a Home Office book reports in 1928 a ‘Juryman with “conscientious obj” to serving who threatens to disagree with verdict of others whatever it might be. Told that such action would be a criminal offence’. Contemporaneous

187 ‘Women on Old Bailey Jury’ The Times (24 Mar 1928). See also ‘Women Jurors in Unpleasant Cases’ The Times (London, 4 Nov 1922), where McCardie J wondered aloud ‘how far it is wise to maintain the ideal of many men that women are purer and more dignified in the eyes of men if they are ignorant of … grim facts’; and when two out of three female jurors declined his offer to allow them to leave the jury, he expressed his ‘very high respect for the courage of these two ladies’.
188 ‘Women Jurors’ The Times (1 Feb 1921).
189 ‘Not Guilty to Everyone’ The Times (6 Sep 1922).
190 ‘Non-Resistance’ Evening Standard (10 Jun 1923). The barrister in Hawles’ influential 1680 dialogue on jury service dismissed similar arguments as ‘but general and weak excuses’: Hawles, above n 17, p 1 (EEBO image 99141: 2).
191 Home Office, above n 24, p 410. The original file has been destroyed. See also R v Schot; R v Barclay [1997] 2 Cr App R 383, where the Court of Appeal held that jurors should not have been proceeded against for contempt where they had expressed a desire not to serve for conscience reasons.
press reports reveal that he was not actually punished due to his name not being selected,\textsuperscript{192} however, making it impossible to tell whether this was simply a rhetorical threat, or whether the trial judge intended to follow it through. Either way, it is clear that the threat of fines for ministerial offences was still considered legitimate.

So how frequently were jurors punished for the straightforward ministerial offences of failing to attend court, or of refusing to serve? The first thing to note is that those cases which are preserved at the National Archives or were reported by the press are by definition unusual: if they were ordinary, uncontroversial cases, they would presumably have been resolved locally. It is therefore not unreasonable to conclude that more jurors must have been fined for non-attendance than those which survive in governmental records. This, in itself, suggests that punishment was considered acceptable for ordinary ministerial offences. There is, on the other hand, the claim of the early twentieth-century judge that London judges treated non-attendance pragmatically, in practice letting absentee jurors off without penalty, while simultaneously taking care to avoid advertising this fact. The evidence of local newspapers suggests that provincial courts took a similar approach, certainly by the early twentieth century. What we do know is that the practice of punishing jurors for ministerial offences was considered a legitimate way of governing jurors. At no point did the Treasury resolve that jurors should not be fined: they always restricted themselves to the question whether this fine, in these circumstances, should be remitted. Punishment for ministerial offences, then, operated as a normal part of jury management.

\textsuperscript{192} ‘Juryman will Judge Not: remarkable letter read in court’ \textit{Nottingham Evening Post} (6 Jun 1928).
Conclusions

The provisions of the Criminal Justice and Courts Act 2015 which create indictable offences of misconduct by a criminal trial juror are probably unprecedented in the modern history of English law. By moving away from contempt and into jury trial for quasi-judicial misconduct, the new provisions draw a sharp line between juror punishment pre- and post-2015. It is, however, possible to piece together a picture of how juror punishment has operated in the recent past; and it is important that this is in fact done, in order to gain a greater sense of the significance of the new offences. What has emerged here, in pulling together archival evidence, is a general resistance to the idea of juror punishment where jurors have acted in their judicial, rather than in their ministerial, capacity. But in practice the judicial-ministerial divide has acted more like a continuum than a hard distinction: the closer you are to the judicial end of the spectrum, the less likely it has been that a juror will be punished; and offences closer to being straightforwardly ministerial have been much more likely to result in punishment. Even here, however, there appears to have been a significant degree of prosecutorial discretion.

Even in the wholly ministerial category of offences, there is a lack of clarity about when jurors were and were not proceeded against. This is, to some extent, a consequence of the fragmentary nature of the surviving records: because juror punishment has not previously been considered a particularly important or controversial topic, files have not been bundled together, and many of the original records referred to in Home Office records have been destroyed. Ministerial offences only appear to have entered the cognisance of central government either when those punished have contacted the Treasury to ask to have their fines remitted, or when the circumstances were sufficiently noteworthy that newspaper cuttings were collected on the issue. While it would have been possible to explore how juror punishment was approached at individual Quarter Sessions and Assize Courts, this would have resulted in a fragmentary
analysis, with much less relevance to understanding the centralised reforms being pursued today. The surviving evidence at the National Archives and in the British Newspaper Archive demonstrates that punishment for ministerial offences was generally dealt with as a routine part of jury management. Juror punishment was much less problematic in straightforwardly ministerial circumstances than it was in the more contentious class of judicial offences.

There is limited evidence of jurors being punished for judicial offences; and even where jurors were punished for non-ministerial offences the problem remains of teasing out the factors which made punishment more or less likely. The quasi-imprisonment of Lathan and his co-jurors can probably be considered exceptional; but the picture is much less clear when considering quasi-ministerial offences such as embracery. Most of the time, the police, the government and the judiciary seem to have been more willing to develop strategies for managing away the problem. But sometimes the person attempting to influence the jury was prosecuted; and very occasionally a juror was also punished for being embraced. One reason for the scarcity of prosecutions for embracery was probably a lack of evidence. As the Home Office official put it in 1966, rejecting proposals to abolish double jeopardy for convicted embracers, the limited advantage of being able to retry such people ‘could hardly compensate for the trouble it could be expected to cause during the passage of the Bill’.

The new offences are only likely to be prosecuted rarely, where jurors have, for example, left printed evidence of their misconduct in the jury room after their deliberations have ended. What this article has demonstrated is that judges have traditionally been very cautious about formally proceeding against jurors suspected of misconduct touching upon their judicial function. Even in cases of embracery and perverting the course of justice, which were tried on indictment and were therefore not subject to the same level of judicial control as were summary contempt cases, there appears to have been a general reluctance to institute proceedings against jurors,
as opposed to the people accused of embracing or perverting them. The nineteenth-century
debates about whether the press or the judiciary were better placed to rebuke jurors felt to have
exercised their judgment improperly hint at a possible explanation: that the strictly judicial
aspect of the judge-jury relationship is ultimately rooted in an idea of the judge as tutor, rather
than as disciplinarian. Despite the new statutory offences’ stated aim of sending out a clear
message that juror misconduct is wrong, and will be dealt with seriously, this means juror
misconduct will probably be dealt with in most cases through practices designed to manage
away the problem, as was seen for example in the discussion of embracery above; and of course
ministerial offences will still be dealt with summarily. Juror punishment can, therefore, be
expected to carry on in much the same way as it did throughout the nineteenth and twentieth
centuries. And if this is so then the future of juror misconduct is unlikely to be radically
different from its recent past.