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What Happens in the Jury Room Stays in the Jury Room: *R v Mirza*, the Criminal Justice and Courts Act, and the Problem of Racial Bias

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Abstract

This article argues that courts' refusal to consider juror testimony about deliberations and the laws restricting jurors from speaking about deliberations prevent defendants from seeking adequate redress for juror racial bias. The article first presents a brief history of the common law and statutory foundations of jury secrecy under English law. I then argue that juror racial bias uniquely threatens the right to an impartial tribunal and that other safeguards are not necessarily adequate to ameliorate or prevent bias during deliberations. English courts have historically upheld jury secrecy by holding that the interests of finality and candour outweigh the injury done to a defendant by juror racial bias, as exemplified in *R v Mirza*. While the Criminal Justice and Courts Act 2015 does make some changes to jury secrecy law — mainly by allowing jurors to report some forms of misconduct that occur during deliberations — this article argues that the Act inadequately protects defendants. The Act's reporting provisions are overly complex, largely non-adversarial, and too focused on enabling the prosecution of jurors who commit misconduct. I argue that a reform of this Act to more explicitly focus on

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protecting defendants from juror misconduct — and in particular, juror racial bias — is necessary to better secure defendants' fair trial rights.

Keywords: law of juries, criminal procedure, racial bias and the law, jury secrecy, fair trial rights

I. Introduction

The pithy tourism slogan for the city of Las Vegas — "what happens in Vegas, stays in Vegas"[1] — would be an apt slogan for the English jury room, too. The criminal law, of course, relies on various forms of compartmentalisation and regulated disclosure of information. For example, judges prevent juries from considering inadmissible evidence, so that the jury might see only what is legal and relevant. With regards to juries, the English law restricts everyone, including the courts themselves, from examining what occurs when the jurors retire and deliberate.[2] Jury secrecy in the English legal system is maintained by two legal instruments — a prohibition on inquiry into the jury room and a prohibition on speaking out from the jury room. The former, Mansfield's rule, prohibits courts from considering juror testimony to undermine or overturn a conviction. The courts cannot, in a legal sense, 'see' what occurs in the jury room. As to the latter, jurors face criminal penalties they face if they disclose their deliberations. The jury room becomes a space set apart, legally speaking.

This secrecy becomes problematic when something goes awry in the jury room. After all, one important thing that happens in the jury room does not stay inside of it — the verdict. A jury's decision-making, though secretive and based on a limited universe of information, has real consequences for the defendant. If a juror commits misconduct, the available remedies are limited by jurors' inability to report the issue and courts' inability to grant relief based on juror testimony. Given the historic and present racial injustices in the criminal legal system, one of the most concerning scenarios is when a juror makes racially prejudiced remarks during deliberations. This type of bias is anathema to the impartial tribunal to which all defendants are entitled, but jury secrecy obstructs the court from giving

1 Samantha Shankman, 'A Brief History of "What Happens in Vegas Stays in Vegas' *The Week* (New York, 1 October 2013) https://theweek.com/articles/459434/brief-history-what-happens-vegas-stays-vegas accessed 3 May 2021.

2 With apologies to the Welsh, I use 'English legal system' and variants thereof throughout this Article to refer to the unified criminal legal system of England and Wales. While the Welsh government has some devolved powers with regard to criminal justice, it does not have such powers over any matters at issue in this Article, such as juries or criminal procedure.

the defendant any relief. The law on jury secrecy is constructed so as to wilfully obscure racial bias from the view of the courts.[3]

This article explores the conflict of jury secrecy and racial bias, particularly through the lens of the Criminal Justice and Courts Act 2015 and *R v. Mirza*.[4] The latter was a 2004 case before the House of Lords, in which the Law Lords refused to admit evidence of a juror's racial bias to quash the defendant's conviction. The former went part way toward removing the gag from jurors; the Act created some exceptions, in the event of juror misconduct, to the blanket bar on jurors' disclosure of deliberations. The Act, though, is insufficient. Intended mainly as an instrument to prosecute jurors for misconduct, the Act does not include racial bias amongst its exceptions. Furthermore, its process for reporting misconduct is unwieldy, non-adversarial, and would have a chilling effect on jurors reporting misconduct.

Section II of this article presents a brief history of juror secrecy and Mansfield's rule. These features are not necessarily as long-standing a part of the English legal system as they are often portrayed, but they nonetheless have found broad purchase in the courts. Section III analyses the conflict of racial bias and jury secrecy in *Mirza.* Racial bias is a paramount threat to the jury system — both to the rights of the individual defendant and the legitimacy of the system as a whole. Section IV catalogues the accomplishments and shortcomings of the 2015 Act. In particular, the Act fails to create a workable structure for handling the types of jury bias present in *Mirza*. Section V proposes appropriate reforms to the 2015 Act, balancing the need for finality and confidentiality in jury verdicts with the guarantee of an impartial, unbiased jury. Few, if any, cases have dealt with the Act's jury secrecy provisions; this area of law is ripe for legislative intervention to strengthen it before another wrenching test case of racial bias occurs. If the English justice system truly intends to treat each defendant without fear or favour, it must open the door to the jury room at least a crack; only then can defendants gain adequate relief when racial bias taints their convictions.

II. A Brief History of Jury Secrecy

A. Statutory jury secrecy

English jury secrecy is a product of both common law and statute, which operate in tandem. As to the latter, a number of statutes serve to prevent jurors from disclosing information from deliberations. The former is applied not to the jurors but to the courts; they are barred by common law from considering juror

[3] While I refer throughout to 'racial bias,' the Equality Act of 2010 includes discrimination based upon ethnicity, nationality, national origin, and colour as racial discrimination.

[4] *R v Mirza* [2004] UKHL 2.

testimony to quash a conviction. Thus, the courts must wilfully refuse to consider some forms of misconduct that might occur in the jury room. I will first detail the history of statutory jury secrecy in modern English law; the next section will consider the common law basis for excluding juror testimony.

The proceedings of English juries are secret; no information from their deliberations (save the verdict, of course) may be disclosed by the jurors nor solicited from them. While courts often cite this principle as a long-standing part of the common law, its actual origins are unclear.[5] The recent modern history of the principle in common law and statute is well-documented. As to the common law basis, in the 1962 case *R v Thompson,* Lord Parker held for the Court of Appeal that jury deliberations were to be secret and not enquired into by the court, nor anyone else.[6] Some 19 years later, Parliament enacted the Contempt of Court Act 1981, providing a statutory basis for the secrecy of jury deliberations. The 1981 Act barred divulging jury deliberations, making it a criminal offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".[7] The Act provided for imprisonment of up to two years as a penalty.[8]

The practical limits of this secrecy have been tested most acutely in instances of juror misconduct. This gag rule also hinders the government's ability to prosecute and combat other forms of juror misconduct, as jurors cannot reveal what occurred in deliberations. In some cases, where juror misconduct has occurred outside of the deliberation room, courts have held that disclosing and considering this information is not barred.[9] English courts have repeatedly held that misconduct occurring inside the jury room could not be divulged outside it, though. The Act did, in theory, make a small exemption: Testimony that encompassed jury deliberations could be used in giving evidence for an "offence committed in relation to the jury".[10] In practice, this exception was usually construed so narrowly as to be useless; the exception allowed for jurors to give this information in court, but

5 Pamela Ferguson, 'The Criminal Jury in England and Scotland: The Confidentiality Principle and the Investigation of Misconduct,' (2006) 10 International Journal of Evidence & Proof 180, 181. This article provides an excellent treatment of the state of jury secrecy law in 2006 along with a comparative treatment of English and Scots law.

6 *R v Thompson* [1962] 4 Cr App R 72.

7 Contempt of Court Act 1981, section 8

8 ibid, Section 14.

9 *R v Young* [1995] QB 324. In this case, the court held that evidence of jurors engaging in a séance to aid in their deliberations was admissible, because it occurred in a hotel, not in the deliberation room. For a good exposition of this case, and of other jury secrecy rulings, see generally Lord Robert Reed, 'The confidentiality of jury deliberations' (2003) 37 The Law Teacher 1.

10 Contempt of Court Act 1981 (n 7) [8].

there was no provision for them to ever notify anyone about the jury misconduct in the first place. For example, in *Attorney General v Scotcher*, the House of Lords upheld the conviction of a juror who told the mother of the defendant information that he believed revealed juror misconduct.[11] If jurors could not notify anyone of misconduct after a verdict without facing prosecution, it made little difference that the 1981 Act allowed for them to give evidence in criminal proceedings regarding that misconduct. The seal of the jury room made sure that misconduct would remain unknown.

B. Mansfield's rule

Of course, the ability of jurors to speak about misconduct would only be a partial step towards remedying that misconduct; it is also necessary that the court be willing to consider that testimony and provide relief to the defendant. Yet the English legal system has been deeply resistant to allowing jurors to impeach their own verdicts via affidavit or testimony. In the 2010 case *R v Thompson*, for example, the Court of Appeal held that it could not admit any evidence of juror misconduct involving internet research during deliberations, even if jurors would not face prosecution for disclosing that information.[12] The common law rule against juror testimony prohibits courts from 'seeing', in a legally meaningful way, juror misconduct that might threaten a conviction.

This rule's current form follows from the judgment of Lord Mansfield in two late 18th-century cases, *R v Almon* and *Vaise v Delaval*, in which he barred juror testimony that the verdict had been reached by a game of chance.[13] This rule has hence sometimes been termed 'Mansfield's Rule,' particularly in the United States of America, where it was adopted in the Federal Rules of Evidence.[14] Yet the actual historical roots of this practice prior to 1785 are murky. Several cases decided by English courts in the years prior to *Vaise* held that juror testimony about various forms of misconduct during deliberations could be admitted to impeach a conviction.[15] For example, in *Metcalfe v Deane*, the court admitted evidence concerning the jurors undertaking investigation and questioning on their own.[16] In *Prior v Powers*, the court similarly heard evidence that the jurors arrived at a decision

[11] *Attorney General v Scotcher* [2005] UKHL 36.
[12] *R v Thompson* [2010] EWCA Crim 1623.
[13] *R v Almon* [1770] 98 ER 411 (KB) and *Vaise v Delaval* [1785] 99 ER 944 (KB).
[14] US Federal Rule of Evidence 606(b).
[15] Andrew Hull, 'Unearthing Mansfield's Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition' (2014) 38 Southern Illinois University Law Review 403, 411–412.
[16] *Metcalfe v Deane* [1590] 78 ER 445 (QB) 445 cited at Hull (n 15) 411.

via coin toss.[17] Hence, the historical precedent for the common law's exclusion of juror testimony is not so certain.

Nonetheless, the inadmissibility of juror testimony has remained constant in modern English law. The usual justification for this testimony's inadmissibility is two-fold. First, the finality of a jury's verdict is valuable. Admission of testimony from a small number of jurors afterwards would consistently throw criminal convictions into doubt; such a problem could be especially bad following convictions by majority verdict, where a disgruntled juror in the minority could assail the verdict. The courts, the government, and the victim all benefit from convictions being final. *R v Qureshi* affirmed the particularly sacrosanct nature of jury deliberations after a verdict has been reached, given the emphasis on finality.[18] Secondly, the admissibility of juror testimony would incentivise defence counsel and other parties to place pressure upon jurors to reveal their deliberations in hopes of finding a ground for appeal. This pressure would in turn undermine the candour of jurors during deliberations. In *Ellis v Deheer*, Lord Justice Atkin cited these two reasons for refusing to admit juror affidavits of misconduct, writing,

> "to my mind it is a principle which it is of the highest importance in the interest of justice to maintain, and an infringement of the rule appears to me a very serious interference with the administration of justice".[19]

The European Court of Human Rights further held in *Gregory v United Kingdom* that the inadmissibility of juror testimony was a "crucial and legitimate feature of English trial law",[20] and allowable under European human rights laws. Finally, restrictions on post-conviction investigation in other jurisdictions, such as the U.S., also cite these same rationales.[21]

Court judgments usually refer to jury secrecy as an established part of the common law, rather than statute. In *R v Andrew Brown*, which the Lords cited in *Mirza,* the Supreme Court of New South Wales held that juror testimony would be always inadmissible.[22] Chief Justice Darley wrote, "I have come to the conclusion that the authorities are all one way, and that the Court cannot look at the affidavits of jurymen for any purpose, whether it be for the purpose of granting a new

[17] *Prior v Powers* [1734] 94 ER 993 (KB) 993 cited at Hull (n 15) 412.

[18] *R v Qureshi* [2002] 1 WLR 518.

[19] *Ellis v Deheer* [1922] 2 KB 121.

[20] *Gregory v United Kingdom* [1997] 25 EHRR 577 [44].

[21] Kathryn E Miller, 'The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases' (2018) 106 California Law Review 160.

[22] At the time, New South Wales was under British law and jurisdiction, with Australia gaining independence in 1942.

trial, or for the purpose of establishing the misconduct of a juryman".[23] Even after jury secrecy laws were passed in the late-20th century, the Court of Appeal found that juror testimony is inadmissible under the common law for the purposes of establishing juror misconduct.[24] Lord Justice Kennedy wrote for the court in *Miah and Akbar*, "the barrier to the reception of material is not to be found in the 1981 Act. It is to be found in a long line of authorities".[25] Thus, the common law prohibition of admission of juror evidence to impeach convictions appears resistant to modern legal challenges. While its well-established nature is often cited by courts to support the rule, some pre-modern cases call into question whether it has always existed in its present form.

The traditional rationale for jury secrecy has been that the harm of breaching that of secrecy outweighed the injury suffered due to undiscovered juror misconduct. Some later statutes, nevertheless, do begin to recognise the harm that jury misconduct can do. For example, the 1981 Act, by allowing prosecutions for juror misconduct, allows the state to seek remedy when its interests are harmed by juror misconduct. When an offence is committed against the jury, however, both the state and defendant are harmed; the defendant suffers from the loss of an impartial tribunal deciding the case solely based on the evidence. Yet the 1981 Act solely provides relief to the state. Mansfield's Rule denies relief to the defendant by disallowing the courts from considering juror testimony to overturn the verdict. This dearth of remedies for the defendant following juror misconduct is the crux of the issue surrounding juror racial bias.

III. The Problem of Racial Bias and Jury Secrecy

A. Bias runs up against secrecy: *Mirza*

Racial bias on the part of jurors poses a particularly thorny challenge to both juror secrecy and the admissibility of juror testimony. A defendant tried by jury has the right not only to a jury that is correct in its composition and deliberates on the evidence to reach a verdict, but also to an impartial jury.[26] The impartial jury must be free from personal prejudices or biases.[27] Yet the absolute secrecy of the jury room shelters whatever biases might arise during deliberations from the scrutiny of the court. Indeed, *Qureshi*, the case that held juror testimony to

[23] [1907] 7 NSW State Reports 299.
[24] *R v Miah and Akbar* [1996] EWCA Crim 1653.
[25] ibid.
[26] *Ferguson* (n 5) 188.
[27] *Pullar v UK* [1996] ECtHR 23.

be always inadmissible, concerned racism in the jury room.[28] This conflict again shone through in the case of *R v Mirza*, which was considered before the House of Lords.[29] In this case, a Pakistani-British man appealed his conviction for several sexual offences against children on the grounds that a juror's racial bias against him tarnished the conviction. Specifically, he contended that the jury drew adverse inferences against him for his use of an interpreter and used racially biased reasoning and language in doing so. The House of Lords held that the rules of jury secrecy must prevail and that this evidence would be inadmissible to quash his conviction. Both the majority and dissent frame the question of *Mirza* similarly: *Does the threat of racial bias outweigh the public policy interests served by jury secrecy, given other methods of reducing jury bias?*

The majority's balancing act came down on the side of jury secrecy, finding that it outweighed the defendant's interests in admitting the juror testimony. The Lords in the majority began by noting the great consideration usually given to the historic justifications for jury secrecy: finality and candour of deliberations. Referring to these two factors, Lord Slynn held, "if there can be a review of what happens between jurors, whether in the jury box or in the jury room, the advantages relied on as justifying the rule will disappear or fundamentally be diminished".[30] Lord Slynn added another connected justification for jury secrecy, too — public confidence. He expressed concern that allowing such testimony would give rise to false or spurious allegations, undermining the jury system.[31]

On the other side of this balancing test, the majority argued that safeguards such as random selection would help minimise bias and made the Lords' ruling compatible with Article 6 of the European Convention on Human Rights.[32] Thus, they argued that juror bias could be adequately combatted without enquiring into juror deliberations. Lord Hope additionally argued that, in other jurisdictions which had applied this balancing test, the interest in juror secrecy outweighed even egregious juror misconduct. He cited an American case where the U.S. Supreme Court refused to admit evidence of jurors using alcohol, marijuana, and cocaine during the trial and deliberations.[33] The majority in *Mirza* concluded that the public policy implications of Mansfield's rule such as finality, candour of deliberations, and public confidence outweighed the threat of racial bias, given the

[28] *Qureshi* (n 18).
[29] *Mirza* (n 4).
[30] ibid [52].
[31] ibid [53].
[32] Gillian Daly, 'Jury Secrecy: *R v Mirza*; *R v Connor and Rollock*' (2004) 8(3) The International Journal of Evidence & Proof 186, 188.
[33] *Tanner v United States* 483 US 107 (1987) cited at *Mirza* (n 4) [98].

other methods judges could use to prevent such bias. This balancing act kept the jury room as a chamber of secrets.

Lord Steyn's dissent in *Mirza* ostensibly rejected this balancing act framework, voting instead to grant Mirza's appeal and quash the conviction. Lord Steyn wrote of balancing jury secrecy and the right to an impartial jury,

> "one is not dealing with a cost/benefit analysis: a miscarriage of justice bears on real individuals, their families, and communities. If the law requires individual cases to be subordinated to systemic considerations affecting the jury system, one may question whether the law has not lost its moral underpinning".[34]

Lord Steyn's assertion, however, was not wholly correct; he was, indeed, doing something of a cost/benefit analysis, but he viewed the costs of racial bias as simply too high to ever justify the benefits of secrecy. Stressing the crucial importance of an impartial tribunal as a matter of "elementary law", he argued that ignoring a blatant instance of racial bias amongst jurors, and refusing to even investigate further, would undermine this right and public confidence in the jury system.[35] The 'elementar[iness]' of the principle of impartiality, in Lord Steyn's dissent, would overpower state's interest in finality. Ultimately, both the majority and Steyn identify the same key principles in assessing the case — the right to an impartial jury, the policy implications of secrecy, and alternatives to correcting bias — but resolve the balancing act differently. Indeed, these same factors reoccur in this article's analysis of the Criminal Justice and Courts Act 2015 in sections IV and V.

B. Why does racial bias threaten juries?

(i) Bias Undermines the Impartial Tribunal and the System's Legitimacy

Racial bias denies the defendant a fair trial, a fundamental right protected under Article 6 of the European Convention on Human Rights and thus incorporated into UK law.[36] In the case *Sander v United Kingdom*, the European Court of Human Rights considered whether a judge's admonition to the jury in the summing-up was enough to ensure a fair trial after a juror reported other jurors making racist jokes. [37] The court concluded that it was not; trial by such a

[34] *Mirza* (n 4) [5].
[35] ibid [5].
[36] Human Rights Act 1998.
[37] *Sander v United Kingdom* [2000] ECtHR 19.

partial jury violated the Convention.[38] In its judgment, the court noted, "[i]t is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused".[39] Insofar as the jury was biased, this trust was grievously undermined; not only the defendant, but the legal system as a whole, was harmed.

Racial bias should be of special concern to criminal justice policymakers. Black people and other racial and ethnic minorities are disproportionately represented amongst defendants and prisoners in the English criminal justice system.[40] The racial disproportionality in the English prison system has, at times, outpaced even that of the United States.[41] Many of the moral panics over crime in British society are intrinsically tied up with anti-Black racism.[42] Racial bias is a unique problem for juries because it is a uniquely harmful problem for the entire criminal legal system.

The role of the jury, however, vis-à-vis racial bias is complex. On the one hand, juries — even all-white juries — tend to convict defendants of all races at relatively similar rates.[43] Conversely, a body of evidence in social psychology indicates that negative stereotypes associating racial and ethnic minorities with criminality are common throughout the population.[44] One study using mock civil juries in the U.S. showed that jurors perceived Black defendants as more culpable, especially those with stronger accents.[45] The problem, though, is that no one has any sense of the scope of this problem because jury deliberations are so secretive. Indeed, the Contempt of Court Act prohibits any research into actual jury decision-making; the research on racial bias conducted thus far has only used mock juries.[46] At the same time, the perceived legitimacy of the jury system, especially in the eyes of citizens from marginalised racial and ethnic groups, does not necessarily concord with empirical findings on jury verdicts. Trust in juries is high generally

38 ibid.

39 ibid [22].

40 David Lammy, 'The Lammy Review: An independent review into the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the Criminal Justice System' (8 September 2017) < https://www.gov.uk/government/publications/lammy-review-final-report>.

41 Michael Tonry, 'Racial Disproportion in US Prisons' (1994) 34 British J of Crim 97.

42 Coretta Phillips and Ben Bowling, 'Ethnicities, Racism, Crime, and Criminal Justice' in Alison Liebling, Shadd Maruna, and Lesley McAra (eds.), *The Oxford Handbook of Criminology* (Oxford University Press 2017) and Paul Gilroy, 'The Myth of Black Criminality' (1982) 19 Socialist Register 46.

43 Cheryl Thomas, 'Are Juries Fair?' (2010) 1/10 Ministry of Justice Research Series, 16.

44 Gillian Daly and Rosemary Pattenden, 'Racial Bias and the English Criminal Trial Jury' (2005) 64(3) Cambridge LJ 678, 681.

45 Jason A Cantone et al., 'Sounding Guilty: How Accent Bias Affects Juror Judgments of Culpability' (2019) 17 Journal of Ethnicity in Criminal Justice 228, 245.

46 Daly and Pattenden (n 44) 679.

across the population, but it is typically higher amongst White people.[47] That jury research has shown that most juries are fair does not mean that the legitimacy ascribed to them reflects that.

Additional safeguards would vitally improve trust in juries, particularly amongst racial groups that disproportionately seek jury trials. Black and Asian defendants are more likely than white defendants to plead not guilty and have their case tried by a jury in Crown Court.[48] Thus, maintaining confidence in the jury system amongst Black and Asian communities is paramount. Even one instance of racial bias deprives the defendant of an impartial jury. Though some reports of racial bias might be false or frivolous, they must all be dealt with because any given allegation might be true and could do incredible harm to that defendant; the possibility of this costly and time-consuming process is the only choice that ensures the impartiality of the jury.[49] Additionally, if such an accusation were made about a judge or magistrate, it would be thoroughly investigated.[50] To suspend such investigation for a jury seems inconsistent, especially given that judges and juries are governed by the same legal standard for impartiality.[51] The benefits of the improved legitimacy of the system, and remedying even a minimal number of

[47] Valerie P. Hans, 'Jury Systems Around the World' (2008) 305 Cornell Law Faculty Publications Paper 276, 282.

[48] Cheryl Thomas, 'Ethnicity and the Fairness of Jury Trials in England and Wales 2006-2014' (2017) 11 Crim LR 860, 867. This fact is somewhat difficult to square with the higher trust in juries amongst White people; what this statistic might indicate is that, while people from racial and ethnic minority backgrounds trust juries less, they trust other criminal justice players such as judges even less than that—and hence opt for trial by jury more often.

[49] John Spencer, 'Did the Jury Misbehave? Don't Ask, Because We Do Not Want to Know' (2002) 61(2) Cambridge LJ 291, 293.

[50] Daly and Pattenden (n 44) 696.

[51] *R v Brown* [2001] EWCA Crim 2828.

wrongful convictions, are justification enough for increasing scrutiny on racial bias amongst juries.[52]

(ii) Pre-verdict Safeguards Against Bias Are Inadequate

Of course, the jury system has numerous safeguards besides post-verdict investigation that are intended to guard against a racially biased conviction. Most of these protections do not offer adequate assurance of an impartial jury, though. The chief four safeguards include the jury oath, random jury selection, unanimous decision-making, and the ability to report misconduct to the judge prior to a verdict.[53] Taking these in turn, a momentary oath is unlikely to change long-held prejudices. In *Sander*, the Strasbourg Court wrote, referencing later warnings from judges, "generally speaking, an admonition or direction by a judge, however clear, detailed and forceful, would not change racist views overnight".[54] Recent psychological work shows that even longer trainings on implicit bias likely lose any effect after a few hours.[55] Hence, oaths or warnings are not likely to actually reduce juror bias.

Random jury selection is theoretically a good way to ensure a diverse set of jurors, including with regard to race. But random selection might just as easily include a racially biased juror. As Darbyshire argues, "random selection may throw up juries which are all male, all Conservative, all white".[56] Without the ability to question jurors on their views, defendants have no safeguard to ensure a racist

[52] These concerns about racial bias and juries have focused on wrongful convictions; racial bias might flow the other way, too, leading to perverse acquittals of groups for which a juror has a favourable prejudice. One rather practical reason for the focus on wrongful convictions is that the possibilities for appealing a wrongful acquittal are much narrower than for appealing a wrongful conviction, given the limited circumstances for re-prosecution under the Criminal Justice Act 2003. Hence, courts have not had to contend with a prosecutor appealing a wrongful acquittal on the ground of positive racial bias. The second, more normative, argument is that a wrongful acquittal is less severe a miscarriage of justice than is a wrongful conviction. This argument stems from Blackstone's ratio — better 10 guilty people be let free than one innocent person be convicted. The legal system has a broad and long-standing commitment to weighing the risk of wrongful conviction more heavily than that of wrongful acquittal.

[53] Daly and Pattenden (n 44) 685.

[54] *Sander* (n 37) [30].

[55] Calvin Lai et al., 'Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time' (2016) 148(8) J Exp Psychol Gen 1001.

[56] Penny Darbyshire, 'The Lamp That Shows That Freedom Lives – Is It Worth The Candle?' [1991] Crim LR 740, 745.

juror is not seated.[57] Furthermore, defendants have no right to a racially diverse jury, as the Court of Appeal held in *R v Ford*.[58]

The requirement that the jury reaches a unanimous verdict might also be a helpful safeguard against the prejudices of a majority. The introduction of majority verdicts on English juries undermines this safeguard.[59] One or two individuals who object to a biased verdict could be overruled by the rest of the jury. A majority verdict is of particular concern in the trial of a racial or ethnic minority defendant, because it could exclude a small number of racial and ethnic minority members on the jury, essentially allowing an all-white majority to decide the verdict.[60] Of course, the counterargument is that majority verdicts allow the jury to exclude the voice of a small number of biased jurors and that the majority verdict is itself a safeguard.[61] In any case, it would be foolish to rely on either unanimous or majority verdicts to protect from racial bias in every case — both have their flaws. The manner of voting cannot scrub bias from that decision-making process.

Finally, no jury secrecy law precludes jurors from drawing the judge's attention to misconduct or bias before a verdict is rendered. Judges might then warn or discharge the jury. Certainly, it is preferable that misconduct or bias be reported immediately, and the jury discharged, saving the defendant from a wrongful conviction and appeal. The costliness and time-intensiveness of a new trial often mean that a warning is given instead, though. As mentioned earlier in the *Sander* ruling, a simple warning is hardly effective at overcoming a biased jury.[62] Additionally, jurors often fail to report misconduct during the case or deliberations. They might fully realise its implications only after the verdict is rendered or feel pressure not to report the misconduct of a fellow juror in court. *Sander* is a good example here, too: The juror who initially reported the misconduct was clearly identified to the rest of the jury and was then pressured by them to sign a letter recanting the allegation of bias.[63] While reporting misconduct before the verdict is preferable for all parties, in reality, jurors often report afterwards. Even when they do report bias during the trial or deliberations, the common remedy of a warning

57 Daly and Pattenden (n 44) 685.

58 *R v Ford* [1989] 89 Cr App R 278.

59 Criminal Justice Act 1967, section 13.

60 Indeed, the United States Supreme Court ruled in *Ramos v Louisiana* 590 US ___ (2020) that non-unanimous jury verdicts violate a defendant's constitutional right to a jury trial. Majority verdicts had been used for a long time as a way to functionally exclude Black jurors, particularly in Southern states, by allowing 10 White jurors to decide the case (2).

61 Daly and Pattenden (n 44) 687.

62 *Sander* (n 37) [30].

63 ibid [29].

is insufficient. None of these other safeguards are adequate to address juror bias that is revealed after the verdict.

The balancing test employed in *Mirza* weighed jury secrecy against the safety of the defendant's conviction. Contrary to the Lords' majority in that case, however, racial bias so heavily threatens the integrity of both an individual conviction and the legal system as a whole that it outweighs the public policy interests in secrecy. Furthermore, the other safeguards in which the *Mirza* majority places faith are ineffective remedies for juror bias. *Mirza*'s balancing test was incorrect in that it failed to give enough weight to the threat of racial bias and gave too much weight to these alternatives to admitting juror testimony. The next section will argue that the Criminal Justice and Courts Act 2015, though an improvement, still fails to properly assess and combat the threat of racial bias.

IV. The Criminal Justice and Courts Act 2015 Falls Short

A. The 2015 act: a solution to juror misconduct?

The Criminal Justice and Courts Act 2015 allowed jurors to speak about deliberations in a few instances and created statutory exceptions to juror secrecy with regard to juror misconduct. This Act ostensibly filled part of the great legal void left by *Mirza*, *Scotcher*, and other cases. Even prior to *Mirza*, legal commentators had identified the lack of a procedure for investigating juror misconduct as an issue. Lord Justice Auld, in his 2001 review of the criminal courts, advocated for amending the Contempt of Court Act 1981 to allow for judicial investigation into "alleged impropriety by a jury, whether in the course of its deliberations or otherwise".[64] The Law Commission, in a 2013 report, also called for Parliament to create a limited exemption from prosecution for jurors to discuss their deliberations in reporting misconduct or a miscarriage of justice.[65] The Criminal Justice and Courts Act partially met these demands by creating exactly that limited manner of reporting.

The 2015 Act addressed a broad range of topics, touching on both civil and criminal proceedings. Its provisions on juries are focused on jury secrecy, though the Act did also raise the maximum eligibility age for jury service to 75.[66] The Act's jury secrecy provisions can be grouped into four categories: new regulations about electronic devices, new jury misconduct offences, exceptions to the bar on disclosing deliberations, and disqualification of those committing jury offences.

[64] Lord Justice Robin Auld, *Review of the Criminal Courts of England and Wales: Report* (2001) 173.

[65] Law Commission, Contempt of Court (1): Juror Misconduct and Internet Publications (Law Com No 340, 2013) 95.

[66] Criminal Justice and Courts Act 2015, Section 68.

The first and final of those categories enacted fairly straightforward changes: Judges can now order jurors, in certain instances, to surrender electronic devices and enlist court officers in enforcing that prohibition.[67] Additionally, jurors who are convicted of misconduct will be barred from jury service for 10 years.[68]

The main portion of the 2015 Act concerning juries is devoted to amending the Juries Act 1974 to create new offences for juror misconduct and exceptions to those offences. Sections 71 and 72 of the Act make it a crime under the Juries Act — rather than simply a form of contempt under the common law — for jurors to conduct their own research or share it with other jurors.[69] Section 73, somewhat tautologically, prohibits jurors from engaging in "prohibited conduct". Offering a definition, the law clarifies that, "'prohibited conduct' means conduct from which it may reasonably be concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue".[70] Finally, Section 74 makes it an offence under the Juries Act to disclose the content of jury deliberations.[71] Each of these crimes is punishable by a fine, up to two years' imprisonment, or both. Section 74 also creates a list of exceptions under which jurors may disclose deliberations.

In these exceptions, the Act lays out both the acceptable reasons for disclosure and the people to whom jurors may disclose information. The two reasons for which a juror may disclose deliberations under Section 74 are if

> "an offence or contempt of court has been, or may have been, committed by or in relation to a juror in connection with those 'proceedings' or 'conduct of a juror in connection with those proceedings may provide grounds for an appeal against conviction or sentence".

Either condition alone is sufficient to justify disclosure. No further definitions are given in the Act for these terms, a shortcoming I will discuss in section IV.B.(iii).

[67] ibid [69-70].

[68] ibid [77].

[69] Judges could sanction jurors for contempt, a feature of the common law, before this legislation, and they still can do so after the Act's passage. The new offences created by the 2015 legislation would be statutory offences triable before a jury in the Crown Court, unlike contempt. Some advocates of the law maintained that this threat of sanction via parliamentary statute, instead of judicial warning, would provide extra power to judges' admonitions to jurors. A.T.H Smith, 'Repositioning the law of contempt: The Criminal Justice and Courts Act 2015' (2015) 11 Crim LR 845, 849.

[70] Criminal Justice and Courts Act 2015, Section 73.

[71] This section additionally supersedes the Contempt of Court Act 1981's prohibition on revealing deliberations, though the prohibition is quite similar—the main change arises in the exceptions.

Jurors are allowed to report these two scenarios to the trial judge, the Court of Appeal, the registrar of criminal appeals, the Criminal Cases Review Commission, or the police. Section 74 also allows jurors to report to a "member of staff of [the trial] court who would reasonably be expected to disclose the information only to a person mentioned in paragraphs (b) to (d)", although the exact interpretation of such a phrase is unclear.

The creation of new offences and the reporting exemptions should not be seen as separate parts of the law, but as an integral whole; the provisions for reporting misconduct were loosened precisely to enable the investigation and prosecution of the misconduct offences the Act creates. The intent of the legislation's jury provisions, as reflected in parliamentary debate, focused on the new prohibitions on juror research and misconduct.[72] Members of Parliament particularly spoke on the new prohibitions against internet research; members variously expressed the purpose of the jury sections as, "modernising the law on the work of juries,"[73] or ensuring "the law on jurors and the use of the internet keeps up to date with the march of technology".[74] Eliminating this type of juror misconduct will likely protect defendants, but the Act's exceptions to jury secrecy should properly be seen as a necessary tool for the Crown to prosecute juror misconduct, rather than as a defendant's rights law. For this, and several other reasons, the Act does not adequately solve the dilemma left open by *Mirza*.

B. The act ultimately proves inadequate

(i) The Act's Reporting Provisions Are Overly Institutional and Not Adversarial

The first major limitation of the Criminal Justice and Courts Act is its overly institutional and prosecutorial reporting structure. When a juror commits misconduct, that misconduct harms both parties in the case. The Crown is harmed by the deprivation of a fair jury, the weakening of jury secrecy, and in the case of misconduct that arises after a verdict, the inability to prosecute the case again in most circumstances.[75] The defendant is harmed because of the deprivation of an

[72] It is worth noting that little of the debate in the House of Commons focused specifically on the jury portion of the Act; the debate over sentencing and parole provisions drew much more attention. What discussion there was of the jury sections was relatively non-controversial. The bill received its first reading in the House of Commons on 5 February 2014, its first reading in the House of Lords on 18 June 2014, and the Royal Assent on 12 February 2015.

[73] HC Deb 24 February 2014, Vol 576, Col 52.

[74] HC Deb 24 February 2014, Vol 576, Col 64.

[75] The Criminal Justice Act 2003 allows for some appeals from perverse acquittals, but generally in the limited cases of particularly severe offences and with the consent of the Director of Public Prosecutions.

impartial jury and fair trial. Yet the Criminal Justice and Courts Act focuses on the harm done to the Crown, not the defendant.

Consider, for example, the means by which misconduct might be reported. The Act states that, after a verdict, a juror might disclose misconduct to the judge (or other court staff), Court of Appeal, registrar of criminal appeals, Criminal Cases Review Commission, or police.[76] The Act then states that the Court of Appeal or registrar of criminal appeals may disclose this information to defence counsel, if they believe it could be a ground for appeal.[77] This procedure, though, places too much power over disclosure into the hands of the judiciary, rather than the defence counsel. The adversarial tradition of the English legal system is intended to place more power into the hands of the parties to the case, rather than with an inquisitorial judge. In Blackstone's formulation:

> "[t]he impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many".[78]

The Act's trust in the Court of Appeal or registrar of criminal appeals to disclose information to the defence relies upon consistently trustworthy people occupying those roles—as is doubtless usually the case. But an adversarial system does not rely on the goodwill of those in power. It rests upon giving power to the opposing parties.

The Crown Prosecution Service, in its guidance to prosecutors, does countenance the possibility that a juror might report misconduct in deliberations directly to defence counsel. In these instances, the guidance states that it might not be in the public interest to prosecute that juror, so long as the juror does not

[76] Criminal Justice and Courts Act 2015, Section 74.

[77] ibid.

[78] William Blackstone, *Commentaries on the Laws of* England, Vol. 3. (1753) 379. See, generally, Stephan Landsman, 'Rise of the Contentious Spirit: Adversary Procedure in 18th Century England' (1990) 75(3) Cornell LR 496.

disseminate the information more widely.[79] This prosecutorial exception still falls short, however, because it places decision-making power with the Crown Prosecution Service. Prosecutors, of course, should work in the interests of justice and not solely conviction, but they are also human. Trust in the goodwill and civic-mindedness of prosecutors is not a substitute for legal protection. A stronger law would create a statutory exemption from prosecution for jurors in this circumstance.

Finally, the adversarial system relies upon open examination of the evidence, rather than secretive investigation. To reference Blackstone once more, "this open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer".[80] By delineating a set list of acceptable investigators who might look into jury misconduct, the Act contravenes this principle. For the public to have trust in the jury system, the public should be able to see the mechanism by which the system hears and decides upon allegations of bias. The Act should both give jurors more protection to report racial bias directly to defence counsel and for that evidence to them be admitted in open court, for public scrutiny. To allow for this open and adversarial examination, however, the Act must remove not only allow jurors to speak from the jury room but also allow courts to listen to them.

(ii) The Act Only Addresses Juror Speech, Not Courts' Inquiries

The Act's focus on allowing jurors to break the seal of the jury room on some occasions only goes part of the way towards addressing juror misconduct. An offence against the jury — whether juror misconduct or jury tampering by a party to the case or third party — not only demands prosecution in its own right but also damages the safety of the conviction at issue, though. As argued earlier, the 2015 Act is heavily focused on enabling prosecution of jurors for misconduct. Even if a juror is free to report misconduct to the Court of Appeal or others without fear of prosecution, the Act contains no guarantee that the court will admit that testimony. The law leaves a gap here. Moreover, there have been few, if any, test cases under the new statute regarding post-verdict testimony.[81] As such, the obstacle for defendants is that a court might hold that the 'long line of authorities,' as Lord

[79] 'Juror Misconduct Offences' (*Crown Prosecution Service*, 5 July 2019) <https://www.cps.gov.uk/legal-guidance/juror-misconduct-offences> accessed 6 December 2020. The 'public interest' prong is one portion of the two-part test prosecutors use to determine whether to charge an offence. The other prong is whether there is sufficient evidence. 'Code for Crown Prosecutors' (*Crown Prosecution Service*, 26 October 2018) < https://www.cps.gov.uk/publication/code-crown-prosecutors#section4> accessed 10 December 2020.

[80] Blackstone (n 78) [373].

[81] Searches of Westlaw, BAILII, and Lexis returned no cases in the U.K. Supreme Court or Court of Appeal involving the disclosure exception provisions of the 2015 Act.

Justice Kennedy wrote, bar admission of juror testimony.[82] The 2015 Act, given its failure to explicitly address admissibility, would be unlikely to change this feature of the common law.

The text of the 2015 Act, though, does show some intent to grant relief for defendants whose cases involve juror misconduct. The Act allows jurors to disclose misconduct which, "may provide grounds for an appeal against conviction or sentence".[83] This exception shows that Parliament, in drafting the law, did have some concern for the disadvantages that defendants face from the misbehaviour of the jury. This concern for defendants indicates that the law intends to carve out an exemption to the common law prohibition on juror testimony. It would be a self-defeating and nonsensical interpretation of the law to argue that it allows jurors to report misconduct that might be grounds for appeal but prohibits courts from considering it. Hence, another weakness of the Act is that it clearly evinces an intent to soften Mansfield's Rule but fails to explicitly do so in the actual text of the law, leading to a lack of clarity.

(iii) The Act Fails to Explicitly Countenance Racial Bias as Grounds of Appeal

Another of the Act's central failings is that does not explicitly mention racial bias, or indeed bias at all, as a potential ground of appeal. The Act provides for jurors to disclose deliberations in two circumstances: where "an offence or contempt of court has been, or may have been, committed by or in relation to a juror in connection with those proceedings", or where the "conduct of a juror in connection with those proceedings may provide grounds for an appeal against conviction or sentence".[84] Racial bias might or might not fall within these provisions. The first provision would cover racial bias if it were connected to some other offence — for example, if a juror researched the case online and then mentioned news coverage of the case that made racially-biased jokes during deliberations. Of course, this scenario would be covered by the exemption for an 'offence' regardless of whether the Article was biased. The trickier case is determining whether juror bias might be disclosable conduct when a jury offence or contempt of court is not committed in its own right.

In most of the preceding noteworthy cases of juror bias, no separate offence was committed. In *Mirza*, the jury's racially-biased assumptions were made solely based on the proceedings in the courtroom;[85] similarly, the jury in *Sander* would not have breached any of the research or prohibited conduct sections of the 2015 Act, had it been in force at the time.[86] In considering whether a juror could disclose

82 *R v Miah and Akbar* (n 24).
83 Criminal Justice and Courts Act 2015, Section 74.
84 ibid.
85 *Mirza* (n 4).
86 *Sander* (n 37).

biased deliberations in these instances, one must look to the three elements of the second exception made by the Act: "conduct of a juror", "in connection with those proceedings", and "may provide grounds for an appeal against conviction or sentence".[87] Racial bias on the part of a juror would clearly meet the second and third parts of this test. A juror's impartiality during deliberations is clearly connected with the trial proceedings; as *Sander* held, prejudice on the part of the jury is clearly a ground for appeal.

Thus, the outstanding question left by the 2015 Act is whether racial bias on the part of a juror constitutes 'conduct'. In some cases, racially-biased speech is clearly conduct. For example, using "threatening, abusive or insulting words" to "stir up racial hatred" would be an offence under the Public Order Act 1986.[88] A juror inciting other jurors to racial hatred would fall under the ambit of 'conduct'. The bar at which speech becomes criminal conduct, though, would be a rather high one to meet. The forms of bias present in juror deliberations are rarely as explicit as the forms of hatred that the law considers to be criminal conduct. In *Mirza*, for example, a juror, "described an admonition not to attach importance to the use of an interpreter as 'playing the race card'".[89] This sort of prejudiced view is not an incitement to hatred, but nonetheless calls into question the jury's impartiality. Such a view is more likely than explicit racial animus to arise in a jury room. Would this type of prejudice be 'conduct' for the purposes of the Criminal Justice and Courts Act?

Very few cases amongst the higher courts, if any, have considered the provisions of the Criminal Justice Act that create new offences under Section 20 of the Juries Act 1974. The scant record that exists suggests that the courts are not willing to interpret juror bias as a form of prohibited conduct regarding which deliberations might be disclosed. In one of the cases regarding whether a judge could inquire into potential juror bias, *R v Eaton*, the Court of Appeal held that, "the judge could not have asked the juror what she might have discussed with her fellow jury members by reason of the provision of Section 20 of the Juries Act 1974, as amended".[90] While the bias at issue in *Eaton* was a personal connection to a co-defendant, not racial bias, this case indicates that juror prejudice would likely

[87] Criminal Justice and Courts Act 2015, Section 74.

[88] Public Order Act 1986, Section 18.

[89] *Mirza* (n 4) [28].

[90] *R v Eaton* [2020] EWCA 595 [22].

not be considered 'conduct' within the meaning of the 2015 Act. This omission is a weakness of the law.

(iv) The Act's Reporting Procedures Will Discourage Reporting

The Act's vague reporting provisions and exemptions, along with strict criminal penalties for illegal disclosure, will discourage reporting of misconduct and bias by lay jurors. Few jurors will ponder the legal intricacies of whether bias is 'conduct', as discussed in the previous section. Consider, too, the reporting provisions of the bill. Jurors may report misconduct in deliberations to several people, one of whom is "a member of staff of that court who would reasonably be expected to disclose the information only to [the trial judge, Court of Appeal, registrar of criminal appeals, or police]". How would a lay juror interpret such a provision and identify such a staff member? Would a court usher, with whom jurors interact quite often, be 'reasonably expected' to meet this provision? Would a clerk or security officer at the court entrance? Now, juxtapose this confusing process with the Act's overall emphasis on juror punishment for misconduct.[91] The result is that jurors will err on the side of caution and be hesitant to report bias of misconduct.

Indeed, in the face of confusion, jurors usually default to not reporting misconduct at all. A recent study asked jurors at the Old Bailey what they understood the restrictions of the 2015 Act to be, after their receiving a notice about it; just under three-quarters of jurors correctly identified the restrictions placed on them.[92] More interestingly, of the jurors who did *not* correctly identify the rules about jury offences, the majority interpreted the rules too strictly — that is, they believed there were no exceptions to the prohibition of disclosure.[93] This study indicates that, in the face of complex disclosure procedures and potential criminal penalties, jurors will likely be overly cautious and not report abnormalities.

Members of Parliament critiqued the bill as unclear during debate in the House of Common. Then-MP Sadiq Khan noted that jurors needed further education and training to correctly follow the law, saying,

> "[t]here are problems with juries not understanding their role sufficiently, and we shall explore what steps can be taken to educate and inform the public and jurors about the important civic function of jury service so that it is less of an alien process to them".[94]

[91] See generally Kevin Crosby, 'Juror Punishment, Juror Guidance, and the Criminal Justice and Courts Act 2015' (2015) 8 Crim LR 578.

[92] Cheryl Thomas, 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service' (2020) 11 Crim LR 987, 996.

[93] ibid.

[94] HC Deb 24 February 2014, Vol 576, Col 64.

MP Andy Slaughter criticised the government for not ensuring that jurors would be provided this training, especially in the digital age, saying, "[h]owever the Government fail to provide any support to juries in explaining their roles and remit as part of any new offences [...]".[95] The Act's lack of clarity around reporting is a major stumbling block.

In summary, the Criminal Justice and Courts Act is a meaningful but ultimately too limited step towards jury transparency. Its reporting procedures suffer from several defects — opacity, the failure to explicitly recognise racial bias, and a lack of adversarialism — that make them unlikely to meaningfully combat racial bias in the jury room. Moreover, the Act only allows jurors to speak; it does not allow courts to listen. Such a remedy will always be incomplete, especially given how much weight courts have traditionally given to the common-law Mansfield's Rule. Better reporting procedures and an explicit statutory repeal of Mansfield's rule are needed.

V. Reforming the 2015 Act

A. Expanding criminal liability exception to racial bias

Parliament should amend the Criminal Justice and Courts Act to specifically allow jurors to disclose deliberations in the event of racial bias on the part of a juror or jurors. As argued in section IV.B.(iii), it is unlikely that racial bias is covered by the current Act's exemption for 'conduct'; Parliament should add to the statute an explicit statement that jurors may disclose racial bias from the deliberations. *Mirza*, and Lord Steyn's dissent in particular, clearly identified this lacuna in English law; when grievous racial bias threatens an individual defendant's right to a fair trial, the broader interest of jury secrecy takes on comparatively less importance. The Criminal Justice and Courts Act worked part way towards remedying this problem, but fell short for a number of reasons, as argued in the previous section. Racial bias is, as the ECtHR in *Sander* held, a unique threat imperilling the right to an impartial tribunal. Its specific inclusion in the statutory exemptions to jury secrecy would help guarantee more defendants the right to an impartial jury. This exemption would also improve the legitimacy of the jury system, especially amongst minority racial and ethnic groups, by showing that the government recognises and is combatting the threat of bias.

In crafting such an amendment, one should first consider what the standard for such bias should be. The Court of Appeal held in *In Re Medicaments* that the European Convention on Human Rights requires a tribunal to assess whether the circumstances regarding a judge or juror, "lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two

[95] HC Deb 24 February 2014, Vol 576, Col 121.

being the same, that the tribunal was biased".[96] This stipulation that bias must actually be expressed and cast doubt on the conviction's fairness would help to protect against frivolous accusations, one of the concerns of the majority of the Lords in *Mirza*.[97] Jurors must not report bias simply based on a general impression, but rather should report particular remarks or events in the jury room that create the 'real possibility' of bias. Parliament, however, ought to emphasise the ability of lay jurors to understand the statute. While judges should instruct jurors to report actual events or remarks that occur, not feelings or intuitions, the consideration of whether bias was actually pernicious enough to affect the conviction ought to be a judicial matter. The law should provide jurors the broadest exception from prosecution possible for good faith reporting. Such a construction would give jurors more confidence to report racial bias; the court could then consider whether or not the conviction should stand. The courts could maintain a rebuttable presumption that the jury was fair, as the law already dictates, in the interests of finality.[98] Hence, statutory language such as the following might suffice: "It will not be an offence to disclose a juror's comment or remarks during deliberations that might indicate racial prejudice or bias towards the defendant". Of course, to enable this judicial consideration, Parliament must also allow courts to admit juror testimony — section V.B addresses this issue.

The other crucial question is whether this exception should allow jurors to report solely racial bias, or also biases against other identity characteristics.[99] Racial bias is not the only type of bias that Parliament might allow jurors to disclose from deliberations, but it should be prioritised. In *Mirza*, Lord Hope raises this question of whether racial bias is deserving of different treatment than discrimination based on language, social group, religion or other factors.[100] Something must distinguish racial bias from these other biases if it is to merit a special exception to jury secrecy rules. Crafting exceptions to jury secrecy is a balancing act. There are good reasons to not want every conviction thrown into doubt by post hoc juror testimony; jury secrecy does serve a legitimate purpose in fostering frank and open deliberations. Understandably, Parliament might not want to allow exceptions to

[96] In *Re Medicaments* [2000] EWCA Civ 350, at para. 85. This standard, though applied to the judge in In Re Medicaments, applies equally to juries as well. R v Brown [2001] EWCA Crim 2828.

[97] *Mirza* (n 4) [53–54].

[98] ibid [112].

[99] Even within the umbrella of 'racial discrimination', the Equality Act 2010 defines race so as to include ethnicity and national origin, colour, and nationality.

[100] *R v Mirza* (n 4) [77].

juror secrecy for every possible type of bias jurors detect from their fellow jurors during deliberations.

Race, however, has several characteristics which make it particularly important; race is foremost amongst those characteristics which merit special exceptions for the reporting of bias. First, as argued earlier, the systemic overrepresentation of black people amongst those stopped by police, those prosecuted by the CPS, and those sentenced to prison shows that race matters in criminal justice.[101] This prima facie evidence of racial disparities gives race importance. Second, minority racial and ethnic groups have faced and continue to face discrimination in other realms such as housing and healthcare.[102] Racial bias clearly affects other areas of society and has a likelihood of being present in jury deliberations. Indeed, in a U.S. case analogous to *Mirza*, *Peña-Rodriguez v Colorado*, the U.S. Supreme Court held that racial bias was such a threat that evidence of it in jury deliberations should be admitted in post-conviction challenges, contravening the traditional application of Mansfield's Rule.[103] As the U.S. Supreme Court noted, racial bias is, "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice".[104] Moreover, as detailed in section III.B.(ii), other safeguards are unable to ensure an unbiased jury with regard to race. Other forms of discrimination are not unimportant, but racial bias, in the criminal justice context, is especially pernicious. Based on the 2015 Act, Parliament does not want to open to floodgates to massive exceptions to jury secrecy. Racial bias should be prioritised, though, amongst a limited number of exemptions as part of this balancing act.

Parliament should additionally change the procedure by which jurors can report bias under the Criminal Justice and Courts Act. As argued in section III.B.(i) and III.B.(iv), the procedures under the 2015 Act are both insufficiently adversarial and overly complicated. They therefore deserve change in their own right to effectively implement the very purpose of the Act, which is to respond to juror misconduct. Hence, I propose two changes. First, defence attorneys should be added as a safe party to whom jurors may disclose misconduct without fear

[101] Lammy Review (n 40).

[102] Cabinet Office, 'Race Disparity Audit' (*GOV.UK,* October 2017) <https://www.gov.uk/government/publications/race-disparity-audit> accessed 9 December 2020 and Public Health England, 'Beyond the data: Understanding the impact of COVID-19 on BAME groups' (June 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf> accessed 9 December 2020.

[103] *Peña-Rodriguez v Colorado* 580 US (2017).

[104] ibid 16.

of prosecution. This change would recognise the adversarial nature of the legal system and empower the defendant's legal representatives.

Additionally, Parliament should make the CPS charging guidance, which generally advises against charging jurors who report misconduct to involved parties in good faith, into law. This guidance states that it is not in the public interest to charge jurors who report misconduct to appropriate parties, for the purpose of assisting the court to hear the case fairly, rather than spreading it to the media or public.[105] It is unlikely that jurors will have consulted the CPS guidance and know this, though. To provide jurors more reassurance, and to thus increase reporting of misconduct to the court and involved parties, Parliament should make this guidance into law, and the courts should incorporate it into the notice given to all jurors. At the same time, courts might continue to reinforce that leaking jury deliberations to the media or on the internet would still result in criminal penalties. This change would encourage jurors to report misconduct while maintaining many important benefits of jury secrecy. It would also remove discretion from prosecutors — who have a vested interest in not seeing their convictions disturbed — over whether to charge jurors who report misconduct. Jurors might report misconduct and bias more readily if they know they will not face prosecution when they are earnestly trying to do right by the court and defendant.

B. Changing Mansfield's Rule

Racial bias is a pernicious threat to defendants' rights and the legitimacy of the criminal legal system that jurors should be able to speak about post-verdict. If one accepts the contention that the bar on jurors speaking about deliberation should be removed, there are no justifiable grounds to not also make an exception to Mansfield's Rule and allow courts to consider this information to quash a conviction. If the intent of the 2015 Act is at least partially to allow defendants some remedy for jury misconduct, as argued in section IV.B.(ii), then courts must be able to consider that misconduct. The courts are the sole body able to grant relief to a defendant whose conviction is unsafe because of juror racial bias;[106] to have any effect, reform of jury secrecy must allow for juror evidence to be considered by the court.

There are, of course, legitimate interests behind Mansfield's Rule — finality and protecting the candour of deliberations. Both of these interests are already rendered moot, though: Once jurors are free to speak about misconduct, the finality of the conviction is undermined in the public eye. Once information

[105] 'Juror Misconduct Offences' (n 79).

[106] The Criminal Cases Review Commission, the other major body involved in reviewing the safety of convictions, may only refer cases back to the Court of Appeal.

from deliberations is released, future jurors' candour is, in theory, chilled. It would be a graver injustice to allow convictions to stand solely on the formalism that finality must be upheld, especially because the benefits of secrecy were obviated by removing the gag on jurors. The courts should use the objective standard from *In re Medicaments* to assess whether a conviction was tainted by bias and potentially grant relief.[107] Wilful ignorance towards bias helps no one, delegitimises the legal system, and makes it look hapless in the face of injustice.

Removing Mansfield's Rule is not a cure-all for every type of bias; courts might still be reluctant to consider allegations of implicit, rather than explicit, racial bias. This type of bias is often harder to recognise and harder to prove following a conviction. While there are additional measures courts might take to fight the problem of implicit bias, this limitation is no good reason to remain ignorant of explicit bias in the meantime.[108] Parliament must amend the Act to directly state that evidence of juror misconduct and bias may be admitted by the courts in considering a defendant's appeal.

VI. Conclusion

The disproportionate representation and disparate treatment of people from marginalised racial and ethnic groups at each stage of the criminal justice system raises grave concerns about where racial bias might arise. Moreover, to maintain the public legitimacy of the jury system, people must have faith that it is impartial and fair; given the higher proportion of Black and Asian defendants that opt for a jury trial, this legitimacy with regard to racial bias is even more paramount. Other safeguards, such as oaths and random selection, might help in preventing some bias, but they are of no use once bias or prejudice occurs; then, only judicial review of the conviction can help the defendant. When jurors cannot speak out and courts cannot consider the evidence, the jury system cannot maintain its own fairness. *Mirza* highlights this approach to bias, where the interests of finality and secrecy overpower the interests of fairness and legitimacy.

The Criminal Justice and Courts Act 2015 partially helps in unsealing the jury room but does not extend far enough. Besides not explicitly combatting racial bias, the Act's reporting provisions are complex and unclear. Combined with its harsh criminal penalties, the Act might ultimately discourage juror reports of misconduct. Finally, the Act does nothing to undo the common law rule against admitting juror testimony. But there is a possible solution. Reforming the Criminal Justice and Courts Act based on the lessons of *Mirza* would be one

[107] In *Re Medicaments* (n 9).

[108] For an overview of potential measures to combat implicit bias on juries, see Anona Su, 'A Proposal to Properly Address Implicit Bias in the Jury' (2020) 31 Hastings Women's Law Journal 79.

small step toward fairness. Parliament should allow jurors to report, without fear of prosecution, instances of racial bias from deliberations to the court or the defendant's legal counsel. Furthermore, the law should allow courts to consider the testimony of jurors in quashing convictions because of the jury's racial bias or other misconduct. The legal system's insistence on ignoring bias in the jury room does not make that bias disappear. It does not make the tainted convictions any fairer. Instead, this wilful refusal allows prejudice to erode the foundations of impartiality upon which the jury system rests. If the jury is to survive as a legitimate feature of English criminal justice, Parliament must allow the courts to look inside the jury room when prejudice, discrimination, and bias lurk. What happens in the jury room must not stay there.