

The theoretical basis of trial by jury has always been puzzling and contentious. Two major political theorists - Thomas Hobbes and Max Weber - have paid it some attention, and both have argued that the jury must be understood as interpreting the law as well as assessing the facts; but what does that imply about the relationship between the rule of law and trial by jury? What kind of decision does a jury come to?

HOBBS (AND WEBER) ON THE JURY

Richard Tuck
Frank G. Thomson Resesarch Professor of Government
Harvard University

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There is one feature of modern political life of which it is possible to say with a high degree of confidence that without Hobbes's influence it would have taken a very different form. It is not the obvious candidates such as (perhaps) the modern impersonal state, or the idea of absolute sovereignty - in both cases the history of their development is complicated, and if Hobbes had never written we might well imagine that ideas like these would nevertheless have appeared in some form. It is in fact a much more surprising area than those: it is the modern Anglo-American idea of the rights of the jury. As I shall show, Hobbes had a direct input into the key legal decision which decided the character of the modern jury. This is both a striking fact in its own right, and something which warns us not to jump too hastily to conclusions about the actual character of the Hobbesian state. It also reminds us what an odd and theoretically interesting institution the jury is - not in the form of Jimmy Fishkin-style advisory juries, but in the form of the jury which actually makes (what used to be) life and death decisions.

The legal decision in question is quite well known, under the name of "Bushell's Case". In August 1670 the Quaker William Penn organised a meeting of three hundred or so followers in Gracechurch Street in London. The meeting was broken up as a riotous assembly, and Penn and one of his companions were prosecuted at the Old Bailey for breaking the Conventicle Act. They denied that what had taken place was a riot; the jury returned a verdict that Penn was "guilty of speaking or preaching to an assembly, met together in Gracechurch-street", but the jurors refused to say, even after repeated questioning from the bench, that Penn was guilty of speaking to an unlawful assembly or to a tumult. The Recorder of London, unsurprisingly took this to be an impossible verdict: if Penn was guilty of addressing the assembly, and if the law determined that such an assembly was illegal, the jury could not find Penn innocent of the charge

against him. The Recorder accordingly refused to accept the verdict and sentenced the jurors to a fine and imprisonment for contempt, on the grounds that they had acquitted the accused “contra plenam et manifestum evidentiā, openly given in court.” Penn’s supporters sued for a habeas corpus writ to free the foreman of the jury, Edward Bushell, and the case was heard by John Vaughan, Chief Justice of Common Pleas. Vaughan gave a lengthy and comprehensive judgement, preserved in his Reports, which enforced the writ and freed Bushell, and established the principle which has persisted down to the present that jurors cannot be punished for perverse decisions or for ignoring the direction of a judge about the law. Vaughan was a close friend of Hobbes, and in his judgement we find clear indications that he had absorbed Hobbes’s own - highly distinctive - ideas about the jury. But before I turn to this, I want to sketch the historical background to the case.¹

The jury system in England began in the Anglo-Norman period as a method of establishing the facts in a variety of different cases: a jury would be empanelled by a representative of the king such as the sheriff or justiciar to determine, for example, whether a town had possessed a fair “since time whereof the memory of man runneth not”, as well as the facts in a criminal case. In all these instances the jury was presumed to have local knowledge of which the king’s representative needed to be informed in order to act appropriately - in the case of a criminal trial, to acquit the accused or condemn him to punishment. Jurors were in effect witnesses rather than judges. But in the course of the thirteenth century this simple structure began to change into something much more ambiguous. One reason for this was the disinclination of justices to accept what would later be called “special” verdicts, that is, verdicts which simply stated the facts as known to the jurors and left it to the justice to apply the law and make the judgement. The justices’ disinclination seems to have been motivated by a desire to

avoid the responsibility for mistaken decisions, for which they could be heavily fined, and special verdicts became very rare, though they have never completely disappeared. The justices themselves thus abdicated from making final judgements - paradoxically, the power of the jury was the result of a defeat in the struggle between judge and jury to avoid responsibility.² Trial by jury came to seem (as it has largely remained at the popular level) the natural institutional expression of article 39 of Magna Carta, that “no freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties ...save by lawful judgement of his peers or [vel] by the law of the land”, though of course the article itself by no means specifies trial by jury in all (or indeed any) cases.

We must remember that until modern times the jury's decision in criminal cases was absolutely final, with regard to both acquittal and conviction. Conviction could be appealed on points of law after 1848, and alas Blair dispensed with the double jeopardy prohibition, but prior to 1848 the actual verdict could not be overturned unless it could be shown that the jurors had been bribed or intimidated, or that there was some gross error in the proceedings. Faced with an acquittal which in the eyes of the presiding judge was patently against the facts, the only recourse under common law which the judge had was to bind over the jurors themselves as pledges for the continued good behaviour of the acquitted³ - and even that was not clearly legitimate.⁴ Juries seem frequently to have exercised their right in criminal matters to disregard the law; indeed, it has been argued that the modern law of manslaughter developed out of the refusal of medieval juries to abide by the strict rules on the definition of justifiable homicide.

The consequence of this was that the English jury increasingly came to resemble the republican Roman jury - that is, a court of jurors or iudices acting as judges under the presidency of a magistrate. This was the jury familiar from the pages of Cicero, and although the Principate

had effectively abolished juries, and although Roman law jurisdictions on the Continent did not revive them, it is tempting to think that the familiarity of educated Englishmen with the republican Roman texts influenced the development of the medieval English jury. In the late medieval Year Books we find remarks such as that jurors are “in a way [en maner] judges”,⁵ and by the early sixteenth century it was possible for Sir Thomas Smith, bringing a humanist’s sensibility to bear on the English constitution, to say straightforwardly that “Iudex, is of us called Judge, but our fashion is so divers, that they which give the deadly stroke, and either condemne or acquite the man for guiltie or not guiltie, are not called Judges, but the twelve men” (1594 p.62).

It should be said here that medieval and early-modern juries were strikingly socially inclusive. Although the statutes governing jury selection required that the jurors be householders worth 40s per annum, in practice (it is now clear) they included any householder above the middle ranks of the peasantry, and even occasionally villeins (as long as that category persisted). Women could also be empanelled for special juries to determine the facts in cases of sexual crime, though they did not sit on regular juries. When Smith elsewhere described jurors as “honest yeomen” he was not far off the mark, though he may have slightly exaggerated their social status.⁶ A comparison with the early-modern electorate is instructive: there too there was a relatively restrictive statute (in the counties 40s again, with the additional requirement of freeholder status), but there too the practice was much wider than might have been supposed, with many copyholders voting in county elections and many large towns giving the vote to almost their entire male population. Women too could on occasion vote.⁷ Juries were probably always more inclusive than the electorate, but the difference should not be overstated.

As in many other areas of late medieval law, the Crown and its lawyers sought to

intervene in what they took to be the failures of the jury system by using the institution of Star Chamber: throughout the sixteenth and early seventeenth century privy councillors and judges sitting in Star Chamber as representatives of the Crown regularly punished jurors who in the eyes of the judges had produced perverse verdicts. Both minor and major cases came within its orbit; as an example of the former, the court in 1580 reviewed a murder trial at the Gloucestershire Assizes and decided that the accused had been wrongly acquitted. The jurors in the case were sentenced to wear papers on their heads at Westminster Hall declaring their offence; to stand with “papers on their heads at the next assizes in Gloucester and in the Cathedral Church whilst a sermon is made for that purpose, and to pay £40 [a good year’s wage] a piece for a fine.”⁸ An example of the latter is the famous Throckmorton case under Mary: in 1554 Sir Nicholas Throckmorton was accused of treason following Wyatt’s Rebellion. The jury of Londoners refused to convict him, even after extensive interrogation of their verdict by the Lord Chief Justice; Star Chamber committed the recalcitrant jurors to prison, and fined three of them the colossal sum of £2,000, in order to bankrupt them.⁹ It should be stressed, however, that in all these cases the original verdict had to stand - Throckmorton (after some delay) walked free, and the accused murderers in Gloucestershire were never convicted.

Though some historians have argued that the popular notion of Star Chamber as a despotic court was unjustified, it is hard not to think that measures such as these, in which jurors were publically humiliated and ruined financially for conduct which could not easily be regarded as corrupt, contributed to the hostility to the court which erupted at the beginning of the Long Parliament. Indeed, Sir Thomas Smith referred to precisely these kinds of cases when he observed that

I have seene in my time (but not in the raigne of the Queene nowe) that an enquest for pronouncing one not guiltie of treason contrarie to such evidence as was brought in, were not only imprisoned for a space, but an hounge fine sett upon their heads, which they were faine to pay: An other enquest for acquitting an other, beside paying a fine of money, put to open ignominie and shame.¹⁰ But those doinges were even then of many accounted verie violent, tyrannicall, and contrarie to the libertie and custome of the realme of England. (p. 89)

In July 1641 Star Chamber was abolished, and no provision was made for any other means of taking action against jurors who disregarded instructions on the law or the plain facts of the case. This may have been an unintended consequence: it is not clear that the M.P.s who passed the Act of abolition understood the potentially far-reaching implications of their decision. In this respect the abolition of Star Chamber resembles the abolition of High Commission in the same year, which removed the legal basis for the enforcement of the Christian religion in England; in that instance too, politicians and lawyers gradually became aware of what they had done and sought to remedy it, but were never able to agree on the appropriate legislative structures. Hobbes, as it happens, was interested in insuring the continued failure of both programmes.¹¹

During the period in which Star Chamber was seeking to control the behaviour of juries there was another kind of attempt to undermine their quasi-judicial role. In his Institutes and his Reports the great late sixteenth-century jurist Sir Edward Coke sought to reintroduce into the practice of the law a much greater emphasis upon the special verdict. Coke was by no means an opponent of Star Chamber jurisdiction - as a judge he sat in the court, and in his 4th Institutes he described it as “the most honourable court, (our parliament excepted) that is in the Christian

world, both in respect of the judges of the court, and of their honourable proceedings according to their just jurisdiction, and the ancient and just orders of the court” (4 Co. Inst 65). And he insisted that “when a jury hath acquitted a felon or traitor against manifest proof, there they may be charged in the Star-Chamber, for their partiality in finding a manifest offender not guilty, ne maleficia remanerent impunita” (12 Co. Rep. 24). His writings are full of the maxim (which he appears to have invented) that ad questionem facti non respondent iudices, ita ad questionem iuris non respondent iuratores - a maxim which became central to later arguments over jury nullification.¹² But we should remember that it was manufactured in the context of a defence of Star Chamber and special verdicts, and fitted very awkwardly with the actual powers of the jury.

Towards the end of the 1640s it began to dawn on some radicals what the consequences of the abolition of Star Chamber had been. The first known case is from the Quarter Sessions at Reading in August 1648, when Sir Henry Marten the famous revolutionary and sympathiser with the Levellers delivered the charge to the Grand Jury on behalf of the magistrates :

in the first place, he wishes them to be rightly informed of their own places and authority, affirming it to be judicial, when as their own (meaning the Justices) was but ministerial; and therefore desired them not to stand bare any longer, but to put on their hats, as became them, and not to under-value their Country, which virtually they were; or words to that effect.¹³

But the issue moved into centre stage after the Republic was declared in January 1649 with the famous treason trial of the Leveller John Lilburne at the London Guild Hall on 24-26 October 1649. Lilburne was accused of publishing treasonous pamphlets; he admitted the fact, but denied

that by the established law they were to be adjudged treasonous. Citing many of the authorities whom we have been considering, Lilburne appealed to the

jury, my countrymen, upon whose consciences, integrity and honesty, my life, and the lives and liberties of the honest men of this nation, now lies; who are in law judges of law as well as fact, and you only the pronouncers of their sentence, will and mind...

Lord Keble. Master Liburne, quietly express yourself, and you do well; the jury are judges of matter of fact altogether, and judge Coke says so: But I tell you the opinon of the court, thy are not judges of matter of law.

Lilburne. The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law, are no more but Norman intruders; and in deed and in truth, if the jury please, are no more but cyphers, to pronounce their verdict.

Judge Jermin. Was there ever such a damnable blasphemous heresy as this, to call the judges of the law, cyphers?

Lilburne. Sir, I entreat you give me leave to read the words of the law, then: for to the jury I apply, as my judges, both in the law and fact.

Lord Keble. We will not deny a tittle of the law.

Judge Jermin. Let all the hearers know, the jury ought to take notice of it, That the judges that are sworn, that are twelve in number, they have ever been judges of the law, from the first time that ever we can read or hear that the law was truly expressed in Engand; and the jury are only judges, whether such a thing

were done or no; they are only judges of matter of fact.

Lilburne. I deny it... ¹⁴

The jury acquitted Lilburne, and his supporters triumphantly had a commemorative medal cast with the inscription IOHN LILBORNE SAVED BY THE POWER OF THE LORD AND THE INTEGRITY OF HIS IVRY WHO ARE IVGES OF LAW AS WEL AS FACT. OCT. 26. 1649 and the names of the jurymen.¹⁵

The trial was the occasion for a number of pamphlets exploring the issues, mostly on Lilburne's side,¹⁶ though the famous Parliamentary propagandist Henry Parker writing in defence of the judges made clear the social implications of Lilburne's views.

We perceive hereby plainly the substance of your Levelling philosophy to be briefly this: The Judges because they understand Law, are to be degraded, and made servants to the Jurors: but the Jurors, because they understand no Law, are to be mounted aloft, where they are to administer justice to the whole Kingdom. The Judges because they are commonly Gentlemen by birth, and have had honorable education, are to be exposed to scorn: but the Jurors, because they be commonly Mechanicks, bred up illiterately to handy crafts, are to be placed at the helme. And consequently Learning and gentle extraction, because they have been in esteem with all Nations from the beginning of the world till now, must be debased; but ignorance, and sordid birth must ascend the chair, and be lifted up to the eminentest offices, and places of power. Coblers must now practise Physick instead of Docters; Tradesmen must get into Pulpits instead of Divines, and

plowmen must ride to the Sessions instead of Justices of the Peace. The pretence of levelling is to put all men upon an equall floore, by adding to the inferior so much as may match him with his superior, and taking from the superior so much as may match him with his inferior: and this is sufficiently heretical in policie.

(sig. C4)

It was at this moment that Hobbes intervened in the argument. Royalists had followed the case with some relish for Lilburne's stand - the royalist newsletter Mercurius Pragmaticus devoted more or less the whole of its 23-30 October issue to an enthusiastic account of Lilburne's arguments in the trial and his acquittal, and Hobbes is likely to have read at least its report. He was writing Leviathan during 1649 and 1650, and in Chapter 23, "Of the Publique Ministers of Sovereign Power" he remarked as follows.

I cannot forbear to observe the excellent constitution of the Courts of Justice, established both for Common, and also for Publique Pleas in England. By Common Pleas, I meane those, where both the Complaynant and Defendant are Subjects: and by Publique, (which are also called Pleas of the Crown) those, where the Complaynant is the Sovereign. For whereas there were two orders of men, whereof one was Lords, the other Commons; the Lords had this Priviledge, to have for Judges if the plea were publique in all Capitall crimes, none but Lords; and of them, as many as would be present; which being ever acknowledged as a Priviledge of favour, their Judges were none but such as they had themselves desired. And in all controversies, every Subject (as also in civill controversies the

Lords) had for Judges, men of the Country, where the matter in controversie lay; against which he might make his exceptions, till at last Twelve men without exception being agreed on, they were Judged by those twelve. So that having his own Judges, there could be nothing alledged by the party, why the sentence should not be finall. These publique persons, with Authority from the Sovereign Power, either to Instruct, or Judge the people, are such members of the Commonwealth, as may fitly be compared to the organs of Voice in a Body naturall. (pp 125-126 original)

A few pages later, in Chapter 26, “Of the Civill Lawes”, he enlarged on this theme.

The abilities required in a good Interpreter of the Law, that is to say, in a good Judge, are not the same with those of an Advocate; namely the study of the Lawes. For a Judge, as he ought to take notice of the Fact, from none but the Witnesses; so also he ought to take notice of the Law, from nothing but the Statutes, and Constitutions of the Sovereign, alledged in the pleading, or declared to him by some that have authority from the Sovereign Power to declare them; and need not take care before-hand, what hee shall Judge; for it shall bee given him what he shall say concerning the Fact, by Witnesses; and what he shall say in pont of Law, from those that shall in their pleadings shew it, and by authority interpret it upon the place. The Lords of Parliament in England were Judges, and most difficult causes have been heard and determined by them; yet few of them were much versed in the study of the Lawes, and fewer had made profession of

them: and though they consulted with Lawyers, that were appointed to be present there for that purpose; yet they alone had the authority of giving Sentence. In like manner, in the ordinary trialls of Right, Twelve men of the common People, are the Judges, and give Sentence, not onely of the Fact, but of the Right; and pronounce simply for the Complaynant, or for the Defendant; that is to say, are Judges not onely of the Fact, but also of the Right: and in a question of crime, not onely determine whether done, or not done; but also whether it be Murder, Homicide, Felony, Assault, and the like, which are determinations of Law: but because they are not supposed to know the Law of themselves, there is one that hath Authority to enforme them of it, in the particular case they are to Judge of. But yet if they judge not according to that he tells them, they are not subject thereby to any penalty; unlesse it be made appear, they did it against their consciences, or had been corrupted by reward. (p. 146 original)

Set in the context of the events of 1649, these are extremely arresting passages. Hobbes had always been hostile to the power and self-conceit of the judiciary - for example in De Cive III.12 he had remarked that “Nothing is commoner than taunting and offensive remarks by the powerful against the less powerful and especially by judges against defendants, which have nothing to do with the charge and are not part of the judge's duty; such men are acting against the natural law and should be considered insolent.” And Edward Coke was already his target in Leviathan, in particular for his belief that the law is

(as Sr. Ed. Coke makes it,) an Artificiall perfection of Reason, gotten by long

study, observation, and experience, (as his was.) For it is possible long study may encrease, and confirm erroneous Sentences: and where men build on false grounds, the more they build, the greater is the ruine: and of those that study, and observe with equall time, and diligence, the reasons and resolutions are, and must remain discordant: and therefore it is not that Juris prudentia, or wisdom of subordinate Judges; but the Reason of this our Artificiall Man the Commonwealth, and his Command, that maketh Law. (p.140 original)

Scepticism about the possibility of natural reason in the law, or moral matters generally, was of course Hobbes's deepest and most long-lasting conviction, voiced first in the memorable passage of the Elements of Law II.10.8:

In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, and from those differences arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what meum and tuum, what a pound, what a quart, &c. For in these things private judgments may differ, and beget controversy. This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known in rerum natura. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power...

What is striking, and new to Leviathan, is Hobbes's application of this idea to the jury. In the existing conditions of English law, there was more risk of the artificial reason of the sovereign being contaminated by rival moral and legal theories if judges were able to bring their professional training to bear on interpretative matters, than if an uninstructed and theoretically unsophisticated group of (in Parker's words) "mechanicks" or "plowmen" were left to draw their own conclusions from the laws cited before them. The jurors should think of themselves not merely as equally the representative of the sovereign as the judge, but as superior to the judge: they were the real representatives, and the judge was merely an adviser. Given that (as Hobbes constantly reminded his readers) the real power over the laws was the power of interpretation, the fact that the jurors could not be prevented from taking up any view they chose about the meaning of the laws gave them enormous authority, which Hobbes seems to have gone out of his way to welcome.

A key feature of juries, understood as interpreters of law, is of course the degree of arbitrariness in their decisions, and the lack of precedental force for the decisions. From a Hobbesian perspective, these two features were their point, since a more consistent and predictable set of judgements from the jurors would render them no better than the professional lawyers whom he detested, seeking to impose new laws on their fellow citizens under the guise of interpreting the sovereign's law. A jury's verdict leaves the existing law intact, it just chooses whether or not to apply it. This is the antithesis of rule of law, but as Hobbes observed, rule of law is a misleading term: "seeing right reason is not existent, the reason of some man, or men, must supply the place thereof", that is, one cannot escape the rule of men. And in the selection of the men to rule over us, a sovereign legislator and a jury have considerable advantages. It

might be asked, if arbitrariness and inscrutability are desirable, why not use some randomised method; why pretend that it is a considered judgement? As we shall see presently, that is in effect a thought which Weber had about the English jury. Hobbes gives us no direct answer to this question, but I think his answer would have been fairly clear. The jury's verdict was, as I said, supposed to be interpretative in character: that is, it was supposed to bear some relationship to the words of the statute, but the relationship was supposed to be loose and not the application of a rational system of deduction. A wholly randomised decision - tossing a coin, say - could not have this character, or at least could only have it in the context of something like an interpretative tie-break.

Lurking beneath Hobbes's argument might be another consideration, of a positive more than a negative kind. The jury was the effective agent of the sovereign; but it was chosen (at random, more or less) from among the sovereign's citizens, and not by the sovereign himself or itself (contrast the modern French system, perhaps). Its participation in a central act of sovereignty is a reminder that Hobbes took seriously the thought - central to his political theory - that the sovereign is his or its citizens. This is usually - and rightly - taken to be in part a means of frustrating any popular resistance to a legal sovereign; but there is always a certain ambiguity in the argument. After all, Hobbes went to some lengths in De Cive to argue that democracy is the fundamental political formation, and (as I have argued in The Sleeping Sovereign) to show that it is compatible with almost any form of government. The failings of democracy to which he consistently drew attention were in fact always those of democratic government, not democratic sovereignty. His sympathy for juries, I think, is another aspect of this ambiguity.

It was Lilburne's trial which prompted Hobbes's defence of the jury, but jury trial remained a key issue under the Commonwealth and Protectorate. The High Court of Justice

established late in 1648 to try the King, and originally supposed to sit only for a month, was renewed periodically down to the Restoration. It heard not only all treason trials but some other capital charges, and it consisted of a set of commissioners named in the various acts which renewed it, sitting without a jury.¹⁷ Looking back after the Restoration, Hobbes singled out the revolutionary High Court as the most obvious breach of the revolutionaries' professed commitment to maintain the fundamental laws of the nation - "Whatsoever they meant by a fundamental law, the erecting of this court was a breach of it, as being warranted by no former law or example in England" (Behemoth ed. Toennies p.158).

At the Restoration the High Court of Justice was discontinued, and Star Chamber did not return - the restored royalists were faithful to the constitutional measures of 1640-41. But that left the jury as it had been in the late 1640s, with an absolute power to determine the outcome of trials and, in effect, the law. As one might have imagined, many judges did not like that prospect, and the 1660s saw a number of attempts by judges to punish jurors for manifestly perverse verdicts,¹⁸ and a brief attempt by the Commons to declare the fining and imprisoning of jurors illegal, but the bill (like many bills in the Parliaments of the 1660s) failed to reach the statute book.¹⁹

John Vaughan was an active M.P. at the time of the 1667 bill, and supported it; when in May 1668 he was appointed chief justice of common pleas he found himself in the perfect position to effect through a judgement what the Commons had failed to bring about. Vaughan had been the manager in the Commons of the impeachment of Clarendon, and his elevation to the bench was one of the first acts of the new "Cabal" ministry that came into office on Clarendon's fall and lasted until 1672. As I have shown in another context, the Cabal ministry contained many friends of Hobbes, and its politics were in general much to his liking;

Clarendon's fall removed from power someone who was once a friend of Hobbes but since the publication of Leviathan had become a dedicated enemy, and among other things lifted the threat of prosecution for atheism from him.²⁰

Under Clarendon's administration, Hobbes had exercised a certain amount of discretion in his public utterances. He removed the passages about the jury from the Latin translation of Leviathan which appeared in 1668 and had been prepared before Clarendon's fall - though it should be said that he removed virtually all passages specifically about English affairs from the translation, presumably in part seeing them as inappropriate for a European, Latin-reading audience. In the Dialogue between a Philosopher and a Student of the Common Laws, which is of course a wholesale denunciation of Edward Coke, Hobbes was rather cautious about repeating his strictures on Coke's view of the jury. He said at one point, in the chapter on capital crimes,

I like not that any private Man should presume to determine, whether such, or such a Fact done be within the words of a Statute, or not, where it belongs only to a Jury of 12 Men to declare in their Verdict, whether the Fact laid open before them be Burglary, Robbery, Theft, or other Felony; for this is to give a leading Judgement to the Jury, who ought not to consider any private Lawyers Institutes, but the Statutes themselves pleaded before them for directions. (Cropsey ed. p. 121)

This is close to his remarks in Leviathan. Similarly, in the chapter on punishments, he insisted that the jury's verdict must be seen as final, and defended the practice of juries in finding for manslaughter in cases of self-defence (pp 150-151). On the other hand, in the chapter on

praemunire he said that “in the Courts of Common Law all Tryals are by 12 Men, who are judges of the Fact; and the Fact known and prov’d, the Judges are to pronounce the Law” (p.137). (It is highly unlikely, incidentally, that he would have said this after *Bushell’s Case*, and somewhat unlikely that he would have said it after 1667: this suggests that the dialogue was largely composed before 1670).²¹ But at the same time, Hobbes was actively (though perhaps secretly) instigating a new edition of Leviathan in which all that he had said about the jury was allowed to stand.²²

At all events, when in 1670 Vaughan came to consider his judgement in *Bushell’s case*, it is hard not to believe that he had Hobbes’s ideas about the jury in his mind. Aubrey in his brief life of Hobbes remembered that “Sir John Vaughan, Lord Chiefe Justice of the Common Pleas, was his great acquaintance, to who he made visitts three times or more in a weeke - out of terme in the morning; in terme-time, in the afternoon.”²³ This was a remarkably close relationship for Hobbes, who shared at least the Dialogue with Vaughan (who greatly admired it, according to Aubrey). Vaughan based his judgement largely on a radical and highly Hobbesian claim about the impossibility of certain knowledge in a legal setting.

I would know whether any thing be more common, than for two men
Students, Barristers, or Judges, to deduce contrary and opposite Conclusions out
of the same Case in Law? And is there any difference that two men should inferr
distinct conclusions from the same Testimony? Is any thing more known than that
the same Author, and place in that Author, is forcibly urg'd to maintain contrary
conclusions, and the decision hard, which is in the right? Is any thing more
frequent in the controversies of Religion, than to press the same Text for opposite

Tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing? Must therefore one of these merit Fine and Imprisonment, because he doth that which he cannot otherwise do, preserving his Oath and integrity? And this often is the case of the Judge and Jury. I conclude therefore, That this Return, charging the Prisoners to have acquitted Penn and Mead, against full and manifest Evidence first and next, without saying that they did know and believe that Evidence to be full and manifest against the indicted persons, is no cause of Fine or Imprisonment. (pp 141-142)

And though Vaughan did not go so far as to state clearly that jurors are judges of law as well as of fact, he came remarkably close.

Without a Fact agreed, it is as impossible for a Judge, or any other, to know the Law relating to that Fact, or direct concerning it, as to know an Accident that hath no Subject.

Hence it follows, That the Judge can never direct what the Law is in any matter controverted, without first knowing the Fact; and then it follows, That without his previous knowledge of the Fact, the Jury cannot go against his Direction in Law, for he could not direct.

But the Judge, quà Judge, cannot know the Fact possibly, but from the Evidence which the Jury have, but (as will appear) he can never know what

Evidence the Jury have, and consequently he cannot know the matter of Fact, nor punish the Jury for going against their Evidence, when he cannot know what their evidence is. (p.147)

(The reason that the Judge cannot know what evidence the jury has, Vaughan argued, is that the jury is always free to use private information which it might possess about the case, and indeed that such a possibility was the original point of the jury).

Vaughan summarised his view in a passage of devastating simplicity.

If the meaning of these words, finding against the direction of the Court in matter of Law, be, That if the Judge having heard the Evidence given in Court (for he knows no other) shall tell the Jury, upon this Evidence, the Law is for the Plaintiff, or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do; Every man sees that the Jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the Tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years. (p.143)

Much praise has been lavished by the legal establishment on Vaughan's judgement (for example, there is a plaque at the Old Bailey commemorating the case), but there has been a tendency to see it as less far-reaching than it really was.²⁴ Given the issues involved in the debates about jurors in the recent past of the judgement, and given the Hobbesian character of

Vaughan's argument, we can now see that it was in fact a very radical decision, and one which lawyers have always found it quite difficult to accept. On Vaughan's account, as on Hobbes's, there is inevitably deep uncertainty about the "truth" in any situation, but a decision has to be made which will be authoritative. The inscrutability of the jurors' deliberations and the decisiveness of their verdict corresponded exactly to what Hobbes envisaged as the act of a sovereign. But they are very different from the method of ascertaining truth which many lawyers (and laymen) take a jury trial to be. The argument of critics of the jury is precisely that there are better methods of investigating crimes, and - above all - that a judicial process should rest on a set of publically avowable reasons for the decision. If Vaughan's decision is taken as - so to speak - the charter of modern jury trial, the implication is that the whole point of jury trial is that there cannot be such reasons, and lawyers (whose life work is the exchange of reasons) will clearly never be comfortable with this.

The fact that this was how to think about juries was clear for at least a hundred years after Bushell's Case, and, strikingly, it made its way into the mainstream of American jurisprudence. Thus Chief Justice John Jay reminded the court in Georgia v. Brailsford (1795)

of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the

best judges of facts; it is, on the other hand, presumable, that the courts are best judges of law. But still both objects are lawfully, within your power of decision.

(US Reports 3 p.4)

Almost two hundred and fifty years after Bushell's Case, another great political theorist turned his attention briefly to the English jury. According to Max Weber, writing (probably) in 1912-13, the English jury

replaced in real actions the older magical-irrational modes of proof, i.e., wager of law and combat, by the interrogation of twelve neighbors sworn to tell whatever they knew about the seisin in question... The jury, as it were, thus took the place of the oracle, and indeed it resembles it inasmuch as it does not indicate rational grounds for its decision. There was to be a distribution of functions between presiding "judge" and jury. The popular view which assumes that questions of fact are decided by the jury and questions of law by the judge is clearly wrong. Lawyers esteem the jury system ... precisely because it decides certain concrete issues of "law" without creating "precedents" which might be binding in the future, in other words, because of the very "irrationality" in which a jury decides questions of law... Because of the jury, some primitive irrationality of the technique of decision and, therefore, of the law itself, has thus continued to survive in English procedure even up to the present time. (pp 762-3)

As we can now see, Weber's account was spot on, and, most strikingly, exactly what the main

theorists of the jury themselves believed to be its point.

For Weber, the jury was in fact the prime modern instance of the same thing he diagnosed in the 'kadi' justice of sharia courts - a "charismatic", anti-rational phenomenon, an 'oracle', a term he also used in his description of the kadi courts, as well as elsewhere in his discussions of English law.

The specific form of charismatic adjudication is prophetic revelation, the oracle, or the Solomonic award of a charismatic sage, an award based on concrete and individual considerations which yet demand absolute validity. This is the realm proper of "kadi-justice" in the proverbial, not the historical sense. For the adjudication of the (historical) Islamic kadi is determined by sacred tradition and its interpretation, which frequently is extremely formalistic; rules are disregarded only when those other means of adjudication fail. Genuine charismatic justice does not refer to rules; in its pure type it is the most extreme contrast to formal and traditional prescription and maintains its autonomy toward the sacredness of tradition as much as toward rationalist deductions from abstract norms... However, because such adjudication replaces personal charismatic authority by a regular procedure which formally determines the will of God, it belongs ... to the realm of ... depersonalization of charisma... (p.1116)

We are accustomed to think of Weberian "charisma" in the modern world mostly in the context of the politicians who smash party machines and appeal directly to the people; his prime examples were Gladstone and Teddy Roosevelt (in 1912). And his discussion of

“depersonalized” charisma in Economy and Society (admittedly a rather sketchy passage) concentrated mostly on the cases of kings and Catholic priests, both examples of individuals who possessed a kind of charismatic authority by virtue of their office. But the jury is a very different kind of charismatic institution, a site of authority which is, as he implied in his remark about the “primitive irrationality of the technique of decision”, very close to pure decisionism.

Though it often used to be said that for Weber these “primitive” institutions could not be treated as possessing any appropriate role in a modern state, we are now (as a result of work by people such as Peter Ghosh and Keith Tribe) much more conscious of the ambiguity and tragic character of Weber’s sense of the modern world - expressed most eloquently, I think, in the astonishing passage in his essay on Russia in 1906, in which he burst out

It is quite ridiculous to attribut to today’s high capitalism, as it exists in America and is being imported into Russia, ... any ‘elective affinity’ with ‘democracy’ or ‘freedom’ (in any sense of the word), when the only question one can ask is how all these things can ‘possibly’ survive at all in the long run under the rule of capitalism.

Rationalisation and standardisation, Weber thought, were winning the day, and it was hard to see how they could be resisted,

Yet time presses, and we ‘must work while it is still day’. An ‘inalienable’ sphere of freedom and personality must be won now for the individual who belongs to the great masses...

Sites of resistance are still available within the rationalising politics of the modern world, though they are fragile, and may “perhaps” never succeed, “at least as far as our weak eyes can see into the impenetrable mists of mankind’s future”.

It is also the case, though Weber never fully confronted this, that the two societies which were most obviously the bearers of high capitalism, Britain and the United States, were the two modern societies in which the process of legal rationalisation was least advanced. This is important, as Weber repeatedly said that legal rationalisation in the medieval and early modern periods in Europe was the forerunner, and an ideal type, of rationalisation in other spheres, in particular neo-classical economics (another ideal type). Not merely the jury was an example of this backwardness: he observed, for example, that the confusion between public and private bills in the English Parliament was the survival of a “primitive” attitude, and he also remarked (thinking presumably of Edward VII) that “the English parliamentary monarchy is more genuinely charismatic than the Continental monarchy”. It is obviously a mistake to suppose that “facts” of this kind undermine his general thesis, any more than “facts” about the history of capitalism in Catholic countries undermine his thesis about the affinity between capitalism and Protestantism, but - like Hobbes - Weber seems to have had a sense that these primitive features could be seen as means by which the danger to human liberty of what he termed rationalisation, and what Hobbes would have called “*Juris prudentiae* or wisdom of subordinate judges” could be resisted.

1. Thomas Andrew Green’s Verdict According to Conscience: Perspectives on the English

Criminal Trial Jury 1200 - 1800 (University of Chicago Press 1985) gives the fullest account of the history of the jury, though my sketch differs from his account in a number of ways.

2. See Edmund M. Morgan, "A Brief History of Special Verdicts and Special Interrogatories" Yale Law Journal 32 (1923) pp 575-592

3. See Anthony Musson, "Twelve Good Men and True? The Character of Early Fourteenth-Century Juries", Law and History Review 15 (1997) p.138.

4. See Year Books of Richard II: 7 Richard II 1383-1384 ed. Maurice J. Holland (The Ames Foundation 1989) pp 58-59 for a case in which the judge told an inquest jury that they had acquitted someone who was known to be a common thief, and they should be bound for his good behaviour; the Year Book reporter remarked "Query by what law?" (quere par quel ley). This case and the comment were known to Vaughan.

5. Arnold op. cit. p.278

6. See the latest account of this question, James Masschaele, Jury, State, and Society in Medieval England (Macmillan 2008) Chapters 4 and 5.

7. See Derek Hirst, The Representative of the People

8. See Charles Hamilton, "Star Chamber and Juries: Some Observations", Albion: A Quarterly Journal Concerned with British Studies 5 (1973) p.238; see *ibid* pp 238-239 for another Gloucestershire case, intriguingly concerned with the murder of a man called Hobbes.

9. Mark Eccles, "George Whetstone in Star Chamber", Review of English Studies N.S. 33 (1982) pp 391-393

10. Though as we have seen, cases such as this did occur "in the raigne of the Queene nowe".

11. On this, see my "Hobbes and Locke on Toleration"

12. It seems to have been a version of a remark in Papinianus, the Roman lawyer, in of course a very different context, that "facti quidem quaestio sit in potestate iudicantium, iuris autem auctoritas non sit." (Dig. 50.1.15). Plowden, the early Elizabethan jurist who was in many ways Coke's forerunner, said something similar - "the office of 12 men is no other than to enquire of matters of fact, and not to adjudge what the law is, for that is the office of the Court, and not of, the jury, and if they find the matter of fact at large, and further say that thereupon the law is so, where in truth the law is not so, the Judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury." Reports 114.

13. William Walwyn, Juries justified: or, A Word of Correction to Mr. Henry Robinson (London 1651) sig.A3. Mercurius Pragmaticus, a royalist news letter which Hobbes may have seen in exile in Paris, reported in August 1648 that "Harry ... preached rare Doctrine at the last Quarter Sessions at Reading, where he gave the Charge, and would not suffer the Jury or the people to stand bare before the Bench, telling them they ought not, because they were the supreme Authority and Maiesty of England." Number 21, August 15 to August 22 1648, sig. Aa3b

14. This is from State Trials IV coll 1379-1380, transcribed from The triall, of Lieut. Colonell John Lilburne (1649) sigg R1ff. The 1649 pamphlet was produced by Lilburne's supporters, but they claimed (on the whole plausibly) that it was based on an "indifferent and even" short-hand record of the proceedings.

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15. Herbert A. Grueber, A Guide to the English Medals Exhibited in the King's Library [British Museum] (London 1881) no. 169
 16. Mercurius Pragmaticus (for King Charles II) 23-30 October 1649; Certaine observations upon the tryall of Leiut. Col. John Lilburne (n.p. 1649), also printed as The second part of the triall of Lieut. Col. John Lilburne (London 1649); John Jones, Jurors judges of law and fact (London 1650), a reply to H[enry] P[arker], A letter of due censure, and redargvtion to Lieut. Coll: John Lilburne (London 1650). We should also add Henry Robinson, Certain considerations in order to a more speedy, cheap, and equall distribution of justice (London 1651) and William Walwyn, Juries justified: or, A word of correction to Mr. Henry Robinson (London 1651).
 17. See Adele Hast, "State Treason Rials during the Puritan Revolution, 1640-1660", Historical Journal 15 (1972) pp 49-50.
 18. For example in 1664, in a forerunner of Bushell's Case, the judge Sir John Kelyng bound over a jury who refused to convict some Quakers of sedition in the face of a clear ruling that if they accepted the facts of the case the law required them to find a guilty verdict; his decision was subsequently endorsed by the Chief Justice (1 Keble 769).
 19. Anchitell Grey, Debates. This grew out of a case in 1667 when Kelyng, now Chief Justice himself, fined Sir Henry Windham, the chairman of a grand jury in Somerset, and the other jurors for finding a verdict of manslaughter contrary to the law; Kelyng also claimed that he could do the same with a petty jury (2 Keble 181). Unfortunately for Kelyng, Windham was an influential M.P., and complained about the fine in the Commons; a Commons committee set up to report on "restraints upon Juries" declared Kelyng's actions in both the Quaker case and the Somerset case "arbitrary and illegal", and brought him before the bar to apologise. Kelyng defended the legality of his actions, and the Commons began proceedings on a bill to declare the fining and imprisoning of jurors illegal.
 20. The Atheism Bill which had threatened Hobbes in 1667 died in Parliament in the spring of 1668 and was not renewed under the Cabal.
 21. Alan Cromartie (pp lxii - lxv) has suggested that it was begun after Behemoth, and possibly after 1670, but Hobbes's remarks on the jury look to me as if they belong to an earlier date.
 22. This is the abortive 1670 edition which, Noel Malcolm has shown, reemerged as part of the so-called "Bear" edition issued in Holland in the later 1670s.
 23. Brief Lives ed. Andrew Clark (OUP 1898) I p. 369.
 24. This is true, I think, of Thomas Andrew Green's Verdict According to Conscience.