

# THE JURY SYSTEM IN CONTEMPORARY IRELAND: IN THE SHADOW OF A TROUBLED PAST

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## I

### INTRODUCTION

One of the aims of this symposium is to demonstrate how the jury system has managed to adapt and survive in a range of very different legal and political environments. In one respect, the survival of the jury in a country that has long been riddled with political upheaval, violence, and division may be viewed as a powerful symbol of the triumph of an institution that has endured throughout the years as a living testament to the adaptability of the common law tradition with which the jury system is often associated. Not only did the jury survive the political troubles in eighteenth and nineteenth century Ireland, but it also has survived the constitutional changes of the twentieth century that brought about the partition of the island into two separate legal jurisdictions, the Republic of Ireland, an independent state comprising twenty-six out of the thirty-two counties on the island, and Northern Ireland, remaining part of the United Kingdom and comprising the other six counties.<sup>1</sup> Although jury trial was imposed under the English common law in Ireland, this mode of trial was enshrined for criminal cases in the Irish Constitution of 1937 and remains an important constitutional right. North of the border, jury trial has survived thirty years of recent troubles, and, although it has been suspended for cases connected with the troubles, all the protagonists in the present "peace process" expect it to be restored once the troubles have abated.

At another level, however, jury trial may be viewed as a dying remnant from the past, more deeply in decline perhaps even than in England and Wales, with only the force of tradition saving it from complete extinction. Jury trials have almost entirely disappeared in civil cases both north and south of the border.<sup>2</sup> In the Republic of Ireland, civil juries are retained only for libel, slander,

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1. For a modern history of Ireland, see ROBERT F. FOSTER, *MODERN IRELAND 1600-1972* (1989). For a history of Northern Ireland, see JONATHAN BARDON, *A HISTORY OF ULSTER* (1992).

2. See RAYMOND BYRNE & J. PAUL MCCUTCHEON, *THE IRISH LEGAL SYSTEM* 102 (3d ed. 1996); BRICE DICKSON, *THE LEGAL SYSTEM OF NORTHERN IRELAND 192-93* (3d ed. 1993).

assault, and false imprisonment cases; in Northern Ireland, civil juries are retained only for libel claims or if the judge accedes to a particular application.<sup>3</sup> As the jury has ceased to play any significant role in civil cases, this article on the contemporary jury in Ireland does not intend to say anything more about them.

The article will focus on the distinctive features of criminal trial by jury in Ireland, both north and south, to explain on the one hand how the jury continues to survive within modern Ireland, and on the other hand how it also has managed to decline in significance. The constitutional guarantee of jury trial in criminal cases in the Irish Republic is subject to important exceptions, with the result that most criminal accused are tried before a judge sitting alone rather than a jury. This also holds true for Northern Ireland. As Ireland is hopefully transformed in the new millennium into a more peaceful and less divisive island, it may be that political conditions will become more conducive for jury trial and its decline will be arrested. But active steps will arguably need to be taken to deal with certain problems inherent in the present system that are likely to persist beyond any abatement of the troubles before the future of the jury trial in Ireland can be fully assured.

## II

### ORIGINS AND DEVELOPMENT OF JURY TRIAL IN IRELAND

The origins of jury trial in Ireland share much in common with those of England and Wales. Commencing with the Anglo-Norman invasion of 1169, the English common law tradition, with its system of trial by jury, gradually supplanted the native custom-based system of Brehon law; by the end of the seventeenth century, the common law tradition was firmly established throughout the country. The inception of the jury trial as developed in England by the Normans is outlined elsewhere in this volume and shall not be rehearsed here.<sup>4</sup> However, the development of the Anglo-Norman jury trial and the differences that emerged in Ireland as a result of the divergent culture and history will be examined. Despite the wholesale imposition of English common law in Ireland, it would appear that the particular society and circumstances in Ireland ensured that jury trial never succeeded in establishing a firm grasp on the Irish legal system, at least not to the same extent as it did in England and Wales.

Jury trial in Ireland has often had to operate in a turbulent society. During the eighteenth and nineteenth centuries in particular, when violence and sectarian tensions abounded, the jury system came under considerable strain. At certain periods and in particular parts of the country, intimidation of both ju-

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3. The most significant recent change occurred when personal injury claims were taken out of the control of juries, first in Northern Ireland in 1987 and shortly afterward in the Republic of Ireland in 1988. This issue is discussed in BRYAN M.E. MCMAHON, *JUDGE OR JURY? THE JURY TRIAL FOR PERSONAL INJURY CASES IN IRELAND* (1985).

4. See Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 *LAW & CONTEMP. PROBS.* 7, 8-10 (Spring 1999).

rors and witnesses, antipathy toward the state, close community ties between jurors and accused, and juror sympathy with the accused combined to create serious difficulties in securing convictions. Jurors were particularly reluctant to enforce the law in agrarian and political cases, but there is also some evidence of a reluctance to convict even in cases of ordinary, everyday crime. This has been borne out by evidence that in the latter half of the nineteenth century, conviction rates were lower than in England and Wales for all categories of crime.<sup>5</sup> Legal folklore also has abounded with stories of perverse jury acquittals.<sup>6</sup> In one of these, a judge is said to have dismissed a prisoner with the words "You have been acquitted by a Limerick jury, and you may now leave the dock without any other stain upon your character!"<sup>7</sup> It has been suggested that the root problem stemmed from the dual function of the system of jury trial.<sup>8</sup> On the one hand, it is supposed to enforce the law of the land; on the other hand, it is supposed to represent judgment by one's peers. Where, however, many of the laws are out of harmony with jurors' own convictions and where jurors have sympathy with many of their peers who are put on trial, the jury system can undermine the entire system of criminal justice.

As a result of these problems, a number of remedial tactics were employed by the Crown and the prosecuting authorities to ensure the conviction of offenders. One tactic was the trial of a large portion of offences without the use of a jury where possible by, for example, the extension of the jurisdiction of the summary courts and trials before "resident magistrates." Although the sentences handed down in these courts of summary jurisdiction would inevitably be lighter, the hope was that this tactic would result in more convictions.<sup>9</sup>

Where the use of jury trial could not be avoided, a number of more subtle tactics were developed by the Crown in an effort to ensure the punishment of offenders. Such strategies included the extensive use of the Crown's right to ask potential jurors to stand by,<sup>10</sup> the transfer of trials to different venues to avoid local prejudices,<sup>11</sup> the use of "special jurors,"<sup>12</sup> and the reduction of charges to convince defendants to plead guilty.<sup>13</sup> The use of the prosecution's

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5. For the statistical evidence see D. Johnson, *Trial by Jury in Ireland 1860-1914*, 17 *LEGAL HIST.* 270, 273-77 (1996).

6. Some of the stories are recounted in MAURICE HEALY, *THE OLD MUNSTER CIRCUIT* (1977), and in ALEXANDER M. SULLIVAN, *THE LAST SERJEANT: THE MEMOIRS OF SERJEANT A.M. SULLIVAN* (1952).

7. HEALY, *supra* note 6, at 229.

8. *See* Johnson, *supra* note 5, at 289.

9. *See id.* at 270-71.

10. "Stand-by" was a right enjoyed by the Crown, under the common law, whereby an unrestricted number of potential jurors could be challenged without cause and thereby excluded from jury service. Although strictly speaking the Crown prosecutors were required to show cause for such challenges when the entire jury panel had been gone through, it appears that in practice the Crown was rarely called upon to do so. *See* Johnson, *supra* note 5, at 271; J.F. McEldowney, "Stand by for the Crown": *An Historical Analysis*, 1979 *CRIM. L. REV.* 272, 275.

11. *See* Johnson, *supra* note 5, at 271.

12. *See id.* "Special jurors" were comprised of wealthy men in the county and were often used for the trial of political or agrarian offences.

13. *See id.*

right to ask potential jurors to stand by was particularly controversial and frequently led to accusations of jury packing. Indeed, it was believed by some that the prosecution used this right to select a jury more sympathetic to the prosecution's case, such as a predominantly Protestant jury where the accused was a Catholic.<sup>14</sup> The Crown, on the other hand, contended that the right of stand-by was used merely to ensure an unbiased jury in cases where the impartiality of potential jurors was in doubt.<sup>15</sup> There was also some suggestion that the sub-sheriffs who empanelled the jury were also involved in jury packing, calling only on particular categories of jurors for particular cases.<sup>16</sup> If it was suspected that a sheriff had manipulated the jury in this way, the English procedure of "challenge to the array" was open to the accused or the prosecution. The potential for such "packing" by sheriffs was, however, greatly reduced in 1873 when the Juries (Ireland) Act of 1871 came into force. This Act provided for a system of jury service by alphabetical rotation and consequently significantly curtailed the discretion of the sheriff in empanelling the jury.

These attempts by the Crown to influence the composition of the jury and thereby the outcome of the case were matched on the defence side by the frequent use of the extensive right of peremptory challenge. Each defendant was given the right to challenge twenty jurors if accused of a felony and, from 1876, six if charged with a misdemeanour,<sup>17</sup> with the result that, despite the strenuous efforts of the Crown, conviction rates were kept low, particularly in "agrarian"<sup>18</sup> and political cases. Although many of the strategies adopted by the government and prosecuting authorities in Ireland to increase the prospect of conviction, such as the extensive use of the summary jurisdiction and the use of stand-by, were also utilised in England and Wales,<sup>19</sup> periods of particular political and agrarian tension in some parts of Ireland caused these tactics to place even greater strain on Irish jury trial.

Indeed, in times of particular unrest, jury trial was suspended altogether for specified periods for certain offences and in particular locations, with the substitution of a variety of special courts. In 1882, for example, in the aftermath of a number of particularly sensational murders known as the Phoenix Park murders,<sup>20</sup> legislation was enacted to allow for the nonjury trial of certain serious offences. The Prevention of Crimes (Ireland) Act of 1882 intended to create a "Special Commission Court" comprising three senior judges who would try

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14. See Johnson, *supra* note 5, at 285; McEldowney, *supra* note 10, at 279-80.

15. See McEldowney, *supra* note 10, at 278-79.

16. See Johnson, *supra* note 5, at 272.

17. See Juries Procedure (Ireland) Act, 1876, 39 & 40 Vict., ch. 78, § 10 (Eng.).

18. Crime committed in rural areas, often associated with the Land Question. See FOSTER, *supra* note 1, at 406. See generally VIRGINIA CROSSMAN, POLITICS, LAW AND ORDER IN NINETEENTH CENTURY IRELAND (1996).

19. See generally J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 (1986); W.R. CORNISH & G. DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at ch. 8 (1989).

20. The so-called Phoenix Park murders were particularly controversial as they were believed to be politically motivated and the victims, Cavendish, the Irish Chief Secretary, and Burke, the Irish Under Secretary, were killed by a secret society known as the "Invincibles."

such offences in the absence of a jury. Although the Special Commission Court was never used, the very enactment of this legislation illustrates that Ireland is not a stranger to the concept of nonjury trial, particularly during troubled periods, and this may go some way to explaining the ease with which jury trial, regarded by some as a fundamental right, continues to be withdrawn from certain categories of offenders well into the twentieth century.

Given the political tensions and divided nature of Irish society in the eighteenth and nineteenth centuries, the notion of trial by an impartial jury of one's peers which would result in a conviction where the evidence of guilt was clear was always going to be a difficult achievement. There are differing views as to the extent of the difficulties encountered by the jury system in Ireland and their impact on the institution. On the one hand, it has been contended that despite its problems, jury trial was never truly doubted as the most appropriate mode of trial for criminal offences in Ireland,<sup>21</sup> whereas on the other hand it has been argued that given the difficult circumstances in which jury trial was forced to operate, the persistence of a jury system in Ireland at all is "an achievement of note."<sup>22</sup> Although we cannot be sure of the extent to which jury trial was truly threatened during this turbulent time, the difficulties of the past have left their mark on the modern jury system in Ireland. If the troubles have cast a shadow on the operation of the modern jury, however, the system has been bolstered in the Republic of Ireland by a constitutional guarantee that protects the right to jury trial in criminal cases. We turn now to consider the significance of this constitutional guarantee.

### III

#### THE CONSTITUTIONAL DIMENSION: JURY TRIAL AS A CONSTITUTIONAL RIGHT

The present Constitution of the Republic of Ireland, enacted by the people in 1937, provides that, subject to three exceptions, "no person shall be tried on any criminal charge without a jury."<sup>23</sup> The exceptions referred to in Article 38.5 relate to summary trial for minor offences, trial by special courts, and trial by military tribunals. Despite the unequivocal words of Article 38.5, however, the meaning of trial by jury is left undefined in the Irish Constitution and it has been argued that this lack of definition gives rise to some confusion as to exactly what type of "jury" the constitutional guarantee seeks to protect.<sup>24</sup> Must the function and composition of juries remain as they were in 1937, for example, in order to enjoy the constitutional guarantee? The Constitution is silent as to what features and functions are fundamental to the constitutional notion

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21. See NEAL GARNHAM, *THE COURTS, CRIME AND THE CRIMINAL LAW IN IRELAND 1692-1760*, at 133 (1996).

22. J.F. McELDOWNNEY, *IRISH JURY TRIAL: A SURVEY OF SOME EIGHTEENTH AND NINETEENTH CENTURY STATUTES 1* (1979).

23. CONST. art. 38.5 (Ir.).

24. See J.M. KELLY ET AL., *THE IRISH CONSTITUTION* 657 (3d ed. 1994).

of a jury, and, as such, there remains much which is unclear regarding the implications of Article 38.5 for jury trial in the Republic of Ireland. However, a number of important decisions have been handed down which go some way toward elucidating the implications of the constitutional guarantee for jury trial in Ireland.

The importance of the constitutional guarantee in light of the troubled nature of Irish history has been expressed by one senior judge:

The bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution thereof of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long been implanted in the consciousness of the people, and, therefore, in the minds of their political representatives, the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to "put himself upon his country," that is to say to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed, so that, amongst other things, if the jury's verdict were one of not guilty, the accused could leave court with the absolute assurance that he would never again "be vexed" for the same charge.<sup>25</sup>

This statement goes some way to explaining why it was thought necessary to entrench trial by jury in the new Constitution. In the eyes of many, the criminal justice system had been corrupted by those in authority during the troubles of the eighteenth and nineteenth century and the constitutionally protected jury provided a safeguard against future tyranny. This continues to provide an enduring rationale for the continuation of the jury system in other countries,<sup>26</sup> but in Ireland, of all places, where there had been such enormous political upheaval and strife, the risk of future tyranny could not be discounted until well into the twentieth century. It would therefore seem that although the troubles provide an explanation of why the jury system never established as firm a grasp on the Irish legal system as it did in England and Wales, they also provide an explanation for its continued existence under the new Constitution.

Despite this entrenchment, however, jury trial in the Republic of Ireland has been significantly eroded in recent years. First, as previously mentioned, the Constitution itself qualifies this right considerably by exempting minor offences, special courts, and military tribunals from jury trial. Second, this right is further diminished by the acceptance of majority as opposed to unanimous jury verdicts. It will become evident when these distinctive features of trial by jury in the Republic of Ireland are examined in more detail that, despite the apparent strength of the constitutional guarantee, official policies on jury trials in criminal cases have become decidedly abolitionist in modern Ireland. But before we examine these issues, we need to examine how the constitutional guarantee has affected the composition of the modern Irish jury.

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25. *The People (Director of Public Prosecutions) v. O'Shea*, [1992] 1 I.R. 384, 432-33 (Henchy, J.) (delivering a minority judgement on the issue of the nonappealability of jury acquittals).

26. See, in particular, SIR PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956), who eloquently described trial by jury as the "lamp that shows that freedom lives."

### A. Jury Composition and Selection in Ireland

The eligibility and selection of jurors in the Republic of Ireland today are governed by the Juries Act of 1976. The immediate motivation for the introduction of this legislation was the decision of the Supreme Court in *de Burca & Anderson v. Attorney General*,<sup>27</sup> although work on the bill was at an advanced stage by the time this decision was handed down. In *de Burca*, the plaintiffs argued successfully that the existing law<sup>28</sup> was inconsistent with the Constitution because it confined jury service to citizens with certain property qualifications and exempted all women. Women were not, strictly speaking, *excluded* from jury service; they were merely *exempt* and could apply for inclusion on jury lists. However, in the ten years preceding the hearing of this action, only two women had actually served on a jury. So far as the property qualification was concerned, the Minister for Justice had statutory power to prescribe the rateable value of land that was to be the minimum qualification for service as a juror in that district.

All five members of the Supreme Court agreed that the property qualification was unconstitutional. Two of them held that it constituted an invidious discrimination which violated the equality clause of the Constitution. Two others held that it produced a lack of representativeness which failed to comply with the notion of a jury as required in criminal cases by Article 38.5 of the Constitution. The fifth member concurred without stating a specific reason. On the issue of women on juries, four members of the Supreme Court found the effective exclusion of women to be unconstitutional, partly on the ground of inequality and partly on the ground of lack of representativeness. The Chief Justice, O'Higgins, dissented on this issue. He held that since the state, while allowing women to serve as jurors, "permits each woman to decide for herself, in accordance with her own circumstances and special responsibilities, whether service on a jury is a right she ought to exercise or a burden she ought to undertake,"<sup>29</sup> it could not be regarded as engaging in invidious discrimination. The 1976 Act, which was implemented partly as a result of this decision, provides simply that, subject to certain exceptions, every citizen between eighteen and seventy years of age entered on the register of Dáil electors in a jury district shall be eligible for jury service.<sup>30</sup> There is no discrimination on the basis of gender or property ownership. The exceptions consist of persons who are in

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27. [1976] 1 I.R. 38.

28. Juries Act (1927) (Ir.).

29. [1976] 1 I.R. at 59.

30. See Juries Act § 6 (1976) (Ir.). The Republic of Ireland legislature consists of the President, the House of Representatives (the Dáil), and the Senate. Members of the Dáil are elected directly by the People. All citizens (and certain others) who have reached the age of 18 are eligible to vote in Dáil elections.

eligible<sup>31</sup> for or disqualified<sup>32</sup> from jury service, and persons excusable as of right.<sup>33</sup>

Turning to the rules governing the selection of juries, panels of potential jurors are first of all drawn up by each county registrar from the register of Dáil electors for the county using "a procedure of random or other non-discriminatory selection."<sup>34</sup> These jurors are then summoned to attend at court on a particular date and at the beginning of each jury trial jurors are selected from the jury panel by ballot in open court.<sup>35</sup> Before jury selection is commenced, however, the judge must warn potential jurors that ineligible or disqualified persons must not serve on the jury and outline the penalty for doing so. The judge must then go on to call upon any person who knows that he or she is not qualified, or is in doubt as to whether he or she is qualified to serve on the jury, or any person who may "have an interest in or connection with the case or the parties," to inform the judge of this fact, either orally or otherwise, if selected.<sup>36</sup> Although having an interest in the case or the parties is not itself grounds for disqualification from jury service, such an interest or connection may form the basis of a challenge.

Like Northern Ireland, but unlike England and Wales,<sup>37</sup> the right of peremptory challenge still exists in the Republic of Ireland, alongside the right to challenge for cause. Indeed, in jury trials in this jurisdiction, both the defence and the prosecution may challenge up to seven jurors without cause.<sup>38</sup> In a case involving many co-defendants, each defendant may challenge seven potential jurors without cause, whereas the prosecution may never challenge more than

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31. *See id.* § 7, sched. 1, pt. 1. The President of Ireland, persons concerned with the administration of justice (including practising lawyers, members of the police, and prison officers), members of the defence forces, and incapable persons are all ineligible for jury service. Incapable persons are those who, because of insufficient capacity to read, deafness, or other permanent infirmity are unfit for jury service, as well as those who, on account of a mental illness or disability, are resident in a hospital or similar institution, or are regularly treated by a medical practitioner.

32. *See id.* § 8. A criminal record is the sole ground for disqualification from jury service. Any person who has ever been sentenced to imprisonment for five years or more, or to detention under section 103 of the Children Act (1908) (which provides for indefinite detention of persons under the age of 17 who have been convicted of murder), or who, within the last 10 years, has served any part of a term of imprisonment or detention where the sentence was for three months or longer, is disqualified.

33. *See* Juries Act § 9, sched. 1, pt. 2 (1976) (Ir.). There is a long list of persons who are excusable as of right. It includes Members of Parliament, ministers of religion, and professional people, such as doctors, veterinary surgeons, and pharmacists, provided they are actually in practice. Many others, including civil servants, local authority officials, and teachers at all educational levels may be excused following certification by a senior official in the relevant workplace that the person in question "performs essential and urgent services of public importance that cannot reasonably be performed by another or postponed." *Id.* All full-time students in any educational institution are also excusable.

34. *Id.* § 11.

35. *See id.* § 15(1). However, when jurors are summoned to make up a deficiency and balloting has already begun, the judge may dispense with the need for a ballot in respect of these jurors. *See id.* § 15(2).

36. *Id.* § 15(3).

37. The right of peremptory challenge was abolished in England and Wales under the Criminal Justice Act, 1988 (Eng.). *See* Lloyd-Bostock & Thomas, *supra* note 4, at 23-24.

38. *See* Juries Act § 20 (1976) (Ir.).



seven jurors notwithstanding the number of co-accused.<sup>39</sup> No explanation whatever need be given for these peremptory challenges. Any number of jurors may subsequently be challenged with cause.<sup>40</sup> Finally, it appears that the right to ask potential jurors to "stand by," once enjoyed by the Crown, no longer exists in Ireland.<sup>41</sup>

Unlike the situation that prevails in the United States, potential jurors in the Republic of Ireland may not be questioned by the parties to the proceedings before challenges are made. Indeed, accused persons and the prosecution are armed with little or no insight into the sympathies and prejudices of potential jurors with which to make the decision to challenge or not. Although any member of the public is entitled to reasonable facilities to inspect a jury panel, and any party to a proceeding is entitled to apply to the county registrar for a copy of the jury panel list free of charge,<sup>42</sup> these lists generally contain only the names and addresses of potential jurors and occasionally their occupations. Consequently, they provide little information for either the accused or the prosecution to decide whether to exercise their rights of challenge.

The rights of challenge (both peremptory and with cause) have so far escaped critical attention in this jurisdiction, although as we shall see, they have been the subject of some scrutiny in Northern Ireland. They can without doubt be used to exclude women (or men), or members of racial, religious, or ethnic minorities. In the absence of any empirical research on the matter, it is difficult to assess the predominant motivations underpinning the use of this statutory privilege. Each side in a case will obviously wish to have a jury most likely to be sympathetic toward it. Age and socio-economic status are therefore likely to be the more predominant criteria informing peremptory challenges. There is evidence that peremptory challenging was commonplace in nineteenth-century trials. Kenny records that in Ireland in the past the policy of some lawyers, presumably acting for the defence, was to challenge anyone who wore a necktie.<sup>43</sup> It is possible that the same mentality may underpin many challenges made today.

There is no statutory requirement for gender balance on Irish juries. The Law Reform Commission recently considered the matter in the context of rape law but decided against recommending a minimum number of women on juries in rape trials.<sup>44</sup> Statistics for the years 1979 to 1986<sup>45</sup> show that the changes made in the 1976 Act have increased the representation of women on juries with the percentage of women on juries varying over those years from twenty-

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39. *See id.*

40. *See id.* § 21.

41. *See* Juries Act § 59 (1927) (Ir.), which made statutory provision for the exercise of a right to "stand by" by the Attorney General. This was abolished when the 1927 Act was repealed by the 1976 Juries Act.

42. Juries Act § 16 (1976) (Ir.).

43. *See* J.W. CECIL TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 610 n.4 (19th ed. 1966).

44. *See* Law Reform Comm'n, Rape (Consultation Paper, 1987).

45. *See id.* at 81, 94-97.

three to forty-four percent. The Commission did not find any direct correlation between the gender composition of juries and verdict, and verdicts of not guilty were returned in several cases in which there had been a majority of women jurors.<sup>46</sup> But there is much still to be investigated about the effect of jury composition on jury verdicts.

It would seem that there is a more general need for empirical investigation into the practice of jury challenges, whether with or without cause, and into patterns of jury composition. As already noted, a wide variety of citizens are eligible to be excused from jury service. Furthermore, the penalty for failure to answer a summons for jury service is merely a fine of fifty pounds.<sup>47</sup> It has been suggested that a fairly high percentage of jurors are likely to be unemployed.<sup>48</sup> All of these factors point to the necessity for an investigation of prevailing patterns of jury composition. Much of the official and rhetorical support for jury trial rests on the assumption that it consists of trial by twelve of one's peers randomly chosen, which in turn implies a reasonable guarantee of representativeness. But for the reasons just indicated, this can no longer be assumed. Also, as Irish society becomes slowly but surely more multicultural, it is all the more important that peremptory challenges are not being used in a discriminatory fashion.

#### B. The Scope of the Right to Jury Trial in the Republic of Ireland

As mentioned above, every person charged with a criminal offence in the Republic of Ireland enjoys a constitutional guarantee to jury trial unless the offence is being tried by a court of summary jurisdiction, a special court, or a military tribunal. Non-minor offences, therefore, which do not fall within one of the other two exceptions retain the constitutional right to jury trial and are tried by a judge and jury in either the Circuit Criminal Court or the Central Criminal Court. The Circuit Criminal Court sits at various locations throughout Ireland and hears non-minor criminal offences, but the most serious criminal offences, such as rape and murder, are dealt with in Dublin in the Central Criminal Court.

The first exception to the right of trial by jury in the Republic of Ireland concerns minor offences, which may be tried by a "court of summary jurisdiction,"<sup>49</sup> meaning in effect the District Court. One of the more innovative aspects of the judicial system established in 1924 after the achievement of political independence was the substitution of a professional judiciary for the magistracy. Therefore, unlike England and Wales, which favour a lay magistracy, legally qualified factfinders are favoured over lay factfinders in courts of summary jurisdiction in the Republic of Ireland. Furthermore, as the qualifica-

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46. *See id.*

47. *See* Juries Act § 34 (1976) (Ir.).

48. *See* MCMAHON, *supra* note 3, at 22.

49. CONST. art. 38.2 (Ir.).

tions for appointment as a district judge are quite stringent,<sup>50</sup> a reasonably extensive jurisdiction in both civil and criminal matters can be granted to the District Court.

Like the question of what constitutes a jury for the purposes of the constitutional guarantee, the Constitution of Ireland does not provide a definition of a “minor” offence for the purposes of summary trial. In the absence of a constitutional or statutory definition, it has been left to the courts to identify the distinguishing characteristics of a minor offence fit to be tried summarily. The main criterion developed so far is the level of punishment which the offence may attract.<sup>51</sup> At present, the District Court is precluded from imposing a prison sentence in excess of one year for any one offence or two years for a combination of offences. It may not impose a fine in excess of £1,000 for an indictable offence, although many summary offences now carry fines of up to £1,500. Any offence for which the appropriate punishment would appear, in the opinion of the District Court, to exceed these sentences should not be treated as minor. The defendant should therefore be sent forward to trial to a higher court or, if he or she has pleaded guilty, be sent forward for sentence on a signed plea. Another distinguishing criterion is the moral quality of the offence—it has been held that certain offences such as murder and rape should never, on account of their heinous nature, be treated as minor.<sup>52</sup> The jurisdiction of the District Court in criminal matters is quite extensive, with the result that, notwithstanding the constitutional guarantee to jury trial in criminal matters, most accused in the Republic of Ireland are tried before a judge sitting alone without a jury. Indeed in 1997, 99.6% of all criminal cases in the Republic of Ireland were dealt with in the District Court before a legally qualified factfinder sitting alone.<sup>53</sup>

The other two exceptions to the right of trial by jury relate to circumstances when jury trial would be inappropriate or would be ineffective to secure the conviction of offenders. Military tribunals may be established to try persons subject to military law and to try offences during war or rebellion. But Article 38.3 of the Constitution also provides for the establishment by law of special courts “for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.” Advantage has been taken of this provision on three occasions since 1939 to establish Special Criminal Courts, the most recent of which was in 1972 when the

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50. To qualify for appointment as a District Judge, a person must have practised as a solicitor or barrister for at least 10 years. See Court (Supplemental Provisions) Act § 29(2) (1961) (Ir.). In practice, however, the vast majority of appointees will have practised for considerably longer; rarely will a person with less than 20 years’ experience be considered for a judicial appointment.

51. See *Conroy v. Attorney General*, [1965] 1 I.R. 411; *Melling v. Ó Mathghamna*, [1962] 1 I.R. 1.

52. See *Conroy*, [1965] 1 I.R. at 436.

53. See Unpublished Statistics provided by the Courts Division, Department of Justice, Equality, and Law Reform, Dublin (on file with authors) [hereinafter, Unpublished Statistics]. This figure includes all adults sent for trial (including those who ultimately pleaded guilty) before the District Court for both summary offences and indictable offences dealt with summarily.

Court was reestablished in response to the spill-over effects of violence within Northern Ireland.<sup>54</sup> The Special Criminal Court is governed by the Offences Against the State Act of 1939, which provides most significantly that this court sit without a jury and that it comprise an uneven number of members not below three.<sup>55</sup>

The jurisdiction of the Special Criminal Court is potentially quite expansive, extending both to certain "scheduled" and "nonscheduled" offences. Under section 36 of the 1939 Act, the government can schedule "offences of any particular class or kind under any particular enactment" for trial by the Special Criminal Court. This has meant that a wide range of offences have been scheduled, including offences under the Malicious Damage Act of 1861, section 7 of the Conspiracy and Protection of Property Act of 1875, the Explosive Substances Act of 1883, and the Firearms Acts of 1925-71. Persons charged with such offences must be tried before the Special Criminal Court unless the Director of Public Prosecutions directs otherwise. In addition, section 46 of the 1939 Act provides that nonscheduled offences also can be tried by the Special Criminal Court where the Director of Public Prosecutions certifies that, in his opinion, the ordinary courts are inadequate in a particular case to secure the effective administration of justice and the preservation of public peace and order. Although the rationale for the establishment of the Special Criminal Court was largely anxiety about jury intimidation by terrorist organisations, the jurisdiction of this court is not restricted to such cases and can extend also to "ordinary" criminal conduct.<sup>56</sup> However, despite the potential within the 1939 Act for the extensive use of the Special Criminal Court, the court has been employed very infrequently in recent years. Indeed, between 1990 and 1997 the number of accused persons indicted in the Special Criminal Court fell from forty-nine to only twenty-six, with as few as twelve and fifteen accused persons facing trial in the Special Criminal Court in 1995 and 1996, respectively.<sup>57</sup>

### C. The Jury's Verdict and the Constitutional Guarantee

Jury trial in criminal cases in the Republic of Ireland has been further eroded by the recent concession by the Supreme Court that a majority verdict will suffice in order to uphold the constitutional guarantee. It could be argued that the very essence of trial by jury as envisaged at the enactment of the Constitution in 1937 demands a unanimous verdict by twelve jurors and, indeed, that such a fundamental alteration to the system of trial by jury would require an amendment to the Constitution and, consequently, a referendum. However,

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54. For more detailed accounts of the Special Criminal Court, see GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* 227-44 (1989); KELLY ET AL., *supra* note 24, at 642-49; MARY ROBINSON, *THE SPECIAL CRIMINAL COURT* (1974).

55. The members of the Special Criminal Court may be judges, solicitors, or barristers of not less than seven years' standing or Defence Forces Officers not below the rank of commandant. See *Offences Against the State Act* § 35, pt. 5 (1939) (Ir.).

56. See *The People (Director of Public Prosecutions) v. Quilligan*, [1986] 1 I.R. 495.

57. See *Unpublished Statistics*, *supra* note 53.

this interpretation of Article 38.5 was categorically rejected by the Supreme Court in *O'Callaghan v. Attorney General*.<sup>58</sup> In that case, the appellant, convicted in the Dublin Circuit Court of larceny and robbery by a majority verdict of ten to two, sought a declaration that section 25 of the Criminal Justice Act 1984, which allows for majority verdicts, was unconstitutional. Section 25(1) of the 1984 Act provides that “[t]he verdict of a jury in criminal proceedings need not be unanimous in a case where there are not fewer than eleven jurors if ten of them agree on the verdict.”

O'Callaghan argued that the constitutional guarantee of trial by jury demanded unanimity and as such section 25 was unconstitutional. In arriving at its decision, the Supreme Court recalled that the requirement of unanimity had previously been relaxed by the Juries (Protection) Act of 1929, and rejected O'Callaghan's submission that unanimity was embedded in the Constitution by Article 38.5. Delivering the opinion of the court, Justice O'Flaherty took the opportunity to shed some further light on the fundamental characteristics of jury trial as protected by the 1937 Constitution:

The purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law, and be tried by a reasonable cross-section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts. The essential feature of a jury trial is to interpose, between the accused and the prosecution, people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused. A requirement of unanimity is not essential to this purpose.<sup>59</sup>

It is arguable, however, that Justice O'Flaherty's statement of the essential features of the constitutionally protected jury represents a considerably watered down version of the 1937 notion of jury trial which required the agreement of all twelve jurors. Indeed, it is questionable whether a majority verdict, where up to two jurors are not convinced of the guilt of the accused beyond a reasonable doubt, adequately protects the rights of the accused.<sup>60</sup> The Supreme Court itself conceded that if the proportion of jurors required for a majority verdict was “substantially lowered,” it might be sufficient to raise a doubt about the guilt of the accused.<sup>61</sup> On the other hand, it has been argued that the approach of the Supreme Court may have been influenced by practical considerations such as the vexation of finding section 25 of the 1984 Act unconstitutional and consequently all of the majority verdicts delivered under it invalid.<sup>62</sup>

In view of the approach of the courts, the constitutional guarantee does not appear to have rendered trial by jury in the Republic of Ireland inviolable. The courts' interpretation of the qualifications to the scope of jury trial and the verdicts of the jury arguably have chipped away at this constitutional “right.” In-

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58. [1993] 2 I.R. 17.

59. *Id.* at 25.

60. For further argument, see G. Maher, *The Verdict of the Jury*, in *THE JURY UNDER ATTACK* 40 (Mark Findlay & Peter Duff eds., 1988).

61. [1993] 2 I.R. at 26.

62. See James Casey, *Interpretation of Constitutional Guarantees: An Antipodean History Lesson?*, 31 IR. JUR. 102, 109 (1996).

deed, further erosion may lie ahead, for as Justice O'Flaherty noted in *O'Callaghan*, in spite of the constitutional protection, "[t]he operation of jury trials in criminal cases is not to be regarded as fixed and immutable; this was made clear by the amendment of the law that was brought about as a consequence of *de Burca v. Attorney General*."<sup>63</sup>

This statement begs the question of how far the constitutionally protected right to jury trial may be removed from the 1937 notion of the jury system without breaching the Constitution. In the light of the Supreme Court decisions to date, it may be thought that the constitutional guarantee does little more than offer rhetorical support for the jury system, rather than any substantial protection.

#### D. Juries, the Media, and Fair Trial

Although the constitutional right to jury trial may not afford as much protection to the jury system in the Irish Republic as advocates of jury trial would like, the Supreme Court has been very insistent on the need for trials to be fair. Article 38.1 of the Constitution states that "no person shall be tried on any criminal charge save in due course of law," and, in conjunction with other constitutional provisions, this has been interpreted by the Supreme Court to mean that every trial shall apply fair procedures.<sup>64</sup> Fairness is therefore an overriding requirement of all trials, whether they are jury trials or not, and this raises the question whether there are circumstances in which jury trial can become unfair.

One concern that has become particularly prevalent in recent years has been the role of the media in its coverage of criminal jury trials. While there is clearly a value in informing the public about the work of our criminal courts, increased media coverage carries with it dangers for the administration of justice, the most significant being that the outcome of a case will be influenced by media coverage. It is often assumed that juries are particularly susceptible to prejudice on account of media coverage, while judges are much less impressionable as a result of their training and experience.<sup>65</sup> It is debatable whether juries are more susceptible than other tribunals of fact in this regard, but it cannot be doubted that the impartiality of a jury's verdict may be compromised where the jurors are exposed to prejudicial media accounts of the parties to proceedings.

There are a number of restrictions placed on reporting and commenting on court proceedings. Although the Constitution of Ireland contains provisions laying down the principle of open justice and freedom of expression, these

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63. [1993] 2 I.R. at 24 (citing *de Burca & Anderson v. Attorney General*, [1976] 1 I.R. 38).

64. See *State (Healy) v. Donoghue*, [1976] 1 I.R. 325, 348-49 (O'Higgins, C.J.). The other constitutional provisions referred to are in Article 34, which recognises the concept of open justice, and Article 40.3, which guarantees the personal rights of the citizen. See KELLY ET AL., *supra* note 24, at 340-59, 589-93.

65. See *Desmond v. Glackin* (No. 2), [1992] 12 I.L.R.M. 490; *Weeland v. RTE*, [1987] 2 I.R. 662; *Cullen v. Toibin & Magill*, [1984] 4 I.L.R.M. 577.

principles have been limited in a number of ways.<sup>66</sup> The traditional way in which the courts have protected parties from prejudicial comment has been by means of the law of contempt of court. The *sub judice* rule in particular, restraining or restricting comment on pending proceedings, has placed considerable limitations on media reporting.<sup>67</sup> As well as these restrictions, the courts have in a number of cases aborted jury trials on the ground that media reporting had created a real risk of an unfair trial.

The balance between the interests of fair trial and freedom of the press was recently addressed by the Supreme Court in *Irish Times Ltd. v. Murphy*,<sup>68</sup> where the Court ruled on the validity of an order made by a circuit court judge prohibiting the media from reporting the evidence which would be given in a drug trial until the conclusion of the trial. The Court agreed with Justice Denham in *D. v. Director of Public Prosecutions*<sup>69</sup> that the right of an accused person to a fair trial is a superior right to the right of free press and, consequently, a court may interfere with the freedom of the press where it is necessary to protect an accused person's right to fair trial. But the Court went on to rule that such interference would be justified only where there was a real risk of an unfair trial if contemporaneous reporting were allowed, and if the damage which any improper reporting would cause could not be remedied by the trial judge either by giving appropriate directions to the jury or otherwise.<sup>70</sup> Chief Justice Hamilton accepted that an accused's right to a fair trial included the right to have the jury reach a verdict by reference only to evidence lawfully admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions gathered from the media or any other outside sources. But he considered that, provided reporting was fair and accurate, it was hard to envisage any circumstances (other than where a trial within a trial is held to determine the admissibility of evidence or where persons are jointly indicted but tried separately) where fair and accurate reporting of proceedings publicly heard before a court could prejudice the right to a fair trial. The circuit judge was not entitled to assume on the evidence before him that the reporting of the proceedings would be other than fair, and even if at any stage the reporting proved to be unfair, he was not entitled to assume that the risk of unfairness could not be avoided by appropriate rulings and directions to the judge.

The Chief Justice also made some comment on the number of recent trials that had been aborted as a result of media coverage. While he defended the right of the trial judge to discharge a jury where the risk of an unfair trial could not be remedied by appropriate rulings and directions to the jury, he urged that

[s]ave in exceptional circumstances, a trial judge should have confidence in the ability of the jury to understand and comply with such directions, to disregard any inadmissi-

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66. See MARIE MCGONAGLE, A TEXTBOOK ON MEDIA LAW ch. 6 (1996).

67. See Kevin Boyle & Marie McGonagle, *Contempt of Court: The Case for Law Reform, in LAW AND THE MEDIA: VIEWS OF JOURNALISTS AND LAWYERS* 127, 146 (Marie McGonagle ed., 1997).

68. [1998] 2 I.L.R.M. 161.

69. [1994] 2 I.R. 465.

70. See also *Z. v. Director of Public Prosecutions*, [1994] 2 I.R. 476.

ble evidence and to give a true verdict in accordance with the evidence. It is only when this is not possible that the extreme step shall be taken of discharging the jury.<sup>71</sup>

It may be necessary to curb the freedom of the media and even, in extreme cases, to abort a trial altogether when there is a real risk of jury prejudice. But there can be little doubt that when these steps are taken the effect is to undermine confidence yet again in the institution of the jury. The Chief Justice made this very point in an earlier case when he said that when juries have regard for factors other than the evidence given at trial, they are disregarding their oath to deliver a "true verdict in accordance with the evidence."<sup>72</sup> The Chief Justice observed that in his eighteen years of practice at the Bar and nineteen years of service as a judge, he shared the confidence that the system has in the ability of juries to act in accordance with their oath. The difficulty is that there is a lack of empirical evidence to substantiate this confidence. Little is known, certainly in Ireland, about what effect media coverage has on juries and whether judicial directions to disregard media coverage can be effective. There is often cynicism expressed about the effectiveness of judicial warnings.<sup>73</sup> At the same time, when juries are formally directed to follow certain directions, there is no evidence that juries do not try their best to follow them. One of the values of jury trial in an adversary system is that there is a full opportunity for the parties to present their case and for the tribunal of fact to be formally instructed as to how to proceed in a manner that cannot be so easily emulated when the same tribunal has to both preside over the trial and come to a decision.<sup>74</sup> When, on the other hand, there is evidence that juries are unable or unwilling to give defendants a fair trial in certain circumstances, then clearly jury trial is no longer such an attractive method of trial and thought has to be given to alternatives. Confidence in juries is also undermined, of course, when juries are disinclined to give the prosecution case a fair hearing. This takes us back to the social and political context in which juries have had to operate in Ireland. Mention has been made of Ireland's turbulent past, but the troubles have lingered on well into the twentieth century, especially in Northern Ireland where violence has been rife, particularly in the last third of the century, and this has posed a major challenge for the jury system.

#### IV

##### THE NORTHERN IRELAND JURY AND THE "TROUBLES"

We have seen that Ireland's turbulent history has not provided fertile ground for the growth and flourishing of jury trial. One of the commonly in-

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71. [1998] 2 I.L.R.M. at 174.

72. *Z. v. Director of Public Prosecutions*, [1994] 2 I.R. 476.

73. See, e.g., R. Munday, *Irregular Disclosure of Evidence of Bad Character*, 1990 CRIM. L. REV. 92-97 (arguing that judicial incantations to juries exhorting them to disregard potent evidence of an accused's disposition are unconvincing).

74. See John D. Jackson, *The Value of Jury Trial*, in CRIMINAL JUSTICE: UNITED KINGDOM ASSOCIATION FOR LEGAL AND SOCIAL PHILOSOPHY: TWENTIETH ANNUAL CONFERENCE AT GLASGOW, 24-26 MARCH 1994, at 79 (Elspeth Attwood & David Golberg eds., 1995).



voked strengths of jury trial in criminal cases is that its lay element acts as an independent buffer within the criminal justice system between the state and the individual, allowing independent external scrutiny of the prosecution's case. This lends legitimacy to the fairness and independence of the system as a whole. When the legitimacy of the state is questioned by a sizeable proportion of the community from which the lay element is drawn, however, and it proves difficult to obtain convictions, the jury system can present formidable problems of law enforcement, especially when the conditions are extreme enough to lend themselves to violence and intimidation.

During the course of this century, there have been periods when the violence has been so extreme that the state has resorted to measures such as the introduction of martial law or the detention of suspects without trial, which have not only resulted in the disbandment of the jury system but in the disbandment of the criminal process altogether.<sup>75</sup> At other times, the state has reacted by taking emergency measures *within* the criminal process, for instance the introduction of trial without jury. Mention has been made of intentions to set up a "Special Commission Court" under the Prevention of Crime (Ireland) Act of 1882. Likewise, the Criminal Procedure (Northern Ireland) Act of 1922 made provision for the trial of certain serious offences in Northern Ireland by a special court consisting of the Lord Chief Justice and one other judge of the Court of Appeal when the accused so requested or when the Attorney General so directed such a trial. Neither of these courts was actually constituted and put into practice, however, and the concept of trying serious cases without a jury in Ireland did not take hold until 1939 when, as we have seen, a special three-judge court was established in the Republic of Ireland under the Offences Against the State Act of 1939.

It has not been until the latest period of "troubles," however, largely located in Northern Ireland, that extensive use has been made of nonjury courts within the criminal process. As already mentioned, the Special Criminal Court was reestablished in the Republic of Ireland in 1972, but more significantly within Northern Ireland itself jury trial was suspended for a range of offences known as "scheduled offences" under the Northern Ireland (Emergency Provisions) Act of 1973 following the recommendations of a Commission chaired by Lord Diplock.<sup>76</sup> The Diplock Commission was set up shortly after the British government prorogued the local Stormont Parliament in 1972 and assumed direct control over Northern Ireland's affairs. Its purpose was to consider what measures should be taken to deal more effectively with terrorism without re-

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75. For a discussion of the use of emergency law during the worst period of violence in Ireland this century, from 1918 to 1925, see COLM CAMPBELL, *EMERGENCY LAW IN IRELAND, 1918-1925* (1994). Since then, detention without trial has been deployed periodically under emergency legislation in both parts of Ireland. The power to detain without trial still exists under emergency legislation in the south, but it was recently removed in Northern Ireland under the Northern Ireland (Emergency Provisions) Act, 1998 (Eng.).

76. See REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185 [hereinafter Diplock Commission].

sorting to internment. The use of internment by the Stormont Government in 1971 under emergency legislation dating back to 1922 had merely contributed to an intensification of the "troubles" and there was an urgent need to consider alternative measures. Although the Commission recommended a range of measures for dealing with political violence within the criminal justice system, the recommendation that certain serious criminal offences should henceforth be tried in the ordinary courts by a single judge without a jury stood out at the time as the most drastic departure from the ordinary criminal process and has proved to be one of the most enduring measures. Until recent years, when the violence has abated, "Diplock" trials, as trials by judge alone in emergency cases have come to be called in Northern Ireland, accounted for around a third of all serious cases in the jurisdiction.<sup>77</sup>

#### A. Suspension of the Jury

Although the Diplock courts have proved controversial, there has been more common ground in the Diplock debate and at the same time more shades of differing opinion within a general consensus than is sometimes recognised.<sup>78</sup> First of all, there has been a general consensus among almost all protagonists that within the adversary system, trial by jury is the ideal method of trying serious criminal cases,<sup>79</sup> although there has been some dispute about whether the next best alternative ought to take the form of trial by a single judge, trial by two or three judges, or trial by a judge and lay assessors.<sup>80</sup> The debate has focused instead very firmly on the peculiar exigencies of the Northern Ireland situation. This would seem to reflect the general consensus throughout Ireland that the jury system is still the ideal form of trial but that it is not always entirely suited to Irish circumstances.

The Diplock Commission considered that, in the circumstances of Northern Ireland in 1972, jury trial was deficient for two reasons. First, violence on the part of paramilitary organisations meant there was a persistent threat of intimidation which extended to jurors as well as witnesses, and "a frightened juror is a bad juror even though his own safety and that of his family may not actually

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77. See A COMMENTARY ON NORTHERN IRELAND CRIME STATISTICS 1993 (1994); A COMMENTARY ON NORTHERN IRELAND CRIME STATISTICS 1996, tpls. 4.7, 4.9 (1997).

78. For further discussion of the Diplock debate and a full analysis of Diplock trials, see JOHN D. JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* (1995).

79. The consensus has not been entirely universal. See Louis Jacques Blom-Cooper, *Public Confidence and the Criminal Process* 16 (1991) (Northern Ireland Criminal Justice conference unpublished paper) (arguing that trial by judge alone provides a "model system of criminal trial and a rational system of justice").

80. The merits and defects of three-judge trials are discussed in REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, Cmnd. 9222 [hereinafter Baker Report], and John Jackson, *Three Judge Courts in Northern Ireland*, in TWELFTH REPORT OF THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS: ANNUAL REPORT FOR 1985-86, at 63 (1987). Support for the notion of involving lay assessors is to be found in KEVIN BOYLE ET AL., *TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE* (1980).

be at risk.”<sup>81</sup> Second, the Commission pointed to the danger of perverse verdicts by partisan jurors. The property qualifications for jury service which existed at that time were more widely met by Protestants than by Catholics, and the rights of stand-by and challenge were exercised in such a way as to accentuate Protestant representation on the jury, with the result that there was a fear that Loyalist defendants in particular had been “unjustly acquitted.”<sup>82</sup> These conclusions were criticised at the time and have been criticised since on the ground of lack of empirical evidence.<sup>83</sup> Since then, the property qualification has been abolished in Northern Ireland, as in England and Wales, and juries are empanelled on the basis of random selection from the electoral register.<sup>84</sup> The enduring rationale for the Diplock courts has therefore tended to be based on the intimidation argument rather than on the problem of perverse acquittals.<sup>85</sup>

The argument is still controversial, particularly so within the last few years when there has been a sharp decline in the level of violence in Northern Ireland.<sup>86</sup> But when it has come to discussion of the policy options available over the years, few at any time have seen the choice as a stark one between wholesale adoption of the Diplock system and immediate return of jury trial in all cases. No one, for example, has argued that the jury system works so badly in the Northern Ireland context that it is necessary to extend the present Diplock system, and at the other extreme, most of those who have been in the forefront of the demand for the restoration of jury trial have recognised that it may be necessary to abandon jury trial in specific instances where it is shown that attempts have been made to interfere with a jury.<sup>87</sup> The issue instead has become one of determining whether the present system strikes the correct balance between protecting against the dangers of juror bias and intimidation and upholding the ideal of jury trial where possible. This is not to say that there have not been a number of other controversial issues affecting the operation of the Diplock courts. There have been concerns about judicial case-hardening, over-reliance on confession evidence, the use of so-called “supergrass” evidence,<sup>88</sup>

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81. Diplock Commission, *supra* note 76, ¶ 36.

82. *Id.*

83. See STEVEN C. GREER & ANTONY WHITE, *ABOLISHING THE DIPLOCK COURTS* ch. 4 (1986); W.L. Twining, *Emergency Provisions and Criminal Process: The Diplock Report*, 1973 CRIM. L. REV. 406, 413.

84. The law was changed shortly after the Diplock Commission reported by the Juries (N.I.) Order (1974). The relevant legislation today is the Juries (N.I.) Order (1996).

85. See, e.g., Baker Report, *supra* note 80, ¶ 107.

86. See COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *NO EMERGENCY, NO EMERGENCY LAW: EMERGENCY LEGISLATION RELATED TO NORTHERN IRELAND: THE CASE FOR REPEAL* (1995).

87. See GREER & WHITE, *supra* note 83, at 66-68.

88. The term “supergrass” was first coined in the early 1970s to describe those “grasses” or informers from the London underworld who testified against their former associates in a series of high-profile mass trials. See STEVEN GREER, *SUPERGRASSES: INFORMERS AND ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND 1* (1995). In one such trial, Bertie Smalls gave evidence against a large number of persons allegedly involved in a series of robberies. See *R. v. Turner*, 61 Cr. App. 67 (1975) (Eng.).

the abrogation of the right of silence, and, most recently, miscarriages of justice. However, many of these relate to other emergency measures, such as the increased powers of arrest and detention given to the security forces, and the relaxation of the rules of evidence that have accompanied the withdrawal of jury trial.<sup>89</sup> It has been argued that these issues have seriously discredited the courts domestically and internationally,<sup>90</sup> but on the central question of abrogation of jury trial itself, few have argued that this is itself fundamentally unfair where the conditions truly make jury trial unworkable.<sup>91</sup>

There has, however, been a strongly argued view that the scheduling system at the core of Diplock court procedure has operated in such a way as to draw too many "ordinary" cases within the Diplock net.<sup>92</sup> The term "scheduled offence" derives from the fact that offences deemed appropriate for trial by judge alone in Diplock courts are listed in Schedule 1 to the Northern Ireland (Emergency Provisions) Act.<sup>93</sup> These include a wide range of serious criminal offences which are all capable of being committed in connection with the emergency situation. The list ranges from general criminal offences such as murder, manslaughter, wounding with intent, grievous bodily harm, and assault occasioning actual bodily harm to offences more specifically related to the troubles such as membership in a proscribed organisation.<sup>94</sup> Since not all cases where these offences have occurred have been connected to the troubles, the Attorney General is given discretion in a particular case to certify that certain scheduled offences are not to be treated as a scheduled offence and are therefore to be dealt with by jury trial.<sup>95</sup>

One criticism has been that this power does not extend to all offences listed in the schedule, with the result that certain offences are incapable of being certified out even where there is no palpable connection with the emergency. The United Kingdom government has progressively taken steps to rectify this by extending the list of scheduled offences which can be certified out, notably the offences of robbery and aggravated burglary which, until 1996, had to be treated as scheduled offences where any weapon was used to carry out the offence.<sup>96</sup>

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89. For a full analysis of all of these issues, see JACKSON & DORAN, *supra* note 78, at 29-55.

90. See Fionnuala Ní Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1378 (1996); see also Paul Hunt & Brice Dickson, *Northern Ireland's Emergency Laws and International Human Rights*, 11 NETHS. Q. HUM. RTS. 173 (1993).

91. It is to be noted that Article 6 of the European Convention on Human Rights does not guarantee a right to jury trial. It has, however, been argued that a system of trial by judge alone alongside a system of jury trial could amount to a breach of Article 26 of the Covenant on Civil and Political Rights which guarantees equal protection under the law. See Brice Dickson, *Northern Ireland's Emergency Legislation—the Wrong Medicine*, 1992 PUB. LAW 592, 607.

92. John D. Jackson & Sean Doran, *Diplock and the Presumption Against Jury Trial: A Critique*, 1992 CRIM. L. REV. 755.

93. The first Northern Ireland (Emergency Provisions) Act dates back to 1973. Since then, there have been periodic revisions and consolidating statutes. The latest Act is the Northern Ireland (Emergency Provisions) Act, 1998 (Eng.).

94. See Northern Ireland (Emergency Provisions) Act, 1996, at sched. 1 (Eng.).

95. See *id.*

96. See *id.* Section 2 of the more recent 1998 Act increases quite substantially the number of offences which can be certified out.

But another criticism is that as the security situation has improved, there has been no attempt made to offset the present scheduling system's presumption against jury trial by establishing a broad presumption in favour of jury trial which would require the Attorney General to certify-*in* any particular case with a connection to the troubles. It has been argued that while such a move would probably not of itself dramatically affect the number of cases going to trial in Diplock courts, it would have considerable symbolic force, as it would represent an official affirmation of faith in the jury system.<sup>97</sup>

This raises the question whether such faith is justified, which shall be addressed shortly. As the security situation hopefully improves, it may be expected that the enduring rationale for the Diplock courts—the threat of intimidation of jurors—will become less defensible and pressures will mount for a full-scale restoration of trial by jury. At the same time, while paramilitary organisations continue to operate, there are likely to continue to be certain cases which have a paramilitary connection where the risks of juror intimidation may be as great as they ever were. One recent well-publicised case, involving eight men charged with armed robbery in Belfast, was certified for jury trial despite reports that the men had IRA connections. Seven trials involving seven juries reportedly took place before the case was finally stopped, and one of the trials collapsed amid allegations of jury tampering.<sup>98</sup> The case has provided reasons to be cautious about an outright restoration of jury trial.

The answer to such cases, however, may be to try to take more active steps to protect the jury from intimidation. It has been suggested that the category of scheduled offences should be used not as a basis for withdrawal of the jury but for the application of certain safeguards in the selection of juries.<sup>99</sup> The measures suggested include withdrawing the names and addresses of jury panels,<sup>100</sup> balloting of jurors by number only,<sup>101</sup> preventing the disclosure of the names and addresses of jurors at all stages,<sup>102</sup> not informing jurors whether they will serve in scheduled or nonscheduled cases,<sup>103</sup> keeping the jury out of sight of the public gallery in scheduled cases,<sup>104</sup> and favouring applications for excusal in scheduled cases from people living in areas where Loyalist or Republican paramilitaries have a particularly strong influence.<sup>105</sup> Although such measures represent regrettable departures from the ideals of fully open and public justice, they have been considered preferable to maintaining Diplock courts.<sup>106</sup>

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97. See Jackson & Doran, *supra* note 92, at 764. Such a procedure has been endorsed by LORD LLOYD, INQUIRY INTO LEGISLATION AGAINST TERRORISM 30-31 (1996) [hereinafter LLOYD REPORT].

98. See John Mullin, *The Trying Game*, GUARDIAN, Jan. 20, 1998, at 17.

99. See C.A. GEARTY & J.A. KIMBALL, TERRORISM AND THE RULE OF LAW 56-57 (1995).

100. See *id.*; GREER & WHITE, *supra* note 83, at 74.

101. See GEARTY & KIMBALL, *supra* note 99, at 56-57; GREER & WHITE, *supra* note 83, at 75.

102. See GEARTY & KIMBALL, *supra* note 99, at 56-57; GREER & WHITE, *supra* note 83, at 75.

103. See GEARTY & KIMBALL, *supra* note 99, at 56-57; GREER & WHITE, *supra* note 83, at 75.

104. See GEARTY & KIMBALL, *supra* note 99, at 56-57; GREER & WHITE, *supra* note 83, at 75.

105. See GEARTY & KIMBALL, *supra* note 99, at 56-57; GREER & WHITE, *supra* note 83, at 76.

106. See GEARTY & KIMBALL, *supra* note 99, at 56-57.

In the absence of an all-embracing threat of political violence which plagues the effective operation of the jury system, it may be argued that there is no particular reason for distinguishing between defendants charged with particular paramilitary offences and, say, defendants charged with the kind of gangland or drug-related offences that have been familiar in London. In both cases, there is a risk of juror intimidation. But there has been little demand in England and Wales for such offences to be tried without a jury and instead the effort there has gone into steps to prevent intimidation, such as the withholding of jurors' names.<sup>107</sup>

This brings us, however, to the point made throughout this symposium that each jury system is embedded in a unique political and cultural context, and that it must not be assumed that the same approach is suitable for all systems. In England and Wales, jury trial for serious criminal offences is considered not merely an ideal mode of trial but for many an essential, ancient right; hence the controversy when it is suggested that serious criminal offences such as fraud should be tried by some other mode or that the right to elect jury trial in certain categories of cases should be removed.<sup>108</sup> It has already been seen that jury trial is less rooted in Irish history. Beyond that, there is the question whether a community as divided as Northern Ireland is as suited to jury trial as less polarised communities. The Diplock Commission's reference to the danger of perverse verdicts by partisan juries was made at a time when property qualifications were more widely met by Protestants and there was a risk of underrepresentation of Catholics. But even with more balanced juries, there is a danger of unfair discrimination on religious or political grounds. This raises the question of how the jury in Northern Ireland has operated throughout the years of the troubles and whether it is worth placing faith in a full-scale return to the system.

#### B. The Jury System in Ordinary Criminal Cases

Leaving aside the scheduling system under emergency legislation, the rules governing the scope of the right to jury trial in Northern Ireland are similar to England and Wales. All offences must be tried summarily or on indictment. Some offences must be tried on indictment in the Crown Court and others, known as "hybrid offences," may be tried either in the magistrates' court or in

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107. Other steps have included keeping jurors out of sight of the public gallery in sensitive cases (recommended by ROYAL COMMISSION ON CRIMINAL JUSTICE, 1993, Cmnd. 2263, at ch. 8), round-the-clock police protection (recommended by *id.*), new offences of intimidating jurors and harming or threatening harm to jurors (adopted in the Criminal Justice and Public Order Act, 1994, § 51(1)-(2) (Eng.); for commentary, see MARTIN WASIK & RICHARD TAYLOR, CRIMINAL JUSTICE & PUBLIC ORDER ACT 1994, at 131-33 (1995)), and the retrial of defendants who have been acquitted by juries which have been "got at" (provided for in the Criminal Procedure and Investigations Act, 1996, §§ 54-57 (Eng.); for commentary, see ROGER LENG & RICHARD TAYLOR, CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996, at 91-106 (1997)).

108. The U.K. government has recently invited comments on both these issues. See HOME OFFICE, DETERMINING MODE OF TRIAL IN EITHER-WAY CASES (1998); HOME OFFICE, JURIES IN SERIOUS FRAUD TRIALS (1998).

the Crown Court.<sup>109</sup> There are three kinds of hybrid offences. The first of these are summary offences for which a defendant can claim trial by jury (provided they are not scheduled offences). These offences are normally tried in the magistrates' court, but if the offence is one for which the person, if convicted, is liable to be sent to prison for more than six months, the defendant must be informed of his right to be tried by jury, unless the offence is a scheduled offence. Secondly, certain indictable offences may be tried summarily if the magistrate believes the case is not a serious one and the prosecution and defence consent. Thirdly, certain offences are stated to be triable either summarily or on indictment, which means that the prosecution decides how the case will be tried.

Since the property qualification was removed in 1974, the composition of the jury in Northern Ireland is also based on very similar lines to that of England and Wales.<sup>110</sup> Every person who is between age eighteen and seventy and is registered as an elector is qualified and liable for jury service. There is no residence requirement. The disqualification, ineligibility, and excusal criteria provisions are almost exactly the same as for England and Wales, except that full-time teachers in any school may refuse to serve in addition to all the other categories of persons who are excusable. The same rules permitting majority verdicts also apply in Northern Ireland.<sup>111</sup>

One significant difference, however, lies in the scope for peremptory challenging in Northern Ireland. Both parties to criminal proceedings are entitled to an unlimited number of challenges to jurors for cause, but, as in England and Wales, challenges for cause are rare. As well as this, however, each defendant is allowed to challenge up to twelve jurors without cause, and evidence suggests that this is a much more frequent occurrence.<sup>112</sup> Figures obtained from the Court Service for a two-month period in 1988 show that in a sample of forty-one cases, there were no challenges for cause, but the average number of peremptory challenges per defendant was nine and in over a third of the cases defendants exercised their full rights of peremptory challenge.<sup>113</sup> In addition, the prosecution's right to stand-by, which is unlimited, was used to remove on average between four and five jurors per defendant.

Although it has been suggested that the peremptory challenge system can undermine the jury system by permitting the packing of juries according to religious denomination,<sup>114</sup> the recent Juries Order preserved the defence right to challenge up to twelve jurors. In a strong defence of the right of peremptory challenge in the Northern Ireland context, the Standing Advisory Commission on Human Rights has taken the view that the peremptory challenge provides an important "safety valve," enabling defendants to correct any perceived re-

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109. See Magistrates' Courts (N.I.) Order (1981), arts. 29, 45, 46 (Eng.).

110. Cf. Lloyd-Bostock & Thomas, *supra* note 4, at 20-23.

111. See Criminal Procedure (Majority Verdicts) Act, 1971, § 1 (N.I.).

112. See Juries (N.I.) Order (1996), art. 15 (Eng.).

113. See SIXTEENTH REPORT OF THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS: REPORT FOR 1990-1991, at ch. 6 (1991) [hereinafter SIXTEENTH REPORT].

114. See GEARTY & KIMBALL, *supra* note 99, ¶ 3.85.

ligious imbalance.<sup>115</sup> When linked with the prosecution's right to stand-by, the right of peremptory challenge enabled the defence to have confidence in the impartiality of the jury and the prosecution to seek to secure a fair trial. Although the Commission had no doubt that panels were randomly selected, panels were unlikely to be representative of the community when exemptions and excusals were taken into account, and challenging was a mechanism whereby any perceived prejudice could be removed. There is no empirical evidence available on the grounds on which parties exercise their right to challenge or stand-by, nor is there any evidence on whether juries end up being representative of the community. The challenging system is certainly a mechanism whereby both sides can achieve a reasonably balanced jury, but questions can be asked about what message this sends about the degree of confidence that can be placed in the jury system as a system of trial by one's peers.<sup>116</sup>

Little is known about the operation of juries in Northern Ireland. Section 8 of the Contempt of Court Act of 1981 applies in Northern Ireland as in England and Wales with the result that jurors cannot be asked about their discussions in the jury room. Some insight into the operation of the jury system was, however, obtained by one of the authors in a survey conducted into the experiences of laypersons in the criminal justice system in Northern Ireland.<sup>117</sup> Questionnaires covering aspects of jury service were handed to jurors over a six-month period after their month's service at Belfast Crown Court. The 237 panellists who responded were concerned about a number of matters, including the challenging system.<sup>118</sup> Significantly, however, there was little evidence to support the particular concerns about juries voiced by the Diplock Commission, although the cases tried were all ordinary cases unconnected directly with the Northern Ireland emergency. As in England and Wales, large numbers of jurors were able to get excused during the fieldwork period.<sup>119</sup> A third of all jurors in the sample considered the possibility of excusal and ten percent actually tried to be excused (unsuccessfully) on grounds of occupation, ill health, or a specific work problem.<sup>120</sup> But the most common reason for wanting to be excused was the inconvenience of jury service.<sup>121</sup> Forty percent said they were worried about serving, but no one mentioned fear of intimidation as the reason.<sup>122</sup> Fear of the unknown and ignorance of procedures seemed to be the

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115. SIXTEENTH REPORT, *supra* note 113, ¶ 6.33.

116. For further discussion on the advantages and disadvantages of peremptory challenging, see S.J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 221-24 (1994); John D. Jackson & Sean Doran, *Juries and Judges: A View From Across the Atlantic*, CRIM. JUST., Winter 1997, at 15, 16.

117. See JOHN D. JACKSON ET AL., *CALLED TO COURT: A PUBLIC REVIEW OF CRIMINAL JUSTICE IN NORTHERN IRELAND* (1991).

118. *See id.* at 89-95.

119. *See id.* at 59-60.

120. *See id.* at 59.

121. *See id.* at 59-60.

122. *See id.* at 59.



most important factors.<sup>123</sup> Similarly, no one made any allegations of jurors discriminating on religious or political grounds. Fifty percent of jurors thought the jury system was fair, fifteen percent unfair, and thirty-five percent were unsure; these proportions were similar for both Catholic and Protestant jurors.<sup>124</sup> Overall, ninety-one percent of those who served on a jury agreed with the verdicts reached in their cases, and nine percent disagreed.<sup>125</sup>

The survey provided no basis for speculation about how the system would cope with scheduled cases. It is also dangerous to infer too much about jury performance in ordinary cases from a small survey based on jury perceptions. But it has been argued that the survey provides little ground for believing that peculiar exigencies of the Northern Ireland situation were having an adverse effect on the workings of the jury system in ordinary criminal cases and to that extent supported the position of those who have advocated a presumption in favour of jury trial.<sup>126</sup>

The survey was confined to Belfast juries, where it has been suggested that there is a greater likelihood of middle class, commercial, or better educated jurors serving on the juries.<sup>127</sup> No research has been carried out into the workings of juries in the rural areas of Northern Ireland outside Belfast. There is some evidence to suggest that the perennial Irish problem of low jury acquittal rates manifests itself in these areas. By itself, the fact that acquittal rates have been generally higher in jury trials than in Diplock trials does not provide any ground for concern about acquittal rates.<sup>128</sup> There is an obvious danger in measuring jury performance against professional performance, as it cannot be assumed that the professional approach is necessarily correct.<sup>129</sup> What gives rise to greater concern is when there are very different rates of jury acquittals throughout a particular jurisdiction. It is part of Northern Ireland legal folklore that jury acquittal rates are much higher in the west of the province than east of the province, and there is some evidence to support this. North Down, for example, is reputed to have the highest conviction rate of any jury in the United Kingdom, while Fermanagh and Tyrone are reputed to have the lowest.<sup>130</sup> The reasons for this are no doubt varied. Interviews with prosecuting counsel by one of the authors revealed that there is a reluctance to rely on police evidence in certain parts of the country, but, according to one very senior prosecuting counsel, the reasons were less political and had more to do with the nature of the offences and close rural ties:

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123. *See id.* at 60.

124. *See id.* at 146.

125. *See id.* at 128-29.

126. *See* Jackson & Doran, *supra* note 92, at 762.

127. *See* JACKSON & DORAN, *supra* note 78, at 238.

128. For detailed comparison of outcomes in jury and Diplock trials, *see id.* at 35.

129. *See* ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* (1976); M.D.A. Freeman, *The Jury on Trial*, 34 *CURRENT LEGAL PROBS.* 65 (1981).

130. *See* JACKSON & DORAN, *supra* note 78, at 170. There is evidence to show that in areas such as Fermanagh and Tyrone, acquittal rates can rise higher than 60%. *See* NORTHERN IRELAND COURT SERVICE, *NORTHERN IRELAND JUDICIAL STATISTICS*, 1995, tbl. 4.

[I]n the country there's still the view that the law case is to some extent a sort of game. The point about the old Irish jury trials is that they were for such things as assaults, stealing in certain forms but very little by way of murder. But the crime problem was not a very big problem and therefore the community reacted very often by thinking that the guy being tried at all represented a punishment for him and therefore they wouldn't increase that punishment by convicting.<sup>131</sup>

These comments suggest that when Northern Ireland enters a genuine climate of peace, there will still be questions to be asked about the effective operation of jury trial and a need to review the existing procedures. No doubt mechanisms could be found for dealing with some of the problems. It has been suggested that fears of sectarian bias might be laid to rest if terrorist-related cases were tried in Belfast by juries selected on a province-wide basis.<sup>132</sup> It may be that for a range of serious criminal cases greater scope could be given to the prosecution and defence to argue for a change of venue. These mechanisms, along with peremptory challenges, are examples of how the jury system may have to be prepared to adapt itself to particular conditions and concerns. But at the same time, they also raise fundamental questions about the suitability of this mode of trial. Many of the mechanisms take the jury system further away from its original rationale, which was to provide for a mode of trial whereby a group of the defendant's peers would be randomly selected from the community to try the defendant. Widespread use of peremptory challenging and changes of venue serve to underline the point that a randomly selected jury from the defendant's community cannot be trusted to deliver a fair and impartial verdict and can ultimately serve to undermine confidence in the whole system.

At this point, questions need to be asked about the viability of other modes of trial. The point has been made that discussion of modes of trial within the United Kingdom has tended to reflect a rather myopic perception that Crown Court trial and trial by magistrates are the sole methods of bringing criminal proceedings to a satisfactory resolution, and that other modes of trial such as trials by judge alone or trial by judge and lay assessors are very much a second best.<sup>133</sup> As in England and Wales, a greater proportion of offences in Northern Ireland are being deemed triable by summary trial and a greater proportion of ordinary cases are therefore being tried by magistrates rather than by juries in the Crown Court. The time has perhaps come to reflect on whether the Diplock mode of trial by judge alone or by judge and lay assessors may serve as a better ideal in certain circumstances. Giving the defendant the right to elect for such a mode of trial in certain serious criminal cases, as is permitted in a number of Commonwealth countries, may, for example, prove to be a better

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131. JACKSON & DORAN, *supra* note 78, at 238.

132. See LLOYD REPORT, *supra* note 97, ¶ 16.18.

133. See John D. Jackson & Sean Doran, *The Relevance to Northern Ireland of the Report of the Royal Commission on Criminal Justice*, in NINETEENTH REPORT OF THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, REPORT FOR 1993-94, annex C (1994).

“safety valve” than requiring defendants to undergo jury trial, albeit with the right to exercise a large number of peremptory challenges.<sup>134</sup>

It has been suggested that as a first step on the road from Diplock courts, the Attorney General ought to be empowered on application by either the defence or the prosecution to order that a particular case should be tried by a judge sitting without a jury where, in his or her opinion, the existence of a conspicuous terrorist element is likely to present difficulties for the conduct of the trial and be prejudicial to the interests of justice.<sup>135</sup> This proposal has been made very much as a transitional measure pending full return to jury trial, but it raises questions as to whether such a certifying-in procedure might not be suitable for a wider range of situations and on a more permanent basis.<sup>136</sup> This kind of mechanism effectively exists at present in the Irish Republic, where the Director of Public Prosecutions has a fairly wide power to certify-in any particular case where “the ordinary courts are inadequate for securing the effective administration of justice and the preservation of public peace and order.”<sup>137</sup> This brings us finally to a consideration of the future role and scope of jury trial within modern Ireland as a whole.

## V

### CONCLUSION

This article has painted a picture of a jury system in decline in both parts of Ireland. Many of the measures which have reduced the right to jury trial have mirrored changes in England and Wales, and, indeed, further inroads have been made by virtue of the nonjury courts established both north and south of the border. Unlike England and Wales, however, these changes have taken place against the background of very little controversy, certainly in southern Ireland. The withdrawal of the jury in Northern Ireland and its replacement by Diplock courts has been controversial, but more on account of the emergency measures which have accompanied the withdrawal of the jury than on account of the denial of jury trial *per se*. In the Republic of Ireland, the declining reach of the jury, even the wide power given to the Director of Public Prosecutions to certify cases for nonjury trial in the Special Criminal Court, has given rise to surprisingly little controversy.<sup>138</sup>

The explanation for this would seem to lie in the history of jury trial in Ireland. For a variety of reasons, jury trial has not proved well suited to Irish circumstances. Jury intimidation and prejudice, distrust of the state, considerable community segregation, and the small and largely rural nature of the jurisdic-

134. See Sean Doran & John D. Jackson, *The Case for Jury Waiver*, 1997 CRIM. L. REV. 155.

135. See LLOYD REPORT, *supra* note 97, ¶ 16.16.

136. See the proposals of John D. Jackson & Sean Doran, *Emergency Provisions in Northern Ireland*, in TWENTY FIRST REPORT OF THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, REPORT FOR 1995-96, at 113 (1996).

137. CONST. art. 38.3 (Ir.); see also *supra* text following note 53 (discussing the Special Criminal Court).

138. There is also surprisingly little legal and academic literature on the contemporary Irish jury.

tions have combined to ensure that jury trial is by no means as entrenched in Irish legal culture as it is in England and Wales. Although a great number of these obstacles to the growth of a robust jury system have abated in recent times, jury trial has failed to flourish on the island.

Unlike other systems, such as those in the United States and more recently Canada, where the constitutional guarantee would seem to have helped to bolster the institution of the jury,<sup>139</sup> the constitutional guarantee in Ireland has failed to halt the decline. The Supreme Court has adopted a pragmatic approach which in effect would seem to permit the scope of jury trial and the powers of the jury to be influenced by contemporary perceptions of a fair trial. If the prevailing perception is that a fair trial can be guaranteed without a jury, it would seem that the Supreme Court is not necessarily going to stand in the way. Indeed, it can be argued that the very existence of a constitution protecting basic fundamental freedoms reduces the need for jury trial.<sup>140</sup> The enduring rationale for a jury system in criminal cases has been that it provides a buffer between the individual and the state and thereby a guarantee against state tyranny. We have seen that jury trial was entrenched in the Irish Constitution largely because of fear of abuse of power on the part of the state. As the Supreme Court has proved more active in preventing encroachment on constitutional rights by the state, however, this particular justification for the jury becomes more superfluous.<sup>141</sup>

Other justifications, of course, remain. A further attraction of jury trial is that it acts as link between the community of professional participants who operate within the criminal justice system and the community outside, injecting, as it has been put, "lay acid" into the system.<sup>142</sup> This is only an advantage, however, if it is possible to find juries who are representative of the community and who can be trusted to bring a degree of impartiality to the case. We have seen that in the past the jury system was plagued by low conviction rates. In fact, conviction rates in Ireland continue to remain quite low, at least in comparison with England and Wales. At the same time, many of the traditional reasons for very low conviction rates in Ireland would seem to be diminishing. There is less suspicion of the state and less tolerance of crime (which has risen in all areas of Ireland, particularly urban property crime in the Dublin area).<sup>143</sup> The murder of an Irish journalist in 1996 in particular prompted concern and caused the Dáil to introduce tougher measures against criminals.<sup>144</sup> All this is likely to make juries more inclined to convict where there is clear evidence of guilt.

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139. See Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141, 146-47 (Spring 1999).

140. See R.J. O'Hanlon, *The Sacred Cow of Trial by Jury*, 27 IR. JUR. 57, 65 (1990).

141. For details of the growing activism of the Supreme Court in protecting constitutional rights, see JAMES P. CASEY, *CONSTITUTIONAL LAW IN IRELAND* (2d ed. 1992); KELLY ET AL., *supra* note 24.

142. Z. Bankowski, *The Jury and Reality*, in *THE JURY UNDER ATTACK*, *supra* note 60, at 20.

143. See JOHN D. BREWER ET AL., *CRIME IN IRELAND 1945-1995: HERE BE DRAGONS* 84-88 (1997).

144. See Ian O'Donnell, *Crime Prevention More Vital Than Punishment*, IR. TIMES, July 27, 1996.

But problems of representativeness remain. The divided nature of Northern Irish society and the small and largely rural nature of both jurisdictions continue to pose problems of jury representativeness and impartiality. The use of peremptory challenges has in the past been used to mitigate some of these problems and, as we have seen, is still defended as an important "safety valve" in the north. At the same time, this power hardly affirms confidence in the system, as it suggests that certain individuals are unable to put aside their personal prejudices when they serve on a jury. Moreover, the peremptory challenge system runs the risk of perpetuating rather than diminishing religious, political, racial, ethnic, and gender discrimination.

It would seem that the future of the jury system in Ireland is bleak unless greater steps are taken to build confidence in its ability to render verdicts which are just and reliable and to attune it more to the needs of the modern Irish criminal justice system. It has been argued that the jury is an ideal mode of trial within an adversary system of justice, as it helps to ensure that the prosecution's case is thoroughly presented and examined.<sup>145</sup> Ireland inherited a strong adversary tradition from the English common law, and this tradition is maintained by a strong bar dedicated to effective advocacy.<sup>146</sup> Many also regard lay participation in the criminal justice system as a very valuable means of promoting confidence in the system.<sup>147</sup> At the same time, as this collection of articles illustrates, there are many different kinds of jury systems and each has to be suited to the political, cultural, and legal contexts in which it is embedded.<sup>148</sup> The prevalent view that juries are unsuited to the Irish context is likely to continue unless steps are taken to look more exactly at how juries are presently selected and how they are actually working. A contrast has been drawn by one of the authors between the secretive attitude adopted toward juries in the United Kingdom and Ireland and the much more open attitude in the United States and Canada.<sup>149</sup> Openness carries the risk of unwelcome exposure but is arguably a healthier attitude to adopt if one is serious about the

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145. For full discussion, see JACKSON & DORAN, *supra* note 78, at 287-304; Sean Doran et al., *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 AM. J. CRIM. L. 1 (1995); Jackson, *supra* note 74.

146. Some of this advocacy is well illustrated in M. McDONNELL BODKIN, *FAMOUS IRISH TRIALS* (1928).

147. The recent Belfast "Good Friday" Agreement established a review of the criminal justice system in Northern Ireland with terms of reference which include considering "measures to improve the responsiveness and accountability of, and lay participation in, the criminal justice system." See REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND: A CONSULTATION PAPER (1998).

148. For more general discussion of the importance of culture in shaping legal institutions, see MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986). For the role of national culture in shaping law, see Oscar G. Chase, *Legal Processes and National Legal Culture*, 5 CARDOZO J. INT'L. & COMP. L. 1 (1997), and the comment of John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on "Legal Processes and National Culture"*, 5 CARDOZO J. INT'L. & COMP. L. 51 (1997).

149. See Jackson & Doran, *supra* note 116.

longer-term future of an institution.<sup>150</sup> Secrecy, on the other hand, is a sign of weakness and is likely to lead to ultimate decline. More open examination of the Irish jury might expose a number of shortcomings with the present system, but it might also suggest particular solutions which may in the longer term help to fashion a system that is more suited to the needs of modern Ireland and is consequently more robust. Until this happens, it is likely that the jury system will sink further into the background of everyday practice in the criminal courts, still serving as a symbol of an ideal mode of justice but playing little part in the bulk of actual cases.

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150. For philosophical development of this argument, see PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* (1988).