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Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law

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TERRORISM AND TRIAL BY JURY: THE VICES AND VIRTUES OF BRITISH AND AMERICAN CRIMINAL LAW

Laura K. Donohue*

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INTRODUCTION

British tradition and the American Constitution guarantee trial by jury for serious crime.¹ But terrorism is not ordinary crime, and the presence of jurors may skew the manner in which terrorist trials unfold in at least three significant ways.

First, organized terrorist groups may deliberately threaten jury members so the accused escapes penalty. The more ingrained the terrorist organization in the fabric of society, the greater the degree of social control exerted under the ongoing threat of violence.

Second, terrorism, at heart a political challenge, may itself politicize a jury. Where nationalist conflict rages, as it does in Northern Ireland, juries may be sympathetic to those engaged in violence and may acquit the guilty. Alternatively, following a terrorist attack, juries may be biased. They may identify with the victims, or they may, consciously or unconsciously, seek to return a verdict that conforms to community sentiment. Jurors also may worry about becoming victims of future attacks.

Third, the presence of jurors may limit the type of information provided by the state. Where national security matters are involved, the government may not want to give ordinary citizens insight into the world of intelligence. Where deeply divisive political violence has been an issue for decades, the state may be concerned about the potential of jurors providing information to terrorist organizations.

These risks are not limited to the terrorist realm. Criminal syndicates, for instance, may try to intimidate juries into returning a verdict of not guilty, and public outrage often accompanies particularly heinous crimes. But the very reason *why* these other contexts give rise to a similar phenomenon is because terrorist crimes have certain characteristics—characteristics that may be reflected in other forms of crime, but which are, in many ways, at the heart of what it means for an act to be terrorist in nature: terrorist organizations are created precisely to coerce a population, or specific individuals, to accede to the group's demands. The challenge is political in nature, and the method of attack is chosen for maximum publicity. Terrorist organizations, moreover, can and often do use information about the state to guide their operations. It is in part because of these risks that the United Kingdom and United States have changed the rules governing terrorist trials—at times eliminating juries altogether.

1. Most criminal cases in the United Kingdom go before magistrates. In England, cases are generally heard by three lay magistrates, who are assisted by a legally qualified "clerk to justices." Alternatively, criminal cases may go before a single Stipendary Magistrate. In Northern Ireland, Resident Magistrates preside, without jurors being present. Some cases must be placed in the Magistrates Court. Others are assigned to the Crown Court, where jurors are present. Yet others have the potential of being assigned either way. This last set is divided into numerous categories, some of which allow the decision on the forum for the trial to be made by the prosecutor, others the defendant, and others the court. For more serious crimes, though, the United Kingdom has traditionally guaranteed juries.

This Article reflects on the relationship between terrorism and jury trial and explores the extent to which the three dangers identified can be mitigated within the criminal-trial framework.² It does not provide a comprehensive analysis of the rich case law and literature that address jury trial—one of the most studied legal institutions on both sides of the Atlantic. Instead, its aim is more modest: The text weighs the advantages and disadvantages of suspending juries specifically for terrorism. Here, the United Kingdom's experiences prove illustrative. The Article considers the extent to which similar concerns bear on the U.S. domestic realm, and the decision to try Guantánamo Bay detainees by military tribunal. It suggests that the arguments for suspending juries in Northern Ireland are more persuasive than for taking similar steps in Great Britain or the United States.

This Article then considers ways to address concerns raised by terrorism that stop short of suspending juries. Juror selection, constraints placed on jurors, and the conduct of the trial itself provide the focus. Of these, emphasis on juror selection, although not unproblematic, proves most promising. Again, distinctions need to be drawn between the United Kingdom and the United States. In the former, for instance, occupational bars to jury service could be lowered, while in the latter, increased emphasis on change in venue may prove particularly effective. Changes in the second category, constraints on jurors, may be the most damaging to the states' counterterrorist programs. Finally, while changes in the trial process may help to address risks, they also may prove contentious and be prone to seeping into the criminal realm. The Article concludes by questioning whether and to what extent such alterations could be insulated from the prosecution of non-terrorist criminal offenses.

2. An additional concern is the tendency of terrorist organizations to use the trial process to further their aims. While this may occur in the absence of a jury, jurors' presence—and the drama of jury trial—may exacerbate the effect. Ted Kaczynski, for instance, planned to stake his defense on the claim that technology was destroying humanity—the animating cause of his decision to kill and maim several dozen people over a seventeen-year period. Greg Lefevre, *Kaczynski Admits He Is Unabomber, Sentenced to Life Without Parole*, CNN.COM, Jan. 22, 1998, <http://www.cnn.com/US/9801/22/unabomb.plea/>. Zacarias Moussaoui also used the trial process to publicize his political message: at his first appearance before the District Court, he spent fifty minutes criticizing Israel. Viveca Novak, *How the Moussaoui Case Crumbled; A Trial Once Described As a Slam Dunk Is Caught In a Post-9/11 Legal Wrangle*, TIME, Oct. 27, 2003, at 32. His legal documents served in similar fashion. See, e.g., Motion by Zacarias Moussaoui to Have Top Mujahid Brother Mohammed at the WTC Trial (World To Circus) and Stop the Pervert Sodom and Gomorah Agents of Torturing this Defender of Muslims, United States v. Moussaoui, Cr. No. 01-455-A (E.D. Va. Mar. 4, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68310/1.pdf>. Similarly, since 1922, Republican suspects in Northern Ireland have stated that they do not recognize the British court system and have on occasion used court appearances to further their claims. Courts can combat the use of trials for propaganda purposes through contempt of court proceedings, limits on media transmission of trial proceedings, and restrictions on who is allowed into the court room. See, e.g., Contempt of Court Act, 1981, c. 49 (Eng.); 18 U.S.C. § 401 (2007); see also FED. R. CRIM. P. 42(b) (providing for summary disposition of criminal contempt).

I. RISKS OF JURY TRIAL

Jurors' presence at terrorist trials risks juror intimidation, politicization of the jury, and the erection of obstacles to the state's use of classified evidence. This Part briefly discusses these issues and shows how they have arisen in the British and American contexts.

A. Juror Intimidation and the Politicization of the Jury

Terrorism is, by nature, a threat. The presence of terrorist organizations in society creates a risk that jurors will be coerced into finding defendants not guilty, despite substantial evidence to the contrary. Beyond this, terrorism tends to polarize communities. Individuals sharing the aim of those engaged in the struggle may be more willing to acquit an individual accused of subverting the state. Conversely, those appalled at the latest acts of violence may be looking to find someone—anyone—responsible. Jurors may be biased against defendants sharing an ethnic or religious background of those engaged in violence. This could influence their ability to evaluate evidence, the way in which juror deliberations unfold, and the verdict.³ Even unconsciously, jurors may want to return a decision consistent with community sentiment—a community potentially angry and scared and mourning the loss of their own. In addition, jurors may be afraid of being the future target of attack, making them less likely to entertain doubt as to the guilt of the accused.

These concerns run through the historical experiences of both the United Kingdom and the United States in their efforts to address terrorism. For the former, Ireland, and later Northern Ireland, proved particularly troubling.

1. Britain considered

In nineteenth century Ireland, juror intimidation was practiced with remarkable openness. The *Irish World* newspaper wrote, “‘I dare them to convict,’ says the writer, ‘I say “dare” advisedly. Let my words go forth. Accused be the juryman who will dare to find these men (the traversers) guilty of any crime against the people of Ireland.’”⁴ In the south of Ireland, crowds lined the streets as the accused were led to trial, shouting out “Down with Cork jurors,” “Down with British law.”⁵ Patrick O’Brien, who went on to become a Member of Parliament, obtained a list of members of the jury who were to sit

3. For more extensive discussion of the social psychology of juror bias in the course of the trial process, see Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and “Terrorist” Trials*, 78 CHI.-KENT L. REV. 1143 (2003).

4. HENRY JAMES, *THE WORK OF THE IRISH LEAGUES: THE SPEECH OF THE RIGHT HON. SIR HENRY JAMES, Q.C., M.P., REPLYING IN THE PARNELL COMMISSION INQUIRY* 552 (London, Cassell & Co. 1890).

5. *Id.*

on the Phoenix Park murders. He distributed 10,000 copies with the warning: “Woe to you if you have any of the goods of these jurors in your house, for then you, as well as they, will have the blood and sufferings of innocent people upon your head.”⁶

Government inquiries focused on what to do about juror intimidation and the politicization of jurors.⁷ The documents examined ways to secure public confidence in the legal system. One report noted that in general juries have performed their duties well but “in other parts of the country, notably in those where agrarian agitation is most prevalent, there is much cause for complaint.”⁸ The report found that jury misconduct “comes within [three] well-defined categories[:] 1. Crimes arising out of disputes as to the occupation of land. 2. Crimes arising out of political or religious antagonism. 3. Aggravated assaults.”⁹ This misconduct, the report continued, “has been attributed by different witnesses to (1) want of intelligence, (2) intimidation and fear, (3) sympathy with the accused person, or (4) a general disinclination to support the law.”¹⁰ Reform of the system became a constant refrain in Parliamentary debate.¹¹

Solutions to these problems ranged from suspending jury trial to requiring jurors to be landed.¹² (The assumption was that the wealthy could not be

6. *Id.* at 553.

7. *See, e.g.*, SELECT COMM. ON IRISH JURY LAWS, REPORT TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, MINUTES OF EVIDENCE, AND APPENDIX, 1881, H.L. 430; SELECT COMM. ON MAGISTRATES AND JURIES, IRISH JURY SYSTEM: FIRST AND SECOND REPORTS OF THE SELECT COMMITTEE ON MAGISTRATES AND JURIES WITH MINUTES OF EVIDENCE, ETC., 1873, H.C. 283 (abstract available at <http://www.bopcris.ac.uk/browse/eppiLCSH/382.html>).

8. SELECT COMM. ON IRISH JURY LAWS, *supra* note 7, ¶ 14.

9. *Id.* ¶ 15.

10. *Id.* ¶ 18.

11. *See*, for example, Bill for Right Proceedings of Grand Juries in Ireland, on Bills of Indictment, 1816, Bill [416]; Bill for Consolidating and Amending Laws Relative to Jurors and Juries in Ireland, 1826-1827, Bill [451]; Bill for Consolidating and Amending Laws Relative to Jurors and Juries in Ireland, 1828, Bill [98]; Bill for Consolidating and Amending Laws Relative to Jurors and Juries in Ireland, 1830, Bill [108]; Bill to Amend Laws Relating to Grand Juries in Ireland, 1833, Bill [42]; Bill to Amend Acts for Consolidating and Amending Laws Relative to Jurors and Juries in Ireland, 1834, Bill [25]; Bill to Amend Common Law Procedure (Ireland) Act, 1853, in Relation to Jurors and Juries in County of Cork, 1864, Bill [43]; Bill to Consolidate and Amend Laws Relating to Petit Juries in Ireland, 1867, Bill [46]; Act to Amend and Consolidate Laws Relating to Juries in Ireland, 1871, Bill [231]; Bill to Provide that Jurors in Criminal Trials in Ireland Be Chosen as in Civil Trials by Ballot, and to Abolish Power of Crown in such Trials to Set Aside Jurors Without Cause, 1872, Bill [47]; Bill to Amend Grand Jury (Ireland) Laws, 1895, Bill [155]; Bill to Amend Law Relating to Jurors in Ireland as Relates to County of Cork, 1895, Bill [121]; Bill to Amend Juries (Ireland) Acts, 1896, Bill [39]; Bill to Provide for Payment of Jurors in Ireland, 1896, Bill [75]. Information on these bills is available at <http://www.bopcris.ac.uk/browse/eppiLCSH/382.html>.

12. *See, e.g.*, JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE: A TREATISE IN COMMENDATION OF THE LAWS OF ENGLAND 87-88 (Francis Gregor trans., Cincinnati, Robert

bought or brought under undue influence of the defendant.¹³) The state actively sought individuals with a strong character, chosen by a disinterested party; and it empanelled individuals whose reputations would be on the line.¹⁴ The government further tried to counter the risks by imposing penalties for perverse verdicts.¹⁵

As political violence continued, the beginning of the twentieth century witnessed the partition of the island.¹⁶ For the next fifty years unionists controlled Northern Ireland. The Irish Republican Army (IRA) launched four campaigns to eliminate the border. In each of these the unionist government used extra-judicial measures, such as executive detention and restriction orders, to address terrorism—reducing concerns about juries by narrowing the role of the judiciary.¹⁷

In the late 1960s, violence again erupted. Alarmed at the growing number of shootings, incendiary devices, and bombings, Westminster assumed direct control of Northern Ireland in 1972. The government immediately instituted a review to examine what steps could be taken to reduce violence.

Lord Diplock, who chaired the inquiry, paid particular attention to the state's tendency to avoid the judicial system by using executive detention measures. He suggested that where cases did go to trial, perverse verdicts and the potential for juror intimidation undermined the system. Although he offered no evidence in support of this claim, he recommended the suspension of jury trial.¹⁸ The subsequent 1973 Northern Ireland (Emergency Provisions) Act eliminated juries for trials of offenses associated with terrorist crime.¹⁹ Although the Act was intended as a temporary measure, for more than thirty years Britain suspended juries in terrorist trials in Northern Ireland.

Clarke & Co. 1874).

13. *Id.* at 88.

14. *Id.* at 92-93.

15. *Id.* at 92.

16. The 1920 Government of Ireland Act, 10 & 11 Geo. 5, c. 67, created one parliament for the six northeastern counties and another for the remaining twenty-six. The northern parliament formed, but in the south Dáil Éireann rejected the statute. Sinn Féin and the Irish Republican Army became increasingly violent. Lloyd George brought leaders from both sides of the border to London to re-negotiate the Act. The resulting treaty provided Ireland with a degree of independence, while requiring continued allegiance to the Crown. The North could decide not to participate in the new Irish structure and instead, through its parliament at Stormont, maintain more direct links to Westminster. Within five months, the North seceded. *See* LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 2-3 (2000).

17. DONOHUE, *supra* note 16, at 44.

18. COMM'N TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, REPORT, 1972, Cmnd. 5185, ¶ 7(g).

19. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 2. The government also heeded another of Diplock's recommendations: it eliminated the property qualification for British subjects called to service in non-terrorist trials.

Successive reviewers of emergency measures recommended changes to the legislation,²⁰ but it was not until December 1999, during the Second Reading of the Terrorism Bill, that the Home Secretary announced that a Review Group would consider and report on what changes could be made to facilitate transition back to trial by jury.²¹ The Review Group had just six months to consider the matter. The final report suggested that while general consensus existed that Northern Ireland needed to return to jury trial, the time was not yet ripe.²² Three material factors would have to be taken into account: the risk of juror intimidation, perverse verdicts, and the level of threat.²³

Mr. Adam Ingram, Minister of State for the Northern Ireland Office, reiterated in Parliament, “While the Government’s overall objective remains a return to jury trial for all offenses in Northern Ireland, the Secretary of State agrees with the Review Group’s recommendation that the time is not yet right for such a move.”²⁴ Juror intimidation and perverse verdicts, emphasized by Lord Diplock nearly three decades before, continued to be a problem. The Review Group explained the difference between Northern Ireland and the rest of the United Kingdom:

While organised gangs in Great Britain may pose a serious threat, the problem in Northern Ireland is exacerbated by the relatively small community and the control the paramilitaries seek to exert over it through intimidation and so-called punishment beatings and shootings. In a small community people are aware of who is on jury service. Paramilitary groups can still exert great influence over their communities and until that wanes, people in those communities will be potentially open to intimidation.²⁵

The inquiry compared the situation to witness intimidation and noted that “[f]or higher levels of intimidation, the protection that may be necessary is so disruptive (i.e. relocation, possible change of identity, long-term protection for entire families) that it would be an unrealistically high price to require of potential jurors.”²⁶ It recognized that such protections may be “extremely resource-intensive.”²⁷ The inquiry cited the importance of building public confidence, for as Lord Diplock had observed, “a frightened juror is a bad juror even though his own safety and that of his family may not actually be at

20. See, e.g., INQUIRY INTO LEGISLATION AGAINST TERRORISM, 1996, Cm. 3420, ¶¶ 16.17, 16.18 (recommending that offenses be certified in, not out of, the Diplock system).

21. 341 PARL. DEB., H.C. (6th ser.) (Dec. 14, 1999) 166; see also N. IR. OFFICE, DIPLOCK REVIEW REPORT 2 (2000) (on file with author) [hereinafter REVIEW REPORT].

22. REVIEW REPORT, *supra* note 21, at 2.

23. *Id.* at 3.

24. 354 PARL. DEB., H.C. (6th ser.) (July 18, 2000) 124WS.

25. REVIEW REPORT, *supra* note 21, at 4.

26. *Id.*

27. *Id.*

risk.”²⁸ In 2000, the state continued juryless courts in Northern Ireland in a temporary subsection of permanent legislation.²⁹

In July 2005, the Provisional Irish Republican Army declared an end to its campaign.³⁰ Within weeks, the British government responded with a program for security normalization that upped the ante, proposing the end of the Diplock system by July 31, 2007. A year later, the Blair government met further progress in the peace process with a consultation paper that recognized the “residual risk from dissident republican and loyalist paramilitaries who are still engaged in planning acts of terrorism and continue to raise funds for their organisations.”³¹ It echoed Lord Diplock: “People in Northern Ireland . . . live in close-knit communities and in some cases these are dominated by members of paramilitary organisations. This increases the risk of intimidation. It also creates a fear of intimidation that can be just as damaging.”³² Nevertheless, the government proposed that the state shift in July 2007 to the presumption of jury trial for terrorist offenses.

Many unionists decried the proposal as an abdication of responsibility: violence may have been decreasing in the province, but it was still there. As Table 1 shows, since March 2003, there had been 347 shootings, 375 assaults, and 18 murders due to political violence.

Table 1. Paramilitary Shootings, Assaults, and Murders (Mar. 2003-Aug. 2006)

Dates	Shootings	Assaults	Murders
Mar. 2003-Feb. 2004	157	153	7
Mar. 2004-Feb. 2005	94	114	4
Mar. 2005-Feb. 2006	78	81	7
Mar. 2006-Aug. 2006	[18]	[27]	[0]
<i>Totals</i>	<i>347</i>	<i>375</i>	<i>18</i>

Source: INDEP. MONITORING COMM’N, TWELFTH REPORT, 2006, Cm., at 18-19.

Although violence was on the decline, dissident paramilitary organizations appeared to be increasing their criminal activities. Reporting in autumn 2006, for instance, the Independent Monitoring Commission (IMC) noted that the Continuity IRA was recruiting and training members in engineering and firearms.³³ Óglaigh na hÉireann, a small dissident group, was gaining

28. *Id.*

29. Terrorism Act, 2000, c. 11, § 75.

30. *IRA Statement in Full*, BBC NEWS, July 28, 2005, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4724599.stm.

31. N. IR. OFFICE, REPLACEMENT ARRANGEMENTS FOR THE DIPLOCK COURT SYSTEM: A CONSULTATION PAPER ¶ 2.7 (2006) [hereinafter CONSULTATION PAPER], available at http://www.nio.gov.uk/replacement_arrangements_for_the_diplock_court_system__a_consultation_paper.pdf.

32. *Id.* ¶ 2.8.

33. INDEP. MONITORING COMM’N, TWELFTH REPORT, 2006, Cm., ¶ 2.8 [hereinafter IMC REPORT], available at <http://www.independentmonitoringcommission.org/documents/>

ground.³⁴ The Loyalist Volunteer Force (LVF) had become “primarily a criminal concern.”³⁵ While it lacked “any coherent political purpose,” the LVF had moved into drug dealing and criminal activity.³⁶ Similarly, the Real IRA (RIRA) continued “to recruit members . . . monitor police officers and stations; and [identify] loyalist paramilitaries as potential targets for attack.”³⁷ The IMC described the Ulster Defence Association as “an active threat to the rule of law”, and the Ulster Volunteer Force, in a similar manner.³⁸

Not only did paramilitary violence continue, but the judicial system was under strain. Police intelligence identified eleven cases of jury tampering in non-Diplock courts 1999-2006, seven of which involved individuals with paramilitary connections.³⁹ Witness intimidation regularly occurred. (In 2004-2005, for instance, the Police Service of Northern Ireland recorded seventy-four instances of witness intimidation.⁴⁰ It is estimated that only half of all cases of intimidation are reported to the police.⁴¹) While not peculiar to Northern Ireland, the situation was considerably worse in the province than in the rest of the United Kingdom.⁴² Lord Carlile, the government’s annual reviewer of counterterrorist law, reported:

I am aware of concern in the courts about intimidatory tactics used in the presence of juries by the connections of defendants, and of the not uncommon failure of prosecution witnesses to turn up at court to give evidence. Intimidation can be subtle but disturbing, for example the repeated presence in the public gallery of persons looking closely at the faces of jurors.⁴³

The issues that plagued the judiciary in nineteenth century Ireland continued to challenge efforts by the British state in the early twenty-first century to establish jury trial for terrorist charges.

uploads/IMC%2012th%20Report%20pdf.pdf. The Independent Monitoring Commission began operating in January 2004 to report on the level of paramilitary activity in Northern Ireland, the normalization of security measures, and the degree to which political parties in the region are upholding their agreements. *Id.* ¶¶ 3-4.

34. *Id.* ¶ 2.5.

35. *Id.* ¶ 2.14.

36. *Id.*

37. *Id.* ¶ 2.25.

38. *Id.* ¶¶ 2.28, 2.35.

39. Letter from Paul Goggins, Parliamentary Under-Sec’y of State for N. Ir. (Jan. 22, 2007) (regarding Justice and Security (Northern Ireland) Bill), available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/46/4608.htm#a33>. *But see* Letter from Lord Carlile of Berriew to Shaun Woodward, Parliamentary Under-Sec’y of State for N. Ir. ¶ 10 (Apr. 2006), in CONSULTATION PAPER, *supra* note 31, annex A (reporting four cases of jury tampering in non-Diplock courts in the past seven years).

40. Letter from Paul Goggins, *supra* note 39.

41. *Id.*

42. Letter from Lord Carlile of Berriew, *supra* note 39, ¶ 11.

43. *Id.* ¶ 12.

2. *America under scrutiny*

The concerns highlighted above extend beyond British or Irish borders. Where suspected terrorists have stood trial, the United States also has witnessed intimidation and politics enter the courtroom through the jury. The infamous trial of Bartolomeo Vanzetti and Nicola Sacco,⁴⁴ two Italian anarchists, proves illustrative. Believing jurors and the trial to be a potential target, Massachusetts responded by taking a series of public security measures: the police guarded the courthouse, and every stranger who entered the courtroom was searched for weapons. The judge also went to some lengths to ensure that the weapons on exhibit were not loaded.⁴⁵ Even this did not prevent one of the jurors from having a bomb thrown at his house.⁴⁶ Simultaneously, Fred Moore, the California attorney who first defended the two men, turned the trial into a political *tour de force*: he organized public meetings, distributed tens of thousands of pamphlets, and drew on international organizations and foreign governments to reshape the question of guilt as a political matter—and thus influence the jurors' decisions.⁴⁷

Juror bias also proved potentially problematic in *United States v. Salameh*, which dealt with the 1993 World Trade Center bombing.⁴⁸ One defendant claimed that his right to fair trial was abridged because the court “failed to ask sufficiently probing questions regarding the jury panel’s bias against Muslims, Arabs and Islamic Fundamentalism.”⁴⁹ The trial judge went through considerable steps to ensure juror impartiality.⁵⁰

44. *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926).

45. OSMOND K. FRAENKEL, *THE SACCO-VANZETTI CASE* 16 (1931).

46. *Id.* at 3.

47. Robert D’Attilio, *Sacco-Vanzetti Case*, <http://www.writing.upenn.edu/~afilreis/88/sacvan.html>. The case sharply divided the country and spawned dozens of books. *See, e.g.*, *COMMONWEALTH VS. SACCO AND VANZETTI* (Robert P. Weeks ed., 1958); FRAENKEL, *supra* note 45; FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927); BRIAN JACKSON, *THE BLACK FLAG: A LOOK BACK AT THE STRANGE CASE OF NICOLA SACCO AND BARTOLOMEO VANZETTI* (1981); ROBERT H. MONTGOMERY, *SACCO-VANZETTI: THE MURDER AND THE MYTH* (1960); KATHERINE ANNE PORTER, *THE NEVER-ENDING WRONG* (1977); *THE SACCO-VANZETTI CASE: TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS 1920-7* (2d ed. 1969); WILLIAM YOUNG & DAVID E. KAISER, *POSTMORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI* (1985).

48. *United States v. Salameh*, 152 F.3d 88, 120 (2d Cir. 1998).

49. *Id.*

50. Judge Duffy selected the jury in three steps. The first considered potential jurors in groups of fifty. The judge explained the charges, read the names, and took petitions for those who wanted to be excused. Duffy eliminated anyone who expressed bias or hesitancy: some ninety out of 150 potential jurors. The second step placed jurors randomly in five groups of twelve. Each group was asked: (1) “If you had to describe your religious views, how would you do it?”; (2) “Have you ever had an incident in your life that would make it difficult to judge another person because of their race or creed or color or national origin or anything like that?”; (3) “Have you ever moved out of an area because you were disturbed that the

Similar concern about scapegoating affected the trial of Omar Mohammed Ali Rezaq, who was accused of killing Americans during the hijacking of Air Egypt Flight 648.⁵¹ On July 17, 1996, the night after the government's closing argument, TWA Flight 800 crashed off the coast of New York. Extensive media coverage followed. One survey found that it was the most heavily covered case in all of 1996.⁵² The accident was widely believed at the time to be the work of terrorists. An article in the *Washington Post* noted that Athens, Flight 800 aircraft's original departure point, was "known as a base for terrorists."⁵³ This was the same city where Rezaq had boarded Air Egypt Flight 648. The judge neither sequestered the jury nor instructed them to avoid the news. Two days later, the jury issued a verdict of guilty.⁵⁴

These cases all took place prior to 9/11. Just over two months after the attacks, the Bush Administration announced that juryless military tribunals would try noncitizens suspected of complicity in international terrorist attacks against the United States.⁵⁵ Nevertheless, terrorist cases involving citizens and noncitizens continued to arise in the domestic criminal court system. And like their predecessors, many gave rise to concerns about the role of the jury.

In 2003, the "Lackwana Six," for example, were indicted on charges of material support to a foreign terrorist organization.⁵⁶ The magistrate openly noted the difficulty of obtaining an impartial trial: "Understandably, the infamous, dastardly and tragic deeds and events of September 11, 2001 have caused a maelstrom of human emotions to be not only released but to also create a human reservoir of strong emotional feelings such as fear, anxiety and hatred as well as a feeling of paranoia in many of the hearts and minds of the inhabitants of this great nation."⁵⁷ He continued, "These are strong emotions of a negative nature which, if not appropriately checked, cause the ability of one to properly reason to be impeded or to be blinded in applying our basic principles of law."⁵⁸ Recognizing the emotional atmosphere that accompanies

area was changing?"; and (4) "Do you think that you could be fair and impartial in a case like this?" *Id.* at 120-21. Again, anyone expressing bias was excused. In the third stage, the judge questioned potential jurors individually with all counsel present. Duffy emphasized the importance of being "totally fair and impartial." *Id.* at 121. The judge asked the remaining venire candidates whether they had ever traveled to the Middle East, had feelings about Israel, or had Muslim friends, colleagues, or business acquaintances. The judge then considered counsels' challenges for cause. After this, peremptory challenges were exercised. The appellate court found the voir dire to be "proper and searching." *Id.* at 120.

51. *United States v. Rezaq*, 134 F.3d 1121, 1125-26 (D.C. Cir. 1998).

52. *Id.* at 1139.

53. Don Phillips, *747 Explodes with 229 Aboard Shortly After Takeoff from N.Y.; Witnesses Say They Saw Fireball Fall*, WASH. POST, July 18, 1996, at A1.

54. *Rezaq*, 134 F.3d at 1139.

55. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

56. *United States v. Goba*, 240 F. Supp. 2d 242, 243-44 (W.D.N.Y. 2003).

57. *United States v. Goba*, 220 F. Supp. 2d 182, 184 (W.D.N.Y. 2002).

58. *Id.*

terrorist attack, even the defendants' soccer coach advised them, "Take a plea because no jury is going to sympathize with you now."⁵⁹

In another case, Enaam Arnaout, the Director of Benevolence International Foundation, pled guilty to funneling charitable contributions to terrorist organizations.⁶⁰ His attorney stated as one motivation for the plea: "One has to question whether a fair and impartial jury could be found anywhere in America today that could sit in judgment of an Arab-American in a case involving allegations of terrorism."⁶¹

In the case of John Walker Lindh, the "American Taliban," who was due to appear before court in the Eastern Division of Virginia, the potential for juror bias was considerable: the courthouse was located in the same district as the Pentagon and close to Washington, D.C. where an anthrax attack had just occurred.⁶² A local Central Intelligence Agency officer, Johnny "Mike" Spann, had been killed just after interviewing Lindh in Afghanistan. With extensive coverage of the September 11 attacks and their aftermath and concerns in the Washington, D.C. area about the risk of future attacks, Virginia jurors appeared to be less sympathetic to Lindh before his trial than jurors elsewhere. One study found that 70% of people in Virginia had an unfavorable or very unfavorable view of Mr. Lindh, as opposed to 55% in Illinois.⁶³

Concerns about intimidation, of course, are not limited to terrorist suspects. In the 1962 trial of Teamster boss Jimmy Hoffa, for instance, the judge responded to a hung jury by declaring a mistrial—on the grounds that labor associates of Hoffa had attempted to tamper with the jury.⁶⁴ And politicization also occurs outside the terrorist context. Particularly heinous crimes spark the same sort of moral outrage and desire to act in accordance with the sense of the community.

But while such concerns *may* arise in the criminal realm, they are central to the nature of terrorist challenge. Nevertheless, such similarities raise two important questions: first, to what degree can measures used in the criminal context translate to the counterterrorist realm? Second, to what extent should counterterrorist changes in court proceedings transfer to criminal law? I return to these considerations later.

59. Michael Powell, *No Choice but Guilty; Lackawanna Case Highlights Legal Tilt*, WASH. POST, July 29, 2003, at A1.

60. Vidmar, *supra* note 3, at 1144; *see* United States v. Arnaout, 431 F.3d 994 (7th Cir. 2005).

61. Vidmar, *supra* note 3, at 1144.

62. *Id.* at 1156-57.

63. *Id.* at 1161.

64. *Hoffa Case Ends with a Mistrial: Judge Orders Investigation into 3 Alleged Attempts to Tamper with Jurors*, N.Y. TIMES, Dec. 24, 1962, at 1.

B. Public Dissemination of Classified Material

The presence of jurors in the courtroom may alter the amount and type of information that the state may be able to reveal. Where national security is on the line, the state may be unwilling to show intelligence methods and sources to the public. Jurors generally do not hold security clearances. And where terrorism has been present for some time, the state may be particularly concerned about jurors providing information—either wittingly or unwittingly—to terrorist groups.

The British government took this concern directly on board in its 1978 guidelines for jury vetting. Where “(a) . . . strong political motives were involved such as [in] I.R.A. and other terrorist cases and cases under the Official Secrets Acts,” and “(b) [s]erious offences [were] alleged to have been committed by a person or persons believed to belong to a gang of professional criminals,”⁶⁵ the state could ask potential jurors to “stand by”—essentially, to go to the end of the line and be considered only after other potential jurors had either been empanelled or dismissed.⁶⁶ The government explained, “In these cases the circumstances may indicate that potential jurors may be susceptible to improper pressure or may, because of extreme political beliefs be biased against either the prosecution or the defence.”⁶⁷ It emphasized

that a juror’s political connections are wholly irrelevant unless they are of so extreme a character as to make it reasonably likely that they will prevent the juror from trying a case fairly or that he may exert improper pressure on his fellow jurors. In Official Secrets cases there is the additional factor that it may be anticipated that some of the evidence will be heard in camera, *when the possibility of a potential juror making improper use of that evidence, voluntarily or under pressure, may need to be borne in mind.*⁶⁸

Another mechanism available to the state to allow it to use confidential information at trial is a Public Interest Immunity (PII) certificate, which allows a minister to approve the use of information and suspend cross-examination of the witness. The purpose is to prevent the public from learning about intelligence methods—such as the structure or extent of surveillance operations—that could then be used against the state. (For the same reason, and to protect the United Kingdom’s ability to procure intelligence from other countries, the Home Office severely restricts the use of intercept evidence in the courtroom).⁶⁹ There is an informal check on this power: political costs

65. *R v. Sheffield Crown Court*, (1980) 71 Crim. App. 19, 30 (Q.B.) (setting forth the government’s guidelines on jury checks as an appendix to the opinion, not included in the official Queen’s Bench reporter, cited *infra* note 109).

66. *Id.* Note that these guidelines appear to apply only to England and not to Northern Ireland, as the legislation to which they refer is solely English.

67. *Id.*

68. *Id.* at 30-31 (emphasis added).

69. COMM. OF PRIVY COUNCILLORS APPOINTED TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS, REPORT, 1957, Cmnd. 283, ¶ 90, available at <http://fipr.org/rip/Birkett.htm>.

accrue for the minister who signs the PII certificate, known in Parliament as a “gag” device, for seeming to hide the source of evidence.⁷⁰

Concern about intelligence information being made available to the jury is not unique to the United Kingdom; nor is it only of issue where conflicts have long been entrenched. A similar concern appears to have played a role in the United States at the recent trial of Zaccharias Moussaoui, the “20th hijacker.”⁷¹ The government sought to block Moussaoui’s efforts to obtain confidential documents and access to certain al Qaeda suspects held at Guantánamo Bay. Judge Leonie Brinkema denied Moussaoui’s motion to obtain the materials, but then allowed him to use prisoners held at the Cuban base as witnesses in his defense.⁷² As the trial judge’s rulings in the Moussaoui case made clear, though, government efforts to withhold evidence can endanger the state’s ability to prosecute terrorist crimes. Like the PII certificate, it also can carry political costs.

In sum, potential juror intimidation, politicization of juries, and public dissemination of classified material raise concerns about the role of juries in terrorist trials. The balance of this essay considers ways to address these concerns. The suspension of juries for terrorist trials provides one solution. The following Part considers the strengths and weaknesses of this approach.

II. JURY SUSPENSION

In 1973, the United Kingdom responded to political violence by suspending jury trial. Single-judge courts had the advantage of emphasizing the rule of law and the role of the judiciary. They neutralized the risk posed to jurors, and they provided a clean start while eliminating jurors’ biases from the equation. The system incorporated important safeguards—requiring judges to indicate the grounds on which they determined the guilt or innocence of the accused and allowing an automatic right of appeal based on law or fact. It proved flexible enough to alter over time to address deficiencies, and it may well have saved valuable resources when the state needed funds for other important security needs.

But the Diplock courts also carried important disadvantages: they clashed with Britain’s traditional embrace of trial by jury, and they eliminated one of the only ways the minority Catholic community could participate in the administration of justice. Simultaneous changes in admissibility of confessions

70. Interview with a senior British civil servant in Stanford, Cal. (Nov. 3, 2006). Information provided to the author upon the condition of anonymity.

71. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (second appellate decision); *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) (first appellate decision); *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (lower court decision sanctioning government for failing to allow the defendant to depose one of the government witnesses).

72. *Moussaoui*, 282 F. Supp. 2d 480.

and rules of evidence raised questions about whether the system was designed to convict individuals—not to dispense justice. The new courts hurt the United Kingdom's international standing. And the changes did not remain insulated from the ordinary criminal realm.

American military commissions also suspended jury trial for terrorist offenses. Their use stemmed in some measure from framing of the fight against al Qaeda as “war” (and thus implying the suitability of using military, not civilian, structures in response). The creation of these tribunals gave the Bush Administration a significant amount of control over the trial process. It eliminated the potential for intimidation. Classified information could be admitted as evidence. And the risks of jury nullification disappeared. Where individuals could be plotting attacks involving massive destruction, narrowing the possibility of the guilty going free reduced the risk to the state.

However, like the Diplock courts, military commissions had important weaknesses. The Administration had not made the case that the civilian courts were inadequate to handle those accused of complicity in September 11, 2001. The decision to bypass juries hit at the heart of their nature as a political institution, in which capacity they provide an important counter to acts of terror. The exclusion of jurors meant that the democratic nature of serving as a juror was lost, even though a better popular understanding of the threat faced would have helped the state in its counterterrorist program. Juries also provide an important check on the majoritarian nature of counterterrorist law. International disapproval of the military commissions carried additional consequences.

A. *The Case of Northern Ireland*

The Diplock courts in Northern Ireland had a number of advantages. First and foremost, they emphasized rule of law and the role of the judiciary in stemming violence. Internment, a purely executive procedure, had been a disaster: on August 9, 1971, Operation Demetrius resulted in the imprisonment, without charge, of hundreds of Catholics in Northern Ireland—many of whom had no involvement with paramilitary organizations.⁷³ Violence in the province exploded. In the four months preceding internment, eight people died from troubles-related violence. In the subsequent four months, 114 individuals were killed.⁷⁴ From seventy-eight explosions in July 1971, the number jumped in August to 131, followed in September by 196.⁷⁵

As a practical matter, the shift to single-judge courts helped to prevent known terrorists from walking free—diminishing the level of violence in the

73. DONOHUE, *supra* note 16, at 118.

74. Charles Carlton, *Judging Without Consensus: The Diplock Courts in Northern Ireland*, 3 *LAW & POL'Y Q.* 225, 229 (1981).

75. DONOHUE, *supra* note 16, at 118.

province and bolstering citizens' belief in the state's ability to protect them. Indeed, after the courts' introduction, violence fell.⁷⁶ And as intended, convictions increased: in the first five years, murder convictions rose from nine to seventy-seven; wounding convictions from 142 to 499; and robbery convictions from 791 to 1836.⁷⁷ At a time when the legitimacy of the state was under attack, it was important for the government to be able to take affirmative and visible steps showing enhanced security. As a structural matter, the shift from internment to the Diplock court system meant that individuals would not lose their freedom at the say-so of a politician, but as a result of a deliberative, judicial process.

Beyond reinforcing the judicial role in countering terrorism, the reforms neutralized the risk posed to jurors by eliminating them from the system. Northern Ireland was, and remains, an extremely close-knit society. The paramilitaries held a strong grip on some local areas. Many alternative solutions—such as masking the identity of the jurors—were implausible. Jurors would have to make the journey to and from court, where they would be seen. As soon as one juror became known to a paramilitary organization, the group could use its coercive powers—threatening the juror or the juror's family members—to identify others. As violence became part of daily life, eliminating jurors relieved some of the burden borne by the citizens.

Simultaneously, the sudden shift signaled a break with the past and suggested a fresh start, while removing juror bias from consideration. Popular perception considered the judicial system as skewed against Catholics. Statistics supported this view. A study by Tom Hadden and Paddy Hillyard in 1973, for instance, found that in political cases, the courts denied bail to 79% of the Catholics who came before it, but only 54% of the Protestants.⁷⁸ Juries, in turn, acquitted approximately 15% of Protestant defendants compared to only 5% of Catholics.⁷⁹ Internment had been intended to get around the problems with the courts. But it had failed. The creation of a new system suggested not a return to the discrepancies of the past, but the beginning of more equitable adjudication.

The system carried other important benefits as well. To retain the adversarial nature of the proceedings, Diplock judges were required to spell out both the factual and legal basis of their decisions. Defendants, in addition, were granted an automatic right of appeal. Matters of either fact or law could be reviewed.

These changes subjected decisions to greater scrutiny and allowed counsel to challenge the basis of the judgments. The written findings required a high

76. Carlton, *supra* note 74, at 233.

77. *Id.* at 234.

78. TOM HADDEN & PADDY HILLYARD, JUSTICE IN NORTHERN IRELAND: A STUDY IN SOCIAL CONFIDENCE 48 tbl.5.2 (1973).

79. *Id.* at 55 tbl.5.6; *see also* Carlton, *supra* note 74, at 235.

level of discipline in the fact-finding phase of the trial: defendants tended to appeal Diplock convictions more frequently than jury convictions—most likely due to the requirement that the judges write out their findings, making it easier to challenge the conclusion.⁸⁰ Judges, in turn, proved sensitive to potential reversals and consequently went to some lengths to ensure the strength of their information.⁸¹ This offered more protection to defendants than jury verdicts would have—the latter being returned without explanation and in relation to which no automatic right of appeal existed.

The system simultaneously allowed for reform to address deficiencies. To avoid being placed in the position of having to instruct themselves to disregard inadmissible evidence, for instance, judges informally began vetting evidence for each other. A few years after the Diplock courts' introduction, the state began to keep more extensive statistics on the operation of the system, and frequent inquiries and reviews kept the matter under advisement.

The decision to move to single-judge courts also may have lowered the costs of prosecution: the state would not have to provide security measures for twelve more people. Instead, it could focus its resources on the judiciary itself. A contrary argument could be made that other characteristics of the system, such as the automatic right to appeal, increased costs. But in the absence of more concrete data, speculation remains just that.

The elimination of the defendant's peers from the courtroom—done without evidence of the need to do so—also carried with it important weaknesses. Perhaps most dramatically, the system clashed with Britain's traditional embrace of jury trial, which legend—if not history—rooted in one of the state's foundation documents: the Magna Carta. Jury trial, celebrated by writers such as Blackstone, symbolized England's embrace of liberty rights.⁸² Although Lord Diplock squarely addressed this issue, stating that jury trial was *not* a fundamental right, giving up juries did weaken state legitimacy at a time when it was under attack. In doing so, it appeared that a different standard

80. JOHN JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* 276-86 (1995); *see also* Carol Daugherty Rasnic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURV. IN'L & COMP. L. 239, 253 (1999). Appeals courts did draw limits—for instance, judges were not required to indicate the relative weight of the factors considered in the judgment, but this did not mean that the information relied upon or the manner in which the judge relied upon it escaped scrutiny. *R v. Caraher*, [2000] NICC 3072, [6] (N. Ir.) (citing *R v. Thain*, [1985] 11 NIJB 31, [60] (N. Ir.)). But where the trial judge relied upon a “defective” or “erroneous finding,” the court treated the situation as “broadly akin to a misdirection of fact by a trial judge to a jury.” *Id.* (citing *R v. Gibson*, [1986] NIJB 1, [29] (N. Ir.)). It asked “whether the jury would inevitably have convicted if the summing-up had not contained the misdirection.” *Id.* (quotation omitted).

81. John D. Jackson, *The Restoration of Jury Trial in Northern Ireland: Can We Learn from the Professional Alternative?*, 2001-2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 15.

82. *See, e.g.*, 4 WILLIAM BLACKSTONE, *COMMENTARIES* *349 (calling the jury the “grand bulwark of [every Englishman's] liberties”).

existed for Northern Ireland than for Great Britain, playing into an old grievance in the province.

Jury suspension also prevented the minority Catholic community from engaging in the administration of justice. Judges at the time came almost entirely from the majority Protestant community. Even as late as 1976, Protestants held sixty-eight of the seventy-four senior court appointments.⁸³ The disparity was exacerbated by republican insistence that nationalists not “buy in” to the British system by participating in a meaningful way in the operation of the courts. In the wake of fifty years of unionist rule, in which the minority community had systematically been discriminated against, attempts to overcome the barriers may have seemed futile. Substantial social and economic barriers also played a role in diminishing the number of Catholics who worked as solicitors. The jury, then, provided an important instrument in engaging the minority community in the administration of justice. Eliminating it took away an opportunity for the state to bypass formal mechanisms and engage directly with individuals in the province.

The simultaneous weakening of *voir dire* (referring in the British context to the admissibility of confessions) and relaxed evidentiary rules bolstered dissidents’ claims against the government. The state began to allow inferences to be drawn from silence, and police testimony became sufficient to find membership in proscribed organizations.⁸⁴ The combination of these changes may have contributed to miscarriages of justice, further eroding public confidence in the system, and making it seem as though the state was trying to “load the deck” against (primarily minority community) defendants.

The single-judge courts also hurt the state’s international standing—and its ability to conduct foreign affairs. In the mid-1980s, for instance, the existence of the Diplock tribunals and the continued refusal of the British government to restore jury trial nearly prevented the Republic of Ireland from signing an extradition treaty.⁸⁵ Such effects can be serious: in the case of extradition, the state’s inability to obtain suspects, particularly from a neighboring territory, increases the potential level of violence.

The shift to single-judge courts in the counterterrorist realm, moreover, did not remain isolated from ordinary criminal law. The transfer happened in two ways. First, the broad range of scheduled offenses that automatically fell under the Diplock system meant that many non-terrorist cases, where no risk of juror

83. Carlton, *supra* note 74, at 227.

84. See The Criminal Evidence (Northern Ireland) Order, 1988, SI 1998/1987 (N. Ir. 20), art. 3; Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40.

85. See, e.g., Hugh Carnegy, *Irish Plea on Diplock Courts Refused*, FIN. TIMES (London), Nov. 6, 1986, at 9; *King Issues Warning to Dublin on Extradition Bill*, FIN. TIMES (London), Oct. 22, 1987, at 48; *Rebuff for Irish on Diplock*, TIMES (London), Nov. 6, 1986; Sarah Spencer & Fran Russell, *Agenda: Breaking the Diplock—A Three-Judge System*, GUARDIAN (London), Aug. 17, 1987.

intimidation existed, came before the courts. By the mid-1980s, some 40% of Diplock cases bore no relationship to paramilitary activity.

Eventually, this problem did abate. In 1986, Westminster responded to calls to end the system by expanding the number of scheduled crimes that could be certified out—that is, sent to non-Diplock courts. The Director of Public Prosecutions accordingly began increasing the number of cases that went to jury trial. (The Attorney General would only deschedule a case where he was “satisfied that it is not connected with the emergency in Northern Ireland.”)⁸⁶ By October 2006, some 85-90% of the cases were being descheduled.⁸⁷

The second way in which the tribunals were brought into criminal law was even more direct: even as efforts were made to restore juries in Northern Ireland in the early twenty-first century, the government began calling for the suspension of jury trial for ordinary criminal law, where particularly complex information or long trials existed.⁸⁸

In 2003, the Criminal Justice Act cemented this shift, providing for the creation of single-judge tribunals throughout England and Wales for cases involving complex fraud or where a significantly high danger of jury tampering exists.⁸⁹ In the latter instance, the prosecution applies to a judge of the Crown Court, who must be satisfied “that there is evidence of a real and present danger that jury tampering would take place” and that “notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.”⁹⁰ The statute offers a handful of examples: retrials where the previous jury was discharged because of jury tampering; situations where defendants have previously been part of proceedings where such efforts had occurred; or cases where actual or attempted intimidation of witnesses had occurred.⁹¹

Although the House of Commons approved the non-jury provisions of the legislation, the House of Lords balked at the suspension of juries. The Conservative peer Lord Hunt of Wirral protested that simplifying the law on fraud would be preferable to eliminating juries altogether.⁹² Liberal Democratic spokesperson Lord Thomas of Gresford noted that the rate of conviction in

86. CONSULTATION PAPER, *supra* note 31, ¶ 2.2.

87. *Id.* ¶ 2.5 (noting also that approximately sixty cases returned for trial without jury, as opposed to 329 in 1986).

88. U.K. HOME OFFICE, JURIES IN SERIOUS FRAUD TRIALS: A CONSULTATION DOCUMENT ¶ 3.18 (1998), available at <http://www.nationalarchives.gov.uk/ERO/records/ho415/1/cpd/pvu/juries.pdf>.

89. Criminal Justice Act, 2003, c. 44, § 43(2), (5). The Lord Chief Justice, or a judge nominated by him, has to agree. *Id.* § 43(4).

90. *Id.* § 44(4), (5).

91. *Id.* § 44(6).

92. 651 PARL. DEB., H.L. (6th ser.) (July 15, 2003) 773.

fraud trials was between 83% and 87%—hardly evidence that the system was not working.⁹³ Labour peer Baroness Kennedy of the Shaws suggested that the jury “protects the judiciary. It is what maintains the esteem of the British judiciary.”⁹⁴ “Trial by a single judge,” she continued, “catapults judges into a position which makes them very vulnerable.”⁹⁵ She tackled class concerns: “white collared professionals” would be “tried by other white collared professionals. How will ordinary citizens, excluded from the process, feel about acquittals in those circumstances?”⁹⁶ Other objections, such as compatibility with provisions of the European Convention of Human Rights regarding discrimination, also surfaced.

To secure the Lords’ agreement, David Blunkett, then Home Secretary, negotiated a compromise: section 43 would only come into force in accordance with provisions made by the Secretary of State.⁹⁷ The Lords agreed and passed the Criminal Justice Act. Two years later, the government brought forward a draft commencement order to bring section 43 into force. The House of Commons Standing Committee approved it. But the House of Lords resisted. When it became evident that the order would not pass the second chamber, the government withdrew it.

In November 2006, the government found a way around the Lords’ objections by renegeing on the earlier deal. It introduced legislation that would remove any requirement that the government obtain the Lords’ approval.⁹⁸ The Fraud (Trials Without a Jury) Bill allowed for section 43 to be implemented solely by the Secretary of State—not agreement by both Houses, under the affirmative procedure. This bill currently is in committee.

These provisions, it is important to note, are not intended to replace the Diplock procedure, but rather to introduce a similar mechanism into the realm of other serious crime. The government claimed in its July 2002 white paper, “We do not expect there to be more than 15-20 such trials a year and we expect their length to reduce as a result.”⁹⁹

B. *The United States*

The United States has pursued a number of terrorist cases—including some against Islamist defendants—through the ordinary court system. Prior to September 11, for instance, the government successfully prosecuted twenty-six

93. *Id.* at 776.

94. *Id.* at 780.

95. *Id.*

96. *Id.* at 781.

97. Criminal Justice Act, 2003, c. 44, § 330(5)(b).

98. Fraud (Trials Without a Jury) Bill, 2006, [Bill 6].

99. U.K. HOME DEP’T, JUSTICE FOR ALL, 2002, Cm. 5563, ¶ 4.30, *available at* <http://www.archive2.official-documents.co.uk/document/cm55/5563/5563.pdf>.

jihad conspirators in the Southern District of New York.¹⁰⁰ Nevertheless, the Bush Administration followed the attacks with the announcement that noncitizens apprehended in the “Global War on Terror” and moved to Guantànamo Bay would be tried by military tribunal. The logic was that the United States found itself embroiled in war—and in war, the military, not the civilian courts, provided the appropriate forum for trying the enemy.

To date, much of the discussion in the United States about Guantànamo Bay has centered on liberty and security concerns, with substantially less emphasis on the trial process itself—and almost no consideration of the implications of not involving juries in the process. While perhaps a secondary consideration, the absence of jurors warrants discussion.

Military commissions offered the Administration a number of advantages. The commissions mitigated the first danger raised in this Article—the potential for juror intimidation. Not only did they accomplish this by eliminating jurors altogether, but an argument could be made that the military officers presiding, trained in self-defense and active combat—and already working in high-risk occupations—were particularly resistant to intimidation. A small group of military personnel, moreover, would be easier to protect from possible retaliation than a larger and more diverse group of jurors.

Military commissions also resolved the third danger identified in this Article: the publicization of secret methods of intelligence gathering. Instead of being aired in a public forum, classified information could be handled by using military judges with security clearances.

The elimination of jurors also gave the Administration considerable control over the trial process and reduced the risk that individuals determined to harm the United States would be set free. Concern here may have stemmed from the complex set of rules built into the ordinary criminal process. The commissions could, for instance, create new rules for the treatment of evidence—which would give the court access to information that otherwise might have been excluded under ordinary criminal procedure. The use of the special tribunals also eliminated the possibility of juror nullification. The Administration was recasting its interrogation standards.¹⁰¹ There may have been concern that jurors who heard about the techniques being used might nullify the proceedings. And where massive attacks using conventional techniques, or operations drawing on biological weapons or nuclear material loomed as threats, taking a chance with the ordinary criminal process—which might acquit the guilty—might have presented too great a risk.

Finally, as a purely legal matter, there were minimal constitutional concerns about excluding juries from a military forum: trials by military commission of offenses against the laws of war are *not* subject to the

100. See *United States v. Bin Laden*, 160 F. Supp. 2d 670 (S.D.N.Y. 2001).

101. See generally *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

constitutional requirement of trial by jury.¹⁰² Similarly, courts-martial are not governed by the procedures of the Sixth Amendment.¹⁰³

Setting aside the arguments in support of eliminating juries for cases connected to the “Global War on Terror,” the decision also carried important weaknesses, many of which have not been aired.

First, the case against using civilian courts because of concern about juror intimidation had not been made. Granted, the September 11 attacks were executed on American soil, and threatening in nothing if not their sheer size. But the personalized nature of violence in Northern Ireland was not mirrored by al Qaeda’s actions within U.S. bounds. Lord Diplock too failed to present evidence of intimidation; however, the strong paramilitary hold over local communities in Northern Ireland provided some evidence of the concern. In contrast, al Qaeda did not exert substantial, personalized control over any region in the United States.

Second, while a stronger argument could be made about the politicization of jurors—specifically, the risk that jurors would engage in scapegoating—the state at no point made this argument. Indeed, the state itself appeared politicized. It had detained more than 1200 individuals within U.S. bounds simply by nature of their nationality, age, and religion. Thousands more had been detained outside the United States. The rules of the newly minted military commissions allowed secret evidence, information obtained under duress, hearsay, and a two-thirds vote of the panel to convict. It took more than two years from when the President announced that detainees would be tried for the first detainee to be granted legal representation.

Third, the presence of jurors may help to counteract the majoritarian tendency of counterterrorist law. That is, counterterrorist measures often disproportionately affect minorities. Citizens in the majority may be more willing to acquiesce when not confronted with the impact of such laws. Preserving jury trials may thus personalize the institutionalized racism that is typical of counterterrorist provisions. Relatedly, jurors’ presence—and the power to nullify or to find the defendant innocent—may help to keep the state in check. The jury here acts as a political force. As one commentator noted, “Ordinary jurors can thwart the power of the judiciary in ways that procedures guaranteed by other individual rights cannot. Federal judicial oversight of state criminal prosecutions threatened state autonomy from without, but jury rights, like voting rights, threatened state power from within.”¹⁰⁴ Efforts by the prosecutor to find a scapegoat—or attempts by the prosecution to use

102. *Ex parte Quirin*, 317 U.S. 1, 40 (1942).

103. *Wright v. Markley*, 351 F.2d 592, 593 (7th Cir. 1965); *De War v. Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), *cert. denied*, 337 U.S. 908 (1949); *Reilly v. Pescor*, 156 F.2d 632, 635 (8th Cir. 1946), *cert. denied*, 329 U.S. 790 (1946).

104. Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE STORIES* 261, 293 (Carol S. Steiker ed., 2006).

questionable (or morally repugnant) interrogation techniques—may fall afoul of citizens' views of appropriate countermeasures.

Fourth, the international, presentational value of eliminating jurors from the court room mattered. As other countries looked at the decision of the United States to convict individuals through wholly executive action, the state's claim to adhere to the rule of law, as understood in liberal, democratic dialogue, came under strain.

A "double deficit" could be said to follow: the United States depends on other countries for extradition, intelligence, and operational support for the "Global War on Terror." The decision to eliminate jurors contributed to other states' reluctance to cooperate with the United States. In 2003, for example, Germany delayed extradition of two al Qaeda suspects, Sheik Muhammad Ali Hassan al-Mouyad and Muhammad Moshen Yahya Zayed.¹⁰⁵ Germany had required the United States's assurance that the two would not be tried by a military tribunal.¹⁰⁶

The country's ability to pursue one of its stated goals—convincing other states to adopt a similar political model—also suffered. When the country is trying to convince regions to adopt liberal, democratic regimes, suddenly eliminating one of the mainstays of such a political structure could lead others to question how solidly liberal, democratic government protects individuals from unilateral, executive power. Wrapped tightly to this concern was the United States's global leadership on individual rights—and its ability to pursue its other foreign policy objectives. Eliminating juries and creating military commissions also ran the risk of American citizens and officials being given fewer protections in judicial proceedings abroad.¹⁰⁷

Keeping these concerns in mind, the question that presents itself is whether the dangers raised at terrorist trials by the presence of jurors could be mitigated in ways that stop short of eliminating juries altogether. Here I focus not on military courts but on the criminal justice systems in Northern Ireland, Great Britain, and the United States—all jurisdictions that will have to grapple with terrorist trials in the foreseeable future.

III. POTENTIAL WAYS TO ADDRESS THE CONCERNS RAISED BY TERRORISM

The most promising adjustments that can be made to address the risks raised in Part I of this Article lie in the realm of juror selection. But just as in considering the suspension of jury trial, differences between the unique

105. Mark Landler, *World Briefing Europe: Germany: Delay in Extradition Ruling*, N.Y. TIMES, July 26, 2003, at A2.

106. *Id.*

107. This point is not to be drawn too strongly. Many states did continue to cooperate with the United States without being public about it. It also is difficult to separate the exclusion of the jury from other concerns states may have about the manner in which the United States was pursuing its "Global War on Terror."

circumstances of Northern Ireland, Great Britain, and the United States need to be taken into account. In the British Isles, a strong cultural bias against collecting information on jurors' backgrounds—and using peremptory or for-cause challenges—exists. American culture, in contrast, appears to have little compunction about examining jurors' backgrounds during voir dire. Nevertheless, prosecutors in the United Kingdom *can* draw from intelligence files to determine in national security cases whether to ask certain jurors to stand by. Juror qualifications also differ: in Northern Ireland, the best approach may be to widen the number of occupations that can be called for jury service. In the United States, a more effective approach may center on efforts to obtain a change in venue or to masque juror identity. In addition, this Part explores the use of alternate jurors. It suggests that a new system, which allows for selection of a significant number of alternates, with the final jury chosen by lot immediately before deliberations, may lower the risks of jury tampering.

All of the above deal with juror selection. Alternatively, constraints placed on jurors are amongst the least effective ways to address the risks associated with terrorist trials. Discharging juries or directing verdicts may be helpful in extreme cases, but reliance on them would be misplaced. The possibility of obtaining special security clearances for jurors deserves further attention.

The final realm considered in Part III centers on fixes to the trial procedure itself. Changes in this area may prove to be particularly controversial—and the hardest to insulate from general criminal law.

A. Juror Selection

The selection of jurors offers the best opportunity for the prosecution or defense to mitigate the risks highlighted in Part I. This Part considers five mechanisms that may be particularly helpful in this regard: collecting juror information, relaxing juror qualifications, expanding the region from which jurors are drawn, moving the trial to a different venue, and using alternate jurors.

1. Collection of information on jurors

One way to address the risks of jury trial is to dismiss jurors who may prove particularly susceptible to terrorist intimidation, who may show a particular bias, or who may be particularly untrustworthy with regard to sensitive information. To screen potential jurors, information that would indicate these risks has to be made available either to the prosecution or the defense, or possibly to both. In the United Kingdom, however, unlike in the United States, there is a strong cultural bias against this approach.

a. British vs. American cultures of juror selection

In the United Kingdom, the right to an impartial jury does not mean a panel *designed* to be impartial, but one drawn by chance from the citizenry. The 1965 Report of the Departmental Committee on Jury Service reasoned, “A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community.”¹⁰⁸ As Lord Denning explained, “Our philosophy is that the jury should be selected at random—from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole—and thus represent the views of the common man.”¹⁰⁹

This means that the United Kingdom does *not* make use of extensive questionnaires regarding jurors’ backgrounds. Neither does it make such extensive use of peremptory challenges or challenges for cause. The latter are only rarely exercised. In regard to the former, in England and Wales, the 1988 Criminal Justice Act abolished peremptory challenges altogether.¹¹⁰

Northern Ireland works according to a different set of rules. There, defendants can challenge up to twelve jurors without showing cause. The prosecution, however, can only challenge for cause.¹¹¹ In both Britain and Northern Ireland, however, the Crown can ask jurors to stand by.¹¹² This power, discussed earlier in this Article, was used at least from 1948 forward (although until 1978 it occurred in secret).¹¹³ When no other jurors are left, under extraordinary circumstances the state can refuse to call the remaining jurors. In England and Wales, the decision to stand by is carefully controlled: it must first be authorized by the Director of Public Prosecution (DPP). The DPP must then report to the Attorney General any instance in which standing by has been authorized. Even this is controversial. Lord Denning opined in *obiter dicta*,

108. DEPARTMENTAL COMM. ON JURY SERV., REPORT, 1965, Cmnd. 2627, ¶ 53. There are qualifications on the British preference for an indiscriminate sample of citizens: until the early 1970s, for instance, property qualifications “excluded many women, lower social class and young people.” Robert J. East, “*Jury Packing: A Thing of the Past?*,” 48 MOD. L. REV. 518, 520 (1985) (quoting BOB ROSHIER & HARVEY TEFF, LAW AND SOCIETY IN ENGLAND 126 (1980)).

109. R v. Sheffield Crown Court, [1980] Q.B. 530, 541. But note that in the case of the “UDR Four” (Ulster Defence Regiment Four), prospective jurors were asked whether they had any close relatives who were or had been a member of the UDR. Telephone interview with a senior Northern Ireland civil servant in Stanford, Cal. (Nov. 20, 2006). Information provided to the author upon the condition of anonymity.

110. Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.).

111. The Juries (Northern Ireland) Order, 1996, SI 1996/1141 (N. Ir. 6), ¶ 15(2).

112. *Id.* ¶ 15(4).

113. East, *supra* note 108, at 520.

To my mind it is unconstitutional for the police authorities to engage in “jury vetting.” So long as a person is eligible for jury service, and is not disqualified, I cannot think it right that, behind his back, the police should go through his record so as to enable him to be asked to “stand by for the Crown,” or to be challenged by the defence. If this sort of thing is to be allowed, what comes of a man’s right of privacy? He is bound to serve on a jury when summoned. Is he thereby liable to have his past record raked up against him—and presented on a plate to prosecuting and defending lawyers—who may use it to keep him out of the jury—and, who knows, it may become known to his neighbours and those about him?¹¹⁴

In *R v. Mason*, British courts formally rejected Denning’s position, saying that some jury vetting is necessary to ensure that individuals who are disqualified because of their past convictions are indeed excluded.¹¹⁵ Lord Justice Lawton explained, “The practice of supplying prosecuting counsel with information about potential jurors’ convictions has been followed during the whole of our professional lives, and almost certainly for generations before us. It is not unlawful, and has not until recently been thought to be unsatisfactory.”¹¹⁶ In accordance with *Mason*, in 1980 the Attorney General issued guidelines that limited the type of information that could be provided to the prosecution on the past criminal record of potential jurors.

With this said, however, special rules about gathering information on jurors may apply for terrorism or national security trials. British law allows prosecutors to obtain intelligence on jurors from law enforcement agencies. The Attorney General Guidelines explain that “in security cases [there is] a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been given in camera.”¹¹⁷ The guidelines further state that

in both security and terrorist cases [there is] the danger that the juror’s political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of a sectarian or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors.¹¹⁸

There is no duty to disclose to the defense when such an inquiry has been conducted.¹¹⁹

114. *Sheffield Crown Court*, [1980] Q.B. at 542.

115. *R v. Mason*, [1981] Q.B. 881.

116. *Id.* at 891. The court was careful though not to comment beyond this issue, on the provision of other information (not related to the past criminal records of potential jurors) to the prosecution.

117. East, *supra* note 108, at 526 (quoting the 1980 Attorney General Guidelines para. 5) (alteration in original).

118. *Id.* (quoting the 1980 Attorney General Guidelines para. 5) (alteration in original).

119. *Id.* at 527.

Both as a general matter and in relation to such special circumstances, the United Kingdom's practice in relation to juror selection runs contrary to that of the United States, where more influence is given up front to the state and to the defense in ensuring an impartial panel of jurors.¹²⁰ The court is allowed to examine prospective jurors and may permit the attorneys on both sides to do so as well.¹²¹ This may include the use of extensive juror questionnaires.¹²² In capital cases tried in federal court, each side can exercise twenty peremptory challenges. In other federal felony cases, the government can exercise six challenges, with the defendant or joint defendants retaining ten peremptory challenges if possible punishment exceeds one year in prison.¹²³ Even in misdemeanor cases, each side is allowed three peremptory challenges.¹²⁴ Again, in contrast to the United Kingdom, the United States has no special provision for prosecutors to obtain intelligence files on potential jurors.

b. Considerations for terrorist trials

The difference between the two states' approach to juror selection makes it difficult—indeed, unwise—to suggest that one particular approach should dominate. Instead, the strengths and weaknesses of each system must be evaluated within their own context.

In regard to the United Kingdom, the practice is moving away from peremptory challenges. Their continued retention in Northern Ireland can be attributed to a lack of pressure to change the system. But there are increasing calls to eliminate them, bringing Northern Ireland in line with England and Wales.¹²⁵ The concern is that defendants can use peremptory challenges to “pack a jury” with individuals from the same political or religious affiliation.

If the aim is to create an even playing field and to ensure a random selection of jurors, it makes little sense to abolish this right for the defense—while maintaining the Crown's ability to stand by. Some restrictions on both parties' ability either to issue peremptory challenges or to stand by potential jurors, however, may go some way towards meeting the concern.¹²⁶ Such steps may help to prevent defendants from being able to load a jury in their favor, while allowing them to address the very real sectarian divide in the province. On the other side, the Attorney General Guidelines in the United Kingdom

120. Compare *R v. Sheffield Crown Court*, [1980] Q.B. 530, 541, with FED. R. CRIM. P. 24.

121. FED. R. CRIM. P. 24(a).

122. See, e.g., U.S. Dist. Court for the Dist. of S.C., Standard Juror Questionnaire, available at <http://www.scd.uscourts.gov/docs/juryques.pdf>.

123. FED. R. CRIM. P. 24(b)(1)-(2).

124. *Id.* R. 24(b)(3).

125. See, e.g., CONSULTATION PAPER, *supra* note 31, ¶¶ 3.3, 3.11-3.13.

126. *Id.* ¶¶ 3.3, 3.14-3.16.

provide a good example of clearly defined and restricted conditions under which stand by could be given effect.¹²⁷

The questions that would have to be addressed are not insignificant. How far into a juror's background should the state be allowed to go in terrorist trials? And at what point does eliminating certain jurors mean that the defendant is no longer being tried by his or her peers? Another concern is how to keep the prosecution from using the power for political gains. In the case of Clive Ponting, for instance, who was charged under the Official Secrets Act, C3 (the head of the vetting section of MI5) vetted a panel of sixty potential jurors. This included careful examination of members of the Labour Party, then in opposition, believed to be associated with extremist elements in the party. MI5 conducted "in-depth" inquiries amongst colleagues, neighbors, and friends and created a dossier on the prospective jurors' political and social activities, their standing in the community, and the like.¹²⁸

While it makes sense to vet potential jurors to reduce the risks posed by involving juries in terrorist trials, counterterrorist provisions provide unusual power that can be used politically—and that has a tendency to be used in non-terrorist-related contexts.¹²⁹ In the *Ponting* case, the investigation progressed relatively far and it focused on members of the opposition—raising political concerns. With no definition of what constitutes a "national security" or "terrorist" case, moreover, such vetting could be applied to a broad range of cases.¹³⁰ Here, the secret nature of the process works against it: it is hard to conduct effective oversight if the information is not made available.

It may be possible to address these concerns by defining what counts as a national security or terrorist trial, and then imposing stringent safeguards on the manner in which jurors are stood by or released. (In the United States, the continued availability of peremptory challenges, together with the juror questionnaire, serves as the functional equivalent.) Where used, however, an independent review or audit of the entities conducting the inquiry would help to ensure that the authority is not abused. The state may issue special rules to solicitors—a practice used in Ireland in the nineteenth century as a way to address political violence—to encourage consistency during the trial process¹³¹

127. *Id.* ¶ 3.16.

128. East, *supra* note 108, at 527-28.

129. See, e.g., Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1194 (2006).

130. East, *supra* note 108, at 530; see also HARRIET HARMAN & JOHN GRIFFITH, *JUSTICE DESERTED: A SUBVERSION OF THE JURY 27* (1979) (arguing for abolishing the jury vetting scheme).

131. Rule for Guidance of Crown Solicitors in Ireland in Relation to Impanelling of Jurors, 1894, Order 33.

2. Juror qualifications

Another possibility might be to broaden juror qualifications, to ensure a broader cross-section of the public. Both the United Kingdom and the United States use a random method of actual selection.¹³² Where the two countries differ is in the qualifications required for individuals to make it into the jury pool.

The law in Northern Ireland restricts participation by age, mental facility, occupation, and criminal record.¹³³ Any persons concerned with the administration of justice are ineligible to serve. This includes anyone holding a judicial office, justices of the peace, barristers, solicitors and their clerks, the Director of Public Prosecution and their staff, officers of the Northern Ireland Office or the Lord Chancellor's Department, members of the Court Service, correction officers, law enforcement officers, forensic scientists, and others. It also excludes anyone serving in the British military forces.¹³⁴

What is interesting about the exclusion of these particular occupations is that, while they may introduce concerns about conflict of interest, they are already high-risk occupations. Their members face little additional risk by serving as jurors. Hence they may be less susceptible to intimidation by paramilitaries—and even stronger candidates for jury service than ordinary members of the public.

The law also allows a range of individuals to be excluded from jury service, including members of Parliament, members of the Northern Ireland Assembly, and representatives of the European Parliament. In the interest of the performance of their public duties, excusing them makes sense. However, the legislation also allows the court to excuse public officials, such as school inspectors, mines inspectors, and the Comptroller and Auditor General for Northern Ireland. The court may also exclude clergy, teachers, lighthouse keepers, medical practitioners, dentists, veterinarians, pharmaceutical chemists, and people aged sixty-five to seventy years old.¹³⁵

What is curious about many of these occupations is that those in them may be less likely to live in paramilitary strongholds, and consequently less likely to be targets of coercion. They may have more contact with individuals from across the religious divide, making it less likely that they would exhibit blatant bias in the conduct of the proceedings. And they may be more keenly aware of the need to prevent transferring information from the courtroom to paramilitary organizations. This is precisely the group of citizens that the state would want to incorporate into its efforts to engage the population in the administration of

132. See 28 U.S.C. § 1861 (2007).

133. See The Juries (Northern Ireland) Order, 1996, SI 1996/1141 (N. Ir. 6), ¶ 3(1), scheds. 1-2 (requiring that jurors be between ages eighteen and seventy, understand English, and be mentally competent).

134. *Id.*

135. *Id.* sched. 3.

justice. As Lord Carlile pointed out, widening the jury pool may dilute the risk of intimidation and perverse verdicts—and it would help to move the province towards normalization.

Northern Irish legislation also disqualifies from jury service anyone who has been sentenced to five years or more or who has been detained during Her Majesty's pleasure, as well as anyone who in the past ten years has served part of a sentence of imprisonment or detention or community service order, or who in the past five years was put on probation.¹³⁶ Unlike the occupational restrictions, these limits, particularly in the paramilitary context, do make sense. To ensure that individuals who have served time are excluded, the government proposed "routine criminal record checks to identify disqualified jurors."¹³⁷ The suggestion of using a central juror administrative body to conduct the checks appears to be a reasonable way to accomplish this.¹³⁸

As a general matter, the Blair government is reluctant to reduce the occupational restrictions on the jury pool in Northern Ireland. While it "would represent another move towards normalisation, the impact of such a measure on jury intimidation and perverse verdicts is unclear. Conversely, amending the criteria to include previously exempted groups may raise perception issues, particularly if combined with the abolition of defence's right of peremptory challenge."¹³⁹ The government concludes, "It is considered appropriate to defer work on widening the jury pool until after the current reforms have been implemented and have had time to bed down."¹⁴⁰

Even as the government is proposing to maintain occupational distinctions in Northern Ireland, it is eliminating them in the rest of the United Kingdom. Whereas before a property qualification and an educational requirement existed in Britain to reduce the potential for politicization and intimidation, now neither distinction is exercised, and members of almost all professions are eligible to serve as jurors.¹⁴¹

Previously, as in Northern Ireland, a range of professions also were excusable as of right: parliamentarians (peers and peeresses entitled to receive writs of summons to attend the House of Lords, members of the House of Commons, and officers of the House of Commons), the military forces, and those in medical and other similar professions (such as medical practitioners, dentists, nurses, midwives, veterinary surgeons and veterinary practitioners, and pharmaceutical chemists).¹⁴² Now, however, the *only* professionals excusable as of right are those serving full time in Her Majesty's naval,

136. *Id.* sched. 1.

137. CONSULTATION PAPER, *supra* note 31, ¶ 3.3.

138. *Id.* ¶ 3.6.

139. *Id.* ¶ 3.25.

140. *Id.* ¶ 3.26.

141. Criminal Justice Act, 2003, c. 44, § 321, sched. 33.

142. Juries Act, 1974, c. 23, sched. 1.

military, or air forces—where the commanding officer certifies that it would be prejudicial to the efficient running of the service.¹⁴³

As in Northern Ireland, individuals who have been imprisoned for life or five or more years, detainees, and anyone serving any part of sentence of imprisonment or detention for three months or more are disqualified.¹⁴⁴ In 1984, the state extended exclusion to a broader range of crimes and incorporated anyone who had served any term of imprisonment in the past ten years.¹⁴⁵

The United States does not have such a long list of occupations formally prevented from taking part in jury trial. There are instead just three groups that are exempt from federal jury service: members of the armed forces on active duty, members of professional fire and police departments, and “public officers” of federal, state or local governments, who are actively engaged full-time in the performance of public duty.¹⁴⁶ This does not mean, though, that all government employees are barred. (The Supreme Court has held that their inclusion in the jury pool is consistent with the Sixth Amendment.)¹⁴⁷

Outside of these areas, anyone who is a U.S. citizen, at least eighteen years of age, proficient in English, not subject to any felony charges or convictions (unless the individual’s civil rights have been restored legally), and not subject to any mental or physical condition that would disqualify the individual may serve as a juror in federal court.¹⁴⁸ It falls to each judicial district to draw up a formal, written plan for selecting jurors.¹⁴⁹ The scheme must ensure that a fair cross-section of the community makes up the pool from which jurors are drawn at random.¹⁵⁰ Federal law requires that voter registration lists, or lists of actual voters, provide the source of names for federal court juries. These can be supplemented with other appropriate lists, such as drivers’ records.¹⁵¹

3. *Geographic draw and change of venue*

Another way in which the risks posed by terrorist trial could be reduced is by expanding the geographic region whence jurors are drawn—perhaps to the point of changing the venue itself. This solution is not a new way to address

143. Criminal Justice Act, 2003, c. 44, § 321, sched. 33(5)-(9).

144. Juries Act, 1974, c. 23, sched. 1.

145. Juries (Disqualification) Act, 1984, c. 34; *see also* Criminal Justice Act, 2003, c. 44, § 321, sched. 33(15).

146. 28 U.S.C. §§ 1861-1878 (2007).

147. *United States v. Wood*, 299 U.S. 123, 137 (1936); *see also* *Smith v. United States*, 180 F.2d 775 (D.C. Cir. 1950) (holding that the inclusion of government employees as jurors did not violate the defendant’s Sixth Amendment rights).

148. 28 U.S.C. § 1865 (2007).

149. *Id.* § 1863.

150. *Id.* § 1861.

151. *Id.* § 1863.

political violence in Ireland. In the nineteenth century, a special inquiry into juries suggested that “in the case of all crimes of a political or agrarian complexion it is desirable to offer every facility for the removal of the trials whenever the circumstances of the locality appear to call for such a step.”¹⁵² That report, however, was written prior to partition—when there were thirty-two counties from which to choose. Northern Ireland is now limited to just six counties, which are closely tied by political and familial links.

The jury pool in Northern Ireland, moreover, is not geographically limited. To address geographic concerns, then—that is, to dilute the number of jurors coming from areas of high paramilitary influence—the state may rely on standing by. The Northern Ireland Office further has suggested that the elimination of peremptories will prevent defendants from being able to stack the jury with members from particular areas.¹⁵³ There is little risk of jury stacking, however, unless defendants may use many peremptory challenges. With a sufficiently limited number of peremptory challenges, the defense may be more likely to use them in an affirmative matter—that is, to eliminate individuals from opposing paramilitary strongholds—than to take a chance that the next individual to be called (or the fifth, or tenth) came from an area their organization controlled.

The possibility of a change in venue may be more applicable to the United States. There, the Sixth Amendment, applied to the states through the Fourteenth Amendment, and the Fifth Amendment’s requirements of due process, guarantee the right to an impartial jury.¹⁵⁴ The central consideration is not whether the community is *aware* of the case, but *whether the jurors have such set opinions at the trial itself that they may be unable to be an impartial judge* of the defendant’s guilt.¹⁵⁵ For the most part, the weight of such bias is determined through issuing juror questionnaires and through questioning at voir dire. In some cases, however, a crime may be so extraordinary that the court anticipates that no jury empanelled in the area of the crime would be sufficiently impartial. This may be particularly true of terrorist trials. In such instances, the judge can approve a change in venue.¹⁵⁶

The risk of an unfair trial was precisely the reason, for instance, why Judge Matsch moved Timothy McVeigh’s trial from Oklahoma City, where he was accused of the 1995 Murrah Federal Building bombing, to Colorado.¹⁵⁷ Judge Matsch explained that trust in the jurors’ ability to be fair

152. SELECT COMM. ON IRISH JURY LAWS, *supra* note 7, ¶ 63.

153. CONSULTATION PAPER, *supra* note 31, ¶ 1.1 (proposing to “reduce the risk of partisan juries by enhancing the random selection of jurors”).

154. *Ristaino v. Ross*, 424 U.S. 589 (1976).

155. *Patton v. Yount*, 467 U.S. 1025, 1035 (1984).

156. An appeals court has ruled that it is permissible to exclude jurors who live where the crime was committed without giving any reason, unless requested to do so. *See Myers v. United States*, 15 F.2d 977 (8th Cir. 1926).

157. *United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996) (holding

diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.¹⁵⁸

Although McVeigh's trial moved to an entirely different state, the bar for changing venues in the United States is rather high. For instance, in one first-degree murder case, the court denied the defendant's motion for change of venue—although eleven of the thirty-nine venirepersons were excluded because of their exposure to pretrial publicity or because they were friends with the victim or the victim's family.¹⁵⁹ All of the jurors had been exposed to pretrial publicity; and all but one of the jurors empanelled had been customers in the victim's store.¹⁶⁰

Terrorist trials too have proven resistant. In June 2002, for instance, Zacharias Moussaoui's efforts to have his trial moved from Virginia to Denver failed. John Walker Lindh, as was earlier noted, similarly failed to get his trial moved out of Virginia.

With this said, for reasons that extend well beyond the two regions, there is a legitimate question in an age of constant news coverage as to the degree to which change of venue would be effective. Although the immediate effect of a terrorist attack is local, its broader target is national in scope. And terrorists often make use of spectacular or particularly egregious violence to draw attention to their cause. The whole purpose of terrorism is to generate as much attention as possible, to underscore the terrorist organization's aims. Together with national media coverage, the idea that particularly significant attacks stay local deserves question. Nevertheless, this may not always be the case. Where particular regions are vulnerable to future attacks, or have suffered significantly in recent incidents, change of venue may mitigate bias.

4. *Alternate jurors*

Yet another way to address potential intimidation of jurors is to call more jurors than are necessary and to retain the additional jurors as alternates. In the United States, for instance, a federal court is allowed to impanel up to six alternate jurors so that any jurors unable to perform their duties, or disqualified,

that evidence established that prejudice against defendants was so great that they could not obtain fair and impartial trial anywhere in Oklahoma, and change of venue to Colorado was appropriate).

158. *Id.* at 1473; *see also* Mastrian v. McManus, 554 F.2d 813, 816 (8th Cir. 1977) (allowing change of venue in non-terrorist case).

159. Brecheen v. Reynolds, 41 F.3d 1343, 1350 (10th Cir. 1994).

160. *Id.*

can be replaced.¹⁶¹ The alternates are selected and sworn in the same way as other jurors and replace jurors in the same sequence in which the alternates were selected.¹⁶² Once seated, their authority is the same as the other jurors.¹⁶³ The court can retain alternates even after the jury retires to deliberate. Like regular jurors, those retained are not allowed to discuss the case with anyone until they are either discharged or used in place of another juror.¹⁶⁴ The practice of drawing alternate jurors has been used in terrorist trials. In the Moussaoui trial, for example, the judge excused all five alternates immediately before deliberations.¹⁶⁵

Alternates provide the judge with a way to address juror tampering or cases of clear bias that emerge during trial. In this sense, their use is similar to rules that allow the court case to proceed with fewer than twelve jurors. In Northern Ireland, for instance, the trial can continue as long as nine of the original twelve are present.¹⁶⁶ In the United States, any defendant who alleges implied juror bias is entitled to a hearing where he or she can prove actual juror bias. If the defendant succeeds, the trial can continue with fewer jurors.

There is another way, however, that alternates could be used to dilute the risk posed by terrorist organizations. One possibility would be to draw twice—or thrice—the number of jurors required to decide the case. All twenty-four, or thirty-six, could sit through the entire trial. Immediately before deliberation, the final twelve could be drawn by lot and adjourn to deliberate. There is some precedent for this: in the state of Washington, for instance, where the practice was to draw a thirteenth juror who was discharged before the case was given to the jury, the lower courts found this practice to be constitutional.¹⁶⁷

The advantage of this approach is that terrorist groups could not easily single out enough jurors before the deliberations to ensure that at least one of the final twelve would cave in to their threat. On the other hand, such a system would help little if jurors' fears arose not from an overt threat, but from the general risk that paramilitary organizations would learn of their decisions during trial and seek retribution. In a place like Northern Ireland, it would still be possible for terrorist groups to determine the identity of those serving as the final petit jury.

In the United States, the disagreement about alternates appears to center on whether alternates would be allowed to sit through the jury deliberations. The courts are split: the Seventh Circuit held that the presence of an alternate juror during jury deliberations did not violate right to trial by jury—although the

161. FED. R. CRIM. P. 24(c)(1).

162. *Id.* R. 24(c)(2).

163. *Id.*

164. *Id.* R. 24(c)(3).

165. Minute Entry, *United States v. Moussaoui*, Cr. No. 01-455-A (E.D. Va. Apr. 24, 2006), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet1.html>.

166. The Juries (Northern Ireland) Order, 1996, SI 1996/1141 (N. Ir. 6), ¶ 21.

167. *Gibson v. United States*, 31 F.2d 19, 21-22 (9th Cir. 1929).

alternate could not participate in the deliberation and vote.¹⁶⁸ However, the Colorado Supreme Court determined that the presence of an alternate juror during deliberations created a presumption of prejudice that, if not rebutted, required reversal.¹⁶⁹ In a case from the District of Columbia, where alternate jurors were substituted at the end of the second phase of a bifurcated trial, the defendant's Sixth Amendment rights were not abridged.¹⁷⁰ Discharging the alternates before the deliberation, however, might reduce potential conflicts with regard to the deliberations themselves.

B. *Juror Constraints*

There are some jury controls in the regular procedure, but many of these go against the grain of both British and American jurisprudence in all but the most extreme cases.

1. *Jury discharge and directed verdicts*

In both countries, judges have the option of discharging the jury as a result of tampering. In England and Wales, if it appears to the judge that coercion has occurred, the judge must, before taking concrete steps to discharge the jury, inform the parties that he intends to do so and the grounds on which he has concluded tampering, and he must give the parties the chance to make representations.¹⁷¹ The judge then may discharge the jury and order the trial to continue without one *only if he is satisfied both that tampering has occurred and that continuing the trial without a jury would be fair to the defendant or defendants.*¹⁷² The judge also can order a new trial—with or without a jury.¹⁷³ As in the Diplock tribunals in Northern Ireland, where the trial, or a subsequent trial, is conducted without a jury, the court must provide a written judgment stating the reasons for the conviction.¹⁷⁴

Similarly, where jurors may be exhibiting extreme political bias, finding defendants guilty even where common sense might dictate otherwise, the judge has the option of directing a verdict of not guilty.

While this power offers some protection against scapegoating, the level of protection ought not to be overestimated. There is a gap between the jury's finding a defendant guilty, and the judge's directing an acquittal, where although the judge would have ruled differently, he will not be willing to

168. *Johnson v. Duckworth*, 650 F.2d 122, 125 (7th Cir. 1981).

169. *People v. Boulies*, 690 P.2d 1253, 1255-56 (Colo. 1984).

170. *Shreeves v. United States*, 395 A.2d 774 (D.C. 1978).

171. Criminal Justice Act, 2003, c. 44, § 46(2) (Eng.).

172. *Id.* § 46(3).

173. *Id.* § 46(4)-(7).

174. *Id.* § 48.

interfere with the jury's determination. One study in the United Kingdom found that some 78-87% of jury verdicts are considered by judges to be "understandable in the light of the evidence."¹⁷⁵ In the United States, the standard—whether a reasonable jury could have come to a similar conclusion—makes it unlikely that judges will enter a directed verdict. Where judges are elected, the likelihood becomes even more remote: no judge who depends upon a popular vote will want to be seen as "soft" on terrorism. And an estimated 87% of the judges in the United States at some point face electors.¹⁷⁶ Thus, while a directed verdict may, at the outside, offer a safety net, it would not cover a lot of cases in which miscarriages of justice could occur.

2. Clearances and classified documents

Another consideration centers on the risk posed by making jurors, who do not have clearances, privy to the methods and substance of intelligence collection. Although neither country maintains a professional jury system—whose members could, for instance, receive clearances—it may be possible to create a new classification to cover jurors for the duration of a national security trial. Certain information may then be considered within the protection of the classification scheme, making any efforts by jurors to discuss the material outside of the deliberation room unlawful.

This approach would require the collection of information on jurors akin to the requirements of British law. Its advantages may well outweigh the disadvantages incurred in suspending juries altogether.

Nevertheless, a number of potential drawbacks attend. Extending security clearances to jurors raises a potential conflict of interest: security clearances fall within the executive—which also prosecutes the case. Another issue to consider is the extent to which requiring clearances would delay the trial. Under ordinary circumstances, clearances can take months, or even years, to secure. The paperwork and research involved may place a significant burden on jurors. Requiring clearances for jurors may skew the representation of the jury. Instead of a true cross-section—especially one representing a minority or immigrant defendant—the make-up of the resulting venire may increase juror bias or politicization. Another potential drawback of this approach is that it may increase the risk posed to jurors after the trial. Terrorist organizations or networks may determine that jurors' knowledge may be helpful for their campaigns. These and other concerns would have to be carefully weighed before instituting a separate juror classification process.

175. MICHAEL ZANDER & PAUL HENDERSON, ROYAL COMM'N ON CRIMINAL JUSTICE, CROWN COURT STUDY 165 (1993).

176. Dirk Olin, Op-Ed., *Courting the Public*, N.Y. TIMES, Mar. 2, 2005, at A19.

C. Trial Procedure

The trial procedure offers further opportunities to address terrorist trial concerns. This Subpart considers three, none of which is particularly satisfying. Jurors could be given heightened security during the proceedings. The penalties associated with jury tampering could be increased. And in Northern Ireland, automatic appeal based on either fact or law could be extended to jury trials.¹⁷⁷

177. Another option might be to permit a decision of the jury by a majority vote. As this Article simply provides a broad survey of some possibilities—instead of analyzing in detail the complex arguments that mark the requirement of unanimity—it is sufficient to note the long history of unanimity in English and American law. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972). Both countries, though, have precedent for departing from a unanimous verdict. In Scotland, where fifteen jurors are empanelled, guilt in criminal trials is determined by the majority. *See* Edwin R. Keedy, *Criminal Procedure in Scotland*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 834, 835, 841 (1913). In 1972 the U.S. Supreme Court considered the state of Oregon’s “ten of twelve” rule. The Court ruled that a state court criminal conviction by less than a unanimous vote of the jury does not violate the Sixth Amendment right to trial by jury, as applied to states through the Fourteenth Amendment. *Apodaca*, 406 U.S. at 406. It is a statutory requirement that a jury verdict in a federal criminal trial be unanimous. FED. R. CRIM. P. 31(a). (Note, however, that this does not foreclose potential constitutional issues that might arise, should the number of jurors decline substantially below twelve individuals.) Specifically in relation to terrorism, however, practical concerns speak against changes in this area—not the least of which relate to the seriousness of the penalties contemplated for crimes relating to terrorism. In both countries, the potential for life imprisonment often accompanies terrorist charges, and in the United States, the penalty may include execution. In addition, while allowing for a majority verdict may help to address intimidation, it may exacerbate scapegoating or perverse acquittals. The nineteenth century witnessed such concerns in Ireland. *See, e.g., SELECT COMM. ON IRISH JURY LAWS, supra* note 7.

Alterations to double jeopardy provide another, albeit highly controversial—and in the United States potentially unconstitutional—route. British precedent exists: the 2003 Criminal Justice Act amended the law to eliminate the bar to re-trying a case, where it can be demonstrated by the state that further evidence has come to light. Criminal Justice Act, 2003, c. 44, §§ 75-79. The legislation went further than Lord Justice Auld did in his 2001 examination of the criminal courts. That report had suggested that if it was clear a jury had not given a full and fair verdict according to the law, and the judge certified his decision, another trial could be held. The 2003 legislation directed the court of appeal, which is responsible for quashing an acquittal, to consider (a) whether evidence is new and compelling, or (b) whether it is “in the interests of justice to proceed with a retrial.” *Id.* §§ 77-79. Such expansive language gives the court broad authority. In the United States, the guarantee against twice being tried for the same offense is almost sacrosanct. *See, e.g., Benton v. Maryland*, 395 U.S. 784 (1969); *see also Schiro v. Farley*, 510 U.S. 222 (1994). The Fifth Amendment reads, “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb” U.S. CONST. amend. V (emphasis added). The animating idea is that the state, with its considerable resources, should not be able to compel a citizen to live in a state of perpetual insecurity. *Benton*, 395 U.S. at 795-96. A distinction, though, needs to be drawn between the types of harms that may come from terrorist trials and the presence of juries more generally. Where jury tampering has occurred, U.S. courts have found that in the absence of a showing of bad faith on the part of the government, a new trial can proceed. *See, e.g., United States v. Mandel*, 431 F. Supp. 90, 97-98 (D. Md. 1977). Where the issue appears instead to be simply the political persuasion of the jurors—untainted by criminal coercion—the case for violating the ban on double jeopardy is

1. *Heightened security and juror anonymity*

Perhaps the most obvious response to juror intimidation is to ensure that jurors are physically protected from assault. The state could create criteria for the conditions under which jurors are entitled to additional police protection,¹⁷⁸ and reassure the jurors that they are protected.¹⁷⁹ Lessons learned in the context of witness intimidation may be applicable.

One problem with this approach, though, is that trials end, and where terrorist organizations have long institutional memories, the absence of security *following* the trial may allow organizations to take revenge—even years later. In the 1980s, for instance, Martin McGartland infiltrated the IRA for the Royal Ulster Constabulary (RUC) Special Branch.¹⁸⁰ He eventually moved to Northumberland, England, and assumed a new identity—Martin Ashe. But in 1999, the IRA found and shot him.¹⁸¹ Eamon Collins was in his twenties when he joined the South Down unit of the Provisional IRA. In 1998, he testified against Thomas “Slab” Murphy. The following year Collins was beaten and stabbed to death as he took his dogs for their morning walk.¹⁸² There do not have to be many such instances for jurors to feel unprotected—even if elaborate security measures are taken during the trial itself.

Supplying protection for all twelve jurors in every terrorist case for the rest of their lives would cost the state a great deal. Protective measures also place an unusually high burden on those called to jury service and give rise to the question of whether the price of jury participation—i.e., a lifetime of fear for oneself and one’s family—is too high.

One question frequently discussed is to what extent jurors’ identities could be masked. In the United Kingdom, for instance, it has been proposed that the government restrict “access to personal juror information” and introduce “guidelines on jury checks.”¹⁸³ The problem with this approach is that the names, addresses, and occupations of potential jurors are provided to both sides. As Lord Carlile observed, jurors would be reassured and the risk of

problematic.

178. CONSULTATION PAPER, *supra* note 31, ¶ 3.21.

179. *Id.* ¶ 3.22.

180. *UK: Manhunt Follows Attack on IRA Informer*, BBC NEWS, June 17, 1999, <http://news.bbc.co.uk/1/hi/uk/371455.stm>.

181. *Id.*

182. *See Real IRA Denies Collins Murder*, BBC NEWS, Jan. 29, 1999, http://news.bbc.co.uk/2/hi/events/northern_ireland/focus/264438.stm; Stephen Scott, *Dead Man Talking*, GUARDIAN UNLIMITED, Jan. 30, 1999, http://www.guardian.co.uk/Northern_Ireland/Story/0,2763,209158,00.html; *see also Is ‘Slab’ Murphy’s Bloody Reign Drawing to an End?*, GUARDIAN UNLIMITED, Oct. 9, 2005, <http://politics.guardian.co.uk/northernirelandassembly/story/0,9061,1588303,00.html>.

183. CONSULTATION PAPER, *supra* note 31, ¶ 3.3.

intimidation and perverse verdicts lowered if jurors could go to court without thinking that the defendant knew their identity.¹⁸⁴

Total anonymity, however, would pose a particular problem for the additional checks on jurors, explored in Part III.A of this Article.¹⁸⁵ It will be recalled that the DPP issued guidance on when and under what conditions checks on the jury can be performed in Northern Ireland. Attorney General guidelines govern the same in Great Britain. In cases of exceptional public importance, or where the state may be particularly sensitive to the jurors' access to state secrets, additional checks can be conducted. It may be possible in Northern Ireland to insulate such investigations from individuals connected to the case. The police service, for instance, could perform background checks, with only jurors' numbers provided to the prosecution and defense.¹⁸⁶ Making it a criminal offense for juror information to be provided to any party, without specific leave of the court, might also address this concern.¹⁸⁷ Other forms of public access also could be denied. For instance, where concerns of intimidation exist, jurors could be seated out of sight from the public gallery.¹⁸⁸ A separate waiting area would help them to avoid mixing with the public.¹⁸⁹

While laudable, however, these options may be more appropriate for Great Britain or the United States than for Northern Ireland.¹⁹⁰ In tight-knit areas, it may be clear who is going to the courthouse. Paramilitary groups need only to identify one juror in order to use that person to find out the others on the panel. Whatever the criminal penalty may be for sharing other jurors' information, paramilitary organizations—with access to weapons and highly coercive techniques—will be able to ensure compliance.

The masking of jurors' identities may be more effective in the United States, where it has been used in non-terrorist related trials. (In 1977, the first completely anonymous jury sat to determine the guilt of Harlem drug trafficker Leroy Barnes.¹⁹¹ For nearly the whole trial, the judge sequestered the jurors.¹⁹²)

As a legal matter, the lower courts have found that a defendant's right to an impartial jury is not violated when the government requests and the district court allows an anonymous jury.¹⁹³ Similarly, where a substantial risk of jury

184. *Id.* ¶ 3.7.

185. *Id.* ¶ 3.8.

186. *Id.* ¶ 3.10 (recommending use of the Police Service of Northern Island (PSNI)).

187. *Id.* ¶ 3.20.

188. *Id.* ¶ 3.18.

189. *Id.* ¶ 3.19.

190. REVIEW REPORT, *supra* note 21, at 16.

191. Matt Hayes, *The Inside Scoop on Jury Tampering*, FOXNEWS.COM, Nov. 26, 2003, <http://www.foxnews.com/story/0,2933,104199,00.html>. See generally *People v. Barnes*, 400 N.Y.S.2d 558 (N.Y. App. Div. 1977).

192. Hayes, *supra* note 191.

193. *United States v. Smith*, 223 F.3d 554, 569 (7th Cir. 2000).

tampering exists, granting anonymity to jurors does not deprive defendants of a fair trial.¹⁹⁴ In another New York case, involving murder, robbery, and extortion linked to gang activity, the district court masked jurors' identities.¹⁹⁵ It then questioned jurors carefully and selected those who did not exhibit any bias.¹⁹⁶ The appellate court determined that, under these circumstances, hiding the jurors' identities was constitutional.¹⁹⁷ That same year, an appellate court offered a set of conditions where it was constitutional for the court to empanel an anonymous jury: where an international drug syndicate was involved, and there was concern that some harm was posed to jurors—and particularly where there was a previous attempt by the defendant to interfere with the judicial process (in this case, ordering a hit on a government witness).¹⁹⁸ Even where the group—but not this particular defendant—is known for intimidation of jurors, the courts have held the conditions sufficient for anonymous empanelment.¹⁹⁹

2. Increase penalties associated with juror intimidation

One suggestion made with some frequency is the possibility of increasing the penalties associated with jury tampering. Here, it is important to recognize that in Northern Ireland it is already illegal to try to coerce—or even influence—jury members.²⁰⁰ The 2000 Terrorism Act makes jury intimidation a scheduled offense.²⁰¹

Similarly, in the United States, it is already illegal to try to influence jurors in the exercise of their duties.²⁰² Federal law carries a fine and up to two years imprisonment.²⁰³ According to the Supreme Court, any private communication, contact, or tampering, directly or indirectly, with jurors during a trial, about the trial itself, is considered presumptively prejudicial—if not done in accordance with court rules and with full knowledge of the parties present.²⁰⁴

Increasing penalties associated with such acts, while signaling the seriousness with which the state views the crime, may have minimal impact on

194. *United States v. Tutino*, 883 F.2d 1125, 1132 (2d Cir. 1989).

195. *United States v. Thai*, 29 F.3d 785, 794 (2d Cir. 1994).

196. *Id.* at 801.

197. *Id.*

198. *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994); see also Reporters Comm. for Freedom of the Press, *Secret Justice: Anonymous Juries: A Survey of the Law*, <http://www.rcfp.org/secretjustice/anonymousjuries/survey.html>.

199. *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994).

200. The Criminal Justice (Northern Ireland) Order, 1996, SI 1996/3160 (N. Ir. 24), ¶ 47 (up to five years imprisonment and fine for any actual or threatened harm to a juror).

201. Terrorism Act, 2000, c. 11, § 11, sched. 9. For the previous version of the law, see Protection of the Person and Property Act (Northern Ireland), 1969, c. 29, § 1 (N. Ir.).

202. 18 U.S.C. § 201(a)-(c) (2007).

203. *Id.* § 201(c).

204. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

the tendency of organized terrorist groups to use intimidatory tactics. Not only is it precisely what such groups specialize in doing, but in capital cases, the stakes for engaging in such behavior outweigh a lengthy term of imprisonment. Where terrorist organizations instruct their members that they should expect to die or to go to prison—as they do in the Provisional IRA—the likelihood of state-sanctioned sentences having much effect is limited. In part because of these considerations, the British Review Group, which in 2000 examined the Diplock courts, failed to identify “any areas where it considers that the creation of new offences would materially reduce the chances of intimidation.”²⁰⁵ It concluded, “The reality is that the problem in this area has not been the adequacy of the legislation but the absence of admissible evidence in individual cases.”²⁰⁶

3. *Automatic appeal on fact or law*

One of the protections offered by the Diplock court system is an automatic right of appeal, based on either fact or law. This method has been suggested as a possible way to address the politicization of juries in the immediate aftermath of a terrorist attack.

One problem with this approach, however, is that juries do not provide written, reasoned verdicts. Unlike Diplock judges, who spell out the basis for their decisions, juries in both the United Kingdom and the United States come to their conclusion in a less transparent manner. They are not professionally trained to write out their determinations.

There may, nevertheless, be a way to transfer some of the strengths of the reasoned verdict system to terrorist trials. Namely, the judge could ask the jury to address a series of questions related to the elements of the crime. This approach has been used in the United Kingdom in libel cases, making the issues in contention clearer on appeal. While this stops short of requiring juries to provide a set of facts, and comes nowhere near the extensive verdicts issued by Diplock judges, requiring reasoned judgments may help to establish some protections for terrorist defendants. And it does, at least in the United Kingdom, appear to be part of a trend: since 1988, for instance, even magistrates have spelled out grounds for reaching their conclusions.

The automatic right of appeal though raises some concern. While it may be helpful for scapegoating, it introduces the question as to why have a jury in the first place. There may be other, more effective, ways to address the politicization of jurors, without bypassing the role of juries in the deliberative process.

205. REVIEW REPORT, *supra* note 21, at 15.

206. *Id.*

CONCLUSION

This Article has sought not to provide a definitive study of jury trial, but, more modestly, to raise issues to be considered in the interplay between terrorism and the presence of jurors. To this end, a comparison between the British and American experience proves illuminating.

The arguments in favor of suspending jury trials in Northern Ireland, where personalized violence greatly increases the risk of juror intimidation—and decreases the effectiveness of the alternatives—are strong. Where juries are not used, automatic appeal based on fact or law offers important protections to the defendant. But as the province moves towards security normalization, a default understanding of trial by jury would strengthen the state's hand.

The movement to *certifying in* cases, instead of having the DPP *certify out*, however, changes the political dynamic—one that the state will have to address. Throughout the 1970s and 1980s, the DPP mostly stayed out of the political arena, preferring to maintain an independent role. The office made no statements to the press during this time, and its hands were tied by legislation: where the crime under contention was scheduled, the case automatically went before a Diplock judge. Shifting to a system of certifying in, however, may place the DPP in a more vulnerable position. A clear set of criteria, handed down by Parliament, and the provision of enhanced security for the growing number of people at the DPP's office, may help to reduce the threat. Making the DPP's decision judicially reviewable would offer additional protection.

Before trials are certified in to the Diplock system, it may be possible to pursue some of the alternatives raised in this Article, particularly in the realm of juror selection. Part III.A, for instance, emphasized broadening the juror pool. Reducing the number of peremptory challenges may help to prevent jury-packing—even while maintaining at least some peremptories will protect against undue conviction from a politicized jury. Simultaneous retention of the power to stand by, strictly controlled by clear guidelines, will help the state to counter the same. In relation to juror constraints, the potential use of directed acquittal, may be of some, albeit limited, effect. In regard to the trial process, heightened security for jurors may help to protect them and convey the feeling of safety. The use of alternate jurors may further reduce the risks of jury tampering, by diluting the pool that could be coerced prior to jury deliberations.

In the United States, similar risks present themselves, but a different historical and constitutional structure exists. The decision to eliminate juries from trials against Islamist militants, while in some sense a result of framing the issue as “war,” carried with it important weaknesses—while obtaining some, but limited gains.

The ordinary court system worked prior to September 11 and continued to work after the attacks as a way to pursue terrorist suspects. There are ways to address some of the risks entailed in terrorist trials within the ordinary criminal system. Changes to juror selection present perhaps the strongest way to address

the deficiencies. In the United States, this translates not into lowering the occupational bar to serving on juries (as it does in Northern Ireland), but into drawing from a broader geographic region—or changing the trial venue altogether. An increased number of alternate jurors, whence the final jury is drawn by lot after the trial proceedings and immediately prior to deliberation, may provide a way to diminish the potential for jury tampering. As in Northern Ireland, in the realm of juror constraints, directed verdicts may, at the outside, provide some relief. The possibility also exists, in relation to classified materials, to construct a system of classification for jurors, to allow them access to intelligence collection methods. This may help to reduce concerns about intelligence leaks. The drawbacks, however, would have to be carefully considered before the adoption of such a system. In the realm of trial procedure, heightened security for jurors may prove effective. Coupled with juror anonymity—again, not a practical option in Northern Ireland—the potential for coercion may drop considerably.

One final point to consider is whether and how to prevent such provisions from seeping into the criminal realm. In Great Britain, such shifts have already occurred: the 2003 Criminal Justice Act provided for the suspension of jury trial for fraud and serious crime.²⁰⁷

If one believes that terrorism can and should be treated differently from ordinary crime, then one possibility, at least in the British context, would be to use clearly defined, statutory tests that focus not on the crime itself, but on the circumstances of the offense and the connections of the defendant.²⁰⁸ The current standard under the 2000 Terrorism Act is to assess whether the crime is connected with the political affairs of Northern Ireland; however, it does not entertain the degree of risk to the administration of justice.

The British government is considering two elements that could be included in the test used to certify cases in to single-judge courts: first, whether the DPP is satisfied that the presence of a jury will significantly interfere with the administration of justice;²⁰⁹ and second, whether a specific range of circumstances holds—linked, perhaps to paramilitary activity or political claims. How this second element is defined will or will not limit the application of the alternative judicial system to non-terrorist crime.²¹⁰ In determining whether to include offenses linked to serious organized crime or public order, due concern must be given to the level of social control exhibited over a particular region. Where violence is personal and pervasive, and the community extremely close knit, it may be necessary to allow for removing jurors from the courtroom even for non-terrorist criminal syndicates. Such cases, however, may

207. See *supra* note 89 and accompanying text.

208. CONSULTATION PAPER, *supra* note 31, ¶ 4.8.

209. *Id.* ¶ 4.9.

210. *Id.* ¶ 4.11.

be few—suggesting first, a default in favor of jury trial, and second, action to mitigate the specific risks raised above.