

THE THIRD TOWER: THE EFFECT OF THE SEPTEMBER 11TH TERRORIST ATTACKS ON THE AMERICAN JURY SYSTEM

INTRODUCTION

Jamil Abdullah Al-Amin was a 1960s activist and the leader of one of the nation's largest Black Muslim groups.¹ Al-Amin was set to stand trial for the murder of a Fulton County sheriff's deputy and the wounding of another deputy, both of whom were shot attempting to serve a warrant on Al-Amin in March 2000.² As his trial date neared, the Muslim community began to fear the worst—that Al-Amin would be convicted not because of his guilt but because he is Muslim.³ “This could be seen as a test case to see that a Muslim can get a fair trial, free of bias,” said Ibrahim Hooper of the Council on American-Islamic Relations, a Muslim advocacy group.⁴

The Muslim community had grave doubts as to whether a Muslim could stand trial with the full force of his Sixth Amendment guarantees.⁵ These doubts permeated the nation's Muslim community on September 9, 2001, just days before Al-Amin was to stand trial.⁶

Only two days later, smoke plumed across the New York City skyline from the footsteps where the World Trade Center once stood. As the smoke drifted away, so too did many Muslim Americans' faith in the integrity of the American jury system and the protection of their constitutional rights.

1. Mitch Stacy, *Life Term Given in Killing to Former H. Rap Brown, No Parole for Ex-Radical in Deputy's Death*, BOSTON GLOBE, Mar. 14, 2002, at A3.

2. Trisha Renaud & Rachel Ramos, *Judge: Scare Won't Halt Jury Picking*, FULTON COUNTY DAILY REP., Jan. 11, 2002.

3. See Ernie Suggs & Jill Young Miller, *Al-Amin on Trial: Former Radical is Again Facing Charges Involving Police Shootout. But This Time, It's a Matter of Life or Death*, ATLANTA J.-CONST., Sept. 9, 2001, at 1E.

4. *Id.*

5. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

6. See Suggs & Miller, *supra* note 3.

I. THE POST-SEPTEMBER 11TH ANTI-MUSLIM SENTIMENT AND THE JUDICIAL RESPONSE

In the weeks following the attacks of September 11, 2001 (hereinafter “the attacks” or “September 11th”), the prejudiced eye of suspicion turned against Muslim Americans.⁷ A *Los Angeles Times* survey conducted in the days following the attacks found that 43% of Americans were more suspicious of people who appeared to be of Arab descent.⁸ Eighty-seven percent of Americans were concerned about another major terrorist attack on the United States.⁹ In another survey conducted the week after the attacks, almost half of respondents (44%) believed the terrorist attacks represented the feelings of Muslim Americans toward the United States.¹⁰ More than half of Americans (58%) felt there should be tighter controls on Muslims traveling on U.S. planes and trains, while 83% thought that tighter restrictions should be imposed on immigrants from Muslim or Arab countries.¹¹ A *CNN/USA Today/Gallup* poll showed that 35% of Americans had less trust in Arabs living in the United States as a result of the September 11th attacks.¹² Also, one-third of Americans, and 55% of those between the ages of eighteen and twenty-nine, reported that they had heard negative comments about Arabs in America.¹³

A number of American Muslims, as well as people of other non-Judeo-Christian faiths, became victims of hate crimes in the weeks and months following the attacks. A Seattle man, armed with a handgun, was charged with attempting to set two cars on fire in an effort to burn down a North Seattle mosque.¹⁴ There were two similar attacks on Texas mosques.¹⁵ In Mesa, Arizona, a gas station owner and follower of the Sikh faith was gunned down outside his business in a seemingly racially-motivated response to the attacks.¹⁶ A Hindu temple in New Jersey was firebombed.¹⁷ A Salt Lake City man was indicted for targeting an Arab-owned fast food restaurant.¹⁸ Colleges across the country reported attacks on Muslim students

7. See Gary Langer, *Toughest Work Ahead*, ABCNEWS.COM (Dec. 20, 2001), at http://abcnews.go.com/sections/politics/DailyNews/STRIKES_poll1011220.html.

8. *Id.*

9. *Id.*

10. THE WIRTHLIN REPORT, Sept. 2001, Vol. 11, No. 8, at 3, available at <http://www.wirthlin.com/pdf/TWR0109.pdf>.

11. *Id.*

12. Michael Paulson, *U.S. Attitude Toward Arabs Souring, According to Poll*, BOSTON GLOBE, Sept. 29, 2001, at A5.

13. *Id.*

14. *Man Faces 4 Charges in Mosque Confrontation*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2001, at B2.

15. *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN.COM (Sept. 17, 2001), at <http://www.cnn.com/2001/US/09/16/gen.hate.crimes/index.html>.

16. *Id.* The murderer of the Sikh man was later sentenced to death for the death. *Man Gets Death for 9/11 Murderous Rampage*, CNN.COM (Oct. 10, 2003), at <http://www.cnn.com/2003/LAW/10/10/sikh.reut/index.html>.

17. *Id.*

18. *Ashcroft to Meet with Muslim Leaders About Hate Crimes*, CNN.COM (Oct. 16, 2001), at

based on animus in the wake of September 11th.¹⁹ In the FBI Hate Crimes Report, the Bureau reported that:

[H]ate crimes against Muslims and people who appear to be of Middle East ethnicity surged in 2001, “presumably as a result of the heinous incidents that occurred on Sept. 11” of that year. The report found that incidents targeting people, institutions and businesses identified with the Islamic faith increased from 28 in 2000 to 481 in 2001. Muslims previously had been among the least-targeted religious groups.²⁰

One survey found that 32% of Americans said that such attacks on mosques and Muslim citizens were “inappropriate but understandable.”²¹

In the tense and anger-filled weeks that followed September 11th, judges postponed trials of Muslim criminal defendants, hoping to avoid the potential prejudices of a jury tempered and tainted by the national hostility toward Muslims and Middle Easterners. In Orange County, California, a judge indefinitely postponed the murder trial of an Egyptian man when nearly twenty prospective jurors admitted they were so angered by the terrorist attacks that they could not be fair to an Arab defendant.²² Nearly one-fourth of prospective jurors in that death penalty case expressed hostility toward the Egyptian defendant during voir dire.²³ In Atlanta, the judge in Jamil Abdullah Al-Amin’s murder trial issued a continuance until January, as the court acknowledged that growing sentiments against Islam could potentially prejudice jurors against a Muslim defendant.²⁴ In New Jersey, a Somerset County assistant prosecutor removed a red, white, and blue lapel after the public defender complained to the judge that her wearing the pin might predispose the jury toward the prosecution.²⁵ Also, in Passaic County,

<http://www.cnn.com/2001/LAW/10/16/justice.antimuslim.incidents/index.html>.

19. *Racial Backlash Flares at Colleges*, CNN.COM (Sept. 21, 2001), at <http://www.cnn.com/2001/fyi/teachers.ednews/09/21/ec.campus.backlash/index.html> (“The American-Arab Anti-Discrimination Committee [said] it has compiled a list of more than 250 violent incidences on college campuses in the [week after September 11th], from direct threats of specific violence to beatings and assault and battery.”).

20. Curt Anderson, *FBI Reports Jump in Violence Against Muslims*, VICTORIA ADVOC., Nov. 25, 2002, available at <http://www.thevictoriaadvocate.com/24hour/nation/story/645165p-4867767c.html>. See also BOB CUDDY ET AL., *CAUGHT IN THE BACKLASH: STORIES FROM NORTHERN CALIFORNIA* (2002) (examining instances of backlash against Arab Americans in Northern California), available at <http://www.aclunc.org/911/backlash.pdf>.

21. THE WIRTHLIN REPORT, *supra* note 10, at 2. See also TOLERANCE.ORG, at http://www.tolerance.org/news/article_hate.jsp?id=278 and http://www.tolerance.org/news/article_hate.jsp?id=412 (listing state-by-state reports of attacks against Arabs and Muslims following the September 11th attacks).

22. Stuart Pfeifer & Jack Leonard, *After the Attack: Dissenting Views, Anger Toward Arabs Delays 2 Murder Trials; Courts: Jury Pools in Orange County and Atlanta Indicate Emotions over Attacks Would Lead to Bias*, L.A. TIMES, Sept. 18, 2001, at A-1-17.

23. *Id.*

24. *Id.*

25. Mary P. Gallagher, *Judges, Lawyers Work to Thwart Anti-Muslim, Anti-Arab Bias in Trials*, N.J. L.J., Oct. 8, 2001.

New Jersey, a Muslim charged with making terrorist threats against his non-Muslim in-laws waived his right to a jury, opting instead for a bench trial.²⁶ Fearing post-September 11th prejudice against Arab Muslim plaintiffs, an Ontario judge went so far as to strike jury notices in a civil case.²⁷

Sustained Animus and the Continued Threat to Muslims

While delays were effective maneuvers in avoiding jury prejudices against Muslim defendants in the immediate wake of the September 11th attacks, the ensuing war in Afghanistan, heightened terror alerts, and continued threats of new domestic attacks have sustained a certain level of animus toward Muslims in the United States. In fact, polls have shown little, if any, change in Americans' perceptions of Muslims as security risks even six months after the attacks:²⁸

Americans' stated level of trust in Muslims and Arabs did not change at all in the months after Sept. 11—five separate surveys taken between September [2001] and March [2002] by three polling organizations show[ed] virtually zero variance in [American perceptions of Muslims as security risks]. A small majority of Americans—61 percent—told a CNN poll in March that their level of trust in “Arabs” had not changed, exactly the same percentage in a CNN poll taken days after the attacks, and virtually identical to a *Washington Post* poll from the same week in September [2001]. These percentages [were] exactly the same as those in an October [2001] poll by ABC News.

At the same time, Americans' tendency to favor special security measures for Muslims remained strong. [A] focus group study that reported tolerance of Muslims also reported that “respondents clearly favored tighter border controls and limiting the number of immigrants”

In November [2001], nearly 80 percent of Americans supported the government's plan to interview about 5,000 young men from the Middle East in the US on temporary visas, knowing that some said

26. *Id.*

27. Joanne Horton, *Should Civil Juries be Struck for Potential Prejudice?*, LAW. WKLY., Feb. 1, 2002. Canadian law already recognized that in certain civil proceedings a jury is not the appropriate trier of fact. *Id.* Historically, this limitation on the right to jury trial was limited to matters involving injunctive or declaratory relief, foreclosure, redemption of a mortgage, matters involving the determination of mixed fact and law, and matters where the evidence is complicated or highly technical. *Id.* See also *Abou-Marie v. Baskey*, 2001, No. 93-CQ-42911, Ont. Sup. C.J. LEXIS 2620 (2001); John Jaffey, *Jury Notice Strikable in Civil Cases Involving Arab Muslims: Judge*, LAW. WKLY., Dec. 14, 2001.

28. Ismail Royer, *US Public Opinion Toward Islam and Muslims After the Sept. 11 Attacks*, ISLAMTODAY.NET, 20-22 (Apr. 2, 2002), at http://www.islamtoday.net/english/special_report/opinion2.pdf.

this singles out these men unfairly on the basis of their national origin. In a March [2002] poll by Gallup, almost 60 percent said Muslim immigration should be reduced or ended completely.²⁹

While irrational fears and unfortunate stereotypes might have subsided to a degree, there is still an ever-present ambivalence toward Muslims and Middle Easterners throughout the population. Tests measuring hidden bias demonstrate that many Americans have a conscious bias against Arab Muslims, and even more have an unconscious or automatic negative response to them.³⁰ So how will courts now deal with the continued prejudices against Muslim defendants in post-September 11th America?

In January 2002, Jamil Abdullah Al-Amin's trial for the shootings of two Fulton County sheriff's deputies finally began, and for many Muslim Americans there was more at stake in that Fulton County courthouse than merely Al-Amin's fate.³¹ For them, the trial would test whether a Muslim could really get a fair trial in post-September 11th America.³² During an initial pretrial hearing, the judge gave attorneys news articles on the negative impact of the attacks on court cases.³³ In addition, the judge called 1500 prospective jurors—more than three times the usual number—in hopes of seating twelve unbiased jurors.³⁴ On the third day of jury selection, events inside the courtroom were upstaged by a bomb scare that shut down the courthouse.³⁵ When jury selection resumed, potential jurors were questioned by attorneys about their thoughts on subjects such as Islam, the police, and the Black Panthers.³⁶ Race came to the forefront of the selection process, with prosecutors using nine of their ten strikes against black veniremen and the defense using eighteen of its twenty strikes against whites.³⁷ Ultimately, the defense succeeded in seating a predominantly black jury,³⁸ presumably

29. *Id.* (internal footnotes omitted).

30. *New Test Measures Hidden Bias Against Arab Muslims*, TOLERANCE.ORG (Nov. 28, 2001), at http://www.tolerance.org/news/article_tol.jsp?id=343 [hereinafter *New Test*]. In a hidden bias test developed by Tolerance.org, in partnership with psychologists at the University of Washington and Yale University, 33% of initial respondents admitted having a conscious bias against Arab Muslims while 53% of test-takers demonstrated "some degree of unconscious or automatic negative reaction . . . to Arab Muslims." *Id.*

31. Lateef Mungin, *Al-Amin Case: More Than a Man Going on Trial; U.S. Goal of Justice for All at Stake in Fulton Courtroom*, ATLANTA J.-CONST., Jan. 6, 2002, at 1D.

32. *Id.*

33. *Id.*

34. *Id.*

35. Renaud & Ramos, *supra* note 2. Fearing that the jurors would draw unwanted inferences from the bomb scare, defense counsel John R. Martin argued that the judge should dismiss that morning's panel. He said, "There are fears in this community due to the Sept. 11th events and our client is Muslim. This [bomb scare] was frightening due to its uncertainty." *Id.*

36. Steve Visser & Ernie Suggs, *Al-Amin Guilty on All Counts; Cleric May Face Execution for Killing Deputy*, ATLANTA J.-CONST., Mar. 10, 2002, at 1A.

37. Steve Visser & Lateef Mungin, *The Trial of Jamil Abdullah Al-Amin: White Men Rejected for Jury*, ATLANTA J.-CONST., Feb. 19, 2002, at 1A.

38. Trisha Renaud, *Al-Amin Trial Openings Ignite Arguments; Judge Raps Defense*, FULTON COUNTY DAILY REP., Feb. 20, 2002.

one that would be less likely to impose the death penalty if Al-Amin was convicted.³⁹

During opening statements, the prosecutor urged the jury to reach its decision based on the evidence—not race, religion, or far-reaching theories about the government.⁴⁰ Further contentions arose when the defense asked that the prosecution not stand when the jury entered and exited the courtroom, since neither Al-Amin nor his attorneys rose at such time.⁴¹ The judge, however, vetoed this request.⁴² Ultimately, the jury convicted Al-Amin on all counts after deliberating ten hours over two days.⁴³ Following the penalty phase of the trial, the jury rejected the prosecution's call for Al-Amin's execution,⁴⁴ and he was sentenced to life without parole in addition to a thirty-five year sentence for other charges.⁴⁵

II. THE EFFECT OF THE ATTACKS ON JURY TRIALS

Al-Amin's trial serves as an example of the potential problems Muslims may face in American courtrooms as a result of the anti-Muslim atmosphere that has permeated the United States since the September 11th terrorist attacks. While criminal defendants facing terror-related charges are more likely to bear the brunt of the anti-Muslim sentiments, litigants of all races and claims may find that changes in American attitudes have affected the jury system as a whole and on many different levels. In criminal cases, prosecutions in general may find a higher success rate as a result of the increased credibility that law enforcement officers have garnered since the attacks, while minority defendants, particularly those of Muslim and Middle Eastern descent, will face increased skepticism by juries. Both criminal de-

39. See Bill Torpy, *Al-Amin Jury Views Surprised Some*, ATLANTA J.-CONST., Mar. 11, 2002, at 1B.

"That's absolutely stereotyping," said Robert Hirschhorn, a Dallas-based jury consultant who helped pick juries in the William Kennedy Smith rape trial and in the case of Oklahoma City bomber Terry Nichols. "These guys have picked a jury from the old school."

That "old school" says white jurors are harsher than black jurors on black defendants and that black jurors are more skeptical of the prosecution. There are reasons for those thoughts:

A 1993 CNN/Gallup poll showed that 74 percent of white people, but only 48 percent of black people, rated their attitude toward police as good. The U.S. General Accounting Office in 1990 found "racial disparities in the charging, sentencing, and imposition of the death penalty." White people are almost twice as likely as black people to favor the death penalty, studies show. But that gap tightens when the victim is black, according to the Capital Jury Study, a national study of death penalty cases. Black jurors who had sentenced a man to death had more nagging doubts about guilt than white jurors, according to that jury study, even when the defendant is white. Those residual doubts grew when the defendant was black.

And "reasonable doubt," the standard used in voting not guilty, often comes easier to black jurors because they are more likely than white jurors to know someone who has had contact with the justice system.

Id.

40. Renaud, *supra* note 38.

41. Al-Amin remained seated because of his Muslim-based belief that he should not rise for any earthly authority. *Id.*

42. The judge said, "We're not Muslims; Mr. Al-Amin is." *Id.*

43. Visser & Suggs, *supra* note 36.

44. Stacy, *supra* note 1.

45. *Id.*

endants and civil litigants, regardless of their race, may find their cases compromised by selecting a Muslim attorney. Regardless of how the effects of September 11th seep into the courtroom, the result is clear: the jury system is forever changed.

“What happened on Sept. 11 changed all of our lives dramatically,” said LaDonna Carlton, a Chicago-based jury consultant. “That change is bound to filter into everything we do in life. Our jury system is one aspect of that.”⁴⁶

Criminal defendants, as well as civil litigants, may be harmed by the indirect but nevertheless critical impact of the terrorist attacks on jurors. Social scientists who study jurors and their attitudes say that ideal jurors are “calm and dispassionate, capable of logically sifting through evidence and evaluating it evenhandedly. Prospective jurors who appear prone to anxiety are wild cards who should be removed.”⁴⁷ In the wake of the attacks, jurors—like so many other Americans—were “angry and fearful and very sensitized to terrorism, injury and death.”⁴⁸ These fears and sensitivities will only perpetuate, if not heighten, with continued threats and ongoing domestic terror alerts.

Plaintiffs may see reduced damage awards from a jury pool more skeptical of Muslim witnesses and litigants. Mohammad Abdel Khaliq, an Arab-American plaintiff, brought suit against American Airlines for injuries sustained in 1999 when an American Airlines plane crashed in Little Rock, Arkansas, killing eleven.⁴⁹ In the wake of the terrorist attacks, Khaliq’s attorney sought a continuance, arguing that Arab-Americans could not get a fair trial in a suit against a company that lost two planes to Arab hijackers on September 11th.⁵⁰ The attorney’s request, however, fell on unsympathetic ears, and the judge denied the continuance.⁵¹

Ultimately, juries might “be stingier with damage awards in personal injury cases that do not involve catastrophic debilitation or loss of life.”⁵² Focus groups gathered by jury consultants to test courtroom strategies expressed skepticism about the actual severity of plaintiffs’ injuries more often in the wake of September 11th.⁵³ This reluctance to award substantial damages could result in reduced punitive awards for corporate misbehavior, regarded as less atrocious than the brutal attacks.⁵⁴ Still other experts be-

46. David R. Kazak, *Why No Jury in America Will Ever be the Same, Experts Say Sept. 11 Attacks Will Change the Way Many Jurors Respond in Courtroom*, CHI. DAILY HERALD, Oct. 21, 2001, at 8.

47. Maura Dolan, *On the Law, Terrorism May Shift Jurors’ Attitudes; Experts Say Panelists Might Trust Police Witnesses More, Be Less Sympathetic in Personal Injury Cases and Go Easier on Corporate Misdeeds*, L.A. TIMES, Oct. 19, 2001, at B2.

48. *Id.*

49. Andrea Harter, *No Delay in American Airlines Lawsuit, Sixty-day Continuance Sought Because Plaintiff, Wife Are Arab-Americans*, ARK. DEMOCRAT-GAZETTE, Sept. 24, 2001, at A2.

50. *Id.*

51. *Id.*

52. Dolan, *supra* note 47.

53. Kazak, *supra* note 46.

54. “‘Punitive damages are intended to punish malicious behavior,’ said [Ronald F.] Beaton, [a jury consultant] Recent events have ‘raised the bar on what is malicious. It will have to be a lot more

lieve jurors might be more likely to blame large corporations in cases where the corporate defendants are perceived to have inadequately protected employees and consumers from dangerous products or hostile working conditions.⁵⁵ Some experts believe plaintiffs in employee disputes and personal injury cases could also receive smaller damage awards because the suffering of such plaintiffs pales in comparison to the suffering of the attacks' victims and their families.⁵⁶

To counteract such results, experts advise plaintiffs' attorneys to narrate their clients' grievances with terminology commonly associated with media coverage of the attacks.⁵⁷ Using words like "crisis," "terror," and "catastrophe," they argue, will ring home with jurors—perhaps winning over their sympathies by putting the jurors' sentiments of fear, anger, and uncertainty to work in plaintiffs' favors.⁵⁸ In addition to the threat of reduced damages awards, plaintiffs in civil rights actions may be discouraged from bringing suit altogether.⁵⁹ Experts say that civil rights suits, particularly those involving allegations of racial profiling by police or businesses, will be much more difficult to win.⁶⁰

Muslim criminal defendants now face increased scrutiny from juries, which threatens to impair the integrity of their Sixth Amendment guarantee to a fair trial.⁶¹ Jurors under the anxiety and fear of new attacks could be more inclined to favor the prosecution over the defendant in criminal trials.⁶² There is already some authority affording prosecutors wide latitude in characterizing defendants facing terror-related charges before a jury.⁶³ Consider the case of Fadi Abdelgani. Abdelgani was one of ten defendants convicted on several charges, including seditious conspiracy and attempted bombing, in connection with a thwarted plot to bomb buildings and tunnels in New York City.⁶⁴ During closing arguments at his trial, the prosecution told the jury that "[t]he defendants in this room conspired to steal from Americans their freedom from fear, and for that they must be held accountable."⁶⁵ On appeal, Abdelgani contended that reversal was required because the prosecution had appealed to the jury's "sense of fear" by making that statement.⁶⁶ The Second Circuit held that there was no breach of Abdelgani's right to receive a fair trial and that the remark was permissible be-

egregious now than it was before Sept. 11, without a doubt." Dolan, *supra* note 47.

55. Paula Christian, *Court Cases Could Face Terror Bias*, TAMPA TRIB., Sept. 25, 2001, at Metro: 1.

56. Dolan, *supra* note 47.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See Kazak, *supra* note 46.

62. See Dolan, *supra* note 47.

63. See *United States v. Rahman*, 189 F.3d 88, 140 (2d Cir. 1999).

64. *Id.* at 103-04.

65. *Id.* at 140 (alteration in original).

66. *Id.*

cause “the conspiracies in question were designed to commit acts of terrorism, which by their nature are intended to instill fear in a population.”⁶⁷

Jurors could also channel their anger and fear by punishing every perceived “bad guy” in such a way that no criminal defendant could get a fair trial.⁶⁸ Defendants charged with crimes involving acts of espionage and terrorism, particularly those defendants who are Muslim or Middle Eastern, will likely face a high risk of conviction due to an increased level of patriotism, which might compel some jurors to blindly convict any perceived “bad guy.”⁶⁹

Even attorneys who are of Muslim or Middle Eastern descent should consider the potential impact of their ethnicity on their clients’ litigation.⁷⁰ One Muslim attorney, Hamdi Rifai, said he lost at least one personal injury client because he is Muslim.⁷¹ A woman, who had called Rifai several times and seemed eager to have him represent her, refused to take or return his phone calls after inquiring as to his ethnicity.⁷² Another Muslim attorney, Sohail Mohammed, a solo practitioner in Clifton, New Jersey, was so concerned about potential juror backlash against Muslims that he feels obligated to ask clients whether they still want him as their counsel.⁷³

Attorneys should also evaluate the impact of key witness testimony where the witness is either Muslim or a law enforcement officer. Muslims or Middle Easterners testifying in any capacity may face more intense skepticism and scrutiny by jurors suffering fear and anger over the attacks.⁷⁴ On the other hand, the testimony of federal agents, police officers, and firefighters could be bolstered by a new sense of patriotism as well as renewed respect afforded to men and women in these professions, who are now deemed heroes for their responses to the attacks.⁷⁵ Additionally, attorneys

67. *Id.* “The government has broad latitude in the inferences it may reasonably suggest to the jury during summation.” *United States v. Casamento*, 887 F.2d 1141, 1189 (2d Cir. 1989). Therefore, for a defendant to get a reversal based on inappropriate remarks by a prosecutor, the defendant will “face a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial.” *United States v. Locascio*, 6 F.3d 924, 945 (2d Cir. 1993).

68. Christian, *supra* note 55.

“In any case involving significant violence being prosecuted by the government, I think a jury could have very strong feelings against the defendant because we have all been just shocked at the violence we witnessed in New York and Washington,” said John Fitzgibbons, a former federal prosecutor who is now a defense attorney.

Id. A Michigan man standing trial for smuggling counterfeit checks through an airport asked a federal judge to stop referring to him by his Muslim-sounding name because it might prejudice the jury against him. Cecil Angel, *Defendant Doesn’t Want Birth Name Used*, DETROIT FREE PRESS, Oct. 2, 2002. A Muslim suspect’s mother believed her son would be unable to get a fair trial on a murder charge because jurors were likely to harbor prejudice against Muslim men as a result of the September 11th attacks. J.M. Kalil, *Apartment Complex Slaying: Suspect’s Mom: Race Played Role*, LAS VEGAS REV.-J., Jan. 20, 2002, at 1B.

69. See Christian, *supra* note 55.

70. See Gallagher, *supra* note 25.

71. *Id.* at 16.

72. *Id.*

73. *Id.*

74. “We don’t know whether their testimony will be subject to greater scrutiny by the jury,” said Harvey Moore, head of Trial Practices in Tampa.” *Id.*

75. See *id.* at 17. See also Christian, *supra* note 55.

may feel limited in their ability to cross-examine such witnesses by tearing apart their testimony or questioning their competence or credibility, as jurors may take offense at such attacks on perceived “heroes.”⁷⁶

Juror tensions over heightened security measures at federal courthouses may also affect the integrity of jury deliberations in particularly sensitive cases involving Muslims. For example, the jurors in the Atlanta trial of Jamil Abdullah Al-Amin spent the third day of jury selection evacuated from the courthouse due to a bomb threat.⁷⁷ Unfortunately, the psychological impact of this type of all-too-common occurrence is difficult, if not impossible, to measure.⁷⁸ Further, the additional security—a necessary safeguard in light of the attacks and the Oklahoma City bombing—may only serve to remind jurors of the new threat facing Americans and renew their fears and anger with one potential outlet being the defendant on trial.⁷⁹

In rare cases, even judges, who are sworn to impartially administer the law, may be conflicted by prejudice against Muslims. In fact, a New York judge resigned amid allegations that he called a Lebanese woman a terrorist when she appeared in court to challenge two parking tickets.⁸⁰ The judge resigned after the woman, who fainted during the alleged incident, filed a complaint with the State Commission on Judicial Conduct.⁸¹ According to the woman, in the course of defending two parking violations, she recalled the judge saying, “You don’t want to pay a ticket, but you have money to support terrorists.”⁸²

III. SOLUTIONS TO NEUTRALIZE THE ATTACKS’ IMPACT ON JURY VERDICTS

Two years after the attacks, terrorism remains the centerpiece of the American consciousness. Following September 11th, the United States defeated the Taliban in Afghanistan,⁸³ President Bush created the Department of Homeland Security in order to streamline American intelligence and protect the nation from future attacks;⁸⁴ and the new advisory system of color-coded terrorist threat levels keeps Americans abreast of the continuing threats to domestic targets.⁸⁵ While the tempers and passions that immedi-

76. *See id.*

77. Renaud & Ramos, *supra* note 2.

78. *See id.*

79. U.S. marshals stood behind concrete barriers with shotguns, the defendant arrived in an armored van, and jurors were identified by number rather than name at the trial of two Lebanese brothers accused of aiding the Hezbollah terrorist group. Irwin Speizer, *Security Heavy in Smuggling Trial*, NEWS & OBSERVER (Raleigh, N.C.), May 21, 2002, at A1. *See also* Christian, *supra* note 55.

80. *Tarrytown: Judge Resigns*, N.Y. TIMES, June 18, 2003, at B6.

81. *Id.*

82. *Id.*

83. Romesh Ratnesar, *Afghanistan: One Year Later, Does Our Fighting in Afghanistan Hold Any Lessons for a Battle with Iraq?*, CNN.COM (Oct. 10, 2002), at <http://www.cnn.com/2002/ALLPOLITICS/10/10/timep.afghanistan.year.later.tm/index.html>.

84. Sean Loughlin, *Bush Launches Homeland Security Department; Democrats, President Trade Charges on Funding*, CNN.COM (Mar. 3, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/02/28/homeland.security/index.html>.

85. *See Sources: U.S. to Raise Terror Alert Level*, CNN.COM (Sept. 10, 2002), at

ately followed September 11th have subsided to some degree, the national security agenda has only heightened American awareness of the looming threat of more attacks. With such ever-present threats and reminders of domestic enemies, judges and attorneys can no longer rely on the mechanism of continuances, which provided a temporary band-aid for the prejudice problem in the weeks immediately following the attacks.⁸⁶ Furthermore, the legal community cannot assume that jurors' passions and biases will completely subside in the foreseeable future. Considering the potentially far-reaching impact of the attacks on the American jury system, legal scholars and courts would be remiss not to seek possible solutions to neutralize the potential harm to litigants and defendants.

One conceivable neutralizing remedy is to scrutinize potential jurors more thoroughly for bias during the voir dire process. Ultimately, this is probably the most workable solution to the potentially damaging effects of the attacks on litigants. In addition, this approach could be accomplished with minimal impact on the present procedures comprising the jury system.

To truly unmask juror biases, attorneys and courts must look beyond the traditional voir dire process, which is often inadequate for a number of reasons.⁸⁷

Traditional voir dire relies on a simplistic legal definition of bias that is concerned only with jurors' overt expressions of their willingness to act with impartiality and without prejudice. The legal definition does not identify the more insidious or subtle case-relevant juror attitudes and experiences that may prevent jurors from rendering a verdict in an objective manner. Nor does this definition recognize the intense social pressures that compel jurors to express socially acceptable responses in open court regardless of their true predispositions.⁸⁸

Indeed, attorneys have a number of tools at their disposal for evaluating potential biases within a jury pool.⁸⁹ One obvious way to unmask juror bias is to engage in a more extensive, probing inquiry of prospective jurors during voir dire. Also, attorneys may consider using a probing questionnaire to assess jurors' attitudes and preconceptions regarding Muslims, as well as their fears and anxieties relating to terrorist attacks.⁹⁰ Tolerance.org (a website created by the Southern Poverty Law Center), in partnership with the

<http://www.cnn.com/2002/US/09/10/ar911.threat.level/index.html>. See also Ashcroft, Ridge, Mueller Announce Terror Threat Level Increase, CNN.COM (Feb. 7, 2003), at <http://cnn.com/2003/US/02/07/threat.transcript/index.html>.

86. See Pfeifer & Leonard, *supra* note 22.

87. See Donald E. Vinson, *Planning Well Before Voir Dire*, NAT'L L.J., Oct. 1, 2001, at B15.

88. *Id.*

89. *Id.*

90. In the trial of two Charlotte men accused of aiding Hezbollah, prospective jurors were required to complete an extensive questionnaire that alluded to the sensitive issues involved in the case, including questions about Muslims and the Middle East. See Speizer, *supra* note 79.

University of Washington and Yale University psychologists, has developed a new hidden bias test designed to measure unconscious or automatic associations that underlie prejudice against Arab Muslims.⁹¹ Attorneys might consider having jurors complete such a test in order to uncover hidden bias.⁹²

These solutions, however, may backfire by further focusing jurors' attentions on the events of September 11th.⁹³ In addition, this approach might not be welcomed by courts. In 1998, Shakur Shabazz stood trial in federal court for his alleged participation in a criminally fraudulent scheme involving the negotiation of more than \$570,000 worth of counterfeit and stolen checks in Oregon and Washington.⁹⁴ At trial, the defendant requested fifteen minutes of individual voir dire and asked that potential jurors be required to complete a six-page questionnaire prior to voir dire.⁹⁵ Shabazz argued that jurors were "more likely to be candid about biases based upon race and religion in filling out a private questionnaire than they would be in answering questions in open court."⁹⁶ Because the defendant failed to demonstrate that race or religion played any role in the events forming the basis of the indictment, his request was denied.⁹⁷ Instead, the court probed the general bias of jurors during the routine voir dire examination.⁹⁸ While rulings like these provide little help to a defendant facing a potentially biased jury pool, a Muslim defendant facing terror-related charges might distinguish such a ruling based on the fact that the nation's attention has become more focused on Muslim defendants in the days since the attacks on the World Trade Center and the Pentagon. Subsequently, the prosecution of Muslim defendants—particularly those facing terrorist-related charges—naturally evokes more passion and resentment from a jury pool than a more petty crime, like check fraud, that was prosecuted before September 11th.

Any attorney fearing the verdict of a biased jury pool should study the nature, scope, and tone of media coverage in the case.⁹⁹ This may provide insight into the prevalent attitudes within the local community from which the jury is selected.¹⁰⁰ Also, an attorney who has previously practiced in the host venue could be consulted regarding practical insights into local attitudes and prejudices in past cases.¹⁰¹ A community attitude survey may also be effective as a formal means of evaluating bias within the jury pool.¹⁰² In

91. See *New Test*, *supra* note 30.

92. See *also id.* and accompanying text.

93. "[T]he tension surrounding the trial poses a challenge to basic impartiality." Speizer, *supra* note 79 (paraphrasing Gene Nichol, Dean of the University of North Carolina School of Law).

94. *United States v. Shabazz*, No. CR 97-183-FR, 1998 WL 744057 (D. Or. Oct. 21, 1998).

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. Vinson, *supra* note 87.

100. *Id.*

101. *Id.*

102. *Id.*

cases where sensitivities and anxieties are particularly proximate to the venue of the trial, attorneys might request a change of venue to empanel a jury remote to the proposed venue's sensitivities. But this solution only addresses the problem in the few cases involving a localized public inflammation.¹⁰³

Consider the case of John Walker Lindh, the so-called "Taliban American" who was indicted on ten counts, including charges of conspiring to kill Americans, providing support to al Qaeda, and using firearms and other destructive devices during crimes of violence.¹⁰⁴ Walker Lindh was set to stand trial in a northern Virginia courtroom—only nine miles away from the Pentagon, where 189 Americans were killed by al Qaeda operatives on September 11th.¹⁰⁵ Walker Lindh's defense counsel requested a change of venue to San Francisco, where Walker Lindh grew up and where his family lives.¹⁰⁶ His attorneys argued that holding the trial near the Pentagon would result in a tainted jury pool, analogizing his case to the trial of Oklahoma City bomber Timothy McVeigh, whose trial was moved to Denver.¹⁰⁷ The judge rejected Walker Lindh's request for change of venue, agreeing with the U.S. Attorney, who argued that jurors in Virginia can be as fair as any in the country and that the attacks on the World Trade Center and the Pentagon could not be analogized to the attack in Oklahoma City, which had a "singular and unique" impact on that city.¹⁰⁸ The denial of Walker Lindh's request for venue change only underscores the notion that changes of venue will not be warmly embraced as a tool to combat the potential prejudices tainting a jury pool.

Perhaps an attorney's most formidable tools for empanelling an impartial jury are peremptory challenges and strikes for cause.¹⁰⁹ Courts generally view strikes, in the context of an extensive voir dire, as the ultimate weapon for seating an unbiased jury.¹¹⁰ Unfortunately, however, its effectiveness is

103. See M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855 (1993).

104. *Venue Change for Lindh Trial Rejected*, CNN.COM (June 18, 2002), at <http://www.cnn.com/2002/LAW/06/17/inv.walker.lindh.hearing/index.html> [hereinafter *Venue Change*].

105. *Id.*

106. *Id.*

107. *Id.* "'You can't go through a day in America without 9/11 being mentioned,' defense attorney James Brosnahan said. 'How can you get a fair trial under these circumstances?'" *Id.*

108. See *Venue Change*, *supra* note 104.

109. Vinson, *supra* note 87. In *Batson v. Kentucky*, the Supreme Court held that Equal Protection prohibits prosecutors from using peremptory strikes against prospective jurors based solely on their race. 476 U.S. 79 (1986). However, *Batson* does not limit counsel's ability to strike for cause in cases where the juror in question has an actual bias that will affect her judgment in the matter. See Vinson, *supra* note 87.

110. See *United States v. Clark*, 398 F. Supp. 341, 356-57 (E.D. Pa. 1975). In the trial of Black Muslims charged with violations of federal bank robbery statutes, a large number of jurors were stricken for cause because of exposure to pretrial publicity. *Id.* at 356. In addition, a total of eighteen peremptory challenges were permitted among the three defendants to exclude those prospective jurors whom they suspected harbored some hidden ill will or prejudice uncovered on the record. *Id.* at 357. In ruling against the defendants' request for a change of venue for fear that local prejudice would prevent them from obtaining a fair trial, the court held:

still limited by the mechanism of voir dire, which can often be ineffective in identifying the actual biases of veniremen.¹¹¹ While judges have some discretion in allowing juror strikes for cause and attorneys maintain the broad power to use peremptory strikes with few limitations, a court's power to determine the composition of a jury must still pass scrutiny under Equal Protection analysis.¹¹²

In the aftermath of the national outrage resulting from the Rodney King verdict, a judge in the Eastern District of New York sought to empanel a jury that was representative of the local community in a case involving a racially-motivated hate crime perpetrated by two African American men against an orthodox Jew.¹¹³ The judge focused particularly on ensuring that the jury be comprised of "appropriate numbers of African Americans and Jews."¹¹⁴ The final jury panel (including alternates) consisted of three African Americans, a Jewish juror ("Jewish Juror 108"), and another juror who did not consider herself Jewish but had Jewish parents.¹¹⁵ Jewish Juror 108, originally the second alternate on the panel, was added to the jury after an African American juror was excused and a white juror was removed in order to facilitate the empanelment of the first two alternates—an African American and Jewish Juror 108.¹¹⁶ This was done solely to facilitate the addition of Jewish Juror 108 to the final panel in an effort to have a "representative" jury.¹¹⁷ These efforts were made despite the fact that Jewish Juror 108 had, in voir dire, revealed the existence of an actual bias requiring his exclusion from the jury.¹¹⁸ The legal issues were further complicated by the fact that both defendants and their counsel had expressly consented to the

We are convinced that the exhaustive and painstaking procedure in jury panel selection gave all of the defendants every possible protection and benefit of any doubt.

... [W]e conclude that the extensive voir dire adequately neutralized the effects of pre-trial publicity, and effectively excluded potential jurors who were prejudiced against Black Muslims.

Id. at 357.

111. See Vinson, *supra* note 87.

112. See *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002).

113. *Id.* at 169-72.

[The judge] made clear his intention to empanel "a moral jury that renders a verdict that has moral integrity." The district court stated that "[t]his trial is occurring for the same reason Rodney King's trial occurred . . . because the first jury did not represent the community." The court relatedly and repeatedly expressed its desire to *empanel* a jury (and not merely *begin from a venire*) "that represents this community."

Id. at 171-72 (second alteration in original) (citation omitted).

114. *Id.* at 199.

115. *Id.* at 200.

116. *Id.* at 172.

117. *Id.* at 200. The judge said, "I will not allow this case to go to the jury without 108 as being a member of that jury, and how that will be achieved I don't know. It may well be just by people falling out." *Id.*

118. *Id.* at 202. A juror's actual bias is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997). When the judge asked Jewish Juror 108 during venire if he could remain impartial and objective in deciding the case, the prospective juror replied, "I don't know. I honestly don't know." *Nelson*, 277 F.3d at 199.

empanelling of both Jewish Juror 108 and the entire “representative” panel.¹¹⁹ The Second Circuit ultimately reversed the defendants’ convictions finding that a biased juror (Jewish Juror 108) was seated,¹²⁰ and “the consent given to the selection of that juror was invalid, since it was obtained in exchange for the improper empanelling of a jury chosen partly on the basis of race and religion”¹²¹ The Second Circuit further held that the Equal Protection Clause forbids considerations such as race and religion in any manner during the jury selection process.¹²²

Some defendants, fearing the unidentifiable prejudices of an “impartial jury,” may request a bench trial, as a judge may prove more objective in deciding the legal issues of a case.¹²³ However, such a waiver by the defendant of his constitutional right to trial by jury may be subject to consent by both the prosecuting attorney and the trial court.¹²⁴ The Federal Rules of Criminal Procedure provide that a defendant is entitled to a jury trial unless he waives that right with the government’s consent and the court’s approval.¹²⁵ In *Patton v. United States*,¹²⁶ the Supreme Court held that a jury trial was a right that a defendant could willingly forgo¹²⁷ but stopped short of declaring that a defendant has the right to demand a trial before a judge sitting alone.¹²⁸ Similarly, in *Adams v. United States*,¹²⁹ the Court continued to recognize that a defendant’s waiver of his right to trial by jury is contingent on the consent of the government attorney as well as that of the trial court.¹³⁰ In *Singer v. United States*,¹³¹ the Court again faced the question of

119. *Id.* at 204.

120. *Id.* at 201. “[T]rying an accused before a jury that is actually biased violates even the most minimal standards of due process.” *Id.* at 206.

121. *Id.* at 201.

122. *Id.* at 207-08.

[A]lthough the motives behind the district court’s race- and religion-based jury selection procedures were undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary, that fact cannot justify the district court’s race-conscious actions. The significance of a jury in our polity as a body chosen apart from racial and religious manipulations is too great to permit categorization by race or religion even from the best of intentions.

Id.

123. *See Singer v. United States*, 380 U.S. 24 (1965). *See also Horton, supra* note 27. Canadian law recognizes that, in some instances, the jury is not the appropriate trier of fact. *Id.*

124. *See Singer*, 380 U.S. at 36.

125. FED. R. CRIM. P. 23(a).

126. 281 U.S. 276 (1930).

127. *Id.* at 278.

128. *See id.* at 312.

Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Id. at 312-13.

129. 317 U.S. 269 (1942).

130. *Id.* at 277-78.

whether a defendant's ability to waive his right to trial by jury is contingent upon the consent of both the prosecution and the trial court.¹³² The case involved a defendant who waived his right to trial by jury only "[f]or the purpose of shortening the trial."¹³³ The Court reasoned:

As with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse. However, the mode itself has been surrounded with safeguards to make it as fair as possible—for example, venue can be changed when there is a well-grounded fear of jury prejudice, Rule 21(a) of the Federal Rules of Criminal Procedure, and prospective jurors are subject to *voir dire* examination, to challenge for cause, and to peremptory challenge, Rule 24(a) and (b).

. . . A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.¹³⁴

Despite its holding, however, the Court recognized that in some instances a defendant may have a compelling reason for obtaining a trial by judge alone over a prosecutor's objection:

We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner [the defendant] argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.¹³⁵

By its holding in *Singer*, the Court left the door open for a defendant who fears widespread, undetectable juror prejudice to request a bench trial despite objections by the prosecution. Such a right could prove invaluable to

131. 380 U.S. 24 (1965).

132. *Id.* at 34.

133. *Id.* at 25 (alteration in original).

134. *Id.* at 35-36.

135. *Id.* at 37-38 (internal footnote omitted).

Muslim defendants who fear prejudice in cases where the prosecution's evidence is especially weak and the jury might be inspired by a sense of patriotism or fear of ostracism by a community thirsty for the punishment of perceived "evildoers." Nevertheless, the Court apparently emphasized that such a waiver is available only in extraordinary circumstances.¹³⁶ This imposes a heavy burden on a defendant to prove that the voir dire process, generally considered effective at producing an impartial jury, is somehow ineffective and deficient in identifying biases and predispositions against the defendant in a particular case.

Such heavy burdens may lead to another potentially unwanted result: defendants pleading guilty in hopes of negotiating a lighter sentence rather than being left to the devices of a jury akin to an angry mob. There may also be a seeming inevitability that angry jurors are predisposed to convict such defendants, especially those charged with terror-related crimes. Consider again the case of John Walker Lindh, the so-called "Taliban American." Walker Lindh was originally charged under a ten-count indictment, facing up to three life sentences plus ninety years in prison if convicted.¹³⁷ As his trial date approached, however, Walker Lindh "pled guilty to one count of supplying services to the Taliban and a criminal information charge that he carried a rifle and two hand grenades while fighting against the U.S.-backed Northern Alliance."¹³⁸ Under his plea agreement, Walker Lindh was sentenced to just twenty years in prison while the government dropped all other counts on the criminal indictment, including the most serious charge—conspiracy to kill U.S. nationals.¹³⁹

Consider also the case of shoe bomber Richard Reid, who was accused of trying to ignite explosives hidden in his sneakers on board a trans-Atlantic flight.¹⁴⁰ Despite originally pleading not guilty to the charges against him,¹⁴¹ Reid eventually pled "guilty to all eight counts against him—including attempted use of a weapon of mass destruction, attempted homicide, and placing an explosive device on an aircraft . . . [to avoid] the difficulty of undergoing a lengthy trial."¹⁴² Likely because the case against Reid was seemingly solid,¹⁴³ the Justice Department never entered into a plea agreement with Reid.¹⁴⁴ After pleading guilty, Reid received three life terms of imprisonment plus 110 additional years.¹⁴⁵ Perhaps Walker Lindh

136. *See id.* at 37-38.

137. *Venue Change*, *supra* note 104.

138. *The Case of the Taliban American*, CNN.COM, at <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html> (last visited Oct. 30, 2003).

139. *Id.*

140. Jason Carroll, *Shoe Bomb Suspect Pleads Innocent*, CNN.COM (Jan. 18, 2002), at <http://www.cnn.com/2002/LAW/01/18/shoe.bomb.plea/index.html>.

141. *Id.*

142. *Richard Reid Pleads Guilty; Faces Minimum Sentence of 60 Years*, CNN.COM (Jan. 22, 2003), at <http://www.cnn.com/2002/LAW/10/04/reid.guilty.plea/index.html>.

143. *See id.* Also, Reid himself said he was "a disciple of Osama bin Laden and an enemy of the United States." *Id.*

144. *Id.*

145. Joanne Mariner, *A Fair Trial for Zacarias Moussaoui*, CNN.COM (Feb. 3, 2003), at

and Reid took heed of the heavy sentences handed down to the six conspirators in the 1993 World Trade Center bombing. Although relatively less destructive than the September 11th attacks,¹⁴⁶ all six conspirators were sentenced to 240-year prison terms.¹⁴⁷ Four other terrorists, all followers of Osama bin Laden, were convicted for the 1998 bombings of two U.S. embassies that left 231 people dead¹⁴⁸ and were sentenced to life imprisonment without parole.¹⁴⁹

Perhaps the true test of whether a Muslim facing terror charges can get a fair trial will play out in the case of Zacarias Moussaoui, an alleged conspirator in the September 11th attacks.¹⁵⁰ Moussaoui is currently facing the death sentence in a U.S. District Court in Virginia.¹⁵¹ A January 27, 2003 editorial in the *Washington Post* labeled Moussaoui's federal prosecution an "experiment."¹⁵² Indeed, the editorial characterized the prospect of a defendant receiving a fair trial—in federal court rather than a military tribunal—as a novel experiment given the circumstances.¹⁵³ The criminal indictment makes a very scant tangible connection between Moussaoui and the attacks, and commentators say that the evidence against him is weak.¹⁵⁴ In light of this, commentators predicted that the government might dismiss the indictment and move to try Moussaoui before a military commission.¹⁵⁵ To do so, commentators suggested, would have been tantamount to a concession by

<http://www.cnn.com/2003/LAW/02/03/findlaw.analysis.mariner.moussaoui/index.html>.

146. The 1993 bombing resulted in the deaths of six people and more than 1000 injuries. *Last World Trade Center Bombing Conspirator Sentenced*, CNN.COM (Apr. 3, 1998), at <http://www.cnn.com/US/9804/03/wtc.bombing/index.html>.

147. Prior to his sentencing, Eyad Ismoil, an alleged conspirator in the 1993 attack, said, "In the world, a fair trial is always rare." In response, the judge said that Ismoil received "an extraordinarily fair trial, something that was quite expensive, something which was done not as a show trial but to give you an opportunity to put forward whatever you wanted to . . ." *Id.* See also Phil Hirschhorn, *Convicted Terrorist Sues U.S. Attorney General*, CNN.COM (May 10, 2002), at <http://www.cnn.com/2002/LAW/05/10/embassy.bomber/index.html>.

148. *Embassy Bombers Jailed for Life*, W. MORNING NEWS (Plymouth, U.K.), Oct. 19, 2001, at 2 [hereinafter *Embassy Bombers*].

149. *Id.* Jurors considered whether the Islamic religious beliefs of one accused embassy bomber, Mohamed Rashed Daoud al-'Owhali, could mitigate his punishment for delivering a bomb that killed 231 people. The jurors asked for a copy of the Quran, but the judge denied the request. Paul Moses & Patricia Hurtado, *The Power of Religion; Jury Weighs Teachings of Islam as It Decides Embassy Bomber's Fate*, NEWSDAY (N.Y.), June 11, 2001, at A08. The jury eventually convicted al-'Owhali. See *Embassy Bombers*, *supra* note 148.

150. Mariner, *supra* note 145. See also David Johnston & Philip Shenon, *Evidence Against Suspect from 9/11 Is Called Weak*, N.Y. TIMES, July 20, 2002, at A-8-5.

Government officials say they have no direct evidence that Mr. Moussaoui had a role in the hijackings. From the beginning the evidence has been circumstantial. . . .

. . . .

The government has yet to produce a witness against Mr. Moussaoui. . . .

. . . [I]nvestigators have said they have failed to find evidence that Mr. Moussaoui ever met Mohamed Atta, the plot's ringleader, or any other hijacker—or that he communicated with any of them by e-mail, telephone or letter.

Id.

151. Mariner, *supra* note 145.

152. *The Moussaoui Experiment*, WASH. POST, Jan. 27, 2003, at A-18.

153. *Id.*

154. *Id.*

155. *Id.*

the government of its inability to secure a conviction in federal court.¹⁵⁶ For many, such an outcome would have dealt a devastating blow to Muslim American protections in criminal proceedings.¹⁵⁷ A U.S. District Judge in Massachusetts wrote:

Bringing criminals to justice in our country has historically involved providing fair trials and punishing only people who are proven guilty beyond a reasonable doubt. . . .

. . . .

. . . Public proceedings, in which defendants can challenge the evidence against them, are features of a fair trial.

. . . .

A fair trial also provides the accused an opportunity to testify and present other evidence. . . .

Most fundamentally, a fair trial requires proof of personal guilt based on compelling evidence rather than on mere suspicion. Any true trial involves the risk that the accused will not be proven guilty and punished. If the verdict is preordained by political considerations, we should not call the process leading to punishment a trial. To do so would only injure international confidence in the integrity of our commitment to the rule of law.

. . . .

A political or military decision to execute or otherwise seriously punish suspects would inevitably enhance the myth of their martyrdom and exacerbate the attitudes that have bred Islamic terrorists. The prospect of trials, on the other hand, would provide a powerful incentive for prosecutors to develop convincing evidence of how crimes against humanity were planned and committed.

If criminal responsibility is proven in proceedings that are perceived to be fair, any reasonable doubt should be removed regarding the identity of the perpetrators and the propriety of serious punishment. Thus, fair trials would have the best chance of persuading Muslims that the United States was acting justifiably as a victim of unpardonable violence rather than as an enemy of Islam. They would also have the potential to create a historical record, which

156. Mariner, *supra* note 145.

157. See Mark L. Wolf, *How to Bring Terrorists to Justice*, BOSTON GLOBE, Nov. 17, 2001, at A15.

Holocaust deniers regularly remind us can be important to future generations.

Fair trials would also be a reaffirmation of our belief in the principle of equal justice under law—an ideal that has been fundamental to our nation¹⁵⁸

Those who feared that Moussaoui's case would ultimately be decided by a secret military tribunal were likely relieved to learn that the Justice Department ultimately did not seek to remove the case from federal court.¹⁵⁹ Despite having his case tried in a more public venue, Moussaoui's rights may still be jeopardized by the "shroud of secrecy" surrounding the government's evidence.¹⁶⁰

IV. CONCLUSION

Not unlike the public interest in the trial of Jamil Abdullah Al-Amin, many Americans anxiously await the outcome of Moussaoui's trial and its implications on the American jury system.¹⁶¹ The true impact of the al Qaeda hijackers on the American jury system is not yet fully realized. As Americans sift through the rubble of their own feelings about the tragic attacks and the ongoing threat of future attacks, courts must be sensitive to the feelings and sentiments of prospective jurors in any case involving a Muslim defendant, litigant, witness, or attorney. The ideal of American justice can stand against airplanes-turned-missiles, but it cannot stand against an apathetic judiciary or an angry mob in the jury box. The blind eyes of American justice cannot take sight in the name of retribution or security.¹⁶² Equal Protection and Sixth Amendment constitutional protections must be sacredly guarded to ensure the stability of the democratic process and the integrity of the civil liberties America has fought for and guarded since the Revolutionary War.

Precedent, for once, may not be an adequate guide for those in pursuit of justice. The prejudice, animus, and anxiety that face Muslims in American courtrooms today are as unique and unprecedented as the terrorist attacks were on that fateful Tuesday morning. Courts must consider the sub-

158. *Id.*

159. Terry Frieden, *U.S. Says Moussaoui OK for Civilian Court*, CNN.COM (Apr. 14, 2003), at <http://www.cnn.com/2003/LAW/04/14/moussaoui.trial/index.html>.

160. *Id.* The prosecution extensively used highly classified materials, to which Moussaoui has no access. *Id.*

161. In a speech at New York University on September 28, 2001, Justice Sandra Day O'Connor said, "It is possible, if not likely, that we will rely more on international rules of war than on our cherished constitutional standards for criminal prosecutions in responding to threats to our national security." Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B-5.

162. Justice O'Connor said, "Lawyers and academics [in the wake of the September 11th attacks] will help define how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and a measure of vengeance." *Id.*

stantial changes in the mainstream American psyche that began as Americans watched the Twin Towers collapse. This schism in the American psyche cannot be forgotten by the ranks of the judiciary. These changes may not be easily filtered through traditional voir dire devices. Instead, courts must make strides to maintain the integrity of the jury selection process and err on the side of precluding prejudice. Only in the decision of twelve truly impartial jurors can Americans' Sixth Amendment guarantees stand strong as a pillar of American constitutionalism.

James Curry Woods

