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**Trial by Jury Involving Persons Accused of Terrorism  
or Supporting Terrorism**

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**I. Introduction**

This chapter explores issues in jury trials involving persons accused of committing acts of international terrorism or financially or otherwise supporting those who do or may commit such acts. The jury is a unique institution that draws upon laypersons to decide whether a person charged with a crime is guilty or innocent. Although the jury is instructed and guided by a trial judge and procedural rules shape what the jury is allowed to hear, ultimately the laypersons deliberate alone and render their verdict.<sup>1</sup> A basic principle of the jury system is that at the start of trial the jurors should have open minds and regard the accused innocent until proven guilty.

The chapter raises issues about jurors' assumptions of innocence in the aftermath of terrorist bombings in the United States, England, Bali, Spain and elsewhere when persons are persons accused of committing acts of terrorism or indirectly supporting terrorists through financing organizations associated with terrorism. A study of a United States trial involving charges of supporting terrorism is used to illustrate the problem, but the thesis of this chapter is that the basic issues apply to trials that might be held in England, Australia, Canada or other countries with jury systems.

## **II. Contemporary International Terrorism And Its Public Perception**

While recognizing that terrorism can take many forms and may be driven by different ideologies, the chapter is concerned with the era following al-Qaeda-inspired attacks on New York City's World Trade Center and the U.S. Military's Pentagon Building in Washington in September 11, 2001,<sup>2</sup> the 2002 bombings in Bali that killed many Australians,<sup>3</sup> the 2004 bombings in Madrid,<sup>4</sup> the 2005 bombings in the center of London and ongoing fears in each country about future attacks.<sup>5</sup> The perpetrators of these attacks have been associated with al-Qaeda's hostility to the United States and its allies because of their hegemony in political, military and cultural spheres in the Middle East and other parts of the world. The perpetrators have been members of the Muslim faith or linked in some way to that faith. Most are of Middle Eastern or Pakistani ethnic descent. Many were citizens or legal residents of the country that were the target of terrorism.

The threat is ongoing. Government leaders have informed their publics that the dangers stem not just from those associated directly with al-Qaeda but organizations that share roughly similar goals with that organization. Western-oriented governments have passed measures that are directed toward not just the terrorists themselves, but also any persons who support those organizations through financing or other means. Government-sponsored websites give detailed accounts of terrorist threats and the steps that are being taken to counter the threats.<sup>6</sup> Public leaders in the United States, England, and Australia, among others, have continually emphasized the threat of terrorist organizations to Western life-styles and political structures. This is not to claim that these concerns and warnings are unwarranted, but the result is that whole citizenries consider themselves to be victims.<sup>7</sup> This sense of being a victim goes beyond just the threat of physical harm to themselves, loved ones or acquaintances but also threats to their conceptions of their deeply held personal values national membership and culture. Some of these attitudes have been expressed in racial and religious slurs or violence against persons identified as Moslem or Arab.<sup>8</sup>

These attitudes have serious implications for the right to trial by a fair and impartial jury because they may influence the way that jurors perceive and evaluate trial evidence. Not everyone accused of acts of terrorism or of indirectly supporting terrorists is necessarily guilty. The central issue is whether ordinary procedural safeguards of the jury system will be sufficient

to ensure a fair trial or whether additional steps might be necessary. Because trial procedures—and their underlying presumptions—differ from country to country a first step is to consider these differences.

### **III. Comparative Perspective on Trial Prejudice and Legal Remedies**

#### **Procedural Perspective**

Among the more than fifty common law countries and territories that still retain trial by jury<sup>9</sup> the United States is unique in a number of important ways. The mass media have almost unfettered ability to cover all phases related to a trial, including pre-trial hearings, as well as the trial itself.<sup>10</sup> In some state courts proceedings can be televised live. This access of the media relates to the U.S. Constitution's First Amendment providing for freedom of the press and that amendment's interpretation by the U.S. Supreme Court. However, even before the age of mass media, indeed, even before the American Revolution, trial procedures had begun to shift from their English origins in that jurors were questioned about their biases by the two sides involved in the criminal or civil dispute.<sup>11</sup>

Today, in the process known as *voir dire* jurors in the United States are questioned about their biases and subject to challenges for cause or peremptory challenges before being seated on the jury. In some high profile trials, particularly in state courts, the process of jury selection may take days or weeks of questioning by the lawyers for the contending sides before a jury is seated. Often the judge, with input from the two contending sides, will send the members of the selected jury pool a lengthy questionnaire to be filled out before their court appearance and their answers are used as a basis of *voir dire* questioning. Attention needs to be drawn to differences between federal court trial procedures in comparison to many state courts. In most cases today the federal trial judge, rather than the contending lawyers, conducts the *voir dire* questioning. The *voir dire* is truncated, usually involving only a few questions about impartiality, although as I will describe below, there are exceptions to this general rule. Additionally, federal courts prohibit cameras of any kind in the courtroom.

Finally, despite the remedial procedure of *voir dire*, a change of venue is possible when one of the parties can convince a judge that *voir dire* will be insufficient to obtain a fair and

impartial jury. In other instances lawyers in federal courts have persuaded judges to expand *voir dire* questioning and allow the parties to participate in the process.<sup>12</sup>

For our purposes here, it is also important to draw attention to another fact, namely that American judges do not engage in ‘summing up’ the evidence during their charge to the jury. In fact some state constitutions forbid the practice.<sup>13</sup>

In contrast to American practices, other common law countries place strong emphasis on pre-trial, mid-trial and post-trial restraints on media.<sup>14</sup> The contempt power of judges is used to attempt to constrain media publicity that might affect jurors. In some instances post-trial reporting may be controlled if it is believed it would jeopardize future proceeding against a defendant or co-defendants or if it would otherwise bring the administration of justice into disrepute. Going still further, jurors in these countries are either proscribed or strongly discouraged from discussing jury room deliberations with representatives from mass media sources. In most of these other countries jurors are forbidden to discuss the jury deliberations with anyone.

Prior restraint is not a perfect remedy for trial prejudice. In an article in the *Criminal Law Review* Corker and Levi have noted a shift in case law in England and Wales wherein courts have recognized that pretrial publicity can cause substantial prejudice, in part because the policing mechanisms are limited.<sup>15</sup> Sometimes prejudicial publicity is generated before charges are laid and sometimes afterward. In addition, focusing solely on media coverage does not take into account potential prejudice arising from pre-existing prejudices against accused persons because of their ethnic or religious identities or prejudice that can arise from widespread community gossip about the alleged crime or the accused person.<sup>16</sup>

Concomitantly, these other common law countries rely heavily on the presumptions that, first, jurors as called remain ‘impartial between the Queen [or State] and the accused’ and second, that judicial instructions on their oath to be impartial plus guidance, including ‘summing up,’ will off-set any biases. Finally, remedies such as a temporary stay of proceedings, or in extreme cases, a permanent stay, may be made. In others a change of venue is considered as a remedy.

Australia and New Zealand have a similar approach to the criminal trial.<sup>17</sup> There are proscriptions about mass media reporting of substantive matters disclosed in pre-trial proceedings and the press or other persons may not query jurors after trial with the intent of publishing anything about jury deliberations. The jurors are chosen as randomly called from the jury panel. After a limited number of peremptory challenges for each side are exercised, the surviving jurors are seated. While theoretically available, the challenge for cause process is almost never used. Change of venue is a remedy when there is a concern about strong prejudice tainting the community. In England and Wales even peremptory challenges have been abolished.<sup>18</sup>

### **Pretrial Prejudice Issues**

The issue of pre-trial prejudice in the United States arising from media coverage has been explored in great detail by both courts and academics.<sup>19</sup> This coverage includes the trial of the Timothy McVeigh for bombing the federal courthouse in Oklahoma,<sup>20</sup> and John Walker Lindh, the ‘American Taliban,’ captured when the United States invaded Afghanistan.<sup>21</sup> The problem, however, arises in other countries as well.

English courts have struggled with a number of cases infected with potential pretrial prejudice.<sup>22</sup> These are reviewed by Corker and Levi<sup>23</sup> and by Naylor.<sup>24</sup> The ‘Maxwell’ trial for fraud in the administration of pension schemes posed major problems of prejudice because of the massive negative media coverage throughout England and Wales and by the fact that pensioners scattered throughout the country were affected when it was discovered that the pension funds were insolvent.<sup>25</sup> As a consequence Justice Phillips, deviating from contemporary English practice, took the extra-ordinary step of interviewing prospective jurors in chambers in an attempt to seat an impartial jury. More recently in *R. v. Bowyer* extensive media coverage of Leeds United FC football player resulted in a mistrial due to media generated publicity and difficulties when a second trial was attempted.<sup>26</sup>

Canada has struggled with issues of pre-trial publicity in a number of cases.<sup>27</sup> These include, but are far from limited to, the Mount Cashel cases involving sexual assaults by lay Catholic priests on boys under their care in the Mount Cashel Orphanage in St. John’s,

Newfoundland and the Bernardo trial involving the abduction, rape and killing of teenage girls by Paul Bernardo and his wife, Karla Homulka.<sup>28</sup>

#### **IV. Analyzing the Potential Effects of Prejudice: A Social and Psychological Perspective**

##### **Dimensions of Prejudice**

Psychological research has shown that prejudicial attitudes and beliefs can affect the way that trial evidence is perceived and evaluated, with the juror tending to accept evidence consistent with his or her prior beliefs and rejecting evidence inconsistent with those beliefs. In turn, the juror constructs narratives or stories of causation and guilt based around those beliefs.<sup>29</sup> Issues that have high emotional elements appear to be harder to overcome than factual material.<sup>30</sup> There is a substantial body of research investigating the effects of media articles on attitudes of juror attitudes and beliefs. This research on mass media effects is critical but incomplete. It has not substantially addressed the effects of access to internet sites that often provides many details, correct or incorrect, about upcoming trials. More important, however, the focus on mass media ignores the sociological dimensions of trial prejudice. Prejudice is often embedded in a broader personal and community context and may have powerful effects on juror attitudes and beliefs. This broader context is especially important in considering trials of accused terrorists and their supporters.

In previous articles I have described an intellectual framework for thinking about juror prejudice.<sup>31</sup> It contains four categories: interest prejudice, specific prejudice, generic prejudice and conformity prejudice.

*Interest prejudice* involves prejudices arising from a juror having a direct or indirect stake in the outcome of the trial. Case law has recognized, for example, that someone being affiliated with an accused may be deemed to be not impartial. In an article based on the John Walker Lindh case, I drew attention to the terrorist attacks of September 11 and its aftermath and argued that the attacks created fears not only about future physical attacks but also perceived threats to American values and culture.<sup>32</sup> Research has demonstrated that when deep-rooted cultural and personal values are threatened, people respond with hostility to persons who are perceived as outsiders or otherwise different.<sup>33</sup>

*Specific prejudice* exists when the juror holds attitudes or beliefs about specific issues in the case at trial that prevent the juror from evaluating the trial evidence with an open mind. These attitudes and beliefs may result from many life experiences, including media coverage of issues. Mass media coverage of events both helps to create public perceptions and reflects community interests and attitudes. Rumor and gossip may generate prejudicial beliefs to jurors. Research with actual trials has shown that the information on which these beliefs are formulated is often erroneous and misleading.

*Generic prejudice* involves the transferring of pre-existing prejudices about categories of persons or other entities to the trial setting. Generic prejudices come into play in the terrorist trials by means of prejudicial attitudes toward Palestinians, Arabs and people of the Moslem faith or perceived Moslem faith. In short, the category of person to which an accused is perceived to belong, such as an Arab or Muslim, may invoke assumptions of guilt in addition to the specific prejudice arising out of the long history of negative publicity leading up to and including the charges against the defendant.

*Conformity prejudice* exists when the juror perceives that there is such strong community reaction in favor of a particular trial outcome that he or she is inclined to reach a verdict consistent with that perceived consensus rather than an impartial evaluation of the evidence. This is one of the most important factors and deserves greater elaboration.

One of the founders of modern sociology, Emile Durkheim, observed in 1893:

“As for the social character of [penal] reaction, it comes from the social nature of the offended sentiments. Because they are found in all consciences, the infraction committed arouses in those who have evidence of it or who learn of its existence the same indignation. Everybody is attacked; consequently, everybody opposes the attack. Not only is the reaction general, but it is collective... It is not produced isolatedly in each one but with a totality and a unity of purpose...”<sup>34</sup>

In a Canadian case involving the killing of a young child, a great deal of prejudice developed in the community even though a defense lawyer had obtained an order proscribing any media coverage.<sup>35</sup> People gossiped because they saw the killing as an odious event relevant to and reflecting on their community. The bombing of the Murrah Federal Building in Oklahoma in April 1995 with the loss of so many lives also caused discussion, rumor and gossip throughout the United States. It threatened community values and evoked calls for the death penalty as

punishment. Importantly, citizens of Oklahoma City, where the bombing occurred, were stronger in their reactions and calls for justice than other Oklahoma communities. After reviewing testimony and survey data trial judge Maitch of the U.S. District Court concluded that ‘the entire state had become a unified community, sharing the emotional trauma of those who had become directly victimized.’<sup>36</sup> In the decision to move the trial from Oklahoma Judge Maitch reviewed various evidence and concluded that Oklahomans were ‘united as a family,’ that there was ‘extraordinary provocation of their emotions of anger and vengeance,’ that there was ‘a prevailing belief that some action must be taken to make things right again,’ and that the common reference in articulating these feelings was “‘seeing that justice is done.’”

Psychological research on trial prejudice has distinguished between potentially biasing factual beliefs and beliefs that have high negative affective content.<sup>37</sup> Beliefs involving negative affect are most likely to have effects on jury decision-making. For example, Honess, Charman and Levi conducted a study involving a simulation of the Maxwell fraud trial, mentioned above.<sup>38</sup> The case involved four defendants accused of conspiring to defraud the beneficiaries of company retirement funds. In the actual trial the defendants were acquitted, but many persons were dissatisfied with the verdict.

The research was carried out some time after the trial had taken place and was intended to explore the effects of attitudes on juror reasoning processes. Jury-eligible participants were interviewed to determine their recall of the case and then asked to participate as jurors in a trial simulation involving a six-hour video simulation of the trial using actors working from verbatim transcripts and documents from the actual trial. The jurors were interviewed at four time periods throughout the trial presentation.

The results showed that the degree of jurors’ factual recall of details about the Maxwell case had minimal influence on juror judgments about the trial evidence. In contrast negative attitudes associated with the case did have an effect, but in a complicated and unexpected way. In the first interview period conducted during the simulation, jurors with greater degrees of negative affect about the Maxwell case were not significantly different than those with lesser negative affect. However, jurors with negative affective responses began to express reasoning favoring guilt at the end of the prosecution’s case. This reasoning about guilt was maintained during and

after the defense presentation. The authors of the research hypothesized that these jurors had withheld judgment at the early stages of evidence presentation because they were waiting for more evidence before reaching a decision, suggesting that the jurors were not preemptively deciding guilt but rather the negative attitudes had led them to interpret the evidence using a prosecutorial mental framework.

The Honess et al. study is consistent with previous research and is highlighted here because it shows the subtle effects that negative attitudes can have on jurors' reasoning processes.

There is not space to further review additional research in this chapter, but the basic findings lead to the conclusion that prejudice can be manifested at various points in the trial process and jeopardize an impartial evaluation of the evidence against an accused.<sup>39</sup> Specifically,

- (1) It can prejudice jurors' initial assumptions about a defendant's guilt;
- (2) It can improperly influence the evaluation of evidence through selective attention and weighting of evidence consistent with pre-existing biases;
- (3) It can influence pre-deliberation preferences of verdicts;
- (4) It can influence the initial distribution of juror verdicts that lead to the final verdict;
- (5) It can promote jury deliberations that enhances the initial biases of the jurors;
- (6) It can instigate a 'rotten apple' effect whereby one or more tainted jurors infect other jurors with emotional appeals during deliberation.
- (7) In the event that the evidence of guilt is near equipoise at the end of trial the deliberations pre-existing juror attitudes can improperly tilt the jury toward a guilt verdict.

There is an important caveat to the implications of this research. Prejudicial attitudes are most likely to have their impact when the evidence supporting guilt or innocence is near equipoise. If the prosecution's case is very strong or very weak, the fact that some of the jurors hold prejudicial attitudes will not be of as much importance as when the evidence is close. Prejudicial attitudes come into play when there is ambiguity that allows jurors to justify their reasoning about evidence in a manner that is consistent with their pre-existing beliefs.

## **Al-Qaeda-linked Trials Are Different than Routine Criminal Trials**

As already indicated, after September 11, 2001 and the subsequent bombings in Bali, Spain and London, trials involving persons accused of al-Qaeda-linked terrorism are different in complexity and magnitude. All of the types of potential prejudice may be at play. There may be extensive media coverage of related events well before charges are laid. Statements by authority figures such as politicians and police, informal gossip, prejudicial racial and ethnic stereotypes of the accused, fears of personal harm for oneself and for loved ones and widely shared feelings of cultural victimization may all be present. A mere focus on mass media-based publicity deflects attention from these other factors that can improperly influence jury outcomes.

## **Jurors Sometimes Lack Self-Awareness of Their Prejudice**

Sometimes judges address the whole panel of assembled jurors about the need to be impartial in deciding the case. They invite any jurors who believe they may not be impartial to identify themselves and then excuse them. The assumption is that the remaining panel members have open minds. A case study involving a Canadian couple accused of killing their child raised serious questions about this assumption.<sup>40</sup> Although the defense lawyers were successful in obtaining a ban against pretrial media coverage, the death of the child aroused considerable community gossip, including very strong feelings against the two accused. At trial the judge addressed the whole panel of over 125 jurors and asked any persons who could not be fair in judging the case to excuse themselves. Only a few persons did so. The judge then allowed a challenge for cause in which jurors were randomly called and questioned individually. Many of the persons who were questioned under this procedure admitted biases that they had not disclosed in response to the judge's original request to step forward. (Most were subsequently excused from the panel.)

There are different reasons for not disclosing bias, including simple unwillingness to admit bias in front of other jurors, but survey research in high profile criminal cases has shown that a major reason for some jurors, often substantial numbers of them, may be that these jurors are not self-cognizant of their biases. Another reason involves the tendency to give socially desirable responses, that is say what they believe is expected of them.<sup>41</sup>

Telephone survey research for the expected trial of John Walker Lindh, the so-called ‘American Taliban,’ serves as a particular example. Mr. Lindh, an American citizen, was captured along with Taliban fighters during the American invasion of Afghanistan.<sup>42</sup> He was brought back to the United States and faced numerous charges. In advance of trial surveys of jury-eligible persons were conducted in the northern Virginia venue in which he was scheduled to be tried as well as four other venues across the country: Chicago, Minneapolis, San Francisco and Seattle.

Citizens in Virginia were more likely to have been exposed to greater amounts of media publicity than other areas of the country<sup>43</sup> and the surveys revealed that Virginians were more likely to have known persons killed in the attacks. Nevertheless, levels of hostility toward Mr. Lindh, as expressed in the surveys, were generally similar across all five locations.

The survey first asked the respondent a lengthy series of questions about Mr. Lindh before asking if he or she could be a fair and impartial juror for his trial. While some persons said they could not be fair and impartial jurors, a substantial number said they could and explained why. However, among the self-professed impartial persons many had just offered responses to other questions that were in sharp contradiction to their professions of impartiality. These responses are documented in detail elsewhere,<sup>44</sup> but several examples help to illustrate the inconsistencies and raise serious questions about the jurors’ professed ability to be an impartial juror.

*Respondent #165* asserted she could be impartial in deciding Mr. Lindh’s guilt or innocence and explained why by saying ‘It must be proven with facts.’ Yet her just expressed responses to other questions on the survey indicated that she had a ‘strongly unfavorable’ impression of the accused, that ‘he is a traitor,’ that he was ‘definitely guilty,’ ‘he killed Americans and should be shot.’ That a jury’s not guilty verdict would be ‘very unacceptable,’ that he should experience ‘death by hanging’ for the reason that ‘I want him to feel pain.’

*Respondent # 506* also said he could be an impartial juror by explaining, ‘I believe in the system and that everyone should have a fair trial.’ But similar to Respondent #165 other interview responses raise questions about his openness of mind. He said Mr. Lindh was ‘Punk-a traitor’ who was ‘definitely guilty’ because ‘they captured him with a gun in his hand where [a]

CIA agent was killed.’ This respondent further stated that if a trial by judge and jury found the accused not guilty, he would find the verdict ‘very unacceptable.’

*Respondent #514* explained that she could be an impartial juror because ‘I feel like it’s my Christian duty to be fair, and listen to all of the things set forth in the courtroom; to me that’s the most important thing - my responsibility as a citizen and my Christian duty to be fair.’ Yet, like other respondents documented above, her earlier answers directly contradicted this profession of ability to be impartial. She had just said, ‘I feel that he was a traitor to our country. And now that he’s been caught, he’s trying to reverse his decision in order to avoid paying the price;’ ‘It’s because I feel he was a traitor who embraced the life of terrorism;’ ‘He has to be tried first but he was with them. He was training with them and didn’t have a very good attitude when he was captured.’

In short, as these examples illustrate, there can be a substantial disjuncture between professions of having an open mind as a juror and expressed feelings and beliefs about an accused.

## **V. Case Study: The Trial of Dr. Sami-Al-Arian**

### **Background: United States v. Sami Al-Arian**

Professor Sami Al-Arian, a Palestinian legal resident in the United States, holding a doctorate from an American university, was a professor of computer science at the University of Southern Florida.<sup>45</sup> Since the 1990s Professor Al-Arian had been an outspoken and harsh critic of United States policies toward Israel and the Palestinians. Since 1995 he had been the subject of negative news coverage by the Tampa and St. Petersburg, Florida newspapers. In 2003 Al-Arian and others were charged with supporting the Palestinian Islamic Jihad movement. Shortly after, Al-Arian was fired from his tenured university position on the grounds that he had improperly used his university position in support of Palestinian causes.

In 2005 Professor Al-Arian and three other men were scheduled for trial on multiple charges, including conspiracy to commit murder abroad, money laundering and obstruction of justice associated with other charges that the men had helped to organize and finance the Palestinian Islamic Jihad, a designated terrorist group that was responsible for more than 100 deaths in Israel and the occupied territories. The Attorney General of the United States declared

in front of national television cameras that the charges were an important strike against terrorism. Local and national newspapers carried many stories on the background leading up to the trial. Almost 1000 articles related to Al-Arian in the *Tampa Bay Tribune* and *St. Petersburg Times* between January 2001 and mid-April 2005. No systematic data were available for newspaper coverage in the decade before 2001, but the number of articles would number in the hundreds, perhaps higher. Al-Arian's notoriety played a prominent role in the 2004 primary elections for a U.S. Senate seat when the former University of South Florida president, Betty Castor, running for that seat, was heavily criticized in advertisements for not firing Al-Arian much earlier than she did, and this probably contributed to her defeat. In those ads Al-Arian was described as a 'suspected terrorist.' Local television coverage of the arrest and charges was intense, including detailed television coverage of Al-Arian being led off in handcuffs after his arrest. Commentary alleging his guilt was featured on the nationally syndicated Fox network's 'O'Reilly Factor' television program.<sup>46</sup>

Al-Arian and the co-defendants denied that they condoned violent activities, and that any promotion of Islamic Jihad was protected by political speech permitted under the First Amendment of the U.S. Constitution. They further contended that their money-raising efforts were to support Palestinian charities. If convicted, Al-Arian and his associates each faced several life sentences.

### **Concerns About Trial Prejudice**

With this background as context a series of questions arose about the ability to obtain a fair and impartial jury. Had the community been tainted by the long controversy involving Dr. Al-Arian and the relevance of the controversy to the Tampa Bay area from which the jurors would be drawn? To be sure, the case received nationwide attention and was taking place in the still-resounding aftermath of the September 11, 2001 attacks, but the saturation of and relevance to the Tampa Bay community was extremely high. The Tampa Bay area has a large Jewish population that, some speculated, would be especially offended by Al-Arian's verbal attacks on Israel and Jews. In addition, the Tampa Bay area has a sizeable population of persons of Arab background and Muslim religion, many of whom are not American citizens. There was indirect evidence of endemic prejudice in the area against Arabs and persons of the Islamic religion.

## **Juror Questionnaires**

As noted above, in contrast to common perceptions about the American trial process, jurors in most federal courts, as opposed to state courts, are subject to limited pre-trial questioning. Questioning is usually conducted only by the trial judge.

The defense teams for all of the accused were concerned about whether they should seek a change of venue or a lesser remedy, such as an extended *voir dire* with lawyer participation in the process. At minimum there was a need to provide evidence that, if extraordinary prejudice existed there was a need for an extraordinary remedy. On prima facie grounds the trial judge was persuaded to send prospective jurors a lengthy questionnaire developed in conjunction with the lawyers for the prosecution as well as the defense. The questionnaire contained 83 questions with the additional instruction that the juror should explain answers in their own words on the questionnaire and not consult with anyone else about how to respond to the questions.<sup>47</sup>

A letter accompanied the questionnaire from the court. The juror was instructed to omit his or her name and simply identify use an assigned juror number. The final page of the questionnaire required the juror to declare as follows: ‘I declare under penalty of perjury that the information which I have provided in this juror questionnaire and any attachments is true and correct. I further declare that I have completed this questionnaire without anyone’s assistance.’ The questionnaire was sent to 500 randomly selected names using the court’s normal procedures for drawing a jury panel.

## **Responses on the Questionnaires**

As a first matter in considering the data, the court’s juror survey raises questions about response rates. Of the 500 hundred questionnaires only 328 were returned. Sixty-eight surveys were returned because the person had moved. Discounting those persons, the sample would be 432, but 104 questionnaires unanswered, yielding a response rate of only 76 percent. This is surprising since the survey was an official command of the Federal Court. Possibly many persons ignored the command because they did not want to serve in a trial that might last as long as six months. But there is another possible reason, namely fear for personal safety. Fear of the

serving as a juror may have been a significant factor in the low response rate. This issue is discussed in more detail later in this chapter.

The juror questionnaire contained open-ended questions that required the potential jurors to explain in their own words reasons behind their beliefs. It concluded with three crucial questions. Question 81 asked, ‘Is there any reason that you could not be completely fair and impartial to the defendants in this case?’ Question 82 asked the same question about being fair and impartial to the government? Question 83 then asked the juror to explain affirmative answers to either of these two questions. In response to the question about being impartial to the accused 34% of jurors declared themselves to be biased. No respondents said they were biased against the government.

What were the bases of this lack of impartiality? In the limited space available for this chapter I offer several edited examples. Some statements are in italics to draw especial attention to what the prospective jurors said.

*Juror 009: [I have] read newspapers, O’Reilley’s Spin Zone TV Newscasts and CNN News, O’Reilley said he believed Al-Arian was guilty and he would spy on him everywhere he went in order to get evidence; I heard that while Al-Arian was a Professor at University of South Florida he was also raising money to sponsor terrorist groups. I have discussed the case with my husband and sister-in-law. I was angry; I feel he is guilty and should be punished. Yes, it (election controversy) would [bias me]; Mr. Martinez accused Mrs. Castor of doing nothing when the accusations about Al-Arian were made public; I feel he is guilty. Yes [I would be biased]. [Al-Arian is] guilty. Government [law officials] found evidence which incriminates him.*

*Juror 204: I wondered why it took so long to build a case against Dr. Al-Arian. It seems like the evidence was there a long time before they arrested him. I wondered how he could stay and live in this country without being asked to leave. I believe on what I have seen on TV, he should have been arrested a long time before he was. Yes, I think he is 99.9% likely to be guilty of what he is charged with based on what I have seen heard, and read on TV and in the newspaper; I believe that Dr. Al-Arian along with his partners helped to raise money and funnel that money to organizations that are against the U.S. Yes, having lived with the hate that Arabs and Palestinians have for the U.S. makes me wonder why we would give assistance to these types of individuals or countries. Yes [I am biased] [Al-Arian is] guilty. Everything that I have read*

and heard about this case has led me to believe that he and his group are guilty. *I would have a hard time being fair and impartial to people who take life for granted.*

*Juror 124:* If Sami Al-Arian is on record for supporting these ‘charitable’ groups that are actually terrorist groups, then I believe that he is someone who supports/incites terrorist attacks or activities against the United States. Right now I think he is guilty. *There would have to be overwhelming evidence to convince me of his innocence.* I don’t know if that labels me impartial or not; Guilty. Footage aired on TV news allegedly shows Sami Al-Arian speaking in support of terrorist groups and activities. *Sami Al-Arian has ties directly or indirectly to Qaida or other terrorist groups.* I already think he is guilty based on news and publicity. I am assuming that it means that I am not impartial.

*Juror 316:* I feel they are both guilty of terrorism acts against the U.S.; I feel Al-Arian is a threat either directly or indirectly to the U.S. citizens, and that he is guilty of the crimes as charged. Yes, my opinions are formed and extremely unlikely to change. What I’ve read/heard points to Al-Arian’s guilt when he’s labeled a terrorist. Yes, very difficult to be impartial. Reports on the defendant’s connection to terrorist organizations, money laundering charges, monies paid to individuals to carry out suicide attacks; Terrorism charges are hard to swallow after 9/11; if you live in America you should not be involved in activities that are harmful to American citizens.

*Juror 480:* Too much to state here—read and followed everything I could. I have a daughter attending USF in Tampa and the jerk was a professor there. *Sami Al-Arian looks like a Moslem Radical to me;* Sami is probably one of those ‘kill the infidels;’ He’s probably had a hand in fund raising for terror organizations. . . .*What do you think! I saw him all sweaty and screaming with laundry wrapped on his head on those films clips.* Looked obvious to me. I think he’s guilty of fund raising for terrorists. What I’ve read and seen in the media *you can take my vote now and save all that taxpayer money. Remember 911?* I think Sami is guilty!

However, questions like Q81 frequently evoke socially desirable responses about being impartial that may be inconsistent with actual attitudes and beliefs. Therefore, I examined the total responses to the juror questionnaire of persons who declared themselves not biased and

found 17 additional jurors who were inconsistent. Consider some edited examples from persons who professed ability to be impartial:

*Juror 120:* They are accused of funding terrorist activities and plots and make out like ordinary people; It has been going on so long, most of the facts are forgotten by all, [I have] *outrage that he's at least somewhat behind this*; I'm not sure (it would be difficult to sit as fair and impartial juror). [He is] *guilty. The government has tons of evidence of at least some acts and has been shown these people could pull a 9/11 on us.* They were in Tampa.

*Juror 139:* [I have seen] TV news reports, newspaper articles, comments from my parents. I feel that Sami Al-Arian and his supporters are liars and terrorists and that they use our freedoms in the U.S. as a cover for their terrorist activities. I think he is a terrorist. Yes [it would be difficult to sit as fair and impartial juror]. He is Guilty. [I base my feelings on] What I have read and heard from the newspapers and my parents.

*Juror 320:* [I have seen] newspaper and TV stories leave me to believe they are all guilty. They had the funds and opportunity to do these things. [I am] upset that others can come to America and get away with anything. The man and all of his co-defendants are guilty! Yes, [it would be difficult to sit as fair and impartial juror]. I feel that the group had been planning some terrorist activities for a long time. They had been spreading the word to others around the country for more support and were never stopped. Yes, [it would be difficult to sit as fair and impartial juror]. Yes [from what I have heard] he is guilty. [I have formed an opinion that he is] guilty. As stated before, the group ... had plenty of papers, etc. which proved what they were doing. I feel the government will have enough evidence to prove their case before coming to court....

Classifying these additional respondents as 'not impartial' leads to an estimate of 129 of 328 persons with very strong biases, or 39% of the sample.

### **Interest Prejudice in the Community: The Effects of September 11, 2001**

Research for the John Walker Lindh ('American Taliban') case, as described above, documented the strong reactions that the attacks of 9/11 had on the American public. The attacks were seen not only in terms of physical fear, but also feelings of hostility arising from strong emotional reactions that American values and culture were being attacked. Similarly, in the Al-

Arian case many jurors mentioned the September 11, 2001 attacks on various questions in the lengthy survey. One question asked jurors if they believed Palestinians were involved in the 2001 attacks. Consider these examples: Juror 004; ‘Sept.11;’ Juror 008: ‘I have family and friends living in New York and are still suffering from 9/11 attack;’ Juror 018, ‘The events of 2001 and subsequent involvement impact on entire society...;’ Juror 025: ‘As with 9/11, these people demonstrate the ability to live amongst us unnoticed...;’ Juror 038: ‘Every American was affected by 9/11 & I wonder and fear what could be next;’ Juror 362: ‘Friends and family associates murdered on 9-11-01.’

### **Interest Prejudice: Fear of Being a Juror in the Al-Arian case**

Consider Juror 280’s answer to a question about serving on the Al-Arian jury: ‘Due to the nature of the case, I would potentially fear for the safety of self and family.’ Juror 414 said: ‘It is important my identity be kept secret from the defendants and from the media.’ Juror 343 asked: ‘What if these defendants are found guilty? What about retaliation against the jurors? What’s to stop their terrorist affiliants from coming after us? Or bombing the courthouse, etc.(?).’ Similarly, Juror 367 wrote ‘I think the biggest fear of people to serve on this jury will be reprisal. How do you know if you are in harm’s way from these people? I feel intimidated.’ Juror 422 said: ‘If these men are guilty and associated with terrorists how safe will it be for myself and family?’ Juror 178 expressed a similar concern: ‘I am worried that my fear of terrorists would affect me to be fair and impartial’

### **Generic Prejudice Regarding Moslems, Arabs/ Palestinians and Non-citizens**

A number of items in the lengthy questionnaire gave respondents the specific opportunity to express any attitudes or beliefs that they had about Palestinians and other Arabs and toward Moslems. One set of questions asked whether non-citizens were entitled to the same constitutional protections that citizens are accorded. Both jurors who declared that they could not be impartial and those who either did not answer questions or who declared themselves to be impartial on the matter of Mr. Al-Arian’s guilt expressed many beliefs and attitudes that show negative stereotyping of Arabs and Moslems. Fully 50 percent of jurors expressed a view that Arabs/Palestinians or Muslims were more violent than other ethnic groups or were responsible in some way for the September 11 attacks on the United States. Many jurors would not accord non-

citizens the same rights of free speech that citizens have, particularly when it is seen as, ‘espousing terrorism’ or ‘degrading the USA.’ Some were even more explicit such as juror 480 reported above who said, ‘[I saw] him all sweaty and screaming with laundry wrapped on his head on those films clips.’

### **Community/ Conformity Prejudice**

It is clear from juror responses, both those admitting bias and those who did not express opinions on guilt, that extensive Tampa Bay area television, radio and newspaper accounts about Mr. Al-Arian had been watched and read by the whole community. Many of these opinions apparently developed prior to the charges being laid against the accused, although they were fanned by subsequent media coverage. Mr. Al-Arian’s residence, employment, and publicized speeches and alleged terrorist-supporting activities occurred in the community in which he was being tried. Some respondents drew attention to this fact with a sense of concern or even of outrage. As a group, the jurors who answered the questionnaire appeared very aware of many details about Mr. Al-Arian. The jurors were cognizant that a not guilty verdict might be met with outrage by some of their friends, family and co-workers. This raised a reasonable concern that a juror or jurors might be influenced by community feeling about the proper verdict in the trial.

### **The Trial and Its Outcome**

Based on the juror questionnaire responses and survey research findings tendered by other defendants, the trial judge deviated from customary procedures. He conducted some preliminary questioning of prospective jurors himself and then allowed both defense and prosecution lawyers to conduct further questioning. A number of jurors were dismissed on hardship grounds because of the expected length of the trial and other jurors were dismissed by the judge ‘for cause’ based upon their questionnaire answers and their in-court examination. Other jurors were dismissed through peremptory challenges. The final jury consisted of twelve persons plus four alternate jurors, who would replace any jurors that, for illness or other reasons, would be dismissed before the jury reached its verdict.

The trial lasted six months. The government produced over 100 witnesses, many flown in from Israel specifically for the trial. Other evidence consisted of hours of surreptitious Federal

Bureau of Investigation wiretaps of conversations involving Mr. Al-Arian and other defendants. After the prosecution closed its case, Mr. Al-Arian's defense counsel concluded the prosecution's case was so weak that there was no need to call defense evidence. After final arguments and judicial instructions the case was placed in the hands of the jury. After thirteen days of deliberations the jury rejected the charges that Mr. Al-Arian and the three co-defendants operated a North American cell for Palestinian Islamic Jihad. The jury unanimously found Mr. Al-Arian not guilty of conspiring to commit murder abroad, money laundering and obstruction of justice; it could not reach consensus on other counts. Two of the other defendants were acquitted of all charges and a third was found not guilty of the main charges and the jury could not reach consensus on the remaining charges.<sup>48</sup>

### **Reflections on Jury Trials Involving Charges of Terrorism**

Each case has unique characteristics and must be evaluated on its own terms. Prior to trial public opinion surveys were also undertaken for the Al-Arian case.<sup>49</sup> The results suggested that if the trial were held in Atlanta Georgia, a city in the same federal judicial district as Tampa, some of the problems of media publicity would have been much less. Possibly fears of jurors about retaliation expressed in the Tampa area would have been less. Possibly prejudice against persons associated with Islam or Arab culture would have been less.

Conceivably there was still some prejudice among the Al-Arian jurors who rendered the not guilty verdicts. If the government's case had been stronger, those prejudices may have come into play. Prejudices are likely to have their strongest influence in instances when the evidence is ambiguous. The Honess et al. study, described earlier, and related research indicates that strong negative attitudes and beliefs have a subtle and invidious impact on the way that jurors interpret trial evidence.

Post-charge media coverage in the Al-Arian case greatly added to the problems of the defense. Because of contempt laws accused persons tried in England, Australia, or Canada would not have been subject to the same media coverage. On the other hand, negatively toned media coverage of events prior to the laying of charges might occur in these other countries, just as occurred in the Maxwell trial. At least for the near future, the prior bombings and terrorist threats have created an atmosphere of fear of and hostility toward terrorism that may lie in the minds of

prospective jurors. Problems of community gossip, generic prejudices against Moslems and Arabs, and juror fears of retaliation after a conviction might well be present, possibly even in greater degrees than were present in the Al-Arian case. Research on the Al-Arian jurors' response to the pre-trial questionnaire as well as research involving other cases indicates that jurors may hold strong prejudices but still profess an ability to be an impartial in deciding guilt or innocence. A jury randomly selected from a population holding such prejudices would not produce a fair and impartial hearing of the charges. It would seem that, similar to the steps taken in England's Maxwell case, a trial judge should consider extraordinary problems that may accompany terrorism trials and be willing to take extraordinary steps to ensure that the jury consists of persons who can weigh the evidence fairly and impartially. The nature of these procedures will, of course, have to be sensitive to the common law procedural practices of the particular country.

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- <sup>1</sup> Neil Vidmar, A Historical and Comparative Perspective on the Common Law Jury, in Neil Vidmar, (ed.), World Jury Systems (Oxford 2000).
- <sup>2</sup> Archives of the September 11, 2001 terrorist attack on America at the World Trade Center Towers in New York City and The Pentagon in Washington, <http://www.september11news.com/>
- <sup>3</sup> [http://en.wikipedia.org/wiki/2005\\_Bali\\_bombings](http://en.wikipedia.org/wiki/2005_Bali_bombings); <http://edition.cnn.com/SPECIALS/2002/bali/>
- <sup>4</sup> [http://en.wikipedia.org/wiki/March\\_11,\\_2004\\_Madrid\\_attacks](http://en.wikipedia.org/wiki/March_11,_2004_Madrid_attacks); BBC News Online readers react to the Madrid bombings [http://news.bbc.co.uk/1/hi/in\\_depth/europe/2004/madrid\\_train\\_attacks/default.stm](http://news.bbc.co.uk/1/hi/in_depth/europe/2004/madrid_train_attacks/default.stm)
- <sup>5</sup> <http://www.cnn.com/SPECIALS/2005/london.bombing>/<http://news.bbc.co.uk/1/hi/uk/4661059.stm>
- <sup>6</sup> For the United States, <http://www.dhs.gov/dhspublic/index.jsp>; for the United Kingdom <http://www.mi5.gov.uk>; for Australia <http://www.nationalsecurity.gov.au>
- <sup>7</sup> For the United Kingdom <http://www.cpcr.org.uk/eventreport.html>
- <sup>8</sup> For the United States <http://unisci.com/stories/20014/1129014.htm>; for the United Kingdom, <http://www.jihadwatch.org/dhimmiwatch/archives/004325.php>; for Australia [http://www.hreoc.gov.au/racial\\_discrimination/isma/consultations/launch\\_speech.html](http://www.hreoc.gov.au/racial_discrimination/isma/consultations/launch_speech.html)
- <sup>9</sup> Neil Vidmar, World Jury Systems (Oxford 2000); Neil Vidmar, Juries and Law Assessors in the Commonwealth: A Contemporary Survey, (2002) 13 Criminal Law Forum 385-407.
- <sup>10</sup> Nancy King, The American Criminal Jury, in Neil Vidmar, (ed.), World Jury Systems (Oxford 2000).
- <sup>11</sup> Neil Vidmar and Valerie Hans, Chapter 3 in American Juries, book manuscript in preparation.
- <sup>12</sup> A ‘continuance’ to allow prejudice to dissipate is an alternative measure to change of venue, but is seldom used.
- <sup>13</sup> Nancy King, The American Criminal Jury, in Neil Vidmar, (ed.), World Jury Systems (Oxford 2000).
- <sup>14</sup> Neil Vidmar, at note 1, above.
- <sup>15</sup> David Corker and Michael Levi, Pretrial Publicity and Its Treatment in the English Courts, (1996) Criminal Law Review 622.
- <sup>16</sup> Neil Vidmar, Case Studies of Pre- and Mid-trial Prejudice in Criminal and Civil Litigation, (2002) 26 Law and Human Behavior 73.

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<sup>17</sup> Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy* in Neil Vidmar, (ed.), *World Jury Systems* (Oxford 2000); Neil Cameron, Susan Potter and Warren Young, *The New Zealand Jury: Towards Reform*, in Neil Vidmar, (ed.), *World Jury Systems* (Oxford 2000).

<sup>18</sup> Sally Lloyd-Bostock and Cheryl Thomas, *The Continuing Decline of the English Jury*, in Neil Vidmar, (ed.), *World Jury Systems* (Oxford 2000); The Auld Report at <http://www.criminal-courts-review.org.uk>

<sup>19</sup> Neil Vidmar, *Case Studies of Pre- and Mid-trial Prejudice in Criminal and Civil Litigation*, (2002)26 *Law and Human Behavior* 73; Christine Studebaker and Steven Penrod, *Pretrial Publicity—The Media, the Law, and Common Sense*, (1997) 3 *Psychology Public Policy and Law* 428; Nancy Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-analytic Review*, (1999) 23 *Law and Human Behavior* 219.

<sup>20</sup> Stephen Jones and Holly Hillerman, *McVeigh, McJustice, McMedia*, (1998) 1998 *Chicago Legal Forum* 53.

<sup>21</sup> Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and Terrorist Trials*, (2003) 78 *Chicago-Kent Law Review*, 1143.

<sup>22</sup> Browyn Naylor, *Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials*, (1994) 53 *Cambridge Law Review* 592-501; David Corker and Michael Levi, *Pre-trial Publicity and Its Treatment in the English Courts*, (1996) *Criminal Law Review* 622-632; Terry Honess, S. Barker, E.A. Charman and Michael Levi, *Empirical and Legal Perspectives on the Impact of Pretrial Publicity*, (2002) *Criminal Law Review* 719-727.

<sup>23</sup> David Corker and Michael Levi, *Pre-trial Publicity and Its Treatment in the English Courts*, (1996) *Criminal Law Review*, 622-632.

<sup>24</sup> Browyn Naylor, *Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials*, (1994) *Cambridge Law Review* 492.

<sup>25</sup> R. v. Maxwell unreported May 25 1995; Francis Gibb, *The Result of the Maxwell Brothers' Case Has Put the System Under the Spotlight*, (January 30, 1996), *The London Times*, at 31.

<sup>26</sup> <http://www.soccergaming.tv/archive/index.php/t-21015.html>;  
<http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2003/06/03/nposh103.xml>

<sup>27</sup> In Canada, the judge may proscribe mass media publication of pre-trial proceedings if such publication might jeopardize the right to a fair trial; in fact the accused has the right to request that the judge enter such an order. The proscription might even apply to the trial itself if publication might jeopardize a future trial of the accused or a co-accused. Jurors are proscribed from discussing their verdict under threat of a hefty fine and up to six months in jail. In typical trials jurors are randomly chosen from the venire and not questioned. Except for a limited number of peremptory challenges allowed to each side the jurors are sworn and seated. Canada does allow exceptions to the

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pre-trial questioning process if one of the parties, usually the accused, convinces the judge that there is a likelihood of some jurors not being impartial due to pre-trial publicity. In these instances a limited number of questions may be put to potential jurors in what is called a ‘challenge for cause.’ Two ‘triers’ chosen from the jury pool then determine if the potential juror is impartial. A change of venue is available if the judge concludes that the community is sufficiently tainted that a challenge for cause proceeding, combined with juror instructions about the responsibility of their oath to remain impartial, would be insufficient to eliminate bias. *See* Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, in Neil Vidmar, (ed.), *World Jury Systems* (2000).

<sup>28</sup> Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, in Neil Vidmar, (ed.), *World Jury Systems* (Oxford 2000).

<sup>29</sup> E.g., Pennington and Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, (1991) 13 *Cardozo Law Review* 519; Pennington and Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, (1982) 62 *Journal of Personality and Social Psychology* 189; Holstein, *Juror’s Interpretation and Jury Decision Making*, (1985) 9 *Law and Human Behavior* 83; Casper et al., *Juror Decision Making, Attitudes and Hindsight Bias*, (1989) 13 *Law and Human Behavior* 291; Smith and Studebaker, *What Do You Expect?: The Effect of People’s Knowledge of Crime Categories on Fact Finding*, (1996) 20 *Law and Human Behavior* 517.

<sup>30</sup> Terry Honess, E. Charman and Michael Levi, *Factual and Affective/Evaluative Recall of Pretrial Publicity: Their Relative Influence on Juror Reasoning and Verdict in a Simulated Fraud Trial*, (2003) 33 *Journal of Applied Social Psychology* 1404.

<sup>31</sup> Neil Vidmar, *Case Studies of Pre- and Mid-trial Prejudice in Criminal and Civil Litigation*, (2002) 26 *Law and Human Behavior* 73.

<sup>32</sup> Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials*, (2003) 78 *Chicago-Kent Law Review* 1143; Nancy Gertner and Judith Mizner, *The Law of Juries* (San Francisco, 1970) at Chapter 5.

<sup>33</sup> E.g., Greenberg et al., *Terror Management Theory of Self Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, in Mark Zanna, (ed.), *Advances in Experimental Social Psychology*, Vol. 29, 61 (1997); Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention and Level of Emotionality*, (1966) 20 *Law and Human Behavior* 565; Kerr et al., *On the Effectiveness of *Voir Dire* In Criminal Cases With Prejudicial Pretrial Publicity: An Empirical Study*, (1991) 40 *American University Law Review* 665; Kramer et al., *Pretrial Publicity, Judicial Remedies and Jury Bias*, (1990) 14 *Law and Human Behavior* 409; James Ogloff and Neil Vidmar, *The Impact of Pretrial Publicity On Jurors: A Study to Compare the Effects of Television and Print Media In a Child Sex Abuse Case*, (1994) 18 *Law and Human Behavior* 507. On the other hand, there is evidence that strong emotional sympathies for victims also adversely affect rational decision making in verdicts, *see* Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, (1997) 65 *Tennessee Law Review* 1 for a review.

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- <sup>34</sup> Emile Durkheim, *The Division of Labor in Society* (George Simpson, trans.) (1893/1967).
- <sup>35</sup> Neil Vidmar and Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, (1984) 22 *Osgoode Hall Law Journal* 487.
- <sup>36</sup> *United States v. McVeigh*, 955 Federal Supplement 1281 (United States District Court, District of Colorado 1997); *see also* *United States v. McVeigh* Federal Supplement 1467, 1473 (United States District Court, Western District of Oklahoma 1996)
- <sup>37</sup> For reviews of this research, *see* Nancy Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-analytic Review*, (1999) 23 *Law and Human Behavior* 219; Christina Studebaker and Steven Penrod, *Pre-trial Publicity :The Media, the Law and Common Sense*, (1997) 3 *Psychology, Public Policy and Law* 428; Neil Vidmar, *Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation*, (2002) 26 *Law and Human Behavior* 73.
- <sup>38</sup> Terry Honess, E. Charman and Michael Levi, *Factual and Affective/Evaluative Recall of Pretrial Publicity: Their Relative Influence on Juror Reasoning and Verdict in a Simulated Fraud Trial*, (2003) 33 *Journal of Applied Social Psychology* 1404.
- <sup>39</sup> Neil Vidmar, *Case Studies of Pre- and Mid-trial Prejudice in Criminal and Civil Litigation*, (2002) 26 *Law and Human Behavior* 73.
- <sup>40</sup> Neil Vidmar and Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, (1984) 22 *Osgoode Hall Law Journal* 487; *see also* Mize, *On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter The Jury Room*, (1999) 36 *Court Review* 10.
- <sup>41</sup> *Ibid.* and Neil Vidmar, *Case Studies of Pre- and Mid-trial Prejudice in Criminal and Civil Litigation*, (2002) 26 *Law and Human Behavior* 73.
- <sup>42</sup> Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials*, (2003) 78 *Chicago-Kent Law Review* 1143.
- <sup>43</sup> Declaration of Steven Penrod in Support of Defendant John Walker Lindh’s Motion to Dismiss , or in the Alternative, for Change of Venue, *United States v. Lindh* (United States District Court, Eastern District Virginia No.02-37-A).
- <sup>44</sup> Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials*, (2003) 78 *Chicago-Kent Law Review* 1143.
- <sup>45</sup> For details of the case, including a copy of the indictment and other legal documents *see* <http://reports.tbo.com/reports/alarian> or [http://en.wikipedia.org/wiki/Sami\\_Al-Arian](http://en.wikipedia.org/wiki/Sami_Al-Arian)

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<sup>46</sup> It is noteworthy that the Tampa Bay area also has a large Jewish population, possibly especially offended by Al-Arian's verbal castigations of Israel.

<sup>47</sup> The questionnaire and the data reported in this chapter are based upon, Neil Vidmar, Declaration in United States v. Al-Arian and Hatem Fariz, Case No. 8:03-CR-77-t-30TBM, United States District Court, Middle District of Florida, Tampa Division, (April 28, 2005). The jury questionnaire offered many opportunities for the juror to express in his or her own words impressions and any biases about the case that arose from media coverage and from discussions about the case with family members, co-workers, friends and acquaintances. The responses offered by the jurors provided important insights into the degree of community attitudes and beliefs about Mr. Al-Arian and his likely guilt in the charges that have been laid against him. They also provided an opportunity to examine inconsistencies in the attitudes and beliefs of jurors who stated that they could be fair and impartial. For example Question 40c asked whether the juror had any connection with the defendants in the case and or whether they had heard or read about it. This question also allowed the juror an opportunity to express his or her opinion. Question 41 offered a similar opportunity and so did Question 42a, which asked, 'What were your reactions or impressions based on what you saw, read or heard?' Questions 43b offered a similar opportunity for self-expression. Questions 44 and 45 asked about the Senatorial Primary Race controversy about Mr. Al-Arian and again offered the opportunity for jurors to state their impressions and feelings in their own words. Question 44d specifically asked the juror: 'Based on this opinion, would it make it difficult for you to sit as a fair and impartial juror in this type of case?' and allowed space to express the reason(s) for the opinion. Question 48 asked: 'Is there anything you have seen, heard or read about that would interfere with your ability to render a fair verdict in this case solely on the evidence presented in court?' Question 49 asked: 'Have you formed an opinion as to the innocence or guilt of any of the defendants in this case before hearing the evidence?' and offered the options of 'Guilty,' 'Innocent' and 'No Decision' followed by 'Please explain what led to your position.' Question 50 asked about opinions on pre-trial rulings and asked for an explanation. Question 52 that asked about the conflict between Israel and the Palestinians also allowed another opportunity for self-expression. Q81 asked 'Is there any reason that you could not be completely fair and impartial to the defendants in this case?' Question 82 asked the same question about being fair and impartial to the government and then asked the juror to explain 'yes' answers to either of these two questions.

<sup>48</sup> Michael Fechter, Elaine Silvestrini and Lenny Savino, No Guilty Verdicts in the Al-Arian Trial, (December 6, 2005), The Tampa Tribune.

<sup>49</sup> Edward Bronson, Declaration in United States v. Al-Arian and Hatem Fariz, Case No. 8:03-CR-77-t-30TBM, United States District Court, Middle District of Florida, Tampa Division, (April 28, 2005).