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LEAVING WONDERLAND:  
DISTINGUISHING TERRORISM FROM OTHER TYPES OF CRIME*

Jonathan Leiken†

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"Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first – verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

Lewis Carroll, Alice's Adventures in Wonderland

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I have never felt more like Alice, as she witnessed the backwards trial of the Knave of Hearts for stealing the Queen's tarts, than I did during the opening moments of jury selection of my very first trial as a federal prosecutor. It was July of 2002, less than a year after the terrorist attacks of September 11, 2001. There I stood, waiting to participate in our American criminal trial process for the very first time -- a process which I had studied and admired for years -- when I was confronted with a problem that, for a moment, undermined my faith and confidence in the entire system.

One of the fundamental principles of our American criminal justice system is that citizens will participate in the process as trial jurors, and that they will do so willingly and with a commitment to being impartial arbiters of the facts based upon the evidence presented to them. What I witnessed during jury selection of my first trial was a significant number of citizens in the jury pool who showed no such commitment. Indeed, some of these potential jurors showed a Queen of Hearts-like willingness to skip the deliberations altogether and to convict the defendant of wrongdoing with which he was not even charged, terrorism, based upon the only two things that the jury pool then knew about him: his name and what he looked like.

The defendant's name was Usama Sadik Ahmed Abdel Whab. He looked like what he was: an Arabic male in his mid-twenties.

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The judge specifically advised the jury pool -- 35 plus citizens filling all of the rows of her courtroom -- that the defendant was charged with two crimes and two crimes only: passport fraud and providing a false statement to a federal agent. The judge emphasized repeatedly that there were no other charges in the case. After so advising the jury pool, Judge McMahon asked (as the judge always does at this point in the trial) the standard, general preliminary question: whether any of the potential jurors felt that they could not be fair and impartial if they were selected to sit on the jury. An astounding number of hands shot up.

This was my first trial, and so I had no other trials with which to compare this immediate opting-out by so many members of the jury pool. Nevertheless, I found it astounding that such a large number would raise their hand in response to this question. How could these people already know, based on the limited information given to them, that they could not be fair and impartial in this trial? Now that I have tried a number of other criminal cases, I know that my intuitions were correct: very few, if any, potential jurors typically raise their hands when asked this preliminary, general question regarding their ability to be impartial in the trial.

One by one, the judge questioned these people as to their asserted incompetency to serve as impartial jurors. One by one, these citizens made statements revealing that they believed that the case had something to do with terrorism and the "war on terror."

I recall one woman saying "I just couldn't..." as she eyed the defendant accusingly. A number of other potential jurors talked about how they had lost loved ones on 9/11. Others expressed fear of Whab. Others criticized the Government for what they believed to be racial profiling after 9/11. One by one, Judge McMahon dismissed each of these citizens from the jury pool.

Hanging in the courtroom that day was a palpable sense of distrust in the system: these citizens seemed to believe that their Government was not telling them the whole story about this man and this trial. No matter what the judge said to them, no matter how carefully she instructed them, they refused to accept that a criminal prosecution of a young Arabic male in July of 2002 was unconnected to terrorism. My gut reaction as a new prosecutor embarking upon his first trial was to feel incredibly deflated at their lack of faith in the system, in their Government, and in me as the Government's representative. I wondered how our justice system, built upon the notion that citizens will rise to the call to serve as arbiters of the facts, could function in an environment of such distrust.

I was gratified to learn that the views expressed by this group of potential jurors did not infect the entire panel. There were ultimately more than enough fair-minded citizens in the venire who embraced their duty as jurors.
Nevertheless, it took us an entire eight-hour trial day to select a jury for a very straightforward, short trial. Indeed, the presentation of evidence in the case took no longer than jury selection: one day. The jurors that were selected fulfilled their duties admirably: they listened carefully to all of the evidence and deliberated to a unanimous verdict. Ultimately, Whab was convicted on all counts of the Indictment.¹

As lead trial counsel and the United States Government’s chief representative on the Whab case, I can say quite candidly that there were no terrorism-related, hidden strategic reasons for charging Whab with the two crimes of passport fraud and lying to a federal agent. This was a simple prosecution, not unlike the hundreds of relatively simple cases that I handled during my first year as a federal prosecutor. Whab was charged with the crimes in the indictment for the sole reason that Whab, in fact, committed those crimes. But it stuck in my mind -- the way that so many potential jurors refused to participate in the case.

My original reaction to the many citizens who opted out of the Whab trial was to condemn them for what I perceived as their failures as citizens: for failing to fulfill their civic duty to participate as fair and impartial jurors in determining the facts in a criminal case. Over time, however, I have come to understand the problem and the solution somewhat differently, and it has everything to do with terrorism.

Here in America, our understanding of terrorism has been slow to develop -- much slower than in Israel, where domestic terrorism in particular has been rampant for decades. It was not until after September 11, 2001 that we as a nation began to see terrorism for what it is: a different animal than other kinds of crime. Most criminal behavior involves an individual or group of individuals working to cheat the system. Terrorism -- politically inspired violence directed against innocent civilians -- is a brand of deadly, psychological warfare that has as its goal to undermine and eventually overthrow our entire system, our political, economic and social institutions, and our entire way of life.

Because we were slow in understanding precisely what terrorism is and how it differs from other types of crime, there has been doubt and suspicion about the readiness of our existing legal procedures in America to deal with the terrorist threat. In particular, there has been doubt and suspicion about our criminal justice system and its ability to deal with terrorism: that is, its ability to provide due process of law to those individuals accused of being terrorists while protecting the nation against future acts of terrorism.

Consider the evolution of how and where our nation has charged and tried suspected terrorists. In the 1990s, terrorism cases were handled in our courts as a brand of serious criminal behavior, as seen in highly publicized and successful criminal prosecutions in the Southern District of New York: the 1993 World Trade Center bombing trial and the embassy bombings trial. After September 11, the public was told that the alleged 20th hijacker, Zacarias Moussaoui, would be tried in federal district court in Virginia, but the prosecution stalled due to the Government’s concerns about revealing to the defendant information that it deemed vital to national security. Now, the public is told that “enemy combatants” are being held and tried by the military in Guantanamo Bay, Cuba.

It is not hard to see why the public would be confused about how and where our Government will charge and try terrorists. The public is left to wonder whether the criminal trial process -- the one that they were taught about in school; the one that they know from their personal experiences and from television, newspapers, movies and books -- is equipped to deal with the national security threat presented by terrorism. The public is left to wonder whether the Government feels compelled by the perceived limitations of the system to cut corners in bringing nominal criminal prosecutions that are, in truth, secret counterterrorism measures against suspected terrorists. The public is left to wonder whether they, when called to serve as jurors in a criminal trial, are secretly being asked to decide a question of national security: a question dealing not with past events but with acts that have not yet occurred. The public is left to wonder, as so many potential jurors wondered in Whab, whether they are being told the whole story.

Forgive my pun, but we must leave Wonderland. Our criminal justice system cannot work unless the public has complete confidence in its integrity. We must cleanse the system, therefore, of cases that present issues that are beyond the scope of the criminal trial process -- cases that deal with the threat to national security posed by terrorism. The public must understand and trust that the criminal trial process will deal with specific enumerated crimes, and nothing more; that they will not be asked, as jurors, to decide an issue of national security.

We must create a system where questions of national security and accusations of terrorist activity are handled separately but within the framework of the Constitution. The system should provide due process to those accused of terrorist acts: where judges participate and review the decisions of the executive branch and the military. We must dedicate ourselves to defining the contours of this system.

Case Western Reserve University Law School has created a Counterterrorism Lab in which law students are grappling with these precise questions. It is my privilege to co-teach this lab with Visiting
Professor Amos Guiora, a former military judge in Israel who has personally presided over numerous terrorism trials. Each of the law students in the lab is assigned a particular potential forum for charging and trying suspected terrorists, among them: our federal courts; a court within the jurisdiction of the United Nations; the Foreign Intelligence Surveillance court; military tribunals; and an international criminal court. Each week, the students write an analytical paper, which they must defend in class, considering a particular angle of a terrorism prosecution in their assigned forum, such as: what rights must be guaranteed to the accused; what legal representation must be provided; and what, if any, role should be played by the media. The students in the lab have demonstrated truly innovative thinking in analyzing these difficult issues.

We must employ this same type of thinking at the highest levels of our Government to ensure that we design a system that operates under the rule of law; a system which properly balances the rights of the accused and the safety of the community in a forum separated from the criminal justice system. If terrorists are engaged in a war of ideas to undermine our society, we must combat this psychological warfare with ideas of our own, rooted firmly in the principles of our Constitution. We must educate the public about how, precisely, charges of terrorism will be handled within this framework, to combat the confusion that exists today.

If we fail in this effort; if we allow the public confusion that I witnessed during my first trial to persist and fester; our country and our justice system will only fall deeper down the rabbit hole.