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# The Politics of Jury Trials in Nineteenth-Century Ireland

**Niamh Howlin\***

*Abstract:*

*This article considers aspects of lay participation in the Irish justice system, focusing on some political dimensions of the trial jury in the nineteenth century. It then identifies some broad themes common to systems of lay participation generally, and particularly nineteenth-century European systems. These include perceptions of legitimacy, State involvement and interference with jury trials, and issues around representativeness. The traditional lack of scholarship in the area of comparative criminal justice history has meant that many of the commonalities between different jury systems have been hitherto unexplored. It is hoped that this paper will contribute to a wider discussion of the various commonalities and differences in the development of lay participation in justice systems.*

## **I. Introduction**

Lay participation in the administration of justice in Ireland is based on a transplant of the English jury of twelve local laymen selected to make a decision on the facts in a civil or a criminal case. Of course, such over-simplification obscures the various intricacies of the nineteenth-century jury system, which had evolved over time into an extremely complex set of rules, procedures and practices. To start with, there were various categories of jury. The grand jury determined whether there was sufficient evidence for a criminal prosecution to run; the trial jury (or petty jury) decided on the guilt or innocence of the defendant in criminal cases, or settled a dispute between parties in a civil action; an inquest or coroner's jury determined how death had occurred in cases that appeared suspicious. Trial juries could be common or special: the former tried the vast bulk of civil and criminal cases, while the latter were considered to have more specialised expertise, and were

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\* Dr Niamh Howlin is a lecturer at the Sutherland School of Law, University College Dublin, Ireland.

mainly used in complex commercial civil actions.<sup>1</sup> Distinctions were sometimes drawn between jurors deciding civil cases and those deciding criminal cases.<sup>2</sup> There were also various specific categories of jury which carried out specific functions, such as the mixed jury *de medietate linguae*,<sup>3</sup> the jury of matrons<sup>4</sup> and the market jury.<sup>5</sup>

The primary focus of this paper is the trial jury,<sup>6</sup> which decided civil and criminal cases at the local level, and at the superior courts of common law in Dublin.<sup>7</sup> There were different procedures involved in summoning and empanelling the various types of jury, and varying threshold requirements for jurors.<sup>8</sup> As regards trial juries (also known as petty juries), the main threshold requirements were: a property qualification (this varied from place to place and at different times during the century); social status (especially as regards special juries); residence (petty juries generally had to be local); age (usually between twenty-one and sixty years, though again this varied) and gender (all jurors were male). Additionally, jurors could be excluded by virtue of their status or occupation (for example, there were extensive exemptions and exclusions for various categories of person).<sup>9</sup> Jurors were

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<sup>1</sup> Oldham has written extensively about the English special jury: see James C Oldham, 'The Origins of the Special Jury,' (1983) 50 *University of Chicago Law Review* 137; James Oldham, 'Special Juries in England: Nineteenth Century Usage and Reform,' (1987) 8 *Journal of Legal History* 148 and James Oldham, *Trial By Jury: The Seventh Amendment and Anglo-American Special Juries* (New York University Press 2006). Parallels can be drawn with the Portuguese system of having commercial cases dealt with by peers, as outlined by Pedro Barbas Homem, 'The Jury and the Portuguese Legal Tradition'; (Lay Participation in Modern Law: A Comparative Historical Analysis, University of Helsinki, Finland, 17-20 September 2014).

<sup>2</sup> For example, civil jurors were entitled to reimbursement, while criminal jurors were not.

<sup>3</sup> This jury decided civil and criminal cases which involved foreigners. See further N. Howlin, 'Fenians, Foreigners and Jury Trials in Ireland 1865-69' (2010) 45 *Irish Jurist* 51.

<sup>4</sup> See generally James C Oldham, 'On Pleading the Belly: A History of the Jury of Matrons' (1985) 6 *Criminal Justice History* 1 and Leonard MacNally, *The Justice of the Peace for Ireland*, vol 1 (J Cumming 1808) 579-80. The jury of matrons was rarely empanelled in nineteenth-century Ireland.

<sup>5</sup> Legislation established market juries in cities to combat fraudulent practices by traders: the Better Regulation of the City of Cork Act 1766 (5 Geo 3 c 24); the Lighting, Cleansing Cities and Market Juries Act 1773 (13 & 14 Geo 3 c 20) and the Market Juries Act 1787 (27 Geo 3 c 46). Market juries became obsolete in Ireland by the mid- nineteenth century, as their functions of the latter were largely taken over by the constabulary.

<sup>6</sup> For comparative purposes, the primary piece of legislation regulating nineteenth-century English juries was the County Juries Act 1825 (6 Geo 4 c 50), a consolidating and reforming Act which replaced the existing patchwork of legislation. Many of the basic principles of jury trial were the same in England as in Ireland, but there were nevertheless differences in the areas of juror qualification and exemption, for example. Other differences in jury practice and procedure included greater use of jury challenges, change of venue procedure and *talesmen*. For some of the differences between English and Irish special juries, see Niamh Howlin 'English and Irish Jury Laws: the Growing Divergence 1825-1833' in Brown and Donlan (eds) *The Laws and Other Legalities of Ireland, 1689-1850* (Ashgate Publications, 2011).

<sup>7</sup> The Courts of Common Pleas, Queen's Bench and Exchequer.

<sup>8</sup> Most of these were set out in legislation, the most significant of which were the Juries (Ireland) Act 1833 (3 & 4 Wm 4 c 91), Juries (Ireland) Act 1871 (34 & 35 Vic c 65); Juries (Ireland) Act 1873 (36 & 37 Vic c 27); Juries (Ireland) Act 1874 (37 & 38 Vic c 28) and the Jurors Qualification (Ireland) Act (39 & 40 Vic c 21).

<sup>9</sup> See generally Niamh Howlin, 'Controlling Jury Composition in Nineteenth-Century Ireland' (2009) 30(3) *The Journal of Legal History* 227. There were more legislative exemptions and disqualifications in Ireland than in England.

selected rather than elected, and jury service was neither hereditary, nor associated with high status or the possibility of consequential election to other offices.<sup>10</sup> Although widening the jury franchise was the aim of many nineteenth-century reformers, jury duty itself was actually perceived as irksome, and those who were qualified to undertake it tried strenuously to avoid it.

## II. Law, Politics and Justice in Nineteenth-Century Ireland

At the dawn of the nineteenth century, legislation established the United Kingdom of Great Britain and Ireland.<sup>11</sup> Ireland lost its parliament, and Irish representatives henceforth served in the Parliament of the United Kingdom of Great Britain and Ireland at Westminster.<sup>12</sup> This had an immense impact on law and justice, and one effect was ‘the exposure of the inadequacies of Ireland’s law and legal system to the scrutiny of the United Kingdom parliament’.<sup>13</sup> The Union ensured that Ireland shared in ‘the new climate of law reform that was to obtain at Westminster, and the legislative triumphs of Benthamite utilitarianism were to be substantially paralleled in Ireland.’<sup>14</sup> This was a positive development, and as Osborough points out, even if some changes fell somewhat short of the ideal, ‘Ireland was the beneficiary of a huge amount of progressive legislation’.<sup>15</sup>

As the century progressed, there was a ‘rationalisation of the machinery of justice’ in the United Kingdom. The reform, simplification and standardization of practice and procedure<sup>16</sup> was led by such advocates of codification and law reform as Robert Peel and Henry Brougham.<sup>17</sup> While some reforms had universal application, others related exclusively to Ireland, with the result that criminal and civil law were administered

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<sup>10</sup> Unlike, for example, the Finnish system: Mia Korpiola, ‘Back to the Glory Days of the Past: Reforming the Finnish Jury ca. 1850-1910’ (Lay Participation in Modern Law: A Comparative Historical Analysis, University of Helsinki, Finland, 17-20 September 2014).

<sup>11</sup> The Union with Ireland Act 1800 (39 & 40 Geo 3 c 67), and The Act of Union (Ireland) 1800 (40 Geo 3 c 38).

<sup>12</sup> See generally Patrick Geoghegan, *The Irish Act of Union: A Study in High Politics 1798-1801* (Gill and Macmillan 1999) and Daire Keogh and Kevin Whelan (eds), *Acts of Union: the Causes, Contexts and Consequences of the Act of Union* (Four Courts Press 2001). Brady notes that that Irish MPs initially represented the Protestant landowning classes, and were essentially conservative: James C Brady, ‘Legal Developments, 1801-79’ in WE Vaughan, *A New History of Ireland, Volume V: Ireland Under the Union, I, 1801-70*, (Oxford University Press 2010), 451.

<sup>13</sup> WN Osborough, ‘The Irish Legal System, 1796-1877 in WN Osborough (ed) *Studies in Irish Legal History* (Four Courts Press 2000) 243.

<sup>14</sup> See Brady, ‘Legal Developments’ 451.

<sup>15</sup> See Osborough, ‘The Irish Legal System’ 244.

<sup>16</sup> *Ibid*, 263. For example, ‘[t]he deployment of crown prosecutors and crown solicitors to handle criminal prosecutions before the assize courts and quarter sessions signalled an innovation in criminal practice of paramount importance.’

<sup>17</sup> See Michael Lobban, ‘Henry Brougham and Law Reform’ (2000) 115 (464) *The English Historical Review* 1184.

differently in Ireland and other parts of the United Kingdom.<sup>18</sup> Large sections of the Irish population were reluctant to participate in the official justice system<sup>19</sup> unless compelled to do so, partially as a consequence of prevailing agrarian disturbances and sectarianism.<sup>20</sup> Consequently, with the exception of juries, the role of amateurs or laypersons in the Irish justice system was minimal. Professional magistrates existed alongside (and ultimately replaced) lay magistrates,<sup>21</sup> and were supported by a centralised, professional police force, the Royal Irish Constabulary.<sup>22</sup> Ireland also had public prosecutors before England, partially in response to the difficulty in finding private individuals willing to prosecute in cases of a political or agrarian character.<sup>23</sup>

The Union with Great Britain was never the seamless convergence of people and politics so optimistically envisaged in the late eighteenth century.<sup>24</sup> Ireland, or ‘the Irish question’ was a divisive political issue in Britain for much of the nineteenth century. In the first half of the century, the Repeal movement, the Great Famine of the 1840s, and large-scale Irish emigration to Great Britain ‘caused widespread consternation and curiosity among the British’,<sup>25</sup> and Irish affairs dominated British public discourse in the mid-century.<sup>26</sup> In particular, the Great Famine can be seen as marking a ‘profound transformation in British perceptions of the Irish’.<sup>27</sup> Before this, English popular sentiment had favoured assimilation of Ireland and Britain,<sup>28</sup> but this changed as Ireland was increasingly seen as

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<sup>18</sup> There were, for example, differing court structures: the Divorce and Matrimonial Causes Act 1857 (20 & 21 Vict c 85) established a Divorce Court in England, but not in Ireland. The Irish Court for Crown Cases reserved heard both civil and criminal cases, unlike its English counterpart. These are but two examples of many instances of the differential administration of the law as between England and Ireland.

<sup>19</sup> A similar ambiguity towards crime and the legal system was seen in Wales: see Richard Ireland, ‘A Second Ireland? Crime and popular culture in nineteenth-century Wales’ in Richard McMahon (ed) *Crime, Law and Popular Culture in Europe 1500-1900* (Willan 2008) 239-261.

<sup>20</sup> See Ian Bridgeman, ‘The Constabulary and the Criminal Justice System in Nineteenth-Century Ireland’ in Ian O’Donnell and Finbarr McAuley (eds), *Criminal Justice History* (Four Courts Press 2003) 110, 118.

<sup>21</sup> See RB McDowell, ‘The Irish Courts of Law, 1801-1914’ (1957) 10(40) *Irish Historical Studies* 363, 373-45.

<sup>22</sup> See Stanley Palmer, ‘The Irish Police Experiment: the Beginnings of Modern Police in the British Isles, 1785-95’ in O’Donnell and McAuley, and Bridgeman, ‘The Constabulary’. The Dublin Metropolitan Police oversaw law and order in the capital.

<sup>23</sup> See John McEldowney, ‘Crown Prosecutions in Nineteenth-Century Ireland’ in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in Britain 1750-1850* (Clarendon Press 1989) 420. Conor Hanly, ‘Criminal Prosecutions in Victorian England’ (21<sup>st</sup> British Legal History Conference, University of Glasgow, 10-13 July 2013), considers some early attempts at public prosecutions in England.

<sup>24</sup> See Patrick O’Farrell, *England and Ireland Since 1800* (Oxford University Press 1975) for an examination of the evolving relationship between the two countries in the nineteenth century.

<sup>25</sup> Edward G Lengel, *The Irish Through British Eyes: Perceptions of Ireland in the Famine Era* (Greenwood Press 2002) 9.

<sup>26</sup> As Lengel, *ibid* 19 expresses, ‘[i]n its rebelliousness Ireland appeared to threaten the material foundations of British prosperity, while in its poverty and moral degradation it seemed a standing reproach to the principles on which the so-called civilizing mission of the British empire was based.’

<sup>27</sup> *Ibid* 56.

<sup>28</sup> *Ibid* ch 2.

being too different, too 'other', to integrate. British Liberals firmly adopted 'the Irish question' as part of their reform agenda, and their emphasis on Ireland's moral and economic reform<sup>29</sup> stemmed from the idea that strengthening the agencies of law and order would be to the benefit of Irish society as a whole. As McDowell describes it, 'impartiality in the administration of the law would create throughout society confidence in the established order.'<sup>30</sup> It was this focus on impartiality that contributed to the establishment of the two police forces mentioned above, as well as the professional magistrates.<sup>31</sup> During this period, Whig or Liberal commentators tended to focus on Ireland's history in arguing for more equitable treatment: Ireland was the way it was because the English had not extended the same privileges and rights enjoyed by its own people.<sup>32</sup> By contrast, Tory or Conservative opinions of Ireland saw it as not being quite ready for equal treatment, because of the 'special conditions' existing. By the late 1860s the Irish question was 'one of the major issues in British politics,'<sup>33</sup> due to Ireland's social problems, increasing agrarian agitation and a rise in nationalism and demands for home rule.<sup>34</sup> The Irish question continued to dominate during the turbulent 1870s and 1880s as demands for land reform and home rule gathered momentum.

Ireland in the early decades of the Union has traditionally been portrayed as a violent society; for example, Connolly writes of a 'more or less permanent presence in Ireland of some level of agrarian crime' which 'seemed to most contemporaries to mark the country out as peculiarly violent and lawless'.<sup>35</sup> Several historians have identified Ireland as having a higher rate of homicides than England and Wales,<sup>36</sup> and a high rate of interpersonal violence, stemming from both agrarian and other causes.<sup>37</sup> However, over

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<sup>29</sup> Richard Ned Lebow, *White Britain and Black Ireland: The Influence of Stereotypes on Colonial Policy* (Institute for the Study of Human Issues 1976) 30-32.

<sup>30</sup> RB McDowell, 'Administration and the Public Services, 1800-71' in Vaughan 551.

<sup>31</sup> Other Whig reforms to the poor laws and to municipal corporations were grounded in utilitarianism

<sup>32</sup> See Lengel 21.

<sup>33</sup> DA Hamer, 'The Irish Question and Liberal Politics, 1867-1894' (1969) 12(3) *The Historical Journal* 511, 511.

<sup>34</sup> *Ibid*, 511. As Boyce points out, the solution to the 'Irish question' was for over a century governed by British perceptions of what the question actually was, and was limited by the realities of British politics. See generally DG Boyce, *The Irish Question and British Politics, 1868-1996* (2<sup>nd</sup> edn, Palgrave Macmillan 1996).

<sup>35</sup> SJ Connolly, 'Union Government, 1812-23' in Vaughan, *A New History of Ireland*, 57.

<sup>36</sup> See for example S.J. Connolly, 'Unnatural death in four nations: Contrasts and comparisons' in *Kingdoms United? Great Britain and Ireland Since 1500: Integration and Diversity* (Dublin, 1999). He points out, 207, that only a small fraction of these were agrarian in nature.

<sup>37</sup> Connolly, 'Union Government', argues that 'the principal aim behind outrage and intimidation has most commonly been seen as the defence of the occupiers of land from excessive rents and eviction.' On faction-fighting in rural Ireland, see James S. Donnelly, Jr, 'Factions in pre-Famine Ireland' in Audrey S Eyler and Robert F Garratt (eds), *The Uses of the Past: Essays on Irish Culture* (University of Delaware Press 1988). Factions were groups held together by 'kinship, common residence and territorial loyalty' (116), and they frequently engaged in violence, preferring generally to settle disputes outside the official justice system (124).

the past few decades a number of scholars have questioned whether Ireland was as violent as previously thought. For example, Conley debunks image of Ireland as being a more violent country than England,<sup>38</sup> and Finnane demonstrates that violent crimes declined in the second half of the century.<sup>39</sup> This is in line with broader studies of the decline of interpersonal violence in Europe over several centuries.<sup>40</sup> Finnane argues that there is 'much evidence of Ireland's "normality" as a society in the post-Famine period', particularly as regards the criminal law and the criminal justice system.<sup>41</sup> Ó Gráda<sup>42</sup> is of the view that claims about the levels of violence were exaggerated, and McMahon similarly argues that violence in Ireland tended to be 'clearly contained and controlled.'<sup>43</sup>

Nevertheless, conviction rates were low, particularly in rural areas,<sup>44</sup> contributing to the impression that the Irish were hostile to law and order. Conley observes that '[t]he British government could rarely count on unquestioning support from any part of the common law system in Ireland. Juries simply refused to convict if they felt the action had been justified or that the issue should be settled outside the courts.'<sup>45</sup> According to Townshend, social protest tended to be misinterpreted by the government as constituting a

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<sup>38</sup> Carolyn Conley, *Melancholy Accidents: The Meaning of Violence in Post-Famine Ireland* (Lexington Books, New York, 1999).

<sup>39</sup> M. Finnane, 'A Decline in Violence in Ireland? Crime, Policing and Social Relations 1860-1914' (1997) 1 *Crime, History and Society* 51.

<sup>40</sup> For example, see Manuel Eisner, 'Modernization, Self-Control and Lethal Violence: the Long-Term Dynamics of European Homicide Rates in Theoretical Perspective', (2001) 41(4) *British Journal of Criminology* 628. See also Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Edmund Jephcott (tr), Eric Dunning, Johan Goudsblom and Stephen Mennell (eds), Blackwell Publishers 2000) 161-172.

<sup>41</sup> Mark Finnane, 'Irish Crime without the Outrage: the Statistics of Criminal Justice in the Later Nineteenth Century' in N.M. Dawson, ed., *Reflections on Law and History* (Dublin: Four Courts Press, 2006), 204.

<sup>42</sup> Cormac Ó Gráda, *Ireland: a New Economic History, 1880-1939* (Oxford, 1994), p. 332. See also K. T. Hoppen, *Elections, Politics and Society in Ireland, 1832-1885* (Oxford, 1984), 342; and Desmond McCabe, 'Law, Conflict and Social Order: County Mayo, 1820-1845' (unpub. Ph.D. dissertation, University College Dublin, 1991), 56.

<sup>43</sup> Richard McMahon, 'A Violent Society? Homicide Rates in Ireland 1831-1850' (2009) 36 *Irish Economic and Social History* 1, 20.

<sup>44</sup> For example, N. Woodward, 'Transportation Convictions During the Great Irish Famine' (2006) 37(1) *Journal of Interdisciplinary History* 59, 65, notes that the number of indictments far outweighed the number of convictions. Neal Garnham, 'The limits of English influence on the Irish criminal law, and the boundaries of discretion in the eighteenth-century Irish criminal justice system', in Sean Patrick Donlan and Michael Brown (eds), *The Boundaries of the State: Law in Ireland, 1700-1850* (Ashgate, 2010), compares jury verdicts and conviction rates in England and Ireland in the late eighteenth century, and posits several reasons for the low conviction rates in Ireland during that period. See also David Johnson, 'Trial by Jury in Ireland 1860-1914' (1996) 17 *The Journal of Legal History* 270, 276. I. O'Donnell, 'The fall and rise of homicide in Ireland', in S. Body-Gendrot, and P. Spierenburg (eds), *Violence in Europe: Historical and Contemporary Perspectives* (New York, Springer, 2008) 80, laments the lack of hard quantitative information in this area.

<sup>45</sup> Conley, *Melancholy Accidents* 6. Richard Ireland observes that Welsh juries were reluctant to convict for offences with a strong moral dimension, such as rape, indecent assault, bestiality and domestic violence: Richard Ireland, 'Putting Oneself on Whose Country? Carmarthenshire Juries in the Mid-Nineteenth Century' in Thomas Glyn Watkin (ed), *Legal Wales: Its Past, Its Future* (2001 The Welsh Legal History Society) 79.

fundamental challenge to the authority of the state.<sup>46</sup> Governments tended to respond by prioritising the suppression of disorder. For example, draconian legislation was introduced in response to such difficulties, suspending trial by jury in disturbed districts; imposing a curfew and appointing a specialised police force to maintain law and order in disturbed areas;<sup>47</sup> and allowing violent agrarian to be tried in Dublin, away from disturbed areas, in contravention of the common law principle that jury trials were to take place in the locality of alleged offences.<sup>48</sup> Further legislation provided for summary trial before two magistrates, or trial by special jury.<sup>49</sup>

### III. The Jury at the Interface of Law, Politics and Religion

De Tocqueville wrote in 1838 that the real strength of the jury lay in its political power. , and he viewed it both a judicial and a political institution.<sup>50</sup> As was the case elsewhere in Europe and in the common-law world, the jury in Ireland became a focal point for reform agitation on a number of occasions during the nineteenth century by Liberals, Nationalists, Catholics and others. British and Irish Liberals increasingly found that their cause aligned to that of the Catholics, and jury reform was part of that agenda.<sup>51</sup>

Religion had a unique place in Irish public life and political discourse, and it has been observed that Irish Catholicism had, for various reasons ‘a necessarily political dimension.’<sup>52</sup> Roman Catholics comprised about eighty percent of the population, and suffered various political and legal limitations under what were known as the penal laws.<sup>53</sup> Many of these restrictions had been lifted by the end of the eighteenth century – for example, in 1793 the right to vote in parliamentary elections and the right to be members of municipal corporations were restored.<sup>54</sup> However, by the early nineteenth century

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<sup>46</sup> Charles Townshend, *Political Violence in Ireland: Government and Resistance Since 1848* (OUP 1983).

<sup>47</sup> The Peace Preservation Act 1814 (54 Geo 3 c 131) and the Insurrection Act 1814 (54 Geo 3 c 180) introduced by Chief Secretary Robert Peel.

<sup>48</sup> Trial of Offences (Ireland) Act 1833 (3 & 4 Wm 4 c 79), also known as the Change of Venue Act. See further below.

<sup>49</sup> Criminal Law and Procedure (Ireland) Act 1887 (50 & 51 Vic c 20).

<sup>50</sup> Alexis de Tocqueville, *Democracy in America*, ed. John C Spencer, trans. Henry Reeve (New York, 1838), 262.

<sup>51</sup> Mid-century liberal revolutions also led to the adoption of jury trials in Austria in 1848: see Greg Taylor, ‘Jury Trial in Austria’ (2011) 14(2) *New Criminal Law Review: An International and Interdisciplinary Journal* 281, 286. By contrast, as outlined by Homem, ‘The Jury and the Portuguese Legal Tradition’. Portuguese Liberals, for example, preferred a professional judiciary over lay administration of justice

<sup>52</sup> RF Foster, ‘Ascendancy and Union,’ in Vaughan 157.

<sup>53</sup> The effect and impact of the penal laws is not yet fully understood. Louis Cullen, ‘Catholics Under the Penal Laws’ (1986) 1 *Eighteenth-Century Ireland* 23, who notes the complexity of the penal laws, 24, and Maureen Wall, ‘The Age of the Penal Laws 1691-1778’ in TW Moody and FX Martin (eds), *The Course of Irish History* (rev ed, Mercier Press 2001).

<sup>54</sup> The Roman Catholic Relief Act 1793 (33 Geo 3 c 21). See generally Eamon O’Flaherty, ‘Ecclesiastical Politics and the Dismantling of the Penal Laws in Ireland, 1774-82’ (1988) 26(101) *Irish Historical Studies* 33. Rights in relation to jury trials were often debated in the same context as voting rights. See for example Anon, *An*

Catholics still could not sit in parliament, were excluded from the majority of senior administrative posts, and could not serve as judges, king's counsel or sheriffs.<sup>55</sup> As Cullen notes, 'the surviving corpus of discriminatory law after 1793 was still large'.<sup>56</sup> Furthermore, there were various insidious practices which indirectly impacted on Catholic civil liberties. For example, they complained that they were routinely excluded from offices for which they were now theoretically eligible.<sup>57</sup> This is borne out in statistics compiled by the Catholic Association in 1828, which demonstrate that 'of 1,314 offices connected with the administration of justice to which Catholics could legally be appointed, only 39 were in fact held by Catholics'.<sup>58</sup> Similarly, Catholics were regularly prevented from sitting on juries, although they were never entirely barred from serving.<sup>59</sup> As Connolly points out, 'the formal exclusion of Catholics from the highest levels of administration and the legal profession was ... part of a much wider set of grievances'.<sup>60</sup>

Discontent at this state of affairs led to the emergence of the Catholic Emancipation movement, which coincided with a general religious revival among all denominations, and a growing anti-Protestant sentiment among Catholics. The 1820s saw an upsurge in sectarian agrarian disturbances, and Connolly points out that 'the forces being employed to suppress the agrarian disturbances of this period – the police, the army, and the yeomanry – were all seen by large sections of the population as essentially protestant bodies'.<sup>61</sup> Elite members of Catholic society such as lawyers, and later merchants and journalists, ensured that the emancipation movement gained mass support and momentum in both Ireland and Britain. Under the charismatic leadership of lawyer Daniel O'Connell, 'the new militant rhetoric demanded rights, rather than concessions; the language was, in a real sense, democratic'.<sup>62</sup> This was a new style of popular politics, and Connolly describes the Catholic leaders as adopting 'the characteristic stance of bourgeois politicians throughout early nineteenth-century Europe, seeking to use popular discontent to further their own political aims, while at the same time holding back from the point at which that discontent would

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*Authentic and Copious Report of the Important Debate at a Meeting of the Catholic Inhabitants of Dublin, on the 31<sup>st</sup> of October Last; Relative to Obtaining the Elective Franchise and the Right of Trial by Jury for the Roman Catholics of this Kingdom* (D Blow 1792).

<sup>55</sup> See further SJ Connolly, 'The Catholic Question, 1801-12' in Vaughan 25-28.

<sup>56</sup> Cullen 24.

<sup>57</sup> Although it is clear that discrimination did exist, it ought to be borne in mind that Catholics were severely under-represented in the middle classes, from which the majority of office-holders were drawn: Connolly, 'The Catholic Question' 26.

<sup>58</sup> *Ibid.*

<sup>59</sup> Garnham points out that Catholics 'could not serve on juries which tried men for foreign enlistment, certain breaches of the penal code or, from 1756, any civil suits between Catholics and Protestants'. Neal Garnham, *The Courts, Crime and the Criminal Law in Ireland, 1692-1760* (Irish Academic Press 1996) 144.

<sup>60</sup> See Connolly 27.

<sup>61</sup> SJ Connolly, 'Mass Politics and Sectarian Conflict, 1823-30' in Vaughan 82. The payment of tithes to the Established Church of Ireland also formed part of the grievances underlying the disturbances.

<sup>62</sup> See RF Foster, 'Ascendancy and Union' 57.

erupt into uncontrollable violence.<sup>63</sup> The liberal approach to Irish policy in the 1830s has been described as being 'directed at pacifying Ireland by redressing grievances'.<sup>64</sup> Its centrepiece, as Bernstein points out, was the conciliation of the Catholics.

Focusing on the position of Catholics in the jury system in particular, one can clearly see how politics and religion impacted upon law and justice. At the height of the emancipation campaign, the 'unequal administration of justice as between Catholic and Protestant' was made 'a major issue.'<sup>65</sup> Even after the passing of the Catholic Relief Act in 1829,<sup>66</sup> some inequalities persisted, and Catholics continued to be under-represented on all types of jury. Allegations of disproportionate religious representation on juries were frequent in the first half of the century, especially when it came to politically sensitive trials.<sup>67</sup> A variety of factors contributed to this. For example, property qualifications for jurors served to keep the majority of Catholics off the jurors' lists, especially since, as a result of the penal laws, many of them did not legally hold freehold in their own names. Even where Catholics qualified as jurors, there were mechanisms and practices which effectively enabled state officials to keep them off specific juries. For example, local sheriffs, who were responsible for compiling jury panels for trials, enjoyed a great deal of autonomy in the first half of the century. It was relatively easy for a sheriff to ensure that Catholic representation on a jury panel was minimal or non-existent, if he so wished. As was the case in other parts of the British empire,<sup>68</sup> allegations of biased and corrupt sheriffs manipulating jury lists were common.<sup>69</sup> The sheriff was obliged, before any court sessions, to return 'twelve good and lawful Men from the Body of his County.'<sup>70</sup> In practice, this was usually carried out by the sub-sheriff, who took these names from a county jurors' book, and until the 1870s he had discretion as to the names he selected.<sup>71</sup> The sub-sheriff might have knowledge of the religious persuasion of potential jurors, or might exclude certain individuals on the basis of having a Catholic-sounding surname. He was free to exclude anyone considered unsuitable. As one contemporary commentator put it, 'in any important political case very great dissatisfaction was generally expressed at the power conferred upon the sheriff, who may

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<sup>63</sup> See Connolly, 'Mass Politics' 94.

<sup>64</sup> George L Bernstein, 'Liberals, the Irish Famine and the Role of the State' (1995) 29 (116) *Irish Historical Studies* 513 515.

<sup>65</sup> See Connolly, 'Mass Politics' 93.

<sup>66</sup> The Roman Catholic Relief Act 1829 (10 Geo 4 c 7).

<sup>67</sup> Claims of jury packing and the under-representation of Catholics travelled with Irish emigrants to Canada, where the issue became highly contentious in the mid-nineteenth century: Robert Brown Blake, *A Trying Question: The Jury in Nineteenth-Century Canada* (University of Toronto Press, 2009) 44-46.

<sup>68</sup> See for example Brown Blake, *A Trying Question* 65-66.

<sup>69</sup> For example, in 1830 there were protests about a sub-sheriff who had 'in no instance ever thought proper to return a Catholic freeholder to serve as a juror, in any case either civil or criminal'. *Fermanagh Sub-Sheriff. Copy of Memorial of Francis McBryan and Other Prisoners, Charged with the Murder at Macken, to the Lord Lieutenant of Ireland, Dated Enniskillen Gaol, 1<sup>st</sup> March 1830, Complaining of the Sub-Sheriff of Fermanagh County, Ireland 1830* (HC 1830, 150 - XXVI), 301, 2.

<sup>70</sup> The Jury Act 1833 (3 & 4 Wm 4 c 91), s. 10. See also the Juries (Ireland) Act 1871 (34 & 35 Vic c 65), s. 13.

<sup>71</sup> 3 & 4 Wm 4 c 91, s. 11.

have had particular views, to select for the trial those jurors who, in his discretion, he thought best qualified to discharge the jury.<sup>72</sup> However, in response to frequent claims of bias, legislation passed in 1871 obviated this problem.<sup>73</sup>

Even if a Catholic was summoned as a juror, he still was not guaranteed to actually try a case. Much antipathy among Catholics and nationalists focused on what was known as the 'stand aside' procedure, something which was apparently used much more in Ireland than in England.<sup>74</sup> This allowed the Crown Solicitor to order any juror – who was duly qualified, had been summoned and attended the court – to stand aside during the selection process. No reason had to be given for this. In theory the juror was being asked to stand aside temporarily, while the list of jurors was being called out. If the list had to be called out a second time, due to an insufficient number of jurors attending, the jurors who had been asked to stand aside would then be duly sworn. In practice, however, the list was almost never called out a second time, so those jurors were effectively prevented from sitting on the jury. The 'stand aside' power was supposed to parallel defendants' rights to challenge jurors with or without cause, but in reality the Crown's right was much greater because there was no limit on the number of jurors who could be discarded in this way. In the first half of the nineteenth century there were allegations that jurors were being set aside on purely religious grounds. For example, Daniel O'Connell told a parliamentary committee in 1825 that in county Cork, police magistrates had been observed 'setting aside the Catholic jurors, and endeavouring to pick out, as much as possible, a Protestant jury' until he objected.<sup>75</sup> Later in the century, the focus of the debate shifted away from exclusion on religious grounds, towards exclusion on political grounds, but often in Ireland the two were interchangeable. Although this 'monstrous and un-English power of selecting a jury'<sup>76</sup> was sharply criticized in Ireland, it is likely that over-use of the stand-aside procedure was exceptional.

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<sup>72</sup> *Report of the Select Committee of House of Lords on Operation of Irish Jury Laws as Regards Trials by Jury in Criminal Cases* (HL 1881, 430 – XI), 1, *per* Purcell, para 24. Another, Buchanan, suggested (para 354-5) that Catholics 'could scarcely be persuaded that the sheriff, having the right of selection and differing from them in religion and politics, did not exercise the right of selection'. English sheriffs also came in for criticism – for example, Oldham notes that there were frequent allegations that sheriffs abused special jury lists: 'Accusations of jury packing were not new in the late eighteenth and early nineteenth centuries, but they grew in quantity and vehemence in the context of the special jury.' James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (New York University Press, 2006) 166.

<sup>73</sup> The Juries (Ireland) Act 1871 (34 & 35 Vic c 65), s. 19 obliged the sheriff to take the names from the book 'in a regular alphabetical series', taking one name from each letter of the alphabet and going through the alphabet as many times as necessary.

<sup>74</sup> Johnson, 'Trial by Jury' 282.

<sup>75</sup> *Select Committee Appointed to Examine Into the Nature and Extent of the Disturbances Which Have Prevailed in Those Districts of Ireland Which Are Now Subject to the Provisions of the Insurrection Act* (HL 1825, 200 – VII), 501, *per* O'Connell, 118. On the other hand, there were witnesses before the same committee who testified that there was usually some, limited, representation of Catholics on juries.

<sup>76</sup> EPS Counsel, *Jury Packing* (2<sup>nd</sup> edn, MH Gill and Son 1887) 9.

As discussed earlier, overtly political or agrarian cases were considered difficult to prosecute in some parts of the country. One contemporary commentator observed in 1859 that '[i]n many parts of Ireland, it is next to impossible to get a conviction of the assassins who execute the dark and bloody decrees of [secret agrarian societies].'<sup>77</sup> In 1832 it was claimed that the Attorney General for Ireland had declined to go ahead with certain prosecutions because there was so little hope of securing convictions.<sup>78</sup> The instances of controversy and high-profile debate over religious and political representation on juries are too numerous to discuss fully here, but a number of instances serve to illustrate the nature and extent of the problem. For example, the prosecutions of the leaders of a failed uprising in 1848 were mired in controversy over the representation of Catholics on the juries. One of the defendants, Thomas Meagher, asked to see a copy of the jury panel in advance of his trial, in order to make more informed challenges. In England this would be a matter of right, whilst in Ireland it was a matter of discretion; his request was denied. When it came to the trial of another nationalist leader, William Smith O'Brien, this distinction between English and Irish practice was criticised, and the defendant sought to have his trial postponed until the jury lists were delivered. Again, this was denied. Of 288 jurors called for his trial, around 18 were Catholic.<sup>79</sup> At another of these trials,<sup>80</sup> there had been 122 Protestants and 28 Catholics on the panel,<sup>81</sup> with the Catholics' names were at the end of the panel, so that they were unlikely to be called. In the aftermath of these trials, a petition, entitled 'No Jury Packing', was signed by several thousand Catholics. It was addressed as

A Memorial ... from the Catholic Bishops, Clergy and Laity, to remonstrate against the continuance of the practice of excluding Roman Catholics from the Jury-box, and thus virtually depriving them of the advantages of the Emancipation Act, and the benefits of the Constitution.<sup>82</sup>

The petition claimed that the practice of excluding Catholics from juries was 'one of the worst instruments of the worst days of oppression' and explained how it had come about that there were no Catholics empanelled for these trials:

1<sup>st</sup>. The panels were so constructed by the Sheriff, as to contain a disproportionately small number of Roman Catholics, and this small number

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<sup>77</sup> Joseph Brown, *The Dark Side of Trial by Jury* (W Maxwell 1859) 15.

<sup>78</sup> HL Deb 3 April 1832, vol 11 cols 1248-9, *per* Lord Wynford.

<sup>79</sup> John George Hodges, *Report of the Trial of William Smith O'Brien for High Treason at the Special Commission for the Co. Tipperary, Held at Clonmel, September and October 1848* (Alexander Thom 1849 79-80).

<sup>80</sup> John George Hodges, *Report of the Trial of John Mitchel for Felony: before the Right Honourable Baron Lefroy, and the Right Hon. Justice Moore, at the Commission Court, Dublin, May 1848* (Alexander Thom, 1848).

<sup>81</sup> *Freeman's Journal*, 25 May 1848. This under-representation of Catholics was mirrored in other trials arising from the uprising. For example, in August 1848 at the trials of John Martin, Kevin Izod O'Doherty only 30 of 130 jurors on the panel were Catholics.

<sup>82</sup> National Archives of Ireland: NAI, OP/1848/110.

placed upon the panel in an unfair and impartial manner: – and 2ndly. The Crown prosecutor by an unusual and arbitrary exercise of the privilege of unlimited challenge, directed every Catholic, as he was called to the jury-box, to stand aside.<sup>83</sup>

Although these trials (and others)<sup>84</sup> were undoubtedly rigged, this was not a universal experience – even the language of the petition suggests that the over-use of challenges by the crown was ‘unusual and arbitrary’. One 1881 commentator suggested that the perception that religious interests overrode all other considerations in the jury box may have been slightly skewed, and that ‘people, as a rule, somehow have an idea that religion will interfere ... they think people of a different religion will have different views of those of the class that are tried, or against whom the charge is made.’<sup>85</sup> Cases where Catholics were dramatically under-represented were ‘naturally much publicised,’<sup>86</sup> and exaggerations in the media were common. For example, newspaper reports of an 1829 murder trial claimed that the Crown had used its right of challenge to object to every Roman Catholic on the panel, but it emerged that there were in fact three jurors sworn onto the jury, while ten had been challenged by the defendants, and not set aside by the crown.<sup>87</sup>

The low esteem in which the Irish jury was held in the early decades of the nineteenth century was reflected in one parliamentarian’s claim that ‘in a case on which religious animosities prevailed, he would infinitely rather trust the life of a man to one of the judges of the land than to an Irish jury.’<sup>88</sup> However, the extent to which the exclusion of Catholics from civil and criminal juries impacted upon fairness is difficult to measure. One can of course point to some extreme cases where the verdict was blatantly unfair, such as the

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<sup>83</sup> See further the claims by Mr W Fagan, MP, that ‘on a late occasion out of a list on the jury book of 2,900 Catholics, and 1,600 Protestants, the sheriff selected a panel of 177, of whom there were not more than twenty-five Catholics, after deducting those who were dead, or could not attend, or were otherwise objectionable; and of these twenty-five, nineteen were placed amongst the last sixty names, and therefore, had no chance of being on the jury, who were to try a Roman Catholic for a political offence.’ HC Deb 05 February 1849, vol 102 cols 284-5.

<sup>84</sup> Another example was the controversy the so-called Sligo Trials of 1887, which involved the trials of dozens of Catholic tenant farmers who refused to pay their rent. Despite being a predominantly Catholic county, the jury panels had a large Protestant majority, and some were exclusively Protestant. These are discussed in detail in Counsel, *Jury Packing*.

<sup>85</sup> *Report of the Select Committee Appointed to Inquire into the State of Westmeath* (HC 1871, 147 – XIII), para 2828.

<sup>86</sup> Johnson, ‘Trial by Jury’ 272.

<sup>87</sup> The reporter of this trial had taken ‘some pains to ascertain whether there exists any just ground for such an assertion; he has for this purpose informed himself of the religion of every gentleman who was either sworn on the jury, put by on behalf of the crown, or challenged by the prisoner.’ A Brewster, *A Report of Seven Trials at the Clonmel Summer Assizes of 1829, Including Those Which Arose Out of the Occurrences at Borrisokane, on the 26<sup>th</sup> and 28<sup>th</sup> of July, 1829* (Richard Milliken and Son 1830) 6. Similarly, at the murder trial of William Pearce at the same sessions, the jury consisted of five Catholics and seven Protestants. Although the crown had set aside seven Roman Catholics, the defendant had actually challenged twenty-three. A Brewster, *A Report of the Trial of William Henry Pearce, for the Murder of Paul Slattery* in the same volume.

<sup>88</sup> HC Deb 11 May 1824, vol 11 cols 651-2.

1811 case of *R v Hall*. The defendant, who was a Protestant and an Orangeman, was charged with breaking and entering a Catholic chapel and stealing vestments, and indeed he admitted his guilt to the provost. Nevertheless, the jury of twelve Protestants controversially returned a verdict of not guilty.<sup>89</sup> Another case involved the offence of administering of an unlawful oath in support of a secret society. The Catholic defendant was tried by a jury consisting of ‘five Orangemen and seven liberal Protestants,’ who returned a guilty verdict without even leaving the jury box.<sup>90</sup> However, there were also instances where cases with a religious or a political element were, perhaps against the odds, not decided merely on that basis – for example, the 1855 trial of a Catholic priest for burning a Protestant bible.<sup>91</sup> There are even instances of attempts being made at the highest levels to ensure religious balance on juries – for example in 1870 the Solicitor General went to great lengths to secure a jury in county Meath which consisted of six Catholics and six Protestants.<sup>92</sup>

Controversy in relation to many high-profile criminal trials of prominent public figures or politicians tended to crystallize around the juries tasked with trying such cases. In some instances, the procedures and abuses which led to non-representation or low representation of certain groups were brought to the fore. For example, when Daniel O’Connell, the leader of the Catholic Emancipation movement, was tried for conspiracy in 1844, Roman Catholics were significantly under-represented on his jury, and the perception was that the jury was rigged against him. This was an extremely high-profile and controversial trial for many reasons, but it was the composition of the jury and allegations of fraud and bias which received the most attention from the public, the media and politicians.<sup>93</sup>

#### IV. Widening (and Contracting) the Jury Franchise

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<sup>89</sup> *Second Report from the Select Committee Appointed to Inquire Into the Nature, Character, Extent and Tendency of Orange Lodges, Associations or Societies in Ireland* 1835 (HC 1835, 475 – XV), 501 and (476 – XVI), 71.

<sup>90</sup> The trial of Patrick Magee, reported in the *Freeman’s Journal*, 3 March 1838.

<sup>91</sup> James Doyle, *A Special Report of the Trial of the Rev Vladimir Petcherine (one of the Redemptorist Fathers) in the Court House, Green-Street, Dublin, December 1855, on an Indictment Charging him with Burning the Protestant Bible at Kingstown* (James Duffy 1856). See also Paul O’Higgins, ‘Blasphemy in Irish Law’ (1960) 23 *Modern Law Review* 151, 163-4.

<sup>92</sup> 1881 Parliamentary Committee, at para. 2395-7. This anecdote is also referred to in RB O’Brien, *Dublin Castle and the Irish People* (2<sup>nd</sup> edn, Kegan Paul, Trench, Turner and Co 1912) 130-1.

<sup>93</sup> There were only 23 eligible Roman Catholic jurors out of a total of 388 on the Dublin special jurors list. However, there were at least 300 Roman Catholic special jurors residing in Dublin. See *R v Daniel O’Connell and others* (1844) 8 ILR 261; also (1844) 11 Cl & F 155; 8 ER 1061; JS Armstrong and ES Trevor, *A Report of the Proceedings on an Indictment for a Conspiracy in the Case of the Queen v Daniel O’Connell and Others* (Hodges and Smith 1844); WC Townsend, ‘The Trial of Daniel O’Connell, esq., MP and others for Conspiracy’ in *Modern State Trials* (Longman, Brown, Green and Longmans 1850) 392, 393 and J Flanedy (ed), *A Special Report of the Proceedings in the Case of the Queen Against Daniel O’Connell, Esq., MP* (Dublin, 1844) 9. See the parliamentary debates over the jury packing in this case: HC Deb 13 February 1844, vol 72 cols 683-787.

Liberal Prime Minister Gladstone's mission was 'to pacify Ireland', and he had used the 'Irish question' to unite the Liberal party.<sup>94</sup> His appointment of Thomas O'Hagan, as the first Catholic Lord Chancellor of Ireland since 1688<sup>95</sup> was viewed as 'a gracious act to the Catholics of Ireland'.<sup>96</sup> O'Hagan was a committed reformer and was 'motivated by a desire to help end Catholic disabilities',<sup>97</sup> including those relating to jury trials. He sought to widen the jury franchise to make the system more streamlined and efficient. Speaking in the House of Lords, he noted the various social and economic changes that had 'revolutionized the different classes of Ireland,' and pointed out that 'the old qualification of freeholders and leaseholders had become so obsolete that there were none who could now constitute a jury in Ireland.'<sup>98</sup> His 1871 Act<sup>99</sup> brought in a rating qualification, significantly widening the jury franchise to include more men from the lower socio-economic classes<sup>100</sup> – which in practice meant more small farmers and more Roman Catholics.<sup>101</sup>

These reforms were unfortunately ill-timed, as they were soon followed by major shift in the political landscape. A widespread violent agitation known as the Land War swept much of the countryside, resulting in significant challenges for the administration of justice. The difficulties in securing convictions in agrarian-related cases were exacerbated by the altered composition of local trial juries.<sup>102</sup> Many of the newly-enfranchised jurors were from the same socio-political class and religious denomination as defendants, and through a mixture of empathy and intimidation were reluctant to convict.<sup>103</sup> This had disastrous

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<sup>94</sup> Daire Hogan, 'Arrows Too Sharply Pointed: the Relations of Lord Justice Christian and Lord O'Hagan, 1868-1874', in John F McEldowney and Paul O'Higgins (eds), *The Common Law Tradition: Essays in Irish Legal History* (Irish Academic Press, 1990).

<sup>95</sup> The Office and Oath Act 1867 (30 & 31 Vic c 75) had removed the prohibition on Roman Catholics holding the office of Lord Chancellor of Ireland.

<sup>96</sup> *Freeman's Journal*, 11 December 1872.

<sup>97</sup> John McEldowney, *Lord O'Hagan and the Irish Jury Act 1871* (PhD thesis, Cambridge 1981), 366.

<sup>98</sup> HL Deb 19 May 1871, vol 206, col 1031.

<sup>99</sup> Juries (Ireland) Act 1871 (34 & 35 Vic c 65).

<sup>100</sup> The 1870s also saw changes to the law governing jury composition in France. See the discussion of the democratization of French juries in the late nineteenth century in James M Donovan, 'Magistrates and Juries in France, 1791-1952' (1999) 22(3) *French Historical Studies* 379, 404-6.

<sup>101</sup> O'Hagan also introduced a range of procedural reforms which not only streamlined the jury procedures and led to greater efficiency, but also did away with some of the lingering abuses which were a source of irritation to the Catholic majority.

<sup>102</sup> Several years later, O'Hagan himself admitted that circumstances were 'greatly unfavourable' to the operation of his reforms. O'Hagan, 'Legal, Educational and Social Reforms in Ireland', in Thomas O'Hagan, *Occasional Papers and Addresses* (Kegan Paul, Trench and Co 1884) 355.

<sup>103</sup> Donovan, 'Magistrates and Juries', explores French juries' reluctance to convict. Some of the reasons behind low conviction rates included the lack of rules of evidence in the *cours d'assises*; jurors' opposition to what they perceived as judicial bias; and their sympathies for certain types of crimes, including crimes of passion, white-collar crimes, offences involving unwanted pregnancies and political crimes (387). (For another view of French juries' leniency in certain areas, see William Savitt, 'Villainous Verdicts? Rethinking the Nineteenth-Century French Jury' (1996) 96(4) *Columbia Law Review* 1019). Irish juries are known to have shared this reluctance when it came to unwanted pregnancies and political crimes, but to date no research has examined white-collar crimes and 'crimes of passion' in the Irish context. Austrian juries shared

consequences for the administration of justice and perceptions of the jury trial in particular. Attempts were made to remedy the defects of the 1871 Act within months of its coming into operation.<sup>104</sup>

As a consequence of these difficulties, the authorities resorted to various means to try to secure convictions in politically-sensitive cases. One way of doing this was to have the venue for a criminal trial moved away from the locality where the alleged offence had taken place, to a different county with a different jury. At common law the general rule was that the trial of any crime should take place in the county where the alleged crime had been committed,<sup>105</sup> but in certain circumstances a case could be tried at a superior court in Dublin, or in a different county. Until the 1880s it was quite difficult to secure a change of venue, but the Criminal Law and Procedure (Ireland) Act 1887<sup>106</sup> made it easier for the Attorney General to change the venue of a criminal trial where he was of the view that a fair and impartial trial could not be had in the original county. Cases were most commonly moved from the West and South, where the agitation was strongest, to Dublin. It was believed that city juries had less sympathy with the agrarian agitation, and were less likely to be under the influence of violent or threatening secret societies. The same legislation also provided for the trial of certain offences by special juries. Men from a higher socio-economic background, they were considered to have less in common with those involved in the agrarian agitation, and to be more likely to convict. This was essentially a means of circumventing O'Hagan's liberal reforms, and ensuring that certain cases continued to be in the hands of an elite. Even more extreme were the provisions allowing for suspension of trial by jury in proclaimed districts, to be replaced by trials before panels of judges. The legislation was controversial, eliciting mixed reactions from parliamentarians, judges, lawyers and other commentators.

## V. Common Themes

Problems and controversies with the Irish jury system were often reflective of wider social, economic and political issues forming part of the 'Irish question'. One indication of the politicisation of jury trials in Ireland is the frequency with which the jury system was the

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the same reluctance to convict for political crimes, and also tended to acquit in cases involving pornography and criminal defamation: see Taylor.

<sup>104</sup> The Juries (Ireland) Act 1873 (36 & 37 Vic c 27), the Juries (Procedure) Ireland Act 1876 (39 & 40 Vic c 78) and the Juries (Qualification) Ireland Act 1876 (39 & 40 Vic c 21).

<sup>105</sup> See, for example, William Hawkins, *Treatise of the Pleas of the Crown*, vol 2 (8<sup>th</sup> edn, Sweet 1824), 403. Inevitably, numerous exceptions to this rule were developed, and many were put on a statutory footing. See Mark S O'Shaughnessy, 'The Venue for Trials, Civil and Criminal', (1865) 4(30) *Journal of the Statistical and Social Inquiry Society of Ireland* 193, 195 and Glanville Williams, 'Venue and the Ambit of Criminal Law' (1965) 81 *Law Quarterly Review* 276, 395, 518.

<sup>106</sup> 50 & 51 Vic c 20. This was also known as the Crimes Act 1887. HC Deb 31 March 1887, vol 313, cols 88-182.

subject of parliamentary scrutiny.<sup>107</sup> Just as nineteenth-century Belgium saw much reactive legislation on juries,<sup>108</sup> so too was the Irish jury system frequently before the Westminster parliament during times of turbulence. The Irish jury system was also frequently the subject of negative commentary in the Houses of Parliament, in a way that the English system was not<sup>109</sup> – for example, criticisms were made about Irish juries being corrupt, intimidated,<sup>110</sup> packed,<sup>111</sup> unrepresentative,<sup>112</sup> partisan, filled with unsuitable men,<sup>113</sup> and motivated by perverse logic.<sup>114</sup> The interplay between juries and politics in nineteenth-century Europe is a topic which merits further scholarship. A full comparative analysis of nineteenth-century jury systems is beyond the scope of this article and it is not proposed to consider every theme which had parallels in other systems.<sup>115</sup> However, there are some universal themes emerging from an analysis of the politics of jury trials in Ireland, several of which are worth mentioning here.

The first is the issue of representativeness. Whenever there is lay involvement in the administration of justice, the issue of representativeness inevitably crops up. Who are the laypersons selected to represent the multitudes? The answer is always a product of both time and place: nineteenth-century conceptions of representativeness meant that gender representation was a non-issue, and a distinction was drawn between ‘worthy’ and ‘unworthy’ candidates. This was variously done through property, status, residence, or

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<sup>107</sup> Parliamentary committees were established to examine the workings of the criminal justice system in 1825, 1839, 1852 and 1871: *Report of the Select Committee Appointed to Inquire into the Disturbances in Ireland* (HC 1825, 20 – VII), 5; *Report from the Select Committee of the House of Lords Appointed to Enquire into the State of Ireland in Respect of Crime, Part 1* (HL 1839, 486 – XI), 1; *Report from the Select Committee on Outrages (Ireland)* (HC 1852, 10 – XIV), 438 and the 1871 Parliamentary Committee. Further committees focused specifically on the jury system in 1873, 1874 and 1881: *Report from the Select Committee Appointed to Inquire into the Working of the Irish Jury System* (HC 1873, 283 – XV), 389; *Report from the Select Committee on the Working of the Irish Jury System* (HC 1874, 244 – IX), 557 and the 1881 Parliamentary Committee. By contrast, the English jury system came under official scrutiny relatively rarely, and always within the context of impending legislative reforms: see *Report of the Select Committee on Law and Practice relating to Summoning, Attendance and Remuneration of Special and Common Juries* (HC 1867, 425 – IX), 597; *Report of the Select Committee on Law and Practice Relating to Summoning, Attendance and Remuneration of Special and Common Juries* (HC 1867-68, 401 – XII), 677, 579, *Report of the Select Committee on Juries Bill* (HC 1870, 306 – VI), 61, and *Report of the Select Committee on Juries Bill* (HC 1872, 286 – X), 563.

<sup>108</sup> Georges Martyn, ‘Belgium’s Obsession with Democratic Control by Jury in High Crime Procedures’ (Lay Participation in Modern Law: A Comparative Historical Analysis, University of Helsinki, Finland, 17-20 September 2014).

<sup>109</sup> That is not to say that English juries were free from criticism: See Conor Hanly, ‘The Decline of Civil Jury Trial in Nineteenth-Century England’ (2005) 26(3) *The Journal of Legal History* 253.

<sup>110</sup> HL Deb 17 July 1893, vol 14 cols 1662-81; HC Deb 17 March 1870, vol 200 cols 81-127.

<sup>111</sup> HC Deb 04 April 1887, vol 313 cols 467-75; HC Deb 11 February 1887, vol 310 cols 1242-353.

<sup>112</sup> HL Deb 31 January 1812, vol 21 cols 408-77.

<sup>113</sup> HC Deb 28 March 1873, vol 215 cols 315-30.

<sup>114</sup> HC Deb 26 June 1879, vol 247 cols 730-807.

<sup>115</sup> For example, the reluctance of Irish juries to convict in certain categories of cases is comparable to the French jury’s high acquittal rate over the course of the nineteenth century, as documented by James Donovan, *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries* (Daniel Ernst and Thomas A Green (eds) (University of North Carolina Press, 2010).

occupational requirements.<sup>116</sup> In Ireland, a combination of rules and abuses often resulted in under-representation or non-representation of particular groups. Agitation for and debate surrounding greater representativeness on Irish juries can be divided into three periods. In the first, from the 1820s to 30s, religious representativeness (as between Catholics and Protestants) was the most urgent issue. In the 1870s and 80s, religion was less of a factor than political representativeness (as between nationalists or Home Rulers and unionists, broadly speaking). And, somewhat overlapping with this, from the 1860s to 1880s there was a move towards greater social representativeness, with liberal reformers seeking to widen the jury franchise so as to include more men from lower socio-economic backgrounds.<sup>117</sup> This was in many ways less urgent than the other two, but in achieving greater social representativeness, O'Hagan indirectly improved religious and political representativeness too. In Ireland, as in France and elsewhere, the democratization of the jury was criticised by some as allowing men who were unsuitable and incompetent to sit on juries.<sup>118</sup> In the late nineteenth century, 'new' jurors were deemed to be ignorant, uneducated and ill-equipped to handle increasingly complex evidence presented at trials.<sup>119</sup> While representativeness is one of the universal anchors for lay participation systems, it is clearly a fluid notion, evolving with social, economic and political realities. Nineteenth-century perceptions of representativeness were much narrower than those of the twenty-first century.<sup>120</sup> Even as agitators for reform sought more representative juries, they still operated within a narrow interpretation of 'representativeness', bound by gender, class, education, health, physical ability, property and so on.

The second theme flowing from this is the State's tendency to restrict or limit jury trial in times of turmoil. This was a frequent feature of the British administration's efforts to deal effectively with the 'Irish question'. For example, witness Robert Peel's early nineteenth century legislation which sought to restrict jury trial. Another example from early in the century was the legislative response to the violent opposition to the payment of tithes by Roman Catholics to the Anglican Church of Ireland in the 1830s.<sup>121</sup> Known as the Tithe War,

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<sup>116</sup> The English County Jury Act 1825 (6 Geo. IV, c. 50), for example, set out the property and status requirements for juries in England. A property requirement in New Zealand was found to be unworkable, and British citizenship coupled with residency sufficed: Neil Cameron, Susan Potter and Warren Young, 'The New Zealand Jury' (1999) 62(2) *Law and Contemporary Problems* 103, 106. Even the Greeks restricted jury service to citizens – a narrower section of society than our modern conceptions of citizenship: David Mirhady, 'Knowing the Law and Deciding Justice: Lay Expertise in the Democratic Athenian Courts' (this volume).

<sup>117</sup> A similar movement was seen in England, where trade unionists sought to achieve better representation of 'working men' on juries: Conor Hanly, 'Judgment by One's Peers? Radical and Trade Unionist Views of Jury Trial in Victorian Britain' (22<sup>nd</sup> British Legal History Conference, University of Reading, 8-11 July 2015).

<sup>118</sup> Similarly, Richard Ireland is of the view that the lower property requirement for Welsh jurors, compared with English jurors, contributed to contemporary dismissals of them as ignorant and incapable. Ireland, 'Putting oneself on whose county?'

<sup>119</sup> See Donovan, 'Juries and Magistrates' 405-7.

<sup>120</sup> Martyn, 'Belgium's Obsession', made a similar point in relation to Belgium.

<sup>121</sup> RF Foster, 'Ascendancy and Union', in RF Foster (ed), *The Oxford History of Ireland* (Oxford University Press 2001) 156.

it was characterised by interpersonal violence, damage to property (including livestock) and the effective use of threats. There was widespread intimidation of both witnesses and jurors in prosecutions connected with the agitation,<sup>122</sup> posing a serious challenge to the effective administration of justice.<sup>123</sup> Legislation was passed<sup>124</sup> to allow for the transfer to other counties of trials relating to the agitation. Similarly, in the 1880s during the Land War, legislation was introduced which allowed certain cases to be tried in different counties, provided for trials by three-judge panels instead of juries, and also allowed certain criminal cases to be tried by special juries. Other jurisdictions, for example Austria and Belgium, have also seen limitations being imposed on civil and criminal jury trials, in response to changing political landscapes.<sup>125</sup> In the British Empire, restrictions were placed on juries to ensure their continued function, albeit in a more limited incarnation – special juries in criminal cases,<sup>126</sup> smaller juries<sup>127</sup> and changes to the rules on jury challenges,<sup>128</sup> for example.

A final theme when considering the history of lay participation in the nineteenth century is its potential to limit judicial and state power. In his examination of the American legal system, de Tocqueville defended the jury as a counterweight against tyranny;<sup>129</sup> one can also look to the role of the jury in relation to the French *code penal*. The important role of juries in press freedom and libel cases has been noted elsewhere.<sup>130</sup> Mid-nineteenth-century Europe witnessed the rapid spread of liberal ideas and a growing desire for lay participation in the administration of justice. The 1820s, for example, saw attempts by the British to introduce juries to other parts of the Empire, such as New South Wales and Van Diemen's Land.<sup>131</sup> At the same time, however, some commentators were beginning to question the need for lay participation at all. For example, Hanly outlines the

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<sup>122</sup> *Report from the Select Committee on the State of Ireland* (HC 1831, 12 – XVI), 677. See also *Memorandum on Juror Intimidation*, 1833, National Archives of Ireland: NAI OP/1833/579.

<sup>123</sup> The caused the Irish judges wrote to the Chief Secretary stating that 'the duty of Jurors is often discharged at the peril of Property and life.' *Letter Regarding the Jury Bill 1833, from the Judges of Ireland to E.G. Stanley, February 1833*, National Archives of Ireland: NAI OP/1833/14.

<sup>124</sup> Trial of Offences (Ireland) Act, 1833 (3 & 4 Wm 4 c 79).

<sup>125</sup> See Taylor and Martyn, for example.

<sup>126</sup> See for example R Knox-Mawer, 'The Jury System in British Colonial Africa' (1858) 2 *Journal of African Law* 160, 163.

<sup>127</sup> See for example JH Jearey, 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: II', (1961) 5(1) *Journal of African Law* 36, 45 and EV Mittlebeeler, 'Race and Jury in Nigeria' (1973-75) 18 *Howard Law Journal* 88, 90.

<sup>128</sup> See for example JJ Cremona, 'The Jury System in Malta' (1964) 13 *American Journal of Comparative Law* 570, 577 and Neil Vidmar, 'The Canadian Criminal Jury: Searching for a Middle Ground', in Neil Vidmar (ed), *World Jury Systems* (Oxford University Press 2000) 231.

<sup>129</sup> For further discussion of de Tocqueville's views on juries, see Albert W Dzur, 'Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury' (2010) 38(5) *Political Theory* 603.

<sup>130</sup> See Martyn in relation to Belgium; Taylor in relation to Austria and Brown Blake in relation to Upper Canada and Nova Scotia.

<sup>131</sup> See Hanly, 'The Decline of Civil Jury Trial' 269.

professionalization of the English legal professions, with an emphasis on 'education, expertise, and skill, in contrast to the amateurism of jurors.'<sup>132</sup> This was one factor contributing to emergence of juryless courts in mid-nineteenth century England. Similarly, Brown Blake writes that '[l]ike many people in the common-law world, Nova Scotians increasingly found juries anachronistic at a time when contemporary thought emphasized that the justice system should be efficient, rational and consistent.'<sup>133</sup> Lay participation purports to lend an air of legitimacy to legal systems, but increasingly, the jury was being viewed less as a necessary check on arbitrary power, and more as an important symbol of participation.

Members of the judiciary and the administration lamented the shift in power which had resulted from the perceived over-liberalisation of the jury franchise, and, as discussed, this in turn led to the passing of legislation designed to disempower petty juries. Judges may have been irked or frustrated by the manner in which juries fulfilled their functions, but they nevertheless supported the institution of the jury in principle. They appreciated the important symbolic and inclusive role played by the jury in securing popular support for the state and its laws.<sup>134</sup>

Although liberal politics cannot be credited with a 'rise' in juries in nineteenth-century Ireland (juries were already a well-established aspect of the Irish justice system), the preoccupation of British Liberals with the 'Irish question' undoubtedly led to improvements in the jury system. This was rooted in Benthamite conceptions of the role of the State: greater acceptance of the legitimacy of the State and its organs would ultimately lead to economic development, and such legitimacy was to be achieved by addressing issues such as representativeness and state bias. In a practical sense, this meant reforming and popularising aspects of the administration of justice, especially the jury. However, the liberalisation of the jury had unforeseen consequences. Defending his much-criticised Juries Act, O'Hagan pointed out that it had

'opened the jury box to classes who had for generations been jealously precluded from any interference with the Courts of Justice. It took away the mischievous discretion with which official persons had been accustomed, sometimes capriciously, and sometimes corruptly, to manipulate the panels at

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<sup>132</sup> *Ibid.*, 265.

<sup>133</sup> Brown Blake, *A Trying Question* 131.

<sup>134</sup> For example, when the government attempted, with the Prevention of Crime (Ireland) Act 1882 (45 & 46 Vic c 25) to temporarily suspend jury trials, senior members of the judiciary were aghast, with one judge going so far as to resign in protest. Heikki Pihlajamäki, 'The Three Models of the Western Lay Judge: From Diversity to Common Extinction' (Lay Participation in Modern Law: A Comparative Historical Analysis, University of Helsinki, Finland, 17-20 September 2014) emphasizes the important symbolic role of the jury.

their good pleasure, and put an end, for ever, to the notorious packing which so often made trial by jury a scandal and a farce.’<sup>135</sup>

Unique political realities notwithstanding, there is a certain universality about lay participation in justice systems. Arguments both for and against juries have been substantially similar, in different countries and at different times, and many legal and political difficulties encountered in Ireland were replicated elsewhere. There is also a universality to the factors which affected the rise in popularity of the jury, and more recently, its decline in many Western systems, are also universal.<sup>136</sup>

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<sup>135</sup> HL Deb 4 August 1876, vol 231 col 497-8.

<sup>136</sup> Pihlajamäki, for example, identifies the increased professionalization of the law, the rise of political democracy and the democratization of the judiciary as three factors common to the decline of the civil, common law and Scandinavian jury systems.