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# Deadly Complexity: Law, Social Movements and Political Violence

Colm Campbell

Ita Connolly

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## War on Terror Symposium

### A Deadly Complexity: Law, Social Movements and Political Violence

Colm Campbell & Ita Connolly\*

The increasing quagmire of the “war on terror” casts doubt on the legal devices that were employed to rationalise it. This is especially the case in Iraq, and is true both in relation to the international use of force and anti-terrorist legal discourse. With regards to the latter, some argue for a recalibration of state response within the parameters of existing discourse (suggesting for instance, that some kind of better ‘balance’ needs to be struck between the interests of protecting society and upholding human rights). This article suggests that the problem lies deeper—that the simplistic structure of dominant anti-terrorist legal discourse obscures the complexity of law’s role in the interactions of the state and its violent challengers; and that dominant ‘anti-terrorist’ legal discourse may contribute to the increasingly obvious problem of counter production in the state of exception.

Dominant discourses proceed from an assumption that a revised legal regime, loosening restrictions on military/security agencies, will yield consequential anti-terrorist benefits. The

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\* Colm Campbell, Professor of Law, ([c.campbell@ulster.ac.uk](mailto:c.campbell@ulster.ac.uk)), and Ita Connolly, Research Associate, ([i.connolly@ulster.ac.uk](mailto:i.connolly@ulster.ac.uk)) both at the Transitional Justice Institute, University of Ulster (UU) ([www.transitionaljustice.ac.uk](http://www.transitionaljustice.ac.uk)). Preparation was assisted by the award of a British Academy Senior Research Fellowship to the first author. Thanks to Kathleen Cavanaugh, Christian Davenport, Fionnuala Ní Aoláin, Bill Rolston, Jillian Schwedler for comments on drafts, and to Mike Ritche of *Coiste na nIarchimí* who facilitated interviews. This article draws upon and develops the arguments first set out in, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MLR 935 (2006).

'torture' debate captures the issue well, though similar structures of argumentation appear in other fields. One stream in this debate invokes the rhetoric of the 'rule of law' and human rights, while arguing that certain formerly taboo subjects need to be revisited. These include loosening prohibitions on torture or rethinking the definition of inhuman treatment.<sup>1</sup> Most [in-] famously, Dershowitz has argued for the introduction of judicial 'torture warrants', authorising the administration of 'excruciating' pain: torture, it is argued, tends to happen anyway, and a formal procedure would provide some safeguards. Ignatieff, while distancing himself from Dershowitz's proposal, has suggested the employment of a harsh, law-based interrogation regime on the basis that society may choose the 'lesser evil' of exceptional anti-terrorist measures (limiting human rights) to 'respond to an attack',<sup>2</sup> in preference to the 'greater evil of its own destruction' (by terrorism). His particular recipe (focusing on sensory deprivation and stress-creation) is strikingly similar to that condemned as 'inhuman and degrading treatment' in Northern Ireland by the European Court of Human Rights.<sup>3</sup>

The other related stream in dominant anti-terrorist discourse, that associated with the 'Bush doctrine', manifests the kind of ambiguous attitude towards the rule of law found in John Yoo's memos challenging legal limitations on Presidential power in the 'war on terror'.<sup>4</sup> This approach tends to stress the need for pre-existing international and domestic legal norms (whether in relation to torture or otherwise) to yield to the exigencies of executive interpretation and action, which may entail claims of extra-ordinary law-making powers.

The modelling employed in much of these discourses tends to be relatively rigid and straightforward: a 'crisis-response model' dominates, the central issue becoming the liberal democratic state's legal *response* to the *crisis* of terrorism. In this response, legal norms, whether created through

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1. See ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 156 (2002).

2. MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 2 (2004). Ignatieff subsequently appears to have partly retreated from this position. Michael Ignatieff, *If Torture Works...*, PROSPECT, Apr. 2006.

3. Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 25, 26 (1978), discussed *infra* note 85.

4. Memorandum from the Office of the Assistant Attorney Gen., U.S. Dep't of Justice, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, for Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

conventional processes or a claimed extraordinary executive right, are assumed have top-down impact upon their targets in a predictable way. Discussion of their 'effectiveness' tends to focus on the individual hypothetical case (typically the 'ticking bomb' scenario involving the possible torture of a suspected terrorist, believed to have information about an already-planted bomb).<sup>5</sup> Original empirical data on the targets of anti-terrorist powers are rarely produced, reflecting a more general lacuna; as Crenshaw points out, 'the study of terrorism still lacks the foundation of extensive primary data based on interviews and life histories of individuals engaged in terrorism'.<sup>6</sup> The result, is heavy reliance on secondary data (as with Ignatieff), or hypothetical scenarios (in the case of Dershowitz), with recommendations for action that have little empirical grounding, a problem that as Brannan has pointed out, afflicts 'terrorism' studies in general.<sup>7</sup> Simplistic, reductive accounts abound, with terrorist activism being explained in terms of the pathological, psychological states,<sup>8</sup> greed, or in the case of female activists, as "terrorism for the sake of love [of a male]."<sup>9</sup>

Such simplistic modelling brings a number of problems, not least that it risks obscuring the workings of a highly complex (and deadly) phenomenon, generating 'remedies' that may have the opposite effects to those intended. It is undoubtedly true that terrorist attacks present the state with a crisis that demands response; to this extent the 'crisis-response' model is viable. Where it becomes suspect is where the relationship is viewed as uni-directional or uni-dimensional. There is a well established 'social movement' literature (overlooked in anti-terrorist legal discourse), suggesting that the state's response ('repression') may function as a stimulus to the mobilisation of

5. DERSHOWITZ, *supra* note 1, at 142–63.

6. Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21<sup>st</sup> Century* 21 POL. PSYCHOL. 405, 410 (2000).

7. See generally David W. Brannan, Philip F. Esler, & N. T. Anders Strindberg, *Talking to "Terrorists": Towards an Independent Analytical Framework for the Study of Violent Substate Activism*, 24 STUD. IN CONFLICT AND TERRORISM 3 (2001).

8. For a critique, see Charles L. Ruby, *Are Terrorists Mentally Deranged?*, 2 ANALYSES OF SOC. ISSUES AND PUB. POL'Y 15 (2002).

9. For critiques of such reductive accounts see Miranda Alison, *Women as Agents of Political Violence: Gendering Security*, 35 SECURITY DIALOGUE 447 (2004), and Brigitte L. Nacos, *The Portrayal of Female Terrorists in the Media: Similar Framing Patterns in the News Coverage of Women in Politics and in Terrorism*, 28 STUD. IN CONFLICT AND TERRORISM 435 (2005).

its violent challengers, leading to fresh terrorist 'response' which in turn provides a stimulus for further state action. Recognition of this dynamic also serves to question the utility of the 'balancing' metaphor, routinely employed in anti-terrorist legal discourse. While the metaphor may be viable in relation to restrictions that impact equally across society (for instance a requirement that all car occupants wear seat belts), it becomes more problematic when restrictions impact largely on suspect, out-groups identified by ethnicity and appearance (as Ronald Dworkin points out, the dominant group may experience scarcely any additional restrictions).<sup>10</sup> It is from the out-group, upon which the weight of the 'balance' falls, that violent challengers are likely to spring.

Dominant legal analyses also tend to overlook a related, well-developed, socio-legal literature on law's contributory role to mobilisation of protest groups, which rejects simple 'top-down' models of law's operation. As a consequence of these omissions and simplifications, anti-terrorist legal analyses have yet to provide an adequate theorisation of law's potential counter-productive effects. Rather than the simplistic models frequently employed, interactive modelling of a 'repression-mobilisation nexus' may offer much more valuable insights that need to be integrated into legal analyses.<sup>11</sup>

This article aims to develop legal thinking in this sphere by providing an account of law's operation in violent conflict that engages with the possibility that in 'anti-terrorist' state action, law may be implicated in the mobilisation of the state's violent challengers. Part 1 sets out a theoretical framework for a dynamic modelling of law's role in a violently conflicted 'rule of law' state. In place of simple crisis-response formulae, it posits an interactive model, exploring law's role in both the repression and mobilisation of the state's violent challengers. The article draws on established work on 'legal mobilization,'<sup>12</sup> supplementing this with social movement theory insights on the mobilisation of violent groups. It hypothesises a process of 'legally implicated mobilisation' which takes account both of

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10. Ronald Dworkin, *The Threat to Patriotism*, 49 N.Y. REV. OF BOOKS, Feb. 28, 2002 at 44. See also Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191 (2003)..

11. The literature on the nexus is explored below *infra* note 34.

12. For a collection of major contributions published from 1976-2003, see MICHAEL W. MCCANN, *LAW AND SOCIAL MOVEMENTS* (2006).

law's presence and its partial absence in 'legal grey zones' during violent conflict, and it suggests how law, viewed in these diffuse terms, may impact key elements of the mobilisation of the state's violent challengers. It also examines the question of the 'messages' sent about law to a variety of actors in such situations, exploring how such messaging may contribute to the process described by Tilly, whereby the democratic state's mechanisms tend to "dampen the processes that generate violent contention."<sup>13</sup>

Part 2 addresses the gap identified by Crenshaw, applying this framework and grounding it, by reference to fresh, interview-based qualitative data on the mobilisation of violent non-state actors. The subject group was composed of activists linked to the main violent, anti-state participant in the Northern Ireland conflict, the Provisional Irish Republican Army ('IRA'). The hypothesis developed in Part 1 implicates law in a process whereby some elements in the state's anti-terrorist/repressive activities could be expected to contribute to the mobilisation of violent challengers. Analysis of the dataset aims to identify which elements might be particularly implicated. It also enables exploration of the complexities of 'messaging' around law; of the paradoxes of law's role both as a tool of repression and a point of resistance; and of the neglected question of possible gendered dimensions in the experience of repression and mobilisation in the liberal state.

While the Northern Ireland conflict differed in many respects from the 'war on terror', at a high level of abstraction there are sufficient points of correspondence to make comparisons viable. Both conflicts involve liberal democratic states with a formal commitment to the rule of law (the UK is a common actor); and both involve entrenched, organised, political violence with complex ethnic dimensions yielding identifiable 'out groups'. Points of comparison and difference, and possible lessons for the broader 'war', are examined in the conclusions.

## 1. LAW AND MOBILISATION

Synthesising a dynamic framework for exploring the law's role in the mobilisation of violent challengers in the 'rule of law' state faces three challenges: (1) the literature on 'legal

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13. CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 44 (2003).

mobilisation' rarely concerns itself with structured violent mobilisation; (2) the literature on structured violent mobilisation rarely concerns itself with law; and (3) since the liberal state displays an axiomatic commitment to the rule of law, it may be difficult to ascertain whether specific behavioural features of the state are explicable in terms of democracy or in terms of law. This article addresses the first two challenges by bringing together the relevant legal and non-legal literatures, and the third by drawing on Abel's exploration of law in apartheid-era South Africa<sup>14</sup>—a violently conflicted, non-democratic, and racist state that paradoxically claimed a commitment to the rule of law.

#### LAW'S RELATIVE AUTONOMY AND LEGAL GREY ZONES

Debates on the relationship of law, power and violence tend to revolve, explicitly or implicitly, around the utility of the rule of law. While a variety of meanings are available, at the concept's core is a rejection of arbitrariness: the state is to act in accordance with predetermined ascertainable law; there is to be equality before the law; and an independent judiciary is to adjudicate on claimed infractions. The concept does not provide an account of how states actually behave: degrees of arbitrariness and illegality characterise the behaviour of all states; judicial decisions can be contradictory, and frequently accommodate themselves to the interests of dominant groups; and rulings challenging such interests may be reversed by fresh legislation. Claims that law is apolitical are unconvincing—hence critical legal scholars' portrayal of law as little more than a superstructural device, buttressing the interests of dominant (hegemonic) groups. Other analyses, while recognising law's hegemonic quality, nevertheless point to its ambivalent position as a potential (if unlikely) check on the power of dominant groups. On this view, law displays elements of a living, partly self-contained system.<sup>15</sup> In Abel's formulation, law is "relatively autonomous," influenced by economic infrastructure, pressured by political forces, shaped by the social system, but not fully

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14. See generally RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994* (1995).

15. Abel uses the term 'autopoiesis' to describe the phenomenon, drawing on AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1 (Gunther Teubner ed., 1988).

determined by any of them.<sup>16</sup> This view is crucial to Abel's analysis of law's ambivalent position under apartheid, offering a route to identifying the specificity of the *legal* contribution, rather than the democratic one, in state behaviour.

When faced with violent challenges, pressures for departure from the rule of law (or in Weberian terms from 'formal rationality') are likely to be especially strong,<sup>17</sup> particularly in relation to the interrogation of prisoners and the use of lethal force. This departure may be indicated by the imposition of a formal or *de facto* 'state of exception.' A variety of factors limits the reach of domestic law on state action: norms may be ambiguous or lacking; prosecutorial discretion may shield state operatives; the judiciary may display marked deference; illegality may involve covert operations in which links with the state may be difficult to prove; ouster clauses may limit domestic courts' jurisdiction; anti-terror/emergency legislation may provide sweeping powers; and jurisdictional issues may be exploited to stymie legal challenges. International law potentially provides an 'objective' correction, but the 'bite' of international law in such situations can be limited by the hegemonic pull of powerful states on the law;<sup>18</sup> by derogation and reservation provisions; by the 'margin of appreciation' doctrine; by strategies of non-ratification; and through obfuscation of fact-finding.

A variety of legal literatures touches upon the phenomenon of law's limited effective reach in states of exception. The criminological literature increasingly looks at the issue under the heading of 'state deviance' and 'state crime'.<sup>19</sup> In human rights and international humanitarian law, the debate tends to be couched in terms of the need to challenge post-conflict immunity for those who have acted with impunity during conflict.<sup>20</sup> Agamben has been interpreted as seeing the state of

16. Abel, *supra* note 8, 523. See also ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978).

17. ISAAC D. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS* 4 (1973).

18. See generally UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers and Georg Nolte eds., 2003), and Colm Campbell, 'Wars on Terror' and Vicarious Hegemons: the UK, *International Law, and the Northern Ireland Conflict*, 54 *INT'L & COMP. L.Q.* 321, 328 (2005).

19. See, e.g., Ronald C. Kramer & Raymond. J. Michalowski, *War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq*, 45 *BRIT. J. CRIMINOLOGY* 446 (2005).

20. See, e.g., Naomi Roht-Arriaza, *State Responsibility to Investigate and*



exception (manifest in the 'war on terror')<sup>21</sup> as co-terminus with a regime of 'anomie' (lawlessness);<sup>22</sup> another interpretation is that Agamben sees zones of anomie and lawfulness co-existing ambiguously in the state of exception.<sup>23</sup> His foundational analysis is that the exceptionality of anomie rather than a liberal commitment to the rule of law is at sovereignty's core. This jurisprudential view forces attention to the law's limited presence, but risks overlooking socio-legal insights into the capacity of the ideology of the rule of law to take on a life of its own, irrespective of the will of the sovereign.

The metaphor most frequently used to describe the phenomenon of law's limited reach in the 'war on terror' is that of the 'legal black hole',<sup>24</sup> but in reality such high-definition, binary divisions (within versus outside law's reach) are rarely identifiable. Violent conflict tends to be characterized by ambiguity, opacity, lack of accountability, and indeterminacy as regards the lawfulness of state action. Rather than 'black holes', 'legal grey zones' provide a much more appropriate metaphor; of the two readings of Agamben discussed earlier, that which portrayed anomie and lawfulness co-existing ambiguously seems preferable.

If this concept of legal grey zones is tied to the earlier discussions of law's autonomy and of the importance of an ideological commitment to the rule of law, two conclusions emerge. The first is that in the (emergency) legal grey zone, law still retains its relative autonomy, but the extent of that autonomy is itself part of the ambiguity. The second is that there are a number of reasons for suggesting that law is implicated in *all* the state's action in these legal grey zones: obstacles to bringing matters before the courts create a high degree of indeterminacy as to which behavior is and is not lawful; and the difficulty of excluding a legal mandate for a

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*Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449 (1990).

21. GIORGIO AGAMBEN, STATE OF EXCEPTION 66–73 (Kevin Attell trans., Univ. of Chicago Press 2005).

22. Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 623–28 (2005).

23. *E.g.*, when Agamben analyzes the *status necessitatus* in the state of exception as "an ambiguous and uncertain zone in which de facto proceedings ... pass over into law ... that is, a threshold where fact and law seem to become undecidable," Agamben, *supra* note 21, at 29.

24. See generally Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

particular action means that law may be implicated in a positive sense. In a negative sense, where the state can be shown to have acted without legal mandate, this represents a failure to live up to an ideological commitment to the rule of law, with the result that law is implicated by a failure of reach.

#### LEGAL MOBILISATION, LEGAL DYNAMISM AND SOCIAL CONFLICT

Conceptualising law as a relatively autonomous phenomenon provides a platform for exploration of the use of law by protest groups, while recognising law's hegemonic quality. The question of law's role in the mobilisation of campaigning groups first emerged in the 1970s in the United States, reflecting legal academics' concern to connect their field with developing social movement theory which sought to explain the contemporary emergence of a plethora of protest movements.

A key socio-legal contribution came with Scheingold's attack on liberal assumptions as constituting no more than a 'myth of rights.'<sup>25</sup> This myth overemphasised the capacity of symbolic litigation to effect social change, and underemphasised the 'inertial' capacity of law to sustain the status quo. Rather than reject legal claim-making, Scheingold propounded a 'politics of rights,' viewing law in instrumental terms as contributing to a strategy of 'political mobilisation' for social change. This suggests that law occupies two positions: in one, legal tactics are part of an integrated campaigning strategy. The other, radical view, projects mobilisation as flowing from legal claim-making, when "[u]nder the right circumstances rights can be used as a catalytic *agent* [of] mobilisation."<sup>26</sup> This stream of thought has been developed in exploring law's role in mobilising relatively peaceful social movements. The need to spread the field of inquiry, particularly in relation to post-9/11 repression and violence in the democratic state, has been clearly recognised.<sup>27</sup>

To take account of law's role in contemporary conflict, it is necessary to set out some key insights from current social

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25. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 6 (2d ed., Univ. of Michigan Press 2004) (1974).

26. *Id.* at 213.

27. See Christian Davenport, *Repression and Mobilization: Insights from Political Science and Sociology*, in *REPRESSION AND MOBILIZATION: SOCIAL MOVEMENTS, PROTEST, AND CONTENTION* VOL. 21 (Christian Davenport, Hank Johnston and Carol Mueller eds., 2005).

movement literature on violent mobilisation. The term 'social movement' is a broad one, facilitating analyses of such diverse phenomena as U.S. labor groups and Latin American agrarian campaigning organisations.<sup>28</sup> Della Porta's ground-breaking study of German and Italian terrorist groups amply demonstrated the viability of this analytical device in relation to structured violent activism.<sup>29</sup>

In contrast to earlier grievance-based theories of conflict eruption, social movement theory, in its more developed form, argues that while grievances are relatively constant, social movements emerge only in particular circumstances. Consequently, the circumstances more than the grievance explain why a movement develops at a given time. The theory has hardened in recent years to emphasise three sets of factors in explaining movements' emergence and development: 'political opportunities,' 'mobilising structures' and 'framing processes,' creating a need to locate law's role in the mobilisation process under each of these headings. This requires that the meanings of these and related terms be explored.

### *Social Movement Theory and the 'Repression-Mobilisation' Nexus*

While individual *motivation* is likely to be heterogeneous, spanning antagonism, self-interest, and altruism, sustained group *mobilisation* is taken to occur only when appropriate conditions under all three headings above are met. 'Political opportunities' refer to the "structure of political opportunities and constraints confronting the movement."<sup>30</sup> The precise political opportunities available at any given time are unique to national contexts, depending on such factors as the nature of the state (democratic/open, authoritarian/closed), and of precise electoral arrangements.

'Mobilising structures' refer to "collective vehicles, informal

28. For a series of essays covering the Latin American spectrum from agrarian reformers to guerrilla groups see SUSAN ECKSTEIN, *POWER AND POPULAR PROTEST: LATIN AMERICAN SOCIAL MOVEMENTS* (Susan Eckstein ed., 2001).

29. See generally DONATELLA DELLA PORTA, *SOCIAL MOVEMENTS, POLITICAL VIOLENCE, AND THE STATE: A COMPARATIVE ANALYSIS OF ITALY AND GERMANY* (1995).

30. DOUG MCADAM, JOHN D. MCCARTHY, & MAYER N. ZALD, *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 2* (1996).

as well as formal, through which people mobilize and engage in collective action."<sup>31</sup> Where movements survive beyond the emergent phase, these structures are likely to be expressed in the formation of 'social movement organizations.' Successful structures are taken to have developed in order to make efficient use of available resources. 'Framing processes' refer to the "conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action."<sup>32</sup> This definition encompasses a range of cultural and ideational elements, providing collective actors with a shared frame of reference. The emergence of a social movement organisation is therefore explained in terms of the relationship between the opportunities a political system affords, the availability of resources from which structures are built, and organisation members' shared understandings.

A related literature focuses on the state's dealings with challengers and protesters (violent or otherwise)—on 'repression,' defined as "obstacles by the state (or its agents) to individual and collective actions by challengers."<sup>33</sup> Interaction between challengers and the state is explored under the rubric of the 'repression-mobilisation nexus.' Whereas legal exploration tends to focus on effectiveness in individual cases, social movement theory's modelling offers the promise of more nuanced, dynamic exploration. The repression-mobilisation nexus demands examination of both the impact of repression on mobilisation, and of mobilisation on repression.

The result has been a vast range of theoretical and empirical explorations of these interactions,<sup>34</sup> resulting in

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31. *Id.* at 3.

32. *Id.* at 6.

33. Clark McPhail and John D. McCarthy, *Protest Mobilization, Protest Repression, and Their Interaction*, in Davenport et al, *supra* note 27, drawing on CHARLES TILLY, *POPULAR CONTENTION IN GREAT BRITAIN, 1758-1834*, 136 (1995).

34. The literature is vast. Sources drawn upon include: Ronald Francisco, *Why Are Collective Conflicts "Stable"?*, in *PATHS TO STATE REPRESSION: HUMAN RIGHTS VIOLATIONS AND CONTENTIOUS POLITICS* (Christian Davenport ed., 2000); Christian Davenport & David A. Armstrong II, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 *AM. J. POL. SCI.* 538 (2004); Ronald A. Francisco, *The Relationship Between Coercion and Protest: An Empirical Evaluation in Three Coercive States*, 39 *J. CONFLICT RESOL.* 263 (1995); Mark Lichbach, *Protest: Random or Contagious? The Postwar United Kingdom*, 11 *ARMED FORCES & SOC'Y* 581 (1985); T. David Mason & Dale A. Krane, *The Political Economy of Death Squads: Towards a Theory of the Impact of State-Sanctioned*

strong confidence about one dynamic in the nexus: challenger mobilisation always induces some degree of repressive state response.<sup>35</sup> As regards to the other dynamic (impact of repression on mobilisation), no one picture has emerged: repression is sometimes effective, sometimes counter-productive, and sometimes makes little identifiable difference.

Whereas earlier work treated dissent and repression as uniform phenomena, Lichbach argued that the state's actions should be assessed in terms of both repression and accommodation; likewise dissenter behaviour should be analysed in terms of the cost-benefit calculations made by 'dissident entrepreneurs'<sup>36</sup> (protester/rebel leaders) according to a rational actor model. Dissenters choose tactics (violent or non-violent), from what Tilly has referred to as the society in question's "repertoire of collective action."<sup>37</sup> If the state represses non-violent protest, dissenters are likely to switch to violent tactics (the substitution or adaptation hypothesis).

In line with the adaptation hypothesis, but in an accelerated form, is Francisco's depiction of 'backlash': which refers to ". . . massive, rapid, and accelerating mobilisation in the wake of harsh repression."<sup>38</sup> 'Harsh repression' (which fits within this article's notion of legal grey zone activities) includes such events as "massacres. . . all involving the one-sided and overwhelming use of state force."<sup>39</sup> Empirical support for recognising the backlash phenomenon came in Khawaja's study of the West Bank;<sup>40</sup> a study in apartheid-era South Africa displayed a similar pattern.<sup>41</sup>

## LAW AS POLITICAL OPPORTUNITY

Most discussion of law's role by social movement theorists

*Terror*, 33 INT'L STUD. Q. 175 (1989).

35. Davenport et al, *supra* note 27, xvi.

36. Mark I. Lichbach, *Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent*, 31 *Journal of Conflict Resolution* 266, 272 (1987).

37. CHARLES TILLY, *FROM MOBILISATION TO REVOLUTION* 39 (1978).

38. Ronald A. Francisco, *The Dictator's Dilemma*, in C. Davenport et al, *supra* note 59.

39. *Id.*

40. Marwan Khawaja, *Repression and Popular Collective Action: Evidence from the West Bank*, 8 *Soc. F.* 47 (1993), and Marwan Khawaja, *Resource Mobilization, Hardship, and Popular Collective Action in the West Bank*, 73 *Soc. F.* 191 (1994).

41. Johan Olivier, *State Repression and Collective Action in South Africa, 1970-84*, 22 *S. AFR. J. SOC.* 109 (1991).

has been located (often implicitly) under 'political opportunity.' All are agreed on law's repressive potential: in some situations law can be employed to repress challengers, thereby closing political opportunity. As regards law-based openings in political opportunity, most commentators have focused on litigation. Building on earlier contributions, McCann advanced a concept of 'legal mobilization,' critiquing court-centred 'top-down' analysis of law's role in social conflict in which "[c]ausality is presumed to initiate at the top in a discrete judicial source, and trickles down unidirectionally on society, if at all."<sup>42</sup> As an alternative he offered a 'decentred' view of law which take social struggles between non-judicial actors as the focus of analysis; such actors "are viewed as practical legal agents rather than as simply reactors to judicial command."<sup>43</sup> Actual direct judicial commands are rare, and are in any case likely to reflect law's hegemonic quality; more important for decentred views of law are the 'knowledge and signals' sent out by the court and assessed by non-judicial actors (i.e. messaging). These indirect effects contribute to participants' tactical judgments about practical action in social conflict.

Rather than internalising a 'myth of rights,' activists in McCann's analysis of the pay equity movement in the United States are portrayed as employing hard-nosed calculation focusing on law's instrumental benefits in advancing particular demands. Given that McCann's analysis proceeds from assumptions of law's hegemonic quality, how is it possible to account for law's capacity sometimes to act against the interests of the dominant group? His solution is to present judicially articulated legal norms as having a capacity to "take [on] a life of their own"<sup>44</sup> in the hands of activists who may be deeply critical of the courts and of law-makers. This view meshes well with Abel's view of apartheid-era law as having a relatively autonomous quality (a discussion that Abel also cross-references to the social movement-influenced legal literature).

The social context in which Abel situates his discussion can be considered the classic 'grey zone' of the state of exception.<sup>45</sup>

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42. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 731 (1992).

43. *Id.*

44. *Id.* at 733.

45. Abel, *supra* note 14, at 539. "Loose coupling between top and bottom—the co-existence of rare conspicuous legalism with pervasive covert illegality—are universal, but South Africa refined this moral division of labor into a high art." *Id.*

Law has the potential to close political opportunity, and political opportunity may also be closed by illegal state action, but law's relative autonomy means both that closure by law is not automatic, and that law offers the remote possibility of challenging closure. Law may be a shield: trials of dissidents can provide a platform for challenging closing. Law can also be a sword: proactive litigation strategies present dissidents with sites of contestation of their choosing (although with lower prospects of success).

McCann's and Abel's analyses focus on claims-making in domestic law. For a variety of reasons, the international arena has provided increasing sites for challenge in recent decades: the growth of international law, particularly of international human rights, international criminal law, and international trade law;<sup>46</sup> this law's claims to universality; the re-emergence of the international criminal prosecution model, and the growth of universal criminal jurisdiction. Some such invocation of international law may be by grassroots campaigning organisations in sites of social conflict (who may simultaneously invoke and critique the law). It may also be by outside entities (such as states, IGOs or international NGOs), all of which can operate to alter the terrain within which localised claims-making occurs.

#### LAW AS RESOURCE: MOBILISING STRUCTURES

In addition to its facilitative quality, McCann posits a 'constitutive' power for law.<sup>47</sup> Legal claim-making is presented not simply as a tool permitting or facilitating mobilised groups, but as a 'resource' which helps to *create* mobilisation<sup>48</sup> For McCann, court cases were used by campaigners "to 'hot wire' movement building campaigns at the grassroots,"<sup>49</sup> bringing in personnel and financial resources. The results of appellate decisions were 'manipulated'<sup>50</sup> to generate publicity, while local

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46. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

47. Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 264 (Austin Sarat & Stuart Scheingold eds., 1998).

48. *Id.*

49. McCann, *supra* note 42, at 738.

50. *Id.*

lawsuits were used as "primary organizing tools by unions and feminist groups."<sup>51</sup> The dynamic being presented is one familiar in social movement theory in which movement 'entrepreneurs' employ or manipulate a resource to build social movement organisations.

The kind of legal resource that McCann focuses upon is litigation, but implicit in Abel's analysis is the possibility that law-based repression may, in certain circumstances, contribute to the mobilisation of the state's challengers. Trials of dissidents can occupy a paradoxical position in that the controversy they generate can operate as a brake on repression. Such proceedings may amount to 'show trials'<sup>52</sup> and so stimulate challengers. The most pronounced example is where challengers deliberately invite prosecution with a view to using the resulting trials as mobilising devices, a tactic that was used in South Africa, and with even greater effect elsewhere.<sup>53</sup>

So far the focus has been on trial as a resource for the state's challengers. But if trial-based repression can be considered a resource, or a provider of resources, a similar categorisation may be appropriate for other categories of repression. Such repression may be lawful or otherwise, although the pronounced legal grey zone phenomenon in states of emergency means that this distinction may be difficult to draw with precision.

This 'grey zone' effect is directly linked to the structure of anti-terrorist/emergency powers (though other factors identified earlier also come into play). These powers tend to be 'executive-oriented,' 'catch-all' (widely drafted) and 'judge-proof.'<sup>54</sup> Emergency and anti-terrorist law tends to invest lower-echelon police and military operatives with considerable discretionary powers (for instance to search houses or to stop and search individuals). These powers may be used with discrimination, or indiscriminately and abusively, but their structure means that distinctions may be difficult to draw. Some repression may be devoid of any legal veneer, and may also be either discriminate or indiscriminate, but particularly if it involves covert activity,

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51. *Id.*

52. ABEL, *supra* note 14, at 528.

53. See JUDITH M. BROWN, *GANDHI AND CIVIL DISOBEDIENCE: THE MAHATMA IN INDIAN POLITICS 1928-34* (1977).

54. See COLM CAMPBELL, *EMERGENCY LAW IN IRELAND, 1918-25* (1994); DAVID BONNER, *EMERGENCY POWERS IN PEACETIME* (1985).



accountability in legal grey zones may be impossible to achieve.

As developed by McCann, 'legal mobilisation' provides a viable account of how demands for legal redress can contribute to building campaigning movements. But there are two additional ways in which contemporary social movement theory implies that law may be a factor in the growth of protest movements (whether violent or otherwise): where the state's exercise of a legal power contributes to challenger mobilisation, or where mobilisation is stimulated when the state acts illegally. In the state with an ideological commitment to the rule of law, law is implicated in both instances—by its presence or by its absence. To address this gap, this article hypothesises a process of 'legally implicated mobilization,' a concept encompassing but broader than legal mobilisation. Legally implicated mobilisation refers to mobilisation of the state's challengers that is stimulated (a) by the exercise of a legal power by state operatives, or (b) by illegal action by such operatives, or (c) where the operatives act in legal grey zones of ambiguous legality, or (d) by legal claim-making by challenger organisations. Again, Abel's analysis of the old South Africa chimes with such an understanding when he suggests that "[i]ndiscriminate state violence transformed the stigma of arrest, detention, and punishment into badges of honor"<sup>55</sup> generating increased mobilisation: "[t]his experience . . . educated cadres and intensified their commitment."<sup>56</sup>

This hypothesis is tested and grounded by reference to the empirical data below, and characteristics of such mobilisation (potentially affecting legal 'damping' and 'messaging') explored. Given Lichbach's insistence on the need to disaggregate state behaviour in the repression-mobilisation nexus, and Abel's emphasis on 'indiscriminate' state action in this context, the question of discrimination in repressive techniques is also explored.

#### LAW AND FRAMING PROCESSES

Abel's 'badge of honor' points not only to consideration of repression as a possible provider of resources to challengers, but also to an examination of law's place in the framing processes they employ. The question is related to that of legal 'messaging.'

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55. ABEL, *supra* note, 14 at 527.

56. *Id.*

McCann's focus was on the role of courts in sending 'signals' to activists about the law, but in the self-defined 'rule of law' state there is no need to view the state's senders of signals only in terms of the courts: the behaviour of all state agents sends signals about the law.

How challengers read these signals is mediated by their framing processes, which in turn may affect the signals that the challengers send. For example: a 'rule of law' state engaging in severe repression (which may be largely illegal), may send a signal to its challengers that legal restrictions on the state's behaviour are being set aside ('the gloves are off'). By contrast, in the authoritarian state ('regimes of ordinary repression'),<sup>57</sup> the 'gloves' may be absent all the time; an increase to severe repression may appear more as incremental change than as a qualitative shift, with the result that the signalling process may be quite different. In the 'rule of law' state, challengers in turn may attempt to construct an ideological device rationalising their use of violence ('motivational framing' in the social movement literature),<sup>58</sup> based partly on the state's legal failings. Any such ideological device is likely to be influenced by the culture of the broader segment of society from which challengers draw support, which in turn is likely to be influenced by the state's behaviour. Framing processes inevitably involve agency, and as the literature in the field identifies, the effectiveness of the frames created is likely to depend on their salience: "[a]re movement framings congruent or resonant with the personal, everyday experiences of the targets of mobilization?"<sup>59</sup> This also has implications for strategies of de-escalation: where a state shifts from severe illegal repression to lower levels of law-based repression, this may send a signal that the 'gloves are on,' affecting societal perceptions of challengers' use of violence (and their associated framing processes).

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57. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (Special Rapporteur Mrs. N. Questiaux).

58. See, e.g., Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 617 (2000).

59. *Id.* at 621.

## 2. THE NORTHERN IRELAND CASE-STUDY

The legal tools employed by the state in the Northern Ireland conflict have been explored at length elsewhere.<sup>60</sup> Various statutory powers existed in the Civil Authorities (Special Powers) Acts<sup>61</sup> (SPA) (repealed in 1973), the Northern Ireland (Emergency Provisions) Acts (EPA) (from 1973 onwards), and the Prevention of Terrorism (Temporary Provisions) Acts (PTA) (from 1974 onwards). The latter provided the template for the centre-piece of current British domestic anti-terrorist legislation, the Terrorism Act 2000 (as amended). Statutory provisions were supplemented by ambiguous and sometimes extensive common law powers, particularly in relation to the use of force. There have been excellent quantitative legal studies on the operation of these tools,<sup>62</sup> and on the experience of ex-prisoners,<sup>63</sup> and well-developed comparative quantitative (non law-based) studies on state repression.<sup>64</sup> As regards qualitative research, Burton<sup>65</sup>, Cavanaugh,<sup>66</sup> and White<sup>67</sup> have conducted pioneering research relating to experiences of repression from political science and sociological perspectives. But there is as yet no qualitative exploration of law's impact on the mobilisation of the state's

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60. See, e.g., GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* (1989); Tom Hadden, Kevin Boyle & Colm Campbell, *Emergency Law in Northern Ireland: The Context*, in JUSTICE UNDER FIRE (Anthony Jennings ed., 1st ed. 1988).

61. CAMPBELL, *supra* note 54, at 277-78.

62. See, e.g., KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, *TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE* (1980); DERMOT WALSH, *THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND* (1983). For a qualitative study in Britain's Irish community, see PADDY HILLYARD, *SUSPECT COMMUNITY: PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS* (1993).

63. See, e.g., Kieran McEvoy, Peter Shirlow & Karen McElrath, *Resistance, Transition and Exclusion: Politically Motivated Ex-Prisoners and Conflict Transformation in Northern Ireland*, 16 *TERRORISM & POL. VIOLENCE* 646 (2004).

64. See, e.g., Ronald A. Francisco, *Coercion and Protest: An Empirical Test in Two Democratic States* 40 *AM. J. POL. SCI.* 1179 (1996); George Tsebelis and John Sprague, *Coercion and Revolution: Variations on a Predator-Prey Model*, 12 *MATHEMATICAL AND COMPUTER MODELLING* 547 (1989).

65. See FRANK BURTON, *THE POLITICS OF LEGITIMACY: STRUGGLES IN A BELFAST COMMUNITY* (1978).

66. See Kathleen A. Cavanaugh, *Interpretations of Political Violence in Ethnically Divided Societies*, 9 *TERRORISM & POL. VIOLENCE* 33 (1997).

67. See Robert W. White, *Issues in the Study of Political Violence: Understanding the Motives of Participants in Small Group Political Violence*, 12 *TERRORISM & POL. VIOLENCE* 95 (2000).

violent challengers.

#### PROFILE OF RESPONDENT GROUP

To address this gap, the respondent group selected for this article consisted of activists incarcerated for IRA-linked activities, identified through ex-prisoner organisation *Coiste na nIarchimí*,<sup>68</sup> all of whom had been released early through the peace process. Semi-structured interviews were recorded, transcribed, and analysed using the QSR Nud\*ist data analysis system.

During questioning it became clear that several respondents had occupied leadership positions in prison, and that some had been involved in extensive activism. What emerged was a group incorporating a slice of IRA 'middle-management'—Lichbach's 'dissident entrepreneurs.'<sup>69</sup> This enhanced the utility of the study; the meso-level is the least researched element of violent republicanism, and its role potentially offered key insights into the mobilisation process. There were 16 respondents in total: three female and 13 male. Six came from rural areas and ten from urban districts. Respondents' ages ranged from 31 to 58 years. Dominant social backgrounds were working class and lower middle class. Educational attainment was high: a number of respondents had university degrees (several obtained in prison), some at the master's and doctoral levels.

Flowing from the analytical framework developed above, this part focuses on three questions: (1) to what extent did respondents link experience of repression to mobilisation? If they did, which kinds of repression were involved, and to what extent was law implicated? (2) What role did law and experience of repression play in the framing processes evinced by the activists? (3) What evidence was there of a 'damping effect' for law, and if evidence were available, how did this effect come about?

When asked about personal experiences and possible impact of security force activity on their behaviour, group members reported memories from pre-teenage years, through to the arrests that led to their trial. Most accounts fell into three

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68. For lists of the organisation's publications and those of its associated groups see <http://www.coiste.ie/publications.htm>.

69. Lichbach, *supra* note 36.

categories: (1) personal experiences of activities such as house searches from childhood onwards; (2) experiences in the interrogation room; and (3) the impact of perceptions of repressive techniques on a group with whom the respondent identified. The latter related to two discrete sets of events which appear to have operated as 'tipping factors', directly propelling respondents into activism.

#### EARLY EXPERIENCES OF REPRESSION

Several of the behaviours described in the first group corresponded with that reported in other studies of security force (particularly Army) behaviour in the 1970s and 1980s: typical 'grey zone' activities, where statutory powers were used in a way that shaded into illegality. One was of 'house raids'—generally referring to Army searches (based on EPA 1973,<sup>70</sup> or on SPA<sup>71</sup>) of their parents' homes in the early 1970s. These operations were typically described as happening in the early hours of the morning, involving the searching of anything from one-third to an entire row of houses. Respondents' accounts were mixed: some described searches executed with clinical efficiency, but the dominant narrative was couched in the language of violent intrusion. Accounts tended to emphasise the humiliation of the older generation, with male respondents in particular, emphasising the treatment of the mother: ". . . you know the Army coming with sledgehammers, and heard them upstairs. . . and the daughters all round me Ma to put a blanket up so my Ma could change - she had a nightie and they were pulling it away 'you f. . .ing Irish bitch get out of the bed.'"<sup>72</sup>

Another set of early experiences related to the use of stop-and-search powers (again based on EPA or SPA),<sup>73</sup> the picture emerging being similar to that reported by McVeigh.<sup>74</sup> Respondents described feelings of harassment through continuous operation of these powers—perhaps six stops in one evening—beginning when they reached the ages of 11-14. Males tended to describe the Army's behaviour in terms of classic male

70. Emergency Powers Act, 1973 (Act No. 53/1973) (N. Ir.).

71. Civil Auth. (Special Powers) Act (N. Ir.), 1922, 12 & 13 Geo. 5. c. 4 (N. Ir.).

72. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).

73. N. Ir. (Emergency Provisions) Act, 1973, c. 53, § 16; Civil Auth. (Special Powers) Act (N. Ir.), 1922, 12 & 13 Geo. 5. c. 6 (N. Ir.).

74. ROBBIE MCVEIGH 'IT'S PART OF LIFE HERE...': THE SECURITY FORCES AND HARASSMENT IN NORTHERN IRELAND (1994).

bullying: “. . . you were getting stopped, you were getting abused, you were lucky you got away without a slap. . . depending on the regiment, you knew you were going to get robbed.”<sup>75</sup> Females, by contrast, tended to describe harassment in terms of sexualised psychological abuse:

I lived in the same street as the school and there was an [Army] outpost at the corner, so I had to pass this outpost ten times a day . . . and there was always a Brit in it and you would never pass it without an abusive comment. All this vulgar stuff and that just happened all the time.<sup>76</sup>

Female accounts of contentious street interactions with the Army in later life tended to emphasise the impact of such interactions on their children. This offered a partial contrast with male accounts in general, which tended to emphasise the impact of Army behaviour on the older generation.

The emphasis by male (rather than female) respondents on the impact of intrusion on the home might appear to run contrary to a stream of feminist analyses that emphasises the significance of the public/private divide. Within this framework, the public space/home dichotomy is a specific manifestation of this divide, with the private sphere being an especially important site of the infliction of harm (generally invisible) on females, and the public being the site where males suffer (much more visible) harm by other males.<sup>77</sup>

There are two reasons for suggesting that this theoretical clash may be more apparent than real: the first is that such limited research as is available in relation to females engaging in political violence suggests that they tend, more than males, to reject projections of themselves as ‘victims.’ Instead females tend to insist on their own agency (perhaps as a consequence of having to assert themselves in male-dominated groups, and to counter gendered-expectations of female activism).<sup>78</sup> Some

75. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).

76. Interview with urban female, in Belfast, N. Ir. (Nov. 2002).

77. For a review of the literature on the question of the importance of the public/private divide in analyses of the gendered aspects of violently conflicted societies, see Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth and Transition*, 16 *UCLA WOMEN'S L. J.* (forthcoming 2007). See also Nthabiseng Motsemme, *The Mute Always Speak: On Women's Silences at the Truth and Reconciliation Commission*, 52 *CURRENT SOC.* 909 (2004); see also generally ALLAN FELDMAN, *FORMATIONS OF VIOLENCE: THE NARRATIVE OF THE BODY AND POLITICAL TERROR IN NORTHERN IRELAND* (1991).

78. See Alison, *supra* note 9.

support for this view emerged in female accounts of interrogations (below). On this understanding, female activists might be expected to de-emphasise the impact of harm within the home, precisely *because* the home was a key site of general female victimhood.<sup>79</sup> The second reason for questioning a theoretical clash is that, as noted above, in male accounts of home intrusion, harm tended to be articulated by reference to female family members; for males, the issue was both a *vicarious* experience of female harm, and personal helplessness in its presence.

More generally, in respondent accounts, initial positive communal perceptions of the British Army changed from “. . . the British Army’s all fantastic guys and they’re all down making them tea and running for Mars bars for the British soldiers for them to protect the Catholics. . .,” to: “. . . next thing the resentment. Whole streets getting raided. . . . Kicked the door down half four in the morning.”<sup>80</sup> For some, experience of repression of this sort was directly linked with later violent involvement: “. . . all them conditions *kind of* made you into this f—g terrorist, and people say why? We didn’t pop out of the trees.”<sup>81</sup> The quote referred to repression having a ‘kind of’ impact, rather than operating as a simple cause-and-effect; other factors are implicitly projected as coming into play.

The most striking feature that emerges from this picture of repression is its indiscriminate quality: there is no suggestion of there being any selectivity, beyond members of the target group being at least 11 years old and living in nationalist working class areas. Reflecting this, the interviews frame perceptions of harassment in a narrative of collective experience: that of the peer group, family, or of broader sections of society: “. . . there was just hostility between my *community* and the British Army.”<sup>82</sup>

The final set of ‘early memories’ related to a less researched area: forced house movement in urban areas as a result of violence early in the conflict. Some reported the destruction of family homes, while other described pre-emptive moves in response to fears of attack. In recent years, the question of forced population movement in violent ethnically driven

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79. We are grateful to Fionnuala Ní Aoláin for this insight.

80. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).

81. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).

82. Interview with urban female, in Belfast, N. Ir. (Nov. 2002).

conflicts has developed a vocabulary of its own,<sup>83</sup> but this language did not exist at the eruption of the Northern Ireland conflict.

Among respondents, the incidence of reported forced movement was much higher than can have been the case in the general population, but qualitative studies do not lend themselves to statistically significant conclusions. Accounts of direct forced expulsion are redolent of extreme trauma (most affected respondents were aged 11-14 years at the time). Some respondents' account of the 'shock' effect focused mainly on the behaviour of former neighbours (accounts are mixed); for others, the shock lay in perceptions of security force collusion (where law was implicitly implicated by its absence): "at. . . thirteen years of age you see RUC men and Specials [constables] . . . standing in the middle of a Loyalist crowd while that Loyalist crowd burns down houses."<sup>84</sup> None of the respondents suggested any direct link between expulsion and violent involvement; in all cases though, the affected respondents had become involved in republican activism within four years of displacement, in most instances, once they reached some point in the 15-16 age range. The typical pattern appeared to be of initial involvement in low level activities, sometimes in the IRAs junior wing ('Fianna Eireann'), 'graduating' to high-intensity violent activism in the IRA proper.

#### PERSONAL EXPERIENCES OF INTERROGATION

Well-documented detainee-abuse claims featured throughout the Northern Ireland conflict. These appeared to follow a cyclical pattern of displacement of abuse: publicity in relation to particular interrogation practices was followed by human rights pressure for change, leading to fresh safeguards, which were then partly circumvented, producing new allegations of abuse, and leading to demands for new safeguards.

Three main phases can be identified. In the early 1970s, following the introduction of indefinite internment without trial under the SPA two sets of allegations surfaced, corresponding with the debate on 'torture lite' and 'torture heavy' in the 'war on terror.' The 'torture lite' allegations entailed the use of the

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83. See e.g., ANDREW BELL-FAILKOFF, *ETHNIC CLEANSING* (1996).

84. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).



'five techniques' of sensory deprivation (hooding, 'white noise', sleep deprivation, deprivation of food and water, and wall-standing), condemned by the European Court of Human Rights as "inhuman or degrading treatment."<sup>85</sup> The 'heavy' allegations involved claims of, amongst other things, severe beatings and forced administration of drugs. In the *Donnelly* case, European litigation in relation to the latter claims was stymied on the grounds that toleration of the activities at a sufficiently high level of command had not been shown to exist:<sup>86</sup> toleration ". . . at the middle or lower levels of the chain of command. . . does not. . . necessarily mean that the state concerned has failed to take the required steps to comply with its substantive obligations."<sup>87</sup> In the domestic courts though, substantial damages were awarded to several of the claimants.

Whereas the practices used in the early 1970s were either admitted (in the case of the 'five techniques'), or tended to leave prominent marks on the body, the allegations that surfaced in the centralised interrogation centres in the late 1970s and early 1980s, were not admitted, and seemed calculated to avoid earlier levels of evident tissue damage. These occurred in an interrogation regime that permitted seven-day detention without charge under the PTA, and which, under the EPA, rendered admissible, confessions that would have been inadmissible under the ordinary law.<sup>88</sup> These allegations included painful manipulation of limbs, partial asphyxiation, and employment of threats, including threats of rape of female detainees.<sup>89</sup> Following pressure from international human rights

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85. See *Ireland v United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 25 (1978); COMMITTEE OF INQUIRY, REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST, 1971, Cmnd. 4832 [hereinafter COMPTON REPORT], REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, Cmd. 4901 [hereinafter PARKER REPORT].

86. *Donnelly & Others v. UK*, App. No. 5577, 5583/73, 4 Eur. Comm'n H.R. Dec. & Rep. 4 (1975).

87. *Id.* at 85.

88. The ordinary law initially employed a common law test of 'voluntariness' in relation to admissibility. Under the Police and Criminal Evidence (Northern Ireland) Order 1989 the ordinary law was changed to allow for the exclusion of confessions based on a test of 'oppression'. Police and Crim. Evidence (N. Ir.) Order, 1989, No.1342 (N.I. 12).

89. AMNESTY INT'L, REPORT OF AN AMNESTY INT'L MISSION TO N. IR. (28 NOV. - 6 DEC. 1977) (AI Index: EUR 45/01/78, 1978).

NGOs<sup>90</sup> and a critical official inquiry,<sup>91</sup> additional safeguards, principally the silent video-monitoring (though not recording) of interrogations, were introduced in 1979.

Subsequently, claims of physical abuse tended to decline (with some fluctuations), but in the late 1980s and early 1990s, allegations of psychological abuse mounted. At the end of 1991 the European Committee for the Prevention of Torture was sufficiently concerned that it judged a visit to Northern Ireland “to be required in the circumstances.”<sup>92</sup> The ensuing report was heavily critical, concluding that “persons arrested in Northern Ireland under the PTA run a significant risk of psychological forms of ill-treatment. . . .”<sup>93</sup> The Committee later called for the closure of the main centre,<sup>94</sup> a call acted upon at the end of 1999.

The interviews in our survey were conducted before the Abu Ghraib prison scandal broke; inevitably that scandal has focused fresh interest in the question of sexualised abuse, including trauma to male genitalia, during interrogation.<sup>95</sup> For interrogators, such abuse provide opportunities for inflicting intense physical pain, but more importantly, for ‘breaking’ a suspect, on the basis that sexuality offers a quick route to core vulnerabilities.

One result has been to force attention on a neglected

90. *Id.*

91. COMMITTEE OF INQUIRY, REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497 [hereinafter BENNETT REPORT].

92. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 7, para. 1, signed Nov. 26, 1987, entered into force Feb. 1, 1989, Doc. No. H(87)4 1987, ETS 126, reprinted in 27 ILM 1152 (1988).

93. REPORT TO THE GOVERNMENT OF THE UNITED KINGDOM OF THE VISIT TO NORTHERN IRELAND CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT), para. 110, CPT (1994), available at <http://www.cpt.coe.int/documents/gbr/1994-17-inf-eng.pdf> (last visited Feb. 12, 2007).

94. REPORT TO THE GOVERNMENT OF THE UNITED KINGDOM ON THE VISIT TO NORTHERN IRELAND CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, at para. 119, CPT (2001), available at <http://www.cpt.coe.int/documents/gbr/2001-06-inf-eng.pdf> (last visited Feb. 12, 2007) [hereinafter the 2001 CPT REPORT].

95. See Eric S. Carlson, *The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals*, 46 BRIT. J. CRIMINOLOGY 16 (2006).

undercurrent in Northern Ireland: in *Donnelly*, one of the detainees described being made to 'bark like a dog', to squat on all fours, and being subject to a serious sexual assault (a brush shaft forced into his anal passage), an allegation generally neglected in the academic literature.<sup>96</sup> Our interviews also reported a current of sexualised abusive behaviour by the security forces, surfacing throughout the conflict, in interactions on the street and in the interrogation room.

One male respondent described a detention in the early 1970s that involved sleep deprivation, being kept in a room with visually disorientating pegboard, followed by an interrogator's demand: ". . . 'right, strip him, strip him,' you know, and you'd stand there naked, and eh squeezing my testicles for a bit, and I fainted."<sup>97</sup> That respondent reported being left with bruising on his body. Several respondents reported detentions in the late 1970s, which involved some overlapping complaints (including partial asphyxiation), but which displayed a much greater emphasis on avoiding bodily marks. Trauma to the male genitals also figured in accounts from this period:

[I]t must be a sexual thing you know, or maybe because most of the people arrested were mainly young fellas, but they used to always concentrate on your privates you know, that sort of thing; em so they were very aggressive you know, but also usually they kept their cool.<sup>98</sup>

Accounts of interrogations in the final period are more mixed. Several respondents emphasised the 'boring'<sup>99</sup> quality of detentions, at which they refused to answer questions, but which they did not depict as involving ill-treatment. The undercurrent of sexualised interrogation practice though, surfaced again in female accounts: ". . . I was physically abused and sort of, in a way, sexually abused. This particular [Special] Branch man was putting his hands on my body, and putting his arms round me, and trying to intimidate me that way."<sup>100</sup> Another session was described as involving a variant of the good cop – bad cop routine: ". . . he [the interrogator] would be nice for a while, and then once he'd changed, then he started to come on

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96. See *Donnelly* Eur. Comm'n H.R. Dec. & Rep., at 15; Compton Report, *supra* note 85, 17; JOHN MCGUFFIN, *THE GUINEAPIGS* 69 (1974).

97. Interview with urban male, in Belfast, N. Ir. (Jan. 2003).

98. Interview with urban male, in Belfast, N. Ir. (Mar. 2003).

99. Interview with rural male, in Belfast, N. Ir. (Dec. 2002).

100. Interview with urban female, in Belfast, N. Ir. (Nov. 2002).

sexually, and then he just got physically abusive."<sup>101</sup>

Female accounts, though, emphasised resilience in the face of attempts by interrogators to use such gendered pressure points as the absence of the (detained) parent: "They said about being out and raiding the house, and 'we're going to out to raid you, and all your kids were yelling and screaming you know,' and I thought 'no I don't think so, my kids are too used to them you know.'" <sup>102</sup>

Overall, therefore, accounts of abuse during interrogation had a temporal dimension consistent with the three phases outlined above. There was also a gendered dimension, with females more likely to recount psychological sexualised abusive behaviour that displayed continuity with gendered experience of street interactions with the Army. With obvious contemporary resonance, 'torture lite' and 'torture heavy' appear not as alternative strategies but as partly contemporaneous and overlapping phenomena. Unacknowledged 'torture heavy' may have happened because 'torture lite' was officially sanctioned, pointing to the importance of messaging within and beyond state structures, a point explored further below.

#### MASS MOBILISATION AND VIOLENT MOBILISATION

The key to interpreting the impact of the third set of experiences lies in the uneven picture of timing of recruitment of members of the respondent group that emerged in the survey: there was heavy clustering around two time-periods (1972-3 and 1981-3), with only outliers joining in other years. Heavy IRA recruitment in 1972-3 is often explained in terms of a reaction to the 'Bloody Sunday' killings in January 1972, when paratroopers shot 13 people dead at a protest march, but the interview data suggests that this may oversimplify the process. The march was called by the Northern Ireland Civil Rights Association (NICRA) to protest against the introduction of internment without trial in August 1971. Soon after the first internment arrests, well-documented accounts of severe prisoner abuse began to circulate, corresponding with the 'torture lite' and 'torture heavy' accounts described above, prompting a resurgence of mass mobilisation in street protests.

Of the respondent group, only one person made an

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101. *Id.*

102. Interview with urban female, Belfast, N. Ir. (Feb. 2003).

automatic link between the Bloody Sunday events and the decision on violent involvement. Rather, a more nuanced picture was painted, of personal experience of lower levels of repression; of identification with the detainees from whom the abuse claims emanated; and of identification with the cause and the victims of the Bloody Sunday protest: "it was all those things, one thing after another and then the next big event after that, Bloody Sunday."<sup>103</sup>

A similarly layered picture emerges in relation to activists in the 1981-83 cluster; in virtually all cases, the radicalisation that led to IRA activism coincided with involvement in street protests on behalf of IRA prisoners participating in the 'dirty protest' (1977 - 81) and hunger-strikes (1980-81) (ten prisoners fasted to death) in the Maze Prison ('H-Blocks') (male prisoners) and in Armagh Jail (female prisoners). The government claimed that conditions in the jails were self-inflicted, while campaigners blamed the authorities for the conditions, for beatings, and for humiliating body searches. The European Commission, which viewed the prisoners' claims as constituting a demand for 'political prisoner status' found that no such ". . . entitlement in the present context can be derived from *existing* norms of international law," though the Commission did criticize the authorities' 'inflexible' approach.<sup>104</sup>

Respondent accounts paint a picture of personal experience of repression creating a predisposition to support for violent anti-state challenge; of identification with protesting prisoners leading to involvement in mass demonstrations; and of the Government's handling of prison protest playing a key role in relation to IRA involvement: the hunger strike ". . . crystallised my opinions and the decisions that you make, and I joined the IRA straight after the hunger strike."<sup>105</sup>

While most respondents implicated personal experience of repression to some extent in their violent involvement, accounts relating to the two big clusters of IRA recruitment had three elements in common, separating them from the cases of outliers: the first is that perceptions of egregious repression directed at a group with whom the respondents identified appeared to function as 'tipping factors.' Both clusters involved perceptions

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103. Interview with urban male, Belfast, N. Ir. (Jan. 2003).

104. *McFeely v U.K.*, App. No. 8317/78, 3 Eur. H.R. Rep. 161, 195 (1980) (Commission Report).

105. Interview with urban male, Belfast, N. Ir. (Dec. 2002).

of prisoner ill-treatment, and multiple deaths for which respondents blamed the state. Della Porta's research suggested a similar, though less pronounced dynamic in the radicalisation of members of German terrorist groups.<sup>106</sup>

The second is that, particularly in the case of the 1972-73 cluster, and to some extent in the 1981-3 group, the activities giving rise to these perceptions corresponded with the pattern of legal grey zones set out earlier: activities of doubtful or heavily contested compatibility with domestic and/or international law norms, where the reach of the law was limited.

The third is that both clusters of violent mobilisation were preceded by largely non-violent mass mobilisation (this bears some comparison with Della Porta's observation that violent radicalisation in mainland Europe in the late 1960s and in the 1980s was preceded by in each case by mass mobilisation)<sup>107</sup>. In both periods in Northern Ireland, mass mobilisation corresponded with McCann's notion of 'legal mobilization.' In the case of NICRA the ending of internment was one of a series of discrete demands for legal reforms around which mobilisation had been built. In the 'H-block and Armagh' campaign, the focus was on five discrete prisoners' demands, such as the right not to wear prison uniforms—a right easily framed in legal terms, and ultimately legislated for in a new statutory instrument.<sup>108</sup> Violent mobilisation, which involved much smaller numbers of individuals, fed off the largely peaceful mass mobilisation that preceded it. This was true of accounts of both male and female activists.

Lichbach's depiction of the 'entrepreneurship' of rebel leaders helps to explain this phenomenon. Just as McCann depicted protest leaders as 'manipulating' the results of litigation to build protest movements, the picture suggested in the survey was of rebel leaders manipulating experiences and perceptions of repression to build their organisation. Entrepreneurship was evident in the extent to which repression, aimed at ending challenge to the state, was paradoxically transformed into a provider of *resources* (recruits and communal support/toleration). Indiscriminate state repression appears as a low-cost benefit to 'violent entrepreneurs,'<sup>109</sup> since by definition

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106. DELLA PORTA, *supra* note 29, at 160.

107. *Id.*

108. The Prison Rules (Northern Ireland) 1982, SR (1982) No. 170, rule 67.

109. DELLA PORTA, *supra* note 29, at 195–201, uses the phrase 'entrepreneurs of

it rarely hits activists, and frequently radicalises the population from which challengers spring; in a formulation attributed to a senior republican, some security force strategies were "the best recruiting tools the IRA ever had."<sup>110</sup> The manipulation leading to this *mobilisation* was able to draw upon a range of individual *motivations*, corresponding with the mixed bag described in several published accounts of IRA involvement.<sup>111</sup> These included the excitement of youthful activism, the 'romantic'<sup>112</sup> appeal of republicanism, and anti-Protestant sectarianism, particularly in 1970s Belfast, which respondents were keen to distance themselves from, but which was acknowledged as a factor motivating some IRA members.

#### LAW, REPRESSION AND FRAMING PROCESSES

Predictably, the framing processes suggested by members of the respondent group appeared to be geared towards valorising the violent mobilisation with which they were associated. International comparisons abounded (principally with the ANC). But these processes also suggested some paradoxical elements, not least in relation to the role of law.

One paradox related to the question of the contribution of the impact of experience of repression in the formation of communal identities. This issue is particularly important given that the 'tipping factors' that emerged in relation to violent activism, related to not to personal experience, but to perceptions of egregious repression directed at members of the community with which respondents identified. Some respondents linked identification with community with personal experience of conflict (including that of repression): "I grew up as a wee Brit. . . It's only when the conflict came you started recognising who you are."<sup>113</sup> This suggests that a process of individual alignment with movement framing processes

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violence' to refer to violent social movement organisations. We employ the title 'violent entrepreneurs' to refer to individual meso-level activists.

110. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1662 (2003) (quoting Interview with Jim McVeigh, Long Kesh, Maze Prison (Dec. 9, 1998)).

111. See EAMON COLLINS, *KILLING RAGE* (1998); SEAN O'CALLAGHAN, *THE INFORMER* (1999).

112. Interview with urban male, Belfast, N. Ir. (Mar. 2003).

113. Interview with urban male, Belfast, N. Ir. (Jan. 2003).

identifying a clear 'enemy' began at an early age; that experience of the impact of emergency powers fed into the adoption and creation of these frames; and that experience of indiscriminate repression had the effect of increasing the sense of solidarity of the targeted group.

Another set of paradoxes related to framing around the question of 'grievances.' In line with contemporary social movement theory on the relatively static quality of grievances, the core grievance articulated by respondents was the traditional one: the illegitimacy of Northern Ireland (rather than security force activity). Nevertheless, there was a marked division in the respondent group in how the claimed failings of the state were framed ('diagnostic framing'),<sup>114</sup> which in turn fed into respondents' rationalisation of violence. One stream attempted to rationalise the use of violence in terms of the need to end British sovereignty in Northern Ireland. The more dominant stream nuanced the issue somewhat, locating resort to violence in the state's suppression of civil rights protests: "we had the Civil Rights [Movement]. . . and we had the state responding violently to those peaceful marches, peaceful requests."<sup>115</sup> From this perspective, violence occurred because of a failure of non-violent efforts to remedy rights-violations, raising the question whether securing peaceful change could contribute to ending violence.

While it is true that NICRA met with a repressive response, it is not true that the effective end of the movement (c. 1972) was the end of progressive change. Rather, direct British rule from 1972 onwards (punctuated by the 1973 power-sharing experiment) was characterised by a twin-track of repression and reform in the anti-discrimination field. From the Anglo-Irish Agreement onwards (1985), this reform process also encompassed greater official recognition of an Irish identity. The 1985 Agreement represented the encapsulation of this identity in a treaty binding in international law,<sup>116</sup> a model subsequently followed in the Belfast/Good Friday Agreement 1998.<sup>117</sup>

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114. Benford & Snow, *supra* note 58, at 615.

115. Interview with rural male, Belfast, N. Ir. (Dec. 2002); *C.f.* DELLA PORTA, *supra* note 29, at 163 (accounting the articulation of "injustice frames" (quoting GAMSON ET AL, ENCOUNTERS WITH UNJUST AUTHORITY (1982)).

116. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, Nov. 15 1985, Gr. Brit. T.S. No. 62 (1985), (Cmnd. 9690).

117. The 1998 Agreement contained both an international treaty between the



The respondent retort to this was partly to appropriate the reform achievements as the result of the use of violence: "... if it hadn't been for armed struggle I don't believe that there would have been an acceptance on the part of the British to actually force the Unionists to accept anti-discrimination *legislation*."<sup>118</sup> In a similar vein, respondents sought to claim the new political dispensation in Northern Ireland (including the Belfast/Good Friday Agreement and increasing legal recognition of an Irish identity), as at least partly their achievement, reflected in one respondent's assertion of a widespread belief that

[W]ithout people that had took part in the armed struggle. . . we would not be at the juncture we are at today. You know people would say 'yes we agree, we may not have agreed with your em methods, but it was without doubt that the IRA has created conditions, has eh brought this on.<sup>119</sup>

This implicit valorisation of law as a vehicle for capturing political gain sits uneasily with the Marxist-influenced analyses provided by some respondents; this demands a re-examination of the position of law in framing processes of violent challengers, beyond a focus either on 'law as repression' or the mobilising effects of legal claims-making. Clearly, respondents did not manifest adherence to Scheingold's 'myth of rights.' Their ideological constructs tended both to incorporate and to go beyond the calculus described by McCann, where pay-equity activists are seen as assessing claim-making in instrumental terms.

Another body of American qualitative work on individualised 'legal consciousness' and on cultural approaches to law and social change presents a more varied picture of law's framing in social conflict, offering additional insights into attitudes of members of the respondent group.<sup>120</sup> Ewick and Silbey demonstrated how one individual can simultaneously display a consciousness of law that is 'multiple and

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UK and Ireland, and a political agreement involving Northern Ireland's political parties. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 ILM 751. See Colm Campbell, Fionnuala Ní Aoláin & Colin Harvey, *The Frontiers of Legal Analysis: Re-Framing the Transition in Northern Ireland* 66 MOD. L. REV. 317 (2003).

118. Interview with urban male, Belfast, N. Ir. (Mar. 2003).

119. Interview with rural male, Belfast, N. Ir. (Feb. 2003).

120. Patricia Ewick & Susan S. Silbey, *Conformity, Contestation and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992).

contingent',<sup>121</sup> simultaneously conforming and resistant. Similarly, Kostiner's qualitative work on attitudes of social justice activist to law's role in social change suggests that individually and collectively the activists displayed not one coherent frame of reference in assessing law's role, but multiple 'schemas' (a concept related to frames),<sup>122</sup> depending on whether law was being assessed in instrumental, political or cultural terms.<sup>123</sup> Culturally, respondent accounts in the Northern Ireland survey tended to project a view of law as a tool of oppressive authority; in instrumental terms, legal claims-making tended to be implicitly validated; and politically, law tended to be viewed ambivalently as potentially capturing or obstructing, political gain. The accounts also suggested some trans-national legal 'frame diffusion.'<sup>124</sup> The emphasis on claims-making by the Northern Ireland Civil Rights Association, was explicitly referenced to the experience of the Civil Rights Movement in the US, and by their constant mention of the ANC, respondents were invoking the example of a movement that took a highly legalised approach to post-conflict transformation.

Substantively, respondent accounts invite the rejoinder that much or all of Northern Ireland's equality reform may have happened anyway; if so, any additional 'gains' were limited to the official recognition of an 'Irish dimension.' Furthermore, even if the initiation of the overall changes process owed something to the combination of civil rights campaigns and armed rebellion in the 1970s, by the end of the decade violence may have become dysfunctional as a vehicle for change. It is impossible to prove this argument one way or the other, but presentation of a key rationale for the IRA's activities as being the achievement of progressive political change, at least some of which could be captured as law, is at odds with the apparent ideological underpinning of violent republicanism. One possibility is that the real goals were always more flexible. A second possibility is that the shift in emphasis can be explained in terms of the failure of the IRA to achieve its core goals, and the consequent need to find alternative gains to represent the

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121. *Id.* at 747.

122. See Benford & Snow, *supra* note 58, at 614, n.3 (describing the relationship between "schemata" and "frames").

123. Idit Kostiner, *Evaluating Legality: Towards a Cultural Approach to the Study of Law and Social Change*, 37 *LAW & SOC'Y REV.* 323 (2003).

124. Benford and Snow, *supra* note 58, at 627.

achievements of 'armed struggle'. A third possibility is that while the original goals of the movement were monolithic, shifts on a sliding scale occurred during the course of the conflict. Most came about because of the successful entry of the IRA's political allies, Sinn Féin,<sup>125</sup> into electoral politics. But some shifts may have come about partly as a result of successes achieved by activists in utilising law as a vehicle for political contestation, thereby opening political opportunities in a way that buttressed the move into electoral politics. Several respondents reported having undertaken successful legal claims to obtain compensation for abuse of emergency powers. Respondents also emphasised the successes of post hunger-strike campaigns by prisoners, which as other studies have illustrated were partly dependent on the creative use of judicial review mechanisms.<sup>126</sup>

A final point to emerge about the framing processes evident in the survey was their exclusionary dimension. While there was a heavy emphasis on the substance and the mobilising effects of state repression on nationalist communities, few respondents demonstrated much awareness of possible mobilising effects of republican violence on loyalist communities, nor did male respondents articulate much regret for IRA victims (females were more likely to). While the position was not uniform, 'regret' tended to relate to the death of civilians resulting from 'silly and stupid mistakes'<sup>127</sup> But the IRA's *systematic* breaches of international standards applicable in violent conflict cannot be dismissed as 'mistakes.' While the pattern of fatalities inflicted by the organisation displayed an emphasis on security force personnel,<sup>128</sup> there appear to have been at least three areas of IRA activity that entailed systematic violations of 'laws of war' standards: the infliction of 'punishment' shootings and beatings of individuals accused of 'anti social activities'; the use of bombs against commercial premises even if warnings were given; and the ill-treatment of

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125. See RICHARD ENGLISH, *ARMED STRUGGLE: A HISTORY OF THE IRA* (2003); BRIAN FEENEY & SINN FÉIN: *A HUNDRED TURBULENT YEARS* (2002).

126. KIERAN MCEVOY, *PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND: RESISTANCE MANAGEMENT, AND RELEASE* (2001).

127. Interview with urban male, Belfast, N. Ir. (Dec. 2002).

128. DAVID MCKITTRICK ET AL, *LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES, 1936* (2004) (attributing the deaths of 911 security force members and 644 civilians to the IRA).

suspected informers. The rights-violations that figured in respondent accounts were those that had instrumental value to the movement's political goals; others seemed generally invisible.

#### LAW AND 'DAMPING'

Tilly's depictions of the mechanisms of the democratic state as having a 'damping' effect on conflict begs the question of law's possible contribution. At first sight, Northern Ireland might seem to contradict his claim: despite being part of a democratic state, the region saw intense violence and repression in the early 1970s. But in the 1980s and 1990s both the violence and the repression had decreased significantly. This cannot be explained simply in terms of incapacity to inflict damage: when the IRA eventually destroyed the remainder of its weaponry in 2005, the stockpile is estimated to have included over two tonnes of Semtex, one thousand firearms (including heavy machine guns), and a number of surface-to-air missiles.<sup>129</sup> The state likewise, retained a repressive potential that was much greater than that deployed. There must therefore have been some forces at work constricting the behaviour of both the state and its challengers.

If these challengers are viewed simply as deracinated entities, it is difficult to see how such forces could have operated. Crenshaw's close reading of the relevant psychological literature rejects such an approach, leading her to conclude that research '...should continue to be based on a model that integrates the individual, the group and society. "Terrorists" cannot be considered in isolation from their social and political context'.<sup>130</sup> Respondent accounts supported Crenshaw's contention, displaying heavy emphases on association with community and on group identity, suggesting at times some merging of individual consciousness: "we didn't carry any

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129. IRA Has Destroyed All Its Arms, BBC News UK Edition, September 26, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/4283444.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4283444.stm) (last visited Feb. 10, 2007).

130. Crenshaw, *supra* note 6, at 418. Crenshaw is dismissive of psychopathological explanations of terrorism; data from Northern Ireland supports her position: R. Elliot and William H. Lockhart, *Characteristics of Scheduled Offenders and Juvenile Delinquents*, in CHILDREN AND YOUNG PEOPLE IN NORTHERN IRELAND, (Jeremy Harbison & Joan Harbison eds., 1980).

baggage with us. . . We don't carry any regrets."<sup>131</sup>

The accounts also project a sense of an organisation generated by a particular set of historical circumstances, but later taking on something of a life of its own: "In 72 it was not a secret army. . . everybody in the district knew who was in the IRA."<sup>132</sup> The resulting security force penetration explains the IRA's partial switch in the mid-1970s to a cell structure, one result being that activists: "became more and more divorced from the people as they tried to protect themselves from the community 'cos they were worried about [informers]."<sup>133</sup> The accounts also suggest that around this time, the IRA's base of active support narrowed considerably. This appears to have left the organisation heavily dependent on a relatively narrow base (the views of which it needed to heed), while also able to count on degrees of toleration in some communities.

Moxon-Browne makes a similar point to Crenshaw when he speaks of Irish republican 'fish' swimming in a fluctuating 'sea' of communal toleration and support.<sup>134</sup> In respondent accounts this tide clearly ebbs and flows. It is presented as having been at its highest when repression was at its harshest, and as declining when repression wound down:

If the Brits were chasing you or you could run into anybody's house and you knew that they would protect you. . . that's the way it was in 1972. I went into jail in January 1973 and whenever I came out [1976] I noticed that there was a big change. . . there would have been a lot less of them prepared to allow you to use their houses.<sup>135</sup>

In respondent accounts the tide rose again in the early 1980s following the second round of mass mobilisation associated with prison protests:

[Y]ou had phenomenal support, it was almost like an Intifada. . . That's what it was like, like the seventies re-run you know. You had literally everybody out, there wasn't a door that wasn't open to you in terms of, you know, in and out of houses, people assisting the IRA.<sup>136</sup>

What emerges from these accounts is an impression of

131. Interview with rural female (Feb. 2003).

132. Interview with urban male in Belfast, N. Ir. (Nov. 2002).

133. Interview with urban male in Belfast, N. Ir. (Mar. 2003).

134. Edward Moxon-Browne, *The Water and the Fish: Public Opinion and the Provisional IRA in Northern Ireland*, in BRITISH PERSPECTIVES ON TERRORISM 41, 68–69 (Paul Wilkinson ed., 1981).

135. Interview with urban male in Belfast, N. Ir. (Nov. 2002).

136. Interview with urban male in Belfast, N. Ir. (Dec. 2002).

complex reciprocity and messaging, supporting Darby's contention that the Northern Ireland conflict had some unstated 'rules.'<sup>137</sup> Respondent accounts suggest that this was not a simple two-way interaction; rather it was at least three-way (state, challengers and affected community). Interactions seem to involve a complex semaphore, affecting not only degrees of violence, but also levels of cruelty. Most indiscriminate republican violence was bunched in the 1970s when repression was at a high level. Respondent accounts suggest a picture of communal toleration for IRA activities increasing when repression was at its most indiscriminate, and decreasing either when repression became less indiscriminate and less egregious, or when the IRA employed indiscriminate violence: ". . . a big difference in Vietnam. . . was the Vietnamese were prepared to suffer an awful lot more than Nationalist people were prepared to."<sup>138</sup> From this perspective, limiting factors on republican violence depended only partly on moral repugnance by challengers to the use of indiscriminate violence, but also on self-interest by 'violent entrepreneurs' who realised that unlimited violence would erode a relatively narrow support base upon which they were heavily dependant.

To return to the question of messaging, the interview data suggest that this debate needs to be widened beyond the current focus in anti-terrorist legal discourse on messaging *within* the state apparatus,<sup>139</sup> to include a broader category of 'legally implicated messaging' to a variety of constituencies arising from legal grey zone activities. This includes the messages that the state sends to targeted communities when it engages in indiscriminate or egregious repression, and that sent by elements in these communities to the state's challengers. This supports the earlier contention that messaging in the 'rule of law' state (where harsh repression is exceptional), is different from that in the authoritarian entity (where it may be the norm).

As regards the damping effects of law, a clear distinction can be identified between the earlier and later phases of the conflict. In the early years, the shock effect of the outbreak of

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137. JOHN DARBY, *INTIMIDATION AND THE CONTROL OF NORTHERN IRELAND* 168–169 (1986).

138. Interview with urban male in Belfast, N. Ir. (Mar. 2003).

139. See Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION*, 229, 245–46 (Sanford Levinson ed., 2004).

violence, coupled with constitutional divisions and uncertainty over common-law powers, created a legal position of considerable laxity, facilitating the emergence of significant grey zones.<sup>140</sup> Later, as official inquiries mounted,<sup>141</sup> and legal norms began to 'bite' more effectively, visible repression came to approximate more closely to formal rationality (although the powers remained highly abrasive), and illegal repression became associated with covert operations, where state involvement was largely invisible (the clearest example being collusion between element in the security forces and loyalist paramilitaries).<sup>142</sup>

At that point, however, a dynamic of mobilisation had already been created in which earlier 'harsh' and often illegal repression had had a critical, long-term impact. As regards the visible, law-based repression that followed in the late 1970s, respondent accounts of street harassment and of arrest and detention have a 'cat and mouse' quality about them. This repression, particularly when indiscriminate in operation, appears to have helped to sustain a degree of mobilisation, though at a declining level from the early 1970s. The effect of the second round of mobilisation, corresponding with the H-Block protest, was partly to reverse this decline from the mid-1980s, and thereafter something of a plateau was reached, whereby repression and mobilisation seem to have sustained each other. This suggests a dynamic in the violently conflicted 'rule of law' state whereby, at the outset of conflict, law cannot prevent the state engaging in activities that contribute to significant challenger mobilisation, but the state, having contributed to this generation, struggles to eliminate violent opposition. While it is important to recognise this element of law-as-limitation on the liberal state, it is also important to include other factors (including media attention and public

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140. See *supra* Part 1.

141. *E.g.*, NORTHERN IRELAND OFFICE, REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497.

142. For a case-study on covert repression, see JUSTIN O'BRIEN, KILLING FINUCANE: MURDER IN DEFENCE OF THE REALM (2005). See also POLICE OMBUDSMAN FOR NORTHERN IRELAND, 'STATEMENT BY THE POLICE OMBUDSMAN FOR NORTHERN IRELAND ON HER INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF RAYMOND MCCORD JUNIOR AND RELATED MATTERS' (2007) (discussing collusion between members of the police and members of a loyalist paramilitary group).

opinion). Law operates not as a guarantee of legality in a violently conflicted liberal state, but as a check on the illegality in which the state can be seen to engage.

### 3. CONCLUSIONS

The analysis points to law's role in the violently conflicted liberal state being much more complex and ambiguous than contemporary anti-terrorist legal discourse suggests. Most importantly, simplistic models of crisis-response and of 'effectiveness' need to be radically revised to take account of the extent to which law is implicated in the impact of state action on challenger mobilisation—of 'legally implicated mobilization.' Rather than conforming to a model of surgical 'response,' the relationship between some kinds of repression and violence may approximate more to one of symbiosis—each feeding off the other, in a mutually sustaining fashion. Reflecting this, the legal narratives implicitly and explicitly presented in the interview data form a complex series of paradoxical relationships: law as repression; law-based and illegal repression in legal grey zones as a spur to challenger mobilisation; law as a vehicle for political contestation; law as potential political gain; and law as a damping mechanism on conflict in the liberal state.

The shortcomings of the dominant discourse point to the need for a reshaping: There is a need for recognition that legal grey zone activities, typical of the state of exception, such as prisoner ill-treatment (often sexualised), and abuse of lethal force, can be particularly implicated in challenger mobilisation. There needs to be a greater recognition amongst lawyers of the capacity of the ideology of the rule of law to take on a life of its own, leaving an ambiguous capacity for legal challenge even in the grey zone—'anomie' is never likely to be complete. There is a need for a recognition that the longer a conflict persists, the greater the pressures for contraction of the grey zone will be. And there is a need to move beyond a narrow concept of 'legal messaging' to take account of the messaging that state action sends between non-state constituencies. The Northern Ireland data suggests some gendered differences in experience of repression, but it also suggests that the dominant pattern of mobilisation (violent activism following involvement in non-violent mass-mobilisation), is similar for males and females,



questioning reductive, gender-specific explanations of violent activism.

This is not to suggest that the analysis developed in this article can be transferred straightforwardly to Western experience of the 'war on terror.' Despite the parallels drawn earlier, there are important differences: the state interest and international standing as between the United States and the United Kingdom are different, as is the degree of internationalisation—indeed globalisation—of the conflict; patterns of the ratification of international law instruments also diverge; and there are important differences between organisations such as the IRA and jihadi terrorist groups.

All of this points to the need for a new research agenda, but it also offers something of a map whereby sites ripe for further legal exploration in the 'war on terror' can be identified. This article concludes therefore with observations under three headings: legal research on violent jihadi groups; the geographic dimension of novel claims-making; and the 'damping' effect of law on conflict.

#### JIHADI TERRORIST GROUPS: A LEGAL RESEARCH AGENDA

There has been little legal research on jihadi terrorist groups. Such research as has been published in other disciplines suggests that some of al-Qaeda's mobilising structures are much more diffuse than those of the IRA, and its political goals more diverse; indeed 'al-Qaeda' may well be partly an abstraction, culled from a variety of violent jihadi entities.<sup>143</sup> Other elements of the Iraqi insurgency may, however, approximate more closely to the Irish example. In terms of collective action repertoires, al-Qaeda violence tends to be much more indiscriminate than was the general pattern in Northern Ireland.<sup>144</sup> In addition, al-Qaeda relies on suicide bombers, and is frequently reported to be intent on developing weapons of mass destruction (although actual attacks have been low-tech); neither consideration applied in Northern Ireland.

The diffuse nature of jihadi mobilising structures may be

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143. See, e.g., JASON BURKE, *AL-QAEDA: THE TRUE STORY OF RADICAL ISLAM* (2004).

144. For example, the IRA frequently gave advance warning of its attacks on property in order to avoid civilian casualties, and maintain its support base. For an American account, see Sarah Lyall, *I.R.A. Bomb Destroyed in Central London*, N.Y. TIMES, Feb. 16, 1996, at 6 (citing an expert on the IRA).

contributing to a particularly dangerous dynamic: the difficulties in combating such mercurial entities may prompt loosely targeted initiatives where intelligence may be faulty or non-existent. Pressures for such activities may be particularly strong in the face of perceived threats from weapons of mass destruction. Such behaviour could be expected to enhance the sense of solidarity of affected out-groups, enhancing the capacity of 'violent entrepreneurs' to manipulate resentments, particularly where long-standing sense grievances against the West/North remains pervasive.

If these patterns repeat themselves, allegations of abuse of detainees in Abu Ghraib, Guantánamo and Basra seem especially likely to have stimulated challenger mobilisation, particularly in populations radicalised by indiscriminate use of exceptional powers. In light of examples from Northern Ireland and elsewhere, the sexualised nature of the abuse in Abu Ghraib appears less an aberration than a specific manifestation of a broader pattern of the employment of sexuality as a weapon in non-conventional conflicts, as in open warfare.

Allegations of abuse in Guantánamo in particular, appear to have been facilitated by the existence of a pronounced legal grey zone, whereby jurisdictional issues were manipulated in an attempt to limit the reach of domestic and international law. It follows that contemporary calls for loosening prohibitions on torture<sup>145</sup> or for redefining 'inhuman and degrading treatment'<sup>146</sup> seem misplaced, not only on grounds of principle, but also on pragmatic grounds since their implementation appears particularly likely to stimulate violent mobilisation. Execution of prisoners following trial by military commission, could also be expected to contribute significantly to violent mobilization, particularly in the case of a series of executions, producing a compound effect.

At this point there is an absence of the kind of empirical data required to assess whether this dynamic is manifesting in any or all or the geographically widely-dispersed sites of the 'war on terror.' There is a need for qualitative and quantitative research on the impact of varieties of repression by states with a formal commitment to the 'rule of law' on the mobilisation and

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145. Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19.

146. Ignatieff in *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* in effect presents the argument for such a redefinition. See *supra* note 2.

the mobilising structures of jihadi-terrorist groups. What kinds or conceptions of law figure in the framing processes of these groups: Divine, domestic, international? Are there any differences in that regard as between groups whose activists are born in the West and others? What judgments about law are implicit in the extensive litigation strategies in which Guantánamo detainees are involved? What role may law play in a variety of conflict-sites in relation to closing or opening of political opportunities affecting violent and non-violent groups? If a shift from violent activism to political challenge would require changes to challenger groups' framing processes, mobilising structures, and the political opportunity structures they face, what legal engineering would be likely to promote such shifts?

#### THE NOVEL GEOGRAPHY OF CLAIMS-MAKING

Constructing the 'war on terror' as 'global' not only elides a number of quite diverse conflicts, it also brings under one rubric a vast range of potential legal claims-making. Four (partly overlapping) prime sites can be identified: where state actors are challenged in their own courts; where state actors are challenged in the domestic legal systems of third countries; where state actors are challenged within international human rights framework; and where behaviour is challenged within regional intergovernmental rights frameworks. Potential claimants are myriad: claims may be brought by human rights NGOs on behalf of detainees allegedly involved in terrorism; by peace-focused social movement organisations; or claims of non-adherence to legal human rights standards may be articulated by regional and international monitoring bodies.

Within state actors' own legal systems, a pattern has emerged of critical decisions by the superior courts in the both the United States<sup>147</sup> and the United Kingdom.<sup>148</sup> This is consistent with the model explored in part 1 above, suggesting the persistence of law's relative autonomy during the state of exception. These partial successes by claims-makers are likely

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147. See, e.g., *Hamdi v Rumsfeld* 542 U.S. 507 (2004); *Hamdan v Rumsfeld*, 126 S.Ct. 2749 (2006).

148. See e.g., *A and Others v Secretary of State for the Home Department*; *X and another v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 3 All ER 169.

to stimulate further litigation. Even if much of this proves ultimately unsuccessful, it seems likely to have significant effects on the mechanics of the state repression, by virtue of the delaying effects of successive court challenge.

Within the legal systems of third countries, transnational patterns are emerging of the use of law both as shield and sword. As a shield, peace protesters in the Republic of Ireland successfully defended themselves against a charge of criminal damage to a US Navy aircraft by invoking a defence that they were acting to prevent the loss of life and property in Iraq.<sup>149</sup> In a British case involving similar facts, a jury was unable to agree on the conviction of anti-war activists who claimed that they acted to prevent the commission of war crimes in Iraq.<sup>150</sup> That defence had been left open by a House of Lords judgement, which nevertheless excluded a defence of acting to prevent the crime of aggression.<sup>151</sup>

A further example of the use of law as a shield is the ruling of the German Federal Administrative Court preventing the imposition of a sanction on an Army officer who refused, on conscientious grounds, to follow orders “that were suited to supporting acts of war in Iraq”;<sup>152</sup> in the officer’s view, the war was “contrary to international law.” Germany also provides an example of the attempted use of law as a sword in the complaint laid by the Centre for Constitutional Rights against a number of prominent named American defendants. This seeks to exploit Germany’s universal criminal jurisdiction over torture, to challenge the legal framework of alleged US ill-treatment of detainees in the ‘war on terror.’<sup>153</sup> Pointedly, the complaint has invoked the precedent of the Nuremberg ‘judges trial,’<sup>154</sup> while recognising the very different scale of Nazi atrocity.

At the international level, neither the United States nor the

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149. See *Not Guilty Verdict in Third Trial of Anti-War Activists*, IRISH TIMES, July 26, 2006, at 4.

150. See Clare Dyer, *Freed Activists Accused of US Bomb Carrier Damage Face Retrial*, GUARDIAN, Sept. 16, 2006, at 7.

151. R v Jones and others [2006] UKHL 16, [2006] All ER 741.

152. 2nd Wehrdienstsenat des Bundesverwaltungsgerichts [BVerwG] [Military Service Division of the German Federal Administrative Court] June 21, 2005, BVerwG 2 WD 12.04 (5), available at <http://www.lcnp.org/global/Germanrefusercase.pdf>.

153. Complaint Lodged with the German Federal Prosecutor §5.23, Centre for Constitutional Rights, at 7 (filed Nov. 14, 2006), available at <http://www.ccr-ny.org/v2/GermanCase2006/germancase.asp>. (based on Rule 17.1.3 press releases)

154. *Id.* at 16–17.

United Kingdom has ratified the Optional Protocol to the ICCPR; individual complaints cannot therefore be brought before the Human Rights Committee. That Committee has however, used the periodic reporting mechanism to raise the question of US violations of the rights of detainees in the 'war on terror',<sup>155</sup> as has the Committee Against Torture, when considering the periodic report of the United States under the UN Torture Convention.<sup>156</sup> A similarly critical approach has been evident from UN thematic human rights mechanisms.<sup>157</sup>

As regards regional human rights mechanisms, the United States has declined to ratify (though it has signed) the American Convention on Human Rights.<sup>158</sup> It nevertheless remains subject to the individual complaint mechanism of the Inter-American Commission on Human Rights through the OAS Charter and the American Declaration of the Rights and Duties of Man, providing a site of potential claims-making. It is also subject to the Commission's 'Precautionary Measures'<sup>159</sup> mechanism, which has been invoked in relation to Guantánamo detainees.<sup>160</sup>

In addition to conventional claims-making in relation to the United Kingdom under the European Convention on Human Rights (ECHR), the global aspect of the 'war on terror' has prompted two novel areas of European legal claims-making. One has been the result both of the United States' use of secret detention centres (some of which may have been in Europe), and of that country's use of 'extraordinary rendition' flights, crossing multiple national airspaces. In these flights, suspected terrorists are believed to have been transferred to countries that practice torture. The use of air space and of

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155. See Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, ¶¶ 12–16, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006).

156. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America*, ¶¶ 13–28, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

157. See generally U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) (prepared by Leila Zerrougui, Leandro Despouy Manfred Nowak, Asma Jahangir, & Paul Hunt).

158. American Convention of Human Rights, July 18, 1978, 1144 U.N.T.S. 123.

159. Rules of Procedure of the Inter-Am. Comm'n on Hum. Rts., art 25(1).

160. Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002), 41 ILM 532 (2002).

possible detention facilities in Europe, has meant that Council of Europe<sup>161</sup> and European Union<sup>162</sup> mechanisms have become sites, not only for direct challenge to the behaviour of their member states, but also for indirect challenge to that of the United States (which has observer status at the Council of Europe).

The second novel feature of European claims-making has been the degree to which the British courts have been willing to accept the 'export' of the ECHR to such conflict-zones as Iraq, where British troops operate in a way that involves exercise of the requisite degree of 'control.'<sup>163</sup> This has been by virtue of the Human Rights Act 1998, which produced a degree of incorporation of the Convention into domestic law.<sup>164</sup> The effect of these rulings has been to expose United Kingdom ground operations where the issue of 'control' arises, to potential ECHR-based claims-making anywhere on the planet. This points to an important distinction from air operations, in relation to which the European Court of Human Rights has taken a markedly more restrictive approach.<sup>165</sup>

#### LAW, DEMOCRACY AND 'DAMPING' CONFLICT

The effect of the exceptional geographical scope of all of this claims-making may be to reduce the degree of departure by

161. See generally European Commission for Democracy through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities*, Council of Europe Doc. CDL-AD(2006)009 (Mar. 17, 2006); Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, Council of Europe Doc. 10957 (June 12, 2006) (prepared by Dick Marty).

162. See generally European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Draft Report on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners*, European Parliament Doc. Provisional 2006/2200 (INI) (Nov. 24, 2006) (prepared by Giovanni Claudio Fava); European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Amendments to the Draft Report*, European Parliament Doc. PE 382.44v02/00 (Jan. 8, 2007) (prepared by Giovanni Claudio Fava).

163. R. (On the Application of Al-Skeini and Others) v. Secretary of State for Defence [2005] EWCA (Civ) 1609, [2006] 3 W.L.R. 508, 528 (Eng.).

164. Human Rights Act, 1998, c. 42, §6.

165. See *Banković v Belgium & Others*, 11 BHRC 435, 454 (2001) (finding that there is no "jurisdictional link" between victims of air power and the states taking the military action).

democratic state actors in the 'war on terror' from previously accepted legal standards. If Tilly's claim that the democratic state's mechanisms tend to "dampen the processes that generate violent contention"<sup>166</sup> is correct, law can be seen as one of these damping mechanisms. Consequently, while some US policy-makers may react critically to transnational legal challenges to the United States' pursuit of the 'war on terror,' more far-sighted policy-makers may be more alive to the possibilities of overall conflict-damping. If the dynamic hypothesis suggested in this paper is correct, the effect of legal claims-making may be to reduce overall violent conflict. Law therefore could be seen, at least partly, as one of the self-correcting mechanisms of the democratic state, alongside such other mechanisms as periodic elections, a free media, and initiatives such as the Iraq Study Group report.<sup>167</sup>

It is relatively easy to imagine how the behaviour of state actors in the 'war on terror' might be damped, but what of non-state actors—of potential terrorists? In the case of individual terrorists willing to employ indiscriminate violence and/or to act as suicide bombers, the possibility of their behaviour also being 'damped' seems remote, depending as it does on some notions of reciprocity. But as the Northern Ireland example illustrates, this limiting effect may depend not simply on the attitude of violent activists but also on the disposition of the communal support base (possibly a narrow one) from which activists spring. If patterns from Northern Ireland replicate themselves, avoidance of indiscriminate or egregious repression could be expected to reduce the kinds of communal toleration and support, most conducive to the emergence of violent activism. Further research around this question is required, but such research needs to be informed by a model of legal dynamism much different from that evident in dominant anti-terrorist discourse.

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166. CHARLES TILLY, *supra* note 13, at 44.

167. JAMES A. BAKER ET. AL., IRAQ STUDY GROUP REPORT: THE WAY FORWARD - A NEW APPROACH (2006).