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Abstract

The British Government has been engaged for more than thirty years in a struggle with terrorism related to Northern Ireland. During what is euphemistically called the Troubles, the British government has implemented a series of special emergency laws to address the violence. Drawing upon the political context and debate surrounding the implementation and development of the emergency legislation this research examines the overall effect of British anti-terrorism legislation on both respect for civil liberties and the government's ability to fight campaigns of violence. Drawing heavily upon primary sources, high profile cases of miscarriages of justice and accusation of an official 'shoot to kill' policy this project explores three distinct areas related to a government's balancing of the exigencies of individual liberty and societal order. First, accusations of an erosion of civil liberties are examined in relation to the war on terrorism. Second, it is argued three decades of special emergency legislation has led to the normalization of policies used to fight terrorism. Third, the powers created to deal with a unique crisis situation have expanded dramatically in scope and have continued to do so even as violence associated with the Troubles diminishes. The research concludes by exploring the project's findings and what the lessons the British experience may have for other liberal democracies dealing with sustained campaigns of violence.

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Table of Contents

Chapter Three - Terrorism in Great Britain and the Government's Response

Chapter Four - Reaction of the Civil Liberties Community

Acronyms

ASU	Active Service Unit
BBC	British Broadcasting Corporation
BSG	Balcombe Street Gang
CAJ	Committee for the Administration of Justice
CID	Criminal Investigations Department
CJA	Criminal Justice (Temporary Provisions) Act 1970
CSJ	Campaign for Social Justice
DCC	Deputy Chief Constable
DPP	Director of Public Prosecutions
DTO	Detention of Terrorists Order
DUP	Democratic Unionist Party
ECHR	European Court of Human Rights
EO	Exclusion Order
EPA	Emergency Powers Act - see also NI(EP)A
FRU	Force Research Unit
GCMS	Gas Chromatography Multiple Spectrometry
GOC	General Officer Commanding (British Army)
HRA 1998	Human Rights Act 1998
IBA	Independent Broadcasting Authority
ICCPR	International Covenant on Civil and Political Rights
INLA	Irish National Liberation Army
IRA	Irish Republican Army
ITV	Independent Television
LIC	Low-intensity Conflict
LVF	Loyalist Volunteer Force
MP	Minister of Parliament
NCCL	National Council for Civil Liberties
NICRA	Northern Ireland Civil Rights Association
NI(EP)A	Northern Ireland (Emergency Provisions) Act - see also EPA
NIHRA	Northern Ireland Human Rights Assembly
NIO	Northern Ireland Office
NIOSS	Northern Ireland Office Secretary of State
OIRA	Official Irish Republican Army
PACE	Police and Criminal Evident Act 1984
PD	People's Democracy
PETN	Pentaerythritol Tetranitrate
PIRA	Provisional IRA
PMNI	Prime Minister of Northern Ireland
PTA	Prevention of Terrorism (Temporary Provisions) Act
PTA 1974	1974 Prevention of Terrorism Act
PV(TP)A	Prevention of Violence (Temporary Provisions) Act
QMG	Quartermaster General
RARDE	Royal Arsenal Research and Development Establishment
RIRA	"Real" IRA
RUC	Royal Ulster Constabulary

SAS	Special Air Service
SDLP	Social Democratic Labour Party
SPA	Special Powers Act
TLC	Thin Layer Chromatography
UDA	Ulster Defense Association
UDR	Ulster Defense Regiment
UFF	Ulster Freedom Fighters
UK	United Kingdom
USC	Ulster Special Constabulary
UUP	Ulster Unionist Party
UVF	Ulster Volunteer Force
UVP	Ulster Volunteer Party

Chapter One

Terrorism and Democracy: The Balance Between Freedom and Order

> "A certain amount of political violence is a price paid for a free and open society" (Brian Jenkins, Rand Corp. *The Washington Post* February 1, 1981).
>
> "The essence of the dilemma for open and pluralist democracies is that the measures they would need to take in order to totally eradicate the threat of terrorism would mean the extinction of the basic freedoms guaranteed by the democratic rule of law and their replacement by a Big Brother of Orwell's nightmare" (Wilkinson 1985, 4).

I Introduction

One of the enduring struggles of a liberal democracy is addressing the tension produced through the interchange between the twin goals of freedom and order. Both are necessary for the proper functioning of a liberal state, but they are often juxtaposed upon the opposite sides of an equilibrium. Modern democracies have endeavored to avoid stressing one side of this balance to the detriment of the other. Democracies, while maintaining this balance, are often influenced by the popular desires for short-term solutions that may be detrimental to one of the two goals. In normal political discourse governments are able to resist the pressure placed upon them by the people. In times of crisis and great stress, the pressure placed upon representative governments for action is often difficult to withstand.

As a producer of random stress, terrorism has an effect that is often greater than the level of violence would normally dictate. How have liberal democracies dealt with the societal stress of terrorism? What types of demands have citizens placed upon the government in times of crisis? Finally, what is the end result of a government's actions upon the tension between the twin goals of liberty and order? The late 20th century

provides several good cases where evidence for these questions may be gleaned. This project will focus on the ongoing thirty-plus-year struggle in Northern Ireland between sectarian paramilitaries and the British government.

In examining questions of this nature, this study will examine the context, history and considerable literature relevant to terrorism related to Northern Ireland.[1] After elucidating upon the positions of those arguing for increased governmental action to improve order and those arguing that government actions have had a detrimental effect on liberty, the project focuses on several high profile 'miscarriages of justice.' After a comparison of the intent of legislation to enhance order and the results of the legislation, the study reports on its findings.

Unquestionably, Great Britain is overall a well-established functioning liberal democracy. But the results of this study suggest that in various aspects of civil liberties and personal freedom Great Britain has become subtly less "liberal." Although there can be a dualistic response to the question "is Great Britain still a liberal democracy?," there is a great deal of gray area between the two polar answers. The findings suggest that in the areas of rule of law, right to life, and reliance upon emergency legislation, Great Britain has become a noticeably less liberal society. In a related manner, in situations where official government policies or unintended consequences of parliamentary legislation have had undesirable or tragic implications, the government's willingness to admit error or culpability has often been lacking. Additionally, the extended nature of the conflict has led to a gradual, but marked increase in the scope and power of emergency laws. As these laws have increased in reach, law enforcement and society have become

[1] The conflict is well credentialed as a case to study--its length of experience as a troubled area and the existence of extensive literature that by 1989 had been estimated by one scholar as exceeding 7,000 separate items Whyte, J. (1990). Interpreting Northern Ireland. Oxford, Clarendon Press.

accustomed to them. A process of normalizing the extraordinary has taken place in Great Britain; what was once considered extraordinary 'emergency' law has become normalized and a part of the 'regular' day-to-day criminal justice system.

In sum, although the conflict is replete with causalities -- over 3,300 people killed and over 36,000 injured in more than three decades of violence related to Northern Ireland (Flanagan 1997, 85; Clarity 1998, A11) -- the findings suggest that there may be a larger, more important casualty in this conflict. That casualty may be the subtle threads of freedom and civil liberties that have made Great Britain one of the great exemplars of modern liberal democracy.

II Objectives of this Study

This research analyzes the tension between freedom and order in a society under siege. Using the United Kingdom as a case study, the focus of this dissertation is the effect of anti-terrorism legislation on both civil liberties and the terrorists' ability to engage in campaigns of violence.

The approach taken is that of a descriptive narrative of the history, development, implementation and consequences of anti-terrorism legislation in both Northern Ireland and Great Britain. The methodology applied is that of a case study, with focused attention on such controversial issues as the 1973 Northern Ireland (Emergency Provisions) Act (NI(EP)A 1973), the Diplock Courts, supergrasses, alleged police brutality, use of torture, and sensory deprivation at several prisons. In addition, the passage of the 1974 Prevention of Terrorism Act (PTA 1974) and its application to the controversial Guildford, Maguire, and Birmingham cases will be explored at length. In examining the

PTA, special focus is placed on the debate surrounding the legislation and the reactions of the civil rights community in the UK.

The research seeks to analyze the manner through which such legislation developed and the consequences of such legislation for democratic traditions and institutions in the United Kingdom. This will be accomplished through an analysis of the controversial episodes that resulted from the implementation of the counter-terrorism legislation. This will allow for a direct comparison of the effects of the legislation to the aspirations of the legislation's proponents. Such a comparison will expose discrepancies and potential shortcomings of the legislation. Although this analysis is limited to the United Kingdom, the in-depth nature of the case study holds the potential for inductively building hypotheses and concepts that would warrant analysis in other democratic states (Eckstein 1975; George 1979).

The objectives of the study will be met by drawing inferences from a comparison of the stated intentions and the results of the emergency legislation. Chapter three sets the political and social context for the implementation of the NI(EP)A and PTA. It surveys the major time periods (e.g., civil rights period, British intervention, Direct Rule, etc.) as a precursor to the introduction of the special anti-terrorism legislation. This chapter also examines the development of each version of NI(EP)A and PTA until their major consolidation into the Terrorism Act 2000. A broad reading of the time period creates a noticeable pattern that is reflected in the chapter. During the long history of British involvement in Northern Ireland there has been a pattern of treating the Irish Catholics as colonial subjects. The creation of both the Republic of Ireland and Northern Ireland in 1922 increased Protestant angst and led to the development of formal and informal

methods of maintaining control over the majority Catholic population (Campbell 1994). The resulting disenfranchisement and overt discrimination suffered by Catholics increased their anger and reenergized the region's traditional "republican" sentiments. When attempts by moderate Catholics to address social and political discrimination through non-violent means, modeled on protests of Martin Luther King and Ghandi, were met with repeated violence, the IRA was given new life.

The chapter finishes by balancing the Catholic view that the intervention of the British and subsequent implementation of anti-terrorism legislation was a continuation of anti-Catholic discrimination through different means with the British view that direct intervention was a fair and balanced way of dealing with the problems in the province. Catholics in Northern Ireland saw proscription, exclusionary powers and other emergency powers applied to a greater degree on the Catholic community than to the majority Protestant community. Additionally, the chapter finds the overall scope and focus of the official reviews of the emergency legislation, until the Lloyd report in 1996, so restricted that they were of little value in addressing core civil liberties issues. An important deviation in this trend, the Lloyd report, began the process that led to the introduction of the Terrorism Act 2000. As argued in later chapters, the Terrorism Act 2000 is the realization of both the fears and predictions of the civil liberties community. Much of the temporary emergency legislation is now firmly ensconced in normal criminal justice legislation. One of the central findings of this project is that, as a result of three decades of emergency legislation, the extraordinary has become the ordinary; powers that were intended as temporary measures to address a crisis are now a permanent

feature of the legal landscape in Great Britain (i.e., Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act of 2001).

The fourth chapter focuses on the civil libertarian's view of events and argues that there has been a steady increase of power in the hands of both the security services and the executive office. This chapter lays the groundwork for one of the key findings of this research. The concentration of legal, albeit arguably illiberal, powers in the hands of the central government has resulted in an overall erosion in civil liberties. The chapter reports on several areas where, according to civil libertarians, emergency legislation has had a detrimental effect on the liberal nature of British society. Of real concern to the civil liberties community is that some of the most egregious affronts (e.g., proscription) are predominantly for public consumption and political theater. This point is later conceded by former British officials and discussed in official government reviews (Jenkins 1991, Lloyd, 1996). Additionally, other powers possessed by the security services have been used to harass, intimidate and blackmail British citizens, most of whom have no connection to the "Troubles" other than their ethnic and religious background. Finally, the chapter reports on an assertion of the civil liberties community that there is a thirty-plus-year pattern of creating legal structures that are illiberal and primarily focused on getting suspects out of society, regardless of the government's ability to 'prove' their guilt. Exclusion, Diplock Courts and supergrasses are all examples that support the argument that the emergency legislation is primarily about creating a veil of legitimacy for otherwise unacceptable legal practices and not about creating a fair criminal justice system. A just and fair legal system is a crucial component of any liberal democracy and the move away from the establishment of a fair criminal justice system is a move away

from a liberal conception of the rule of law. The government vigorously denied these assertions, arguing that the security environment, as a result of the Troubles, created a 'clear and present' danger justifying the temporary abridgment of non-essential freedoms.

In explaining, justifying, and defending the various iterations of anti-terrorism legislation in Britain, the government focused on the nature of the problem and the importance of demonstrating to the people that something was being done. The overall goal in the words of one MP was "protecting … liberties" (*Hansard* H.C. 5s, 882:704). The chapter outlines the debates on anti-terrorism legislation related to the Troubles and finds one clear theme: the conflict in Northern Ireland is unique and, therefore, requires exceptional means to counter it. Most observers of events in Northern Ireland support the veracity of that view. There is no doubt the Troubles were, in the words of Paul Wilkinson, "the most severe terrorist campaign experienced in Western Europe in modern times" (quoted in O'Connor 1988, 528). This research project finds that the reliance on this argument has lessened and the rhetoric of the government's rationale for sustaining and increasing anti-terrorist legislation has shifted from the Troubles to other forms of terrorism (i.e., international terrorism). This finding supports the civil libertarians' argument that the government and security services would become accustomed to the 'special powers' and seek to find rationale and justifications to keep the accumulated powers.

A second theme teased out of the historical record relates to the need for democracies to be responsive to public pressure. During the introduction of the PTA, the Parliamentary debate was replete with examples of supporters arguing the Act represented the middle ground between doing nothing and acting forcibly and vocally to

meet the demands of people in and out of government who where arguing for stronger action (e.g., the death penalty). As put starkly by MP Tom Litterick, "The situation suggests its own answer. The House wants Blood" (*Hansard* H.C. 5s, 882:672).

Finally, chapter five provides the government's philosophical justification, which developed over time, for the temporary abridgment of civil liberties as part of the war on terrorism. The overall argument made is the view that governments have a positive obligation, as elucidated by Isaiah Berlin (1969), to protect the lives of their citizens, even if the measures taken in executing the obligation interferes with other established liberties.[2] By placing and defending the introduction and expansion of emergency anti-terrorism powers in the context of a 'hierarchy of rights,' the government justifies its actions related to the war on terrorism. One of the arguments made in this project is that the British government has moved away from the traditional British understanding of civil liberties and has moved towards what Ni Aolain (1996) calls an "emergency regime." As it became more apparent that civil liberties were being abridged, the government has redefined the debate away from defending the legislation (by arguing that it does not trample the State's traditional negative obligation towards British citizens) to promoting a positive obligation that requires greater intervention into the personal liberties of the people to protect selected rights (Feldman 1993).

After a thorough discussion of the two general positions on the need and implications of emergency anti-terrorism legislation in Great Britain, the research project examines several high profile cases where it is alleged a combination of the population's demand for results and the substantial power conferred to the government through

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[2] For an example of this argument, see MP John McQuade speech in Parliament July, 2 1979 (*Hansard* 5s, H.C. 969: 948).

emergency anti-terrorism legislation went terribly wrong and substantial violations of civil liberties occurred. In the "miscarriages of justice" cases, the controversy over the killing of three unarmed IRA operatives in Gibraltar and revelations supporting the long-held belief that the British government had an official 'shoot-to-kill policy' related to the Troubles. In short, evidence strongly points to a government that knowingly violated the personal rights and liberties of its citizens. This project puts forth the conclusions that the government has produced a society with less liberty; it has tacitly approved of killing suspected terrorists (many of whom were innocent of any ties to the terrorism) and has been unresponsive in addressing official misconduct. These last conclusions are supported by the stonewalling policies discussed in both the John Stalker and "Death on the Rock" cases.

Drawing upon the various cases, and tying together common threads and themes, the research concludes that a noticeable and significant erosion in traditional civil liberties has taken place as a result of anti-terrorism legislation relating to the Troubles. This loss of liberty has been in a range of areas including, due process and freedom from arbitrary arrest. Another finding of this research is related to examining how the expansion of the emergency legislation's scope has affected the liberal democratic nature of Great Britain. The scope and power of the temporary emergency legislation has grown tremendously in the nearly three decades since its enactment. This project argues, that as the scope has increased, the legislation is now used in areas that would have been totally unacceptable when it was originally introduced. Additionally, as the scope of the legislation has increased, it has led to a normalization of these powers. This project demonstrates that many of policies which were unthinkable prior to the introduction of

the NI(EP)A and PTA (e.g., juryless court, random arrests and other abridgements of personal liberty) and were enacted as temporary measures to deal with the severity of the crisis are now standard law enforcement practices.

In sum, the findings of this research project are pessimistic in relation to the maintenance of personal liberties in Great Britain. The increase in powers to fight terrorism has led to a corresponding decrease in traditional civil liberties. The expansion of scope and corresponding normalization of the extraordinary will continue to lead to less negative liberty and personal freedom. As these two trends continue to invest the central government with more powers, there will be a continued reluctance to admit culpability when the use of these powers is abused. The project ends with some tentative comments related to implications for other liberal democracies in a post-September 11 world.

III Importance of Studying Terrorism and Democracy

This research is significant in several ways. First, the NI(EP)A and PTA are arguably the most controversial pieces of counter-terrorism legislation ever enacted by a liberal democracy. This examination of the British experience provides a contribution to the continuing debate in the United Kingdom. Second, the research will provide an important update of the British experience. It has been some time since the cases examined have been revisited in a manner that allows the goals of the legislation's proponents to be compared to the actual effects of the legislation. Included in this project is an examination of the legislation's influence upon terrorists' ability to engage in campaigns of violence. Through an in-depth comparison of the promulgated intent of the

legislation versus its actual effects, this research will be able to contribute to the existing literature.

Finally, by examining the tension produced between freedom and order in a society under siege, this research has the potential to detect changes in the democratic character of Great Britain. There are significant repercussions if this research provides evidence that more than two decades of emergency legislation has affected the nature of democracy in Great Britain. A finding that three decades of emergency legislation have not affected the democratic character of Great Britain would also be significant.

IV Methodological Approach

The study begins by chronicling terrorist incidents and the political atmosphere that existed at the time the various legislative acts were introduced. This historical narrative will limit the investigation from the early 1970s to the present. It is important to understand the political context during this time period in order to appreciate why Great Britain was a "society under siege." During this portion of the historical narrative, the various installments of the anti-terrorism legislation will be examined. In this way, the nature and scope of the legislation will be elucidated.

After thoroughly examining the formation and passage of the legislation, the project will delve into the reaction of the civil liberties community in the United Kingdom. In addition to exploring the opponents' views and interpretations of the legislation, the research project will produce an account from the legislation's proponents. Here, an examination of the aspirations and intentions of the legislation's sponsors will be undertaken in detail. Throughout this section the dissertation will draw heavily upon

primary documents including, but not limited to, the following: the various installments of the NI(EP)A and PTA, the *Hansard* Papers, the Diplock Report, and various other special reports published since the early 1970s.

The next phase of the dissertation is the case study. A series of historical cases will be examined in relation to the application of counter-terrorism legislation. Included among the events to be examined are the uses of the Diplock courts, supergrasses, and alleged police use of torture and sensory deprivation. In addition, the events surrounding the Guildford, McGuire, and Birmingham cases will also receive an extensive review.

After providing a detailed description of the legislation's intent and its subsequent effect, the two will be compared. By examining discrepancies between intended goals of the legislation and the results of its implementation, a discussion will ensue concerning the overall effect of the legislation. This comparison provides the framework for the most important phase of the project. In this comparative phase, the focus will be an examination of some of the inherent problems facing Great Britain as it attempts to balance the conflicting requirements of liberty and order in a society under siege.

How has British policy toward domestic terrorism affected the democratic character of Great Britain? The main focus of this dissertation is the tension between civil liberties--a core of liberal democracy--and the state power necessary to provide societal order. Therefore, special attention will be focused on the ways anti-terrorism legislation has affected specific civil liberties.

V Brief Introduction to the Paramilitaries

The chaos of allegiances and loyalties in Northern Ireland is not easy to untangle or understand. The terminology used to describe and classify the myriad of groups can be equally Byzantine. Traditionally there are two major sectarian groups: Catholics and Protestants.

A). Catholics

Catholics in Northern Ireland are usually connected with the term Republican. As an ideology, Republicanism advocates Irish nationalism and the complete withdrawal of the British forces from Northern Ireland and political union with the Irish Republic (McCaffrey 1979, 124, 162-165). The IRA has a long history in the struggle in Northern Ireland. The IRA was previously known as the Irish Volunteers, which in 1919 was reconstituted into the IRA. The IRA has fought the British numerous times throughout this century.

At the beginning of the newest stage of long-time conflict, in December 1969, the "Provisional" (PIRA) split from the "Official" IRA. The split was for a number of related reasons: first, because the Officials proposed to end abstentionism; second, the Officials displayed a predisposition for Marxism; and, perhaps most importantly, because the Officials had been singularly ineffective in defending Catholic areas against attacks (Bowden 1976, 427; Doumitt 1985, 21; 1986; Hayes 1998). Traditionally, the Provisional IRA (also called the "Provos" or simply the IRA) has not participated in what it sees as the illegitimate governments of Stormont and Northern Ireland Office (NIO) of British direct rule. Its mission has been to expel the British from Ulster and achieve political unity with the Republic of Ireland by any means possible. Recently, the IRA has loosened its stance and taken more of what has been described as a somewhat pragmatic political

position. This shift has been seen in the negotiating positions of the IRA's "political wing" called Sinn Féin. In the 1980s, the two parts (IRA and Sinn Féin) worked together as an electoral one-two punch of "armalite and ballot box" which led to Gerry Adams being elected MP for West Belfast in 1983 (Guelke and Smyth 1992; Lloyd 1998 electronic version). Adams did not take his place in Westminster, due to his refusal to take an oath to the Queen.

In February 1992, Sinn Féin launched an initiative called "Towards a lasting peace in Ireland." The document's language was more sensitive and looked towards Dublin for leadership. In addition, it contained references to national reconciliation and the need for a democratic compromise (Hayes 1998, 29). This initiative eventually led to the Joint Declaration for Peace (the Downing Street Declaration) on December 15, 1993.[3] In April, the IRA called a three-day cease-fire. Adams was able to sell the peace to the IRA on the promise of political influence and substantive progress. The IRA, on assurance from the Irish government that it would seek to negotiate a "transitional arrangement" towards independence, implemented a complete cessation of armed activities on August 31, 1994. The IRA was taking an unprecedented risk for peace in an effort to provide support for Sinn Féin's political strategy (Hayes 1998, 31). These actions saw the thrust of the mainstream Republican movement shift noticeably towards the peace process, while the traditional core, exemplified by the Army Council, the IRA, and those engaged in the armed struggle, waited on events (Bell 1998, 14).

There seemed to be a genuine change at the time in IRA/Republican rhetoric as more focus was placed upon equal citizenship and cultural pluralism, and less on the old

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[3] For a copy of the Downing Street Declaration see Seaton, C. E. (1998). Northern Ireland: The Context for Conflict and for Reconciliation. Lanham, MD, University Press of America.

hard-line credo of a Gaelic (Catholic) "green" unitary state established by force (Hayes 1998, 33). London could seemingly rest easy now that the Downing Street Declaration had finally produced an Irish accommodation. A window of opportunity had opened, but how would the IRA interpret each party's actions? The answer to that question came 17 months later as the IRA, impatient with the stalled peace talks, announced the end of its cease-fire in a public statement on February 9, 1996 (Stevenson 1996-97, electronic version). Hours later, the IRA detonated a 1,500 pound fertilizer bomb at the Canary Wharf business complex in east London (O'Doherty 1998, 100-1). Two store keepers died and more than 100 civilians were injured; damage was estimated at $140 million (Stevenson 1996-97, electronic version). The other attacks in this most recent IRA bombing campaign were limited to the British mainland in order to avoid a loyalist backlash (Bell 1998, 21).

The IRA/Republican view was that the British seemed intent on avoiding any serious talks. The popular view was that London was stringing the IRA along, possibly engineering a split in the ranks to be followed by a security mop-up (McKitrick 1996). As the IRA put it in a February 15, 1996 issue of *An Phoblacht/Republican News*, "instead of embracing the peace process, the British government acted in bad faith, with Mr. Major and the Unionist leaders squandering this opportunity to resolve the conflict" (p. 3). This is a view emphasized by J. Bowyer Bell who argued that the republican leadership had been tricked throughout history during "negotiations," cunningly drafted agreements, secret promises, hints and guesses, initiatives later denied, and all the wiles of London and Dublin. The IRA leadership was apt to suspect all but the tangible. And nothing tangible had come after the cease-fire. The republicans wanted more -- more

negotiations, more agreements, more concessions, and more pressure on the unionists (Bell 1998, 19). The bombing campaign had its intended effect; the British government reenergized the talks and made significant political concessions (Clarity 1998).

The election of a new Labour government brought a new dynamic to the impasse in the peace process. Impressive electoral showings by Sinn Féin, first in the Northern Ireland local elections and then in the British general elections in May 1997, indicated that the IRA's Northern Irish constituency was solid (Bell 1998, 24). The elections saw Sinn Féin's share of the vote increase from 10 percent to 16 percent (O'Doherty 1998, 158-9). Influenced by this strong electoral showing and actions by the Blair government, the IRA announced the "unequivocal restoration of the ceasefire" and complete cessation of military operation starting July 20, 1997 (Seaton 1998, 210). This cease-fire made them eligible to enter the "All Party Peace Talks" sponsored by former US Senator George Mitchell.

On August 19, the Secretary of State, Mo Mowlam, announced the IRA cease-fire had been sufficiently well observed for Sinn Féin to enter into talks. Later, Sinn Féin signed the six principles of non-violence set forth by Mitchell and entered the all-party talks. The major sticking point during this round of talks was decommissioning the IRA. The IRA has steadfastly refused to disarm itself until dramatic changes had been made and the reforms promised by the various agreements became irreversible. Paul Arthur, of Ulster University, put it this way:

> "the republican attitude towards decommissioning is more emotional than a matter of security. Fathers tell sons what happened in the earlier generation. The natural tendency was and is to be fundamentally suspicious of the British" (Clarity 1998).

During this set of all-party talks a number of murders and bombings took place; most of these events were blamed on splinter groups such as Continuity IRA, INLA, and small

Protestant paramilitaries such as the Red Hand Defenders (Clarity 1998). Many observers see these acts of violence mainly as attempts to derail the peace talks.

The talks continued and on April 10, 1998, signatures were placed on the "Good Friday Agreement." The agreement was a great step forward and most received it positively. The agreement included the holding of a referendum to gauge popular support in both the Republic of Ireland and Northern Ireland for the agreement. In a May 22, 1998, referendum, 71 percent of Northern Ireland's population and 94 percent of voters in the Republic of Ireland supported the agreement (voter turnout was more than 80 percent and 56 percent, respectively) (1998).

The peace process was moving along fairly smoothly when an event that garnered little popular publicity happened. In October 1997, a small group of disaffected IRA hardliners broke away and formed the "Real IRA" (Hillenbrand 1998). One of the main causes of the split was a strong objection to the 1997 cease-fire and to the involvement of the republican movement in the peace process (Boyne 1998, electronic version). While the RIRA was small, numbering approximately 100 members, a veteran leader within the IRA led it. He had served as quartermaster general (QMG) for about ten years and on the IRA's Army Council. His knowledge and experience in procuring and storing war material ensured that the RIRA was well supplied (Boyne 1998).

The RIRA's dislike of the peace process led to a devastating bombing on August 15, 1998. The RIRA packed 225 kg (500 lbs) of high explosives into a maroon Vauxhall Astra and parked it near the center of Omagh (Alderson, Ryder et al. 1998, electronic version). Due to a miscommunication in the RIRA's advanced warning (it is unknown if the incorrect warning was a simple misunderstanding or a deliberate calculated tactic)

people were herded away from where the bomb was *supposed to be* to where it really was and casualties were extremely high – twenty-nine dead with over 200 wounded. It was the single worst atrocity since the two pub bombings in Birmingham (1974), which killed twenty-one and injured 184 (Boyne 1998, electronic version). The explosives were from IRA stores and the detonator was from a stock believed to number 2,900 that was purchased from an American dealer using money raised by US sympathizers (Lloyd 1998, electronic version).

If an atrocity such as this could have a hint of a silver lining it was the public reaction to the massacre in Omagh (see Alderson, Ryder et al. 1998; Cannon 1998; Hillenbrand 1998). The religious make-up of Omagh was 60%/40% Catholic/Protestant and the casualties mirrored these percentages. Because most of the casualties were Catholic, and republicans seemed genuinely outraged by the carnage, the Loyalist paramilitaries did not retaliate. Therefore, there was no retaliation or escalation -- the cease-fires held. All parties spoke out and condemned the violence, including the Marxist-leaning INLA, which responded to Omagh by renouncing terrorism altogether and apologizing for its past actions (Cannon 1998, electronic version). These acts plus others helped strengthen the peace process. Within days, the Real IRA issued a statement apologizing for the deaths of civilians and explained that the warning was misunderstood. Five hours later, it issued a second statement declaring "that all military operations have been suspended" while the group underwent "a process of consultation on our future direction" (Hillenbrand 1998, electronic version). Seamus Mallon, the highest ranking Catholic official in the new Northern Ireland government body stated, "I believe the Omagh bombing is a watershed, people have drawn a line in the sand beyond which

violence will never be allowed to exist here again" (Cannon 1998). The people of Northern Ireland hope he is correct.

Although the violence has not completely ceased, and the IRA has not allowed itself to be disarmed, the peace seems to be gaining strength and violence is losing some of its broad-based support. The process moved far enough to see two of Sinn Féin leaders earn ministerial positions in the new Northern Ireland government.

B). Protestants

The early Protestants in Northern Ireland were immigrants from England and Scotland. King James I gave Protestant immigrants, the "Undertakers," six Ulster counties to colonize and to create "Plantations." Plantations were created in many parts of Ireland, but the process was most successful in the six Ulster counties because of the dispossession of local Irish tenets and landlords (Coogan 1993, 4). Although an English presence in Ireland went back to the 12th century, the serious problems between the Irish and the English started in the 16th century when the Irish began an organized resistance to English colonization (McCaffrey 1979, 1-34). The conflict deepened when Henry VIII mandated Protestantism as the religion of the realm. Irish hatred was further intensified by Oliver Cromwell's invasion and subsequent devastation of the Irish countryside in 1649. An Irish diaspora was further deepened when Protestant forces under William of Orange defeated the Catholic army of James II in 1690 at the Battle of Boyne River[4] (MacEoin 1974, 122). This event had the effect of strengthening the Protestant business class' political and economic domination of Ireland.

[4] MacEoin describes the Battle of Boyne as a successful rear-guard action. The decisive defeat of Catholic forces took place a year later at the Battle of Aughrim. The Battle of Boyne is, however, the battle that is most invoked in Irish mythology concerning English/Protestant oppression.

Protestants gained political domination over the Catholic minority through the use of gerrymandering, biased voting schemes, and out-right discrimination. Therefore, Protestants who support a continued political relationship with Westminster are considered "Loyalists" -- loyal to the crown. Protestant groups are associated with the color orange. For example, one of the oldest Protestant organizations is called the Orange Order (in honor of William's victory in 1690). Established in 1795, this semi-secret order is dedicated to defending Ulster and the British Crown against Catholicism (McCaffrey 1979, 21).

Another term used to describe Protestants and their loyalty to the crown is Unionist -- remaining united with the British government. The main outlet for Unionist views was the Unionist Party. The Unionist Party was formed in 1885 to prevent Home Rule (from Dublin), which it associated with "Rome Rule;" therefore, the Unionists used sectarian politics to assure Ulster's union with Britain and a separate parliament. In the modern politics of Northern Ireland the Unionists draw their support from the wealthy business class, the Protestant urban proletariat, and farmers who benefit from their provincial status with Britain (McCaffrey 1979, 11, 177).

Other groups associated with the Loyalist side of the conflict include the Ulster Volunteer Force (UVF), Ulster Defense Association (UDA) and Ulster Freedom Fighters (UFF). The UVF is an illegal Protestant paramilitary group, which was formed in 1966. It is described as the Unionist counterpart to the IRA with the avowed purpose to defend the constitution of Northern Ireland (Holland 1969, 244-246). The UDA is the largest Protestant paramilitary group in Ulster. Formed in 1972 as a legal entity, more recently the UDA has advocated separation from Britain and an independent state for Ulster. Its

primary loyalty is to Northern Ireland rather than Protestantism (Gray 1972, 276-277). Finally, the UFF is a fictitious name invented by the UDA in the early 1970s to deflect blame for sectarian murders and to distract British authorities from moving against the UDA as a source of Protestant terrorism (Holland 1969, 92-96). Overall, Protestant groups, according to J. Bowyer Bell, are less professional than the IRA. Their organizations are shifting, undisciplined, and without hierarchy, titles or ranks. For the most part Protestant gunmen sought to intimidate, to 'exploit the gun' for advantage, prestige, easy money, and play the role of defender (Bell 1998, 14).

The Protestant groups have steadfastly fought for control of Northern Ireland independent of direct British rule. They fear that isolation on the island would inevitably lead to assimilation into an alien Catholic, Celtic culture that had, over seventy years, absorbed or alienated most of the Protestants in the Republic (Bell 1998, 25).

As the peace process stuttered along over the past decade-and-a-half, Unionists have become increasingly factioned, even as the Nationalists became more unified. In part, this has been due to a generational effect of a new, younger, more militant set of leaders -- especially in the UDA (for a recent history of the UDA and UVF see Bruce 2001). The new leadership is determined to demonstrate its effectiveness, in contrast to the old guard, and match the IRA blow for blow (Guelke 1995, 127).

Through the late 1980s and into the early 1990s, several initiatives, including Sinn Féin's "Towards a lasting peace in Ireland," failed to take hold and the killings continued. The increased Unionist violence led the UDA, like the PIRA, to be banned by the British Government. In 1993, a shift in momentum began as the Joint Declaration for Peace (the Downing Street Declaration) was signed on December 15, 1993. Later, on October 13,

1994, in response to an IRA cease-fire, the Combined Loyalist Military command called for a similar action. The cease-fire was popular and allowed Protestant "men of violence" to call for more involvement in the peace process (1998).

In September 1995, David Trimble was elected head of the UUP. Although elected as a "hard-liner," he has since made his policies more flexible. The peace process continued to move slowly forward; by this time most parties had signed on to the Mitchell report, which established six principles of non-violence for entry into all-party talks. Through 1996, the UUP stayed out of the multi-party talks, but on September 17, 1997 the UUP joined the talks being held at Stormont. Trimble quickly suggested an election to create a 'body' to select representatives to the all-party talks (1996).

Over the next year the Unionist parties made a series of concessions. Many Unionists were concerned and often enraged by these concessions, particularly the release of terrorists (a majority of them republican) and the entry of Sinn Féin into the talks (Lloyd 1998, electronic version). Although there were serious complaints from various Unionist groups, especially Rev. Ian Paisley's DUP, and sporadic violence from the UFF and LVF, the peace was so popular with Protestants that Loyalist forces received praise for their restraint and role in the peace process (Bell 1998, 15).

The peace process led to the Good Friday Agreement and Trimble's UUP took a big risk by signing it. Trimble signed, aware that there were no real guarantees that the IRA would disarm and that many unionists would remain deeply suspicious of the north-south bodies that they perceived as a precursor of unification. The fact that the UUP, the largest unionist group, signed the deal was a tribute to Trimble, as well as a reflection of the intense pressure placed on the UUP from all sides (1998).

As PM Tony Blair talked about "the hand of history," many Protestants were beginning to accept the inevitable (Reid 1998). The rejectionists, led by Rev. Ian Paisley, were not pleased with the agreement. They continued to argue that the agreement was a stalking horse for a united Ireland and denounced its "concessions to terrorism" (1998). John Lloyd, writing in *Foreign Affairs*, argued:

> "It is … no mystery why unionists do not all gladly embrace peace. They see the enemy against which they have fought for three decades brought inside the pale of democratic politics and rewarded with seats, ministerial posts, and salaries--without changing positions, apologizing for past murders, or giving up any of its large stock of weapons" (Lloyd 1998, electronic version).

None of these concerns were sufficient to block the passage of the Good Friday referendum and the formation of a new shadow government in Northern Ireland, with UUP's David Trimble as First Minister. Even the horrific bombing in Omagh could not derail the process. In part, due to twisted Irish luck, in which a majority of the Omagh casualties were Catholic, the Loyalists restrained themselves from retaliating. Although the peace seemed to have weathered this crisis, it strengthened the hand of Rev. Ian Paisley and his DUP, who opposed the agreement from the start.

The fledgling shadow government survived its first of many political crises. Many of these crises centered on continued terrorist actions by those who, for one reason or another, opposed peace in Northern Ireland. How the newly elected leaders handled these crises says a great deal about the chances for success and peace.

The battle between these two sectarian groups has created, in the words of Rona Fields, a society "on the run" (1973). The Troubles affected every part of Northern Ireland's society. In Fields' words, it was impossible to 'be yourself,' because the fear engendered by the conflict became a "screen through which everything else is perceived in a skewed perspective" (1973, 15). While this research project is not a psychological

profile of the Troubles, it does draw upon strands of Fields' work. It is in this environment that societies are most susceptible to loss of liberty. For what is liberty and freedom, when your own identity is in danger? Civil liberties mean little when one is concerned for one's own existence. How the on-going conflict affects the psychology of the citizens of Northern Ireland and Great Britain influences the appropriate balance between freedom and order.

VI Key Concepts

As a precursor to delving into this discussion, an examination of what the meaning of various concepts used throughout the study must be established. Grant Wardlaw (1994) has put forth four general principles that should guide liberal democracies in their counter-terrorism policy-making, which will be used as a guide in this discussion. The operationalization of these terms draws upon the work found in a wealth of subfields that have produced a myriad of definitions and little agreement.

The first principle is the existence of an official definition of terrorism. There needs to be some objective criteria for what is meant by a "terrorist." Terrorism, like other public policy problems faced by governments, "must first be perceived and accurately defined before [it] can be solved" (Hayes 1992, 2). The lack of a precise definition of terrorism allows counter-terrorism policy to encompass activities that many would not consider terrorism. Wardlaw sees an expansion of the term terrorism leading to a meaningless "catchall" that encompasses everything from "minor crimes to international warfare" (Wardlaw 1994, 6). This problem of "definition creep" is one of the methodological problems found in Uri Ra'anan et al. (1986) and can be seen in the

use of the term "narcoterrorism," a term loaded in emotion and symbolism (see further Wardlaw 1988; Damask 1996; Miller and Damask 1996).

The second principle is the existence of a "genuine and public commitment to the rule of law" (Wardlaw 1994, 8). The importance of this principle is addressed in greater detail in Chapter two. A third principle, according to Wardlaw, requires that language should not run ahead of the facts or opinions. Although rhetoric is an inevitable part of the democratic process, the public discourse must not be shown to be devoid of content. The final principle requires that government should realize (and educate their publics to understand) that there is no simple solution to terrorism (1994, 9). This point is strongly supported by Paul Wilkinson, who stated, "anyone who claims to have a total solution to terrorism in a democracy is either a fool or a knave" (1985, 4).

A). Terrorism

The effort to formulate an acceptable definition of terrorism has been likened, by one scholar, to the search for the Holy Grail (Levitt 1986, 97). The analogy is not quite accurate. While many people have claimed to know the location of the Holy Grail, no one has come forth stating they found it. With regards to terrorism, scholars, politicians and policy-makers alike have "discovered" multiple definitions. Within the literature of political violence, definitions of terrorism are as plentiful as they are diverse. One scholar reported 109 different definitions of terrorism in use in the subfield (Schmid 1984, 111). There even exists an entire doctoral dissertation focused upon defining the term "terrorism" (Hoffman 1984). Lists of various definitions of terrorism can be found in several research guides on the subject (see Schmid 1984; Schmid and Jongman 1988, 33-38; Shafritz, Jr. et al. 1991; Atkins 1992; Anderson and Sloan 1995).

Scholars who study terrorism have attempted to establish systematic approaches to defining the concept. Schmid invested more than 100 pages to the task of an adequate definition of terrorism and the result was the author volunteering a definition, which was *210 words long* (Schmid 1984, 111)! Schmid and Jongman examined 109 definitions to determine which concepts were most frequently employed to construct a definition (1988). Wilkinson has developed seven characteristics to be used in establishing the political use of terror (1986, 51-56). The U.S. Army sponsored research to develop a usable definition of terrorism, and concluded, "any usable definition must have value-neutrality" (Vought and Jr. 1986, 71). When all the academic wrangling is over, a definition is, in the words of Thomas Mitchell, "nothing more than a tool of understanding. It is not truth or wisdom itself but merely means of imposing a degree of conceptual order" (Mitchell 1991, 13).

The definition of terrorism used in this research is the official definition of the British Government:

> "the use of violence for political ends, and included any use of violence for the purpose of putting the public or any section of the public in fear" (NI(EP)A 1973, (s) 28 (1)).

As will be seen in later chapters, opponents of emergency legislation have a number of problems with the official government definition of terrorism.

B). Liberty

The term liberty can be traced back to the Latin term *liber*, meaning "free," and originally denoted the philosophy of freedom (von Mises 1985, v, 20). A book publisher, Liberty Fund, uses a cuneiform inscription as its logo, which is the oldest known written appearance of the word "freedom" or "liberty." The term is from a clay document dated circa 2300 B.C. The centuries of discussion concerning liberty led to great volumes being

written with little in the way of uniform agreement on what exactly liberty encompasses. Accordingly, Paul Wilkinson has stated, "[t]hose who attempt to nail down a precise definition of liberal principles and doctrines are on a wild goose chase" (1986, 4). What follows is not an attempt to capture the proverbial goose, but only to bring a modicum of order and understanding to the flock.

John Locke sees liberty as one of the key natural rights that all humans possess (1980). According to Nobel Laureate F.A. Hayek, liberty is a situation in which a man is not subject to the arbitrary coercion of another (i.e., the "state" for purposes of this research) (1960, 11). Arbitrary coercion, for Hayek, is an act that serves a particular end of government and is determined by a specific act of will and not by a universal rule needed for the maintenance of that self-generating overall order of actions (Hayek 1978, 135). Hayek goes on to say that liberty strives to minimize coercion or its harmful effects, even if the effects cannot be eliminated completely (Hayek 1960, 12; see further, Feldman 1993, 8). This view of liberty is described by Robert Nozick as a condition which provides protection from internal and external threats, but performs few other functions (1974, 26-8, 333-4). This traditional formulation of liberty is described as negative liberty: freedom from harm, rather than rights to goods (Berlin 1969, 122-123). Accordingly, the state has no responsibility for taking positive steps to ensure that people are able to take advantage of liberties, but only to prevent other people from improperly interfering with the liberties (Gray 1986, 67-71, 125-129). In keeping people (i.e., “the state”) from improperly interfering with the liberties of its citizens, it is important that clear limits be placed on the role of the state.

More recent treatments of the term liberty have created a different interpretation that places positive responsibilities upon the state. In this formulation, termed "positive liberty," the word is understood as a positive obligation placed upon the state to act in order to provide certain essentials to the population. Positive liberty is seen as necessary in order to make negative liberty equally valuable. In other words, positive liberty creates a bridge between the value of traditional (negative) liberty and the different values of equality and social justice (Feldman 1993, 11). Falling under the rubric of positive liberties are rights to a minimum wage, health care, adequate housing, and so forth. The reaction of governments to terrorist attacks has a greater effect on negative liberty than on positive liberty. However, an argument can be made that the attention and resources put into fighting terrorism reduce those available for social programs (areas promoting positive liberty). This argument can be seen as similar to the common “guns or butter” debates. Nevertheless, the focus of this research is on a government’s effect on negative liberty, not positive liberty.

David Feldman states in *Civil Liberties and Human Rights in England and Wales* that liberty is the right to act, free of coercion, in a manner which does not interfere with the liberties of others (1993, 8). According to Feldman, the attitude which has long dominated the law in Britain is a "*liberal* conception of rights: it demands respect for the freedom of others, but does not appear to place any obligation on people beyond the duty not to interfere improperly with the freedom of others" (emphasis in original Feldman 1993, 9). This view of the British tradition places minimal demands upon the state. The demands of liberty in Britain require the state to maintain a police force and a legal system which create and foster conditions in which liberty and freedom may be

protected[5] (Feldman 1993, 3). Additionally, as von Mises states, "the task of the state consists solely and exclusively in guaranteeing the protection of life, health, liberty, and private property" (1985, 25). Finally, in addition to placing minimal demands on the state, liberty requires a strong binding of state power to create "firewalls" between the coercive powers of the state and its citizens.

C). Liberal Democracy

Michael Doyle (1983) classifies liberal democracy according to a set of three rights.[6] First is the right to be free from arbitrary authority and coercion. Under this rubric, one would find the following rights: right to life, liberty and security of person; freedom of religion, speech, press and assembly; right to trial by jury; freedom from arbitrary arrest and detention; and "due process of the law" (Pennock 1950, 13-20; Minogue 1979, 3-16; Raphael 1992, 103-13). Second, social and economic rights of the citizens must be unfettered. To meet these criteria states make certain societal institutions available to all who desire access. Universal access to education, ownership of private property, and an economy in which economic decisions are shaped by the forces of supply and demand are examples of these types of rights (Doyle 1983, 208). Finally, modern democracies involve popular sovereignty in the form of majority rule with a corresponding protection of minority rights.[7] This includes the right of participation and representation in the political process -- for example: regular and competitive elections,

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5 For the liberal tradition's view on the role of the state in society and in protecting liberties Hayek, F. (1960). The Constitution of Liberty. Chicago, University of Chicago Press, Nozick, R. (1974). Anarchy, State and Utopia. Oxford, Basil Blackwell.

6 For an insightful comparison between liberal and illiberal democracies see Zakaria, F. (1997). "The Rise of Illiberal Democracy." Foreign Affairs **76**(6): 22-43.

7 Within the American context see Madison, *The Federalist Papers # 51*. An interesting discussion of an attempt within the 1984 Irish-Anglo Agreement to deal with the issue of protection of minority rights Symmons, C. R. (1990). The Anglo-Irish Agreement and International Precedents: A Unique Experiment in Inter-State Co-operation on Minority Rights. Lessons From Northern Ireland. J. Hayes and P. O'Higgins. Belfast, SLS Legal Publications (NI) Ltd.**:** 221-259.

universal or near universal suffrage and representative governing bodies (Doyle 1983 206-207; see also Schmid 1993, 15). Each of these rights focuses on the importance of securing individual freedom from the constraints of the state by ensuring that the state's "power be kept within [suitable] bounds" (Hayek 1960, 401).

This dissertation will focus on the effect of anti-terrorism legislation upon the first category of rights. Traditionally, these have been called "civil liberties." These include: freedom of speech, the press and assembly; the right to a fair and speedy trial; the right to trial by jury; and a right to be treated according to "due process of the law," which is taken to include: no arbitrary arrest, detention or torture, access to the evidence used in the trial, impartial hearing open to the public and the presumption of innocence until proven guilty (Pennock 1950, 13-20; Minogue 1979, 3-16; Raphael 1992, 103-13). In other words, according to the great English constitutional theorist A.V. Dicey, liberty is a person's "right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification" (1982, 124). Modern usage calls for a "rights audit," meaning the rights of individuals are respected according to traditions of the domestic jurisdictions (Allan 1993, 135-162) and the demands of international law (Walker 1997).

D). Rule of Law

The rule of law is another concept with a long history of discussion and debate. The term used by the ancient Greeks was "isonomia," which meant "equality of laws to all manner of persons" (Florio 1598). One of the first recorded uses of the rule of law as a political concept was by the great Greek leader Solon who gave the Athenian people "equal laws for the noble and the base" (Hayek 1960, 164). In addition, Solon saw rule of

law as the "certainty of being governed legally in accordance with known rules" (see further Acton 1907, 7; Barker 1925, 44). "Isonomia," or "isonomy" as it was spelled in England, was commonly used throughout the 17th Century until it was gradually replaced by "equality before the law," "government of law," and finally "rule of law" (Hayek 1960, 164).

The principle of rule of law was seen as the replacement of rule by men -- arbitrary rule based on the whim and pleasure of the leaders -- with rule by a predetermined set of general rules to which *all* have to abide (Wilkinson 1986, 15). These laws must be passed with the general consent of the people, be seen to be in the general interest of all, and be impartially administered within the polity (Dicey 1982, 110-116). E.P. Thompson describes the rule of law as “an unqualified human good” and continues on to say that it is the “imposing of effective inhibitions upon power and defence of the citizen from power’s all intrusive claims” (Thompson 1977, 266). "The end of law," as Locke put it, "is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom" (1980, ch. VI, § 57). When laws cease to apply equally to all, no matter how democratic the political system, the society ceases to be governed by rule of law. In sum, for centuries political philosophers have recognized that the maintenance of law is a fundamental purpose of government and without it, to paraphrase Hobbes; life is nasty, brutish, and short.

E). Use of Force

According to classical liberals, the proper role of the state is to protect individual liberty. Often this is seen as an attempt by the state to ensure that the exercise of

individual autonomy will not create a situation where the liberty of others is adversely affected (Chalk 1995, 13). As Locke put it, "The end of government is the good of mankind" (Locke 1980, ch. XIX, § 229). In order for the government to achieve these goals, a system of criminal law enforcement and judicial sanction is used to impose limits on personal freedom and restrict behavior that would otherwise be injurious to others. Liberals see the use of the state's monopoly on the legitimate use of coercive force (Weber 1947, 78) as a means to preserve internal peace and order, to enforce the law, and protect the community against external threats as appropriate (Wilkinson 1986, 17). The paradox here is "the need to invest the state with enough power to ensure that it can effectively protect both the individual and society from harmful influences," but while doing so also "constrain possible abuses of that power" by the state (Chalk 1995, 14).

It will be instructive here to make two important distinctions: the first addresses the use of power -- force versus violence; and the second differentiates among response options available to governments. In examining the first, this dissertation distinguishes between "force," which is the legitimate and legally authorized use of coercive power to preserve the integrity of the state, and "violence," the unauthorized and illegal use of coercive power, whether by the state, factions or individuals (Wilkinson 1986, 19). There is a presumption of illegitimacy in the use of the term violence. Seen in this context, the term “legitimate violence” is an oxymoron (Guelke 1995, 20).

With this understanding of the use of coercive power we can return to Chalk's paradox and apply it to this research project. Power used to protect individuals and societal liberties is force, and if the state becomes, in Locke's words, "exorbitant in the use of their power, and employs it for the destruction, and not the preservation, of the

properties of people," then ‘force’ is violence (1980, ch. XIX, § 229). Societies that criminalize the use of violence are clearly distinguishing violence from the force used by police to uphold law and order. The distinction is underpinned by the placing of legal limits on what agents of the state may do in the name of force (Guelke 1995, 21).

F). Policy Approaches

There are a plethora of policy approaches available to democratic regimes in addressing domestic terrorism. The most common way to differentiate among response options is to separate them into the *soft line* (e.g., addressing root causes) and the *hard line* (e.g., President Reagan’s “swift and effective retribution” coupled with a firm no-negotiations policy) (Crelinsten and Schmid 1993, 309). Peter Sederberg, for example, distinguishes between conciliatory and repressive responses (1989), while Alex Schmid distinguishes between conciliation and force (1988). The two most common forms of *conciliatory* response are *accommodation* (including direct negotiation with terrorists and the possibility of giving in to specific demands) and *reform* (usually addressing the grievances raised by terrorists without directly dealing with the terrorist themselves). The two most common forms of *repressive* response are the legal-repressive and the military or what Crelinsten calls the *criminal justice model* and the *war model*, respectively (1989). In the former case, counter-terrorism policy adheres to the rule of law while treating terrorism as a crime. In the latter case, counter-terrorism adheres to rules of war while treating terrorism as a special form of war or low-intensity conflict (LIC) (Crelinsten and Schmid 1993, 309-10). British policy in Northern Ireland has been an evolution from the war model to the criminal justice model, a policy called Ulsterization, while leaving the question of adherence to the rule of law open to discussion.

VII Organization of this Study

Chapter two discusses the relevant literature in the field. This chapter examines several inter-related areas of the literature. First, the chapter will provide a general overview of anti-terrorism literature, but more specifically, it will discuss the potential effects of legislation upon civil liberties. Also, chapter two updates the present literature on British anti-terrorism policy, the literature warning of British governmental overreaction, threats to civil liberties found in emergency anti-terrorist legislation, and finally, it updates the literature on what are known as 'miscarriages of justices.' Especially relevant is the experience of such episodes as the "Guildford four," "Birmingham six," and others.

Chapter three reviews events leading up to the Troubles that preceded British intervention. In addition, chapter three will provide an examination of the terrorist incidents and the government's response. Chapter four focuses on the reaction of the civil liberties community to the action taken by the government.

Chapter five is an examination of the aspirations the legislation's proponents held. Which members of parliament supported emergency legislation and what were their arguments? In addition, the government's implementation of the legislation will be examined. Chapter six examines several of the more controversial miscarriages of justice in recent years. The role, if any, played by the emergency legislation in these miscarriages of justice will be examined. In addition, the manner in which the government has handled these cases will be reported and the effect of the legislation on its intended target -- Irish terrorism -- will be explored. Chapter seven takes the product

of the previous two chapters and compares the legislative intent with the result found in the cases.

Chapter eight summarizes the findings and discusses the overall problems of liberty and order within the contest of the British experience. In addition, the chapter will discuss other avenues of research produced by this project.

VIII Chapter Summary

This study examines the balance between freedom and order, as Great Britain deals with the continued political violence associated with Northern Ireland. For several decades the British government has dealt with the violence through a serious of temporary emergency powers enacted by parliament. The powers have ranged from the Northern Ireland (Emergency Powers) Act to the Prevention of Terrorism Act, both of which have been reviewed and revised on numerous occasions.

Through parliamentary debates and official reviews these extraordinary powers have been justified by official sources as necessary to maintain law and order. Just as frequently, and perhaps more vociferously, the long line of emergency powers have been critiqued and criticized by academics, civil libertarians, and some citizens within the government as violating basic tenets of British democracy (i.e., political freedoms, rights, and the rule of law). This study will examine and compare the arguments put forth on both sides and relate them to the literature on acceptable practices for democratic societies in a state under siege.

Chapter Two

Competing Views of the "Troubles"

> "The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also" (Griffith 1979, 19).

> "Nevertheless, a remarkable situation persists in Northern Ireland. Nowhere else do soldiers or policemen, armed to the teeth, roam the streets. In other parts of the State do paramilitary groups hold sway over sympathetic communities? Only in Northern Ireland are citizens killing and being killed because of their political beliefs" (Walker 1990, 166-7).

I Introduction

The Birmingham pub bombings on November 21, 1974 are commonly acknowledged as the incidents that led to the introduction and implementation of the Prevention of Terrorism Act (PTA). The death of 21 and injury to 180 victims outraged the British public. Almost immediately following the incident, then Home Secretary, Mr. Jenkins, stood in the House of Commons and argued the case for emergency legislation to stop the campaign of terror. Jenkins admitted that the emergency measures (i.e., PTA) were "draconian … [and] … unprecedented in peacetime," but were "fully justified to meet the clear and present danger" (*Hansard* H.C. 5s, 882:35). The PTA, described by Abraham Miller as "an astounding piece of legislation for any democracy," (1990, 315) sailed through parliament in fewer than forty-two hours (Hall 1988, 144).

The purpose of this chapter is to review the previous writings on the British government's approach to counter-terrorism in Northern Ireland. First, this chapter will explore literature on combating terrorism in a democratic context. Here, various writings, ranging from broad theoretical overviews to works specifically focused on the British

case will be reviewed. This chapter will demonstrate that this project is a needed updating of the scholarly writings on the subject.

Since implementation of emergency powers in Northern Ireland, some methods used by the British have been severely criticized by members of government and both the academic and the civil rights communities. This chapter will review the literature on the use of emergency powers, the interplay between terrorism and democracy and the theoretical problems of balancing freedom and order in a society in a state of crisis.

This chapter will also review the scholarly literature that addresses the powers legislated to the security apparatus to combat terrorism. Special attention will be given to the effects of the Diplock Courts, Supergrasses, arrest powers, and the criminal justice system in Northern Ireland. Any discussion of these effects would be incomplete without exploring the miscarriages of justice now known as the Guildford Four, the Birmingham Six, and the Maguire Seven, so these will be examined.

II Terrorism and Democracy

One area of writing on the topic of anti-terrorism in a democratic context is that of protecting the special character of liberal democracies. Within this section of the literature, Yehezekel Dror (1983) urges governments to preserve a 'cool' attitude when addressing public pressure for action to capture the perpetrators and prevent further attacks. Dror states that terrorism is a part of a mosaic of challenges that all democratic governments face. According to Dror, if governments overreact and use the terrorist as a convenient 'enemy,' leaders may be unknowingly justifying the move toward a non-democratic regime.

Martha Crenshaw echoes this sentiment in the introduction to her book *Terrorism, Legitimacy, and Power* (Crenshaw 1983) when she concludes that terrorism is not the most important problem modern governments face. Crenshaw asserts that for governments to develop effective anti-terrorism policies, they must place the search for a solution to terrorism in perspective.

A). Danger of Overreaction

Overreaction is a theme also found in the writings of Judy Torrance who emphasizes, in "The Response of Democratic Governments to Violence," the importance of avoiding "clumsy over-reaction that will alienate [the government's] popular support" (1995, 329). Terrorists attempt to provoke the government into a "frustration response" (Williams 1980). In doing so, the terrorist exposes the repressive side of the state and the government's failures are used to gain popular support (Hazlip 1980). In the face of both tactics, the government, according to John Williams, could be forced to overreact, thereby revealing its weaknesses (Williams 1997, 213).

Events in Great Britain have not led to the overreaction discussed by the previous authors, which would cause what Hall et al. called (1978), a "moral panic," thus creating a major discrepancy between the perceived threat and reality. This research project examines whether emergency legislation was created in an environment ripe for a "moral panic" and hence resulted in an overreaction by the government.

Related to the work by Dror and Crenshaw are the writings of J. Bowyer Bell (1978; 1978; 1993) and Grant Wardlaw (1986; 1988; 1989; 1994). Bell, in *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), advocates caution in dealing with governmental responses to political violence. Bell stresses that

"less is more" in dealing with government anti-terrorist countermeasures. Overreaction by the government and the excessive attention given to terrorism by the media leads to the formation of a discrepancy between the perceived threat and reality (Hall, Chritcher et al. 1978). Philip Cerny (1981) concurs that this discrepancy gives the terrorists their real power. This power is not based upon their threat to overthrow society by force, but is grounded in their ability to get the media to highlight the fragility and vulnerability of social order. This creates an environment in which the government subverts itself by eroding the democratic principles upon which its own legitimacy depends. In support of this view Andrew Mack, in "The Utility of Terrorism" (1981), argues that terrorist groups, by their nature and the strategies they pursue, are incapable of posing a serious threat to secure democratic states.

This theme is followed by Wardlaw, who argues that many governments "encourage exaggerated perceptions of the threat," which leads to an overly aggressive response to terrorism (1988, 239). The exaggerated perceptions can not only lead to a response which is out of proportion with what is needed to deal with the terrorists, but lead to the emotional justification for such action as has been pointed out by Murray Edelman (1988). Edelman argues that crises, like most political problems, not only initiate public demands but then are typically used to rationalize the enacted public policy (1988, 31-32). Terrorist acts, singularly or as part of a concerted campaign of terror, epitomize this type of effect upon public policy. The media sensationalization of the incidents further magnifies the reaction of the government. Grant Wardlaw asserts that a central problem for democracies involves responding to knee-jerk public reactions in a way that still allows the government to accurately assess the nature of the terrorist threat

and construct rational countermeasures which address the threat without damaging democratic practices and traditions (Wardlaw 1994). The maintenance of democratic practices and tradition in part depends, according to Roberta Smith, upon sustaining a strong law enforcement mechanism with an efficient organizational structure (Smith 1997).

The possibility of damaging democratic institutions is a theme taken up by David Charters, who states that there are three main responses elicited from governments by terrorists which would be harmful to democracy (1994). The first is forcing a government to modify or abandon established policies for action favored by the terrorists. The second is changing attitudes of the population in favor of less democratic means of government. The final response is goading a government to introduce countermeasures that undermine democratic practices and human rights (Charters 1994, 212).

B). Maintaining the Essence of Liberal Democratic Values

Another theme stressed in the literature is the importance of maintaining "democratic processes of government and rule of law" (Wardlaw 1989, 69) and taking actions which are “consistent with democratic values and the rule of law” (Wardlaw 1988, 239). This view is echoed by Merlyn Rees, who argues in his 1981 essay that terrorists attempt to goad governments into taking actions, which lead to the steady erosion of civil liberties. To avoid this leaders must, in Rees’ words, “keep a steady nerve” so as not to react in a manner which is counterproductive and aids the terrorist’s strategy (1981, 87). The reaction which invades the sanctity of the individual’s autonomy, according to Matthew James, enables terrorists to assert the myth that they are liberators of the oppressed and not violent insurrectionists (James 1997).

Wardlaw's work provides a useful research agenda in which to work from in examining British anti-terrorism policy. However, this research project differs from Wardlaw's work in the scope of inquiry. Wardlaw addresses both international and domestic terrorism in his book. This research, while addressing the concepts of democracy, use of force, legitimacy and rule of law focuses solely upon terrorist acts and anti-terrorist policy related to the Northern Ireland situation.

Peter Chalk, in "The Liberal Democratic Response to Terrorism" (1995), examines the key principles that should guide a liberal democratic state's response to terrorism in a manner that is both effective and consistent with its own principles. In a society under siege by terrorist violence, the more persistent and serious the level of terrorism, the higher is the likelihood that the majority will be willing to accept greater limits on their personal freedom for the sake of enhanced security (Crelinsten and Schmid 1993, 332-3). Chalk, in this article, argues the important issue is one of balance and is true of all aspects of the liberal state's response to terrorism. He examines four areas where the "tension between democratic acceptability and effectiveness is seen to be the greatest" (Chalk 1995, 10). These four areas include the enactment of special anti-terrorism legislation, control over the media, use of anti-terrorism commando teams, and covert intelligence gathering techniques. This research focuses upon the first two of Chalk's four areas, although the latter two are relevant to this project.

Another work with a more focused approach is John E. Finn's book, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991). Finn's three-part study examines the limits beyond which constitutional states must not tread in their attempts to deal with violent political upheaval. Finn argues that in the process of making a

constitution, there are 'preconstitutional principles' which inform what goes into the document. It is these preconstitutional principles that are important, not the written words. Finn implies that a resort to emergency powers is improper unless the crisis cannot be resolved by the use of non-emergency methods.

The first two sections of *Constitutions in Crisis* are especially relevant to this research project. The first section outlines a theory of constitutionalism from which a set of constraints upon the exercise of emergency powers is derived. This theme is also found in Subrata Chowdhury's book, *Rule of Law in a State of Emergency* (1989), in which the author posits that one of the primary dilemmas posed to states in times of crisis is the obligation to protect the integrity of the state while simultaneously protecting the rights of individuals. The next two sections of the Finn book apply the theory and its implications to the cases of Northern Ireland and Germany. Finn argues less emphasis is needed on the actual constitutional rights and more emphasis is needed on why it was thought such protections were desirable in the first place. Simply put, although crises test the limits of constitutional documents, there are basic principles that permit and control the use of emergency powers. This research will draw upon Finn's ideas and examine whether the possibility existed that the crisis in Northern Ireland could have been dealt with without resorting to the EPA and PTA as they are formulated.

C). Democracy, Terrorism and Northern Ireland: Literature on the British Case

A similar work, "The Fortification of an Emergency Regime" (1996) by Fionnuala Ni Aolain, examines the long-term implications of the various installments of 'emergency rule' in Northern Ireland. Aolain concludes that the longer the special legislation remains in force the more entrenched the emergency legislation becomes

within the system. This leads to reluctance on the part of state actors to "relinquish the immense omnipotence facilitated by legislative and executive acts" (Ni Aolain 1996,1387). Conor Gearty has argued the emergency legislation has in fact become normalized and increased greatly in size and scope (Gearty 1994, 177-8).

One of the potential long-term affects of emergency rule is that of altering the range of legal powers available to the police. In essence, the long-term use of emergency powers alters the role of the state vis-à-vis the individual in potentially dangerous ways. Central to any discussion of the proper role of the state is the issue of policing. Angela Hegarty has argued, in a 1997 essay, that an examination of the 1996 parade season in Northern Ireland demonstrates the British Government's failure to protect the principle of the rule of law (Hegarty 1997). The degree to which the rule of law was disregarded has grave consequences, according to the Human Rights Watch, for the administration of justice in Northern Ireland (HRW 1997).

Special emergency powers in and of themselves are intrinsically neither good nor bad, according to Clive Walker, who argues that the key is a set of political and national security elites who are focused upon maintenance of individual rights and other democratic values and not maintenance of their authority (1997, 612). It is the question of democratic values and individual liberty versus the maintenance of a state's authority--the ability to enforce societal order--which is key to a democracy's ability to weather periods of emergency.

D). Freedom versus Order: An Insurmountable Dilemma?

One of the chief concerns of this study is the question of "freedom versus order" and at its core this question is a theoretical inquiry. Since democracy is the process by

which freedoms are maximized when possible and reconciled when necessary, this inevitably means that select freedoms in some areas of life must of necessity be abridged for other societal needs such as security. This leads to what Sidney Hook calls "strategic or preferred freedoms" on whose functioning the very processes of liberal democracy rest (Hook 1959, xi). Hayek states, that "if all are to be as free as possible, coercion cannot be entirely eliminated, but only reduced to that minimum which is necessary to prevent individuals or groups from arbitrarily coercing others" (Hayek 1978, 133). Both these views infer a tension between freedom and order. In addition, Hook and Hayek suggest that in well-ordered liberal democracies this tension creates a balance.

Using the metaphor of a teeter-totter demonstrates this balance; on one end you have freedom (accompanied by its often-ignored partner responsibility) and on the other end is order. If society moves too far towards order it necessarily restricts the freedom of everyone. A similar problem exists if society strives too diligently for freedom--the possibility of a somewhat more chaotic environment and even a breakdown in social order *may* result (Frohnmayer 1995, 19). The balance of the two is the key to a smooth running liberal democracy. This project shows that in the British case the balance is not static; it is constantly ebbing and flowing over time. The debate in Britain is not simply that the balance has shifted towards order, but that it has gone too far. This project makes tentative conclusions related to this debate.

When discussing the balancing of this tension, it is important to note that societies are fluid organisms, which move back and forth along the continuum of freedom and order. A small shift in one direction or the other is not dangerous. The danger lies in large shifts (either quickly or gradually) in either direction. The policies of a society under

siege must balance the tension between being a rational response to groups engaged in political or paramilitary violence (Walker 1997)--assuming the aim of maintenance of a liberal democracy--(Mathews 1988, xxvii-32, 218-302) and avoiding "the triumph of security over legality" (Asmal 1990, 1, 12). As alluded to above, some freedoms are more important than others, so smaller shifts in critical freedoms are more of a concern than larger shifts in less crucial freedoms. For example, a small loss in the freedom of personal speech is more dangerous than the loss of the right to own a pet cat.

1). Elements of Freedom

Determining the relative value of one freedom over another is difficult and goes beyond the scope of this project. There is some agreement among liberal democratic theorists on which freedoms are most important: freedom of speech and the press, protection of private property from arbitrary search and seizure, due process of the law, rule of law and the freedom to be left alone, among others (see chapter 1). It is the obligation of the state to use the minimum of coercive force in order to protect all citizens from violations of the above freedoms and liberties. As put by the 19th century writer Herbert Spencer, the aim of the state is to secure "the liberty of each, limited alone by the like liberty of all" (quoted in Herbert 1978, 124).

The problem, according to Hook, is that the state subordinated the processes and strategic freedoms of democracy to particular programs (Hook 1959, xi). Hayek agreed, and argued that governments cannot coerce the private citizen as a means for the achievement of particular state purposes (Hayek 1978, 135). The balancing of freedom and order, of core freedoms and peripheral freedoms, is difficult, but it is the most difficult in times of crisis.

Paul Wilkinson argued that the most dangerous of all threats to liberal democracies is the state's failure to provide what citizens see as a basic expectation--a safe living environment (Wilkinson 1992, 163). This theme is seen in the work of George Alexander on human rights in emergency situations. He has argued that the emergency creates "an insurmountable dilemma" for democratic governments because, on the one hand, such a government is under an obligation to protect the integrity of the state, while on the other hand it is under an obligation to protect human rights (Alexander 1984, 2-3). The historical record on this balancing tension has tended to go towards the state protecting itself at the expense of individual liberties. Boyle et al. point this out in their book and argue convincingly that "when a state is threatened the legal system will be used on behalf of the state by those in power in whatever way seems to them most likely to restore stability" (Boyle, Hadden et al. 1975, 1-3). Citizens of liberal democracies have historically been willing to let cherished freedoms be temporarily abridged during states of emergencies. The danger lies in governments using emergencies to expand the scope of their power.

Freedom is the absence of arbitrary coercion and is applied through the concept of "the rule of law" (both discussed in the first chapter). As the situation in Northern Ireland is examined, British anti-terrorism policy can be compared to the developed theories on liberty/freedom, individual rights, and rule of law to see if the theories would have predicted events in Great Britain. With the onset of the Troubles, in which direction has Great Britain moved on this theoretical continuum of freedom versus order? All societies move back and forth along this continuum as various policies interact with developing societal issues. The key is the presence of a pattern. A policy that restricts freedom in

favor of order is completely acceptable if the circumstance (i.e., crisis) warrants the act and if the equipoise is restored after the crisis has past. However, the same policy may be more problematic if it is one in a long train of acts that create a cumulative effect on the balance of freedom and order, which will be difficult to reverse or correct.

As government policy addresses violence, what affect has it had on the law in Great Britain? Is the law retaining its "generality;" that is, in the words of F.A. Hayek, does the law create a set of "general rules that apply equally to everybody"? Hayek states that the "generality" attribute of law is its most important element (Hayek 1960, 153). The generality of the rule of law creates a general abstract set of rules. A well-written set of abstract rules should be absent of particulars and should not single out any specific persons or groups of persons. How general an abstract set of principles is British law in regards to the Troubles? As a result of anti-terrorism laws are certain people placed into categories of "status" in relation to the law?[8] The overall thrust of this project finds the large increases in legislation to address the terrorist campaign in Northern Ireland has led away from the traditional view of a generalized set of laws as understood in a classical liberal interpretation of the rule of law. Additionally, the project finds there is support for the assertion that enacting special emergency antiterrorism legislation has focused on a selected element of the population.

Theoretical approaches to the limit of state authority is another area where the findings of this research project can speak to a broader set of philosophical writings. States are entrusted with a monopoly of coercive power in society in order to achieve a liberal state's primary purpose of attempting to ensure that the exercise of individual

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[8] See Graveson, R. H. (1940-41). "The Movement from Status to Contract." Modern Law Review **IV**. For an interesting discussion on how societies have moved from status-based law (with right and duties conveyed to certain classes of individuals) to contract law where people are all equal before law.

autonomy will not create a situation where the liberty of others is adversely affected (Chalk 1995, 13).

If there is a growth in the power accumulated by the state, the question must be asked, when has this growth taken place and how was it justified? In a free society, actions that are contrary to the principles of a liberal state must be explained and defended by those requesting the action. The literature discusses a number of explanations of why governments grow and accumulate power. Some scholars see the growth in the power of the state as an inevitable result of modernization, others see increasing public goods leading to the welfare state as the culprit, while still others focus on ideological considerations (Higgs 1987, 3-22). Another hypothesis found in the literature is that a crisis creates an environment ripe for government growth. This thesis argues that under certain conditions national emergencies call forth extensions of government control over areas not traditionally controlled by the government. As the emergency recedes, the government devolves *some* of the extra authority, but maintains part of the extension, thus gradually accumulating power. Certainly the late 1960s and early 1970s were times of public emergency for Great Britain in relation to Northern Ireland and crisis measures were undertaken, but does the crisis remain at the same level today? If not, what is the status of the emergency powers enacted during this time of crisis?[9]

E). Section Summary

In sum, when the analysis is complete, does Great Britain meet the liberty sustaining requirement articulated by Peter Chalk, that "protecting the individual from the

[9] For a discussion of "public emergency" and allied concepts see Chowdhury, S. R. (1989). Rule of Law in a State of Emergency. London, Pinter Publishers.

arbitrary actions of the state is a requirement that must *always* supersede other [state] objectives" (Chalk 1995, 15)? Temporarily abridging civil liberties has always been a policy option in dealing with crisis situations and Great Britain has used this option several times in relation to the Troubles. How does the action taken by the British government compare to the accumulated writings on the rule of law, state authority, and use and abuse of the idea of public emergencies? Overall, the finding of this project supports the view that the British case is subtly less liberal. The evolution in this direction is significant, but not to the point of jeopardizing Britain's standing as an exemplar of modern democratic governance.

III Terrorism and Northern Ireland: The British Response

In March 1972, the government of the United Kingdom assumed direct responsibility for security policies and laws in Northern Ireland. The British Parliament, reacting to several distinct terrorist campaigns in Northern Ireland, passed the Northern Ireland (Emergency Provisions) Act in 1973. This act, applicable only in Ulster, was amended and reorganized several times in the following years. The NI(EP)A was followed in 1974 by the Prevention of Terrorism Act (PTA), which applies to both Northern Ireland and Great Britain. The PTA passed quickly through Parliament with little discussion of the relative merits of the legislation.

According to many observers, the legislation was written in a time of crisis under the assumptions that (1) the criminal justice process was severely strained by Irish terrorism and (2) liberal democracies were limited and constrained in their responses to terrorism. Based upon the assumption that the judicial system in Northern Ireland had

been unable to effectively deal with political violence, a committee was created which later developed the "Diplock Report 1972" (Finn 1987, 115). Most of the recommendations from Lord Diplock's report were incorporated into the original Northern Ireland (Emergency Provisions) Act of 1973.

Bruce W. Warner, in “Great Britain and the Response to International Terrorism” (1994) states that the British government overreacted in establishing the PTA. He argues that there is little evidence to substantiate the claim that domestic terrorism "fundamentally threatens the stability of the state" (Warner 1994, 36). He analyzes whether the powers of the PTA itself irreversibly damaged the state's democratic fabric and credentials. Although Warner states that the United Kingdom is still a viable democracy, he argues that the PTA has imposed undemocratic restrictions and has made Britain a subtly less-free society.

Warner’s article is indicative of much of the literature on terrorism, British counter-measures, and civil liberties, which tend to play both sides of the fence. Authors argue that British counter-measures are a dangerous overreaction, resulting in a wide variety of abuses of power, and then state that little damage has been done to the democratic nature of the country. This research explores when “abuses of power” related to anti-terrorism legislation cause irreparable damage to democratic states. Although an exact answer related to this issue is unlikely to be agreed upon, it is instructive to look for ‘signs of concern’ that society is moving away from its liberal principles.

Merlyn Rees, former Secretary of State for Northern Ireland, argues that countermeasures inherently affect the freedoms enjoyed by society (1981). Continued assaults by terrorists discredit the government and sow the seeds of public doubt toward

the government's ability to protect its citizens. The end goal of the terrorist is the steady erosion of civil liberties to a point where the government and society have lost their commitment to democratic values and in the British context have "been compelled to make some inroads into [British] civil liberties" (Rees 1981, 87). However, while Rees is fairly circumspect and concerned about these "inroads," Rees is, on the whole, rather confident that the emergency powers are temporary and appropriate. Part of the rationale for Rees' positive view is, as pointed out by David Charters, that the most serious violations of democratic principles and liberty are not the result of special legislation, but occur outside the realm of law and administrative power (Charters 1994, 222). That is, Rees' underlying assumption is that terrorists destroy liberty, not government. In examining Charter's assertion, this research project hopes to ascertain if there might be a connection between increased powers, weakening of due process considerations, changes in judicial process and a feeling of empowerment which leads to overstepping the rule of law.

Graham Zellick, in "Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties," expresses similar concerns about liberties in Great Britain without sharing Rees' optimism. After a long and thorough examination of British domestic security legislation, Zellick concludes that many of the powers possessed by the British government are "both unnecessary and an affront to democracy" (1990, 820).

One of the most important writers on the subject of terrorism and the liberal state is Paul Wilkinson (1981; 1985; 1986; 1992; 1996). In his book, *Terrorism and the Liberal State* (1986), Wilkinson lays out a set of guidelines for a democratic response to terrorism. First, be proactive. According to Wilkinson, keeping the democratic system in

"good condition" is crucial in preventing an environment conducive to terrorism from developing. Included in this category is the necessity to protect the rights of minorities and to keep ultimate control, thereby ensuring accountability of the bureaucracy, armed forces, police and security services (1986, 295). Second, and closely related to the above, is the need to retain an independent judiciary, rule of law and the constitutional structure. All of these are vital components to ensuring democratic governance. Related to maintaining the rule of law is demonstrating convincingly that convicted terrorists are being punished not for their political beliefs, but for their serious criminal offenses (1986, 296). The need to protect "democratic rule of law" and "basic civil rights" (1985, 12-13) are themes consistent in Wilkinson's writings. According to Wilkinson, the "most dangerous of all threats to liberal democracies is a situation in which the liberal government is failing to meet the widely perceived basic expectation and needs of its citizens" (1992, 163). Is the British response to political violence in Northern Ireland leading to what Irving Louis Horowitz calls the "structural victim of terrorism"--the loss of democracy (1983, 49)? While examining the overall affect of British anti-terrorism policy on democracy, this research project also addresses the issue of state legitimacy and accountability, dedication and respect for the tenets of the rule of law, protection of individual rights and liberties, and keeping security services in check.

One of the earliest works on terrorism and civil liberties written, by sociologist Irving Louis Horowitz (1977), is titled "Can Democracy Cope with Terrorism?". In this article, Horowitz is very concerned with the development of nationalized anti-terrorist policies, which steadily erode civil liberties. The trend described by Horowitz is seen in British anti-terrorism legislation dealing with Northern Ireland. Horowitz poses the

question which is at the heart of this research project--*can democracies adequately deal with domestic terrorism without an unacceptable loss of civil liberties and freedom*? Horowitz's article, while a theoretical piece, does not focus specifically upon Great Britain, but provides an overall assessment of areas that are commonly affected by counter-terrorist policy. Horowitz also discusses how the social scientists who have been called upon to focus their skills on the problem of terrorism can produce an "anti-terrorism industry" under which the erosion of civil liberties can be rationalized to the general public (1977, 36).

A final and important set of writings on the subject of the British response to terrorism are authored by Clive Walker (1983; 1984; 1985; 1988; 1992; 1997). Walker, whose doctoral dissertation became the book *The Prevention of Terrorism in British Law*, has written cogently on the need to balance security needs with protection of basic civil liberties. He has written several articles concerning the official reviews of the PTA and how these reviews have impacted subsequent versions of legislation. Walker notes that while many changes in the PTA have resulted because of official reviews, that the most fundamental flaws of the legislation have not been addressed. He is especially concerned with the insufficient attention to the inclusion of what one scholar calls “limiting principles” (Twining 1973, 406) in the Act (Walker 1984, 713). In a later article, Walker demonstrated an even more explicit concern about the effect of emergency legislation when he described the need for “political reform” rather than “political repression” in Northern Ireland (Walker 1988, 622). Walker elucidated on “reforms” in another article, “Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom’s Prevention of Terrorism Acts,” where he argues that it is an uphill

battle of civil liberties groups in dealing with the PTA because public pressures and sympathies support the Act (Walker 1997, electronic version). It is the British people's pressures and sympathies for emergency legislation, which, according to Brian Dorrian, is responsible for the growth of emergency power in the United Kingdom. Dorrian argues that only through a change in public opinion on the part of the British people will the institutionalization of the police state be reversed (1992, 191).

IV The British Response and Civil Liberties

The goal of the terrorist is to provoke the government into repressive actions which alienate the population (Marighela 1971, 61-97) The IRA is no different in this regard.[10] Even as its campaigns of terror try to push Britain out of Northern Ireland, it aims to discredit Westminster. This can be done by demonstrating to the population that the government is incapable of protecting them, thus necessitating political change, or by goading the government into taking repressive actions that damage civil liberties and undermine popular support.

One way terrorists can demonstrate that the government cannot protect the population is to demonstrate convincingly that the government cannot protect itself. This was in part the goal, when at 2:54 a.m. October 12, 1984, the IRA came very close to killing the entire British cabinet by detonating a bomb at the Grand Hotel in Brighton where the Conservative Party was having its annual meeting. Prime Minister Margaret Thatcher narrowly escaped injury in an explosion which killed four and wounded thirty-two others (Anderson 1984). The IRA had slipped into the hotel weeks before and had

[10] It is important to note that while terrorists groups, especially nihilistic European ones, took Marighela quite seriously, most students of terrorism see Marighela's adoption of Nechaev's (1869) ideas as mere propaganda.

planted the bomb, using a timer from a VCR, directly behind the wall. Although counter-terrorism resources did not prevent the incident, they worked after the fact. The bomber was captured and it was discovered that he had plans to bomb another twelve seaside resorts in order to disrupt tourism (Clutterbuck 1990, 48). The bomb, according to an IRA statement, was aimed at Mrs. Thatcher and her "warmongers" (Apple 1984). The statement went on to mock British attempts to stop the IRA campaign of terror, by stating, "Today we were unlucky … But remember, we have only to be lucky once; you will have to be lucky always" (Anderson 1984).

Thatcher, although shaken, insisted the conference resume and told the delegates "all attempts to destroy democracy by terrorism will fail." While Thatcher attempted to keep a "business as usual" approach, the rest of the country was much less patient. Under the headline EXTERMINATE THEM, *The Sun* called on the government to "track down these pitiless Provos like the rats they are" (Anderson 1984). The overall impact of the attack was minor, but its symbolism was huge and it was another reminder of how little success British counter-terrorism policy was having in relation to the Troubles.

The literature on British counter-terrorism measures is replete with works addressing alleged government policy concerning terrorism connected to Northern Ireland. The reactions of Westminster to the Troubles, according to Stephen Livingstone, negatively affects both the rule of law and the criminal justice system in Northern Ireland (1990). Although both Livingstone and Kevin Boyle (1990) argues the situation was improving (increased reliance upon "police prosecution" over "military security"), the latter would more pessimistic in regard to the time needed before the rule of law would again able to protect the liberties of all those involved in the conflict.

Any investigation of British anti-terrorism policy in Northern Ireland must address the accusations that the police and military had a "shoot-to-kill" policy in regard to suspected IRA terrorists. Most prominent examples of the alleged "shoot-to-kill" policy were the incident at Gibraltar where three unarmed IRA activists were killed by an Special Air Service squad (SAS), and the Stalker Affair involving an investigation into the death of six people in Northern Ireland at the hands of the Royal Ulster Constabulary (RUC). Both examples are marked by a tremendous amount of stonewalling by the police and security services[11] (Doherty 1986; Amnesty 1988; Stalker 1988). In both cases, the evidence, as it is known, points convincingly towards the fact that British security services killed these nine people. Most troubling was the fact that all of the security service members involved were found to have acted within the law, or were not brought to trial for "national security reasons." Incredibly, even the RUC members who lied, destroyed evidence, and provided false stories as part of the cover-up were for the most part not punished for their acts (Cadwallader 1988; Campbell 1988). Other incidents similar to those above have continued to surface, even in the face of official denials and several "exhaustive" government investigations, which settled few and created more questions. Democracies like Great Britain cannot allow these types of events to happen and still purport to govern by the rule of law. Those who try find world opinion places them at a level with Bulgaria, South Africa and Belarus.

The widespread belief that the British government had tacitly supported a "shoot-to-kill" policy was given credence as more information came forward concerning the extra-legal killings. The information was related to the army's "force research unit"

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[11] One of the dead IRA activists, Mairead Farrell, had been one of the three female IRA prisoners from the Armagh jail to join the 1980 hunger strike for special prisoner status Taylor, P. (1997). Behind the Mask: The IRA and Sinn Féin. New York, TV Books.

which had infiltrated an agent, Brian Nelson, into the largest of the loyalist paramilitary groups--the UDA (Ware 1998, electronic version). Nelson was used to help create "target lists" of IRA activists for UDA hit squads. Nelson's handlers, the British military, provided the names on the lists. This "assassination by proxy" might not literally fall under a shoot-to-kill policy, but is very disturbing, quite illegal, and an affront to any conception of the rule of law (1998, 34; Ware 1998, electronic version). Nelson and his army handlers justified their actions by claiming that they saved "innocent lives" by assisting the UDA in targeting "only legitimate targets" (Ware and Seed 1998). This reasoning might have cold military logic, but it was against the law and, as evidence demonstrated, it did not always work. Several of the thirty killings in which Nelson was involved included non-IRA members (Ware 1998). The evidence of collusion between the security services and Loyalists is especially troubling when one realizes that in the early 1990s Protestant paramilitaries are killing more people per year than the IRA (Flaherty 1994).

There was another element of these stories that fits into the larger context of this project. The single most important element keeping these incidents in the spotlight was the cherished rights of the press. The information that had come forth (especially from official sources) was due to the pressure applied by the press corps investigating the truth.[12] In each of these cases it was investigative reporting that demonstrated that the government has been less than forthright with its citizens about its behavior. In the same vein, as has been pointed out by Abraham Miller's research on the "Guildford Four," if not for a free media keeping these stories in the minds of the people, tragic injustices in

[12] For a treatment on how the press handled the Stalker Affair see The Stalker Affair and the Press, Murphy, D. (1991). The Stalker Affair and the Press. Boston, Unwin Hyman.

the name of social order might well have never been uncovered and in some cases rectified (Miller 1990). It has been these cherished civil liberties that the British government has attempted for years to curtail in the name of national security (Zellick 1990). These liberties, and those who exercised them, allowed the world to see what Michael Farrell describes as "security and politics living together in sin, the judiciary in bed with the police" (Farrell 1988, 8).

One of the more prolific and determined authors regarding the effect of the PTA on civil liberties in Britain is Paddy Hillyard. Hillyard's early work focused upon decline of parliamentary power *vis a vis* the executive, the normalization of emergency laws and widespread governmental disregard of the rule of law (Hillyard 1983; Hillyard 1988, 198-201). Hillyard's widely cited book, *The Coercive State* (co-authored with Janie Percy-Smith) (1988), examines the PTA as one example of an overall trend toward accumulation of coercive state power and diminishing of civil liberties in Britain. This book was followed up a year later by an article entitled "The Coercive State Revisited," and was intended to demonstrate that there has been no reversal in the trend described in the earlier book. In fact, according to the article, the contrary is happening as "recent developments have led to a further decline of democracy and more coercion" (Hillyard and Percy-Smith 1989, 534). In a later book by Hillyard, *Suspect Community: Peoples Experience of the Prevention of Terrorism Acts in Britain* (1993) (written in association with the National Council for Civil Liberties - henceforth NCCL), the author argues that the PTA has created a 'suspect community' whose members have suffered widespread violation of their civil liberties. Hillyard believes that the PTA has had an insidious effect on the criminal justice system and has silenced, even criminalized, political opposition to

Britain's role in Northern Ireland. This argument is a refinement of an earlier one which posits that the British government uses other state agencies (planners and social workers) in a concerted effort to control particular sections of the population (1983, 59).

The theme that the excessive concentration of executive power in dealing with the Troubles is slowly destroying civil liberties is also presented in Patricia Hewitt's book *Abuses of Power: Civil Liberties in the United Kingdom* (Hewitt 1982). Another book which examines the abuse of power, *The New Prevention of Terrorism Act: The Case for Repeal* (also sponsored by the NCCL), concluded that the centralization of power has undermined the rule of law, resulting in a situation where "individual liberty is no longer protected by law, but is at the arbitrary disposition of the Executive" (Scorer, Spencer et al. 1985).

Others see the accumulation of "temporary" power by the executive as dangerous also. In examining these powers and the official reviews, professors Sim and Thomas state that the continued use of emergency legislation "pushes back the threshold of repression by normalising the extraordinary" (1983, 72). They go further, and say that the official reviews "makes the 'temporary', 'draconian' and extraordinary powers available under the Acts more permanent, more ordinary and more central to the administration and practice of criminal justice in Britain" (Sim and Thomas 1983, 72). Gearty and Kimbell conclude that emergency legislation (specifically the PTA) has "over the years developed from being an emergency response and a temporary expedient into a more or less permanent security measure" (Gearty and Kimbell 1995, par. 5.8). In short, these authors make a strong case that the desire for order has come with the routinization of civil liberty violations.

Donald Jackson demonstrates the degree to which the citizens of Great Britain have suffered a loss of civil liberties in several publications. The first piece is an article entitled "Prevention of Terrorism: The United Kingdom Confronts the European Convention on Human Rights" (Jackson 1994). In this work, he argues, from 1959 to 1989, the UK has been the most frequent violator of the European Convention on Human Rights. He built upon this essay and later published a book examining the numerous confrontations between British security policies related to the Troubles and the European Convention on Human Rights (Jackson 1997). Another book focusing on human rights is *At the Crossroads*, which argues that the British government has used the emergency to avoid a serious discussion of abuses in the United Kingdom (LCHR 1996).

This more general treatment of the literature on British countermeasures and its effect on civil liberties will be broken down into five categories. The five categories are not meant to be exhaustive, but to stay within the scope of this project.

A). Diplock Courts and Supergrasses

Following the suspension of the Stormont Parliament and the imposition of direct rule in 1972, Westminster decided to investigate politically acceptable alternatives to internment. In the words of Northern Ireland Secretary William Whitelaw, the question was

> "whether changes should be made in the administration of justice in order to deal more effectively with terrorism without using internment under the Special Powers Act" (*Hansard* H.C. 5s, 855:276).

To this end, the Diplock Commission was established and charged with investigating alternatives. The recommendations of the Diplock Report were incorporated into the Northern Ireland (Emergency Provisions) Act 1973. Since the release of the Report and

enactment of NI(EP)A 1973, the recommendations of the Commission have engendered a great deal of debate, controversy and corresponding academic writings.

1). Juryless Courts

An even cursory examination of the literature on the Diplock Court system immediately reveals that the supporting writing comes mainly from official reports. Opponents of the Diplock system for the most part come from the academic and civil rights community. One of the detractors of the Diplock Report was Professor William Twining (1973), who described the report as hastily written, poorly researched and a panicky response to a crisis. His views of the courts recommended by the Report were likewise less than positive. Professor Twining's critique would be echoed over the years by other writers whose problems with the Diplock system can be categorized as followed: too narrow a scope of opinions garnered, lack of empirical evidence to support conclusions, and insufficient attention to the effect of the juryless courts.

The first criticism of the Diplock System has been discussed by Greer and White (1986), who point out that while the Report was to examine alternatives to the present system *in* Northern Ireland, only one of the four members of the commission (Lord Diplock himself) bothered to visit the troubled area at all, and he only visited twice (two days each time). When Diplock did visit Northern Ireland, his meetings were restricted to "members of the security forces on the ground" (Diplock 1972, par. 4) and no one else (Greer and White 1986, 2). According to one scholar, the entire exercise cannot help but be seen as four outsiders sitting across the water in England propounding solutions for Ulster, while consulting only with the authorities (Twining 1973).

The second critique made of the Diplock Courts was the lack of empirical evidence provided and insufficient attention paid to the consequences of juryless courts. While the abolition of the jury system was one of the most controversial decisions and had far reaching implications, it received very little attention in the Report. Of the 119 paragraphs found in the Diplock Report, only seven were devoted to the jury question (Greer and White 1986, 3).

Part of the reason there was so little discussion about the jury system was due to the paucity of empirical evidence concerning juries in Northern Ireland. The only evidence available related to intimidation of witnesses (Diplock 1972, pars. 17-26). In one well publicized case in 1972, an important witness in a forthcoming case against an IRA suspect was shot dead shortly before the trial was due to begin (Boyle, Hadden et al. 1980, 57). Due to the lack of evidence on jury intimidation, the Report discussed the effect of witness intimidation and made a logical leap that the same applied to juries (Bonner 1985, 136). Diplock felt that the knowledge of witness intimidation created a climate of fear that influenced jurors. According to Diplock, "the threat of intimidation…extends also to jurors though not to the same extent." Diplock goes on to say that "a frightened juror is a bad juror even though his own safety and that of his family may not be at risk" (Diplock 1972, par. 36). The concern over jury intimidation was one reason for abolishing jury trials altogether.

Another possible reason for moving away from jury trials, put forth by Kevin Boyle, was because of a practice called "standing by." In this practice, prosecutors would purposely exclude Catholic jurors on the grounds that they were specifically open to bias by intimidation. This meant that in practice, most juries were exclusively or

predominantly Protestant, and this led to a number of allegedly perverse acquittals in cases against loyalists (Boyle, Hadden et al. 1980, 57).

Even if one accepts both the analogy between witness and juror intimidation as sound and as anecdotal evidence concerning "jury stacking", it does not follow that suspension of jury trials is therefore justified. While the evidence points towards witness intimidation, witnesses were not abolished because it would remove a valuable source of prosecutorial evidence (Greer and White 1986, 49). The evidence that points towards witness intimidation is inappropriately used to justify juryless trials. On the other hand, evidence does show that juries are less likely to convict than non-jury courts (Walsh 1983, 16). According to Greer, the abolition of juries has created a system with a "conviction-orientation" (Greer and White 1986, 50). The view of most of the literature on the Diplock courts can be summarized as follows:

> It is fair to conclude … that the Diplock court system has continued to operate without discrimination and that from the point of view of the authorities it has worked smoothly and efficiently. But this bureaucratic success has been achieved at a high cost in terms of public acceptability and confidence in the system of criminal justice (Boyle, Hadden et al. 1980, 86).

Overall, the writing suggests that the scarcity of evidence on jury intimidation in itself suggests that the problem was not as serious as has been alleged.

Supporters of the Diplock system point to the fact that civil trials have been conducted without juries (Bonner 1985, 136). The Gardiner Report (1975), in reviewing the operation of the Diplock system, relied upon evidence of witness tampering (there could be no data on jury intimidation—there were no juries) to support his case that juryless trials should continue. Between January 1, 1972 and August 31, 1974 there were 482 cases of witness intimidation (Gardiner 1975, par. 27). The Report concludes: "There has been wide agreement among those who gave evidence before us, and who were best

qualified to judge that the new system has worked fairly and well" (Gardiner 1975, 29). Overall, the official reviews have tended to support the conclusion that the Diplock courts were doing a reasonably good job under the circumstance and that concerns about the loss of cherished civil liberties were not founded.

2). Supergrasses

London journalists first coined the term "supergrass" in the early 1970s to describe those "grasses" (i.e., informers) from the London underworld that testified against their alleged former associates.[13] Put another way, a supergrass is an accomplice who turns "Queen's evidence on a grand scale" (Bonner 1988, 23). Greer put the term in a more sinister context when he stated that supergrasses are "a modern instance of the age-old use of informants for the purpose of social control" (1995, 1). It is based simply on a utilitarian notion that the greater public interest is served by dealing with one suspect more leniently, so a greater number can be brought to "justice" (Hillyard and Percy-Smith 1984, 351).

All supergrass trials were heard in Diplock courts where the importance of balancing these issues is handled by a single judge. This is especially important in light of changes that allowed for conviction based on uncorroborated supergrass statements/evidence. As was seen in our discussion concerning the Diplock courts, most of the proponents of supergrasses come from official sources, and the detractors come mainly from the academic and civil liberties communities.

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[13] It is said that the nickname "grass" for informer derives from the Cockney rhyming slang "grasshopper" for "copper" (policeman), but it may also owe something to the popular song "Whispering Grass" and to the phrase "snake in the grass" Greer, S. (1995). Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland. Oxford, Clarendon Press.

One of the first writers on this subject was Lord Gifford QC, a Labour peer, who was commissioned by the London-based civil liberties organization, The Cobden Trust. The report, released at a press conference in the House of Lords, stated that the use of supergrass evidence had led "to the telling of lies and the conviction of the innocent" and warned that it could damage public confidence in the courts of Northern Ireland. In Gifford's opinion, the supergrass trials had caused a dangerous anger and alienation among a broad section of both Protestant and Catholic populations, and although there was a need to combat terrorism, this could not be done effectively "by twisting the course of justice" (Gifford 1984, par. 95).

The literature's overall critique of the supergrass system follows that of the Diplock courts--the system was established to gain successful prosecution of those terrorists who would otherwise be unreachable. The number of people affected by supergrasses is approximately 500 (Bonner 1988, 23; Greer 1995, 284-286).[14] The problem is more extensive than unjust arrests. Many people are convicted due to the supergrasse's accusations. An *Amnesty International* investigation found that of the 65 people convicted (of the 200 defendants prosecuted) between 1983 and 1985, all but one of the convictions was overturned by the Court of Appeal (1988, 61).

According to David Bonner, the supergrass system was "unsatisfactory" (Bonner 1988, 53), and Steven Greer has stated that "[i]t has achieved little except misery for those involved, considerable public expense, and a sharpened and perhaps even extended distrust of the legal system amongst certain sections of the community" (Greer 1988, 98). John Jackson states that supergrass trials "give rise to particular concern and which

[14] Mr. Nicholas Scott, Northern Ireland Junior Minister puts the figure at 593 between 1982-85 (*Hansard* 6s, 73:100). Accuracy is precluded by the fact that a number of supergrasses retracted their evidence before their names became public.

arguably call for greater safeguards for defendants than exist at present" (Greer 1995, 115). This sentiment is echoed by *Amnesty International,* which argues that the use of supergrasses has failed to guarantee the basic right to a fair trial (1988). In sum, the opponents of the supergrass system paint an unflattering picture of a system replete with problems and needing to be jettisoned.

Supporters of the supergrass system can be classified as representing the "official perspective," which emerged from the various branches of the state of Northern Ireland. This perspective denies that the supergrass process is a system at all since it was largely spontaneous in origin and had been managed by independent criminal justice institutions (Greer 1995, 102). The official view feels that although offering rewards to the supergrass is "distasteful" (Hermon 1983, xiii), it could be justified in the public interest and that according to then Attorney General, Sir Michael Havers, the supergrass trials in the Diplock courts did not represent any significant departure form recognized standards of due process (*Hansard* H.C. 6s, 47:3-5). Havers also says that he was "entirely satisfied, both as to the correctness of the principles in accordance with which the Director has taken his divisions" and with the information which he had received from the Director as to the decision taken in individual cases[15] (*Hansard* H.C. 6s, 47:3-5).

Defending the supergrass process, which he describes as an "impartial process of law enforcement," Chief Constable Sir John Hermon states that the whole community has benefited "immeasurably" (Hermon 1983, xii). He goes on to say that supergrasses had "dealt a severe blow to the morale of both republican and loyalist terrorist organizations and their ability to murder and destroy" (Hermon 1984, xiii). In one area alone, claimed

[15] It is the Director of Public Prosecution who considers the evidence (supergrasses statements) and decides whether to proceed or not.

Sir John, there had been a 73 percent reduction in the murder rate and a 61 percent overall reduction in terrorist operations which meant that many more people were alive (Hermon 1984, xiii).

The upbeat nature of the office line was supported by the *Review of the Northern Ireland (Emergency Provisions) Act 1978*, (1984) by Sir George Baker who stated his conclusions even *before* any of the counter-arguments were considered. Sir George felt that

> "The overall benefits to the community from the conviction of many terrorist who would otherwise be free to continue the murder and mayhem is such that, as a matter of policy, prosecutions with accomplices called as Crown witnesses will continue. The AG [Attorney General] has said so. I myself cannot see any objection …" (Baker 1984, pars 165-6).

The only criticism voiced by Baker at all was found in a brief section at the end which talked pragmatically about the fact that these cases had so many defendants, so many charges and such delays in starting the long trials (Baker 1984, par 172).

The opponents of the supergrass system talk about violation of rule of law and right to a fair hearing--in Greer's words, "counterproductive crime control short-cuts" in which the statistics demonstrate low overall conviction rate (Greer 1987, 669). Such trials were abandoned in 1986, when it was noted that judges were not sufficiently discriminating in the use of uncorroborated evidence (Shroff 1995, 126). Supergrass supporters can point to a drastic decline in terrorist activities during the time of extensive use of supergrasses. This project will examine both perspectives to determine if either has a case, if the violations of individual rights (if any) are justified by the lessening of terrorist operations or if there might be other influences at work that may account for the decline in terrorist activities.

B). Arrest and Search Powers

People are most vulnerable when the state uses force to detain them against their will. Where there is an arrest by a police officer there is a restraint not just of the person but also of that person's right and freedoms. Both the EPA and the PTA have created new arrest and detention powers for the police and the armed forces. Although there are a number of differences in the arrest and detention powers conferred by various section of the EPA and the PTA, the literature on both sides of the argument has general perspectives that bridge the particulars.

Supporters of the arrest and detention power conferred by the emergency legislation claim it is a means of intelligence gathering due to the overriding need to combat terrorism (Walsh 1988, 37). The official justification for these powers is put in terms of the difficulties of policing Northern Ireland, thus making it imperative that suspects be arrested and detained in order to interview the person and gather reliable intelligence (Bennett 1979 pars. 28-9). The authorities take the view that security forces in Northern Ireland need a constant flow of reliable information on terrorist membership, organization, activities, plans and resources in order to save lives and avoid injury (Bennett 1979; Baker 1984). Emergency arrest and detention powers, therefore, are said to be crucial to the anti-terrorist program (Walker 1992).

Extended detention, up to seven days under the PTA (1989 s.14(5)), is supposedly necessary in order to gather intimate knowledge of the terrorist *milieu*, and to be able to gain vital leads through highlighting gaps and inconsistencies in a person's story (Bonner 1985, 124). Such careful interrogation, it is argued, requires time (Evelegh 1978, 60-75, 143-7; Shackleton 1978, pars. 69-77; Baker 1984, pars. 270, 272, 282). Lord Jellicoe thought extended detention to be valuable in that it gave the police adequate time to

complete forensic inquires, to check identities and statements against existing intelligence and to follow up on new lines of inquiry (Jellicoe 1983, pars. 59-60). Jellicoe followed up with the opinion that the police would be "seriously handicapped" if such powers were abolished, a view also shared by Baker (Jellicoe 1983, par. 65; Baker 1984, par. 257). Although Jellicoe was worried about "seriously handicapping" the security forces, the European Court of Human Rights, in Brogan v. United Kingdom, saw it as a violation of Article 5 of the European Convention on Human Rights (Bradley 1995).

Robin Evelegh, commanding officer of the 3rd Battalion Royal Green Jackets stationed in the Upper Falls Area of Belfast and author of *Peace-Keeping in a Democratic Society* (1978), has argued for even more extensive powers. They include the obligation of citizens to attend periodic census-type security surveillance interviews to better enable the security forces to build up an intelligence profile of the population in terms of the fingerprints, photographs, and signatures (which might be included on compulsory identity cards). Additionally, these interviews would explore the individual political views and attitudes to authority of everyone in a particular "rebel-affected" area (Evelegh 1978, 119-132). These ideas, along with the use of cash payments and immunity from prosecution as a means of encouraging defectors or informers within terrorist groups, were allegedly successful in dealing with other colonial emergencies (Kitson 1971, 107-12; Evelegh 1978, 68-75). For a different perspective, see Lowery (1977).

The official attitude, as can be seen above, is dominated by a preoccupation with security. The test is how many individuals are arrested, how much intelligence is gathered, how many individuals are brought to trial, how many convictions are secured

and so on. According to Walsh (1988, 37), little thought is given to the propriety and legality of the methods used to achieve those ends and the damaging side effects that it produces. One side effect is found in Peter Hain's book, *Policing the Police*, which states early on that "the police *are* becoming a law unto themselves, that they *are* assuming an independent political role, and that it is *imperative* to reverse these trends" (Hain 1979, 2).

It is exactly these wide-ranging and dangerous side effects that most concern opponents of the arrest and detention powers found in the EPA and PTA. Many opponents of these emergency powers see them used to justify quasi-legal intelligence gathering operations (Boyle, Hadden et al. 1975, 43-6). Between 1975 and 1980, section 11 of the EPA has been applied on average 2,000 times a year (Walsh 1983). Walsh examines the arrest powers of the EPA and the PTA and finds that 75 percent and 55 percent, respectively, of individuals arrested are released without charge (see also Walsh 1982, 38-9; Walsh 1988, 35). Such tactics may, of course, materially assist the security forces to bring terrorists to justice. But as Boyle, Hadden and Hillyard have warned, a security policy involving "screening," where there is an obvious risk that large numbers of people would be ill-treated or abused, is counter-productive because it increases alienation of civilians and thus helps to ensure a continuing flow of recruits to terrorist organizations to replace the ones who were successfully incarcerated (Boyle, Hadden et al. 1975, 57).

Another insidious effect of the screening process is the use of arrest powers to intimidate opponents of government policy. This is clearly demonstrated in the case relayed in Peter Hain's book. An Irish couple living in London for 25 years was routinely

arrested for supporting terrorism (she was a secretary for the Irish Civil Rights Association in Britain). Part of her job was raising money for dependents of Republican prisoners in Britain. The couple and their fifteen-year-old daughter were arrested and questioned several times until they decided to quit their jobs and return to Ireland permanently, thus obtaining the result the Special Branch had set out to achieve (1979, 131-2). Hain concludes by noting that there should be no illusions that police would not use the power conveyed to them by emergency legislation in just such a manner if they thought the circumstances justified it (Hain 1979).

Questions of pragmatism aside, proponents of emergency arrest and detention powers argue that an interviewing period is needed for in-depth questioning to find inconsistencies in suspects' stories and gain low-level background information that may prove useful in other situations. If the security forces detain people who they know have nothing to do with terrorist activities, but, according to Walsh (cited in Bonner 1985), simply because they reside in a particular area, they *might* provide information that can be used to show an inconsistency in another detainee's story. This clearly is a violation of civil liberties. The important consideration is whether the crisis warrants short-term suspension of personal liberties in order to protect the viability of the state. Are the powers being used, as Evelegh (1978) has argued, to fight terrorism or to criminalize the political opposition of British policy in Northern Ireland as others have argued (Boyle, Hadden et al. 1980; Scorer, Spencer et al. 1985; Hall 1988)? Determining the appropriate balance between necessary police power and protection of cherished freedoms, as seen above, is at the core of this research project.

An important corollary to the arrest and search powers relates to who was given the power. We see in the British handling of the Troubles a vacillation back and forth between police or army supremacy in the conflict in Northern Ireland. As the situation in 1969 quickly got out of hand it became obvious that the RUC with assistance from the B-Specials were unable to adequately deal with the circumstances in Ulster. James Callaghan, at the time Labour home secretary, argued that the problem was weakness and incapacity on the part of the RUC (Callaghan 1973, 17-8). This perceived failure on the part of police supremacy led to the introduction of the British army into the fray. The effect of British troops in Ulster, according to Paddy Devlin (a nationalist politician bitterly opposed to the PIRA) was to turn the Catholic working class almost overnight "from neutral or even sympathetic support for the military to outright hatred" (Devlin 1994, 134). The reaction was one of more military intervention. This phase of the conflict saw the army attempting to suppress the Catholic revolt through traditional counter-insurgency methods, but the tactic succeeded only in making the situation worse (Newsinger 1995, 86). Counter-insurgency tactics with the army in charge of the security situation was a failure and something new was needed.

The new policy was to be called "Ulsterisation," an internal security strategy reliant on policing and the judicial process. The policy was the outcome of a security review headed by a senior Home Office civil servant, John Bourn, who produced a report titled *The Way Ahead* (Newsinger 1995, 89). The two central pillars of Ulsterisation were police primacy and criminalization. From now on the RUC would play the leading role in the conflict with IRA. There would be times when the British government would consider

going back to the counter-insurgency model of army supremacy, but the RUC has remained in charge to this day.

The change to police supremacy would have serious implications for policing in the whole of the United Kingdom. Slowly, what was to evolve by this policy was one of the most dangerous changes that can happen to a democratic state. The police began to increasingly resemble a paramilitary organization, which incorporates the functions of intelligence gathering agencies and less of what they are meant to be--a law enforcement agency. This blending of police duties, military training and tactics with intelligence gathering done in covert operations is dangerous to democratic accountability and was in part responsible for the Stalker Affair, the incident at Gibraltar, and the Brian Nelson revelations (Ware 1998, electronic version).

C). Proscription

Proscription is the power to ban an organization which appears to be affiliated with terrorism occurring in the United Kingdom and connected with Northern Ireland (PTA 1989 s.1(2)(a)). On the opening day of debate on the original PTA 1974, then Home Secretary Roy Jenkins stated, "the proscribing of organizations is for us a wholly exceptional measure and can be justified only by a wholly exceptional situation--a clear and present danger" (*Hansard* H.C. 5s, 882:635). Other commentators stated the power of proscription was "cosmetic and had been provided for in the Act simply to assuage public opinion" (Hain 1979, 123). This view was given some credence by Jenkins' own words:

> "I have never claimed and do not claim now, that proscription of the IRA will of itself reduce terrorist outrages. But the public should no longer have to endure the affront of public demonstrations in support of that body" (*Hansard* H.C. 5s, 882:636).

Unfortunately, to achieve this goal, proscription must be sufficiently broad to suppress all public emanations relating to outlawed groups, even if that means confusing Republican violence with Republican politics (Lowry 1977, 202).

Clive Walker (1992), in summarizing the literature on support for proscription, placed the arguments into four classifications. The first positive claim made in favor of proscription is that it operates as a kind of legislative safety valve. By expressing public feelings of anger it has been argued that reprisals on Irish communities have been avoided (Shackleton 1978, par. 118; Jellicoe 1983, par. 207). A second claim is that proscription displays political strength by acting as a "useful token of the government's determination to crack down on terrorist organisations" (Wilkinson 1986, 170), a view echoed by Jellicoe, who states that it "enshrines in legislation public aversion to organisations which use, and espouse, violence as means to political end" (1983, par. 207; see also Colville 1987, par. 13.1.6).

A third advantage of proscription is that it intimidates and discourages supporters of terrorist groups (Shackleton 1978, par. 31). This earlier claim has been modified to state that proscription provides "a positive disincentive to youthful potential recruits and to parades and fund-raising" (Baker 1984, par. 414; Colville 1987, par. 13.1.6). Wilkinson points out that the effect of stopping some parades prevents supporters of one side from provoking frays with rival groups. This helps to free the police from the dreary and time-consuming work of crowd and riot control on the streets, and allows them to focus on protecting the general public and catching criminals (Wilkinson 1986, 170).

Finally, proscription might usefully "short-circuit" the regular law. Lord Diplock stated,

> "It relieves the prosecution of the necessity to prove in court each time that an individual member of one of the named organisations in charged that its objects or the means by which it seeks to attain them are unlawful. On this charge of criminal conspiracy at common law, the evidence to establish this, though it be common knowledge, would have to be repeated in each case brought before the courts" (Diplock 1972, par. 21).

In a similar vein, Walker states the use of proscription as a short-circuiting device provides a much similar alternative to the offense of seditious conspiracy, which prosecutors might otherwise be tempted to invoke (Walker 1992, 1986 p. 47).

Critics assail each of these four alleged positive aspects of proscription. As to the first claim, that proscription has vented anger which might be directed at the substantial Irish community living in Great Britain, if private retribution is a real threat (and there are examples to be found) it is those who are preparing to undertake unlawful revenge attacks who are *least likely* to be mollified by the vicarious revenge of proscription (Walker 1992 (1986 p. 46)). Thus, as many acts of revenge have been perpetrated since the passage of the Act as before it (The Times March 12, 1975 p. 2 cited in Walker 1992 (1986 p. 46)).

The second claim put forth by supporters of proscription, that using it "demonstrates political resolve" and a "get tough attitude," is equally scoffed at by detractors. Opponents of proscription concede that although in any crisis situation there is always a corresponding propaganda war, it is important to remember that the propaganda war is of secondary importance. It was Peter Hall who said that proscription is all about the propaganda war against Irish Republicanism, not IRA terrorism (Hall 1988, 146). Walker argues that it is better for public confidence to demonstrate substantive security and political policies than to pass presentational legislation that is bound to be found ineffective in practical terms (Walker 1992 (1986 p. 46)). This seems to be the case, as the *Economist* described the proscription element of the PTA as "more spectacular than

effective" (November 30, 1974 cited in Wilkinson 1986, 170). In addition, even if the propaganda war was paramount, it hands the IRA an easy victory because by outlawing it the law strengthens the IRA's claim that its inability to operate lawfully justifies a resort to violent terms (Walker 1992 (1986 p. 51)).

In dealing with the third reason, "a disincentive for people to join proscribed groups," opponents point out that outlawing fringe groups is as likely to create "the glamour of illegality which may galvanise flagging interest" (Hogan and Walker 1989, 142). In addition, while proscription will dissuade the casual member, it will not deter those most deeply involved (Jellicoe 1983, pars. 207-208). Finally, by outlawing these groups the already difficult job of the security forces may be made more difficult. Police usually draw upon fringe supporters for information because they are more accessible than dedicated terrorists (Baker 1984, par. 407; see also Hogan and Walker 1989, 142; Walker 1992 (1986 p. 50)).

The final reason given by supporters of proscription is that it serves as a legal shortcut in prosecution. While it is true that proscription in some cases makes it easier to get terrorists off the street, it also dramatically reduces freedom of expression and assembly. According to Walker, proscription is "extremely damaging" to liberty (Jellicoe 1983, par. 210; see also Hogan and Walker 1989, 142; Walker 1992 1986 p. 50).

Other criticism put forth against proscription includes that the benefits are limited at best (Jellicoe 1983, par. 207), it is too blunt and inflexible a weapon (Colville 1987, par. 13.1.9) and has been "distinctly uneven in its application" (Gardiner 1975, par. 69). Overall, even if proscription was an effective policy tool, it still warrants rejection since it breaches the guiding principles of liberty that regular law should take precedence over

special measures where possible, and that effective safeguards should be incorporated (Walker 1992 1986, p. 51), both of which are missing from the power of proscription.

D). *Miscarriages of Justice*

A number of high profile terrorist arrests, trials and convictions (which are surrounded by as much controversy as media attention) led to long prison terms for more than twenty people and the death of one person while in detention. All of these individuals later had their convictions reversed after lengthy appeals. The three most controversial and well-known cases—the Guildford Four, the Birmingham Six, and the Maguire Seven--arose out of the IRA's 1974 bombing campaign on the British mainland in which at least twenty-eight people died. These cases are *causes célebre* for those who feel the British justice system, especially as it pertains to the Troubles, is severely lacking in anything resembling justice for the accused. The literature on the subject has tended to fall into two categories: the journalistic accounts and the scholarly writing on the subject.

The journalistic accounts are supportive of the victims and very harsh on the British legal system. It could be argued that the victims of these miscarriages of justice have the media, in part, to thank for their freedom. It was the media which acted "responsibi[ly] … to make the public aware of the cost to balance freedom with order" (Miller 1990, 57). Without the media keeping the plight of these victims firmly ensconced in the popular press, the government could have continued its policy of "complete intransigence" in dealing with this issue (Mansfield 1994, ix).

One of the first books in this genre, *Error of Judgment: The Truth About the Birmingham Bombing* by Chris Mullin, had an immediate effect. Speaking in Parliament, then Home Secretary Douglas Hurd referred the Birmingham Six case to the Court of

Appeals mentioning the effect of Mullin's book[16] (*Hansard* H.C. 6s, 108:737). This is the goal of most of the journalistic works on the British miscarriages of justice. Ludovic Kennedy, in the forward of *Time Bomb: Irish Bombers, English Justice and the Guildford Four* (McKee and Franey 1988, xii), states that the arguments provided by the authors should have persuaded Hurd to refer the case back to the Court of Appeal. This book chronicles the odyssey of the Guildford Four providing a powerful argument which undoubtedly aided in getting the referral and subsequent quashing of the conviction on October 19, 1989.

Two other books, which while falling within this category of works have a somewhat broader focus, are Bob Woffinden's *Miscarriages of Justice* (1989) and Michael Mansfield's *Presumed Guilty: The British Legal System Exposed* (1994). Woffinden's book is a historical treatment in which the first half examines cases of miscarriages of justices from 1946 through 1986, and whose second half examines the Guildford, Maguire and Birmingham cases. Mansfield's book is a broader indictment of the British legal system. Mansfield, a leading defense barrister, looks at the systemic problem plaguing British justice and continually reinforces the following theme. Throughout all the miscarriages of justice, it was not the police, politicians, the State, or the so-called responsible members of society who eventually demanded justice in these cases, but rather the victims, their families, friends, and supporters who had to fight for truth and justice (Mansfield 1994, ix-x).

The scholarly writing on miscarriages of justice deals mainly with systemic problems and deficiencies within the British criminal justice system. Steven Greer, in his

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16 While Hurd did refer the Birmingham Six case back to the Court of Appeal, on January 28th, 1988, the Court decided not to allow the appeal. It was another three years (March 14, 1991) before the Court of Appeal changed its mind and quashed their convictions.

article “Miscarriages of Criminal Justice Reconsidered,” argues that no criminal justice system can be made “miscarriage proof” (Greer 1994, 73), although it is also true that special anti-terrorist criminal justice processes, such as the Diplock system of weakening due process constraints, make it much easier for people to be found guilty of crimes they did not commit (Greer 1994, 68-69). Greer’s systemic concerns are given a human face by Joshua Rozenberg, whose “Miscarriages of Justice” (1992) methodically reviews each of the major cases of miscarriages of justice. Rozenberg concludes by stating, that as awful as these miscarriage are, the greatest damage of these cases is to the “public shattered confidence” in the criminal justice system (1992, 116).

The public’s confidence in the criminal justice system (specifically the appeal system) was part of the reason why the Civil Liberties Trust, along with Liberty (a.k.a. NCCL) sponsored a report on the criminal justice system in Great Britain. The report agreed with Greer (1994) in stating that “no system of criminal justice is immune from miscarriages of justice” (Thornton, Mallalieu et al. 1993, 24). But the report also points out numerous faults within the present system and makes a whole host of suggestions in how to reduce the chances of such miscarriages happening again.

E). *Interrogation in Depth: The “Five Techniques”*

In August 1971, as the Government of Northern Ireland was struggling to quell an “unprecedented” armed urban insurrection, it reintroduced internment (see chapter three; for a more extensive background see O'Boyle 1977). Up to this time, the RUC was unable to deal with the escalating situation, in part due to the fact that it was woefully uninformed in areas of basic intelligence needed for counter-insurgency operations (Taylor 1980, 19). Internment was intended to first get IRA personnel off the streets and,

second, to provide police authorities the opportunity to gather low-level intelligence concerning the IRA organization, structure and activities. The process used by some members of the RUC to gather information involved the use of what has been called the "five techniques" or, as it is also known, "interrogation in depth" (ICJ 1983, 228). Detainees were forced to stand against a wall for prolonged periods, hooded, and subjected to continuous white noise, and be deprived of food and sleep to become more disorientated and more susceptible to influenced confessions (Spjut 1979, 266). Allegations of abuse were so rampant that the Conservative government of the time was forced to order an official inquiry chaired by Sir Edmund Compton (1971). Later, the Republic of Ireland would bring Great Britain before the European Court of Human Rights (ECHR), where Britain would be found guilty of torture and inhuman and degrading treatment[17] (Bradley 1995).

The arrest and detention powers of the NI(EP)A and PTA create innumerable situations where people are at the complete and total mercy of the police and/or security service. The purpose of the detention, as mentioned above, is mainly intelligence gathering. Often the people who are brought into custody do not wish to provide the information that the police demand. The police and security forces, which are under tremendous pressure to deal with the violence and produce arrests and convictions, go further than they should.

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17 The verdict was later modified on appeal to the European Court of Human Rights, when the "torture" count was dropped. This allowed the British papers to claim, in a satisfying although misleading headline, "Britain Acquitted of Torture" Taylor, P. (1980). Beating the Terrorist?: Interrogation in Omagh, Gough, and Castlereagh. Middlesex, England, Penguin Books, Gearty, C. A. (1993). "The European Court of Human Rights and the Protections of Civil Liberties: An Overview." Cambridge Law Journal **89**: electronic version.

Such events have taken place, and although the allegations of torture and inhuman treatment were vigorously denied by the British government, it has paid over a half a million pounds in compensation for ill-treatment while in police custody (Taylor 1980, 14). These allegations and denials are important to this study. Democracies, as open and free political associations, are not supposed to treat their citizens in this manner. When violations of civil liberties take place, democratic governments are required to admit their transgressions, punish excessive behavior, compensate the victims and take precautions to ensure the situation does not arise again.

The British government has not lived up to this standard. In *Ireland* v. *UK* (1978) the ECHR held that the five interrogation techniques employed against internees amounted to inhuman and degrading treatment, contrary to Article 3 of the Convention. According to Dickson, the British government in defense stated use of the technique had been discontinued, but no steps were ever taken to punish those who had administered them (Dickson 1995, 74; see further Dickson 1997).

When these events are examined in detail, how did the British government handle the allegations? Westminster created three separate government inquiries (Hunt 1969; Compton 1971; Parker 1972). The conclusions and solutions that emanated from the reports (Compton and Parker's) have been described by one legal scholar as similar to "peopling a monastery with prostitutes and publishing the mere change of lodging as an exemplary rehabilitation" (Brownlie 1972, 507).

Additionally, the hearings from the ECHR and special investigative reports compiled by Amnesty International, the Northern Ireland Human Rights Assembly (NIHRA) and NCCL are available for examination (Amnesty 1978; NCCL 1993). Also,

there is more than ample scholarly writing on the subject (Fields 1973; O'Boyle 1977; Bishop 1978; Spjut 1979; Boyle, Hadden et al. 1980, 38-56; Taylor 1980). The experience of the Guildford Four and Birmingham Six suggest that there might be more than just some isolated bad behavior--a systematic pattern of official mistreatment when the police are empowered by the necessity and desperation of a society under siege. In relation to the miscarriages of justice cases, there have been some scholarly investigations into the effects of torture in these situations (Gudjonsson 1992).

V Chapter Summary

This chapter noted that in order to properly understand the direction of this research project there must be a grasp of the early literature on terrorism and democracy. Three main sets of literature were addressed in this chapter; the general literature on terrorism and democracy; focused writings on the British/Northern Irish context of a democratic society's battle against terrorism; and a burgeoning literature surrounding the British government's use of emergency anti-terrorism legislation and the special powers it confers to the police and executive.

This literature demonstrates a set of British policies meant to degrade the ability of terrorists to sustain campaigns of violence. But, as Drake has argued, any modicum of British success has only led to a reorganized, stronger and more professional IRA (Drake 1995). The civil liberties community would fully support this view and assert that it has also led to widespread abuses, violations of civil liberties and given the IRA a more supportive environment in which to operate.

The first set of literature is mostly concerned with protecting liberal democratic institutions and norms. In this context, most writers urge a slow deliberate policy-making process and preventing the terrorists from goading the government into hastily written and poorly conceived reactions. By remaining calm, the State's representatives take much of the symbolic power away from terrorists and demonstrate that the society is still functioning normally. This literature is summarized by Grant Wardlaw, who states, "The bottom line for the democracies is to remember not only whom they are fighting, but what they are fighting for" (Wardlaw 1994, 10).

The literature addressing the British case is immense, with hundreds of scholarly works and a nearly equal output from governmental sources. It is a rich literature containing diametrically opposed conclusions. Generally, the scholarly works see grave problems, especially in the area of civil liberties, and in the government's handling of terrorism in Northern Ireland. The official sources, while having an occasional criticism and reform proposal, are generally supportive and laudatory towards the government's efforts to create order in the province. In the words of Bruce W. Warner, official reviews of emergency legislation "while insisting that the PTA was effective against terrorism, they acknowledge that it was difficult to *prove* the effectiveness of the powers" (original emphasis Warner 1994, 20). This level of disagreement in literature on basically similar topics is ideal for the comparative research being conducted in this study.

The final set of literature, dealing with the special powers conferred by emergency legislation, contains several different sub-literatures. Each set of sub-literature bifurcates along similar lines as was seen above. The scholarly writings, for the most part, are critical of the new powers while the official sources justify the powers, explain

away problems, and call for new and expanded powers. Here also, the literature is ideally suited for comparing the claims of the critics to the claims of those enacting and wielding the special powers.

Throughout this literature two distinct views on responding to the Troubles are discernable. One view can be articulated as being an all-out war limited only by what the public would accept, and the other that of country slowing bleeding away its liberal democratic legitimacy in a war of its own making. The analysis in this project examines almost three decades of terrorism and corresponding anti-terrorism legislation to see if there has been any discernible damage to the democratic character of Great Britain. This research takes the literature a step further by critically examining nearly thirty years of conflict in order to better understand the strains placed on the institutions of a liberal democracy. One question addressed is whether the "temporary provisions" are truly temporary or have become institutionalized and found in other parts of the legal system. A danger exists that emergency legislation is accepted only because it is 'temporary,' but for various reasons remains in effect much longer than planned. Over time, the temporary and extraordinary become normal, thus creating a new baseline for the next 'temporary emergency' provision.

The Troubles are one the most enduring conflicts of its type any modern democracy has faced. This provides a unique opportunity to see any long-term changes, not just of institutional structures, but of attitudes found in ruling elites. This analysis will examine whether the miscarriages of justice, the alleged shoot-to-kill policy, and police/state cover-ups such as alluded to in the Stalker Affair are simply aberrations or symptoms of the degeneration of the values crucial to the maintenance of a liberal

political order. How did the British government deal with accusations of improper conduct, and what does it tell us about the democratic nature of Great Britain? A state with a strong respect for liberal democratic ideals will be transparent in much of its actions; only areas of vital national security will be protected from the view of its citizens. This is especially true when accusations of misconduct are made.

Finally, this study will examine whether three decades of internal conflict have weakened the State's adherence to the idea of a rule by laws. In general, has the State respected the tenets of liberty, private property, innocence until proven otherwise, and freedom from arbitrary detentions? Great Britain's experience balancing these two concepts will speak to the overall theoretical debate on the topic. What lessons for others may be drawn from the nearly thirty-years of Troubles?

Chapter Three

Terrorism in Great Britain and the Government's Response

> "No revolution was ever won without violence" Angry Brigade 1971 (Walker 1992, 4).

> "As long as terrorism is no more than a nuisance, a democracy will rightly resist any attempts to curtail its traditional freedoms. Once terrorism becomes more than a nuisance, once normal functioning of society is affected there will be overwhelming pressure on the government to defeat them by all available means" (Laqueur 1987, 95).

> "Late that night I was sitting in the Ministerial box listening to the debate…Next to me was the man who drafted the Bill. Repeatedly, I turned to him to ask in what way the different provisions would have prevented the Birmingham bombings. Eventually he replied, 'You know very well that is not what it is about. We have to appease them. They are after capital punishment. They have to be given something" Clare Short, Labour MP on the night PTA 1974 was being debated (*Hansard* H.C. 6s, 47:90).

I Introduction

One of the primary duties of a state is to provide order within its jurisdiction. Control over territory claimed by a political entity is one of the prerequisites of being a state. At times the British government has struggled to keep order within Northern Ireland and has called upon emergency legislation to aid in maintaining order.

This chapter examines the history of political violence connected to Northern Ireland in Great Britain. Since 1969 there have been nearly 3,300 deaths in Northern Ireland attributed to the Troubles (Flanagan 1997, A11; Clarity 1998, 85). Of that total, 949 belong to the various security services operating in Northern Ireland and 2,260 were civilians[18] (NIO 1997). By chronicling the history of violence and the subsequent reaction of the British government, a backdrop is created for later comparison between legislative aspirations and concern among the civil liberties community.

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18 Government statistics place "suspected terrorists" under the category of civilians.

II History of the Violence

The most important source of terrorism in Great Britain has been and continues to be Irish Nationalism. This is not to discount terrorist events emanating from Welsh and Scottish discontent (Walker 1992, 20-21) or the use of British soil by the Libyans, Palestinians and a host of other foreign or international terrorists (Warner 1994; Wilkinson 1996, 35-7). Although terrorism attributed to these groups has caused much pain and suffering, the primary terrorist threat is related to Northern Ireland (Wilkinson 1996, 33; NIO 1997). The Irish challenges to the legitimacy of British actions in Ireland can be traced back through the Irish Republican Brotherhood and Young Ireland to the outbreaks of Whiteboyism in 1761 (see Williams 1973; Philpin 1987). To a large degree, these demands for political independence were satisfied by the passage of the Government of Ireland Act 1920 and the Irish Free State Act 1922 (Walker 1992, 17; Campbell 1994).

The Irish Free State Act created the precursor independent Republic of Ireland. However, after some creative boundary drawing, the settlement left six Irish counties, with a two-to-one Protestant majority, in a new territory called Northern Ireland still firmly attached to the United Kingdom (ICJ 1983, 219). The Catholics of Northern Ireland felt little loyalty to the province, refusing to accept their links with the United Kingdom, its political system, queen or parliament (Carlton 1981). In return, the Protestants of Northern Ireland regarded the Catholics as potential, if not actual, traitors who should be excluded from place and power. The lack of a political consensus (Rose 1971; 1976) created by the 1922 settlement left the substantial Catholic minority with

little political influence, and therefore at the mercy of the politically dominant Protestant majority. The consequence of this partition has been irredentist campaigns of terrorist violence.

Upon its creation in 1922, Northern Ireland was in a state of incipient civil war. The loyalty of nearly half of the population was uncertain. Indeed, Ulster's second city (Derry/Londonderry) was predominantly Catholic (Finn 1991, 53). Due to the situation in Northern Ireland, Protestant leaders feared Catholic uprising, and not without reason. Sectarian violence was so widespread that almost 300 people were killed between 1920 and 1922. In the latter year alone, 232 people were killed (including two Unionist MPs), nearly 1,000 were wounded, 400 were interned, and more than £3 million worth of property was destroyed (Arthur 1980, 25-26).

Considering the level of violence, it came as no surprise that the government of Northern Ireland, at Stormont Castle, resorted to emergency legislation. According to Finn, given the sad history of violence in Northern Ireland, it would have been more surprising had the state *not* resorted to emergency measures (1991, 53). One constitutional lawyer described the resulting legislation, the Civil Authorities (Special Powers) Act 1922 (SPA), as "a desperate measure taken to deal with a desperate situation" (Magee 1974, 77). Intermittent violence gave Stormont the excuse to make the previously temporary SPA permanent in 1933 (Finn 1987, 115). Although the SPA is the starting point for this project, it should not be thought of "as a unique piece of legislation, but as taking its place in that long line of repressive statutes which the unsettled state of Ireland has called forth" (Magee 1974, 77). As will be seen, not only is the SPA the focus

of many Catholic complaints, but it is used as a base line for the development of later pieces of emergency legislation to deal with Northern Ireland.

The history of the Catholic dissent has been one of violent rebellions, albeit unsuccessful ones. However, borrowing heavily from their American counterparts, Catholics changed tactics in the 1960s and established a network of civil rights organizations throughout Northern Ireland.

III Civil Rights Movement

As the 1960s began, a new movement developed within Northern Ireland. This civil rights movement was fueled by a younger generation of middle-class, university-educated Catholics who had no firsthand experience with the earlier violent years. This challenge to the Northern Irish state was quite different from the radical republican campaigns of the past. The civil rights movement emphasized nonviolence and campaigned for reforms *within* Ulster. These reforms would enable Catholics to participate fully and equally in the political and economic life of the province and required the equal application of civil and criminal laws. In this respect, it was fundamentally different from past Catholic challenges to the state. Previous challenges to the legitimacy of Northern Ireland's constitutional union with the United Kingdom, from the 1920s through the 1950s, were marked with violence. The strategy of the civil rights movement sought not the destruction of the existing constitutional order, but rather full inclusion within that order (Finn 1991, 55).[19] The civil rights movement concentrated

[19] For a dissenting opinion of this thesis; see Hewitt, C. (1981). "Catholic Grievances, Catholic Nationalism and Violence in Northern Ireland during the Civil Rights Period: A Reconsideration." British Journal of Sociology **32**(3): 362-380.

upon the construction of a constitutional community within Ulster; a community that would be:

> "centered on a number of fundamental democratic claims: the right to participate in the election of central and local government through a scrupulously fair electoral system; the right to pursue legitimate political and social objectives without interference from government; the right to share equitably in the allocation of state resources; and the right to freedom from arbitrary arrest or detention" (Boyle, Hadden et al. 1975, 8).

Substantial bickering within and among the myriad of groups marked the civil rights movement in Northern Ireland. There was little centralized organization among the civil rights groups, which were composed of several large national organizations and a welter of smaller local groups, each with its own program for reform. On February 1, 1967, the Northern Ireland Civil Rights Association (NICRA) was formed as a province-wide organization committed to electoral reform and ending sectarian discrimination in hiring and public housing (Crozier 1973, 2). The independence and autonomy of the sundry associations created substantial headaches for the Stormont government as it tried to deal with demands for reform. Stormont had the mistaken idea that gaining the cooperation of one, the NICRA, would ensure the cooperation of other civil rights groups (Finn 1991, 56).

During this time the civil rights organizations (the NICRA in particular) were labeled as IRA fronts or sympathizers. The charge stemmed partly from a propaganda effort on the part of Loyalists and partly from genuine belief. The Cameron Commission, appointed by Northern Ireland's Prime Minister O'Neill, concluded that most NICRA members had no ties to radical republican groups, and that on the whole the movement sought to achieve its aims "within the framework of the Constitution" (Cameron 1975, 19). The commission did find that NICRA's membership included some IRA

sympathizers, and that "left wing extremists…would be ready to take over, if they could … and direct its activities from a reformist policy to a much more radical course" (Magee 1974, 122).

Although the "left wing extremists" failed in their goal, actions on the part of radical Protestants and the indifference on the part of Westminster and Stormont created the same result. Stormont rebuked most attempts by moderate Catholics for peaceful reform. The initial response of Stormont to the civil rights movement ranged from indifference to outright hostility (Finn 1991, 57). Westminster knew little about what was going on, and had few reliable means of discovery (Shaw 1979, 49). Westminster's policy could be described as one of benign neglect. One example of Stormont's hostility was an attempt to limit Catholic opportunities to express dissent by passing the 1967 Republican Clubs legislation, promulgated under the Special Powers Act. The 1967 legislation made unlawful "organizations declaring themselves as 'republican clubs' or any like organization howsoever described" (Boyle, Hadden et al. 1975, 13-5).

A). Public Demonstrations: A New Phase in the Civil Rights Movement

At first, leaders of the civil rights movement pursued their goals through peaceful political and legal action; their strategy was to create public pressure to force Westminster and Stormont to implement needed political, economic, and social reforms. When this strategy failed, the more aggressive elements of the movement, confirming the Cameron Commission's (1975) findings, began to organize more provocative marches and rallies.

The first of these marches in Northern Ireland arose from an instance of housing discrimination. In June 1968, a National MP, Austin Currie, was attempting to secure a

council house (local subsidized housing) for a poor Catholic family. Local Unionist leaders resisted, preferring to give the house to a nineteen-year-old Protestant woman, who happened to be the secretary to a prominent Unionist official. Currie took the issue to Stormont, but they declined to involve themselves, stating that it was a local issue (Rose 1971, 102-3). Upset by how the situation was handled, Currie, on June 20, 1968, organized a "squat-in" at the house. The "squat-in" was a success and the Catholic family was given the house, thus leading Currie and others associated with the Campaign for Social Justice (CSJ--a small civil rights group) to organize a second public march for Saturday, August 24, in Dungannon (Arthur 1980, 103-4). It caused an immediate reaction from members of the Protestant community.

Upon hearing of the planned march, Reverend Ian Paisley, the outspoken anti-Catholic leader of the Ulster Volunteer Party (UVP), announced that he had organized a counter-demonstration in Dungannon for the same day. Concerned about possible problems, Minister of Home Affairs William Craig used his powers under the Public Order Act to reroute the CSJ march through the primarily Catholic sections of Dungannon--thus not meeting Paisley's UVP march (Rose 1971, 103; Arthur 1980, 103-4). The CSJ march attracted 2,500 participants (Rose 1971, 103-4; Bew and Gillespie 1993, 3) and demonstrated the increasing frustration that moderate Catholics, both leaders and rank and file members, felt at trying to secure civil rights through the normal channels of political participation (Finn 1991, 58). The frustration led to continued efforts to promote the Catholic plight in Northern Ireland.

Given the success and publicity generated by this march, it was not long before the NICRA and CSJ were organizing another march for October 5, 1968. The location

chosen was Derry (or Londonderry as the Protestants prefer to call it). Derry/Londonderry (pronounced "Londundree") was the logical choice for the march, for it held tremendous political and religious significance to both communities in Northern Ireland. The city's very name evoked conflict.[20] Although Catholics constituted a majority in Derry/Londonderry, gerrymandering and restrictive franchise laws usually gave Protestants control of the city government (Finn 1991, 58).

When it became public knowledge that Catholics were planning a march, a local Protestant organization dedicated to the memory of King William's historic victory over James at Derry in 1689, known as the Apprentice Boys, notified the Royal Ulster Constabulary (RUC) that they would hold their annual parade through the heart of Derry on the same day and along the same route that the Catholic activists had planned (Rose 1971, 103-5). The NICRA/CSJ march was planned to take the Catholic marchers through the Protestant sections of the city. Self-styled protectors of the city's virtue, the Apprentice Boys would not quietly suffer this deliberate provocation. It later came to light that the entire Protestant march was a ruse designed to force Craig to ban the NICRA/CSJ's demonstrations (Hull 1976, 40-1). The ploy worked, in part, for Craig did ban both demonstrations.

The Protestants saw this as a victory, but it had consequences far beyond the events of the day. Catholics were incensed at what they saw as another Unionist attempt to foreclose all avenues of political dissent. More extreme elements of the activist community, including members of the Young Socialists group, persuaded a skeptical

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20 The conflict evoked within the communities is seen in the sexual imagery associated with the city. This imagery is no less important in Protestant than in Catholic mythology. For Protestants, Londonderry is a "virtuous Protestant maiden," whose honor they must defend. For Catholics, she is "a bedraggled Catholic wench," raped and assaulted by Protestant conquerors Arthur, P. (1980). Political Realities: The Government and Politics of Northern Ireland. Burnt Mill, England, Longman Group.

NICRA to defy Craig's ban. On October 5, more than 2000 people, including several MPs, gathered in a Catholic ghetto to begin the march. As the marchers made their move toward the heart of the city, RUC and B Specials, using batons and water cannons to break up the demonstration, intercepted them.[21] The B Specials were almost exclusively Protestant and protected Protestant interests (Hull 1976, 37).

A number of demonstrators were attacked as they sat down and began singing "We Shall Overcome" in defiance of a police order to disperse (Bew and Gillespie 1993, 3). The brutal attack against a peaceful, albeit illegal, march resulted in injuries to seventy-seven civilians and eleven policemen while attracting worldwide television coverage (Rose 1971, 103). It was becoming more difficult for Westminster to ignore the events in Northern Ireland.

Tensions continued to mount with Catholic demonstrations and Protestant counter-demonstrations becoming more extreme (Sobieck 1990, 149). Interspersed with the demonstrations were half-hearted reform proposals on the part of Stormont, but none of the proposals met the requirement of "one-man, one-vote," which was the core of the civil rights movement[22] (Guelke 1982, 92; Finn 1991, 60). While not satisfying the Catholics, the reforms were evoking hostilities from many Loyalists (Scarman 1972, pars. 1.4-1.9). In an attempt to try to keep control of an increasingly chaotic situation, Stormont PM O'Neill asked for the resignation of Minister of Home Affairs William Craig, who many on both sides blamed for the recent violence (Farrell 1980, 248-9).

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21 B Specials are a category of Ulster Special Constabulary (USC), a reserve police force founded in 1920.

22 The one-man, one-vote demand eliminated the disenfranchisement of categories of adults living in relatives' homes and this disproportionally affected Catholics Cunningham, M. F. (1991). British Government Policy in Northern Ireland 1969 -1989: Its Nature and Execution. New York, Manchester University Press. It is not until April 23, 1969 that Stormont accepts universal adult suffrage in local government elections, conceding the Civil Rights movement's demand for "one-man, one-vote."

O'Neill also made a passionate plea to Unionists to accept reforms, explaining that continued stonewalling might lead Westminster to intervene.

> "Mr. Wilson made it absolutely clear … that if we did not face up to our problems the Westminster Parliament might well decide to act over our heads. Where would our Constitution be then? What shred of self-respect would be left to us? If we allowed others to solve our problems because we had not the--let me use a plain word--guts to face up to them, we would be utterly shamed" (Magee 1974, 118-9).

The year 1968 ended with Northern Ireland on the verge of even more violence--as even Craig admitted on December 2, "ordinary decent people have been at the boiling-point for some time" (Bew and Gillespie 1993, 8). While Republicans were enraged and increasingly frustrated by events, Unionists were becoming more entrenched in their desire to keep the status quo. Later the Scarman Report would describe the Government's dilemma. If it stood firm it attracted violent opposition. Yet to promise reforms under threats to law and order was a recipe to encourage further demonstrations and counter-demonstrations--thus increasing the risk of violent confrontations between the activists and police (1972, pars. 1.4-1.9). Relations between the police and the Catholic community had deteriorated to the point that several Catholic ghetto areas were starting to erect barricades to keep both Loyalists and the RUC from entering (Arthur 1980, 109). The creation of "no-go" areas was starting, and politicians on both sides of the conflict were beginning to look toward Westminster--wondering what was next.

IV 1969 The "Troubles" Continue: British Intervention

January 1969 had an inauspicious start as a radical left-wing group called the People's Democracy (PD) completed a four-day protest march. On the fourth day, 200 Loyalists attacked several hundred marchers, accompanied by 80 policemen. Among the attackers were a number of off-duty members of the wholly Protestant B Specials, who

used a variety of homemade weapons to attack the marchers (Devlin 1975, 139-141). Two students of that attack summarized their findings as follows:

> "The attack was organised locally by representatives of the Orange Order and the Special Constabulary, in close collaboration with some members, at least, of the Royal Ulster Constabulary … The police force on duty … were not expected to resist or arrest attackers … After the event, no real attempt was made to pursue those involved. Five people were prosecuted. These were victims largely irrelevant to the organisation of the onslaughts" (Egan and McCormack 1969, 56).

Fortunately there were no fatalities, although numerous individuals were hospitalized.

Demonstrations and counter-demonstrations continued, and the level of violence escalated throughout the winter and spring. By April, violence was no longer random; it was taking on the form of an organized campaign. After a series of attacks on public buildings and utilities, 1,500 troops of the British army were sent out to take responsibility for guarding vital installations (Demaris 1977, 300; Bew and Gillespie 1993, 14).

By summer, violence had led to the first death. On July 16, a 42-year-old taxi driver from Derry/Londonderry, died from injuries received after police beat him on April 19. Police attacked and batoned him in his home while they were pursuing rioters in the Bogside (a Catholic Ghetto). He never recovered from the internal injuries and heart attack he suffered. According to Chief Constable Sir Arthur Young, "a conspiracy of silence" among RUC officers successfully hid the identities of the policemen involved in the incident (Bew and Gillespie 1993, 17).

Throughout the spring and summer, the police had been able to contain the sectarian rioting, but by August 12, 1969 the force of the violence, coupled with the growing exhaustion on the part of the RUC, allowed the violence to go to a new level. A parade by the Apprentice Boys of Londonderry led to a riot as the marchers passed the

Catholic ghetto of Bogside. By evening, the rioting had been in progress for several hours, and 1,000 policemen with armored vehicles and water cannons entered Bogside to try to contain the rioting. The rioters pushed them back, and by midnight the police resorted to tear gas. Deputy Inspector-General of the RUC Graham Shillington stated that, were it not for the use of tear gas, the police:

> "would have been completely overrun and there would have been a great deal of damaged property … Our chaps are still dead tired. We have not got the manpower to keep these groups apart" (Bew and Gillespie 1993, 17).

The success of the police at the "Battle of Bogside" eventually led to the erection of more permanent barricades in Catholic working-class areas. No-go zones for the RUC were becoming more common in Catholic areas of Northern Ireland. The "Free Derry" area of Bogside became the most famous of these no-go areas.[23]

The rioting spread to other areas of Northern Ireland, and the situation quickly deteriorated into widespread open sectarian conflict as Protestants began to fear that the very existence of Northern Ireland was under threat. In Belfast, hundreds of homes were burnt to the ground, and thousands of people were left homeless by the violence (Scarman 1972). To many observers, Stormont was no longer in control of the situation.

During this first two weeks of August, the chief inspector of the RUC described the rioting in Belfast as "a state of war" (Rose 1971, 106). The chief inspector's description was no exaggeration. At this time, Northern Ireland was in a state of war. On August 13, 1969, Jack Lynch, the Taoiseach (head of government) for the Republic of Ireland, went on television and stated that army field hospitals and refugee camps would be set up near the border with Northern Ireland. Lynch also asked the British to request that a U.N. peacekeeping force be sent to Ulster (Hull 1976, 154).

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23 For an interesting description of "Free Derry," see *New York Times*, April 27, 1972.

By August 14, all of the police resources available to the Stormont government had been deployed and were completely exhausted.[24] Prime Minister of Northern Ireland (PMNI) Chichester-Clark reluctantly ordered the chief constable of the RUC to request the aid of the British army. It was hoped the Army could draw upon its considerable counter-insurgency experience in Aden and Malaya to formulate successful tactics and methods (Livingstone 1990, 88). The British government agreed to the request under Clause 75 of the Government of Ireland Act. This intervention "in aide of the civil power" would be different; the army would not take orders from the Unionist government as it had during pre-1949 outbursts of political violence (O'Duffy 1996, 105). As part of the agreement to involve British troops, the B Specials were put under control of the army (Magee 1974, 259-60). The division of responsibility for security was essentially a compromise. In certain situations (during "normal" policing), the B Specials and RUC were under Stormont's control, but when deployed for riot control, they were controlled by the British Army (Cunningham 1991, 23). The no-go areas were to be a special focus of the troop intervention. When Lt. General Sir Ian Freeland was asked by the Stormont Cabinet how long it would take to repossess Bogside, he replied "three hours to take over and about three years to get out again" (Hamill 1986). Freeland seems to have underestimated by an ever increasing number of years (O'Duffy 1996, 105).

A week later, PMNI Chichester-Clark was in London for a meeting with British officials concerning the province. During this meeting, a joint communiqué was hammered out--the Downing Street Declaration of 1993. The declaration set forth the pace and nature of reform. The communiqué was filled with reassurance, praise, and

[24] The Government of Ireland Act of 1949 requires that all civil power should be deployed prior to calling in the British troops.

quiet agreements that meant to convince people that Stormont and Westminster had found common ground. The troops would leave once law and order were restored, and every citizen of Northern Ireland would receive the "same equality of treatment and freedom from discrimination as obtained in the rest of the United Kingdom irrespective of political views or religion" (Bell 1993, 116). Those who signed the declaration knew what it really meant: an end to all of the legal sectarian practices.

> "It would be an end to a paramilitary RUC intimidating Catholics, an end to B Specials as an Orange militia, and the multivoting in local elections to Protestant advantage, and biased housing allocations, and gerrymandering away the little Catholic advantage that did exist. It would be an end to all the nasties recently revealed, all the long-ignored practices … Or else. Or else direct rule" (Bell 1993, 116).

Thus continued the main British tactic dealing with Stormont--threaten direct rule (Insight 1972, 84-5, 110). The intermittent threats of direct rule led to half-hearted reform attempts that led to more problems.

V Reform and Repression: September 1969 to Internment

The use of British troops followed by the Downing Street Declaration increased Westminster's leverage on Stormont for reforms. Reforms were enacted while fighting was still raging in the province. Sectarian attacks were taking place with greater frequency and intensity. In Belfast, more than 1,500 of the 28,000 Catholic households were evacuated during the "breakdown of public order" (Scarman 1972, 248) because of attacks by Loyalists. Due to Catholic reprisals, similar evacuations were necessary for many Protestants.

The first reforms to be attempted were those suggested by the Hunt Commission (1969). The object of the reforms was to neutralize the political control of the police and establish a wholly civilian and non-armed police force. Consequently, the B Specials

were to be disbanded and a new force, the Ulster Defense Regiment (UDR), was established under the control of the British Army (Hillyard 1983, 36). As the police were being reformed, much to the displeasure of Loyalists, the Unionist government brought together legislation under the Criminal Justice (Temporary Provisions) Act 1970 (CJA) to deal with the rioters. The Act provided for a six month minimum mandatory jail sentence for any person convicted of "riotous behavior," "disorderly behavior" or "behavior likely to cause a breach of the peace" (Boyle 1970). Immediately, there were numerous allegations concerning the partisan manner in which the CJA was being enforced.

Other reforms, outside the administration of justice, were taking place to remedy the previous sectarian discrimination. Here too, the Unionists were creatively circumventing the reforms. Expanding the franchise at the local level was intended to end discriminatory behavior (especially subsidized housing) by local unionist governments, but as the reforms were implemented, Stormont denuded local authorities of considerable powers. Stormont created a new centralized housing authority, thus still keeping control over housing assignments firmly in the hands of the Unionists (Hillyard 1983, 36). The same strategy was applied in the areas of education, planning, health and social services (for full details see Birrell and Murie 1980; O'Dowd, Rolston et al. 1980). The reforms, while substantial on paper, meant little in reality.

During these legislative reforms, the tactical situation on the streets was deteriorating. The areas in need of Army services were predominantly Catholic and, irrespective of reality, the perception was that the British Army was supportive of Protestants. Catholics, who cheered the arrival of the British troops, were beginning to see the Army as an extension of Stormont (Hillyard 1983, 36). This change in attitude

allowed the Provisionals to intensify their propaganda efforts to paint the Army as the tool of the Orange Stormont regime[25] (Bew and Gillespie 1993, 19). As this relationship worsened, the Army began taking a tougher line on the rioters. A routine house search in early July 1970 led to large scale riots, and the army introduced a curfew, further damaging relations between Catholics and the British Army (O'Fearghail 1970). As time wore on and stress took its toll on the young British soldiers, many of them projected their mounting anger with the IRA onto the visage and behavior of every Catholic they encountered (Fields 1973, 56-7). It was evident to all that the nature of the conflict was changing. It was no longer the army and police versus street rioters, but a guerrilla war between the IRA and the British Army.

As violence in the street increased, demands by Protestants for tougher measures also increased. This led to a more coercive policy to address the problems. On March 9, 1971, three British soldiers (two of them brothers aged 17 and 18), were lured out of a bar by the PIRA operatives and shot execution style (Bew and Gillespie 1993, 33). These murders broke what Brendan O'Duffy called a "symbolic barrier," and hard-line Unionists were demanding the re-introductions of internment[26] (1996, 105). Prime Minister Chichester-Clark resisted these calls, believing that a quick fix of repression would be counter-productive. While he declared that Northern Ireland was "at war" with the PIRA, he knew it would be an extended campaign rather than a decisive battle (Kelly 1988, 150). To meet the immediate demands of the situation, and for political

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25 According to some British officers there is some truth to this “propaganda.” Rona Fields interviewed one officer in Belfast: “The men are becoming annoyed that they are expected to enforce the law on the Catholics community and not on the Protestants. Some of them want to get in there and make them respect the law too” Fields, R. M. (1973). A Society on the Run: A Psychology of Northern Ireland. Middlesex, England, Penguin Education.

26 Internment has been used several times throughout the British/Irish conflict. It is the administrated arrest and detention without trial for indefinite periods of time.

expediency, Chichester-Clark went to London to request 3,000 more troops. He was given only 1,300, and he resigned in protest on March 20, 1971. Three days later, Brian Faulkner became Prime Minister of Northern Ireland by defeating hard-liner William Craig. Faulkner, considered a pragmatist by Unionist standards, stocked his cabinet with a mix of hard-liners and liberals, and indirectly involved the SDLP (Cunningham 1991, 44-5). The demands by both sides for changes and a new Prime Minister did little to stop the violence.

The summer saw continued violence, and Westminster's insistence on distancing itself from the source of the conflict encouraged the Stormont Government to use more extreme measures (O'Duffy 1996, 107). By mid-July, Faulkner was emphasizing the threats from all sides and seeking permission from Westminster to re-introduce internment. There seemed to be little else that could be done (Cunningham 1991, 58). The Heath government was resistant to the idea and was pressuring Faulkner to address the upcoming Apprentice Boys Parade in Derry/Londonderry. Faulkner suggested that he would ban the parade if London would give him the go-ahead for re-introducing internment (O'Duffy 1996, 107). But it was practically impossible for Stormont to do so without the assistance of the army, and to obtain the army's help required Westminster's consent (Spjut 1986, 715).

On July 17, the IRA blew up the new *Daily Mirror* printing plant causing £2 million worth of damage. Faulkner again met with British PM Heath, discussing the need (in Faulkner's mind) to resort to the SPA and to internment (Finn 1991, 68). On Thursday, August 5, Faulkner met with Heath and Lord Carrington and stated unequivocally the need for internment. Faulkner stressed to Heath that the annual

Apprentice Boys' Parade was only a week away. Heath reluctantly agreed to let Faulkner begin internment operations (Weinraub 1972, 39, 44). To his credit, General Harry Tuzo, Army General Officer Commanding (GOC), opposed the decision, fearing it would trigger a new round of violence. Tuzo thought internment a "distasteful weapon" (Magee 1974, 142). In addition, the GOC advised against internment on the grounds that accurate information (needed to make the operation work) on the IRA was woefully lacking (Graham 1971, 648; see further Diplock 1972, par. 32). GOC Tuzo's advice would turn out to be prophetic.

On August 9, at 4:30 a.m., Operation Demetrius began. Army patrols swept through Catholic ghettos in Belfast, Newry, Derry/Londonderry, Armagh, and others arresting "dangerous gunmen and terrorists" (Lowry 1976, 276). Brian Faulkner announced later in the day that people were being arrested for questioning and possible internment without trial. He went on to say:

> "I have taken this serious step solely for the protection of life and the security of property … We are, quite simply, at war with the terrorist, and in a state of war many sacrifices have to be made, and made in a co-operative and understanding spirit."

The initial swoop was aimed exclusively at Nationalists, and not limited to those thought to be leaders or members of the IRA (Cunningham 1991, 58). The poor quality of the intelligence the operation relied upon became painfully apparent.

> "Soldiers arrived to arrest men who had been in the campaign in the 1940s and 1950s; there was another suspect aged 77 who had first been jailed in 1929; another was blind and yet another in Armagh, was found to have been dead for four years…A company commander in Londonderry found that his men had few of the right names and addresses. Often the men they wanted lived next door to the house they tried" (see further McGuffin 1973; Hamill 1986, 60).

The operation had two major blunders. First, Stormont ignored the mild advice of Home Secretary Maudling to add a few Protestant names to the list of people to be picked up--thus internment was to be demonstrably sectarian. Blunder two became clear: a

person did not need to be a hard core terrorist to be on the list--any difficult Catholic would do (Bell 1993, 216). From every possible perspective, states Finn, the operation was an overwhelming disaster (1991, 68-9).

Operation Demetrius set out to arrest 452 men. Only 342 were captured, and of these, 105 were released after one or two days of interrogation (Bew and Gillespie 1993, 36). The stated goal of Demetrius was to capture IRA members; instead the RUC arrested moderate civil rights activists, young socialists, and outspoken intellectuals (Finn 1991, 69). Between August 9 and December 14, 1971, 1,576 people were interned; 934 were later released without charge (Lowry 1976, 261, 274). The arrest of so many Catholics, followed by the release of more than sixty percent of them without charges being applied, was invariably going to have repercussions

Internment accomplished two things in Ulster. First, it accomplished something that the IRA had been unable to do themselves--that is, to unite the "IRA's fiercest enemies inside the Catholic community behind them and [lend] some credence to their claims to legitimacy" (Bishop and Patterson 1987, 189). Second, the experience of internment and concomitant interrogation drove many "moderate Catholics away from the middle ground." Seldom did men return from internment "as tolerant of the regime as they had gone in" (Insight Team 1972, 269-70). Internment helped polarize the Catholic position in Northern Ireland.

The intensity of Catholic reaction to the internment caught both Stormont and Westminster by surprise. Both governments had foreseen rioting, but not the open warfare that actually followed (Magee 1974, 142). Arithmetic tells the story. In the four months preceding internment--April to July 1971--four soldiers and four civilians were

killed. In the four months after it--August to November--the death toll soared to thirty soldiers, eleven members of the RUC and UDR, and seventy-three civilians.

Internment continued and so did the violence. Hard-line Unionists felt threatened by the abolition of the B Special. They felt it left a gap in the province's defenses which the newly formed UDR failed to fill. To fill this perceived "security gap," Protestants founded the Ulster Defense Association (UDA). The UDA was a collection of Loyalists from a wide range of Protestant vigilante and paramilitary groups (Bew and Gillespie 1993, 39). The UDA set up barricades, similar to those used in Catholic areas, in the Protestant areas of Belfast (Boyle, Hadden et al. 1975, 32-3; see further Bell 1978, 137-9). The UDA also adopted PIRA tactics and soon began a campaign of assassinating Catholics and Protestants friendly with Catholics (Finn 1991, 76). By October 7, Westminster had sent an additional 1,500 troops in an attempt to stabilize a deteriorating security situation. By the end of the year, the Troubles had led to 174 deaths and more than 1,500 bombings (Bew and Gillespie 1993, 43). It seemed that direct rule was only a matter of time.

VI Direct Rule

As the new year began, internment was as unpopular as ever. To take advantage of the political climate, the NICRA began planning an anti-internment demonstration to be held on Sunday, January 30. Local RUC officials advised Stormont to let the march proceed without interference, but afterward to arrest its leaders under either the SPA or Public Orders Act (Farrell 1980, 289). Stormont, however, caved to demands by hard-liners led by former home affairs minister William Craig, and the march was confronted

by RUC and the military (Finn 1991, 74). The demonstration began as planned, but part way through the march it encountered members of the 1st battalion of a British Parachute Regiment. A riot ensued, and while no one is sure who started the shooting, in the end fourteen unarmed civilians were killed by the troops.[27] Catholics throughout the Kingdom were incensed and "Bloody Sunday," as the incident was called, pushed sectarian violence to previously unknown levels.[28]

Bloody Sunday meant open season on British troops, and by March 20 fifty-six soldiers had been killed (Farrell 1980, 290). The IRA, meanwhile, stepped up its bombing campaign. Ultra right-wing Unionists, distressed by Stormont's seeming unwillingness to engage the Provos and enter Catholic no-go areas, formed increasingly violent paramilitary groups. William Craig led one such group, the Ulster Vanguard Movement, made up of hard-line elements of the Orange Order lodges and the Apprentice Boys (Magee 1974, 141). The events emanating from Bloody Sunday "produced such a degeneration in security that Westminster instituted direct rule of Northern Ireland" (Crenshaw 1984, 248). The situation in Northern Ireland forced Westminster to intervene.

On March 24, PM Heath announced the suspension of the Stormont government. In the House of Commons, Heath said:

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27 The Widgery Tribunal concluded that no evidence could be located demonstrating that the civilians were armed Widgery, L. (1972). Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day. London, Her Majesty's Stationery Office.

28 In Dublin, the British Embassy was burnt to the ground and MP Bernadette Delvin attacked British Home Secretary Reginald Maulding in Parliament, punching and scratching him until two other MPs pulled her off. When asked later if she would apologize, Delvin replied, "I'm only sorry I did not get him by the throat" Lewis, A. (1972). British Inquiry in Ulster Shootings as Emotion Rises. New York Times. New York. Many other Catholics shared her sentiments.

> "The United Kingdom government remains of the view that the transfer of this responsibility [law and order] to Westminster is an indispensable condition for progress in finding a political solution in Northern Ireland" (*Hansard* H.C. 5As, 833:1860).

Stormont's suspension was designed to be short-term. Under the terms of the Ireland Act of 1949, Stormont was to be prorogued, initially for one year, during which time Westminster would assume "full and direct responsibility for the administration of Northern Ireland" until a new political solution to the problem of the Province could be determined (Scarman 1972, sec. 3, 2; 1981; see further Hadfield 1990). The newly established Northern Ireland Office (NIO), with Secretary of State William Whitelaw, took administrative control of Northern Ireland away from Stormont and created a new enemy for British troops--hard line Unionists. After an army operation in July against Protestant no-go areas to arrest a prominent UDA leader, another high ranking UDA official swore that "[t]he British Army and the British government are now our enemies" (Magee 1974, 156). Britain could do nothing to appease one community without risking a riot from the other (Finn 1991, 76). British direct rule had begun.

VII Diplock and the NI(EP)A 1973

Dissolution of Stormont was a temporary measure for Westminster, and the British were anxious to find a political solution to the mess in Northern Ireland. Part of any political solution involved addressing the court system in Northern Ireland. Due to the three-way civil war raging among the IRA, militant Protestant groups, and security forces (RUC and British Army), the legal system had simply stopped functioning. In addition to this task, the British wanted to mollify the Catholic community by meeting one of their primary demands--and one of the central objectives of the Northern Irish civil

rights movement--the replacement of the SPA with something more "acceptable" (Finn 1991, 85).

Westminster hoped to take care of both of these issues when, on September 22 1972, the NIO released a statement announcing the formation of a commission, chaired by Lord Chief Justice Diplock, to consider:

> "What arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations" (Diplock 1972, 1).

By establishing a commission, headed by a highly respected law lord, Westminster hoped to temporarily placate both communities in Northern Ireland while more permanent measures could be devised.

As the committee's charter made clear, Lord Diplock was to proceed from the assumption that the Northern Irish judicial system had been unable to cope effectively with criminal offenses involving acts of terrorism (Finn 1991, 85). The major recommendation made in the Diplock Report was that internment be phased out in favor of establishing special, juryless tribunals, made up of a single judge to handle trials related to scheduled offenses[29] (1972, pars. 35-41). Before the Report was published the Government introduced as an interim measure the Detention of Terrorists (Northern Ireland) Order 1972, which substituted the name “detention” for “internment.” The change was generally considered to be “internment under another name” (Twining 1973, 410).

Courts in Northern Ireland had been plagued by intimidation and coercion of prospective witnesses and jurors by paramilitary groups, and the juryless trials were to

[29] Scheduled offenses include: murder, manslaughter, arson, malicious damage, riot, firearms, explosives, etc. For a complete listing see NI(EP)A 1973, Schedule 4, Part I.

deal with this problem (Diplock 1972, pars. 12-20). In addition, these single judge tribunals (later named "Diplock Courts") would also avoid the problem of "perverse acquittals." Perverse acquittals were cases where prosecutors would disqualify potential Catholic jurors in order to get a substantially Protestant jury, which would acquit Loyalist defendants. The burden of proof in cases involving possession of firearms and explosives was altered to require defendants to prove that they did not know the weapons/explosives were in their possession (Diplock 1972 pars. 61-72). The admissibility of confessions obtained from suspects was increased by the suspension of the technical rules and practices, which regulated interrogations. This had the effect of lowering the standards of admission of confession in Diplock Courts (Carlton 1981, 244). Diplock argued the present system of

> "rendering inadmissible any statement made by the accused after his arrest unless it was volunteered upon his own initiative without any persuasion or encouragement by anyone in authority" (1972, 81)

was resulting in the acquittal of guilty persons (1972, 59). The recommendation, Diplock hoped, would aid in bringing law and order back to Northern Ireland.

The bulk of the Diplock Report's recommendations were incorporated into the NI(EP)A, which became law on July 1973. During the debate, NIOSS Whitelaw promised that the SPA would be repealed in its entirety if the Bill was passed (Cunningham 1991, 71). As promised, the SPA 1922 was repealed, along with Detention of Terrorist (NI) Order 1972, and the Criminal Justice (Temporary Provisions) Act (NI) 1970 (Cunningham 1991, 73). The repeal of SPA was seen as a positive step towards less reliance upon ‘special emergency’ powers. There was no question that some of the powers found in the SPA were not conducive to a traditional liberal society. The next step would be to examine the SPA replacement. In a time of obvious social crisis in Northern

Ireland, would Westminster's response be cautious and measured, as the literature represented by Bell (1978; Bell 1978; Bell 1993), and Crenshaw (1983) argues or would it be "over-reaction" that scholars argue does more harm than good (Williams 1980; Torrance 1995, 329)? As will be discussed below, many believed the response was inappropriate, greater than the situation warranted and exacerbated an already bad security environment.

Diplock had a number of recommendations affecting the role of the security forces in Northern Ireland. These recommendations were also incorporated into the NI(EP)A 1973, conferring more powers to the security forces to fight terrorism. Section 2 established the juryless trials (Diplock courts) for scheduled offenses. Provisions for bail were drastically curtailed by Section 3, which only a judge of the High Court could stipulate (s.2 (1)). The burden of proof in cases related to proscribed articles (e.g., firearms, explosives, etc.) was reversed (s.7 (3)). If charged with possessing a proscribed article, the prosecution need not prove guilt. The individual charged had the onus of responsibility of proving to the court that he did not know the article in question was in his possession (s.7 (1) (a) (b)). Section 10 allowed constables to arrest "without warrant" any persons whom they "suspected" of being a terrorist. In addition, this section also increased the detention period from forty-eight to seventy-two hours (s.10 (3)). Section 12 gave similar powers to the armed forces, although their allotted period of detainment was four hours. Section 16 allowed: "[a]ny member of Her Majesty's forces on duty or any constable may stop and question any person for the purpose of ascertaining that person's identity and movements and what he knows concerning any recent explosion or any other incident endangering life." Section 19 proscribed certain organizations listed in

Schedule 2 of the Act. Included among the organizations proscribed were the IRA, Sinn Féin, and UVA.

The NI(EP)A provided the basis for security legislation over the subsequent years. It was meant to be a major change in security strategy--a shift away from executive detention toward the judicial process. Both major political parties in Britain agreed that this change in strategy was possible because of the substantial decrease in violence in 1973 as compared to 1972.[30]

A). Gardiner Review of NI(EP)A 1973

In June 1974, the British government established a committee, chaired by Lord Gardiner, to examine what powers and provisions were necessary to deal with terrorism and subversion in Northern Ireland and to "examine the working of the Northern Ireland (Emergency Provisions) Act 1973; and to make recommendations" (1975, 1). In addition, the committee was to report on civil liberties and human rights in Northern Ireland (1975, par. 6). The Gardiner report began its investigation with the advantage of a more indulgent timetable and terms of reference than those imposed upon the Diplock Review (Hogan and Walker 1989, 27).

The resulting report, according to Hogan and Walker, "was better informed and more comprehensive that its predecessor but essentially limited itself to fine tuning" the NI(EP)A 1973 (1989, 28). The Gardiner Report argued for the restoration of trial by juries for serious crimes as soon as it became possible, but had objections to its restoration at present (Gardiner 1975, pars. 26-9). Among the objections was that of juror intimidation, a point raised by the Diplock Report (1972, pars. 34-41). Due to the lack of

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30 The number of shooting incidents and deaths in 1973 was approximately half that of 1972 Cunningham, M. F. (1991). British Government Policy in Northern Ireland 1969 -1989: Its Nature and Execution. New York, Manchester University Press.

jury trials in Northern Ireland the committee could not cite any examples of "juror intimidation," but did state there were 482 instances, between January 1, 1972 and August 31, 1974, of witnesses to terrorism refusing to make a statement or give evidence in court because of fear (Gardiner 1975, par. 27). The Report concludes that "right to a fair trial has been respected and maintained and that the administration of justice has not suffered" (Gardiner 1975, par. 29). As an ironic coincidence, the Gardiner Report was just being completed as the PTA 1974, described my many as more draconian than the original, was passed. The recommendations of the Gardiner Report were the foundation for the revision of the NI(EP)A in 1975. The 1975 Act was further revised in the Consolidation act of 1978. It extended only to Northern Ireland (s. 36 (2)), received Royal Assent on March 23, 1978 and came into force on June 1, 1978.

B). NI(EP)A 1978

The 1978 Act added a number of new powers to the fight against terrorism in Northern Ireland. Of particular note were the changes made to Section 11, which dealt with arrest and detention powers. Section 11 permitted the police to arrest a suspect and detain him for up to seventy-two hours (Walsh 1988, 31). An arresting constable was required to inform the suspect he had been detained under Section 11 as a suspected terrorist, but did not have to demonstrate that the suspicion was reasonable or verifiable (Finn 1991, 88). The police were permitted to interrogate suspects throughout the three-day period. Detainees had no right to silence, as they would under the common law: a suspect was required to answer questions concerning identity and recent movements. Furthermore, there was no formal right to a solicitor during the three-day period unless and until the suspect was charged with a specific offense (Finn 1991, 88). This section

was used to arrest and question individuals to check their suitability for being charged with a different offense (Bennett 1979, par. 66). The aim of section 11 was not to bring a suspect before court; section 11(3) makes it clear that the requirement to bring an arrested individual before the court as soon as practical did not apply (Walsh 1988, 32). Dermot Walsh has called section 11 the "questioning powers" and he states that these powers were introduced initially for the RUC to facilitate detention without trial (Walsh 1988, 32).

Another change related to arrest powers involved section 14(1), in which any "member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he *suspects* of committing, having committed or about to commit *any offence*"(emphasis added see further Baker 1984). To comply with the common law duty to give reasons for the arrest, the arresting officer only need inform the individual that "he [the soldier] is effecting the arrest as a member of Her Majesty's forces" (s.14(2)). The change in the "give reason" rule reflects the concerns voiced in the Diplock report about arrests by soldiers in "extremist strongholds" where soldiers might come under attack from a sniper or other sympathizers in the local populace (1972, par. 44).

Section 22 is another interesting addition to NI(EP)A, which concerned many in the civil liberties community. This section makes it a crime to collect records (including photographs), publish, and/or communicate information which might be useful to terrorists, concerning police officers, members of Her Majesty's forces, Judges, and/or court officers (Bonner 1985, 109). The burden of proof in this "spying offence" lies with the accused (s.22(1)). In essence, one is guilty until proven innocent. A typical situation

covered by this section is the "logging" of security forces' movements or of police and army vehicle registration numbers. It is not too unrealistic to see the potential for the oppressive application of this section to the Fourth Estate[31] (Bonner 1985, 109).

It would be five years before there would be a review of the NI(EP)A 1978. From the time of the passage of the 1978 Act to Baker's review, almost 600 people would die in Northern Ireland due to the Troubles (Flanagan 1997, 85). Another 3,600 people would be charged with terrorist offenses (Flanagan 1997, 88).

C). Baker Review

On April 8, 1983 it was announced that Rt. Hon. Sir George Baker had accepted a government invitation to review the NI(EP)A 1978. The NI(EP)A 1978 was a consolidation Act to bring together elements from the NI(EP)A 1973; the Northern Ireland Young Persons Act 1974; and the Northern Ireland Emergency Provisions (Amendment) Act 1975 (Baker 1984, par. 25).

The terms of reference included accepting the necessity of emergency powers to combat terrorism, and determining whether the Act's provisions struck a balance between liberties and adequate powers for security forces and the courts to protect the public. In addition, Baker was to take into account Lord Jellicoe's review of the portions of the PTA 1976 which affected Northern Ireland (Baker 1984, par. 1). The first line of the terms of reference continued the trend of the previous official reviews--the legitimacy of the legislation could not be called into question. This left only fine tuning the present

[31] Baker, in his review of the NI(EP)A 1978, disagreed that section 22 might lead to media censorship, but gave no justification for his view. He argued that the scope of section 22 should be expanded to include MPs, former MPs, former members of the security forces, police, and former members of the judicial office Baker, G. (1984). Review of the Operations of the Northern Ireland (Emergency Provisions) Act 1978. London, Her Majesty's Stationery Office.

legislation, which Baker did by producing seventy-four separate recommendations (1984, ch. 16).

Baker, early in the report, argued that circumstances in Northern Ireland made it irresponsible to abandon emergency powers *in toto* (1984, par. 50). In examining the situation created by the NI(EP)A, he explored whether repeal or amendments to the Act would "deprive yet another man, woman or child of the right to life or to live free from fear" (Baker 1984 par. 51). While exploring these questions, Baker saw a need to conform more closely to the normal provisions of the European Convention on Human Rights (ECHR) and reduce the scope of the United Kingdom's derogation under Article 15 (Baker 1984, pars. 30, 264).

A number of Baker's recommendations brought back reforms sponsored by other reviews. For example, Baker echoed both Jellicoe's (1983) and Bennett's (1979) proposals to improve the treatment of individuals who were under police custody (1984, par. 308). To deal with problems of verbal abuse, threats to the suspect's families, and in order to protect the police against false allegations, Baker recommended prisoner interviews be tape recorded (Baker 1984, pars. 308-19).

In addressing section 14, which conveys controversial arrest powers of the armed forces, Baker noted that between one-third and one-half of those arrested were handed over to the RUC at or before the expiration of the four-hour period for re-arrest and further questioning (Baker 1984). Baker, and others, found that section 14 was used randomly for low-level intelligence gathering and for purposes of harassment, particularly in Republican areas (Walsh 1983, 38-40; Baker 1984, par. 347; Walsh 1988, 34-7). Baker recommended keeping section 14 powers (1984, 341), but sought to narrow

its scope by changing the wording from "suspects" to those under "reasonable suspicion" of being involved in a terrorist act (1984, 346-7). In addition, Baker suggested a requirement that arresting soldiers be more informative as to the reason for arrest (e.g., "you were throwing a petrol bomb") (1984, pars. 350-1). This would have ended the practice of arresting someone on the suspicion they had committed "any offence" (NI(EP)A 1978 s.14(1)). As one scholar put it, at the time, "it remains to be seen whether the reformulated power … would alter existing practice" of using section 14 for intelligence gathering[32] (Bonner 1984, 355).

One recommendation made in the Baker Report, which is interesting to the larger project, is his call for further thought on the official definition of "terrorism" by omitting the reference to "political ends" (Baker 1984, pars. 440-1). Baker argued the emphasis should be placed upon the crime and not the motive of the criminal. As part of his ruminating on the issue, Baker invited Paul Wilkinson to suggest a definition of terrorism; Wilkinson offered: "The systematic use of violence to create a climate of fear, to publicize a cause or to coerce a target into conceding the terrorists' aims" (Baker 1984, par. 440). Although, Wilkinson's suggested definition was not used and the legislation retained the original 1973 language.

One final recommendation made by Baker was that the NI(EP)A should parallel the PTA 1984 s.17(3) inasmuch that the NI(EP)A should be subject to annual renewal, but have a maximum life of five years (Baker 1984, par. 444; see further Hansard H.C. 6As. 70:575).

D). NI(EP)A 1991

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32 Issue will be addressed in Chapter 7.

The 1991 Act had several changes from the previous incarnation: it created new offenses, gave new powers to the police and army, and provided for more power to the courts and Secretary of State for Northern Ireland. These powers were intended to enhance the ability of police to arrest the leaders of terrorist groups, to further aid in squeezing the financial assets of terrorists, and to deal with unexpected threats to peace and security in Northern Ireland.

NI(EP)A 1991 introduces two new sections which create further scheduled offenses. The first, section 27, reads:

> "Any person who directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism is guilty of an offence and liable on conviction on indictment to imprisonment for life."

This provision is an attempt to get at the "godfathers" of terrorism, instead of the terrorist foot soldiers. It was introduced by the government during the final committee state and has been described as "the most poorly drafted and ill-defined of all the 1991 Act's measures" (Dickson 1992, 616). Creating legislative powers to arrest and convict "terrorist kingpins" is a laudable goal, but this section fails in its goal.

The second new provision comes straight from a recommendation made by Lord Colville, which states:

> "There are now various articles which, though harmless in themselves, are so closely associated with terrorist activities that possession of them, in circumstances giving rise to reasonable suspicion of connection with terrorism, should be a new offence" (Colville 1987, par. 2.7.3).

The government was persuaded by Colville's view and it enacted section 30, which makes it

> "an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the item is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland" (NI(EP)A 1991).

Items which could fall under the rubric of "harmless in themselves" but "closely associated with terrorist activities" included boiler suits, rubber gloves, adhesive tape, bell pushes, coffee grinders and kitchen scales (Colville 1987, par. 2.6(b)). Here, as in other facets of emergency legislation, the accused is guilty unless he can prove himself innocent (s.30(2)). As a cautionary measure, Colville envisioned this power applying only outside a person's home. The government did not see it the same way; in Lord Belstead's words, "…the police and armed forces have plenty of evidence of homes being used in Northern Ireland for the construction of improvised explosive devices" (*Hansard* H.L. 5Bs, 527:1693).

In addition to the new offenses created by the 1991 Act, there were also several new powers for security forces in Northern Ireland. The most important of the new powers is conferred by section 22. This section empowers any soldier or police officer who is lawfully searching a person or place to examine any document found in the course of the search in order to ascertain whether it contains information that might be useful to terrorists. If the situation does not allow an immediate examination, the document can be removed for examination elsewhere for up to 96 hours (s.22(2)). Although the document is not supposed to be copied or photographed while in custody of the security service (s.22(4)), the Act does not make it an offense to do either (Dickson 1992, 618). Two safeguards accompanying the provision are that documents, which the soldier or police officer has reasonable cause to believe are legally privileged, may not be examined (s.22(3)) and a written record must be made of all examinations carried out (s.22(5)-(8). However, how soldiers or police officers with little legal training should be able to

distinguish between documents that might be legally privileged and those that are not was not addressed.

Another new power conferred to the security apparatus in Northern Ireland was meant to counter interference by local people with security measures on or near the border with the Republic of Ireland. Incidents usually occurred where residents had removed barriers or constructed a route around a barrier. Section 18(4) now allowed a soldier to seize and detain for up to four hours anything which they suspected of being used to interfere with work executed under the road-closing powers in section 24 and 25 (Dickson 1992, 619).

The courts were also given new authority by the passage of NI(EP)A 1991. The courts now have the authority to confiscate the proceeds of terrorist-related activities. The most important condition required was that the defendant must have been convicted of a "relevant offence," which included such crimes as intimidation, providing financial assistance for terrorism, withholding information about acts of terrorism or any other indictable offense charged as a result of a terrorist funds investigation (Dickson 1992, 620).

If all the other old and new powers were not enough, the Secretary of State was given new wide-ranging powers to "make provision additional to the foregoing provisions of this Act for promoting the preservation of the peace and maintenance of order" (s.58). This power, as Bruce Dickson describes it, to "create summary criminal offences," (Dickson 1992, 620) was controversial and keenly contested in parliamentary debates (*Hansard* H.L. 5Bs, 528:1433-6; 529:815-8). The government maintained, on

rather specious grounds, that because the 1991 Act contained more provisions than any previous EPA, there was less scope left for invoking section 58 (Dickson 1992, 622).

VIII Path to the PTA

As in previous IRA campaigns, part of the Republican strategy was to bring the war home to the British and increase the intensity until British forces withdrew from Northern Ireland. In February 1972, a bomb planted by the OIRA outside the officers' mess at Aldershot killed seven civilians. The following year saw an increased and sustained campaign of violence by the PIRA, and there were no fewer than eighty-six explosions, leading to one death and more than 380 casualties. In the first ten months of 1974, the IRA further intensified its terror campaign on the British mainland, claiming responsibility for ninety-nine bombings, which killed nineteen people and injured 145 others. The first twenty days of November saw further escalation in the violence. Eleven attacks took place in Great Britain during this time period, resulting in four deaths and thirty-five injuries (Shackleton 1978, par. 2).

The British government could not ignore this continuing mayhem and in 1973 the Home Office began to draw up contingency plans. The draft Bill would outlaw the IRA and restrict its movement from Ireland to the mainland (*Hansard* H.L. 5Bs, 504:22). Therefore, when, on November 21, 1974, members of the PIRA planted bombs in two public houses in Birmingham, killing twenty-one people and injuring 184 others, Westminster was ready to act.[33]

The nation was horrified by this act of violence. *The Times* condemned the catastrophe as an "act of war" (November 3, 1974, 15). The public demanded official

[33] Nineteen people died at the scene and two died later from their injuries.

vengeance, and, with sizable Irish communities in Glasgow, Liverpool and London, the appalling prospect of sectarian reprisals in the cities of Britain was seen as a distinct possibility (Walker 1992, 31). The situation was ripe for even greater violence, and "the stage was set" for some type of government action--that action would be the PTA (Miller 1985).

Westminster responded to the public demands by introducing the Prevention of Terrorism (Temporary Provisions) Act (PTA). On November 25th, Home Secretary Mr. Jenkins stated to the House of Commons:

> "The powers … are Draconian. In combination they are unprecedented in peacetime. I believe these are fully justified to meet the clear and present danger" (*Hansard* H.C. 5As, 882:35).

Even with such a foreboding introduction by the Bill's sponsor, Parliament was enthusiastic about the bill, and the PTA sailed though Parliament in less than forty-two hours (Hall 1988, 144). The PTA, described as "an astounding piece of legislation for any democracy," passed with virtually no dissent (Miller 1990, 315). The legislative process surrounding the PTA has been summarized as follows:

> "Bombs in Birmingham public house. Result: immediate enactment of the Prevention of Terrorism (Temporary Provisions) Act 1974. Had there been no bombs in Birmingham, presumably there would have been no Act" (Street 1975, 192).

Although some have argued that the PTA was an immediate reaction to the Birmingham Bombings, others argue that it was a preplanned policy, with "contingency plans" circulated eighteen months prior to the Birmingham incidents (Scorer, Spencer et al. 1985, 1), and that the timing of the Act was politically slick (see discussion Walker 1992, 32-3). In the words of Paul Wilkinson, the PTA was "not a panic measure" (Wilkinson 1986, 169). In any case, it brought new legal powers to bear upon terrorism related to Northern Ireland.

The design of the PTA was based upon three prior pieces of legislation: the NI(EP)A 1973, Prevention of Violence (Temporary Provisions) Act 1939 (PV(TP)A), and the Immigration Act of 1971. The act can be broken down into three related parts: Part I defines terrorism and authorizes the Home Secretary to proscribe terrorist organizations. Part II confers the power to "exclude" suspects from certain parts of the United Kingdom, and Part III extends the police powers of arrest, search and detention.

Part I of the act contains two sections. Section 1 allows the Home Secretary to outlaw (i.e., proscribe) a terrorist group. The original version proscribes the Irish Republican Army (IRA) (Schedule 1 s.1). The proscription portion of the PTA was modeled upon NI(EP)A 1973 (Street 1975, 192). The IRA was the only "proscribed organization," although the Home Secretary had the power to add to the list any other organizations which appeared to him to be involved with terrorism occurring in the UK and connected to Northern Irish affairs (Bishop 1978, 146). The wording of Section 1 was exceedingly broad and vague in that an organization could be proscribed "if it appears to him [Home Secretary]" to be "concerned" with terrorism occurring in the UK and connected with Northern Ireland. Thus, the Home Secretary did not have to initiate any form of inquiry and was not required to produce any evidence as to why it appeared to him that an organization was concerned with terrorism (Lowry 1977, 189). Section 2 curtailed certain forms of public expression of support for proscribed organizations. Any person, who in a public place "wears any item of dress, or wears, carries or displays any article, in such a way…as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation" is liable for arrest and imprisonment (s.2 (1) (a) (b)). Undoubtedly this is a set of powers with substantial possibilities of misuse.

Part II of the act, one of the most controversial sections, re-introduced "exclusion orders." An exclusion order prohibited a person who was involved with terrorism from residing in, or entering, Great Britain. It was based upon the PV(TP)A 1939. There were certain classes of individuals who were exempt (citizens of the UK and colonies, residents of Great Britain for the past 20 years and some others), but on their shoulders lay the onus of proving their eligibility for exemption (s. 5 (3)). The way the exclusion orders were formulated, citizens falling within this category, and who had no other citizenship, could not be sent outside the UK (except by their ascent); they were sent to Northern Ireland. This led many Protestants in Northern Ireland to complain that "Ulster would become a dumping ground for British Terrorists" (Bishop 1978 147).

Harry Street, who wrote one of the earliest pieces on the PTA, asked why exclusion orders were necessary. He pointed out other ways that the ordinary judicial process could handle such cases (1975, 195). The only reason given by the minister during debate was that it could be used when the information about the suspect was of a sensitive nature, and could not be presented before a court (*Hansard* H.C. 5s, 881:748). In short, it was a power designed to give the Executive a way of avoiding going to open court.

Traditional conceptions of the rule of law within the literature are difficult to rectify with the power of exclusion. The power to exclude, with the listed exemptions, creates a *de jure* two-tiered set of different legal classes. In the British case, this law singled out Irish immigrants (and later, as will be seen in Chapter Seven, was expanded to other immigrants not connected to the Troubles). A move away from treating all

citizens equitably is one of the primary ‘warning signs’ discussed within the literature on liberty and the rule of law (Acton 1907; Hayek 1960; Hayek 1978).

Part III dealt with arrest and detention sections of the PTA 1974. The PTA 1974 gave police the power to arrest without warrant, on "reasonable suspicion" that the person in question had committed previously promulgate offenses--involvement with proscribed organizations, subject to an exclusion order, etc. Section 7(1)(a)(c) of the act gave broad powers to the police, allowing them to not only arrest and detain, but to also search persons and property for evidence. Street added dryly that "of course this gives the Executive wider powers than they now legally possess" (1975, 198).

Another aspect of the PTA 1974 was, as Street described, an "unprecedented feature"--the establishment of security control over travelers entering or leaving Great Britain or Northern Ireland (1975, 198). The controls were modeled on the Immigration Act 1971, although the police were the principal examining officers. The officers had broad latitude to question, search and detain persons and property (s.8 (2) (b)).

The initial version of the PTA contained many new legislative powers to assist in the fight against terrorism. Various changes were made in the PTA during the Parliament's renewal discussions. During these renewal periods, there were four substantive revisions of the PTA (1976, 1984, 1989, 1996). The next sections examine what changes were made during each revision of the PTA.

IX PTA 1976

One aspect of the PTA 1974 was that the legislation was made subject to renewal by affirmative resolution of Parliament every six months. Accordingly, Parliament

renewed the 1974 Act in May 1975. The IRA's continued campaign of violence in Britain easily persuaded Parliament to renew the Act for a further six months (Walker 1992, 33). During that period, terrorist violence killed nine people and injured more than 160, providing the circumstances needed for Parliamentary renewal (*Hansard* H.C. 6s, 220:279-80). The act was renewed for only four months (instead of the normal six months) because Home Secretary Mr. Jenkins believed it would not be right to seek Parliamentary approval for such a course without allowing some opportunity for debate on the main provisions of the Act. Mr. Jenkins therefore introduced a bill to replace the 1974 Act, and on March 25th, 1976 the Act was put into effect (Shackleton 1978, par. 8).

The newly revised and re-enacted PTA 1976 included a number of changes, most significantly the introduction of two new provisions. The first was Section 10, which made it an offense to make or receive contributions towards acts of terrorism (s.10(1)(a)). The other was Section 11, which made it a crime to fail to notify the police about terrorist activities related to Northern Irish affairs (s.11(1)(a)(b)). Another important change was the fact that the new version was subject to renewal every 12 months instead of six (s.17).

Twelve months later, March 1977, Parliament renewed the 1976 Act for another year because of the continuing bombing attacks in London (*Hansard* H.C. 5As, 927:1568). As part of the proposal to renew PTA 1976, Mr. Rees conceded that "there is a feeling that there is a need for an investigation into some aspects of the Act…I shall carefully consider that matter" (*Hansard* H.C. 5As, 927:1476). After due consideration, Mr. Jenkins, on December 12, 1977, announced to Parliament that Lord Shackleton was undertaking a review of PTA 1974 and PTA 1976 with these terms of reference:

> "Accepting the continuing need for legislation against terrorism, to assess the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976, with

> particular regard to the effectiveness of this legislation and its effect on the liberties of the subject, and to report" (Shackleton 1978, i).

The Shackleton review was important because it was the first in a line of government reports stressing that the need for the legislation was "off the table," therefore the review *may not question the legitimacy of the Act*--only assess its "effectiveness" and "effect on liberties." Five years later, the next review would be constrained by a similar mandate.

A). Jellicoe Report

Two themes in Parliament pursuant to the Act dominated discussion during the years immediately following the Shackleton Report. The first was a general lack of interest on the part of most members of Parliament, with the result that debates tended to be short, poorly attended, and held late at night (Walker 1992, 35). The second trend, also discussed at length by Walker, was that, due to the passage of time, official support for the Act tended to "harden" (1992, 35).

During this time, only minor adjustments were made to the PTA 1976. The Prevention of Terrorism (Supplemental Temporary Provisions) Amendment Order 1979 was passed March 21, 1979. The 1979 Amendment Order reduced the amount of time the police could detain a person at a port or airport to 48 hours (Scorer, Spencer et al. 1985, 3). This brought the powers of detention in line with detention elsewhere in the kingdom.

On March 30, 1979, Conservative MP Airey Neave, a close confidant of Margaret Thatcher, was killed while driving out of the parking area reserved for members of Parliament (Miller 1991, 310). His executioners, the Irish National Liberation Army (INLA), were a splinter group of the PIRA. The INLA was dedicated to expelling the British from Northern Ireland by violent means (Adams 1986, 260). The INLA was considered more brutal than the PIRA and soon gained a reputation as the "mad gunmen"

(Sobieck 1990, 159). The INLA's claim of responsibility for assassinating Neave led them to be added to the schedule of proscribed organizations (Scorer, Spencer et al. 1985, 4).

Even with the terrorist events mentioned above, by 1981, opponents to the Act were able to bring the proposal for a new review to a vote. The vote failed 189 to 141 (*Hansard* H.C. 6As, 1:336-74). The following year, the government acceded to the demand for a new review during renewal debate in March 1982. The Rt. Honorable Earl Jellicoe was chosen to review the Act.

Jellicoe began the report by autobiographically stating that prior to taking on the responsibility of this review, he studied the Parliamentary debates to determine for himself whether the legislation was necessary. He stated in the opening paragraph:

> "I have since become convinced … that *if special legislation effectively reduces terrorism, as I believe it does, it should be continued as long as a substantial terrorist threat remains*" (original emphasis, Jellicoe 1983, par. 1).

Jellicoe's belief in the necessity of the Act was fortuitous, because the terms of reference (as they had been for Shackleton) proceeded from the assumption that there was a "continuing need for legislation against terrorism" (Jellicoe 1983, iv). Mr. Whitelaw, in a ministerial directive, made this clear, stating that the review "ought not to focus on whether or not we need the Act" (*Hansard* H.C. 6As, 20:152). The scope of the review was further limited by the constitution of the review, which forbade the examination of the NI(EP)A, 1978 (Jellicoe 1983, par. 6). This directive severely limited the review's ability to survey the response to terrorism in Northern Ireland. Even with these limitations, the Jellicoe report was meticulously argued and contained a number of worthwhile suggestions for reform (Bonner 1983; Walker 1983; Walker 1992, ch. 4).

Many of Jellicoe's recommendations were later implemented in subsequent versions of the PTA.

One of the recommendations of the Jellicoe report dealt with arrest powers (s.12). Jellicoe, relying heavily upon Section 12 arrest statistics, argued that their use has "led to the charging and subsequent conviction of a large number of people guilty of very serious criminal offenses connected with terrorism *which in many cases would not and could not have resulted from arrest under other powers"*[34] (Jellicoe 1983, par. 56). In relation to these arrest powers, Jellicoe argued that the port arrest powers had a deterrent effect "not demonstrated by the numbers apprehended" (1983, par. 139). In light of Jellicoe's view of the success of this particular aspect of port controls and special arrest powers, he recommended that they should be expanded to include international, but not domestic, non-Irish terrorism (Jellicoe 1983, pars. 12, 23, 76, 77, 144). The recommendation proved to be controversial, with substantial debate in Parliament (*Hansard* H.C. 6As, 38:582, 608). As David Bonner asked, if these powers were "necessary and valuable" for dealing with international and Northern Irish terrorism, what reason could there be to deny application to domestic terrorism (1983, 226)? These recommendations were not included in legislation until the Terrorism Act 2000.

Other recommendations made in the Jellicoe Report included improving the protection of detained individuals and ensuring their humane treatment when in official custody though implementation of the Report of the *Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Bennett 1979) (herein known as the Bennett Report). Included within this set of proposals were printed notices of prisoners'

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[34] The statistics can be seen in Table I in Annex D of the Jellicoe Report and are summarized in paragraph 45 of the report.

rights, which included the provision of clean bed linens, mattresses, blankets, etc., tape recording whole interviews with suspects, and the possibility of private consultation with solicitors at any time during detention (see also Bonner 1983, 229; Jellicoe 1983, pars. 82-94, 105-7; Walker 1992, 169).

Relating to the structure of the PTA 1976, Jellicoe had two recommendations. First, following the precedent set by Section 1 of the Armed Forces Act, 1981, the PTA should have a maximum life of five years, and re-enactment after that period should be preceded by another full review. There would still be annual renewals, but after five years the re-enactment "would require a new Bill" (Jellicoe 1983, par. 14). Second, the report advocated removal of the "Temporary Provisions" portion of the title, recognizing that the epithet "rings increasingly hollow" (Jellicoe 1983, par. 18).

The report was received favorably by the government, which implemented many of the recommendations administratively and presented a bill in July 1983 to replace PTA 1976 with suitable changes. The bill was introduced with a new title, "Prevention of Terrorism Bill," but during the committee stage of the legislative process, this recommendation was excised. In addition, Section 17 was added, providing for annual renewal subject to a maximum five-year life (Walker 1992). The five-year guillotine was welcomed by many, for it ensured that the Act would, in the words of one MP, eventually have to be considered "in detail and de novo" (*Hansard* H.C. 6As, 47:56).

Several important changes emerged from the Jellicoe Report that need to be briefly addressed. First, most of the Jellicoe recommendations were to be implemented with few additions or subtractions. Although the report was severely limited in the scope of its inquiry, it had produced sound proposals and, more importantly, it skirted very

closely to sensitive issues. The government's desire to avoid these sensitive topics was furthered by this development and, for the first time, substantial political disagreements occurred over the Act (Walker 1992, 35).

These disagreements developed between the official Opposition, who objected to re-enactment of the Act even in this reformed version on the one side, and the government, which strongly supported re-enactment and portrayed the Bill as "a bulwark against further outbreaks of senseless violence" (*Hansard* H.C. 6As, 47:54). Due to the government's overwhelming majority the latter view triumphed. In March, the 1984 version of the PTA became law.

This episode of the PTA was important because it showed for the first time a loss of bipartisan support for the Act, which Parliament had previously supported automatically (Foley 1982, 284). After 1984, the PTA had substantial detractors, both in the opposition and outside of government circles.

X The 1984 Act and the Colville Review

The establishment of an organized opposition to the PTA and an increase in international terrorist events in Great Britain played a substantial role in the outcome of the 1984 version of the PTA. A series of well-publicized international terrorist events on British soil confirmed Jellicoe's words:[35]

> "it seems to me an inescapable conclusion that terrorism associated with causes beyond the United Kingdom now poses a greater threat than it did several years ago, both relatively and absolutely. From the information presented to me I see no ground for believing this threat will diminish in the short term" (Jellicoe 1983, par. 23).

[35] Iranian Embassy siege of 1980, the hijacking of Tanzanian airline to Stansted airport in February 1982, and the attempted murder of the Israeli Ambassador in June 1982 to mention a couple.

While the influence of the organized opposition led to the addition of a number of limitations and safeguards to the Act, the increased focus on international terrorism led to several changes in the PTA.[36]

One aspect of this increased focus on international terrorism was section 12. The new power related to arresting a person who was or has been concerned with planning or engaging in acts of terrorism. Section 12(3) defined relevant "acts of terrorism" as:

> "(a) acts of terrorism connected with the affairs of Northern Ireland; and
> (b) acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland."

As Walker points out, "acts of terrorism" in the 1976 Act were unqualified, so the new Act appeared to narrow the legislation's scope (1984, 705). The Home Office, in an official circular, narrowed the scope of the 1976 Act. It stated

> "… it would be contrary to the intention of the Act for this power to be used to arrest someone concerned with terrorism known to be unconnected with Northern Ireland" (*Hansard* H.C. 6As, 1:393).

In light of this, one can see how section 12(3)(a) dealt with the types of terrorism previously covered, but section 12(3)(b) expanded jurisdiction by allowing arrests in connection with all other forms of terrorism except non-Irish, domestic terrorism.

Parliament's justification for this expansion in scope was to point out that the change had been recommended in the Jellicoe report. Jellicoe justified the extension of section 12 to cover international terrorism in two ways. First, section 12 powers had proven useful against Irish terrorists and therefore should aid in dealing with international terrorism. Second, it removed one of the major complaints--that the section was aimed primarily and in a discriminatory manner toward Irish people. By extending it to cover other types of terrorism, this problem would be alleviated (Jellicoe 1983, par. 76).

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36 These will be discussed in detail in Chapter Four.

Another element of section 12 is the arrest and detention powers. A constable can arrest an individual based upon the vague concept of "suspected terrorist activity" as opposed to a specific criminal offense. The aim of section 12(1)(b), in the words of Dermot Walsh, was to "place suspected terrorists in the custody and control of the RUC" (Walsh 1988, 33). There is no requirement to bring the suspect before the court as soon as reasonably practical. This suggests that the power was not originally intended to make suspected terrorists amenable to the courts, but to make the suspect amenable to the RUC for general intelligence gathering about terrorist organizations and the vetting of the suspect's suitability for an exclusion order (Walsh 1988, 33). The original version of this section of the PTA only allowed for detention for up to four hours, but the 1978 Act allows for detention up to forty-eight hours. The Secretary of State may extend the period up to five days.

On the surface, the structure of British anti-terrorism legislation changed very little (Walker 1984, 711). Jellicoe's recommendation for changing the name of the Bill (1983, par. 18) was rejected by Parliament (Walker 1992, 37). The only important innovation emanating from Jellicoe's Report (1983, par. 14) was that the Act would cease to have effect after five years in order to ensure that Parliament conducted a review which was both detailed and *de novo* at the time (PTA 1984 s.17(3)). Both these ideas were supported by Viscount Colville's 1987 review of the 1984 Act (1987, par. 3.1.9).

The Colville review, in the words of Clive Walker, "[r]egrettably … was required to labour under the same constraints as previous appointees"[37] (Walker 1992, 37). Although severely limited in scope, Colville's report did include a wide range of

[37] Those terms required that Colville accept "the continuing need for legislation against terrorism," thus like previous reviews he could not investigate the need for emergency legislation only in effectiveness.

proposals. Colville proposed that exclusion and the offense of withholding information be abolished (Colville 1987, par. 11.6.1, 15.1.1). Although recommending that these two powers be abolished, Colville did recommend an enlargement of other police powers. The powers Colville wanted to see expanded were those related to investigation of financial matters (1987, 14.2.8). These expanded powers, it was hoped, would aid in locating terrorist controlled funds hidden in the United Kingdom. In addition, Colville viewed the temporary status of the Act as fueling controversy, increasing uncertainty, and impeding the allocation of resources (1987, 3.1.8). This opinion led Colville to recommend, as Jellicoe had done, a name change, dropping the words "temporary provisions" from the title (1987, 54. rec. 5) and suggesting a radical change in the structure of the Act.

Part of the structural change envisioned by Colville was classifying PTA powers as either “core controls” or "temporary controls." The core controls, according to Colville, were to include special police powers and financial offenses and were to be put on a permanent footing, subject to annual review, but not annual legislative renewal. Permanence was given to elements of the Act that could apply to international terrorism, but not those dealing exclusively with events in Northern Ireland. Colville realized, or hoped, that someday the problems of Northern Ireland would be solved, but Britain would never solve all of the world's conflict (1987, pars. 3.1.7, 3.1.8). The powers of exclusion, proscription and withholding information would fall under the rubric of “temporary.” Colville seem to relegate to temporary status, in Walker's words, "any measures viewed as peripheral, Draconian or untenable" (1992, 38).

Colville's review was submitted to Parliament in December of 1987. One year later, as the five-year life span of the 1984 Act was coming to an end and debate began in the House of Commons concerning Colville's recommendation, a new version of the PTA was being created.

XI The 1989 Version of the PTA

The 1989 Act has been described at the "most thorough revision since 1974" (Walker 1992, 38). Although many of Colville's recommendations were not implemented (core controls, ending exclusion and the decriminalization of withholding information), other changes led to the overall doubling of the size of the Act. Among the revisions, were a return to "a potentially unlimited life" for the Act (dropping s.17(2) of the 1984 Act i.e., the five year life-span) and a new emphasis on combating the financial supporters of terrorist activities (Bonner 1989, 476). It is the new investigative powers to examine financial records which will be explored next.

In the late 1980s scholars and governments began to take a serious look at the financial base of international terrorism organizations. In an influential book, James Adams stated that many key terrorist groups had strong and sophisticated financial operations (1986). Adams argued that several terrorist groups had successfully integrated their financial operation into the legal commercial networks and some had attained the financial status and impact comparable to multinational corporations (1986, chaps. 4, 5). Adams went on to state that the IRA possessed "protection rackets and money laundering operations that are more reminiscent of the Mafia than a Marxist organisation" (1986, 5). British estimates put the IRA's annual income at between £3-£4 million (*Hansard* H.C.

6As, 143:212). Others put it as high as £7 million (Adams, Morgan et al. 1988, 38-39). Despite the media hype given to support from Libya and Irish American groups such as Noraid, the bulk of IRA resources were and are generated within the United Kingdom and the Republic of Ireland, with Northern Ireland being the principal source (Hansard H.L. 5Bs 504:14; see further Adams 1986, 5-6, chaps. 6, 7). The money is made through a number of illegal (smuggling, bank robberies, kidnappings, ransoms and protection rackets) and legal schemes (taxi-firms, associated garage repair operations, social clubs, restaurants, shops, including video-hire shops) (Hansard H.C. 6As 143:212; see also Bonner 1989). Money is also raised through direct collections and subscription. Early versions of the Act contained (see e.g. PTA 1984, s. 10) legislation to deal with these financial contributions for acts of terrorism, however they were generally ineffective (*Hansard* H.L. 5Bs, 504:14). The increased financial sophistication of the IRA required a substantial revision of the sections of the PTA.

The 1989 Act aided police agencies in dealing with the financial aspects of terrorism, in the words of MP Douglas Hurd, by "provid[ing] a comprehensive scheme of investigation, prosecution and forfeiture of funds or property destined to be used to finance terrorism" (*Hansard* H.C. 6s, 143:212). Sections 9-11 dealt directly with the criminalization of financial assistance to terrorism and proscribed organizations.

Section 9 dealt with contributions towards acts of terrorism. It is an offense to solicit individuals to give, lend, or otherwise make available money or property intended, or for which one might have *reasonable cause to suspect* will be used for the commission of acts of terrorism (s.9(1)(a)). In addition, it is a crime to be involved in any way with the arrangement of money or property which will be made available to another person,

knowing or having *reasonable cause to suspect* will be applied in the commission of a terrorist act (s.9(2)(a)(b)). This section of the Act provided the defense of not knowing or having no *reasonable cause to suspect* the activities would contribute to a terrorist event (s.9(5)(b). It is the words italicized above, as we will see in the next chapter, that worry the civil liberties community about possible abuses of power.

Section 10 made it an offense to give, lend (s.10(1)(b)), or to solicit or invite others (s.10(1)(a)) to make available money or property for the benefit of a proscribed organization.[38] A third offense, one David Bonner states is likely to "involve innocent, albeit careless parties to a transaction," is committed when one enters into or is otherwise concerned in an arrangement whereby money or other property is or is to be made available for the benefit of such an organization (s.10(1)(c) see further Bonner 1989, 462). As with section 9, there is a defense of proving no knowledge and no *reasonable cause to suspect* the arrangement related to a proscribed organization (s.10(2)).

Section 11 created an offense of assisting in the retention or control of terrorist funds. Here, as in section 10, there is apt to be a number of innocent and careless individuals in the financial world who will fall victim to this provision of the Act (Bonner 1989, 462). A person commits the offense by retaining or controlling terrorist funds. In addition, this section deals with the concealment, removal from jurisdiction and transfer of funds connected to terrorism (s.11(1)). Again, as in section 9 and 10, there is a defense of proving no knowledge and no *reasonable cause to suspect* one's actions dealt with financial arrangements related to terrorism (s.12(2) see further Bonner 1989, 463).

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38 Unlike section 10 of the 1984 Act which it replaces, section 11's (and section 13's) definition of "proscribed organisation" includes groups proscribed in section 21 of the NI(EP)A 1978 not just those found in schedule 1 of the 1989 Act.

Additional powers to investigate financial dealings were not the only changes to the 1989 Act. There was one change made related to the structural procedures surrounding renewal of the Act. The Conservative government rejected a proposal that would have made each separate order of the PTA up for renewal individually (*Hansard* H.L. 5Bs, 504:989). Individual renewal would have afforded a greater choice of parliamentary response in dealing with the more controversial aspects of the Act. Instead, hostile resolutions to the individual sections are made prior to, but on the same day, as the renewal order; if it receives support, the government withdraws and modifies the bill (*Hansard* H.L. 5Bs, 504:993-4). After all the resolutions are voted upon, the new PTA comes forth for a vote *in toto*. Not only does this give very little time for opponents of the Bill to effectively debate the flaws of the Act (Walker 1992, 39), but it also places the opposition into a position of either opposing renewal *in toto* or abstaining. Both leave the opposition open to attacks of being "soft on terrorism" (Bonner 1989, 476). In essence, the system makes it harder to deal with the more egregious aspects of the Act.

XII Lloyd Report 1996

In December 1995, Lord Lloyd was asked to review the law governing the prevention of terrorism. From the outset Lloyd was given greater scope and latitude in his review than had been the case in previous reviews. The increased scope of the review allowed Lloyd to examine both the PTA 1989 and the NI(EP)A 1996 in addition to other supplementary legislation (e.g., Police and Criminal Evidence Act 1984). It was the first time in the history of official reviews of the various pieces of emergency legislation that

both were examined together *in toto*. There were three other major differences between this review and previous reviews.

First, unlike prior reviews, Lloyd was required to take into account the United Kingdom's obligation under international law.[39] In the history of the Troubles spanning more than thirty years, these obligations have caused the British government numerous headaches related to their counter-terrorism efforts in Northern Ireland. Due to the tension between the need to fight terrorism and obligations under international law, Britain has on several occasions been taken before the European Court at Strasbourg.[40] In several cases Britain faced derogation under Article 15(1) of ECHR (limiting police powers under existing legislation). Discussion of these important issues is an important and valuable addition to the ongoing debate regarding the role of emergency legislation in the United Kingdom.

Another difference from previous reviews was a substantial change in the base assumption for the need of emergency legislation. Whereas previous government reviews were not allowed to address the need for emergency counter-terrorism legislation, Lloyd was given the latitude to be open to the view that ordinary law could be sufficient to deal with the terrorist threat. This allowed a wholly different set of questions to be asked, opening up unique lines of inquiry and greatly strengthening the value of the review.

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39 Specifically, treaty obligation under European Convention on Human Rights 1950 (ECHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). Both, according to Lloyd have an effect upon the British counter-terrorist efforts in Northern Ireland Lloyd, L. and S. J. Kerr (1996). Inquiry into Legislation Against Terrorism. London.

40 See, for example, *Ireland v UK* (1978); *Brogan and others v UK* (1988); *Fox and others v UK* (1990); *Brannigan and McBride v UK* (1993); and *Murray v UK* (1996). For examples see, Gearty, C. A. (1993). "The European Court of Human Rights and the Protections of Civil Liberties: An Overview." Cambridge Law Journal **89**: electronic version, Bradley, A. W. (1995). "The United Kingdom, The European Court of Human Rights, and Constitutional Review." Cardozo Law Review **233**: electronic version.

The final difference was "by far the most important" according to Lloyd (Lloyd and Kerr 1996, vi). Unlike other reviews, Lloyd was not concerned primarily with the present; his review was focused on the future. Lloyd was to proceed from the assumption that there existed a lasting peace in Northern Ireland. Due to this assumption, the report focused largely on "other kinds of terrorism." The assumption could be made because at the time Lloyd started his review the cease-fire in Northern Ireland had been in place for seventeen months.[41]

The difference in terms of reference for the Lloyd reports created a very different set of conclusions. Lloyd stated if lasting peace were established, there would be no need for emergency legislation, although some form of permanent counter-terrorism legislation would be necessary. Additionally, unlike the various incarnations of the PTA and NI(EP)A that have a more limited geographic scope, Lloyd proposed that the new legislation should make no distinction between different parts of the United Kingdom (including Northern Ireland).

The increased scope of the Lloyd review included discussions on a host of issues including the need for permanent legislation, altering the definition of terrorism and the need for special powers such as internment, exclusion, and Diplock Courts. In examining the need for anti-terrorism legislation, Lloyd drew upon two propositions: first, terrorists present an exceptionally serious threat to society and, second, terrorists are particularly difficult to catch and convict without special powers. Starting from these propositions, Lloyd concluded that there would be a need for permanent anti-terrorism legislation (Lloyd and Kerr 1996, pars. 5.10, 5.15).

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41 The cease-fire ended on February 9, 1996 when the IRA exploded a bomb at Canary Wharf.

Addressing the definition of terrorism, Lloyd acknowledged why the original PTA excluded all forms of terrorism other than those acts associated with Northern Ireland. In his words, the situation was one of "extreme urgency" and presented a "grave threat on the mainland." The threat from international terrorism was modest in comparison and the threat from non-Irish domestic terrorism was nonexistent (Lloyd and Kerr 1996, par. 5.18).

In 1984, the scope of the PTA's view of terrorism was increased to include international terrorism, while still excluding non-Irish domestic terrorism. Lloyd reasoned that a person killed by a terrorist attack would make no distinction between an international perpetrator or domestic one. He pointed out that while the occurrence of non-Irish domestic terrorism is still quite low, it may not always be that way. If new groups emerged that chose the "bomb to the ballot box," according to Lloyd, it made sense that the official definition should cover all forms of terrorism (Lloyd and Kerr 1996, par. 5.21).

Lloyd briefly discussed the power of exclusion found in the PTA and stated that the powers would not be relevant, or needed in the permanent legislation, if a lasting peace was established in Northern Ireland (Lloyd and Kerr 1996, par. 16.4). In examining the possibility of creating a new power, based upon elements of the existing PTA, to exclude or deport foreign nationals suspected of involvement in terrorism, Lloyd stated that normal immigration law provided adequate power to deport (Lloyd and Kerr 1996, par. 12.7, 12.9). Specifically, Lloyd was referring to the Secretary of State's power to exclude an individual if the act is "conducive to the public good" (section 13(5) of the Immigration Act 1977).

Executive detention, better known as "internment," is one of the most controversial of all existing elements of the NI(EP)A. Section 36 and Schedule 3 gave the Secretary of State (NIO) the power to detain terrorist suspects without a trial. Although the power has not been used since 1975 and the provisions are not currently in force, they may be activated at any time (Lloyd and Kerr 1996, par. 16.5). Although Lloyd understood the Government's reasons for reserving the power to reintroduce executive detention while conflict remains in Northern Ireland, he added that the power conflicted with Article 5 ECHR.[42] If a lasting peace were to be established in Northern Ireland, the power of internment would be needed in any permanent body of counter-terrorism legislation (Lloyd and Kerr 1996, par. 16.8).

The Diplock Courts were established, with the NI(EP)A, to deal with intimidation of witnesses and jurors and the danger that juries might be biased by sectarian prejudices. To remedy these problems, juryless courts were established for "scheduled offences," those commonly committed by terrorists. Some of these offenses (e.g., murder, manslaughter and robbery) could be committed by those with no connection to terrorism, so the Attorney General has the right to "certify out" cases--have the case heard in traditional jury trials (Lloyd and Kerr 1996, pars. 16-10, 16.11). While commenting on the successful and fair application of justice through the Diplock Courts, Lloyd stated that with the normal caveat of peace, a time will come when there will be no need to distinguish between terrorist and non-terrorist crimes. Therefore, the administration of justice in Northern Ireland should fall into line with the rest of the United Kingdom and jury trials should be restored (Lloyd and Kerr 1996, par. 16.13).

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42 A person can only be deprived of his liberty in accordance with the due process of the law.

XIII Terrorism Act 2000

Drawing upon the Lloyd report (1996), a Home Office Consultation Paper (1998), and four years of deliberations, the British Government enacted the Terrorism Act of 2000 (TA 2000), which repealed and replaced both ordinary law and emergency legislation that had been in effect for nearly 30 years (NIO 2001). Both the NI(EP)A and the PTA were replaced in order to bring all anti-terrorism laws together in a single comprehensive code. Growth in size, scope and complexity of the NI(EP)A and PTA was getting to be politically and legally unwieldy. Scholars of the legal tradition related to the rule of law would argue that the legal tangle created by these two pieces of emergency legislation created a situation where it was nearly impossible for the average person to have confidence in his knowledge and understanding of the promulgated laws (Hayek 1960; Nozick 1974). The overall result of the consolidation of the emergency legislations into the Terrorism Act 2000, as will be demonstrated in Chapter Seven, was to create a larger, more expansive and, in some cases, more powerful set of legislative tools.

A significant goal in passing the Terrorism Act 2000 was to secure the withdrawal of the notice of derogation under Article 15 of the ECHR (European Convention on Human Rights) with respect to police detention power under previous legislation (Walker 2002, xi), which was given greater credence with the passage of the Human Rights Act 1998. The HRA 1998 incorporated into British Law the ECHR (Walker 2000, 1). Another factor that led to the creation of this legislation was the upcoming expiration of the NI(EP)A 1998 on August 24, 2000. Thus, its replacement became an issue. Additionally, other factors were coming into play as a result of the Belfast Agreement

signed on Good Friday 1998; it was a condition of the Agreement that security matters should be reviewed (Walker 2000, 1).

As a complement to the Lloyd report, Paul Wilkinson, one of the foremost scholars in the area of terrorism studies, was asked to produce a report surveying the future threat of both international and domestic terrorism (other than terrorism connected to affairs in Northern Ireland) and to comment on the contribution which legislation could make to counter the threats (Wilkinson 1996). From his recommendations, Terrorism Act 2000 began with the assumption that there is a continuing need for extensive legislation against political violence now and into the foreseeable future (Walker 2002, 11).

The Terrorism Act of 2000 contained several substantial alterations to the legal environment related to fighting terrorism significant to this study. First, unlike any of its predecessors, Terrorism Act 2000 was intended to be not only comprehensive but also permanent, no longer requiring renewal or re-enactment, save for one part relating exclusively to Northern Ireland[43] (Walker 2002, xi). This alteration addressed the complaints of many who believed the annual reports, periodic in-depth reviews, and five-year Parliamentary renewal debates reeked of political spectacle. Renewal debates often took place very late at night or early in the morning hours and were sparsely attended. Additionally, by making the legislation "permanent" it took away the taint of "emergency," "temporary" and "special," which gave rise to a belief the legislation was

[43] Part VII of the Act is exclusively for Northern Ireland and included such issues as retaining the "Diplock Court" system and a lower standard of the admissibility of confessions as a basis for prosecution and conviction than in ordinary courts Amnesty, I. (2000). United Kingdom: Briefing on the Terrorism Bill. London, Amnest International.

extra-legal.[44] In short, in the public relations battle it made the legislation more respectable, by placing it within the realm of "normal law."

Another positive change was that two of the most "oppressive" and "draconian" elements of the legislation (Shackleton 1978, par. 50; Colville 1987, par. 11.7.1) were dropped from the pre-existing legislation (Walker 2000, 14; Walker 2002, xi). To many, the elimination of exclusion orders and the power of executive internment were welcomed (Walker 2002 31). A number of official reviewers reluctantly supported exclusion, while stating that elimination of the power may be a hard choice, but it "would be the correct one" (Colville 1987, par. 11.6.1). Lloyd was especially strong in his desire to see exclusion orders eliminated from the panoply of options for the government (1996, pars. 16.2 - 16.4). The final support needed to end EOs came when a Home Office Consultation Paper argued it was more profitable to keep suspects under surveillance and, where possible, charge them with offenses (1998, pars 5.6, 5.7). Additionally, executive internment in Northern Ireland, described by MP Ingram as "the terrorist's friend" because they were used by the paramilitaries as terrorist staff colleges where those detained openly recruited and shared trade secrets and techniques (*Hansard* H.C. 6s Standing Committee A: 73). In short, an executive power that had done so much to worsen the Troubles in the early 1970s was no longer on the legal books.

Additionally, the Act included new safeguards for those in police custody. For example, suspects in police custody would have audio and video recordings made of interviews. Also included in the Act is the right to have someone informed of one's detention, the right to legal advice and to have a lawyer present during police interviews.

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[44] There will be annual reports to Parliament on the working of the Act, as required by section 126 NIO (2001). Counter-Terrorism Legislation: Terrorism Act 2000. London, Northern Ireland Office.

The final safeguard is the creation of an Independent Terrorism Act Reviewer to conduct independent oversight of the Act (NIO 2001).

Finally, the new legislation significantly changed the official definition of terrorism. Many people argued for years that the definition was politically charged and had a detrimental effect on the situation in Northern Ireland. The alterations in the definitions, while pleasing some for being less political, concerned others for the new definition greatly expanded the range and scope of the new legislation's reach. Continuing the trend suggested in the Jellicoe review (1983, 144) and integrated into the PTA 1984, the Terrorism Act 2000 had jurisdiction over a much wider range of terrorism, including international and non-Irish domestic terrorism (Walker 2002, 30). As will be discussed later, many saw this expansion of what had previously been "emergency" and "extraordinary" legislative power normalized and made part of the regular criminal justice code. In short, what had been extraordinary now was normal.

In sum, the Terrorism Act 2000 had something for everyone. It gave something to civil right proponents by jettisoning two of the most detested aspects of emergency legislation (exclusion and internment). For advocates of constitutional governance, it harmonized the anti-terrorism law in a way never before seen in the United Kingdom, moving the legal order more towards the Hayekian ideal of rule of law (see further Hayek 1960). But as it gave with one hand it took away with another, and as Walker has discussed, the Terrorism Act 2000 also expanded numerous areas of governmental power related to fighting terrorism (Walker 2000; see also Hammerton 2001; Walker 2002).

XIV Chapter Summary

This chapter noted that in order to understand the enacted emergency legislation a familiarity with the context of the conflict in Northern Ireland is necessary. As has been seen, the political violence associated with Northern Ireland has a long and bloody history. This chapter has chronicled the evolution of that violence from the early civil rights period, through Bloody Sunday and direct rule, up to the present. During this time the violence has ebbed and flowed and parliament responded with various security measures to contain this violence, while attempting to maintain a framework of rule of law.

An examination of the historical record has demonstrated how Westminster reacted to the political violence during this time. First with internment, then the introduction of the NI(EP)A 1973 and later the first installment of the PTA 1974. The security situation, which in official circles, has necessitated new emergency legislation with increased power to arrest and convict terrorists (NI(EP)A) (Dickson 1992, 595). In addition, the official reviews and parliamentary debates demonstrate Westminister's desire to balance new powers to fight terrorism with a modicum of concern for civil liberties. This balance has produced considerable tension in dealing with revision and renewal of the various components of British anti-terrorism legislation. The need, in the eyes of parliament, to strike a balance between strong security measures and political freedom for those involved has evoked strong criticism from the civil liberties community.

The next chapter examines the reaction of the civil liberties community to the emergency legislation enacted during the Troubles in Northern Ireland. The chapter

draws upon the historical record as seen in the preceding chapters and argues that it fits into a pattern found within the literature, which argued that long-term reliance upon 'temporary emergency' legislation would lead to it becoming entrenched and normalized within the standard criminal justice system (Gearty 1994; Gearty and Kimbell 1995; Ni Aolain 1996). Additionally, an elucidation of the civil liberties community's interpretation of the historical record will provide evidence to the literature represented by John Locke and other liberal scholars, who argue that British law, in this instance, does not promote the ends of a liberal society. It would be difficult, according to this school of thought, to argue that the laws promulgated related to fighting terrorism associated with Northern Ireland, meet the criteria that the appropriate goal of the law is "not to abolish or restrain, but to preserve and enlarge freedom" (Locke 1980, ch. VI, § 57).

Chapter Four

Reaction of the Civil Liberties Community

> "The terrorist and the policeman both come from the same basket" (Conrad 1907, 69).

> "The loss of freedom seldom happens overnight … Oppression doesn't stand on the doorstep with a toothbrush moustache and a swastika armband. It creeps up insidiously; it creeps up step by step; and all of a sudden the unfortunate citizen realizes that it has gone" (Lord Chief Justice Lane, *Hansard* H.L. 5Bs, 527:1331).

Introduction: Origins of the Civil Liberties Perspective

Civil liberties and opposition groups in Northern Ireland and in Great Britain have always taken issue with certain actions undertaken by the British government in Northern Ireland. Stormont's move to make the Special Powers Act (SPA) permanent in 1933 led to a 1936 inquiry into the operation of the SPA by the London-based National Council for Civil Liberties (NCCL) (Dickson 1995, 63). The NCCL inquiry concluded:

> "the Northern Irish Government has used Special Powers towards securing the domination of one particular faction and, at the same time, towards curtailing the lawful activities of its opponents … It is sad that in the guise of temporary and emergency legislation there should have been created under the shadow of the British Constitution a permanent machine of dictatorship - a standing temptation to whatever intolerant or bigoted section may attain power to abuse its authority at the expense of the people it rules" (NCCL 1936, 39).

The report had little impact on policy in Northern Ireland, but did set a precedent and began what was to become one of the central demands of the civil rights campaigners who began lobbying in earnest in the mid-1960s: repeal of the Act (Purdie 1990). Although the SPA was repealed in 1973 with the passing of the NI(EP)A 1973, many of the powers found in the original legislation are still on the books. Hence, the campaign to rid Northern Ireland of these emergency powers continues today.

This chapter examines the history of complaints lodged by civil libertarians, human rights activists and other interested parties against the British anti-terrorism legislation used in dealing with the Troubles in Northern Ireland. The PTA and NI(EP)A possess a number of parallel powers and in order to add some organizational clarity, the powers will be dealt with in combination (e.g., the proscription power found in the EPA and the almost identical power found in the PTA will be dealt with as one type or category of powers).[45] This will add conceptual clarity to the great variety of critiques of the emergency powers.

This chapter examines the criticism made by the civil liberties community of the major emergency powers vested in the NI(EP)A and PTA, including: 1) proscription, 2) exclusion orders, 3) arrest and detention, 4) non-jury Diplock courts, and 5) supergrasses. After briefly reviewing each of these powers, the chapter will relate the primary criticism made by the civil liberties community and other parties who see the legislation as a threat to individual liberty. In addition, the chapter will examine each power in relation to its evolution over the thirty-plus years of conflict. In sum, the themes of this chapter are to lay out the complaints expressed by the civil liberties organizations and elucidate their predictions of the legislation's effect on personal freedom.

II Proscription

The power to proscribe or ban an organization is found in Part I, Sections 1-3 of the PTA and Part III, Section 21 of the NI(EP)A. Proscription continues the old Special Powers Regulation section 24A. This power outlaws membership, encouragement or

[45] For ease of presentation, each power is discussed as it was originally enacted. Changes in the more recent Acts are mentioned in footnotes. In this way the predictions of the critics (e.g., that the powers will be broadened, etc.) can be measured in Chapter 7.

support for proscribed groups, including the convening of public or private meetings in support of these groups. The two sections are fairly similar in their scope except that § 6 of the NI(EP)A makes it a crime to have in possession a document addressed by, related to, or emanating from a proscribed organization. The PTA makes it an offense to display, carry or wear in public anything which arouses reasonable suspicion that you are a member or supporter of a proscribed organization (Section 3 § 1(a)(b)). The PTA originally banned the IRA (no distinction was made between the Official or Provisional branches). Later the legislation was amended, banning the Irish National Liberation Army (INLA) as well. The NI(EP)A bans eight additional groups, including some Protestant groups such as the Ulster Freedom Fighters, Ulster Defense Force, and the Ulster Volunteer Force (NI(EP)A 1996 Sched. 2, in James 1997, fn. 92).

The concerns of the civil liberties groups fall into three categories of complaints: 1) proscription was enacted for purely cosmetic purposes; 2) proscription has a chilling effect on and diminishes freedoms of speech and association; 3) proscription makes law enforcement more difficult. David Bonner has pointed out that these concerns are magnified by the "vagueness and uncertainty of these offences" (Bonner 1985, 187). In addition, the NCCL has argued that the banned group does not have an opportunity to challenge the government's evidence in court or appeal the decision (Scorer 1976, 8).

A). Cosmetic Justification: "More Spectacular than Effective"

Many civil liberties groups opposed proscription because it does little to fight terrorism, other than to assuage public opinion (Hain 1979, 123; Scorer, Spencer et al. 1985, 15), a view given credence by then Home Secretary Roy Jenkins, who stated, "I have never claimed and do not claim now, that proscription of the IRA will of itself

reduce terrorist outrages" (*Hansard* H.C. 5s, 882:636). Both the Home Office and the police argued against proscription until the weight of public opinion was alleged to necessitate its inclusion into the original 1973 PTA (NCCL 1975, 7). The Home Office and the police were not interested in the extra authority; the Home Secretary claimed the authority would not actually help reduce terrorism. In addition, an IRA spokesman stated that proscription of the IRA (the IRA was banned by s. 19 schd. 2 of NI(EP)A 1973) "has never harmed us" (Fisk 1974). Then why was it introduced?

An editorial in *The Times* stated that since the Birmingham bombings aroused a clear expectation in the public's mind that the government would react decisively, "the government could not afford to disappoint that expectation" [, 1974, 1974]. The *Economist* argued that proscription is "more spectacular than effective" (Anonymous 1974). But perhaps Roy Jenkins best summarized the political nature of proscription when he stated, "the public should no longer have to endure the affront of public demonstrations in support of that body [IRA]" (*Hansard* H.C. 5s, 882:636). In short, the power of proscription gave political cover to the politicians, assuaged public opinion, sounded tough, but admittedly did little to fight terrorism.

B). Freedom of Speech and Association

The power to curb membership in political groups and to adversely influence political speech is dangerous to democracy. Therefore, it is this power which has aroused the greatest concern from civil liberties groups, especially as it relates to banning groups and arresting those who demonstrate "reasonable apprehension" that they are members or supporters of proscribed organizations (PTA 1974 Pt. 1, sec. 2 §1(b)).

NCCL's Catherine Scorer has argued that the intention of proscription is to curtail the "legitimate political activity by a number of groups who campaign peacefully for the unification of Ireland" (Scorer 1976, 7). This chilling effect on freedom of expression can lead to a feeling of "self censorship" brought about by the sensible effort to avoid censorship (NCCL 1975, 7). It might have the effect, as put by Hogan and Walker, of curtailing perfectly legal democratic expression for fear of arrest, which could adversely affect the principle of free elections (Hogan and Walker 1989, 142).

Hain also expresses concern that demonstrations related to events in Northern Ireland may get out of hand and lead to the banishment of all organizations in attendance because the Home Secretary took the view that a section of the population was put in fear (Hain 1979, 132). In essence, non-proscribed groups that share similar beliefs (although non-violent) could be punished and have their liberties infringed. Persons could be punished by the state for their beliefs without committing any illegal acts.

C). Making law Enforcement Tougher

While Home Secretary Reginald Maudling persistently refused to consider proscription on the grounds that the power was useless because an organization could just change its name and continue on with the same goals (Scorer 1976), security experts have long argued that proscription simply tends to drive the target organizations completely underground and makes the tasks of intelligence gathering and detection more difficult for law enforcement (Wilkinson 1986, 171). Hogan and Walker point out that another reason why proscription is counter-productive is because of the marked decrease in the ability of police to infiltrate outlawed secretive groups. Becoming a member of a legal organization, attending its meetings and receiving its newsletters is a much simpler task

(1989, 142). Additionally, even the official reviews admit that banning a group adds an air of mystique and glamour of illegality that may galvanize interest in membership (Baker 1984, par. 420).

Finally, proscribing an organization allows it to claim that it must use illegal means because the government gives it no other options. In this situation, a further alienation of the Irish community in Britain would create hostilities against the police and increase sympathy and possible support for terrorist organizations. According to the NCCL, all of these problems make terrorism more difficult to fight (Fisk 1974).

D). Anti-Proscription Summary

As the Emergency Provisions Bill was getting its final reading, MP Gerry Fitt objected and described proscription as "the most obnoxious provision of that Act" (*Hansard* H.C. 5s, 859:876-7). While others might disagree that proscription is the worst part of the Bill, it does have insidious effects such as limiting free expression, association, and the ability of law enforcement personnel to track potentially dangerous terrorist suspects. The provision is clearly a state power that is open to abuse and, even if not abused, represents a tragic loss of personal freedom.

III Exclusion Orders

Exclusion orders, which have their genesis in the Prevention of Violence (Temporary Provisions) Act of 1939, provide the British government with a system of internal exile.[46] As Richard Harvey explains, the British government can "restrict where a

[46] For a detailed discussion on exclusion orders see Bonner, D. (1982). "Combating Terrorism in Great Britain: The Role of Exclusion Orders." Public Law: 262-281, Bonner, D. (1985). Emergency Powers in Peacetime. London, Sweet & Maxwell, Walker, C. (1992). The Prevention of Terrorism in British Law. Manchester, Manchester University Press, Walker, C. (1996). The Governance of Special

citizen of the UK can live or move, under threat of up to five year's [*sic*] imprisonment and an unlimited fine" (Harvey 1981, 17). The power to exclude individuals from Great Britain was placed in Part II of the PTA 1974 (it remains Part II s. 4(1) of the PTA 1989).[47]

The process begins with the collection of intelligence material by the police and security services (Shackleton 1978, par. 39). Senior police officers and civil servants as high as the deputy secretary level in the Home Office vet the information before it is eventually communicated to the Home Secretary who makes a final decision[48] (Committee 1995, 73). A person is excluded from Great Britain if the Home Secretary is satisfied that the person has been involved in terrorism and/or is attempting, or may attempt, to enter Great Britain for the purpose of terrorism connected to Northern Ireland (sec. 4 § 1(a)(b)). The Home Secretary, according to Spjut, has virtually unfettered discretion to make exclusion orders (Spjut 1974).

The excluded person cannot enter or try to enter Great Britain for three years, after which time the matter is reviewed. Another exclusion order will be made if considered appropriate. The Home Secretary can revoke an exclusion order at any time and the periodic review must be conducted after three years (Walker 1996, 614). Excluded individuals are usually sent to Northern Ireland.

The civil liberties community has argued that exclusion orders violate a number of important individual liberties. David Feldman, in *Civil Liberties and Human Rights in*

Powers: A Case Study of Exclusion and the Treatment of Individual Rights under the Prevention of Terrorism Acts. Understanding Human Rights. C. Gearty and A. Tomkins. London, Mansell**:** 611-644.

47 Under this part of the Act, it is important to remember that Great Britain means England, Scotland and Wales; United Kingdom means Great Britain and Northern Ireland Scorer, C. (1976). The Prevention of Terrorism Acts 1974 and 1976. London, NCCL.

48 The British Home Secretary excludes persons from Great Britain, while the Secretary of State for Northern Ireland holds the power to exclude persons from Northern Ireland through the PTA 1974 sec. 3.

England and Wales, pointed out that the "right for citizens and others to move freely within the country" is a long cherished liberty of Englishmen going as far back as chapter 42 of the Magna Carta of 1215 (1993, 315). Lord Shackleton has upheld the importance of freedom of movement by describing the exclusion power as "inherently arbitrary and oppressive" (Shackleton 1978, par. 50). The complaints against the exclusion orders range from philosophical to practical.

A). Internal Exile

Civil libertarians argue that the idea of people being effectively condemned to a form of internal exile is simply wrong (generally see Hayek 1960, ch. 14). Although it does not contravene international human rights law, it is bad for a country's international reputation, particularly as the restriction on liberty is imposed (as we will see below) without the need for proof before a judicial tribunal (Feldman 1993, 347). David Bonner has described the power as the "most disturbing feature of the legislation" (1982, 263). In Parliament it has been described as "internal banishment" (*Hansard* H.C. 6s, 47:65) and in many ways reminds one of the internal exiles and forced relocations made in the Soviet Union under Stalin. The NCCL points out that the United Kingdom government, the British press, and a large section of the British public condemned the Soviet Government's "internal exile" of Sakharov and other dissidents, while at the same time applauding the PTA's power to do precisely the same thing (Scorer, Spencer et al. 1985, 74). Even more disturbing is the questionable nature of the information upon which the decisions are based and the lack of an independent or public evaluation.

B). Questionable Information With No Right to Question It

Another potential problem with exclusionary powers according to the civil liberties groups concerns the reliability of the information and the fact that excluded individuals are never allowed to examine, access, or call into question the information upon which decisions are based. Even with the vetting process involving the police and Home Office civil servants, there are clearly risks that some of the evidence may be unreliable (Bonner 1982, 271).

There is a wealth of examples of bureaucratic mix-ups and mistaken identities, enough to make anyone suspicious and extremely skeptical of the process. All one has to do is remember the plethora of intelligence errors which were made manifest on August 9, 1971 in Operation Demetrius.[49] In Demetrius, as in many intelligence-gathering operations, a great deal of the information came from informants who were paid for their services. The government justifies the refusal to release information related to exclusion orders on the premise that releasing the information might compromise intelligence assets and/or informants.

An informant's motives must always be suspect: there may be financial pressure or a personal malice when the information is provided. Related to this was the problem of testing whether the informer acted as an *agent provocateur* (Scorer 1976, 12; Scorer and Hewitt 1981, 27-28). Additionally, there is less certainty that the evidence is truthful, according to Walker, because "it is by no means as rigorously examined as it would be in a criminal trial" (Walker 1992). Walker explains, elsewhere, that "most of the information is hearsay and low-grade information" and should be viewed with a great deal of circumspection (Walker 1997). This is in large part due to the arbitrary and subjective manner in which the process takes place.

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[49] An attempt to round up IRA terrorists for internment in Northern Ireland, see chapter 2.

The Secretary of State takes the prepared information (with recommendations by lower level personnel) and decides whether he is satisfied, in his own mind, of "terrorist" involvement. It is important to note that the question of whether the Secretary's suspicion is *reasonable* is wholly irrelevant (Committee 1995, 73). The Secretary's "test" is completely subjective. There is no criterion for measurement or consistency. Concerned groups point out that the criteria is not really needed because no reason need be given to the excluded individual (Scorer, Spencer et al. 1985, 23; Committee 1995, 73). No reason is given, and no evidence is put forth to justify the exclusion. As put by a member of the NCCL,

> "Solicitors are thus in the impossible position of hazarding guesses at the police evidence and attempting to refute unknown allegation in making representations to the Home Secretary. They are in no position to explore the evidence with their clients or to pursue any line of inquiry not supplied by the client" (Scorer, Spencer et al. 1985, 23-4).

If the lack of established criteria or the state's conscious decision not to inform a person why he must leave his home were not enough, civil liberties groups point out that exclusion is a form of punishment that violates due process.

C). Issues Related to the Denial of Due Process

Civil liberties groups argue that excluding a person from his place of residence without explanation or cause is damaging enough to the fabric of democracy, but in combination with the reality that there is no recourse to the court, the power is completely unacceptable (Walker 1996, 617). In addition, the powers of exclusion are a negation of the principle of the assumption of innocence until guilt is proven in a competent court hearing (Hain 1979, 128). It has been suggested by some that exclusion orders could be used on people who cannot be found guilty of anything and therefore cannot be brought to trial (Committee 1995, 76). This is the view of the NCCL, which believes exclusion

orders are a violation of Article 6 of the European Convention on Human Rights, which provides that in any criminal proceeding the defendant is entitled to a fair and public hearing by an independent and impartial tribunal established by the law (Scorer, Spencer et al. 1985, 32). The government gets around this by claiming that exclusion is not a punishment but simply a public policy decision and therefore does not require an independent legal proceeding (Jellicoe 1983, par. 191).

Accountability, according to Jellicoe, is found in Parliament. Ministers of Parliament can speak if they feel that exclusion orders are being misapplied or the powers are being abused (1983, 174). To civil liberties groups this sounds good but rings hollow since MPs are not informed of decisions being made by the Home Office and cannot examine the police evidence on which the decisions are based (Scorer, Spencer et al. 1985, 30).

D). The Creation of Devil Island in Ulster

Former Home Secretary Roy Jenkins claimed that exclusion orders allowed him to rid Britain of "dangerous terrorists" and some of "the most experienced leaders of the Official and Provisional IRA" (Scorer, Spencer et al. 1985, 25). So, where are these terrorists sent? Not to prisons. Most of them are sent to Northern Ireland. Yet, if these "experienced terrorists leaders" are so dangerous, why are they removed from one part of the country only to be allowed to move freely in another area where they can continue their violent ways? If they are not "dangerous" why are they being excluded?

Rev. Ian Paisley, leader of the Democratic Unionist Party in Ulster, and considered a hard-liner on dealing with terrorists, had this to say about exclusion:

> "I cannot see how it helps the situation by turning Northern Ireland into a sort of 'Devils Island' where the undesirables are sent, whether of Irish birth or not. It may get the Government off the hook, and protect citizens here [Great Britain] against terrorism, but

> they are creating big problems for the Northern Ireland Office, making it carry the whole weight of what is repugnant to many people in our community" (Clark 1974).

Paisley goes on to say that:

> "If a man is a terrorist or suspected to be one, then instead of being excluded he should be arrested and tried" (Clark 1974).

Instead of the British Government resolving the alleged problem by having suspected terrorists arrested, tried and sent to prison, exclusion allows the British government to push the problem off on Northern Ireland and out of the British media spotlight (Committee 1995, 73).

MP Gary Fitts has pointed out yet another potential problem resulting from exclusion orders. In addition to catching hard-core terrorists, it might also sweep up persons on the periphery who are legitimate political activists and others who are totally uninvolved in terrorism (*Hansard* H.C. 6s, 1:386). The power to exclude could have adverse effects on a person's life, therefore accentuating the need to avoid complacency in relation to the use of this power.

E). Exclusion Summary

Lord Jellicoe has summarized the overall view of the civil liberties community on the subject of exclusion orders, as

> "the most extreme of the Act's powers: in its effects on civil liberties, it is in my view more secure than any other power in the Act; in its procedure and principles it departs more thoroughly from the normal criminal process [and] it has aroused substantial resentment even among many, particularly in Northern Ireland, who support the aims and content of the remainder of the legislation" (Jellicoe 1983, par. 175).

The Guardian, in an official editorial regarding the PTA, wrote, "if even one Irish person has been wrongly served with an exclusion order then civil liberties have been badly damaged by the new Act. And even if none have been wrongly served, civil liberties have still been eroded. No one can defend the act from a civil liberties platform" (NCCL 1975,

16). Finally, as long as the suspect and his lawyer are refused the right to be informed of the accusations, denied the right to challenge the state's evidence and cross-examine prosecution witnesses, and refused the right to a judicial hearing and appeal, there must be an overwhelming probability that people are excluded on the basis of inaccurate evidence (Scorer, Spencer et al. 1985, 31). Exclusion can easily be used as a judicial shortcut to rid the government without trial or appeal of 'problem' people it cannot or chooses not to try in court. For civil liberties groups the creation of an unassailable power allowing the government to get rid of people without recourse is unconscionable and casts doubt on the democratic nature of the regime.

IV Arrest and Detention Powers

A). Arrest Powers Under Emergency Legislation

Arrest has been defined as the beginning of imprisonment (Walsh 1983, 21). Once a person has been lawfully arrested, he is no longer at liberty to go or do as he pleases. Arrest is, therefore, a very serious infringement of a person's liberty. It could be argued that the arrest powers found in the emergency legislation could affect the relationship between the individual and the state. In examining the extension of arrest powers, once again the powers of both the PTA and NI(EP)A will be lumped together for conceptual clarity, a common approach among scholars when considering potential abuses (Walsh 1988, 34).

The two main arrest powers found in NI(EP)A 1978 were section 13(1) and section 11.[50] Section 13(1) allowed a constable to arrest any person who he had

[50] These two arrest powers are found in EPA 1991 at s. 17 and s. 18. The former is for the police and the latter section is for soldiers on duty.

"*reasonable* grounds to suspect is committing, has committed or is about to commit a scheduled offense" (emphasis added) or an unscheduled offense under the Act. The second power, s. 11, allowed the arrest of suspected "terrorists." Since s. 11 was designed to facilitate internment, this provision allowed police to detain suspects for three days to photograph and fingerprint them.[51] In this way, s. 11 allowed arrest for questioning (Hogan and Walker 1989). Additionally, it is important to point out that s. 11 did not have the requirement that the suspicion be "reasonable" (Walker 1985, 146). The constable need only in his own mind suspect that the person was a terrorist, and it was based upon "honest suspicion." Section 11 proved controversial from its inception, but due to the vagueness of the "honest suspicion" criteria, it was quite popular with the police. The power was abolished in 1987, but not before being supplanted by a third power (Hogan and Walker 1989, 48).

This third power was s. 12 of the PTA 1984 (s. 14(1) of PTA 1989), which was developed for the benefit of British police in the battle against mainland terrorism related to Northern Ireland. This section of the PTA, according to Hain, did the most to strengthen the powers of the police (Hain 1979, 130-1). Although there are similarities between the two, there are also substantial differences, which reveal the true nature of s. 12. First, s. 11 necessitated an "active" involvement in terrorism, whereas s. 12 accepts a "passive" involvement that could be remote from any violence. Next, the "honest suspicion" of s. 11 is replaced with what the government argued was a more objective standard described as "reasonable grounds for suspecting." The "reasonable" criteria

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51 NI(EP)A s. 11 was followed immediately by the s. 12 power to detain terrorists without trial. Section 12 (detention without trial) was not renewed by Parliament in 1980 (*Hansard* H.C. 5s, 989:434). It however, remains on the books and can be revived by the Secretary of State at any moment even without Parliamentary approval Harvey, R. (1981). Diplock and the Assault on Civil Liberties: Time to Repeal Northern Ireland's Emergency Legislation. London, Haldane Society of Socialist Lawyers.

relates to evidence that would "influence a reasonable person" (Walker 1992). Finally, s. 12 allows for a 48-hour detention period with up to an additional five days with permission from of the Secretary of State (Scorer 1976, 23). This goes far beyond the 72 hour maximum of the s. 11 of the NI(EP)A (Hogan and Walker 1989, 48) and has caused a great deal of consternation among civil libertarians.

There were several concerns expressed by the civil rights community about the arrest powers found in various installments of the NI(EP)A and PTA. These concerns range from the powers being used mainly for low-level intelligence gathering to the possibility that these 'extraordinary powers' would become normalized and be integrated into common criminal law. In addition, as has been pointed out by the NCCL, the emergency legislation will abandon traditional safeguards by giving the police powers that cannot be effectively challenged in the courts[52] (NCCL 1975, 2).

1). Legalized Intelligence Gathering

One of the earliest criticisms was that the extended powers of arrest for questioning would likely encourage the police to indulge in "fishing expeditions" (arrest and interrogation of unlikely suspects) in order to gather low-level intelligence (Scorer 1976, 23). This concern was reinforced when Lord Chief Justice Lowry, commenting on a case[53], said:

> "No specific crime need be suspected in order to ground a proper arrest under section [PTA 1989 s. 14(1); previously s. 12 of PTA 1984]…No charge may follow at all; thus an arrest is not necessarily…the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated…Rather it is usually the first step in the investigation of the suspected person's involvement in terrorism" (Walker 1992, 161).

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52 That all suspects are protected by due process of law, that people are considered innocent until proven guilty, and innocent people are not wrongfully convicted.

53 *R v. Officer in charge of Police Office, Castlerreagh, ex parte Lynch*

Other civil libertarians worried that the power would be extended based upon no more suspicion than a person's residence in a particular area (Walsh 1981, 7-8). Finally, others warned that the availability of large numbers of people who could be arrested, nearly at will, would create an obvious risk that some could be ill-treated or abused in the interrogation process (Boyle, Hadden et al. 1980, 27).

2). The Normalization of the Extraordinary

At the introduction of emergency legislation, which was considered "temporary" and expected to shortly disappear, civil libertarians were very concerned that the temporary would become permanent (Walsh 1982, 12). Garry Fitt, in the renewal debate of 1983, articulated this point well when he stated, "It is my impression that once a government [has] these powers in their control they are very reluctant to give them up" (*Hansard* H.C. 6s, 1:382). The civil libertarians' concern over normalization of the emergency law goes beyond the fear of constant renewal of "temporary legislation" and the fear that the government would not want to give up these extraordinary powers; the concern was also that over time there would be a confluence between emergency legislation and normal criminal codes (NCCL 1975, 2; Hillyard 1983, 58; Hillyard 1993, 263).

Over time there would be a tendency to use the stronger, more flexible anti-terrorism powers to arrest common criminals and, quite possibly, to harass subject populations. Civil liberty advocates point to the use of non-emergency police powers to harass individuals in inner city neighborhoods (Walsh 1983, 22). Walsh goes on to argue that the significant and potent weapon of arrest powers without a need to "suspect any particular offense" would be in a police arsenal (Walsh 1983, 22-3). The ability of the

state to arrest, detain, and question an individual without suspicion that an actual crime has been committed is very dangerous to the continued freedom of individuals. Additionally, once a person has been arrested and his name is added to the police records, it can be used in the future as grounds for suspicion and to justify re-arresting the person (Scorer, Spencer et al. 1985, 49). In short, one arrest produces the justification for the next arrest, which produces the justification for further arrest and interrogation.

3). Increased Intelligence, But Losing the War for the Hearts and Minds

A final concern related to arrest powers was that they would have a negative effect on the communities in which they are used. Some in the civil liberties movement fear that police will choose "suspects" to arrest more for the nature of their politics than for any connection with political violence (Scorer and Hewitt 1981, 39-45). This could be especially true in Republican communities in Northern Ireland and Irish sections of Great Britain. The NCCL argued that the introduction of these police powers will not aid in the detection of terrorists, because any information gained through "screening oriented" arrests will be given grudgingly, and no "valuable" information will be volunteered (NCCL 1975, 3). In fact, a community that believes the police are treated it unjustly will be more sympathetic, and possibly more supportive, of the terrorists. Therefore, use of these police powers will be counter-productive to the overall security strategy.

4). Arrest Powers: A Summary

Civil libertarians argue strongly that arrests which are difficult to challenge in court and primarily for low-level intelligence gathering are not appropriate and will alienate the population on which they are used. It is simply not acceptable to deprive someone of his liberty simply to obtain information of debatable value from him if he is

not suspected of any offense, even if such information could lead to the arrest of terrorists (Scorer, Spencer et al. 1985, 47). In addition, these powers represent a fundamental shift within the criminal justice system from policing offenses to policing people; a shift from crime to status (Hillyard 1983, 59). Finally, the arrest of individuals puts them in a very vulnerable situation and can lead to other civil rights abuses while in detention.

B). Detention Powers Under Emergency Legislation

Detention powers, at port of entry, whether exercised by the police, the army, or customs officials are unacceptable to civil liberties groups as provided under various sections of the emergency legislation. The first time detention without trial was attempted in Northern Ireland was with internment in 1916 and more recently in 1971; it turned out to be a security and political disaster that one official report holds responsible for greatly increasing IRA support (Gardiner 1975). While Lord Diplock was finishing his report in 1972, the Government introduced as an *interim* measure, the Detention of Terrorists (Northern Ireland) Order 1972, which substituted the name "detention" for "internment" but was widely considered as being "internment under another name" (Twining 1973, 410). Later "internment lite" was introduced through various sections of the NI(EP)A and PTA.

Hogan, commenting on s. 18(1) of the NI(EP)A 1978 (as amended), said that the power is exceedingly broad in many respects. Most striking is the absence of *any* requirement of suspicion. Although lacuna is not supposed to permit harassment or personal vendettas to be pursued with impunity, it does mean that the power can be exercised on the flimsiest of excuses or, indeed, randomly (Hogan and Walker 1989, 58). PTA 1973 (as amended up to PTA 1989) also allowed for extended police custody.

Section 14(1) allowed a constable to "arrest without warrant a person whom he has reasonable grounds" to suspect is involved in terrorism (§ (a) (b)) or is subject to an exclusion order (§ c). Upon arrest a person can be detained for up to 48 hours (s. 14 (4)) and with the Secretary of State's approval, the detention can be extended to a period not to extend five additional days for a total of seven (s. 14 (5)). Under normal legislation, the Police and Criminal Evident Order 1989 (PACE), a suspect cannot be held longer than four days. Under the PTA, the detainee is denied any form of due process in considering whether an extension should be granted (Committee 1995, 39).

The PTA allows the Secretary of State to confer on examining officers (police, immigration officers, some Customs and Excise officers) powers of detention. Under these powers, officers can detain anyone entering or leaving Great Britain (Scorer, Spencer et al. 1985, 35). Unlike arrest inland, officials do not need to have any suspicion at all that the person is involved in terrorism. The individual can be detained for up to 24 hours. This detention power is to confirm identification and see if they are wanted for any other reasons.

The NI(EP)A has additional powers conferred to the armed forces. An on-duty member of the British military may arrest without warrant, and detain for up to four hours a person whom he suspects of committing, having committed or being about to commit any offense as defined in the Act (s. 14 (1) see further Harvey 1981, 81). Additionally, soldiers are given the authority to stop and question any person as to his identity and knowledge of terrorist incidents (Hillyard 1983, 40). The four-hour detention allows the military to confirm identity, subject the individual to limited questioning, and, if necessary, turn the suspect over to the RUC for re-arrest.

Civil liberties organizations see three main categories of problems with detention powers. First, they violate due process since the detainee is not allowed a hearing, nor is the power vested in an independent judicial officer (Walker 1992, 165). Further, no criteria are specified for the grant of an application for detention extension, though a list provided by Shackleton is considered relevant in practice (see Shackleton 1978, 59,60, 72; Jellicoe 1983, 59, 60). Second, the time spent in custody (up to seven days) combined with official suspicion of terrorist involvement can lead the arresting officers to pressure the detainee for information. Scorer stated early on that prolonged detention would mean little without disregarding the Judges Rules on the treatment of incarcerated individuals (1976, 26).[54] These high-pressure tactics can easily cross over to abuse, torture, or inhuman treatment. Professor Graham Zellick, in a letter published in *The Times*, (11/28/74) states:

> "Our ordinary system of police investigation and interrogation is unsuited to a system in which an individual is being detained in the police station for a week. There is no magisterial supervision, no tape recording, no right to a lawyer. The memory of interrogation techniques employed by the security forces in Ulster is still too fresh for there to be no misgivings as to *what may happen to a suspect kept incommunicado in a police cell*" (emphasis added cited in NCCL 1975, 32).

Third, 'successful' interrogations can lead to the potential for confession made under duress solely to end the questioning i.e., false confessions (Baker 1984, par. 276; Bonner 1985, 150; Scorer, Spencer et al. 1985, 49). Put simply, detention powers found in the emergency legislation could lead to people being coerced into making false confessions for numerous reasons.

In summary, civil liberties groups contend the detention powers found in both the NI(EP)A and the PTA are undemocratic and will lead to widespread abuses. The

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54 See Scorer, C. (1976). The Prevention of Terrorism Acts 1974 and 1976. London, NCCL. for more on Judges Rules.

orientation of the detention powers is to encourage extensive police incarcerations and conversely, deny people their fundamental democratic right to freedom from arbitrary detention. As put by Ewing and Gearty, "This is British Law's black hole for civil liberties, and it is one into which hapless suspects may be quite lawfully sucked" (Ewing and Gearty 1990, 223-4). MP Fitt put it this way in discussing the detention powers: "If the security forces cannot get the accused person one way they will certainly get him the other way" (*Hansard* H.C. 5s, 855:329). Finally, detention powers could lead to unlawful treatment of detainees, false confessions, and therefore potential miscarriages of justice.

V Diplock Courts[55]

Jury-less courts, which were recommended by a commission chaired by Lord Justice Diplock were given the name Diplock Courts (1972). The recommendation of jury-less courts, along with a number of other changes in the judicial landscape, were introduced through the NI(EP)A 1973. The proroguing of Stormont had created a three-way civil war between the IRA, Loyalist paramilitaries and the British security forces. In this deteriorating security and political environment, the legal system became increasingly ineffectual[56] (Carlton 1981). The Diplock Commission was appointed to consider how to deal with the legal repercussions of an area which, according to one Irish scholar, lacked political consensus (Rose 1971; Rose 1976).

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55 For background see chapter three of this project; and for more on the Diplock Courts see Korff, D. (1984). The Diplock Courts in Northern Ireland: A Fair Trial? Utrecht, Netherlands, Netherlands Institute of Human Rights, Greer, S. C. and A. White (1986). Abolishing the Diplock Courts: The Case for Restoring Jury Trials to Scheduled Offenses in Northern Ireland. London, The Cobden Trust.

56 Father Dennis Faul, one of the NICRA's legal experts, concluded: "Our people are afraid of the Courts: they believe the judicial system as it operates in the blatantly sectarian conditions of life here is loaded against them" (*Irish Times*, December 2, 1969).

The civil liberties community has made numerous strenuous objections to the Diplock Courts: the use of a single judge without a jury, introduction of scheduled offenses, modified rules of evidence and lowered standards of admission for confessions. MP Arthur Davidson, quoting Blackstone, cautioned that:

> "Inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution and that, though begun in trifles, the precedent may gradually increase and spread to the *utter disuse of juries in questions of the most momentous concern*" (original emphasis *Hansard* H.C. 5s, 855:312-314).

The civil liberties concerns over what Hillyard calls "radical modification of ordinary criminal process" are seen below (1983, 48).

A). "Good Enough for Northern Ireland"

The first concern relates to the Diplock process and the paucity of time and attention given the complicated problem under consideration. Twining has described the entire Diplock Report as being "unnecessarily hurried" (Twining 1973, 417). The Diplock commission's appointed, by a Northern Ireland Office (NIO) statement September 22, 1972; held their first meeting on October 20, and less than two months later Secretary of State Whitelaw presented its finding and recommendations to Parliament. With scarcely any amendments or changes it received Royal Assent as NI(EP)A 1973 in August (Harvey 1981, 9). The Diplock commission did all its work and the government created what would become NI(EP)A 1973 in approximately two months. In a related manner, the amount of space (measured in paragraphs) in the Diplock Report dedicated to discussing the jury question is quite small. The Report

dedicates only seven paragraphs out of the total of 119 (less than six percent) to this very important issue.[57]

B). Scheduled Offenses: Here Today … There Tomorrow

One of the recommendations made by the Diplock Commission was that certain crimes (those listed in a schedule, i.e., appendix to the Act) are to be labeled as "scheduled offenses."[58] These scheduled offenses all have different modes of bail and conduct of trial. The use of scheduled offenses seriously undermines elements of due process, changes rules of evidence and burden of proof requirements along with negating other civil liberties. Additionally, as has been demonstrated by Boyle et al., the list of scheduled offenses has expanded (1980, 58).

Furthermore, some in Parliament worried that the introduction of these types of powers in Northern Ireland would lead to their introduction in Great Britain. One MP put it this way:

> "it is the first step which is being taken to erode our rights and freedom under the law. These are being taken away by the bill. It is a much easier step to move legislation from Northern Ireland to the rest of the United Kingdom than to bring in this kind of legislation directly here" (*Hansard* H.C. 5s, 855:307).

If the state of emergency in Northern Ireland could justify such affronts to civil liberties, then how could Great Britain (if ever in similar circumstances) be able to deal with the 'temporary' abridgment of traditional freedoms? This is especially possible if a

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57 The same 'level of dedication' was seen by Gardiner (chair of the first review of the Diplock system) who dealt with the entire matter in less that seven percent of the paragraphs found in the Report Greer, S. C. and A. White (1986). Abolishing the Diplock Courts: The Case for Restoring Jury Trials to Scheduled Offenses in Northern Ireland. London, The Cobden Trust.

58 Included in the schedule are murder, manslaughter, serious offenses against the person, arson, malicious damage, riot, offenses under the Firearms Act (NI) 1969 and the Explosive Substances Act 1883, robbery and aggravated burglary, intimidation, membership of proscribed organization and collecting information likely to be of use to terrorists. See current schedule attached to most recent Act.

convincing argument can be made that the powers in Northern Ireland were beneficial and had negligible affects on the democratic nature of Ulster.

Many individuals worried about the fact that ordinary offenses (i.e., those which are not connected with the current civil unrest and which would normally be tried by jury) have fallen into the Diplock system (Greer and White 1988, 57). This potential problem of listing crimes (schedule offenses) without regard to the motivation or association of the person committing the crime was a problem predicted by the Labour opposition in 1973 (*Hansard* H.C. 5s, Standing Committee B 2:62, 1972-3).

C). Trial By Jury: "The Lamp that Shows that Freedom Lives"

Civil libertarians examining the Diplock recommendations worried that a court containing only a single judge would be more likely to convict than a jury of peers. This thesis is known in the literature as "case hardening." According to Baker, case hardening means that "a judge has heard it all before; therefore he does not believe the accused; therefore he is or becomes prosecution-minded or more prosecution-minded" (Baker 1984, par. 122). According to this thesis, the controversial nature of the evidence used and the fact that a suspect's fate depends upon the judgment, perception, and attitude of one individual greatly increases the risk of an innocent person being convicted (Bonner 1985, 146).

Given the nature of and background to the offenses being tried in the Diplock courts, it is inevitable that one trial will be very similar to the next. The focus of the trial will be the content of the crucial evidence (most often a confession) which was procured through some form of interrogation. The police, according to Dermot Walsh, have a very distinct advantage, as they are regular actors in this process while the accused normally

experience it only once. For the judge, the offenses charged, and the evidence and the defense offered will bear a boring, repetitive similarity. It is to be expected that the judge will tend to favor the police version as he becomes increasingly skeptical of the 'same old' defense being offered by one accused after another; particularly since the police have become increasingly professional in giving evidence of events in the interrogation room (Walsh 1983, 97).

The bias towards the police in these trials is very dangerous, because in addition to leading to case hardening it also eliminates citizens from the process. As Lord Justice Devlin put it in his book, *Trial by Jury*:

> "The one object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will and the next to overthrow or diminish Trial by Jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that Trial by Jury is more than an instrument of justice and more than one wheel of the constitution. It is the lamp that shows that freedom lives" (cited in *Hansard* H.C. 5s, 855:305).

In short, the ending of trial by jury is the first step towards destruction of citizen participation in the judicial system and quite possibly the democratic structure of the society.

D). Changing Rules of Evidence

One of the hallmarks of a just legal system is the concept of innocence until proven guilty (Scorer 1976, 2). This is one of the areas in which the Diplock system (via the NI(EP)A 1978 s. 9(1)) makes great inroads into cherished judicial safeguards and civil liberties. In cases where a person is charged with possessing firearms, ammunition, explosives and/or petrol bombs, the prosecution no longer needs to prove beyond a reasonable doubt that the suspect is guilty. The suspect is guilty if he cannot prove he "did not at that time know of its presence in the premises in question, or, if he did know,

that he had no control over it" (Bonner 1985, 138). The prosecution must still prove that the suspect and the item were in the same premises.

MP Sam Silkin, not known as one of Britain's leading civil libertarians, nevertheless hit the mark accurately in expressing the concern of many, when he protested:

> "How can we justify a system in which the more serious the offense and the more catastrophic the penalty the lower the burden of proof and the lesser the safeguards for the things which related to it?" (*Hansard* H.C. 5s, 869:737).

The lowering of standards on admissibility of certain types of evidence in Diplock Courts was also found in an even more dangerous attack on traditional conceptions of civil liberties--that of admissibility of confessions.

E). Admissibility of Confessions and 'How You Get Them'

For confessions to be admissible in court, most common laws require the information obtained in confessions be "voluntary" in the sense that it had not been obtained from the subject by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression (Judges Rules 1964 cited in Greer and White 1986, 16). The NI(EP)A altered this rule for Northern Ireland by placing a burden on an accused who wishes to challenge the admissibility of a confession in a Diplock court. Through s.8(2) of the 1978 Act the defense must adduce *prima facie* evidence "that the accused was subjected to torture or to inhumane or degrading treatment in order to induce him to make the statement."

Civil libertarians fear that the relaxation in scheduled offenses of what Diplock called "technical" rules, practices and judicial discretion as to the admissibility of confessions, so as to render admissible the products of legitimate extended interrogations (Diplock 1972, par. 87-92), will lead to the use of physical and psychological

mistreatment which can increase the likelihood of false convictions. It is unclear how much physical mistreatment and psychological pressure would be permitted in these situations (Greer 1980, 215). It is certain, however, that ambiguity, as is found in the debates and case law surrounding interrogation techniques, will produce inappropriate behavior. Even the Bennett Report, which gave recommendations designed to prevent physical abuse during interrogation, did little to curtail the extreme psychological pressures at the heart of the interrogation process (Hillyard 1983, 50).

F). Summary

In summary, civil liberties groups argue that the introduction to Northern Ireland of a number of Diplock recommendations through various installments of the NI(EP)A will lead to the curtailment of civil liberties. The Act itself, described as "temporary," will probably not remain so (Walsh 1982, 7). In addition, the changes in rules about admissibility of confessions and evidence will lead to 'case hardening' or, as put by one scholar, the new court system will be "conviction oriented" (Twining 1973, 411). There is also the likelihood that a judicial system that forgets the application of a "popular instead of a professional standard" (Devlin 1981, 176) will lose the trust of the society it is meant to serve (Greer and White 1988, 57). MP Bernadette Devlin gets to the core of this view in her comments in the House of Commons, in which she said;

> "It is very strange to hear from the Government of this country, the executive, new phrases for old ideas. Suddenly, the legal traditions of this country become mere technicalities. Suddenly, it is in the interest of the law and the judicial process to talk about the protection of judges and the securing of convictions, when…it is the protection of society and of the individual with which we should be concerned" (*Hansard* H.C. 5s, 855:305).

Finally, as Twining warns, events in Northern Ireland (i.e., the Diplock Report and its recommendations) may give a foretaste of the kind of approach to emergency powers

which might be expected in Britain should an acute security situation develop in the years ahead (1973, 407).

VI Supergrasses

The Supergrass system evolved in the 1980s out of the security apparatus policy of increased intelligence gathering, combined with a focus on trial convictions through confessions obtained in interrogations (Hillyard and Percy-Smith 1984, 341). The use of this type of "accomplice evidence" has a long history of use in England[59] (Greer and White 1986, 18). The Bennett Report (1979), according to Greer, made the extraction of these prized confessions much more difficult (1988, 85). Therefore, the policy of securing convictions through confessions alone lost its viability and seems to have prompted the security forces to concentrate their efforts on enlisting the services of informers (Walsh 1983, 68). This policy, or "security strategy" as some call it (although not the government), seems to be a systematic way of getting suspected terrorists out of circulation (Hadden 1983, 9; McGrory 1984, 12-4; Jennings and Greer 1986, 8).

Opponents of the supergrass system have several grave concerns related to the use of what the government has described as "converted terrorists."[60] First, there is the problem of the reliability of testimony given by supergrasses. The reliability relates to police involvement with the recruitment and possible coaching of witnesses, the incentives for witnesses to lie (e.g., personal gain, revenge on a former colleague, etc.),

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59 Giving evidence to the police against accomplices is the basis of one of the most commonly used game theory techniques--The Prisoner's Dilemma.

60 The government's use of the term "converted terrorist" is an attempt to give some propaganda value, but only one person (Kevin McGrady) was truly repentant, because of a religious conversion, and could be considered a converted terrorist Hillyard, P. and J. Percy-Smith (1984). "Converting Terrorist: The Use of Supergrasses in Northern Ireland." Journal of Law and Society **11**(3): 335-355.

and the developing literature on the unreliability of witness testimony. Second, there is the chance, because of jury-less trials and the use of uncorroborated witness testimony, that innocent people will be convicted. Finally, there could be a considerable effect on the public's confidence in the judicial system. This is especially important if particularly violent criminals receive substantially reduced sentences (or complete amnesty) or if the trials begin to take on the character of "show trials." For these reasons the civil liberties community has always been against the use of supergrasses in Northern Ireland.

A). Reliability of Testimony Concerns

The concerns related to the reliability of testimony fall into three main categories. The first relates to the overall reliability of witness testimony as found in the psychological research. The second deals with the motives for individuals to turn Queen's evidence and the incentives to lie to the security services. The final concern is related to the involvement of the police in recruiting, encouraging, supporting, and potentially coaching the supergrasses.

1). Witness Testimony

The literature is replete with research demonstrating the unreliability of witnesses. But since witnesses are very important to the criminal justice system, attempts are made to increase the verisimilitude of their testimony. The Diplock Courts have become increasingly willing to convict on uncorroborated (or weakly corroborated) witness testimony. As will be demonstrated, there is an abundance of psychological research demonstrating the circumspect nature with which supergrass testimony should be considered. As Hillyard points out, in arguing against the use of supergrasses, the witness may be honest yet simply incorrect in his testimony (1984, 348).

There are a number of factors that affect a witness' ability to accurately recall information. One of the most important is time. As the interval between the time of the information's initial acquisition and the time of its attempted retrieval increases, the information becomes less available and reliable (Loftus and Loftus). Another element that decreases the reliability of witness testimony is when initial information acquisition is induced from stressful or violent situations (Ellis 1984; Cutler, Penrod et al. 1987; Egeth 1994). Often the events supergrasses are concerned with--murders, robberies, terrorist attacks, and so forth, would be considered stressful.

Related to these variables is what Loftus and Loftus call "post-perceptual" information. If a witness is introduced to new information in certain ways it can replace information that is already in the person's memory (Loftus and Loftus). The post-perceptual problem can be accentuated through the orchestrated introduction of misleading information that would fit into a previously existing schema (List 1986; Weingardt, Loftus et al. 1995). Other psychologists have demonstrated that misleading post-perceptual information introduced during stress could easily be blended with reality to create false memories (Lindsay 1990). There is a voluminous set of literature related to the reliability of eyewitness testimony in times of stress that calls into question the use of uncorroborated supergrasses testimony. When combined with other variables, the reliability of a supergrass is exceedingly suspect. Convictions solely based on a supergrass' testimony are therefore dubious at best, and at most a terrible violation of an individual's liberty.

2). Motivation of Supergrass Testimony

What makes a lifelong terrorist who may have killed, maimed and/or robbed people for years want to turn Queen's evidence and testify against colleagues and the cause for which he had sacrificed so much? For most supergrasses the general answer is clear--self-interest. The most common of these self-interested motives, according to Gifford, is to avoid a long prison sentence (Gifford 1984, 25). Suspects who become supergrasses realize they are facing the loss of their freedom for very long periods of time. Additionally, supergrass testimony should be suspected because the testimony could be in exchange for bail, lenient sentencing, or for money and protection for themselves and their family (cited in Bonner 1988, 34). Beyond the advantage gained by giving accomplice evidence, there is the chance of fabrication in order to settle old scores (Bonner 1988, 34), or possibly get back at someone the suspect believes contributed to his present predicament (Gifford 1984, 26). All of this means the judicial system's use of supergrasses must be very circumspect and require substantial corroboration.

In sum, because suspects who become supergrasses are not upstanding citizens, there is reason to suspect they are giving evidence for something other than their ethical beliefs. Hillyard states that this problem "raises far-reaching issues about the whole strategy" (1984, 343). The testimony of these dishonest individuals is circumspect alone, but in combination with their criminal past, the chance to reduce or avoid a prolonged prison sentence, or seek revenge against an adversary, one easily finds ample reasons to doubt supergrasses and their evidence (Bonner 1985, 144). The reliance upon supergrasses could have substantial repercussions on the judicial process. The consequences to the criminal justice system could be greater if the police took an active role in creating supergrasses.

3). Creating a Supergrass: Possible Police Recruitment

When a person is in police custody he is usually psychologically vulnerable. The person is cut off from family, friends and support networks. He is afraid, alone, and facing the possibility of a long prison sentence. If the suspect turns Queen's evidence, he has a chance to substantially shorten his incarceration, but only if he provides a substantial amount of good information leading to convictions in court. Therefore, a strong incentive is present for the supergrass to provide names to police. In addition, a successful supergrass can bring a great deal of official praise upon the police department. Therefore, there is a corresponding motivation on the part of the police to "find volunteer supergrasses." This leads the civil liberties community to fear that police inducements might influence suspects to lie. The pressure to demonstrate progress, through courtroom convictions, could lead to the police playing an aggressive role in facilitating supergrasses.

Once a suspect turns supergrass, there is always the possibility that he will recant prior to the trial. The police must therefore be cautious with the supergrass during the time he remains in police custody. During this time the supergrass is totally dependent upon the police, both physically and emotionally (Gifford 1984, 27). This absolute dependence decreases the supergrass' ability to resist police requests. It is during this time that the greatest potential for planned or unplanned witness tampering, as discussed in the preceding section, can occur. As Bonner has suggested, "there must be a strong temptation to add names to [the supergrasses'] list at police behest" (Bonner 1985, 144).

In sum, the pressure on police to produce convictions can lead to the police playing an inappropriately active role in the recruitment and retention of supergrasses.

The problem with the police using inducements to create supergrasses is that it might influence a supergrass to lie in order to maximize his value to the police.

B). Increased Possibility of Convicting the Innocent

Civil libertarians worry that relaxed rules of evidence (uncorroborated eyewitness testimony) combined with the unique nature of the Diplock system (single judge, no jury) greatly increase the potential for innocent people to be convicted (Hillyard and Percy-Smith 1984, 351; Bonner 1985, 144-5; Bonner 1988, 34).

The first problem is in the use of uncorroborated evidence to convict suspects. The law has traditionally attempted to deal with the problems of uncorroborated accomplice evidence by requiring the trial judge to warn the arbiter of fact (normally a skeptical jury, but in Northern Ireland the judge himself) of the dangers of convicting on uncorroborated testimony (Bonner 1985, 144-5). If the judge follows protocol he must participate in what has been described as a schizophrenic argument on the basis of a self-inflicted warning (Hillyard and Percy-Smith 1984, 350). Lord Gifford has argued the problem leads to an "unreal mental operation" (Gifford 1984, par. 10). In short, the judge must warn *himself* of the dangers of uncorroborated testimony and weigh the dangers involved. Although judges try their utmost to function as "reasonable juries," it is the position of civil liberties groups that Diplock courts will have a higher percentage of convictions based solely on uncorroborated witness testimony than will a jury trial (Greer and White 1986, 19).

In sum, due to the reliance upon a single judge in Diplock courts, a defendant is at more risk than would be the case with a jury (Greer 1995, 116). As pointed out by Greer,

the evidence of a supergrass (who has turned state's evidence) should not be assessed by people who are employed by the state (1986, 19).

C). Public Loss of Confidence in the Judicial System

The concerns raised above, if realized, could substantially damage the already frail support the Northern Irish court system possesses (Greer 1983; Hadden 1983; Holland 1983; Workers' 1984). Additionally, a large number of trials based upon supergrasses and sponsored by a state security apparatus known for their use of degrading and inhumane forms of interrogation to get detainees to implicate others may leave the government open to allegations of creating Stalinist-like "show trials"[61] (Greer 1995, 117). Finally, the prospects of citizens seeing a supergrass being granted immunity from prosecution for crimes which may be as serious as, or more serious, than those of the persons they accuse is "morally objectionable" (Walsh 1983, 91).

In summary, the civil liberties community has expressed a number of reservations concerning the use of supergrasses in Diplcock courts as a means to alleviate the political violence. One noted scholar said that the supergrass strategy, like the prior security based strategies, is unlikely to have a marked effect on terrorism (Hillyard and Percy-Smith 1984, 353).

Supergrass trials have the potential of putting innocent people behind bars through the use of uncorroborated evidence, which is highly suspect in its truthfulness. Even if a person is guilty, due process demands that he receive a fair trial, absent of legal shortcuts intended to aid the conviction process. Even if the 'conviction rate' is increased

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61 For a fictionalized account of the process of taking detainees and turning them to give accomplice evidence at Stalinist show trials see Koestler, A. (1941). Darkness at Noon. New York, Macmillan.

through supergrass testimony, the negative effects and subsequent loss of public confidence in the apparatus of the state will eventually lead to increased violence.

VI Terrorism and the Media: Capping the Lens

The British media has been subjected to governmental restrictions, some legal, and others extra-legal. The legal controls are supplied primarily by section 21 of the NI(EP)A 1978 and section 11 of the PTA 1976 (s. 18 of the 1989 Act). Their effect is that arrangements to interview, or to witness the activities of, paramilitary volunteers may be an offense, unless law enforcement personnel are informed in advance. Subsequent failure to identify journalistic contacts may also be in contempt of court (see generally Walker 1992, 130-44). Additionally, political pressure has resulted in the adoption of editorial policies which display sympathy for the official spokesman and explanations rather than impartiality between them and those of the paramilitaries (Hogan and Walker 1989, 158). These policies have led to the development of a regime of direct political pressure and internal censorship (Weir 1994). These were not the only restrictions related to free expression and the Troubles in Northern Ireland.

In response to a continued IRA bombing campaign on the mainland, then Home Secretary Douglas Hurd announced, on October 19, 1988, that he had issued instructions to the two broadcasting authorities, the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA), requiring them to deny access to the airwaves to specific organizations in Northern Ireland[62] (*Hansard* H.C. 6s, 138:893). The directive to the BBC was issued under clause 13(4) of the BBC's Licenses and Agreement, and

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62 The British broadcasting ban was lifted on September 16, 1994 by then PM John Major Graham, I. and D. Henderson (1994). Major Lifts IRA Gag and Promises Ulster Referendum. Press Association Newsfile. London**:** electronic version.

that to the IBA under section 29(3) of the Broadcasting Act 1981 (Magrath 1991, 19). The text of the notices required them not to broadcast material, which consisted of or included:

> "1. …any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where--
>
> (a) the person speaking the words represents or purports to represent an organization specified in paragraph 2 below, or
> the words support or solicit or invite support for such an organization,
> other than any matter specified in paragraph 3 below.
>
> 2. The organizations referred to in paragraph 1 above are--
>
> (a) any organization which is for the time being a proscribed organization for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and
> (b) Sinn Féin, Republican Sinn Féin and the Ulster Defense Association (Thompson 1989, 528-9).[63]

Both the BBC and the IBA were given some advance indication of the notices and they were able to produce guidelines for their staffs.

Opponents of the broadcast ban were quick to attack the new administrative directive. Some argued that it was a propaganda victory for the IRA and another example of a policy rushed into with little thought of the long-term implications (*Hansard* H.C. 6s, 138:895). "How many," asked MP Seamus Mallon, "will lay down their guns because they cannot watch Gerry Adams on Television?" (*Hansard* H.C. 6s, 138:897). His colleague MP Eddie McGrady said, "Sinn Féin should be kept fully in the public eye where their hypocrisy can be exposed" (Article19 1989, 28). Another MP, Paddy Ashdown, described the ban as "ill-conceived, ill-judged and almost certainly to be counter-productive" (Owens and Burns 1994, 7). In addition to being 'ill-conceived,' the

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63 The directives exclude the spoken words of matter in the course of proceedings in Parliament and in support of a candidate at a parliamentary, European Parliamentary or local elections pending that election. Additionally, the ban does not apply to purely fictional works Krotoszynski, R. J. (1994). "*Brind & Rust v. Sullivan*: Free Speech and the Limits of A Written Constitution." Florida State University Law Review **22**(1): 2-34.

government's justification, as one scholar has argued, was not very clearly articulated (Gearty 1994, 159).

The ban was also criticized on the grounds that its authority is "extremely wide," catching not only interviews with Sinn Féin or IRA representatives, but the reporting by journalists of news information about the IRA or Sinn Féin (Gearty 1994, 159). According to many critics, the ban is intended to make it possible to forget that Sinn Féin is popular in certain parts of Northern Ireland. MP Len Livingstone pointed out that the IRA has sustained itself until the 1950s with no access whatsoever to television, so this ban was unlikely to make a real difference (*Hansard* H.C. 6s, 138:901). But Sinn Féin is a legal political group in Northern Ireland, which represents tens of thousands of British citizens at various levels of government[64] (Graham and Henderson 1994). In the words of one senior television executive, "to permit a party to stand for a democratic election and then outlaw its access to the media puts a dangerous strain on the laws governing broadcasting which were never designed for such a purpose (Forgan 1988, 10; cited in Zellick 1990, 779). According to one MP, the ban is the worst of both worlds and a "dangerous precedent;" it leaves Sinn Féin a legal organization while denying it the right of free expression (*Hansard* H.C. 6s, 138:895). Cyril Townsend, a Conservative MP who was deeply troubled by his party's initiation of the ban, said "we are cold-bloodedly discriminating against a political party in part of our kingdom…this is a measure of censorship" (Article19 1989, 29). In short, it will interfere with the political process in the United Kingdom.

64 It should be noted that during part of the period the ban was in force Gerry Adams was an elected Minister of Parliament.

Coincidentally, the ban was seen in the same light as proscription. As MP Roy Hattersley put it, the proposal was:

> "trivial, worthless and almost certainly counter-productive in the real fight against terrorism … [the ban] … is intended to create the illusion, rather than the reality, of activity. It will make the Government look simultaneously repressive and ridiculous" (*Hansard* H.C. 6s, 138:894).

Accordingly, detractors argue that the implementation of the ban would be of little concrete value and would be more symbolic than substantial. To the civil liberties community, it was one more example of the British Government usurping liberties for the mere appearance of fighting terrorism.

Finally, while some British newspapers did support the ban, most expressed opposition to it.[65] The *Daily Telegraph* opposed it on four grounds: 1) ineffectiveness; 2) the negative foreign reaction; 3) the precedent set by banning the appearances of members of a legal party; and 4) the preferred alternative strategy of "more effective action by the security forces and the proper consideration of whether Sinn Féin itself should be banned." The *Today* called the ban "futile," "muddled" and a victory for the IRA, a view shared by *The Observer* and the *Mail on Sunday*, the latter adding that it was "wrong in principle…misguided in practice." *The People* said it was "the tactic of the Eastern Bloc or South Africa, not of a civilised democracy"[66] (Article19 1989, 29).

In conclusion, civil libertarians strongly opposed the broadcasting ban as violating one of the most cherished and important rights--freedom of expression. To the civil liberties community, the ban was of little or no value in terms of fighting terrorism, was a huge propaganda victory for the IRA, and, most importantly, would restrict the freedom

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65 The overall score among the major British national newspapers was six in support of the ban, ten against; in terms of circulation, 9.8 million in support, 12.6 million against.

66 Interestingly South African State President P.W. Botha gave the ban his total backing and made the point that the UK was no longer in a strong position to criticize the South African censorship measures (*The Guardian* October 22, 1988; *The Citizen*, Johannesburg, October 27, 1988).

of expression of a recognized political party. It was believed that the silencing of Sinn Féin was the primary goal of the ban. Finally, it was predicted that the extremely wide net encompassed by the ban would spread to other areas of speech that dealt with Government policy in Northern Ireland.

VII Conclusions

This chapter has argued that many of the powers found in the emergency legislation are violations of basic civil liberties. Introduction of emergency powers, through the recommendation of the Diplock report, passage of NI(EP)A 1973, and later the PTA 1974, in addition to a whole host of new powers given the state's security services, were legislated in response to the continuing campaigns of political violence associated with Northern Ireland. In the words of one civil liberties scholar, the Diplock Report treated a political matter as if it were mainly a technical legal problem (Twining 1973, 417). This policy of dealing with a violent political environment by increasing police powers and negating traditional judicial safeguards in order to maximize convictions is dangerous to the continuance of a healthy, functioning liberal democracy in the United Kingdom. While it may be possible to achieve an acceptable level of violence (whatever that might mean), ultimately the law cannot be used to solve what is in essence a political problem[67] (Hillyard and Percy-Smith 1984, 353).

The civil liberties community has argued that many of the new powers (proscription and exclusion the foremost) are based upon shallow justifications, are

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[67] MP Fitt argued at the second reading of NI(EP)A 1973 that he did "not believe that [the Bill] will contribute in any way to bringing peace to Northern Ireland, or to ending the violence there." In fact, he believed the opposite; he continued by saying that "[l]egislation of this type is counter-productive" (Hansard 5s, 855:327).

particularly arbitrary, and are violations of traditional personal freedoms. Other powers, such as the arrest, detention and questioning powers, are also violations of civil rights and are written in such a manner as to facilitate the possibility of widespread abuse. Although the civil liberties community understands fully the need to combat terrorism, it has argued that one does not combat terrorism effectively by twisting the course of justice (Gifford 1984, 34).

The powers created by the state have a negative effect on the role and place of the individual with society. Conor Gearty has argued that these emergency powers have "fundamentally transformed the relationship between the individual and the state" (1994, 153).

Finally, along with the many opportunities to abuse power demonstrated above, the most insidious potential effects of the introduction of special police powers through emergency legislation is that these powers will become the norm and be accepted and integrated into the general criminal code. This potentiality could negatively impact the liberty of everyone in the United Kingdom and lead to the erosion of popular support of the judicial system and the government that created it.

Chapter Five

Government Aspirations and the Implementation of Emergency Legislation

> "This new Bill [NI(EP)A 1973] which, by any standards, will give the security authorities ample power to deal with the terrorism which now exists" John E. Maginnis (*Hansard* H.C. 5s, 855:326).
>
> "The situation suggests its own answer. The House wants Blood" Tom Litterick (*Hansard* H.C. 5s, 882:672).
>
> "Would help to get rid of the I.R.A. cancer in society" (*New York Times*, December 21, 1972, 43).

I Introduction

This chapter chronicles the aspirations articulated by supporters of the emergency powers found in the various versions of the Northern Ireland (Emergency Provisions) Act (NI(EP)A) and the Prevention of Terrorism Act (PTA). These pieces of legislation were a direct result of developments in Great Britain related to the Troubles in Northern Ireland. They are part of an ever-evolving set of policies aimed at preventing terrorism related to Northern Ireland and maintaining a democratic society.

Immediately after the introduction of the military into Northern Ireland (August 1969), Catholics welcomed the intervention. Over time the military was seen to be working with the Protestant paramilitaries, thus leading to an increase in violence (Hillyard 1983, 36) and, in turn, the use of administrative internment (August 1971). The British government regularly professed its determination to stabilize Northern Ireland. Representatives of Her Majesty's government promised not to withdraw the army until "law and order [had] been restored" and all of Northern Ireland's citizens had been guaranteed "their equal rights and protection under the law" (Carlton 1977, 133). As it became more apparent that the strategy of military predominance and internment, based

partially upon the theories of military strategist Brigadier Kitson (1971), was a failure, Westminster examined alternative ways in which to deal with the emergency.

The principle development was the replacement of a security policy (executive internment and later detention) centralized in the executive authority of the Northern Ireland Office (NIO) under the Special Powers Act (SPA) with a new system of judicial determination developed by the Diplock Commission (1972). This was a strategy to criminalize and depoliticize the conflict. This policy of "normalization" through "criminalizing" the process was furthered by the enactment and implementation of the NI(EP)A 1973. The aim was to distance the executive from the day-to-day administration of the emergency powers in an attempt to depoliticize the nature of the British response in order to gain the confidence of Northern Ireland's minority community (Hillyard 1983, 38).

Support for the NI(EP)A was intended to give law enforcement personnel the legal resources needed to reduce terrorism in Northern Ireland. MP John E. Maginnis made this point during debate on NI(EP)A, when he stated the "new Bill [will], by any standard, […] give the security authorities ample power to deal with the terrorism which now exists."[68] He continued on, in what was to be a rather ironic statement, by saying "we must realise that if we do not win the fight against terrorism in Northern Ireland it will have to be fought again in this country" (*Hansard* H.C. 5s, 855:326). Interestingly, the degree of overstatement in Maginnis' first assertion is only matched by accuracy of his second prediction.

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68 Home Secretary Jenkins was not so optimistic. During the renewal debate (November 26, 1975), Jenkins introduced the Bill as "not a panacea, not as a promise of bringing an immediate or speedy end to the outrages … but as the right contribution which the Government and this house can made to the efforts of the police and of the public as a whole to resist and overcome the evil of terrorism" (*Hansard* 5s, 901:892).

The IRA's 1974 bombing campaign brought the Troubles home to the mainland in a way different from the 1972 bombing of Aldershot and produced a strong reaction on the part of government. The IRA bombing on October 5, in Guildford, and on November 21, in Birmingham, horrified the nation and led to the introduction of the PTA in November of 1974, but the Act should not be viewed solely as a response to those two bombings.

In February 1972, the car bombing of an army barracks at Aldershot, by the Official I.R.A., led to the death of seven civilians. The following year, the Provisionals initiated a more sustained campaign of violence where no fewer that eighty-six explosions resulted in one death and more than 380 injured. Even prior to the October Guildford bombing, there were ninety-nine further incidents and in November alone there were eleven attacks producing four dead and thirty-five injured (Walker 1992, 32). In total, in the eighteen months leading up to the introduction of the PTA, nearly 700 people were injured by I.R.A. bombs in Britain (Wilkinson 1986, 169).

As these campaigns of terror were being inflicted upon the British homeland, the Home Office, as early as 1973, began drawing up contingency plans, including a draft of the PTA (*Hansard* H.C. 6s 1:360). In this light, the legislation can correctly be seen as a government counter-measure to escalating political violence and "not a panic measure" (Wilkinson 1986, 169). What is seen as objectionable to some observers was not the state of preparedness, but the secrecy in which it was undertaken and the cynicism with which it was revealed only when the vigilance of Parliament was at its lowest ebb[69] (Walker 1992, 32). According to Walker, democracy surely requires more than

[69] Similarly, the timing of the introduction of the Emergency Powers (Defence) Act 1939 was determined by a desire to avoid opposition Stammers, N. (1983). Civil Liberties in Britain During the 2nd World War: A Political Study. New York, St. Martin.

consideration of a Bill at leisure behind a "veil of official secrecy followed by a legislative stampede" (Walker 1992, 32).

The PTA, like its Northern Irish cousin, was intended to be temporary. This point was underscored by then Home Secretary Jenkins, who stated, "I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary" (*Hansard* H.C. 5s, 882:642).

Support for the Bill was widespread. One MP stated clearly that "justification" for the powers was "overwhelming" (*Hansard* H.C. 5s, 882:648). MP Ivan Lawrence, drawing upon the French philosopher Jean-Jacques Rousseau, stated:

> "This Bill, by responding to the public will, achieves the response of the people and, therefore, will be far more likely to stop the terrorists" (*Hansard* H.C. 5s, 855:740).

Another MP, in pushing for a capital punishment provision within the Bill, argued that the Bill "must satisfy the people as well as protect them" (*Hansard* H.C. 5s, 882:729). Both these MPs promoted the need to assuage public demands while attaining the primary aspiration of the Bill's proponents to make it "harder to commit acts of terrorism" (*Hansard* H.C. 5s, 882:684). Throughout the truncated debate on emergency legislation, supporters argued that the powers of proscription, arrest and detention, exclusion, jury-less courts and, later, an administrative broadcasting ban, would provide security by preventing terrorism while maintaining the rule of law.

II Proscription

Proscription is found in s. 21 of the NI(EP)A 1978 and Part I, s. 1 of the PTA 1989 and it is the power to ban organizations which "appear" to the Secretary of State (NIO) or Secretary of State (UK) to be "concerned in, or in promoting or encouraging

terrorism … connected with the affairs of Northern Ireland" PTA § 2(a). Also outlawed by the parts of the Acts in question is soliciting or inviting support (PTA s. 2(b) and NI(EP)A s. 21 § 1(b)); possessing a document addressed to, related to, or emanating from (NI(EP)A § 6(a)(b)(c)); and/or dressing in a manner or displaying any article to arouse reasonable apprehension that he is a member or supporter of a proscribed organization (PTA s. 3 § 1(a)(b)).

There are two purposes of proscription, which will be categorized as presentational and practical. Home Secretary Roy Jenkins stated at an early renewal hearing that proscription "does not directly reduce or give protection against terrorist activity" (*Hansard* H.C. 5s, 892:1084). MP Jenkins made the primary purpose of proscription quite clear from the outset; it was so "the public [would] not have to endure the affront of public demonstrations in support of [the IRA]" (*Hansard* H.C. 5s, 882:636). This presentational effect of "enshrining in legislation public aversion to organisations which use, and espouse, violence as a means to a political end" was intended to assuage public opinion (see further Shackleton 1978, par. 28; Jellicoe 1983, par. 207; Irish 1987, 169).

Related to this public aversion was the decision to end parades and public fundraising on behalf of the IRA (Shackleton 1978, par. 28; Jellicoe 1983, par. 207; Colville 1987, par. 13.1.6). Gardiner recommended as a way of assuaging public outrage the banning of anything resembling a uniform or article of clothing that would show support of a proscribed organization.[70] It was Gardiner's opinion that the wearing of

[70] Included in this would be black berets, dark sunglasses, and dark clothing. The courts have also interpreted the wearing of small badges and emblems, which cannot realistically be designated as the wearing of a uniform, as violations under the Act Walker, C. (1992). The Prevention of Terrorism in British Law. Manchester, Manchester University Press.

disguises intimidated innocent citizens (Gardiner 1975, par. 72). But the primary reason for proscription, as put succinctly by Clive Walker, was simply "cosmetic": a provision to "remove the IRA from public sight" (Walker 1992, 64).

Proscription was intended to have other, more "practical," (although somewhat related) effects. Then Minister of State, Home Office, Alexander Lyon, argued that the "penalties suggested in the Bill are sufficient to deter people from being members of the IRA or, at least, from openly accepting membership of the IRA" (*Hansard* H.C. 5s, 882:783). Furthermore, proscription was seen as being a positive disincentive to youthful potential recruits (Baker 1984, par. 414) and an aid in prosecution by saving the crown attorneys the tedious process of repeating the evidence to prove a criminal conspiracy:

> "It relieves the prosecution of the necessity to prove each time that an individual member of one of the named organisations is charged that its objects or the means by which it seeks to attack them are unlawful" (Diplock 1972, par. 21).

In addition, the proscription of certain organizations, particularly in Great Britain, avoids serious provocations against the Irish community (Hansard 5s, 892:1084 Shackleton 1978, par. 119) and what Bonner describes as a potential "backlash" against Irish descendants living in Great Britain (Bonner 1985, 185). Finally, it was argued that by proscribing the IRA, British policy was brought in line with the Republic of Ireland and Northern Ireland; and the advantage of a united front on this subject (*Hansard* H.C. 5s, 892:1108).

Proscribing an organization is not a step to be taken lightly in a liberal democracy because of its impact on freedom of association, assembly and expression (Bonner 1985, 184). The British government has argued that there is clear and present justification to temporarily abridge traditional liberties to protect the larger freedoms of the society. As was put by MP Lyon, although the police might find their job more difficult, "the

government took the step only in the end because in the end it became clear…[that] the open panoply of IRA activities was such an affront to our people that it had to be banned for that purpose" (*Hansard* H.C. 5s, 882:746).

III Exclusion Orders

The power to exclude an individual is left over from the Prevention of Violence (Temporary Provisions) Act 1939.[71] The provision provides the British government the power to ban individuals from living in certain parts of the Kingdom. Others have described the power as a system of internal exile. In Richard Harvey's words, the British government can "restrict where a citizen of the UK can live or move, under threat of up to five year's (*sic*) imprisonment and an unlimited fine" (Harvey 1981, 17). The power of exclusion was placed in Part II of the PTA 1974 (it remains Part II s 4(1) of the PTA 1989).

The object of exclusion, according to Home Secretary Jenkins, is to enable the Secretary of State to exclude from Great Britain "certain people who are concerned in the commission, preparation or instigation of acts of terrorism" or people who try to enter Great Britain to engage in acts of terrorism related to Northern Ireland[72] (*Hansard* H.C. 5s, 882:636). Information collected by the police and security services is vetted by senior police officers and civil servants up to the deputy secretary level in the Home Office

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71 For a detailed discussion on exclusion orders see Bonner, D. (1982). "Combating Terrorism in Great Britain: The Role of Exclusion Orders." Public Law: 262-281, Bonner, D. (1985). Emergency Powers in Peacetime. London, Sweet & Maxwell, Walker, C. (1992). The Prevention of Terrorism in British Law. Manchester, Manchester University Press, Walker, C. (1996). The Governance of Special Powers: A Case Study of Exclusion and the Treatment of Individual Rights under the Prevention of Terrorism Acts. Understanding Human Rights. C. Gearty and A. Tomkins. London, Mansell**:** 611-644.

72 Under this part of the Act, it is important to remember that Great Britain means England, Scotland and Wales; United Kingdom means Great Britain and Northern Ireland Scorer, C. (1976). The Prevention of Terrorism Acts 1974 and 1976. London, NCCL.

before it is eventually communicated to the Home Secretary, who makes a final decision.[73]

An excluded person cannot enter or try to enter Great Britain for three years, after which time the matter is reviewed, and if considered appropriate, another exclusion order made. An exclusion order can be revoked at any time by the Home Secretary and a periodic review must be conducted after three years (Walker 1996, 614). Jenkins, in introducing the Bill, made clear that the Bill included the safeguard of the right to representation which is derived from the PV(PT)A 1939 (*Hansard* H.C. 5s, 882:637). The power to exclude was introduced with several purposes in mind.

As is seen in the following quote by Home Secretary Roy Jenkins, exclusion orders have two primary functions.

> "In proposing exceptional powers [read exclusion orders] I have had in mind the need to be able to take effective action against those who are involved in a terrorist campaign, against whom there is not evidence of the kind needed for a successful prosecution" (*Hansard* H.C. 5s, 882:637).

Jenkins made clear in the first renewal debate that the two functions were meant to be administrative acts to prevent terrorism, not judicial sanctions to punish those involved in terrorism (*Hansard* H.C. 5s, 892:1090). The official justification of the two administrative, but not punitive, functions will be elucidated in following paragraphs.

A). Preventing Terrorism in Great Britain

The primary justification for the use of exclusion orders is to prevent acts of terrorism in Great Britain. This is done by excluding terrorist leaders, contacts, and personnel already in Britain (Scorer, Spencer et al. 1985, 25), thereby preventing them from moving freely about the Kingdom. In explaining the government's position on the

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[73] The British Home Secretary excludes for Great Britain, while the Secretary of State for Northern Ireland holds the power to exclude person from Northern Ireland through the PTA 1974 sec. 3.

need for exclusion powers, MP Lyon states, "What we are seeking to do is to exclude from this country certain persons who have been found to be engaged in terrorism" (*Hansard* H.C. 5s, 882:748). By excluding people that the Secretary of State is "satisfied" (Part II, s 5(1) PTA 1989) are involved in terrorist behavior, supporters of the Government position argue that it will "make it harder to commit acts of terrorism" (*Hansard* H.C. 5s, 882:684).

If the primary goal of exclusion power is to prevent terrorism, then by removing the people most likely to commit acts of violence from Great Britain and making it a crime to return, the government will succeed in what it sets out to accomplish. To assuage concerns of excluding people who should be arrested, Lyon made clear the Government's priority in relation to this issue:

> "If the evidence is available for the conviction of an offence within Great Britain, such a person will be charged and, subject to the decision of the jury, convicted in this country and dealt with by the normal processes of the law" (*Hansard* H.C. 5s, 882:748).

Lyon goes on to discuss how exclusion orders related to individuals in which the evidence was of a sensitive kind and could not, for one reason or another, be produced in a court. The protection of intelligence assets was part of the Government's official justification for the power to exclude.[74]

B). Avoiding Judicial Technicalities

Three interrelated arguments made by supporters of exclusion orders dealt with the necessity of finding an alternative to taking the person to court. The first was that the evidence available to the police may be insufficient to successfully bring charges before

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74 The decision not to use some information in legal proceedings because it would jeopardize intelligence assets is not unique to Britain. In the United States, VERONA intercepts, which were critical to the government's case against the Rosenbergs, were not used in court. For an official British perspective on the dangers of exposing intelligence assets that would ultimately "increase risks" for security service personnel, see Mr. Roy Jenkins, MP comments (*Hansard* 5s, 901:886-7).

the court (Shackleton 1978, par. 76). The police are able to accomplish the legislation's primary objective of preventing terrorism by excluding someone they believe to be guilty of committing a terrorist offense, but lack the evidence for a conviction, thus preventing possible acts of violence. In sum, exclusion allows the police to engage in the proactive disruption of terrorist plans based on inadmissible evidence.

The second rationale, related to court proceedings, was that it protected valuable security networks, informants, and other intelligence methods and assets (Bonner 1982, 265; Walker 1992, 86). A Home Office Circular supports this assertion that avoiding taking a case to court through the use of the administrative power to exclude relates to protecting sensitive information related to national security (cited in Committee 1995, 75). The national security justification was invoked in the Parliamentary debate from the Bill's inception. Home Secretary Jenkins, in stating why there should not be a "full-scaled system of judicial review" related to the authorizing of exclusion orders, stated that

> "exclusion orders are concerned with national security rather than with judicial issues" (*Hansard* H.C. 5s, 882:637).

Therefore, as

> "distasteful though this may be to me and to others…the final decision must, I believe, rest with the Secretary of State" (*Hansard* H.C. 5s, 882:637).

Jenkins finishes the Government's position by emphasizing:

> "We must not be inhibited by an inability to use highly sensitive information, from getting rid of terrorists who may, if we do not get rid of them, commit in the future some dreadful act in this country" (*Hansard* H.C. 5s, 882:637).

In sum, the power to exclude allows the Government the ability to prevent terrorism by ridding the country of individuals the police believe are involved in acts of terror, but

would prefer not to take to court because of the risk of opening to scrutiny operation methods of the security forces and sources of information.

The third official justification for exclusion orders involves the creation of additional preventive measures to help the police fight terrorism. Exclusion, as put by Clive Walker, saves the police time, since there is no need to build up a painstaking forensic case against the suspect (Walker 1996, 617). Related to husbanding valuable police resources, Viscount Colville, reporting on conversations with English and Scottish Association of Chief Police Officers, stated that exclusion orders save police resources by negating the need to provide surveillance on all the suspected Irish terrorists who would be able to travel through Great Britain (Colville 1987, par. 11.5.1). Finally, Walker provides one tangential related rationale for exclusion, which is more political than practical. In short, exclusion provided the British public evidence of overt government action against, and the continued "Ulsterization" of, Republican terrorism.

In summary, the official justification for exclusion orders was a three-fold argument that the power will assist in the prevention of terrorism. First, exclusion helps prevents terrorism by removing dangerous terrorists from Great Britain and disrupting their ability to roam freely around the country. Second, by excluding individuals the government believes will be involved in terrorism, but for which the government lacks sufficient or admissible evidence, the country is made safer. Finally, it allows the government to save precious time and money by excluding individuals instead of providing expensive, time consuming, and often unsuccessful surveillance on suspected terrorists. By excluding them, the police save time and money, which can be used in other

areas to the benefit of the people. According to defenders of exclusion, the power of internal banishment aids in the legislation's overall mission of preventing terrorism.

IV Arrest and Detention Powers

A). Arrest Powers Under Emergency Legislation

Arrest powers under the PTA 1973, according to Home Secretary Jenkins, allow the police to arrest a person whom a constable "reasonably suspects" of being concerned in the commission, preparation and instigation of acts of terrorism (*Hansard* H.C. 5s, 882:640). In examining the extension of arrest powers, as was done in the preceding chapter, the powers of both the PTA and NI(EP)A will be lumped together for parsimony and conceptual clarity--a common approach among scholars when considering potential abuses (Walsh 1988, 34).

The two main arrest powers found in NI(EP)A 1978 were s. 13(1) and s. 11. Section 13(1) allowed a constable to arrest any person who he had "*reasonable* grounds to suspect is committing, has committed or is about to commit a scheduled offense" (author emphasis) or an unscheduled offense under the Act.[75] The second power, s. 11, allowed the arrest of suspected "terrorists." Since s. 11 was designed to facilitate internment, this provision allowed police to detain suspects for three days to photograph and fingerprint them.[76] In this way, s. 11 allowed arrest for questioning (Hogan and Walker 1989). Additionally, it is important to point out that s. 11 did not have the

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75 These two arrest powers are found in EPA 1991 at s. 17 and s. 18. The former is for the police and the latter section is for soldier on duty.

76 NI(EP)A s. 11 was followed immediately by the s. 12 power to detain terrorists without trial. Section 12 (detention without trial) was not renewed by Parliament in 1980 (*Hansard* 5s, 989:434). It however remains on the books and can be revived by the Secretary of State at any moment even without Parliamentary approval Harvey, R. (1981). Diplock and the Assault on Civil Liberties: Time to Repeal Northern Ireland's Emergency Legislation. London, Haldane Society of Socialist Lawyers.

requirement that the suspicion be "reasonable" (Walker 1985, 146). The constable need only in his own mind suspect: 1) that the person was a terrorist; and 2) it was based upon "honest suspicion". Section 11 proved controversial from its inception, but due to the vagueness of the "honest suspicion" criteria it was quite popular with the police. The power was abolished in 1987, but not before being supplanted by a third power (Hogan and Walker 1989, 48).

This third force was s. 12 of the PTA 1984 (later became s. 14(1) of PTA 1989), which was developed for the benefit of British police in the battle against mainland terrorism related to Northern Ireland. This section of the PTA, according to Hain, did the most to strengthen the powers of the police (Hain 1979, 130-1). Although there are obvious similarities between the two, there are also substantial differences which reveal the true nature of s. 12. First, s. 11 necessitated an "active" involvement in terrorism, whereas s. 12 accepted a "passive" involvement that could be remote from any violence. Next, the "honest suspicion" of s. 11 is replaced with what the government argued was a more objective standard described as "reasonable grounds for suspecting." The "reasonable" criteria related to evidence that would "influence a reasonable person" (*Hansard* H.C. 5s, 882:904-5). Finally, s. 12 allows for a 48-hour detention period with up to an additional five days extra with permission of the Secretary of State (s 12(2). This exceeds the 72 hour maximum of the s. 11 of the NI(EP)A (Hogan and Walker 1989, 48). In the words of Clive Walker, this demonstrates the "true purpose of section 14(1)(a)" which is not to grant needless arrest powers, but "to make available extra periods of detention and without an *inter partes* judicial hearing" (Walker 1992, 156).

In examining the *Hansard* debates on the introduction of the PTA (November 1974) and its first two renewals (May 1975 and November 1975), one notices the amount of time spent debating arrest powers in the 1974 debate was almost non-existent compared to the renewal debates of 1975.[77] Home Secretary Jenkins, giving the official position on arrest powers, conceded it is an "exceptional power" which "causes disquiet to some people," but

> "Nevertheless, I am satisfied that it is necessary, and that, without it, the task of obtaining the kind of information on which charges can be brought or exclusion order made would be virtually impossible. It is therefore in present circumstances an essential power" (*Hansard* H.C. 5s, 901:889).

Later in the debate, MP Dr. Shirley Summerskill touted the value of arrest powers and stated, "the additional powers given to the police have led to striking successes in bringing terrorists to justice" (*Hansard* H.C. 5s, 901:993). Within these two comments lies the official rationale for introducing and continuing emergency arrest powers. The powers, according to proponents, aid in bringing terrorists to justice and aid in obtaining convictions in court as well as assisting in the gathering of intelligence from detained suspects.

1). Bringing Terrorists to Trial

A number of scholars have pointed out that one of the primary reasons for the introduction of emergency arrest powers is to aid in the arrest, incarceration and conviction of suspected terrorists (Walsh 1983, 26, 33). Hogan and Walker said it more specifically, the arrest power "facilitates interrogation with a view to presenting a case before the courts" (1989, 57). Bringing a suspect to trial is not the only justification for arrest powers.

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77 The focus of much of the November debate was on proscription, exclusion, and the overall need for emergency legislation. The primary focus of the introductory NI(EP)A debate was on the Diplock Court recommendations.

Home Secretary Jenkins' speech during the second reading of the 1974 PTA Bill made clear the purpose of arrest powers:

> "The object of this exceptional power … is to enable the police to hold people whom they have good reason to believe are involved in acts of terrorism but whom they cannot immediately connect with specific offences" (*Hansard* H.C. 5s, 882:640).

Jenkins continued on to say the arrest power provided the police an opportunity to check fingerprint records in order to see if there was "evidence on which specific charges can be brought or, if not, evidence on which it would be right for the Secretary of State to make an exclusion order" (*Hansard* H.C. 5s, 882:641).[78] Lord Shackleton, in his review of the 1974 and 1976 Act, argued that the primary purpose of the Act's powers was to prevent terrorism, and in doing so there was a "need to take immediate action to prevent loss of life, serious injury and acute suffering" (1978, par. 135). The arrest power conveyed in the NI(EP)A and PTA made possible that type of quick preventive action. Shackleton also argued that the "prevention of terrorism is not simply a question of arresting people who can promptly be charged with offences," it is also the gathering of intelligence in order to prevent acts of terrorism (Shackleton 1978, par. 135).

2). Gathering Information and Checking Police Records

The second justification given by supporters of arrest powers has been described by commentators as necessary in order to gather information (Scorer and Hewitt 1981, 25). Dermot Walsh stated that the purpose of section 12 of the PTA was to put subjects in the custody and control of the police. Additionally, Walsh argued that the section weakened the requirement to bring a suspect before the court as soon as reasonably practical and made the suspect "amenable" for general intelligence gathering (Walsh

[78] Jenkins gives an almost verbatim speech six months later during renewal debates (*Hansard* H.C. 5s, 892:1088)

1988, 33). Again, according to Walsh, this justification was based upon the security service's need for a continuous flow of timely accurate intelligence to fight terrorism (1988, 37).

Judge Bennett echoed this sentiment in relation to the NI(EP)A and its use in Northern Ireland. He argued that these exceptional arrest powers were very valuable due to the difficulties of policing Northern Ireland, thus making it imperative that suspects be interviewed at the police station and placing a premium on the evidence gained (Bennett 1979, 28, 29). Put another way, the arrest power found in the emergency legislation, according to Jenkins, "enables comprehensive inquires to be made" thus providing valuable information on terrorists and their organizations (*Hansard* H.C. 5s, 901:889).

In sum, according to supporters of the arrest clauses found in both the NI(EP)A and PTA, these additional powers provide the security apparatus with the ability to prevent terrorism by arresting individuals with less evidence than normal police powers would require. These arrest powers, and the reduction in terrorism they promise, are augmented by the complimentary power of additional detention power to more fully take advantage of the opportunities available to arrest suspected terrorists.

B). Detention Powers Under Emergency Legislation

The power of arrest is accompanied by the power to detain suspects for a specific period of time. Lord Diplock defines detention as "deprivation of liberty as a result of an extra-judicial process" (Diplock 1972, 28). For arrest powers, the initial period of detention was not to exceed 48 hours; however, the Secretary of State could extend this period up to five days more. As will be seen below, supporters of extended detention see this power as providing a greater window of opportunity to gain important information

from incarcerated suspects. Supporters argue that quite often suspects are not persuaded to make statements until late stages in their interrogation. In relation to judicial review, Jenkins made clear the government's view that detention powers are

> "closely related to the powers to make exclusion orders which essentially depend upon decisions of the executive. Accordingly, it would not be appropriate to make these matters dependent on any form of judicial determination" (*Hansard* H.C. 5s, 882:641).

In short, the government's case is that extended detention is an administrative decision and therefore not relevant to judicial oversight.

The arrest and corresponding detention powers have the same goal--the prevention of terrorism. There was a second set of detention powers found in s. 13(1) PTA 1976, that convey to port authorities the legal right to stop and question individuals entering and leaving Great Britain (s. 16(1) PTA 1989). Port control powers relax the "reasonable suspicion" threshold needed to warrant an arrest and detainment. Jellicoe stated that, unlike inland authorities, only in rare cases will port authorities have the time to develop more than faint doubts as to a passenger's bona fides, and in most cases the decision to examine a passenger in more detail was based upon an officer's "instinct" rather than any specific intelligence (Scorer, Spencer et al. 1985). The powers are described by Jellicoe as "primarily deterrent and protective" (1983, par. 116). MP Lyon stated in debate that the authority of law enforcement officials to check the passage of terrorists as they enter Great Britain was a "limited power" (*Hansard* H.C. 5s, 882:751). In short, the power to detain at ports of entry, while primarily a deterrent, can also be used like its inland brother to question suspects.

The aspirations of the detention powers are simply the prevention of terrorism and protection of the public. This is accomplished in two ways. First, extended detention provides the police ample time to cross reference fingerprints, alibis, and search other

police databases. Second, the extra detention time provides the police the opportunity to properly interrogate detainees. Both are intended to provide enough evidence to bring charges upon the suspects and place them before a judge for trial (Walsh 1988, 38).

The power of extended detention allows police to gain very important information concerning terrorist organizations. This power has been justified by claims that it addresses the difficulties inherent in the Troubles, the need to bring suspects to the police station for interviews and the premium placed on gathering information for convictions (Bennett 1979, pars. 28, 29). Robin Evelegh, former commander of a battalion in Northern Ireland, has argued that extended detention provides intimate knowledge of the terrorists' *milieu* and insights into the pronunciation of particular words and names which can be essential to highlighting inconsistencies in a suspect's story (Evelegh 1978, 60-75, 143-7, 150). Jellicoe echoed much of the same sentiment when he stated that the detention gave the police time to check out identities, complete forensic inquires, and compare statements against existing intelligence which might possibly allow for the discovery of valuable new lines of inquiry (1983, pars. 59-60). This is a view shared by Baker and Colville (Baker 1984, par. 270; Colville 1987, par. 5.1.6). Each reviewer opined that the police would be "seriously handicapped if such powers were not available to the police (Jellicoe 1983, par. 65; Baker 1984, 257).

Another way the detention powers assist in the prevention of terrorism is that they provide the police time to convince the suspect to confess to the crime. Walsh points out that the increased length of time a suspect could stay in detention became even more important after public pressure forced the police (RUC in particular) to tone down their methods of interrogation (Walsh 1988, 39). According to this argument, it takes more

time to get a suspect to break through bribery and/or psychological pressure than through "interrogation in depth." Shackleton felt the extra time was especially important as the terrorist organizations had been training their activists in techniques to remain silent under prolonged police questioning (1978, par. 72). If this was true, and many observers thought it was, then it would take more time to get useful information from the suspect. Jellicoe argued that it might take until the fourth or fifth day before a suspect began to talk to police (Scorer, Spencer et al. 1985, 48). It could also aid in the discovery of potential supergrasses. In short, the increased time allowed the police ample opportunity to make a connection with the detainee and persuade him to talk.

In sum, the powers of arrest and detention are intended to give the police the ability to bring suspects in for questioning and provide ample time to build a case against them, leading towards a conviction (Walsh 1983, 69; Walsh 1988). Diplock justified these extraordinary powers by stating:

> "Reluctant though we are to propose any curtailment, however slight, of the liberty of any innocent man we think that it is justifiable to take the risk that occasionally a person who takes no part in terrorist activity and has no special knowledge about terrorist organisations should be detained for such short time as is needed to establish his identity, rather than that dangerous and guilty men should escape justice because of technical rule about arrest to which it is impracticable to conform to existing circumstances" (1972, par. 48).

In the end, the justification was that these powers gave considerable assistance to the police in their fight against terrorism (*Hansard* H.C. 5s, 892:1088). Or, as Diplock put it, "we are satisfied that public safety will still require a resort to detention by extra-judicial process" (Diplock 1972, par. 34). If the Troubles continue, the powers are needed to safeguard the public and protect the rule of law.

V Diplock Courts

The disaster of the military option in Northern Ireland and the massive increase it caused in sectarian violence led Westminster to empower a commission to examine special procedures in which to deal with the crisis. A crisis described by one MP as leading to the

> "unavoidable conclusion that the ordinary systems of law in this country are not sufficient to match the campaign which has been deliberately mounted against the people of Northern Ireland by the subversive elements at work in Ulster" (*Hansard* H.C. 5s, 855:308).

The commission released a set of findings, called the Diplock Report, which pointed out three specific problems in securing convictions under ordinary criminal procedures. The first problem was that a number of convictions which had been based upon confessions had been overturned. Second, there was concern about possible intimidation of witnesses and jurors. Finally, there was concern about sectarian bias leading to perverse acquittals. The recommendations of the Diplock Commission were meant to address these perceived problems (Boyle, Hadden et al. 1980, 57). In short, the recommendations were intended to increase the number of convictions, "restor[e] the efficiency of criminal courts" and bring the facade of rule by law to Northern Ireland (Diplock 1972, 27).

An evolution in strategy, later to be called 'Ulsterization,' would necessitate changes in the region's judicial system (Hillyard 1983, 48). The first and most drastic change was the abolition of jury trials for the newly created "scheduled offenses" and its replacement by single judge trials, more commonly known as Diplock Courts. The Diplock Courts were intended to deal with two problems simultaneously. The problems of witness tampering and perverse outcomes due to jury packing would both be alleviated through this system.

Supporters in Parliament presented several examples of witnesses and jurors being intimidated by terrorists (*Hansard* H.C. 5s, 855:381). Diplock discussed a "pervading atmosphere of fear" among jurors and even related an example of a witness who was shot dead in his home in front of his family before he could testify (Diplock 1972, par. 17). Diplock extrapolated from cases of witness intimidation and juror tampering to justify the policy, stating that a frightened juror makes a bad juror (Diplock 1972, par. 36).

A further justification for ending trial by jury was made by alluding to perverse acquittals. MP Whitelaw stated that some "verdicts given are rather hard to understand" (*Hansard* H.C. 5s, 855:281). Another MP, in discussing a conversation with a Catholic priest, stated that there was a belief that it was impossible to get a just decision from packed juries[79] (*Hansard* H.C. 5s, 855:294). Lord Hailsham, the Lord Chancellor, claimed to have "some startling figures" and "quite voluminous" evidence to support the government's case[80] (*Hansard* H.L. 5s, 344:714, 693). Even years later one MP stated in Parliament, in reference to Diplock Courts, "How else can trials be held and perverse verdicts avoided other than under the present system? Juries have shown that they are not prepared to convict persons who share their religion and where they are liable to be nobbled" (*Hansard* H.C. 6s, 70:632).

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79 At this time, according to figures presented in the Lord Diplock's report, "Protestants outnumbered Catholics by about two to one" in Northern Ireland. This population difference was not the only influence on Protestant domination of juries. Serving on a jury was limited to property owners, thus removing most Catholics from consideration and accentuating Protestant domination of juries Diplock, L. (1972). Report on the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland. London, Her Majesty's Stationery Office.

80 However, Lord Hailsham declined to give any details in the debates and refused a written request from NCCL that these figures be made available Greer, S. C. and A. White (1986). Abolishing the Diplock Courts: The Case for Restoring Jury Trials to Scheduled Offenses in Northern Ireland. London, The Cobden Trust.

Baker, in his 1984 report on the NI(EP)A, stated that "there cannot be any doubt that there was actual intimidation of juries before the 1973 [NI(EP)A]" and he continued on to say,

> "the overwhelming weight of opinion from those best qualified to judge is that members of juries in serious cases would be in more danger today than ever before. The methods of intimidation are more sophisticated and have been well tried on witnesses and others" (Baker 1984, pars. 99, 107).

The official line was that intimidation of witnesses and jurors necessitated the use of special courts to ensure the rule of law remained functioning in Northern Ireland.

Throughout the debate, opponents of the Diplock system asked for more than anecdotal evidence in relation to perverse outcomes. Supporters responded that one cannot examine the problem statistically, because one cannot be in the jury room when the decision is made (*Hansard* H.C. 5s, 855:334). When responding to the same line of questioning, Lord Diplock, in the House of Lords, responded, "When I see a fire starting, and indeed we saw a fire starting then, I send for the fire brigade not a statistician" (*Hansard* H.L. 5s, 344:704).

The second set of justifications for abolishing jury trials dealt with a subtle but important set of changes in the rules governing the admissibility of confessions in scheduled cases. The use of arrest, detention and interrogation prior to 1973 had led to a number of confessions which were later quashed on appeal (Boyle, Hadden et al. 1980, 57). Any attempt to increase convictions and maintain any semblance of a system based upon the rule of law needed to ease the admissibility of confessions and that is what Diplock set out to do. Diplock stated that "the detailed technical rules and practices as to the 'admissibility' of exculpatory statements by the accused … are hampering the course

of justice" and forcing authorities to resort to detention in a significant number of cases that could be dealt with both effectively and fairly by trial (Diplock 1972, par. 87).

One MP stated in support of Diplock's proposal that the "ordinary rule of law cannot apply in Northern Ireland. The terrorists seek to hide behind the ordinary rules of evidence" (*Hansard* H.C. 5s, 855:310). In altering the ordinary rules of evidence and lowering the legal bar for the admissibility of confessions, Diplock made clear that confessions obtained through torture, inhuman or degrading treatment would still be inadmissible (Diplock 1972, par. 89). In doing so, Diplock stayed within the European Convention for the Protection of Human Rights and Fundamental Freedom, but did not preclude the use of "building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner" or by making promises and/or pointing out the repercussions of remaining silent (Diplock 1972, par. 90). By lowering the standard in which a confession is admissible, Diplock moved the judicial system toward a more conviction-friendly environment.

In sum, Diplock's understanding of the extent of the emergency, and corresponding breakdown in the judicial system, led him to conclude that there was a need to create stability and confidence in the courts. If temporarily lowering admissibility standards for confessions and making small sacrifices in traditional legal safeguards (technical rules according to Diplock) was what it took to bring a modicum of stability to Northern Ireland, then the price was cheap. The result, NI(EP)A 1973, was a piece of emergency legislation that was intended to attain Diplock's goals of a stable, effective court system which convicted terrorists and worked toward restoring law and order to

Northern Ireland. One MP described the legislation as setting "out the rights and responsibilities of the individual and the power and responsibility of the security forces in a more simple and understandable form" (*Hansard* H.C. 5s, 944:1832). According to this MP the legislation simplified the legal system and promised the return of some legitimacy to the Northern Irish legal system, but it would have some unintended consequences which will be examined next.

VI Supergrasses System

The supergrass system has a very different origin than the above discussed legislatively derived powers. The use of supergrasses was not a power granted through legislative fiat in order to assist in combating terrorism. Historically, the philosophical justification for the use of accomplice evidence comes from British philosopher Jeremy Bentham who endorsed the idea of paying rewards to accomplices in the name of the utilitarian principle of the "greater good" (Bentham 1968, 223). Bentham goes on to argue that inducing criminals to break the bonds of loyalty and trust between themselves would be in the public interest (Bentham 1968, 224). Modern supergrasses have their genesis in fighting organized crime in London in the early 1970s.[81] The use of accomplice evidence migrated to Northern Ireland due to changes in the rules of admissibility of confessions and uncorroborated eyewitness testimony led to the spontaneous creation of a significant number of supergrasses between 1981 and 1986. Therefore the British Government has always argued that there was never a "supergrass

[81] The term "supergrass"--probably derived from the Cockney rhyming slang grasshopper-copper--was first coined when a number of London banks robbers gave Queen's evidence against former accomplices Greer, S. (1995). Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland. Oxford, Clarendon Press.

system" as part of an official policy, (Bonner 1988, 30) because the degree of co-ordination and planning which the term implies was completely absent (Greer 1987, 666). This is supported by the fact that no new laws were introduced to encourage collaboration in Northern Ireland, although changes to rules of evidence contained in NI(EP)A 1973 undoubtedly facilitated the use of accomplice evidence. In addition, the supergrass phenomenon appears to have been a direct outgrowth of the extensive informer system, stimulated by the RUC and the security forces and adopted by the judiciary for a significant but limited period of time (Jamieson, 12).

The government's case for supporting the use of "converted terrorists" (the government preferred term) is one of justifying an ongoing process instead of justifying a new program. The government typically used one of the three justifications for this practice: 1) to deal with emergency situations the judicial system must use every legal means available; 2) the system eased evidence collection and lessened reliance on hard-to-obtain forensic evidence; 3) increased public safety by bringing terrorists to trial. In short, all three of the justifications are summarized by former Chief Constable of Northern Ireland, John Hermon when he stated, due to accomplice evidence "lives are saved and violence reduced" (Hermon 1983).

The first justification relates to the extension of the emergency situation and the seeming inability of the military option to effectively control terrorist activities. The switch in strategies from military preeminence to a judicial strategy (especially in Northern Ireland) necessitated the use of all the legal means available in the fight against terrorism (Gifford 1984, 12). According to David Bonner, the RUC saw the development of supergrasses as a major breakthrough in the battle against terrorism (1985, 144). In

part, the use of accomplice evidence regained ground lost through an increased understanding on the part of terrorists of how to beat the legal system (Graham 1983, 10).

John Hermon, then Chief Constable for Northern Ireland, argued that the use of supergrasses created disarray among terrorist groups by breaking down the trust between members (Hermon 1983, xi-xii). By creating doubt in the reliability and unity of terrorist members, supporters have argued that the secretive organizations are broken open and made accessible to the criminal law process (Graham 1983, 10; Hermon 1983, xiii; Bonner 1988, 32).

A second justification for the use of supergrasses was the difficulty in obtaining other forms of evidence to use in court. David Bonner discussed how a meticulous examination of the scene of terrorist incident may often be difficult because the incident may have occurred in an area 'hostile' to the presence of security forces (Bonner 1988, 25). Additionally, material evidence may have been destroyed and discovery of eyewitnesses may be difficult; therefore, supergrasses provide evidence where none might be available otherwise (Graham 1983, 10). The use of accomplice evidence might be the only thing that puts a terrorist in prison, which was the third rationale for supergrasses (Gifford 1984, 12).

The following two quotes, made by Attorney General Michael Havers speaking in support of the use of accomplice evidence, articulate the official view that trial convictions were of the utmost importance. In responding to oral questions Havers notes:

> "where the evidence of an accomplice appears to be credible, and cogent and relates to serious terrorist crime, there is an overriding public interest in having terrorist charges brought before court" (*Hansard* H.C. 6s, 47:3-5 written answer).

Havers stated later:

> "Where the evidence which the accomplice can give is credible and cogent and involves perhaps a large number of alleged terrorists who cannot otherwise be charged or brought before the court, the prospect of saving lives, whether the lives of the ordinary members of the public or members of the security forces, and the prevention of further violent crime must [be] weigh[ed] heavily" (cited in Gifford 1984, 11).

In sum, the third official rationale for the use of supergrasses is that terrorists will be incarcerated (Gifford 1984, 12), especially terrorists who would otherwise escape justice (Hermon 1983). Baker echoes this sentiment in his 1984 review of NI(EP)A 1978 and stated that there would be an overall benefit to the community from the conviction of terrorists who, without accomplice evidence, would be free to murder and create mayhem (Baker 1984, pars. 165-6).

In conclusion, supporters of accomplice evidence argue that the voluntary nature of the act, coupled with the judge's ability to weigh the credibility of the evidence (better than a jury would be able to do), made the supergrass system an effective and safe way to fight terrorism using the judicial system (Gifford 1984, 11, 26). John Hermon stated that accomplice evidence has dealt a severe blow to the morale of terrorist groups on both sides and that the whole region has experienced "immeasurable" benefits (1983, 108). Hermon continues on to say that the continued use of supergrasses is vital to the well-being of Northern Ireland (1983, 108). Any intrusion on civil liberties or judicial safeguards would be worth the risk to prevent guilty men from going free to continue their campaigns of terror (Graham 1983, 10).

VII The Administrative Broadcast Ban of 1988

If, as has been pointed out by Clive Walker, the ultimate pointer to terrorist success in a democracy is the degree of public support that it attains, there is an inevitable interest in how the media portrays both terrorists and the State. It is hardly surprising then

that both have endeavored to manipulate the media to their advantage (Walker 1992, 267). This section examines official governmental intervention into the media's reporting of the conflict in Northern Ireland.

During the Troubles the British government attempted through several measures to limit the exposure of terrorists and their supporters to the media. The limiting of terrorists' access to the media was intended to deny them a platform in which to espouse their message of violence. Early in the conflict, in 1971, the media adopted, under official pressure, 'voluntary' measures aimed at restricting the access of paramilitary representatives to radio and television coverage (Hogan and Walker 1989, 158). In addition, there was an officially inspired policy of demonstrating support for the anti-terrorism policies while limiting the sympathies shown for the spokesmen of violence (Annan 1977, par. 17.11; Curtis 1984, 9-20). In 1977, ministerial displeasure led to the curtailing of reporting in *This Week* about the treatment of police detainees in Northern Ireland (*Hansard* H.C. 5s, 939:1735). Later, in July 1979, government officials were extremely upset about a *Tonight* program which included an interview with an INLA representative, who claimed responsibility in Dublin on behalf of his group for the murder of MP Airey Neave, who was also a close friend of Margaret Thatcher. Then, in October 1979, a *Panorama* crew filmed an IRA roadblock in Carrickmore, Northern Ireland. Although the publicity stunt was not transmitted, the reporters, as in the previous example, failed to inform the security forces until long after the trail was cold. These events incurred the wrath of the Attorney-General who gave a final warning that in the future he would take a stricter view of such activities (Walker 1992, 142-3). The voluntary agreement regime was breaking down.

Government's ire was again raised in 1985 with the production of "At the Edge of the Union" by BBC's *Real Lives* program, in which Martin McGuinness (of Sinn Féin) was interviewed. The interview was criticized by Margaret Thatcher as giving the "oxygen of publicity" to terrorists (The Times July 16, 1985 pp. 1, 30 cited in Walker 1992, 268). In the opinion of the government, the media was not doing its part in the war on terrorism and was being grossly manipulated by terrorists for their own violent ends.

These 'voluntary' guidelines, and the State's view on their lackluster implantation, created friction between the media and the government which in turn led to a number of confrontations. This led to more legal means being used to restrict access by terrorists to the media. One of these legislative attempts to deny paramilitaries access to the media was found in section 21 of the NI(EP)A 1978 and section 11 of the PTA 1976 (s. 18 of the 1989 Act). These sections required that any arrangements to interview or to witness the activities of paramilitary volunteers may be an offense, unless law enforcement personnel are informed in advance. Failure on the part of journalists to identify their contacts could also be in contempt of court (see generally Walker 1992, 130-44).

These provisions led to the arrests and questioning of a number of reporters along with the confiscation of their equipment. One of the more ominous occurrences happened in 1979, when the American reporter Pierre Sallinger was arrested in Belfast together with his American Broadcast Company (ABC) colleagues and the Provisional Sinn Féin politicians he was interviewing. The RUC, which believed an illegal display was planned, confiscated the film of the meeting but brought no charges (Walker 1992, 142). This is

but one of a number of arrests made under the auspices of sections 21 of the NI(EP)A and 11 (later 18) of the PTA.

In 1984, after the devastating IRA bombing of the Conservative national convention in Brighton, which nearly decapitated the British government, then Prime Minister Margaret Thatcher strongly suggested that the media adopt a more pervasive 'voluntary' code of conduct to deny publicity to terrorists. She said: "We must try to find ways to starve the terrorist and the hijacker of the oxygen of publicity on which they depend" (Owens and Burns 1994, 7). Thatcher was drawing upon the previously made recommendations of Lord Gardiner, found in his review of civil liberties in Northern Ireland (1975, par. 76).

Attempts by the media to implement Thatcher's strongly implied 'voluntary' measures did not stop what she saw as inappropriate appearances of terrorists and their apologists in the media--especially on television. The situation came to a head over an investigative documentary by Thames TV called *Death on the Rock*, which challenged the official version of the March 1988 killing of three unarmed IRA terrorists in Gibraltar by SAS operatives. The Foreign Minister tried unsuccessfully to persuade the regulating authorities not to allow transmission of the program. PM Thatcher and then Home Secretary Douglas Hurd attacked the documentary as substantially untrue (Klug, Starmer et al. 1996, 182-3). Asked whether she was furious about the program, Thatcher replied that her feeling went "deeper than that" (Barnett and Curry 1994, 118, 123).

In response to a continued IRA bombing campaign on the mainland and frustration with the media representation of official security policy, Home Secretary Hurd announced, on October 19, 1988, that he had issued instructions to the two broadcasting

authorities, the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA), which required them to deny access to specific organizations in Northern Ireland[82] (*Hansard* H.C. 6s, 138:893). The directive to the BBC was issued under clause 13(4) of the BBC's Licenses and Agreement, and to the IBA under section 29(3) of the Broadcasting Act 1981 (Magrath 1991, 19). The text of the notices required them not to broadcast material, which consisted of or included:

> "1. …any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where--
>
> (a) the person speaking the words represents or purports to represent an organization specified in paragraph 2 below, or
> the words support or solicit or invite support for such an organization,
> other than any matter specified in paragraph 3 below.
>
> 2. The organizations referred to in paragraph 1 above are--
>
> (a) any organization which is for the time being a proscribed organization for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and
> (b) Sinn Féin, Republican Sinn Féin and the Ulster Defense Association" (Thompson 1989, 528-9).

The directive excluded the spoken words in the course of proceedings in Parliament and in support of a candidate at a parliamentary, European Parliamentary or local elections pending that election. Additionally, the ban did not apply to purely fictional works[83] (Krotoszynski 1994, 12, fn. 54).

The ban was written with specific limits to its power and with specific aims to be achieved. The Home Secretary was quick to point out that this "is not censorship, because it does not deal with or prohibit the reporting of events…Broadly, we are putting

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82 The British broadcasting ban was lifted on September 16, 1994 by then PM John Major Graham, I. and D. Henderson (1994). Major Lifts IRA Gag and Promises Ulster Referendum. Press Association Newsfile. London**:** electronic version.

83 In the Republic of Ireland an episode of the popular television series, *Star Trek: The Next Generation*, fell victim to Section 31, the Republic's stronger version of the UK Broadcasting Ban. The story, set on a far flung planet, dealt intelligently with the question of political violence. Admittedly it contained a reference to IRA success in the reunification of Ireland well into the 21st Century McCaffery, C. (1995). "Mass Political Communication, Terrorism and Censorship: Lessons from Ireland." Intermedia **23**(3): 41-5.

broadcasters on the same basis as representatives of the written press" (Article19 1989, 26). In short, the written press has never been able to relate the sound of an IRA spokesman and now neither will broadcasters.

Some outside of the government supported the ban. The *Daily Express* stated that the ban was "long overdue … sensible and right … [we] wonder why [the government] stopped short of proscribing Sinn Féin." The *Daily Mail* felt that the ban did not go far enough and wrote: "Meanwhile half a ban is better than no ban." Finally, the *Daily Star* described the ban as "a crushing blow…to starve the IRA and other killer gangs of publicity" (Article19 1989, 27). Noticeably, the media support for the ban came from print media and none from broadcast journalists. The strongest support came from the government sponsors of the ban.

In the Parliamentary debate following the government's introduction of the ban four aspirations were articulated. The four goals can be briefly stated as follows: 1) the appearance on television of terrorists or their supporter caused offense, particularly after a terrorist outrage; 2) television appearances gave undeserved publicity contrary to public interests; 3) media coverage increased the standing of terrorist groups and gave the false impression that support for terrorism was itself a legitimate political opinion; 4) broadcaster statements were intended to, and sometimes did, intimidate some of those to whom they were directed.

The first category, the offense caused by the appearance of terrorists on television, was one of the first points made by Home Secretary Hurd upon introducing the legislation. This offensive behavior was caused, according to Hurd, when "representatives of paramilitary organizations and their political wings…use these

opportunities as an attempt to justify their criminal activities" (*Hansard* H.C. 6s, 138:893). The government's contention was that British citizens must be protected from the harm caused by listening to terrorist apologists attempt to justify the killing of a number of innocent individuals (Halliwell 1991, 247). One scholar describes the legislation as serving largely to "protect feelings" (Zellick 1990, 779).

The second aspiration of the ban was to deny, in the words of Margaret Thatcher, the "oxygen of publicity" that the media provided for terrorists (The Times, July 16, 1985 p. 1, 30 cited in Walker 1992, 268). According to this argument, the "terrorists themselves draw support and sustenance from access to radio and television." The government, in the words of Hurd, had decided that the time had come "to deny this easy platform to those who use it to propagate terrorism" (*Hansard* H.C. 6s, 138:893). The assumption of this argument was that by cutting off the supply of electronic media exposure, support for the IRA's armed conflict would suffocate.

Former Secretary of State for Northern Ireland Lord (Roy) Mason provided one of the strongest endorsements for the ban, and stated the ban did not go far enough, when he argued forcefully in House of Lords that

> "in a democratic society it is defensible to stifle all outlets of those terrorist groups who are bent on undermining the authority of the state and … smashing our democratic institutions. If we are to cut off the oxygen supply of propaganda--and I welcome this move … we should also cover the written medium. The present measure is only a half-measure … We should go the whole hog and stop all propaganda on television, radio and the newspapers" (cited in Article19 1989, 27).

Mason's years of first hand knowledge in Northern Ireland led credence to his argument.

Additionally, the banning of paramilitary supporters would help prevent confusion on the part of citizens who cannot understand how the government's fight against terrorism can be taken seriously when they hear a news account of a paramilitary

sympathizer using the media to undermine the government's position on policy related to Northern Ireland (*Hansard* H.C. 6s, 138:895). In short, quoting Hurd once again, the ban would "remove from the men of violence an extra weapon which the existence of direct access to the media has provided for them" (Owens and Burns 1994, 7).

A third and closely related reason for the broadcast ban, according to the government, was that exposure of the terrorists and their supporters on television and radio led to an increase in their standing within the community. Supporters of limiting the terrorists' access to the media, as early as the Gardiner report, stated that the media does not act responsibly in covering terrorist acts. Gardiner states that the media "must bear a degree of responsibility for the encouragement of terrorist activity in Northern Ireland" through interviews with leaders of organizations whose avowed aim is to violently overthrow the lawful government. Gardiner goes on to accuse the media of sensationalizing the terrorist acts which create a "spurious glamour" both for the activities and the perpetrators (1975, par. 73). MP Maginnis, drawing upon this line of reasoning, stated that the ban was "aimed at protecting, not the intelligent viewer, but young people who can be influenced by the likes of Gerry Adams and Danny Morrison on television" (*Hansard* H.C. 6s, 138:896). Finally, members of the House of Lords argued that the constant appearance of terrorists and their apologists on radio and television enhanced their standing and lent them political legitimacy (Thompson 1991, 348). In sum, people need to be protected from confusing and possibly harmful views that the paramilitary spokesmen would espouse through the electronic media.

A fourth rationale for the broadcasting ban was to end the intimidation of people by the representatives of paramilitaries. It was argued by supporters of the ban that

terrorists used the broadcast media to make thinly disguised threats against individuals. The idea that the terrorist was manipulating the media to deliver threats and warnings was untenable. Hurd made this quite clear in his original statement when he stated his intent to prevent terrorists from using radio and television "to deliver indirect threats" (Gearty 1994, 158). In short, the public in general and the paramilitaries' targets should not have to endure the use of government-licensed television to transmit threatening messages from criminals.

In conclusion, the government, working under the well-supported assumption that publicity and media exposure are vital components to a sustained terrorist campaign, or, as put by one scholar "are entwined in an almost inexorable, symbiotic relationship," took appropriate measures to address this issue (Miller 1982, 13). All of the measures taken by the State were done with the purpose of protecting British citizens from terrorism while encroaching as little as possible upon cherished freedoms of expression. The right of the State to encroach upon civil liberties was articulated by MP David Owens who stated, "restricting the civil rights of the few…to try to protect the many" is an acceptable tradeoff (Article19 1989, 27). In working toward this goal, the government first tried to remedy the situation through voluntary agreements with the major media establishments. This was to prevent terrorists from being allowed to "extort publicity" in order to further their cause of violence (Annan 1977, par. 17. 12).

The British government came to believe that the voluntary agreements and other indirect controls were not adequately curtailing the free publicity terrorists were receiving via the media.[84] The State pressured both the BBC and IBA (succeeded by the ITC) to

[84] Governments can influence reporting and the analysis of events through the reporters reliance upon official sources for their articles. Some authors argue the entire texture and context of information

move away from the traditional approach of impartiality between the IRA and Security forces (Annan 1977, par. 17.11). According to some scholars, these indirect controls had more to do with getting the media to implement their own stringent internal controls that just happened to be officially inspired (Curtis 1984; Walker 1992, 268). When these and other indirect controls did not seem to be having the desired effect, the government turned to more explicit controls in order to cut off this access to media publicity.

In an effort to balance both the exigencies of security policy and civil liberties, the government implemented minor pieces of legislation that did not restrict any reporting, but only required that law enforcement agencies be made aware of the meetings in advance. There would be no legal restriction on content or reporting, only a requirement that the police know about all interviews prior to them taking place. As the security situation deteriorated and, in the government's view, the media continued to play an irresponsible role in providing terrorists with an ample platform in which to espouse violence, the government had to take additional action.

In response, the government implemented a temporary broadcasting ban to restrict the spoken message of what former Northern Ireland Secretary Tom King called a party that "was claiming the right to democratic free speech while using violence" (Conaty 1994, 5). It is a public policy initiative to continue to counter terrorism associated with the Troubles. Douglas Hurd made it quite clear in parliament that "This is not a restriction on reporting," only a ban on the transmission of the voices belonging to terrorists and their supporters (Henderson, Miller et al. 1990). In the words of PM Thatcher, just after the ban was announced: "To beat off your enemy in a war you have to

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about the troubles in Northern Ireland have been altered in this manner Rolston, B. (1991). The Media and Northern Ireland: Covering the Troubles. Houndmills, Basingstoke, Hamshire, Macmillan.

suspend some of your civil liberties for a time" (The Times October 26, 1988 cited in Article19 1991, 341). In sum, these measures, although distasteful and regrettable, would assist in the defeat of forces of terror attempting to destroy democracy in the United Kingdom.

VIII Conclusions

The overall aspirations of emergency legislation were to prevent terrorism and satisfy public demands for action against those who used violence for political purposes, while protecting democratic institutions such as the rule of law. This later aspiration was important due to the knowledge that the terrorists had as one of their goals the destruction of the rule of law (*Hansard* H.C. 5s, 855:326). It was felt that the power encapsulated in the NI(EP)A and PTA made "useful contribution[s] to preventing acts of terrorism" in the United Kingdom (*Hansard* H.C. 5s, 901:890).

Supporters of the legislation were not all equally pleased with the emergency power conferred to the security forces. Several MPs stated categorically that the Bill did not go far enough in fighting terrorism (*Hansard* H.C. 5s, 882:652, 682). There was discussion of the mood of the British people who demanded "revenge" (*Hansard* H.C. 5s, 882:648). In addition, a number of MPs bristled at any discussion of concern for civil liberties. Mr. Carol Mather stated:

> "We are now at war with the terrorist. We are not interfering with the liberties of the subject. We are protecting those liberties" (*Hansard* H.C. 5s, 882:704).

MP Kevin MacNamara argued that the primary duty of parliament is to protect the liberties of British citizens, but liberty is of "little value to someone who is six feet beneath the ground or someone whose body has been dismembered by a bomb" (*Hansard*

H.C. 5s, 882:699). Another MP responding to a prediction that civil liberties would be 'abridged,' fired back,

> "Of course civil liberties will [be abridged]. We know that passing this kind of legislation means that they will. But the very first function of any government is the maintenance of life and property, and there is real doubt in this country at the moment" (*Hansard* H.C. 5s, 882:648).

Other MPs scoffed at concerns about the loss of freedom. One MP made it clear that "Threats to free society come from a collapse of authority ... not giving out a little power" (*Hansard* H.C. 5s, 901:894). The loss of civil liberties, in this view, was a phantom menace; the real danger was *not* giving law enforcement personnel the authority they needed to fight terrorism.

Even if some liberty and freedom was lost, MP Michael Mates argued "the vast majority of the people of this country are only too ready to suffer some personal inconvenience if it means ridding our society of the cancer of terrorism" (*Hansard* H.C. 5s, 882:652). Another MP attacked the notion that a dangerous internal police force was being created, with the power to abuse its authority, by saying, "The police are not wielding arbitrary power ... They are defenders, not threats, to our free institutions" (*Hansard* H.C. 5s, 901:894). In the end, the view that won the day was that any infringement of liberty by this legislation was "fully justified" and the power legalized by the legislation was in "no way repressive, let alone unnecessarily repressive" (*Hansard* H.C. 5s, 901:895).

Only the future would reveal whether the aspirations of the legislation were realized and Jenkins' belief in the temporary nature of the Act was correct (*Hansard* H.C. 5s, 882:642). Let us now examine some of the events which resulted from a society under

siege utilizing emergency legislation to confer powers to a law enforcement agency in an effort to fight terrorism.

Chapter Six

Examination of Recent Test Cases

> "You all stand convicted ... on the clearest and most overwhelming evidence I have ever seen of the crime of murder" Mr. Justice Bridge, trial judge in the Birmingham Six (McFadyean 1990, 13).
>
> "The longer the hearing has gone on, the more convinced this court has become that the verdict of the jury [in the 1975 trial] was correct" Lord Lane, the Lord Chief Justice dismissing a second appeal for the Birmingham Six, January 1988 *The Economist* (1990, 52-3)

I Introduction

In a time of crisis is it reasonable and expected that governments will act in accordance with the need to provide security and order within their jurisdiction? In the wake of events related to Northern Ireland, especially the IRA's terror bombing of the mainland, it was not surprising that the British government would take action to deal with the terrorist threats. Detractors have described the government's response, the Prevention of Terrorism Act (PTA), as an ill advised hurried piece of legislation. Supporters of the PTA argue that it was "not a panic measure," because the main elements of the legislation had been worked out well in advance of bombing in Guildford and Birmingham in 1974 (Wilkinson 1986, 169). Regardless of this debate the government expected certain results from the enactment of the PTA. The previous chapters have elucidated the overall aspirations of the legislation and reaction of the Act's opponents, but the overall result of the emergency legislation has not been examined.

The goal of this chapter is to examine several cases emanating from the time of the implementation and use of emergency powers in a society that perceives itself to be under siege. The cases to be examined fall into two categories. The first group of cases are known as "miscarriages of justices." In these cases the use of emergency legislation

led to the arrest and conviction of innocent people. This set of cases involves what are known in the literature as the Guildford Four, Maguire Seven and Birmingham Six. These three cases are as important as they are interrelated; information elicited from the Guildford Four was used to arrest and convict the Maguire Seven. The second set of cases focus on the overall mood of the government and involve both accusations of government collusion with loyalist forces in Northern Ireland and government-sanctioned assassinations of suspected IRA terrorists. Especially relevant will be the manner in which the government dealt with these cases. Through an examination of these two sets of cases a comparison will be done to explore the relationship between extraordinary legislation and potential violations of civil liberties, including miscarriages of justice.

II Miscarriages of Justice and Government Response

A). Guildford Four

In October 1975, Patrick Armstrong, Gerard Conlon, Paul Hill and Carol Richardson were convicted of five murders arising from the bombing, a year earlier, of the Horse and Groom pub in Guildford. In addition, Armstrong and Hill were convicted of two murders arising from an explosion in November 1974 at the King's Arms pub in Woolwich. Their arrests and subsequent detainment (each was held without access to legal counsel for several days through the newly introduced PTA) led to confessions of guilt related to the bombings (Gudjonsson 1992, 261). Lacking any collaborating evidence, the prosecution's case was based almost entirely on the confessions made to police. All were sentenced to life in prison.

1). Paul Hill[85]

The first to be arrested was Paul Hill, who had come to England in August 1972, with his girlfriend Gina Clarke, to look for employment. They were broke and destitute, living at one time with Paul's uncle, Hugh Maguire, and then at a Catholic-run youth hostel (McKee and Franey 1988, 78). They existed though charity, working odd jobs and by the proceeds of occasional theft; some of which was perpetrated with Hill's school friend Gerard "Gerry" Conlon. Through a chain of events that to this day is not totally understood, British law enforcement were provided Hill's name in connection to the killing of Brian Shaw and the Guildford Pub Bombings.[86]

During his incarceration and questioning, Hill contended he was treated inappropriately. According to both police reports and Hill's account, the first twenty-four hours in police custody focused upon the Shaw murder. Hill stated that he was psychologically abused, intimidated, and it was suggested that if he did not cooperate completely, things would go poorly for Gina. Hill later told his solicitor, "I signed it because I was exhausted, I was unable to think any more." Later he stated, "I was relieved when there were no more questions" (McKee and Franey 1988, 96). Hill was wrong when he thought his questioning was over.

According to police records, the next set of interrogations began about 5:55 p.m. on Friday, November 29. A new set of officers came to interview Hill. One of them, as he sat down, stated "Now he'll tell you about Guildford." The tactics were the same ones

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85 For Paul Hill's view of events see his book Hill, P. and R. Bennett (1990). Stolen Years: Before and after Guildford. London, Doubleday.

86 Brian Shaw was a former British soldier who was found dead July 20, 1973, in a derelict building in Belfast. He had been shot twice in the head at short range. The Provisional IRA promptly claimed responsibility, saying that Shaw was an Army spy. The British Army denounced the claim as "utter rubbish". For a discussion of the various stories related to Hill's name coming to the attention of the RUC and British law enforcement, see McKee, G. and R. Franey (1988). Time Bomb. London, Bloomsbury Publishing.

used to get the Shaw confession: "confess, or we'll do Gina for it" (McKee and Franey 1988, 96). The details of the interview are recorded in detail elsewhere, but during this time Hill began implicating numerous other individuals.[87] Among the people implicated in Hill's confession were Gerry Conlon, Patrick Armstrong, both of Belfast, and Carole Richardson, Armstrong's 17-year-old English girlfriend. Additionally, Hill mentioned other members of Conlon's family, including his uncle Hugh Maguire (Miller 1990, 311) and, according to *The Spectator*, another aunt, Anne Maguire (Anonymous 1989, 5).

2). Gerry Conlon[88]

Gerry was with his family in Belfast on November 28th, when the news came that someone had been arrested for the Guildford bombing. Gerry later told police that although the suspect was shown on television with a blanket over his head, he thought he recognized Paul Hill from his pants and two-tone shoes that Hill had purchased after one of their numerous robberies. On November 30, before 6 a.m., a police officer and four soldiers arrived at the Conlon home to arrest Gerry. The police did not, then or later, search the house and they left Gerry alone in his bedroom to change clothes in order to come with them to the police station.

This laidback attitude on the part of police towards a suspect in a major terrorist attack is furthered by other irregularities. The first relates to the arrest and conviction of the Guildford Four. In 1987, a Home Office memorandum painted an interesting

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87 Press accounts put the number at 30, but in an interview with American scholar Abraham Miller, Hill states the number at sixty Miller, A. H. (1990). Terrorism and the Media: Lessons from the British Experience. Annual Editions: Violence and Terrorism Third Edition. Suilford, CT, The Dushkin Publishing Group, Inc.

88 For Gerry Conlon's view of events see his book Conlon, G. (1990). Proven Innocent: The Story of Gerry Conlon of the Guildford Four. London, Hamish Hamilton. It was renamed in 1993 In the Name of the Father.

portrayal of the suspects that would have been obvious to any law enforcement agent involved with IRA procedures. The Home Office notes:

> "[t]he character and behavior of the Four was such as to make them unlikely people to be terrorists, and that they were not the kind of people that the Provisional IRA would have used" (quoted in Rozenberg 1992, 92).

Put another way, although the police knew the three (their squats had been raided frequently) and thus were easy targets for the police, they were unlikely IRA bombers. During the previous interactions with police, each of the three gave their real names. No member of the IRA would give their real name, which could be easily crosschecked against computer files both in London and Belfast. Additionally, they took drugs, lived in squats and were involved in petty crime. Ironically, as pointed out by one researcher, the same factors that made them easy scapegoats made them unlikely IRA activists (Miller 1990, 309). Finally, if Conlon was involved with the IRA and the bombing, as soon as he thought he recognized Hill on the news, in police custody, he would have fled for the Republic of Ireland where he would have been immune from extradition to Britain.

According to Conlon, after his arrest by the RUC, he was beaten so badly that his clothing was soaked though with blood. The RUC sent soldiers back to retrieve clean clothes from his parent's home for his trip to England (Mansfield 1994, 80). Once in England, Conlon alleges he was beaten again, made to stand naked in an unheated cell with open windows and deprived of food for several days. Conlon's experience is similar to those who were subject to various sensory deprivation techniques used by the British at Castlereagh and Maze prisons.[89] As a result of the interrogation, Conlon eventually

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89 The Republic of Ireland took Britain before the European Commission on Human Rights in 1971 for use of sensory deprivation techniques, also known as the Five Techniques. For more information about the Five Techniques and its use at Castlereagh and Maze prison facilities see Taylor, P. (1980). Beating the Terrorist?: Interrogation in Omagh, Gough, and Castlereagh. Middlesex, England, Penguin Books, Cobane,

signed a confession written by the police. In his confession, Conlon implicated his aunt Anne Maguire in the Guildford Pub bombing and then told the police he had learned to make bombs at his aunt's home (Kee 1986, 72-3).

3). Carole Richardson

Carol Richardson's name and address originally came to the attention of the police due to a police report she filed with Patrick Armstrong. The two were traveling through England unsuccessfully looking for jobs. During their travels they kept in contact with their families. Once in the town of Folkestone, Richardson stopped at a phone booth to call her mother, who would call her back. A drunk outside the booth got impatient and beat on the door. When Richardson opened the door to explain she would only be a minute longer, he grabbed her by the hair and hit her head on the side of the booth. Carole fled to a store to call the police; the drunken man made his call and when getting ready to leave the phone booth found himself confronted by four construction workers who had witnessed the incident and wanted to teach him a lesson. Patrick convinced the workmen to wait and let the police handle it. The police arrived and took names, addresses, and statements from all involved (McKee and Franey 1988, 318).

On December 3, Carole was arrested as possibly being one of the two individuals known as the "courting couple" who had not yet been identified and who were suspected by police of being the bombers. Carole, like Paul and Gerry, alleged similar treatment by authorities while in police custody. At the time of her arrest and interrogation, by her own admission, she was high from the ingestion of 20 Tuinal capsules (Gudjonsson 1992, 266). At the end of the first day of interviews, the police report described Richardson as

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C. T. (2000). The Use of the 'Five Techniques' in the Fight against Terrorism in Northern Ireland. Encyclopedia of Prisoners of War and Internment. J. F. Vance. Santa Barbara, CA, ABC-Clio**:** 149-150.

"hysterical and in need of medical attention" (Kee 1986, 138). A police surgeon, Dr Kamis Makos, was called to examine Richardson. The police claim that in Dr. Makos' company, and in the presence of a female constable, Richardson admitted to planting the bomb with Armstrong at Guildford (Gudjonsson 1992). A *Times* article later reported that in addition to her self-induced state of anxiety, Richardson was injected with pethidine by Dr. Makos (1989, 1). It was in this state of mind, and without parental or legal representation, that police allege she made the confession. The police denied the accusation of physical/psychological abuse and, as *The Times* put it, reduced Richardson to "an abject state of terror" (The Times, October 2, 1975 quoted in Mansfield 1994, 319).

The first question asked by the police was Carole's whereabouts on the night of the bombing. She could not remember where she was, but said if she could see her diary it would help her memory. Her diary had been destroyed in an accident at the squat. When asked again, she stated that without her diary, she was simply unable to give an account of her activities that evening (Woffinden 1989, 327). While in custody, Carole was asked to show on a sketch plan of the pub where she was sitting; she placed herself nowhere near where the police knew the bomb had been planted (Kee 1986, 136). Carole was placed in several police lineups and eight witnesses from the Horse & Groom pub failed to select her (McKee 1986). Carole was not the only member of the Guildford Four whom the police had trouble tying to eyewitnesses. Composite sketches made from survivors of the blast had the male as clean-shaven, though Armstrong had a beard throughout this period (Woffinden 1989, 196).

4). Trials and Conviction

On the morning of Tuesday, September 16, nine months after being arrested for the Guildford Bombing, the four were in court.[90] Presiding over the case was Mr. Justice John Donaldson.[91] The lead prosecutor was Sir Michael Havers, Conservative MP, and former Solicitor General, who in 1975 was shadow Attorney General and had ten years experience as Queens Counsel. At the start of the trial, as the charges were being read and pleas were expected, Hill replied to the first charge by stating, "I refuse to take part in this ... I refuse to defend myself. Your justice stinks" (McKee and Franey 1988, 233). This did little to help his case or to gain sympathy with the jury.

Sir Michael began his opening statement claiming "this is a IRA case" and that the four defendants were IRA members. Sir Michael continued, according to the court transcripts, to claim these were "carefully planned crimes with photographic reconnaissance done in advance and photographs of the targets prepared." He went on to say that Hill and Conlon came to England specifically for the bombing and that Richardson and Armstrong were the "courting couple." He concluded that the bombing was a crime of "military precision" (McKee and Franey 1988, 234).

As the Crown attorneys began to make their case they drew almost exclusively from the defendants' confessions (Miller 1990, 310). The claims, by Sir Michael, of photographic reconnaissance were supported with no collaborating evidence. There were no photographs shown or camera equipment produced to support the Crown's assertions

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90 In addition to the Guildford bombing charge, Hill and Armstrong were facing further charges of murder for the bombing at King's Arms at Woolwich on November 7.

91 In the late 1980s, Justice Donaldson was made Lord Donaldson, Master of the Rolls, arguably the most influential post in the judiciary. Prior to his appointment to the Central Criminal Court at Old Bailey Donaldson was a "highly controversial judge" in the mid 1970s. His time as President of the ill-fated National Industrial Relations Court so enraged trade unionist and the Labour Party that 188 MPs launched an impeachment attempt (an act unprecedented in the twentieth century). Michael Foot described him as having a "trigger-happy judicial finger" McKee, G. and R. Franey (1988). Time Bomb. London, Bloomsbury Publishing.

(Woffinden 1989, 234). There was no evidence given to the claims that Hill and Conlon had come to England specifically to carry out these attacks and no evidence of advanced planning. Additionally, the Crown made no attempt to elucidate upon which defendant did what on the alleged bombing trip to Guildford. According to Sir Michael, it was immaterial. Once the defendants became members of the team, knowing what was intended, it did not matter what part each played. This saved the prosecution the difficulty of presenting which of the various confessions was actually the true picture,[92] but it did mean that the case needed the conviction of all four. If they were a team and worked together, then an alibi for one would cast doubt on the rest (McKee and Franey 1988, 237).

In addressing the identification of the "courting couple" (who police argued planted the bomb), Sir Michael told the jury that from soldiers' descriptions, Richardson and Armstrong had been positively identified. In presenting this portion of the case, Sir Michael stated that the deposition of Private Jonathan Cook provided descriptions that matched those of Richardson and probably of Armstrong. According to Sir Michael, "It was a very observant description." Cook was insistent that the girl had "natural blond" hair and that the male had "wavy, dark hair." Richardson was a natural brunette and there was a photo taken later in the evening on the night of the bombing that showed her hair was brown. Armstrong had completely straight, long, fair hair (McKee and Franey 1988, 234). Although Sir Michael stated he would demonstrate that the two were the "courting couple," he never did. In fact, the police and Crown, as seen above, had evidence that would cast substantial doubt on the thesis of Richardson and Armstrong as the bombers.

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92 The confessions did not agree with one another.

On the fourth day, the proceeding had to be held up for thirty minutes because Hill failed to show up in court. Eventually he appeared with one eye bruised, swollen and black, which, according to the Guardian correspondent covering the trial, seemed to get worse as the morning progressed (Kee 1986, 179). At the end of the day, the police announced outside court that a full-scale inquiry had begun to establish how this had happened, but nothing came of the investigation (McKee and Franey 1988, 238). This would not be the only time in the trial that support for the defendants' accusations of police brutality would appear. While giving testimony, Conlon claimed that an interrogating officer stated, "Blake will make you see a bit of the light." Then Detective Inspector Blake came screaming into the room, smashed Colon's head against the wall, punched him in the kidneys, made him strip and began to crush his testicles. He shouted at the 20-year-old Conlon that unless he confessed his mother would be shot by the S.A.S. (Special Air Services) (Cockburn 1989, 555). Conlon stated that during this interrogation, Blake took off his jacket, rolled up his sleeves, and then beat him. Conlon remembered that the man had a tattoo of a dagger with writing. Blake was asked to roll up his sleeves for the jury and he did have the tattoo described by Conlon[93] (Woffinden 1989, 319).

The defendants put forth alibis that in some cases hurt their pleas of innocence, but in Richardson's case, her alibi made the Crown case more complicated. Hill's alibi, that he was with his girlfriend at the time of the bombing, was weakened by a number of apparent self-constructed contradictions. Armstrong's was unconvincing because in discussing the detail of his whereabouts that night, he confused October 5 with another

93 Blake explained this by stating that the Godalming Police Station was centrally heated and sometimes it got excessively hot and that he sometimes took off his jacket and rolled up his sleeves to be more comfortable.

Saturday night altogether. Conlon has a strong alibi, but it went for not, since the man who could substantiate it returned to Ireland and did not re-emerge (Kee 1986, 182-3). Therefore, the prosecution argued that Conlon's alibi totally lacked corroboration (Gudjonsson 1992, 268). It is Richardson's alibi that is the most compelling and brings forth the most interesting questions.

As mentioned above, Richardson admitted to police that she could not remember what she had done that evening. An alibi came into existence on December 20, 1975 when Frank Johnson (a friend of Richardson) walked into a police station and told police, "One of the people you've got for the Guildford Bombing is the wrong person, 'cause I was with her that night." According to Johnson's account of events, he arrived at their pre-arranged meeting-place, the Charlie Chaplin pub, at about 6:15 p.m., and 10-15 minutes later Lisa Astin and Richardson also arrived. From there they went to a concert held at a pub called the Elephant and Castle in London (Kee 1986, 183). Johnson was a friend of one of the band members. This friendship allowed the three of them access to the band's dressing room, where a number of pictures were taken, several of which included Richardson.

When Johnson, in early December, heard of Richardson's arrest he realized that they had been together than night. At first he was disinclined to approach the police. Therefore, he called the clerk of courts at Guildford who refused to disclose information about Richardson's defense attorney. Then he called the National Council for Civil Liberties (NCCL), but did not get very far. According to Johnson, after a couple days he felt his worries were ridiculous, his friend was innocent, so he went to the Newcastle police station and asked for the station sergeant. He spoke with local special branch

officers and was then sent home. A couple hours later he was called back to the police station and met with three members of the Surrey Constabulary's bombing inquiry team. Johnson said he could sense immediately that "things weren't very friendly" (Woffinden 1989, 322).

The Surrey police asked Johnson to repeat his story, then read it back to him and he reiterated that he had been with Richardson from 6:30 p.m. through the rest of the night. According to Johnson, the police said, "look, she's told us she did it. You say, she was with you." He confirmed that they were together. The police responded, "Well if you were with her, you must have been in Guildford. We'll just have to charge you with murder." Johnson laughed, and said, "fair enough" because he thought this was really "a big joke." Johnson was kept in a cell overnight, given breakfast and then left to himself until late afternoon. His story was checked with the members of the band, who collaborated the story, and then the police put him through the same questioning. Johnson was photographed and released with an apology that no car was available to drive him home.

After Christmas, Johnson secured a job with a local slaughterhouse. On a Tuesday in late January, a plainclothes detective requested Johnson get in his car. Johnson, just finishing work, was unwashed and smelling of animal fats. He was taken to Newcastle's West End police station. He was refused a request to have a solicitor; being told, "You're not talking to anyone, nobody knows where you are." Additionally, he was refused a request to wash, being told, "You've probably got nitroglycerine on your hands." Later, police from Guildford met with him, asking if he wanted to change his story. Johnson kept to his story. He was again kept overnight, but this time the blankets were removed

from his cell and, according to Johnson, the officer stated, “See if you can catch pneumonia tonight.”

The next morning Johnson was taken to the Newcastle airport and flown to Gatwick, where a car with uniformed policemen was waiting on the tarmac. He was pushed in the back, and handcuffed to a handle on the floor. After being driven by the bombed pubs, he was charged with offenses under the PTA. At this point, Johnson had been in police custody approximately eighteen hours. Over the next day, Johnson alleges the police made verbal threats, threats to his family, physical violence and claimed that no one knew where he was and it would stay that way (Kee 1986, 183). Eventually, the physical and psychological pressure began to take its toll and Johnson agreed to sign a fresh statement. The police were specifically interested in changing the time he saw Richardson so as to give some room to spare on the police version of Richardson’s timetable.

Johnson was advised to take a holiday on the continent and told if he turned up in court they would make sure he received seventeen years for attempting to pervert the course of justice. He was released on Friday evening wearing the same clothes he was wearing when he left the slaughterhouse seventy-five hours earlier. He still had not been allowed to wash. He was given no official assistance to get back home, but for whatever reason the police officer at the typewriter slipped him fifty pence to catch the train (Kee 1986, 325).

Even after the threats, Johnson appeared in court and gave testimony along with Lisa Astin supporting Richardson’s alibi and whereabouts on the night of the Guildford bombing. Astin told the court about spending all afternoon with Richardson and visiting a

close friend, Maura Kelly, at the ABC Bakery between 4 and 5 p.m., before going back to Algernon Road to change for the concert[94] (Kee 1986, 183). Then Astin described the evening at the concert, providing photographs of Richardson at the concert. Even the club's doorman remembered Richardson and her friends arriving between 7:30 and 7:45 p.m., because they were guests of the band with complimentary tickets[95] (Woffinden 1989, 325).

Richardson's counsel, Eric Meyers QC, pointed out to the court that the alibi evidence had not been produced by the defense, but had been discovered by the police. In fact, the defense had not been told for some time about the development. The defense complained that the police and prosecution had gone to great lengths not to allow information about the possible alibi to surface. Police had told members of the band, when checking Johnson's stories, that they need not forward their evidence to the defense attorneys (Woffinden 1989, 325).

Sir Michael and the prosecution needed to reconcile their version of events, pieced together from the confessions, with Richardson's alibi. Using Johnson's second statement and the doorman's concession of it maybe being 7:45 p.m., Sir Michael argued that it still allowed fifty minutes for Richardson to get from the Guildford pub to the Elephant and Castle. Sir Michael was then able to produce police tests that showed they had timed the trip and completed it in forty-eight minutes. The police never revealed when or how they did their timed test drive. The defense asked the Daimler Car Hire to

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94 Maura Kelly was 16 at the time and by the time of the trial her mother had taken her back to the Republic of Ireland. Kelly was refused permission from her mother to attend and participate in the trial, wishing to have nothing to do with its "terrorist overtones" Kee, R. (1986). Trial and Error: The True Events Surrounding the Conviction and Trials of the Guildford Four and the Maguire Seven. London, Penguin Books.

95 The doorman said 7:30 p.m., but on cross-examination conceded that she could have arrived as late as 7:45 p.m. Woffinden, B. (1989). Miscarriages of Justice. London, Coronet Books.

cover the route on a Saturday as fast as they could. They did it twice; the first time it took sixty-four minutes, the second sixty-five minutes (Woffinden 1989, 326).

Freelance writer Bob Woffinden brings up some interesting questions related to the handling of Richardson's alibi. First, if, as Sir Michael asserts, the Guildford Four were well-trained IRA operatives, why did none of them have a good alibi from the start? Their alibis only developed over time and were rambling and inconsistent. Richardson never came up with one herself. It was only the belated intervention of a friend at the other end of the country that brought the alibi to light. If the IRA were going to create an unbreakable alibi, would she not know it in advance? Why would the IRA go to great lengths to create an alibi for Richardson, but not the others?

Second, even if the police version of the time required to drive from the Guildford Pub to the Elephant and Castle Pub is accepted, there are still some problems. The order and timing of events proposed by the police, with a two-minute margin of error, allows no time for Richardson to walk from the pub to her car or, at the other end of her trip, to park her car and walk to the concert hall. Additionally, no time is allotted to change from the clothes she was seen in at Guildford to the clothes she was wearing at the concert. This scenario paints a highly unlikely scenario of bombers working on a very tight schedule; IRA operatives do not walk into a pub crowded with wary suspicious soldiers, plant a bomb, and dash out. Furthermore, the getaway proposed by the prosecution is highly unlikely. The last thing the a bomber wants to do is draw attention to the escape; the speedy trip presented by Sir Michael to get Richardson to the Elephant and Castle in less than fifty minutes would have been as foolish as it was unnecessary (Woffinden 1989, 326-7).

The court and jury could not help but notice that there were many anomalies in the prosecution's version of events and proposed timelines, not to mention the confessions of the accused.[96] In regard to the confessions, Sir Michael alternately described them as possessing "startling accuracy" to "deliberately misleading" (McKee and Franey 1988, 237). The existence of confessions containing both obvious contradictions and ostensibly accurate details became the central problem for the prosecution. Sir Michael argued that the discrepancies in their stories were part of a sophisticated and concerted IRA counter-interrogation technique designed to confuse and mislead the police about the true nature of the operation (Kee 1986, 185; McKee and Franey 1988, 237). Several questions arise from the prosecution's theory of a sophisticated counter-interrogation technique. First, the background and demeanor of the defendants, except possibly Hill, hardly suggested the type of sophisticated, shrewd professional the IRA would need in order to inculcate with this technique (Kee 1986, 185). For the most part, the defendants were drug-addicted vagrants unable to keep a decent job. Second, if the task was simply to mislead the police, why make any important or accurate admissions (Woffinden 1989, 238)? Finally, if the long list of names given by some of the defendants was a ruse to throw the police off the track of the real IRA members involved, why would it include one name, Anne Maguire,[97] which according to the Crown, had been actively involved in the bombing, and was cited in the trial as showing Conlon how to make IRA bombs (Kee 1986, 189)?

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96 One source puts the count at more than 140 discrepancies in their confessions Gudjonsson, G. H. (1992). The Psychology of Interrogations, Confessions and Testimony. New York, John Wiley & Sons.

97 It is this connection, from Conlon's confession, which will lead to another miscarriage of justice known as the Maguire Seven.

The dilemma of these and other anomalies could only be resolved by a jury that would balance the many discrepancies with accurate details that only someone close to the incident could know. After deliberating for less than two days, the jury unanimously found Richardson, Conlon, Hill, and Armstrong guilty of the October 5, 1974 murders and conspiracy to cause explosions related to the bombing the Guildford pub and the latter two guilty, additionally, of the November 7, 1974 bombing at Woolwich[98] (Kee 1986, 196). The sentences of life were noteworthy for being the longest handed in an English court of law, and were eventually entered in the *Guinness Book of Records* (Woffinden 1989, 315). During the sentencing, according to Conlon, Judge Donaldson spoke aloud, wishing that the law permitted him to send the four to the gallows (cited in Miller 1990, 310). Donaldson continued, saying that there would be no question of them getting early release after twelve to fifteen years, because the Home Secretary was obliged to consult the trial judge before making such a recommendation. Donaldson, then age fifty-four, made it clear that "it must be doubtful whether any question of release will arise during the life-time of the trial judge" (Davies and Franey 1986; Kee 1986, 197).

During the trial there were several more bombings by the seemingly unstoppable London Active Service Unit (ASU). These and other bombings, between February though December, are known as "phase two" of the IRA's 1975 mainland bombing campaign. As part of "phase two," the IRA, on September 22, 1975, placed a bomb on the outside window ledge of a hotel coffee house, causing some minor injuries. Three days later another soldiers' pub, the Hare and Hounds, was bombed. Even after the Guildford Four convictions, bombing with the identical signature continued. The IRA

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98 The Crown contends that only Hill was present at the scene of the Woolwich bombing, but Armstrong was convicted on the grounds of being what would one have been called an "accessory before the fact" Woffinden, B. (1989). Miscarriages of Justice. London, Coronet Books.

called the police and told them they had the wrong people and for proof they would leave an undetonated bomb, identical to those used at Guildford, Woolwich and other locations at a specified location in Margaret Thatcher's district (Miller 1990, 310). The undetonated bomb was found and provided clear forensic evidence connecting it to the one used at Guildford and Woolwich.[99]

On December 6, 1975, a dramatic car chase through the west end of London led to a six-day siege and the subsequent arrest of the London ASU. This event, known as the Balcombe Street siege, added a series of interesting twists to the Guildford Four case. The IRA maintained that the four ASU members held out with their hostages, with no chance of escape, in order to maximize publicity and ensure that the men would not suffer beating by police or prison staff after their surrender[100] (Woffinden 1989, 333).

The four members of the London ASU, or Balcombe Street Gang (BSG) as they became known, immediately told police that the Guildford Four were innocent. Alastair Logan,[101] after interviewing the BSG, stated that there were "certain idiosyncrasies in the methods by which they constructed bombs, things which were peculiar to that particular group, and which continued long after [the Guildford Four] were in custody" (Woffinden 1989, 335). Forensic evidence, which was later discovered and "suppressed" by the government, linked the bombs that exploded in Guildford and Woolwich to several other bombs that had exploded both before and after those two incidents. The evidence strongly

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99 Miller notes that a bomb's signature is as distinctive as a human fingerprint. The bomb's wrapping, the amount of explosive, the manufacture's explosive lot and the characteristics of the detonation device are distinctive to a bomb maker Miller, A. H. (1990). "Preserving Liberty in a Society under Siege: The Media and the 'Guildford Four'." Terrorism and Political Violence **2**: 305-323.

100 In view of what the Guildford Four alleged and what had happened a year earlier to those accused of the Birmingham bombings, it seemed a sensible precaution.

101 Alastair Logan was originally Armstrong's lawyer and for a while represented all four defendants. Later Hill and Conlon would get different defense attorneys. Logan, who worked unpaid almost continuously for 10 years, is one of the chief reasons for the release of the Guildford Four.

indicated that all 32 bombings had a "common source of supply, information and expertise" that pointed to a single IRA unit conducting the attacks. Fingerprints on some of the unexploded bombs tied them to the BSG, but none of the fingerprints matched any of the Guildford Four (Gudjonsson 1992, 267).

5). Summary

Throughout the trial the defendants' confession was the key to the prosecution's case. The confession that began the entire process, Paul Hill's, named more than sixty other people. His confession to police on November 29, 1974 led to the arrest of more than Gerry Conlon, Paddy Armstrong, and Carole Richardson; it also brought to the attention of police other members of Conlon's family. Not everyone named by Hill was arrested, but many were, including members of the Anne Maguire family.

B). Maguire Seven

On the basis of Gerry Conlon's confession, the police descended upon the home of Anne and Paddy Maguire. They arrested Anne Maguire, her husband Patrick (Paddy), her sons Patrick and Vincent, her brother Shawn Smyth, her husband's brother-in-law, Patrick Conlon (Guiseppe), and Patrick O'Neill, a family friend, on charges of operating a bomb-making factory for the IRA. The police searched the house and found nothing, but swab tests done on the Maguires revealed traces of nitroglycerine (as used in bomb making). The swab tests were the sole evidence used in the conviction. All of the Maguire Seven were eventually jailed under the PTA.

1). The Arrest

On December 2, 1974, several days after the arrest of his son Gerry (and incidentally several days after the passing of the PTA into law), Guiseppe Conlon

decided to travel to London to assist his son. Because Guiseppe was quite ill from extensive tuberculosis in his lungs, his wife, friends and his lawyer all tried to convince him not to risk his health by traveling. Before leaving, he contacted his neighbor police station to inform them of where and why he was traveling to London. He planned on staying with his brother-in-law, Hugh Maguire, and Maguire's wife who lived in London, but had not been able to get in contact with them for several days.[102] Guiseppe arrived in London on Tuesday, December 3. Unable to find his brother-in-law (Hugh Maguire), he went to stay at his other brother-in-law's home (Anne and Paddy Maguire). Paddy was home alone (Anne was at a cleaning job). After making some calls, the two went down to the local pub for drinks. After a number of drinks they went back to the Maguire home, met Anne, who had returned from work, and discussed the situation (Kee 1986, 84).

At approximately 6:00 p.m. that evening, a family friend, Patrick O'Neill, called to ask for assistance with a personal situation. His wife was expecting their fourth child and would need a couple extra days in the hospital, and O'Neill asked if Anne would look after their three young daughters for a couple days. Anne agreed and Patrick said he would bring them to her. Later Paddy, still not totally recovered from his afternoon drinking with Guiseppe, left the house and headed to the Harrow Road Police Station to inquire about Hugh. Paddy was worried that Hugh, who had some health problems, might be in trouble at the apartment and unable to answer the phone (Kee 1986, 86). After getting what he felt was the runaround, Paddy got angry at the police station. It was in

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102 Hugh and Kitty Maguire were not available because they had been arrested on the morning of Saturday, November 30, 1974 under the PTA and were being held without access to a lawyer. They were arrested because Gerry Conlon had mentioned their names and he had stayed with Hugh and Kitty Maguire once Maguire, A. and J. Gallagher (1994). Miscarriage of Justice: An Irish Family's Story of Wrongful Conviction as IRA Terrorists. Niwot, CO, Roberts Rinehart Publishers. No one except the police knew where they were. Due to the fact they had unassailable alibis, they were later released without charge.

this state of mind, still under the influence of alcohol and very upset, that he arrived home at 7:00 p.m.

Unbeknownst to the Maguire household, they were under police surveillance. Just after Paddy's arrival home, Sean Smyth, Anne's brother, who was staying with the Maguire's, came home. Sean Tully, a friend of both the Hugh and Paddy Maguire families, stopped by and told everyone the news about Hugh and Kitty being picked up by police in relation to the Guildford bombing (Maguire and Gallagher 1994, 29).

Hugh and Kitty Maguire's arrest had been a result of Paul Hill's confession stating that they had been part of the Guildford Bombings. Fortunately, Hugh and his wife had unshakable alibis, so Hill retracted and said it was the wrong Maguire and then named Conlon's aunt, Anne Maguire, as the one who had helped with the Guildford Bombings. When Anne was able to demonstrate she had been at the circus that night with her two children, Hill said he had misspoken, and meant to say that he had learned to build bombs in Anne Maguire's kitchen (Miller 1990, 311).

A few minutes after Sean Tully arrived with this shocking news, Pat O'Neill arrived with his three daughters. Anne immediately began preparing them some food. Patrick said goodbye to his children and the four men (Paddy, Patrick, Guiseppe, and Sean Smyth) decided to start Patrick's trip home by having a drink at a local pub called the Royal Lancer. Two detectives followed the men during their 500-meter walk (Kee 1986, 90). They were just having their second pint when Paddy's son John came into the bar followed, by men. The men introduced themselves as police officers and asked the four to step outside to answer some questions (Maguire and Gallagher 1994, 33).

Back at the Maguire residence, during the time the men were at the pub, the bomb squad arrived. Detective Chief Inspector David Munday told Anne to put the children in a room in back, so as not to frighten them. Then he told Anne that his squad would search the house. The police were looking for evidence of the "bomb making factory" that they had been told about in Gerry Conlon's confession.[103] Anne replied, "Certainly. All you will find is a rubber bullet. I'll get it for you."[104] Anne was told to stay seated in the living room (Kee 1986, 91). After searching the house and being questioned extensively about rubber gloves found in a kitchen drawer, the Maguires where taken down to the local police station.[105] The police never found any evidence of bomb-making equipment in the house or garden. The only items of notice were the rubber bullet, rubber gloves and a roll of tape. Both Anne and Paddy were arrested along with their three sons (Vincent, age 16, John, 15 and Patrick, 13). The only member of the Maguire family not arrested was their eight-year-old daughter Anne Marie.

2). The Interrogation

The next day Anne Maguire was taken to Guildford for questioning. As she was brought into the Guildford Police station, she could hear a crowd of people chanting "Hang the Irish Bastards, hang them" (Maguire and Gallagher 1994,41). During the following week in which Anne was held under authority of the PTA, she alleges that the police physically and psychologically abused her. Originally she was arrested on charges

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103 Conlon's confession also stated that Anne Maguire had been part of the team on the Guildford Bombing Kee, R. (1986). Trial and Error: The True Events Surrounding the Conviction and Trials of the Guildford Four and the Maguire Seven. London, Penguin Books.

104 The rubber bullet was a souvenir from the last time Anne had been to Belfast to visit family. She was given the bullet as a reminder of how life was in Northern Ireland.

105 Anne told the police, who confirmed it with her doctor, that she suffered a skin disease (dermatitis) and wore the gloves when she was working because of the prescribed ointment on her hands Kee, R. (1986). Trial and Error: The True Events Surrounding the Conviction and Trials of the Guildford Four and the Maguire Seven. London, Penguin Books.

of operating a bomb factory in her home and later, on December 7, she was charged with participating in the Guildford Pub bombings. She alleged that she was beaten upside the head when asking questions and made to stand spread eagle against the wall until she collapsed and then they kicked her in the back.[106] The police then pulled her around by her hair and abused her verbally. The doctor's report, when Anne was allowed to see one later in the week, described huge clumps of missing hair. Additionally, according to Anne, since the interrogation her kidneys have not functioned properly. The beatings were so severe that when a female doctor examined her several weeks later it was determined that she needed gynecological surgery (Maguire and Gallagher 1994, 57).

During their time in police custody, the accused were fingerprinted, photographed and questioned about bomb making at the house. The confessions of Hill and Conlon had both said they learned to make bombs in Anne Maguire's kitchen and that Anne had been with them during the Guildford Bombing. The police should have had an easy time demonstrating this claim, because nitroglycerine absorbs into the skin of anyone handling it and thus is detectable through scientific tests. Therefore, not only should bomb making equipment have been found at the Maguire residence, but those who handled it should have tested positive for handling nitroglycerine. Therefore, the police conducted a test known as TLC (Thin Layer Chromatography) on the suspects. For the test, hand swabs (one dry for a base line and one with ether for testing purposes) were done to the front and back of the suspects' hands. Additionally, scrapings were done under their fingernails. These samples were sent to Royal Arsenal Research & Development

106 Forcing a suspect to stand spread eagle until they collapse is one of the "Five Techniques" used by British forces to break a person's will to resist Taylor, P. (1980). Beating the Terrorist?: Interrogation in Omagh, Gough, and Castlereagh. Middlesex, England, Penguin Books, Cobane, C. T. (2000). The Use of the 'Five Techniques' in the Fight against Terrorism in Northern Ireland. Encyclopedia of Prisoners of War and Internment. J. F. Vance. Santa Barbara, CA, ABC-Clio**:** 149-150.

Establishment (RARDE) at Woolwich for testing. Curiously, the only samples not taken straight to Woolwich for testing were Anne's rubber gloves; the copious supply was sent to the New Scotland Yard and then several days later was sent to Woolwich for testing (Woffinden 1989, 362-3).

By Thursday December 5, the official results of the TLC test were back from RARDE. They indicated positive traces of nitroglycerine on the hands or under the fingernails of Paddy Maguire, Guiseppe Conlon, Sean Smyth, Pat O'Neill and two of the three Maguire sons (Vincent and Patrick). The results showed a great deal of variance. Giuseppe and Sean's hands were the most contaminated; both hands tested positive on both the swabs and nail scrapings. For O'Neill, all his nail scrapings were positives and swabs negative. Paddy's nail scrapings and the dry swab on his right hand were positive and the rest were negative. Vincent and Patrick were positive on their right hand nails scraping only. Only John and Anne Maguire's hands were clear (Kee 1986, 106).

Before the trial went to court, Anne was released on bail and, in her autobiography, tells of the social ostracism[107] she received from long-time friends and neighbors and of the numerous beatings her sons endured at the hands of the police. According to Anne, the police would regularly grab one of the Maguire boys off the street and beat them in a van and then dump their bruised, bleeding body off in front of their home. After taking Patrick to the doctor, due to one of the more severe beatings, Anne contacted the police complaints commission. The police complaints officer asked Patrick if he knew the numbers the policemen wore who beat him. Patrick took the officer up to his room and showed him the list of the numbers he had written up and

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[107] Roy Jenkins talks in his book A Life at the Center about the many calls for bringing back capital punishment and "mass expulsion of the Irish population" Jenkins, R. (1991). A Life at the Center: Memoirs of a Radical Reformer. New York, Random House.

down one entire wall. He told the commissioner they picked him up and beat him approximately once a week. The beatings finally stopped when Paddy Maguire went on a hunger strike and wrote the Metropolitan Police Commissioner that he would not eat until the beatings of his sons stopped (Maguire and Gallagher 1994, 67). Although the police beating stopped, the social ostracism did not and now the Maguires had to rely on the British justice system to demonstrate their innocence.

3). The Trial

On January 27, 1976, more than one year after their arrest, the Maguire Seven trial began in the same courtroom (Old Bailey), with the same judge (Justice John Donaldson) and the same prosecuting attorney (Sir Michael Havers) as was used in the Guildford Four trial. Justice Donaldson made it clear from the outset that there was no connection between the Maguire case and the Guildford bombers, beyond the fact that some of the accused were related to Gerry Conlon and one of them claimed to have come to England on hearing of Conlon's arrest (McKee and Franey 1988, 309).

The prosecution argued that the arrest of Gerry Conlon led to a telegram being sent to the Maguire home, which according to Sir Michael started "alarm bells … ringing." The Maguire's and their associates, according to Sir Michael, knew the game was up, so it was "all hands to the pump" to get rid of the nitroglycerine. Furthermore, in his opening statement, Sir Michael promised to produce evidence that not only had the accused handled a quantity of explosives, but had "kneaded and manipulated" it into small bags (Woffinden 1989, 361). The defense pointed out that it was during the time that Sir Michael described as a frantic dumping of explosives and bomb making equipment; the police were watching the Maguire home. It was during the same period of

time that Anne calmly acceded to O'Neill's request to take care of his three girls for a couple of days.

With the preliminaries aside, the heart of the prosecution's case was the TLC tests. The result of the test showed positive for five of the seven. Anne's hands tested negative, but she was charged anyway on the grounds that at least one of her rubber gloves tested positive for nitroglycerine. Sir Michael brought in expert witnesses to make a key point related to the reliability of the test, emphasizing that the behavior of nitroglycerine was unique and could not be confused with that of any other substance (McKee and Franey 1988, 310).

As the defense argued its case, it came to light that the person who performed the TLC test was an eighteen-year old lab technician whom the judge described as "an apprentice," and had only been working at RARDE for nine weeks. The lab technician violated a number of RARDE policies in testing the Maguire samples. First, the technician used up the entire sample in the test. Contrary to standard scientific procedures, the samples were not divided, so that confirmatory tests could be made on other portions of the sample. Second, the director of RARDE had ruled that the sub-divided samples should be crosschecked and that the TLC test was never the only test conducted. There should be triangulation done by other similar tests. Due to the technician's error, not only could no independent verification be done, because the samples had not been sub-divided, but the entire lot samples had been used and thus destroyed in the process (Woffinden 1989, 363). Additionally, the amount of nitroglycerin reportedly found on the plastic gloves was so small that it was destroyed during the tests seeking to establish its validity as evidence (Cockburn 1989, 554).

Finally, the results of the test were not photographed. Therefore, "Exhibit A," the only evidence that mattered, no longer existed (Woffinden 1989, 363).

The defense brought to the stand Dr. John Yallop, who was not only the former director of RARDE, with thirty-four years experience working with explosives, but was the individual who had originally devised the TLC test. Dr. Yallop stated that there were a number of disturbing features related to the case and in conjunction with misgivings about the test, which made it unwise to convict solely based on the TLC results.[108] First, five people (and Anne's gloves) tested positive for nitroglycerine, but no trace of explosives were ever found. Neither the bomb-sniffing dogs nor the mechanical sniffer device detected any traces of explosive vapor anywhere in the house (especially the kitchen drawer where Anne's gloves were stored).[109] If the family members did a professional job of cleaning, it is "decidedly queer" that they had not extended their professional expertise to cleaning their own hands.[110] Second, it was puzzling that no explosives, detonators, timing devices, batteries or wire were ever found in the home (McKee and Franey 1988, 311).

Third, one of the features of the evidence that made Dr. Yallop reassess the reliability of his own test were the results coming from Paddy Maguire. As previously discussed, each suspect had his or her hand dry-swabbed and then swabbed with an ether swab. Dr. Yallop explained that nitroglycerine absorbs into the skin in about twenty minutes, hence the need for the ether swab to penetrate the skin. In Paddy's test, which

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108 Since the trial, Yallop has repudiated the test and it is no longer in use Price, C. (1984). Aunt Annie's Bomb Kitchen. New Statesman**:** 12.

109 The police test over ninety items of clothing and all gave negative results with the mechanical sniffer test May, S. J. (1990). Interim Report on The Maguire Case. London, Her Majesty's Stationery Office.

110 Anne Maguire was a cleaning lady for several homes/businesses in her neighborhood and the prosecution had inferred that Anne had used her cleaning skills to rid the house of any explosive residue.

according to the prosecution's case would have been three to four hours after he handled the explosives, the dry swab was the only of the two swabbings to test positive. According to Yallop, it would be highly irregular to have enough nitroglycerine on your hand (three to four hours after handling) to be detected in the dry swab, but not enough absorbed into the skin to be detected by the more accurate ether swabbing. Put another way, if the dry (i.e., surface) swabbing was positive, then there was still nitroglycerine present on the hand. If there was nitroglycerine still present on the hands it was still in the process of absorption, thus the ether (i.e., penetrative) swabbing would also have to be positive. Any other results, according to Yallop, would be "an extraordinary anomaly" (McKee and Franey 1988, 320).

Finally, Dr. Yallop pointed out that handling nitroglycerine is very dangerous. Nitroglycerine rapidly absorbs through the skin and bloodstream, producing blinding headaches known to scientists as "NG headaches." Knowing the dangers of handling nitroglycerine, would Anne be the only one to take precautions? Additionally, would Anne take precautions of wearing gloves while allowing her children to use their bare hands? At this point the judge interrupted Dr. Yallop to comment that this was hardly "expert" evidence (McKee and Franey 1988, 312).

The jury took almost two days to reach a decision. All of the Maguire Seven were unanimously found guilty, except young Patrick, who was convicted by a majority of eleven to one. The case turned on the forensic evidence produced by TLC tests and the confessions given by Paul Hill and Gerry Conlon to the police--confessions they later retracted in court claiming they were forced. The Maguire Seven were never convicted of

running a bomb-making factory (as was widely reported in the press), but of possessing explosives.

Justice Donaldson, in contrast to his conduct at the Guildford trial where he passed no comment on the verdicts, told the Maguires that in his opinion they had been "rightly convicted." Anne and Paddy Maguire, the master bomb-makers, were sentenced to the maximum allowed for the possession to explosives, fourteen years. Guiseppe Conlon, who had alerted the RUC in Northern Ireland of his trip to London to help his son get a lawyer (convicted Guildford Four bomber Gerry Conlon), Sean Smyth, Anne's brother and temporary lodger with the Maguires, and Pat O'Neill, who supposedly used his three daughters as a cover for his activities, each received twelve years. Vincent Maguire, sixteen at the time of the trial, was given five years, and fourteen year-old Patrick was given four years. Patrick is the youngest person in Britain ever imprisoned for terrorist offenses and placed in an adult prison; he had to hold his pants up each day because none were small enough for his adolescent waist (and belts were not allowed) (Maguire and Gallagher 1994, 94 166).

C). Birmingham Six

The story of the Birmingham Six began with an IRA bombing gone wrong. On November 14, 1974, James McDade, an IRA activist based in Birmingham, was killed by his own bomb as he was planting it outside the Coventry telephone exchange. One week later, as McDade's remains were being flown back to Belfast, two bombs were detonated at approximately 8:15 pm in two Birmingham pubs called the Mulberry Bush and The Tavern in the Town. The death toll of the largest mass murder in British history was twenty-one dead and 162 injured (McFadyean 1990, 12). Birmingham has traditionally

played host to a large Irish community, estimated in 1974 at about 100,000, and because of the continuing IRA bombings on the mainland, anti-Irish feelings, which had long been latent, were growing (Woffinden 1989, 299). These anti-Irish sentiments would prove to be very costly to six Irish residents of Birmingham returning to Northern Ireland for the funeral.

One of the Birmingham Six, Gerry Hunter, was friendly with James McDade. Hunter and McDade had attended the same secondary school in Belfast. Hunter was not especially interested in politics and he disliked the methods of the IRA, but felt that he should do the right thing and attend the funeral.[111] Several friends and drinking buddies (Dick McIlkenny, Paddy Hill, William Power and John Walker) all decided to attend. A sixth friend, Hugh Callaghan, could not afford the trip, but decided to see his friends off at the train station, which would take them to the ferry[112] (Woffinden 1989, 385-8). It may seem strange that individuals without an interest in politics or much sympathy for the IRA would attend the funeral of an IRA bomber. According to Michael Farrell, of the *Sunday Tribune* of Dublin, "[f]uneral-going is part of the ghetto culture of Northern Ireland" and "[i]t does not necessarily imply support for the deceased's political views" (Farrell 1984). In addition to the funeral, Hunter had another reason to go: his father had died the previous month and he wanted to bring his mother back to Birmingham to enjoy a break and spend time with her grandchildren (Woffinden 1989, 387).

The six travelers were late to the train station and missed the 6:55 p.m. train, so they waited in the station pub until the 7:55 train arrived. Hunter made a couple of calls

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111 Hunter and his wife knew McDade's wife and he tried to organize a collection (as is the tradition for any death of a husband), but could not because everyone was short on money. Instead he arranged to purchase Mass Cards, have them signed by all of his drinking buddies down at the Crossway and take them with him to the funeral Woffinden, B. (1989). Miscarriages of Justice. London, Coronet Books.

112 Callaghan was on social security due to a stomach ulcer, which kept him off work.

to assure they had a ride when they got off the boat, because with the Troubles in Belfast none of them wanted to walk through Belfast at night. The train left on time and the five travelers (Callahan stayed on the train platform) headed toward the Heysham ferry. During the train ride they played cards (Hunter and Walker had tried to organize a pub team in 1973 to play competitive Don, or alternately called Dom Pedro, in a local Sunday league).

Unknown to the five men, an alert ticket salesperson at the Birmingham train station called police to say that a group of Irishmen had purchased tickets to Heysham a little while before the two bombs exploded. Upon arriving at Heysham, the five men prepared to board the ferry. One of them, Hill, had his luggage checked and was waved ahead of the others. He boarded the ferry and went to the bar, bought a drink and waited for his friends. The other four, thinking that Hill was behind them, idly chatted with a Special Branch detective and waited for Hill to arrive, so they could embark. When the detective asked them the purpose for their trip, each replied that he was visiting relatives; not surprisingly, none mentioned that he was going to the funeral of an IRA terrorist (Woffinden 1989, 385).

As information from the Birmingham police about the suspicious ticket sales reached Haysham, Hunter, McIlkenny, Power and Walker were asked to accompany police to a local police station, so they could be questioned. During their questioning they happened to mention that a friend of theirs was traveling with them. Hill, who was already on the ferry, was arrested. While the five were in police custody, their bags were more thoroughly searched and the Mass Cards were found. Additionally, it became apparent that they lied about their reason for traveling to Northern Ireland (Woffinden

1989, 389). Additionally, the name Hugh Callaghan was made known to the police and he was arrested 11:00 p.m. the next evening.

While at the police station, at approximately 3:00 a.m., Birmingham police arrived with Dr. Frank Skuse (Home Office scientist) to question the men and take samples for forensics testing. At nearly the same time, between 3:00 a.m. and 5:00 a.m., with the questioning of the five not yet completed and the results of forensics test not yet known, the homes of the men were raided and searched by police. No evidence was found in any of the homes connecting the five to the Birmingham bombings. During the early morning questioning, Dr. Skuse subjected the five to a Greiss test.[113] At the time, it was thought to be a foolproof means of detecting nitroglycerine on the hands of someone who had handled explosives (Gudjonsson 1992, 268).

Each of the first five men arrested told a strikingly similar story. All alleged that the statements they made while in police custody had been extorted under physical and psychological duress. On Friday morning, each was given breakfast and told to remove his clothes for forensic testing. The police had a potential goldmine of forensic evidence. The suspects (except Callaghan) were all wearing the exact same clothes they had been wearing at the time of the bombing. The clothes should be rich in supporting forensic evidence. After giving up their clothes the men alleged that they were physically abused, deprived of sleep and denied food until their Monday morning court appearance. The alleged physical abuse included being punched and kicked in the back and genitals. Additionally, Walker described having his foot burned with a lit cigarette (months later he showed his still badly swollen foot in court) (Woffinden 1989, 394-5). The psychological pressure, they claim, was worse. They were told that their homes were

113 The Greiss test, named after the chemist who invented it.

surrounded by screaming mobs, that their wives and children were being attacked and that there would be no protection for them until a statement was signed. Several alleged that guns were produced and stuck in their face or pushed into their mouths. McIlkenny testified that he was "constantly punched and slapped and eventually ... broke down completely." He continued on to say that he signed the confession because, "I had just given up - I couldn't take any more" (Woffinden 1989, 395).

After making their Monday court appearance, where the only sign of maltreatment was Walker's black eye, they were moved to Winson Green prison. Callaghan remembered a policeman telling him that a reception had been arranged for them. Upon walking into the prison there were wardens, guards and prisoners waiting for them. Someone yelled "Here's the IRA bastards that done the bombing" and according to Callaghan "all hell let loose." It must have looked like a pub brawl, continued Callaghan, because of all the chairs flying around the room (Mansfield 1994). After what the Birmingham Six described as an eternity, they were put into a small room. After a while they were taken out and told to take a shower (standard procedure for newly admitted prisoners). In the shower waiting for them were a number of other prisoners who formed a gauntlet that the Birmingham Six had to run through. In the shower-gauntlet, they were kicked, punched and had their hair pulled (Mansfield 1994, 135). Walker would lose several teeth as a result of being punched by prisoners. The prisoners who were instructed to clean the bathroom area afterwards found the water red with blood[114] (Woffinden 1989, 396).

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114 The Winson Green prison doctor, Dr. Arthur Harwood, was in an invidious position. He saw them Monday afternoon and could not deny they were maltreated, and his original testimony placed blame on the police, but he later changed his testimony, saying the abuse took place at the prison. In any event, his testimony did damage to the Birmingham Six's later civil case of police abuse and misconduct. Complaints

1). The Trial

The trial date for the Birmingham Six was set for May 9, 1975, but due to the media exposure in the Birmingham area the defense counsel requested a change of venue. Mr. Justice Bridge granted the defense's application and the trial was moved back one month and relocated to a 900-year-old castle in Lancaster, which was also used as a medium security prison. The evidence for the June 9 trial fell into three categories: the forensic tests, circumstantial evidence of association with the IRA and confessions made by four of the six accused while in police custody (Gudjonsson 1992, 269).

The first of the three categories of evidence, the forensic evidence, should have provided overwhelming support of the prosecution's case. Because the suspects were apprehended several hours after the explosion, still wearing the same clothes, it should be replete with usable evidence. Forensic scientists used by the prosecution avoided the mistakes made in the Maguire Seven trial; there would be no single test, which destroyed the evidence completed by an eighteen year-old "apprentice" technician. The professional credentials of Dr. Skuse were beyond question. Dr. Skuse submitted the swabs to three separate tests: Griess, TLC and a more sophisticated (Skuse stated it was at least 100 times more accurate than other tests) Gas Chromatography Multiple Spectrometry (GCMS) test (for more on these tests see Mullins 1986, 165-70).

The Griess and TLC tests for nitroglycerine came back positive for Hill and Power, but negative for all the rest of the suspects. On the more sophisticated GCMS test a negative came back on Power and a doubtful positive on Hill. Dr. Skuse then did a test

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about mistreatment by police and prison wardens led to an investigation that found that the police did not violate police disciplinary standards, but led to charges of assault being levied against 14 wardens. Each received a suspension *with full pay* as a result of their actions Woffinden, B. (1989). Miscarriages of Justice. London, Coronet Books.

for another component of explosives, ammonium nitrate. Here, he got positive results from Hill and Power's samples, as well as from Walker's. Incidentally, Dr. Skuse also got a positive reaction from a swab of his own hand. Dr. Skuse said in court that Walker's test results were so uncertain that no judicial weight could be attached. The test results on Hunter, McIlkenny and Callaghan (who was swabbed at Sutton Coldfield police station) all proved negative. Dr. Skuse declared in court that he was "ninety-nine percent certain" that Hill and Power had been handling explosives (Mullins 1986, 166). Another forensic scientist, Dr. Judith Drayton, who had preformed the test for nitroglycerine on one of the defendants noted "[p]ossible nitroglycerine present, very small" *The Economist* (1990). No collaborating forensic evidence of explosives was found on their clothes or, after extensive searches, in their homes.

The defense called Dr. Black, an independent consultant, who had been, until 1970, Chief Inspector of Explosives for the Home Office. He stated that the tests were unreliable because other substances, notable nitrocellulose, could produce the same results. Dr. Black pointed out that nitrocellulose has industrial applications including the types of paint and varnish used in public-house furniture and bars. He also pointed out that the GCMS test is so much better than the TLC of Griess test that a negative on the former invalidates a positive on the latter two, which was the situation with Hill and Power's test results. In sum, Black told the court that Skuse's test did not succeed in identifying nitroglycerine (Woffinden 1989, 392-3).

Another crucial factor related to the forensic evidence was the fact that the men (according to the prosecution) had been playing cards on the train ride to Haysham. Accordingly, if one person had traces of explosive on his hand then they all should have

had them. The cards also should test positive for traces of explosives. Unfortunately, the cards could not be tested because the police had lost them (Woffinden 1989, 393).

In the second of the three categories of evidence tying the defendants to the IRA, the prosecution continuously mentioned the fact that the suspects lied about the reason for their trip to Belfast (i.e., to attend the funeral of IRA bomber James McDade). The prosecution pointed to the Mass Cards, the attempt to raise money for McDade's wife and family, and that several of the suspects knew McDade when they were children. Finally, the prosecution produced Thomas Watts (who worked with Walker and McIlkenny). Watt stated that he had heard Walker admit to planting other bombs and that Walker had asked Watts where he could buy cheap alarm clocks. The defense, to cast doubt upon Watts testimony, got him to admit under oath that he had provided shelter to a known criminal named Littlejohn,[115] wanted for armed robbery by both the British and Irish security services. He admitted to aiding a known criminal, but was never charged for the crime (Woffinden 1989, 398). The jury took this evidence to be collaborative to the forensic evidence and the key confessions.

Due to the anomalies of the forensic evidence and the weakness of prosecution witnesses, the government's case hinged overwhelmingly on the confessions made in police custody. The four men who made the confessions, like the Guildford Four, retracted them at their trial and alleged that they had been extracted through extreme ill treatment. Woffingden has pointed out that the confessions provided absolutely no information about the crimes other than what the police already knew. Additionally, he stated, a close read of them demonstrated that they were illogical, contradictory and most

115 There is evidence that Littlejohns's series of robberies were part of a British secret service project to discredit the IRA Ibid.

improbable (1989, 393). After a week of legal arguments, as the defense tried to have the confessions thrown out, the judge ruled that they were admissible. Later, he refused to allow the juries to actually see the written statements made by the Birmingham Six.[116]

As the trial ended, Judge Bridge gave a final summation and direction to the jury. He focused the jury's attention on the two most important elements of the prosecution's case, the confessions of the six suspects and the scientific evidence. Related to accusations of police brutality, Judge Bridge stated that the two accounts (police and Birmingham Six) were totally irreconcilable and "gross perjury was being committed by one party or the other." He continued, "if the defendants' stories were to be believed, many police officers had behaved in a manner that recalled the Star Chamber, the rack and the thumb screws of four or five hundred years ago" (Woffinden 1989, 405). In addressing the later issue, Judge Bridge emphasized the importance of the evidence, stating, "the forensic scientists were able to infer so much that one is lost in admiration for the *precision of their science*" (emphasis added Mansfield 1994, 246). With comments of this tenor, the jury was sent off to deliberate.

The jury was out six and a half hours, and on August 15, 1975 returned verdicts of guilty on all 126 murder charges. All of them were sentenced to life imprisonment and the judge did not recommend minimum sentences.[117] In remarks to the Birmingham Six after the verdict was read, Judge Bridge stated, "You all stand convicted … on the

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116 According to the confessions, Power said that he alone planted the bombs; Callaghan said that he and Hunter planted the bombs; Walker admitted that he and Hunter did it; and McIlkenny confessed that he and Hill did the job Ibid.

117 There was such fervor over this omission that Justice Bridge took what he called as a "wholly exceptional course" of writing *The Times* to clarify his position. He explained that he could see no reason "to anticipate that either the Parole Board or any Home Secretary in future years will need reminding, by the presence of a recommendation on the file, of the enormity of the crime (*The Times*, August 21, 1975). In short, the judge saw no possibility that the Birmingham Six would ever be allowed parole, so why give an opinion of 'enough time served.'

clearest and most overwhelming evidence I have ever seen of the crime of murder" (McFadyean 1990, 13). Judge Bridge finished by stating, "I am entirely satisfied, and the jury by their verdicts have shown they are satisfied, that all the investigations were carried out with scrupulous propriety" (Woffinden 1989, 407).

D). Appeals and Conviction Overturned

Seventeen people were convicted of engaging in terrorist activities related to Northern Ireland. All claimed to be innocent, and all had a number of supporters both inside and outside the legal community believing that grievous errors had been made with these convictions. Conversely, there are scores of individuals who expressed publicly with the same level of passion that the convictions were just and fair. For each of the three groups of convicted terrorists, in addition to their families and their supporters, the guilty verdicts began the next stage of their ordeals, appeals process.

Each of the three groups of "convicted terrorists" was to have lengthy and complicated appeals processes. This section will condense the multiple appeals into the themes found in the appeal hearing for each of the three groups. Then a discussion of an official government report by Sir John May, which played a watershed role in creating momentum that ultimately led to the overturning of the convictions, will be examined.

1). Maguire Seven

The first of the three cases to get an appeal hearing was the Maguire Seven. On July 20, 1977 in Old Bailey (the same courthouse in which they were found guilty), their appeal was heard. The presiding judge in the appeal was to be Lord Justice Roskill, then age sixty-seven. He was known to be profoundly conservative among a set of appeal judges, not noted for their liberal tendencies. The focus of the appeals hearing was to

decide if there was sufficient reason to conduct another hearing to reexamine the case. The primary issue in the appeal hearing was the scientific evidence. Additionally, the attorneys for the appellants argued that Judge Donaldson's summation to the jury had misled the jury on several important points.

The defense argued that the conflict between the expert witnesses made the convictions unsafe. The key point for the defense was "Exhibit 60," the TLC test for nitroglycerin. The scientists for the Crown argued that the reaction of the test to nitroglycerin was totally unique and no other substance could be confused with it, therefore the defendants must have handled nitroglycerin. The defense demonstrated that another substance, PETN, gave identical results.[118] Additionally, the mechanical sniffer found no evidence of nitroglycerin. The defense pointed out that the Crown failed to carry out corroborative tests and the initial findings were contradictory and inconclusive, even within the Crown's scientist's own terms of reference (McKee 1986, 391).

In relation to Donaldson's summation, the defense argued that the judge misled the jury on the time the Maguires needed to get rid of the nitroglycerin that the Crown claimed they had been handling. The judge stated that they had thirty minutes in which to hide/destroy the evidence. But he did not point out that for all but a fraction of that time the men in question were under the surveillance of the police. Only while in the pub were the men not under police surveillance. In short, the judge gave the impression that the Maguire men had thirty minutes to get rid of the alleged explosives, but in reality they only had a fraction of the time. This is an important point when one considers that the

118 Due to the fact that PETN is also an explosive, the point is somewhat academic, but important nevertheless. The Crown never argued that PETN is involved in the bombing. There is no residue other that nitroglycerine at the crime scene. At this point the defense is creating doubt in the judges' mind in order to earn an appeal.

police searched the entire neighborhood and never found any evidence of nitroglycerin. Therefore, the defense argued, these facts cast a reasonable doubt on the original jury's verdict and necessitated a full appeals hearing.

The Appeals Court took the view that the discrepancies in the scientific evidence did not warrant any judicial concern. Additionally, the absence of any bulk explosive found in the house or neighborhood was not a problem because the appellants could have gotten rid of the nitroglycerin earlier in the day. The problem here lies in the case made by the Crown itself. The Crown argued that the Maguires became panicked and began getting rid of the explosives upon hearing that Hugh Maguire had been arrested. Why would the members of "Annie Maguire's bomb factory" have reason to get rid of the explosives as argued by the appeals court, *a priori* to knowing that one of their family members had been arrested? The Appeals Court did not explain this point. Related to the accusation that Judge Donaldson's summation was less that adequate, Judge Roskill, the spokesman for the Appeals Court, stated that there was no reason for the convictions to be disturbed "either on the basis of them being unsafe or unsatisfactory or that the learned judge was guilty of any non-direction or misdirection or that his summing-up was in any way unbalanced" (McKee 1986, 392). In sum, it took nine days for the appeals court to refuse the Maguire Seven's first set of petitions.

2). Guildford Four

No one familiar with the Guildford and Maguire cases could be encouraged to see that same judge, Lord Justice Roskill, was to preside over the October 10, 1977 appeal of the Guildford Four. Joining Judge Roskill was Lord Justice Lawton, who has told a BBC interviewer once "I have 50 years' experience of the administration of justice and I don't

think the juries get it all that wrong in the sense of convicting the innocent. They frequently get it wrong in acquitting the guilty" (McKee 1986, 393). With the judges selected, the location, Old Bailey, selected, and, rumors of a mass IRA breakout imminent, and a high degree of security, the appeals hearing began.

The grounds for the appeal were clearly set forth in large part as a result of the Balcombe Street Active Service Unit (ASU) trial. According to an article in the *Spectator*, two of the four members of the ASU (Joe O'Connell and Brendon Dowd) admitted to doing the Guildford and Woolwich bombings and gave details of the logistics and manufacture of the bombs that only someone intimately involved could know (1988, 5). According to Ludovic Kennedy, they produced evidence that only the bombers could have known, which was later borne out by police files (Kennedy 1989). All of the Balcombe Street men insisted they had no connection to the Guildford Four and had never heard of them prior to the latter's arrest. Additionally, defense attorney Alastair Logan invited the judges to compare the confessions of the Balcombe Street ASU and that of the Guildford Four. The comparison demonstrated 153 internal discrepancies within the Guildford Four confessions and almost none in the Balcombe Street gang confessions. Logan's point was to raise the question, how could two similarly trained IRA cells behave so differently under interrogation?

Members of the Balcombe Street ASU gave such quality of detail in their testimony that Crown attorney Sir Michael Havers stated that the account had a "ring of truth," that "a great deal of what [they] says is true," and their testimony showed a "very close personal knowledge" of both the Guildford and Woolwich bombings (McKee 1986, 395-6). Even Lord Justice Roskill admitted, "It is difficult to believe that had [they] not

been present on both occasions [their] knowledge of the detail ... could have been wholly invented" (McKee 1986, 396). Compared to the level of detail provided by the Balcombe Street ASU, the Guildford Four evidence was revealing. While in custody of the police, the defendants were asked to provide specifics of the bombing. For example, one of the things Richardson was asked to do was draw a picture of the bomb used. It was described by one of the Crown witnesses as the sort of things a child would have drawn and later said that most people would be hard pressed to describe it as a drawing of a bomb at all (Woffinden 1989, 319).

On October 29th, less than three weeks after the hearing began, the Guildford appeal was denied. The testimony of admitted IRA terrorists, possessing exacting details of the Guildford bombings, was discounted. The Justices who rejected the Gilfford Four's appeal in 1977 declared that the Balcombe Street IRA unit's confession "gave rise to no lurking doubts whatever in our minds" (Cockburn 1989, 554). According to Lord Roskill, the testimony given by the Balcombe Street Gang did nothing to exonerate the Guildford Four; it only proved that the Guildford and BSG had undertaken the bombing in conjunction with one anther (Kennedy 1989).

3). Birmingham Six

The first appeal of the Birmingham Six was held on March 30, 1976, and focused mainly on accusations of police maltreatment of the suspects leading to forced confessions. There was little in the way of new evidence and the bruises had healed, so the defendants lacked the credibility they possessed sitting in the dock beaten and bruised. The appeal was denied. After the appeal was denied, the Birmingham Six filed a civil action against the police and prison officials for assault and mistreatment while in

custody. Lord Denning, the Master of the Rolls and one of the most powerful judges in the country, threw out the case. In relation to the Birmingham Six's accusations of gross mistreatment by the police, he said,

> "If the six men win it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence and that the conviction were erroneous ... This is such an appalling vista that every sensible person in the land would say it cannot be right that these actions should go any further" (Mansfield 1994, 83).

In 1987, a second appeals hearing was applied for and granted. The courts agreed to the hearing because new evidence had surfaced related to the two main points on which the prosecution's case rested: the confession evidence and the forensic evidence. New witnesses had come forward and new information was available that had not been heard during the original trial.

An important reason for the new evidence and the new trial was the work of investigative reporters and the mass media. On October 28, 1985, *World in Action,* a Granada Television program, aired a show that presented evidence that seriously challenged, if not completely demolished the validity of Dr. Skuse's forensic science findings. Two scientists were commissioned to run a series of Griess test on a number of common substances, including nitrocellulose. The result was that a number of common substances gave positive reactions to the Greiss test. Included among the substances tested were playing cards. The five men (although not Callaghan) had been playing cards shortly before their arrest. In other words, the positive Greiss test reaction on the hand of two of the men may have been a result of innocent contamination (Gudjonsson 1992, 269). On the same program Roy Jenkins, Home Secretary at the time of the bombings, stated that "[t]he new evidence I have seen would be sufficient to create in my mind what's sometimes called a lurking doubt as to whether the conviction in these cases were

safe" (Mullins 1986, v). Due to the public stir these revelations caused, more new evidence was forthcoming.

As the public doubts about the validity of the convictions became stronger, new witnesses felt empowered to come forth and tell their stories. Included among these were two police officers. In October 1986, ex-police officer Tom Clarke came forward and said he was at the police station the night the Birmingham Six were "questioned" and could collaborate their stories of ill-treatment at the hands of the police (Gudjonsson 1992, 270). Additionally, policewomen Joyce Lynas stated that she had seen the six beaten by police (Mansfield 1994, 260). As the evidence mounted, so did the pressure for a new appeal.

In the fall of 1987, the Birmingham Six case went before a Court of Appeal. As seen above, the defense made two arguments for overturning the conviction. First, the forensics evidence presented by Dr. Frank Skuse at the original trial could no longer be considered reliable. During the appeal, Dr. Skuse conceded that he carried out tests not specific to nitroglycerin and the positive results on the original tests could be the result of innocent contamination. Additionally, the validity of his testimony was further called into question by a series of contradictory statements (Mansfield 1994, 260). Second, the written confessions of the Birmingham Six were involuntary, brought about through the use of physical and psychological abuse and were therefore unreliable. Eyewitness evidence presented at the appeal substantiated the claims of the Birmingham Six that they were ill-treated while in custody and that physical force and psychological abuse was used to illicit the confessions used in the original conviction (Gudjonsson 1992, 270).

It was the middle of December 1987, the appeal was winding down and, according to one observer, the case went well. In light of the fate of the Guildford Four and Maguire Seven, supporters of the Birmingham Six had little optimism at the start of the appeal. All that changed when on the last day of trial the judges stated that there would be no verdict until sometime after Christmas. This gave hope to many. As Breda Power, Billy Power's daughter, put it, "If there wasn't a chance, why delay?" (Mansfield 1994, 260). When the judges returned with a verdict six weeks later all hope was dashed, when on January 28, 1988, as reported in *The Economist*, Lord Lane, the Lord Chief Justice, and two other presiding judges dismissed the second appeal emphatically stating, "the longer this hearing has gone on, the more convinced this court has become that the verdict of the jury (in the 1975 trial) was correct." The Lord Chief Justice went on to say that there were "no doubts" about the justice of the convictions (1990, 52). Lord Denning, another of the presiding judges, stated after the trial, in an environment of growing public doubt of the Birmingham Six's guilt,

> "It is better that some innocent men remain in jail than the integrity of the English judicial system be impugned" (Mansfield 1994, 261).

The Birmingham Six, like the Guildford Four and the Maguire Seven, would stay in prison. It was not until greater public awareness and outrage that these victims saw justice.

E). Convictions Quashed

Throughout the various appeals, popular and elite opinion[119] slowly and steadily changed from admiration of the police and government for the capture and conviction of

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119 The range of "elites" who came to see these cases as travesties of justice is immense and only a very short sampling is possible. The list includes Cardinal Hume, Lord Scarman and Lord Devlin (two distinguished law lords) and two former Home Secretaries--Roy Jenkins and Merlyn Rees Kee, R. (1986). Trial and Error: The True Events Surrounding the Conviction and Trials of the Guildford Four and the

dangerous terrorists to a growing doubt and then belief that a horrible perversion of justice had taken place. Finally, on October 19, 1989, something happened that had never before occurred in the history of the British legal system: the conviction an IRA terrorist was overturned. Within the next eighteen month the Maguire Seven and the Birmingham Six would also be free from their experience with miscarriages of justice (1991, electronic version). On that day the Guildford Four had their conviction overturned and were free after 15 years in prison for crimes they did not commit.

On October 26, 1989, only seven days after the release of the Guildford Four, the British government commissioned Sir John May to undertake and investigate the events leading to the conviction of the Maguire Seven. The Interim May Report, as it is known, concluded that the case should be referred back to the Court of Appeals (May 1990, 52). May made four points related to the Maguire convictions. First, the scientific evidence used in the trial had been so totally discredited that, in May's words, "on this basis alone the Court of Appeals should be invited to set aside the convictions." This was, in May's words, because the Crown could no longer prove that there were traces of nitroglycerin on the hands of the Maguire Seven or the rubber gloves. Second, the Maguires only came to the attention of the police because of statements made by the two of the Guildford Four while in custody. The Guildford Four alleged that the confessions were beaten out of them. The overturning of the Guildford Four case added doubt to the validity of the Maguire convictions. Next, May discusses in the report how the jury was inadequately directed by the judge to the foundational importance of Exhibit 60 in making the Crown case. This error, according to May's conclusions, "could well have had an important

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Maguire Seven. London, Penguin Books. To add to the already considerable pressure was "Motion 280 Miscarriage of Justice." This motion, signed by four hundred Members of Parliament called on the Home Secretary to initiate a review of the convictions of the Maguire Seven.

effect upon the jury's mind." Finally, because no evidence of a quantity of nitroglycerin was ever found and there was "no evidence of any primary or secondary sources of contamination in the house," the possibility of innocent contamination of their hands and the rubber gloves was a distinct possibility. This potentiality had not been excluded at the trial (May 1990, 50-52; see also Victory 2002).

The May Interim Report was given to the House of Commons on July 9, 1990, just one month after an appeal court upheld the conviction of the Maguire Seven. Due to the fact that May's findings and conclusions had been circulating in government and media circles for some time, many people were quite upset by the ruling. May himself made no secret of his surprise that the Court of Appeal "clearly found itself unable to agree with any of the other conclusions to which I had come in my interim report." Understandably, the judgment of the Court was not well received, either by the Maguire Seven or by the many who had been campaigning on their behalf (Maguire and Gallagher 1994, 151). It would be another year before the Maguire Seven would get the appeal that set them free. On June 26, 1991, the Maguire Seven were finally found innocent of the charges of handling explosives and operating a "bomb factory." But for one member of the Maguire Seven it was too late. Guiseppe Conlon, who had traveled from Northern Ireland to help his son Gerry (of the Guildford Four) died January 23, 1980.

The last of the three major miscarriages of justice, the Birmingham Six, would finally get their release. Their final appeal hearing was a result of the Home Secretary deciding on August 1990 to refer the case back to the Court of Appeal after a police inquiry had, quite independently, found discrepancies in the police interview record of one of the men. Here was more evidence, as in the Guildford Four case, that the police

had fabricated documentary evidence against the Birmingham Six. In addition to the problems with the confessions, the Crown's chief forensic witness, Dr. Drayton, admitted in an interview with *The Economist* that she thought her testimony had been drastically misconstrued. Her test did not apply to five of the six men and the findings were far short of "conclusive" and could have been a "rogue" result (1990, 52). The Director of Public Prosecutions could no longer rely on either the forensic evidence or the police evidence to uphold the 1975 convictions of the Birmingham Six. The Court of Appeals heard the case and overturned the conviction on Thursday, March 14 1991. Justice had finally triumphed, but not before the Birmingham Six had spent sixteen years in prison for a crime they did not commit.

The experiences of these three sets of miscarriages of justice are troubling in a liberal democratic society. They must, however, be put into a context of a criminal justice system that is designed and run by humans. Because humans and the organizations they construct are fallible, it must be accepted that these miscarriages might be the result of nothing more sinister than simple human error. Keeping this possibility in mind, other cases, not of miscarriages of justice, but accusations of the British Government using extra legal means (including sanctioned murders) to deal with the terrorism associated with Northern Ireland must be examined.

III Accusations of RUC/Loyalist collusion and Shoot-to-kill policy

The first use of British troops in the modern Troubles was in 1969 and, initially, the Catholics in Northern Ireland welcomed the soldiers. The use of British troops by Westminister was seen by Catholics as an attempt to end the blatant discrimination and

uneven use of police power by the Protestant Stormont government. Initially, the British soldiers themselves saw their role as peacekeepers and protectors of the innocent. Due to the nature of civil unrest and irrespective of reality, the perception developed that the predominantly Protestant British military was being used as an extension of Stormont (Hillyard 1983, 36). As the relationship between the Catholic community and the British soldiers deteriorated, IRA propaganda painted a picture of soldiers doing Stormont's dirty work. This led to less cooperation on the part of Catholics and necessitated that the troops begin to take a tougher line against Catholic demonstrators, which further aggravated the situation (O'Fearghail 1970; Bew and Gillespie 1993, 19).

As the situation continued to deteriorate, the British soldiers, both as individuals and as an organization, began to project their growing frustration and anger on the IRA and, by extension, the larger Catholic community. To the soldiers, the perception was that the people they were sent to protect were now turning against them. Unfortunately for all sides (except the IRA), events as they happened created a perceived alliance between the Stormont regime and the British army. Because Westerminster had no illusions as to what Stormont had been doing to its Catholic citizens, the agreement introducing troops into Northern Ireland was careful not to allow the military to be a tool of social control and oppression in the hands of Stormont. As the security environment worsened, the British army found itself forced into a tacit alliance with Stormont and Protestant paramilitary organizations. Over time the Catholic community began making accusations of collusion between the British military and intelligence services and Protestant paramilitary organizations. These accusations included the sharing of British situational intelligence with Protestant paramilitaries, in order to allow the paramilitaries to engage in attacks

that the British army could not legally undertake. Eventually, the accusations reached the point of the British supplying paramilitaries with lists of IRA leaders to kill and the British security service and military being given an official "shoot-to-kill" license in regards to suspected IRA terrorists.

During this time there was no shortage of claims that the British Government, largely through the SAS (Special Air Service), had provided Protestant paramilitaries (primarily the UDA and UVF) with guns and information, and even on occasion taken part in joint operations (Bruce 1992, 200).[120] The most prominent examples of the alleged British "shoot-to-kill" policy involves an incident at Gibraltar in which three unarmed IRA activists were killed by a SAS squad, and what is known as the Stalker Affair involving a stonewalled investigation by the police and security services into the death of six people in Northern Ireland at the hands of the various security services operating in Northern Ireland. The accusations of officially sanctioned killing and government cover-ups has the potential of creating the impression of a pattern of inappropriate behavior related to British counter-terrorism policy related to Northern Ireland.

A). "Death on the Rock"

In an incident taking place on March 6, 1988, and commonly referred to as "death on the rock," an SAS team ambushed three unarmed IRA operatives planning on bombing the changing-of-the-guard ceremonies in Gibraltar. Initial reports had the three moving from Spain to Gibraltar and being "handed off" from Spanish authorities to British secret service personnel. In the words of the Secretary of State Sir Geoffrey Howe, after the three terrorists had dropped off the car and as they were walking back to

120 For a useful compilation of accusations and evidence of SAS/Protestant Paramilitary collusion see Murray, R. (1990). The SAS in Ireland. Dublin, Mercier Press.

the Spanish border, "they were challenged by security forces. When challenged, they made movements that led the military personnel operating in support of the Gibraltar police to conclude that their own lives and the lives of others were under threat. In light of this response, they were shot" (*Hansard* H.C. 6s, 129:21).

Later, as more details became known about Operation Flavius and the unlawful nature of the killings became apparent, the British government changed its story. Government officials began claiming that the Spanish had lost the IRA team and the SAS were taken off-guard by the sudden appearance of the three in Gibraltar (Alegre, Yeves et al. 1989, 11). This "mistake by the Spanish authorities," according to the British government, led to the need for improvisation. As a result, the IRA members noticed the SAS team and, according to the SAS members, made movements toward pockets and purses as if going for weapons. Therefore the SAS personnel, in self-defense, shot and killed the IRA suspects. The car was empty and the IRA suspects had no weapons or detonating device. Making the situation look worse, as reported in *The Economist*, were witnesses who claimed the SAS made no attempt to arrest or warn the victims and one IRA member was shot repeatedly as he lay dying on the ground (1988, 15).

The official version of events increasingly lost legitimacy due to the government's considerable efforts to suppress or disparage a TV program, *Death on the Rock*, which took a very critical view of the SAS' excessive use of force as well as the attempted cover-up by the government (Neillands 1998, 243). Jonathan Aitken, former Chief Secretary to the Treasury, described the British government's attempts to reconcile effective counter-terrorism with the rule of law, and when that failed to conceal its actions as "a huge smoke-screen of humbug" (Jack 1995, 21). The attempts by the British

Government to conceal the details led to greater attention by the media and thus more evidence coming forth. The British government refused to release transcripts of radio communication that took place during the operation. Transcripts provided by the Spanish government demonstrate that Spanish authorities followed the three IRA suspects up to the border and provided British authorities "minute-by-minute details" (Alegre, Yeves et al. 1989, 11). The more that was discovered related to the incident, the more it seemed apparent that the SAS was working with something similar to a shoot-to-kill policy.

It is important to note that although all three were unarmed and there was no explosive in the car in Gibraltar, the three were IRA terrorists with long records of indiscriminate killing and a second car in Spain was found full of Semtex and ready to move into position.[121] There is no doubt that these three IRA operatives were planning to bomb the Changing of the Guard ceremony at the Governor's Palace; the question centers on whether they had to be killed. Is this the way that liberal democratic societies handle counter terrorist operations (Neillands 1998, 243)?

At an inquest related to the killing, the SAS men gave evidence from behind a screen and the jury returned a nine to two verdict upholding the government's contention that it was a "lawful killing." In September 1993, the families of the deceased IRA operatives took their case to the European Court of Human Rights (ECHR). It was argued in *McCann and Others vs. United Kingdom* that the British Government was answerable under Article 2 (Right to Life). The case examined whether the SAS team had taken reasonable steps in order to avoid a resort to lethal force. Particularly disturbing to the

[121] Standard IRA tactics in such a car bombing is to park one car near the target (to hold the parking spot) and on the appointed day move the second, bomb-laden car into the spot reserved by the first vehicle. Then they would dump the first car and exit the area. In this case, the IRA suspects were intercepted prior to getting back to where the second car was parked in Spain.

judges was the level of SAS training in "shoot-to-kill tactics" and the fact the three suspects were shot a total of *twenty-nine times* (Wadham 1995, electronic version). Additionally, investigative reports uncovered that the Spanish had informed the British that all three were unarmed and did not have explosives with them (Alegre, Yeves et al. 1989, 12). It took seven months of hearing before the ruling (ten votes to two) that the killings had been "unnecessary." Because the dead were unarmed, did not try to resist arrest, did not have the means to explode a bomb, had not placed a bomb in Gibraltar and, at the time they were shot, were not a threat to the police, SAS or anyone else, the evidence strongly pointed towards an officially sanctioned killing. It was raised at both the official inquest and the ECHR trial that although the SAS claimed all three seemed to be reaching for weapons, none of them had any weapons or remote detonators (Neillands 1998, 244). Additionally, according to an article in *The Economist*, some witnesses claimed that no attempt to arrest or warn the IRA suspects was made and that two of the dead were shot again while lying on the ground (1988, 15; see also Neillands 1998, 243). Finally, experts challenged the government's claim about being worried that the suspects might have been trying to activate a remote control detonator. A British bomb disposal expert, as reported in *The Economist*, testified that it was "very unlikely" that a hand held detonator would have the one and a half mile range necessary to detonate the car bomb (1988, 70). This act by the SAS was reminiscent of a "hit squad" and could be dealt with as a tragic accident, but for the vigorous, concerted and sustained attempts by the British government to obfuscate the facts of the event and prevent any investigation of the events from being publicly aired. More claims of government sanctioned killings and attempts to thwart justice are also seen in the Stalker Affair.

B). Stalker Affair

The Stalker Affair involved events surrounding an investigation by John Stalker, Deputy Chief Constable (DCC) of Greater Manchester Police, who was asked to investigate the death of six "alleged terrorists" in Northern Ireland. The six deaths were in three separate incidents between November 11 and December 12, 1982. During the initial investigation (pre-Stalker) one of the constables involved stated in court that he had been instructed by senior police officers to lie about events surrounding one of the incidents in order to protect the nature of the special operations involved. It soon became obvious that the Criminal Investigations Department (CID), the Director of Public Prosecutions and the courts had all quite deliberately been misled in order to protect police procedures (Stalker 1988, 12-13). The public outcry demanded a further investigation into these events. The implications for the administration of justice in Northern Ireland were profoundly serious if it were true that British authorities were operating under orders to "shoot-to-kill."

In May 1984, barely two months after being appointed DCC, John Stalker was asked to lead a further investigation of the deaths. As a police officer in England, Stalker had no legal authority or power in Northern Ireland. From the start of the investigation, Stalker was warned to expect less than full cooperation because the RUC and its Chief Constable Sir John Hermon regarded the inquiry as unnecessary (Stalker 1988, 26). Throughout the investigation Stalker found the RUC, and especially the Special Branch officers, uncooperative and at times resentful (Stalker 1988, 32-36).

The more obstinate the behavior of the RUC, the more determined Stalker and his team became. This determination was seen in Stalker's efforts to procure an audiotape that recorded events surrounding one of the incidents.

1). The Hayshed Tape

On November 24, 1982, Michael Tighe (age seventeen) and Martin McCauley (age twenty) approached a shed they had been asked to watch while the owner was on holiday. Upon approaching the shed the two noticed an open window and decided to crawl through the window in order to investigate further. Once in the shed, they noticed a rifle and ventured to look closer. Two shots rang out and Tighe was killed outright and McCauley heard someone say "right, come on out," but before he could move he was shot twice (Stalker 1988, 65). Neither man had any known or suspected ties to any IRA group (Amnesty 1988, 21).

The official police version stated that a RUC patrol investigating suspicious activity around the hayshed spotted two young men, one of whom was armed, going into the shed. When a police officer approached the hayshed, he heard the sound of a rifle mechanism cocking and shouted a warning. The police opened fire and shot both men, who had pointed rifles at them. In the shed three rifles were found, each more tan sixty years old, but no ammunition was found.

During the initial investigation, an RUC officer referred to as "Sergeant X," admitted in court that he had lied to the police detectives on orders from a Special Branch superintendent to protect an informant and conceal Special Branch involvement in the operation. Sergeant X was told that he was authorized to give false information under the Official Secrets Act (Amnesty 1988, 21).

Unbeknownst to anyone at the time, there was a sophisticated listening device placed in the rafters of the building. Therefore, the entire "Hayshed event " --the voices, the conversations, the sequence of shots and events afterwards--had been recorded. The two young men had walked into a sophisticated operation that had been camouflaged to look like a chance encounter. No one in the security services or police could have imagined that one day its existence would be known worldwide and become the rope in a bitter tug-of-war.

Stalker became aware of the tape in the winter of 1984 and immediately began trying to obtain a copy of it. If the "official" version of the story was accurate, here was the best proof to support police assertions that they shouted warnings to the two young men prior to opening fire. If the "official" version was different the tape would be damaging evidence of police misconduct.

When Stalker discovered the tape's existence, the knowledge of which was never volunteered to him, he asked the head of the Special Branch about it. He reluctantly confirmed the existence of the tape, but enigmatically said, "you will never be able to hear it" (Stalker 1988, 68). After the constable, who listened to the tape and had it transcribed, refused to discuss it or produce the tape or a transcript, Stalker took the request for cooperation to the Chief Constable John Herman. Herman stated it was not his tape to give, but that it belonged to the Security Services (MI5 to be exact). After a huge amount of stalling, stonewalling and flat refusal to give over the tapes, it was reported that the two copies of the tape had been destroyed.[122] A MI5 officer in London destroyed one tape and a RUC Special Branch inspector destroyed the other copy (*The Guardian*,

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122 The entire story of the stonewalling can be read in Chapter Three, titled "The Tape," in The Stalker Affair Stalker, J. (1988). The Stalker Affair. New York, Viking.

Feb. 22, 1988). The RUC officer stated that the tape revealed things "best forgotten" (Amnesty 1988, 23).

The story does not end there; as Stalker's commitment led him closer to gaining access to the tape, events took an ominous turn. On May 28, 1986, Stalker received a call from Mr. Roger Rees, the Clerk to the Greater Manchester Police Authority. Stalker was informed of serious allegations made against him that might invite a disciplinary offense. It was no secret that Stalker was within a couple of days of obtaining the vital tape and authority to interview the senior RUC member who had refused to talk (Stalker 1988, 109). The next day Stalker met with the individual charged with investigating him, Colin Sampson, the Chief Constable of the West Yorkshire Police (who would also be assigned to the Northern Ireland investigation in which Stalker had been working). Upon meeting with Sampson, Stalker mentioned his concern for the ongoing investigation in Northern Ireland, and Sampson responded ominously, "You must, from now on, worry only about yourself" (Stalker 1988, 110). Stalker would not get the Hayshed tape or the interviews with high-ranking RUC officers; he was placed on extended leave.

This leave was later changed to an official suspension. During the five-week investigation, which involved sixteen police officers, no official charges or allegations were brought against Stalker, but continued stories were leaked to the papers alleging homosexuality, improper acquaintanceship with a known criminal (a businessman named Kevin Taylor) and misuse of police resources[123] (Stalker 1988, 149). More police officers

[123] Kevin Taylor was acquitted on a "minor fraud charge" after a four-year investigation. The process forced Taylor into bankruptcy. In the trial phase the British government went to extreme lengths to prevent the key witness, John Stalker, from testifying through a Public Interest Immunity certificate. NIOSS Sir Patrick Mayhew signed the certificate. The government lawyer stated that the PII certificate silencing Stalker was for the good of the country, because any discussion of the RUC's alleged "shoot-to-kill" policy would jeopardize the peace process Lashmar, P. (1995). A Gagging Matter; Settlement between

were assigned to investigate Stalker than had been allotted to Stalker's investigation of six deaths! Throughout the investigation officials continually denied, even when not being asked, that the investigation and suspension were connected to Northern Ireland. Later it was made public that it was Sir John Hermon (Chief Constable for the RUC) who had statutorily approved Stalker's removal from the Northern Ireland investigation (Stalker 1988, 165). In addition, the investigation of Stalker did not begin until after Stalker had delivered a preliminary report (Stalker 1988, 187). As the *Irish Press* put it in a June 23, 1986 article, "Every new piece of evidence adds to the impression that here has been a deliberate attempt to frame the Manchester police chief (*sic*) and to subvert the course of justice in Northern Ireland" (Doherty 1986, 61).

At the end of the ordeal, no evidence of wrongdoing on the part of Stalker could be found, but Stalker was left with a staggering legal bill. To add insult to injury, the police committee refused to pay his legal bills. In England, senior police officials who were formally charged of a crime had their legal bills paid even if they were found guilty, but the individuals who initiated the "charges" stated that since no "formal charges" were levied, Stalker did not warrant reimbursement. Those who had initiated the investigation for a time even denied him the money sent from people all over the world assisting him with legal and other expenses. The whole episode resulted in a national scandal and embarrassment which led to a new British coinage being added to the popular culture lexicon--to be "Stalkered," meaning to be set up or framed by the government (Browner 1988, 73).

Manchester Police and Kevin Taylor. New Statesman & Society. **8:** 22. Taylor was later awarded a reputed £1 million, in an out of court settlement, on malicious prosecution charges.

At every turn the Northern Ireland investigation was hampered and stonewalled. The Northern Ireland investigation did produce arrests of some RUC officers for murder, but all were acquitted. In addition, nothing was done about the evidence that false stories were concocted and told to CID, RUC investigators and to the courts (Cadwallader 1988; Campbell 1988). In 1988, the British government did acknowledge that there was "prima facie evidence" of a conspiracy to pervert the course of justice by RUC officials in relation to the "shoot-to-kill" investigations. No criminal proceedings took place and after another long investigation, the only punishments handed out were reprimands (Lashmar 1995). Attorney General Patrick Mayhew refused to bring charges for "national security reasons" and also refused to release the report (Bilski and Keene 1988). It seems that in the Stalker case, as in the Gibraltar case, British security services got away with murder and, as Stalker stated, although there may not have been an official "shoot-to-kill" policy, there was a strong inclination towards it (Campbell 1988, 10).

2). Nelson Affair

This "inclination" was supported as more information came forward concerning the British government's involvement in extra-legal killings. The involvement was related to the army's "force research unit" (FRU) which had infiltrated an agent, Brian Nelson, into the largest of the loyalist paramilitary groups--the UDA (Ware 1998, electronic version). From 1987 to 1989, the FRU used Nelson in his role as the UDA's top intelligence officer to help create "target lists" of IRA activists for UDA hit squads (Davies 1999, 21). According to the *Sunday Telegraph*, Nelson's handlers, the British military, provided the names on the lists. This "assassination by proxy" might not literally fall under a shoot-to-kill policy, but is very disturbing, quite illegal, and an

affront to any conception of the rule of law (1998, 34; Ware 1998, electronic version). Nelson and his army handlers justified their actions by claiming that they saved "innocent lives" by assisting the UDA in targeting "only legitimate targets" (Ware and Seed 1998). This reasoning might have cold military logic, but it was against the law and, as evidence demonstrated, it did not always work. Several of the thirty killings in which Nelson was involved included non-IRA members (Ware 1998, electronic version).

The entire operation began to come apart after the killing of John Anthony Loughlin Maginn, who the FRU suspected of being an active member of the PIRA. The UDA issued a statement bragging about how good their intelligence was and that they only murdered Republican terrorists (the boast was untrue; they had made mistakes and killed numerous innocents). Part of the statement, incredibly, was a confidential file belonging to the security forces identifying Maginn as an intelligence officer (Davies 1999, 218). This started the Steven inquiry, which uncovered the connection of the FRU and UDA, which ultimately let to the disbanding of the FRU.

IV Conclusion

The cases examined in the chapter show the results of a society and government struggling to deal with a sophisticated and enduring campaign of terror. In dealing with the violence connected with Northern Ireland, which at this time has spread to the British mainland, new emergency powers were enacted. The emergency powers were intended to be a temporary solution to extraordinary events. They were implemented in a society reeling from several horrific terrorist assaults. In the context of a society perceiving itself to be under siege, it is not surprising that examples of overly exuberant law enforcement may occur. The important element to analyze is not the isolated case or two, but patterns

of behavior on the part of law enforcement, security services and the government in dealing with terrorism. This chapter has recounted how arrest powers created by the PTA were used to hold people in a vulnerable, isolated situation and how the police used the arrest powers to intimidate suspects and witnesses. Additionally, how do societies' protectors deal with mistakes or errors in combating terrorism? Did the pressure of a society under siege lead to a conviction-friendly court system that cared more about what one scholar called "symbolic ritual" than pursuing truth and justice (Miller 1991)? In the following chapter, the intentions of the government and security authorities will be compared with both the successes of and consequences of legislation related to terrorism connected to Northern Ireland.

Chapter Seven

Legislative Intent versus Case Results

> "Security is like Liberty … in that many are the crimes that have been committed in its name" Justice Jackson (Hook 1959, 239).

> "For if the police, above all people, are seen to flout the law and are yet to be regarded as lawfully exercising powers granted to them by Acts of Parliament, diminished respect for the law and for the officers of law enforcement must inevitably follow" (Lord Davies allowing an appeal in MORRIS V BEARDMORE 1980 2 AE p. 761).

I Introduction

There have always been diametrically opposed views on the use of special legislation to deal with the Troubles. Justification for the emergency legislation has often resembled that of a parent explaining to a child that although this remedy is going to be very distasteful, the severity of his illness requires it, and he will only have to take it for a short time and then all his ailments will be gone. In much the same way, supporters of special anti-terrorism legislation have stated that the provisions, while distasteful, are "temporary" and will be repealed as soon as the emergency has passed. Detractors have always believed that the Troubles are a political problem, requiring a political solution and that draconian emergency anti-terrorism powers only exacerbate an already bad situation. In short, the use of special executive powers has been one of the problems since the start of the British involvement in Northern Ireland. On this side of the argument, even if detractors would grant the need for some extraordinary powers to deal with the sectarian political violence, they would argue the offerings of Westminster have devastated traditional civil liberties without a corresponding improvement in the security situation.

The official government view of the intent of the emergency legislation is best summarized by a set of quotations from the initial set of debates on the PTA, which parallel the hypothetical parent's comments to the sick child. The first quote is by a supporter, stating the need for emergency legislation to deal with the extraordinary times:

> "One thought which cannot be far from our mind is that such a Bill would not have been passed in different circumstances" (*Hansard*, H.C. 5s 892:1112).

A second example is by a supporter who states forcefully the government's distaste at having to implement the emergency legislation on society:

> "The Bill contains some features unpalatable to a democratic society. Her Majesty's Government does not disguise the fact that it imposes serious limitations on the traditional liberty of the subject." (*Hansard*, H.C. 5s 855:290).

Next, another supporter explains the need to hold the line during the tough days ahead. Although there will be some limiting of traditional civil liberties, the overall goal is to protect them *as much as is possible*:

> "[B]oth in Great Britain and Northern Ireland we shall have a lasting victory over terrorism only if we demonstrate our unqualified devotion to a genuinely free society ... [W]e must be able to say to people who question our commitment to a free society that even in the face of a terrorist threat, we do all we can to ensure that it is preserved to the furthest degree that its preservation is possible ... [The PTA] is manifestly a denial of civil liberties" (*Hansard* H.C. 5s 882:634).

Finally, MP Roy Jenkins asserts the government's goal is to implement legislation that is temporary in its scope.

> "[P]rovisions expire after 12 months unless they are renewed. That is the best evidence a Government can give that they intend the provision to be temporary" (*Hansard*, H.C. 5s 855:361).

The question is simple. Has the government attained these goals? In acknowledging its regret at having to implement such legislation, has Westminster endeavored over the past thirty years to eliminate or at least reduce, when possible, the scope of these 'unpalatable features'? During the Troubled times, can the government "demonstrate [its] unqualified devotion to a genuinely free society" (*Hansard* H.C. 5s 882:634) through examples where the tradition of liberal democracy was given precedent over the exigency of security? Finally, does a thorough examination of the scions of the SPA show a serious goal of making the powers found in the various incarnations of "emergency" legislation truly temporary?

The goal of this chapter is to ask these questions and examine them, when possible, in the light of the cases found in the previous chapter. From this comparison tentative conclusions can be reached in the next chapter as to the success of the British government at balancing freedom and liberty in a context of protracted political violence.

II Proscription

One of the most controversial elements of the NI(EP)A and PTA was the executive power to proscribe an organization. In the overall debate between civil liberties and the legitimate power of the state to create order so citizens can enjoy the fruits of liberal democracy, where does proscription fall? Is it an important weapon in the war on terrorism related to Northern Ireland? Is there empirical evidence that it has allowed the state to more effectively prevent terrorist attacks? If not, what has been the role of executive proscription in Westminster's decades-long conflict with Irish terrorism? Conversely, what has been the effect of proscription on civil liberties within the United Kingdom?

The purpose for introducing proscription was stated by MP Jenkins during initial discussion of the PTA, "The public should no longer have to endure the affronts of public demonstrations in support of [the IRA]" (*Hansard* H.C. 5s, 882:636). Nearly a decade later (1983), the Home Office Minister, Mr. Waddington, pointed out that proscription had denied IRA supporters the opportunity "to flaunt themselves in public" (*Hansard* H.C. 5s, 38:633). That same year, Earl Jellicoe, in a review of the PTA, argued that proscription has calmed public outrage and averted "any danger of this outrage being expressed in disorder" (Jellicoe 1983, par. 207).

Scholars have said much the same as the elected officials. According to one noted expert, the rationale for introducing proscription was largely presentational rather than practical; it enshrined in law the public's abhorrence at the methods used by such groups to achieve political ends in a liberal democracy (Bonner 2000, 41). Because a government's first duty is to protect the life and property of it citizens, Westminster, as put by one scholar, "had to be *seen* as acting in accordance with this aim" (Donohue 2001, 317). Wilkinson put it more bluntly, stating the "primary function of the section ... was to give legislative expression to public revulsion and reassurance that severe measures were being taken against the terrorist" (Wilkinson 2000, 113). Additionally, scholars and a number of civil liberties organizations have argued that proscription would have a detrimental effect on speech, press and assembly. One scholar stated bluntly that proscription would have "a chilling effect on the media" (Lowry 1977, 201).

Both sides of the debate can point to results of proscription and claim their views were validated. The NCCL has recorded a number of incidents where political groups have restricted their activities for fear of being charged under the Acts. In 1979, five members of the 'Revolutionary Communist Group' were arrested for selling Republican papers at a 'Hands off Ireland' rally (Scorer, Spencer et al. 1985, 15). Another study chronicled the problem the 'Troops Out Movement' had in booking halls for public meetings and in getting permission to hold rallies as a result of the uncertainty of proscription (Scorer and Hewitt 1981, 18-20). Clive Walker points out that the result is suppressed public expression of support for Republicanism, since it is easy to accuse members of legitimate political groups of providing material support for terrorists whose political aims they share (Walker 1992, 63). For example, after the passage of PTA 1974,

a brewery wrote a memo to its associated pubs, warning that it may violate the Act to permit such activities as the sale of Republican newspapers, raffle tickets and news sheets, collection of money, and/or "use of rooms for meetings, dances, [or] singing of songs of an IRA nature" (Hain 1979, 125). The activities specified in the Act are vague and the result was that many public houses and clubs refused access to collectors, even those from genuine charities, and the use of their rooms for political meetings. The problems associated with proscription are also discussed in the official reviews.

Jellicoe observed that it is asking a great deal of police to apply proscription "while not affecting the free expression of views about Northern Ireland" (Jellicoe 1983, par. 212). Although Viscount Colville stated in a 1987 review of the PTA, "If it were possible, I would be happy to get rid of it altogether" (Colville 1987, par. 13.1.9), earlier in the report, he argues that groups cannot be deproscribed without causing great problems. According to Colville, repeal of the power of proscription would be perceived as "a recognition ... the leading merchants of Irish terrorism were no longer disapproved" (Colville 1987, 13.1.6).

One of the rationales for proscribing terrorist groups is to provide a manner for ordinary citizens to express their "outrage" and, as argued by Jellicoe, to keep British citizens from acting upon this anger to the detriment of citizens of Irish ancestry (Jellicoe 1983). As Baker has pointed out, proscription did not stop all reprisals (Baker 1984, par. 414). As seen in Chapter Six, Anne Maguire and her family suffered reprisals from both the police and ordinary citizens (Maguire and Gallagher 1994). Additionally, the police used the fear of reprisals against the suspects' families as part of the psychological operations to break the will of the Birmingham Six (Mullins 1986).

In a related point, Baker argued "illegality [related to proscription] is now a positive disincentive to youthful potential recruits," but two paragraphs later Baker states that proscription in Northern Ireland has not "created an atmosphere in which discussion has been inhibited by fear of police action" and then supports this assertion, stating "A cursory glance at any copy of *An Phoblacht* (Republican News) would dispel any illusion about Northern Ireland" (Baker 1984, par. 414, 416). At first blush, Baker's arguments support his assertion that proscription has not adversely affected the political environment as detractors of proscription predicted, but a closer read finds Baker's reasoning contradictory.

In the latter example, Baker states that one can see, in the *An Phoblacht*, that freedom to speak about Republican views is alive and well. In the former example, he makes it clear that proscription has created a disincentive to join groups that are proscribed *or* aligned with proscribed groups. By creating a disincentive for people to associate with groups that may be tainted with a relationship to a proscribed group the government is, in effect, cutting off the recruiting farm clubs for terrorist groups. With Baker's statement that, it may be desirable to make it more difficult for proscribed groups to recruit, he is tacitly admitting that proscription does make it more difficult for non-proscribed but politically sympathetic groups to function. Or, as put by David Bonner, proscription "penalised the activities of groups holding unpopular views on Northern Ireland policy" (Bonner 1985, 187). Accordingly, the power of proscription does have the effect of limiting freedom of assembly.

Opponents of proscription have seen a number of their concerns realized. First, there was the possibility that the power could be used in a discriminatory fashion.

Second, that proscription, which originally only covered terrorism related to Northern Ireland, would be expanded. Related to the first issue, although the NI(EPA) does proscribe some Protestant paramilitaries, the PTA did not; it banned only Catholic groups. Although Loyalist violence, fund raising, and weapons procurement does take place in Great Britain, Westminster chooses not to proscribe Protestant organizations.[124] For example, MP Waddington pointed out in a Parliamentary committee debate that Loyalist paramilitaries have engaged in terrorist attacks on Irish pubs in London in 1975 and Glasgow in 1979, but the Protestant group responsible was not added to the list of proscribed groups (cited in Walker 1992, 57).

Although proscription was primarily for domestic political consumption, official discussions to expand the list of proscribed groups started almost immediately. Colville, in one of the reviews of the PTA, discusses the number of suggestions made to him that "the power to proscribe should be extended to cover international terrorist organisations" (1987, par. 13.1.9). The potential use (and subsequent abuse) of this power has been recognized by British law enforcement. In a pamphlet titled *Public Order and the Police*, published by the Police Review Publications, the following quote appeared:

> "A much simpler action to prevent any of our present troubles would be to declare the National Front, the Socialist Worker' Party or whatever party is causing the trouble to be proscribed organisation under the Prevention of Terrorism (Temporary Provisions) Act 1976" (Scorer, Spencer et al. 1985).

The pamphlet was written by Kenneth Sloan, training officer with the Manchester police, and carried an introduction by William Whitelaw, former NIOSS. It should be noted the

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124 For a discussion of Loyalist activities related to terrorism in Great British see Walker, C. (1992). The Prevention of Terrorism in British Law. Manchester, Manchester University Press.

actions of the groups suggested had nothing to do with terrorism related to Northern Ireland.

Although scholars and security experts have long argued that proscription simply drives the target organizations completely underground and makes the task of intelligence-gathering and detection more difficult for the police, they admit there has been an upside to proscription (Wilkinson 1986, 170; Wilkinson 2000, 113). One official review of the PTA stated that as a result of proscription, the flow of terrorist funds from Great Britain has been fairly limited (Jellicoe 1983, par. 208). Another positive benefit of proscription, according to one noted scholar, is that it "deprives the terrorists of the opportunity to march demonstrate and provoke affrays with rival groups (*sic*) This helps to free the police from the dreary and time-consuming work of crowd and riot control on the streets, and enables them to concentrate on protecting the general public and catching criminals" (Wilkinson 1986, 170).

The goal of executive proscription was put succinctly by Clive Walker, "to remove the I.R.A. from public sight" (1992, 64). In that it has been successful; during a twelve-year period (1974 to1986), only ten charges of violating the proscription power were made in Great Britain (excluding Northern Ireland). This is compared to a much higher number of charges made during a much shorter period of time in Northern Ireland[125] (Donohue 2001).

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125 There were 537 charges of violating section 21 (proscription) of the NI(EP)A between 1978 and 1983 Baker, G. (1984). Review of the Operations of the Northern Ireland (Emergency Provisions) Act 1978. London, Her Majesty's Stationery Office. Some have argued that the increased use of the NI(EP)A in Northern Ireland was because the Protestants saw any expression of Republicanism as an attack on their position of the North and needed to be squelched Donahue, L. K. (2000). Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom. B. D. P. 2000-05 and E. D. P. ESPD-2000-01. Harvard University, John F. Kennedy School of Government**:** 41.

Although Wilkinson, in his seminal work, *Terrorism and the Liberal State*, argues that the "[proscription] was politically well-judged" and a "useful token of the government's determination" (Wilkinson 1986, 170), Walker argues that the "censorious tendencies" which are "intended byproducts, are extremely damaging" (Walker 1992, 63). It is not hard to imagine that was exactly what MP Ian Gilmour was thinking during the 1974 PTA debate, when he stated, "I think, too, that [proscription under the NI(EP)A 1973] has cut down the activities of both the *political wings* of the Provisional and Official IRA, and that also is to the good" (emphasis added quoted in Scorer, Spencer et al. 1985, 15).

As Bonner has pointed out, proscription was "not a step to be lightly taken in a liberal democracy because of its impact on freedom of association, of assembly and of expression" (Bonner 1985, 184). However, these freedoms have been curtailed in order to "avoid flouting," "displays of support" and "angering the average British citizen." As put ironically by one scholar, it is a "curious, if emotionally understandable, rationale for eroding freedom of association and freedom of expression" (Ewing and Gearty 1990)

Finally, the executive power to ban an organization leads to problems related to the rule of law. Bonner has pointed out the "vagueness and uncertainty of these offences" cause problems and the "offences fall far short of the *desideratum* of certainty in the criminal law" (Bonner 1985, 187). Another scholar argues that by waiving the rights of individuals suspected of membership, the power of proscription creates "a status of suspect to whom a second tier of justice applied" (Donohue 2001, 318).

Overall, proscription has played an unfortunate role in limiting several important civil liberties, damaging the rule of law, and aggravating the political situation for a

counter-terrorism policy described, by the *Economist*, as "more spectacular than effective" (Wilkinson 1986, 170). In short, the benefits derived from proscription are quite limited. Almost all proponents of executive proscription admit it does little to prevent terrorists from conducting campaigns of violence. It is simply a symbolic "useful token." When commentators do provide justification for the power, freeing police from the "dreary" task of crowd control is the usual justification. By almost any account, these justifications fall short of a strong support for proscription.

III Exclusion

Under this provision of the PTA and NI(EP)A, any Secretary of State (normally the Home Secretary) can place an exclusion order (EO) on any individuals to whom it "appears ... expedient" to "prevent acts of terrorism ... [related] to Northern Ireland." Additionally, an EO can be enacted if the Home Secretary believes the person is involved with, or intending to enter Great Britain/UK with the purpose of, the "commission, preparation or instigation, of acts of terrorism" related to Northern Ireland.[126] In balancing the intended effect of this power with its consequences, several questions need to be asked. First, how has the power to exclude individuals assisted in anti-terrorism operations in the UK? Second, how has the power been used and what have been the consequences?

The ability to exclude individuals from portions of Great Britain was not a new power. Both the 1914-15 Defence of the Realm Acts and the Prevention of Violence (Temporary Provisions) Act of 1939 contained the executive power to ban individuals from traveling to and within Great Britain (Donohue 2001, 221). Therefore, the

126 Exclusion in the PTA refers to Great Britain (Wales, Scotland and England), whereas exclusion under the NI(EP)A refers to the United Kingdom, which includes Northern Ireland.

introduction of EOs did have the power of precedence in British legal doctrine. The overall goal of exclusion was to keep people out of Great Britain that were potential security threats.

Supporters of EOs have argued they protect valuable intelligence methods and sources from discovery by terrorists. In initial debates for the PTA, MP Roy Jenkins stated "open proceedings or public presentation of the evidence" in many cases would "increase risks" of further terrorist attacks (*Hansard* H.C. 5s 901:886-7). A 1989 Home Office Circular stated that the use of EOs was intended to avoid the problem of revealing sensitive information and/or methods of intelligence gathering (number 27/89 cited in Committee 1995, 75). Security services have always argued revealing sources and techniques put people's lives at risk (i.e., informants) and allows targets to develop counter-measures, which make further information gathering more difficult, more expensive, and less effective.

Another beneficial aspect of EOs, according to supporters, is that they allow law enforcement to disrupt terrorist operations by intervening at an earlier stage of development, because the order may be based on inadmissible evidence and may be granted when the available evidence does not reach the criminal standard (Walker 1996, 617). Additionally, in a point cited by Walker, and used by supporters of executive proscription, it saved the police time, since there would be no need to build up a complicated forensics case against the suspect (MP Brittan, Hansard, November 15, 1983 cited in Walker 1996, 617). This view of the police was supported in Colville's official review of the PTA, where police testified to the committee that security services would

not be able to provide surveillance for all the Irish terrorists who might arrive, so it would be more cost effective and easier to exclude them (Colville 1987, par. 11.5.1).

In other official reviews, both Shackleton and Jellicoe concluded the government's use of EOs had successfully attained its objectives of reducing terrorism (Shackleton 1978, par. 130; Jellicoe 1983, par. 176). The latter makes his view explicit, stating "the exclusion of some people ... has contributed to public safety in the United Kingdom and this could not have been achieved through the normal criminal process." Jellicoe continued, "exclusion has rid Great Britain of dangerous terrorists" and reduced terrorism because these security risks are no longer about to travel freely between Great Britain and Northern Ireland (1983, par. 176). According to Shackleton, "the alternative to exclusion [in the police's view] would be to allow people strongly suspected of being terrorists, but against whom there is insufficient evidence for a charge ... free rein to plan and commit terrorist activities here ... for the purpose of inflicting death, injury and damage on the community in Great Britain" (Shackleton 1978, par. 63). Jellicoe did modify his support, and admitted there are costs, by stating he is "not suggesting…the benefits of every exclusion have outweighed its cost in terms of civil liberties and of hardship to the excluded person and his family" (Jellicoe 1983, par. 176). Jellicoe alludes casually to what many detractors believe is a serious problem: the power's affects on civil liberties.

Scholars have described exclusion orders as "provid[ing] the most disturbing feature of the legislation" (Bonner 1982, 262) and "one of the most severe attacks on civil liberties contained in the Act" (Hain 1979, 127). At every stage in the process of creating EOs, critics find fault and unacceptable consequences. Many take issue with the fact that

the test created in the legislation to determine whom the government can exclude is purely subjective. It only stated the Home Secretary needed to be satisfied in his own mind of terrorist involvement. The question of *reasonable suspicion* is wholly irrelevant. Accordingly, there is no necessity to provide a rationale or reason to an individual served with an exclusion order (Committee 1995, 73). Other critics point out that because of the secrecy involved, EOs are open to abuse by police and government for dealing with issues other than Irish terrorism.

Opponents of EOs have documented numerous cases where police have misrepresented information to get an individual excluded (Scorer 1976, 13-22). The information on which an EO is based is not available to those being excluded and therefore not open to critical examination. The potential for abuse is magnified by the fact that the State's evidence often comes from informants whose motivation may be malice, pressure from law enforcement, and/or prospects of financial or other gain (Scorer 1976, 12; Scorer and Hewitt 1981, 27-28; Walker 2002, 511). Although it did not involve EO, informants provided poor information to the police in the case of the Guilford bombing suspect Paul Hill, who under interrogation gave the police sixty names (Miller 1990). The names given by Hill led to the subsequent arrest of not only the rest of the Guildford Four, but also the Maguire Seven. It must be remembered that the information extracted from the Guildford Four, Maguire Seven and Birmingham Six was all usable if the Home Secretary would have chosen to exclude any of the individuals named. Additionally, several members of these miscarriages of justice stated they were so abused they would have mentioned anyone's name to stop the interrogations. All of the information and names gathered during these "interviews" were eligible for justifying an

exclusion order. Finally, it was "evidence" provided by informants that substantiated the claims of impropriety against John Stalker and led to his dismissal from the investigation. All of the information provided by informants was later (years later) shown to be unreliable. Evidence points to the conclusion these informants were pressured by high-ranking security officials to stop Stalker's investigation of accusations of government sanctioned killings.

Opponents of EOs have expressed concern the executive decision will be used simply as a device to get rid of people whom the authorities suspect to be involved in terrorism, but lack the evidence to obtain a conviction in a court (Hain 1979, 128). Additionally, there is the possibility exclusion will be used on individuals Westminster does not like (Committee 1995, 76). Finally, the threat of an EO could be used to influence individuals to act in ways they would otherwise not act.

There is a growing list of individuals who, upon being acquitted of a crime, have been served with an exclusion order as they left the courthouse. For example, Edward James Forrest was arrested in October 1974 for possession of explosives. He appeared in court on Monday, January 6, 1975 and the DPP (Director of Public Prosecutions) offered no evidence and Forrest was released. Immediately upon leaving the courthouse, he was arrested under the PTA and taken back to the Brixton Prison where he was served an exclusion order. Two days later he was flown to Northern Ireland. According to one commentator, it was clear the police relied upon the Act's exclusion power because the prosecution "did not think that it had a sufficiently strong case to succeed before a jury" (Hain 1979, 128). Another example involves three Irish citizens, the Winchester Three, whose case was dealt with in the same manner. Arrested, found innocent in court, and

released, they were re-arrested under the PTA as they left the courthouse and served with exclusion orders sending them to the Republic of Ireland (Committee 1995, 74, fn 117).

One of the most notorious and bizarre cases related to the use of an exclusion order involves the leader of Sinn Féin, Gerry Adams. In December 1982, Gerry Adams, Danny Morrison and Martin McGuiness, all leading figures in Provisional Sinn Féin, were served with EOs confining them to Northern Ireland (Walker 1983, 537). Margaret Thatcher, then Prime Minister, claimed the orders were justified "on the basis of intelligence about the men's involvement in terrorist activities" (*Hansard* H.C. 5s 33: 982). Therefore, the government had in its possession evidence Adams and the others were involved in the "commission, preparation or instigation, of acts of terrorism" (PTA, Section 4). In June 1983, Adams was elected to Parliament as an MP from West Belfast. The same government that claimed to have evidence related to Adams' involvement with the commissioning of terrorism then lifted the exclusion order. The bizarre twist of the use of this EO continued; when Adams lost his seat in the 1992 general election, he was subsequently re-excluded. This exclusion order would only last two months, as Adams was again de-excluded after the IRA announced a cease-fire (Committee 1995, 76).

Walker notes the dangerous irony of this case of exclusion. If the British Government really believed Adams was involved in "the commission, preparation or instigation of acts of terrorism," then by de-excluding him because of his election to Parliament, the Government allowed a dangerous terrorist easy access to prime targets such as the Houses of Parliament and prominent public figures. Surely, according to one scholar, such a situation would increase, not decrease, the need for Adam's exclusion (Walker 1992, 86). Was Great Britain safer because of the use of this exclusion order?

Was the loss of civil liberties justified by the increased security gained through excluding these three leaders of Sinn Féin? Was this a case of exclusion orders for national security considerations or political theater?

Finally, opponents of exclusion have documented numerous cases of the security services and police using the threat of exclusion to get cooperation from individuals. For example, the CAJ has recorded several instances where people reported being detained in England, Wales and Scotland (by Special Branch or MI5) and asked to cooperate in intelligence gathering. When they refused, exclusion orders were immediately served to them (Committee 1995, 74). Additionally, Liberty (also known as the NCCL - National Committee for Civil Liberties) has documented numerous complaints by British citizens who were approached by police and told "we know you're a bomber, and we are going to prove it. If we can't prove it, we can always get you deported [excluded]." According to the victims, police use it to play on the fears of the suspect and no evidence is needed. The threat of exclusion is used in a fashion similar to the use of the threat of internment during the early 1970s in Northern Ireland (NCCL 1975, 33). These examples are admittedly different, but eerily similar to the threats made on the Guildford Four and Annie Maguire of the Maguire Seven ("admit it or we will get you for something else").

Opponents of the executive power of exclusion conclude this anti-terrorist method is open to abuse and, contrary to Roy Jenkins' assertion that exclusion orders are "concerned with gelignite, not with ideology," in reality, accumulated evidence seems to point to the fact EOs have as much to do with politics as terrorism (*Hansard* H.C. 5s 892:1085). One group which has campaigned for years to repeal this power states this directly, "[I]t is difficult to resist the conclusion that exclusion has, in some cases, been

directed against those who articulate a political message in opposition to British government policy on Northern Ireland" (Committee 1995, 76).

While there is definitely evidence pointing to the appearance that the power has been abused, other detractors argue whether the power is abused is not the issue; EOs are quite simply a violation of civil liberties and on that ground alone should be discontinued. As put by one official reviewer in 1985, exclusion orders are "objectionable in principle" (Philip 1986, par. 20). One way exclusion violates civil liberties is the "negation of the principle of the assumption of innocence until guilt is proved" (Hain 1979, 128). There is no court hearing, no confrontation of your accusers, and no cross-examining the prosecution's witnesses or even being made aware of the evidence when an exclusion order is made. Colville argues this situation may lead to a person being excluded by the use of inaccurate information (see further Bonner 1982, 271; 1987. par. 11.4.1). For this reason, Colville, a reluctant supporter of the provision, described exclusion as "the most draconian [powers] in the ... Act" (1987, par. 11.7.1).

Second, opponents argue EOs deny citizens convicted of no crime the right of free travel in their own country. The power of exclusion puts Great Britain into the same category, albeit on a lesser scale, as Czarist Russia and the Soviet Union, who used internal passports to control the free travel of its subjects. Drawing upon the government sponsored Standing Advisory Commission on Human Rights, the CAJ has complained exclusion is "inconsistent with the right of a citizen to reside and travel freely throughout the territory of the state of which he is a citizen" (Committee 1995, 75).

Finally, a person subjected to "internal banishment ... must endure it stripped of most rights of due process and natural law" (Walker 1992, 89). As mentioned earlier,

there is no trial, just an administrative meeting. EOs are basically a way to "circumvent the normal judicial process and to deny those served with an exclusion order the right to a fair and proper hearing in public" (Hain 1979, 128). Related to the loss of the right of a trial, opponents of EOs point out their use can lead to a worsening of the political environment related to the dealing with the Troubles. By excluding individuals from all parts of Great Britain except Northern Ireland, in essence Westminster is creating a "dumping ground" for terrorists. In the context of negotiations between Westminster and the Irish community in Northern Ireland, what message is being sent when "people considered unsafe by the government to walk the streets of Britain are adjudged fine for the streets of Northern Ireland"? The CAJ's argument goes on to state, "If proper jdicial (*sic*) procedures can find no reason to keep a person off the streets, executive *fiat* certainly has no legitimacy in this respect" (Committee 1995, 76).

On balance, the power of exclusion seems to be more of a hindrance than help. First, most of the exclusion orders given create "internal banishment" to Northern Ireland. This does not prevent terrorism; it only moves a majority of potential terrorists to a central location. If a person is motivated to commit acts of terrorism in England, Wales or Scotland, moving him to Northern Ireland is not going to remove the desire for violence; it only changes the targets within reach. The targets within reach are now all in Northern Ireland. Simply put, exclusion does not eliminate terrorism; it just shifts the geographical location within the United Kingdom from one location to another (Northern Ireland).

Second, proponents tout the time saved on law enforcement and security services. EOs free up police from having to develop complicated forensic evidence cases for trial

and worrying valuable intelligence methods will be compromised. Additionally, by excluding potential terrorists the police avoid being overwhelmed by the need to follow suspected terrorists constantly. Both arguments are spurious. The first argument, of making life easier for the police, flies in the face of centuries of British legal philosophy. The goal of the British legal system is not to make the system "convenient and easy" for the police, but to ensure *civil liberties of suspects are protected*. Related to the second argument, Walker has pointed out the arguments concerning EOs saving police time are only acceptable if terrorism is overwhelming police resources, which has never been the situation in Britain (Walker 1996, 617).

Finally, there has been no public evidence provided by the government to support the assertion that exclusion has reduced terrorism related to Northern Ireland or effectively made it more difficult for terrorists to conduct campaigns of violence. Walker stated in his influential book, *The Prevention of Terrorism in British Law*, that it is "extremely difficult to demonstrate empirically that exclusion has or is ever likely to, prevent terrorism" (1992, 87). Walker conducted one of the few studies on the link between EOs and terrorism and found that between 1977 and 1990 there was "no close correlation between new exclusion orders and overt terrorist activity" (Walker 1992, 82). The main cause of the government's argument for keeping the power is the police want to keep it; it protects sources and evidence from public scrutiny and makes their job more convenient.

A). Loss of Basic Liberties

There may be little evidence other than unsubstantiated assertions to support the claim that exclusion reduces the threat of terrorism in the United Kingdom, but there is

ample evidence supporting the claim that it reduces civil liberties. Exclusion orders deny basic civil liberties of right to trial, presumption of innocence and free travel to all parts of one's country. In short, a person who is served an EO is no longer a full citizen. Additionally, as seen above, the power has been abused by law enforcement, used in a bizarre manner with obvious political overtones, and is rife with potential error.

Not only has almost every official reviewer, even those who reluctantly support its continuation, spoken out against it (e.g., Shackleton 1978; Jellicoe 1983; Colville 1987), but even sitting Home Secretaries have conceded EOs' negative effects on civil liberties. In response to Sir Philips' review, the Home Secretary recognized exclusion orders "very considerably infringe ordinary civil liberties" (cited in Gearty 1994, 170). The continued use of exclusion orders has damaged the British government's civil rights reputation in the eyes of the international community (Scorer 1976, 12; Donahue 2000, 31). Colville stated that the power of executive exclusion should be revoked and argued this action "would be the correct one both in terms of civil rights in the United Kingdom and this country's reputation in that respect among the international community" (Colville 1987, par. 11.6.1).

B). Summary

Not withstanding Paul Wilkinson's assertion of the "proven value" of exclusion (1988, 45), most commentators would support the conclusion of the PTA's first reviewer, that exclusion is "inherently arbitrary and oppressive" and derogates from the civil rights of suspects (Shackleton 1978, par 50). Even when conceding some value in the arguments made by the government and law enforcement, reviewers were, in Colville's words, "not convinced that the ends justify the means" (1987, par. 11.6.1).

As put by MP Hattersley, the loss of civil liberties associated with EOs can only be "tolerable in a free society … if they are absolutely necessary, unquestionably effective and properly operated" (*Hansard* H.C. 5s 1:340). Supporters of exclusion have not reached that threshold. Throughout the literature on British anti-terrorism policy, the same themes occur in relation to exclusion. First, it is an executive act, it is "not a judicial proceeding and it involves no charges, trial or court" (Shackleton 1978, 122). Second, it is a violation of people's fundamental liberties because it "involved no right of appeal and failure to inform people of the charges against them, [and thus] clearly breaches international fair trial standards" (Committee 1995, 76). Additionally, official reviewers have understood law enforcement believes the power is beneficial in their job of fighting terrorism and eliminating the power of exclusion may be a hard choice, but "it would be the correct one ... in terms of civil rights" (Colville 1987, par. 11.6.1). Finally, the overwhelming "reason for continuance of exclusion may more clearly be located in the political desire to be seen to be taking overt action against, and to 'Ulsterize', Republican terrorism" (Walker 1996, 617). By almost any standard, "being seen as doing something" is not a justifiable rationale for significantly reducing civil liberties in the United Kingdom.

In the Terrorism Act 2000, the power to exclude was removed. The Lloyd report (1996), along with previous reports, had suggested its elimination. The key factor in the government's decision to remove executive exclusion was a Home Office Circular (1998, pars. 5.6, 5.7) which stated it was more profitable to keep suspects under surveillance and, where possible, charge them with offenses. The government's decision, although late, is a positive step forward. Tacitly, the government is admitting exclusion was not as

effective an anti-terrorism measure as they believed it would be, therefore making it harder to justify nearly three decades of reduced civil and political rights for British citizens.

IV Arrest and Detention Powers

In November 1974, approximately two weeks before the PTA would be introduced, Professor Graham Zellick argued in a letter to *The Times* that the

> "ordinary [British] system of police investigation and interrogation is unsuited to a system in which an individual is being detained in the police station for a week. There is no magisterial supervision, no tape recording, no right to a lawyer. The memory of interrogation techniques employed by the security forces in Ulster is still too fresh for there to be no misgivings as to what may happen to a suspect kept incommunicado in a police cell" (quoted in NCCL 1975, 32).

Within the next several weeks, scores of people were arrested under the PTA. Among them were eleven individuals known as the Guildford Four and the Maguire Seven. They were picked up under Part III, section 12 of the Act, which has been described as having "done the most to strengthen the powers of the police" (Hain 1979, 131) and widen the powers to arrest British citizens (Bonner 2000, 43). This next section examines the results of this "widening" and "strengthening" of police powers.

The powers of arrest and detention are broad, varied and have been changed in numerous ways since their origins in NI(EP)A 1973, PTA 1974 and now the Terrorism Act 2000. Throughout all the various incarnations of these pieces of emergency legislation, the arrest and detention powers themselves have remained remarkably constant (except for a greater range of 'terrorism' which falls under the Acts jurisdiction). After a brief summary of the three major families of legislation, the powers, as was done in Chapter Four, will be addressed together for conceptual clarity. The collapsing of the

entire range of arrest and detention powers under the various versions of emergency legislation is a common approach within the literature (Walsh 1983, 34).

Section 11(1) of the NI(EP)A 1973, which only has jurisdiction in Northern Ireland[127], empowered the police to arrest without warrant any person whom they suspected of being a terrorist (Whitty, Murphy et al. 2001, 131). As was noted in Chapter Four, there are no requirements for the suspicion be "reasonable." The NI(EP)A 1973, under section 14, allowed members of the armed forces the same power. Individuals detained in Northern Ireland under the Act may be held up to three days. In a related fashion, the security forces in Northern Ireland may stop any person as long as necessary in order to question him with respect to his identity and what he knows about any recent explosion or other life-endangering incident (Bonner 2000, 41).

The PTA, which covers all of the United Kingdom except Northern Ireland, has similar features for police, but not for the armed forces. Section 12 (1)(b) of the PTA 1974 allowed police to arrest, without warrant, anyone whom they had a reasonable suspicion to be or to have been concerned in the commission, preparation or instigation of acts of terrorism. The major difference relates to the use of the word 'reasonable.'[128]

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127 The exact section and sub-section of NI(EP)A and PTA has changed throughout the various versions of the legislation. For ease of reading, the section from the original version of the two Acts will be used whenever possible.

128 An example of the debate over what is "reasonable suspicion" and the courts expanding the definition is *O'Hara v. Chief Constable of RUC* (1997). The plaintiff was arrested under PTA by a police officer whose only suspicion was superiors mentioned his name in a briefing. O'Hara was detained and interrogated for two weeks until police realized he was innocent. PTA states, police must have "reasonable suspicion" to arrest. O'Hara sued for false arrest, stating the arresting officer had no "reasonable suspicion." In the process of the suit, it was expected that O'Hara would find out what evidence the police had to incorrectly connect him with terrorism. Due to the ruling by the House of Lords, he was unable to find out why he was suspected of terrorism. In *O'Hara v. Chief Constable of RUC* (1997) the House of Lords ruled that the officer did have "reasonable suspicion" because a superior had provided him with the information. According to the decision, "the objective test of reasonableness does not mean that the court has to go beyond what was in the mind of the arresting officer" Walker, C. (1985). "Emergency Arrest Powers." Northern Ireland Law Quarterly **36**: 145-155, Coutts, J. A. (1997). "Arrest Without Warrant of Suspected Terrorist (United Kingdom)." Journal of Criminal Law **61**(3): 308-10, Hunt, A. (1997).

Detained individuals can be held up to forty-eight hours, and with the knowledge of the Secretary of State, another five days. Paul Wilkinson has described these powers as "[b]y far the most useful of the powers afforded" by the PTA (1986, 171).

The Terrorism Act 2000 Part V section 41 contains almost identical powers of arrest and detention powers. In the words of one scholar, it is "the successor of section 14 of the [PTA] 1989" and is "arguably the most important single provision in the Act"[129] (Walker 2002, 119). This Act combines the areas of official jurisdiction of the two previous Acts and therefore covers the entirety of the United Kingdom. Similar to the two pieces of emergency legislation it replaces, detention is for fourty-eight hours, but an application can extend it up to five more days (Walker 2002, 123). Under the NI(EP)A and PTA, the relevant Home Secretary could extend the detention through executive fiat. The Terrorism Act 2000 gives power to a judicial authority created to determine the appropriateness of such requests. Ordinary law, under the Police and Criminal Evidence Act 1984 (PACE), allows for up to thirty-six hours with an extension, in serious crimes, up to an additional fourty-eight hours depending on the approval of a magistrates' court in an *inter partes* hearing (Bonner 2000, 43). According to some scholars, transferring the power to authorize up to seven days of detention from the Home Secretary's office to a judicial authority would not, in practice, result in the curtailment of lengthy police interrogations (Whitty, Murphy et al. 2001, 111-2). The 2000 Act is different from the other two Acts because there is no need for there to be any specific offense in the mind of the arresting officer. This greatly increased the power of the state; by giving the police

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"Terrorism and Reasonable Suspicion by 'Proxy'." Law Quarterly Review **113**: 548-52, Walker, C. (2002). Blackstone's Guide to the Anti-Terrorism Legislation. New York, Oxford University Press. Therefore, the courts have insulated the "briefing officer" of having to provide justification to the suspect or the courts in cases involving the PTA.

129 Section 14 of PTA 1989 is the exact same arrest and detention power as section 12 of PTA 1974.

wider discretion in carrying out investigations, police are not bound by the need to "state on arrest or subsequently the offences which may be in mind" (Walker 2002, 121). In short, law enforcement personnel can arrest and detain people without telling them for what they are being held (other than that their arrest is empowered by the Terrorism Act 2000).

Supporters of the arrest and detention power have argued it is indispensable for effective investigations in terms of interrogation, identity confirmation, forensic testing and liaison with other police forces (Walker 1992, 281). Additionally, Jellicoe (1983) supported the powers because IRA terrorists had special counter-interrogation training, and extra time was necessary to break through their resistance. Jellicoe stated that this time was needed to remove initial resistance and could possibly take four or five days (cited in Scorer, Spencer et al. 1985, 48). Early in the debate on the arrest and detention portions of the Acts, Roy Jenkins stated, "I am satisfied that it is necessary and that without it, the task of obtaining the kind of information on which charges can be brought or exclusion orders made would be *virtually impossible*" (emphasis added, cited in Scorer 1976, 25). During the same debate the Under-Secretary of the State for the Home Office argued, "[t]here can be little doubt that the powers contained in the [PTA] now in force played a vitally important role in combating terrorism ... the additional powers given to the police have led to striking success in bringing terrorists to justice (Scorer 1976, 25). The example of the "striking success" used to buttress the Under-Secretary's argument related to four young people later to become famous as the "Guildford Four."

A). Intelligence Gathering

The official justification for arrest powers as a means of intelligence gathering has always been the overriding need to combat terrorism related to Northern Ireland. The government stated that law enforcement and security forces need a constant flow of reliable information on terrorist membership, organization, activities, plans and resources in order to save lives and avoid injury. When asked if normal police powers would suffice, the government stated an emphatic 'no' (Bennett 1979; Baker 1984; Walsh 1988, 37). The "intelligence" gathered ranges greatly from detainee to detainee. Once arrested under the NI(EP)A or PTA the police have the right to use "reasonable force" to ensure suspects are fingerprinted and photographed. The information is placed in a national database where it remains even if a person is released without charge. Civil rights groups have documented the use of this information to justify future suspicions against that person (Scorer, Spencer et al. 1985, 49). Therefore, being arrested once for intelligence gathering automatically triggers the "suspicion" (NI(EP)A) and "reasonable suspicion" (PTA) threshold for further arrest and detention under emergency legislation. In short, the legislation has created the justification for the initial arrest and, thus, further justification for future arrests.

In the history of the Troubles, random arrests were authorized by the SPA 1922, executive internment, the Detention of Terrorist Order 1972 (DTO 1972), and the NI(EP)A 1973. This led to people being repeatedly arrested for "intelligence gathering, surveillance and harassment" (Walsh 1983, 126). The object was to build up and maintain an intelligence file on individuals and the community in which they lived. People were questioned on a range of details related to their family, associates, interests, movements, organizations and individuals in their area (Walsh 1988, 35). The people

were arrested and not even told what the "suspicion" was for which they were being detained. It has been argued that such powers can only encourage abuse and greatly magnify the frustration felt by citizens in being deprived of their liberty in the first place (Walsh 1983, 126). The corresponding arrest and detention power in Great Britain has been described as "the most valuable powers gained by the British police" which "increase[d] the period for which terrorist suspects can be detained for questioning" (Wilkinson 1986, 169). MP Canavan pointed out that from 1974 to 1996, more than 27,000 people were arrested under PTA alone; of that group fewer than fifteen percent were charged with a crime (*Hansard* H.C. 6s, 273:1162).

In defending these statistics MP Leon Brittan stated

> "What the figures do not tell you is about how much information was obtained, not only about the people concerned but about others, and how many threats were averted as a result of obtaining information from those who were detained. The object of the exercise is not just to secure conviction but to secure information" (Interview with This Week, TRE Radio, quoted in Whitty, Murphy et al. 2001, 136).

Echoing the official view, one author justified this low 'charge rate' by stating, "the information gathered from such techniques *most likely* had a significant impact on level of violence in both Northern Ireland and Great Britain" (emphasis added Donahue 2000, 7). What took place during these detainments and how information has been extracted is the next issue to be examined.

B). Interrogations

Once a person has been arrested, he is no longer at liberty to go or do as he pleases. Therefore, because of the serious infringement upon a person's liberty, arrest powers must be taken very seriously. Additionally, how the suspect is treated while in custody is equally important. Supporters of the arrest and detainment power argue detainment allows for more confessions, among other things. The argument continues;

because people in Northern Ireland are afraid to appear in court due to paramilitary reprisals, law enforcement relies heavily upon confessions (Diplock 1972). In part, this problem of witness and jury tampering is the reason why Diplock Courts were created (see below).

To get terrorists who are ideologically motivated, hardened, and well trained to confess to their crimes takes time and aggressive interrogation tactics. Both of these are provided in the arrest and detention powers found in the Acts. William Sargant, who wrote the seminal work *Battle of the Mind* (Sargant 1957 (1997)), stated six constants are needed for successful interrogation: fatigue, tension, isolation, uncertainty, use of vicious language and a permeating atmosphere of seriousness (cited in Scorer, Spencer et al. 1985, 49). The question arises, in a liberal democracy, when do the interrogation techniques of fatigue, isolation, vicious language, etc. become inappropriate abuse? The use of these inhumane and degrading treatments (i.e., the Five Techniques) led to the UK being condemned by the European Court of Human Rights in *Ireland v. United Kingdom* 1978 (see futher Compton 1971; Brownlie 1972; Parker 1972; Cobane 2000). Substantial evidence has surfaced related to serious physical abuse of suspects by RUC detectives in the 1970s (Taylor 1980). There are also multiple cases of the mistreatment as seen in the Guildford Four, Maguire Seven and Birmingham Six. Although reforms, such as the Terrorism Act 2000 have reduced the number of incidences of alleged abuse, accusations of mistreatment have again increased and interrogation by the RUC has been the subject of criticism by UN organizations[130] (Baker 1984, pars. 308-14; see also The Guardian, October 29, 1991, p. 3). In each of these latter three cases of abuse, extended detention

[130] Section (100) introduced the videotaping of police interviews at holding centers Whitty, N., T. Murphy, et al. (2001). Civil Liberties Law: The Human Rights Act Era. London, Butterworths.

was used to get the suspects to confess. In each of these miscarriages of justice the confessions were later retracted in court and shown to be the result of physical and psychological coercion.

Sargant, in a November 1975 *Times* article, stated that during long interrogation there is a time "When the brain finally switches under induced fatigue and stress it becomes first of all very 'suggestible.'" He continues on saying, "People can be made to sign statements they would otherwise never have given when mentally normal" (Sargant 1957 (1997); quoted in Scorer 1976, 34; see also Gudjonsson 1992). In both Great Britain and Northern Ireland, but especially the latter, confessions became the only or the main evidence against suspects at trial (Bonner 2000, 44). The result has been police use the time to break down a suspect's will to resist and get a confession. This typically becomes the sole reason for convictions in court; therefore, according to Scorer, less emphasis is placed upon gathering independent collaborative evidence (1985, 48). Basically, it becomes a short cut for law enforcement officials. Cases such as the Guildford Four and Birmingham Six, in which the primary evidence of guilt was coerced confessions, support this assertion. These high profile cases are not the only examples of police using abuse/harassment during detainment to gather information and elicit confessions. Scorer et al., in two separate studies, detailed the stories of scores of people who have suffered at the hands of police while in custody under emergency law (Scorer 1976, 27-31; Scorer, Spencer et al. 1985, 37-46). Quite simply, as has been demonstrated, the arrest and detention powers of emergency legislation created an environment ripe for the abuse of civil liberties. In the perceived 'state of emergency,' law enforcement personnel have crossed the line of abuse many times.

C). Statistics

Former Home Secretary Lyon told Parliament that arrest and detainment powers "enable the police to hold people whom they have good reason to believe are involved in acts of terrorism, but who they cannot immediately connect with specific offences" (*Hansard* H.C. 5s, 881:640). One scholar has described this justification as arresting a suspect and then looking for a crime with which to charge him (Hain 1979, 135). The numbers bear out his argument.

In one early study, between November 1974 and March 1981, 5,119 people were arrested under the PTA; only 363 (seven percent) were ever charged with a crime of any kind and only seventy-three (1.4 percent) were charged with an offense under the Act. Of the seventy-three charged, only thirty-eight (.7 percent of the total arrested) were convicted of a crime and sent to prison (Harvey 1981, 15; for a more detailed break down see Scorer, Spencer et al. 1985, 36-7). When looking at data from January 1, 1984 to June 30, 1987, one official reviewer stated, "there is *prima facie* ... cause for concern" because nearly eighty percent of all people arrested in Great Britain on suspicion of involvement in terrorism relating to Northern Ireland were released without charge (Colville 1987).

The overall picture of statistics related to arrest and detention connected to emergency legislation is not much better. From 1974 to 1996, more than 27,000 people were arrested under PTA alone; of those arrested, fewer than fifteen percent were charged with a crime (*Hansard* H.C. 6s, 273:1162). Looking specifically at one portion of arrest powers, PTA s. 14, which required a "reasonable suspicion" to justify arrest, Livingstone found a high percentage (more than sixty-seven percent) were released without charge.

He concluded most arrests are basically for intelligence gathering, and are not focused on apprehending those involved in criminal activities (Livingstone 1989, 289).

The numbers in Northern Ireland, if possible, are worse. One study in 1980 found that ninety percent of all those arrested under NI(EP)A were not charged with a crime; they were questioned and released without charge (Walsh 1983, 33). Looking at arrests made by the armed forces, Walsh pointed out between June 1, 1980 and May 31, 1981, the army made 1,504 arrests related to s. 14 of NI(EP)A. Only 418 (twenty-seven percent) of these were transferred to RUC custody and of these only seven (.4 percent) were ever brought before a Diplock court (Walsh 1983, 34). The civil liberties of more than 1,500 people were violated, many several times, for the arrest of seven people.

In 1992, NCCL released a report on civil liberties in Northern Ireland. They collected statements from 268 people who were detained under the NI(EP)A and who alleged ill-treatment. Of those 268 detainees, 222 (eighty-three percent) were released without charge (for a listing of the alleged ill-treatment see NCCL 1993, 33). The fact that most of the arrests mentioned in the above statistics took place at the person's home (twice as many as on the street) suggests strongly that most of the arrests were carefully pre-planned operations in which the police knew the identity of the person they wanted to interview (Walsh 1983, 34). The police suspected the person in question had information they needed to add details to their intelligence log sheets, so they (the police) arranged to have them picked up at the most convenient location, their home.

One theme found throughout the literature on arrest and detention powers (and all the emergency powers legislation) is much of what is done through special anti-terrorism

legislation could be handled through "ordinary law." In addressing this point, Roy Jenkins stated in Parliament:

> "It could be reasonably pointed out that a considerable number of people ... would have been arrested under normal police power if the Act had not been in force. What the section does is to strengthen, extend and perhaps in some cases *regularise* police powers of arrest and detention in relation to suspected terrorists."

After being presented with arrest figures (e.g., see above), Jenkins went on,

> "Clearly most of these people would have been detained even if the Act had not been in force" (emphasis added, cited in Scorer, Spencer et al. 1985, 47).

The reason for choosing to use the PTA or NI(EP)A to arrest someone when it could have been done under ordinary law is articulated by one scholar as simply giving greater latitude and power over the suspect and making it easier for the officer. Using emergency anti-terrorism legislation allows the police to "hold a suspect for a much longer period of time; to question him on a much broader range of matters" and thus freed the police "from the more stringent legal requirements of an ordinary arrest" and "[made] it easier for them to extract a confession from a suspect" (Walsh 1983, 32).

D). International Perspective

The arrest and detention powers have not only been examined and found wanting by domestic civil libertarians, but the international community has also criticized the British government for the powers conferred through emergency legislation. The European Court of Human Rights (ECHR) has found that certain anti-terrorism practices are in violation of the most fundamental rights protected by the ECHR, such as right to life (*McCann, Farrell and Savage v. UK* 1995) and the right to freedom from inhuman and degrading treatment (*Ireland v. UK* 1978) (see further Roche 1989-90; Marks 1995). Additionally, two key elements of the emergency legislation have been found in breach of the International Convention of Civil and Political Rights (ICCPR). For example, the

NI(EP)A was found in violation in *Fox, Campbell and Hartley v. UK* (1991) and the PTA, in *Brogan and others v. UK* (1989). In the latter, the ECHR found four days and six hours of detention under PTA (which allowed up to seven days) breached the ECHR. Westminster chose to derogate under Article 15 of the ECHR and similarly under Article 4 ICCPR to keep seven-day detention power in place. These articles allow High Contracting Parties to temporarily suspend certain obligations during an emergency "threatening the life of the nation" (Committee 1995, 40). Even after the passing of the Human Rights Act (HRA), which was intended to influence the British government to move away from derogation under emergency legislation, the UK still had to derogate[131] (Walker 2002, 125).

E). Summary

When internment was introduced on August 9, 1971, under the SPA 1922, it proved to be very controversial and poorly implemented (bad intelligence), but it did lead to a great deal of new information being gathered (Elliot and Flackes 1999, 662). As a result of the Catholic community's hatred of internment, violence increased dramatically. Internment, as an emergency measure, was quickly seen as counterproductive and became part of the problem (Wilkinson 2000, 115-6). To move away from internment under the SPA 1922, the Detention of Terrorism Order was passed to put a more politically palatable face on the power of detention (Elliot and Flackes 1999, 664). Basically, detention was a cleaned up version of internment (which remained on the books until 1998 (Wilkinson 2000, 115-6)), with the same deteriorating effect on the

131 The new derogation notice, issued in December 2001, related to keeping international terrorist suspects who cannot be deported for longer that seven days.

political environment. “Detention,” as put by one Senior Army Officer in Northern Ireland, became a kind of “Staff College for terrorists” (Wilkinson 1986, 169).

Both the SPA 1922 and DTO 1972 were replaced with the NI(EP)A 1973, which can be seen as a further cleaning up of the same ugly power in what was hopefully an even more palatable package. Because internment was such a major abridgment of civil liberties and involved the loss of the right of Habeas Corpus, but provided a powerful anti-terrorist tool, Westminister officials found a way of getting the same power under a different and more politically palatable guise (Wilkinson 2000, 116). Although the arrest powers of the NI(EP)A were supposed to be more in line with the tenants of a liberal democracy, one civil rights advocacy group described it as “legitimis[ing] past malpractice” (NCCL 1975, 31). Another scholar explained that arrest and detention powers under NI(EP)A (and PTA) merely legitimized past police malpractice and stated, “[i]t has long been the case that police have arrested persons and detained them in custody for the purposes of interrogation for periods of seven days or even more” (Hain 1979, 135). Put another way, it legalized action by the RUC, which has been described as an organization that operated “as though it were above the law” (Walsh 1988, 43). The police euphemistically describe these people as “helping the police with their enquires,” but, in actuality, they are not there of their own volition and are not free to leave (Hain 1979, 135). Even an official reviewer inferred the intention of section 11 of NI(EP)A 1973 was to be “used as the start of a procedure leading to questioning, followed by detention *without judicial trial*” (emphasis added Bennett 1979, par. 66; see also Hansard 5s, 855:285).

Basically, the official attitude is dominated by a preoccupation with security. The test used by the government is how many individuals are arrested, how much intelligence is gathered, how many exclusion orders served, how many individuals are brought to trial, how many convictions are secured and so on. Little thought is given to the propriety or legality of the methods used to achieve those ends or the damaging side effects they produced (Walsh 1988, 37). The information used in the FRU/UDA (Force Research Unit and Ulster Defense Association) collusion scandal was the same information gathered through the interviews facilitated by arrest and detention powers. The FRU had access to all information collected during these interrogations organized on P-cards (Personality Cards). The information on these P-cards was passed on to the FRU agent Brian Nelson, who was head of intelligence for the UDA. Nelson would pass the intelligence on to his UDA superiors, who used it to plan and execute political killings. The information on the P-cards included a person's name, address, telephone number, etc., (all the standard information), but also included the person's immediate and extended family, alleged friends and acquaintances, even people the suspect visited, the places he was seen drinking or visiting and the people to whom he talked and with whom he drank (Davies 1999, 13). This is one extreme example of what a database of intelligence can be used for in a society that sees itself as under siege.

According to detractors, it is simply not acceptable to deprive anybody of their liberty simply to obtain information from them if they are not suspected of any offense (Scorer, Spencer et al. 1985, 47). The creation of elaborate "intelligence files" with detailed personal information by the government reeks of the files created and used by the Stazi and KGB in East Germany and the Soviet Union. The results are, as predicted,

less liberty for British citizens, abuse by police while under arrest, and a subtly less free society, which in several respects begins to resemble past communist totalitarian societies. This is the result of nearly three decades of special legislation giving police and security forces increased arrest and detention power to deal with political violence associated with the Troubles.

V Diplock Courts

Diplock Courts were one of the major modifications brought about by the NI(EP)A 1973. In addition to a number of new police powers (discussed earlier), the NI(EP)A instituted the special Diplock Courts to deal with terrorist cases that contained significant pre-trial modifications (Walker 2002, 188). The Diplock Courts were a concerted effort by the British government to handle the continuing political crisis in Northern Ireland. In these courts, a single judge heard cases alone, without the benefit of a jury, using modified rules of evidence and lower standards for the admissibility of confessions[132] (Carlton 1981, 226). Suspects were diverted to the Diplock courts if charged with a "scheduled offense." Many of the listed "scheduled offenses" cross over into non-political offenses (e.g., murder, firearms, etc.). In cases of scheduled offenses committed by someone with no involvement in the political violence related to Northern Ireland, the Attorney General can "certify out" or "de-schedule" the case, so it is heard in an ordinary jury court (Committee 1995, 59). The Diplock courts have been vilified by civil rights advocates for violating the important and long-held right of trial by jury, but over time the view has become more mixed.

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132 Other changes later integrated into the Diplock Court system included an automatic right to appeal and a requirement that the judge support a conviction with stated reasons, Doran, S. and J. Jackson (1995). Diplock Courts: a Model for British Justice? Northern Ireland's System of Trial by Judge is Widely Hated. The Independent. London**:** 12.

A). Importance of Jury Trials

There is a consensus in academic, legal and lay circles that jury trials are the ideal format for trying serious criminal cases (Doran and Jackson 1995). For centuries, political philosophers have recognized the maintenance of law as a fundamental purpose of government. Without rule of law, in the famous words of Thomas Hobbes, life soon becomes 'nasty, brutish and short' (Carlton 1981, 226). Early on it was determined trial by a jury of one's peers was far more likely to lead to a just decision than trial involving one of the monarch's selected minions (Frohnen 1998).

As the Troubles escalated, for numerous reasons trial by jury, which Blackstone stated was the "the glory of English law," (1830, 396) failed to safeguard civil rights of the Catholic minority in Northern Ireland.[133] Because of the political manipulation of the legal system, many Catholics had little faith in the courts. In the words of Father Dennis Faul, a legal expert for the Northern Ireland Civil Rights Association (NICRA), "Our people [Catholics] are afraid of the Courts: They believe the judicial system as it operates in the blatantly sectarian condition of life here is loaded against them" (Irish Times, December 2, 1969 cited in Carlton 1981, 228).

In 1967, then Prime Minister Wilson stated that Britain would do what was needed until "law and order had been restored," and residents of Northern Ireland guaranteed, "their equal rights and protection under the law" (Carlton 1977, 133). In 1973, with the goal of accomplishing that objective, the NI(EP)A, with its concomitant Diplock Court system, was introduced to address the sectarian bias in the criminal justice system. William Whitelaw, SSNIO at the time of the Act's introduction, stated, "Given

[133] Part of the reason was jurors were selected from property tax payers and laws had been rigged to make it nearly impossible for Catholics to own property, therefore excluding them from jury selection.

the cessation of violence for political ends in Northern Ireland, the Government will be only too glad to see these provisions brought to an end" (quoted in Doran and Jackson 1995). After an experience spanning more than thirty-years with the Diplock court system, it is still in existence today. Even though the NI(EP)A is gone, the juryless courts still live on in the Terrorism Act 2000 (Walker 2002, 188). The desire to phase out the Diplock Courts is seen in numerous official documents, but still they exist (Lloyd and Kerr 1996, par. 16.16; Home 1998, par. 13.8; NIO 2000, 2). Northern Ireland is no closer to returning to jury trial for serious offenses than it was thirty-years ago. Why does it remain on the books? What have been the results, both good and bad, of the three-decade long experiment of juryless courts? How often is it used, and for what type of trials?

B). The Downside of Thirty-Years of Diplock Courts

The Diplock Courts have moved through three distinct phases. First, the seventies saw a time of extreme violence in Northern Ireland and the single judge courts were very busy. Many observers accused the Diplock courts of turning a blind eye to the unsavory police behavior leading to many 'confessions.' These confessions were readily accepted into a legal system legislatively altered to lower the standard for the admissibility of confessions. According to the rules of the Diplock system (in both NI(EP)A and Terrorism Act 2000), confessions are admissible if they have not been obtained by "torture, inhuman or degrading treatment or by violence or threat of violence" (Whitty, Murphy et al. 2001, 132). As has been shown in several domestic and international legal cases, the operationalized definition of "torture, inhuman or degrading treatment or by violence or threat of violence" has been crossed numerous times.

The 1980s was the second phase, known in the literature as the "supergrass era," and is considered by many as the "darkest hour" of the Diplock system (Doran and Jackson 1995). This period corresponded roughly with Westminster's greater emphasis on 'Ulsterisation' and police primacy or 'criminalisation' (Bonner 1984). The former meant an increased reliance upon local recruited forces, the RUC and UDR, with the Army, in much reduced numbers, in a supportive role. The latter meant the increased use of a court-oriented option, a criminal prosecution approach which treated terrorists as criminal offenders. The increased reliance upon confessions (phase one) and the concomitant problems were the result of that strategy. Therefore, the British government needed to respond to the growing pressure to move away from the number of heavily influenced confessions coming before the Diplock courts. This led to what is known as 'supergrasses' or as the police preferred, 'converted terrorists" (Bonner 1988, 30). These supergrasses, according to the police, were former terrorists who had seen the error of their ways and made voluntary statements to the law enforcement personnel (RUC 1983, xi-xii).

The use of accomplice evidence is not a new phenomenon to the law (Gifford 1984, 4-5). On the one hand, such evidence given by insiders would certainly be valuable in enabling the conviction of those in secretive organizations who might otherwise escape justice for serious crimes and may sow the seeds of distrust in terrorist paramilitaries (Graham 1983, 10). On the other hand, numerous opponents have pointed out the dark side of relying on 'accomplice evidence:' the character of witnesses, possible motivation or advantages gained by providing information (money, lenient sentences, etc.), the opportunity to "stitch" in an innocent person's name to get even for a past wrong, or even

police creating the informer through coercion (Greer 1983, 11; Walsh 1983, 90-2; McGrory 1984, 13-14).

This five-year experiment (1981-1985) was a dismal failure for both civil liberties and the Northern Ireland criminal justice system.[134] In the end, thirty supergrasses led to the arrest of more than 500 persons charged solely on the word of their former accomplices (Bonner 1988, 23; see further BBC 2002). Many commentators described the process as a systematic way of removing suspected terrorists from circulation in the community (Hadden 1983; Workers' 1984; Jennings and Greer 1986). The "*de facto* internment," as characterized by Walker (2002, 191), worked in two ways. First, many of the suspects were arrested because supergrasses were being held in jail (on remand) for one to two years awaiting trial (Bonner 1988, 34; Committee 1995, 68). Several other scholars reported even longer stays in jail for suspects waiting for their day in court (Baker 1984, pars. 173-87; Ryder 1984, 2). The situation got so out of hand it created difficult logistical problems for the government, as shown in 1986, when the Attorney-General, declined to give an average remand period for those charged on accomplice evidence because it would involve too great an expense to provide an answer (Hansard 5s 90:243, cited in Jackson 1984-85).

The second manner in which the supergrass system combined with the Diplock Courts to create a "quasi-internment" related to the high rate of convictions (Committee 1995, 68). Through this combination of juryless courts and supergrasses, hundreds of terrorists were removed from the streets of Northern Ireland. Judges who were presented with absolutely no corroborative evidence convicted many of these 'terrorists'. One study

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134 Formal use of Supergrasses was limited to these years, but the fallout i.e., appeals, lawsuits, etc. continued on for years.

found the conviction rate was fifty-five percent in trials wholly or in part dependent upon supergrass evidence (Greer 1987; Greer 1987, 7; Greer 1988; Greer 1995). Another study found from 1981 through 1983, fully one-third of those found guilty were convicted without corroboration (McGrory 1984, 4-5).

At first blush, a high conviction rate and scores of terrorists removed from the street looks good, but the conviction rate was pre-appeal. A significant number of defendants were convicted with uncorroborated testimony in large-scale, multi-defendant cases (McGrory 1984, 4-5). Even Baker in his review of the NI(EP)A saw problems with the large scale nature of the trials; he suggested no more than 20 defendants at a time, but he rejected a requirement of corroboration in all cases (Baker 1984, 163-72). Although Baker did not see a problem with uncorroborated testimony, the appeal court system did and individuals who were convicted on the uncorroborated evidence of supergrasses had their convictions overturned on appeal (Committee 1995, 67). For these people justice came late, but when it did arrive they were set free. What cannot be returned to these people, their families, and their neighbors is confidence their government respects civil liberties.

The third phase, which includes the 1990s to the present, is defined by a steadily decreasing use of Diplock trials. These three phases demonstrate the systemic lessening of civil liberties in one portion of the United Kingdom.

The underlying assumption of the Diplock Court system was that a government could simply take the jury out of the picture, yet the basic shape and character of the criminal trial would remain the same (Doran and Jackson 1995; Jackson and Doran 1995). Many argued the special courts were a mistake and would lead to more problems.

One of the concerns was that a single judge hearing scheduled offenses would become desensitized and, in the words of one Member of Parliament, "conviction oriented" (*Hansard* H.C. 5s 855:306). This problem of desensitization, known in the literature as "case-hardening," involved a lone judge who over time grew accustomed to uncritically accepting the prosecution's case and evidence. The judge becomes tired of the same old lines of defense put forward day in, day out by defendants (Damaska 1973, 538-9; Boyle, Hadden et al. 1975, 98; see also Baker 1984, par. 122).

In an extensive research study done by two highly respected law faculty, a number of Diplock judges and lawyers who tried cases in the juryless system were interviewed on their perceptions. The findings supported the assertion the Diplock Courts lead to desensitized judges. They concluded case-hardening was present, but it needed a slightly more nuanced understanding. According to the study, judges tended to take a more focused and "legalistic" view of the evidence, which works against the defense, whereas juries tended to take a broader view of the merits of a case. Several judges stated they "simply could not allow sentiment to get the better of them." Additionally, judges were not always able, through their own personal experiences, to understand how certain defense explanations could possibly be valid. In other words, they were unable to empathize with the defendants. Juries, on the other hand, came "cold" to the evidence and were more likely to take a fresh approach to the case and judge it on its merits (see further Jackson and Doran 1993; Doran and Jackson 1995; Jackson and Doran 1995). Juries will not have heard the same or similar story numerous times and, therefore, be more sympathetic to the overall context of the case.

The Committee for the Administration of Justice (1995) published a study on defendants in Diplock Courts from 1973 to 1979 and found the average acquittal rate in contested cases fell by nearly fifty percent. This gives considerable support to Boyle, Hadden and Hillyard's contention that "in the absence of juries, judges have become case-hardened and thus more ready to convict" (1980, 60). Baker acknowledged that as a result of the suspension of jury trials, there was the possibility of judges becoming "prosecution minded" (Baker 1984, pars. 122-26). In a somewhat broader and slightly different study, it was demonstrated that from 1974 to 1986 the acquittal rate for jury trials was considerably higher than those of the Diplock Courts (fifty-five percent vs. thirty-three percent). Finally, if one looks at data from 1984 to 1994, there is a continuous drop in the acquittal rate -- from a high of fifty-three percent in 1984 to an all time low of twenty-nine and twenty-four percent (1993 and 1994, respectively) (Committee 1995, 66). These various sets of data strongly suggest when left as sole arbiters of law, fact, and judgment, judges are prone to weary cynicism and case-hardening.

Walker has pointed out a related variable leading to case-hardening. The location of the trial seems to affects the overall view of the judge. Scheduled offenses are held in the Crown Court in Belfast. The facility is a highly secure building and to many resembles a fortress. This environment of foreboding, where judges pass through special security procedures on a regular basis, cannot help but make judges realize they are not dealing with ordinary suspects. Over time it must influence their perceptions (Walker 2002, 191). Lloyd has supported the assertion that the nature of special trials and the facility may create prejudice toward the defendant from "case hardened" judges (1996, 16.16-18).

Another problem with the Diplock Courts is they hear cases not related to political violence in Northern Ireland. According to one study, in 1981, forty percent of offenses tried in the Diplock Courts were unrelated to terrorist activities (Walsh 1983, 16, 59-60). The Baker report admitted and accepted the injustice of having non-terrorist criminals tried in Diplock courts, which were created specially for terrorists (Baker 1984). Another study pointed out that many armed robberies are committed with no political motive, only financial gain, but they are treated as politically motivated by the emergency legislation holding jurisdiction in Northern Ireland (Committee 1995, 59). It is inconsistent to say, as Baker does, it is an 'injustice' for a suspect accused of a non-terrorist related murder (for example) to be tried in a non-jury court, but it is not an 'injustice' for a person suspected of murder related to the political violence in Northern Ireland to be tried in a special non-jury court. As put by one scholar, a trial does not become fair because it is politically expedient (Greer and White 1988).

Although there is great concern among observers related to Diplock Courts, a number of studies have turned up both predicted and unpredicted positive attributes. The positive results will be examined next.

C). Positive Aspects of Diplock Courts

First and foremost, Diplock Courts have ended gross sectarian bias of juries. Even critics of the juryless trial system have noticed suspension of jury trials "appears to have removed a major source of differentiation between Protestant and Catholic defendants" (report written by Tom Hadden, Kevin Boyle and Paddy Hillyard for Fortnight, cited in Fisk 1974, 16). In the first six months, judges acquitted five percent of Protestant defendants, as compared to twelve percent of Catholics. Proportion of Protestants

pleading guilty rose from thirty-one percent to seventy-nine percent, mainly because they could no longer count on friendly juries (Carlton 1981, 235). Over the next six years these rates remained constant (Boyle, Hadden et al. 1975; Boyle, Hadden et al. 1979). Finally, there have, for the most part, been few claims of miscarriage of justice (for an alternate view see Doran and Jackson 1995; Dickson 1999).

The external reviews of the Diplock Court system, while not uniformly positive, tend to support the conclusion that they are doing a reasonably good job under the circumstances. Gardiner concluded, "[t]here has been wide agreement among those who gave evidence before us, and who were best qualified to judge that the new system has worked fairly and well" (1975). Three leading legal scholars and critics of emergency legislation agree (Boyle, Hadden et al. 1979). Although the population of Northern Ireland Protestants express greater confidence in the Diplock Courts than do Catholics by a 75% to 63% margin, the fact that sixty-plus percent of the Catholic community has confidence in the legal system is a positive point (NIOSRB 1999).

D). Summary

Since 1973, more than 10,000 defendants have passed through the Diplock Court system. During this time the annual average has dropped from about 1,000 at the peak of the Troubles (the 1970s) to around 600 (in the 1980s) to about 400 (in the early 1990s) and between 1996 and 1998 it has dropped further, to be below 170 (statistics taken from Jackson and Doran 1995, 19; NIO 1998; Walker 2002, 193). In the first five years, when use of juryless courts was greatest, convictions rose dramatically. Partly due to the Diplock Courts, the security situation improved to the point where the government released the last 1,981 people in administrative detention without trial. According to one

scholar, "while impossible to assess what effect the Diplock Courts have had compared to other factors, such as improved army and police intelligence and training, increased public spending, political initiatives, and simple war weariness, it does seem they have made a significant contribution to the restoration of law and order"[135] (Carlton 1981, 234).

Although by one measure "law and order" have been restored, the rule of law and the cherished civil liberty of trial by jury have not been restored. There is ample reason to return jury trials (and full civil liberties) to serious offenses in Northern Ireland. According to a study by two well-respected law faculty in Northern Ireland, all signs indicate that the jury system for crimes not related to political violence in Northern Ireland is running satisfactorily (Doran and Jackson 1995; Jackson and Doran 1995). If it is believed to be premature for a return of full jury trials, there have been numerous alternatives available for an intermediate arrangement between Diplock Courts and the jury system (Baker 1984; Greer and White 1986; Greer and White 1988; Jackson, Quinn et al. 1999). Most recently, one scholar argued, "[t]here should be some movement towards normality -- it is not acceptable simply to reproduce [referring to Terrorism Act 2000] at this stage in the peace process the 'Diplock courts' of 1973" (Walker 2002, 193).

These ideas were rejected in a recent report from the Northern Ireland Office (NIO 2000). MP Adam Ingram expressed the government's view in Parliament, when he stated, "there is nothing to show that the system [Diplock Courts] has produced perverse judgments or that it has lowered standards" (*Hansard* H.C. 6s 301:173). Originally, the

135 Public spending on social service and programs rose by forty-seven percent in real terms between 1967 and 1977 as compared to fourteen percent for the rest of U.K. Carlton, C. (1981). "Judging Without Consensus: The Diplock Courts in Northern Ireland." Law and Policy Quarterly **3**: 225-42.

rationale for the juryless courts was a state of emergency where the 'ordinary court system' could not function; now the Diplock Courts are treated as the *de facto* 'ordinary court' and justified, in part, because they have not produced any major miscarriages of justice. A violation of a core civil liberty cannot be justified because it has not created a major miscarriage of justice; this is not a train of logic to be tolerated in a free society.

It is a testimony to how normalized emergency anti-terrorism powers have become in the UK that a legal system which denied over 10,000 people the right to trial by jury, permitted untold numbers of confessions to be coerced from suspects, and thrived on highly questionable supergrass testimony is justifiable because it has not produced a Guildford Four, Maguire Seven or Birmingham Six.

VI Conclusion

In examining the overall aspiration of the emergency legislation compared to the results, it is hard not to conclude that the former have been detrimental to the fabric of civil society. The original purpose of the emergency legislation was to deal with a security situation that was out of control. In the words of many government officials, once the security situation was back to normal, emergency legislation would be rescinded. In terms of violence, the situation in Northern Ireland related to violence and death, is below a pre-1969 level.[136] In Northern Ireland, deaths as a result of political violence are lower than the number of deaths resulting from car accidents. What has not

136 In 1969, fourteen people were killed in Northern Ireland as a result of the Troubles. The number was higher than 100 (with a high of 470 in 1972, and for five years, 1972 to 1976, annual deaths related to political violence was more than 200) for much of the 1970s. Since 1994, there has been only one year with a death toll over 22 (that was 1998 with the Omagh bombing by the splinter group Real IRA). From 1994 to 2001, there have been three years, 1995, 1999 and 2001 where deaths have been below ten per year. A similar trend is seen in injuries related to political violence in Northern Ireland (see further "Deaths as a Result of the Security Situation: Statistics from 1969 to June 2001" Royal Ulster Constabulary, www.nio.gov.uk/pdf/secstats/pdf).

improved as dramatically is the political situation. It is hard not to agree with Conor Gearty when he states, “The PTA and the other emergency laws that apply to Northern Ireland have failed in their original purpose and over time become part of the problem rather than the solution” (Gearty and Kimbell 1995).

The experience of the various miscarriages of justice is instructive of the government’s dedication to civil liberties. An examination of the official reports into the Guildford Four tragedy prompted one lawyer to state, “At the end of the day, four people spent 15 years in jail for an offence they didn’t commit, and no one knows after reading that report why that happened” (Maguire and Gallagher 1994, 170). In fairness, the May report does point to misconduct and overzealous behavior on the part of some low level Surrey police officers. But is difficult to accept that the Guildford Four spend almost 15 years in prison simply because of faked notes and pressured interviews. As was demonstrated in Chapter Six, a political and criminal justice system that did not have civil liberties, justice or fairness as a priority was a large part of the reason for this tragedy. The Guildford Four specifically, and the other cases in general, were victims of criminal justice personnel who deliberately ignored or suppressed witnesses’ alibis for the defendants, physically coerced confessions, concealed relevant testimony from other suspects, and later squelched forensic evidence confirming the admission of the Balcombe Street Gang’s culpability in the Guildford bombings (Cockburn 1989).

In the lengthy multi-faceted appeal process, the people were victims of a criminal justice system and government that put the interest of the system ahead of truth and justice. Several representative quotes demonstrating the level of conviction bias related to the Troubles are found in the British criminal justice system:

> "You all stand convicted ... on the clearest and most overwhelming evidence I have ever seen of the crime of murder" Mr. Justice Bridge, trial judge in the Birmingham Six (McFadyean 1990, 13).

After the original trial, the Lord Chief Justice, dismissing a second appeal for the Birmingham Six, stated,

> "the longer the hearing has gone on, the more convinced this court has become that the verdict of the jury [in the 1975 trial] was correct" Lord Lane, January 1988 (cited in theThe Economist 1990, 52-3)

When public doubt arose related to the justice of one of the convictions (i.e., Birmingham Six), a Law Lord and one of the presiding judges at the trial stated,

> "It is better that some innocent men remain in jail than the integrity of the English judicial system be impugned" (Lord Denning, cited in Mansfield 1994, 261).

Years later, the same Law Lord would comment on the Birmingham Six conviction that "apart form those confessions, the police had no sufficient evidence on which to charge, let alone convict the men" (Woffinden 1989, 393).

The day the Guildford Four were released, October 19, 1989, Home Secretary Hurd explained several times that a miscarriage of this type could not happen again because of the safeguards found in the 1984 Police and Criminal Evidence Act (PACE). According to Hurd, having all terrorist cases investigated by the Anti-Terrorist Branch rather than by local police forces, the existence of a more reliable and sophisticated forensic science, and other safeguards, such as stricter controls over police detention, improved rights of access to lawyers, and tape-recording of all statements in police stations, would help prevent future miscarriages of justice (1991). Unfortunately, the Guildford Four, like the Maguire Seven, the Birmingham Six and untold others, were held under PTA. The only provisions of PACE that might have helped, such as access to

lawyers, stricter control over police detention and tape recording interviews, do not apply to terrorist suspects[137] (1988, 5; 1991).

Even the commission that investigated the Guildford Four and Maguire Seven miscarriages of justice became part of the tragedy. Sir John May in his report states:

> "Having regard to the public outrage over these bombings which were followed shortly afterwards by the Birmingham pub bombings, I would not have been surprised if any police force had adopted a hostile approach; the police may have been threatening, they may have even behaved improperly; at this length of time [from the events] I am in no position to make findings on these questions" (Maguire and Gallagher 1994, 169).

It is testimony to the British government's view on civil liberties that John May, official reviewer of the Guildford Four miscarriage of justice, could so conveniently explain it away by stating, "I would not have been surprised if any police force" would have trampled on the civil liberties of the citizens they are sworn to protect (Maguire and Gallagher 1994, 169). Finally, with all the tragedy surrounding the Guildford Four and Maguire Seven cases, it is ironic that many of the key people involved in the trial (the prosecutor, the judge, Chief and Assistant Chief Constable of Surrey, to mention but a few), were all promoted and given awards for their work (Kee 1986, 227-8). It is worth remembering the May Inquiry could find no fault other than several low-level police officers.

It was not only in the media-highlighted miscarriages of justice that the government's consistent disregard for liberties is found. Many of the elements of the emergency legislation and its follow-up revisions, which added considerable legal powers to the police arsenal, are an affront to liberal democracies. Guilt through association and the corresponding loss of freedom of association found in proscription is as unacceptable as it is prevalent in British anti-terrorism philosophy. Executive exclusion, which for

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137 These safeguards have been included in the Terrorism Act 2000

nearly three decades the government claimed was critical to its anti-terrorism campaign, is also an affront to civil liberties. Not only did this vital anti-terrorism tactic violate due process, but it also reversed the cherished legal belief that one is innocent until proven guilty. Additionally, internal banishment removes the right of free travel in a country in which one holds a passport. The British government gave up this *critical* anti-terrorism power with the Terrorism Act 2000, in part because law enforcement and security services believed it was counter-productive.

In addition to the government culpability related to the examined miscarriages of justice and the development of a legal system replete with "case hardening" when dealing with legal issues related to the Troubles, the government can no longer credibly deny the existence of a sanctioned shoot-to-kill policy. Events in Gibraltar and throughout Northern Ireland point to the fact that the British Government utilized proxy hit squads to address issues of political violence with which it could not deal within the legal system.

Finally, as a set of Acts which were written to be and advertised as 'temporary,' they have amazing staying power, remaining on the books for three decades. Although the NI(EP)A and PTA may no longer exist as legislation in the United Kingdom, the powers that came into existence through these Acts continue on, as permanent legislation, in the Terrorism Act 2000. In the words of Roy Jenkins, official sponsor of the PTA 1974, "I do not regret having introduced [the PTA]. But I would have been horrified to have been told at the time that it would still be law nearly [three] decades later" (Jenkins 1991, 375). The claims of the law's temporary nature ring hollow after thirty years, and with most of the powers integrated into new permanent legislation, these "draconian" powers are now normalized.

It seems much of what passed as vital emergency powers in the battle against political violence in Northern Ireland was the result of a government striving to maintain its own credibility. In the words of one noted scholar, "Unable to stop the bombing in the streets, Britain was searching for security in the symbolism and enforcement of harsh laws" (Miller 1990, 308). Even when the government made mistakes and violated people's civil liberties, it struggled mightily to cover up these transgressions, even going so far as to limit the media's ability to uncover the truth. In the words of MP Hattersley, these emergency powers are "tolerable in a free society only if they are absolutely necessary, unquestionably effective and properly operated" (*Hansard* H.C. 5s, 1:340). While the status of "absolute necessity" is debatable, this chapter has demonstrated a strong case that the powers have not really been "unquestionably effective" and certainly not "properly operated." It is to the theoretical implications of these findings that this project turns next.

Chapter Eight

Conclusions: Problems of Liberty and Order the British Experience

> The question cannot be whether the authorities ought to impose restriction upon freedom of the individual, but only how far they ought to go in this respect (von Mises 1927 (1985), 52).
>
> "Northern Ireland … is in a life and death struggle for its existence. The rights of the individual must be balanced with the rights of the community" Rev. Ian Paisley (*Hansard* H.C. 5s, 855:344).
>
> "There are few provisions in the Prevention of Terrorism Act which do not have unwelcome effects upon civil liberties" (Jellicoe 1983, par. 225).
>
> "The only liberty I mean, is a Liberty connected with order;
> that not only exists along with order and virtue, but which
> cannot exist at all without them" Edmund Burke, 1774.

I Introduction

The previous chapters have laid out a research project examining the role and effects of British anti-terrorism policy related to Northern Ireland on the liberal democratic nature of the United Kingdom. This chapter summarizes the findings, makes some tentative conclusions and comments on the place of these findings/conclusions related to the wider context of tension between democracies and anti-terrorism strategies. The chapter begins by briefly reiterating the basic tenets of a liberal democratic regime and comparing this baseline to the British experience with emergency anti-terrorism legislation. It examines the patterns that have emerged in British anti-terrorism policies with an emphasis on comparing these trends to the predictions of the civil liberties community and the aims of the legislation's supporters.

II Liberal Democratic Principles and the British Experience

In chapter one, the works of several democratic theorists were used to produce a set of rights all liberal democratic states must protect. In short, those who advocated the Anglo/Saxon tradition of rights, based upon a Lockean social contract, argue citizens voluntarily limit their perfect freedom in order to leave the state of nature and enjoy essential liberties (Locke 1980). According to Peter Chalk, a primary purpose of the liberal state is to ensure the exercise of one's individual autonomy will not create a situation where the liberty of others is adversely affected (Chalk 1995, 13). In this framework, it is permissible for the liberal state to restrict individual freedom to protect the liberties of all, but there must be clear limits imposed on state authority and its power over the individual. In the words of one scholar of liberty, who emphasizes the importance of securing individual liberty from the power of the state, societal rules must ensure the State's "power be kept within [suitable] bounds" (Hayek 1960, 401). In terms of internal security, as Paul Wilkinson points out, "no liberal democrat is willing to pay the price of human freedom simply … to achieve total political obedience or submission" (Wilkinson 1986, 122). The values that are considered the foundation of a liberal democratic state traditionally include the following: liberty and security of person; freedom of speech, press and assembly; right to a trial by a jury of your peers; freedom from arbitrary arrest and detention; due process of the law and the right to life (Pennock 1950, 13-20; Minogue 1979, 3-16; Raphael 1992, 103-13).

Civil liberties are the core of any formulation of a liberal state, but should not, as put by one American judge, be seen as a "suicide pact" (cited in Walker 2000, 2). It is permissible and justifiable for liberal democracies to defend their existence and values "even if this defence involves some limitation of rights" (Walker 2002, 12). This is true

even in the most severe crises, where, according to Paul Wilkinson, liberal democracies must seek to remain true to themselves, preserving constitutional authority, the rule of law, civil liberties, and at the same time maintaining societal order. This proviso must be tempered with the caveat that the response of the liberal state must never include methods incompatible with liberal values of humanity, liberty and justice. Accordingly, as put by one scholar, it is a dangerous illusion to believe a state can 'protect' liberal democracy by gutting civil liberties, human rights and constitutional protections (Wilkinson 2000, 115).

Unfortunately, as this project has demonstrated, this has been the result of three-plus decades of conflict related to Northern Ireland. It has been the recurring theme in the official government arguments in support of extraordinary emergency powers that the inherent dangers related to political violence in connection to Northern Ireland pose such a unique and severe threat to Great Britain it required the "curtailment of liberties for a few to protect the liberties of the many" (Whitty, Murphy et al. 2001, 104). As a result of this belief in the exceptional nature of the Troubles, Britain has, in the words of one scholar, seen the "end of the age of Liberal innocence" (Porter 1978, 192).

This chapter will summarize the finding of this research, drawing upon the historical record of the Troubles to demonstrate thirty-plus years of temporary emergency legislation have led to the substantial erosion of civil liberties, the normalization of the extraordinary powers of temporary legislation, and continued expansion of the legislation's scope and power. The substantial political violence of the early 1970s was used as justification for a set of emergency legislation that only had jurisdiction related to Northern Ireland. This project has found these 'illiberal' emergency powers, justified in part because they were only to be used in relation to terrorism connected to the Troubles,

are now greatly expanded, used to fight terrorism with no connection to Northern Ireland, and have become part of the normal criminal justice system. The lessons learned in the case of Britain's three-decade struggle to balance freedom and order will be used to make some tentative comments on the future of civil liberties in a post-September 11th world of terrorism. These findings will be supported in the following section.

III Erosion of Core Civil Liberties

Throughout the history of the Troubles there has been a continuous pattern of altering the manner in which core civil liberties are protected. The pattern is sometimes subtle and other times substantial, but the trend is unmistakably in the direction of less respect and protection of historically guaranteed civil liberties. In the words of one member of Parliament, due to the Troubles in Northern Ireland, "We are left with the eternal dilemma of any liberal democracy. At what point does it say that in the interests of the whole of society it may be necessary to exclude people from the country or to intern them without trial and without the evidence being produced?" (*Hansard* H.C. 5s, 892:1126). This project concludes that each of the core civil liberties have been steadily eroded vis-à-vis emergency legislation.

A). Due Process and Freedom from Arbitrary Arrest

Two areas consistently attacked through the continued use of emergency legislation are freedom from arbitrary arrest/detention and the right of due process under the law. As has been demonstrated in earlier chapters, from the beginning of the modern Troubles the government (via Stormont or Westminster after the start of Direct Rule) has implemented one policy after another to administratively punish and detain, without a

trial, individuals suspected of engaging in political violence related to Northern Ireland. Beginning with Operation Demitrius on August 9, 1971, the government reintroduced internment. Internment, which remained a legal option through the SPA, had been used in prior political crises related to Northern Ireland.

As defined by Lord Diplock, internment is the "imprisonment at the arbitrary diktat of the Executive Government" (Diplock 1972, par. 28). Because of the strong and violent reaction to internment, which led to a large spike in violence, Westminster looked for a different policy to deal with the situation.[138] The response was the Detention of Terrorists (Northern Ireland) Order 1972 (DTO 1972). The DTO, while moving away from internment under the hated SPA, can be seen as the same means wrapped in a different package. Detention was described by Lord Diplock as being the "[d]eprivation of liberty as a result of an extra-judicial process" (Diplock 1972, par. 28). The name was different, but the result (loss of liberty without trial) and reaction (more violence) were the same.

The British Government, in order to deal with the escalating problems in Northern Ireland that was by then spreading to the British mainland, introduced the NI(EP)A 1973 and PTA 1974. Both of these legislative initiatives contained elements that denied individuals their due process. Both contained exclusion powers, which allowed the executive office to administratively ban individuals from parts of their home country. According to one noted counter-terrorism expert, exclusion was "drastic," because these people held UK passports and banishing someone from a part of the territory of which he

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138 According to then NIOSS Merlyn Rees, "the key is internment. Whoever one talks to in the minority group in Ulster, one can be in no doubt that since internment the political situation has changed radically. Internment has hardened attitudes" (*Hansard* H.C. 5s 626:1661; re-quoted in *Hansard* H.C. 5s 902:762).

is a citizen is not something which could or should be proposed in normal circumstances (Jenkins 1991, 372-3). It was not until the late 1990s that an appeal system was developed for people whose lives were drastically altered by executive fiat. Even with an appeal process, the power of exclusion represented a substantial loss of civil rights for British citizens.

Exclusion was not the only aspect of the emergency legislation that denied people the right of due process. The arrest and detention powers found in the NI(EP)A and PTA worked in much the same manner as internment and the DTO, albeit for a shorter duration. Under various provisions of special anti-terrorism legislation, the police could arrest and detain a person for up to seven days. As one scholar pointed out, the ability to arrest and detain at will, combined with a history of internment and the fact nearly eighty percent of all arrested and detained (under the NI(EP)A and PTA) are released without charge, has created a "suspect community." These individuals and groups who live in Britain but have family, business, or social contacts with Ireland or Northern Ireland are constantly under the threat of being arrested and detained (Hillyard 1993). With only twenty percent of those arrested charged, and most of those charged under normal law, the impression that these arrests are for some other purpose is created. Intelligence gathering is the purpose (Walsh 1983, 126; Cunningham 1991, 102). A large number of innocent people are arrested annually, on no grounds other than their residence, ethnicity and hence their presumed knowledge of terrorist organizations and activities, in order for the government to gather low level intelligence (Fisk 1974, 16; Walker 1997, electronic copy). The fact that arrest and detention powers are used primarily for intelligence gathering was confirmed, albeit unintentionally, by former Home Secretary Leon Brittan,

when arguing the low rate of prosecution did not indicate minimal usefulness of arrest powers.

> "The object of the exercise in not just to secure conviction but to secure information" (interview on This Week, RTE Radio, June 1985, quoted in Whitty, Murphy et al. 2001, 136).

The number of people arrested under the PTA alone exceeded 27,000 and fewer than fifteen percent were charged with any crime (*Hansard* H.C. 6s, 273:1162). Additionally, there is ample evidence many people are 'screened' multiple times with some examples of people being 'screened' more than a dozen times in a two-year period (Harvey 1981, 12). The 'screening' process not only plays havoc with the personal and professional lives of those unnecessarily arrested, but denies individuals their civil liberties. Additionally, the knowledge of selected 'screening' undermines the public trust and confidence in government and creates social divisions, which only makes the situation more difficult for security services (Crelinsten 1998, 412). Finally, arrest powers found in this special emergency legislation created an atmosphere in which many British citizens could never be certain they would not be arrested and detained for the "suspicion" they *may* possess information that *might potentially* be of value in the security service's national anti-terrorism database.

The potential for abuse when the state possesses the arrest powers found in British emergency legislation is apparent in the cases of miscarriages of justice examined in Chapter Six. Not only were the lives of the Guildford Four, Maguire Seven and Birmingham Six forever altered, but these arrest powers can and were used to intimidate witnesses. Frank Johnson, witness for Carole Richarson, who was arrested and re-arrested under the PTA is a good example of abuse of power. During his detainment, he alleges he was told "nobody knows where you are" and he ought to take a holiday and not show up

at the Guildford trial (thus denying Richardson an alibi)[139] (Kee 1986, 183, 325). It is not only arrest powers that provide the means to intimidate and coerce witnesses; exclusion has been used by security services to influence and blackmail potential informers (Committee 1995, 75). Additionally, one scholar has documented the abuse of arrest and detention powers for other reasons, such as personal vendettas and harassment of selected individuals (Walsh 1983, 126). Finally, as was demonstrated in Chapter Seven, exclusion has been used to deal with individuals the government, for various reasons, has chosen not to deal with in a court of law.

The goal of getting suspected terrorists off the streets at any cost has been an important element of British anti-terrorism policy and is seen in both the Diplock Courts and the use of Supergrasses. Throughout the Diplock period, rules of evidence were altered to make convictions easier. Relaxing rules related to the acceptability of confessions has increased the number of convictions, but also increased the number of successful appeals (in itself a form of detention). It allowed defendants to be found guilty solely on confessions. Often the suspects would retract their "initial confession," stating it had been coerced. The British security forces had a name for this type of questioning of terrorist subjects -- "deep interrogation" or "the five techniques." These techniques were used in many of Great Britain's colonial struggles and imported for use in the Troubles (Kitson 1971; Hamill 1986). By creating a judicial system that permitted, and even at times facilitated, the use of physical and psychological pressure, the British government

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139 The manner in which this power is used leads to people disappearing for up to a week at a time. One example of this is Hugh Maguire (the first Maguire mentioned by Gerry Conlon during his interrogation). Both Hugh and his wife disappeared for several days before they resurfaced. It was Hugh Maguire that Guiseppe Conlon was trying to get a hold of when he traveled from Northern Ireland to London to assist his son (Guiseppe planned on staying at Hugh's home). Guiseppe only went to Anne and Paddy Maguire's home because no one (except the police) knew the location of Hugh and his wife.

was tacitly approving the use of violence to extract confessions in order to secure convictions. This is clearly seen in the Guildford Four and Birmingham Six cases (Gudjonsson 1992). Wider use of physical and psychological coercion to extract confessions is reported in Peter Taylor's (1980) important book and by numerous civil rights organizations (e.g., Amnesty International, NCCL, Committee on the Administration of Justice). Additionally, the European Court of Human Rights has acknowledged mistreatment.

Likewise, the Supergrass experiment, which emanated out of the Diplock Court system's use of uncorroborated confessions, relied upon often-uncorroborated accomplice evidence. The long wait for trial (often two years) and exceedingly high conviction rates (almost sixty percent) created what one-scholar terms "*de facto* internment" (Walker 2002, 191). The Supergrass system was abandoned after a couple years and almost all of the guilty verdicts based upon uncorroborated accomplice evidence were overturned on appeal. Although justice has been reached in most of these cases, the fact remains that many victims of the Supergrass system spent years in prison as a result of this illiberal process.

It is not that the British Government did not have ample advice on the implications of emergency legislation. In 1981, then NIOSS William Whitelaw stated, "[the PTA] infringe[s] upon our shared concept of civil liberties, but that is the price which the House has always accepted" (*Hansard* H.C. 6s, 1:341). As was discussed in an earlier chapter, numerous cases before the European Court of Human Rights found British anti-terrorism legislation violated international law. Additionally, several official reviewers commented on the damaging effects of elements of the NI(EP)A and PTA on

the British Government's civil rights reputation in international community (Colville 1987; Rowe 1995; Rowe 1995). These diverse elements in tandem led one observer to note Great Britain's use of modified court proceedings eroded the principle that justice and fairness must be the primary goal in order to be an effective part of a liberal democracy's criminal justice system (Charters 1994, 222). In addition to facilitating the partial demise of due process, the Diplock court system took away the right of trial by a jury of one's peers for individuals charged under the emergency legislation.

B). Trial by Jury

The importance of jury trials has a long history in British legal tradition. It was one of the important checks on the power of the monarchy (Frohnen 1998). Over the years, the jury has stood between the might of the state and the vulnerability of the individual. Sir William Blackstone stated,

> "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English Law ... The liberties of England cannot but subsist so long as this palladium of liberty remains sacred and inviolate, not only from all open attacks (which not will be so hardy as to make), but also from all secret machination, which may sap and undermine it by introducing new and arbitrary methods of trial" (from Commentaries, Book iv, p. 350 quoted in Greer and White 1988, 50).

The eminent legal commentator Lord Devlin echoed the importance of trial by jury, albeit more parsimoniously, when he stated it is the "lamp that shows freedom lives" (Devlin 1956, 164). For many in Northern Ireland, that lamp no longer exists.

In the first decade alone, more than 10,000 people were denied trial by jury because they were charged with scheduled crimes under the NI(EP)A (Greer and White 1988, 50). Since then thousands more have been arrested and convicted in juryless courts. In commenting on the effect of Diplock courts on the legal environment of Northern Ireland, Lord Devlin stated, "[j]ury exclusion as a remedy seems to have the same appeal

as bleeding the patient had to the medicos of the 17th Century" (Greer and White 1986). The number of complaints against the system and the results it produced led to many Parliamentary debates and proposals. Many of the proposed changes were "symbolic." For example, one proposal involved increasing the number of judges from one to three in the Diplock courts. Lord Diplock was less than enthusiastic about the reform because it would slow down the legal process (*Hansard* H.C. 5s, 855:302-3). An official reviewer expressed disinterest in the proposal because it would lead to staffing difficulties (Rowe 1995). The theme of the criticism is that of being less efficient and more of a burden on judicial resources, not whether the process is just or in line with liberties expected in a liberal democracy. The right of due process and freedom from arbitrary arrest and detention are not the only liberties being eroded in Great Britain as a result of emergency legislation.

C). Assaults on Freedom of Speech, Press and Assembly

Roy Jenkins commented in his autobiography about preparations for introducing the PTA in 1974. He stated,

> "We had carefully prepared contingency plans, made up of one measure for show and three of real practical importance. The first related to making the IRA an illegal organization in Great Britain" (Jenkins 1991, 372).

Proscription, making membership or affiliation with a banned organization illegal, was the measure made for "show." It was enacted for political symbolism and, many argued, was counter-productive (see Wilkinson 1986, 170; Jenkins 1991, 372; Wilkinson 2000, 113). According to one noted scholar, proscription has been of marginal effectiveness. Not only has the IRA survived for most of the century, but there were only two convictions in Britain between 1974 and 1994 (Walker 2000, 15). Paramilitary groups

cannot be abolished by legislative fiat and legislation as political theater is rarely good for the long-term health of a liberal democracy.

Freedom of assembly is not the only liberty eroded by executive proscription. The wording of the proscription power of the PTA states any person who in a public place "wears any item of dress, or wears, carries or displays any article, in such a way … as to arouse reasonable apprehension he is a member or supporter of a proscribed organisation" is liable for arrest and imprisonment (s.2 (1) (a) (b)). Proscription not only bans symbolic speech, but also political expression that is vital to the maintenance of a liberal democracy (Walker 1992). Incidentally, the European Court of Human Rights in Strasbourg has argued in several opinions that freedom of association is closely linked to freedom of expression (Fenwick 2000, 63).

It was discussed earlier that the Terrorism Act 2000 dropped the power of exclusion because the British Government found the executive power to be "fundamentally objectionable" (Home 1998, par. 5.6) because it interfered with freedom of movement. However, according to Walker, the government failed to acknowledge that, in a similar manner, proscription fundamentally interferes with freedom of expression, an equally important right (2000, 15).

Proscription is not the only area in which freedom of expression and press are curbed. The 1988 Broadcasting Ban issued by then Home Secretary Douglas Hurd made it illegal to broadcast individuals belonging to or speaking in support of proscribed organizations (Brock 1992; Banwell 1995). The ban was intended to cut off what then Prime Minister Margaret Thatcher called the "oxygen" of terrorists -- publicity (Wilkinson 1988). What the government directive did, in combination with the other

aspects of the PTA, was lead to "capping the lens" of the media (Miller 1991). These attempts at administratively and legislatively hamstringing the media—in essence censorship, can also be seen in the great lengths the British government went in order to prevent the media from investigating and reporting on Operation Flavius (the SAS killings of IRA operatives in Gibraltar in 1988), the Stalker Affair and more than thirty killings in Northern Ireland tied to Brian Nelson and his handlers, the Force Research Unit (Windlesham and Rampton 1989; Murphy 1991; Neillands 1998, 243).

D). Right to Life

In incidents spanning the entire history of the Troubles, from January 30, 1972 (Bloody Sunday, where fourteen civil rights marchers were fired upon and killed by British Paratroopers) to the SAS "dirty war" in the 1980s, more than 300 civilians have been killed by the British military and security personnel[140] (Neillands 1998; Ware 1998; Ware and Seed 1998). According to one scholar, what is now referred to as the 'shoot-to-kill' policy of the civilian and military security forces began about the same time the Supergrass system began its fateful run (Hillyard 1987, 301). It started with the RUC establishing a special deep surveillance unit trained by the army's elite SAS. The emphasis, according to one senior RUC officer, was on "firepower, speed and aggression" (Asmal 1983, 41). The blending of civil police duties with military training and tactics has led to the violation of numerous British citizens' right to life. According to one scholar, when military and police functions blur there is a danger to democracy:

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140 A majority of these killings (294) have been ascribed to the army Whitty, N., T. Murphy, et al. (2001). Civil Liberties Law: The Human Rights Act Era. London, Butterworths. By one account 155 of the dead had no known connection to paramilitary organizations or activities Asmal, K. (1983). Shoot to Kill: International Lawyers' Inquiry into the Lethal Use of Firearms by Security Forces in Northern Ireland. Dublin, Mercier Press.

> "sidestepping the rule of law in the name of security (the primacy of security over freedom, and effectiveness over democratic acceptability); the commission of gross human rights violation such as torture or extra-judicial killings (the primacy of necessity over proportionality); the emergence of a cult of clandestinely (primacy of government secrecy and cover-ups over openness and disclosure); and a lack of accountability (primacy of authority over legitimacy -- we know what's best; just trust us)" (Crelinsten 1998, 412).

All of these are seen in British response to terrorism related to Northern Ireland.

If the accidental and, as recent evidence indicates, sanctioned killings by the British government were not serious enough, constant British cover-ups and obfuscation made the government seem even more recalcitrant and guilty. As demonstrated in an earlier chapter, John Stalker's investigation was practically defined by official stonewalling and malfeasance that eventually forced Stalker off the investigation by creating false charges against him. As part of the smear campaign to discredit Stalker and get him taken off the case, his friend John Taylor was falsely accused of being involved with organized crime. Taylor was later awarded £1.4 million for the malicious prosecution (Whitty, Murphy et al. 2001, 145). A second much narrower investigation by John Stevens and his team, took fourteen years and produced a 3,000 page report documenting British military and Loyalist paramilitary "collusion," the willful withholding of evidence, and government agents' "involve[ment] in murder" (Hoge 2003, electronic version). As noted criminal justice scholar Anthony Jennings pointed out, the vagueness and imprecision of laws related to military personnel's use of violence has led to "the security forces being granted a virtually unlimited licence to kill" (Jennings 1988, 112).

It is unfortunately true some members of the British government supported the officially sanctioned killings, believing it prevented more deaths. As MP Sammy Wilson stated,

> "It is easy for Mr Stevens from his law and order ivory tower to pontificate about the rights or wrongs of employing such tactics: it is another matter for brave men who were fighting a dirty terrorist war to have to make balanced judgments *which definitely avoided much more bloodshed* (emphasis added Taylor 2003, electronic version).

This view, with the ample evidence that knowledge of Brian Nelson's targets were discussed at the highest levels of the British government, leads to the conclusion that in certain areas in the war on terrorism related to Northern Ireland, Westminster has not respected the right to life. This is even more chilling when it is remembered that many of the killings connected to Brian Nelson and FRU were misidentified, leading to the death of innocent people with no connection to terrorism. As put in a recent book on the role of the SAS in Northern Ireland, on nearly every occasion, prior to the killings and murder attempts, intelligence was passed from the FRU officer to the Joint Irish Section headquarters in Northern Ireland and then distributed to the Joint Intelligence Committee. On no occasion were instructions received by the FRU in Belfast telling them to halt the sectarian killings. The Prime Minister, MI5 officers, senior security officers and all members of the JIC were aware a man named Brian Nelson, the chief intelligence officer for the UDA, was involved in these murders. Additionally, it was known the FRU was 'handling' Nelson at the time. Yet nothing was done to stop the killings. In the name of security in Northern Ireland, the British Government allowed the FRU to direct killings of Catholics, including both members of the PIRA and innocent victims who had no involvement at all (Davies 1999, 22).

One can argue whether the ebb and flow of the Troubles constitutes a crisis for the survival of Great Britain and therefore debate the necessity of using 'all means available,' but governments cannot be above the law, especially those claiming the moral mantel of liberal democracy. To deny that is to take the same line of argument as the

IRA: "we cannot use the law to get our way, so we will get our way in spite of it" (*Economist* 1988). There is ample evidence that in relation to political violence in Northern Ireland, that is exactly the justification made by the British government.[141]

E). Summary

It is true, Rule of Law cannot exist in any country where fundamental liberties of the citizens are not protected in the courts of justice. Unfortunately, evidence points convincingly towards a conclusion that respect for liberty is increasingly being eroded through reliance upon special emergency anti-terrorism legislation (Babington 1995, xvi). According to some scholars, liberal restraint, imposed on the government in the form of constitutional safeguards, form an integral part of any liberal democratic polity. The rights of the accused must be protected; the powers of judicial and police officials must be limited by such imperatives as reasonable suspicion, 'minimum force', and due process; and redress must be available for those wrongly accused or imprisoned. It is the existence of such safeguards that legitimize and generate public acceptance of the state's use of coercive violence in the exercise of criminal justice (Crelinsten and Ozket 1996, 8). This study supports the findings of other research that concludes the erosion of democracy and liberty does not take place solely within the gambit of special legislation or administrative measures. Violations occurring outside the realm of law and administrative power (e.g., judicial system, security service, etc.) are often more serious (Charters 1994, 222). A quote from a recent book on the Guildford Four tragedy brings this point to light:

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141 The European Court of Human Rights has found certain anti-terrorist practices to be in violation of the fundamental human right of right to life, see *McCann, Farrell and Savage v. UK* (1995) and *Jordan v UK* (2001).

> "For years the police, the Court of Appeal and the Home Office could not continence the thought that the wrong people were languishing in prison ... The checks and balances of justice failed the Guildford Four ... because of the system, from the outset and for the years to follow, worked to confirm rather than question the original assumption that the Four were guilty" (The Independent July 1, 1994 quoted in Victory 2002, 297).

In much the same fashion,

> "as special police units are called on to fight terrorism, police begin to move away from the doctrine of minimal force and adopt special weapons and tactics that mirror the military doctrine of maximal force. In doing so, they take on an aura of hit squads that follow shoot-to-kill policies, rather than police officers intent on apprehending a suspect for criminal prosecution" (Crelinsten 1998, 411).

Great Britain has taken the route of treating the political conflict in Northern Ireland as an undeclared war and, in doing so, trampled far too many individuals' right to life.

Finally, the erosion of civil liberties as a result of anti-terrorism legislation demonstrates the British Government is increasingly dismantling these liberal safeguards in the name of societal order. The British government increasingly seems to believe, as put by Grant Wardlaw, "depriving citizens of their individual rights and suspending the democratic process is necessary to maintain 'order.'" Therefore, the government is putting itself "on the same [mistaken] moral plane as the terrorists who believe the ends justify the means" (Wardlaw 1989, 69).

IV Normalization: The Extraordinary becomes the Ordinary

The original emergency legislation was enacted during substantial political violence related to Northern Ireland. Then Home Secretary Roy Jenkins stated when introducing the PTA, that it was "unprecedented in peacetime," but "fully justified to meet the clear and present danger" (*Hansard* H.C. 5s, 882:35). Although the death toll related to the Troubles had been 470 in 1972 and 252 in 1973, a vast majority of the

deaths were isolated in Northern Ireland.[142] In 1974, the IRA began a concerted campaign of violence on the mainland. In the first ten months of 1974 there were ninety-nine bombings, killing nineteen people and injuring 145 others. According to one scholar, at the intervals they were taking place, the deaths and injuries may have been tolerable (Miller 1990, 307). But the November 21st Birmingham bombings, which killed twenty-one and injured 180, made the level of violence intolerable. In this atmosphere, with a 'clear and present danger,' the PTA was passed. Through the three decades of the Troubles, one of the recurring arguments for restricting civil liberties was that the danger inherent in terrorism associated with Northern Ireland posed such a particular threat to British liberal democracy it required the "curtailment of liberties for a few to protect the liberties of the many" (Whitty, Murphy et al. 2001, 104). The emergency legislation made a clear distinction between terrorism related to Northern Ireland and other forms of domestic and international terrorism.

The argument in this section is, similar to one made by Laura Donahue, that British emergency measures shared a common initial perception; they represented extraordinary moves designed to meet the needs of a passing emergency. Over time, however, they became standard and unexceptional, a baseline from which further extraordinary powers could be introduced (2000, 40). Reviewers of the emergency legislation, specifically the PTA, recommended the "Temporary Provisions" element of the full title of the Act be removed because, in the words of Jellicoe, it "[rang]

142 It should be noted that since 1978 only two years (1979, 1981) have seen deaths as a result of the security situation in Northern Ireland reach more than 100 and since 1995 several years have not climbed into double digits (Northern Ireland Office - www.nio.gov.uk/pdf/secstates.pdf).

increasingly hollow"[143] (Jellicoe 1983, par. 18). The government chose not to adopt this suggestion to diminish fears of the legislation becoming increasingly long-lived (Donohue 2001, 249). It is ironic that after only ten years of "special" powers the government was worried removing the "temporary" tag would give the wrong idea that the illiberal legislation would be around permanently. The "temporary" PTA lasted almost thirty years and although the actual legislation was repealed in 2001 the powers, which made it so controversial live on in the "ordinary" Terrorism Act 2000 (Walker 2000, 2).

A related part of the normalization process has been the inclusion of emergency power into ordinary law. One of the stated objectives found in the Jellicoe report was that the PTA be brought in line with normal political powers, practices and procedures. Or in Jellicoe's words, "the terms and operation of emergency legislation should be as close as possible to those of the general law" (Jellicoe 1983, 11). This was a truly laudable task, which could be accomplished in one of two ways: 1) making special emergency powers less exceptional and bringing them closer to ordinary law, or 2) altering normal law in a manner which moved it closer to the powers found in emergency legislation. Jellicoe's suggestion of utilizing the first method and bringing the PTA in line with a bill being discussed in Parliament, which would become the Police and Criminal Evidence Act 1984, was not to be. Unfortunately, for civil liberties in Great Britain, the second method was utilized.

M.P. Jim Marshall vocalized this worry during Parliamentary debate on PACE 1984:

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143 It should be noted that the Prevention of Violence (Temporary Provisions) Act of 1939 lasted for 15 years before it was rescinded.

> "Quite apart from the anxiety about the way in which the Act is applied, there is the added danger that long-term acceptance of its provisions will corrupt our democratic system. I believe that there is evidence that this has begun to happen. The power to detain suspects for seven days, which produced a shock on both side of the house in 1974, now hardly causes an eyelid to flutter. Under the Police and Criminal Evidence Bill, which is passing through the House, the police will have power to detain suspects--I admit with safeguards--for 96 hours. That is a trade off between the acceptability of the seven days in the Prevention of Terrorism Act and increasing the length of detention in the Bill now passing through the House.
>
> One of the most alarming aspects of the Jellicoe report is its frequent reference to the Police Act 1976 (*sic*) as through that is the standard of normality to which the Prevention of Terrorism Act should aspire. This is an example of an insidious circular process in which draconian laws soften us up for similar laws which become the desired standard for further measures" (*Hansard* H.C. 5s, 38:633).

As stated in an article on the normalization of the PTA, "the widely increased police powers within the Police and Criminal Evidence Bill suggest the emergency nature of the [PTA] will to an even greater extent be subsumed within everyday police practice." As a result, "what was abnormal in 1982 becomes normal in 1983; likewise emergency measures become standard and unexceptional" (Sim and Thomas 1983, 75). Or, put another way, what was classified as extraordinary powers had been subsumed by ordinary police powers, thus normalizing the extraordinary by pushing back the threshold of what constitutes repression. As put by one scholar, "a system which was widely regarded as a temporary measure to deal with the particular problems of political violence is now becoming the normal process for all offences" (Hillyard 1983, 51). Powers previously described as "extraordinary," "draconian," "special" and "temporary" were now a normal part of the ordinary criminal justice system.

One final example, internment under the SPA, DTO and then NI(EP)A, was the 'poster child' of draconian emergency legislation. Removing it from the government legal tool kit was always a top priority of those interested in civil liberties reform. It was very controversial, even though it had not been used since 1975 (Spjut 1975; Lowry 1976; Spjut 1986). In the 1990s, in several official reports, Colville (1990, par. 11.10)

and Lloyd (1996, par. 16.8) recommended the abolition of internment/detention and, as mentioned previously, it is not found in the Terrorism Act 2000. Unfortunately, internment/detention has been able to find its way into the 'ordinary' criminal justice system through the Anti-terrorism, Crime and Security Act 2001, which revived one form of detention without trial for specified foreign terrorist suspects and certain asylum seekers (Walker 2002, xi). The evidence seems to point to a belief that as long as a police power is a component of ordinary legislation and not part of legislation with the tags of 'emergency' or 'temporary,' it is acceptable and normal.

Another aspect of temporary emergency legislation which was originally confined to only political violence related to Northern Ireland and has now found its way into the ordinary criminal justice system nearly thirty years later is the admissibility of confessions. The original NI(EP)A eased restrictions on the admissibility of confessions, allowing them, providing they have not been obtained by "torture, inhuman or degrading treatment or by violence or the threat of violence." When first introduced in 1973, this provision departed significantly from the standard of using only voluntary statements, which is found in 'ordinary' criminal law, but, according to Walsh, the language in PACE 1984 (i.e., ordinary law) is much closer to the NI(EP)A language (1983, 129). The current Terrorism Act 2000, in relation to the admissibility of confessions (see section 108), uses the original NI(EP)A language (Whitty, Murphy et al. 2001, 132). Again, the draconian has become the standard, or, as David Bonner put it, "the degree of assimilation with ordinary laws is apparent only because [normal laws] have moved further in the direction of the emergency regime" (2000, 49).

As will be dealt with in more detail in the next section, the normalization process also included the scope of emergency legislation. Originally conceived to address only political violence associated with Northern Ireland, the scope of the legislation was expanded, on the suggestion of Lord Jellicoe, to also cover international terrorism (1983, pars. 77, 144). The PTA 1984 integrated this suggestion. In 1996 Lord Lloyd was asked to report on the future need for counter-terrorism legislation in the context of a possible lasting peace in Northern Ireland. The report concluded that even if peace was achieved there would remain a need for dedicated power to fight increasing international terrorism and possible domestic terrorism in the future (Lloyd and Kerr 1996, par. 1.24). Support for Lloyd's assertion on the expanding nature of terrorism facing future British governments was found in Appendix F of the Lloyd report, prepared by Professor Paul Wilkinson, who drew attention to the increasing nature of non-Irish domestic terrorism (Wilkinson 1996, 34). Lloyd's main recommendation, that the 'temporary' emergency legislation of the PTA and NI(EP)A be replaced with permanent anti-terrorism legislation, was seen by many as a move away from *ad hoc* nature and a sign of the normalization of the extraordinary. According to one scholar, the move toward normalization was the unfortunate vindication of concerns voiced by critics since the mid 1970s (Cunningham 1991, 104). The concern was that what the government claimed was temporary would eventually become permanent. The passing of the Terrorism Act 2000 seems to support this concern.

As a result of the Jellicoe report, the PTA, which was introduced to focus exclusively on violence associated with Northern Ireland, was redirected toward foreign terrorists (1983). The trend of emergency powers has been that anti-terrorism legislation

first conceived to deal with the Troubles is increasingly directed at terrorism with no relation to Northern Ireland. Continuing this trend, and as a result of suggestions found in the joint Home Office and Northern Ireland Office Consultation Paper (Home 1998, par. 3.10), the jurisdiction of the Terrorism Act 2000 was increased dramatically. The Terrorism Act 2000 legislative scope includes Scottish and Welsh nationalist terrorism (seen as a diminishing threat), animal rights violence and environmental terrorism (for more on the growth of the latter two forms of terrorism see Wilkinson 1996; Monaghan 1999; Taylor and Horgan 1999). Most of the 'exceptional powers' that were only to be used in fighting terrorism associated with the Troubles are now standard for all types of political violence.

Lloyd's review had other effects on the normalization of special anti-terrorism legislation beyond its main recommendation of creating permanent legislation to replace the temporary emergency legislation. One suggestion was annual reviews were no longer needed. According to one scholar, this indicated the continued process of 'normalisation' of the so-called emergency legislation and consolidating it into ordinary law (Cunningham 1991, 105). Lloyd's argument emanates from the assumption that emergency legislation is such a normal part of the legal landscape and people are so accustomed to it that the routine annual reviews are a waste of time. Additionally, by eliminating the most egregious aspects of emergency powers (e.g., exclusion, internment and its temporary nature), subtly less egregious elements (i.e., arrest and detentions, proscription, etc.) could be continued and made permanent. In a modified manner that is what has happened with the Terrorism Act 2000. Just because legislation is 'normalized'

by omitting the words “emergency provisions” or “temporary provisions” does not mean it is supportive of civil liberties.

A). Summary

Although it goes beyond the scope of this project, the normalization of draconian emergency law in attempting to deal with political violence related to Northern Ireland encompasses the whole of the 20th Century, according to Donahue. Britain’s use of emergency law in the early 1970s had undergone some alterations, but the basic measures remained the same since the Defence of the Realm Act 1914 - 1915 and the SPA 1922 and 1943 (Donohue 2001, 341). Since the 1970s, the specific provisions have continued to evolve in response to internal demands, internal reviews and international attention. As this study indicates, the pattern has been one of steady blending of ‘special temporary measures’ with ordinary law. The inevitable result has been provisions originally viewed as draconian began to look normal and acceptable compared with their successors (Fenwick 2000, 65). Additionally, these temporary measures, which, according to the government, would have never been implemented but for the ‘clear and present danger’ of political violence related to Northern Ireland, have for nearly three decades been reenacted, revamped, and enhanced, drawing justification not from the diminishing violence of the Trouble, but from international terrorism and other forms of domestic terrorism, including animal rights activism. What was once extraordinary legislation meant to deal with a significant level of political violence, described by Paul Wilkinson as “the most severe terrorist campaign experienced in Western Europe in modern times” (quoted in O'Connor 1988, 528), can now used to deal with over zealous members of PETA.

One of the watershed events in the normalization process was the report produced by Jellicoe, a former SAS officer and ex-head of the secret National Security Commission. His report resulted in making the 'temporary,' 'draconian' and 'extraordinary powers' available under the Act more permanent, increasingly ordinary, and more central to the administration and practice of normal criminal justice in Britain (Sim and Thomas 1983, 72). This process supports the argument made by Laura Donahue, who states there is very little either new or temporary about emergency measures enacted to combat Northern Irish violence (Donohue 2001, 353). This continued repackaging of draconian proscriptions into new packages has led people to see what were once exceptional powers and practices as being normal (Whitty, Murphy et al. 2001, 105). Some have argued part of the reason for this repackaging is to keep the powers available to the government. As put by MP Garry Fitt, during the 1981 renewal debate for the PTA, "Once the power had been gained, those wielding them were unwilling to see them diminished." He continued on to say, "It is my impression that once a government have these powers in their control they are very reluctant to give them up" (*Hansard* H.C. 5s, 1:382). Over time the repackaging leads to a process of normalization and assimilation into the ordinary criminal justice system. The degree of assimilation with ordinary laws is not only due to the longevity of the special powers, but because the 'normal' laws have themselves moved in the direction of the extraordinary measures (see Walsh 1982, 37, 53-7; Bonner 1989, 473). Or, as one scholar put it recently, "because [ordinary laws] have moved further in the direction of the emergency regime" (Bonner 2000, 49). In short, as Ewing and Gearty argue, and has been demonstrated in this study, the NI(EP)A and PTA were adopted as emergency anti-

terrorism measures, but their provisions have been increasingly applied as ordinary criminal law through such legislation as PACE (Ewing and Gearty 1990, 213). Finally, drawing back to the MP Fitt's quotes above, the continuation of special powers also helps the police and security services, who have a vested interest in maintaining their budgets and personnel (IaSC 1996; Walker 1997, electronic version). The same evolutionary process of normalization culminated in the Terrorism Act 2000.

V Expansion of Emergency Powers

One of the first aspects of expansion related to emergency legislation is simple size (i.e., length and complexity of the NI(EP)A and PTA). The core legislative aspects of the original incarnation of the NI(EP)A 1973 were less than thirty half-pages long, and contained thirty-one sections and five schedules.[144] After several reenactments and revisions, the 1987 version of the NI(EP)A was twenty-four full pages (equivalent of forty-eight half-pages), twenty-seven sections and two schedules long. According to then SSNIO Peter Brooke, the NI(EP)A 1991 was more than three times longer than its predecessor (i.e., the 1987 version) (*Hansard* H.C. 6s, 193:514). A similar trend is seen with the PTA. The PTA 1976 was approximately sixteen half-pages long, and contained sixteen sections and three schedules. By the 1989 version, the PTA had grown to nearly seventy-two full pages (equivalent of 144 half-pages), with twenty-eight sections and nine schedules. The overall growth of the legislation is astounding. For the NI(EP)A its growth in pages exceeded fifty percent in little more than a decade and for the PTA an

144 Early versions of the legislation were published as pamphlets, which were basically sheets of 8 1/2 by 11 inch paper folded in half. Therefore, each 'page' is 8 1/2 by 5 1/2. Referring to them as half pages is descriptively accurate and distinguishes them from later versions that are printed on regular 8 1/2 by 11 inch sheets of paper.

incredible 900 percent growth in page length. By the time the Terrorism Act 2000 passed Parliament, it had grown to 145 pages (approximately 290 half-pages), contained more than 130 sections and sixteen schedules (to see a copy of the entire Act see Walker 2002, 291-436).

Taking into consideration that the NI(EP)A and PTA have substantial overlap in powers (e.g., arrest, detention, proscription, etc.), combining the two should have led to some consolidation and, thus, a modicum of brevity. Although length is one important example of the overall expansion of emergency legislation, size is not everything. A law containing 200 pages that does not intervene in a person's day-to-day life or erode a person's civil liberties is not a problem, but a one-page law may substantially and negatively affect civil liberties. Additionally, there may be good reasons for some growth in the size/length of special anti-terrorism legislation. For example, the rise in the use of computers (cyber-terrorism) and the increased importance of finances in fighting terrorism (tracing and confiscating terrorist assets, preventing money laundering, etc.) all necessitate expanding certain elements of anti-terrorism legislation, but as the scope and powers of the government expand there is always the possibility it will lead to a concomitant loss of individual liberty.

Many of the "draconian" elements originally in the legislation remained a part of the emergency powers for nearly thirty years. Although, as noted earlier, some were removed with passage of the Terrorism Act 2000, most still remain. Therefore, the move to 'ordinary legislation' with the Terrorism Act 2000, in the words of Walker, "cannot be said to be a clean break with the past, since most of its contents are easily traceable to the legislation which it is to replace" (Walker 2000, 2). Additionally, as put by Donahue,

from 1972 to 2000, the "amendments to the 1973 EPA and 1974 PTA largely centered on cosmetic alteration to the existing statutes, leaving the vast majority of provisions included in the 1973 and 1974 Acts still there in 2000" (Donohue 2001, 312). Although there were several new powers introduced to the emergency legislation, very few were relinquished. Of the powers relinquished (e.g., internment and exclusion), there have been legislative attempts to reintroduce them under other guises. First a Home Office/NIO report supporting the abolishment of internment stated, "[abolishing legislation allowing internment] does not rule out for all time the reintroduction of the power to intern" (Home 1998, par. 14.2). Additionally, the recent Anti-terrorism, Crime and Security Act 2001 allows a detention/internment without trial for asylum seekers who may have connections to international terrorism (Walker 2002, 31). Finally, in a post-September 11 world, the Home Secretary's words have demonstrated a more receptive attitude towards other forms of internment related to terrorism (*Hansard* H.C. 6s, 372:930). The move from 'emergency legislations' to 'ordinary law' has continued the process of expansion in both the scope and range of anti-terrorism legislation.

This increasing expansion of the powers available to the government and the use of these powers in areas beyond the issues they were originally enacted to address is troublesome. One example is the Diplock Courts of Northern Ireland. Originally the centerpiece of the NI(EP)A 1973 and intended only for scheduled offenses (serious crimes related to terrorism associated with Northern Ireland), their use has been expanded. As demonstrated in Chapter Seven, for various reasons, non-scheduled cases have been heard in juryless courts (Walsh 1983, 16, 59-60; Committee 1995). Official government reviews have acknowledged the problem (Baker 1984). In addition to

expanding the range of cases heard in Northern Ireland's Diplock Courts, there have been attempts to bring juryless courts to the criminal justice system of mainland Britain. The head of the National Crime Squad stated the need to do away with jury trials for certain types of trials in Britain, by saying "We are talking essentially about Diplock-style courts. It works in Northern Ireland. I don't say everyone will like it there, but is it because they can't influence a jury?" (Steele 1998). Although this reform has not yet been implemented, it convincingly demonstrates how normalization of extraordinary powers (nearly thirty years of juryless courts) can be used to justify their expansion into other areas.

The same logic and continued attempts to expand the use of the powers of extraordinary legislation is also seen with proscription. As early as 1985, Catherine Scorer et al. were documenting attempts to broaden the range of groups that could be proscribed. In the 1980 renewal debate for the PTA, MP Martin Flannery stated the mood well: "there is a spirit of witch hunt and retribution calling for the proscription of groups that have nothing proven against them under the Act" (Scorer, Spencer et al. 1985, 17). Colville too, in the area of expanding the PTA's powers to cover international terrorism, spoke of the number of suggestions made to him that proscription should be extended to cover international terrorist organisations" (Colville 1987, par. 13.1.9). To Colville's credit, and the British Government's, proscription through the NI(EP)A and PTA was never expanded past terrorism connected to Northern Ireland. This example demonstrates there was pressure to expand the scope of emergency powers throughout the three decades of the Troubles. The introduction of the Terrorism Act 2000 changed this reality; it expanded executive proscription to international terrorist groups who not only had no

connection to Northern Ireland, but had no connection to Great Britain.[145] Home Secretary Jack Straw stated the new legislation would "strengthen … important powers against terrorism." but what the legislation does is greatly expand powers that were only justifiable because of an unique security environment in Northern Ireland to all facets of terrorism (Hyland 2001).

Another area of expansion seen in the emergency legislation relates to the range of terrorism falling under the legislation's jurisdiction. As mentioned earlier, the original emergency legislation only had jurisdiction to terrorism connected to Northern Ireland. Over time this slowly changed. The Jellicoe Report recommended arrest and detention powers be extended to cover international terrorism (1983, pars. 77, 144). The 1984 version of the PTA incorporated Jellicoe's recommendation and extended the scope of arrest and detention powers to international terrorism, but exempted domestic terrorism (Donohue 2001, 249). As one scholar has pointed out, it seemed odd this exceptional police power should be necessary and valuable for international terrorism and terrorism related to Northern Ireland, but not to other forms of domestic terrorism or just terrorism in general (Bonner 1983, 226). Lord Lloyd of Berwick, in his report on the future need of anti-terrorism legislation in Great Britain, concluded that even if the IRA disappeared, statutory anti-terrorism legislation similar to the PTA would still be needed (Lloyd and Kerr 1996). That legislation is the Terrorism Act 2000.

The continued expansion of emergency legislations, with an evolving rationale for its renewal, is stated clearly by a member of Parliament who stated, that it is vital for

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145 "Britain List Terrorist Act Groups" CNN.Com Posted February 28, 2001.

Great Britain to "continue to have on the state book legislation which will enable a democratic society to respond to the ever-present threat of international terrorism, regardless of the situation in Northern Ireland" (cited in Donohue 2001, 321). During the renewal debates in 1996, Michael Howard, then Home Secretary, agreed 'there is always likely to be terrorism of an international kind ... the manifestation[s] of it are increasing; and … the need for the [PTA] in order to counter them therefore remains" (*Hansard* H.C. 6s, 273:1129). The use of the PTA bears out these statements. Between 1984 and 1996, more than twenty-one percent of those detained and subsequently charged under the Act were involved with international terrorism. In 1995 the number rose to fifty percent of all those detained and charged under the PTA (Donohue 2001, 321).

The original PTA was enacted to deal exclusively with terrorism related to the 'unique and temporary emergency in Northern Ireland,' in the 1980s the scope of the PTA was expanded to include international terrorism (but not non-Irish domestic terrorism) and by 1996 international terrorism was the main, if not sole, justification for continuing with this greatly expanded "draconian" legislation. By the time the PTA and the NI(EP)A (which was also originally created only to deal with terrorism related to Northern Ireland) were combined into the Terrorism Act 2000, all forms of terrorism in Great Britain fell under its purview. Part of this expansion in scope is a result of a wider definition of terrorism (Whitty, Murphy et al. 2001, 127). By creating a more inclusive definition of terrorism and giving the Terrorism Act 2000 a broader definition, not only was more power given to the government, but in the words of one scholar, it "indicated the further relegation of the protection of civil liberties" to second tier status (Cunningham 2001, 136).

An ironic element of the entire expansion process has been that it has taken place in an environment of decreasing political violence in the United Kingdom. As Livingstone and Whitty have demonstrated, both Northern Ireland-related and other terrorist incidents have been steadily declining in the UK since the early 1980s (Livingstone and Whitty 1996). In fact, when the Lockerbie bombing is omitted from statistics, only 36 deaths can be attributed to 'international terrorism' since 1985. Moreover, as Gearty and Kimbell point out, many of the successes the police and security agencies have had in dealing with foreign terrorist groups could have occurred without using emergency anti-terrorism powers (Gearty and Kimbell 1995, 24-5). Certainly, no British law, government power or legislation (extraordinary or normal) would have prevented the tragedy of Pan Am 109. But as Dickson stated, in describing much of the British anti-terrorism regime, it is simply "symbolic law making" (Dickson 1992). In a related sense, Donahue argued, it is the fear of losing life and property, not the actual loss, which provides the drive for the British Government to expand these laws (Donahue 2000).

Finally, as alluded to above, the Terrorism Act 2000 significantly changed the official definition of terrorism. Many people argued for years that the definition used in the NI(EP)A and PTA was politically charged and had a deteriorating effect on the situation in Northern Ireland. The alterations in the definitions, while pleasing some for being less political, concern others because the new definition greatly expand the range and scope of the new legislation's reach. Continuing the trend suggested in the Jellicoe review (1983, 144) and integrated into the PTA 1984, the Terrorism Act 2000 has jurisdiction over a much wider range of terrorism, including international and non-Irish

domestic terrorism (Walker 2002, 30). As will be discussed later, many saw this expanded definition of what had previously been 'emergency' and 'extraordinary' legislative power normalized and made part of the regular criminal justice code. In short, wide-ranging powers which had been extraordinary are now even more expansive and normal.

A). Summary

In many ways the Terrorism Act 2000 avoids the "incremental extension" that occurred over the previous decades (Fenwick 2000, 65). The size, scope and range of powers found in the Terrorism Act 2000 is far beyond what government officials in 1973 could have dreamed of implementing. Ironically, the Terrorism Act 2000 is more extensive than in the worst years of Irish terrorist violence (Fenwick 2000, 69). The statistics speak for themselves; from 1972 to 1977 nearly 1,300 people were killed as a result of the Troubles. From 1996 to 2001, fewer than 120 people were killed.[146] It must be noted, the latter number includes the Omagh bombing in 1998 by the splinter group the Real IRA (Walker 1999). If those deaths are taken out of the equation, then deaths between 1996 and 2001 are less than 100. Incidentally, the total would be less than one-half the total of any one-year from 1972 to 1977. In short, it is a totally different security environment, but the powers have grown dramatically.

VI Future Direction of Liberal Democracy and Terrorism

With the trend of increased attention to international terrorism in the wake of September 11th, and the existence of a substantial and potential growing domestic terrorism threat, Western democracies have overhauled their anti-terrorism legislation.

146 Statistics from www.nio.gov.uk/pdf/pdf/secstats.pdf

Britain's Labour party moved the main elements of anti-terrorism legislation from the realm of extraordinary and temporary emergency legislation to 'ordinary permanent' law through the Terrorism Act 2000. Canada introduced new legislation to address terrorism in a post-September 11th world just over a month after that fateful day (Daniels, Macklem et al. 2001). The same is seen in the target of the September 11 attack. The United States not only enacted what is known as the Patriot Act, but it also created an entire new federal agency to coordinate Homeland Security. As was the case in the United Kingdom, and more recently in Canada, the new Department of Homeland Security is not without significant critics, who worry about loss of civil liberties in the name of security (Lynch 2002).

The Terrorism Act 2000 represents one of the most significant extensions of 'emergency legislation' over the last thirty years. Its introduction in the absence of any 'clear and present' danger may be seen as an example of the failure of British democracy to protect civil liberties. The legislation is remarkable in its abandonment of all the features which sought to make the original legislation appear tolerable: its limited application, its temporary nature, annual review and scrutiny of the continuing threat. Paradoxically, as pointed out by one scholar, it affords the legislation all the hallmarks of ordinary criminal law while continuing to justify its draconian nature on the basis of the special need to combat terrorism (Fenwick 2000, 110-1). Walker points out the British government's move towards permanent legislation, as seen in the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001, may have a negative effect on civil liberties, because neither piece of legislation provides for the kind of structure to ensure the future democratic accountability. Additionally, the requirements for annual review or

periodic renewal are absent (Walker 2000, 2; see further Walker 2002). The concern that permanent legislation with no periodic review is dangerous to civil liberties is a trend observed in other countries implementing post-September 11 anti-terrorism laws (Editorial 2001).

British attempts to criminalize the problem of terrorism associated with the Troubles, which is a trend seen in the liberal democracies, leads to a paradox of political tension. Dorrian points out a contradiction in British anti-terrorism strategy; on one hand the terrorist violence is cited as justification for a wide-ranging set of emergency/special powers. Terrorist violence is itself defined specifically by reference to political motivation. On the other hand, the state uses its emergency/special power as though it were dealing with instances of common crime (Dorrian 1992). As Ewing and Gearty point out, "The IRA are terrorist (i.e., political) when it come to arguing for new laws; criminal when it comes to applying them (Ewing and Gearty 1990, 252). A similar trend is seen in the United States with the case of accused September 11th coconspirator Zacarias Moussaoui. The Justice Department has touted its ability to use the rule of law to deal with terrorists and get convictions, but in the Moussaoui case a recent court ruling is causing the U.S. Government to consider removing the case from the civilian jurisdiction and send it to a special military tribunal.

The contradiction between rhetoric of civil liberties, rule of law and current government reality must be addressed in the future as liberal states continue to preserve their way of life in a world replete with terrorism. Indeed, as Moxon-Browne has pointed out, if criminalization means greater reliance on the due process of law, then due process itself must become more apparent (Moxon-Browne 1983, 151). Similarly, in the words of

Boyle, Hadden and Hillyard, speaking specifically of the British experience, "[i]f the practice of the state authorities does not live up to the commitments which they proclaim, their reliance on the force of law will achieve nothing" (Boyle, Hadden et al. 1980, 151).

Part of the pressure democratic states seem increasingly incapable of withstanding is public opinion. Although the public is completely justified in expecting a modicum of societal order, during crises they are quite often prepared to accept encroachments upon their freedoms that they would otherwise find unacceptable. Internment of Japanese-Americans during World War II is one historical example. Coming back to the British Case we see that the PTA was a reaction to the 1974 Birmingham pub bombings. The Criminal Justice (Terrorism and Conspiracy) Act of 1998 was a response to the outrage of Omagh (Walker 2002, 3). The Terrorism Act 2000 was completed after nearly four years of careful work and study, but that did not stop the British government from enacting the Anti-terrorism, Crime and Security Act 2001 several months after September 11th (Walker 2002, 4). Additionally, as was mentioned earlier, the Canadian government introduced new legislation a week after September 11th. The last two cases are especially revealing; two liberal democracies which were not attacked, implemented new legislation containing substantial upgrades in powers for security forces to address terrorism. In the British case, the new powers were on top of legislation that was nearly four years in the making and contained substantial new and expanded powers in and of itself.

If the past and present provides us, in the words of Patrick Henry, a "lamp of experience" in which to peer into the future, then liberal democracies will not heed the advice of Paul Wilkinson, that "even in its most severe crises, the liberal democracy must seek to remain true to itself ... in upholding constitutional authority and preserving law

and order" (2000, 115). Events such as these will provide a great deal of support to the theory of Robert Higgs, who argues growth in government and the concomitant loss of civil liberties are a result of power grabs brought on by crisis, especially crises involving security threats (Higgs 1987).

These findings raise interesting questions and potential areas for further exploration. A comparative study of the development of emergency legislation in Great Britain and the United States would be instructive to look for similarities and trends in how liberal democracies deal with the tension between freedom and order. Specifically, one could examine a hypothesis that powers granted to the security services in a time of crisis (i.e., Birmingham, Omagh, and September 11th) were powers that were requested previously, but denied during 'normal' times. A more challenging, but similar line of inquiry would be to examine the relationship between American and British anti-terrorism legislation. An examination of how much of American anti-terrorism legislation has been modeled on British emergency legislation and if there is a trend of justifying arguably illiberal American anti-terrorism policy by stating it has been used in Great Britain would be interesting. Finally, an examination of claims that Arab-Americans are becoming a "suspect community" in the eyes of American law enforcement in much the same way that Paddy Hillyard has argued the Irish Catholics have become in Great Britain would also support assertions of the dangers of anti-terrorism legislation for civil liberties (Hillyard 1993). Equally interesting would be a study examining why this phenomenon has not taken place in America.

VII Conclusion

If a democracy readily abandons its democratic ideals, including adherence to the rule of law, in the face of political violence, it lays itself open to the charge its attachment to them was always precarious and qualified. Conversely, as put famously by an American judge, "democracy is not a suicide pact" (Terminiello v. Chicago 1949, cited in Walker 2000, 2). Therefore, a liberal democracy has a right and duty to defend its values and political intuitions, because, as put by Home Secretary Jack Straw in 1999, "by its nature terrorism is designed to strike at the heart of our democratic values" (*Guardian* November 14, 1999). In defending these 'values' to protect and maintain social order, some have argued the need to temporarily abridge civil liberties. Prime Minister Margaret Thatcher made this point forcefully in 1988, when she famously said, "We do sometime have to sacrifice a little of the freedom we cherish in order to defend ourselves from those whose aim it is to destroy that freedom altogether" (quoted in Fenwick 2000, 60). The challenge of this study was to examine the British experience with emergency legislation spanning more than thirty years and see if there was a loss of liberty and if the gains in creating effective counter-terrorism legislation were worth the cost in civil liberties.

Throughout this research project a pattern has been demonstrated of the security services and the Government regularly requesting greater statutory authority and arguing more police "powers" are needed to effectively fight terrorism (e.g., *Hansard* H.C. 6s, 193:514). The threat is so great and the enemy so dangerous that the government continually renews highly controversial special emergency legislation, which later evolves into permanent legislation, all while official statistics demonstrate terrorism violence is decreasing. With continued, albeit fitful, progress in the peace process, it is

not uncommon to have fewer than ten terrorism deaths (related to the Troubles) in an entire year. This is hardly a situation warranting the range and scope of powers inherited to the Terrorism Act 2000 from the NI(EP)A and PTA. It may be argued that the success of generations of special anti-terrorism legislation is the cause for the drop in deaths related to the security situation in Northern Ireland. While certainly hard work and quality law enforcement, combined with the panoply of powers in the hands of security personnel, has played a vital role, it must be remembered that data from the Home Office shows between 1974 and 1990 fewer than three percent of more than 7,000 people arrested and detained under the PTA were charged and not all of them were found guilty (Reinares 1998, 363). Finally, most scholars place a lion's share of the responsibility for decreased violence related to Northern Ireland on the slow but steady results of the peace process and a much-improved political environment.

The former head of the civil rights group Liberty (formally NCCL), John Wadham, was quoted in a newspaper article stating, "Draconian anti-terrorism law ... have a far greater impact on human rights than they ever will on crime" (Guardian November 14, 1999 quoted in Fenwick 2000, 60). Professor Wadham is correct in his assertion and this research project has borne this out. The draconian special legislation moved the British legal system away from the rule of law, and without a full commitment to the rule of law, the difference between the terrorist's and the state's vision of power begins to diminish. The powers created in the name of fighting terrorism connected to Northern Ireland has warped the legal environment, led to a variety of miscarriages of justice and, in the words of noted scholar Conor Gearty, has "fundamentally transformed the relationship between the individual and the state" (Gearty 1994, 153). All of this

occurs while having so little affect on the overall security environment that the government claims it must keep and expand the present powers.

As the previous chapters have argued, the overall result of the British response to terrorism related to Northern Ireland has been a steady erosion of civil liberties, miscarriages of justice and government sanctioned killings combined with a concerted official effort to cover up the incidents. The information that does come forth (especially from official sources) has been due to the pressure applied by the press corps investigating the incidents. In each of these cases, it was investigative reporting that demonstrated the government had been less than forthright with its citizens about events. In the same vein, as has been pointed out by Abraham Miller's research on the "Guildford Four," if it were not for a free media keeping these stories in the minds of the people, tragic injustices in the name of social order might well have never been uncovered and rectified (Miller 1990). Looking beyond the Guildford Four to the other cases of miscarriage of justice we see a similar pattern. These mistakes were only retroactively rectified (at an extremely late date) thanks to the determination of the suspects' friends and family members, the efforts of a few eminent jurists and politicians with national clout working with a determined part of the liberal press (Reinares 1998, 364). It was not the glorious English constitution, the criminal justice system or even the appeals process that saved these victims of British justice: it was a free media keeping the story of these miscarriages of justice in front of the people, so public pressure could work as it should in a liberal democracy[147] (Mansfield 1994, 262). It has been the civil liberties

147 One only has to remember the infamous words of Lord Denning. Lord Denning, then Master of the Rolls and one of the most powerful judges in the country, blocked the Birmingham Six's civil actions with the words, "If the six men win it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence

of freedom of speech and press the British government has attempted for years to curtail in the name of national security (Zellick 1990). One scholar, who has examined these issues in comparative perspective, concluded one lesson to be drawn from the British experience is censorship tends to be self-defeating as well as unjustified (Reinares 1998, 357).

No government likes the frequent revelations made by a free and active press, but in the words of Alexis de Tocqueville, "in order to enjoy the inestimable benefits the liberty of the press ensures, it is necessary to submit to the inevitable evils that it creates" (quoted in Stoler 1986). No liberal state will get everything correct, it will even make mistakes, grievous mistakes, but a liberal democracy must come forth with its errors and not attempt to hide its mistakes through suppression of the media as the British tried to do on numerous occasions (Zellick 1990).

Noted scholar David Charters, in the conclusion of his well received book on terrorism, democracy and civil liberties, states bluntly, that "[s]ummary execution, torture, falsification of evidence and cover-ups are the weapons of state terror, the very antithesis of democracy and human rights" (Charters 1994, 223). This project has accumulated evidence related to the British government, under the auspices of temporary emergency powers, being involved in each of these acts. The government's culpability is not only at lower levels of responsibility, as was argued in the May Report on the

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and that the convictions were erroneous ... This is such an *appalling vista* that every sensible person in the land would say in cannot be right that the actions should go any further." Several years later, in 1988, Lord Denning, amidst a growing clamor for release of the Birmingham Six, stated "It is better that some innocent men remain in jail than the integrity of the English judicial system be impugned" Mansfield, M. (1994). Presumed Guilty: The British Legal System Exposed. London, Mandarin.

Guildford Four miscarriage of justice, but at all levels of the British government (Victory 2002, 297). As was mentioned in Chapter Six, all the main players for the government involved in the three major miscarriages were promoted and eventually reached the highest pinnacles of power within Britain[148] (Kee 1986, 228). Not one person involved in the Guildford Four tragedy was publicly rebuked or officially censored for these tragic occurrences (Victory 2002, 303). The miscarriages of justice revealed a series of machinations carried out by police officers investigating the crimes, ranging from concealing evidence to falsifying testimony and obtaining confessions by the use of intimidation, trickery and violence (Greer 1995). In events related to the "shoot-to-kill" policy, other than international condemnation at the hands of the European Court of Human Rights and international public opinion, no ranking member of the British security service or government has paid a price for the officially sanctioned murders of nearly thirty people (Davies 1999).

One of the key features of any liberal democracy is the rule of law and as one observer pointed out, the stability of the rule of law in Britain has been repeatedly placed in jeopardy, and "[u]nless we can find an effective way of mastering [violent criminal behavior], the belief that we are living under Thee Rule of Law may soon become exposed as a fanciful myth" (Babington 1995). Many of the measures discussed in the preceding chapters clearly indicate a willingness on the part of government officials to abandon the rule of law and civil liberties in the face of terrorism despite uncertainty as to the need to adopt them.

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148 This supports an important point made by David Charter, who states excesses are as likely to arise within the ambit of executive and administrative agencies as from the special legislative powers Charters, D. A. (1994). Conclusions: Security and Liberty in Balance--Countering Terrorism in the Democratic Context. The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Counties. D. A. Charter. Westport, Connecticut, Greenwood Press.

It should be clear that in most regards Great Britain is not less democratic. The part of the equation that makes up political democracy dealing with free, fair and frequent elections is healthy. What is slowly being eroded in the name of the will-o-wisp of security is the concomitant elements of civil liberties, rule of law and respect for personal freedom. It is not, as argued by Fareed Zakaria, that countries like Great Britain are becoming less democratic; what is happening is they becoming less liberal (Zakaria 1997). The lesson for all liberal democracies confronted by political violence is to keep their focus on the real prize -- preservation of the liberal democratic ideals that make these countries worth fighting for.

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