

ARTICLES

Managing Terrorism

Fionnuala Ní Aoláin* & Colm Campbell**

Legal analysis of the now much maligned “war on terror” has been a growth industry in the United States, the United Kingdom, and elsewhere since the events of September 11, 2001.¹ A substantial literature spanning multiple legal systems has emerged to address its scope, nomenclature and consequences. How best to respond to and regulate terrorism remains a contested debate intellectually and practically. Modeling of various forms pervades the field. For example, some scholars and policy makers employ a “business as usual” counter-terrorism model critiquing reliance on exceptional procedures when dealing with violence and insurgency.² This model assumes the sufficiency of the ordinary law to cope with challenges posed by violent actors and other security threats. But most models assume that exceptional legal powers will be adopted to address terrorism, and explicitly or implicitly depict this adoption in terms of some form of norm-exception continuum. Sustained debates pervade both legal scholarship and practice on the acceptance of exceptional (anti-terrorism) norms as lawful and legitimate counterpoised with trenchant views on exceptional norms as characterized or defined by lawlessness.³ Such debates, scholarship and analysis are regularly based on supposition rather than empirical knowledge or testing.

* Fionnuala Ní Aoláin is University Regents Professor & Robina Chair in Law, Public Policy and Society at the University of Minnesota Law School, and Professor of Law at the Transitional Justice Institute, Ulster University, Northern Ireland. We note our thanks to Ita Connolly for her research work on the empirical aspects of this project. We thank Ami Hutchinson, Jesse Goldfarb and Amanda McAlister for research assistance. Comments by Professors Clive Walker and Louise Mallinder were helpful in the revisions of this article. All remaining faults lie with the authors. © 2018, Fionnuala Ní Aoláin* & Colm Campbell.

** Professor Colm Campbell is an Emeritus Professor at the Transitional Justice Institute, Ulster University.

1. *See, e.g.*, DAVID COLE, *SECURING LIBERTY: DEBATING ISSUES OF TERRORISM AND DEMOCRATIC VALUES IN THE POST-9/11 UNITED STATES* (2011); CIAN C. MURPHY, *EU COUNTER-TERRORISM LAW: PRE-EMPTION AND THE RULE OF LAW* (2012); ERIC A. POSNER & ADRIENNE VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); KENT ROACH, *SEPTEMBER 11: CONSEQUENCES FOR CANADA* (2003); GLENN SULMASY, *THE NATIONAL SECURITY COURT: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* (2009); Gabor Rona, *A Bull in the China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L. L.J. 135 (2008); Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, CRIM. L. REV. 311 (2004); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006).

2. OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 86–109 (2006).

3. GIORGIO AGAMBEN, *STATE OF EXCEPTION 3* (Kevin Attell trans., University of Chicago Press 2005) (2003); GROSS & AOLÁIN, *supra* note 2, at 110–70; Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825 (2000).

Security argumentation significantly based on supposition raises important questions as to whether the underpinning assertions in the national security sphere are normatively justifiable. Recognition of such lacunae tends to highlight other gaps—specifically that claims about the *effectiveness* of particular exceptional powers also tend to rely upon normative assertions that they “ought to work,” unsupported by verifiable data. Data gaps abound in national security debates, and in legal contestation about whether anti-terrorism regulation is effective or necessary. This article dives into that empirical gap by providing unique data on the operation of detention, arrest, and trial regimes created to counter and manage terrorism in the United Kingdom. While the data is specific to the regulation of terrorism in the United Kingdom, we claim that our analysis is useful and applicable to the regulation of terrorism by other democratic states, including the United States. We have chosen to focus on democratic states because we do not assume the replicability of these findings to non-democratic states, where the pull to legality is not present in the same way, nor the pressure points both external and internal comparable.

Emergencies and national security needs present unique challenges to data-gathering by empirical legal researchers; to state the obvious, few countries permit outsiders’ presence during waterboarding. But, if data on interrogation practices and on exceptional courts’ operation can be obtained, they offer a route to evaluating claims about the nature and form of the norm-exception relationship.⁴ Moreover, such data offer a means to appraise critical assumptions that pervade national security discourses concerning the efficiency, necessity, and rationale for certain forms of macro- and micro-regulation. Courts and custodial settings are particularly important sites in which the state and non-state actors engage in what Charles Tilly called the “repertoire of contention.”⁵ The contestation spans legitimacy, lawfulness, lawlessness, efficiency and human rights-based compliance in court and interrogation practices. In the “state of justice” (*rechtsstaat*),⁶ the ideal frequently invoked by democratic states while countering terrorism,⁶ this contention is certain to involve legal claims-making by multiple actors in myriad ways.⁷ We examine both the political and the legal dynamic of contention in this article.

4. See John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004). For recent applications of these relationships, see INT’L FED’N FOR HUMAN RIGHTS (FIDH), *France: International Fact-Finding Mission Report, Counter-Terrorism Measures and Human Rights, When the Exception Becomes the Norm* (June 2016), https://www.fidh.org/IMG/pdf/report_counter_terrorism_measures_human_rights.pdf.

5. CHARLES TILLY, REGIMES AND REPERTOIRES 30–59 (2006).

6. The notion of “*rechtsstaat*” derives from a doctrine in continental European legal thinking which originated in German jurisprudence. The closest translation into English is “a state based on the rule of law.” See NEVIL JOHNSON, STATE AND GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY: THE EXECUTIVE AT WORK 13 (2d ed. 1983).

7. See Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MOD. L. REV. 935 (2006).

If trial in the special/exceptional/terrorist court amounts to a contest with the state, it is also likely to be a site of interaction and perhaps contestation between the open state (typified by the law-based conventional court), and the secret state (typified by intelligence gathering, interrogation, rendition, and related practices). The secret state is likely to be involved in the process that led to the defendant's arrest (through electronic or personal surveillance, or recruiting and operating informers); in the interrogation of the suspect (whether by conducting interrogations or by briefing interrogators); and in the trial process when there is an attempt to rely upon or to discredit evidence obtained from intelligence sources. While the nature of the secret state makes it a virtually impossible subject of direct legal research, its operation may nevertheless leave legal traces (for instance, the arrest of a terrorism suspect at home at 4 a.m., has a high probability of being intelligence-reliant). Assembling and triangulating such traces may allow one to construct the elements of the secret state's operation.⁸ As such, we can explore the relationship between the law and violent (and other) challengers, assess the claims of the state for particular kinds of legal powers for specific kinds of security challenges, and explore the extent to which law is present, absent, or muted in the national security arena. Our article offers some preliminary roadmaps on how the intersection of empirical legal analysis with contextual framing reveals the complex interplay between the open and secret state, giving a unique insight into the operation of counter-terrorism practices illustrated through detention and trial processes.

Part I of this article addresses the challenges and specificity of obtaining reliable data on terrorism, and outlines the features and practice of the United Kingdom's anti-terrorist apparatus, specifically the arrest, detention, and trial regimes used to manage terrorism from the late 1970s to the present day. Here we explore the overlap between terrorism management systems in the United Kingdom with parallel structures in other democracies, addressing the core tension between a law-enforcement model and a counter-insurgency model during arrest, interrogation, and trial. Drawing directly on our dataset of terrorist trials, Part II of the article takes a close look at who is being arrested and processed for trial. We are particularly interested in the profile of defendants charged with terrorist offenses, and we offer a number of counter-intuitive insights which speak directly to issues of profiling and mobilization for politically-motivated violence. Part III closely examines arrest patterns, paying careful attention to which actors are undertaking arrest, and how these actors change over time, thereby tracking the move from militarization to crime-enforcement strategies in the management of terrorist challengers. Part IV takes us to the interrogation room, where we use our data to glean fresh insights into the tensions that surface between legality and counter-terrorism management in the encounter between the detainee and the interrogator. Legality is engaged by the formalities of arrest and the potential to be charged with a specified crime; counter-terrorism management is invariably

8. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 84–86 (2010).

present from the opportunities to gather intelligence (as opposed to trial useful) information, to convince a detainee to cooperate and collude with the state as an informer, and because of the ever-present danger of ill-treatment to elicit information about impending terrorist attacks which a detainee is unwilling or unable to give that information freely. Here we illustrate the increased juridification of the interrogation encounter over time, a phenomenon we characterize as the inevitable consequence of managing terrorism through law in a democracy. Access to lawyers is the focus of Part V, where our data points to a strained relationship between access to counsel and the goals of the interrogation process. Uniquely, we track the concentration of confessional evidence by detainees and project the legal significance of early access to lawyers, as well as the paucity of empirical evidence for late confessions, undermining state arguments for extended detention. Part VI explores the dynamics of confession under interrogation for terrorist detainees, giving rich detail on the tensions that invariably surface between legality demands and counter-insurgency imperatives. Our conclusion brings together the themes of terrorism management, juridification, and the exposed tensions between legality and counter-terrorism that manifest through the data presented. Above all else, the data affords a rare insight into the sealed world of terrorism-related interrogation and arrest in democracies, undoing presumptions and allowing some sacred cows to be demystified.

I. EMPIRICAL RESEARCH IN THE CONTEXT OF TERRORISM

This article examines some of these issues using original empirical data focusing on pre-trial stages in Northern Ireland's "Diplock" court process. Diplock courts were non-jury exceptional courts established to try scheduled (or terrorist offenses) in 1972 as the conflict in Northern Ireland escalated and the courts became a centerpiece of state conflict management strategies. The data addressed here cover the time period 2000–2001 of the United Kingdom's military, political, and legal engagement with paramilitary actors and groups, following the signing and implementation of the Good Friday Agreement, also called the Belfast Agreement, in 1998.⁹ We concentrated on this time period because prior empirical work by Boyle, Hadden, Hillyard, and Walsh has illuminated significant patterns in the operation of non-jury courts from the early 1980's onwards,¹⁰ and we sought to explore post-peace process data on the practice of detention, interrogation, and trial in Northern Ireland. Thus, this work, using the same broad data analysis and coding form builds on and extends previous empirical research on exceptional courts in Northern Ireland. From the mid-1970s onwards, Diplock courts (so called because their creation followed a recommendation by Lord

9. Agreement Reached in the Multi-Party Negotiations, UK–Ir., Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Good Friday Agreement]. Such groups included the Irish Republican Army (IRA), the Irish National Liberation Army (INLA), and the Ulster Volunteer Force (UVF).

10. See, e.g., KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975) [hereinafter LAW AND STATE].

Diplock, a senior British judge),¹¹ occupied a place of pride in British security strategies in Northern Ireland. The state's decision to utilize a criminal enforcement strategy in tandem with ongoing military containment strategies to address the challenge of violent contenders is one that has been mirrored by other democracies both pre- and post-September 11, 2001.¹²

Instituted under emergency legislation,¹³ the status and procedure in the Diplock courts followed that of Belfast's main criminal court, with five critical differences. First, the jury was dispensed with so that a single judge decided questions of law and fact.¹⁴ Second, the jurisdiction of the courts was defined in terms of "scheduled" offenses; these included typical terrorist-type offenses (such as possession of explosives), but also other offenses – for instance involving use of imitation firearms – which might be committed either by paramilitaries or by "Ordinary Decent Criminals" (ODCs) – a term infamously used in contradistinction to "terrorists."¹⁵ Third, the rules on admissibility of confessions were relaxed so that some confessions that would ordinarily be rejected under existing common law rules were made admissible.¹⁶ Fourth, there were wider rights of appeal.¹⁷ Fifth, under the most recent version of the Justice and Security (Northern Ireland) Act 2007, there is an important screening process by the Director of Public Prosecutions.¹⁸

In practice, the shift on admitting confessional evidence was linked to the creation of three main interrogation facilities (that is, holding centers), the principal one of which was located at Castlereagh near the largest city in Northern Ireland (Belfast), beginning in the early 1970s. The salient point is that an exceptional *system* was created generating its own dynamics. This involved arrest and detention under exceptional/national security powers (typically under the Prevention of Terrorism Acts (PTA), which allowed up to seven-day pre-charging

11. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, at 3–4 (UK) [hereinafter DIPLOCK REPORT].

12. The governments of Spain, Germany, Canada, and others, for example, have combined the efforts of a civil police force with those of military strategies to combat terrorism. See generally J.R. Thackrah, *Army-Police Collaboration Against Terrorism*, 56 POLICE J. 41, 41 (1983) (noting that during the conflict in Northern Ireland, the army functioned as a police force). The use of exceptional courts has been a particular feature. See, e.g., GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE (Fionnuala Ní Aoláin & Oren Gross eds., 2013).

13. Walker, *supra* note 1, at 312.

14. DIPLOCK REPORT, *supra* note 11.

15. This term was memorialized by the Baker Report. THE SECRETARY OF STATE FOR NORTHERN IRELAND, REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, Cmnd. 9222 at ¶ 136 (UK).

16. See JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 57-58 (1995).

17. See John D. Jackson & Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 CRIM. L.F. 503, 520 (1993).

18. Justice and Security (Northern Ireland) Act 2007, c. 6, § 1 (UK).

detention)¹⁹ in *de facto* interrogation centers, questioning by dedicated police teams under strong pressure to obtain confessions, and trial in Diplock courts, frequently based on confessions that might otherwise be inadmissible.²⁰ Nascent overlap between the open and closed state was already evident in the creation of the courts and their attendant enabling system.

Northern Ireland's ordinary criminal legal system continued to operate in parallel, frequently processing comparable numbers of ODCs in jury trials.²¹ While such defendants would have been arrested and detained under ordinary legal powers, these regular powers morphed in the course of the conflict to reflect many of the essential contours of exceptional powers, opening up broad challenges of legitimacy for the exceptional legal regime. Most notably, the Criminal Evidence (Northern Ireland) Order 1988 resulted in the abrogation of the right to silence for paramilitary defendants in the jurisdiction, and Northern Ireland's Police and Criminal Evidence Order 1989 (PACE (NI)) introduced four-day pre-charging detention (previously only forty-eight hours were allowed),²² and altered rules on admissibility of confessions.²³ The extension of this measure from the exceptional trial of persons suspected of committing terrorist offenses to the trials of "ODCs" in Northern Ireland, and ultimately to ordinary criminal defendants in England is a prime example of a move from the 'extra-ordinary' to the ordinary in the counter-terrorism context.

As Diplock courts have shifted from being dedicated vehicles for the trial of suspected terrorists into becoming part of the regular legal system via legislation, they bear notable comparison with the most recent generation of U.S. Military Commissions.²⁴ Of course, the very point of Diplock was to move away from a "war on terror" model and to criminalize the actors engaged in politically motivated violence, while the U.S. Military Commissions distinctly (though ineptly) embraced the laws of war, and the juridical anchor of the war model for the legitimacy of the trials.²⁵ Importantly, at no point during Northern Ireland's conflict did the authorities deploy non-statutory judicial or quasi-judicial bodies

19. The 1974 PTA specifically allowed for up to 48 hours of pre-charging detention, but with the caveat that the Secretary of State may extend the detention by up to five additional days. Prevention of Terrorism (Temporary Provisions Act) 1974, c. 56, § 7(2) (UK).

20. See KEVIN BOYLE, TOM HADDEN & PATTY HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 49 (1980) [hereinafter TEN YEARS]; DERMOT WALSH, COBDEN TRUST, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND 100 (1983).

21. Supporting data compiled from centralized database. See DEPARTMENT OF JUSTICE, *Northern Ireland Courts and Tribunals Webpages*, <http://www.courtsni.gov.uk/en-gb/publications/archivedpublications/pages/default.aspx> (dataset on file with author).

22. Police and Criminal Evidence Order (Northern Ireland) 1989.

23. Clive Walker, *The Bombs in Omagh and their Aftermath: The Criminal Justice (Terrorist and Conspiracy) Act 1988*, 62 MOD. L. R. 879, 883 (1999).

24. See Military Commissions Act of 2006, 10 U.S.C. §§ 948a–950t, 948b (2012) (authorizing the use of military commissions for "violations of the laws of war, and other offenses . . .").

25. See Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1322, 1341 (2007).

corresponding to the first generation of Military Commissions established by President Bush's Executive Order on November 13, 2001. The British Government had employed similar non-statutory "military courts" to deal with insurgency in Ireland in the early twentieth century.²⁶ But, in an unheralded warning to the Bush-era experience, these bodies became so legally entangled though lawyers bringing multiple motions challenging them in the civil courts,²⁷ that thereafter the British abandoned the device. Ongoing challenges in the United States concerning the legality, expediency, and fairness of the revised Military Commissions affirm that ongoing and unrelenting judicial engagement mirrors the earlier British quagmire with no end in sight.²⁸ Only statutory bodies were deployed in the various counter-insurgency campaigns that marked the United Kingdom's post-Second World War period of decolonization.²⁹ This meant that once it was decided in the early 1970s to employ special courts in Northern Ireland, it was inevitable that they would be statutory in authorization.³⁰ The only real question was whether one judge would sit alone, and if so, whether some system of assessors of fact would be employed. As noted above, the simplest option was chosen: one judge with no assessors.³¹

The data forming the basis of our analysis covers the post Good Friday/Belfast peace Agreement phase of the Diplock system and no parallel or similar database is available elsewhere. Focusing on this period has a number of advantages in comparative terms. The first springs from its near contemporaneity with the post-9/11 terrorism experienced by many states. The United Kingdom moved virtually seamlessly from combating the Irish Republican Army (IRA) in Northern Ireland prior to the peace process, to dealing with IRA splinter groups opposed to the 1998 peace agreement, to countering al Qaeda-oriented activities in the United Kingdom (indeed one such latter case was tried in a Diplock court) to contemporary focused ISIS challenges.³² This is not to suggest that all these violent actors can meaningfully be considered a manifestation of the single phenomenon of terrorism—the

26. See COLM CAMPBELL, *EMERGENCY LAW IN IRELAND, 1918-1925* 93 (1994).

27. *Id.* at 64.

28. See, e.g., *In re Khalid Shaikh Mohammad*, 866 F.3d 473 (D.C. Cir. 2017) (per curiam); *In re Khadr*, 823 F.3d 92, 97 n.2 (D.C. Cir. 2016); *In re al-Nashiri* 791 F.3d 71, 75–76 (D.C. Cir. 2015).

29. See generally BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE* (2004 ed. 2001) (examining the role of human rights in administering new constitutions in the post-colonial era).

30. DIPLOCK REPORT, *supra* note 11, 8–9, ¶¶ 12–14.

31. The reasons for choice of only one judge seem to have been not only simplicity but, more convincingly, security and practicality. See CLIVE WALKER, *TERRORISM AND THE LAW* 493–529 (2011) (noting there were not enough NI judges to provide more than one judge per trial, and it was seen as undesirable to bus in judges from Britain). Note that the Diplock Courts were finally closed in 2007. See NORTHERN IRELAND OFFICE, *REPLACEMENT ARRANGEMENTS FOR THE DIPLOCK COURT SYSTEM: A CONSULTATION PAPER 2* (2006), <http://cain.ulst.ac.uk/issues/politics/docs/nio/nio110806diplock.pdf> (noting that "Under the programme of security normalisation announced on 1 August 2005, the legislation underpinning the Diplock system is due to be repealed on 31 July 2007.").

32. See, e.g., LORD CARLILE, *REPORT ON THE OPERATION IN 2001 OF THE TERRORISM ACT 2000* (2002); *id.* at Annex H (*REPORT ON THE OPERATION IN 2001 OF PART VII OF THE TERRORISM ACT 2000*); LORD CARLILE, *REPORT ON THE OPERATION IN 2002 OF PART VII OF THE TERRORISM ACT 2000* (2002); LORD CARLILE, *REPORT ON THE OPERATION IN 2002 AND 2003 OF THE TERRORISM ACT 2000* (2004).

IRA had quite different targeting policies, structures, and goals from al Qaeda and ISIS,³³—but at a sufficiently high level of abstraction some transcending issues surrounding the interrogation and trial of violent actors present themselves. These can then be analyzed through a nuanced, contextual understanding of the actors, which is what this article seeks to do.

The second advantage of analyzing this data springs from the originality of focusing on the end phase of states of emergency.³⁴ By emergency, we mean the use of exceptional legal powers by the state to address a situation of crisis, whether economic, political, or social in nature. The United Kingdom exercised its prerogatives and derogated on a number of occasions from the European Convention on Human Rights.³⁵ As one of the authors has explored in depth elsewhere, the resort to derogation has been markedly absent from the United Kingdom's (and other states') post-9/11 responses to terrorism.³⁶ This article allows us to explore arrest and interrogation practice as formal derogation practice is on the wane. Analysis of the norm-exception relationship has tended to focus on the initial trajectory³⁷—from norm to exception; our data as demonstrated in this article allows empirical examination of the opposite trajectory— from exception to norm. Using official court records following from access given by the Northern Ireland Court Service to the authors that recorded details of interrogation, access to lawyers, and of evidence, SPSS cross-tabulations were generated based on literature and/or inductive reasoning from the data to track the process from initial arrest, through interrogation, charging, and trial in the immediate post Good Friday Agreement phase of the conflict in Northern Ireland.³⁸ A key and unique facet of this project is its longitudinal dimension, involving access to approximately 400 individual cases of persons tried under national security-specific provisions in U.K. law in cohorts from 1988 to 2001. To avoid confusion,

33. Compare TIM PAT COOGAN, *THE IRA* 38–47 (Palgrave 2002) (1970), with Daniel L. Byman, *al Qaeda's M&A Strategy*, BROOKINGS INST. (DEC. 7, 2010), <https://www.brookings.edu/opinions/al-qaedas-ma-strategy/> (discussing the recruitment, organization, and targeting policies of Al Qaeda); see also Peter Taylor, *Comparing the Evolution of IS and the IRA*, BBC NEWS (Apr. 22, 2015), <http://www.bbc.com/news/uk-northern-ireland-32326431> (analyzing the similarities between the rise of ISIL and the IRA).

34. See, e.g., Nicole Questiaux (Special Rapporteur), Econ. & Soc. Council (UN ESCOR), *Study on the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc. E/CN. 4/Sub. 2/1982/15 (July 27, 1982); Committee on International Terrorism, *International Law Association Paris Conference (1984)*, 7 TERRORISM: AN INTERNATIONAL JOURNAL 199 (2008).

35. See, e.g., *Marshall v. United Kingdom*, app. No. 41571/98, Eur. Ct. H.R. (2001), <http://hudoc.echr.coe.int/eng?i=001-5967>; *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. 29 (ser. A) (1993); *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. 11 (ser. A) (1988); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

36. Fionnuala Ní Aoláin, *The Cloak and Dagger Game of Derogation*, in HUMAN RIGHTS IN EMERGENCIES 124 (Evan J. Criddle ed., 2016).

37. See, e.g., ANTONY JENNINGS, *JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND* (1990); Conor Gearty, *Terrorism and Human Rights: A Case Study in Impending Legal Realities*, 19 LEGAL STUD. 367 (1999); John Jackson, *Many Years On in Northern Ireland: The Diplock Legacy*, 60 N. IR. LEGAL Q. 213 (2009).

38. Details of methodology are found in Appendix I: Methodology.

the data presented in tabular form covers only the 2000–2001 cohorts, but key points from the 1988–99 dataset are referenced as relevant in the text.

Unlike many jurisdictions that have resorted to the use of exceptional courts to process terrorist crime, consistent empirical work in Northern Ireland through the 1970s and 1980s has detailed the patterns and influences on due process rights and mechanisms, as the state increasingly relied on the legal process to address the challenge of political and terrorist violence.³⁹ The research strategy in this project sought to ensure that the methodologies employed were compatible with earlier studies of the Diplock courts,⁴⁰ permitting future assessment of their operation over a period of nearly four decades. This unique continuity of data and analysis offers an important and under-explored opportunity to assess the means by which the democratic state responds to terrorist actors and other violent challenges; how rule of law institutions function in such circumstances; and to draw broader theoretical conclusions (many counter-intuitive to prevailing orthodoxies).

The questions addressed in this article break down into two sets – the specific and the conceptual. The specific questions in relation to pre-trial aspects of the Diplock court system include:

- ←Who was interrogated?
- Did they have lawyers present?
- ←How extensive was the interrogation?
- ←Did they make confessions, and if so, when?
- Did the lawyers make any difference?
- ←To what extent were the state's practices informed by the influence of external oversight exercised by international courts and tribunals and by the requirements of treaty obligations (requiring any measures taken to be compatible with human rights norms, or for the state to make specific and justified derogations from those obligations)?⁴¹

The broader conceptual issues that the data set and its analysis raise include:

- What does state practice tell us about the viability of a sealed norm-exception antinomy?
- As the emergency declined, was there any evidence of hybridization of the normal and the exceptional legal systems?

39. See BOYLE, HADDEN & HILLYARD, *LAW AND STATE*, *supra* note 10.

40. See, e.g., BOYLE, HADDEN & HILLYARD, *TEN YEARS*, *supra* note 20.

41. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

- To what extent can the exception explored here demonstrate where law plays a limited or perhaps a dampening role?
- In the longer term, as all these data sets are analyzed in tandem, what does a longitudinal study over the entire length of a conflict say about the role of legal institutions and the effect of legal culture on a state's resort to exceptional powers?
- What are the implications of our findings for states currently at the forefront of the utilization of courts and custodial settings as a means to contain or process terrorist actors and other violent challengers and terrorists, notably the United Kingdom and the United States?

II. DEFENDANTS: WHO WAS TRIED BEFORE THE DIPLOCK COURTS?

If interrogation processes and trials are sites of contention between the state and non-state actors, examination of the ages and backgrounds of defendants can provide a snapshot of sorts of that interaction at a particular moment. This can give clues about degrees of radicalization and mobilization of the state's challengers, facilitating exploration of the complex interaction these are likely to have with the state's security apparatus.⁴² It may also offer clues as to how the state might respond in multi-dimensional ways to the communities and individuals who may have a negative relationship with the state. This dynamic is all the more pertinent given state attention to countering and preventing violent extremism, and the elusive search for effective strategies to identify those men (and women) most at risk of being radicalized or engaged in politically-motivated violence.⁴³ Thus, a fundamental component of the defendant profile analysis is the extent to which the state's legal system contributes to or dampens the mobilization of extremists.

What is striking about the data is that it shows that paramilitary defendants⁴⁴ being charged under national security provisions have gotten significantly older over time in the course of the Northern Ireland conflict. In the 2000–2001 study, 51 percent are 28+ years of age and only 27 percent were under 22 years of age (Table 1). This typology is true of both Republicans and Loyalists – that is, it cuts

42. See TED ROBERT GURR, *WHY MEN REBEL* (1970); Ted Robert Gurr, *Why Minorities Rebel: A Global Analysis of Communal Mobilization and Conflict Since 1945*, 14 INT'L POL. SCI. REV. 161 (1993) (discussing political protest and rebellion by communal groups); Campbell & Connolly, *supra* note 7 (discussing the mobilization of states' violent challengers).

43. See, e.g., HM GOVERNMENT HOME OFFICE, *PREVENT STRATEGY*, 2011, Cm. 8092 (UK) [hereinafter "PREVENT STRATEGY"]; Violent Radicalization and Homegrown Terrorism Prevention Act, H.R. 1955, 110th Cong. (1st Sess. 2007); EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES* (2011) (outlining President Obama's counter-terrorism strategy at a local level).

44. A note on terminology – we refer variously in the study to paramilitary actors and also use the term 'terrorism' as appropriate, in part to defer the broader and more complex engagement with the dynamic of multiple actors in the conflict and to eschew the wholesale use of 'terrorists' terminology that tends to heighten rather than minimize the perceived political import of the analysis.

across paramilitary offenders on both side of the political divide. Defendants in our 1988 cohort were younger, and a study of the Diplock Courts by Boyle, Hadden and Hillyard in the 1970s found 60 percent aged 21 or under.⁴⁵

This data compliments the data analysis of “ordinary” criminality, which points to a decline in criminal participation as individuals get older.⁴⁶ Here, the personal costs of constant engagement with the criminal justice system, the experience of imprisonment, and the emotional tug from families and communities have all been identified as significant elements in prompting behavioral change. Why our data has a different hue is a puzzle, which we explain by reference to state conflict management strategies as well social and psycho-social aspects stemming from the specificity of mobilization to non-state paramilitary groups. Whether this pattern holds for all terrorist organizations over time requires further empirical analysis.

Our data is consistent with, but does not prove, the hypothesis that the state’s de-escalation of its security strategies from circa 1990 had the effect of curbing the kind of cycles of radicalization and violent mobilization evident earlier in the conflict.⁴⁷ In other words, if there was a nexus between state repression and violence, we suggest that curbing the repression also had the effect of lessening the supply of younger recruits to paramilitary groups. This particular point has clear contemporary resonance, as pervasive security concerns about radical recruitment to al Qaeda, ISIS (and other Islamic groups) are shaping security thinking and initiatives across multiple spheres (for example, foreign policy and national security).⁴⁸ In the United Kingdom this concern has sparked multiple policies from key government departments, with little indication of its grounding in empirical data.⁴⁹

One might also posit that the data reflects the increased sophistication of paramilitary groups that, given the growing capabilities of state security forces, realized that the effective conduct of their campaigns required trained and

45. BOYLE, HADDEN AND HILLYARD, LAW AND STATE, *supra* note 10, at 23 table 3.2, *See also*, Campbell & Connolly *supra* note 7, at 358.

46. Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship Social Variation, Social Explanation*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell eds. 2015).

47. *See, e.g.*, J. BOWYER BELL, THE SECRET ARMY: A HISTORY OF THE IRA 1916–1970 (1970).

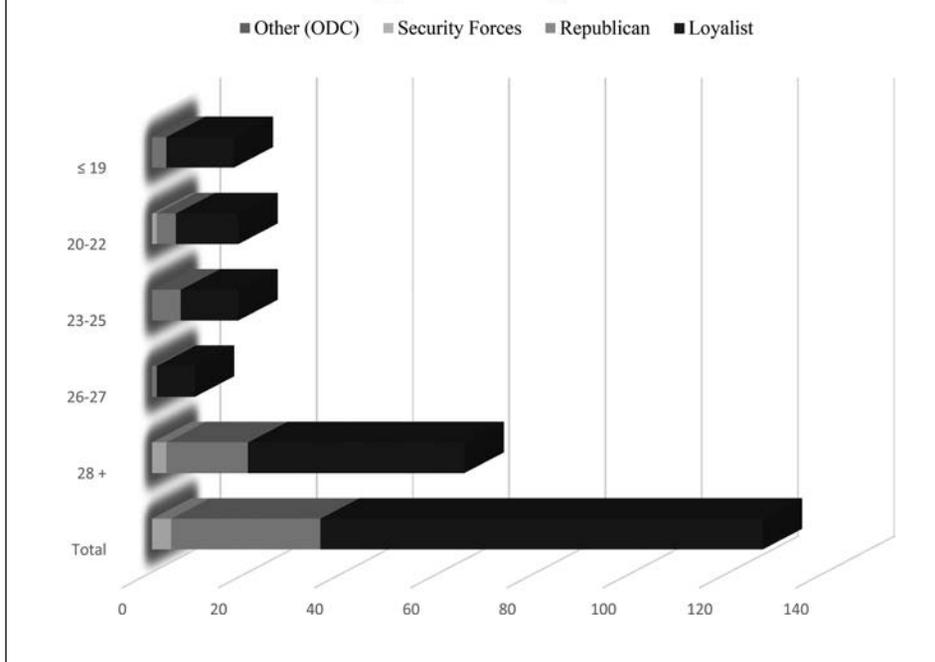
48. *See, e.g.*, FARHAD KHOSROKHAVAR, RADICALIZATION: WHY SOME PEOPLE CHOOSE THE PATH OF VIOLENCE (Jane Marie Todd trans., 2017); WILLEM KOOMEN & JOOP VAN DER PLIGT, THE PSYCHOLOGY OF RADICALIZATION AND TERRORISM (2015); Mary Beth Altier & John Horgan, *The Future of Terrorist De-Radicalization Programs*, 13 GEO. J. INT’L AFF., Spring/Summer 2012, at 83 (2012); Khouwaga Yusoufzai & Franziska Emmerling, *How Identity Crisis, Relative Deprivation, Personal Characteristics, and Empathy Contribute to the Engagement of Western Individuals in Islamist Terrorist Behavior*, 8 J. TERRORISM RES. 68 (2017).

49. *See, e.g.*, PREVENT STRATEGY, *supra* note 43 (detailing the United Kingdom’s counter-extremism strategy, including efforts to prevent radicalization); HOME OFFICE, PREVENTING EXTREMISM TOGETHER: PLACES OF WORSHIP (2005) (UK); HM GOVERNMENT HOME OFFICE, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM’S STRATEGY, 2006, Cm. 6888 (UK). For an assessment of age (and other) factors underpinning the recruitment of al Qaeda offenders, *see* HANNAH STUART, THE HENRY JACKSON SOC’Y, ISLAMIST TERRORISM: KEY FINDINGS AND ANALYSIS (2017).

Table 1. Defendants: Age & Background 2000-2001

	<i>Age of Defendant</i>										Total	
	19 or under		20-22		23-25		26-27		28 +			
<i>Background</i>		Row %		Row %		Row %		Row %		Row %		Col %
Loyalist	14	15%	13	14%	12	13%	8	9%	45	49%	92	72%
Republican	3	10%	4	13%	6	19%	1	3%	17	55%	31	24%
Security Forces	0	0%	1	25%	0	0%	0	0%	3	75%	4	3%
Other (ODC)	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Total	17	13%	18	14%	18	14%	9	7%	65	51%	127	100%

Defendants: Age & Background 2000-2001



experienced operatives. We think this is less likely given the finite supply of volunteers to paramilitary organizations and our view that the paramilitary organizations did not have great capacity to regulate their supply of volunteers. The age dimension is also useful to interrogate assumptions that pervade scholarly and policy debates concerning the ‘typical’ or average profile (including age) of likely offenders with the supposition that the most likely group of men to engage in politically motivated violence are young. This assumption has a reach across

multiple contexts such as the use of profiling patterns in ‘stop and search’ measures,⁵⁰ and other arenas of direct interface between communities perceived as vulnerable to radicalization and the state.

The data also suggest that mobilization does not age out, and the commitment to ideology and to certain political goals is secured in ways that make sustained engagement throughout a lifetime a predictable feature. Moreover, individuals in our study are located in families and communities that may broadly support and solidify the political objectives being articulated, thereby providing sustained encouragement to imprisoned or militarily active individuals, in ways that are distinct and different from regular criminal activity. These communities may also be under the most sustained policing and military engagement by the state, complicating the ‘push-pull’ factors that lead to sustained mobilization into political violence.

Placing the data in historical context permits us to observe that a fundamental shift has occurred in the profile of the average paramilitary offender in Northern Ireland. The data relate to a time period in which a major peace agreement (the Good Friday/Belfast Agreement) had been signed between the primary protagonists to the conflict,⁵¹ though with considerable dissention from both political constituencies – the Loyalist political and paramilitary groupings and dissident Republican groups.⁵² Yet, the contours of the defendants’ profile follows that of changing power relationships following the Good Friday Agreement. Prior to the Agreement, a majority of defendants had been Republicans—suspected IRA operatives.⁵³ What is striking about our data set is that Loyalists now outnumber Republicans nearly 3:1 in terms of who is being arrested for offenses covered by the Prevention of Terrorism Acts. Most of the Loyalist defendants were charged with public order offenses, generally those involving street protests and other forms of violent assembly.⁵⁴ In general, the context for such public street-based

50. In the United Kingdom, for example, the use of Terrorism Act powers to stop and search suspects resulted in a dramatic increase in the ethnic profiling of young minorities. See RUNNYMEDE PERSPECTIVES, *ETHNIC PROFILING: THE USE OF “RACE” IN UK LAW ENFORCEMENT* 7 (Kjartan Páll Sveinsson ed., 2010) (“The massive increase in stop and search recently has – unsurprisingly – affected minority ethnic young people to a far greater extent than their white peers.”).

51. See Good Friday Agreement, *supra* note 9. For a comprehensive analysis of the Good Friday Agreement, see Volume 22(4) (1999) of the *Fordham Journal of International Law*, which features 28 articles and essays analyzing Northern Ireland’s peace process. 22 *FORDHAM INT’L L.J.* 1136, 1136–1906 (1999). See also LEE A. SMITHEY, *UNIONISTS, LOYALISTS, AND CONFLICT TRANSFORMATION IN NORTHERN IRELAND* (2011) (providing a case study of the communities after the signing of the agreement).

52. A number of groups do not observe a ceasefire status, including the Real IRA which called off its ceasefire in 2000. Cf. POLICE SERVICE OF NORTHERN IRELAND, *POLICE RECORDED SECURITY SITUATION STATISTICS: ANNUAL REPORT COVERING THE PERIOD 1ST APRIL 2016 – 31 MARCH 2017* (2017), <https://www.psn.police.uk/globalassets/inside-the-psni/our-statistics/security-situation-statistics/2017/annual-security-situation-statistics-report-2016-17.pdf> (discussing a rise in security incidents in the early 2000s).

53. Cf. BOYLE, HADDEN & HILLYARD, *LAW AND STATE*, *supra* note 10, at 23 table 3.2.

54. See generally CAROLYN GALLAHER, *LOYALIST PARAMILITARIES IN POST-ACCORD NORTHERN IRELAND* (2007). Unresolved issues from the Belfast Agreement led to rioting and violence on multiple

contestation arose from protests against newly synchronized administrative provisions. These measures called for the regulation of religious and political marches in Northern Ireland, an aspect of public political identity most associated with Loyalist groups, a manifesto that emerged decisively from the peace process.⁵⁵ These data point to a transformation in which groups and individuals are likely to challenge the state, and counter-intuitively affirm that peace agreements may not in fact deliver fully peaceful outcomes in the short to medium term. Rather, spoilers, oppositional organizations and new forms of mobilization may be part of the transitional landscape. The legal and political terrain may remain complex but in differently textured ways.

Another notable point is that the legal system in the period under review became more narrowly focused on politically-motivated offenses. At earlier points in the conflict, one of the major legal criticisms of terrorism legislation and its enforcement was directed at the practice of sweeping up persons who were not associated with terrorist violence, a practice enabled by the broad definitions of crimes contained in the Prevention of Terrorism Acts and the Emergency Powers Acts (for example, use of a firearm would automatically define a crime as being ‘terrorist’ in nature, even if it were used in ordinary crime).⁵⁶ Moreover, legal changes have bolstered this move with successive modifications to both the list of scheduled offenses and also discretion in filtering out those who formally fall within the list.⁵⁷ This finding is illustrated by the nil return on what have been euphemistically termed “ODCs”. In our data, ODCs are not appearing in the non-jury court system, hence a 0 percent return. In a relevant 1980 study ODCs were appearing in the Diplock courts at a 40 percent rate,⁵⁸ and in the 1988 data set, ODCs were present at a rate of 20 percent.

This finding confirmed our intuition that the screening out of ODCs over time from the Diplock courts illuminates some of the complexity of the norm-exceptional antimony in prolonged emergencies. Specifically, while there are examples of hybridization (for example, the abrogation of the right to silence), practice can also run in the other direction. There was sustained pressure domestically from NGOs and civil society and internationally from human rights bodies to remove ODCs from Diplock courts. ODC’s presence in the exceptional legal system was a legitimacy challenge for the state, pointing to flawed procedural fairness and to the costs of exceptionality for the integrity of the ordinary law. The “fix” was

occasions. In 2013, for example, violence erupted following a decision to fly the Union Flag on designated days only—as opposed to every day. The resulting Haass-O’Sullivan talks failed to result in a consensus. See Gerry Adams, *Lessons from the Irish Peace Process*, 16 GEO. J. INT’L AFF. 218, 218–20 (2015).

55. Kevin Hearty, *The Great Awakening? The Belfast Flag Protests and Protestant/Unionist/Loyalist Counter-Memory in Northern Ireland* 30 IRISH POLITICAL STUDIES 157 (2015)

56. See Dermot Walsh, *Erasing the Distinction Between Anti-Terrorist and Criminal Justice Measures in Ireland*, in COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW: CROSSING LEGAL BOUNDARIES IN DEFENSE OF THE STATE 212–237 (Aniceto Masferrer & Clive Walker eds., 2013).

57. See WALKER, TERRORISM AND THE LAW, *supra* note 31, at 493–529.

58. For data points see WALSH, *supra* note 20, at 80–82.

relatively simple (enabling an effective de-scheduling mechanism). Moreover, the narrative of the costs to the individual ODC defendant portrayed the system as opposed to the basic protection of individual liberty, a virtue the democratic state was anxious to maintain. Overall, however, one has to view the sealing off of the Diplock system from ODCs as telling only a partial story of norm-exceptional antinomy, as other practices from the Diplock courts migrated to the ordinary law, even as the cohort of defendants within the system appeared more uniform over time.

III. ARREST AND EXCEPTIONALISM

In our 2000–2001 data set there was, at most, one arrest by the Army or in joint Army/Police operations (Table 2). Earlier studies of arrest patterns undertaken during the middle period of the conflict found 11 percent of arrests across both categories (solely or jointly by the Army).⁵⁹ This data reflects fundamental shifts as to which actors are dominating the management of conflict, over the course of the life-cycle of conflict space. If military presence in a conflict space generally co-relates with the intensive and extra-ordinary phase of conflict regulation, this data set again points to the malleability and trajectory of conflict regulation from exceptional to regularization.

In Northern Ireland a politically agreed upon process of demilitarization took place after 1998.⁶⁰ This process included early release of persons serving prison terms for crimes defined as “terrorist” (under the PTA or EPA), essentially a *de jure* amnesty,⁶¹ as well as an internationally monitored process of demilitarization that destroyed significant quantities of weapons and explosive materials.⁶² In the same context, the deployment of the British army was substantially scaled back,⁶³ and the police took over and civilianized a range of functions that had, to that

59. *Id.* at 36.

60. See Good Friday Agreement, *supra* note 9, at Strand Three: Decommissioning. The most recent document related to the decommissioning of military and paramilitary weapons was published in November 2015. See N. IR. EXEC., A FRESH START: THE STORMONT AGREEMENT AND IMPLEMENTATION PLAN (2015), <https://www.northernireland.gov.uk/publications/fresh-start-stormont-agreement-and-implementation-plan-0>.

61. It is fair to say that the status of release as a form of amnesty is contestable. A *de facto* amnesty occurs typically when nothing is done, no investigations or trials are pursued, the state acts as if the crimes did not take place. A *de jure* amnesty is different as there is a legal framework setting out an exceptional decision not to prosecute specific categories of crimes and offenders. The Early Release Scheme may be viewed as different again as the beneficiaries *were convicted*, those convictions remained on their record and they were released on license. See generally LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE 37 (2008) (explaining the differences between decisions to grant amnesty).

62. See Good Friday Agreement, *supra* note 49, at Annex B, Prisoners, ¶¶ 1, 5; MALLINDER, *supra* note 61, at 157–58.

63. Operation Banner ended in 2007. The official review is Army Code 71842. Page 7-1 has troop numbers reflected for the totality of the conflict. See CHIEF OF THE GENERAL STAFF, ARMY OF THE UNITED KINGDOM, OPERATION BANNER: AN ANALYSIS OF MILITARY OPERATION IN NORTHERN IRELAND, (2007), http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf; see also ANDREW SANDERS & IAN S. WOOD, TIMES OF TROUBLES: BRITAIN'S WAR IN NORTHERN IRELAND vi–vii (2012) (citing the military levels of engagement during the conflict).

Table 2. Who Made the Arrests?

	<i>Arrestor (note: RUC is used for Royal Ulster Constabulary)</i>									
	Uniformed RUC Alone		Plainclothes RUC Alone		Other		Not Known		Total	
<i>Defendant Background</i>	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %
Loyalist	55	59.8%	34	37.0%	1	1.1%	2	2.2%	92	72.4%
Republican	25	80.6%	6	19.4%	0	0%	0	0%	31	24.4%
Security Forces	0	0%	0	0%	0	0%	4	100.0%	4	3.1%
Total	80	63.0%	40	31.5%	1	8%	6	4.7%	127	100.0%

Arrestor Category	Loyalist	Republican	Security Forces
Uniformed RUC alone	55	25	0
Plainclothes RUC alone	34	6	0
Other	1	0	0
Not known	0	0	4

point, required close military support. This pattern of handover has some contemporary resonance in Iraq and Afghanistan, though it is worth noting the distinctions that pertain to the higher degree of effective security control in Northern Ireland. In Iraq and Afghanistan, British and American forces made local police and military units responsible for the front-line engagement with terrorist groups,⁶⁴ as well as signalling a shift from external to internal control of law

64. See, e.g., ANTONIA CHAYES, BORDERLESS WARS: CIVIL MILITARY DISORDER AND LEGAL UNCERTAINTY 25–58 (2015) (discussing the United States Counterinsurgency Strategy and the handover of local control of military forces in Iraq and Afghanistan); see also BUREAU OF POLITICAL-MILITARY AFFAIRS, DEP’T OF STATE, U.S. GOVERNMENT COUNTERINSURGENCY GUIDE (2009), <https://www.state.gov/documents/organization/119629.pdf> (outlining United States military policy related to containing and addressing the root causes of insurgent activities in military zones); Travers B. Child, *We Don’t Need No Education: Reconstruction and Conflict across Afghanistan*, HOUSEHOLDS IN CONFLICT NETWORK (Feb. 2017), <http://www.hicn.org/wordpress/wp-content/uploads/2012/06/HiCN-WP-244.pdf> (examining the status of the military led reconstructions in Afghanistan and Iraq).

enforcement. In practice, this has been much less successful than anticipated,⁶⁵ in part because of the lack of a comprehensive and inclusive political settlement involving all major political and military factions in both countries.

The arrest patterns and the primacy of the police in the latter phases of the conflict in Northern Ireland demonstrate an embedding normality as the system moves towards greater formal rationality in its practices. On the one hand this may appear as a move away from exceptionality, but the shift to police-led anti-terrorism practice must also account for the marked militarization of the police over time, a direct result of a militarized conflict. This shift towards formal rationality is also evident from exploring the regimes governing detention. While 63 percent of persons are arrested (and subsequently detained) under what could be termed a counter-terrorist regime, 30 percent are held under the ordinary law provisions of the Police and Criminal Evidence Order, ordinary criminal law in the jurisdiction (Table 3).

In parallel with changes to the exceptional regime governing detention (principally the Prevention of Terrorism Acts (PTAs) and the Northern Ireland (Emergency Provisions) Acts (EPAs),⁶⁶ during the course of the conflict the ordinary law on detention was also recast in a way that brought it more into line with the exceptional legal system. Notably, much of this legislation was introduced and gained parliamentary approval on the basis that it had specific purview over the particular circumstances and challenges of terrorism. In reality, the changes had sizeable effects on the operation of the ordinary criminal justice system. There are obvious parallels to the Congressional debates concerning the passage of the USA PATRIOT Act.⁶⁷ The ordinary law now provided for 4-day detention

65. See, e.g., Patrick Porter, *Last Charge of the Knights? Iraq, Afghanistan, and the Special Relationship*, 86 INT'L AFF. 355, 368 (2010) (citing the infiltration of the al-Sadr militia force in the British-trained Basra police force); Seth G. Jones, *The Rise of Afghanistan's Insurgency: State Failure and Jihad*, 32 INT'L SEC. Q., Spring 2008, at 7, 17 (explaining the risk of infiltration by insurgent forces for local police forces in Afghanistan).

66. E.g., The Prevention of Terrorism (Temporary Provisions) Act 1984, c. 8 (superseded) (UK); The Prevention of Terrorism (Temporary Provisions) Act 1989, c. 4 (repealed) (UK); The Prevention of Terrorism (Additional Powers) Act 1996, c.7 (UK); Northern Ireland (Emergency Provisions) Act 1974, c. 56 (UK); Northern Ireland (Emergency Provisions) Act 1978, c. 8 (UK) (repealed 1991).

67. Section 412 of the PATRIOT Act requires that the Attorney General shall detain any alien who is suspected of terrorism and that the alien remain in custody until he/she is removed from the United States. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-52 (2001). Under the provisions of this section, the Attorney General can decide to continue detaining the individual for a period of up to six months if the "release of the alien will threaten the national security of the United States." *Id.* The provisions in the PATRIOT Act differ from other immigration statutes authorizing mandatory detention because they broaden the definition of terrorism to include anyone who provides material support to an organization if that person knew or reasonably should have known that their activity would support a designated terrorist organization or any organization that engages in terrorist activity. See *id.* at §411(a)(1)(F)-(G). This essentially means that anyone who has had any connection to a terrorist organization, whether or not they participated in terroristic activities, is deportable under the PATRIOT Act. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 967 (2002). This broad definition means that any association with a terrorist organization could result in detention and

Table 3. Arrest Power Used

	<i>Arrest Power Used</i>									
	S.14 PTA 1989 (7-day)		Art26 PACE (NI) Order 1989 (4-day power)		Other		Not known		Total	
<i>Defendant Background</i>	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %
Loyalist	57	62.0%	31	33.7%	4	4.3%	0	0%	92	100.0%
Republican	23	74.2%	7	22.6%	0	0%	1	3.2%	31	100.0%
Security Forces	0	0%	0	0%	4	100.0%	0	0%	4	100.0%
Total	80	63.0%	38	29.9%	8	6.3%	1	.8%	127	100.0%

Arrest Power	Loyalist	Republican	Security Forces	Total
S.14 PTA 1989 (7-day)	57	23	0	80
A.26 PACE (NI) (4-day)	31	7	0	38
Other	4	0	4	8
Not known	0	1	0	1

without charge,⁶⁸ and also introduced new rules for the admissibility of confessions, and for access to lawyers. These restrictions were applied across the board on the “right to silence,” the United Kingdom equivalent to Miranda warnings.⁶⁹ Therefore, while the trajectory in this sample is from the exception to the norm, that ‘norm’ is one that has been reshaped in a way that to a degree mirrors the exceptional.

subsequent deportation. *Id.* at 966–72. *See, e.g.*, 147 CONG. REC. S11,004 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

68. The Police and Criminal Evidence Act 1984, c. 60, § 44 (3)(b) (UK).

69. *See* *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966); T.E. St. Johnson, *Judges’ Rules and Police Interrogation in England Today*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 85, 86–88 (1964) (noting the formation of judicial policy relating to a right to remain silent during police interrogation within the Judges’ Rules of 1912 and 1918); The Police and Criminal Evidence Act 1984, c. 60, §§ 66–67 (UK) (directing the creation of codes of practice for police procedures including interrogation); *Reid v. Howard* (1995) 184 CLR 1, 8 (Austl.).

The complexity of two detention regimes operating in parallel, with both feeding into Diplock trials, raises questions of legal hybridity that are explored further below. At this point, what can be noted is that ordinary law, specifically PACE (NI) provisions are more likely to have been used against Loyalists (23 percent) than against Republicans (32 percent), because the former were more heavily involved in public order disturbances. Interestingly, statistics in England and Wales follow the same trend. In recent years, most terrorist suspects have been arrested under PACE and not the Terrorism Act.⁷⁰ There may be several reasons for this pattern. First, police forces in the United Kingdom mainland may have greater familiarity with PACE provisions: this is what they use regularly and understand best. Second, there may be uncertainty whether the suspect is a terrorist or an ODC, and conservative policing might prefer the ordinary law over the exceptional in the context of uncertainty. The third factor may be the unavailability of police bail under the Terrorism Act.⁷¹ In sum, these statistics reveal the fluidity of charging practices post-conflict with some distinct differences from the conflict period, and some stasis in other respects.

IV: CONTENTIOUS ZONES: INTO THE INTERROGATION CENTER

Post-arrest data are best contextualized in terms of the contested history of interrogation and detention in Northern Ireland, which can partly be considered a struggle for the juridification of the interrogation room. The juridification struggle occurs in all interrogation rooms but is particularly pronounced in democratic states, struggling to manage terrorism by law. The juridification of that contested space mirrors a broader tension between a war-versus-criminal model of conflict control, a debate with ongoing contemporary resonance.⁷² This tension manifests both politically and legally and in turn entails a battle between the secret and the open state. Invoking this tension between the open and secret state is well-rehearsed.⁷³ This article's contribution is to expose the specificity of that tension in the highly ritualized and closed space of the interrogation room.

70. See Home Office, Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update 30 September 2013, Great Britain, Gov.UK (Mar. 6, 2014), <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-september-2013/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-quarterly-update-to-30-s>.

71. Terrorism Act 2000, c. 11, ¶ 67 (UK), amended by Terrorism (Northern Ireland) Act 2006, c. 4, § 5(2)–(3), sched. (UK) (denying bail under scheduled offenses unless detainee is admitted to bail by a judge of the High Court or the Court of Appeal, or by the judge of the court of trial on adjourning the trial of such person).

72. See, e.g., Jude McCulloch & Sharon Pickering, *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror,"* 49 BRIT. J. CRIMINOLOGY 628 (2009).

73. There is a substantial and varied literature on the notion of the "open" and "closed" state particularly in the context of national security infrastructure. See, e.g., AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* (1999); DAVID R. RUDGERS, *CREATING THE SECRET STATE: THE ORIGINS OF THE CENTRAL INTELLIGENCE AGENCY, 1943–1947* (2000).

Northern Ireland in the early 1970s was characterized by significant lawlessness as the state responded to the breakdown of the rule of law, intertwined with the emergence of what has variously been described as low-level armed conflict, terrorism, and extreme criminality.⁷⁴ In parallel with post-9/11 practices, state abuse of persons in detention figured prominently—resulting in well-documented allegations of what could be termed “torture lite,”⁷⁵ and “torture heavy.”⁷⁶ The late 1970s saw a police-based interrogation process in Northern Ireland for suspected terrorist offenders (with interrogators coming from the regular Criminal Investigation Department (CID)), rather than the Special Branch (intelligence operatives).⁷⁷ While ordinary policing management of arrest and detention for ODCs was more closely regulated, sustained legal challenges ultimately produced evidence of institutional and individual lawlessness.⁷⁸ Sustained criticisms from international oversight bodies (including the United Nations Committee Against Torture (UNCAT) and the European Committee Against Torture (EuroCAT)),⁷⁹ contributed to an increase in safeguards: video and then audio-recording,⁸⁰ the introduction of provisions allowing defendants conditional access to lawyers,⁸¹ and the appointment of an Independent Commissioner for the

74. See, e.g., BOYLE, HADDEN & HILLYARD, *TEN YEARS*, *supra* note 20; BRENDAN O’LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* (1993); CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* (1986).

75. See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 41, 66 (1978) (holding that the interrogation techniques utilized by the Government of the United Kingdom, specifically hooding, prolonged noise exposure, sleep deprivation, reduced diet, and long periods of standing in painful postures, caused “at least intense physical and mental suffering and led to acute psychiatric disturbances,” and amounted to inhuman treatment in violation of Article 3 of the Convention); see also *Ireland v. United Kingdom*, App. No. 5310/71, 1978 Y.B. Eur. Conv. On H.R. 602, 604–06 (Eur. Ct. H.R.) (providing a summary of the same case).

76. See generally *Donnelly v. United Kingdom*, App. Nos. 5577/72, 1973 Y.B. Eur. Conv. on H.R. 212, 212–16 (Eur. Comm’n on H.R.) (addressing allegations of torture that included beatings on the head, body, and genitals, the administration of electric shocks to the genitals, and the administration of psychiatric drugs meant to induce confessions). Note that in *Donnelly*, the Commission held that in proving systemic human rights violations, “administrative practices” includes only tolerance of brutality and ill-treatment at the highest levels of government. See *id.* at 234–48. In practice, this threshold is very difficult to reach.

77. See, e.g., Jon Moran, *Evaluating Special Branch and the Use of Informer Intelligence in Northern Ireland*, 25 J. INTEL. & NAT’L SECURITY 1 (2010).

78. See, e.g., *Fox v. United Kingdom*, App. No. 12244/86, 182 Eur. Ct. H.R. (ser. A) (1990), 13 Eur. H.R. Rep. 157; COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE* (1991), <https://caj.org.uk/1991/11/16/s002-submission-united-nations-committee-torture/>. For other pertinent policy papers and briefs by the Committee on the Administration of Justice dealing with police practices in Northern Ireland in the 1980s and 1990s, see generally COMMITTEE ON THE ADMINISTRATION OF JUSTICE, <https://caj.org.uk>.

79. See Brice Dickson, *Northern Ireland’s Emergency Legislation – The Wrong Medicine?*, 1992 PUB. L. 592, 602 n.58 (discussing hearings held by UNCAT into allegations of torture at detention centers in Northern Ireland).

80. See *The Police and Criminal Evidence (Northern Ireland) Order 1989*, SI 1989/1341 (N. Ir. 12) art. 60-60A.

81. *Id.* at art. 59.

Holding Centers who would serve as a “watchdog.”⁸²

In Northern Ireland, exceptionality extended not only to the legal architecture, but also to the physical structures. Interrogation sites are rarely oases of calm. As has been clear from U.S. experience in the War on Terror, the interrogation sites’ construction may constitute not simply a physical space, but it may also be an integral part of the process.⁸³ Prolonged deprivation of daylight, fluctuations in heat and cold, noises, vibrations and surroundings that provoke disorientation and discomfort, may raise detainee stress levels and increase depression, making the detainee more susceptible to interrogators’ strategies.⁸⁴ The site almost inevitably becomes the location of legal contestation.⁸⁵ For the United Kingdom, contestation was engaged by international human rights treaty obligations. This created a pathway to argue that the process of interrogation violated the prohibitions on torture, inhuman and degrading treatment.⁸⁶

Castlereagh Holding Center was the prime destination for detainees in Northern Ireland arrested under the Prevention of Terrorism Acts. As an official watchdog described the site, “physical conditions . . . are, to employ moderate

82. See Owen Bowcott, *The Unexpected Visitor: The Appointment of Sir Louis Blom-Cooper QC to the New Post of Independent Commissioner for Northern Ireland’s Paramilitary Holding Centres Has Received a Guarded Welcome*, THE GUARDIAN, Apr. 27, 1993, at 1, ProQuest, Doc. ID 293428411.

83. See, e.g., Charlie Savage, *Camp X-Ray: A Ghost Prison*, N.Y. TIMES (Sept. 1, 2014), <https://www.nytimes.com/interactive/2014/09/01/us/Guantánamo-camp-x-ray-ghost-prison-photographs.html>; see also Carol Rosenberg, *Lawyers Postpone Guantánamo Testimony from CIA’S First ‘Black Site’ Prisoner*, MIAMI HERALD (Mar. 20, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article139657118.html>; Carol Rosenberg, *Guantánamo Hearing Halted by Supposed CIA ‘Black Site’ Worker Serving as War Court Linguist*, MIAMI HERALD (Feb. 9, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article9600110.html>; Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.’s Secret Interrogation Program*, THE NEW YORKER (Aug. 13, 2007), <http://www.newyorker.com/magazine/2007/08/13/the-black-sites>. The issues of detention remain heavily contested in Military Commission pre-trial litigation, noting for example the ongoing litigation in the case of Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin’Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, including defense motions to recuse the military judge and current prosecution team based on the behaviors and actions of both in the destruction of a black site in which it is believed detainees were held and subject to torture. Appellate Exhibit 425 (Mohammad), Mr. Mohammad’s Motion To Recuse Military Judge and the Current Prosecution Team, United States v. Mohammad (Mil. Comm’n’s Trial Judiciary May 10, 2016), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE425\(KSM\)\).pdf?ver=2016-05-27-113904-540](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425(KSM)).pdf?ver=2016-05-27-113904-540); [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE425\(KSM\)\).pdf?ver=2016-05-27-113904-540](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425(KSM)).pdf?ver=2016-05-27-113904-540); see also Appellate Exhibit 425J, Government Notice at 1, United States v. Mohammad (Mil. Comm’n’s Trial Judiciary July 8, 2016), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE425J\(Gov\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425J(Gov)).pdf), (attaching as an exhibit Bin al-Shibh v. Obama, No. 06-1725 (D.D.C. May 7, 2012), in which Judge Sullivan allowed the destruction of the site in question following the preservation of evidence through alternative methods, like digital and photographic preservation).

84. Cf. Memorandum for John Rizzo, Acting General Counsel of the CIA (Aug. 1, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf> (discussing the loud noises that result from a technique known as “walling”).

85. In the context of U.S. post-9/11 practices, see, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006); *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010); *Rasul v. Myers*, 512 F.3d 644, 650 (D.C. Cir. 2008), *vacated*, *Rasul v. Myers*, 555 U.S. 1083 (2008).

86. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

language, austere and forbidding.”⁸⁷ Thirty cells provided detainee accommodation, each with a floor area of 6.25 square metres, and furnished with a bed and chair. Following a complaint by another human rights watchdog, bedding, which had apparently been quite poor, was improved.⁸⁸ Cells were window-less, lit by artificial light that was dimmed at night but never turned off. There were no clocks, and no reading or writing materials were allowed. The European Committee for the Prevention of Torture found in its 1994 report that the “ventilation system appeared to function only moderately well and created a rather intrusive level of noise in certain cells.”⁸⁹

From the moment of her arrival at the interrogation center, the detainee became the responsibility of the facility’s uniformed staff. The staff opened a custody record and subjected the detainee to a thorough search in which personal possessions (including watches) were removed for the duration of her stay. The staff could take the detainee’s clothes for forensic examination, in which case they provided government-issued clothes (generally known as a “space suit”). Under a statutory code introduced under the Emergency Provisions Act,⁹⁰ detainees were to be provided with notices detailing their [conditional] rights to have someone informed of their arrest, their rights of access to a legal counsel, and the main provisions of the Criminal Evidence (NI) Order 1989 (which relates to abrogation of the right to silence, an issue examined below). The next stage was a medical examination carried out in the interrogation center’s medical surgery center by an officially appointed doctor. Once the examination was completed, the detainee was taken to her cell from which she might later be moved to an interview room.

Castlereagh had a total of twenty-one interview rooms, broken up into a group of thirteen rooms adjacent to the cells, and a group of either rooms in a separate building. The rooms in the larger group measured six square meters, and were fitted with a table and three chairs. As with the cells, there was no natural light – it appears that outside windows were covered in plywood – and no clocks. The other interview rooms were somewhat bigger and benefited from some sunlight. There were no facilities for exercise either indoors or outdoors. As the European Committee for the Prevention of Torture noted of the conditions, “[a]ll these factors contributed to create a distinctly claustrophobic atmosphere.”⁹¹

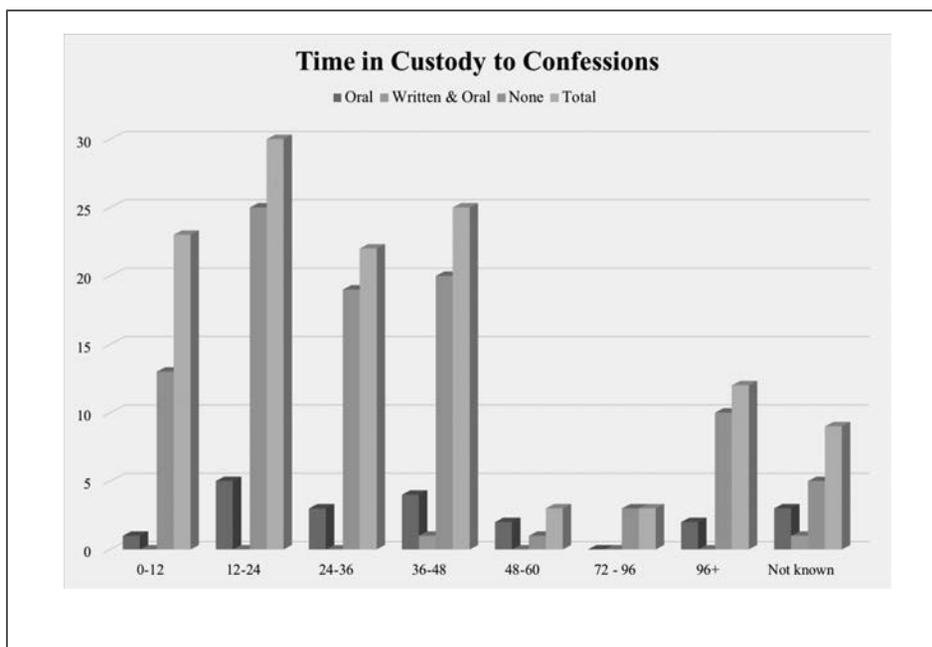
87. SIR LOUIS BLOM-COOPER QC, FIRST ANNUAL (1993) REPORT OF THE INDEPENDENT COMMISSIONER FOR THE HOLDING CENTRES 32 (1994) (N. Ir.) [hereinafter FIRST ANNUAL BLOM-COOPER REPORT].

88. HELSINKI WATCH & THE PRISON PROJECT, HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED KINGDOM 8-10 (1992), <https://www.hrw.org/sites/default/files/reports/UK926.PDF>; see HELSINKI WATCH, HUMAN RIGHTS WATCH, CHILDREN IN NORTHERN IRELAND: ABUSED BY SECURITY FORCES AND PARAMILITARIES 16 (1992).

89. EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE GOVERNMENT OF THE UNITED KINGDOM ON THE VISIT TO NORTHERN IRELAND CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT FROM 20 TO 29 JULY 1993, ¶ 40 (1994).

90. *Cf.* Northern Ireland (Emergency Provisions) Act 1973 c. 53, sch. 1 (UK).

91. EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, *supra* note 89, at ¶ 45.

Table 4. Relationship between Custody Duration and Confession

In general, once the detainee was brought to the interview room, the Criminal Investigation Department (CID) began the interrogation. Generally, two detectives at a time carried out the questioning. These detectives rotated with one or more other teams, the usual practice being that between four and six officers questioned the detainee. Undoubtedly, having a very large number of detectives conduct a particular interrogation may create confusion in the detainee, and therefore increase the risk of a false confession. Recognizing the need to keep a check on their numbers, the government commissioned the Bennett Report (following multiple allegations of ill-treatment), which recommended *inter alia* that no more than six police personnel be involved in any one case.⁹² Nevertheless, the problem persisted: our survey disclosed that this maximum was exceeded in 12 percent of cases in the 1988/9 data set.⁹³ But the broader point is to illustrate the dynamic of juridification in the interrogation space. The data then reveal that notwithstanding high-level recommendations to control and contain the nature of the

92. H.G. BENNETT, REPORT OF THE COMMISSION OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497, ¶ 181 (UK). In addition, the Report was instrumental in introducing changes (record-keeping, checks by superior officers, and medical and legal access) which had some significant impact on the approach to interrogation and treatment, especially after a legal basis was set out in the Northern Ireland (Emergency Powers) Act. *See* Northern Ireland (Emergency Powers) Act of 1987, c. 30, §§ 14-16 (repealed 1991) (UK).

93. Data on file with authors.

interface between the detainee and the police, the impact of the policy recommendations varied.

What is striking about this data is the obvious point that the majority of defendants give confessional evidence to their interrogators within 48 hours after being brought into custody. As the narrative above indicates, the conditions under which individuals were held and the oppressiveness of the interrogation environment may have been a significant contributing factor to their willingness to give oral and/or written testimony. As will be discussed further below, this data set undermines expansive claims by the state for the imperative of prolonged detention in order to extract sufficient evidence to charge and continue detention (on the assumption that the goal is to process such individuals through the courts).

a. The Divergent Goals of Interrogation

The updated U.S. Field Manual on Insurgencies and Counterinsurgencies (COIN) the Manual reflects a virtual global unanimity in its depiction of accurate and up-to-date intelligence as a key resource for the state facing terrorist challenges.⁹⁴ Intelligence is the foundation of counter-insurgency action by the state. The COIN strategy outlined in the Manual draws on a variety of cross-jurisdictional examples to highlight the consistency of this insight.

At the outbreak of the Northern Ireland conflict, the authorities' intelligence was famously poor, producing heavy reliance on prisoner interrogation.⁹⁵ In the short-term this deficit was tackled as a variety of intelligence agencies all operating in the jurisdiction built up informer networks,⁹⁶ constructed vast databases recording details of homes and family life in insurgent-dominated areas, and later developed ever more effective aerial and electronic surveillance techniques.

If the need for intelligence is a counter-insurgency truism, another is that interrogation purposes have bifurcated, producing partly incompatible goals: the discovery of data (typically the function of intelligence operatives), and the generation of confessions usable as evidence at trial (typically a police function). The latter entails examination of interrogation's results by the courts, perhaps retrospectively imposing the juridic upon the interrogation room; the former may dictate that interrogation be conducted according to a simple test of effectiveness, perhaps involving significant unlawfulness (including torture). In the authoritarian state, this bifurcation may make little difference as the courts may be willing to overlook legal shortcomings in the evidence, but in the *rechtsstaat*,⁹⁷ there are likely to be limits to courts' willingness to convict on confessions obtained

94. HEADQUARTERS, DEP'T OF THE ARMY & HEADQUARTERS, U.S. MARINE CORPS, FIELD MANUAL 3-24 (MARINE CORPS WARFIGHTING PUBLICATION 3-33.5), INSURGENCIES AND COUNTERINSURGENCIES, at 1-19, 1-20 (May 2014), <https://fas.org/irp/doddir/army/fm3-24.pdf>.

95. Cf. FRANK KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY AND PEACEKEEPING* 142-43 (1971).

96. See Ron Dudai, *Informers and the Transition in Northern Ireland*, 52 BRIT. J. CRIMINOLOGY 32, 35 (2012).

97. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 467 & n.127 (2008).

through abrasive interrogation. This bifurcation also manifested itself for a considerable period in Northern Ireland, with separate administrative guidelines drawn up in 1977 (Guide to the Emergency Powers) on interrogation for intelligence-gathering as distinct from assembling legally-admissible evidence.⁹⁸ It ended formally in 1991 as the conflict was also heading into its end-game phase. In the Courts, the rules on the admissibility of evidence were weakened, thereby making confessional evidence the mainstay of many Diplock court trials with all the attendant challenges of legitimacy and fairness.⁹⁹

The dilemmas in this sphere are likely to be particularly acute where the state initially embarks on a strategy of interrogation for intelligence-gathering, and later institutes trials on the basis of admissions obtained under interrogation. In the common law world, the only option is likely to be the alteration or abandonment of rules on admissibility of confessions. In the U.S. experience, the first generation of military commissions can be seen partly as an attempt to create quasi-judicial entities producing convictions using material from intelligence-oriented interrogation.¹⁰⁰ This strategy, aiming at reliance upon unlawfully obtained confessions and therefore at the exclusion of the juridic, proved non-viable over time, as before the most recent generation of Military Commissions such confessions became inadmissible.¹⁰¹ In parallel, bifurcation in the United Kingdom ended with the Terrorism Act 2000 (Cessation of Effect of Section 76) Order, 2002, affirming again a non-linear move from exception to a form of regularization, in the envelope of permanent anti-terrorism legislation.¹⁰² Clearly the juridic trumps, but in a form of norm-exception hybrid that resists easy classification.

98. The Guidance was replaced by a code under section 61 of the 1991 EPA. Northern Ireland (Emergency Provisions) Act 1991, c. 24, § 61 (UK). With respect to the Northern Ireland Office's Guide to the Emergency Powers, police are reminded of the necessity to caution before questioning only when the detainee is suspected of an offense and when questions are put for the purpose of obtaining evidence to be put in court. The inference may be correctly drawn that not all persons are detained in connection with offenses nor questioned about them. CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 195 (2d ed. 1992). The use of the Guidance is also discussed in MARK URBAN, *BIG BOYS' RULES: THE SAS AND THE SECRET STRUGGLE AGAINST THE IRA* (1992). The parallels to this challenge in the United States are aptly illustrated by the Guantánamo Military Commissions. Detainees initially held and interrogated using torture with the stated goal of eliciting information to prevent further attacks on the United States, were later processed for trial by military commission, creating the insurmountable obstacle of 'clean' evidence. See Christopher W. Behan, *Everybody Talks: Evaluating the Admissibility of Coercively Obtained Evidence in Trials by Military Commission*, 48 WASHBURN L.J. 563, 592 (2009); Carol Rosenberg, *How Long After Torture are Statements Admissible? Guantánamo Court Debates Question*, MIAMI HERALD (Aug. 4, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article165305107.html>; Morris D. Davis, *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115, 120 (2009).

99. On the rules of admissibility in Diplock Courts, see John D. Jackson & Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 CRIM. L.F. 503, 506–08 (1993).

100. See Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U.L. REV. 1683, 1721–22 (2009).

101. David Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVE (Oren Gross & Fionnuala Ní Aoláin, eds. 2013).

102. The Terrorism Act 2000 (Cessation of Effect of Section 76) Order 2002, SI 2002/2141 (UK).

V. ACCESS TO LAWYERS

Globally, the question of access by independent lawyers to clients held in interrogation centers is a fraught issue. Contact with the outside world, particularly within the first forty-eight hours of detention, is recognized as one of the best brakes on detainee ill-treatment.¹⁰³ A prisoner may find herself having to deal with a mass of unfamiliar legal requirements in a highly charged environment. From the state's perspective, access to independent lawyers may be seen to break interrogation's rhythm, limiting its effectiveness. Where the interrogation is conducted by, or at the behest of, the secret state, unlawfulness may be common, providing independent lawyers with opportunities ripe for legal exposure in a way that conflicts with the secret state's agenda and effectiveness. Similarly, there may be resistance to lawyers' presence during interrogation, not simply because this would hamper interrogators' style, but also because the state will argue that sensitive information with which the detainee should be confronted cannot be disclosed in the lawyer's presence. Finally, the state may conflate the lawyer's professional duty to her client's case with unprofessional sympathy with the client's cause, perhaps presuming that "they will pass information to terrorists" and/or "they are terrorists."¹⁰⁴ Even if the state (particularly the secret state), succeeds at first instance in whole or in part to exclude lawyers from interrogation centers, in the *rechtstaat*, multiple challenges by lawyers are likely in the superior courts.¹⁰⁵ Lawyer participation therefore becomes a site of conflict where the battle for its juridification consistently plays out.

U.S. authorities have, at various points, attempted to strictly limit access to civilian counsel for those Guantánamo prisoners without pending habeas petitions (although at least one federal court has rejected these restrictions).¹⁰⁶ During

103. See G.A. Res. 39/46, annex, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, art. 6, ¶ 3 (Dec. 10, 1984).

104. Threats against lawyers were pervasive in Northern Ireland. See SIR MICHAEL MORLAND, DAME VALERIE STRACHAN, AND SIR ANTHONY BURDEN, *THE ROSEMARY NELSON INQUIRY REPORT*, 2011, HC 947, (UK); Fred Attewill, *RUC Ignored Death Threats Against Murdered Lawyer*, *THE GUARDIAN* (Sep. 19, 2007), <https://www.theguardian.com/uk/2007/sep/19/northernireland>; Owen Bowcott, *Pat Finucane Case: The Secret Service Failures and Black Ops That Led to Killing*, *THE GUARDIAN* (Dec. 12, 2012), <https://www.theguardian.com/uk/2012/dec/12/pat-finucane-secret-service-killing>; Mark McGovern, *State Violence and the Colonial Roots of Collusion in Northern Ireland*, 57 *RACE & CLASS*, no. 2, 2015, at 3; HUMAN RIGHTS FIRST, *A TROUBLING TURN: THE VILIFICATION OF HUMAN RIGHTS LAWYERS IN NORTHERN IRELAND* (2017), <http://www.humanrightsfirst.org/sites/default/files/A-Troubling-Turn.pdf>.

105. See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Averill v. United Kingdom*, 2000-VI Eur. Ct. H.R. 203; *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. 29 (ser. A) (1993); Stephen J. Schulhofer, *Checks and balances in Wartime: American, British and Israeli Experiences*, 102 *MICH. L. REV.* 1906 (2004).

106. *In re Guantánamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *74 (D.D.C. Sept. 6, 2012); see also Amy Shepard, Note, *Hinging on Habeas? The Guantánamo Memorandum of Understanding and the Detainees' Continued Right to Counsel*, 1 *NAT'L SEC. L.J.* 151 (2013) (evaluating the Memorandum of Understanding restrictions struck down in *In re Guantánamo Bay Detainee Continued Access to Counsel*); Fionnuala Ní Aoláin, *Lawyers, Military Commissions and the Rule of Law in Democratic States*, in *COUNTER-TERRORISM, CONSTITUTIONALISM AND MISCARRIAGES OF JUSTICE* (Colin King, Genevieve Lennon and Carole McCartney, eds. 2018).

interrogation, prisoners had been denied access to lawyers of any kind, at least from 2002 to 2004.¹⁰⁷ The protection of the attorney-client privilege remains an ongoing issue at the Guantánamo Military Commissions. In pre-trial proceedings, the docket has consistently dealt with defense motions to permanently and verifiably disable audio monitoring equipment capability in attorney-client meeting rooms,¹⁰⁸ as well as the effect on the attorney client relationships of an FBI investigation regarding one defense team and the infiltration of that same defense team by the FBI.¹⁰⁹ In earlier versions, the Administration also sought in specific cases to limit and control the independence of counsel defending persons suspected of terrorist offenses. For example, in the case of Richard Reid, the U.K. national who tried to ignite explosives contained in his shoes on an American Airlines flight, Reid's lawyers from the Federal Public Defender's office refused to sign a document, based on the Special Administrative Measures, that effectively restricted their ability and independence to conduct their client's defense.¹¹⁰ Punitive measures followed, including the administration's decision to cut off access to their client.¹¹¹ In January 2007, a senior U.S. official condemned U.S. law firms for representing inmates of the Guantánamo internment camp, explicitly stating that it was "shocking" that they were "representing detainees down there" and suggesting that when corporate America was aware of their practices "those CEO's are going to make those law firms choose between representing terrorists or representing reputable firms."¹¹² A speedy Pentagon retraction followed these remarks,¹¹³ affirming a thread we analyze further here, namely the

107. See LAUREL FLETCHER ET AL., HUM. RTS. CTR. AND INT'L HUM. RTS. L. CLINIC, U.C., BERKELEY, GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES 77 (2008).

108. See Appellate Exhibit 133RR, Mr. al Baluchi's Motion To Permanently and Verifiably Disable Audio Monitoring Capability in Attorney-Client Meeting Rooms, United States v. Mohammad (Military Comm'n's Trial Judiciary July 17, 2017), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133RR\(AAA\)\).PDF](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133RR(AAA)).PDF).

109. Ní Aoláin, *Lawyers, Military Commissions and the Rule of Law in Democratic States* supra note 106; David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981 (2008).

110. United States v. Reid, 214 F. Supp. 2d 84, 87-88 (D. Mass. 2002); see also Douglass Cassell, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811 (2008) (discussing the use of preventative detention in Reid and other cases).

111. See Reid, 214 F. Supp. 2d at 88. Special Administrative Measures (SAM's) were regulations promulgated by Attorney General Ashcroft which allowed the imposition upon Federal Prisoners restrictions inter alia on communication. *Id.* at 86. All SAMs are prisoner specific. *Id.* at 87. The government eventually stood back from the measures and the limitations prevented what would have been a likely constitutional clash over the meaning and application of the Sixth Amendment. See *id.* at 100.

112. Charles "Cully" Stimson, the Deputy Assistant Secretary of Defense for detainee affairs, sought to discourage American corporations from doing business with law firms that represented inmates of the Guantánamo internment camp. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), <http://www.nytimes.com/2007/01/13/washington/13gitmo.html>; Editorial, *Editorial, Round Up the Usual Lawyers*, N.Y. TIMES (Jan. 13, 2007), <https://www.nytimes.com/2007/01/13/opinion/13sat1.html>.

113. Josh White, *U.S. Official Apologizes for Guantánamo Remarks*, WASH. POST (Jan. 17, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR2007011601442.html>.

continued (if limited) traction that accords to the right to counsel even when other related and fundamental rights in a due process context are being largely stripped of meaningful content.

Clearly if restricting the pool of defense lawyers at Guantánamo was aimed at producing a cohort of docile advocates, the strategy failed. Links established by military lawyers with their civilian counterparts facilitated strategic claims-making in the civil courts, ultimately undermining three generations of Military Commissions.¹¹⁴ Moreover, the robust defense of detainees undertaken by military defense lawyers presents an interesting sub-case of the dampening effect of legal counsel on the operation and effectiveness of the closed state.¹¹⁵

As the conflict reignited in Northern Ireland (from 1969 onwards), persons held under emergency powers initially had no explicit right of access to a lawyer during detention. Eventually, a conditional right was granted in 1987.¹¹⁶ While a proposal to limit access to a pool of selected counsel surfaced at one time,¹¹⁷ the scheme came to nothing. Defense counsel faced challenges of access but rarely complete denial of legal representation. Faced with the numbers of CID officers

114. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); In re *Khalid Shaikh Mohammad*, 866 F.3d 473 (D.C. Cir. 2017) (per curiam); In re *Khadr*, 823 F.3d 92, 97 n.2 (D.C. Cir. 2016); In re *al-Nashiri* 791 F.3d 71, 75–76 (D.C. Cir. 2015).

115. See Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010) (analyzing the role of military lawyers in curbing transgressions and affecting legal culture in the zone of conflict).

116. Northern Ireland (Emergency Provisions) Act 1987, c. 30, § 15 (UK).

117. The issue arose when the Independent Commissioner for the Holding Centres, Sir Louis Blom-Cooper, came to consider the UN Basic Principles on the Role of Lawyers, principle 8 of which provided: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with and consult with a lawyer without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.” FIRST ANNUAL BLOM-COOPER REPORT, *supra* note 83, at 65 (quoting Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers, art. 8 (Aug. 27–Sept. 7, 1990)). Provisions, such as those in the 1987 EPA allowing police officers to listen in on consultations would appear to have been ruled out by principle 8. Compare 1987 EPA, *supra* note 110, at § 15, ¶ 11, with Basic Principles, art. 8. In addition, denial of access to solicitors as permitted in Northern Ireland would appear to conflict with principles 1, 5 and 8. Blom-Cooper in his first report took a different view. Drawing a distinction between legal advice which is required prior to charging, and legal assistance which is called for once a suspect has been charged, his opinion was that the UN principles “relate exclusively to criminal proceedings. A person arrested on suspicion of having committed a crime, but who has not yet been charged with any offence, becomes subject to the rules of criminal justice only on being charged.” FIRST ANNUAL BLOM-COOPER REPORT, *supra* note 83, at 66. The UN principles were therefore inapplicable to the situation in the interrogation centers prior to charging. *Id.* Elsewhere he opined: “It is this legal advice to which the suspect is entitled to have access. It is, moreover, an entitlement to a service and not to an individual professional who is qualified to provide advice.” *Id.* at 68. For that reason, he felt free to draw up a scheme whereby in place of the existing deferrable right to have access to a solicitor of his/her choice, the detainee would have access to a lawyer employed by a legal advice unit administered by the Law Society for Northern Ireland, and attached to the holding centre. *Id.* at 68–71. Other lawyers, in his view, “should be debarred from any professional involvement at the Holding Centre.” *Id.* at 70. See also B. Fitzpatrick and Clive Walker, *Holding Centres in Northern Ireland, the Independent Commissioner and the Rights of Detainees*, 4 EUR. HUM. RTS. L. REV. 27, 38 (1999) (explaining that Blom-Cooper’s promotion of the Legal Advice Unit failed).

described above, detainees were at a distinct legal disadvantage. The officers would have been familiar with the possibly damning legal consequences that might flow from the use of particular words or phrases by the suspect, while she was almost invariably not. This was particularly so in the context of the limitations on the “right to silence,” the common-law incarnation of the right against self-incrimination, introduced in Northern Ireland in 1988.¹¹⁸ The problems were compounded by the nebulosity of the grounds for arrest under the Prevention of Terrorism Act (suspicion of involvement in terrorism), which might result in the detainee not being told of which (if any) specific offense she was suspected. And in the case of an incommunicado arrest where family and friends were not informed, this general insecurity would have been exacerbated by an acute sense of isolation for the detainee.

PTA detainees were therefore particularly in need of access to their lawyers – indeed in England and Wales during the same period it was the norm not only to allow such consultation when requested, but also to permit counsel to sit in on her client’s interrogation. In Northern Ireland, the position was quite different. The 1991 Emergency Provisions Act provided that the right of access by a person held under the “terrorism provisions”¹¹⁹ could be delayed for up to 48 hours at a time, where a police superintendent had reasonable grounds to believe the exercise of the right might lead to such consequences as the harming of evidence or the alerting of suspects not yet arrested.¹²⁰

These powers are based upon, but are more draconian than, provisions of PACE which have also been followed in PACE (NI) 1989.¹²¹ Despite the fact that the uniform branch of the Royal Ulster Constabulary (RUC) are regarded as having overall responsibility for the detainee’s welfare, the decision on access to legal advisors was invariably made by an officer from the detective branch, those engaged specifically in direct counter-terrorism management.

In line with experience elsewhere around the globe, it is possible that denial of access to counsel was motivated less by suspicion that information would be passed to paramilitary groups than by fear that access would interfere with interrogation. Accordingly, a number of motions attempted to challenge and force

118. See generally SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* (2d ed. 1998); Andrew Ashworth & Peter Creighton, *The Right of Silence in Northern Ireland*, in *LESSONS FROM NORTHERN IRELAND* 117 (Jon Hayes & Paul O’Higgins eds., 1990).

119. Northern Ireland (Emergency Provisions) Act 1991, c. 24, § 45(1) (UK).

120. Section 45(8) of the 1991 EPA, *id.*, provided for delays where a senior officer believes access “(a) will lead to interference with or harm to evidence connected with a scheduled offence or interference with or physical injury to any person; or (b) will lead to the alerting of any person suspected of having committed such an offence but not yet arrested for it; or (c) will hinder the recovery of any property obtained as a result of such an offence; or (d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or (e) by alerting any person, will make it more difficult—(i) to prevent an act of terrorism; or (ii) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism.” *Id.* at § 45(8).

121. The Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (N. Ir. 12) art. 59.

some reasonable explanation for the delay, thus confirming that the matter could be susceptible to meaningful scrutiny by the courts.¹²²

Following a series of high court decisions concerning access to legal counsel there was a marked fall-off in denial of access to legal counsel in the 1990s in Northern Ireland, suggesting that repeated challenges may have had an ameliorating effect on police conduct.¹²³ This represents an important point of juridification and a tipping from *de facto* deference to intelligence towards prioritization to due process constraints. Also significant was an emerging practice of courts in the

122. In *Re McNearney*, the Belfast High Court held that the police (RUC) had to offer specific reasons for the denial of access to legal counsel, and that general claims would not suffice. *See, Re McNearney* [1991] High Court (NI). In *Re Duffy*, the solicitor whose access had been denied sought to challenge his exclusion by reliance on an undertaking which he had provided to the RUC, "Not to communicate with any person, any matter as to what occurred during consultation for the deferred period" and "[t]o maintain total supervision over any papers relating to this consultation." In this instance access was granted since the High Court accepted the argument that "there is now no risk of a message containing a coded warning to terrorists being conveyed, because the solicitor has given an undertaking, the sincerity of which has not been challenged, that he will not pass on any message to anyone." This was not however, a blanket validation of such undertakings, since the court was at pains to state that it recognized that there was a possibility that in a particular case, an undertaking "could not be relied upon." The giving of such undertakings therefore presents a number of problems for lawyers. Were the police to assert, as it was suggested in *Re Duffy* they might, that a particular solicitor's undertaking was unreliable, this would have the effect of marking out the solicitor in question as a 'terrorist sympathizer' with all the consequences which could flow from such a categorization. If the grounds on which the RUC's opinion of a particular solicitor were to be challenged, the police would almost certainly claim that this was a confidential intelligence matter, the sources for which could not be disclosed. *Re Duffy's Application* [1991] 7 N.I.J.B. 62 HC. Even were the court not to accept the RUC's assertion, the damage would have been done. Moreover, as the Lawyers Committee for Human Rights pointed out, undertakings not to disclose information are in direct conflict with the solicitor's obligation to his/her client to use information gleaned from the initial interview to seek exculpatory evidence without delay, or simply to relay pressing messages to the detainees' family. LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND (1993). Subsequent rulings have, in any case, tended to undermine the usefulness of these undertakings. *Re McKenna and McKenna* involved an application for judicial review of denial of access where the solicitor in question filed an undertaking in the usual terms. In response, the police asserted that where a solicitor had submitted an undertaking in good faith, a paramilitary group would still force him/her to divulge information through kidnapping and torture. This prompted the solicitor to submit an affidavit in which he averred that "It has not been my personal experience nor has it been the experience of any member of this firm that any pressure has been brought to bear by members of terrorist organizations to divulge confidential information." In the event, police investigations were completed before the matter came to court, and access had been granted. Nevertheless, the Court of Appeal took the opportunity to deal with the substance of the matter holding that the police had satisfied the burden of proof that there were reasonable grounds for the Superintendent's belief "because the Provisional IRA is a completely ruthless and unscrupulous terrorist organization which would be fully prepared to threat (sic), against him or his family, to compel [the solicitor] against his will and in breach of his undertaking, to disclose to it what the applicants had told him in the course of consultations." *Re McKenna and McKenna* [1991] Court of Appeal (NI, unreported). The ruling was buttressed by the decision of the Court of Appeal in *Re Kenneway*, in which substantially the same police argument was accepted. While there has, in Britain, been some willingness to accept the 'coded message' argument when considering the corresponding provisions of PACE, the courts in general have taken a more robust attitude to police assertions than has been evident in Northern Ireland and no 'kidnapping' argument has ever been accepted (or even presented). In *re Kenneway's Application* [1992] Court of Appeal (Northern Ireland) (unreported).

123. *See, e.g., R v. McNeill* [1993] NI 46, 48 CA; *R v. Harper* [1990] NI 28, 30 CA; *R v. Dillon and Another*, [1984] NI 292, 292 CA.

jurisdiction to issue interim injunctions which prevented interrogation prior to the hearing of the substantive issue. Thus, even where the application ultimately failed, the interrogation process had been interrupted. The change may also have come about from a realization that a strategy of over-reliance on far-fetched excuses before judges for denial of access would prove untenable in the long term.¹²⁴ A further factor facilitating access may have been the willingness of the courts to exclude confessions obtained when access to a lawyer has been manifestly unlawfully denied,¹²⁵ though in other cases where admissibility of confessions has been challenged on the basis of denial of access, the Diplock courts displayed a willingness to accept the kind of police arguments advanced in the judicial review cases.¹²⁶

Developments in relation to access to legal advice in the 1990s were not, however, uniformly positive, as lawyers reported an innovative tactic of granting access immediately following arrest, and then subsequently using the power to defer access to allow questioning to continue.¹²⁷ This had the advantage from the police point of view of enabling the investigating officers to claim that the suspect had immediate access to independent legal advice if the matter was raised (for instance, where the admissibility of a confession is at issue). But, from the detainee's point of view, this arrangement offered the distinct disadvantage that since the consultation would generally take place before the interrogation started, she would typically have no idea of the charges (if any) she would face, and thus the effective legal advice the lawyer would provide was very limited. Where access was granted, it is not at all clear that the confidentiality of the lawyer-client relationship was respected, even where there had been no stipulation that the consultation take place within the vision of a police officer.

At the start of this century, patterns from the 1990s concerning access to counsel for terrorism related (PTA) detainees remained largely intact, although some shifts were evident. Most striking in our survey data was the extent to which the picture of PTA detentions provided the reverse image to those under PACE (NI). In 86 percent of PTA detentions, the prisoners' lawyer was not present during interrogation (Table 5), the typical practice being that access was granted when the detainee was first brought to Castlereagh, and then after forty-eight hours. In the case of PACE (NI) detentions however, 87 percent of prisoners had their lawyers present (Table 5). Reflecting a degree of softening in the police position, 8 percent of PTA detainees were permitted to have their lawyers present during some or all of the

124. For example, to many seasoned observers of the legal system in Northern Ireland, the prospect of solicitors or their families being kidnapped and mistreated by paramilitary groups seems less than entirely convincing. No evidence was forthcoming that such events had taken place in the past, and were such kidnappings to occur, it is unlikely that solicitors would continue with their current work practices. The result therefore for paramilitary organizations whose members (or alleged members) were regularly appearing before the Courts, would have been practically entirely counter-productive.

125. See *R v. Gilgunn* (Oct. 1991) (unreported).

126. See *R v. Harper* [1990] NI 28 CA.

127. See Martin S. Flaherty, *Interrogation, Legal Advice, and Human Rights in Northern Ireland*, 27 COLUM. HUM. RTS. L. REV. 1, 7–8 (1995).

Table 5. Detention Power & Presence of a Lawyer

	Lawyer Presence & Interrogation								Total	Col %
	L. Present All Interrogations		L. Present Some Interrogations		Lawyer Not Present		Not Known			
<i>Arrest Power</i>		Row %		Row %		Row %		Row %		
S.14 PTA 1989	3	4%	3	4%	69	86%	5	6%	80	63%
S.18 EPA 1996	0	0%	0	0%	0	0%	0	0%	0	0%
Art 26 PACE (NI) 1989	33	87%	1	3%	4	11%	0	0%	38	30%
Other	5	63%	0	0%	3	38%	0	0%	8	6%
Not known	1	100%	0	0%	0	0%	0	0%	1	1%
Total	42	33%	4	3%	76	60%	5	4%	127	100%

interrogation. These prisoners benefited from a regime that had already been in place in England, and would be introduced in Northern Ireland a few years later.

The issue of access to counsel also illustrates the salience of the Diplock system’s hybridity at the start of the twentieth century. Two quite distinct feeder mechanisms are identifiable: the PTA route and that of PACE (NI). This multiplicity of routes to access counsel carried through to trial, where the insertion of a PACE stream into the Diplock system seemed to present few institutional difficulties (the issue of confessions is discussed below). This finding underscores our broader hypothesis that there is fluidity both ways: exception-norm and norm-exception. This both provides further support for the juridification hypothesis, but also implicitly articulates some

ambivalences: the fact that towards the end of the conflict the ordinary law on detention could be knitted seamlessly with Diplock trials meant that the system approximated more to the legal norm; but this may only have been possible at least partly because the legal norm, (represented by PACE (NI)), was heavily shaped by the exception (represented by the PTA). Overall, however, access to lawyers has improved as evidenced by a marked increase in access to lawyers under PACE conditions,¹²⁸ approximated to the exception (represented by PTA).

VI. CONFESSORIAL EVIDENCE AND THE CLOSED STATE

Walsh's 1984 study found that 90 percent of Diplock cases were based solely or mainly on confessions.¹²⁹ The figure is striking, particularly when seen against the background of abusive interrogation in Northern Ireland in the 1970s.¹³⁰ The key to understanding the role played by confessions in the Diplock system lies in the special rules for the admissibility of confessions before Diplock courts introduced by the Emergency Provisions Act.¹³¹ At the start of the conflict the ordinary law demanded that confessions be voluntary in order to be admissible. Predictably, confessions obtained in interrogation-oriented facilities were ruled inadmissible by the ordinary courts. In order to preserve this interrogation-oriented approach, the voluntariness test was abolished for the Diplock courts.¹³² In its place came a test that made statements inadmissible if obtained by inhuman or degrading treatment or torture.¹³³ This begged the question of the degree of coercion short of inhuman or degrading treatment (the European Convention on

128. DAVID BROWN, HOME OFFICE, PACE 10 YEARS ON: A REVIEW OF THE RESEARCH 91–121 (Home Office Research Study 155, 1997) (UK); TOM BUCKE & DAVID BROWN, HOME OFFICE, IN POLICE CUSTODY: POLICE POWERS AND SUSPECTS' RIGHTS UNDER THE REVISED PACE CODES OF PRACTICE 19–29 (Home Office Research Study 174, 1997) (UK). Northern Ireland Office statistics for terrorism arrests after the passage of the Terrorism Act show limited refusals / delays in access. *See, e.g.*, NORTHERN IRELAND STATISTICS AND RESEARCH AGENCY, NORTHERN IRELAND OFFICE, RESEARCH AND STATISTICAL BULLETIN 2/2002, NORTHERN IRELAND STATISTICS ON THE OPERATION OF THE TERRORISM ACT 2000: JULY-SEPTEMBER 2001, at 17, <http://webarchive.nationalarchives.gov.uk/20040722012500/http://www.nio.gov.uk/azlist.htm>.

129. WALSH, *supra* note 20, at 84.

130. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) (the judgments and decisions in the case); Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) (multiple years) (the pleadings, European Commission on Human Rights' report to the European Court of Human Rights, and other documents); Samantha Newbery, *Intelligence and Controversial British Interrogation Techniques: The Northern Ireland Case 1971–2*, 20 IRISH STUD. INT'L AFF. 103, 103–04 (2009).

131. The Northern Ireland (Emergency Provisions Act) 1973, c. 53, § 6 (UK).

132. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, para. 80 (UK) (noting that the legal requirement of voluntary admission would exclude all statements uncovered through interrogation).

133. The first revised test was set out in the 1973 EPA, *supra* note 124. Over time, this changed slightly, so that section 11 of the Northern Ireland (Emergency Provisions) Act 1991 provided:

(2) Where . . . —

- (a) the prosecution proposes to give, or (as the case may be) has given, in evidence a statement made by the accused, and
- (b) prima facie evidence is adduced that the accused was subjected to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture), in order to induce him to make the statement, then, unless the prosecution satisfies the

Human Rights standard) that might be permissible. While at least one judge seemed willing to tolerate “a moderate degree of physical ill-treatment,”¹³⁴ this approach was not acceptable to the superior courts. The message that interrogators appear to have received is that confessions did not need to be voluntary, but could not be relied on if the detainee bore marks of physical ill treatment. This provided the legislative backdrop to the plethora of ill-treatment allegations in the late 1970s. Over the years, the test for admissibility was tightened somewhat by statute and through case law, but it remained distinct from the ordinary law. If reliance on the confession declined overall, it still retained obvious attractions for the intelligence operatives who conducted the interrogations. First, it had the virtues of simplicity: a conviction could be obtained on no evidence other than a statement provided by the defendant. Second, where a defendant made a confession, there was no need to go behind the statement in a way that might disclose why the interrogators had begun questioning her about that particular crime. The result could be to protect informers and/or electronic surveillance strategies.

Our data tracked the decline of confessions in the Diplock system, with a significant downward shift in 1988/89, culminating in a situation in 2001–02 in which confessions were present in only 25 percent of cases (Table 7). What empirical evidence at the latter stages of the conflict in Northern Ireland illustrates is that safeguards designed to guard against abusive interrogation practices, and heightened scrutiny by the U.N. and European Committees Against Torture,¹³⁵ seem to have had a practical impact in the custodial space. Certainly, at least, claims of ill-treatment greatly decreased. One contributory factor that may explain this shift is that the state became increasingly reliant upon (and more expert in gathering) “hard” evidence: this evidence would typically include scene-of-the-crime

court that the statement was not obtained by so subjecting the accused in the manner indicated by that evidence, the court shall do one of the following things, namely—

- (i) in the case of a statement proposed to be given in evidence, exclude the statement;
- (ii) in the case of a statement already received in evidence, continue the trial disregarding the statement; or
- (iii) in either case, direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).

(3) It is hereby declared that, in the case of any statement made by the accused and not obtained by so subjecting him as mentioned in subsection (2)(b) above, the court in any such proceedings as are mentioned in subsection (1) above has a discretion to do one of the things mentioned in subsection (2)(i) to (iii) above if it appears to the court that it is appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice. Northern Ireland (Emergency Provisions) Act 1991, c. 24, § 11 (UK).

134. R. v. McCormick [1977] NI 105, 111 (Belfast).

135. See, e.g., Commission for the Prevention of Torture, *Conditions of Detention in Police Establishments: United Kingdom (Northern Ireland) Visit Report 1993*, COUNCIL OF EUROPE (Mar. 13, 1994), <http://hudoc.cpt.coe.int/eng?i=p-gbr-19930720-en-12>; Commission for the Prevention of Torture, *Recapitulations and Conclusions/ A. Castlereagh Holding Centres*, COUNCIL OF EUROPE (July 21, 2000), <http://hudoc.cpt.coe.int/eng?i=p-gbr-19991129-en-35>; Committee Against Torture, Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CAT/C/67/Add. 2 (May. 27, 2004).

forensics and fiber evidence (which figured significantly in our survey).¹³⁶

One further dimension that may explain the data's demonstration of a decrease in confession-based evidence is a shift due to the abrogation of the right against self-incrimination – the “right to silence,” discussed above. The dynamics of this shift are the subject of a separate analysis in our larger research project, and that analysis will not be replicated here. What can be noted is that the Criminal Evidence (NI) Order 1988 permits inferences, which may be negative, from a detainee's failure to mention a fact that she later relies upon in defense, or where she fails to account for marks on her clothes, or for her presence in a particular place.¹³⁷ A detainee may have perfectly understandable reasons for staying silent, and yet run the risk of negative inferences.¹³⁸ In any case, the Order may place the interrogator in a win-win situation. If the detainee speaks, she may incriminate herself, but if she stays silent in response to specific questions, she may also incriminate herself. Our survey highlighted universal use of a new general caution¹³⁹ (“post-Miranda” in U.S. terms), and significant levels of use of the

136. This instinct seemed to have been shared by non-state actors also evidenced by the bombing of the building which housed and processed such evidence in the 1990s. See David McKittrick, *Damage in Huge Blast Put at 20m Pounds: A Belfast Housing Estate Counts the Cost of an IRA Bomb Which May Have Destroyed Vital Criminal Evidence*, THE INDEPENDENT (Sep. 24, 1992), <http://www.independent.co.uk/news/uk/damage-in-huge-blast-put-at-20m-pounds-a-belfast-housing-estate-counts-the-cost-of-an-ira-bomb-which-1553481.html>.

137. The Order enables a judge, jury or magistrate to draw ‘such inferences . . .’ as appear proper from an accused's silence in four main circumstances:

- * (Art. 3) where during police questioning s/he fails to mention a fact relied on in her defence in subsequent proceedings;
- * (Art. 4). where at his trial s/he fails to give evidence or to answer questions (without cause) when requested by the court;
- * (Art. 5) where following arrest, s/he fails when requested to account for the presence of any object, substance or mark on her person, clothing or in her possession or in any place in which s/he is at the time of her arrest;
- * (Art. 6) where following arrest, s/he fails to account for her presence at a place at the time the offence for which s/he was arrested is alleged to have been committed.

Criminal Evidence (Northern Ireland) Order 1988, SI 1988/1987 (N.I. 20) (as amended). Silence in these circumstances can be taken to amount to corroboration of other evidence against the accused, *see id.*, but a person cannot be convicted solely on the basis of an inference from her silence. *Id.* at Art. 2(4). Inferences under the Order can be drawn at committal stage, when deciding whether the accused has a case to answer at the end of the prosecution case, and when reaching a finding of guilt or innocence. *Id.* at Art. 3(2).

138. In the case of someone detained under the PTA, since the police do not need to explain the precise offenses suspected, the person may be afraid to break her silence, because to do so may risk suggesting involvement in some as yet unknown crimes. The person may also be afraid that to speak will implicate others, and thus attract the ‘informer’ label, with possible lethal consequences at the hands of paramilitary groups. Uncertainty about their legal position may also lead them to refuse to answer questions until they have had the opportunity to speak to their solicitor, an event which, as discussed above, can be deferred for 48 hours at a time.

139. In response to the introduction of the Order, a new general caution was introduced by the RUC in the following terms (1988):

You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence.

provisions of the Order in relation to such issues as requiring explanations for the presence of fibers or for the defendant's location at particular times.

The Order was introduced in Northern Ireland by an expedited "Order in Council" procedure as part of an "anti-terrorist package" following one of the region's periodic upsurges in violence.¹⁴⁰ Shortly thereafter, with some pockets of dissent,¹⁴¹ virtually identical provisions were legislated for in Britain.¹⁴² The result was that provisions initially having the aura of exceptionality soon became entrenched and normalized, reinforcing the point that the exception changed the norm in its own image, and the scope of normal criminal justice norms was irrevocably changed.

Defense lawyers play a critical part in the legitimization process that is ever-present in exceptional court regimes. The right to defend oneself or to be defended by legal assistance of one's own choosing is deeply entrenched in the normative framework of many constitutions and also in international human rights' law treaties.¹⁴³ In multiple contexts the state places specific constraints on the access to and independence of defense counsel.¹⁴⁴ Paradoxically, lawyers occupy a singular space by simultaneously providing the means to undermine the courts they operate within and legitimate them by the fact of their representation. Maintaining the convention of independent representation remains a defining

Additional forms of caution are employed where the RUC wish to invoke the provisions of art. 5 and art. 6 of the Order. Cited in *Averill v. United Kingdom* No 36408/97 ECtHR (Third Section), decision of 06.07. 1999.

140. One of the worst atrocities of the conflict was the Omagh Bombing, which swiftly led to further legal responses by the state. See *Omagh Bomb: 15 August 1998*, BBC (last viewed on Sep. 4, 2017), http://www.bbc.co.uk/history/events/omagh_bomb. The legislation which followed was the Criminal Justice (Terrorism and Conspiracy) Act 1998, c. 40 (UK). See Clive Walker, *The Bombs in Omagh and their Aftermath: The Criminal Justice (Terrorism and Conspiracy Act) 1998*, 62 MOD. L. REV. 879 (1999).

141. See ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1993, Cm. 2263, at 55 (UK) ("They may still choose to run the risk of such comment, or indeed to remain silent throughout their trial. But if they do, it will be in the knowledge that their hope of an acquittal rests on the ability of defending counsel either to convince the jury that there is a reasonable explanation for the departure or, where silence is maintained throughout, to discredit the prosecution evidence in the jury's eyes").

142. See, e.g., Criminal Justice and Public Order Act 1994, c. 33, §§ 34–38 (UK).

143. E.g. International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N. T.S. 171 ("Everyone charged with a criminal offense shall have the right . . . to be charged in his presence, and to defend himself in person or through legal assistance of his own choosing . . .").

144. See FIRST ANNUAL BLOM-COOPER REPORT, *supra* note 83, at 68–76 (recommending establishment of a "legal advice unit" to advise persons detained at Holding Centres and indicating that in most instances such unit would take the place of private solicitors). A cogent U.S. example is the decision of a federal judge in Manhattan to reject a request for a lawyer for Nazih Abdul-Hamed al-Ruqai, who faced indictment on conspiracy charges stemming from the 1998 bombing of two United States embassies in East Africa. See, e.g., Benjamin Weiser, *Request to Appoint Lawyer for Terror Suspect is Denied*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/nyregion/request-to-appoint-lawyer-for-terror-suspect-is-denied.html>. Acknowledging the importance of transparency and participation by external counsel in Foreign Intelligence Surveillance Court (FISC) proceedings, modifications to the Foreign Intelligence Surveillance Act (FISA) in 2015 permit appointment of amicus curiae to address concerns about legitimacy and independence at the FISC. See USA Freedom Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 267, 279-80.

aspect of Special Courts and Military Commissions in most contexts.¹⁴⁵ States seem generally willing to carry the costs of the internal and external critiques posed by such lawyers, including the ongoing possibility that strong representation may assist persons charged in being fully acquitted. The benefit to the state is ultimately linked to the perceptions of legitimacy that may follow from the services provided by defense counsel. Our analysis here seeks to chart what the impact of lawyers' presence will have on the substance and outcomes of interrogations.

The data's most surprising finding is that, in terms of confessions, it did not seem to make that much difference whether lawyers were present or not. This finding is counter-intuitive to much of the advocacy that has pervaded public and legal debates concerning access of terrorist detainees to legal counsel.¹⁴⁶ In our Northern Ireland dataset, confessions were more likely in situations covered by the regular criminal law (PACE (NI) cases) where defense counsel was present (29 percent) than in PTA cases (22 percent) where none was present (Table 6).

In many of the heated debates concerning detention of persons suspected of terrorist crimes, states continue to press for extended detention of suspects—and usually meet significant resistance from civil libertarians and others concerned with the effect on due process rights and the rule of law.¹⁴⁷ The latter's concerns are usually based on the dangers of abrogating basic common law and statutory principles concerned with regulating the time between detention and charging persons detained with an offense. There is also concern about the propensity for torture or ill-treatment in custody based on lack of access to a lawyer. Based on the data above, some the debate seems misplaced, at least as far as confessions are concerned. In this study, it seems clear that if a confession is going to be made by a terrorist suspect, it is likely to be made in the first 48 hours of detention—75 percent for oral confessions (Table 7). This suggests

145. Ní Aoláin, *Lawyers, Military Commissions and the Rule of Law in Democratic States* supra note 106.

146. See Charles Donahue, Jr., *An Historical Argument for Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1034–45 (1964) (summarizing the history of the right to counsel during the investigative process).

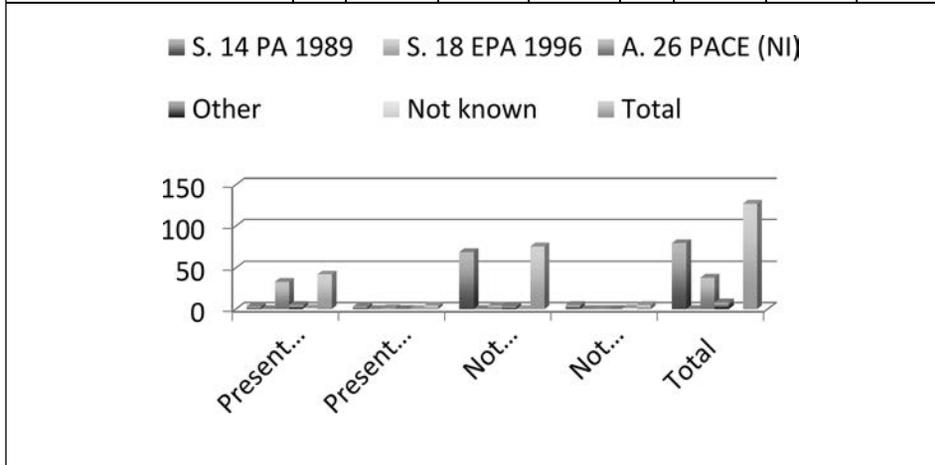
147. See, e.g., HOUSE OF LORDS AND HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-07, HL 157, HC 394 (UK), <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf>; CLAIRE FEIKERT, LAW LIBRARY OF CONGRESS, UNITED KINGDOM: PRE-CHARGE DETENTION FOR TERRORIST SUSPECTS (2008), <https://www.loc.gov/law/help/uk-pre-charge-detention/uk-pre-charge-detention.pdf>.

In France, following the July 2016 Nice attack, authorities extended a state of emergency that had been invoked following previous attacks in 2015 pursuant to France's 1955 governing states of emergency. See Loi 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence [Law No. 2016-1767 of 19 December 2016 Extending the Application of Law No. 55-385 of 3 April 1955 Regarding the State of Emergency], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 20, 2016. For a criticism of the expansion of police power in France, see Elias Groll, *Hollande's Post-Paris Power Grab*, FOREIGN POLICY (Nov. 20, 2015), <http://foreignpolicy.com/2015/11/20/hollandes-post-paris-power-grab/>.

For a discussion of this issue in Germany, see Christopher Michaelson, *From Strasbourg with Love: Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights*, 12 HUM. RTS. L. REV. 148 (2012).

Table 6. Presence of Lawyers and Confessions

	Confession						Total	Col %
	Oral		Written & Oral		None			
<i>L. Presence & Interrogation</i>	Count	Row %	Count	Row %	Count	Row %	Count	Col %
L. Present All Interrogations	12	29%	1	2%	29	69%	42	33%
L. Present Some Interrogations	0	0%	0	0%	4	100%	4	3%
L. Not Present	17	22%	1	1%	58	76%	76	60%
Not known	0	0%	0	0%	5	100%	5	4%
Total	29	23%	2	2%	96	76%	127	100%



that efforts to protect the due process rights and to protect access to legal counsel rights for individuals should be concentrated on this first critical period. It indicates that state efforts to keep detainees for longer periods on the basis that more time produces more confessions has little empirical basis. There may, of course, be other rationale for longer detention from the state’s perspective—including other forms of evidence gathering and case preparation—but efficacy of producing confessions is not one of them.

In the period mapped here we identify a discrete group—9 percent—who appear to be subject to more extensive interrogation (Table 7). This group is particularly significant in terms of international legal regulation, since significantly extended detention of these individuals would likely be dependent on derogation by the United Kingdom from its international obligations under the International

Table 7. Time in Custody and Confessions

		Time in Police Custody																	
		0-12		12-24		24-36		36-48		48-60		72 - 96		96+		Not Known		Total	
<i>Confessions</i>			Row %		Row %		Row %		Row %		Row %		Row %		Row %		Row %		Row %
Oral	1	34%	5	17%	3	10%	4	14%	2	7%	0	0%	2	7%	3	10%	29	100%	
Written & oral	0	0%	0	0%	0	0%	1	50%	0	0%	0	0%	0	0%	1	50%	2	100%	
None	13	14%	25	26%	19	20%	20	21%	1	1%	3	3%	10	10%	5	5%	96	100%	
Total	23	18%	30	24%	22	17%	25	20%	3	2%	3	2%	12	9%	9	7%	127	100%	

Covenant on Civil and Political Rights and the European Convention on Human Rights.¹⁴⁸ In most cases however, detaining the person for an extended period did not secure a confession. This data shows only two confessions based upon the derogation, questioning the need for it, if the stated premise is securing confessional evidence. This finding (if replicable in other states derogating their obligations to enable extended detention) confirms that specialist review bodies such as regional human rights courts or U.N. bodies, should pay particularly close attention to the practices of states in the context of extended detention. Robust skepticism as to the necessity of detention to enable confessions would seem to be in order.

In multiple jurisdictions dealing with terrorist crime and threats, an important normative discussion arises concerning the number of interrogation sessions which may be necessary in order to secure confessional evidence to aid conviction of a detainee. In this analysis, we particularly focus on the discrete group of detainees who are not only being held for extended periods of detention but are also being subject to multiple interrogation sessions. A counter-intuitive pattern emerges: a discrete subset of 9 percent of detainees are being subjected to 17 plus interrogation sessions (Table 8). Walsh's earlier study found only 2 percent subjected to 16 plus interrogation sessions in what many might describe as the most evident military phase of the conflict and where the civilian deaths and casualties were higher statistically.¹⁴⁹ One explanation here, noting the later stage of conflict and greater international attention on the state's actions, is that interrogators attempted extensive interrogation in order to achieve results that previously may have been achieved by intensive, and potentially abusive, interrogation.¹⁵⁰

These results indicate some traction to the theory of institutional imprinting, and its specific play in the interrogation context. It is notable that there was only one confession in an instance where there were 17 plus interrogation sessions. This outcome questions the effectiveness of the powers granted, and the

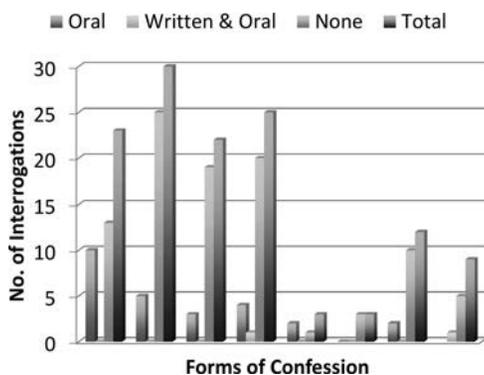
148. Following the September 11 terrorist attacks in the United States, and believing that certain foreign nationals present in the U.K. were providing support for Islamist terrorist operations, the United Kingdom issued an Article 15 (Derogation in Times of Emergency) notice of derogation from its Article 5 § 1 (Right to Liberty and Security) obligations. For an in-depth discussion of the legality of this derogation, see *A. and Others v. The United Kingdom*, 2009-II Eur. Ct. H.R. 137; Marko Milanovic, *European Court Decides A and Others v. United Kingdom*, EJIL: TALK! (Feb. 19, 2009), <http://www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/>. While derogation is, we argue, at issue in the extended detention scenario, we note that a significant legal issue in this context is the point of judicial oversight.

149. WALSH, *supra* note 20, at 65; On patterns of death during the conflict see DAVID MCKITTRICK ET AL., *LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES* (2001).

150. On abusive interrogation practices in the jurisdiction, see Report of the Commission of Inquiry into Police Interrogation Procedures in Northern Ireland, 1979, Cmnd. 9497 (UK) [hereinafter *The Bennett Report*]. On international attention to the state's human rights obligations in the context of fighting terrorism, see, e.g., COUNCIL OF EUROPE, DIRECTORATE GENERAL OF HUMAN RIGHTS, *GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM* (December 2002), <https://polis.osce.org/node/4956>.

Table 8. No. of Interrogation Sessions and Confessions

	<i>Number of Interrogation Sessions</i>								Total	Col %
	1-3		4-9		10-16		17+			
<i>Confession (s)</i>		Row %		Row %		Row %		Row %	Count	Col %
Oral	15	52%	9	31%	4	14%	1	3%	29	23%
Written & Oral	0	0%	1	50%	1	50%	0	0%	2	2%
None	36	38%	41	43%	8	8%	11	11%	96	76%
Total	51	40%	51	40%	13	10%	12	9%	127	100%



legitimacy of their operation on the terms sought by the Executive Branch.¹⁵¹

CONCLUSION

Our exploration of the trajectory between norm and exception challenges scholarly and policy claims of a one way and highly static relationship between these phenomena in situations of crisis, particularly those occasioned by terrorism. Our data and analysis demonstrates that there is far more inter-activity between exceptional and ordinary law concerning arrest, detention and trial in democracies managing terrorist challenges than has generally been observed to

151. This also from an international human rights law perspective opens up significant questions on the necessity for the derogation from treaty obligations. On derogation in emergency, see Fionnuala Ní Aoláin & Oren Gross, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

date. This is particularly true of a long-term, low-intensity conflict/high-intensity emergency when interrogation, arrest and trial become an integral part of dealing with terrorism. What we observe is a process of osmosis between the exception and the norm. This results in a “norm” that partly mirrors the legal contours of the exception. In short, over time ordinary law and practice absorbs and is modified by the reality that an exceptional legal system is operating by its side to manage terrorism. As this article demonstrates, in long-term conflicts or processes of managing terrorism the exception is hybridized to create new norms that embody both the exception and the ordinary law. This article charts that ebb and flow between the normal legal system and the exceptional legal system through processes of arrest, detention, interrogation and criminal trial. We show that exceptionality is accommodated but most importantly that exceptionality and normal legal process are not in a linear relationship. The relationships between legal norm and exception in the long-term management of terrorism are neither simple nor easily categorized.

By and large the following conclusions can be drawn. First, the move to exceptional (often ill-considered) legal process which generally emerges in the initial phase of a democratic state’s responses to terrorism is invariably modified. The modification results from the trend toward juridification in democratic societies. Democracies have a variable tolerance for outright extra-legality, and courts in particular feel the pull of legitimacy and rights-bearing claims which results over time to greater legal normality. Second, that tug to the juridic is not linear and can result in the extra-ordinary contaminating the ordinary legal system. This process of osmosis from the exceptional to the norm can have long-term effects on the integrity of the legal system, whereby norms created to regulate terrorism are absorbed into the regular criminal law in insidious ways. Third, the shape and scope of the regular legal process, institutional identity and security sector behavior is shaped and influenced by their long-term interaction with the exceptional legal process. Most notably in the United Kingdom this is evidenced by the Terrorism Act of 2000 (not examined in this study) which absorbed decades of exceptional anti-terrorism legislation and now has been woven into the fabric of everyday law in the United Kingdom and Northern Ireland.¹⁵²

The longitudinal analysis of the dataset referenced in this study (circa 400 cases in tranches from 1988 to 2001), notably points to an increasing juridification of the exception over time, suggesting that the law has a centripetal effect and supporting what David Dyzenhaus has referred to as a “compulsion to legality.”¹⁵³ That compulsion is not merely an abstract phenomenon but, as we reflect here, has practical and significant effects on practices in the custodial settings which operate as one of the effective front lines on terrorism. In a state with an

152. See Christian A. Honeywood, *Britain’s Approach to Balancing Counter-Terrorism Laws with Human Rights*, 9 J. STRATEGIC SEC. 28, 41–43 (2016) (noting the evolution of the British approach to litigation involving terrorism claims).

153. David Dyzenhaus, *The Compulsion of Legality*, in EMERGENCIES AND THE LIMITS OF LEGALITY 33, 34 (Victor V. Ramraj ed., 2008).

ideological commitment to the rule of law, we claim that a strategy of illegality in the field of counter-insurgency is unlikely to be viable in the middle to long term.

If the long-term U.S. experience with Military Commissions culminating in their post-9/11 incarnations is compared to the United Kingdom's experience of counter-insurgency tribunals culminating in the Diplock courts, one conclusion might be that they show similarities in trajectories of progressive juridification. Another might be that Diplock Courts are further along the curve, leading one to implicitly question the viability of the military commissions option in the long term.¹⁵⁴ At the very least our data point to the trajectories that follow in democratic states when long-term use is made of the criminal justice system to manage terrorism.

Managing terrorism is an enormous contemporary challenge. We observe that little sustained empirical knowledge has infused much of the contemporary legal and political debates concerning terrorism measures in the United Kingdom, the United States and beyond. Contemporary assertions about how to manage terrorism abound with untested assertions, and with little more than conjecture on what "works," or what the long-term effects of terrorism legislation might be on the rule of law. Our study, while focused on a particular period in a particular jurisdiction, seeks to pry open some of that untested territory in order to demonstrate long-term consequences and effects of counter-terrorism practice and thus challenge some sacred cows of counter-terrorism orthodoxy. Much more of this kind of long-term empirical work in the courts and in detention settings is needed to pin down the efficacy, value, and costs of substantially modifying the legal system over time to process violent political actors. Ultimately, the positive rule of law trajectories demonstrated in this study give us hope, not least because the pull to juridification remains strong, no matter the length or substance of challenge to the state. In a final salvo, it is worth noting that the conflict and terrorism challenges in Northern Ireland were not ultimately managed to a solution by the courts, nor by military action, but rather by addressing the conditions conducive to terrorism and concluding a complex and contested peace agreement among protagonists. This may be the obvious and definitive lesson about managing terrorism successfully.

154. The juncture between the war on terror and criminalization/normalization was played out again to some extent between 2001–05, resulting again in a decision in favor of the latter as the only effective stance in the age of long-term 'neighbour terrorism.' See *A v. Secretary of State for the Home Department* [2004] UKHL 56 (appeal taken from Eng.); Clive Walker, 'Know Thine Enemy as Thyself: Discerning Friend from Foe under Anti-Terrorism Laws', 32 MELB. U. L. REV. 275 (2008).

APPENDIX: METHODOLOGY

The data set out in the tables are drawn from a survey of 127 cases which comprise all those tried in the Northern Ireland Diplock courts in 2000 and in 2001. After that period, Diplock trials tapered off significantly. The trial of one individual is referred to as a 'case'; several such cases could be tried on one indictment, and in each case the defendant typically faced a number of charges. The same approach was taken with the 272 cases from 1988–89. The sample periods, January to March 1989 and January to March 1990, were chosen because they came before and after the coming into force of the Criminal Evidence (NI) Order 1988, which severely abrogated the right to silence in Northern Ireland (approximately equivalent to Miranda rights in the United States), and thus might provide some data on the operation in practice of the Order. For the sake of clarity, the 1988–89 data are not included in this paper's tables, although the text includes salient results from analysis of these data.

For each case, a data sheet listing such variables as time of arrest, place of arrest and other relevant criteria was completed by referring to the 'Crown Book' and the court files. The authors were given access to these files and had ethical and security clearance to undertake the research. Being common law-based, Diplock court procedure is roughly similar to that employed in U.S. criminal courts. The Crown book records such details as the name of the defendant, the charges, the plea, the trial judge and the outcome. The court files consist largely of a statement of the evidence against the accused. From the police evidence, it was generally possible to build up a picture of the arrest procedure and of the interrogation process (or at least the police versions of them). In some cases, evidence could be assessed through an examination of forensic reports. This information was then coded (using a detailed code sheet) and cross-tabulations generated using SPSS.

Much of the data consisted of hard factual material (such as details of charges), the collection of which was unproblematic. There were however two elements that involved a degree of subjective judgment. The first entailed an assessment of the strength of the evidence, other than confession evidence, against the accused. This was particularly important in measuring the degree of dependence of the Diplock system on confessions. Following Walsh's Diplock court study (1983), the rule of thumb we adopted was that strong circumstantial, identification, or forensic evidence was taken to amount to substantial evidence, while other material was considered insubstantial.

The second area in which a degree of subjective judgment was involved came in assessing the status of the defendant ('paramilitary/terrorist-type,' non-paramilitary/criminal, security forces). Examination of the 1988–89 court files, particularly of the police evidence, soon revealed that a significant number of those being tried were facing charges that seemed to have nothing to do with political violence. A typical example might be two defendants who apparently decided to rob a chip shop with an imitation firearm after a Friday night's drinking binge.

This state of affairs came about largely because of the mandatory way in which offenses were channeled to the Diplock courts at that time (this was later changed). In some cases, the question of status was easy to decide, in others less so. Again, following Walsh (1983), the test used was that:

[I]f the offence was carried out ostensibly for the furtherance of a paramilitary objective, for sectarian purposes or by members of the security forces in allegedly countering terrorism then it was classified as political or terrorist. Such offences would cover ones of shooting members of the security forces or robbing banks to boost the financial resources of a paramilitary organization. Also included, however, are rioting and hijacking which in many cases could be interpreted more as mere hooliganism than as being politically motivated. Sectarian attacks and offences committed by the security forces while on active duty, such as grievous bodily harm inflicted in the interrogation room are also included because they are so closely related to the current violence to justify their being treated in this way. If the offence was carried out by the individual ostensibly for his own personal gain or gratification then it was classified as ordinary criminal. . . . It should be noted here that the mere fact of membership of, or association with a paramilitary group would not, in itself, be decisive in this classification.¹⁵⁵

Where there was some doubt about the matter, this survey tended to err on the side of caution by viewing the suspect as paramilitary unless the evidence clearly suggested otherwise.

155. WALSH, *supra* note 20, at 16-17.
