Making ‘Wars on Terror’? Global Lessons from Northern Ireland

Colm Campbell & Ita Connolly

In place of the simple modelling employed in anti-terrorist legal discourse, this article posits an interactive model of the relationship between the state and violent political actors, exploring law’s role in both the repression and mobilisation of challengers. Drawing on social movement theory, it hypothesises a process of ‘legally implicated mobilisation’ which takes account both of law’s presence and its partial absence in ‘legal grey zones’ during violent conflict, and it suggests how law may impact upon key elements of the mobilization process. The hypothesis is applied to qualitative data from Northern Ireland on violent challengers. The data point to the importance of ‘messaging’ about law in the state of exception, supporting claims that law can have a ‘damping’ effect on violent conflict. The relationship between repression and violence is partly symbiotic, and in the global ‘war on terror,’ prisoner-abuse may have a mobilizing effect on violent challengers.

Dominant legal discourses on the ‘war on terror’ proceed from an assumption that a revised legal regime, loosening restrictions on security agencies, will yield consequential anti-terrorist benefits. One stream invokes the rhetoric of the ‘rule of law’ and human rights, while arguing that formerly taboo subjects, such as loosening prohibitions on torture or inhuman treatment, need to be revisited. The other, associated with the ‘Bush doctrine’, manifests a more ambiguous attitude to the rule of law, stressing the need for pre-existing international and domestic legal norms to yield to the exigencies of executive action, which may entail claims of extra-ordinary law-making powers. The modelling employed in these discourses tends to be relatively rigid and straightforward: a ‘crisis-response model’ dominates, the central issue becoming law’s role in the response of the liberal democratic state to the crisis of terrorism. In this response, legal norms, whether created through conventional processes or a claimed extraordinary executive right, are assumed to impact upon their targets in a top-down, predictable way. Discussion of their ‘effectiveness’ tends to focus on the individual hypothetical case. Original empirical data on the targets of anti-terrorist powers are rarely produced, reflecting a more general lacuna; as Crenshaw points out, ‘the study of terrorism still lacks the foundation of extensive primary data based on interviews and life histories of individuals engaged in terrorism’. The result is heavy reliance

*Transitional Justice Institute, University of Ulster. Preparation was assisted by the award of a British Academy Senior Research Fellowship to the first author. Thanks to Kathleen Cavanaugh, Christian Davenport, Fionnuala Ní Aoláin, Bill Rolston, Jillian Schwedler and Phil Scraton for comments on drafts and to Mike Ritchie of Coiste na nIarchimí who facilitated interviews.

2 Dershowitz, n 1, above, 142-163.
on secondary data or hypothetical scenarios, with recommendations for action that have little empirical grounding.  

The danger with such modelling is that its simplicity risks obscuring the workings of a highly complex (and deadly) phenomenon, generating ‘remedies’ that may have effects opposite to those intended. It is undoubtedly true that terrorist attacks present the state with a crisis that demands response; to this extent the ‘crisis-response’ model is viable. Where it becomes suspect is where the relationship is viewed as uni-directional or uni-dimensional. There is a well established ‘social movement’ literature (overlooked in anti-terrorist legal discourse), suggesting that the state’s response (‘repression’) may function as a stimulus to the mobilisation of its violent challengers, leading to fresh terrorist ‘response’ which in turn provides a stimulus for further state action. Dominant legal analyses also tend to overlook a related, well-developed, socio-legal literature on law’s contributory role to mobilisation of protest groups, which rejects simple ‘top-down’ models of law’s operation. Consequently, anti-terrorist legal analyses have yet to provide an adequate theorisation of law’s potential counter-productive effects. Rather than the simple models frequently employed, interactive modelling of a ‘repression-mobilisation nexus’ may offer much more valuable insights that need to be integrated into legal analyses.

This article aims to develop legal thinking in this sphere by providing an account of law’s operation in violent conflict that engages with the possibility that in ‘anti-terrorist’ state action, law may be implicated in the mobilisation of the state’s violent challengers.

The second section addresses the gap identified by Crenshaw, applying this framework to fresh interview-based qualitative data on the mobilisation of violent non-state actors. The subject group was composed of activists linked to the main violent anti-state participant in the Northern Ireland conflict, the

---


5 The literature on the nexus is explored in n. 26 below.


Provisional Irish Republican Army (‘IRA’). The hypothesis developed in the first section implicates law in a process whereby some elements in the state’s anti-terrorist/repressive activities could be expected to contribute to the mobilisation of violent challengers. Analysis of the dataset aims to identify which elements might be particularly implicated. It also enables exploration of the complexities of ‘messaging’ and the paradoxes of law’s role as both a tool of repression and a point of resistance.

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

**LAW AND MOBILISATION**

Synthesising a dynamic framework for exploration of law’s role in the mobilisation of violent challengers in the ‘rule of law’ state faces three challenges: firstly the literature on ‘legal mobilisation’ rarely concerns itself with structured violent mobilisation; secondly, the literature on structured violent mobilisation rarely concerns itself with law; and thirdly, since the liberal state displays an axiomatic commitment to the rule of law, it may be difficult to ascertain whether specific behavioural features of the state are explicable in terms of democracy or in terms of law. This article addresses the first two challenges by bringing together the relevant legal and non-legal literatures, and the third by drawing on Abel’s exploration of law in apartheid-era South Africa\(^8\) – a violently conflicted non-democratic racist state that paradoxically claimed a commitment to the rule of law.

**Law’s relative autonomy and legal grey zones**

Debates on the relationship of law, power and violence tend to revolve, explicitly or implicitly, around the utility of the rule of law. While a variety of meanings are available, at the concept’s core is a rejection of arbitrariness: the state is to act in accordance with predetermined ascertainable law; there is to be equality before the law; and an independent judiciary is to adjudicate on claimed infractions. The concept does not provide an account of how states actually behave: degrees of arbitrariness and illegality characterise the behaviour of all states; judicial decisions can be contradictory, and frequently accommodate themselves to the interests of dominant groups; and rulings challenging such interests may be reversed by fresh legislation. Claims that law is apolitical are unconvincing - hence critical

---

legal portrayals of law as little more than a superstructural device, buttressing the interests of dominant (hegemonic) groups. Other analyses, while recognising law’s hegemonic quality, nevertheless point to its ambivalent position as a potential (if unlikely) check on the power of dominant groups. On this view, law displays elements of a living, partly self-contained system. In Abel’s formulation, law is “relatively autonomous”, influenced by economic infrastructure, pressured by political forces, shaped by the social system, but not fully determined by any of them. This view is crucial to Abel’s analysis of law’s ambivalent position under apartheid, offering a route to identifying the specificity of the legal contribution, rather than the democratic, in state behaviour.

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

A variety of legal literatures touches upon the phenomenon of law’s limited effective reach in states of exception. The criminological literature increasingly looks at the issue under the heading of ‘state deviance’ and ‘state crime’. In human rights and international humanitarian law, the debate tends to be couched in terms of the need to challenge post-conflict immunity for those who have acted with impunity during conflict. Agamben has been interpreted as seeing the state of exception (manifest in the ‘war on terror’) as co-terminus with a regime of ‘anomie’ (lawlessness); another interpretation is that Agamben sees zones of anomie and lawfulness co-existing ambiguously in the state of exception. His foundational analysis is that the exceptionality of anomie rather than a liberal commitment to the rule of law is at sovereignty’s core, a view that forces attention

---

10 Abel, n 8 above, 523.
16 As when Agamben analyses the status necessitatus in the state of exception as ‘…an ambiguous and uncertain zone in which de facto proceedings… pass over into law… that is, a threshold where fact and law seem to become undecidable’, Agamben, n 14, above, 29.
on law’s limited presence, but risks underestimating the capacity of the ideology of the rule of law to take on a life of its own.

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

If this concept of legal grey zones is tied to the earlier discussions of law’s autonomy and of the importance of an ideological commitment to the rule of law, two conclusions emerge. The first is that in the (emergency) legal grey zone, law still retains its relative autonomy, but the extent of that autonomy is itself part of the ambiguity. The second is that there are a number of reasons for suggesting that law is implicated in all the state’s action in these legal grey zones: obstacles to bringing matters before the courts create a high degree of indeterminacy as to which behaviour is and is not lawful; the difficulty of excluding a legal mandate for a particular action means that law may be implicated in a positive sense. In a negative sense, where the state can be shown to have acted without legal mandate, this represents a failure to live up to an ideological commitment to the rule of law, with the result that law is implicated by a failure of reach.

Legal mobilisation, legal dynamism and social conflict

Conceptualising law as a relatively autonomous phenomenon provides a platform for exploration of the use of law by protest groups, while recognising law’s hegemonic quality. The question of law’s role in the mobilisation of campaigning groups first emerged in the 1970s in the US, reflecting legal academics’ concern to connect their field with emerging social movement theory which sought to explain the contemporary emergence of a plethora of protest movements. In contrast to earlier, grievance-based theories of conflict eruption, social movement theory in its more developed form argued that while grievances are relatively constant, social movements emerge only in particular circumstances (the term ‘social movement’ covers the spectrum from American ‘green’ campaigners to 1970s Italian terrorist groups). Consequently, the circumstances more than the grievance explain why a movement develops at a given time.

A key socio-legal contribution came with Scheingold’s attack on liberal assumptions as constituting no more than a ‘myth of rights’. This myth overemphasised the capacity of symbolic litigation to effect social change, and underemphasised the ‘inertial’ capacity of law to sustain the status quo. Rather than reject

18 D. McAdam, J.D. McCarthy, and M.N. Zald, Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings (Cambridge: CUP, 1996).
legal claim-making, Scheingold propounded a ‘politics of rights,’ viewing law in instrumental terms as contributing to a strategy of ‘political mobilisation’ for social change. This suggests that law occupies two positions: in one, legal tactics are part of an integrated campaigning strategy. The other, radical view, projects mobilisation as flowing from legal claim-making, when ‘under the right circumstances rights can be used as a catalytic agent for mobilisation’. This stream of thought has been developed in exploring law’s role in mobilising relatively peaceful social movements. The need to spread the field of inquiry, particularly in relation to post-9/11 repression and violence in the democratic state, has been clearly recognised. To take account of law’s role in contemporary conflict, it is necessary to set out some key insights from current social movement literature on violent mobilisation. This theory has hardened in recent years to emphasise three sets of factors in explaining movements’ emergence: ‘political opportunities’, ‘mobilising structures’ and ‘framing processes’, creating a need to locate law’s role in the mobilisation process under each of these headings. This requires that the meanings of these and related terms be explored.

**Social movement theory and the ‘repression-mobilisation’ nexus**

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

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

---

20 ibid 213.
22 McAdam et al, n 18 above, 2.
23 ibid 3.
24 ibid 6.
A related literature focuses on the state’s dealings with challengers and protesters (violent or otherwise) - on ‘repression’, defined as ‘obstacles by the state (or its agents) to individual and collective actions by challengers’. Interaction between challengers and the state is explored under the rubric of the ‘repression-mobilisation nexus’. Whereas legal exploration tends to focus on effectiveness in individual cases, social movement theory’s modelling offers the promise of more nuanced, dynamic, exploration. The repression-mobilisation nexus demands examination of both the impact of repression on mobilisation, and of mobilisation on repression.

The result has been a vast range of theoretical and empirical explorations of these interactions, resulting in strong confidence about one dynamic in the nexus: challenger mobilisation always induces some degree of repressive state response. As regards the other dynamic (impact of repression on mobilisation), no one picture has emerged: repression is sometimes effective, sometimes counter-productive, and sometimes makes little identifiable difference.

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

In line with the adaptation hypothesis, but in an accelerated form, is Francisco’s depiction of ‘backlash’: which refers to ‘...massive, rapid, and accelerating mobilisation in the wake of harsh repression’. ‘Harsh repression’ (which fits within this article’s notion of legal grey zone activities) includes such events as ‘massacres... all involving the one-sided and overwhelming use of state force’. Such a massacre ‘...becomes a focal point, rendering the public good against the state more salient than ever’.

Empirical support for recognising the backlash

---

27 Davenport et al, n 21 above, xvi.
31 Ibid.
32 Ibid 72.
phenomenon came in Khawaja’s study of the Occupied Territories, a study in apartheid-era South Africa displayed a similar pattern.

Law as political opportunity

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

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

The social context in which Abel situates his discussion can be considered the classic ‘grey zone’ of the state of exception. Law has the potential to close political opportunity, and political opportunity may also be closed by illegal state action, but law’s relative autonomy means both that closure by law is not automatic, and

---

36 Ibid.
37 Ibid 733.
38 ‘the co-existence of rare conspicuous legalism with pervasive covert illegality – are universal, but South Africa refined this moral division of labour into a high art’, Abel, n 8 above, 539.
that law offers the remote possibility of challenging closure. Law may be a shield: trials of dissidents can provide a platform for challenging closing. Law can also be a sword: proactive litigation strategies present dissidents with sites of contestation of their choosing (although with lower prospects of success).

**Law as resource: Mobilising structures**

McCann also posits a ‘constitutive’\(^{39}\) power for law. Legal claim-making is presented not simply as a tool permitting or facilitating mobilised groups, but as a ‘resource’\(^{40}\) which helps to create mobilisation. For McCann, court cases were used by campaigners to ‘...“hot wire” movement building campaigns at the grassroots’, bringing in personnel and financial resources.\(^{41}\) The results of appellate decisions were ‘manipulated’\(^{42}\) to generate publicity, while local lawsuits were used as ‘primary organizing tools by unions and feminist groups’.\(^{43}\) The dynamic being presented is one familiar in social movement theory in which movement ‘entrepreneurs’ employ or manipulate a resource to build social movement organisations.

The kind of legal resource that McCann focuses upon is litigation, but implicit in Abel’s analysis is the possibility that law-based repression may, in certain circumstances, contribute to the mobilisation of the state’s challengers. Trials of dissidents can occupy a paradoxical position in that the controversy they generate can operate as a brake on repression. Such proceedings may amount to ‘show trials’\(^{44}\) and so stimulate challengers. The most pronounced example is where challengers deliberately invite prosecution with a view to using the resulting trials as mobilising devices, a tactic that was used in South Africa, and with even greater effect elsewhere.\(^{45}\)

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

This ‘grey zone’ effect is directly linked to the structure of anti-terrorist/emergency powers (though other factors identified earlier also come into play). These powers tend to be ‘executive-oriented’, ‘catch-all’ (widely drafted) and ‘judge-proof’. Emergency and anti-terrorist law tends to invest lower-echelon police and military operatives with considerable discretionary powers (for instance to search houses or to stop and search individuals). These powers may be used with


\(^{40}\) ibid.

\(^{41}\) ibid.

\(^{42}\) ibid.

\(^{43}\) ibid.

\(^{44}\) Abel, n 8 above, 528.

discrimination, or indiscriminately and abusively, but their structure means that distinctions may be difficult to draw. Some repression may be devoid of any legal veneer, and may also be either discriminate or indiscriminate, but particularly if it involves covert activity, accountability in legal grey zones may be impossible to achieve.

As developed by McCann, ‘legal mobilisation’ provides a viable account of how demands for legal redress can contribute to building campaigning movements. But there are two additional ways in which contemporary social movement theory implies that law may be a factor in the growth of protest movements (whether violent or otherwise): where the state’s exercise of a legal power contributes to challenger mobilisation, or where mobilisation is stimulated when the state acts illegally. In the state with an ideological commitment to the rule of law, law is implicated in both instances – by its presence or by its absence. To address this gap, this article hypothesises a process of ‘legally implicated mobilization,’ a concept encompassing but broader than legal mobilisation. Legally implicated mobilisation refers to mobilisation of the state’s challengers that is stimulated (a) by the exercise of a legal power by state operatives, or (b) by illegal action by such operatives, or (c) where the operatives act in legal grey zones of ambiguous legality, or (d) by legal claim-making by challenger organisations. Again, Abel’s analysis of the old South Africa chimes with such an understanding when he suggests that ‘[I]ndiscriminate state violence’… transformed the stigma of arrest, detention, and punishment into badges of honor’, generating increased mobilisation: ‘this experience… educated cadres and intensified their commitment’.

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

Law and framing processes

Abel’s ‘badge of honor’ points not only to consideration of repression as a possible provider of resources to challengers, but also to an examination of law’s place in the framing processes they employ. The question is related to that of legal ‘messaging’. McCann’s focus was on the role of courts in sending ‘signals’ to activists about the law, but in the self-defined ‘rule of law’ state there is no need to view the state’s senders of signals only in terms of the courts: the behaviour of all state agents sends signals about the law. How challengers read these signals is mediated by their framing processes, which in turn may affect the signals that the challengers send. For example: a ‘rule of law’ state engaging in severe repression (which may be largely illegal), may send a signal to its challengers that legal restrictions on the state’s behaviour are being set aside (‘the gloves are off’). By contrast, in the

---

46 Abel, n 8 above, 527.
47 Ibid.
authoritarian state (‘regimes of ordinary repression’), the ‘gloves’ may be absent all the time; an increase to severe repression may appear more as incremental change than as a qualitative shift, with the result that the signalling process may be quite different. In the ‘rule of law’ state, challengers in turn may attempt to construct an ideological device rationalising their use of violence, based partly on the state’s legal failings. Any such ideological device is likely to be influenced by the culture of the broader segment of society from which challengers draw support, which in turn is likely to be influenced by the state’s behaviour. Conversely, where a state de-escalates from severe illegal repression to lower levels of law-based repression, this may send a signal that the ‘gloves are on,’ affecting societal perceptions of the use of challenger violence.

The focus up to this point on law in challenger framing processes has been on law-as-repression. But what about the framing processes of violent challengers that may simultaneously valorise legal claim-making as a worthwhile activity? Violent challengers are unlikely to manifest adherence to Scheingold’s ‘myth of rights’; potentially, their ideology may correspond with the calculus described by McCann, where pay-equity activists are seen as uniformly assessing claim-making in instrumental terms. More recent qualitative work on individualised ‘legal consciousness’ and on cultural approaches to law and social change presents a more varied picture of law’s framing in social conflict. Ewick and Silbey demonstrated how one individual can simultaneously display a consciousness of law that is ‘multiple and contingent,’ simultaneously conforming and resistant. Similarly, Kostiner’s qualitative work on attitudes of social justice activist to law’s role in social change suggests that individually and collectively the activists displayed not one coherent frame of reference in assessing law’s role, but multiple frames (or ‘schemas’), depending on whether law was being assessed in instrumental, political or cultural terms. This question of consistency or otherwise in activists’ attitudes to law’s role in conflict is explored empirically below, alongside the question of whether legal ‘signalling’ can be said to have a dampening effect on conflict.

THE NORTHERN IRELAND CASE-STUDY

The legal tools employed by the state in the Northern Ireland conflict have been explored at length elsewhere. Various statutory powers existed in the Civil Authorities (Special Powers) Acts (SPA) (repealed in 1973), the Northern Ireland (Emergency Provisions) Acts (EPA) (from 1973 onwards), and the Prevention of

50 Ibid 747.
Terrorism (Temporary Provisions) Acts (PTA) (from 1974 onwards). These were supplemented by ambiguous and sometimes extensive common law powers, particularly in relation to the use of force. There have been excellent quantitative legal studies on the operation of these tools, and on the experience of ex-prisoners, and well-developed comparative quantitative (non law-based) studies on state repression. As regards qualitative research, Burton, Cavanaugh and White have conducted pioneering research relating to experiences of repression from political science and sociological perspectives. But there is as yet no qualitative exploration of law’s impact on the mobilisation of the state’s violent challengers.

Profile of respondent group

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

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


60 Lichbach, n 28 above.
Flowing from the analytical framework developed above, this part focuses on three questions: (1) to what extent did respondents link experience of repression to mobilisation? If they did, which kinds of repression were involved, and to what extent was law implicated? (2) What role did law and experience of repression play in the framing processes evinced by the activists? (3) What evidence was there of a ‘damping effect’ for law, and if evidence were available, how did this effect come about?

**Experiences of repression and mobilisation**

When asked about early experiences and possible impact of security force activity on their behaviour, group members reported memories from pre-teenage years, through to the arrests that led to their trial. Most accounts fell into two categories: the first was of personal experiences of activities such as house searches from childhood onwards. The second recorded the impact of perceptions of repressive techniques on a group with whom the respondent identified. The latter related to two discrete sets of events which appear to have operated as ‘tipping factors’, directly propelling respondents into activism.

Several of the behaviours described in the first group corresponded with that reported in other studies of security force (particularly Army) behaviour in the 1970s and 1980s: typical ‘grey zone’ activities, where statutory powers were used in a way that shaded into illegality. One was of ‘house raids’ - generally referring to Army searches (based on EPA 1973,61 or on SPA62) of their parents’ homes in the early 1970s. These operations were typically described as happening in the early hours of the morning, involving the searching of anything from one-third to an entire row of houses. Respondents’ accounts tended to be couched in the language of violent intrusion, with particular emphasis on the humiliation of the mother: ‘Pull floorboards up... abuse people, abuse your mother...’63

Another set of early experiences related to the use of stop-and-search powers (again based on EPA or SPA),64 the picture emerging being similar to that reported by McVeigh.65 Respondents described feelings of harassment through continuous operation of these powers - perhaps six stops in one evening - beginning when they reached the ages of 11-15. Males tended to describe the Army’s behaviour in terms of classic male bullying. Females, by contrast, tended to describe harassment in terms of gendered abuse: ‘...they [the Army] would be drivin’ about in jeeps and they would just shout vulgar things at you’.66

In respondent accounts, initial positive communal perceptions of the British Army changed from ‘...the British Army’s all fantastic guys and they’re all down

---

61 EPA (1973) s 17.
62 SPA Reg. 4.
63 Interview, urban male, Belfast, January 2003.
64 EPA (1973) s 16 and SPA Reg. 6.
65 R. McVeigh, “It’s Part of Life Here...”: The Security Forces and Harassment in Northern Ireland (Belfast: CAJ, 1994)
66 Interview, urban female, Belfast, November 2002.
making them tea and running for Mars bars for the British soldiers for them to protect the Catholics…’, to: ‘…next thing the resentment. Whole streets getting raided….. Kicked the door down half four in the morning’. 67 For some, experience of repression of this sort was directly linked with later violent involvement: ‘…all them conditions kind of’ made you into this f---g terrorist, and people say why? We didn’t pop out of the trees’. 68 The quote referred to repression having a ‘kind of’ impact, rather than operating as a simple cause-and-effect; other factors are implicitly projected as coming into play.

The most striking feature that emerges from this picture of repression is its indiscriminate quality: there is no suggestion of there being any selectivity, beyond members of the target group being at least 11 years old and living in nationalist working class areas. Reflecting this, the interviews frame perceptions of harassment in a narrative of collective experience: that of the peer group, family, or of broader sections of society: ‘…there was just hostility between my community and the British Army’. 69

The final set of ‘early memories’ related to a less researched area: forced house movement in urban areas as a result of violence early in the conflict. Some reported the destruction of family homes, while other described pre-emptive moves in response to fears of attack. In recent years, the question of forced population movement in violent ethnically driven conflicts has developed a vocabulary of its own, 70 but this language did not exist at the eruption of the Northern Ireland conflict.

Among respondents, the incidence of reported forced movement was much higher than can have been the case in the general population, but qualitative surveys do not lend themselves to statistically significant conclusions. Accounts of direct forced expulsion are redolent of extreme trauma (most respondents were aged 11-14 years at the time). Some respondents’ account of the ‘shock’ effect focused mainly on the behaviour of former neighbours (accounts are mixed); for others, the shock lay in perceptions of security force collusion (where law was implicitly implicated by its absence): ‘at… thirteen years of age you see RUC men and Specials [constables]… standing in the middle of a Loyalist crowd while that Loyalist crowd burns down houses’. 71 None of the respondents suggested any direct link between expulsion and violent involvement; in all cases though, the respondents had become involved in republican activism within four years of displacement, in most instances, once they reached some point in the 15–16 age group.

The key to interpreting the impact of the second set of experiences (those not linked to childhood) lies in the uneven picture of timing of recruitment of members of the respondent group that emerged in the survey: there was heavy clustering around two time-periods (1972-3 and 1981-3), with only outliers joining in other years. Heavy IRA recruitment in 1972-3 is often explained in terms of a

---

67 Interview, urban male, Belfast, January 2003.
68 Interview, urban male, Belfast, January 2003.
69 Interview, urban female, Belfast, November 2002.
71 Interview, urban male, Belfast, January 2003.
reaction to the ‘Bloody Sunday’ killings in January 1972, when paratroopers shot 13 people dead at a protest march, but the interview data suggests that this may oversimplify the process. The march was called by the Northern Ireland Civil Rights Association (NICRA) to protest against the introduction of internment without trial in August 1971. Soon after the first internment arrests, well-documented accounts of severe prisoner abuse began to circulate, prompting a resurgence of mass mobilisation in street protests. Some accounts entailed the use of sensory deprivation interrogation techniques, condemned by the European Court of Human Rights as ‘inhuman or degrading treatment’.72 Others involved claims of beatings, forced administration of drugs, and sexual assault. European litigation in relation to the latter claims was stymied on the grounds that toleration of the activities at a sufficiently high level of command had not been shown to exist.73

Of the respondent group, only one made an automatic link between the Bloody Sunday events and the decision on violent involvement. Rather, a more nuanced picture was painted, of personal experience of lower levels of repression; of identification with the detainees from whom the abuse claims emanated; and of identification with the cause and the victims of the Bloody Sunday protest: ‘it was all those things, one thing after another and then the next big event after that, Bloody Sunday’.74

A similarly layered picture emerges in relation to activists in the 1981-83 cluster; in virtually all cases, the radicalisation that led to IRA activism coincided with involvement in street protests on behalf of IRA prisoners participating in the ‘dirty protest’ (1977 – 81) and hunger-strikes (1980-81) (ten prisoners fasted to death), in the Maze Prison (‘H-Blocks’) and in Armagh Jail. The government claimed that conditions in the jail were self-inflicted, while campaigners blamed the authorities for the conditions, for beatings, and for humiliating body searches. The European Commission, which viewed the prisoners’ claims as constituting a demand for ‘political prisoner status’ found that no such ‘...entitlement in the present context can be derived from existing norms of international law’, though the Commission did criticize the authorities’ ‘inflexible’ approach.75

Respondent accounts paint a picture of personal experience of repression creating a predisposition to support for violent anti-state challenge; of identification with protesting prisoners leading to involvement in mass demonstrations; and of the Government’s handling of prison protest playing a key role in relation to IRA involvement: the hunger strike ‘...crystallised my opinions and the decisions that you make, and I joined the IRA straight after the hunger strike’.76

While most respondents implicated personal experience of repression to some extent in their violent involvement, accounts relating to the two big clusters of IRA recruitment had three elements in common, separating them from the cases of outliers: the first is that perceptions of egregious repression directed at a group

---

72 Ireland v United Kingdom (1978) 2 EHRR 25.
73 Donnelly and Others v UK, Application 5577, 5583/73, Decision of the Commission, 5 April 1973.
74 Interview, urban male, Belfast, January 2003.
76 Interview, urban male, Belfast, December 2002.
with whom the respondents identified appeared to function as ‘tipping factors’. Both clusters involved perceptions of prisoner ill-treatment, and multiple deaths for which respondents blamed the state. The second is that, particularly in the case of the 1972-73 cluster, and to some extent in the 1981-3 group, the activities giving rise to these perceptions corresponded with the pattern of legal grey zones set out earlier: activities of doubtful or heavily contested compatibility with domestic and/or international law norms, where the reach of the law was limited.

The third is that both clusters of violent mobilisation were preceded by largely non-violent mass mobilisation. In both instances mass mobilisation corresponded with McCann’s notion of ‘legal mobilisation’. In the case of NICRA the ending of internment was one of a series of discrete demands for legal reforms around which mobilisation had been built. In the ‘H-block and Armagh’ campaign, the focus was on five discrete prisoners’ demands, such as the right not to wear prison uniforms – a right easily framed in legal terms, and ultimately legislated for in a new statutory instrument. Violent mobilisation, which involved much smaller numbers of individuals, fed off the largely peaceful mass mobilisation that preceded it.

Lichbach’s depiction of the ‘entrepreneurship’ of rebel leaders helps to explain this phenomenon. Just as McCann depicted protest leaders as ‘manipulating’ the results of litigation to built protest movements, the picture suggested in the survey was of rebel leaders manipulating experiences and perceptions of repression to build their organisation. Entrepreneurship was evident in the extent to which repression, aimed at ending challenge to the state, was paradoxically transformed into a provider of resources (recruits and communal support/toleration). Indiscriminate state repression appears as a low-cost benefit to ‘violent entrepreneurs’, since by definition it rarely hits activists, and frequently radicalises the population from which challengers spring; in a formulation attributed to a senior republican, some security force strategies were “the best recruiting tools the IRA ever had.”

The manipulation leading to this mobilisation was able to draw upon a range of individual motivations, corresponding with the mixed bag described in several published accounts of IRA involvement. These included the excitement of youthful activism, the ‘romantic’ appeal of republicanism, and anti-Protestant sectarianism, particularly in 1970s Belfast, which respondents were keen to distance themselves from, but which was acknowledged as a factor motivating some IRA members.

Law, repression and framing processes

Predictably, the framing processes suggested by members of the respondent group appeared to be geared towards valorising the violent mobilisation with which

80 Interview, urban male, Belfast, March 2003.
they were associated. International comparisons abounded (principally with the ANC). But these processes also suggested some paradoxical elements, not least in relation to the role of law.

One paradox related to the question of the contribution of the impact of experience of repression in the formation of communal identities. This issue is particularly important given that the ‘tipping factors’ that emerged in relation to violent activism, related to not to personal experience, but to perceptions of egregious repression directed at members of the community with which respondents identified. Some respondents linked identification with community with personal experience of repression: ‘I grew up as a wee Brit… It’s only when the conflict came you started recognising who you are’. This suggests that a process of individual alignment with broader framing processes identifying a clear ‘enemy’ began at an early age; that experience of the impact of emergency powers fed into the adoption and creation of these frames; and that (in line with Khawaja’s analysis), experience of indiscriminate repression had the effect of increasing the sense of solidarity of the targeted group.

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

While it is true that NICRA met with a repressive response, it is not true that the effective end of the movement (c. 1972) was the end of progressive change. Rather, direct British rule from 1972 onwards (punctuated by the 1973 power-sharing experiment) was characterised by a twin-track of repression and reform in the anti-discrimination field. From the Anglo-Irish Agreement onwards (1985), this reform process also encompassed greater official recognition of an Irish identity.

The respondent retort to this was partly to appropriate the reform achievements as the result of the use of violence: ‘...if it hadn’t been for armed struggle I don’t believe that there would have been an acceptance on the part of the British to actually force the Unionists to accept anti-discrimination legislation.’ This implicit valorisation of law sits uneasily with the Marxist-influenced analyses provided by some respondents. In many respects, the paradoxes paralleled those

81 Interview, urban male, Belfast, January 2003.
82 Interview, rural male, Belfast, December 2002.
83 Interview, urban male, Belfast, March 2003.
reported by Kostiner in American social justice activists’ attitude to law.\footnote{Kostiner, n 51 above.} They also resonate with Ewick and Silbey’s depiction of a ‘legal consciousness’ that could be simultaneously conforming and resistant.\footnote{Ewick and Silbey, n 49 above.}

Respondent accounts beg the obvious rejoinder that reform may have come despite rather than because of ‘armed struggle’, or that even if the initiation of the process owed something to the combination of civil rights campaigns and armed rebellion in the 1970s, by the end of the decade violence had become dysfunctional as a vehicle for change. It is impossible to prove this argument one way or the other, but presentation of a key rationale for the IRA’s activities as being the achievement of progressive political change, at least some of which could be captured as law, is at odds with the apparent ideological underpinning of violent republicanism. One possibility is that the real goals were always more flexible. A second possibility is that the shift in emphasis can be explained in terms of the failure of the IRA to achieve its core goals, and the consequent need to find alternative gains to represent the achievements of ‘armed struggle’. A third possibility is that while the original goals of the movement were monolithic, shifts on a sliding scale occurred during the course of the conflict. Most came about because of the successful entry of the IRA’s political allies, Sinn Féin,\footnote{See B. Feeney, Sinn Féin: A Hundred Turbulent Years (Dublin: O’Brien Press, 2002), and R. English, Armed Struggle: A History of the IRA (London: Macmillan, 2003).} into electoral politics. But some shifts may have come about partly as a result of successes achieved by activists in utilising law as a vehicle for political contestation, thereby opening political opportunities in a way that buttressed the move into electoral politics. Several respondents reported having undertaken successful legal claims to obtain compensation for abuse of emergency powers. Respondents also emphasised the successes of post-hunger-strike campaigns by prisoners, which as other studies have illustrated were partly dependent on the creative use of judicial review mechanisms.\footnote{K. McEvoy, Paramilitary Imprisonment in Northern Ireland: Resistance Management, and Release (Oxford: OUP, 2001).}

A final point to emerge about the framing processes evident in the survey was their exclusionary dimension. While there was a heavy emphasis on the substance and the mobilising effects of state repression on nationalist communities, few respondents demonstrated much awareness of possible mobilising effects of republican violence on loyalist communities, nor did they articulate much regret for IRA victims. While the position was not uniform, ‘regret’ tended to relate to the death of civilians resulting from ‘silly and stupid mistakes’\footnote{Interview, urban male, December 2002.} But the IRA’s systematic breaches of international standards applicable in violent conflict cannot be dismissed as ‘mistakes’. While the pattern of fatalities inflicted by the organisation displayed an emphasis on security force personnel,\footnote{The deaths of 911 security forces members and 644 civilians are attributed to the IRA in D. McKittrick et al, Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles (Edinburgh: Mainstream, 2004) 1536.} there appear to have been at least three areas of IRA activity that entailed systematic violations of ‘laws of war’ standards: the infliction of ‘punishment’ shootings and beatings on individuals accused of ‘anti social activities’; the use of bombs against commercial premises.\footnote{\footnotetext{89}}
even if warnings were given; and the ill-treatment of suspected informers. The rights-vi

violations that figured in respondent accounts were those that had instrumental value to

the movement’s political goals; other seemed generally invisible.

**Law and ‘damping’**

Tilly’s depictions of the mechanisms of the democratic state as having a ‘damping’ effect

on conflict begs the question of law’s possible contribution. Northern Ireland seems to

contradict his claim: despite being part of a democratic state, the region saw intense

violence and repression in the early 1970s. But in the 1980s and 1990s both the violence

and the repression had decreased significantly. This cannot be explained simply in terms

of incapacity to inflict damage: when the IRA eventually destroyed its weaponry in 2005,

the stockpile is estimated to have included over two tonnes of Semtex, and one thousand

firearms. The state retained a repressive potential that was much greater than that

deployed. There must therefore have been some forces at work constricting the behaviour

of both the state and its challengers.

If these challengers are viewed simply as deracinated entities, it is difficult to see

how such forces could have operated. Crenshaw’s close reading of the relevant

psychological literature rejects such an approach, leading her to conclude that research

‘…should continue to be based on a model that integrates the individual, the group and

society. “Terrorists” cannot be considered in isolation from their social and political

context’. Respondent accounts supported Crenshaw’s contention, displaying heavy

emphasises on association with community and on group identity, suggesting at times

some merging of individual consciousness: ‘we didn’t carry any baggage with us... We

don’t carry any regrets.’

The accounts also project a sense of an organisation generated by a particular set of

historical circumstances, but later taking on something of a life of its own: ‘In ’72 it was

not a secret army… everybody in the district knew who was in the IRA’ The resulting

security force penetration explains the IRA’s switch in the mid-1970s to a cell structure,

one result being that activists: ‘ became more and more divorced from the people as they

tried to protect themselves from the community ‘cos they were worried about touts’

[informers]. The accounts also suggest that around this time, the IRA’s base of active

support narrowed considerably. This appears to have left the organisation heavily

dependent on a narrow base (the views of which it needed to heed), while also able to

count on degrees of toleration in some communities.

Moxon-Browne makes a similar point to Crenshaw when he speaks of Irish

republican ‘fish’ swimming in a fluctuating ‘sea’ of communal toleration and


91 Crenshaw, n 3 above, 418. Crenshaw is dismissive of psychopathological explanations of terrorism; data

from Northern Ireland supports her position: R. Elliot and W.H. Lockhart, ‘Characteristics of Scheduled

Offenders and Juvenile Delinquents’, in J.I. Harbison and J.J.M. Harbison (eds), *Children and Young


92 Interview, rural female, February 2003.

93 Interview, urban male, Belfast, November 2002.

94 Interview, urban male, Belfast, March 2003.
In respondent accounts this tide clearly ebbs and flows. It is presented at having been at its highest when repression was at its harshest, and as declining when repression wound down: ‘If the Brits were chasing you or you could run into anybody’s house and you knew that they would protect you… that’s the way it was in 1972. I went into jail in January 1973 and whenever I came out [1976] I noticed that there was a big change… there would have been a lot less of them prepared to allow you to use their houses’.  

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

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

As regards the damping effects of law, a clear distinction can be identified between the earlier and later phases of the conflict. In the early years, the shock effect of the outbreak of violence, coupled with constitutional divisions and uncertainty over common-law powers, created a legal position of considerable laxity, facilitating the emergence of significant grey zones. Later, as official inqui-

---

96 Interview, urban male, Belfast, November 2002.
98 Interview, urban male, Belfast, March 2003.
ries mounted,\textsuperscript{100} and legal norms began to ‘bite’ more effectively, visible repression came to approximate more closely to formal rationality (although the powers remained highly abrasive), and illegal repression became associated with covert, largely invisible operations.\textsuperscript{101}

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

CONCLUSIONS

The legal narratives implicitly and explicitly presented in the interview data form a complex series of paradoxical relationships: law as repression; law-based and illegal repression in legal grey zones as a spur to challenger mobilisation; law as a vehicle for political contestation; law as potential political gain; and law as a damping mechanism on conflict in the liberal state.

The analysis points to law’s role in the violently conflicted liberal state being much more complex and ambiguous than contemporary anti-terrorist legal discourse suggests. Most importantly, simplistic models of crisis-response and of ‘effectiveness’ need to be radically revised to take account of the extent to which law is implicated in the impact of state action on challenger mobilisation – of ‘legally implicated mobilisation’. Rather than conforming to a model of surgical ‘response’, the relationship between repression and violence may approximate more to one of symbiosis - each feeding off the other, in a mutually sustaining fashion.

Lawyers need to recognise that grey zones in which legality may be absent or ambiguous are a characteristic of crisis situations, and that typical grey zone

\textsuperscript{100} eg Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland, Cmnd 7497 (1979).

\textsuperscript{101} For a case-study on covert repression, see J. O’Brien, Killing Finucane: Murder in Defence of the Realm (Dublin: Gill and Macmillan, 2005).
activities, such as ill-treatment of prisoners and the use of lethal force, can be particularly implicated in challenger mobilisation. They need to acknowledge the ability of the ideology of the rule of law to take on a life of its own, leaving an ambiguous capacity for legal challenge even in the grey zone – ‘anomie’ is never likely to be complete. They need to recognise that the longer a conflict persists, the greater the pressures for contraction of the grey zone will be. And they need to move beyond a narrow concept of ‘legal messaging’ to take account of the messaging that state action sends between non-state constituencies.

This is not to suggest that the analysis developed in this article can be transferred straightforwardly to Western experience of the ‘war on terror’. Despite the parallels drawn earlier, there are important differences: the state interest and international standing in each case is different, as is the degree of internationalisation; patterns of the ratification of international law instruments also differ. As regards non-state actors, al-Qaeda’s mobilising structures and ideology are much more diffuse than those of the IRA, although other elements of the Iraqi insurgency may bear more of a resemblance to the latter. Al-Qaeda violence also tends to be much more indiscriminate that was the general pattern in Northern Ireland. In addition, Al-Qaeda relies on suicide bombers, and is frequently reported to be intent on developing weapons of mass destruction; neither consideration applied in Northern Ireland.

In the absence of original empirical data on the mobilisation of non-state actors in the ‘war on terror’, all that can be done at this point is to take account of these differences and explore the prognosis if patterns from Northern Ireland replicate themselves. On this basis, a number of highly tentative conclusions suggest themselves in relation to Iraq and the threat of jihadi terrorism in the UK. The Northern Ireland example particularly implicates two kinds of legal grey zone activity in challenger mobilisation: (1) personal experience of indiscriminate and abusive use of low level anti-terrorist powers in creating a pre-disposition to violent activism; and (2) perceptions of egregious repression, directed at a group (particularly prisoners or victims of lethal force) with whom potential activists identified. It also suggests that indiscriminate repression impacting on a defined population group has the effect of solidifying the sense of identity of the out-group, and that violent mobilisation is likely to be most intense in situations in which ‘violent entrepreneurs’ can manipulate the legacy of preceding peaceful mass mobilisation.

If these patterns repeat themselves, reports of abuse of detainees in Guantánamo Bay, Abu Ghaiba and in Basra seem especially likely to stimulate challenger mobilisation, particularly in populations radicalised by indiscriminate use of exceptional powers. Abuse in these instances (particularly Guantánamo), appears to have been facilitated by the existence of a pronounced legal grey zone, whereby jurisdictional issues were manipulated in an attempt to limit the reach of domestic and international law. It follows that contemporary calls for loosening prohibitions on torture seem misplaced, since their implementation appears particularly likely to stimulate violent mobilisation.

As regards indiscriminate security force activity, there is much anecdotal evidence that the behaviour of US troops in Iraq corresponds in some respects with that of the British Army in Northern Ireland in the early 1970s. There is also disturbing evidence of indiscriminate use of anti-terrorist powers in Britain, where
in the period from 11 September 2001 to December 2005 111,000 people were stopped and searched under the Terrorism Act 2000. The powers in the Act (as amended) are related to, and in several instances are more extensive than, those employed in Northern Ireland. The diffuse nature of terrorist mobilising structures may be enhancing the dynamic: the difficulties in combating such mercurial entities may prompt loosely targeted initiatives where intelligence may be faulty or non-existent. Pressures for such activities may be particularly strong in the face of perceived threats from weapons of mass destruction. Such behaviour could be expected to enhance the sense of solidarity of out-group (British Muslims), enhancing the capacity of ‘violent entrepreneurs’ to manipulate resentments, particularly where long-standing grievances remains pervasive, in a society that has already experienced some mass mobilisation in protests about the legality of the Iraq war.

Might we expect what we have called the damping effect of law to manifest itself? In the case of both the US and the UK, there are some pointers suggesting that such a damping effect on state behaviour may be emerging, particularly as a result of activism by the judiciaries in each state, but perhaps also as a result of a growing body of criticism from international human rights mechanisms. In the case of terrorists willing to employ indiscriminate violence and/or to act as suicide bombers, the possibility of their behaviour also being ‘damped’ seems remote, depending as it does on some notions of reciprocity. But as the Northern Ireland example illustrates, this limiting effect may depend less on the attitude of violent activists than on the disposition of the communal support base (possibly a narrow one) from which activists spring. It is unclear whether this dynamic will ever manifest itself in the case of international terrorists who may have little contact with the population in the state in which they operate. But in the case of potential ‘home grown’ terrorists, the picture may be different. If the Northern Ireland pattern repeats itself, avoidance of indiscriminate or egregious repression could be expected to reduce the kinds of communal toleration and support most conducive to the emergence of violent activism. The reverse may also occur. Unless the appropriate lessons of conflicts such as that in Northern Ireland are learned, and anti-terrorist legal discourse is reframed in a way that takes adequate account of the complexity of state action and law’s role, the latter scenario may remain a tragic possibility.