



10

BEYOND RADICALIZATION—TOWARDS AN INTEGRATED ANTI-VIOLENCE RULE OF LAW STRATEGY*

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1. Introduction

Bombs in crowded cafes blind. The blast radius delineates immediate victimhood, but such attacks can also blind the state to the consequences of its ‘anti-terrorist’ actions. Globally, patterns are emerging that profoundly challenge prevailing orthodoxies: legal regimes employed to ‘combat terrorism’ can apparently promote the enemy they claim to destroy; and ‘taking the gloves off’ seems rarely to work for the law based state (hands just get dirty).

Clearly, there are problems at the technocratic (planning and execution) level. But this chapter argues that problems are more deeply rooted: that dominant ‘anti-terrorist’ discourses are constructed in ways that conceal unpalatable consequences; that these discourses [mis-]shape policy; and that responsibility for overall shortcomings lies at least as much at these levels as with operatives at the sharp end.

The chapter begins with a critique of some influential anti-terrorist legal discourses. It then sets out an alternative socio-legal model of law’s role in situations of insurgency and terrorism in the state ideologically committed to the ‘rule of law’ (the ‘*rechtsstaat*’). This explores not only the state’s engagement with law in its attempt to deal with its enemies (a ‘top-down’ perspective), but also law’s operation within the civilian population from whom violent actors spring (‘bottom-up’). This model is then employed to analyse four conflict sites separated widely by geography and types of legal system. Comparisons facilitate identification of cross-jurisdictional

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Colm Campbell

patterns; using these as reference points, elements of an alternative anti-violence, rule of law strategy are suggested.

2. The Poverty of Dominant Discourses

Rather than attempt to cover the entire span of contemporary ‘anti-terrorist’ literature, this section focuses on four salient features: its dominant modelling; its approach to limitation and ‘balance’; its elevation of hypotheticals over real-world data; and its neglect of law’s impact on subaltern groups. Dominant discourses, particularly in law, rely heavily on variants of the ‘crisis [of terrorism]—response [of the state]’ models. The number of scholarly articles that include ‘terrorism’ and ‘response’ in their *title* alone since 9/11 (700), exceeds that in the world’s previous published output. Some 326,000 articles include both terms in their discussions.¹ In the most basic legal version, terrorism represents a crisis to which the state must respond, generally by using law to limit rights. More developed versions along ‘terrorology lines’ add provisos that the state should not respond counter-productively.² But even here the state’s possible contribution to conflict is obscured—it is a reactor not an actor; it responds to, but does not create crises. It is only in the political science and sociological literature examined below that models emerge which transcend ‘crisis-response’.

Much of the legal discourse sees the need for rights limitation as self-evident: the only questions being ‘by how much?’, and ‘what balance is to be struck?’. Rarely is it explained how the (many) limitations will contribute to the response’s effectiveness (this would involve engagement with real life data). Once the need for limitation is accepted, the secondary question of balance is addressed using a linear seesaw metaphor: the right in question is represented by a plank (with seats at each end), and the extent to which the right is exercisable is shown by the distance between the ends of the plank and the fulcrum (Figure 1). In the ordinary case the rights of society and of suspected criminals are evenly balanced. But the more evil (and heavy) the terrorist, the greater the seesaw needs to be weighted in favour of society, potentially leading to the virtual extinction of the right in question.

As regards ‘proof’ of the need for particular powers, two broad strategies can be identified. The first, employed most [in]famously by Dershowitz,³ avoids the need for empirical data by relying upon hypotheticals—typically the ‘ticking bomb’ scenario: a captured uncooperative terrorist is known to have planted a bomb;

¹ Google Scholar <<http://scholar.google.co.uk/>> accessed 29 March 2011.

² P Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (2nd edn Routledge, London 2006).

³ AM Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Haven, CT 2002).



10. Beyond Radicalization: Towards an Integrated Strategy

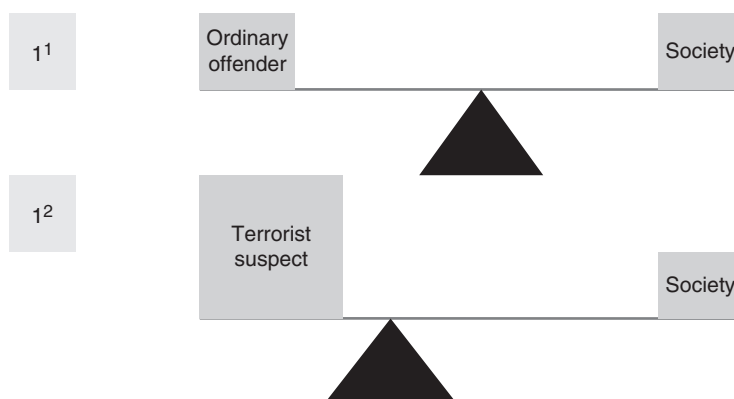


Figure 1 Balance as a Seesaw

unless he is tortured to locate it, many people will die. Dershowitz recommends a system of judicial ‘torture warrants’ authorizing the insertion of needles under the suspect’s nails. The pain will cause him to disclose the location; lives will be saved; and the tactic is therefore effective. Torture tends to happen anyway, and should be institutionalized and thereby delimited.

Quite apart from moral objections, Dershowitz’s sleight of hand is to shift from torture being effective with one ‘ticking bomb’ terrorist to being an effective counter-terrorist tactic in general. Empirical evidence (discussed below) suggests that torturing one can radicalize one hundred. Some may become new bombers, multiplying the problem several-fold. Furthermore, institutionalizing controlled torture sends messages to security personnel that torture is acceptable, risking downward spirals of ‘informal’ torture, extremist radicalization, and violence. It is not that Dershowitz addresses and dismisses the ‘messaging’ issue—he simply ignores it. The view of law he employs is highly normative, with law operating in a ‘top down’ manner.

Few of the main contributors take the trouble to assemble original empirical material on terrorism, or *terrorists*⁴—indeed an antipathy towards primary studies can be evident. For instance Wilkinson’s *Terrorism versus Democracy: The Liberal State Response*⁵ relies entirely on secondary or tertiary data. This use is highly selective, seemingly limited to data supporting the author’s thesis. Despite drawing frequently on Northern Ireland, the work entirely ignores all the key empirical studies on special courts and emergency powers in the region.⁶ Wilkinson’s approach helps to

⁴ See DW Brannan, PF Esler, and NT Anders Strindberg, ‘Talking to “Terrorists”: Towards an Independent Analytical Framework for the Study of Violent Substate Activism’ (2001) 24 *Studies in Conflict and Terrorism* 3.

⁵ Wilkinson (n 2).

⁶ Probably the most important reference points were a series of internationally celebrated primary empirical studies by Professor Tom Hadden and associated contributors, for example T Hadden, K Boyle, and P Hillyard, *Ten Years on in Northern Ireland* (The Cobden Trust, London 1980).

Colm Campbell

explain how, in his earlier *Terrorism and the Liberal State*, he could be so emphatic in his approval of internment without trial in Northern Ireland.⁷ It is now clear that internment's introduction was a marked failure (in the book's second edition the claim has disappeared).⁸

In much of the literature the result tends to be portrayals of irrational, mindless, sociopathic, or evil individuals, whose capacity for indiscriminate violence is limited only by availability of weaponry. A number of consequences flow: since the threat is potentially unlimited, particularly harsh measures are required. As terrorists are mindless, their entrepreneurship, and specifically their capacity creatively to exploit the state's mistakes, is ignored. And opportunities for peace may be overlooked by analyses of insurgents' goals informed by 'mindlessness' paradigms. The dynamic appears to be that trusted individuals are facilitated to acquaint themselves with official security thinking. Insights thereby gained are fed into their analyses, which are then incorporated in policy elaboration, producing loops of continual reinforcement.

3. Building a Law and Social Movement Model

'Top-down' views of law can help solve some legal puzzles, but have a number of shortcomings in current contexts: (1) they neglect a key insight of the 'law and society' movement—law's 'Janus-faced' quality—simultaneously a tool of repression and source of challenger empowerment;⁹ (2) they contribute little to solving the conundrum of why 'anti-terrorist' law can be counter-productive; (3) their focus on positive norms tends to underplay the significance of situations where security forces act outside their powers.

The alternative 'bottom-up' model employed here looks at law less as a multiplicity of norms than primarily as 'particular traditions of knowledge and communicative practice'¹⁰ in which messaging around law is a major concern (messaging occurs when norms are complied with and when they are not). Deracinated views of terrorists are rejected as inaccurate;¹¹ rather the model analyses the state's violent challengers through the lens of social movement theory. Such groups have agency, and the analysis uses this capacity to provide an account of security law's potentially counter-productive effects.

⁷ See P Wilkinson, *Terrorism and the Liberal State* (1st edn Macmillan, Oxford 1977) 155ff.

⁸ P Wilkinson, *Terrorism and the Liberal State* (2nd edn Macmillan, Oxford 1986).

⁹ See RL Abel, *Politics by other Means: Law in the Struggle Against Apartheid, 1980–1994* (Routledge, London 1995); A Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 *Journal of Law and Society* 309.

¹⁰ MW McCann (ed), *Law and Social Movements* (Ashgate, Aldershot 2006) xii.

¹¹ See in general M Crenshaw, 'The Psychology of Terrorism: An Agenda for the 21st Century' (2000) 21 *Political Psychology* 405; and M Crenshaw, *Terrorism in Context Causes, Processes and Consequences* (Routledge, London 2010).



10. *Beyond Radicalization: Towards an Integrated Strategy*

While some states pursue an ‘anti-terrorist’ agenda with little regard for the law, the sole focus here is on the *rechtsstaat*—a usefully concise German formulation of a concept pervasive in Western legal systems—in English the ‘rule of law state’. This refers to a commitment that the state aims to function in accordance with ‘the principle of legality’, providing remedies when it fails to do so; this contrasts with states characterized by the arbitrary exercise of power. In the *rechtsstaat* law is to mediate the exercise of this power, even if mediation cannot be perfect. The *rechtsstaat* claim functions as an ideological device, not a description of states’ actual behaviour. The presence of appeal courts, and the availability of judicial review, represent implicit acceptance that no states are able always to respect all the law.

‘Thin’ accounts of the rule of law focus on procedural correctness—if a law is properly enacted and the state has behaved in accordance with it, successful challenge is impossible. Law is seen primarily as imposing obligations on the populace (rather than on the state)—sometimes referred to as ‘rule by law’. By contrast, ‘thick’ accounts of the rule of law are concerned additionally with law’s substance. This may open possibilities for challenging state action on grounds of lack of compatibility with such concepts as proportionality or fundamental human rights. How social movements can use law to further their aims is analysed further in Section 5.

4. The Case Studies

Four jurisdictions have been selected to provide a spread of contexts, legal systems, and geography in analysing the complexities of political violence and the *rechtsstaat*: Northern Ireland (1968–1998), the Occupied Palestinian Territories (OPT) (1967–2011), the Federal Republic of Germany (1967–1998), and apartheid era South Africa (1960–1994). In many contemporary ‘legal responses to terrorism’ conversations, it tends to be assumed that the *rechtsstaat* is coincident with liberal democracy, but this can be misleading. South Africa’s apartheid era racist constitution denied it any claims to be considered ‘democratic’. It nevertheless considered itself a *rechtsstaat*, and its judges sometimes displayed willingness to challenge state action.¹² Furthermore, while a liberal democratic state may subject itself to the rule of law within its borders, it may employ lesser standards when acting outside. While Israel is frequently considered a democratic *rechtsstaat* within its pre-1967 borders, the Israeli legal system does not apply in the OPT (apart from East Jerusalem). It is therefore not generally possible to invoke this system to challenge security force activities; however such actions may be challenged before the Supreme Court of Israel for incompatibility with international law.¹³

¹² Abel (n 9).

¹³ See generally D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, Albany 2002), especially 19–29.



Colm Campbell

A further problem occurs where the state overall is liberal democratic, but where it contains a conflicted region with severe democratic and/or rule of law deficits ('brown zones').¹⁴ This was the case with Northern Ireland where for much of its existence the state lacked the consent of up to 40 per cent of the population. For decades, only thin rule of law adherence obtained (although thickening occurred during the conflict). Germany had the clearest case to be considered both *rechtsstaat* and liberal democracy, though even here claims of significant rights violations surfaced (see below).

Nomenclature in relation to exceptional legislation is not common across the conflict sites. For ease of reference, the term 'security' is used here (referring to protecting the dominant group's security). The structure of such powers in Northern Ireland, South Africa, and the OPT shares family resemblances—all were under British rule at some time. An original emergency statute/ordinance existed, incorporating a delegated power to make wide ranging regulations (Table 1, column 2). These were later supplemented or replaced by anti-terrorist Acts (Table 1, column 3). There also existed legislation that while not badged as exceptional, nevertheless had an equivalent effect (Table 1, column 4).

Much of the substantive content of security legislation and regulations was broadly similar in all three sites. This included powers to arrest, detain, and interrogate for extended periods on vague grounds; to conduct warrantless searches; to assign or limit residence; to operate checkpoints; to proscribe organizations; and to detain without trial indefinitely. In general, the South African and Israeli provisions were more draconian than those in Northern Ireland. In all three sites, legislation was frequently drafted to be 'catch-all' and 'judge-proof'. It cast the net wide to include all possible suspects even if innocent people were also caught up; and it aimed to limit the potential for judicial interference, typically by excluding 'reasonableness' requirements in security powers.¹⁵

In Northern Ireland, the ordinary mechanisms for prosecuting criminality applied to alleged security force misbehaviour, but in practice prosecutions were very rare. In the OPT the Israeli military ruled on its own alleged criminality through its courts-martial system. In South Africa (from 1986)¹⁶ an attempt was made to short circuit prosecutions, with a regulation providing for *prospective* indemnity. Where security forces engaged in multiple killings attracting international attention, the response in Northern Ireland (paratroopers killed 13 civil rights protesters on

¹⁴ See G O'Donnell, 'On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Post-Communist Countries' (1993) 21 *World Development* 1355.

¹⁵ See generally O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP, Cambridge 2006).

¹⁶ AS Mathews, *Freedom, State Security and The Rule of Law—Dilemmas of the Apartheid Society* (Sweet and Maxwell, London 1988) 205.

**Table 1 Emergency and Security Legislation in South Africa, Northern Ireland, Occupied Palestinian Territories, and the Federal Republic of Germany**

1. Jurisdiction	2. Emergency Powers	3. Anti-terrorist or Security	4. Other
South Africa (1960–94)	Public Safety Act 1953 Public Safety Amendment Act 1986	Internal Security Act 1982 Unlawful Organisations Act 1960 Suppression of Communism Act 1950 Internal Security Act 1950	Pass laws
Northern Ireland (1968–98)	Civil Authorities (Special Power) Acts Northern Ireland 1922–43	Detention of Terrorists (Northern Ireland) Order 1972 Northern Ireland (Emergency Provisions) Acts 1973–98 Prevention of Terrorism (Temporary Provisions) Acts 1974–89	Criminal Evidence (Northern Ireland) Order 1988
Occupied Palestinian Territories (1967–2011)	Defence (Emergency) Regulations 1945 made under Palestine (Defence) Order 1937	'Military Orders' issued by the Israeli Defence Forces (total number = circa 1700)	
Federal Republic of Germany (1968–98)	Emergency Law 1968 ('Notstandsgesetze' of 30 May 1968)	'Anti-Terror Act' 1974 [Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Strafverfahrensrechts vom 20. Dezember 1974, Bundesgesetzblatt (BGBl) 1974 I, 3686] 'Anti-Terror Act' 1976 [Gesetz zur Änderung des Strafgesetzbuches, der Strafprozessordnung und des Strafvollzugsgesetzes, der Bundesrechtsanwaltsordnung und der Strafvollzugsgesetzes vom 18. August 1976, BGBl 1976 I, 2181] 'Contact Law' ('Kontaktsperre-Gesetz) 1977 [Gesetz zur Änderung des Einführungs-gesetzes zum Gerichtsverfassungsgesetz vom 2. Oktober 1977, BGBl 1977 11877] 'Raid Act' 1978 [Gesetz zur Änderung der Strafprozessord-nung 14 Apr. 1978 BGBl I, at 497] 'Act Amending the Criminal Code and the Act on Assemblies against Terrorism' 1985 [Gesetz zur Änderung des Strafgesetzbuches und des Versammlungsgesetzes vom 18. Juli 1985, BGBl I, at 1511] 'Passport Act and Act Amending the Code of Criminal Procedure' 1986 [Paßgesetz und Gesetz zur Änderung der Strafprozessordnung vom 19. April 1986, BGBl I, at 537] 'Act for the Fight against Terrorism' 1986 [Gesetz zur Bekämpfung des Terrorismus vom 12 December 1986 BGBl I, at 2566]	'Eavesdropping Act' (Abhör-gesetz) of 13 August 1968 'The Radicals Decree' (Radikalener-läss), 28 January 1972



Colm Campbell

'Bloody Sunday')¹⁷ and South Africa (69 demonstrators killed by police at Sharpeville), was to initiate forms of public inquiry. Invariably, while the conflict persisted, these exonerated the security forces (South Africa's 'Wessels Commission' after Sharpeville,¹⁸ and Northern Ireland's 'Widgery Commission' after Bloody Sunday¹⁹). Israel's 'Turkel Commission'²⁰ in relation to the 'Gaza flotilla' performed a similar function. Post conflict dynamics were different: the South African Truth and Reconciliation Commission's Report rejected the earlier account of Sharpeville,²¹ while the Saville Commission Report²² effectively overruled Widgery.

Germany was the outlier in several respects: it was the only jurisdiction where courts could strike down legislation by reference to a written constitution. While the state made provision for emergency powers in 1968 (the 'Notstandsgesetze'), these were not invoked in dealing with terrorism. Rather a number of 'Anti-Terror' Acts were adopted (Table 1, column 3) that significantly eroded the accused's right to choose his or her legal team; that provided for trial *in absentia*; and that permitted temporary incommunicado detention of prisoners.²³ Membership of a terrorist organization was made a crime, and powers were granted to search entire apartment blocks. But there were no special powers to arrest and detain (except for a 12 hour power to determine identity), as were typical in the jurisdictions explored above.

In South Africa, Northern Ireland, and the OPT, there was rule of law erosion at multiple levels, of which three are focused on here. The first was the use of 'delegated' law-making. This was very pronounced in South Africa, and an equivalent result was arrived at in the OPT under the 'Military Order' system under which the Israel Defence Forces (IDF) create, apply, and enforce the law. In Northern Ireland, it was a lesser issue, as the Special Powers Act was repealed five years into the conflict. Delegation removes law-making from parliament, thereby minimizing scrutiny; in effect the executive or the security *apparatus* is made a legislator.

¹⁷ D Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (Macmillan, London 2000).

¹⁸ P Frankel, *An Ordinary Atrocity Sharpeville and Its Massacre* (Yale University Press, New Haven, CT 2001).

¹⁹ WJP Widgery, 'Report of the tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day' (HMSO, London 1972).

²⁰ The Turkel Commission, 'The Public Commission to Examine the Maritime Incident of 31 May 2010' (January 2011) <<http://www.turkel-committee.gov.il/files/worddocs//8707200211english.pdf>> accessed 29 March 2011.

²¹ Truth and Reconciliation Commission, 'Truth and Reconciliation Commission Report of South Africa: Volume 3' (29 October 1998) Chapter 6, 537 <<http://www.justice.gov.za/trc/report/finalreport/Volume%203.pdf>> accessed 29 March 2011.

²² Bloody Sunday Inquiry, 'The Report of the Bloody Sunday Inquiry' (Saville Report) (HC 29-I-HC 29-X, Volumes 1–10) (London, 15 June 2010) <<http://www.bloody-sunday-inquiry.org/index.html>> accessed 29 March 2011.

²³ See A Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terror Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France* (Intersentia, Antwerp 2009) 237–65.



10. *Beyond Radicalization: Towards an Integrated Strategy*

The second springs from the view that law in the *rechtsstaat* is to mediate the state-individual relationship. The ‘catch-all’ drafting of the above security powers limits this mediating potential—people arrested under sweeping laws find it difficult to bring successful false arrest actions; this is also true of ‘judge-proofing’ security powers. The third relates to lack of accountability for security forces, either through non-prosecution or through flawed inquiries, where serious infractions are believed to have occurred. Whereas the rule of law requires that security forces be subject to the law, this suggests that they are partly above it. In Germany, rule of law erosion was generally less marked, but was significant in relation to a cluster of issues around prisoner isolation and lawyer access (below).

5. Social Movements and the Law

In analysing the emergence and development of insurgent or terrorist groups, social movement theory draws centrally on three analytical devices: ‘mobilizing structures’, ‘framing processes’, and ‘political opportunity structures’. ‘Mobilizing structures’ refer to ‘collective vehicles, informal as well as formal, through which people mobilize and engage in collective action’.²⁴ When structures gel, the result is the ‘social movement organization’ (SMO), which, with linked organizations, form a ‘social movement family’. Here the typical ‘family’ consists of an armed group and political party: Unkhonto we Sizwe (MK) and the African National Congress (ANC) (South Africa); Fatah with its opaque links to Tanzim (OPT); and the Irish Republican Army (IRA) and Sinn Féin (Northern Ireland). Germany diverged in that its Red Army Faction (RAF) had a unitary structure. Hereafter, unless otherwise indicated, ‘SMO’ is used to refer to the armed ‘wing’ of bifurcated structures, and ‘movement’ refers to the SMO and its linked party.

In social movement theory in general, successful organizations are characterized by a capacity to maximize uptake of human and material resources. Initiative by movement entrepreneurs is key, with decision-making assumed to accord with forms of rational actor models. Financial resources are typically easily obtained (through diasporas, bank robberies, or ‘revolutionary taxes’); likewise, the world is awash with small arms. The critical element is human resource—at three levels: (1) recruits; (2) active supporters; and (3) societal elements displaying passive support, toleration, or neutrality in relation to the SMO’s activities. What the SMO requires from (2) are accurate intelligence, safe houses, and weapons storage. From (3) what is primarily needed is an unwillingness to provide information to security agencies. Group size correlates with degree of structure: MK had a large paper membership

²⁴ D McAdam, JD McCarthy, and MN Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (CUP, Cambridge 2004) 3.



Colm Campbell

(circa 23,000) and was highly structured;²⁵ the IRA was likewise highly structured, with a membership at any one time of around 1,500.²⁶ In both cases the number of fighters was much lower. The RAF probably had a few dozen members operating in loosely linked cells.²⁷

The second device key to social movement analysis is that of 'framing processes'—the 'conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action'.²⁸ Encompassing a range of cultural and ideational elements, these provide shared frames of reference for members, with 'frame-diffusion' producing transmission between movements. Key to SMO growth are 'frame-alignment' processes—'strategic efforts by [SMOs] to link their interests and interpretive frames with those of prospective constituents and actual or prospective resource providers'.²⁹ Depictions of state failings must strike a chord with potential supporters (frame resonance) and be sufficiently grave (diagnostic framing) to sustain fighters (motivational framing) for 'armed struggle' leading to 'victory' (prognostic framing).

The third key analytical device is that of 'political opportunity structures'—the 'structures of political opportunities and constraints confronting the movement'. A critical issue here is the extent of banning, and censorship, and of limitations on assembly, and participation in parliament: banning armed groups is virtually certain, banning parties less so. In South Africa both MK and the ANC were banned; in Northern Ireland while the IRA was proscribed throughout, bans on Sinn Féin were eventually lifted (1975). An insurgent movement is therefore likely to thrive (a) when resources are plentiful, and its structures facilitate maximum uptake; (b) when its framing processes resonate with targets of mobilization; and (c) when it can exploit openings (and perhaps closings) in the political opportunity structure. Under all three headings, entrepreneurship by movement activists is key.

In the *rechtsstaat*, these closings of political opportunity structures are likely to be cast as law. Yet simultaneously, law in the *rechtsstaat* provides potential openings via legal challenge to the closures. Though inevitably influenced by powerful social forces, Abel emphasizes how even in the former South Africa law could be considered to have had a 'relatively autonomous'³⁰ quality. It was therefore open to deployment

²⁵ T Motumi and Uwe Sizwe, 'Structure, Training and Force Levels' (1984–1994) 18 *African Defence Review* 1, 8 <<http://www.iss.co.za/PUBS/ASR/ADR18/Motumi.html>> accessed 2 April 2011.

²⁶ In 2005 the Irish Justice Minister told parliament that there were 'between 1,000 and 1,500 active volunteers in the IRA'. See Dáil Eireann Debates, Vol 605 No 1 (2005) <<http://debates.oireachtas.ie/dail/2005/06/23/00010.asp>> accessed 29 March 2011.

²⁷ See RA Francisco, *Collective Action Theory and Empirical Evidence* (Springer, London 2010) 98.

²⁸ McAdam, McCarthy, and Zald (n 24) 6.

²⁹ RD Benford and DA Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 *Annual Review of Sociology* 611, 624.

³⁰ Abel (n 9) 8.

10. *Beyond Radicalization: Towards an Integrated Strategy*

by the state's opponents *to some degree*, whether as shield (when defending prosecuted SMO members), or as a sword (when challenging restrictions).³¹ In the *rechtsstaat* it is impossible to assess the political opportunity structure without regard to law. Radical groups' framing processes may also have important legal dimensions. Such key master-frames as 'rights' and 'injustice' almost invariably raise questions that demand legal answers (whether in condemning particular laws or in promising law based protection once the group wins).

6. Patterns of Mobilization

Within the social movement literature, the 'politics of contention' stream has well developed and sometimes empirically grounded analyses of mobilization and political violence.³² Degrees of consensus are relatively high in some areas, and lower in others. Available analyses were developed by political scientists rather than lawyers. Few attempts were made to tease out legal dimensions, and published analyses are not limited to the *rechtsstaat*.

Some degree of consensus exists in relation to the following propositions:

- (1) With such varieties of variables present in conflicted society there is no 'one size fits all' model to be applied mechanistically.
- (2) Having a 'cause' (typically evidenced by 'widespread discontent and dissatisfaction')³³ is a necessary but not sufficient condition for mobilization.
- (3) Mass mobilization tends to occur in cycles.
- (4) A contingent relationship exists between mass mobilization and violent mobilization; this is linked to protestor 'backlash' after egregious repression and to the actions of movement 'entrepreneurs'.³⁴
- (5) Once significant violent mobilization occurs, political violence can rapidly become entrenched, and is likely to reach a plateau.³⁵

The case studies illustrate how such issues can play out: reflecting the cyclical nature of mass movements, South Africa, Northern Ireland, and the OPT demonstrate

³¹ For such use by IRA prisoners and Sinn Féin see K McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release* (OUP, Oxford 2001) 167–77.

³² The literature drawn upon here is too voluminous to list. Francisco (n 27) surveys some key contributions. Others include C Davenport, H Johnston, and C Mueller (eds), *Repression and Mobilization: Social Movements, Protest, and Contention Volume 21* (University of Minnesota Press, Minneapolis 2005); C Tilly, *The Politics of Collective Violence* (CUP, Cambridge 2003).

³³ A Oberschall, 'Explaining Terrorism: The Contribution of Collective Action Theory' (2004) 21 *Sociological Theory* 26, 27.

³⁴ MI Lichbach, 'Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent' (1987) 31 *Journal of Conflict Resolution* 266, 272.

³⁵ R Francisco, 'Why Are Collective Conflicts "Stable"?' in C Davenport (ed), *Paths to State Repression: Human Rights Violations and Contentious Politics* (Rowman and Littlefield Publishers Inc, Lanham 2000).



Colm Campbell

two cycles of mass mobilization (Table 2). These were largely peaceful, except in the OPT where mass mobilization involved significant rioting from the outset. Germany had only one major period of mass mobilization.

In all a cause can be identified (weakly in Germany), although in every instance its existence pre-dated mass mobilization (reinforcing the point that the cause, by itself, is insufficient). In South Africa the first wave was in 1960, but the apartheid system had been formally instituted 12 years earlier. In the OPT the first Intifada occurred approximately 20 years after the start of Israeli occupation. In Northern Ireland initial mass mobilization around denial of 'civil rights' came nearly a half century after the state's foundation. The insistence by German radicals in 1968 that they were living in a 'fascist' continuation of the National Socialist State came approximately two decades after the Federal Republic's creation. Inevitably, this begs the question of why the [unlikely] realization had not dawned earlier?

If the 'cause' is relatively constant, how to explain the beginnings of mass mobilization at particular times? Typically there is an event that appears to symbolize and crystallize the overall cause, a process occurring with greater or lesser input from movement entrepreneurs. In South Africa, the second wave of mobilization arose from the attempted imposition of compulsory secondary school education in the Afrikaans language. To black African students this was as an attempted exercise in white domination, and they rebelled accordingly. In Northern Ireland the trigger for the first wave of mass mobilization is often considered to have been bans on radical political parades and associations, and an act of discriminatory public housing allocation. In Germany a key issue appears to have been the Vietnam war, prompting ideational development ('anti-imperialist', 'anti-fascist') that was turned against the German State.

Reflecting the *rechtsstaat* quality of the case studies, there is some evidence of casting claims-making in legal terms. In South Africa initial mobilization contested the 'Pass Laws' (which restricted movement for Black Africans within South Africa). In Northern Ireland, 'civil rights' demands encompassed legal reforms, including repeal of the Civil Authorities (Special Powers) Acts Northern Ireland 1922–43 (Table 1) There was also evidence of cross-national frame-diffusion: mainstream Northern Ireland protesters borrowed from the American Civil Rights Movement, with a leftist minority modelling framing on '*les événements*' in France and Germany (where students in turn borrowed framing from third world liberation movements). As regards collective action repertoires, during the mass mobilization phase the prime protest form in the case studies was the march (OPT, Germany, Northern Ireland, South Africa), with rent and rates strikes (Northern Ireland), strikes (OPT), school boycotts (South Africa), and rioting (all) also figuring.



Table 2 Cross-National Patterns and Violent Mobilization

	South Africa (A) (1960–61)	South Africa (B) (1976)	OPT (A) First Intifada (1987–92)	OPT (B) Second Intifada (2000–05)	Northern Ireland (A) (1968–72)	Northern Ireland (B) (1980–81)	Federal Republic of Germany (1967–72)
<i>Focus of Initial Radicalization/ Mass Mobilization</i>	Pass Laws/Apartheid (1960)	Apartheid/Forced instruction through Afrikaans (1976)	Military occupation/death of four Palestinians at Erez crossing (1987)	Military occupation/ Visit of Israeli PM to Temple Mount/ Al-Haram Al-Sharif (2000)	Denial of civil rights (1968–69) and prisoner ill-treatment (1971–72)	Prisoner ill-treatment/ removal of 'special category status' (1976 and 1980)	Anti-Vietnam war, anti-Shah protests, 1968 student revolt
<i>Protest Forms</i>	Protest marches	School boycott	Rioting; mass protests; strikes	Rioting	Protest marches; rent and rates strike	Protest marches; assassination of prison officers	Protest marches
<i>State Action</i>	Harassment of actual and potential marchers	Harsh public order policing	Use of exceptional force against rioters and protesters	Introduction of Israeli police and military presence in area	Police brutality at civil rights marches	Unyielding approach to prisoners' demands	Harsh policing at student protests
<i>Tipping Point</i>	Sharpeville killing of 69 civilians by SA Police (1960)	Soweto killing of 195–700 civilians by SA Police (1976)	Shooting dead of first rioter (1987)	47 Palestinians and five Israelis killed in first five days after Israeli PM's visit (2000)	'Bloody Sunday' killings of 13 Civil Rights protesters by paratroopers (1972)	Death of ten hunger strikers (1981)	Shooting dead of student demonstrator at anti-Shah protests (1967)
<i>Violent Mobilization</i>	Foundation of Unkhonto we Sizwe (MK) (ANC military wing) (1961) and Poqo/ APLA (PAC military wing) (1960s)	Increased recruitment for ANC and MK. Strengthening of ANC's position as dominant resistance group	Reinforcement of PLO's prime position; emergence of Hamas (1987)	Strengthening position of Hamas (particularly in Gaza)	More radical 'Provisional IRA' eclipses reformist 'Official IRA' (1972–)	Increased recruitment and support for Provisional IRA	Formation of RAF (1970)



Colm Campbell

7. Backlash

In some societies relatively peaceful mass demonstrations retain primacy in collective action cycles. In others (including the case studies), peaceful protest is replaced by degrees of violence, perhaps involving mass participation (OPT), and/or action by insurgent (South Africa, OPT, Northern Ireland) or terrorist (Germany) groups. In many of these situations it is relatively easy to show increases in violence immediately following employment of some egregious repressive technique. But of itself, this demonstrates no more than coincidence or simple correlation. Exploration of possible causal processes requires more sophisticated analytical techniques.

In the 'politics of contention' literature a variety of quantitative and qualitative techniques are employed to explore the issue, generating studies both of the effect of harsh (but bounded) state repression on collective protest action, and of more intense repression involving extensive use of lethal force. Quantitative methodologies involve assembling large volumes of data on the use of particular repressive techniques (for example, arrests and banning of marches), and on protest actions (for example, marches or rioting) over a defined time period. Regression analysis explores the possible relationship between the two over time using appropriate statistical tools. This chapter draws on three such studies from South Africa, the West Bank, and Northern Ireland. In all three the focus was less on immediate impact of repression on collective action, than on observable effects within time-limited periods ('lagged effects').

Hewitt's 1984 work covering Northern Ireland is the earliest and the least developed methodologically,³⁶ and since it also analysed four other conflict sites³⁷ it is the thinnest in terms of volume of data per site. These data (from 1970–1981) were gathered under three headings: 'terrorist measures and security force counter-measures', 'economic conditions', and 'significant events' (for example, truces).³⁸ The 'effectiveness' of anti-terrorist measures was assessed by plotting levels of terrorist activity (a) over time, and (b) against some policy indicator (such as use of special courts).

For Olivier's 1991 study of state repression and collective action in South Africa from 1970 to 1984,³⁹ data were gathered on (a) protest events and conflict events (in which two or more opposing ethnic groups engage in collective action, that might have involved violence (but excluding guerrilla violence)); and (b) measures of state repression (measured as police force strength; numbers detained; and kinds

³⁶ C Hewitt, *The Effectiveness of Anti-Terrorist Policies* (Rowman and Littlefield Publishers Inc, Lanham 1984).

³⁷ Uruguay, Cyprus, Spain, and Italy.

³⁸ Hewitt (n 36) 102–09.

³⁹ J Olivier, 'State Repression and Collective Action in South Africa, 1970–84' (1991) 22 *South African Journal of Sociology* 109.



10. *Beyond Radicalization: Towards an Integrated Strategy*

of police intervention—from mere presence through to shooting). The data were coded, and the relationship between (a) and (b) analysed.

The OPT analysis relies on Khawaja's 1993 study of collective action and repression in the West Bank (Gaza was not included). A later study from the region is available, but as that focuses on only one tactic (suicide bombing), it is of less general applicability.⁴⁰ With similarities to Olivier, Khawaja employed a dataset covering 1976–1985 assembled from published accounts of (a) Israeli military actions (installing checkpoints, beatings, etc); and (b) collective political violence (but excluding guerrilla violence).⁴¹ The relationship between the two was then plotted.

In contrast to quantitative methodologies, qualitative techniques typically employ in-depth, semi-structured interviews with key actors; salient issues are identified ('coded'), and, using dedicated software, trends are drawn out. This chapter draws on Campbell and Connolly's qualitative Northern Ireland study based on life-history interviews with 17 former IRA prisoners (mostly mid-level), and on Della Porte's study of political violence in Germany (and Italy), which involved the collection of 40 oral life histories and 100 written biographies of activists. Quantitative techniques are good for broad patterns and have the benefits of maximal objectivity. Qualitative techniques are better at teasing out the fine texture of human processes, though are inevitably more subjective. Deploying both techniques simultaneously in relation to the same phenomenon may permit degrees of cross checking ('triangulation') of findings.

A critical question across these studies was whether state repression decreased, increased, or made no difference to levels of collective protest action? Olivier's conclusion was that South African repression tended to increase the rate of collective action. The mere *presence* of police at an event was found to increase subsequent collective action by 69 per cent.⁴² It also appeared that the harshest repression was the least effective: where policed opened fire, subsequent collective action increased by 107 per cent⁴³ over situations where police were not present.

These findings were echoed in Khawaja's study which found that many Israeli methods of repression increased collective action, though unevenly so. Where tear gas was used the increase was 44 per cent; dispersal of gatherings by force produced a 39 per cent increase: 'Instead of deterring protest, repression increased subsequent collective action'.⁴⁴ As regards 'collective punishments', Khawaja emphasized

⁴⁰ B Araj, 'Harsh State Repression as a Cause of Suicide Bombing: The Case of the Palestinian-Israeli Conflict' (2008) 31 *Studies in Conflict and Terrorism* 284.

⁴¹ M Khawaja, 'Repression and Popular Collective Action: Evidence From the West Bank' (1993) 8 *Sociological Forum* 47.

⁴² Olivier (n 39) 114.

⁴³ Olivier (n 39) 114.

⁴⁴ Khawaja (n 41) 64.

Colm Campbell

the pronounced effects for increased protest where these punishments provoked uninvolved 'bystanders', an effect 'perhaps due to the catchall nature of this tactic, since provocation includes a diverse set of token and physical acts'.⁴⁵ While levels of violence and repression greatly increased with the events that triggered the first Intifada, Khawaja's analysis was that patterns of interaction during the Intifada represented continuity with patterns evident in his study.

The broader sweep of Hewitt's study means that it is less easy to extract salient statistics, but the overall thrust is clear: neither Northern Ireland nor his other conflict sites 'displays any recognizable pattern whereby violence declines following the introduction of emergency powers'⁴⁶ (rather he footnotes that violence increased following internment's introduction in the jurisdiction). As regards institutional dimensions, he found across his study that 'military activity and terrorism are usually positively and significantly correlated'.⁴⁷ This, he pointed out, could be interpreted as suggesting either that the military provokes terrorism or that it responds to it (he preferred the latter, though without statistical support). His overall conclusions emphasized the dangers of harsh and indiscriminate action: '... the more repressive regimes are no more successful in reducing terrorism than the more liberal regimes. Increasing repression did not lower the level of terrorist violence in . . . Northern Ireland.'⁴⁸ Stressing the dangers of the impact of repressive strategies on the general population (with echoes of Khawaja's 'bystander' discussion), he concluded that 'heavy-handed repression is counter-productive, and should not be used routinely'.⁴⁹

The strength of these studies is that they demonstrate links rather than simple correlations between some repressive techniques (particularly if indiscriminate or egregious) and increased collective protest action—the pattern is similar across all three. Only Hewitt measures impact on insurgent activity, but he omits the very start of the conflict (1968–1969), and he makes little attempt to disaggregate such key events in 1971–1972 as the introduction of internment and Bloody Sunday. These studies therefore leave largely unaddressed the question of how in some societies, terrorist or insurgent violence supersedes more peaceful forms of collective action (though Khawaja provides some pointers in his explanation of how protest action intensifies). Some answers can be found in the qualitative 'activist' studies, but useful insights can also be gleaned from studies focusing on the effects of *the* egregious repressive technique: the massacre.

Early collective action theorization assumed that when repression became very harsh, potential demonstrators would assess the cost of protest as excessive (personally),

⁴⁵ Khawaja (n 41) 60.

⁴⁶ Hewitt (n 36) ewitt 66.

⁴⁷ Hewitt (n 36) ewitt 86.

⁴⁸ Hewitt (n 36) e94.

⁴⁹ Hewitt (n 36) ewit 94.

10. *Beyond Radicalization: Towards an Integrated Strategy*

with mobilization consequently declining. Subsequent empirically based studies suggested the opposite, even where repression involved massacres after mass mobilization. Francisco's study of 31 20th century massacres demonstrated that rather than deter protesters many seemed to increase resistance (an effect referred to in the literature as 'backlash' or 'blowback'). His explanation was that leaders were generally either unaffected by massacres or were replaced by more effective cadres, and communication channels (for organization) remained intact. Activists (now highly motivated) adapted with new protest forms, sometimes involving insurgent violence (the study included Sharpeville, Soweto, the Temple Mount, and Bloody Sunday).⁵⁰

In the OPT, the 'second Intifada' approximated to this pattern. In Northern Ireland the second wave of mass mobilization (around regimes for IRA prisoners ('H Block/ Armagh')) seems to have had similar consequences, even though the deaths (for which the state was blamed) resulted from hunger strikes rather than massacres. In others, it appeared that even one high profile killing of a demonstrator or rioter could replicate the effect (OPT, first Intifada; Germany) (Table 2). Overall, 'backlash' seemed to represent a significant intensification of a phenomenon already apparent in relation to ordinary indiscriminate repression.

How these quantitative studies fit with relevant qualitative data can be explored by juxtaposing their conclusions with those in the Della Porta, and Campbell and Connolly, studies under four headings: (1) creating identity: repression and exclusion; (2) the uses of indiscriminate repression; (3) tipping factors for violent activism; and (4) entrepreneurship, structure, and framing.

7.1. **Creating Identity: Exclusion and Repression**

Both Della Porta, and Campbell and Connolly, explored activists' life histories, charting experience of the state and deepening radicalization; in each the issue of radicalization is closely linked to that of identity. The recurring picture is of the emergence of a sense of self as a member of a victimized group to the extent that membership comes significantly to define the self. In Germany exclusion had a strong sub-cultural (rather than ethnic) dimension. Della Porta emphasizes the importance of perceptions of exclusion and of persecution of protestors: '[a]ctivists felt that a "pogrom-like" attitude pervaded the population against "the students"'.⁵¹ This was so even if 'the students' had not personally been violently attacked: '[r]adicalization was therefore encouraged less by direct experience of violence than by a sense of being violently rejected by mainstream society'.⁵²

⁵⁰ RA Francisco, 'After the Massacre: Mobilization in the Wake of Harsh Repression' (2004) 9 Mobilization 107, 109.

⁵¹ D Donatella Della Porta, *Social Movements, Political Violence, and the State: a Comparative Analysis of Italy and Germany* (CUP, Cambridge 1995) 157.

⁵² Della Porta (n 51) 157.

Colm Campbell

Khawaja's analysis also suggests that in radicalization's early states it is less personal experience than generalized perception of state repression that is important: 'repression can strengthen collective identity . . . by operating as a symbolic reminder of a group's shared circumstance vis-à-vis authorities and their agents of control'.⁵³ Through this process, self-identification as a member of a group under military occupation is enhanced '[a]nd salient identity implies increased within-group solidarity'.⁵⁴ In Campbell and Connolly's Northern Ireland study perceptions of an exclusionary state also emerged. In parallel, repression and inter-communal violence seemed to reinforce a sense of self as belonging to a threatened group.

The overall picture is of perceptions of closures of political opportunities; this was seen as occurring partly through state repression, and reinforced a sense of out-group identity. None of this is to suggest a mechanistic relationship between out-group identity and repression; it is almost certainly more accurate to see it as a complex dialectical one, with repression affecting identity, and identity repression.

7.2. The Uses of Indiscriminate Repression

Early in the protest cycle numbers participating in relatively peaceful protests may vary, but few involve themselves in quasi-violent challenge to the state. Some protests remain at that stage—how then to explain why in others many more become drawn into protest, and some into violent activism? The case studies point to a common thread: the effect of relatively indiscriminate state repression—Khawaja's radicalized 'bystander' phenomenon (noted above): '[i]n the initial phase of a protest cycle only committed activists participate. But such encounters most often lead to the provocation of bystanders, for in responding to collective protests, the agents of control are likely to commit wrongdoings . . .'⁵⁵ In charting the deepening radicalization in Germany, Della Porta emphasizes the importance of perceptions of police brutality in public order situations beyond those immediately affected. As an activist put it: 'I had never been at a march . . . And there I saw three policemen who were beating a girl. I think if it had been a boy, I would not have felt so shocked.'⁵⁶

In the Campbell and Connolly data, respondents reported traumatic military house searches from childhood, sometimes involving entering an entire row. Some were described as professionally conducted, others as involving significant abuse and humiliation of parents (particularly mothers). From age 11 males in nationalist areas described significant bullying by the British Army, typically around the exercise of 'stop and search' powers under the Northern Ireland (Emergency Provisions) Acts 1973–1998; correspondingly females described experiencing strong verbal

⁵³ Khawaja (n 41) 66.

⁵⁴ Khawaja (n 41) 66.

⁵⁵ Khawaja (n 41) 66.

⁵⁶ Della Porta (n 51) 158.

10. *Beyond Radicalization: Towards an Integrated Strategy*

sexist abuse from soldiers. But this was rarely projected as propelling individuals into political violence. Rather the suggestion was that these experiences produced a much greater sense of self-identification as part of a victimized community, contributing to intensification of oppositional community cohesion.

Across all three case studies the process of deepening radicalization was intimately linked with rule of law degradation, though this was far more marked in the West Bank and Northern Ireland than in Germany. Degradation occurred when security force members acted outside the law (for instance with claimed police brutality in Germany); but it could also occur where they acted under security powers that in Northern Ireland and the OPT had been cast in 'catch-all', 'judge-proof', and 'executive-oriented' ways, facilitating indiscriminate use.

7.3. Tipping Factors for Violent Activism

While rule of law degradation is linked to radicalization, nothing guarantees a continued deepening of the process; in Khawaja's formulation 'the translation of collective dispositions resulting from increased solidarity into action is by no means mechanical and instant'.⁵⁷ Most of the radicalized go no further than relatively peaceful protest action, but some make the leap to violent mobilization. In the case of the latter, the qualitative literature emphasizes a number of factors: principally killings of protestors ('backlash'), and prisoner issues (particularly deaths).

In Della Porta's study two shootings early in the protest cycle emerged as having profound effects: those of protestor Benno Ohnesorg shot by a policeman, and of student leader Rudi Dutschke by a right-wing extremist. In the words of one activist, '[t]he turning point of the state apparatuses, which was embodied in Ohnesorg's and Rudi's cases, proved that the state was ready to do anything and that its fascist face appeared'.⁵⁸ In Della Porta's view, 'the deaths were sufficient to create the feeling (on the libertarian left) that 'they were firing at us'.⁵⁹ Such situations are open to manipulation not only by activists and by state operatives, but also by actors external to the conflict. After Ohnesorg's death the policeman was tried (twice); his predictable acquittal seemingly conformed to the pattern of legal impunity during conflict for state operatives' use of lethal force. Only in 2009 did it emerge that he had been a Stasi agent (whether he acted under orders from the organization is unclear).⁶⁰

In Campbell and Connolly's study the bulk of respondents had joined the IRA in one of two clusters, the first of which was around the Bloody Sunday killings. But rather

⁵⁷ Khawaja (n 41) 66.

⁵⁸ Della Porta (n 51) 159.

⁵⁹ Della Porta (n 51) 163.

⁶⁰ 'East German Spy Shot West Berlin Martyr', *Der Spiegel OnLine International* (22 May 2009) <<http://www.spiegel.de/international/germany/0,1518,626275,00.html>> accessed 29 March 2011.

Colm Campbell

than coming 'out of the blue' the picture painted was more nuanced: six months earlier internment had been introduced, followed by the torture of some detainees. The Bloody Sunday march had been in protest against the policy. Repression particularly appeared to have had the effect of reinforcing a sense of self as a member of an out-group, leading to *identification with* victims of harsh repression. Khawaja reported a similar dynamic: 'identification with those who suffer from repression creates unity and is . . . an important factor for . . . the eventual crystallization of collective identity'.⁶¹ This helps to explain how in Campbell and Connolly's study, with respect to the Bloody Sunday killings, respondents identified with the victims as members of the same-group: 'it was all those things, one thing after another and then the next big event after that, Bloody Sunday'.⁶²

If identification with prisoners was part of the Bloody Sunday dynamic, it was central to the second major pole of IRA recruitment in Campbell and Connolly's study: around prison protests and hunger strikes (ten died in 1981). What is notable is that hunger strikers' deaths seem to have had effects equivalent to deaths caused directly by the state. Germany manifested a similar dynamic. Among the factors Della Porta points to in explaining how the RAF was able to recruit and survive beyond the first generation are resonance of political prisoner issues amongst targets of mobilization, including conditions of detention and prison deaths of RAF founders. In this context it is worth noting that while German security legislation was in general less wide ranging than in the other case studies, it was striking in its focus on isolating prisoners. Della Porta also emphasized the importance of the hunger strike, indeed there is an eerie echo in the comments of activists quoted in the two studies—Della Porta: '[t]he death of [hunger striker] Holger Meins and the decision to take up arms were one and the same thing. Reflection was not possible anymore';⁶³ and Campbell and Connolly: '[the hunger strike] crystallized my opinions and the decisions that you make, and I joined the IRA straight after the hunger strike'.⁶⁴ A final factor emphasized by Della Porta was less the indiscriminate use of repression than its relatively discriminate, if wide ranging, use on those already radicalized: 'fear of arrest . . . was often itself the spur to joining an underground group'.⁶⁵

7.4. Entrepreneurship, Structure, and Framing

This is not to suggest that the process from prison/protest deaths to growth of the group was automatic. In all the case studies more than one armed opposition group existed (each potentially benefiting from increased recruitment); but typically one

⁶¹ Khawaja (n 41) 66.

⁶² C Campbell and I Connolly, 'Making War on Terror? Global Lessons from Northern Ireland' (2006) 69 MLR 935, 949.

⁶³ Della Porta (n 51) 169, quoting 'V. Speitel, Wir Wollten Alles und Gleichzeitig Nichts. I.' (1980) 31 *Der Spiegel* 36, 41.

⁶⁴ Campbell and Connolly (n 62) 949.

⁶⁵ Della Porta (n 51) 183.

10. *Beyond Radicalization: Towards an Integrated Strategy*

emerged significantly ahead of the others (for example, the IRA's dominance vis-à-vis the Irish National Liberation Army). Agency was critical: in Della Porta's analysis of the emergence of violent radical groups: '[e]xploiting environmental conditions conducive to militancy . . . these groups . . . created new resources and occasions for violence . . . [They] became agents, or entrepreneurs, for the propagation of violence.'⁶⁶

Khawaja describes a similar dynamic: 'SMOs use authorities' provocations and harmful reactions to protesters as *assets* for long-term mobilization . . . [They] capitalize on initial conflicts with authorities, using their outcomes as resources for further mobilization of support.'⁶⁷ This kind of entrepreneurship was also emphasized in Campbell and Connolly's study: '[i]ndiscriminate state repression appears as a low-cost benefit to "violent entrepreneurs", since by definition it rarely hits activists, and frequently radicalizes the population from which challengers spring'.⁶⁸ As one republican activist put it, certain security force strategies provided 'the best recruiting tools the IRA ever had'.⁶⁹ A central paradox therefore emerges: a major resource provider for insurgent or terrorist groups may be the practices of the security forces charged with combating them.

Entrepreneurship may also be evident in relation to the political opportunity structure facing the group. For instance, banning or censoring an associated political party amounts domestically to closing political opportunities. Internationally however, movement entrepreneurs may use this ban to rally international support against such 'anti-democratic' practices. If so, the original closing is transformed into an opening.

Entrepreneurship is also central to the framing processes of effective groups. As discussed in Section 5, the literature emphasizes resonance and function as key issues. As regards the former, the challenge for movement entrepreneurs is to identify targets of mobilization (potential members or supporters), and ensure that frames employed resonate strongly with them. The 'injustice' master frame (the stock-in-trade of social movements), typically provides a starting point. The task of ensuring frame resonance is greatly assisted when the state exhibits the requisite behaviour. In Khawaja's formulation: 'In their efforts to gain popular sympathy for the collective cause, . . . [SMOs] point to repeated acts of repression, as these acts ease their ask of constructing a bad "profile" of the authorities.'⁷⁰ These kinds of state failings typically represent rule of law degradation. The most potent example is in relation to the killings linked to the 'backlash' effect: the widely perceived unjustifiability of these killings ensured maximum resonance for a variety of 'injustice'

⁶⁶ Della Porta (n 51) 195.

⁶⁷ Khawaja (n 41) 67 (original emphasis).

⁶⁸ Campbell and Connolly (n 62) 950.

⁶⁹ Campbell and Connolly (n 62) 950, quoting M O'Connor and C Rumann, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland' (2003) 24 *Cardozo L Rev* 1657, 1662.

⁷⁰ Khawaja (n 41) 67.



Colm Campbell

frames. It is not suggested that blowback occurs because the infraction is identified as *specifically* legal. The data tend to suggest that it is the perceived injustice of the killing(s) rather than their illegal quality that produces the mobilizing effects. Unlawfulness though, means that movement entrepreneurs can easily project the enemy state as ‘hypocritical’ (a *rechtsstaat* that murders), in a way that resonates powerfully. This resonance was amplified by what appeared to be subsequent *systemic* rule of law failures. A pattern of lack of accountability is identifiable in South Africa, the West Bank, and Northern Ireland; the more ambivalent German situation has been noted above. In all, it was not simply a question of particular legal powers: it was also one of the overall legal *regime* that gave resonance to injustice frames.

In the OPT the principal diagnostic frame identified the problem as ‘occupation’ (an assertion that coincided with the international law position). The IRA also employed ‘occupation’ frames although the British presence was not an occupation in international law. The frame nevertheless appears to have been effective early in the conflict, since the ‘Bloody Sunday’ killings, and more quotidian experience of violent military house searches (signifying various degrees of ‘rule of law’ attrition) could be portrayed as typical ‘occupiers’ acts’. In South Africa it was simple to portray the apartheid state as ‘racist’, but after Sharpeville, and later Soweto, it could also be framed as ‘murderous’. Diagnostic framing had to be grave for all of the movements because of its link to prognostic framing—invariably ‘armed struggle’ and political struggle to bring about a state that was sovereign (OPT and Northern Ireland), or non-racialist (South Africa). Correspondingly, motivational framing tended to be along ‘onwards to national liberation’ lines. In Germany, prognostic framing was extremely vague. Primarily this reflected the RAF’s ultra leftism, but there is also an organizational dimension: since the group had no associated political party there was little imperative to set out clear political programmes.

8. Concluding Thought: Elements of an Integrated Anti-Violence Rule of Law Strategy

While the above points strongly to some link between rule of law degradation and political violence in situations of incipient or actual conflict, it does not establish a relationship that is neat, linear, or automatic. The space between such repression and its possible result is punctuated by questions of agency, timing, and degree.

Repression appears least effective when it is indiscriminate and egregious, and when it is employed when mass mobilization (largely peaceful) has already occurred. At this point egregious repression (particularly killing protesters), seems to promote the shift by some into violent mobilization, and the consequent emergence of terrorist or insurgent groups. The state’s continued use of indiscriminate repression seems to assist the flow of recruits to, and communal support or toleration for such groups. Likewise, indiscriminate or egregious repression appears to make it easier for the



10. Beyond Radicalization: Towards an Integrated Strategy

group to promote 'enemy state' images, in a way that resonates with actual or potential supporters. Banning or censoring parties associated with insurgent groups can effectively close off some domestic political opportunities, but may create political opportunities internationally.

This is not to say that harsh repression, antithetical to the rule of law, is always ineffective. After the post Bloody Sunday surge in violence, the Northern Ireland security forces were able to slow and then reverse the growth in IRA violence. These relative successes were achieved largely through the mechanism of the 'confessions' of suspects tried in jury-less Diplock courts (special evidence rules applied).⁷¹ *De facto* interrogation centres facilitated use of techniques not amounting to torture, but which probably constituted inhuman or degrading treatment.⁷²

Why were these practices apparently not counter-productive? First, the techniques were much more discriminate than in the early 1970s. The British Army still employed stop and search powers on a massive scale, but the most invasive techniques of mass repression, the curfew and saturation house searches, were completely or largely abandoned. Counter-productive effects almost certainly continued, but these appear to have been cancelled out by effects that were productive from the state's point of view. Security force shootings of IRA suspects in that period did not have effects equivalent to earlier killings of civilian protestors. Likewise it appears to have been more difficult for movement framers to create convincing 'enemy state' frames when internment and torture were no longer employed (though that changed with the H Block/Armagh prison campaign). Furthermore, several deliberate or botched IRA actions had caused significant civilian casualties,⁷³ costing the organization much support.

Similar points could be made about the situation in the OPT and South Africa. While there are good grounds for suggesting that Israeli repression contributed significantly to the first Intifada's emergence and escalation, the IDF nevertheless ultimately contained the situation through harsh repression (even if containment only lasted until the second Intifada's emergence). Likewise, while the Sharpeville massacre was the spur for creating MK, and while the Soweto killings prompted floods of new recruits, the organization never posed a serious internal risk to the South African State;⁷⁴ harsh repression contained it.

⁷¹ D Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (The Cobden Trust, London 1983).

⁷² See Amnesty International, 'Northern Ireland: Report of an Amnesty International Mission' (Report) (1978) AI index EUR45/01/78; Secretary of State for Northern Ireland, 'Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland' (Cm 7497, 16 March 1979) ('Bennett Report').

⁷³ Ulster University's CAIN project lists 30% of fatalities caused by the IRA as 'civilian' based upon an updating of information from M Sutton, 'An Index of Deaths from the Conflict in Ireland' (Beyond the Pale, Belfast 1994) <<http://cain.ulst.ac.uk/sutton/>> accessed 21 July 2011. Another study classifies 36% as 'civilian', see D McKittrick, S Kelters, B Feeney, C Thornton, and D McVeal, *Lost Lives* (Mainstream, Edinburgh 2007) 1562.

⁷⁴ Motumi (n 25).

*Colm Campbell*

Della Porta provides some useful insights here: ‘a decisive peculiarity of [violent] movement organizations [including terrorist groups] is their relation to [mass] mobilization, a process from which they derive most of their resources. Mobilization, however, is a terminal process: it can last a short or long time, but it cannot last forever.’⁷⁵ Mass mobilization therefore occurs in cycles, and the emergence of terrorist or insurgent groups is linked to the declining phase of the cycle (and seems contingent on such ‘tipping factors’ as the state’s killing demonstrators). Therefore the longer the insurgent campaign continues, the greater the decline in the resources available to it from the original mass mobilization. It may be appropriate therefore to consider insurgent campaigns as constituting distinguishable protest cycles.

In the late 1970s, when IRA violence declined, repression seems to have been quite effective. What saved the IRA was reorganization (introducing cell structures), and the second cycle of mass mobilization around the hunger strikes. The decline in its violence stopped and the situation partly reversed, but there was no third cycle, and by the 1990s the organization’s violence within Northern Ireland was declining (though more effective in Britain). Definitive assessments remain elusive: it is obvious in retrospect that the republican leadership had decided that more was to be gained from a peace process than from continuing violence; and there is much anecdotal evidence that the ‘armed struggle’ was being deliberately wound down.⁷⁶ Nevertheless, repression appeared more effective (particularly intelligence penetration); the state avoided any more ‘Bloody Sundays,’ and overt repression at least displayed significant levels of rule of law adherence (even if increasing evidence of unlawful covert repression emerged).⁷⁷

This chimes (though not identically) with social theorist Zygmunt Bauman’s conclusions: as regards Germany, ‘the eventual falling apart of the Red Army Faction with its disappearance from German life, was brought about not by the repressive police actions; it was due to changed social conditions’.⁷⁸ And as regards Northern Ireland, ‘the same may be said of the sad story of Northern Irish terrorism, obviously kept alive and growing in support thanks in large measure to the harsh military response of the British; its ultimate collapse could be ascribed to the Irish economic miracle and to a phenomenon similar to “metal fatigue”, rather than to anything which the British Army did or was capable of doing’.⁷⁹

⁷⁵ Della Porta (n 51) 196.

⁷⁶ G Bradley with B Feeney, *Insider: Gerry Bradley’s Life in the IRA* (O’Brien Press Ltd, Dublin 2008).

⁷⁷ Principally in relation to collusion in killings between loyalist paramilitaries and security force elements. See Stevens Inquiry, ‘Overview and Recommendations’ (17 April 2003) (known as Stevens III) <<http://cain.ulst.ac.uk/issues/violence/docs/stevens3/stevens3summary.pdf>> accessed 29 March 2011.

⁷⁸ Z Bauman, *Liquid Times: Living in an Age of Uncertainty* (Polity Press, Cambridge 2007) 19.

⁷⁹ Bauman (n 78) 19.



10. *Beyond Radicalization: Towards an Integrated Strategy*

What all of this suggests is that for the *rechtsstaat* egregious and indiscriminate harsh overt repression always seems to have counter-productive effects overall. While strategies that entail lower levels of rule of law degradation can sometimes be effective, this seems largely limited to the declining phase of the violent protest cycle. In general, strategies that maximize rule of law adherence seem to pose the least risk of escalating conflict in the early stages. They also seem to offer the greatest possibility (a) for avoiding circumstances leading to further rounds of mass mobilization; and (b) of containing conflict pending peace negotiations.

What then is the alternative to the kinds of security policies analysed above? What might a strategy aimed at minimizing the chances of conflict escalation, and maximizing the chances for peace-making, look like? And how to advance beyond the trite formulation that ‘all we need is full rule of law adherence’? A starting point is critical reappraisal of the state’s role in conflict. As discussed above, simple ‘stimulus-response’ models can have the effect of hiding the state’s agency from itself. The empirical data analysed and referenced above demonstrate that state action is often key to conflict escalation, and central to ‘backlash’ effects. Here states engage in violence rather than responding to that of others. For that reason this chapter focuses on ‘anti-violence’ rather than ‘anti-terrorist’ strategies. A conceptual leap is needed to seeing states during conflict as inevitably agents, and sometimes violent ones: a crucial element in lessening violence is to make the state less violent. The question is related to that of how law is to be conceptualized? It is legitimate to see law as a norm-system, but this was never intended to provide an account of how law is perceived and manipulated by and between subaltern groups in conflict situations. There is a need to incorporate a view of law as a system of communications, and to pay careful attention to law’s place in messaging and framing during conflict.

In recent years ‘radicalization’ has become a dirty word—a staging post to terrorism. Yet during the last quarter millennium, only one of the world’s radical governance ideas has seen off challenges from autocracy, fascism, and Leninism: it is democracy. To engage in mass protests (with degrees of radicalization inevitable), can be to express democratic impulses. In the case studies, while many were involved in mass protest, the numbers who switched to violent mobilization were much smaller. The issue is therefore not the radicalization, but the switch to violent mobilization. And in that context, it is imperative to realize that in the case studies, this switch was associated with ‘backlash’ following deaths for which the state was blamed.

As regards those who switch from peaceful protest to violence, the case studies point to the inadequacy of the ‘mindless terrorist’ formula. At the mid or upper levels, the data suggest strong entrepreneurial capacities in the more effective terrorist and insurgent groups—and a corresponding ability to exploit the state’s mistakes. These and other data support the hypothesis that key decision-making in such groups is best analysed under qualified ‘rational actor’ models. While this might suggest increased dangerousness, it also opens the possibility that the group will choose peace as a way of doing politics if afforded a political outlet, and if the state contains its violence.

Colm Campbell

Since a developed insurgency is famously difficult to defeat, the primary aim of an anti-violence strategy must be to avoid its initial eruption (most obviously by addressing grievances). But once protest mobilization has taken place it is critical to avoid the kind of acts identified in the case studies as triggering ‘backlash’: killing protestors, and a cluster of prisoner issues. When insurgency has already taken root, the only feasible strategy is likely to be some engagement with the group, leading ultimately to a variety of ‘peace process’—a settlement (with inevitable compromises) is to be negotiated by the state, the group, and others.

Law may have an important role to play here. Whereas in a strategy of ‘repressive primacy’ law may play a role in escalating conflict, one of ‘rule of law primacy’ aims to ensure that law is strategically deployed to maximize potential for de-escalation (Table 3). For instance, rule of law adherence minimizes the chances that ‘enemy state’ frames will resonate effectively, even in radicalized communities. Allowing some openings in the political opportunity structure may have the effect of suggesting further gains for the movement if it abandons violence. A prime requirement is likely to be that any political party associated with the SMO is, or remains, unbanned (providing what it is hoped will be the sole mobilizing structures in the future).

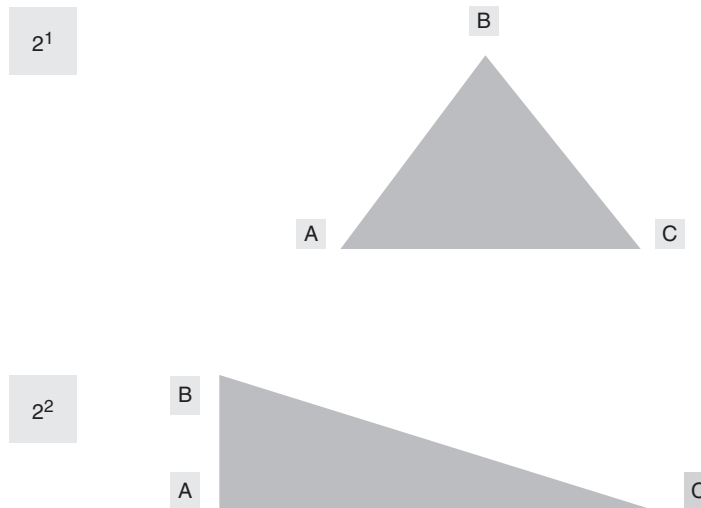
There also needs to be reconsideration of how security powers are structured. The point was made above that the seesaw ‘balance’ metaphor frequently employed in ‘anti-terrorist’ discourse tends to have the effect of eviscerating rights to the point of obliteration in the case of ‘suspected terrorists’. An alternative is to conceptualize the issue in triangular terms, with overall rights protection in a particular zone represented by the area enclosed by the triangle: the extent of a particular right (A-B) is currently defined by the distance from A to B; the two other rights with which it is linked are indicated by A-C and B-C so that A-B-C form a triangle (Figure 2). If a need for a diminution of right A-B could be empirically demonstrated, this diminution could be compensated for by an enhancement of A-C and A-B, so that overall levels of rights protection (enclosed by the triangle) remain roughly the same. For instance, if an extended detention period for investigating offences were permitted, a designated magistrate might be made *actively* responsible for ensuring detainees’ freedom from ill-treatment, thereby amplifying rights of judicial access.

Variants of this approach could be applied across the spectrum of issues addressed in this chapter, from the structure of legal powers to operational matters. Where for instance it was thought necessary to deploy the military for security duties, civilians (not intelligence operatives) could be inserted at mid-levels in military command structures. Their purpose would be to provide oversight rather than command; but their presence could help to ensure that the military operated according to a peace-oriented strategy, rather than in accordance with deeply engrained ‘war fighting’ instincts.

The thrust of much of this chapter is to suggest that conventional ‘anti-terrorist’ legal discourse is severely impoverished. But analysis has gone beyond mere critique

**Table 3 Engaging Violent Social Movements: Repressive v Rule of Law Strategies**

	Mobilizing Structures (radical social movement family)	Framing Processes (radical social movement family)	Political Opportunity (radical social movement family)
A. Repressive Primacy	<p>Enhances mass mobilization (peaceful) and radicalization in affected communities.</p> <p>Facilitates recruitment: (percentage of those involved in mass mobilization join armed group or associated political party).</p> <p>Earns passive or active support/toleration by radicalized individuals, facilitates fundraising, 'safe houses' intelligence, etc.</p> <p>Improved international contacts facilitate arms acquisition, enhancing armed group capacity.</p>	<p>State action gives resonance to 'injustice frames'.</p> <p>State action gives salience to organizational frames.</p> <p>Facilitates easy construction of motivational frames.</p> <p>'Show trials' resonance.</p> <p>Facilitates frame selection from overseas conflict sites.</p>	<p>International contacts enhanced.</p> <p>Use of law as shield to resist closing (banning).</p> <p>Use of law as sword to create openings.</p> <p>Prosecutions turned into/conducted as 'show trials', creating political opportunities.</p>
B. Rule of Law Primacy	<p>Little to give momentum for mass mobilization.</p> <p>Difficult to recruit in any numbers.</p> <p>Limited active and passive support/toleration.</p> <p>International support limited/ ultra Party (rather than SMO) structures best adapted for resource uptake.</p>	<p>State rule of law compliance may deprive SMO frames of resonance and salience.</p> <p>Motivational frame-construction difficult.</p> <p>'Show trial' frames (prognostic) lack resonance.</p>	<p>Exploitation of domestic political opportunities dents radicalism.</p> <p>Few opportunities to exploit 'show trial' claims.</p> <p>Absence of harsh repression limits international audience.</p> <p>Armed wing may be seen as hindrance to progress of party.</p>

**Figure 2 Balance as Triangle**

Colm Campbell

to demonstrate how reconceptualizing salient legal issues could enhance the conflict-transformation potential of law, or at least limit its potential for conflict escalation. In many violently conflicted societies the appropriate aim is not to 'defeat the enemy' (with law manipulated to that end), but rather to use law to bring the enemy into a better way of doing politics, and to bring the state into operating a (law based) model of human security compatible with it.

9. Recommendations

- Reconceptualize the state's role as an actor, acknowledging that its 'anti-terrorist measures' may have a capacity both to suppress terrorism and insurgency and to contribute to their escalation. In any given situation, the dominance of escalatory or of suppressive effects may fluctuate over time.
- Empirical data link these escalatory effects to rule of law degradation, though the nexus is not automatic. The acts that seem to have greatest mobilizing effects (and therefore critical to avoid) are killing demonstrators (during the mass mobilization protest phase), and perceived prisoner abuse. Particular attention is therefore needed in relation to legal protections against prisoner abuse, and against the misuse of lethal force.
- The employment of hypotheticals is implicated in the promotion of these escalatory measures. Future strategies should abandon their use in favour of reliance on primary empirical data on terrorists and insurgents; on their violence; and on the effect of state action on the communities on which it impacts.
- This requires consideration of law as a system not only of norms, but also of communication.
- Simple 'balancing' metaphors for rights limitation in situations of insurgency and terrorism are inadequate. New models could provide that where a need is shown for limiting a right in a particular sphere, this limitation is compensated for by the enhancement of other rights, so that the overall level of rights protection in the area is maintained.
- There is a need to reclaim the value of democratic radicalization. Empirical data suggest that while many are radicalized, few make the jump to violent mobilization; they also suggest that egregious acts of state repression are implicated in this shift. To demonize 'radicalization' as a concept may obscure the importance of that nexus.
- The end goal in situations such as those analysed is not to defeat the enemy, but rather to use law to bring the enemy into a better way of doing politics, and to bring the state into operating a model of human security compatible with it.