

Public Security and Individual Freedom: The Dilemma of Northern Ireland

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Northern Ireland has been the scene of recurring and often horrifying violence since 1969, as terrorist groups have clashed with each other, with the British Army, and with the Royal Ulster Constabulary (R.U.C.). The situation has been a difficult one for both the people and the legal system of Northern Ireland: faced with the problem of highly dedicated terrorists, the British government has had to confront directly the tension between its duty to protect public security and its concomitant obligation to safeguard individual freedom. This Article focuses on the British government's most recent legislative response to this tension, the Emergency Provisions Act (EPA),¹ and appraises its success in accommodating the competing demands of public safety and private liberty.

The EPA cannot be assessed without some understanding of the historical background of the current situation and of the different sources of the violence wracking Northern Ireland. Section I of the Article is intended to provide this information in capsule form. Section II explains the operation of the EPA, with particular attention to its breadth and to its potentially counterproductive effects. The standards for the admissibility of confessions to crimes covered by the EPA and the lack of procedures for the independent investigation and evaluation of complaints against the security forces are analyzed in detail in Sections III and IV, respectively. In Section V, the Article concludes with recommendations for legal reform that would establish a better balance between the need for public security and the need for legal protection against excessive or unnecessary intrusions on individual freedom.

I. Origin and Nature of the Present Conflict

British control of all of Ireland was consolidated in the sixteenth cen-

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1. Northern Ireland (Emergency Provisions) Act, 1978, ch. 5. The first version of the EPA was enacted in 1973. *See* Northern Ireland (Emergency Provisions) Act, 1973, ch. 53. Unless otherwise indicated, all citations in this Article are to the 1978 EPA.

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tury,² and maintained for hundreds of years thereafter despite repeated insurrections by Irish desirous of breaking the link that had been established by force of arms.³ The Government of Ireland Act, passed by the British Parliament in 1920,⁴ formally partitioned northern and southern Ireland by establishing separate parliaments of limited powers for each.⁵ The northern entity, composed of six counties within the province of Ulster, became Northern Ireland, and has remained continuously within the British domain.⁶ Under the terms of the Anglo-Irish Treaty of 1921,⁷ the southern entity, composed of the remaining twenty-six counties of Ireland, became in 1922 the Irish Free State.⁸ Today it is the Republic of Ireland, which is completely independent of Great Britain.⁹

The demographic fact that helped shape the creation of Northern Ireland and that remains basic to the situation is that approximately 65% of the population are Protestants,¹⁰ the descendants of seventeenth-century Scottish and English colonists,¹¹ whose religion¹² and history differ from those of the Catholic minority. The Republic of Ireland, on the other hand, has a predominantly Catholic population,¹³ and a constitution that until recently conferred on the Catholic church a special role in national affairs,¹⁴ and that still outlaws divorce.¹⁵

2. See Hayes-McCoy, *The Tudor Conquest (1534-1603)*, in *THE COURSE OF IRISH HISTORY* 174 (T. Moody & F. Martin eds. 1967).

3. Concise histories of Ireland include R. EDWARDS, *AN ATLAS OF IRISH HISTORY* (1973); J. BECKETT, *A SHORT HISTORY OF IRELAND* (1973); *THE COURSE OF IRISH HISTORY* (T. Moody & F. Martin eds. 1967); T. MOODY, *THE ULSTER QUESTION: 1603-1973* (1974); L. DE PAOR, *DIVIDED ULSTER* (1973).

4. See McCartney, *From Parnell to Pearse (1891-1921)*, in *THE COURSE OF IRISH HISTORY*, *supra* note 3, at 294, 311-12.

5. Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67; see R. HULL, *THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND* 34 (1976).

6. R. HULL, *supra* note 5, at 19-20.

7. See Treaty, Dec. 6, 1921, Great Britain-Ireland, 26 L.N.T.S. 10.

8. See Irish Free State (Agreement) Act, 1922, 12 Geo. 5, ch. 4.

9. See R. HULL, *supra* note 5, at 19-21. Great Britain formally recognized this independence with the passage of the Ireland Act of 1949. Ireland Act, 1949, 12, 13 & 14 Geo. 6, ch. 41.

10. IRELAND, *A CHRONOLOGY AND FACT BOOK* 143 (W. Griffin ed. and compiler 1973) [hereinafter FACT BOOK].

11. See Clarke, *The Colonisation of Ulster and the Rebellion of 1641 (1603-1660)*, in *THE COURSE OF IRISH HISTORY*, *supra* note 3, at 189.

12. It should be noted that Protestantism in Northern Ireland is not monolithic; it embraces many separate sects. See FACT BOOK, *supra* note 10, at 143.

13. Data collected in 1961 indicated that about 90% of the population was Catholic. *Id.* This figure may actually understate the percentage of Catholics, for intermarriage during the last generation is widely thought to have pushed the Catholic percentage over 95%. See Perry, *These Irish Eyes Aren't Smiling on a Paddy's Day Parade*, Wall St. J., Mar. 15, 1983, at 26, col. 3.

14. BUNREACT NA HEIREANN (Constitution of Ireland), arts. 44.2, .3 (repealed 1972).

15. *Id.* art. 41.3(2).

Great Britain partitioned Ireland ostensibly to guarantee that the Protestants in the North would be ensured political power in their own state despite the existence of the overwhelming Catholic majority in the South.¹⁶ The demographic consequence of this partition, however, was to create a Catholic minority in Northern Ireland that itself has been without political power. This demographic and political dilemma—whether the Protestants in the North should be a minority as compared with the Catholics throughout Ireland, or whether the Catholics in the North should be a minority as compared with the Protestants there—heretofore has proven insoluble.

While the conflict in Northern Ireland is often described as one pitting the Protestant majority against the Catholic minority, this strictly religious characterization obscures the true nature of the conflict. The term “Protestant” describes that part of the population which traces its lineage to the seventeenth-century colonists, and which is largely Protestant, while the term “Catholic” describes the native Irish, who have been predominantly Catholic since the fifth century. To the extent that these sectarian labels imply that the conflict is a “religious war,” that Protestants are attacked because they attend a Protestant church, and that Catholics are attacked because they attend a Catholic one, they are misleading. Rather, the conflict should be understood as one between the Unionists, or Loyalists, who wish to maintain the state of union with Great Britain as a link to their heritage, and the Nationalists, or the more militant Republicans, who wish to reinstitute an undivided Ireland as a link to their heritage. Two related issues—the preservation of historical and cultural ties, whether to Great Britain or to Ireland, and the fact that political power may depend on which ties are preserved—have inspired the violence, not religious beliefs *per se*.¹⁷ The historical division between Unionist and Nationalist, and therefore be-

16. See R. HULL, *supra* note 5, at 55-56.

17. As described by The Times of London,

[t]here are two communities in Northern Ireland, different in their origins, nursing different historical myths, possessing distinguishable cultures, having different songs and heroes, and wearing different denominations of the same religion. Religion is the clearest badge of these differences. But the conflict is not *about* religion. It is about the self-assertion of two distinct communities, one of which is dominant in the public affairs of the province.

The Times (London), Aug. 30, 1969, at 7, col. 1 (editorial) (emphasis in the original).

This is not to suggest that “sectarian” murders—ones committed against an individual known to be of a certain religion—do not occur. The important point is that the victims in such murders are likely to have been chosen because it is assumed that they also oppose the political aspirations of their assassins. Politics in most cases has primacy over religion, although the religious element plays some role, and the religious labels often are used for the sake of convenience. Some Unionist factions, however, do stress the “evils” of Catholicism. See P. MARRIAN, PAISLEY: MAN OF WRATH (1973).

tween Protestant and Catholic, rendered even more acute by years of discrimination against the minority, has made Northern Ireland fertile ground for violence and civil unrest.

The Unionist Party, closely connected through much of its existence to the often violently anti-Catholic Orange Order,¹⁸ governed Northern Ireland without interruption until 1972,¹⁹ when the imposition of direct rule from Westminster effectively suspended parliamentary government within Northern Ireland.²⁰ It is now admitted that during this period discrimination against the Catholic minority was widespread in housing, employment, and the administration of justice.²¹

Progress toward equality of opportunity in housing²² and employment²³ has been made, but true economic equality between majority and minority has not yet been realized.²⁴ The burdens of inequality have been complicated by the fact that Northern Ireland generally is much poorer than the rest of the United Kingdom.²⁵ Attempts to remedy inequalities have been handicapped during the last decade by economic decline, as continuing violence and the problems in the British and world economies have combined to deter new industry from locating in Northern Ireland and to persuade some existing firms to close or

18. W. FLACKES, *NORTHERN IRELAND, A POLITICAL DIRECTORY, 1968-1979*, at 103 (1980).

19. T. MOODY, *supra* note 3, at 32, 48.

20. Northern Ireland (Temporary Provisions) Act, 1972, ch. 22 (authorization of direct rule); see generally THE SUNDAY TIMES INSIGHT TEAM, *ULSTER* 280-310 (1972).

21. See THE SUNDAY TIMES INSIGHT TEAM, *supra* note 20, at 27-55 (general discussion of discrimination); FAIR EMPLOYMENT AGENCY FOR NORTHERN IRELAND, *AN INDUSTRIAL AND OCCUPATIONAL PROFILE OF THE TWO SECTIONS OF THE POPULATION IN NORTHERN IRELAND* (1978) (general discussion of employment discrimination); R. MILLER, *OCCUPATIONAL MOBILITY OF PROTESTANTS AND ROMAN CATHOLICS IN NORTHERN IRELAND* (1979) (structural discrimination in occupational patterns); K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND*, chs. 2, 7, 9 (1975) (discrimination in the administration of justice).

22. Public housing is now being awarded on the basis of objective criteria, which has reduced significantly concern about discriminatory awards. Housing remains a serious problem, however, as 14.1% of the housing stock is classified as unfit for human habitation, compared with 4.6% for England and Wales. Rowthorn, *Northern Ireland: an economy in crisis*, 5 CAMBRIDGE J. ECON. 1, at 15 (1981).

23. The Fair Employment Agency, which was established to monitor public and private employment practices, now requires the recipients of government contracts to hold Equal Opportunity Certificates, which the agency may revoke upon findings of non-compliance with their terms. See FAIR EMPLOYMENT AGENCY FOR NORTHERN IRELAND, *SIXTH REPORT AND SETTLEMENT OF ACCOUNTS* 4-5, 10-12 (1982).

24. Rowthorn, *supra* note 22, at 8-10, 18-22. This study found that "[m]any people continue to live in real poverty and deprivation—especially Catholics, who remain lower paid, more poorly housed, and more prone to unemployment than Protestants." *Id.* at 15.

25. The standard of living in Northern Ireland was substantially lower than that of the United Kingdom generally until the late 1960's. Although important gains have been made since then, average earnings remain lower, and unemployment higher than in the United Kingdom as a whole. *Id.* at 14-16.

relocate.²⁶

Catholic suspicions about fairness in the administration of justice still run deep.²⁷ The foundations for these fears are embedded deeply in Irish history.²⁸ In Northern Ireland, the Unionists maintained their control from 1922 to 1972 with the help of the Special Powers Act,²⁹ a sweeping measure that gave authorities extraordinary powers of search and seizure, internment, and censorship.³⁰ The Act was supplemented by additional regulations and statutes which prohibited, for example, membership in proscribed organizations³¹ and the display of certain flags and emblems.³² The Unionists used the legislation to stifle dissent in the minority community,³³ which was not protected by a written system of constitutional rights,³⁴ and which lacked the political power to

26. *Id.* at 16-18. It has been estimated that the conflict has destroyed or prevented the creation of 25,000 manufacturing jobs in Northern Ireland. *Id.* at 18. Unemployment in Northern Ireland is now running at about 24% of the work force. Irish Times, Jan. 5, 1983, at 9, col. 1.

27. The basis for these suspicions, embodied in an expression heard often in the poorer Catholic communities that "there's one justice for 'them,' and another for 'us,' has been thoroughly documented in K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 21, at chs. 7, 9.

28. For example, in the eighteenth century the all-Protestant parliament of Ireland enacted a comprehensive set of anti-Catholic measures which forbade Catholics from holding any government office, from entering the legal profession, and from holding commissions in the army and navy. See Wall, *The Age of the Penal Laws (1691-1778)*, in *THE COURSE OF IRISH HISTORY*, *supra* note 3, at 217.

29. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, N. Ir. Pub. Gen. Acts, 12 & 13 Geo. 5, ch. 5, *repealed by* the Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, § 31(2).

30. See Bishop, *Law in the Control of Terrorism and Insurrection: The British Laboratory Experience*, 42 L. & CONTEMP. PROBS. 140, 157-58 (1978).

31. Bishop, *supra* note 30, at 159.

32. Flags and Emblems (Display) Act (Northern Ireland), 1954, N. Ir. Pub. Gen. Acts, 2 & 3 Eliz. 2, ch. 10.

33. The history of the special power laws in Northern Ireland, as well as the Catholic perception of their effect, was offered in 1978 by Gerry Fitt, M.P. for West Belfast:

As anyone in Northern Ireland knows, emergency provisions legislation of this description was first placed on the statute book in the Northern Ireland House of Commons in 1922. It was known as the Special Powers Act. From 1922 until 1929 it was renewed every twelve months by the Parliament in Northern Ireland. In 1929 the Government said that the Act should become a permanent part of Northern Ireland legislation. Therefore, it was not of necessity debated every year in the Northern Ireland House of Commons.

Throughout those years certain sections and provisions of the Special Powers Act were used against individuals in Northern Ireland. That did not stop the violence, it increased it. Every year, at Easter, whenever there was a Royal visit or if there seemed to be a heightening of tension between Republican and Loyalist communities, the Act was brought into being, and though people were not charged, they were interned.

Looking back, we now see that such legislation as this is no guarantee that there will be a diminution of violence.

959 PARL. DEB., H.C. (5th ser.) 1544 (1978) (statement of G. Fitt, M.P. for West Belfast).

34. Rose, *On the Priorities of Citizenship in the Deep South and Northern Ireland*, 38 J. POL. 247, 275-76 (1976).

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defend itself.

The Special Powers Act was justified on the ground that it was necessary to combat a highly feared secret organization, the Irish Republican Army (I.R.A.).³⁵ Ironically, however, during the period from 1922 to 1968, the I.R.A. was largely inactive as a military unit in Northern Ireland.³⁶ Nonetheless, official state visits by British dignitaries and British national holidays were marked by systematic arrests and temporary detention of suspected I.R.A. members.³⁷

The current wave of violence began in 1968, when civil rights marchers protesting housing discrimination were attacked by Protestant mobs and by members of a new disbanded all-Unionist reserve police force.³⁸ The violence, which has continued with only brief respites,³⁹ has sprung from several sources⁴⁰ and has claimed thousands of victims from both sides.⁴¹ On the side of the Republicans, two groups have been especially active. The best known is the Provisional I.R.A.,⁴²

35. See Bishop, *supra* note 30, at 157.

36. For example, its one northern "campaign," conducted by the I.R.A. from 1956 to 1962, resulted in the deaths of eighteen persons, the majority of them members of the I.R.A. See J. BELL, *THE SECRET ARMY*, 321-97 (1972).

37. See *supra* note 33.

38. See THE SUNDAY TIMES INSIGHT TEAM, *supra* note 20, at chs. 1-4; DISTURBANCES IN NORTHERN IRELAND: REPORT OF THE COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, N. IR. CMD. No. 532 (1969) (Lord Cameron, Chairman) [hereinafter CAMERON REPORT].

39. Almost 2,300 people have been killed, and over 25,000 seriously injured, in politically related violence since 1969. During the same period, over 12,000 bombs and incendiary devices have been exploded in Northern Ireland, and 29,429 shooting incidents have been reported. The violence peaked in 1972, the year after internment without trial was introduced, and the first year of direct rule from Westminster, with almost twice as many violent incidents as any of the next succeeding four years. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT 1982, at 48 (table 6) (1983). Violence declined sharply in 1980. *Id.* It escalated again in 1981, however, when 101 people were killed (44 members of the security forces, and 57 civilians, some terrorists), 578 bombs were exploded, and 1,142 shooting incidents took place. *Id.*

40. It has been estimated that of 2,250 politically related fatalities classified as of June, 1982, 53.2% were caused by Republican terrorist organizations, 27% by Loyalist organizations, 11.2% by security forces, and 8.2% by undetermined agents. McKeown, *Numbering the Dead: A Register of Northern Ireland's Casualties*, IN DUBLIN, Dec. 16, 1982, at 20, 22.

41. Of the fatalities, 56.9% were civilians, 29.2% were members of the security forces, 11.5% were members of terrorist groups, and 2.4% could not be classified. *Id.* Of the 1,885 dead who were natives of Northern Ireland, 1,016 were Catholic and 839 were Protestant. *Id.* Given that over half the fatalities have been caused by Republican groups, the conclusion seems inescapable that a substantial number of Catholics have died at the hands of their co-religionists.

42. It is important to distinguish the Provisional I.R.A. from the Official I.R.A.—"Official" because a majority of the delegates at a 1970 I.R.A. congress voted to support its position. It maintained a distinct military presence until 1972, when it declared a unilateral cease-fire on the ground that a majority of the population of Northern Ireland favored union with the United Kingdom. Its policy, first announced in 1970, has been to work for full minority rights within the United Kingdom, but also to support a decentralized government

which has directed an assassination campaign against representatives of the British Army, the R.U.C., the Ulster Defence Regiment (U.D.R.—a kind of National Guard composed of volunteers from Northern Ireland), and their respective reserves.⁴³ The Provisional I.R.A. also has killed politicians, judges, prison employees, and members of other terrorist groups, as well as hundreds of unintended victims.⁴⁴ A second group, the Irish National Liberation Army (I.N.L.A.) is the military wing of the Irish Republican Socialist Party.⁴⁵ It too wages a military battle, sometimes with terrifying success,⁴⁶ but its membership is apparently less numerous than that of the Provisional I.R.A.⁴⁷

Loyalist terrorist activity seems motivated by fears of a possible union with the Republic of Ireland and by anger at what is perceived to be violence directed against the Protestant and Loyalist majority community. This activity has been aimed primarily at Catholics, through intimidation of families living in mixed areas and attacks on Catholic pubs and individuals.⁴⁸ Just as different Republic factions have engaged in internecine strife, Loyalist groups occasionally have attacked each other, although their differences appear to concern territorial control and racketeering more than differences in political and military strategy.⁴⁹

There are two major Loyalist terrorist organizations. The Ulster Volunteer Force (U.V.F.) originated in the early twentieth century in response to the "threat" posed by an independent Ireland, but then largely disappeared after the partition of Ireland.⁵⁰ A group claiming its name and heritage emerged violently in the 1960s, and was declared illegal in 1966.⁵¹ This proscription was lifted briefly in 1974, when the

in Northern Ireland which, it believes, would lead eventually to union with the Irish Republic. See W. FLACKES, *supra* note 18, at 111-20.

43. See T. COOGAN, THE I.R.A. 461-81 (1980).

44. *Id.* See also *supra* notes 39-41.

45. W. FLACKES, *supra* note 18, at 72.

46. The group claimed responsibility for the March, 1979 assassination of Airey Neave, M.P., Conservative Shadow Secretary for Northern Ireland and close friend of Prime Minister Thatcher. *Id.* It also claimed responsibility for a December, 1982 pub explosion which left 16 people dead and 29 seriously injured. Wash. Post, Dec. 8, 1982, at A28, col. 3.

47. W. FLACKES, *supra* note 18, at 72.

48. See K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND, 21-22 (1980) [hereinafter TEN YEARS ON]. It is easily, but not necessarily correctly, argued that Loyalist terrorists are more "sectarian" than their more "political" Republican counterparts. This apparent distinction is probably a function of the nature of the conflict. Republican terrorists can pick "political" targets who are symbols of the political and economic status quo, while Loyalist targets are more obviously "sectarian." *Id.*

49. *Id.*

50. M. DILLON & D. LEHANE, POLITICAL MURDER IN NORTHERN IRELAND 28 (1973).

51. *Id.* at 28-35.

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U.V.F. undertook a short-lived political action campaign.⁵² It soon reverted to terrorism, however, and was banned again under the terms of the EPA.⁵³

The second, and much larger, Loyalist organization, is the Ulster Defence Association (U.D.A.). Founded in 1971 to coordinate opposition to the I.R.A. among various Protestant groups,⁵⁴ it has recruited large numbers of working class Protestants from all over Northern Ireland.⁵⁵ Its initial purpose was to demonstrate the strength of opposition in Northern Ireland to a united island, and to that end it organized impressive and disciplined public military maneuvers.⁵⁶ It changed its position in 1977 and campaigned politically for the creation of a Northern Ireland independent of Great Britain and the Irish Republic.⁵⁷ In 1981, however, during a hunger strike by Republican prisoners, the U.D.A. abandoned the approach and returned to its Loyalist position.⁵⁸ While the U.D.A. has never been proscribed, it has played a major role in the intimidation of Catholics, and few doubt that some of its members have been involved in assassination and bombing.⁵⁹

The final actors in this military drama are the government forces, which include some 30,000 members of the British Army and the R.U.C.,⁶⁰ and who patrol a country of 1.5 million inhabitants.⁶¹ These troops are ostensibly assisted in their efforts to maintain order by the existence of emergency legislation, the scope and effects of which this Article is intended to analyze.

II. The EPA: Protection of Public Security at the Expense of Individual Freedom

Adopted in 1973 following the recommendation of a British government commission chaired by Lord Diplock,⁶² the EPA has remained

52. W. FLACKES, *supra* note 18, at 147.

53. *Id.*

54. *Id.* at 138-39.

55. *Id.* at 138.

56. *Id.* at 139.

57. *Id.* at 140-41.

58. Interview with Andrew Tyrie, Chief of Staff, U.D.A., in Belfast, Northern Ireland (Oct. 20, 1981).

59. TEN YEARS ON, *supra* note 48, at 20.

60. As of July, 1979, 13,000 regular soldiers and almost 12,000 police and reservists were deployed in Northern Ireland. 969 PARL. DEB., H.C. (5th ser.) 934-35 (1979), (statement of Humphrey Atkins, Secretary of State for Northern Ireland). By December 1980, the total had climbed to 31,500. TEN YEARS ON, *supra* note 48, at 25.

61. NORTHERN IRELAND INFORMATION SERVICE, FACTS AT YOUR FINGERTIPS 4 (1981).

62. See REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, CMD. 5, No. 5185 (1972) (Lord Diplock, Chairman) [hereinafter DIPLOCK REPORT]. The EPA contained a provision repealing the

fundamentally unaltered since its enactment. A government committee, chaired by Lord Gardiner and appointed in 1974 to assess the anti-terrorist measures in the context of human rights and civil liberties, recommended some important changes,⁶³ but essentially the EPA was left intact. Sixteen semi-annual reviews of the EPA undertaken by the British Parliament have resulted in only one major change: the power of internment, which originally could be invoked at the discretion of the Secretary of State, can now be invoked only with parliamentary approval.⁶⁴ At each review, the British government has recommended continuation of the EPA,⁶⁵ and Parliament has appeared willing to accept this recommendation virtually automatically.⁶⁶ A small but vocal minority (about 20 of the approximately 670 members of Parliament) has consistently criticized the invasions of individual freedom permitted under the EPA,⁶⁷ but it received no widespread support, at least during the first fourteen renewal debates.⁶⁸

While the application of the EPA is confined to Northern Ireland,⁶⁹ its scope within the province is far-reaching. The Act applies primarily to "scheduled offenses,"⁷⁰ which generally constitute "terrorist" crimes such as arson, kidnapping, use of explosives, and hijacking.⁷¹ It established special police and judicial procedures to be used in the investiga-

Special Powers Act. EPA, 1973, ch. 53, § 31(2). It should be understood as the latest version of the emergency laws that have been in effect in Northern Ireland since its establishment. *See supra* notes 29-33 and accompanying text.

63. *See* REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND, CMD. 5, No. 5847 (1975) (Lord Gardiner, Chairman) [hereinafter GARDINER REPORT]. The Gardiner Report's criticisms of the internment program were instrumental in persuading the government to abandon internment in favor of the trial of suspected terrorists in special courts. *See id.* at para. 148, at 43; *infra* note 105 and accompanying text. The Report also recommended that Parliament reaffirm judicial discretion to exclude the admission into evidence of statements made under questionable circumstances. GARDINER REPORT, *supra*, para. 50, at 17. The recommendation was not adopted. *See infra* notes 181-85 and accompanying text.

64. Northern Ireland (Emergency Provisions) Act 1978 (Continuance) Order, 1980 STAT. INST., No. 1049.

65. *See, e.g.*, 959 PARL. DEB., H.C. (5th ser.) 1499-1500 (1978) (statement of Roy Mason, Secretary of State for Northern Ireland); 969 PARL. DEB., H.C. (5th ser.) 931-35 (1979) (statement of Humphrey Atkins, Secretary of State for Northern Ireland).

66. *See, e.g.*, 969 PARL. DEB., H.C. (5th ser.) 925-1066 (1979) (parliamentary debate on continuation of the EPA); 959 PARL. DEB., H.C. (5th ser.) 1499-1586 (1978) (same).

67. *See, e.g.*, 959 PARL. DEB., H.C. (5th ser.) 1539 (1978) (statement of Tom Litterick, M.P. for Birmingham); 969 PARL. DEB., H.C. (5th ser.) 944 (1979) (statement of Brynmor John M.P. for Pontypridd).

68. *See infra* notes 81-82 and accompanying text.

69. EPA § 36(2).

70. *Id.* § 30, sched. 4.

71. *Id.*

tion and trial of scheduled offenses.⁷² It permits arrest and search without warrant of those suspected of “committing, having committed, or being about to commit” offenses covered by the EPA,⁷³ and makes it illegal for those witnessing or having knowledge of terrorist incidents to refuse to cooperate with the authorities.⁷⁴ Persons suspected of being terrorists may be arrested without warrant and detained for up to seventy-two hours.⁷⁵ Moreover, its extraordinary powers are not limited to scheduled offenses: British troops are permitted to arrest and detain temporarily without charge or warrant any individual suspected of any crime.⁷⁶ The EPA also creates new categories of crimes, such as wearing hoods in public,⁷⁷ and retains many features of earlier emergency laws.⁷⁸ Given this scope, the conclusion that the EPA has touched the lives of many thousands of people in Northern Ireland is inescapable.

British government officials have acknowledged the wide sweep of the EPA as well as its intrusive character. Merlyn Rees, a former Secretary of State for Northern Ireland, described its scope as follows:

- all terrorist type offenses to be categorized as “scheduled offenses”;
- trials of scheduled offenses to be by a senior judge, sitting alone [no right to a jury trial], but with more than usual rights of appeal;
- bail in scheduled cases to be given only by the High Court (rather than by a magistrate) and then only if stringent precautions were made;
- the arrest without warrant and detention by the police for up to 72 hours of any person suspected of being a terrorist . . . ;
- the arrest and detention of a suspect [for any offense] for up to four hours by members of the Army;
- wide powers of search and seizure by members of the security forces;
- reversal of the normal onus of proof in relation to offenses of possession of arms and explosives;

72. See, e.g., *id.* § 2 (special conditions for bail); *id.* § 6 (special courts for trial of scheduled offenses); *id.* § 7 (no jury trials of scheduled offenses).

73. *Id.* §§ 13, 14.

74. Section 18 of the EPA provides that “any member of Her Majesty’s forces on duty or any constable may stop and question any person for the purpose of ascertaining” the person’s identity and movements “and what he knows concerning any recent explosion or other incident” Failure to stop or refusal to answer to the best of one’s “knowledge or ability” can result in six months in prison or £100 fine, or both. *Id.* § 18.

75. *Id.* § 13. Other anti-terrorist legislation permits the detention of suspected terrorists for periods up to seven days. Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8, § 12(2).

76. *Id.* § 14(1).

77. *Id.* § 26.

78. For example, section 21 of the EPA prohibits membership in proscribed organizations. *Id.* § 21. This offense is analogous to one defined under regulations issued pursuant to the Special Powers Act. See *supra* note 31 and accompanying text. Both the Provisional I.R.A. and the U.V.F. are proscribed. EPA § 21, sched. 2.

—a fresh system of detention by the executive.⁷⁹

Acknowledging the severity of the measure at the time of its enactment, then Secretary of State William Whitelaw declared that “[t]he Bill contains some features unpalatable to a democratic society. Her Majesty’s government does not disguise the fact that it imposes serious limitations on the traditional liberty of the subject.”⁸⁰

The bipartisan consensus that had supported automatic continuation of the EPA broke down in 1981, when the British Labour Party supported a motion introduced in Parliament that called for a broad investigation of the operation of the Act.⁸¹ In analyzing the emergence of opposition to the EPA, it may be noted that the Act has generated two distinct but related concerns: (1) that the EPA must be scrutinized because it contemplates intolerable violations of individual rights; and (2) that the EPA, when considered instrumentally, must be judged a failure because its counterproductive effects—the possible swelling of terrorist ranks, and the erosion of respect for law and order—fuel the very crisis that the EPA was intended to quell.⁸²

Regarding the first concern, while it is undeniable that the right to live is the most basic human right, and that the right to live without fear of death or grievous bodily injury is almost equally central, it seems undeniable that the government’s responsibility to protect individual freedom has been seriously compromised under the emergency regime. Military forces are virtually omnipresent.⁸³ Almost 300,000 warrantless home searches were authorized between 1971 and June, 1978.⁸⁴ These home searches occurred at an average rate of about ninety per day.⁸⁵ Between 1972 and 1978 more than 25,000 persons were arrested and detained for periods ranging from four hours to

79. Rees, *Terror in Ireland—and Britain’s Response*, in *BRITISH PERSPECTIVES ON TERRORISM* 83, 84 (P. Wilkinson ed. 1981).

80. PEACE PEOPLE, *THE CASE FOR THE REPLACEMENT OF THE EMERGENCY PROVISION ACT BY NORMAL JUDICIAL PROCESS* 3 (n.d.) (quoting William Whitelaw) (on file with *The Yale Journal of World Public Order*).

81. See 7 *PARL. DEB.*, H.C. (6th ser.) 1032-46 (1981). The motion was defeated by a vote of 279 to 213. *Id.* at 1046.

82. J. Don Concannon, M.P. and former Minister of State for Northern Ireland, articulated these concerns as follows:

[w]hile we fully accept the need to protect the community against terrorism, we are deeply concerned about the erosion of basic civil liberties. The continued and unreviewed emergency powers as they stand may impede the possibilities of a peaceful settlement.

Id. at 1040.

83. See *supra* note 60 and accompanying text.

84. PEACE PEOPLE, *TIME FOR A CHANGE* 8 (1980) (parliamentary submission) (on file with *The Yale Journal of World Public Order*) [hereinafter *TIME FOR A CHANGE*].

85. *Id.*

seven days.⁸⁶ Of those detained between September, 1977 and August, 1978, only about 35% were ultimately charged with an offense.⁸⁷ In the first ten months of 1980, 3,868 persons were arrested by the police and army under the EPA.⁸⁸ A mere 8.6% of those arrested were eventually prosecuted,⁸⁹ compared with an 80 to 90% average for those arrested in England and Wales.⁹⁰

Important as this immediate concern for human rights may be, it can be argued that the second concern—that the EPA produces longterm counterproductive effects—is even more fundamental. If the EPA creates resentment, drives people into the terrorist groups, and undermines basic respect for the rule of law across Northern Ireland, it may be exacerbating the violence it was designed to combat and making it even more difficult to achieve a definitive resolution of the situation that would guarantee public security and basic individual freedom.

With respect to the relationship between the EPA and the recruitment of terrorists, it seems plausible that the incursions into homes through search and seizure and the arrest and detention of persons without warrant or charge may encourage the involvement of young people in the violence. It should be noted that the current violence is largely the product of young people who have grown up since the beginning of the most recent period of terror. Two-thirds of those serving prison terms longer than four years were under fifteen years of age when the current emergency began; one-third were under nine.⁹¹ Northern Ireland, which formerly had the lowest per capita prison population in Western Europe, now has the highest and youngest.⁹² More-

86. TIME FOR A CHANGE, *supra* note 84, at 9.

87. See REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND app. I, at 141, CMD. 5, No. 7497 (1979) (His Honor H.G. Bennett, Chairman) [hereinafter BENNETT REPORT].

88. 945 PARL. DEB., H.C. (5th ser.) 271, 605-06 (1980) (response of Humphrey Atkins, Secretary of State, to written parliamentary question no. 49).

89. *Id.* Given that so few of those detained under the EPA are ever charged with an offense, concern has arisen that the provisions of the EPA are not being used to investigate terrorist incidents, but rather to compile information about individuals and even entire communities. One recent survey found that 72% of a geographically and socioeconomically diverse sample of arrestees were not questioned about their involvement in specific incidents at all. See D. WALSH, ARREST AND INTERROGATION: NORTHERN IRELAND 1981 (1981) (on file with *The Yale Journal of World Public Order*).

90. See ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, CMD. 5, No. 8092, para. 3.17, at 43, para. 4.43, at 83 (1981).

91. NORTHERN IRELAND OFFICE, THE CORRYMEELA CONFERENCE (OCTOBER 1979) ON PRISONS IN NORTHERN IRELAND, 1980 ONWARDS, WITH SPECIAL REFERENCE TO THE LONG-TERM PRISONER 13 (Chart 3) (1979) (government paper submitted to the conference) (on file with *The Yale Journal of World Public Order*).

92. THE PEACE PEOPLE, THE H-BLOCK PROTEST, HUNGER STRIKES AND EMERGENCY LAW 7 (1980) (on file with *The Yale Journal of World Public Order*).

over, one study of the backgrounds of terrorists has concluded that most I.R.A. operations are carried out by recent recruits whose backgrounds make them representative members of the working class Catholic communities in which they live.⁹³ In short, many of the terrorists at work are typical members of a younger generation that has grown up with violence and with the extreme measures taken to curtail it.

While the history and traditions of the Catholic communities in Northern Ireland ensure substantial resentment of British security forces and justice,⁹⁴ the process by which this general resentment is translated in individual cases into active support of a terrorist group is not clear. Perhaps the internment of a relative without trial or the destruction of property during a pre-dawn house search, or harassment on a local street might be sufficient to push a Catholic youth into membership in the youth wing of the Provisional I.R.A. But even given this uncertainty, the potential effects of the searches permitted under the EPA on terrorist recruitment is enormous. If only 2% of the 600 families whose homes were searched each week between 1970 and 1978 produced terrorist volunteers, the Provisional I.R.A. could have afforded a complete turnover every year in its corps of 500 active duty volunteers.⁹⁵

The second pernicious effect of the EPA is that it may be undermining the respect for law and order necessary for a peaceful long-term solution to the crisis. This danger was recognized nine years ago in the Gardiner Report, which noted that the basic strategy of the terrorists was to provoke governmental reactions that would destroy the popular support that the government would otherwise enjoy.⁹⁶ It also noted that short-time measures might restore order, but that long-term solutions required popular support.⁹⁷ Unfortunately, these warnings do not appear to have been heeded, as the government, at least since the pas-

93. Boyle, Hadden & Hillyard, *Emergency Powers: Ten Years On*, FORTNIGHT, Jan. 1980, at 3, 4. The authors based their conclusions on their systematic review of the record in cases adjudicated by the courts of Northern Ireland in 1975 and 1979. See also TIME FOR CHANGE, *supra* note 84, at 9-10.

94. See *supra* notes 27-34 and accompanying text.

95. A secret paper of the British Ministry of Defence estimated that the Provisional I.R.A. had 500 "activist" members. MINISTRY OF DEFENCE, NORTHERN IRELAND FUTURE TERRORIST TRENDS, at G-1 (Dec. 15, 1978) (on file with *The Yale Journal of World Public Order*). A copy of the report was diverted and made public. The numerical strength of terrorist groups is, for obvious reasons, difficult to estimate accurately.

96. GARDINER REPORT, *supra* note 63, para. 17, at 7. For a discussion of this strategy generally, see R. CLUTTERBUCK, LIVING WITH TERRORISM 17 (1975); P. WILKINSON, TERRORISM AND THE LIBERAL STATE 66 (1977).

97. GARDINER REPORT, *supra* note 63, para. 19, at 7.

sage of the EPA, has focused almost exclusively on imposing repressive measures, and not on building a long-term consensus.

Even accepting the primacy of the EPA's short-term goal—the suppression of violence—the EPA must be adjudged a failure, because violence continues to wrack Northern Ireland.⁹⁸ Because the Act has failed to stop the terror, the population has lost confidence and has grown angry at the legal system, which has deprived individuals of basic civil liberties without offering any compensating increase in personal security. While the issue is not susceptible to quantitative analysis—for obvious reasons the participants are unwilling to speak—it seems plausible that as this loss of confidence and anger grow, the net effect of the EPA may be to produce more violence, not less.

The loss of respect for law is a dangerous development in any country, but especially so in Northern Ireland, where history guarantees a long and deep popular memory of civil strife.⁹⁹ Decision-makers should assess carefully whether measures implemented for short-term gains are outweighed by less tangible but more dangerous long-term consequences. While some form of emergency law will probably continue in Northern Ireland, further reliance on the deprivation of liberty demonstrates that the government itself is not fully committed to the rule of law as the appropriate vehicle to preserve public order. Thus, so long as the current crisis lasts, the daily impact of emergency law must be tempered by respect for the equitable administration of justice.

III. Admissibility Standards

A detailed analysis of the admissibility standards created under the EPA suggests strongly that the EPA should be reformed to make inadmissible as evidence statements obtained from persons interrogated under suspicious circumstances.

Section 8 of the EPA provides that any statement made by the accused during the investigation of a scheduled offense is admissible unless the accused can present “prima facie evidence” that he or she was “subjected to torture, inhuman or degrading treatment” for the purpose of inducing a statement.¹⁰⁰ This new standard represents a substantial

98. See *supra* notes 193-96 and accompanying text.

99. DIPLOCK REPORT, *supra* note 62, para. 13, at 9.

100. Section 8 of the EPA (formerly section 6) provides that:

- (1) In any criminal proceedings for a scheduled offence, or two or more offences which are or include scheduled offences, a statement made by the accused may be given in evidence by the prosecution in so far as—
 - (a) it is relevant to any matter in issue in the proceedings; and
 - (b) it is not excluded by the court in pursuance of subsection (2) below.

erosion of the traditional common law principle of voluntariness, under which a statement was admissible only if offered freely.¹⁰¹ The new standard is also dangerously vague, because it leaves uncertain how much abuse constitutes "inhuman or degrading treatment."¹⁰² This issue is of more than academic concern. Permitting the security forces to mistreat prisoners to the point of "torture, inhuman or degrading treatment" has ensured that this provision of the EPA would generate enormous tension and controversy.¹⁰³ Finally, reflecting the standard's vagueness, the courts of Northern Ireland have proven incapable of interpreting it in a coherent fashion.¹⁰⁴ These factors make a powerful argument that the standard should be fundamentally changed.

A. *The Controversy*

Since 1975 the anti-terrorist strategy of the British government has been to eschew internment, in which detainees were held up to four years without charge or trial, in favor of the pursuit of convictions in the courts.¹⁰⁵ Those accused of terrorist offenses have been tried by special non-jury "Diplock Courts" created by the EPA in 1973.¹⁰⁶ The

- (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to *torture or to inhuman or degrading treatment* in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained—

- (a) exclude the statement, or
- (b) if the statement has been received in evidence, either—
 - (i) continue the trial disregarding the statement; or
 - (ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).

- (3) This section does not apply to a summary trial.

EPA § 8 (emphasis added).

101. See *infra* notes 136-37 and accompanying text.

102. See *infra* notes 186-88 and accompanying text.

103. See *infra* notes 116-27 and accompanying text.

104. See *infra* notes 168-79 and accompanying text.

105. Internment, which had been the official strategy since 1971, proved counterproductive. See K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 21, at 55-77. In the four months following its implementation in 1971, the number of murders increased twelvefold over the number committed in the preceding four months. SUNDAY TIMES INSIGHT TEAM, *supra* note 20, at 269. The Gardiner Report severely criticized the internment strategy. GARDINER REPORT, *supra* note 63, para. 148, at 43. Its criticisms helped persuade the government to change strategy. TEN YEARS ON, *supra* note 48, at 24.

Nearly 2,000 people, including only 107 Protestants, were interned without trial for varying periods of time between August, 1971 and December, 1975. N.Y. Times, Dec. 6, 1975, at 1, col. 1, at 6, col. 2. The power of internment is still on the books, EPA § 12, sched. 1, but it can be invoked only with parliamentary approval. See *supra* note 64 and accompanying text. It has not been used since 1975. TEN YEARS ON, *supra* note 48, at 24. The government continues to retain and to use its significant powers of temporary detention. EPA §§ 11, 14; see *supra* notes 75, 86 and accompanying text.

106. The courts are known by the name of the chairman of the commission that recom-

hope of the government has been that the return to the rule of law—symbolized by the end of internment—would alleviate the deep-seated mistrust of the legal system prevalent in the Catholic community.¹⁰⁷ The basic problem with this hope has been that the emergency regime of the EPA, despite the suspension of internment, cannot be viewed as normal law.¹⁰⁸

In particular, section 8, by removing the common law test of voluntariness in the admissibility of confessions, has caused major changes in traditional police and legal procedure. At the police level, a shift has occurred from pre-arrest acquisition of independent evidence to post-arrest interrogation as the primary tool of gathering evidence.¹⁰⁹ At the trial level, a shift has occurred from the jury's determination of the accused's guilt or innocence to judicial rulings on the admissibility of the accused's confession¹¹⁰—rulings that, given the reliance on confessions, are practically dispositive of the question of guilt or innocence.

During 1976 and 1977, the two years after internment was abandoned, 3,147 persons were charged with scheduled offenses under the EPA.¹¹¹ A conviction was obtained in 94% of these cases, a figure not in itself alarming.¹¹² However, between 70 and 90% of these convictions were based wholly or mainly on admissions made to the police and held admissible by the courts under section 8.¹¹³ At the same time, the number of complaints of ill treatment during interrogation increased from 180 in 1975 to 384 in 1976,¹¹⁴ and almost 1100 for 1977 and 1978 combined.¹¹⁵

mended their establishment. See DIPLOCK REPORT, *supra* note 62, at paras. 35-41, at 17-19. Among their special features are the lack of jury trial, EPA § 7, and the reversal of the burden of proof in bail proceedings and trials of possession offenses. EPA §§ 2, 9. For a general discussion of the operation of Diplock Courts, see TEN YEARS ON, *supra* note 48, at 57-88.

107. See TEN YEARS ON, *supra* note 48, at 102.

108. See *supra* notes 69-80 and accompanying text.

109. Grier, *The Admissibility of Confessions Under the Northern Ireland (Emergency Provisions) Act*, 31 N. IR. L.Q. 205, 208 (1980).

110. *Id.*

111. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND 2 (1978) (AI Index EUR 45/01/78) (reporting data supplied by the R.U.C.).

112. Sunday Times (London), Oct. 23, 1977, at 3, col. 1 (reporting research of the Law Department, Queen's University, Belfast).

113. *Id.* Research on the evidence used against defendants in Diplock trials between January and April, 1979 indicates that in 56% of the cases a statement from the defendant was the only evidence, in 30% of the cases the evidence consisted of the defendant's statement and other evidence, in 6% of the cases no statement was made, and in 6% of the cases the nature of the evidence could not be determined. TEN YEARS ON, *supra* note 48, at 44.

114. TEN YEARS ON, *supra* note 48, at 39.

115. TIME FOR A CHANGE, *supra* note 84, at 17.

The opening of special police interrogation centers at Castlereagh and Gough Army Barracks was accompanied by large increases in the number of complaints of ill treatment during interrogation made against the police.¹¹⁶ Such complaints were made by the Northern Ireland Civil Rights Association, by representatives of the mainly Catholic Social Democratic and Labour Party,¹¹⁷ by the Catholic Church,¹¹⁸ and by solicitors defending alleged terrorists in the Diplock Courts.¹¹⁹ The Ulster Defence Association and the Loyalist-oriented Ulster Civil Liberties Advice Center also complained,¹²⁰ which indicates that the perception of ill treatment was not confined to the Catholic community. The wave of complaints received widespread publicity through two national television documentaries.¹²¹ Finally, after the Police Surgeons Association began to speak out,¹²² and Amnesty International issued a damning report about the situation,¹²³ the government appointed a Committee of Inquiry into Police Interrogation Procedures in Northern Ireland—the Bennett Committee.¹²⁴

The Bennett Committee was not empowered to investigate individual complaints, as could Amnesty International,¹²⁵ but nevertheless in its March 1979 report it found that there were cases “in which injuries, whatever their precise cause, were not self-inflicted and were sustained in police custody.”¹²⁶ The Committee’s report contained sixty-four findings and recommendations designed to improve the supervision of interrogation and to eliminate the possibility of further abuses.¹²⁷ These recommendations included installing closed-circuit T.V. in all interview rooms,¹²⁸ limiting the length of interviews and the number of

116. TEN YEARS ON, *supra* note 48, at 39; *see generally* P. TAYLOR, BEATING THE TERRORISTS? INTERROGATION IN GOUGH AND CASTLEREAGH ch. 7 (treatment at Castlereagh) & ch. 12 (treatment at Gough).

117. *See* AMNESTY INTERNATIONAL, *supra* note 111, at 3 (complaints of Northern Ireland Civil Rights Association and Social Democratic and Labour Party).

118. *Id.* (statements of Tomas O’Fiach, Archbishop of Armagh).

119. *Id.* at 3-4 (solicitors’ letter of complaint to Secretary of State).

120. *Id.* at 3 (dossier compiled by Ulster Defence Association), 4 (videotape produced by Advice Center).

121. *See* P. TAYLOR, *supra* note 116, at 163-64 (March 1977 BBC broadcast of interview alleging mistreatment) & at 221-22 (October 1977 Thames Television Company broadcast of “Inhuman and Degrading Treatment”).

122. *Id.* at 261. Doctors working at the Crumlin Road Jail examined the medical records of forty-four prisoners and found twenty-eight to have significant physical injuries. *Id.*

123. AMNESTY INTERNATIONAL, *supra* note 111.

124. *See* BENNETT REPORT, *supra* note 87.

125. *Id.* para. 2, at 1.

126. *Id.* para. 163, at 55.

127. *Id.* para. 404, at 135-40.

128. *Id.* para. 404(36), at 138.

interviewers,¹²⁹ promulgating a formal code of conduct for interviewers,¹³⁰ and granting an absolute right of access to a solicitor after a person had been detained forty-eight hours in custody.¹³¹ The government has formally accepted most of these recommendations,¹³² though questions have been raised as to whether that commitment has been honored fully in practice.¹³³ But even accepting that improvements were made as a result of the Bennett Committee report, the basic difficulties created by the section 8 legal standard remain.

B. Legal Debate: Standards Old and New

The Diplock Commission, whose recommendations guided the drafting of the EPA,¹³⁴ believed that the then prevailing common law standard regarding the admissibility of confessions so favored the defendant in Northern Ireland that in the struggle against terrorism the authorities were being forced to rely on the detention of suspected terrorists and not on their trial in courts of law.¹³⁵ The necessary implication of the Commission's judgment was that to foster a return to the rule of law symbolized by judicial trials, it was necessary to suspend an important legal protection—the principle of voluntariness in the admissibility of confessions.

The principle of voluntariness, operative throughout the United Kingdom before the enactment of the EPA, was deeply established in the common law.¹³⁶ It is well summarized in an official R.U.C. manual that describes the law of evidence outside the context of the EPA: "The

129. *Id.* para. 404(24), at 137.

130. *Id.* para. 404(25), at 137.

131. *Id.* para. 404(45), at 138-39.

132. NORTHERN IRELAND OFFICE, ACTION TO BE TAKEN ON THE RECOMMENDATIONS OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURE IN NORTHERN IRELAND (n.d.) (on file with *The Yale Journal of World Public Order*).

133. See Walsh, *Arrest and Interrogation*, in THE ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND 6 (proceedings of conference held in Belfast, June 13, 1981) (on file with *The Yale Journal of World Public Order*). Walsh found that recommendations regarding the permitted number of detectives involved in interrogation and the right of access to solicitors were often ignored. *Id.* at 7.

134. See *supra* note 62 and accompanying text.

135. DIPLOCK REPORT, *supra* note 62, para. 87, at 31.

136. See *Ibrahim v. Rex*, [1914-15] All E.R. 874. The case involved the appeal of a soldier who had been convicted of murder; the issue of the admissibility of the defendant's confession was raised because he had confessed when asked by his commanding officer why he had committed the crime. After reviewing the development of the common law doctrine on admissibility, Lord Sumner concluded that

[i]t has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

accepted test of voluntariness is in these terms:—The confession must not have been induced by threat of prejudice or detriment or hope of advantage of a temporal character held out by a person in authority, or by oppression.”¹³⁷ The Diplock Commission recommended that the law be changed so that in trials of scheduled offenses confessions obtained in violation of the principle might still be admissible.¹³⁸ Its proposed substitute rule, derived from Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹³⁹ was to make statements admissible unless “torture or . . . inhuman or degrading treatment” was used to induce them.¹⁴⁰ This suggestion, adopted in what is now section 8 of the EPA,¹⁴¹ represented a sharp and obvious departure from the principle of voluntariness.

1. *Non-physical Force Atmosphere—Flaws in the Diplock Commission’s Approach to Interrogation*

The Diplock Commission clearly foresaw that the new admissibility standard would permit interrogators to use psychological pressure to induce confessions. It stated that the proposed standard would permit the creation of a psychological atmosphere in which the person being

Id. at 877.

This venerable doctrine still plays an important role in British criminal law. See *Director of Public Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175 (House of Lords). In this case a drug possession conviction was upheld after a finding that any hint of inducement in the questioning of the defendant had been overcome by three specific refusals by the police to make a deal. The language of the opinion laid out the principle of voluntariness in virtually the same language as had been used in the *Ibrahim* case of some sixty years before. *Id.* at 175.

The voluntariness test has also been accepted by the courts of Northern Ireland in deciding cases outside the context of the EPA. See *Regina v. Corr*, 1968 N. Ir. L.R. 193 (C.C.A.). The court found admissible statements made by the defendant after questioning by the police. Although the appellant made no allegations of oppressive, harsh, or misleading interrogation, the court noted in dicta that even “vigorous cross-examination” might have been enough to render the admission involuntary.

The effect of a vigorous cross-examination or . . . of a series ‘of searching interrogatories’ on one who is not free to get away from his questioner may, in certain circumstances, be to arouse hope of release or fear of further detention or other prejudicial result in the mind of the suspect according to whether or not he makes answers or keeps silent. But it also acts more directly by subjecting the person questioned to a degree of pressure which saps his will and makes him talk. We think such pressure may well . . . suffice to make statements obtained by it inadmissible in point of law.

Id. at 211.

137. K. MASTERTSON, EVIDENCE IN CRIMINAL CASES 21 (1978).

138. DIPLOCK REPORT, *supra* note 62, para. 89, at 32.

139. See European Convention for the Protection of Human Rights and Fundamental Liberties, art. 3, 213 U.N.T.S. 221; DIPLOCK REPORT, *supra* note 62, para. 90, at 32. Article 3 is not an admissibility standard per se; rather, it flatly prohibits the use of “torture, inhuman or degrading treatment.”

140. DIPLOCK REPORT, *supra* note 62, para. 89, at 32.

141. See *supra* note 139.

questioned would be more willing to speak, and, furthermore, that in creating this atmosphere the use of “promises of favours” and “indications of [unfavorable] consequences” to induce statements was allowed.¹⁴² The common law standard excluding statements made in “hope of advantage” or under “threat of detriment” thus was clearly rejected. The Commission believed that modern techniques of interrogation, which seek to create in the suspect the desire to confide in the questioner, do “not involve cruel or degrading treatment.”¹⁴³ The actual or threatened use of violence, however, was to continue to render a confession inadmissible.¹⁴⁴

At the Castlereagh and Gough interrogation centers, both of which have been designed to intensify the prisoner’s sense of isolation and thereby create the “psychological atmosphere” foreseen by the Diplock Commission,¹⁴⁵ suspects are kept isolated for up to seven days.¹⁴⁶ They suffer severe stress and fatigue.¹⁴⁷ The future appears grim—they may believe they will be beaten or will receive long prison sentences—and they are kept awake long hours and probably find it difficult to sleep in a strange and frightening environment.¹⁴⁸ Each day relaxed interrogation teams start the questioning anew, alternately menacing or befriending the disoriented suspect.¹⁴⁹ Evidence indicates that these techniques succeed relatively quickly, as “even the strongest wills” weaken due to isolation, stress, fatigue, and uncertainty.¹⁵⁰

Psychological pressure theoretically may be sufficient to produce confessions, but in the atmosphere sanctioned by the Diplock Commission it was perhaps inevitable that the psychological approach would be mixed with or give way to violence. As has been seen, evidence from numerous and diverse sources suggests that violent interrogation has occurred frequently.¹⁵¹

142. DIPLOCK REPORT, *supra* note 62, para. 89, at 32.

143. *Id.* para. 84, at 30.

144. *Id.* para. 91, at 32. The Commission’s attitude toward violence may be inferred from the following:

[w]e do not think that . . . the police . . . should be discouraged from creating by *means which do not involve physical violence, the threat of it, or any other inhuman or degrading treatment*, a situation in which a guilty man is more likely than he otherwise would have been . . . to speak

Id. (emphasis added).

145. See TEN YEARS ON, *supra* note 48, at 45.

146. *Id.* at 45–46.

147. *Id.* at 46.

148. *Id.*

149. *Id.*

150. *Id.* at 45.

151. See *supra* notes 116–22 and accompanying text.

2. *"Torture, Inhuman or Degrading Treatment"—Flaws in the Diplock Standard*

The second major problem with the section 8 admissibility standard is that it is fundamentally ambiguous in two critical respects. First, an important inconsistency separates the Diplock Commission's intended interpretation of "torture, inhuman or degrading treatment" and the interpretation of that standard by the European Commission on Human Rights, to whose decisions, given the origins of the standard,¹⁵² the courts of Northern Ireland inevitably have looked for guidance. Second, it is unclear to what extent the section 8 standard preserves the common law tradition of judicial discretion in ruling on the admissibility of confessions. These two ambiguities have combined to produce enormous and dangerous confusion.

The European Commission offered a thorough interpretation of the "torture, inhuman or degrading treatment" standard in its opinion in the 1969 *Greek Case (Denmark v. Greece)*.¹⁵³ The case involved a complaint by four countries brought against Greece over its suspension of certain constitutional rights afforded its citizens, as well as its alleged torture of political prisoners. In sustaining some of the allegations of the complaint the Commission rendered the following definitions:

Inhuman treatment: at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.¹⁵⁴

Torture: often used to describe inhuman treatment, which has a purpose, such as the obtaining of information, or confession, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.¹⁵⁵

Non-physical torture: the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.¹⁵⁶

Degrading treatment: treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.¹⁵⁷

The Commission's majority opinion stated that a distinction must be drawn between acts prohibited by Article 3 and "a certain roughness of treatment [that] may take the form of slaps or blows of the hand on the

152. See *supra* note 139 and accompanying text.

153. 1969 [THE GREEK CASE] Y.B. EUR. CONV. ON HUMAN RIGHTS 1 (Eur. Comm'n on Human Rights). The case was a consolidation of applications by Denmark, Norway, Sweden, and the Netherlands.

154. *Id.* at 186.

155. *Id.*

156. *Id.* at 461.

157. *Id.* at 186.

head or face.”¹⁵⁸

An illustration of the Commission’s view of this distinction may be found in the case of *X against the United Kingdom*,¹⁵⁹ a routine criminal case in which the applicant claimed to have been attacked by a police dog and assaulted twice while handcuffed.¹⁶⁰ While the Commission rejected the applicant’s version of the facts, it concluded in dicta that even on its face the application did “not disclose a treatment so serious as to amount to inhuman or degrading treatment within the meaning of Art. 3 of the Convention.”¹⁶¹ Thus, it is clear that the interpretation by the European Commission tolerates physical mistreatment not permissible under the voluntariness principle—a possibility that the Diplock Commission apparently did not foresee.¹⁶²

Two decisions on admissibility, handed down immediately before and after the enactment of the EPA, illustrate well the nature of the change that the implementation of the standard of the European Convention was intended to effect. Shortly before the EPA established the new admissibility standard, the Lord Chief Justice of Northern Ireland held in *Regina v. Flynn*¹⁶³ that confessions obtained at the Holywood Army Barracks were inadmissible because the Barracks was “a set-up officially organized and operated to gain information . . . from persons who would otherwise have been less willing to give it.”¹⁶⁴ The Diplock Report specifically criticized this decision,¹⁶⁵ and the Lord Chief Justice accommodated that criticism in an opinion delivered shortly after the new standard took effect. In construing the new standard, he found in *Regina v. Corey*¹⁶⁶ that “[t]here is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials.”¹⁶⁷

158. *Id.* at 501. Ironically, the Commission used these exact definitions in rendering its opinion in the 1971 case of *Ireland v. United Kingdom*, which involved a number of complaints of ill-treatment during interrogations at the Holywood Army Barracks between August and December 1971. *Ireland v. United Kingdom*, 1978 E.C.H.R. 377, No. 5310/71 (judgement of Jan. 18, 1978). At the time of the complaint the Special Powers Act, the predecessor of the EPA, was still in effect. See *supra* notes 29-32 and accompanying text.

159. 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 250 (Eur. Comm’n on Human Rights).

160. *Id.* at 252.

161. *Id.* at 276.

162. See *supra* note 144 and accompanying text.

163. (Belfast City Comm’n, May 23, 1972) (ruling by Lowry, L.C.J.), *digested in* 23 N. Ir. L.Q. 343 (1972).

164. Note, *Admissibility of Confessions and the Common Law in Times of Emergency*, 24 N. Ir. L.Q. 199, 202 (1974) (quoting *Regina v. Flynn* (Belfast City Comm’n, May 23, 1972)).

165. DIPLOCK REPORT, *supra* note 62, para. 83, at 30.

166. Note, 1979 N. Ir. 49 (Belfast City Comm’n, Dec. 6, 1973) (ruling by Lowry, L.C.J.), *digested in* 25 N. Ir. L.Q. 180 (1974).

167. 1979 N. Ir. 50.

Despite this apparent initial clarity, later cases have revealed that the courts of Northern Ireland are deeply troubled by the departure from the common law, and are finding the new standard difficult to interpret. One leading case on section 8 which betrays this difficulty in *Regina v. McCormick*,¹⁶⁸ which concerned the admissibility of statements made by five defendants charged with offenses ranging from murder to membership in a proscribed organization.¹⁶⁹ After noting that the European Convention cases permit “‘a certain roughness of treatment,’” the Lord Justice (the trial court judge) wrote that decisions under article 3 appear to contemplate the use of physical violence not permitted under the common law standard.¹⁷⁰ He further argued that if the Diplock standard were interpreted in the same way as article 3,¹⁷¹ it must be read to permit the use of “a moderate degree of physical maltreatment for the purpose of inducing a statement.”¹⁷² Put differently, the court appeared to hold that a statement would be held admissible unless “torture, inhuman or degrading treatment” in the sense described by the European Commission was used for the purpose of inducing it.¹⁷³

Shifting directions, however, the opinion then examined the power of judicial discretion, which, it maintained, provided non-statutory control over the means by which statements are obtained.¹⁷⁴ It invoked language from *Regina v. Corey*,¹⁷⁵ the earlier case interpreting the section 8 standard, to the effect that judges were still permitted to exclude statements if their admission “‘would not be in the interests of justice.’”¹⁷⁶ Seizing on this “interests of justice” rationale, the opinion excluded some of the statements at issue in *McCormick* because in its view they had been induced by physical violence.¹⁷⁷

168. 1977 N. Ir. 105.

169. *Id.*

170. *Id.* at 110.

171. On this issue, the court asserted that

the terms torture or inhuman or degrading conduct in section 6 of the 1973 Act are taken from Article 3 and Parliament in using these words was accepting as guidelines the standards laid down in the European Convention on Human Rights and incorporating these in the domestic legislation.

Id. at 109.

172. *Id.* at 111.

173. *Id.*

174. *Id.*

175. See *supra* notes 166-67 and accompanying text.

176. 1977 N. Ir. at 112 (quoting *Regina v. Corey* (Belfast City Comm'n, Dec. 6, 1973)). Judicial discretion permits the court to exclude statements which satisfy the strict legal tests of admissibility, but which the court concludes could not be admitted without “operat[ing] unfairly against a defendant.” *Collis v. Gunn*, [1964] 1 Q.B. 495, 501. Like the principle of voluntariness, which section 8 explicitly abandoned, it is deeply embedded in the common law. See GARDINER REPORT, *supra* note 63, para. 47, at 16.

177. 1977 N. Ir. at 112. In a later case, *Regina v. O'Halloran*, the Lord Chief Justice

In short, the opinion is contradictory. After apparently endorsing the view that "it is open to an interviewer to use a moderate degree of physical maltreatment for the purpose of inducing a statement,"¹⁷⁸ the opinion excluded statements precisely on the ground that violence had been used to obtain them. The rationale of the opinion was further obscured by language in the conclusion to the effect that the discretionary power "should not be exercised so as to defeat the will of Parliament as expressed" in section 8.¹⁷⁹

The second basic ambiguity in the interpretation of section 8 is, however, precisely that the will of Parliament with respect to the judicial power of discretion is impossible to determine. The Diplock Commission clearly intended that its proposed standard would suspend the common law principle of voluntariness, and would remove from judges the discretionary power to depart from the standard even should the "interests of justice" require it.¹⁸⁰ It seemed neither to anticipate the use of physical violence in interrogation, nor to be aware that the case law under article 3 permitted such conduct.¹⁸¹

The Gardiner Committee, the only Parliamentary body to review the EPA, conceded that reading the Diplock Report might lead one to believe that by enacting the EPA, Parliament had intended that judges no longer have discretion over admissibility in trials of scheduled offenses.¹⁸² It rejected this view, however, and argued that Parliamentary withdrawal of such well-established judicial power could only be made in "clear terms,"¹⁸³ which the EPA failed to do. The Gardiner Report favored an express statutory affirmation that judicial discretion was unimpaired, and recommended a provision to that effect to Parliament.¹⁸⁴ Such language has not been inserted, however.

In short, the language which the Gardiner Committee maintained was necessary to remove the power of discretion has not been inserted in the EPA. Nor has the language it suggested that would affirm ex-

appeared to deny the permissibility of any degree of physical violence. 1979 N. Ir. 45 (C.A.). In dicta, he expressed doubt that even under the section 8 standard a court should ever admit statements once violence had been shown to have occurred during the interrogation. *Id.* at 47.

178. 1977 N. Ir. at 111.

179. *Id.* at 114.

180. The Diplock Report asserted that "the current technical rules, practice and judicial discretion as to the admissibility of confessions ought to be suspended for the duration of the emergency in respect of Scheduled Offences." DIPLOCK REPORT, *supra* note 62, para. 89, at 32.

181. See *supra* notes 153-61 and accompanying text.

182. GARDINER REPORT, *supra* note 63, para. 48, at 16-17.

183. *Id.* at 17.

184. *Id.* para. 50, at 17.

PLICITLY the power of discretion. While Parliament has not resolved the matter, some courts in Northern Ireland have concluded that their discretionary power still survives.¹⁸⁵

It seems fair to draw at least two conclusions from this confusion. First, the section 8 standard is inherently ambiguous in two fundamental respects. First, the approach of the Diplock Commission and that of the European Commission differ with respect to the permissibility of the use of physical violence. This tension has not been resolved, and the courts of Northern Ireland have been left with the difficult task of reconciling the Diplock approach, which did not contemplate the use of physical violence,¹⁸⁶ and the European Commission approach, which has found "slaps or blows of the hand on the head or face not unacceptable."¹⁸⁷ In addition, it is not clear whether in trying to reconcile these two approaches, the courts of Northern Ireland may invoke their common law discretionary powers, although some have continued to do so.¹⁸⁸

The second conclusion to be drawn is that it seems likely that the confusion over the "torture, inhuman or degrading treatment" standard has contributed to the use of violence during interrogations. One study of post-*McCormick* cases has concluded that "the possible exclusion of statements did not act as an effective control of police malpractice."¹⁸⁹ The authors of the study asserted that the inherent ambiguity of section 8 as revealed in judicial application may have persuaded some interrogators that physical ill treatment was permissible.¹⁹⁰ Although section 8 and the admissibility of confessions were, strictly speaking, outside its mandate,¹⁹¹ the Bennett Committee noted that "the uncertainty, despite the standards upheld and applied by the courts, about what is permissible and what is not, short of the use of physical violence or ill treatment, may tempt police officers to see how far they can go and what they can get away with."¹⁹² It is clearly questionable whether the Commission's confidence that the application of

185. An evidence manual written by an R.U.C. investigator has concluded that the judicial power of discretion survived the enactment of the EPA. See K. MASTERSON, *supra* note 137, at 25-26. Grier has concluded, rather safely, that "a precise analysis of the scope of the judicial discretion in the context of section 8 is not yet feasible." Grier, *supra* note 109, at 224.

186. See *supra* notes 143-44 and accompanying text.

187. See *supra* notes 153-58 and accompanying text.

188. See *supra* notes 176-77 and accompanying text.

189. TEN YEARS ON, *supra* note 48, at 48.

190. *Id.*

191. BENNETT REPORT, *supra* note 87, para. 3, at 2.

192. *Id.* para. 84, at 31.

the standard would prevent the use of physical violence was justified. It is unquestionable that its general apprehension of the problems likely to be caused by the standard was justified.

C. *Defense of the New Standard: A Rebuttal*

A defense of the new standard of admissibility would probably focus on its ostensible efficacy. Concern that the standard may encourage psychological or even physical violence is misplaced, it could be argued, because such violence can be justified in the name of community safety. Confessions are crucial, given the present situation, because witnesses are reluctant to testify out of fear of the terrorists or out of general disrespect for the system of justice. Confessions are difficult to obtain with traditional means of interrogation, however, because dedicated terrorists are not likely to "crack" as would ordinary criminals. In short, such a defense would squarely pose an alternative: a choice must be made between violence in interrogation and violence in the streets, and the former is to be preferred.

This defense is vulnerable to several attacks. In the first place, it can be argued that questions of efficacy are simply irrelevant. The techniques contemplated under section 8 are *a priori* unacceptable. The psychological damage inflicted by the non-physical abuse may be just as significant as that inflicted by more physical forms of persuasion. The physical violence that is the inevitable product of the new standard would never be tolerated as punishment for persons already proven guilty. Accordingly, it cannot be accepted as an appropriate instrument for use in the determination of guilt.

Even should the efficacy argument be accepted in principle, it can be defeated on its own terms. The new admissibility standard has not, as far as can be ascertained, contributed to a decline in the level of violence. While the overall level of violence fell sharply in the last four months of 1976,¹⁹³ this decline was in all likelihood due to the emergence of the Peace People, a non-sectarian peace group which inspired broad-based marches calling for an end to the conflict.¹⁹⁴ There was,

193. The indices for the measurement of terrorist activity showed declines of 30% to 60% during the last four months of 1976 as compared with the same period for 1975. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT FOR 1977, at 72-73 (tables 1-5) (1978). Nonetheless, terrorist activity, as measured by the number of politically related murders, ran at high levels in 1976, the first full year of the new emphasis on conviction in courts of law. The data show the year to have been the third worst since the outbreak of the violence in 1969. See ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT 1982, at 48 (table 3) (1983).

194. See N.Y. Times, Sept. 5, 1976, at 15, col. 1; *id.*, Oct. 24, 1976, at 18, col. 1; *id.*, Nov. 28, at 17, col. 1.

however, no evidence that the interrogation practices tolerated under section 8 were effective in decreasing the number of terrorist crimes,¹⁹⁵ whatever their success in producing individual confessions.¹⁹⁶ In fact, terrorist acts measured in number of deaths by violence and number of terrorist incidents actually increased in 1976, the full first year in which the new approach was employed. It is plausible that the interrogation controversy increased opposition to government policies and added new recruits to terrorist rolls, at least on the Republican side.

A second flaw in the efficacy argument is that it fails to take account of data indicating that only a relatively small number of those interrogated under the new standard have been charged with a crime. For the period between September, 1977 and August, 1978, only 37% of those interrogated at Castlereagh and 24% of those interrogated at Gough and Strand Road, Londonderry were ultimately charged.¹⁹⁷ During the first ten months of 1980, only 8.6% of all those arrested under the EPA were ever charged.¹⁹⁸ These figures admit of only two conclusions: either large numbers of innocent people have been subjected to prolonged interrogation, or prolonged interrogation failed in most cases to produce a confession from those who had something to confess.

Equally damaging to the efficacy defense of section 8 is the finding by Boyle, Hadden and Hillyard that "the majority of those who did make a confession did so relatively quickly."¹⁹⁹ Fifty percent of all those covered in their survey who chose to make a statement did so within the first three hours of interrogation, and a further 25% within the next three hours.²⁰⁰ Prolonged interrogation, stress, fatigue, and mental and physical harassment do not appear to have been important factors in inducing most confessions. Perhaps the extended interrogations could be justified if it could be shown that the last 25% of the confessions, those which were not forthcoming until after the initial six hours of interrogation, came from hardened men and women of violence. The very fact that the government has never produced any data which support this conclusion is suggestive; if evidence showing that

195. Despite the substantial decline at the end of the year, 297 politically related fatalities occurred in 1976, as compared with 247 in 1975. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT FOR 1979, at 59 (table 6) (1980). Similarly, 3,339 terrorist incidents were reported in 1976, as compared with 2,496 in 1975. *Id.*

196. Charges were brought against 708 terrorist suspects in 1976, more than double the number for 1975. P. TAYLOR, *supra* note 116, at 80.

197. BENNETT REPORT, *supra* note 87, app. 1, at 141.

198. See *supra* note 89 and accompanying text.

199. TEN YEARS ON, *supra* note 48, at 44-45.

200. *Id.* at 45.

those who confessed after prolonged interrogation tended to be those most responsible for the violence, one must assume that it would have been given wide publicity during the long period of criticism of the security forces for their interrogation practices.²⁰¹

Whatever success section 8 may be claimed to have had in inducing true confessions must be balanced against the significant danger that it may also induce false confessions. The underlying rationale of the voluntariness principle was to guard against this danger, as well as to discourage improper police practices.²⁰² Although no clear proof of a false confession has been found, substantial doubts about the validity of confessions have been raised in a significant number of cases.²⁰³ One R.U.C. detective, a member of an interrogation team, has estimated that 2% of all those convicted were innocent.²⁰⁴ That would suggest that between 1976 and 1977 over 50 innocent people were convicted.²⁰⁵

The last and most damaging argument to be made against those who would justify section 8 on grounds of efficacy is that it contributes to the perceived substantive unfairness in the legal system.²⁰⁶ Police interrogation practices as condoned by section 8 are certain to arouse popular anger, and further diminish prospects for popular cooperation with security forces. The Diplock Commission warned that "the reputation of Courts of Justice would be sullied if they countenanced convictions on evidence obtained by methods which flout universally accepted standards of behavior."²⁰⁷ Ironically, however, section 8 is contributing to precisely that result.

IV. Police Complaint Procedures

So long as extraordinary powers are conferred on the security forces by statutes such as the EPA, it is essential that the exercise of these powers be tempered by the establishment in Northern Ireland of procedures for the independent investigation and evaluation of allegations of police misconduct. The need for such procedures is made even more pressing by the longstanding tradition of discrimination against the Catholic minority in the administration of justice.²⁰⁸ Therefore, it must

201. See *supra* notes 116-24 and accompanying text.

202. R. CROSS, EVIDENCE 446-47 (2d ed. 1963).

203. TEN YEARS ON, *supra* note 48, at 46.

204. P. TAYLOR, *supra* note 116, at 339.

205. *Id.*

206. See *supra* notes 27-28 and accompanying text.

207. DIPLOCK REPORT, *supra* note 62, para. 89, at 32.

208. See *supra* notes 27-33 and accompanying text.

be regarded as a critical failing of the legal system in Northern Ireland that such procedures are virtually nonexistent.

The call for the establishment of procedures for the independent investigation of complaints was sounded almost as soon as the current cycle of violence began in Northern Ireland in 1969. The Cameron Report, which studied the rioting of that year, recommended the abandonment of the longstanding policy that only the Chief Constable institute disciplinary courts of inquiry,²⁰⁹ and that independent procedures be established.²¹⁰ These recommendations were not adopted, however, and despite further calls for the institution of such procedures,²¹¹ and the implementation of some superficial reforms,²¹² the need remains as pressing as ever.²¹³

In 1970, the parliament of Northern Ireland significantly overhauled the administration of the R.U.C. by the passage of the Police Act (Northern Ireland),²¹⁴ which removed the constabulary from the direct control of the Minister of the Interior of Northern Ireland.²¹⁵ The act made the constabulary responsible to the Police Authority,²¹⁶ a public body appointed by the Governor of Northern Ireland²¹⁷ and to be composed of diverse community representatives.²¹⁸ Part of the Police Authority's mandate was, and remains, to keep itself "informed as to the manner in which complaints from the public against members of the police force are dealt with by the Chief Constable."²¹⁹ As part of its

209. See Constabulary (Ireland) Act, 6 & 7 Will. 4, ch. 12, § 24.

210. CAMERON REPORT, *supra* note 38, at para. 230.

211. See GARDINER REPORT, *supra* note 63, para. 97, at 32.

212. See *infra* notes 222-28 and accompanying text.

213. This issue also has received substantial attention throughout the United Kingdom as a whole. See REPORT OF A WORKING PARTY APPOINTED BY THE HOME SECRETARY ON THE ESTABLISHMENT OF AN INDEPENDENT ELEMENT IN THE INVESTIGATION OF COMPLAINTS AGAINST THE POLICE, CMD. 5; No. 8193 (1981) (Lord Plowden, Chairman) (rejecting the establishment of independent investigations in favor of reliance on investigation by officers from other forces); REPORT OF AN INQUIRY INTO THE BRIXTON DISORDERS, CMD. 5, No. 8422 (1981) (Lord Scarman, Chairman) (concluding after analysis of the causes of the Brixton race riots that independent evaluation of complaints is appropriate).

214. 1970 N. Ir. Pub. Gen. Acts, ch. 9.

215. *Id.* § 1.

216. *Id.*

217. *Id.* § 1(3), sched. 1, §§ 1-9. After the imposition of direct rule from Westminster, control over the Police Authority was vested in the Secretary of State for Northern Ireland.

218. *Id.* This reform was instituted at the recommendation of the Hunt Committee, which had been appointed in the wake of the 1969 rioting to analyze the structure of the police force. See REPORT OF THE ADVISORY COMMITTEE ON POLICE IN NORTHERN IRELAND, N. IR. CMD., No. 535, at 3 (1969) (J. Hunt, Chairman) [hereinafter HUNT REPORT]. The committee found that the police were too directly responsible to elected officials in a political system in which victory virtually was guaranteed to the members of a single party. *Id.* paras. 84-85, at 21-22.

219. 1970 N. Ir. Pub. Gen. Acts, ch. 9, § 12(1). The wording of the statute speaks of the

general power to keep itself informed, the Authority can request reports on complaints and investigations,²²⁰ and in cases that affect "the public interest," can require the Chief Constable to convene a tribunal of inquiry.²²¹

The issue of police complaint procedures has received extensive attention in Northern Ireland since the publication of the Cameron Report. In addition to proposing the establishment of the Police Authority, the Hunt Commission recommended that complaints be investigated by police officers from counties different from those of the officers being investigated,²²² and the Black Report, which reviewed the problem once more in 1974, found that this reform had been implemented.²²³ In the meantime, the Gardiner Report had called for the establishment of independent procedures,²²⁴ but this proposal was rejected by the Black Report, which instead endorsed the establishment of a Police Complaint Board.²²⁵ Finally, the Bennett Report of 1979 recommended further limited reforms, including a policy that in cases that have aroused "public disquiet," every effort be made to use investigating officers from other police forces in the United Kingdom.²²⁶

Despite all this attention to the problem, the basic structure remains the same. As the Black Report endorsed as a fundamental principle,²²⁷ and as the Bennett Report accepted for what it claimed was the lack of a better alternative,²²⁸ operational control over the investigation of complaints remains in the hands of the police. While four separate procedures for the investigation of complaints have been established, none can be called independent in any meaningful sense. Thus, the complaint procedures remain inadequate, and the public perception of the legal system suffers as a result.

A. *Criminal Prosecution by the Director of Public Prosecutions*

Under regulations issued pursuant to the 1970 Police Authority Act, the Chief Constable is the disciplinary authority for all ranks up to and

"Inspector General," but regulations issued since its enactment have replaced that phrase with the phrase "Chief Constable." BENNETT REPORT, *supra* note 87, para. 284, at 96.

220. 1970 N. Ir. Pub. Gen. Acts, ch. 9, § 15(2).

221. *Id.* § 13.

222. HUNT REPORT, *supra* note 218, para. 133, at 32.

223. REPORT OF THE WORKING PARTY FOR NORTHERN IRELAND, CMD. 5, No. 6475 (1975) (Sir Harold Black, Chairman) [hereinafter BLACK REPORT].

224. GARDINER REPORT, *supra* note 63, para. 98, at 32.

225. BLACK REPORT, *supra* note 223, para. 53, at 16. This reform was instituted in 1977. See *infra* notes 259-71 and accompanying text.

226. BENNETT REPORT, *supra* note 87, para. 357, at 118.

227. BLACK REPORT, *supra* note 223, para. 22(i), at 8.

228. *Id.* para. 356, at 117-18.

including Chief Superintendent, while the Police Authority is given responsibility for the higher ranks.²²⁹ The authority for the lower ranks has been delegated to a Senior Deputy Chief Constable, who evaluates the complaint in the first instance and then assigns a member of the Complaints and Discipline branch of the R.U.C. to investigate it.²³⁰ After the investigator's report has been reviewed, the Chief Constable must send it to the Director of Public Prosecutions (D.P.P.) unless he is "satisfied that no criminal offence has been committed."²³¹

Under Article 5 of the Prosecution of Offences Order,²³² the decision to press any criminal charge, including the indictment of a police officer, is entirely the responsibility of the D.P.P., whose discretion in this regard is subject only to his accountability to the Attorney General of the United Kingdom.²³³ The inherent weakness of this putative independence is apparent, however, in that the Order establishes no power of investigation, and, in fact, the D.P.P. has no staff for investigation.²³⁴ Any further information required by the D.P.P. must be requested from the Chief Constable.²³⁵ Thus, the prosecution decision is only nominally an independent one; the D.P.P.'s dependence on the R.U.C. for the investigation of any complaint against members of the R.U.C. is absolute.

B. *R.U.C. Disciplinary Procedures*

The role of the D.P.P. in the evaluation of complaints against the police is to determine whether the senior police officer's report contains sufficient evidence upon which to initiate criminal proceedings against the accused policeman.²³⁶ A variety of factors, including the credibility of potential witnesses, the admissibility of evidence, and the presence of competing demands on limited staff may influence the D.P.P.'s decision.²³⁷ None of these factors may necessarily address the issue of whether an assault or some other behavior warranting disciplinary ac-

229. R.U.C. (Complaints) Regulations, 1977 STAT. R. & O.N. IR., No. 235; R.U.C. (Discipline and Disciplinary Appeals) Regulations, 1977 STAT. R. & O.N. IR., No. 236.

230. BENNETT REPORT, *supra* note 87, para. 285, at 97.

231. 1970 N. Ir. Pub. Gen. Acts, ch. 9, § 13(5). Pursuant to powers conferred by the Prosecution of Offences Order, the D.P.P. has required the Chief Constable to send it any allegation of criminal conduct made against a police officer. Prosecution of Offences (Northern Ireland) Order, 1972 STAT. INST., No. 538, art. 6(3)(b); *see* BENNETT REPORT, *supra* note 87, para. 286, at 97.

232. Prosecution of Offences (Northern Ireland) Order, *supra* note 231, art. 5.

233. *Id.*

234. BENNETT REPORT, *supra* note 87, para. 288, at 98.

235. *Id.*

236. P. TAYLOR, *supra* note 116, at 57.

237. *Id.*

tion has occurred. Nonetheless, the R.U.C. has consistently interpreted British double jeopardy rules to require that if the D.P.P. has considered and rejected criminal charges against a constable or police officer, internal disciplinary action is automatically precluded. The result of this interpretation has been substantially to undercut whatever role the R.U.C. internal disciplinary procedure might play in the investigation of complaints against the police.

The literal wording of the double jeopardy rule would not appear to require that a decision not to prosecute rule out internal disciplinary proceedings. According to the Police Order of 1977, "where a member of the police force has been acquitted or convicted of a criminal offence he shall not be liable to be charged with any offence against discipline which is in substance the same as the offence of which he has been acquitted or convicted."²³⁸ As the Bennett Report pointed out, however, "[a]cquitted means, of course, acquitted by a court, but, in the application of the 'double jeopardy' rule, 'acquitted' has also been taken to refer in some degree to decisions by the Director of Public Prosecutions that there should be no prosecution."²³⁹ It also noted that the R.U.C. approach to the double jeopardy rule has been more absolute than was intended.²⁴⁰ Nonetheless, the R.U.C. disciplinary machinery, which could play an important role in controlling misconduct that falls below the level of an indictable offense but that is still counterproductive or unbecoming, will not investigate a case in which the D.P.P. has declined to prosecute.

C. *Tribunals of Inquiry*

A third procedure for the evaluation of complaints against the police is that the Police Authority can require the establishment of a tribunal of inquiry.²⁴¹ In cases in which the complaint "relates to a matter affecting or appearing to affect the public interest,"²⁴² the Police Authority can require the Chief Constable to refer the complaint to a tribunal consisting of a lawyer appointed by the Lord Chief Justice of Northern Ireland and two police officers appointed by the Authority itself.²⁴³

238. Police (Northern Ireland) Order, 1977 STAT. INST., No. 53, art. 14.

239. BENNETT REPORT, *supra* note 87, para. 364, at 120.

240. *Id.* para. 365, at 121. This policy has continued despite the issuance in 1977 of a Home Office circular that warned specifically against an overly broad application of the double jeopardy rule in the context of police disciplinary procedures. *Id.*

241. Police (Northern Ireland) Act, 1970, ch. 9, § 13(2).

242. *Id.*

243. *Id.* § 13(3). These officers may be affiliated with any police force in the United Kingdom. *Id.*

Although the tribunal option would appear to offer some promise of independent investigation, as of 1979 it had been invoked only once since the Police Authority was established in 1970.²⁴⁴ The number of complaints has remained relatively constant; in 1972, 2,617 complaints were filed, and in 1979, 2,183 were filed.²⁴⁵ To discharge its statutory mandate to keep itself informed of complaints against the police, the Police Authority during this period relied exclusively on the reports it received from the R.U.C. It had considered the tribunal option only twice before the first and only establishment of a tribunal of inquiry, which was appointed in 1979 to consider the case of James Rafferty.²⁴⁶

The facts and aftermath of the Rafferty case suggest that any hope that the tribunal of inquiry might be able to exercise independent investigatory power is misplaced. After his arrest on November 11, 1976, Rafferty, who had no prior criminal record, was interrogated for three days.²⁴⁷ Upon his release he was examined by two doctors, one a police surgeon, who found him to be suffering severe bruises and a spinal laceration, and who recommended urgent hospital treatment.²⁴⁸ Rafferty was hospitalized for four days after his release, during which time the extent of his injuries was confirmed by two more doctors, one a Fellow of the Royal College of Surgeons.²⁴⁹ No criminal charge was ever brought against him.

Although the matter was raised by one of its own members almost immediately after the incident, for two years the Police Authority refused repeated requests to initiate a tribunal of inquiry.²⁵⁰ During that period the investigations undertaken by the R.U.C. and by the D.P.P. both came to naught.²⁵¹ Finally, in October, 1978, the Police Authority agreed that a tribunal should hear the case, and in the spring of 1979, the tribunal was appointed.²⁵² The tribunal began to hear testimony in December, 1980.²⁵³ After medical testimony corroborated the severity of his injuries, Rafferty himself testified. Certain cross examination of

244. BENNETT REPORT, *supra* note 84, para. 392, at 130. During the same period, almost 20,000 formal complaints were filed against the police, including 1,382 alleging an assault during interrogation, during the period from 1976 to 1978. *Id.* app. II, at 142 (data supplied by the R.U.C.).

245. NORTHERN IRELAND CIVIL RIGHTS ASSOCIATION, THE RAFFERTY FILE 13 (1980) (copy on file with *The Yale Journal of World Public Order*) [hereinafter RAFFERTY FILE].

246. P. TAYLOR, *supra* note 116, at 105.

247. *Id.* at 88.

248. *Id.* at 96.

249. *Id.* Rafferty was also found to be suffering from some degree of amnesia. *Id.* at 97.

250. *Id.* at 97-105.

251. *Id.*

252. *Id.* at 105.

253. RAFFERTY FILE, *supra* note 245, at 7.

Rafferty by counsel for the police witnesses was ruled improper, whereupon counsel and the police witnesses refused to participate further in the proceedings.²⁵⁴ Following this action, the tribunal sought and obtained subpoenas that required the police witnesses to testify.²⁵⁵ Six of the witnesses appealed this decision, and nine days later Lord Justice Gibson quashed the subpoenas,²⁵⁶ ruling that the tribunal was not exercising a judicial function and therefore could not avail itself of the subpoena power of the courts.²⁵⁷ This decision effectively ended the inquiry, for the police witnesses indicated that, at the advice of counsel, they would not participate further in the inquiry unless legally compelled to do so.²⁵⁸ Thus, the Police Authority's first and heretofore only tribunal of inquiry, held four years after the occurrence of the incident it was to investigate, broke up after two days of testimony. Any confidence that the community might have had in its institutional capacity to conduct independent investigations was perhaps permanently destroyed.

D. *The Police Complaints Board*

The fourth procedure for the evaluation of complaints lies with the Police Complaints Board, which consists of at least six members,²⁵⁹ none of whom may be affiliated with a police force.²⁶⁰ According to the Black Report, which endorsed the establishment of the Board,²⁶¹ the rationale underlying its creation was to introduce "some form of independent scrutiny" into the investigation of complaints made against the R.U.C. but which are not referred to the D.P.P.²⁶² The Board was intended neither to make its own investigations,²⁶³ nor to usurp the position of the D.P.P.,²⁶⁴ rather, by receiving copies of complaints and investigation reports,²⁶⁵ it was to consult with and make recommendations to the Chief Constable about possible internal disci-

254. *Id.*

255. *See In re Sterritt*, 1980 N. Ir. 234, 234.

256. *Id.*

257. *Id.*

258. *Id.* at 235. Lord Justice Gibson called the result "singularly unfortunate," but held that the law left him no room for a different decision. *Id.* at 240.

259. Police (Northern Ireland) Order, *supra* note 238, art. 3(1).

260. *Id.* art. 3(2).

261. BLACK REPORT, *supra* note 223, para. 53, at 15-16.

262. *Id.* para. 16, at 6-7; *see supra* notes 229-31 and accompanying text.

263. BLACK REPORT, *supra* note 223, para. 22(i), at 8.

264. *Id.* para. 22(ii), at 8.

265. Police (Northern Ireland), Order, *supra* note 238, art. 5.

plinary procedures.²⁶⁶ The Board is not sent copies of complaints that the Chief Constable forwards to the D.P.P. until after the question of criminal proceedings has been settled.²⁶⁷

The fundamental problem with this structure is that because virtually all complaints made against the police allege some criminal conduct,²⁶⁸ they are therefore sent first to the D.P.P.²⁶⁹ Thus, the Board is not involved in the evaluation of any complaint that alleges criminal conduct; either the D.P.P. presses criminal charges, which eliminates any role for the Board, or the D.P.P. does not, which, given the peculiar interpretation of the double jeopardy rule in Northern Ireland, has the same effect.²⁷⁰

In short, the Police Complaint Board's power is confined to whatever role it might play with the Chief Constable concerning the appropriateness of internal disciplinary proceedings in those rare cases in which criminal behavior is not alleged in the complaint at issue. Even this limited power has not been used effectively,²⁷¹ and if it were, it is the possible criminal behavior of members of the R.U.C., not minor disciplinary infractions, with which the public is most concerned. Thus, it is most unlikely that the Board will ever play an important role in the investigation of complaints against the police.

E. *The Need for Independent Investigations*

No procedure for the independent investigation of complaints against the police yet exists in Northern Ireland. Criminal prosecution by the D.P.P., the tribunals of inquiry, and the Police Complaint Board are all thoroughly dependent on the cooperation of the R.U.C. The constabulary's internal disciplinary powers, even should they be exercised in good faith, are seriously handicapped by the interpretation of the double jeopardy rule. Until this failing is remedied, public confi-

266. *Id.* art. 6. As a power of last resort the Board can compel the Chief Constable to initiate a disciplinary hearing. *Id.* art. 6(2).

267. *Id.* art. 8(1).

268. See BENNETT REPORT, *supra* note 87, para. 329, at 110.

269. *Id.*; see *supra* notes 229-31 and accompanying text.

270. See *supra* notes 236-40 and accompanying text. In a special report to the Secretary of State, the Board itself expressed the view that the extent of the restriction on its scope caused by the double jeopardy rule was not fully appreciated by its members at the time of their appointment, and that the rule "constitutes a serious curtailment" of the effectiveness of their role. BENNETT REPORT, *supra* note 87, para. 397, at 132.

271. The Bennett Report noted that as of March, 1979, the Board had not exercised any of its powers. *Id.* para. 398, at 132. In June, 1981, an independent investigatory group found that the Police Complaint Board and the tribunals of inquiry, whose weakness had been betrayed in the Rafferty case, were "equally ineffective." THE ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND, *supra* note 133, at 4.

dence in the legal system, so important to the achievement of a peaceful solution to the conflict, will remain seriously diminished.

Two factors guarantee that even if the R.U.C. changed its interpretation of the double jeopardy rule to permit departmental investigations despite a decision not to prosecute, independent investigations would still be required. The first, not unique to Northern Ireland, is the inherent difficulty in asking members of the police force to investigate their colleagues. Members of the R.U.C., like policemen everywhere, share a spirit of loyalty and are anxious not to harm a fellow officer performing a difficult job. This spirit of corporate unity, no doubt made even more intense by the deaths of 173 members of the police at the hands of terrorists between 1969 and 1982,²⁷² inevitably penetrates and weakens the independence and objectivity of police investigations.

The second factor arguing in favor of the need to establish independent complaint procedures is a legal one which concerns the possibility of conflict of interest. In cases in which the complaint stems from police conduct during an interrogation, the complainant may have been charged with a criminal offense on the basis of his or her admission. A vigorous investigation of the complaint may have the effect of rendering inadmissible the confession made by the criminal defendant *qua* complainant. In light of this circumstance, the Bennett Commission found that the "investigation of a complaint will consciously or unconsciously be influenced by the wish to support the Crown case against the complainant."²⁷³ A vigorous investigation of a complaint may be viewed not only as a slap against fellow officers, but also as an actual reward for criminal defendants. Thus, a conflict of interest inevitably is presented to the prosecutor who directs the investigation of the complaint and to the police who perform the actual investigation itself.

So long as no independent investigation of complaints against the police exists in Northern Ireland, the perception of discrimination in the administration of justice, already so deeply rooted in the Catholic community,²⁷⁴ is bound to continue. Thus, one important goal of the last decade of British policy in Northern Ireland—public acceptance of the R.U.C. as "civilian, impartial, and accountable"²⁷⁵—is bound to fail. The data show that only fourteen prosecutions were pressed against police officers in the years 1976 through 1979, and not a single

272. ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLE'S ANNUAL REPORT 1982, at 48 (table 6) (1983).

273. BENNETT REPORT, *supra* note 87, para. 352, at 117.

274. See *supra* notes 27-33 and accompanying text.

275. HUNT REPORT, *supra* note 218, para. 176; see AMNESTY INTERNATIONAL, *supra* note 111, at 1-2.

conviction was obtained.²⁷⁶ Despite the wave of negative publicity that preceded the appointment of the Bennett Committee, at the time its report was issued not a single police officer had been convicted of a crime arising out of a maltreatment claim.²⁷⁷ The Standing Advisory Committee on Human Rights has repeatedly urged that "justice must not only be done, it must be seen to be done."²⁷⁸ Given the present state of the procedures for the investigation of complaints against the police, it is hardly surprising that many people neither see justice being done, nor believe that it is being done at all.

V. Ameliorating the Situation: An Agenda for Reform

Incremental reforms can be implemented that would help convince the public that a system offering substantive and procedural fairness can be built in Northern Ireland. Indeed, the very implementation of reforms in the admissibility standard and in the procedures for the investigation of complaints made against the police would send a clear signal that the authorities themselves are determined to govern within reasonable limits prescribed by law, and without resort to "emergency" powers that invite arbitrary and capricious misuse. No reform can be expected to eradicate overnight centuries of hatred and mistrust. Sensible and feasible measures are available, however, that could begin the process of building confidence in the rule of law that is the surest weapon against those who would resort to violent and extra-legal means to achieve their objectives.

A. *Interrogation Practices and the Admissibility Standard of Section 8*

The fact that the admissibility standard of section 8 of the EPA is derived from the European Convention on Human Rights does not justify ignoring the manifold problems it has created. Decisions under the Convention appear to condone the use of physical violence in interrogations by the police, and the standard's imprecision has made impossible the coherent judicial interpretation of its requirements. Reforms must be implemented to resolve both these difficulties.

276. P. TAYLOR, *supra* note 116, at 58.

277. BENNETT REPORT, *supra* note 87, para. 157, at 52. During this period 19 officers were prosecuted. Of these, 16 were acquitted outright, in one case the prosecution declined to continue after trial had begun, and 2 convictions were reversed on appeal. *Id.*

278. See STANDING ADVISORY COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT (1980) (on file with *The Yale Journal of World Public Order*). The committee was created by the Northern Ireland Constitution Act, 1973, ch. 36, § 20.

1. *Physical Violence in Interrogation Is Counterproductive and Should Be Specifically Proscribed*

The use of physical violence in interrogation is counterproductive in at least two ways: (1) as the Diplock Commission recognized, it may prevent the development of any rapport between the person questioned and the questioners; and (2) it only exacerbates the atmosphere of community distrust that permeates Northern Ireland. An explicit and absolute ban on its use might make possible more effective interrogation and certainly would improve community relations.

To make such a ban meaningful, the message must be clearly conveyed to all concerned that not only will evidence that has been obtained by the use or threat of violence be excluded from the courts, but that members of the police force who violate the proscription will be punished. The promulgation of a code of permissible interrogation practices would constitute a useful first step in the communication of such a message.²⁷⁹ In addition, the establishment of independent procedures for the evaluation of complaints made against the police would deter further abuse and assure the public that the problem is taken seriously by the authorities.

2. *The Admissibility Standard of Section 8 Should Be Abolished and the Common Law Test of Voluntariness Restored*

The practical operation of section 8 has created serious problems that have not been offset by any compensating increase in public safety. This fact should be recognized, and the standard abolished. The voluntariness test should be restored, together with a re-affirmation of the power of judicial discretion to exclude admissions of dubious probative value or ones made under questionable circumstances. Other provisions of the EPA have provided the security forces sufficient powers of investigation and detention such that this counterproductive and unfair standard can be safely abandoned.

B. *The Investigation of Complaints Against the Police*

The clear lack of any power of independent investigation in the hands of the D.P.P., the Police Authority, or the Police Complaints Board and the regular acquittals in the few prosecutions of members of the police preclude the development within the Catholic community of any feeling of confidence in the fairness or impartiality of the R.U.C.

279. See BENNETT REPORT, *supra* note 87, paras. 180-83, at 63-64. Professors Boyle, Hadden, and Hillyard have drafted such a code that could serve as a model on which to base the regulation of interrogation practices. TEN YEARS ON, *supra* note 48, at 110-13.

That confidence is especially important in a society in which the police are, and have been for decades, vested with special emergency powers of unreviewable discretion that permit the detention of suspects for days without charge. A thoroughgoing reform of the procedures for the investigation of complaints against the police is essential in a community in which distrust between members of a minority community on the one hand, and members of the security forces and the majority community on the other, is rampant.

1. *The Rule Against Double Jeopardy Must Be Construed Literally*

A decision by the D.P.P. not to prosecute should not result in the absolution of those accused of disciplinary offenses that do not rise to the level of criminal behavior. The use of internal disciplinary machinery should not be confused with the public prosecution of a criminal offense. Misconduct which is less than criminal still may merit disciplinary sanction, and the R.U.C.'s interpretation of the double jeopardy rule should be changed to take cognizance of this fact.

2. *Complaints Must Be Investigated by Persons Institutionally Independent from Those Persons Being Investigated*

Systems for the investigation of complaints made against the police generally involve four steps—the receipt of the complaint, the investigation of the complaint, the determination whether to initiate proceedings, be they disciplinary or judicial, and the ultimate resolution of the complaint. Independence can be established at any or all of these steps.²⁸⁰ It can be ensured by establishing a special police unit to investigate complaints, or by creating an oversight position in the form of an ombudsman.

A special police unit established solely to investigate complaints against the police should be designed to take account of the need to protect police morale as well as the need for the thorough and independent investigation of complaints. As a full-time body, the unit would be able to develop expertise in the investigation of complaints.

280. The author has surveyed elsewhere possible methods for the creation of such independence. See T. FOLEY, COMPLAINTS AGAINST THE POLICE (1980) (mimeo) (copy on file with *The Yale Journal of World Public Order*). See also Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964); Grant, *Complaints Against the Police—the North-American Experience*, 23 CRIM. L. REV. 338 (1976) (independence in the determination and resolution of charges); Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515 (1971) (survey of complaints procedures with emphasis on police cooperation); Lenzi, *Reviewing Civilian Complaints of Police Misconduct*, 48 TEMPLE L.Q. 89 (1974) (analysis of alleged systematic violations of constitutional rights by members of the Philadelphia Police Department, with suggestions for more effective complaint procedures).

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Its independence from other branches of the police and the freedom of its members from ordinary police work should serve to insulate it to a substantial degree from the pressures typically created by the investigation of fellow officers. This independence should serve to impress the public with the seriousness with which the police examine allegations of wrongdoing, although public perception in Northern Ireland will depend ultimately on the achievement of demonstrably fair results. That such a unit can successfully identify and investigate problems within the ranks of police has been demonstrated elsewhere.²⁸¹

A second alternative to the present system would be the creation of an ombudsman, a Public Complaints Commissioner, who would have the authority to scrutinize all investigations of complaints within a certain period after the receipt of the complaint by the police.²⁸² A staff of civilian investigators would assist the ombudsman, who would possess full subpoena power, the right of access to police records, and the power to order public hearings on the basis of either the staff or police investigations.

A combination of the two approaches—the creation of both special investigation unit and an ombudsman—would be an ideal solution to the complaint problem in Northern Ireland. Under this plan, a special investigation unit would answer to the Chief Constable, but its actions would be monitored by an ombudsman.²⁸³ The ombudsman would play several roles—he or she could receive complaints independently of the police, serve as a conciliator in cases calling for informal resolution, monitor ongoing investigations, and conduct investigations when the circumstances require. Providing the ombudsman with an independent staff empowered to compel testimony and the production of documents by the police would eliminate the problems encountered heretofore by

281. *See Get the cops*, *ECONOMIST*, May 28, 1977, at 71 (successful investigations of corruption in the Hong Kong police); *Sins of the fathers*, *ECONOMIST*, June 25, 1977, at 23 (efforts of Scotland Yard special investigating team to uncover police corruption). The resignations from the constabulary of the corrupt officers identified by the Scotland Yard team are reported to have increased public confidence in the police and heightened departmental morale. *Id.*

282. For general discussions of the ombudsman concept, see Gellhorn, *The Norwegian Ombudsman*, 18 *STAN. L. REV.* 293 (1966); Gellhorn, *Finland's Official Watchmen*, 114 *U. PA. L. REV.* 327 (1966); Gellhorn, *Settling Disagreements with Officials in Japan*, 79 *HARV. L. REV.* 685 (1966). A police complaints ombudsman was established in Toronto in July, 1981. *Civilians Are Watching the Watchmen*, *MACLEANS*, Aug. 24, 1981, at 54. The possible establishment of such a position has received extensive attention in Australia. *See AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 1: COMPLAINTS AGAINST THE POLICE* (1979); *AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 9: COMPLAINTS AGAINST THE POLICE* (Supplementary Report 1980).

283. This approach is under review by the Australian Law Reform Commission. *See AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 1, supra* note 282, paras. 65-79, at 17-21.

the Police Authority and the Police Complaints Board. Public hearings ordered under the ombudsman's powers would have real authority, in contrast to the tribunals of inquiry, and would be likely to produce full police cooperation. Although this approach would not institutionalize a completely independent investigation process, it would accommodate the demands of investigative competence and objectivity, police morale, and public confidence.

No procedure for the investigation of complaints against the police can operate effectively without police cooperation. Moreover, a police force cannot function effectively without the consent and support of the community it serves. The Chief Constable has, therefore, two mutually reinforcing interests—the enforcement of respect for the law among the constabulary and the encouragement of community support and respect for the rule of law, which is critical to effective law enforcement. Criminal activity, whether committed by police or terrorists, undermines respect for law if left unpunished. The public's revulsion at acts of violence is the natural ally of the police, but the lack of an independent procedure for the investigation of complaints deprives the constabulary of the support which could be so important in the struggle for peace in Northern Ireland.

Legal institutions and protections will not themselves eradicate the generations of mistrust in Northern Ireland. But as the public's patience with the terrorism committed in its name wears thin, desire for the rule of law undoubtedly will grow stronger. This popular desire for fair and effective law enforcement will not materialize, however, unless a legal system is established in which justice not only is done, but is seen to be done. In Northern Ireland, where memories are understandably long, reforms of the kind suggested in this Article must be implemented if this critical goal is to be achieved.