

Considering Just-World Thinking in Counterterrorism Cases: Miscarriages of Justice in Northern Ireland

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Recent literature has drawn a parallel between the discriminatory application of counterterrorism legislation to the Irish population in the United Kingdom during the Northern Ireland conflict and the targeting of Muslims after September 2001. Less attention has been paid to lessons that can be drawn from judicial decision making in terrorism-related cases stemming from the Northern Ireland conflict. This Article examines Northern Ireland Court of Appeal (“NICA”) jurisprudence on miscarriages of justice in cases regarding counterterrorism offenses. In particular, the Article focuses on cases referred after the 1998 peace agreements in Northern Ireland from the Criminal Cases Review Commission (“CCRC”), a relatively new entity that investigates potential wrongful convictions in England, Wales, and Northern Ireland. Although the NICA’s human rights jurisprudence has developed significantly in recent years, the study of CCRC-referred cases finds that judges have retained confidence in the integrity of the conflict-era counterterrorism system even while acknowledging abuses and procedural irregularities that occurred. This study partially contradicts contentions that judicial deference to the executive recedes in a post-conflict or post-emergency period. Despite a high rate of quashed convictions, the NICA’s decisions suggest that it seeks to limit a large number of referrals and demonstrate a judicial predisposition to defend the justness of the past system’s laws and procedure. This perspective is consistent with what social psychologists have studied as “just-world thinking,” in which objective observers, although motivated by a concern with justice, believe—as a result of cognitive bias—that individuals “got what they deserved.” The Article considers

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other potential interpretations of the jurisprudence and contends that conservative decision making is particularly dangerous in the politicized realm of counterterrorism and in light of the criminalization of members of suspect communities.

INTRODUCTION

[S]ix soldiers came into the cubicle where I was being held and grabbed me. They held me down on the floor and one of them placed a towel over my face, and they . . . started pouring the water through the towel all round my face, very slowly After a while you can't get your breath but you still try to get your breath, so when you were trying to breathe in through your mouth you are sucking the water in, and if you try to breathe in through your nose, you are sniffing the water in. It was continual, a slow process, and at the end of it you basically feel like you are suffocating. They did not stop until I passed out, or was close to passing out. They repeated that three or four times, but were still getting the same answer. I told them I had not shot the soldier.¹

Liam Holden's account of waterboarding, eerily similar to that of post-September 11, 2001 ("9/11") suspects,² was given in harrowing detail at his trial in Belfast, Northern Ireland in 1973.³ Holden alleged that he was tortured and threatened by British soldiers to elicit a confession; after being hooded and taken to a field, and with a gun put to his head, he confessed.⁴ Aged nineteen at the time, Holden was subsequently convicted by a jury for the murder of Private Frank Bell⁵ and was the last man sentenced to death in Northern Ireland. That sentence was subsequently commuted, and he ultimately spent seventeen years in jail.⁶

1. Vincent Kearney, *Death Sentence Man Liam Holden: "I Was Tortured into a False Confession"*, BBC NEWS (June 21, 2012, 7:54 AM), <http://www.bbc.co.uk/news/uk-northern-ireland-18525630>, archived at perma.law.harvard.edu/0C3cyEjm3dF.

2. See, e.g., HUMAN RIGHTS WATCH, *DELIVERED INTO ENEMY HANDS: US-LED ABUSE AND RENDITION OF OPPONENTS TO GADDAFI'S LIBYA* 48–51 (2012), available at http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf, archived at <http://perma.cc/U3BY-X5N7> (documenting allegations of abuse in U.S. custody made by two Libyans detained in Pakistan in 2003 and held in U.S.-run detention facilities in Afghanistan).

3. See *R v. Holden*, [2012] NICA (Crim) 26, [11]. Almost forty years later, Holden said "[the] feeling will never leave me . . . [T]alking about it now, I get a gagging sensation in my throat. . . . By the time they were finished with me I would have admitted to killing JFK." Kearney, *supra* note 1.

4. Kearney, *supra* note 1.

5. *Holden*, [2012] NICA (Crim) 26, [1].

6. Four weeks after sentencing, his sentence was commuted to life in prison. See *id.* *Last Ever UK Death Sentence Conviction Quashed*, BBC NEWS (June 21, 2012, 9:42 AM), <http://www.bbc.co.uk/news/uk-northern-ireland-18525631>, archived at <http://perma.law.harvard.edu/0mqRRc5PtnK>.

In 2012, the Northern Ireland Court of Appeal (“NICA”) found that the army unlawfully had held Holden before transferring him to police custody, and that the trial judge may have excluded his confession, or the jury may have acquitted him, had this been known at the time.⁷ Holden’s is one in a series of convictions quashed by the NICA for various forms of misconduct and procedural irregularity that occurred during the government-labeled “struggle against terrorism.”⁸

Recent literature has drawn a parallel between the discriminatory application of counterterrorism legislation to the Irish population in Britain during the Northern Ireland conflict and the targeting of Muslims after September 2001 and demonstrated the construction of each of these groups as “suspect communities” in the United Kingdom.⁹ Similarly, it has been argued that the political responses to “old” and “new” perceived terrorist threats are not significantly different.¹⁰ Less attention has been paid to lessons that can be drawn from judicial decision making in Northern Irish counterterrorism case law.¹¹ This Article examines NICA jurisprudence in cases referred after the 1998 peace agreements in Northern Ireland from the Criminal Cases Review Commission (“CCRC”), a relatively new public body that reviews possible miscarriages of justice in England, Wales, and

7. Holden, [2012] NICA (Crim) 26, [22]–[23].

8. See cases cited *infra* note 245.

9. See generally MARY J. HICKMAN ET AL., “SUSPECT COMMUNITIES”? COUNTER-TERRORISM POLICY, THE PRESS, AND THE IMPACT ON IRISH AND MUSLIM COMMUNITIES IN BRITAIN (2011), available at <https://metranet.londonmet.ac.uk/fms/MRSite/Research/iset/Suspect%20Communities%20Findings%20July2011.pdf>, archived at <http://perma.cc/JP6P-U7A8> (comparing, inter alia, ways in which the two communities are represented as suspect in public discourse, the impact of these representations on the communities, and individual experiences related to counterterrorism provisions); Henri C. Nickels et al., *Constructing “Suspect” Communities and Britishness: Mapping British Press Coverage of Irish and Muslim Communities, 1974–2007*, 27 EUR. J. COMM. 135 (2012) (analyzing public discourse via media representations of the two communities); Christina Pantazis & Simon Pemberton, *From the “Old” to the “New” Suspect Community: Examining the Impacts of Recent UK Counter-Terrorism Legislation*, 49 BRIT. J. CRIMINOLOGY 646 (2009) [hereinafter Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*] (examining how political discourse and counterterrorism policy has constructed Muslims in Britain as a suspect community, replacing the Irish as the principal suspect community for the state); Christina Pantazis & Simon Pemberton, *Restating the Case for the “Suspect Community”: A Reply to Greer*, 51 BRIT. J. CRIMINOLOGY 1054 (2011) (defending, inter alia, the identification of suspect communities in the authors’ 2009 study and evidence used to support the study’s conclusions). *Contra* Steven Greer, *Anti-Terrorist Laws and the United Kingdom’s “Suspect Muslim Community”: A Reply to Pantazis and Pemberton*, 50 BRIT. J. CRIMINOLOGY 1171 (2010) (arguing that Pantazis and Pemberton’s definition of a suspect community is overly broad and challenging its evidential basis).

10. Gabe Mythen, *The Postmodern Terrorist Risk: Plus Ça Change, Plus C’est la Mêmes Chose*, in RECONSTRUCTING POSTMODERNISM: CRITICAL DEBATES 61, 73 (Jason L. Powell & Tim Owen eds., 2007).

11. *But see* Aileen McColgan, *Lessons from the Past? Northern Ireland, Terrorism Now and Then, and the Human Rights Act*, in THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS 177 (Tom Campbell et al. eds., 2011) (describing human rights abuses perpetuated by the British state in Northern Ireland between 1967 and the mid-1980s and the judiciary’s failure to adequately respond to them). On the risk of miscarriages of justice in the post-9/11 counterterrorism context, see Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967 *passim* (2004).

Northern Ireland, and is empowered to refer cases to appellate courts.¹² The NICA judgments offer an opportunity for renewed reflection on criminal justice processes relating to the Northern Ireland conflict (“the conflict”) and provide an added dimension to assessments of present-day counterterrorism strategies. In sum, in this line of cases, the NICA acknowledges wrongdoing by the police but sets a high bar for future applicants before the CCRC. Appellants face significant challenges in seeking to overturn their convictions, and the court demonstrates the confidence in the past system that is characteristic of just-world thinking. This pattern highlights the need for robust due process protections for terrorism suspects.

Thirty-two of the thirty-eight cases referred from the CCRC to the NICA have resulted in the convictions being quashed,¹³ yet the NICA decisions severely restrict future referrals from the CCRC in conflict-related cases. Individuals labeled as terrorist suspects face difficulties in challenging their convictions, in part, arguably, because the NICA retains confidence in the integrity of the conflict-era criminal justice system.¹⁴ The perseverance of legal positivism and faith in the past system is striking. The phenomenon is surprising because, when convictions have been overturned, it has been on the basis of errors or police misconduct, including, in some cases, evidence that police witnesses provided false testimony to trial courts.¹⁵ The NICA has engaged with and developed human rights jurisprudence in the past decade, and in that respect the court is part of a maturing legal culture in Northern Ireland.¹⁶ However, recent decisions in CCRC-referred cases

12. Criminal Appeal Act, 1995, c. 35, §§ 8–12; see generally *About the Criminal Cases Review Commission*, MINISTRY JUSTICE <http://www.justice.gov.uk/about/criminal-cases-review-commission> (last visited Oct. 31, 2013), archived at <http://perma.law.harvard.edu/0DS6VdvhfQH/>. The CCRC was established in January 1997 and referred its first Northern Irish case in the 1998–99 term. CCRC, ANNUAL REPORT 1998–99, at 13 (1999). For an analysis of the U.K. approach to wrongful convictions, including the practice of the CCRC and the Court of Appeal of England and Wales and a comparison to the U.S. approach, see Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. Tol. L. Rev. 108 *passim* (2009).

13. Three convictions were upheld, and in three other cases judgments have not yet been issued. Four referrals were not in conflict-related cases; all of these convictions were quashed. See discussion *infra* Part IV.A and note 245.

14. The court is willing to uphold conflict-era convictions and has not cast doubt on the functioning of the police, prosecution service, or the courts more generally. See discussion *infra* Part IV.B.

15. See cases cited *infra* notes 296–305.

16. Legal culture is a complicated concept and it is beyond the scope of this Article to explore such trends in depth. See, e.g., Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 34–35 (1969) (describing the concept of legal culture). Since the Human Rights Act, 1998, c. 42 [hereinafter HRA], came into force in October 2000, legal argument is more frequently oriented around human rights claims; the HRA has also had an impact on legal training and discourse more generally. The HRA allows for the domestic enforceability of rights contained in the European Convention on Human Rights. European Convention on Human Rights, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR]. See, e.g., Brice Dickson, *The Impact of the Human Rights Act in Northern Ireland*, in JUDGES, TRANSITION, AND HUMAN RIGHTS 201, 220–21 (John Morison et al. eds., 2007) (describing judges from Northern Ireland as faithfully applying the HRA); see generally Brice Dickson & Terence McCleave, *Human Rights in the Courts of Northern Ireland 2009–2010*, 61 N.I.L.Q. 411 (2010); Ronagh McQuigg, A “Very Limited” Effect or a “Seismic” Impact? A Study of the Impact of the Human Rights Act 1998 on the Courts of Northern Ireland, 3 PUB. L. 551 (2010);

are at odds with that assessment. The judgments also challenge the assumption that judicial deference to governments associated with conflict, emergency, or authoritarianism lessens significantly in a post-conflict (or post-emergency or new democratic) period,¹⁷ instead highlighting the complexities of political transition.

This Article analyzes the NICA case law to consider practical and philosophical explanations for these outcomes. Given that there are thousands of counterterrorism convictions,¹⁸ the NICA likely seeks to limit a deluge of appeals, but the court arguably also accepts the justness of the past system's laws and procedures.¹⁹ The judgments are consistent with what social psychologists have defined as just-world thinking, a cognitive bias that causes objective observers, motivated by a concern with justice and a need to believe that the world *is* just, to overlook victimization and believe individuals have gotten what they deserved.²⁰ This interpretation resonates with commentators in various disciplines who have argued that law enables people to imagine an ordered and principled social world.²¹ Practically, such a

cf. David L. Weiden, *Examining the Influence of the European Convention on Human Rights in Northern Ireland Courts*, 46 SOC. SCI. J. 150, 160–61 (2009) (confirming a changing legal culture in Northern Ireland but finding appellate courts not more likely to rule against the government in the four years following the entry into force of the HRA). In 2001, Justice Brian Kerr (then of the NICA and currently on the U.K. Supreme Court (“UKSC”)) anticipated that judges and practitioners would become increasingly familiar with human rights principles. In *Re Northern Ireland Human Rights Commission*, [2001] NICA 17, [295]–[296]; [2001] N.I. 271, CA (Kerr, J., dissenting) (cited in Gordon Anthony, *Public Law Litigation and the Belfast Agreement*, 8 EUR. PUB. L. 401, 412 (2002)).

17. In recent years, scholars of judicial politics increasingly have explored the complicated relationship between political transition and judicial power, although mostly through macro-level and comparative studies not wholly focused on legal analysis. See, e.g., REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* 29 (2004); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 121–33 (2003); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 177–222 (2007); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 183–86 (2004) (including South Africa as one case study); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292–94 (2002); Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423, 424 (1998); Güneç Murat Tezcür, *Judicial Activism in Perilous Times: The Turkish Case*, 43 LAW & SOC'Y REV. 305 (2009).

18. JOHN JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARIAL SYSTEM* 19 (1995) (noting that there had been “well over 10,000 defendants” processed under counterterrorism legislation from 1973 to 1995); PETER SHIRLOW & KIERAN McEVoy, *BEYOND THE WIRE: FORMER PRISONERS AND CONFLICT TRANSFORMATION IN NORTHERN IRELAND* 2 (2008) (estimating that 15,000 republican and 5,000–10,000 loyalist paramilitary members were imprisoned during the conflict).

19. See discussion *infra* Part IV.B.

20. See Melvin J. Lerner & Carolyn H. Simmons, *The Observer's Reaction to the “Innocent Victim”:* *Compassion or Rejection?* 4 J. PERSONALITY & SOC. PSYCHOL. 203, 209 (1966); Carolyn L. Hafer & Laurent Bègue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 PSYCHOL. BULL. 128, 128–30 (2005) (assessing research on the concept).

21. See, e.g., Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC'Y 411, 416 (2007) (citing CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 234 (1st ed. 1983)). In the second edition of *LOCAL KNOWLEDGE*, Geertz conceptualizes law as “constructive,” “constitutive,” and “formational.” CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 218 (2d ed. 1993) [hereinafter GEERTZ 2d ed.]; see also Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*,

perspective obscures the contradictions and uncertainties inherent in law enforcement interventions,²² promoting an external impression that the system is functioning properly.

The NICA's faith in the past system's ability to do justice was arguably reinforced by the dominance of confession evidence in counterterrorism cases as well as public discourses about conduct labeled as "terrorism." First, the police and legislators prioritized interrogation in these investigations because of difficulties in obtaining other forms of evidence.²³ Observers and those processed through the counterterrorism system allege that a policy of coercion and mistreatment ensued; indeed, human rights investigators and journalists have documented credible evidence of widespread abuse.²⁴ Although the majority of those detained were released without charge,²⁵ confessions were the dominant form of evidence in court cases.²⁶ The evidentiary standard for admitting confessions was lower than in non-terrorism cases, and the lower standard reduced judicial scrutiny of the circumstances in which the evidence was obtained.²⁷

Second, in addition to institutional biases created by the emphasis on confession evidence during investigation and trial, judges may have been influenced by public discourses relating to the conflict.²⁸ Even in non-conflict settings, researchers have concluded:

A confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, the public This chain of events, in effect, leads each part of the system to be

39 MERCER L. REV. 937, 937, 945–51; PETER MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* 23 (2d ed. 1997).

22. See James W. Williams, *Taking It to the Streets: Policing and the Practice of Constitutive Criminology*, in *CONSTITUTIVE CRIMINOLOGY AT WORK: APPLICATIONS TO CRIME AND JUSTICE* 149, 154 (Stuart Henry & Dragan Milovanovic eds., 1999).

23. CHRIS RYDER, *THE RUC 1922–1997: A FORCE UNDER FIRE* 149 (1997).

24. The issue is discussed in particular in Part III.A. See, e.g., IAN COBAIN, *CRUEL BRITANNIA: A SECRET HISTORY OF TORTURE* ch. 6 (2012); PETER TAYLOR, *BEATING THE TERRORISTS? INTERROGATION IN OMAGH, GOUGH AND CASTLEREAGH* 334 (1980); AMNESTY INT'L, *REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND* (28 NOVEMBER 1977–6 DECEMBER 1977) ch. 1 (1978), available at <http://cain.ulst.ac.uk/issues/police/docs/amnesty78.htm#chap1>, archived at <http://perma.law.harvard.edu/0fnJ3B3RAHM>.

25. DERMOT P.J. WALSH, *THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND* 19 (1983) (finding that 90% of those arrested under emergency legislation were released without charge in a 1980 study). Data from the Royal Ulster Constabulary, the former police force of Northern Ireland, from the 1980s indicated that two-thirds of those arrested were released without charge. McColgan, *supra* note 11, at 196 (citing JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 89 (1991)).

26. See *infra* note 214.

27. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 6 [hereinafter EPA 1973]; Northern Ireland (Emergency Provisions) Act, 1978, c. 5, § 8 [hereinafter EPA 1978]; see discussion *infra* Part III.C.

28. NOEL WHITTY ET AL., *CIVIL LIBERTIES LAW: THE HUMAN RIGHTS ACT ERA* 103, 155, 158 (2001).

stacked against the confessor; he will be treated more harshly at every stage of the investigative and trial process.²⁹

In conflict-related cases, defendants were processed as suspected terrorists based on genuinely held—but not necessarily reasonable—suspicion by the police.³⁰ Most defendants were suspected of membership in a paramilitary group,³¹ and the majority were also part of a suspect community within Northern Ireland—the nationalist community.³² Governments and the media portrayed terrorism as representing a threat to “the life of the nation.”³³ Use of such absolutist terms justified the application of draconian law, influencing public opinion and the attitudes of criminal justice actors such as

29. Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. PSYCHIATRY & L. 9, 19–20 (2010) (citations omitted); see Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 298–99 (1996); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429, 481–84 (1998).

30. See, e.g., EPA 1978, §§ 11, 13; see also discussion *infra* Part III.A.

31. Paramilitary groups in Northern Ireland generally can be designated as “republican” or “loyalist.” Republicans (predominantly Catholic) support a republic form of government and the union of the six Northern Irish counties with the twenty-six counties of the Republic of Ireland. Loyalists (predominantly Protestant) support the continued union of Northern Ireland with Britain under the British Crown. Membership of both types of group was proscribed under counterterrorism legislation. See legislation cited *infra* note 57. Both republicans and loyalists were processed under the counterterrorism regime, the former in significantly greater numbers.

32. See Paddy Hillyard, *Political and Social Dimensions of Emergency Law in Northern Ireland*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 191, 194–96 (Anthony Jennings ed., 2d ed. 1990) [hereinafter JUSTICE UNDER FIRE]. Nationalists, the vast majority of whom are Catholic, support a united Ireland whereas the mostly Protestant unionist community supports union with Britain.

33. This phrase is taken from the ECHR, under which state parties can derogate from most rights “[i]n time of war or other public emergency threatening the life of the nation.” ECHR, *supra* note 16, art. 15(1). The United Kingdom lodged a notice of derogation with the Council of Europe on June 27, 1957, in relation to the right to liberty under article 5 and the right to a fair trial under article 6 in respect to “civil disturbances” in Northern Ireland. See *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (1980) (accepting these notices of derogation and finding that the internment of terrorism suspects did not violate the ECHR). Derogation notices were in place during most of the conflict, but these were withdrawn in 2001, only for a new derogation notice regarding article 5 to be submitted after 9/11. BRICE DICKSON, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONFLICT IN NORTHERN IRELAND* 69–70 (2010). These were formal assertions by U.K. governments that the nation was facing a fundamental threat; officials’ public rhetoric was generally consistent with that portrayal. In 1984, after the Irish Republican Army (“IRA”) bombed the Grand Hotel in Brighton in which Prime Minister Margaret Thatcher and her cabinet had been staying, Thatcher said “[i]t was an attempt to cripple Her Majesty’s democratically-elected Government. . . . [A]ll attempts to destroy democracy by terrorism will fail.” Margaret Thatcher, Speech to Conservative Party Conference (Oct. 12, 1984), available at <http://www.margarethatcher.org/speeches/displaydocument.asp?docid=105763>, archived at <http://perma.law.harvard.edu/02ynBJJKgas/>. Similarly, and particularly in the aftermath of violent events, media outlets “emphasized the integrity of the social order and represented terrorism as the inhuman and irrational embodiment of encroaching chaos.” Peter Taylor, *The Semantics of Political Violence, in WAR AND WORDS: THE NORTHERN IRELAND MEDIA READER* 329, 329 (Bill Rolston & David Miller eds., 1996) (citing Philip Elliott, *Press Performance as Political Ritual, in THE SOCIOLOGY OF JOURNALISM AND THE PRESS* 141, 177 (Harry Christian ed., 1980)); see, e.g., LIZ CURTIS, *IRELAND: THE PROPAGANDA WAR: THE BRITISH MEDIA AND THE BATTLE FOR HEARTS AND MINDS* 119–20 (1984) (identifying misinformation in the press).

judges.³⁴ Despite the passage of time and the acknowledgement of abuses, confession evidence and the terrorism designation remain difficult to overcome³⁵ and may even continue to be viewed as evidence of guilt.³⁶

Part I of this Article covers the political fluidity of the definition of terrorism and the consequences of using this label in the United Kingdom. This section focuses on two triggers for counterterrorism measures: political violence in Northern Ireland from the 1960s and violence associated with global terrorism from the late 1990s. Part II addresses the legacy of the conflict for criminal justice and security agencies throughout the United Kingdom. Much of the literature arguing that U.K. counterterrorism powers have expanded greatly since the late 1990s disregards U.K.-wide and Northern Ireland powers introduced from the 1970s in response to the conflict, such as the intelligence systems still used today. Martin Innes has argued that, because these systems are centered on individual human sources, they may not be as effective in dealing with al-Qaeda.³⁷ An understanding of the legacy of the past, therefore, is important in assessing the efficacy of current approaches to counterterrorism. Part III reviews conflict-era criminal procedure reforms implemented to deal with terrorism cases, including rules related to the obtaining and using confessions and access to counsel.

Part IV assesses cases referred from the CCRC to the NICA after the Good Friday Agreement in 1998, a milestone in the Northern Ireland peace process, consisting of a multi-party agreement among eight Northern Ireland political parties and an agreement by the British and Irish governments.³⁸ The CCRC referrals support the argument that during the conflict the judiciary in Northern Ireland placed inordinate trust in the police. The cases also raise questions about the current court's faith in processes of the past, highlighting the difficulties that those convicted under counterterrorism legislation continue to face. Despite the transformational changes that have occurred in post-conflict Northern Ireland³⁹ and the release of political

34. WHITTY ET AL., *supra* note 28, at 112, 116, 119.

35. See discussion *infra* Part IV.A.

36. See discussion *infra* Part IV.C.

37. Martin Innes, *Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 232 (2006).

38. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Apr. 10, 1998, Cm. 3883, available at http://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf, archived at <http://perma.cc/4DSN-K68R> (also known as the "Belfast Agreement"); see Northern Ireland Act, 1998, c. 47 (codifying aspects of the Good Friday Agreement).

39. See generally AOGÁN MULCAHY, *POLICING NORTHERN IRELAND: CONFLICT, LEGITIMACY AND REFORM* 168–203 (2006) (discussing policing and criminal justice reforms after the Good Friday Agreement); Gordon Anthony, *Northern Ireland: The Devolution of Policing and Criminal Justice*, 17 EUR. PUB. L. 197 (2011) (discussing the devolution of policing and criminal justice matters to the Northern Ireland Assembly and the establishment of, inter alia, a Minister of Justice and Attorney General in Northern Ireland); Gerald P. Conroy et al., *Northern Ireland: A Report by a Mission of the Committee on International Human Rights*, 59 REC. ASS'N B. CITY N.Y. 314 (2004), available at <http://www2.nycbar.org>.

pressures of conflict, the impact of draconian counterterrorism law and procedure endures. The more modern, rights-focused judiciary in Northern Ireland retains a positivist approach in this particular area. The Article concludes by considering broader lessons that can be learned about judging and lawmaking in the counterterrorism context.

I. DEFINING TERRORISM

Most governments identify terrorism as a category of crime that requires special laws and procedures,⁴⁰ which has significant implications for suspects, particularly when counterterrorism law entails departures from due process protections accorded in ordinary criminal trials. Terrorism is a subjective concept, however, and academic and legal definitions of the term vary widely. Fifteen years ago, Alex Schmid and A.J. Jongman identified 22 elements arising out of 109 different definitions.⁴¹ Walter Laqueur has since defined terrorism as including political assassinations, violent independence movements against colonial powers, and shootings with mass fatalities.⁴² Peter Neumann's working definition is more limited and more representative of contemporary ideas: "the deliberate creation of fear, usually through the use (or threat of use) of symbolic acts of violence, to influence the political behavior of a target group."⁴³ This definition lacks the specificity that would be required of a legal definition, and it also does not acknowledge a state role in identifying conduct as terrorism. A state must label behavior as something different from ordinary crime or other forms of political activity for it to be dealt with as terrorism under the law. For example, states might link conduct to a complex and sinister network, or fear-inducing or symbolic violence. An assessment is made about suspects' behaviors and goals, often by investigators and prosecutors, which is dependent on political and social context.⁴⁴ The designation of any conduct as criminal is a political

org/Publications/record/Vol_59_%20no_2.pdf, archived at <http://perma.cc/E4DB-9R9A> (outlining criminal justice reforms in the five years following the Good Friday Agreement).

40. Clive Walker, *Briefing on the Terrorism Act 2000*, 12 *TERRORISM & POL. VIOLENCE* 1, 3 (2000).

41. ALEX P. SCHMID & A.J. JONGMAN ET AL., *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES & LITERATURE* 5–6 (2d ed. 1988); see also BRUCE HOFFMAN, *INSIDE TERRORISM* 33–34 (2d ed. 2006).

42. WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 20, 82, 151 (1999).

43. PETER R. NEUMANN, *OLD & NEW TERRORISM: LATE MODERNITY, GLOBALIZATION AND THE TRANSFORMATION OF POLITICAL VIOLENCE* 8 (2009).

44. See ADRIAN GUELKE, *THE AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM* 21–23, 25–28 (1995). Compare *Jared Loughner Enters Guilty Plea After Being Found Competent to Stand Trial*, *GUARDIAN* (Aug. 7, 2012), <http://www.theguardian.com/world/2012/aug/07/jared-loughner-pleads-guilty-arizona>, archived at <http://perma.cc/ZJG7-VL82> (discussing Jared Loughner, whose targets in January 2011 included a U.S. Representative and those attending a constituents' meeting, and who was treated as a common criminal), with *Terror Hits Home: The Oklahoma City Bombing*, FBI, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Oct. 27, 2013), archived at <http://perma.law.harvard.edu/0D2MTrQ65w/> (discussing the investigation of Timothy McVeigh as a domestic terrorist).

process, defined in liberal democracies by legislation and implemented by criminal justice actors. As with law generally, the parameters of crime are socially determined and influenced by an engaged and partial, rather than a neutral, state.⁴⁵ But defining terrorism in particular is a politically charged endeavor, and the regulation of suspected terrorist activity is more politically influenced than many other areas of criminal law.⁴⁶

Conceptually, terrorism is perceived as “worse” than or different from other kinds of crime because it involves a threat to the state and the political status quo. Government officials consider terrorism to be particularly problematic *because* it is political. In the United Kingdom, experts view terrorism as “an attack not only on our security, our rule of law, and the safety of the state, but on civilized society itself.”⁴⁷ Kieran McEvoy and Brian Gormally argue that such “tenets of terrorology” assume the absolute moral legitimacy of the liberal state and have been used to justify the use of force to counter threats.⁴⁸ During the conflict, the British Parliament authorized special counterterrorism powers to confront “the gravest threat that [the nation] has faced since the end of the Second World War,”⁴⁹ and popular support for counterterrorism policy was maintained by emphasizing the danger posed by groups such as the Irish Republican Army (“IRA”).⁵⁰ The IRA was portrayed as a genuinely evil force and its supporters were dehumanized as part of the propaganda war, a key tool of the conflict.⁵¹ Yet successive British governments still described terrorism as

45. MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 12–17, 152–53, 156, 230–33 (2000) (considering “law as command” as one of three conceptualizations of law, and finding that although law has more influence over politics than it did in the past—and positive law can constrain the powerful—the relationship between the two is interdependent and law is not established outside of politics); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 24–30 (Alan Sheridan trans., Penguin Books 1991) (1977) (discussing, as background to an understanding of social control in modern penality, crime and punishment as strategic and pervasive social mechanisms); MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: *LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976* 23–42 (David Macey trans., Picador 2003) (1975) (conceptualizing law, broadly construed, as one vehicle for power in society alongside norms, and power as being exercised not simply by the state or the powerful but through networks in society); *see also* Phil Scraton, *LAW, ORDER AND THE AUTHORITARIAN STATE: READINGS IN CRITICAL CRIMINOLOGY*, at vii–ix (Phil Scraton ed., 1987) (contending that regulation by the state via the rule of law and criminal justice processes proliferated in the 1980s, resulting in the marginalization of categories of people).

46. *See* Clive Walker, *The Legal Definition of “Terrorism” in United Kingdom Law and Beyond*, *PUB. L.* 331, 332–33 (2007).

47. PAUL WILKINSON, *TERRORISM AND THE LIBERAL STATE* 66 (2d ed. 1986).

48. Kieran McEvoy & Brian Gormally, “*Seeing Is Believing: Positivist Terrorology, Peacemaking Criminology, and the Northern Ireland Peace Process*,” 8 *CRITICAL CRIMINOLOGY* 9, 14–17 (1997).

49. 882 *PARL. DEB., H.C.* (5th ser.) (1974) 743 (statement by Minister of State Alexander Lyon on the Prevention of Terrorism (Temporary Provisions) Act).

50. For further discussion of propaganda in the counterterrorism realm, *see* C.P. Walker, *Irish Republican Prisoners: Political Detainees, Prisoners of War, or Common Criminals?*, 19 *IR. JURIST* 189, 190–92 (1984); CURTIS, *supra* note 33, at 232–35, 275–76.

51. *See generally* CURTIS, *supra* note 33, at chs. 5–6, 10. Misinformation in the press was often a result of misleading information provided by police or other official sources. *Id.* at 92–96, 235–37. State press offices framed the conflict as one in which the IRA was responsible for violence, and the British press emphasized Protestant civilian casualties and the pitting of the good state against irra-

crime, obscuring the political motivations of such organizations in an attempt to undermine public support for those groups.⁵² Most notably, this was accomplished by denying that the government was a party to a conflict,⁵³ and by processing terrorist suspects through the normal criminal justice system (a policy known as “criminalization”).⁵⁴ Prime Minister Margaret Thatcher summed up the British position in 1981, responding to the hunger strike by IRA prisoners who sought to be identified as political prisoners: “Crime is crime is crime. It is not political, it is crime.”⁵⁵

The propaganda campaign against paramilitary groups focused on public perception, but the government also mobilized the law. Paradoxically, heavy-handed and special powers were used against terrorism suspects even as they were processed in the ordinary criminal justice system.⁵⁶ Moreover, it was contradictory that despite British governments publicly disavowing the political motivations of groups labeled as terrorists, political motivation was a fundamental element of the legal definition of terrorism. U.K. legislation from 1973 until 2000 provided that terrorism “means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”⁵⁷ As with Neumann’s definition, terrorism involved political aims, but in contrast to that

tional terrorists. *Id.* at 108–09, 114–15, 241. Many press outlets sensationally repeated these themes. *See id.* at 114 (citing a study finding press coverage of the IRA assassination of Lord Mountbatten attributed the killing to “evil men,” “psychopathic thugs,” and “the product of ‘diseased minds rather than political calculation’” (citations omitted)); *see also* DAVID MILLER, DON’T MENTION THE WAR: NORTHERN IRELAND, PROPAGANDA AND THE MEDIA 2–3, 12, 99–149 (1994); David Miller, *The Northern Ireland Information Services and the Media: Aims, Strategy, Tactics*, in WAR AND WORDS: THE NORTHERN IRELAND MEDIA READER, *supra* note 33, at 208–09, 211, 213, 228. The IRA was, however, responsible for the majority of conflict-related deaths. DAVID MCKITTRICK ET AL., LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES 1553 tbl.2 (2007) (estimating that 10% of deaths are attributable to state forces, 30% to members of loyalist paramilitary groups, and 58% to members of republican paramilitary groups). Of the deaths for which the IRA was responsible, 36% of victims were civilians. MCKITTRICK ET AL., *supra*, at 1562 tbl.20.

52. *See* Walker, *supra* note 50, at 191–92; FIONNUALA NÍ AOLÁIN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND 44–45 (2000).

53. *See, e.g.*, JOHN MCGARRY & BRENDAN O’LEARY, EXPLAINING NORTHERN IRELAND: BROKEN IMAGES 2 (1995) (quoting former Secretary of State for Northern Ireland Patrick Mayhew: “The only ‘conflict’ is the conflict that is waged by paramilitary forces”); McEvoy & Gormally, *supra* note 48, at 9–10, 18–19.

54. NÍ AOLÁIN, *supra* note 52, at 45–47; GUELKE, *supra* note 44, at 113.

55. 6 *Key Moments That Defined Margaret Thatcher’s Relationship with Ireland*, JOURNAL (Apr. 9, 2013, 6:45 AM), <http://www.thejournal.ie/margaret-thatcher-ireland-haughey-north-861575-Apr-2013/>, archived at <http://perma.cc/6FRQ-47RB>; *see also* JOHN CAMPBELL, MARGARET THATCHER VOLUME 2: THE IRON LADY 423–25 (2008) (discussing the denial of political status for prisoners by the Thatcher government).

56. *See* discussion *infra* Part III (discussing special powers and processes for terrorism suspects).

57. *See, e.g.*, Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, § 20(1) [hereinafter PTA 1989]; Northern Ireland (Emergency Provisions) Act, 1996, c. 22, § 58 [hereinafter EPA 1996]. Successive Prevention of Terrorism (Temporary Provisions) Acts were applicable throughout the United Kingdom from 1974 on a temporary but continually renewed basis until repealed by the Terrorism Act, 2000, c. 11 [hereinafter TA 2000]. Northern Ireland–specific Northern Ireland (Emergency Provisions) Acts, first enacted in 1973, were also continually renewed until ultimately repealed by the TA 2000.

definition, the relevant conduct had to be violent whether or not it was intended to create public fear. Neither of the two core counterterrorism statutes created an offense of terrorism per se.⁵⁸ Instead, both statutes used the term in ancillary offenses, such as “financial assistance for terrorism,” and to designate circumstances in which special powers could be invoked.⁵⁹ “The use of violence for political ends” is a vague standard. As a result, police officers and prosecutors had significant discretion to determine whether conduct was terrorism and whether a suspect was a terrorist. In addition, the Secretary of State of Northern Ireland determined whether an organization should be proscribed, meaning that involvement in the organization would be criminalized.⁶⁰

The classification of terrorism was also remarkably broad in other ways. During the conflict, the assumption of terrorism was automatically attached to a number of violent offenses in Northern Ireland. Successive Northern Ireland (Emergency Provisions) Acts (“EPAs”) created a presumption that murder and wounding with intent—among other violent and weapon-related offense—involved terrorism, unless the Attorney General certified that they should not be treated as such.⁶¹ For other offenses, such as those involving explosives, the presumption was not rebuttable.⁶²

Cases designated as involving “scheduled offences” were subject to special procedures, such as non-jury trials.⁶³ The “politically loaded character” of the terrorist label and the vagueness of the statutory definitions potentially could have led to contradictory outcomes when applied in individual cases.⁶⁴ Scholars argue, however, that the government, security forces, and the judiciary were in agreement regarding which groups were terrorists during the Northern Ireland conflict and the appropriate response to them.⁶⁵

A. “New” Terrorism

Peter Mandelson, the Northern Ireland Secretary from late 1999 to January 2001, distinguished the IRA from al-Qaeda in a television program covering the impact of the 9/11 attacks in the following terms:

58. See PTA 1989; EPA 1996.

59. See, e.g., PTA 1989, §§ 9–12 (defining four offenses proscribed as financial assistance for terrorism), 14(1)(b) (“[A] constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be . . . a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism . . .”); EPA 1996, §§ 29 (defining the offense of “[d]irecting terrorist organization”), 17–27 (“[p]owers of Arrest, Search and Seizure, etc.”).

60. See, e.g., EPA 1973, § 19(4).

61. See, e.g., *id.* sched. 4, pt. 1, paras. 1–12, nn.1–4; EPA 1996, § 1, sched. 1, paras. 1–22, n.1.

62. See, e.g., EPA 1973, sched. 4, pt. 1, paras. 7, 9; EPA 1996, § 1, sched. 1, paras. 8, 12–13.

63. See, e.g., EPA 1973, § 2 (“[m]ode of trial on indictment of scheduled offences,” requiring non-jury trials); *id.* § 3 (“[l]imitation of power to grant bail in case of scheduled offences”); EPA 1996, §§ 3, 11 (“[m]ode of trial on indictment of scheduled offences”).

64. WHITTY ET AL., *supra* note 28, at 118–19.

65. *Id.*

{T}he distinction we have to make is not between good and bad terrorists. It is between those terrorists who have political objectives and are prepared to . . . engage in some sort of dialogue and ultimately some sort of political or peace process. I don't call them terrorists when they reach that stage. They are resisters. They are freedom-fighters They're like territorial, as opposed to international, terrorists. . . . [Gerry Adams] is tied to the IRA, a terrorist organisation or a paramilitary organisation which is engaged in a ceasefire, which is committed to a peace process, whose political representatives take part in political institutions, and that's the difference.⁶⁶

The newfound pragmatism evident in this quotation was at odds with much of the British government's rhetoric during the conflict.⁶⁷ To policymakers in the post-9/11 United Kingdom, the "old" Northern Irish terrorism should be distinguished from the "new" global variety; although peace in Northern Ireland had not been consolidated in 2001, a political path apart from violence had been established.⁶⁸ Notably, however, the changed political context and a policy approach associated with accommodation⁶⁹ had not led to a relaxation of counterterrorism powers.⁷⁰ The Mandelson statement, and vehement objection to it by Northern Irish unionist politi-

66. IRA "Freedom Fighters" Says MP, BBC NEWS (Dec. 30, 2001, 9:39 AM), http://news.bbc.co.uk/1/hi/northern_ireland/1733091.stm, archived at <http://perma.law.harvard.edu/0MehgCQqHsA/>. Mandelson later partially recanted the statement, contending that he did not consider IRA members to be freedom fighters. MP Denies "IRA Freedom Fighters" Claim, BBC NEWS (Dec. 30, 2001, 12:51 PM), http://news.bbc.co.uk/1/hi/northern_ireland/1734383.stm, archived at <http://perma.law.harvard.edu/0kDrEhkqcpK/>.

67. See *supra* note 51 and accompanying text; JIM PRIOR, BALANCE OF POWER 221 (1986) (former Secretary of State for Northern Ireland); see generally Miller, *supra* note 51; MITCHELL B. REISS, NEGOTIATING WITH EVIL: WHEN TO TALK TO TERRORISTS ch. 1 (2010).

68. The Mandelson quote is a clear public statement to this effect. Compare JONATHAN POWELL, GREAT HATRED, LITTLE ROOM: MAKING PEACE IN NORTHERN IRELAND 310–13 (2008) (former Chief of Staff to Prime Minister Tony Blair discussing approach of British officials to the peace process in Northern Ireland), with Ian Katz, *Top Blair Aide: We Must Talk to al-Qaida*, GUARDIAN (Mar. 15, 2008), <http://www.theguardian.com/uk/2008/mar/15/uksecurity.alqaida>, archived at <http://perma.law.harvard.edu/0rUmibXTzgi/> (reporting Powell's recommendation for governments to communicate with contemporary terrorist groups and noting that a spokesperson for the U.K. Foreign Office responded that "[i]t is inconceivable that [Her Majesty's government] would ever seek to reach a mutually acceptable accommodation with a terrorist organisation like al-Qaida").

69. GUELKE, *supra* note 44, at 196–97.

70. From March 2001, organizations proscribed under the TA 2000 included those linked to Northern Ireland as well as international groups such as al-Qaeda. TA 2000, sched. 2 (as amended by, for example, Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order, 2001, SI 2001/1261, art. 2; Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order, 2002, SI 2002/2724, art. 2). Part II of this Article compares counterterrorism policy during the conflict with that after the Good Friday Agreement, but it should be noted that part VII of the TA 2000 provided for special measures applicable only in Northern Ireland on a temporary basis, including, for example, the use of non-jury trials. TA 2000, § 75. Non-jury trials are now provided for in the Justice and Security (Northern Ireland) Act, 2007, c. 6, discussed *infra* note 449.

cians,⁷¹ underscores the context-specific, subjective nature of the terrorism designation. The label is part of the political game between governments and those who challenge them. A few years previously, Mandelson would not have made such a statement.

Terrorism scholars and policymakers believe that a distinct form of terrorism is now prevalent—one that is widely perceived to be more ruthless—and that it requires distinct modes of analysis and policy responses.⁷² Those who accept the concept of “new terrorism” consider it to be a new manifestation of an old problem, but they emphasize its novel features and significance relative to other forms of terrorism.⁷³ Under this view, despite commonalities, contemporary terrorist groups are more likely to be structurally diffuse, transnational, religiously inspired, and more intent on mass civilian casualties and visible violence than those of the past.⁷⁴ A willingness to engage in suicide bombing is often emphasized.⁷⁵ New terrorists—distinguished from traditional terrorists still active today—are less interested in forcing concessions, winning popular support, and achieving ideological aims.⁷⁶ Others agree that these are identifying characteristics of global terrorism (or “superterrorism”) but challenge its prevalence, given evidence that conflict-related terrorism and nationalist-separatist terrorism remain more widespread.⁷⁷ Alexander Spencer argues that “the distinction between old and new terrorism is artificial and to some extent dangerous.”⁷⁸ Indeed, labels have policy implications, and new terrorism has been the justification for expanded executive control and regulation, modified criminal or quasi-criminal procedure, and severe substantive laws in jurisdictions around the world.⁷⁹

71. See Sarah Hall, *Mandelson Enrages Unionists by Calling IRA Freedom Fighters*, *GUARDIAN* (Dec. 28, 2001, 8:30 PM), <http://www.theguardian.com/politics/2001/dec/29/uk.northernireland>, archived at <http://perma.cc/0sQimoabF8N>.

72. See HOFFMAN, *supra* note 41, at 127–30; NEUMANN, *supra* note 43, at 28, 146, 150–58; RICHARD JACKSON ET AL., *TERRORISM: A CRITICAL INTRODUCTION* 165–67 (2011) (discussing scholarship that distinguishes between “new” and “old” terrorism); Alexander Spencer, *Questioning the Concept of “New Terrorism”*, 8 *PEACE, CONFLICT & DEV.* 1, 4–5 (2006). Scholars identified the new form of terrorism predominantly from the late 1980s. See, e.g., Brian Jenkins, *Future Trends in International Terrorism*, in *CURRENT PERSPECTIVES ON INTERNATIONAL TERRORISM* 246 (Robert O. Slater & Michael Stohl eds., 1988).

73. See, e.g., HOFFMAN, *supra* note 41, at 64, 270–72, 280–81; LAQUEUR, *supra* note 42, at 81–82; NEUMANN, *supra* note 43, at ch. 2.

74. HOFFMAN, *supra* note 41, at 271; NEUMANN, *supra* note 43, at 17–28.

75. See, e.g., NEUMANN, *supra* note 43, at 117; see also *id.* at 118–49.

76. See LAQUEUR, *supra* note 42, at 80–81, 274.

77. See, e.g., EKATERINA A. STEPANOVA, *TERRORISM IN ASYMMETRICAL CONFLICT: IDEOLOGICAL AND STRUCTURAL ASPECTS* 11, 55, 101, 132 (2008).

78. Spencer, *supra* note 72, at 5.

79. JACKSON ET AL., *supra* note 72, at 167. In the United Kingdom, the TA 2000 was introduced to address contemporary terrorism. See Jack Straw, *I’m Simply Protecting Democracy*, *GUARDIAN* (Dec. 14, 1999), <http://www.theguardian.com/politics/1999/dec/14/jackstraw.labour>, archived at <http://perma.cc/B45Y-ZZUD> (opinion article by the then Home Secretary, defending the Bill that became the TA 2000 and explaining “the [Prevention of Terrorism (Temporary Provisions) Act] was a temporary measure to deal mainly with Irish terrorism, and took no account of the changing nature of the terrorist threat.

In the United Kingdom, the current definition of terrorism is broader than it was during the conflict, but there are significant parallels in the government's approach. Since 2000, the legal definition of terrorism expressly includes threats and nonviolent activity.⁸⁰ The Terrorism Act, 2000 ("TA 2000") defines terrorism as "the use or threat of action" involving "serious violence," "serious damage to property," the endangerment of another's life, the creation of a serious public health or safety risk, or the purpose "seriously to interfere with or seriously to disrupt an electronic system," if the use or threat of those actions is designed either to influence the government or an international governmental organization or to intimidate the public, and the use or threat is made for the purpose of advancing a political, religious, racial, or ideological cause.⁸¹ The addition of religious, racial, or ideological motivation is notable, as well as the more descriptive parameters of conduct in the definition. Nonetheless, differentiation between terrorism and ordinary crime remains a subjective analysis.

The broad definition is not the main source of controversy surrounding counterterrorism legislation,⁸² but it does expand the scope of activity that can be subjected to the regime. Similar to the old regime, new terrorism is not a stand-alone offense, but rather an element of most of the dozens of offenses set out in the TA 2000 and other legislation in the counterterrorism arsenal, including: membership of a proscribed organization, using money for the purposes of terrorism, preparation for terrorist acts, or possessing a document containing information likely to be useful to a person preparing an act of terrorism. Many offenses involve conduct that could be deemed preparatory for terrorism. In the aftermath of a violent incident or where a terrorism plot is suspected, prosecutors can charge suspects with ordinary criminal offenses—such as murder under the common law or causing an explosion likely to endanger life under the Explosive Substances Act, 1883⁸³—and include related terrorism offenses in the same indictment.

This legislation puts that right too.") For commentary on modifications introduced by the TA 2000, see Walker, *supra* note 40; see also GUELKE, *supra* note 44, at 197; Liz Fekete, *The Terrorism Act 2000: An Interview with Gareth Peirce*, 43(2) RACE & CLASS 95, 97–98 (2001) (documenting the opinion of a defense lawyer). Policies introduced after 9/11 were designed to respond to features associated with contemporary terrorism. Spencer, *supra* note 72, at 26; see generally KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* (2011) (discussing policies in several countries).

80. TA 2000, § 1. For analyses of the definition, see Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724 (2002); Walker, *supra* note 46, at 337–40.

81. TA 2000, § 1(1)–(2) (as amended in 2006 and 2008). When explosives or firearms are used or threatened, it is not necessary to prove an intention to influence the government or intimidate the public. *Id.* § 1(3).

82. Criticism has instead focused on special police powers and new offenses under subsequent legislation such as the Terrorism Act, 2006, c. 11. See, e.g., Walker, *supra* note 46, at 331.

83. Explosive Substances Act, 1883, 46 & 47 Vict., c. 3, § 2 ("causing explosion likely to endanger life or property").

These ordinary offenses do not require proof of political motivation or the intention to influence or intimidate.⁸⁴

In any case, if the defendant is convicted of an ordinary crime, in England, Wales, and Scotland the court must determine at the sentencing stage whether the offense has a terrorist connection and, if so, must treat that fact as an aggravating factor.⁸⁵ In Northern Ireland, however, cases can be certified at the outset by the Director of Public Prosecutions as involving a Northern Ireland-oriented proscribed organization, and in these cases the trials are conducted without a jury.⁸⁶

The current definition of terrorism captures a wide range of activities. As in the past, the concept is ambiguous, such that criminal justice actors retain significant discretion to designate conduct as terrorism, which can allow for errors and biases in decision making. The consequences of the label also remain significant because unique security-oriented powers, procedures, and offenses apply under the legislation.

II. COUNTERTERRORISM THEN AND NOW

In the United Kingdom, governmental and parliamentary reactions to post-1960s political violence in Northern Ireland, and more recent global terrorism, have followed a similar pattern. A comparison of the two regimes is valuable in considering whether the mistakes of the past are being, or may be, repeated. Draconian laws were introduced in the immediate aftermath of violent incidents,⁸⁷ driven in part by politicians' desires to be perceived as in control and doing something to address public fear.⁸⁸ These laws sought to prevent subsequent attacks and to facilitate the apprehension and neutralization of suspected terrorists.⁸⁹ Longer-term political and legal strategies were also developed, some of which scaled back the initial mea-

84. See JONATHAN HERRING, *CRIMINAL LAW: TEXT, CASES, AND MATERIALS* 238–42 (5th ed. 2012) (definition of murder). For an example of a case in which both terrorism and non-terrorism offenses were charged, see *Nine Charged with Conspiracy to Cause Explosions in the UK*, CROWN PROSECUTION SERV. (Dec. 26, 2010), http://www.cps.gov.uk/news/latest_news/150_10/, archived at <http://www.perma.cc/0f1uoZCaoEP>.

85. Counter-Terrorism Act, 2008, c. 28, §§ 30–32.

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

87. See, e.g., WHITTY ET AL., *supra* note 28, at 123; Clive Walker, *The Bombs in Omagh and Their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998*, 62 MOD. L. REV. 879, 880–83 (1999). Clive Walker assessed post-9/11 legislation in the United Kingdom as “ill-considered, ill-defined ‘panic’ legislation.” Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT’L CRIM. JUST. 1137, 1143–44 (2006) [hereinafter Walker, *Clamping Down on Terrorism*].

88. HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMM. ON HUMAN RIGHTS, TENTH REPORT OF SESSION 2004–05: PREVENTION OF TERRORISM BILL, 2005, H.L. 68, H.C. 334, ¶ 16; WHITTY ET AL., *supra* note 28, at 123; Conor Gearty, *Dilemmas of Terror*, PROSPECT, Oct. 2007, at 34 (citing unidentified former cabinet minister).

89. Most notably the Anti-Terrorism Crime and Security Act, 2001, c. 24, §§ 21–23 (repealed), provided for detention of suspected international terrorists without trial. Such a measure echoed the policy of internment of terrorism suspects, applied in Northern Ireland in the early 1970s. See DICKSON, *supra* note 33, at 52–55; Ní Aoláin, *supra* note 52, at 41.

asures in response to domestic or international pressure, political calculation, or judicial censure.⁹⁰ However, many reactive measures have “stuck,” or become mainstreamed, so as to apply to non-terrorist offenders.⁹¹ Moreover, fear of terrorism has seemingly been exploited by governments to “sneak[] tough provisions through parliament,”⁹² to justify the continuation of special powers, and as a general strategy of social control.⁹³ This section explores similarities between counterterrorism policies of the past and present. Under both regimes, suspects and defendants receive fewer due process protections as compared to ordinary criminal suspects. Consequently, those processed as alleged terrorists are vulnerable to politically biased decision making and the risks of just-world thinking by criminal justice actors. The present model of counterterrorism laws in western democracies is

widely regarded as having reduced due process protections, increased police powers, boosted executive powers to unprecedented levels while simultaneously reducing judicial oversight, and eroded the once closely monitored demarcation between the intelligence and security agencies on the one hand and state and federal police services on the other.⁹⁴

90. Sections of the Anti-Terrorism Crime and Security Act, 2001 providing for detention without trial were repealed by the U.K. Parliament after the House of Lords determined the provisions were incompatible with the ECHR. *See* Prevention of Terrorism Act, 2005, c. 2, § 16; *A v. Sec’y State for the Home Dep’t*, [2004] UKHL 56, (2005) 2 A.C. 68, [73], [85], [97], [139], [160], [239], [240] (appeal taken from Eng.); *see also A v. United Kingdom*, 49 Eur. H.R. Rep. 625, paras. 190, 223–24 (2009) (finding the United Kingdom in violation of the right to liberty and security in article 5 of the ECHR in respect to several individuals detained under the 2001 Act). The 2005 Act replaced detention without trial with “control orders.” Prevention of Terrorism Act, 2005, §§ 1–9. These provisions have since been replaced, however, by “terrorism prevention and investigation measures,” which allow the government to restrict the residence and travel of terrorism suspects. Terrorism Prevention and Investigations Measures Act, 2011, c. 23, §§ 1–4, sched. 1. Other counterterrorism provisions that provoked controversy have also been revoked, including police powers to stop and search individuals without suspicion, TA 2000, §§ 44–47, and the maximum period of detention without charge, which had been twenty-eight days, *id.* sched. 8, para. 36(3)(b)(ii). *See* Protection of Freedoms Act, 2012, c. 9, §§ 57–61, 63 (amending, *inter alia*, part V and schedule 1 of the TA 2000 so that police are required to have reasonable suspicion to stop and search and limiting detention without charge to fourteen days). For the government’s current counterterrorism strategy, *see* OFFICE FOR SEC. & COUNTER-TERRORISM, *CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM* paras. 1.38, 1.54 (2011), available at <https://www.gov.uk/government/policies/protecting-the-uk-against-terrorism>, archived at <http://www.perma.cc/0zgUA2ZYe8b> (emphasizing the importance of relationships with the private sector); Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*, *supra* note 9, at 659 (discussing CONTEST and its attempts to embed a community policing approach). In relation to the Northern Ireland conflict, the government shifted from a focus on a militaristic internment policy to a criminalization strategy. *See* Ní Aoláin, *supra* note 52, at 38–41, 44–47.

91. *See, e.g.,* WHITTY ET AL., *supra* note 28, at 126–27 (assessing the TA 2000 as normalizing draconian emergency legislation).

92. Gearty, *supra* note 88, at 35.

93. Gabe Mythen & Sandra Walklate, *Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?*, 46 BRIT. J. CRIMINOLOGY 379, 388–90 (2006).

94. SHARON PICKERING ET AL., *COUNTER-TERRORISM POLICING: COMMUNITY, COHESION AND SECURITY* 16 (2008) (citing JONATHAN R. WHITE, *DEFENDING THE HOMELAND: DOMESTIC INTELLIGENCE, LAW ENFORCEMENT, AND SECURITY* (2002)).

Such arguments have been made about the U.K. approach in particular⁹⁵ and about counterterrorism as part of a broader shift to a security-oriented state since the late twentieth century⁹⁶ that is “increasingly shaping public policy.”⁹⁷ Jude McCulloch and Sharon Pickering contrast “post-crime” criminal justice with the “pre-crime” counterterrorism framework that allows the state to confront suspected terrorists without offenses having been committed as well as to convict individuals for nonviolent conduct such as association and preparatory offenses.⁹⁸ National security is pursued through criminal justice measures. Laws facilitate the intelligence-gathering capabilities of the police, and terrorism provides a key justification for the expansion of covert policing.⁹⁹

Often overlooked, however, are nearly identical assessments made about counterterrorism strategies during decades of conflict in Northern Ireland, which had U.K.-wide impact.¹⁰⁰ Direct rule in Northern Ireland was imposed by the British government from March 1972 and remained in place throughout most of the conflict.¹⁰¹ This form of governance vested power over policing and security matters in the U.K. government and Westminster, usurping local authority over these issues.¹⁰² Despite the more recent

95. See, e.g., GUELKE, *supra* note 44, at 197 (categorizing the British government’s approach to international terrorism as suppression); Fenwick, *supra* note 80, at 725–27 (describing legislation adopted after 9/11 as “authoritarian”); Janet L. Hiebert, *Parliamentary Review of Terrorism Measures*, 68 MOD. L. REV. 676 (2005) (assessing counterterrorism measures as coercive and identifying tension between the government and the House of Lords, as well as between the government and Parliament’s Joint Committee on Human Rights); Bethan Loftus & Benjamin Goold, *Covert Surveillance and the Invisibilities of Policing*, 12 CRIMINOLOGY & CRIM. JUST. 275, 278–79 (2012) (noting that the significant role of intelligence-led, covert policing is driven in part by pressures to respond to global terrorism); Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*, *supra* note 9, at 651–54 (emphasizing expanded and discretionary police powers and the undermining of due process protections in contemporary counterterrorism law); Clive Walker & Andrew Staniforth, *The Amplification and Melding of Counter-Terrorism Agencies: From Security Service to Police and Back Again*, in COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW 293, 293, 305–07 (Aniceto Masferrer & Clive Walker eds., 2013) (discussing the “melding” of police and security agencies in response to terrorism).

96. See Simon Hallsworth & John Lea, *Reconstructing Leviathan: Emerging Contours of the Security State*, 14 THEORETICAL CRIMINOLOGY 141, 148–53 (2011); Lucia Zedner, *Pre-Crime and Post-Criminology?*, 11 THEORETICAL CRIMINOLOGY 261, 264 (2007).

97. Mythen & Walklate, *supra* note 93, at 395; see also Tim Newburn & Robert Reiner, *From PC Dixon to Dixon PLC: Policing and Policing Powers Since 1954*, 2004 CRIM. L. REV. 601, 618.

98. Jude McCulloch & Sharon Pickering, *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the “War on Terror”*, 49 BRIT. J. CRIMINOLOGY 628, 633 (2009).

99. Loftus & Goold, *supra* note 95, at 277.

100. The legacy of the conflict is often unexplored in assessments of today’s counterterrorism regime. *But see, e.g.*, Mario Matassa & Tim Newburn, *Policing and Terrorism*, in HANDBOOK OF POLICING 468, 476–80, 485 (Tim Newburn ed., 1st ed. 2003) (discussing risks associated with special counterterrorism policing powers); Christina Pantazis & Simon Pemberton, *Policy Transfer and the UK’s “War on Terror”: A Political Economy Approach*, 37 POL’Y & POL. 363, 374–75 (2009) (considering the conflict as the historical context for contemporary counterterrorism strategies); Walker, *supra* note 40 (assessing provisions of the TA 2000 and comparing them with those under legislation in the 1970s and 1980s).

101. BRIGID HADFIELD, *THE CONSTITUTION OF NORTHERN IRELAND* 101–02, 114, 116–17 (1989) (tracing the introduction of direct rule in 1972, with a short period of devolution from January to May 1974); MULCAHY, *supra* note 39, at 31.

102. MULCAHY, *supra* note 39, at 31.

pragmatism suggested above by Mandelson, from the mid-1970s the government treated paramilitary suspects in Northern Ireland as ordinary criminals, enacting legislation to deal with them through the normal criminal justice system, albeit under amended rules paradoxically linked to their status as suspected terrorists.¹⁰³ Although control over security was centralized, the government sought to portray the conflict as a local one and transfer responsibility for law and order from the military to the Royal Ulster Constabulary (“RUC”) in a process known as “ulsterization.”¹⁰⁴ Criminalization and ulsterization strategies aimed to reduce the visibility and activity of the British army and executive in Northern Ireland and improve the public profile of the RUC among nationalists.¹⁰⁵ Emergency legislation enhanced police autonomy and power and reduced due process protections for suspects,¹⁰⁶ and judicial oversight of executive powers was weaker than it is today.¹⁰⁷ The lines between policing, intelligence, and security duties were blurred: security was the dominant task of the RUC, and the intelligence unit of the RUC (“Special Branch”) became increasingly pivotal in intelligence gathering in Northern Ireland.¹⁰⁸ The Security Service, the national

103. EPA 1973; see Ní Aoláin, *supra* note 52, at 44–47; Matassa & Newburn, *supra* note 100, at 482. Guelke has identified three general responses to political violence by governments: accommodation (giving leniency to suspects and acknowledging political motivation), criminalization (processing suspects as ordinary criminals), and suppression (treating suspects more harshly than ordinary criminals). GUELKE, *supra* note 44, at 195. Despite instances of accommodation during the conflict (e.g., political status for paramilitary prisoners from 1972 to 1976 and after the 1980–1981 hunger strikes) and non-public dialogue with paramilitary leaders, suppression and criminalization dominated U.K. government policy throughout the conflict. Accommodation strategies late in the conflict and during the peace process are not addressed in this Article. On the criminalization strategy in Northern Ireland, see Tom Hadden et al., *Emergency Law in Northern Ireland: The Context*, in JUSTICE UNDER FIRE, *supra* note 32, at 1, 8–10.

104. Ní Aoláin, *supra* note 52, at 46; GRAHAM ELLISON & JIM SMYTH, THE CROWNED HARP: POLICING NORTHERN IRELAND 80–85 (2000).

105. For a detailed explanation of these objectives, see ELLISON & SMYTH, *supra* note 104, at 80–85. Although nationalists did not necessarily support the republican movement during the conflict, as a community they were targeted as suspicious by security forces and in turn lacked confidence in the police. MULCAHY, *supra* note 39, at 4–6, 69–71. The police force was predominantly Protestant and unionist. ELLISON & SMYTH, *supra* note 104, at 153.

106. See, e.g., EPA 1978, §§ 8, 11, 13–14 (admissions by persons charged with scheduled offenses, entry and search of premises for purposes of arresting terrorists, constables’ general power of arrest and seizure, and powers of arrest of members of Her Majesty’s forces); Prevention of Terrorism (Temporary Provisions) Act, 1984, c. 8, § 12(1)(b) [hereinafter PTA 1984] (constables’ power of arrest). Section 11 of the EPA 1978 was repealed by the Northern Ireland (Emergency Provisions) Act, 1987, c. 30 [hereinafter EPA 1987], and subsequent comparable powers required “reasonable suspicion.” *But see* Dermot P.J. Walsh, *Arrest and Interrogation*, in JUSTICE UNDER FIRE, *supra* note 32, at 27, 31 (arguing that interpretations of section 11 endured beyond the date of its repeal). See generally *id.* at 27, 31–43 (assessing the application of arrest powers and admissibility provisions under the EPA 1978, the EPA 1987, and the PTA 1984 and arguing that emergency legislation expanded police powers and reduced judicial oversight, exacerbated by judicial interpretations deferential to the police).

107. Although the use of judicial review has been on the ascendancy in the United Kingdom since the 1960s, before the HRA a public decision maker generally could only successfully be challenged if the applicant could prove she acted outside of the law, unreasonably, or with procedural impropriety. See Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, 2000 PUB. L. 671, 672; GORDON ANTHONY, JUDICIAL REVIEW IN NORTHERN IRELAND 115–19 (2007).

108. ELLISON & SMYTH, *supra* note 104, at 104–10.

intelligence agency, and the army maintained involvement in Northern Ireland, predating the confirmation in the Security Service Act, 1996 that a U.K.-wide function of the Security Service is to act in support of the activities of the police forces.¹⁰⁹

Contemporary counterterrorism powers and offenses are clearly rooted in these past measures.¹¹⁰ The Prevention of Terrorism (Temporary Provisions) Act, 1989 (“PTA 1989”) established a template for the TA 2000, which replaced the PTA 1989 and the Northern Ireland (Emergency Provisions) Act, 1996 (“EPA 1996”) and remains the centerpiece of counterterrorism legislation in the United Kingdom.¹¹¹ Both regimes authorized arresting without warrant those reasonably suspected by constables of terrorism,¹¹² detaining without charge for several days (presently fourteen days),¹¹³ and in some circumstances, stopping and searching without suspicion under a provision introduced into the PTA 1989 in 1994.¹¹⁴ The TA 2000 proscribes membership and support of specific organizations—provisions that echo the EPAs.¹¹⁵ As in Northern Ireland after the end of internment in 1975, today the criminal justice system processes most suspects, with the notable exception of suspected terrorists subject to civil terrorism preven-

109. See Security Service Act, 1996, c. 35, § 1; see also Matassa & Newburn, *supra* note 100, at 484; Walker, *Clamping Down on Terrorism*, *supra* note 87, at 1148.

110. John F. McEldowney, *Political Security and Democratic Rights*, 12 DEMOCRATIZATION 766, 766–82 (2005). Policy origins could be traced back further still. Mario Matassa and Tim Newburn suggest Irish terrorism “has been a strategic driver for developments in policing on the mainland” since at least the early nineteenth century. Matassa & Newburn, *supra* note 100, at 468. Others identify counterinsurgency and colonial policing legacies in conflict-era and contemporary policing. See ELLISON & SMYTH, *supra* note 104, 73–78; McCulloch & Pickering, *supra* note 98, at 637; P.A.J. Waddington & Martin Wright, *Police Use of Force, Firearms and Riot-Control*, in HANDBOOK OF POLICING 465, 476 (Tim Newburn ed., 2d ed. 2008); see also Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 5, c. 5, § 1(1) (the precursor to the EPA 1973, empowering the government to “take all such steps . . . as may be necessary for preserving the peace and maintaining order”).

111. TA 2000, § 125, sched. 16 (repealing the PTA 1989, the EPA 1996, and the EPA 1998). In an examination of the TA 2000 before its enactment, Walker noted that “most of its contents are easily traceable to the legislation which it is to replace.” Walker, *supra* note 40, at 2, 14 (discussing proscription of organizations); see also *id.* at 19 (discussing arrest without warrant).

112. Compare TA 2000, § 41, with PTA 1989, § 14. Comparable powers relating to ordinary offenses are found in Police and Criminal Evidence Act, 1984, c. 60, § 24 [hereinafter PACE 1984] and Police and Criminal Evidence (Northern Ireland) Order, 1989, SI 1989/1341 (N. Ir. 12), art. 26 [hereinafter PACE (NI)].

113. A forty-eight-hour period of detention could be extended by five days with the authorization of the Secretary of State under section 14 of the PTA 1989. The detention period has been amended three times since the commencement of the TA 2000. See Protection of Freedoms Act, 2012, c. 9, § 57. The latest amendments entered into force on July 10, 2012. Protection of Freedoms Act, 2012 (Commencement No. 1) Order, 2012, c. 41, § 4(a).

114. Compare TA 2000, §§ 44–47 (now repealed), with PTA 1989, § 13A (as amended). See R (Gillan) v. Comm’r of Police of the Metropolis, [2006] UKHL 12, (2006) 2 A.C. 307 [9] (appeal taken from Eng.) (discussing similarities between the PTA 1989 and the TA 2000 in this respect); see also Protection of Freedoms Act, 2012, c. 9, §§ 59, 61 (repealing sections 44–47 of the TA 2000 but introducing section 47A, which provides that a constable may stop and search a person or vehicle without reasonable suspicion when such searches are authorized in a specified location by a senior police officer who “reasonably suspects that an act of terrorism will take place”).

115. Compare TA 2000, pts. II–III, with EPA 1996, §§ 30–31.

tion and investigation measures (“TPIM”).¹¹⁶ There is an emphasis on intelligence gathering—running informers and infiltration, interrogation, and surveillance—by police as well as by the intelligence services.¹¹⁷ Overlap in functions between the police and security services predated recent counterterrorism strategies; such activity was evident during the conflict¹¹⁸ and, more generally, in the historic role of the Special Branch in Britain.¹¹⁹

Executive powers in the counterterrorism realm are not significantly greater than during the conflict. In certain respects, today’s regime is less extraordinary than in the past; for example, aggressive interrogations are no longer officially tolerated,¹²⁰ non-jury courts are not the norm (except, still, in Northern Ireland), and the Human Rights Act, 1998 (“HRA”) has raised the minimum standards of fairness for criminal investigations and prosecutions.¹²¹ In addition, the Police and Criminal Evidence Act, 1984 (“PACE 1984”), governing police conduct in non-terrorism cases, has had a significant impact on police culture and practice.¹²² Some of the most draconian recent measures, including the original control orders and the power to stop and search without suspicion under section 44 of the TA 2000, have been scaled back because of judicial censure and political pressure.¹²³

To be sure, the current approach is distinct from the past, particularly in terms of civil measures. The United Kingdom responded to the new terrorism analysis with successive legislative measures that “push down into the interstices of social life.”¹²⁴ Counterterrorism objectives are integrated into the regulation of transportation, communication, and financial transactions, with, for example, increased emphasis on international activity and inter-

116. See TA 2000, pts. II–III, VI (defining relevant offenses). Individuals can be subjected to TPIMs on the basis of reasonable belief by the U.K. Secretary of State, and these can impose limitations on, inter alia, residence and travel, including requiring an individual to remain in a specified residence for certain hours at night. Terrorism Prevention and Investigation Measures Act, 2011, c. 23, §§ 2–3, sched. 1, pt. 1. Application of the measures can be appealed, but proceedings may involve the use of secret evidence. See *id.* §§ 16–18, sched. 4; Justice and Security Act, 2013, c. 18, pt. 2 (providing for closed material proceedings).

117. Bethan Loftus et al., *Covert Policing and the Regulation of Investigatory Powers Act 2000*, 8 ARCHBOLD REV. 5, 6 (2010); see also WHITTY ET AL., *supra* note 28, at 143–47.

118. Loftus et al., *supra* note 117, at 5, 6; WHITTY ET AL., *supra* note 28, at 143–47.

119. See Walker & Staniforth, *supra* note 95, at 294–95.

120. See discussion *infra* Part III.C. But see COBAIN, *supra* note 24, at 304–05 (discussing Ministry of Defence training materials encouraging anxiety- and fear-inducing interrogation methods).

121. HRA (allowing for domestic enforceability of most ECHR rights). On the current use of non-jury courts in the United Kingdom, see *infra* notes 450–51 and accompanying text. The HRA is discussed *supra* note 16, and cases in which U.K. courts have interpreted legislation to comply with article 6 of the ECHR are discussed *infra* note 426.

122. See John Coppen, *PACE: A View from the Custody Suite*, in REGULATING POLICING: THE POLICE AND CRIMINAL EVIDENCE ACT 1984: PAST, PRESENT AND FUTURE 75 (Ed Cape & Richard Young eds., 2008) [hereinafter REGULATING POLICING]; John Long, *Keeping PACE? Some Front Line Policing Perspectives*, in REGULATING POLICING, *supra*, at 91.

123. See *supra* note 90 and accompanying text.

124. Hallsworth & Lea, *supra* note 96, at 148–49, 153 (considering counterterrorism measures, including stop and search powers under the TA 2000, control orders under the Prevention of Terrorism Act, 2005, c. 2, the length of pre-trial detention, and vague offense definitions in the context of a broader analysis of the emergence of a “security state”).

state cooperation.¹²⁵ Noncriminal initiatives such as control orders (recently replaced by more time-limited TPIMs), restrictive immigration policies, and further powers over suspects' assets characterize a multifaceted, preventative approach.¹²⁶ In addition, contemporary responses to terrorism must be understood alongside punitive and politically risk-averse shifts in criminal justice policy,¹²⁷ which, though they are not limited to the terrorism realm, help to explain its development.¹²⁸ Normalization of counterterrorism powers has increasingly led to convergence between the policing of terrorism and ordinary crime,¹²⁹ fixed rather than temporary measures, and commonalities with policies in other countries.¹³⁰ These are aspects of the enduring "state of exception" common to contemporary politics,¹³¹ in part justified by government portrayals of the steady-state global nature of the war on terrorism,¹³² but also not unlike the political experience in Northern Ireland from the 1970s to 1990s. Although circumstances in Northern Ireland were exceptional in comparison to the rest of the United Kingdom, the counterterrorism regime became normalized in that, inter alia, counterterrorism approaches dominated the function of the police and other public bodies, emergency legislation was nominally temporary but continually renewed, and counterterrorism provisions were often used in non-terrorism cases.¹³³

In a study published in 1993, Paddy Hillyard identified ways in which the Irish in Britain had become defined as a suspect community and treated as such under emergency legislation.¹³⁴ That analysis was also applied to

125. See Michael Levi, *Combating the Financing of Terrorism*, 50 BRIT. J. CRIMINOLOGY 650 (2010); Loftus & Goold, *supra* note 95, at 277–78 (identifying terrorism as one driver behind the growth of covert policing and covert surveillance); Pantazis & Pemberton, *supra* note 100, at 367–69.

126. See Mary Bosworth & Mhairi Guild, *Governing Through Migration Control*, 48 BRIT. J. CRIMINOLOGY, 703, 707–10 (2008) (on immigration); Hallsworth & Lea, *supra* note 96, at 148–50; Matassa & Newburn, *supra* note 100, at 488 (on measures related to finances); Ben Middleton, *Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: The Counter-Terrorism Review 2011*, 75 J. CRIM. L. 225, 233–40 (2011).

127. See Ian Loader, *Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales*, 46 BRIT. J. CRIMINOLOGY 561, 578–81 (2006); Mythen & Walklate, *supra* note 93.

128. See generally Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729 (2011).

129. Matassa & Newburn, *supra* note 100, at 476.

130. Pantazis & Pemberton, *supra* note 100.

131. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 2–3, 86–87 (Kevin Attell trans., 2005).

132. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 92 (2003); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 2 (2006).

133. COMM. ON THE ADMIN. OF JUSTICE, *WAR ON TERROR: LESSONS FROM NORTHERN IRELAND* 15–16, 24, 40–41 (2008); MULCAHY, *supra* note 39, at 75–76; Hillyard, *supra* note 32, at 195–96, 198–200 (describing the alleged impact of counterterrorism policing on planning and development projects and identifying ways in which emergency legislation had become normalized); see also PADDY HILLYARD, *SUSPECT COMMUNITY: PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN* 263–64 (1993) (discussing impact of the Prevention of Terrorism (Temporary Provisions) Acts on ordinary criminal law throughout the United Kingdom).

134. HILLYARD, *supra* note 133, at 257–61 (examining, inter alia, use of detention powers and exclusion orders under successive Prevention of Terrorism (Temporary Provisions) Acts, including the

Catholics and nationalists¹³⁵ in Northern Ireland; counterterrorism strategies targeted the nationalist community for police intervention, higher levels of surveillance, home searches, and harassment by security forces.¹³⁶ Emergency arrest powers were used as a means to gather intelligence even where powers under ordinary legislation would have been more appropriate.¹³⁷ At the time, the continued renewal of powers related to the designated “state of emergency” provoked consternation and was identified as a source of injustice.¹³⁸ Mistreatment of detainees and harsh treatment of defendants also resulted.¹³⁹ The majority of detainees and defendants processed under counterterrorism legislation was Catholic.¹⁴⁰

Scholars have identified similarly harmful effects on individuals and communities targeted by counterterrorism measures during the conflict and at present.¹⁴¹ As a consequence of the combination of pre- and post-crime strategies under the current counterterrorism regime, the pool of potential transgressors is significantly wider than with ordinary criminal law. New suspect communities in U.K. society—in particular the Muslim community and those presumed to be members of it—have been constructed.¹⁴² As in the past, counterterrorism legislation has facilitated the targeting of individuals not because of suspected wrongdoing but because of their presumed membership in a particular group.¹⁴³ The state disproportionately subjects

Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, pts. II–III [hereinafter PTA 1974] and PTA 1989, pts. II, IV).

135. See *supra* note 105.

136. Hillyard, *supra* note 32, at 194–99; MULCAHY, *supra* note 39, at 70–71.

137. WALSH, *supra* note 25, at 32–34.

138. See, e.g., Paddy Hillyard, *The Normalization of Special Powers, in A READER ON CRIMINAL JUSTICE* (Nicola Lacey ed., 1994); COMM. ON THE ADMIN. OF JUSTICE, NO EMERGENCY, NO EMERGENCY LAW: EMERGENCY LEGISLATION RELATED TO NORTHERN IRELAND (1995).

139. KEVIN BOYLE ET AL., TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE chs. 5–6 (1980); ELLISON & SMYTH, *supra* note 104, at 96–99, 110–15; HILLYARD, *supra* note 133, ch. 12; WALSH, *supra* note 25, chs. 2–4. This mistreatment is discussed in more detail in Part III.

140. The number of Catholics processed in non-jury trials as compared to Protestants is not necessarily evidence that a suspect community existed. Although Catholics were a minority community in Northern Ireland during the conflict, republican paramilitary organizations (predominantly Catholic) were responsible for more violence than loyalist groups (predominantly Protestant). See *supra* note 51. The precise number of defendants in non-jury trials is not available, but data on arrests, the ex-prisoner population, and samples of defendants in non-jury courts are indicative. Hillyard estimates that, of 44,279 arrests under counterterrorism legislation by the police and the army between 1975 and 1986, 10% of Catholics would have been arrested (and one in four Catholic men between ages sixteen and forty-four). Hillyard, *supra* note 32, at 196–97. He assumes that three-quarters of all arrests were of Catholics. *Id.* Given that many of those arrested were released without charge, these figures are inadequate in comparing prosecution rates for Catholics and Protestants. See SHIRLOW & McEVOY, *supra* note 18. In Walsh’s study on the application of emergency legislation in non-jury trials, he found seventy loyalist and ninety republican defendants were processed in a three-month period in 1981. WALSH, *supra* note 25, at 15–16, 65, tbl.11 (including the total number of loyalist and republican defendants in the court survey).

141. See Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*, *supra* note 9.

142. See generally HICKMAN ET AL., *supra* note 9; Nickels et al., *supra* note 9.

143. Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*, *supra* note 9, at 649, 651–52 (discussing, for example, the broad definition of terrorism in TA 2000, §§ 1–2, the proscript-

the suspect community to scrutiny and application of harsher measures. Counterterrorism techniques are oriented around characteristics such as “birthplace, skin color and religion” rather than “reliable quantitative judgments about the probabilities of offending,” resulting in the further marginalization of certain minority populations.¹⁴⁴

III. QUESTIONING AND PROSECUTING TERRORISM SUSPECTS (1970s–1990s)

In Northern Ireland, the counterterrorism context created a distinct criminal process marked by heavy reliance on elicited confessions, a low threshold for the admissibility of confessions, and delayed access to counsel. These modifications reflected an emphasis on intelligence gathering in conflict-related police work and the government’s desire to secure convictions in terrorism cases.¹⁴⁵ As such, they were key factors in the miscarriage of justice cases covered in Part IV of this Article, even more so because of judicial confidence in police evidence.

A. *Confessions at Any Cost*

In furtherance of the policy of criminalization, and after internment of paramilitary suspects ceased in 1975, the RUC focused on intelligence gathering through detention and high-pressure interrogation of suspects and their associates.¹⁴⁶ The legislative regime facilitated this intelligence-oriented strategy. The police and the army could stop and question a person without suspicion¹⁴⁷ and arrest without warrant a person suspected of “being a terrorist” or committing an offense under the EPA then in force.¹⁴⁸ Until 1987, suspicion did not need to be reasonable—it only needed to be genuinely held—nor did it need to relate to a specific offense.¹⁴⁹ The RUC had other arrest powers,¹⁵⁰ but it used the EPAs and the Prevention of Terrorism (Temporary Provisions) Acts (“PTAs”) to detain those who could not otherwise be arrested and to question individuals on a wider range of matters.¹⁵¹ A high percentage of those arrested under the EPAs and PTAs

tion of groups believed to be concerned with terrorism, *id.* § 3, sched. 2 (as amended), and the discretionary nature of stop and search and arrest powers, *id.* §§ 41, 44–45).

144. Mythen & Walklate, *supra* note 93, at 390–91.

145. See Ní Aoláin, *supra* note 52, at 45–46; Walsh, *supra* note 106, at 37–38.

146. Walsh, *supra* note 106, at 35–40. The application of emergency powers in ordinary cases and in circumstances in which no prosecutions resulted is beyond the scope of this Article. See generally HELSINKI WATCH, HUMAN RIGHTS IN NORTHERN IRELAND 11–26, 87 (1991); WALSH, *supra* note 25, at 59–60, 80, 82.

147. See, e.g., EPA 1978, § 18.

148. *Id.* §§ 11, 13.

149. *Id.*; see also EPA 1987, § 6, sched. 2.

150. See, e.g., PTA 1974, § 7(1)(b); Criminal Law Act (NI), 1967, c. 18, § 2.

151. HELSINKI WATCH, *supra* note 146, at 14; WALSH, *supra* note 25, at 32–34.

were released without charge,¹⁵² suggesting that the purpose of many arrests was intelligence gathering rather than prosecution.¹⁵³ Suspects could be held for longer than the usual forty-eight hours.¹⁵⁴ For example, under the Northern Ireland (Emergency Provisions) Act, 1978, the period of detention without charge was seventy-two hours,¹⁵⁵ and under the Prevention of Terrorism (Temporary Provisions) Act, 1974, the period was seven days with the consent of the Secretary of State.¹⁵⁶ Those arrested were routinely detained in the early hours of the morning and questioned over several days, with multiple interviews per day and some lasting several hours, at times late at night.¹⁵⁷ Access to counsel was delayed.¹⁵⁸ Similarly, the RUC practice was to restrict parents or appropriate adults from accompanying minors during interviews.¹⁵⁹ After 1988, inferences could be drawn from a suspect's silence upon questioning,¹⁶⁰ a generally applicable evidentiary change first adopted in Northern Ireland to encourage terrorism suspects to respond to police questioning and subsequently extended to England and Wales.¹⁶¹

RUC detention centers became notorious for physical and mental mistreatment of suspected paramilitaries. Defense lawyers and the Association of Forensic Medical Officers raised alarm in the late 1970s about alleged ill treatment,¹⁶² with an Amnesty International investigation concluding that legal provisions eroding suspects' rights had "helped create the circumstances in which maltreatment of suspects ha[d] taken place."¹⁶³ Consistent and credible allegations of abuse included beatings and threats of death, violence, and rape, as well as physically exhausting procedures such as

152. HELSINKI WATCH, *supra* note 146, 13–14; Walsh, *supra* note 106, at 33–34.

153. Ní Aoláin, *supra* note 52, at 45; Walsh, *supra* note 106, at 33–34.

154. After the enactment of PACE (NI), non-terrorism criminal suspects could be held for thirty-six hours for serious offenses, a period that could be extended to a maximum of seventy-two hours with the authorization of a magistrates' court. PACE (NI), arts. 42–44.

155. EPA 1978, § 11(3).

156. PTA 1974, § 7(2).

157. *See, e.g.*, BOYLE ET AL., *supra* note 139, at 40–42; TAYLOR, *supra* note 24; Walsh, *supra* note 106, at 39–40.

158. *See* discussion *infra* Part III.B.

159. H.G. BENNETT, REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cm. 7497, ¶ 129.

160. Criminal Evidence (Northern Ireland) Order, 1988, SI 1988/1987 (N. Ir. 20), arts. 2–6. Since the late 1990s, however, no inference can be drawn if the suspect does not have the opportunity to consult a lawyer before being questioned, if the accused is at an authorized place of detention. Criminal Evidence (Northern Ireland) Order, 1999, SI 1999/2789 (N. Ir. 8), art. 36.

161. *See* John D. Jackson, *Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom*, 5 INT'L J. EVIDENCE & PROOF 145, 145–46, 153 (2001).

162. AMNESTY INT'L, *supra* note 24, ch. I (citing a 1977 letter by defense lawyers who considered ill treatment to be "common practice" in certain police stations and noting doctors were among those publicly expressing concern); BENNETT, *supra* note 159, ¶ 159 (referring to concern about ill treatment raised by the Association of Forensic Medical Officers); Eric Stover & Michael Nelson, *Medical Action Against Torture*, in THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS 101, 119 (Eric Stover & Elena O. Nightingale eds., 1985) (noting a public statement by the Association of Forensic Medical Officers).

163. AMNESTY INT'L, *supra* note 24, Conclusions.

standing against a wall for long periods of time.¹⁶⁴ Sleep deprivation and hooding were alleged in some cases, techniques which were among the five that Prime Minister Edward Heath had in 1972 assured would no longer be used in interrogations and which the European Court of Human Rights (“ECtHR”) held amounted to inhuman or degrading treatment when used in combination.¹⁶⁵ The Bennett Committee, a government-commissioned inquiry into police interrogation procedures, concluded in its report (“the Bennett Report”) that injuries had been sustained in custody and recommended changes in procedure, including access to counsel at an earlier stage of detention.¹⁶⁶ Nonetheless, the report demonstrated significant faith in senior police officers to detect and deal with misconduct and echoed the view that there was a coordinated campaign to discredit the police.¹⁶⁷ One medical officer who had given evidence to the inquiry resigned shortly after the Bennett Report was published, having concluded the report had had little impact on some detectives.¹⁶⁸ In his view, interrogation was expected to produce results even at the price of “a certain degree of ill-treatment,” and “ill-treatment [by the RUC] was condoned at a very high level.”¹⁶⁹ Another reported that he had seen up to 160 cases of non-self-inflicted injuries in custody.¹⁷⁰ His neutrality was attacked by way of a leaked story that his wife had been raped, allegedly by a member of the security forces who was never caught.¹⁷¹

After the publication of the Bennett Report, allegations of abuse subsequently dipped, then ebbed and flowed for the remainder of the conflict, with suspect treatment seemingly more influenced by internal RUC policy than by rates of paramilitary violence.¹⁷² For example, although complaints of assault during interviews dropped from a high of 671 in 1977 to 159 in 1979, there were 395 such complaints in 1992 (271 by those arrested under emergency legislation) and 234 in 1995.¹⁷³ In each of these years, there

164. *Id.* at ch. III.

165. *Id.*; *see also* Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, ¶¶ 167–68 (1980). The five sensory deprivation techniques consist of wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. *Id.* ¶ 96.

166. *See* BENNETT, *supra* note 159, ¶¶ 163, 404(45).

167. *Id.* ¶¶ 19, 202.

168. TAYLOR, *supra* note 24, at 334.

169. *Id.*

170. *See* 964 PARL. DEB., H.C. (5th ser.) (1979) 52–54 (U.K.) (statement by Member of Parliament William Craig, commenting on the television program in which prison doctor Robert Irwin claimed to have examined abused prisoners and challenging the doctor’s veracity).

171. *See* 964 PARL. DEB., H.C. (5th ser.) (1979) 1102–04 (U.K.) (statement by Member of Parliament Gerard Fitt); TAYLOR, *supra* note 24, at 319–20.

172. *See* ELLISON & SMYTH, *supra* note 104, at 97. In their study of the RUC, Graham Ellison and Jim Smyth identify strategic planning by senior RUC and government officials throughout the conflict, ranging from efforts to “win over” the nationalist community to alleged involvement with loyalist death squads. *Id.* at 84–87, 89–91, 97, 104, 147–48.

173. *See* BENNETT, *supra* note 159, at app. 2 (regarding 1977); TAYLOR, *supra* note 24, at 337–38 (regarding 1979); Council of Europe, *Report to the Government of the United Kingdom on the Visit to Northern Ireland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment*

were no disciplinary sanctions and no convictions of RUC officers for assault,¹⁷⁴ a striking absence. Complaint statistics are one indicator of police conduct, but these should be viewed cautiously. The data likely underestimates the extent of physical and mental mistreatment considering the fear and mistrust of the complaint system by detainees, the high percentages of complainants who refused to cooperate with related investigations, and the numerous informal allegations and acknowledgments of abuse by interrogators.¹⁷⁵ Conversely, officials contended that false complaints were high, evidenced by low numbers of disciplinary action and prosecution.¹⁷⁶ Yet several civil claims were settled by the RUC¹⁷⁷ and, to quote Lord Colville reporting on the relevant EPA in 1992:

[I]f a disciplinary system seldom if ever reaches an adverse decision about a person who works, after training, within a disciplined structure, it is more likely that the system is faulty than that nobody in that profession or discipline ever makes even the most minor mistake or commits some foible.¹⁷⁸

Problems in the detention centers continued into the 1990s. The U.N. Human Rights Committee recommended closing the Castlereagh Center in Belfast as a matter of urgency in 1995; after a 1993 visit the European Committee for the Prevention of Torture (“CPT”) found poor detention conditions and allegations of ill treatment “striking” in number and consistency.¹⁷⁹ Likewise, the U.N. Committee Against Torture considered that practices at the Center might still breach the U.N. Convention Against Torture in 1995,¹⁸⁰ and in 1998 maintained that the facility should be closed at the earliest opportunity.¹⁸¹ By the end of the millennium, after silent videotaping of interviews became standard,¹⁸² complaints of abuse

or Punishment from 20 to 29 July 1993, at 33, Doc. CPT/Inf (94) 17 (Nov. 17, 1994) (regarding 1992); HUMAN RIGHTS WATCH, *TO SERVE WITHOUT FAVOR: POLICING, HUMAN RIGHTS, AND ACCOUNTABILITY IN NORTHERN IRELAND* 27 (1997) (regarding 1995).

174. BENNETT, *supra* note 159, ¶¶ 113, 157, app. 2; Council of Europe, *supra* note 173, at 33; HUMAN RIGHTS WATCH, *supra* note 173, at 27; MULCAHY, *supra* note 39, at 39.

175. See, e.g., COBAIN, *supra* note 24, at ch. 6; TAYLOR, *supra* note 24, at 156–57, 321.

176. See, e.g., BENNETT, *supra* note 159, ¶¶ 154, 158, 336–38, 349 (discussing other reasons for false allegations).

177. BENNETT, *supra* note 159, ¶ 155; see also Council of Europe, *Report to the Government of the United Kingdom on the Visit to Northern Ireland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 29 November to 8 December 1999*, ¶¶ 20–22, 54, Doc. CPT/Inf (2001) 6 (May 3, 2001) (discussing settlements in the late 1990s).

178. See Council of Europe, *supra* note 177, at 33.

179. United Nations, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Comments of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, ¶¶ 11, 22, U.N. Doc. CCPR/C/79/Add.55 (July 27, 1995); Council of Europe, *supra* note 173, at 109.

180. U.N. Comm. Against Torture, *Fifteenth Session: Summary Record of the First Part (Public) of the 234th Meeting*, ¶ 27, U.N. Doc. CAT/C/SR.234 (Nov. 22, 1995).

181. Rep. of the Comm. Against Torture, 23d Sess., 8–19 Nov., 1999, 24th Sess., 1–19 May, 2000, ¶ 77(a), U.N. Doc. A/54/44; GAOR, 55th Sess., Supp. No. 44 (1999).

182. Silent video recording was required after 1996 by revisions to the EPA. EPA 1996, § 53(1)(b). Video recording of interviews in non-terrorism cases was introduced in 2002 through amendments to

against police dropped appreciably, and in 2000 the Office of the Police Ombudsman for Northern Ireland was established as an independent police complaints body.¹⁸³ After a visit in 1999, the CPT concluded that allegations of ill treatment by those detained for terrorism offenses had declined significantly, but that physical mistreatment had “yet to be completely eradicated” and that psychological ill treatment, such as threats and intimidation, persisted.¹⁸⁴ The CPT again called attention to the Castlereagh Center as particularly problematic and, within a month of the visit, the facility was closed.¹⁸⁵

B. Delayed Access to Counsel

In the 1970s, solicitors were not admitted to see terrorism suspects before they were charged. The RUC determined that access “could only frustrate the obtaining of a confession” because solicitors would advise silence.¹⁸⁶ The RUC Code was amended in 1979 to require access to counsel upon request after forty-eight hours of detention,¹⁸⁷ but the police did not always comply.¹⁸⁸ A similar right was subsequently codified; after 1987, access could be delayed for up to forty-eight hours if specified grounds were met—for example, if the exercise of the right to counsel would interfere with the gathering of information or make it more difficult to prevent terrorism.¹⁸⁹ In some circumstances, consultations between solicitors and clients could be and were monitored by officials.¹⁹⁰ The stated practice of the RUC into the 1990s was that counsel was never permitted to attend interrogations. This contrasted with policy (but not always practice) in ordinary

the PACE (NI). See PACE (NI), § 60A. The use of audio and videotapes during questioning had been piloted in England and Wales in the late 1970s and was frequently utilized there in the 1990s, but it was not viewed as a solution in Northern Ireland. The Bennett Committee considered that although recordings would create reliable records of confessions, they might increase the reluctance of detainees to speak to police and the victimization of informants by paramilitary groups. BENNETT, *supra* note 159, ¶ 199.

183. See Council of Europe, *supra* note 177, ¶¶ 11, 13; POLICE OMBUDSMAN FOR NORTHERN IRELAND, DEVELOPMENTS IN POLICE COMPLAINTS—TEN YEARS ON *passim* (2010) (documenting complaints statistics and key issues in police accountability).

184. Council of Europe, *supra* note 177, ¶¶ 122–24.

185. Council of Europe, *supra* note 177, ¶¶ 8, 19, 25, 119.

186. BENNETT, *supra* note 159, ¶¶ 123, 272.

187. BOYLE ET AL., *supra* note 139, at 50–51; 17 PARL. DEB., H.C. (6th ser.) (1982) 66–67W (written answer by Secretary of State for Northern Ireland James Prior).

188. WALSH, *supra* note 25, 66–67; see also McColgan, *supra* note 11, at 196 (noting that the RUC cautioned officers not to tell detainees they could see a solicitor (citing FINN, *supra* note 25)). Delaying access to counsel was also not uncommon in non-terrorism cases at the time. JOHN JACKSON ET AL., CALLED TO COURT: A PUBLIC REVIEW OF CRIMINAL JUSTICE IN NORTHERN IRELAND 62–63 (1991); WALSH, *supra* note 25, at 66 (citing studies on practice in England and Wales).

189. See, e.g., EPA 1996, § 47. The original provision was EPA 1987, § 15 in England and Wales; cf. PACE 1984, § 58(12)–(13) (now repealed).

190. HELSINKI WATCH, *supra* note 146, at 36.

criminal justice matters and in terrorism cases in England and Wales under “Judges’ Rules” relating to the detention and interview of suspects.¹⁹¹

These restrictions aided the police in obtaining confessions and made it more difficult to substantiate claims of abuse, given lengthy periods that detainees were held incommunicado. Attempts to challenge the denial of immediate access to solicitors failed in the courts.¹⁹² Similarly, the House of Lords denied there was a common law right for suspects to be accompanied by solicitors during police interviews, finding that distinct treatment of terrorist suspects was “part of a deliberate legislative policy.”¹⁹³ However, Brice Dickson has questioned the House of Lords’ conclusion on the legislative regime, given that solicitor presence during interviews was not addressed during debates on the enactment of the EPA 1996 and given that the legislation does not expressly prohibit such access.¹⁹⁴ The Divisional Court of Northern Ireland also concluded that the Chief Constable of the RUC was authorized to refuse solicitor presence during interviews, in an opinion Dickson identified as “the epitome of how deferential, even as recently as the mid-1990s, courts in Northern Ireland could be to police and government anti-terrorism policies.”¹⁹⁵

C. *The Admissibility of Confessions*

Rules on admissibility of confessions were also distinct in the counterterrorism realm, a legislative acknowledgment that rougher treatment of these suspects was acceptable and should not prevent the use of confessions at trial.¹⁹⁶ A confession would only be excluded under the EPAs if the accused provided prima facie evidence that he was subjected to torture or inhuman or degrading treatment, and the prosecution was not able to prove that the confession was not obtained in that manner.¹⁹⁷ In contrast, in ordinary cases the admissibility of confession evidence depended (until 1989)¹⁹⁸ on whether it was “voluntary,” meaning “it ha[d] not been obtained from [the accused] by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.”¹⁹⁹ The gap between these stan-

191. Practice Note (Judges’ Rules), [1964] 1 W.L.R. 152 (Eng.) (introduced in Northern Ireland in 1976); cf. PACE 1984, § 58; PACE (NI), art. 59.

192. DICKSON, *supra* note 33, at 174–82; see, e.g., R v. Harper, [1990] N.I. 28 (NICA); R v. Chief Constable, *ex parte* McKenna, [1992] N.I. 116 (Q.B.); Cullen v. Chief Constable of the RUC, [2003] UKHL 39, [2003] 1 W.L.R. 1763 (appeal taken from N. Ir.).

193. R v. Chief Constable of the RUC, *ex parte* Begley, [1997] UKHL 39, [1997] 1 W.L.R. 1475, [1481]–[1482] (appeal taken from N. Ir.).

194. DICKSON, *supra* note 33, at 184.

195. *Id.* at 182–83 (discussing Re Russell’s Application, [1996] N.I. 310 (Q.B.)).

196. Walsh, *supra* note 106, 37–39 (discussing EPA 1978, § 8, as amended by the EPA 1987).

197. See EPA 1973, § 6; EPA 1978, § 8. After 1996, the EPA 1996 also required exclusion if the accused had been subjected to violence or the threat of violence. See EPA 1996, § 12.

198. Under the PACE 1984, which replaced the Judges’ Rules, confessions should be excluded if obtained by oppression or in consequence of anything said or done that renders them unreliable. PACE 1984, § 76; PACE (NI), art. 74.

199. Practice Note (Judges’ Rules), [1964] 1 W.L.R. 152, 153 (Eng.).

dards allowed, in counterterrorism cases, for conduct that pressured suspects to confess. A certain degree of abuse, coercion, and manipulation would not prevent the use of a statement at trial.²⁰⁰

The courts were responsible for determining what conduct reached the level of torture or inhuman or degrading treatment.²⁰¹ In *R v. McCormick*, a case that became known among some in the legal profession as the “torturers’ charter,”²⁰² the applicable EPA was interpreted to allow “a moderate degree of physical maltreatment.”²⁰³ The NICA subsequently doubted whether it could be satisfied that a confession was obtained without torture or inhuman or degrading treatment if physical violence was employed during interrogation, and it protected courts’ residual discretionary power to exclude statements induced by violence or impropriety.²⁰⁴ But guidance on the use of judicial discretion was ambiguous. Whether a court should exclude evidence depended on the particular facts of each case and was appropriate only where failure to do so might “create injustice” by admitting a statement that, although admissible under the applicable EPA, was suspect because of the method by which it was obtained.²⁰⁵ *McCormick* also held, however, that the discretion could not be used to defeat the intention of Parliament under the EPA, which was to relax admissibility rules in these cases.²⁰⁶ This case law provided very little guidance to police,²⁰⁷ and the courts in practice gave the RUC significant latitude in carrying out coercive interrogations.²⁰⁸

Cases in which confessions were challenged turned on whether the courts determined evidence to be sufficient to support a claim of abuse or misconduct.²⁰⁹ Once the defense raised the issue, the prosecution had the burden of proving beyond a reasonable doubt that a confession had not been obtained in the prohibited manner.²¹⁰ If police denied the claim, a defendant was required to substantiate it with some evidence, raising a question about whether in practice the courts required prosecutors to discharge the bur-

200. William E. Hellerstein et al., *Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York*, 43 REC. ASS’N B. CITY N.Y. 110, 169–71 (1988), available at <http://www.nycbar.org/pdf/report/88083%20-%20Criminal%20Justice%20and%20Human%20Rights%20in%20Ireland.pdf>, archived at <http://perma.cc/7B3H-5SN8>.

201. See, e.g., EPA 1978, § 8(1)(b), (2).

202. TAYLOR, *supra* note 24, 77.

203. [1977] N.I. 105, 111, *appeal allowed*, [1984] N.I. 50 (NICA).

204. *R v. O’Halloran*, [1979] N.I. 45 (NICA).

205. *McCormick*, [1977] N.I. 105, 114–15.

206. *Id.* at 107–08, 114–15.

207. BENNETT, *supra* note 159, ¶ 84.

208. See COBAIN, *supra* note 24, at 190–200.

209. See BOYLE ET AL., *supra* note 139, at 48 (finding that contested confessions were excluded mainly when the judge was satisfied, based on medical evidence, of physical maltreatment); Walsh, *supra* note 106, at 40–42 (providing examples of the evidence required to exclude a confession).

210. See, e.g., EPA 1978, § 8(2); BENNETT, *supra* note 159, ¶ 78 (citing *R v. Hetherington*, [1975] N.I. 164, (Belfast City Comm’n) 166–68, which interpreted the equivalent provision, section 6(2), of the EPA 1973).

den.²¹¹ Limited information was available about what took place in interrogation suites, aside from police notes and the testimony of police officers and suspects; in many cases there was no corroborating evidence except when medical officers had documented injuries after an interrogation.²¹² Evidence from silent, closed-circuit television monitoring was not always available at trial.²¹³

In practice, confessions were the main form of evidence used against defendants under emergency legislation,²¹⁴ and evidence provided by police was preferred over that of defendants and even medical officers.²¹⁵ According to Dermot Walsh, the judiciary “effectively abdicated its control over the criminal justice process to the RUC”;²¹⁶ others concluded it was futile for defendants to challenge the admissibility of confessions.²¹⁷

D. Non-Jury Trials

Trial without jury for scheduled offenses was introduced in the EPA 1973²¹⁸ after a government-commissioned inquiry recommended the procedure to prevent biased verdicts and intimidation of jurors by members of paramilitary organizations.²¹⁹ In addition to their traditional powers, judges had the authority to make findings that would otherwise be made by a jury.²²⁰ Decisions on the admissibility of confessions were particularly sig-

211. Stephen Livingstone, *And Justice for All? The Judiciary and the Legal Profession in Transition*, in HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 131, 145–46 (Colin Harvey ed., 2001) (noting the reluctance of judges in the early 1980s to exclude confessions in which verbal abuse and threats were alleged); Walsh, *supra* note 106, at 40–42.

212. See, e.g., BENNETT, *supra* note 159, ¶¶ 344–47 (addressing these issues in the context of complaint investigations); JACKSON & DORAN, *supra* note 18, at 218–19 (explaining the challenges judges faced in determining whether to believe defendants or police officers).

213. See *supra* note 182.

214. The Director of Public Prosecutions estimated that in the first six months of 1978 the prosecution depended wholly or mainly on admissions of the accused in 75–80% of scheduled offense cases. BENNETT, *supra* note 159, ¶ 30. Confessions were involved in 89% of the cases in Walsh’s 1980–1981 study, WALSH, *supra* note 25, at 72, and the Committee on the Administration of Justice estimated a similar figure in 1990, HELSINKI WATCH, *supra* note 146, at 30–31.

215. See, e.g., Walsh, *supra* note 106, at 40; cases cited *infra* notes 292–96, 304. But see JACKSON & DORAN, *supra* note 18, at 218–20 (identifying a tendency to judge the credibility of defendants’ allegations based on judges’ ideas of what most people would do in the circumstances).

216. Walsh, *supra* note 106, at 40–42, 44.

217. See John Jackson, *Many Years on in Northern Ireland: The Diplock Legacy*, 60 N.I.L.Q. 213, 221 (2009); Clive Walker, *The Commodity of Justice in States of Emergency*, 50 N.I.L.Q. 164 (1999).

218. See EPA 1973, § 2. This Article does not assess the overall fairness of the non-jury system as compared to the jury system but instead focuses on practices and outcomes of the non-jury system. For a comparative approach, see STEVEN C. GREER & ANTONY WHITE, *ABOLISHING THE DIPLOCK COURTS: THE CASE FOR RESTORING JURY TRIAL TO SCHEDULED OFFENCES IN NORTHERN IRELAND* ch. 2 (1986); DICKSON, *supra* note 33, at 205–09; JACKSON & DORAN, *supra* note 18.

219. LORD DIPLOCK, *REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND*, 1972, Cm. 5185, ¶¶ 7(g), 35–41. Non-jury courts were subsequently known as “Diplock courts” in Northern Ireland. Interestingly, the Commission was particularly concerned with perverse acquittals of loyalist paramilitary members, given the disproportionately Protestant jury pool. *Id.*

220. See, e.g., EPA 1978, § 7(2).

nificant in terrorism cases, given the emphasis on confession evidence discussed above, and considering that judges determined both admissibility and guilt. Consequently, non-jury courts exercised greater power over the parties than they did in jury trials.²²¹ When evidence was deemed inadmissible, judges had discretion to stop the trial and restart it before a different judge, but this discretion was not often used.²²² Instead, the judge who had made preliminary evidentiary determinations was meant to disregard knowledge about excluded evidence when deciding guilt.²²³ Similarly, courts were often privy to other inadmissible evidence, such as the prior record of the accused.²²⁴ When confessions were admitted, the accused had no opportunity to have different individuals make new findings about credibility and the value of the evidence, a procedure that is routine in jury cases. A defendant inevitably encountered difficulty convincing a judge who had admitted evidence that little weight should be attached to it.²²⁵ In cases discussed in Part IV, determinations of admissibility and guilt were interlinked and consistent, indicating that courts relied on inquiries into the former in determining the latter.

Throughout the conflict, acquittal rates were lower in scheduled offense cases than in ordinary criminal cases, and they decreased considerably in the first six years of non-jury trials, raising questions about whether judges had become hardened in terrorism cases and were more inclined to accept prosecution evidence over that of the defense.²²⁶ However, as a variety of factors could have influenced these acquittal rates, such as the type and quality of cases brought by prosecutors, none of the studies into the non-jury system conclusively affirm the hardening theory.²²⁷ Success rates on appeal were also significantly lower than in ordinary cases; for appeals determined between 1987 and 1993, the overall success rate was 16% in non-jury cases and 32% in jury cases.²²⁸ These numbers do not invite clear conclusions about the non-jury system, but certain features of the appellate system raise concerns about whether cases were sufficiently scrutinized on review.²²⁹ First, many trial judges in non-jury cases also served on the appellate court.²³⁰ Given the overlap, trial judges were intimately aware of the expectations of the NICA, and appellate judges were not necessarily a step re-

221. JACKSON & DORAN, *supra* note 18, at 284.

222. WALSH, *supra* note 25, at 99.

223. Greer & White, *A Return to Trial by Jury*, in JUSTICE UNDER FIRE, *supra* note 32, at 47, 52–53.

224. *Id.*

225. GREER & WHITE, *supra* note 218, at 17.

226. JACKSON & DORAN, *supra* note 18, at 30, 33–35.

227. DICKSON, *supra* note 33, at 208–09; *see, e.g.*, JACKSON & DORAN, *supra* note 18, at 238–40, 290–91.

228. JACKSON & DORAN, *supra* note 18, at 281.

229. For further analysis of non-jury courts, *see id.*; GREER & WHITE, *supra* note 218; Brice Dickson, *Northern Ireland's Troubles and the Judges*, in NORTHERN IRELAND: POLITICS AND THE CONSTITUTION 130 (Brigid Hadfield ed., 1992); Jackson, *supra* note 217, at 215–25; Walker, *supra* note 217, at 167–68.

230. JACKSON & DORAN, *supra* note 18, at 282.

moved from the trial system. Second, trial judges tended to conform to norms they believed the NICA would uphold.²³¹ The judgments were therefore more difficult to challenge on appeal, although it is often not clear if they were unassailable in substance or merely in form. Third, the NICA deferred to trial courts' findings of fact—in line with the approach taken in jury trials—rather than adopting a more interventionist role that would have allowed the court to “fulfill the tasks of providing a forum of accountability for the trial judge and of acting as a residual protector of the accused's interests in the absence of the jury.”²³²

In terms of political consequences, the non-jury system “fueled the sense of injustice which . . . sustained the . . . conflict.”²³³ Graham Ellison and Jim Smyth consider that the judiciary was “relatively untainted by the controversy over ill-treatment under interrogation” as compared to the RUC.²³⁴ But to those processed at the time, and in the view of many in the broader community, the judiciary overlooked mistreatment and were biased against terrorism suspects.²³⁵ The perception that the judiciary was key to the government's criminalization strategy, reinforcing historic views about the justice system in Northern Ireland, was held by republican paramilitaries, who responded in violent²³⁶ and nonviolent ways.²³⁷ The non-jury courts damaged the integrity of the criminal justice system on a much wider scale²³⁸ and were criticized for violating central tenets of common law criminal procedure.²³⁹ The justice system was viewed by a significant portion of the population as “a key part of [the British state's] armoury” in the

231. *Id.*

232. *Id.* at 282–85.

233. GREER & WHITE, *supra* note 218, at 80.

234. ELLISON & SMYTH, *supra* note 104, at 112.

235. Special Rapporteur on the Independence of Judges and Lawyers, *Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland*, ¶ 83 & n.32, U.N. Doc. E/CN.4/1998/39/Add.4 (Mar. 5, 1998) (by Param Cumaraswamy) [hereinafter Cumaraswamy] (receiving evidence that almost half of the Catholic population in Northern Ireland viewed the administration of justice in non-jury cases as not being independent and impartial).

236. Judges, along with others viewed as supporting the British state in Ireland, were considered by the IRA to be “legitimate targets” during the conflict. TIM PAT COOGAN, *THE IRA* 379–80 (2002); GUELKE, *supra* note 44, at 114. Five judges were murdered and several others survived assassination attempts. Livingstone, *supra* note 211, at 144; *see also* PETER CORY, *CORY COLLUSION INQUIRY REPORT: LORD JUSTICE GIBSON AND LADY GIBSON* (2003) (giving background information on the killing of one judge and his wife); *Mary McCardle – Mary Travers Murder “a Tragic Mistake”*, BBC NEWS (June 2, 2011, 2:33 AM), <http://www.bbc.co.uk/news/uk-northern-ireland-13625007>, archived at <http://perma.law.harvard.edu/OBQoU1Es4CQ> (discussing another judge's daughter who was killed during an attempt on the judge's life).

237. This included, for example, refusing to recognize the court, particularly in the 1970s. On resistance through criminal processes, *see* Kieran McEvoy, *Law, Struggle, and Political Transformation in Northern Ireland*, 27 *J.L. & Soc'y* 542, 546–53 (2000).

238. Cumaraswamy, *supra* note 235.

239. *See* LORD GIFFORD, *SUPERGRASSES: THE USE OF ACCOMPLICE EVIDENCE IN NORTHERN IRELAND* 30–32 (1984); GREER & WHITE, *supra* note 218. *But cf.* Hellerstein et al., *supra* note 200, at 189–94 (finding that the non-jury system conformed with the requirements of international human rights law even if it diverged from standard norms of British justice, but concluding that it should be modified and used less frequently).

conflict²⁴⁰ despite claims by dominant voices within the legal community, including members of the judiciary, that the courts were neutral and working to uphold the rule of law.²⁴¹

IV. THE NORTHERN IRELAND MISCARRIAGE OF JUSTICE CASES

Until the recent spate of cases referred from the CCRC, debates surrounding the non-jury system did not focus on miscarriages of justice, and “[a] myth has thus been constructed that Northern Ireland has had very few, if any, such miscarriages.”²⁴² That perception overlooked campaigns and legal challenges in individual cases²⁴³ and human rights abuses in police custody,²⁴⁴ as well as the many reasons that claims were not pursued or were not successful. The cases referred to the NICA from the CCRC²⁴⁵ provide evidence of conflict-era bias against terrorism suspects and defendants in the criminal justice system, including severe treatment, partiality toward police evidence at trial, and insensitivity to the vulnerabilities of alleged terrorists. Stronger procedural safeguards would arguably have minimized the consequences of such treatment. The modest number of overturned convictions, as a proportion of the total cases processed through non-jury

240. Kieran McEvoy, *What Did the Lawyers Do During the “War”? Neutrality, Conflict and the Culture of Quietism*, 74 MOD. L. REV. 350, 379–82 (2011). Aside from the conditions of conflict, it has been convincingly argued that U.K. judges “operate as an essential part of the democratic machinery of administration.” J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 291 (5th ed. 1997).

241. See *R v. Gibney*, (1983) 13 N.I.J.B. 7 (NICC) [8] (Lord Lowry, L.C.J.) (quoted in Jackson, *supra* note 217, at 221); Cumaraswamy, *supra* note 235, ¶ 76; see also Dickson, *supra* note 229, at 136–37; WHITTY ET AL., *supra* note 28, at 156; Livingstone, *supra* note 211, at 144–45, 152–53.

242. Brice Dickson, *Miscarriages of Justice in Northern Ireland*, in *MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR* 287, 287 (Clive Walker & Keir Starmer eds., 1999).

243. See JACKSON & DORAN, *supra* note 18, at 29, 50–51; Dickson, *supra* note 229.

244. WHITTY ET AL., *supra* note 28, at 148–49.

245. Conflict-related referrals to the NICA in which judgments have been issued (representing thirty-one applicants) are: *R v. Gorman*, LEXIS (NICA Oct. 29, 1999); *R v. Magee*, [2001] N.I. 217 (NICA); *R v. Walsh*, [2002] NICA (Crim) 1, *re-opened*, 2007 WL 4368155 (NICA Jan. 24, 2007), *appeal allowed*, [2010] NICA (Crim) 7; *R v. Green*, [2002] NICA (Crim) 14; *R v. Boyle* (NICA Apr. 29, 2003) (no transcript available); *R v. Latimer*, [2004] NICA (Crim) 3; *R v. Hinds*, [2005] NICA (Crim) 36; *R v. Adams*, [2006] NICA (Crim) 6; *R v. Mulholland*, [2006] NICA (Crim) 32; *R v. McCartney*, [2007] NICA (Crim) 10; *R v. McMenamin*, [2007] NICA (Crim) 22; *R v. Morrison*, [2009] NICA (Crim) 1; *R v. Fitzpatrick*, [2009] NICA (Crim) 60; *R v. McCourt*, [2010] NICA (Crim) 6; *R v. Brown*, [2012] NICA (Crim) 14; *R v. Holden*, [2012] NICA (Crim) 26; *R v. Livingstone*, [2013] NICA (Crim) 33. The four non-conflict-related referrals are *R v. Gordon*, [2000] NICA (Crim) 28; *R v. O’Doherty*, [2003] 1 Crim. App. 5; *R v. K (a minor)*, (NICA, May 4, 2010) (unreported); *R v. Chakwane*, [2013] NICA (Crim) 24. Judgments have not been issued for three conflict-related referrals: James Martin and Veronica Ryan (both referred Sept. 23, 2011) and Martin McCauley (referred Jan. 25, 2013). CCRC, *ANNUAL REPORT AND ACCOUNTS 2011/12*, at 16, 64 (2012) [hereinafter CCRC, 2011/12]; CCRC, *ANNUAL REPORT AND ACCOUNTS 2012/13*, at 16, 65 (2013) [hereinafter CCRC, 2012/13]. In regard to Martin and Ryan, who had separate convictions quashed along with Daniel Morrison in 2009, the Public Prosecution Service now accepts that their guilty verdicts for false imprisonment should be overturned. The NICA reserved judgment in the case pending a decision on the Service’s application for the judgment to remain closed. See *Couple Want IRA Conviction Quash Decision Made Public*, BBC NEWS (Apr. 18, 2013, 1:42 PM), <http://www.bbc.co.uk/news/uk-northern-ireland-22208527>, archived at <http://perma.law.harvard.edu/0732dQtNa2Q>.

courts, cannot adequately indicate the pervasiveness of abuses and miscarriages of justice. But it is not sustainable to argue that the non-jury system in Northern Ireland “worked well” because there are few proven miscarriages of justice from the time.²⁴⁶ This section provides an overview of CCRC referrals and an analysis of the NICA judgments.

In this Article, the term “miscarriage of justice” refers to convictions that an appellate court has determined to be unsafe²⁴⁷ after a referral from the CCRC or would do so if the case were before them. These cases are not limited to those who are innocent,²⁴⁸ but arguably the NICA jurisprudence excludes cases that should constitute miscarriages of justice.²⁴⁹ Indeed, the case law captures some but not all convictions in which contemporary standards of fairness were violated and some but not all cases in which convictions were obtained despite mistreatment or abuse of process.²⁵⁰

A. CCRC Referrals: A Limited Sample

The CCRC referred thirty-eight cases to the NICA between its establishment in 1997 and March 2013.²⁵¹ Thirty-four of the cases were conflict-related, and all of those except *R v. Holden*²⁵² had been heard without a jury. At least one of the cases involved ordinary crime but is designated as conflict-related because it was processed under emergency legislation.²⁵³ Each

246. Jill Molloy, *Trial on Indictment Without a Jury*, 73 J. CRIM. L. 466, 469 (2009).

247. In Northern Ireland, appeals against conviction are successful only when the NICA “thinks that the conviction is unsafe”; in such circumstances the NICA must quash the conviction. Criminal Appeal (Northern Ireland) Act, 1980, c. 47, §§ 1–2, *amended by* Criminal Appeal (Northern Ireland) Act, 1995, c. 35, § 2. Similar rules govern criminal appeals in England and Wales. *See* Criminal Appeal Act, 1968, c. 19, § 2 (as amended). In most cases, a determination that a conviction is unsafe is made because the appellate court is in doubt about the defendant’s guilt as a result of an error or a procedural irregularity made at or before trial. *See, e.g.,* *R v. Davis*, [2001] 1 Crim. App. 8 (EWCA) [50]–[56] (finding errors at trial relevant to a determination of safety irrespective of guilt but noting that usually the appellate court inquiry focuses on doubt about guilt). A court may also quash a conviction in more ambiguous circumstances when it has a lurking doubt about whether an injustice has occurred. *See id.* [55]; *infra* note 278. In jury cases, the ground of appeal must raise a doubt about the safety of the jury’s verdict. *See R v. Bieber*, [2006] All E.R. (D) 276 (EWCA).

248. Indeed, a court’s jurisdiction to find a conviction unsafe includes circumstances in which the prosecution should not have taken place (and is therefore considered an abuse of process), even where there is certainty about guilt. *See R v. Mullen*, [2000] Q.B. 520 (EWCA) 535–36, 540 (finding that the appellant had been unlawfully deported from Zimbabwe to England and that his subsequent prosecution in England was therefore unlawful); *see also R v. Davis*, [2001] 1 Crim. App. 8 (EWCA) [56], [95] (the quashing of a conviction was “not a finding of innocence, far from it”).

249. For significantly wider definitions of miscarriages of justice, see MICHAEL NAUGHTON, *RETHINKING MISCARRIAGES OF JUSTICE: BEYOND THE TIP OF THE ICEBERG* (2d ed. 2012); Dickson, *supra* note 229.

250. *See* Hannah Quirk & Marny Requa, *The Supreme Court on Compensation for Miscarriages of Justice: Is It Better That Ten Innocents Are Denied Compensation Than One Guilty Person Receives It?*, 75 MOD. L. REV. 387, 400 (2012) (discussing compensation for miscarriages of justice in the United Kingdom and arguing that state abuse requires an adequate response in the form of compensation to victims).

251. *See* sources cited *supra* note 245 and accompanying text.

252. [2012] NICA (Crim) 26. All other conflict-related referrals listed in *supra* note 245 were heard without a jury.

253. *See R v. Adams*, [2006] NICA (Crim) 6.

of the non-conflict convictions and twenty-eight of the conflict-related convictions have been quashed, with three cases still pending—a successful referral rate of 91% in all concluded cases and 90% in conflict-related cases. This can be compared to the CCRC’s 70% average for U.K.-wide referrals.²⁵⁴ Through March 2013, the CCRC has referred 3.5% of the total applications it received,²⁵⁵ with a higher referral rate in Northern Irish cases (11% through December 2012).²⁵⁶ The vast majority of applications to the CCRC from Northern Ireland have been in relation to scheduled offenses (approximately 250 of 335).²⁵⁷

This section considers three of the many hurdles that must be passed before a case is formally considered a miscarriage of justice. At each stage cases are filtered. An applicant must first choose to pursue exoneration and sustain the claim over time; the interest and ability to do so varies with the individual. The applicant must also be aware of the CCRC process. The legal tests relied on by the CCRC in referring cases to the NICA, and by the NICA in quashing convictions, further narrow the pool and potentially exclude miscarriages of justice.

First, after a criminal conviction and an unsuccessful appeal (or when the time to appeal has expired), many individuals and family members do not pursue applications for innumerable personal reasons. Those who do persevere are an “extraordinary breed”²⁵⁸ given the effort involved. The passage of time, the terms of the Good Friday Agreement, and political and social circumstances are additional deterrents in the Northern Ireland cases. Conflict-era convictions spanned the 1970s, 1980s, and 1990s,²⁵⁹ and the length of time between conviction and the establishment of the CCRC likely reduced applications. Moreover, older cases require more time to investigate,²⁶⁰ and applicants and their families must remain involved during the process. The average time between the CCRC receipt of an application and the issuing of a decision is approximately eighteen months in cases in

254. CCRC, 2012/13, *supra* note 245, at 11.

255. *Id.*

256. Email from Justin Hawkins, Head of Comm’n, CCRC (Dec. 5, 2012) (on file with author).

257. *Id.* It was reported that hundreds of individuals convicted under emergency legislation planned to submit applications to the CCRC. See Ian Cobain, *Hundreds of Northern Ireland “Terrorists” Allege Police Torture*, GUARDIAN (Oct. 11, 2010), <http://www.guardian.co.uk/uk/2010/oct/11/northern-ireland-terrorists-miscarriages-justice>, archived at perma.law.harvard.edu/0tE7t7n5MTF. Twenty-eight youth confession cases were pending before the CCRC prior to the May 2012 NICA decision in *R v. Brown*, [2012] NICA (Crim) 14. CCRC, 2011/12, *supra* note 245, at 13. Only one case was referred after the *Brown* decision; it was not a youth confession case, but those that were pending in 2012 may still be under investigation.

258. SURVIVING JUSTICE: AMERICA’S WRONGFULLY CONVICTED AND EXONERATED 9 (Lola Vollen & Dave Eggers eds., 2008).

259. Seventeen of the appellants in Northern Ireland conflict-related cases were convicted in the 1970s, seven in the 1980s, and ten in the early 1990s.

260. The CCRC has not reported an average time for Northern Ireland historic cases. It has noted that, in relation to conflict-related cases primarily from the 1970s and 1980s, the “review of such very old cases presents its own difficulties and involves the use of considerably greater resources than the review of more recent convictions.” CCRC, ANNUAL REPORT AND ACCOUNTS 2010/11 16 (2011).

which the applicant was at liberty.²⁶¹ Once referred to the NICA, the court has decided cases, on average, within approximately 17.5 months,²⁶² although one case was decided forty months after referral,²⁶³ and another conviction quashed (after initially being upheld) eight years later.²⁶⁴ With an estimated 15,000 republicans and between 5,000 and 10,000 loyalists imprisoned during the conflict,²⁶⁵ the vast majority completed their sentences before the Good Friday Agreement; 482 have been released subsequently under procedures established during those negotiations.²⁶⁶ Although ex-prisoners retain a criminal record and some are on license,²⁶⁷ these burdens are arguably less of a motivator to campaign for exoneration than is incarceration itself. Moreover, many in the republican community lacked confidence in the criminal justice system well into the post-conflict era, which likely affected their willingness to apply to the CCRC.²⁶⁸

Second, after the establishment of the CCRC, there was a lack of awareness of its mandate, particularly in Northern Ireland from which the CCRC received few applications.²⁶⁹ This issue was largely addressed through a public relations campaign by the CCRC, through high-profile cases,²⁷⁰ and through activism on the issue.²⁷¹ But the CCRC still acknowledges obsta-

261. This number refers to cases decided from March 2012 to March 2013 and is comprised of, first, an average of nine months from receipt of an application to its allocation to a case review manager for applicants at liberty and, second, an average of 37.6 weeks for a case to be reviewed. See CCRC, 2012/13, *supra* note 245, at 10–11.

262. This figure is an average of twenty-one cases representing thirty-five appellants, calculated by the author based on referral dates and NICA judgment dates.

263. See *R v. Brown*, [2012] NICA (Crim) 14; CCRC, 2012/13, *supra* note 245, at 66 (noting *Brown* was referred on Jan. 27, 2009).

264. See *R v. Walsh*, [2002] NICA (Crim) 1, *appeal allowed*, [2010] NICA (Crim) 7.

265. SHIRLOW & McEVoy, *supra* note 18.

266. See Northern Ireland (Sentences) Act, 1998, c. 35. Twenty-one of those were recalled. SENTENCE REVIEW COMM'RS, ANNUAL REPORT 2011/12 (2012).

267. See Northern Ireland (Sentences) Act, 1998, §§ 3–9; see also Clare D. Dwyer, *Risk, Politics and the Scientification of Political Judgment: Prisoner Release and Conflict Transformation in Northern Ireland*, 47 BRIT. J. CRIMINOLOGY 779, 787–94 (2007) (analyzing risk assessments of prisoners released under the terms of the Good Friday Agreement).

268. See MULCAHY, *supra* note 39, at 172, 183–86; Graham Ellison et al., *Responsible Participation, Community Engagement and Policing in Transitional Societies: Lessons from a Local Crime Survey in Northern Ireland*, 51 HOWARD J. CRIM. JUST. 488, 489, 493, 495 (2012).

269. See, e.g., CCRC, ANNUAL REPORT 2003–2004, at 43 (2004).

270. See *id.* at 54; CCRC, ANNUAL REPORT & ACCOUNTS 2004–2005, at 38 (2005). High-profile cases include those of Raymond McCartney and Danny Morrison. McCartney was an important republican figure and, from the late 1980s, leader of IRA prisoners in the Maze prison. KIERAN McEVoy, PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND: RESISTANCE, MANAGEMENT AND RELEASE 162 (2001); see also *Journalist and Politician Cleared of 1977 Murders*, IRISH NEWS (Feb. 17, 2007), http://www.nuzhound.com/articles/irish_news/arts2007/feb16_journalist_politician_cleared_1977_murder.php, archived at <http://perma.law.harvard.edu/09vTKRMr9Js>. Danny Morrison was a publicity director of Sinn Féin, the leading republican political party, during the conflict. Owen Bowcott, *Former Sinn Féin Director Danny Morrison Cleared*, GUARDIAN (Oct. 28, 2008), <http://www.theguardian.com/uk/2008/oct/24/danny-morrison-northern-ireland>, archived at <http://perma.law.harvard.edu/04B8dnyUzrL>.

271. The Irish Centre on Wrongful Convictions was established in 2012 as a resource for former prisoners seeking to have conflict-era convictions overturned, including those making submissions to the CCRC, and to investigate miscarriages of justice. IRISH CTR. ON WRONGFUL CONVICTIONS, <http://icwc.artisteer.net/> (last visited Mar. 18, 2014), archived at <http://perma.cc/GXA4-JU6J>.

cles to the pursuit of claims and has emphasized the use of legal representatives and support groups to increase the accessibility of the organization.²⁷² Before the establishment of the CCRC, those who were convicted could apply to the Secretary of State for Northern Ireland for an out-of-time referral to the appellate court.²⁷³ Those in scheduled offense cases were rarely successful, which likely deterred others from applying to the CCRC.²⁷⁴

Third, the standards governing referrals and appeals limit successful applications. The CCRC can only refer a case when it considers there to be a “real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.”²⁷⁵ This requires new evidence or a new legal argument not presented to the trial or appellate courts.²⁷⁶ In exceptional circumstances the CCRC has authority to refer cases even without new evidence or a new argument—for example, where it appears the court simply made a mistake.²⁷⁷ The CCRC has rarely used this power, just as appellate courts are reticent to quash convictions when there is a “lurking doubt” about the safety of a conviction but an error or procedural irregularity is not obvious.²⁷⁸ Except in exceptional circumstances, the applicant must have appealed the conviction.²⁷⁹ Here, the abnormality of counterterrorism justice is relevant. Defendants often did not appeal convictions for reasons such as republican political strategy, legal advice, or assumptions that appeals would be futile given judicial attitudes to defendants in terrorism cases.²⁸⁰

272. CCRC, 2011/12, *supra* note 245, at 6, 31–32.

273. *See* Criminal Appeal (Northern Ireland) Act, 1980, c. 47, § 14.

274. Of the CCRC-referred cases discussed in Part IV, at least two of those that were quashed had been the subject of failed applications to the Secretary of State. *See* R v. Green, [2002] NICA (Crim) 14; R v. Adams, [2006] NICA (Crim) 6. Clive Walker described the equivalent pre-CCRC process in England and Wales as “a ramshackle and secretive review by Home Office officials.” Clive Walker, *Miscarriages of Justice in Principle and Practice*, in *MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR*, *supra* note 242, at 31, 55.

275. Criminal Appeal Act, 1995, c. 35, § 13(1)(a).

276. *Id.* § 13(1)(b)(i).

277. *Id.* § 13(2); *see, e.g.*, R v. McCourt, [2010] NICA (Crim) 6 (trial judge failed to provide a judgment stating the reason for the conviction, a requirement under section 2(5) of the EPA 1973).

278. In relation to the lurking doubt principle and jury trials, *see generally* Pope v. The Queen, [2012] EWCA (Crim) 2241; R v. Cooper, [1969] 1 Q.B. 267 (EWCA). A conviction may be quashed even when an appellate court, while not convinced that an appellant is innocent, “is subject to some lurking doubt or uneasiness whether an injustice has been done.” R v. CCRC *ex parte* Pearson, [2000] 1 Crim. App. 141 (Q.B.) 146–47.

279. *See* Criminal Appeal Act, 1995, c. 35, § 13(1)(c), (2). The CCRC does make use of the proviso to this rule and refers cases that were not appealed. *See, e.g.*, R v. Gorman, LEXIS (NICA Oct. 29, 1999) (appeals abandoned); R v. Hindes, [2005] NICA (Crim) 36, [2]; R v. Mulholland, [2006] NICA (Crim) 32, [13] (two notices of appeal abandoned); R v. McMenamain, [2007] NICA (Crim) 22, [3]; R v. Brown, [2012] NICA (Crim) 14, [39].

280. *See, e.g.*, R v. Mulholland, [2006] NICA (Crim) 32, [13] (defendant abandoning appeal on legal advice); R v. Magee, [2001] N.I. 217 (NICA) [228]–[229], [231] (NICA concluding that, at the time of the defendant’s original trial in 1990 and under the EPA 1978 and the Northern Ireland (Emergency Provisions) Act, 1991, c. 24, the argument that a confession should be excluded on the basis of the conditions at Castlereagh in combination with the delay in legal advice would have failed); *see also* Hannah Quirk, *Don’t Mention the War: The Court of Appeal, the Criminal Cases Review Commission*

If referred, the NICA decides whether it considers the conviction to be unsafe. A violation of rules in force at the time or of contemporary standards of fairness will not necessarily result in a reversal.²⁸¹ The NICA has expressed skepticism about arguments not raised at trial or on appeal, notwithstanding that the vast majority of those convicted in non-jury courts did not appeal²⁸² and despite numerous rationales for such courses of action linked to the circumstances of conflict.²⁸³ Thus a strong argument for post-conflict review—the confession was fabricated or the result of ill treatment—may fail because it was not raised previously. The CCRC is de jure and de facto deferential, seeking to avoid referring cases that raise issues that did not succeed before the NICA in previous referrals or other cases. The real possibility test²⁸⁴ entrenches appellate court jurisprudence.²⁸⁵ As a result of recent NICA case law, applications can be rejected by the CCRC despite violations of past protections for defendants.²⁸⁶ The next section explores these issues through an analysis of decision making in conflict-related referrals.

B. *The NICA Judgments*

The referred cases, although a small census, confirm that during the conflict, the judiciary failed to recognize and respond to abuses of power and credible evidence of human rights violations perpetrated by security forces. The cases also demonstrate a persistently deferential approach in counterterrorism jurisprudence.²⁸⁷ In pre-1998 trials and appeals, the NICA favored conservative interpretations of the provisions of EPAs and PTAs, purport-

and *Dealing with the Past in Northern Ireland*, 76 MOD. L. REV. 949, 958–60 (2013) (noting the lack of significance of the appeal system in non-jury cases and potential reasons why a low percentage of those convicted of scheduled offenses appealed). On the non-recognition of courts more generally, see McEvoy, *supra* note 237, at 547–49.

281. See *Brown*, [2012] NICA (Crim) 14, [34], [39]; discussion *infra* Part IV.B.

282. See, e.g., *Brown*, [2012] NICA (Crim) 14, [39], [46]; GREER & WHITE, *supra* note 218, at 11.

283. See Quirk, *supra* note 280, at 958–60 (on lack of appeals); McEvoy, *supra* note 237, at 547–49, 552 (on refusing to recognize the court and challenge evidence).

284. Criminal Appeal Act, 1995, c. 35, § 13(1)(a).

285. In comparison, the Scottish CCRC refers cases when it is believed that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made. Criminal Procedure (Scotland) Act, 1995, c. 46, § 194C. On the one hand, the “miscarriage of justice” portion of the Scottish test has the potential to allow for a greater number of cases to be referred on a similar issue (as compared to the real possibility test) and, therefore, greater development of the law on criminal appeals. On the other, the Scottish CCRC has authority to determine when a referral is in the interests of justice, providing the body with discretion to refrain from referring cases. For an analysis of the work of the Scottish CCRC, see Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153, 1205, 1211–12 (2013).

286. See, e.g., *Brown*, [2012] NICA (Crim) 14, [18], [23], [39], [46] (finding violations of the Judges’ Rules, governing interrogation and detention would not have been a sufficient ground to exclude a confession under the EPA 1973, and determining that two convictions obtained in such a manner were not unsafe).

287. McColgan, *supra* note 11, at 196–200 (arguing that the judiciary did little to mitigate the impact of counterterrorism measures during the conflict).

edly to uphold the will of Parliament. Positivist decision making²⁸⁸ in scheduled offense cases was coupled with a trust in police evidence, which supports studies that have found significant barriers to challenging confessions in these cases at trial.²⁸⁹ In recent case law, the NICA has affirmed the approach taken by conflict-era courts, even when it has found that new evidence requires a conviction to be quashed.²⁹⁰

As background to the recent judgments, the cases provide a window into decision making during the conflict. Trial courts were required to issue reasoned, written judgments in non-jury cases, which allows for a more comprehensive evaluation of decision making than would be possible after jury trials.²⁹¹ These show that even with substantial evidence in their favor, and despite indications that widespread abuse was taking place in interrogation centers, defendants were not able to overcome police evidence.²⁹² For instance, in *R v. McCartney*, the testimony of a medical doctor supporting the defendant's claim of police assault was considered honest but disregarded because it was found to be "coloured by [the doctor's] belief" that the defendant had been ill-treated at Castlereagh.²⁹³ The defendant was portrayed as intelligent and ruthless, and defense witnesses who were allegedly assaulted on the same day at Castlereagh were found to be inventive or dishonest and prepared to inflict severe injuries on themselves, despite one having abdominal bruising considered by the same judge as unlikely to have been self-inflicted.²⁹⁴ The trial judge in *R v. McCaul* acknowledged that a sixteen-year-old defendant attended a special school and suffered from a mental handicap, but the trial judge relied on police evidence that the defendant had dictated five statements to them in a 4.5-hour interview that took place at night—his fifth interview totaling thirteen hours of questioning in a thirty-six-hour period.²⁹⁵ In *R v. Magee* the trial judge convicted the accused on confession evidence despite being aware that electrostatic detection apparatus ("ESDA") tests demonstrated police interview

288. On Northern Ireland legal culture more broadly, see McEvoy, *supra* note 240, at 381.

289. See, e.g., Jackson, *supra* note 217; Walker, *supra* note 217.

290. In particular, the jurisprudence upholds conflict-era interpretations of the EPAs and the scope of the judicial discretion to exclude confessions. See, e.g., Brown, [2012] NICA (Crim) 14, [12]–[18]; see also *infra* note 319 and accompanying text, discussing the NICA's reticence to reassess facts determined at trial except to the extent that new facts required it to do so.

291. See, e.g., EPA 1973, § 2(5).

292. See, e.g., *R v. McCartney*, [2007] NICA (Crim) 10, [34], [67]–[68] (discussing trial judgment); *R v. McCaul*, LEXIS (NICA, Sept. 12, 1980); *R v. Magee*, LEXIS (NICA, June 16, 1993), [18]–[20].

293. *R (Adams) v. Sec'y of State for Justice*, [2011] UKSC 18, [2012] 1 A.C. 48 (UKSC) [136] (quoting *McCartney* trial judgment in a related compensation case); *R v. McCartney*, [2007] NICA (Crim) 10, [35] (discussing conclusions of trial judge).

294. *McCartney*, [2007] NICA (Crim) 10, [34], [67]–[68].

295. LEXIS (NICA, Sept. 12, 1980) (dismissing appeal and discussing trial judgment); see also *R v. Brown*, [2012] NICA (Crim) 14, [51]–[53] (referring to trial judgment in *McCaul*).

notes had been altered.²⁹⁶ McCartney and McCaul were convicted in 1979, and Magee's original trial was in 1990. Each of the defendants appealed against conviction, and the appeals were dismissed by the NICA within a few years of the original trials.²⁹⁷ These convictions have now been quashed by the NICA after CCRC referrals.²⁹⁸

Similarly, *R v. Adams*²⁹⁹ and *R v. Mulholland*³⁰⁰ demonstrated a judicial preference for police evidence during the conflict. The trial court found Adams to be not believable, a decision upheld in an out-of-time appeal.³⁰¹ On review after referral from the CCRC, the NICA overturned the conviction, finding Adams was "abnormally suggestible" at the time of interrogation.³⁰² Likewise, the NICA now deems a number of teenagers convicted on the basis of confession evidence to have been potentially vulnerable.³⁰³ In *Mulholland*, one part of a written confession was relied on whereas another was rejected as possibly false.³⁰⁴ The results of ESDA tests were raised in an appeal against conviction in *R v. Latimer*, which was upheld despite acknowledgement that police officers had given false evidence at trial about the writing of notes and their authentication.³⁰⁵ *Latimer* is one of the few conflict-related CCRC-referred cases in which the conviction has been upheld.³⁰⁶ Although these judgments could reflect errors that might occur in any busy criminal justice system, collectively they appear to indicate a bias against defense evidence.

In some cases, legal advice was poor.³⁰⁷ For example, counsel advised and allowed a defendant in one case to plead guilty when he had been in a secure care home at the time of the offense, and counsel recommended after sentencing that he not appeal because he had received a "good result."³⁰⁸ In

296. LEXIS (NICA, June 16, 1993), [18]–[20] (dismissing appeal and discussing trial judgment after Dec. 21, 1990 conviction of appellant); *R v. Magee*, [2001] N.I. 217 (NICA) [225] (discussing trial judgment).

297. See *McCartney*, [2007] NICA (Crim) 10, [2]–[3]; *McCaul*, LEXIS (NICA, June 16, 1993), [3]–[4]; *Magee*, LEXIS (NICA, June 16, 1993), [1], [22].

298. *McCartney*, [2007] NICA (Crim) 10, [96]; *Brown*, [2012] NICA (Crim) 14, [54] (in relation to *McCaul*); *Magee*, [2001] N.I. 217 (NICA) [232].

299. [2006] NICA (Crim) 6, [11], [13] (reviewing trial judgment).

300. [2006] NICA (Crim) 32, [6]–[12] (reviewing trial judgments).

301. *Adams*, [2006] NICA (Crim) 6, [11] (referring to trial judgment).

302. *Id.* [22].

303. See *R v. Hinds*, [2005] NICA (Crim) 36, [42]–[43], [54]; see also *R v. Brown*, [2012] NICA (Crim) 14, [54] (in relation to *McCaul*). In regard to adult defendants, see *R v. Magee*, [2001] N.I. 217 (NICA) [231]–[232]; *R v. Green*, [2002] NICA (Crim) 14.

304. [2006] NICA (Crim) 32, [8], [11] (citing *ex tempore* and written trial judgments).

305. LEXIS, at *8, 16, 21, 28 (NICA, Jul. 29, 1992), [16], [21], [28], [47], [51]. For the court's conclusions on the co-appellants, see *id.* at *53; see also *R v. Latimer*, [2004] NICA (Crim) 3, [15]–[16] (discussing prior appeal judgment).

306. See *Latimer*, [2004] NICA (Crim) 3, [81].

307. See *R v. McMenamin*, [2007] NICA (Crim) 22, [13]–[14], [22]; *R v. Mulholland*, [2006] NICA (Crim) 32, [13], [15], [31]–[34]; see also *R v. Hinds*, [2005] NICA (Crim) 36, [39] (noting that appellants had been advised to plead guilty even though rules of detention and interrogation had been violated).

308. *McMenamin*, [2007] NICA (Crim) 22, [13]–[14], [22].

Mulholland, claims of physical abuse and police misconduct were not made that would have raised serious concerns about the reliability of the confessions.³⁰⁹

The current NICA has now reconsidered these convictions. Within the thirty-one conflict-related cases that have been decided, the NICA had doubts about the reliability of the convicted persons' confessions in twenty-six of the twenty-eight cases that were quashed. These cases point to police misconduct or failure to account for a suspect's vulnerability. Of the remaining two, one involved violation of Ministry of Defence orders by soldiers,³¹⁰ and, in the final case, the presiding judge had failed to issue a written judgment expressing reasons for conviction.³¹¹ No other conviction was quashed on the basis of errors made by judges or counsel. The NICA found that allegations of physical mistreatment raised a doubt about the safety of conviction in only three³¹² of the twelve cases in which they were raised.³¹³ In each of the three that were overturned, the accused supported his claims with evidence that other former detainees had lodged complaints against the same police officers.³¹⁴

Generally, the appellants put forward fresh evidence that had not been presented at trial or on an original appeal, such as evidence of expert witnesses who employed ESDA tests on police interview notes, or psychologists' opinions on mental conditions of the appellants. The success of the appeals depended largely on this new evidence.³¹⁵ At least three successful appeals, though, relied on new arguments rather than new evidence.³¹⁶

309. This is based on the multiple grounds of appeal relied on by *Mulholland* after referral from the CCRC, many of which could have been advanced after trial. *Mulholland* was advised not to appeal conviction. *Mulholland*, [2006] NICA (Crim) 32, [13], [15], [31]–[34]; *see also* *R v. Adams*, [2006] NICA (Crim) 6, [12], [22]–[26] (several issues not explored at trial contributed to a decision in 2006 that the conviction was not safe).

310. *R v. Holden*, [2012] NICA (Crim) 26.

311. *R v. McCourt*, [2010] NICA (Crim) 6.

312. *R v. McCartney*, [2007] NICA (Crim) 10, [96] (two cases determined together); *Mulholland*, [2006] NICA (Crim) 32, [47].

313. *See, e.g.*, *R v. Gorman*, LEXIS (NICA Oct. 29, 1999), [6]; *R v. Magee*, [2001] N.I. 217 (NICA) [231]; *R v. Hinds*, [2005] NICA (Crim) 36, [27]–[28]; *Mulholland*, [2006] NICA (Crim) 32, [47]; *McCartney*, [2007] NICA (Crim) 10, [96]; *McMenamin*, [2007] NICA (Crim) 22, [22]–[23]; *R v. Brown*, [2012] NICA (Crim) 14, [34] (McDonald), [39] (Brown), [44]–[45] (Wright). In other cases, such claims had been raised at original trials or on appeal but may not have been a ground of appeal after the CCRC referral. *See, e.g.*, *R v. Green*, [2002] NICA (Crim) 14; *Holden*, [2012] NICA (Crim) 26.

314. *McCartney*, [2007] NICA (Crim) 10, [96] (two cases determined together); *Mulholland*, [2006] NICA (Crim) 32, [47].

315. *See Gorman*, LEXIS (NICA Oct. 29, 1999); *R v. Walsh*, [2010] NICA (Crim) 7, [19], [24], [34], [35]; *Green*, [2002] NICA (Crim) 14; *Hinds*, [2005] NICA (Crim) 36, [42]–[45]; *R v. Adams*, [2006] NICA (Crim) 6, [3], [22]–[24]; *McCartney*, [2007] NICA (Crim) 10, [69]–[73]; *R v. Morrison*, [2009] NICA (Crim) 1, [1], [4]–[5]; *Holden*, [2012] NICA (Crim) 26, [14]–[18], [24]; *R v. Livingstone*, [2013] NICA 33, [8]–[18], [29]. In *R v. Latimer*, [2004] NICA (Crim) 3, [17], [77], the appeal failed despite new evidence, and in *Mulholland*, [2006] NICA (Crim) 32, [15(3)], [47], the appeal succeeded on the basis of the new evidence in conjunction with new arguments related to violations of the Judges' Rules.

316. *See Magee*, [2001] N.I. 217 (NICA) [228]–[229]; *McMenamin*, [2007] NICA (Crim) 22, [22]; *Brown*, [2012] NICA (Crim) 14, [34] (McDonald); *see also* *R v. Fitzpatrick*, [2009] NICA (Crim) 60, [1]

Only in the case of McCaul did the NICA reconsider the findings of fact by the trial judge without new evidence or a new argument,³¹⁷ on the basis of more recent case law regarding the suggestibility of mentally handicapped young people.³¹⁸ The court's reticence to reassess the facts or disturb the trial court's view that police evidence was reliable, except to the extent that new evidence required such a reassessment, suggests the court believed issues raised at trial or on appeal were adequately addressed.³¹⁹ This belief is significant because of the NICA's acknowledgement that it has authority to reexamine the evidence given at trial when considering the safety of a conviction.³²⁰

The onus is on applicants to raise issues based on facts not considered by the trial courts; arguments based on unfairness are otherwise unlikely to succeed.³²¹ The NICA has viewed appellants' cases as weaker if they did not challenge confession evidence at trial or on an initial appeal,³²² and the circumstances of conflict have not been relied on to account for failures to appeal. The court's "generally cautious approach" to non-jury cases, identified during the conflict, has continued.³²³

C. *Unfair But Not Unsafe?*

Although a high percentage of cases referred from the CCRC have been quashed, the bases of NICA decisions limit prospects for future appli-

(noting appellants pled guilty at trial). In relation to Brown and Wright, appeals on the basis of new arguments were unsuccessful. *Brown*, [2012] NICA (Crim) 14, [38]–[39], [44]–[46].

317. The issue of whether McCaul's confession was admissible, given his mental condition, was raised at trial and in an appeal that was dismissed in 1980. *R v. McCaul*, LEXIS (NICA, Sept. 12, 1980); *Brown*, [2012] NICA (Crim) 14, [15] (discussing earlier NICA consideration of McCaul's conviction).

318. See *Brown*, [2012] NICA (Crim) 14, [54] (citing *R v. Hussain*, [2005] EWCA (Crim), [31]).

319. In most cases the court indicated that it had a "significant sense of unease" about the verdicts, which has been interpreted as the court being more willing to rely on the lurking doubt doctrine than is the England and Wales Court of Appeal. See Quirk, *supra* note 280, at 965–66. Nonetheless the NICA decisions generally depended on new evidence raising such a doubt rather than considering safety by reference to the evidence presented at trial alone. See *supra* note 315.

320. See *R v. Pollock*, [2004] NICA (Crim) 34, *cited in R v. Walsh*, [2010] NICA (Crim) 9, [32] and *Brown*, [2012] NICA (Crim) 14, [32]; see also *R v. McCourt*, [2010] NICA (Crim) 6, [6] (overturning conviction because it was unable to review the judge's verdict regarding "serious" disputed factual matters).

321. In *R v. Mulbolland*, [2006] NICA (Crim) 32, [44]–[48], and *Fitzpatrick*, [2009] NICA (Crim) 60, [3]–[4], the court accepted new arguments regarding violations of rules of detention and interrogation, but such an approach was rejected in *Brown*, [2012] NICA (Crim) 14, [38]–[39], [44]–[46]. *R v. Magee*, [2001] N.I. 217 (NICA) [231]–[232], which considered the conditions of detention in holding that the conviction was unsafe, is exceptional in that the court took into account a ruling against the United Kingdom by the ECtHR in the appellant's case. See *infra* text accompanying note 363. In *Magee*, [2001] N.I. 217 (NICA) [229], the NICA also considered that the HRA applied retrospectively, a determination that has since been rejected. See *infra* note 355. Successful cases on the basis of new arguments now seem to depend on defendants having admitted to crimes they could not have committed. See *Brown* [2012] NICA 14, [34] (McDonald); see also *McMenamin*, [2007] NICA (Crim) 22, [24].

322. See *Brown*, [2012] NICA (Crim) 14, [39], [46] (*Brown*, *Wright*).

323. See JACKSON & DORAN, *supra* note 18, at 284.

cants.³²⁴ This is most apparent in juvenile confession cases. The leading decision, involving four joined appeals, found that breaches of the Judges' Rules do not necessarily render a conviction unsafe,³²⁵ and that evidence of abuse against others by interviewing police officers is not necessarily determinative.³²⁶ Each of the four applicants (Peter McDonald, James Brown, Eric Wright, and Stephen McCaul) was convicted on the basis of confession evidence; each was aged fifteen or sixteen when arrested and interviewed without access to counsel and without an appropriate adult present.³²⁷ The convictions of Brown and Wright were upheld; those of McDonald and McCaul were quashed.³²⁸ With regard to Brown and Wright, the NICA found that the Judges' Rules relating to interrogation had been breached, but the NICA further found that there was no independent evidence to support their allegations of mistreatment and it noted that their confessions had not been challenged at trial.³²⁹ The court defended these results by emphasizing that, at the time of the trials, breaches of the Judges' Rules alone did not render confessions inadmissible.³³⁰ In non-terrorism cases today, violations of PACE 1984 provisions and police codes of conduct do not always result in the exclusion of statements but they are carefully scrutinized by appellate courts.³³¹ Moreover, access to a solicitor while a defendant is in police custody is considered to be "one of the most important and fundamental rights of the citizen" and denial of such access can be a sufficient basis for quashing a conviction.³³²

In cases with substantial delay between conviction and appeal and a change in law in the interim, the NICA seeks to adhere to the approach of the Court of Appeal of England and Wales ("EWCA"),³³³ which has held

324. The cases generally indicate that the NICA was initially resistant to applications but had become more accepting of them by the late 2000s. *Brown*, [2012] NICA (Crim) 14, however, is more restrictive to future applicants, *see id.* [19], [23], [39], [46] (the application of standards identified by the NICA to applicants Brown and Wright).

325. *Brown*, [2012] NICA (Crim) 14, [34], [39].

326. *Id.* [30], [34] (acknowledging complaints made by other detainees against officers who interviewed appellant McDonald but basing decision on other grounds).

327. *Id.* [1].

328. *Id.* [34], [39], [46], [54].

329. *Id.* [1], [39], [45]–[46].

330. *Id.* [18].

331. PACE 1984, §§ 76, 78(1); PACE (NI), arts. 74, 76(1); *R v. Walsh*, (1990) 91 Crim. App. 161 (EWCA) [163]; *see also* *R v. Alladice*, (1988) 87 Crim. App. 380 (EWCA). *But cf.* *R v. Keenan*, [1990] 2 Q.B. 54 (EWCA) 69–70 (evidence ought to be excluded where breaches of PACE 1984 were "significant and substantial"). Under PACE 1984, a person arrested and in custody at a police station is entitled to consult a solicitor at any time. PACE 1984, § 58(1); PACE (NI), art. 59(1).

332. *R v. Samuel*, [1988] Q.B. 615 (EWCA) 630 (conviction quashed where access to solicitor denied); *Walsh*, (1990) 91 Crim. App. 161 (EWCA) 163–64 (conviction quashed where access to solicitor denied and other PACE 1984 provisions breached). *But see* *R v. Dunford*, (1990) 91 Crim. App. 150 (EWCA) 157 (appeal dismissed where the appellant had been previously convicted of unrelated offenses and "solicitor's advice would not have added anything to this particular appellant's knowledge of his rights").

333. Case law of the EWCA is persuasive authority in Northern Irish courts; that of the UKSC is binding. BRICE DICKSON, *LAW IN NORTHERN IRELAND* 95 (2d ed. 2013).

that statutory rules in effect at the time of trial should be applied on appeal but that the safety of convictions should be judged according to modern standards of fairness and the common law as it is presently understood.³³⁴ In the English case *R v. King*, based entirely on confession evidence, Lord Bingham advised that the only concern on appeal was the safety of the conviction; the appropriate approach is to “consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy.”³³⁵ It follows that the EPAs should be applied (as well as common law interpretations of their provisions that remain unchanged), but the safety of convictions should be considered in light of contemporary standards of fairness, which is often guided by judicial understandings of fair trial rights codified in article 6 of the European Convention on Human Rights (“ECHR”).³³⁶ Under the EPAs, judges were not required to exclude a confession that might be involuntary because of abuse or impropriety, but neither were they prohibited from doing so.³³⁷ An appellate court, in reviewing a conviction today and determining whether the non-jury court should (or might) have excluded the confession, can consider relevant European and domestic jurisprudence. In two of the CCRC referrals, the NICA relied on case law that reflects *ex post facto* common law developments: the *McCartney* decision was supported by reference to a holding in 2000 that police officers being cross-examined about alleged misconduct can be questioned about acquittals in unrelated cases that indicate that the jury must have disbelieved the evidence of the officers in question.³³⁸ In *R v. Brown*, in relation to the case of McCaul, the NICA relied on a recent decision regarding the suggestibility of mentally handicapped young people in finding the conviction unsafe.³³⁹

The problem with the results in the cases of *Brown* and *Wright* turns on modern standards of fairness, but it is equally significant that the rules of the time were violated. In *R v. Mulholland*—a CCRC referral that predated *Brown*—the NICA interpreted *R v. King* narrowly to mean that “breach of the rules prevailing at the time would constitute *prima facie* grounds for

334. *R v. Gordon*, [2000] NICA (Crim) 28 (citing *R v. Bentley*, [2001] 1 Crim. App. 21 (EWCA)).

335. (2000) 2 Crim. App. 391 (EWCA) [402].

336. Appellants cannot rely on ECHR rights as a basis of appeal in respect to convictions that took place before the HRA came into force in 2000, *R v. Lambert*, [2001] UKHL 37, [2002] 2 A.C. 545, [10] (Lord Slynn), [104], [111], [116] (Lord Hope) (appeal taken from Eng.), but domestic interpretations of ECHR rights and ECtHR jurisprudence are nonetheless influential to determinations of contemporary standards of fairness. *See, e.g.*, *R v. Crilly*, [2011] NICC 14, [34]–[39], [41] (N. Ir.) (relying on UKSC and ECtHR article 6 ECHR jurisprudence in determining contemporary standards of fairness).

337. *See supra* text accompanying notes 202–16.

338. [2007] NICA 10, [94] (citing *R v. Twitchell*, [2000] 1 Crim. App. 373 (EWCA)).

339. [2012] NICA (Crim) 14, [54] (citing *R v. Hussain*, [2005] EWCA (Crim) 31).

concluding that the conviction was unsafe, and that absent any counter-vailing factors that displaced that preliminary conclusion, the conviction must be quashed.”³⁴⁰ Where the *Mulholland* rule would allow for a conviction to be considered safe despite unfairness only in exceptional circumstances,³⁴¹ in *Brown* the court emphasized that admissibility should be judged against the backdrop of the EPAs.³⁴² The court acknowledged that changed standards of fairness “may be material” in determining admissibility but laid down no further guidance in that regard.³⁴³

A prosecutor’s reliance at trial on admissions made by a defendant who had no access to counsel when questioned in custody (notwithstanding the defendant’s age) was recently held by the U.K. Supreme Court (“UKSC”) to violate the defendant’s fair trial rights under the ECHR, in particular article 6(3)(c) the right to defend oneself in person or through legal assistance of one’s own choosing.³⁴⁴ The *Cadder* decision, which adheres to the ECtHR Grand Chamber decision in *Salduz v. Turkey*,³⁴⁵ brings Scottish law into line with the rest of the United Kingdom and Council of Europe countries.³⁴⁶ According to the ECtHR, the right to legal assistance when questioned is not necessarily an absolute right, but even justified restrictions of the right may result in unfair hearings and breach of the ECHR.³⁴⁷ A violation of fair trial rights, however, does not necessarily result in a conviction being unsafe; for example, if there is sufficient additional evidence against the accused to convict.³⁴⁸ *Cadder* relied on ECtHR jurisprudence to find that the defendant’s fair trial rights were violated, but the UKSC remitted the case back to the Scottish High Court of Justiciary to determine whether the conviction should be quashed.³⁴⁹

Cadder highlights an incongruity in the processing of defendants in the United Kingdom, under which the trial can be deemed unfair but the con-

340. [2006] NICA (Crim) 32, [44].

341. See also R v. Magee, [2001] NICA (Crim) 217, [231]–[232].

342. [2012] NICA (Crim) 14, [19], [23].

343. *Id.* [19].

344. *Cadder v. H.M. Advocate*, [2010] UKSC 43, [2010] 1 W.L.R. 2601, [63], [93] (appeal taken from Scot.).

345. 49 Eur. Ct. H.R. 19 (2009).

346. See *Cadder*, [2010] UKSC 43, [2010] 1 W.L.R. 2601, [49], [51], [97] (appeal taken from Scot.).

347. *Id.* [41], [95] (citing *Salduz v. Turkey*, 49 Eur. Ct. H.R. 19).

348. *Id.* [64].

349. *Id.* The referral to the Scottish court reflects different functions of the UKSC and U.K. high courts—the UKSC can quash a Scottish conviction in some circumstances, but generally the UKSC determines legal questions and the High Court of Justiciary, the highest criminal court in Scotland, resolves cases. See *id.* Jurisdiction of the UKSC in relation to Scottish criminal cases was altered in April 2013. See Scotland Act, 2012, c.11, § 36 (amending Scottish criminal procedure). The *Cadder* judgment does not apply retrospectively, but it could have an effect on completed cases if, on the basis of an application, the Scottish CCRC were to consider that a miscarriage of justice may have occurred. See *Cadder*, [2010] UKSC 43, [2010] 1 W.L.R. 2601, [103] (appeal taken from Scot.).

viction safe.³⁵⁰ In *Cadder*, the UKSC adhered to the ECHR interpretation of article 6, and thus it was not a case relying on constitutional dualism, in which international rights arising under the ECHR are distinguished from domestic rights created under the HRA (which are themselves drawn from the ECHR).³⁵¹ Nonetheless, the outcome allows for a result at odds with the European standard. Under U.K. law, defendants are entitled to access to counsel while in police custody, but violation of the right in a manner that results in an unfair trial will not necessarily undermine a subsequent conviction.³⁵² In other fair trial cases, the EWCA has acknowledged that the role of domestic courts is distinct from that of the ECtHR,³⁵³ but it considered the approach to safety as parallel to that of fairness, such that different results before U.K. courts and the ECtHR would be “rare indeed.”³⁵⁴

The *Brown* judgment indicates how wide the gap between fairness and safety can be in historic cases.³⁵⁵ The NICA recognized that changed standards of fairness can be relevant to the safety of old convictions.³⁵⁶ The court did not, however, discuss article 6 or other modern standards related to the detention and interrogation of appellants. In three of the four appeals, the court simply assessed the facts of each case under the law applicable at the time of the trials.³⁵⁷ In regard to conditions of detention, the

350. See also *R v. King*, [2000] 2 Crim. App. 391 (EWCA) 402 (finding that where the defendant is convicted on the basis of a confession later retracted, and the confession was obtained in breach of rules at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction); Case Comment, *Appeal: Leave to Appeal*, CRIM. L. REV. 835 (2000).

351. See, e.g., Gordon Anthony, *Human Rights in Northern Ireland After In Re McKerr*, 11 EUR. PUB. L. 5, 11 (2005); discussion *infra* note 364. *In Re McKerr*, [2004] UKHL 12, [2004] 1 W.L.R. 807, [25] (appeal taken from N. Ir.) provides an example of this practice. Similarly, in cases such as *R v. Horncastle*, [2009] UKSC 14, [2010] 2 A.C. 373, [11], [107] (appeal taken from Eng.), UKSC interpretations of ECHR rights have diverged from that of the ECtHR. See Marny Requa, *Absent Witnesses and the UK Supreme Court: Judicial Deference As Judicial Dialogue?*, 14 INT'L J. EVIDENCE & PROOF 208, 223–24 (2010) (discussing *Horncastle*).

352. See *Cadder*, [2010] UKSC 43, [2010] 1 W.L.R. 2601, [63]–[64], [93] (appeal taken from Scot.).

353. Domestic courts determine whether an appellant's conviction is safe, whereas the ECtHR assesses the fairness of the trial as a whole in determining whether a state party (here the United Kingdom) has breached article 6 of the ECHR. See *R v. Davis*, [2001] 1 Crim. App. 8 (EWCA) [65].

354. See *R v. Francom*, [2001] 1 Crim. App. 17 (EWCA) [47] (finding that lack of safety would be approached in exactly the same way as the ECtHR approaches lack of fairness, but allowing that a breach of article 6 does not necessarily render a conviction unsafe); *R v. Togher*, [2001] 1 Crim. App. 33 (EWCA) [30] (“[I]f a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe.”). *Togher* was followed by the NICA in the CCRC-referred case of *R v. Magee*, [2001] N.I. 217 (NICA) [231]. On *Togher* and related case law, see Nick Taylor & David Ormerod, *Mind the Gaps: Safety, Fairness and Moral Legitimacy*, CRIM. L. REV. 266 (2004).

355. An appellant whose trial took place before the HRA came into effect cannot rely on ECHR rights in his or her appeal, *R v. Lambert*, [2001] UKHL 37, [2002] 2 A.C. 545, [10] (Lord Slynn), [104], [111], [116] (Lord Hope), and thus the NICA was not obligated under the HRA to take into account ECtHR jurisprudence in *Brown*. Instead, modern standards were considered relevant through the application of *King*.

356. *Brown*, [2012] NICA (Crim) 14, [19], [23].

357. *Id.* [18], [34], [39], [46].

NICA jurisprudence has moved away from treating the facilities and circumstances of detention during the conflict as undermining the safety of convictions.³⁵⁸

The case of McDonald, one of the appellants in *Brown*, provides an example. When referring the case to the NICA, the CCRC emphasized significant breaches of the Judges' Rules related to the detention and interview of McDonald and, as a consequence, the potential unreliability and inadmissibility of the admissions made. The CCRC provided prosecution files containing complaints by other detainees against the officers who had interviewed McDonald.³⁵⁹ The NICA decision quashing the conviction was based on an inaccuracy in one of the first admissions—McDonald allegedly admitted luring army personnel into a trap, an event that appeared to the NICA not to have occurred, casting doubt on the reliability of subsequent admissions.³⁶⁰ It is not surprising that the court determined the matter on a single, unambiguous issue,³⁶¹ but earlier cases, such as *R v. Fitzpatrick*, had indicated that the NICA was open to arguments on the conditions of detention and the particular burdens faced by suspects, particularly young ones, subjected to interrogations under emergency legislation during the conflict.³⁶² The NICA approach can be contrasted with that of the ECtHR, which in *Magee v. United Kingdom* had considered the conditions at Castlereagh as impacting the fairness of the trial process, resulting in a breach of article 6 of the ECHR.³⁶³ ECtHR decisions are not binding on U.K. courts, however.³⁶⁴ The government has an international obligation to comply with

358. Cf. *Magee*, [2001] N.I. 217 (NICA) [231]–[232]; *R v. Mulholland*, [2006] NICA (Crim) 32, [44]–[48]; *R v. Fitzpatrick*, [2009] NICA (Crim) 60, [2]–[4].

359. *Brown*, [2012] NICA (Crim) 14, [2], [30].

360. *Id.* [29]–[30], [34].

361. See *infra* notes 376–78 and accompanying text; see also Livingstone, *supra* note 211, at 144; Walker, *supra* note 217, at 166, 168 (arguing that domestic judicial review before the HRA was “unlikely to pick up anything other than the isolated and fairly blatant abuse. . . . [T]here is undoubtedly a failure to respond to a larger picture, such as when the NICA solemnly sat through case after case in 1976 and thereafter in which confessions were disputed but without any wider inquiry into what was happening at the Castlereagh Holding Centre”).

362. See *Mulholland*, [2006] NICA (Crim) 32, [44]–[48]; *Fitzpatrick*, [2009] NICA (Crim) 60, [2]–[5].

363. App. No. 28135/95, 31 Eur. H.R. Rep. 35, 43–44 (2001). Of the cases referred from the CCRC to the NICA, only *Magee* was the subject of an ECtHR judgment. On the “very small role” played by the ECHR in regulating the U.K. government’s strategy for dealing with terrorist violence and for a discussion of ECtHR cases on fair trial rights during the Northern Ireland conflict, see Dickson, *supra* note 33, at 169–224.

364. After the enactment of the HRA, ECHR rights can be enforced in U.K. courts, and domestic courts are obligated to “take into account” ECtHR judgments. HRA, §§ 2(1), 6(1). But this is when a party invokes the ECHR in a domestic case and the domestic court is determining a question under the ECHR. *Id.* § 2(1). U.K. courts have emphasized a distinction between international rights arising under the ECHR and domestic court interpretation of ECHR rights when an issue is raised under the HRA. In *Re McKerr*, [2004] UKHL 12, [2004] 1 W.L.R. 807, [25] (appeal taken from N. Ir.); see also Marny Requa, *Keeping Up with Strasbourg: Article 2 Obligations and Northern Ireland’s Pending Inquests*, 2012 PUB. LAW 610, 616–18 (discussing the UKSC interpretation of the duty in section 2(1) of the HRA to take into account ECtHR jurisprudence).

the ECHR;³⁶⁵ failure to do so, if an individual application is made to the ECtHR, may result in a finding against the United Kingdom by the ECtHR and the awarding of compensation or costs.³⁶⁶ It does not, however, disturb the applicant's criminal conviction.

As a result of *Brown*, those who allege mistreatment or a fabricated or police-dictated confession will only rarely succeed, even when investigatory rules were breached. The NICA's willingness to diverge from contemporary standards of fairness, alongside the lower threshold for the admissibility of confession evidence from the conflict-era counterterrorism provisions, means that it is more difficult to overturn a conviction from the period of conflict as compared to an appeal in a recent case. Meanwhile, it is extremely unlikely that convictions today would be based, or prosecutions pursued, on confession evidence obtained in the manner acknowledged by the NICA in the *Brown* appeals.³⁶⁷

D. NICA Miscarriage of Justice Jurisprudence, in Sum

The NICA jurisprudence in post-conflict miscarriage of justice cases limits the bases upon which the CCRC can refer future cases, supporting factual decisions and interpretations of emergency legislation made by the courts during the conflict. The vast majority of conflict-era counterterrorism convictions remain intact, and applicants to the CCRC and appellants before the NICA will not necessarily be assisted by U.K. courts' contemporary interpretations of article 6 of the ECHR. The NICA acknowledges police failings only when the evidence is overwhelming; the prospect that abuses systematically tainted prosecutorial and trial processes is not countenanced.³⁶⁸ There are many possible explanations for the NICA's approach,

365. ECHR, *supra* note 16, art. 1. The United Kingdom signed the treaty on November 4, 1950 and ratified it on March 8, 1951. Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, Council of Europe, available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>, archived at <http://perma.law.harvard.edu/0M3x9V2oAAb>.

366. See ECHR, *supra* note 16, arts. 29, 32, 34, 41. In *Magee v. United Kingdom*, costs and expenses were awarded but a claim for compensation, because of loss of liberty and imprisonment, was rejected. App. No. 28135/95, 31 Eur. H.R. Rep. 35, 53–58 (2001).

367. See, e.g., *R v. Crilly*, [2011] NICC 14, [7], [23iv], [39]–[41], [43] (N. Ir.) (evidence incriminating the defendant excluded; evidence had been obtained through interrogation of third party with no access to counsel).

368. See, for example, *R v. Mulholland*, in which the NICA concluded it is virtually certain the trial judge would not have admitted a confession had he known that the requirement in the Judges' Rules that a young person be accompanied by an adult during questioning had been violated, and that another detainee alleged mistreatment by the same detectives who had interviewed the appellant. [2006] NICA (Crim) 32, [14], [46]–[47]. At trial, Mulholland (who was sixteen at the time of his detention) had challenged the admission of his confession on the basis that he had been mistreated in custody, that he was denied access to a solicitor, and that his statement was involuntary and untrue (he had an alibi). *Id.* [6]. The trial judge declined to exercise his discretion to exclude the statement and considered the allegations of assault to be groundless. *Id.* [7]–[10]. The judge found Mulholland guilty of one charge to which Mulholland had confessed (membership of a proscribed organization) but not guilty of the other (involvement in a petrol bomb attack). *Id.* His confession had been the sole evidence for both

including the political ideology of individual judges, legal conservatism, confusion regarding applicable standards when there has been significant time between conviction and appeal, and the minimal judicial reform that has occurred in post-conflict Northern Ireland.³⁶⁹ The *Brown* case can be understood, at least in part, in efficiency terms—an effort to curb the number of referrals that might have arisen if cases such as *R v. Fitzpatrick*³⁷⁰ were understood to mean that confession-based convictions were unsafe where the Judges’ Rules had been violated. It was, after all, documented police policy to delay access to counsel and, in cases of young offenders, access to an adult,³⁷¹ and dozens of juvenile confession cases were pending before the CCRC.³⁷² Without discounting these explanations, this Article places particular emphasis on judicial attitudes that appear evident from the judgments themselves.

charges. *Id.* [5]. Thus the trial judge had ruled on a separate violation of the Judges’ Rules—denial of access to counsel—and had based the conviction on a confession that was considered possibly not true in relation to one charge. The NICA’s confidence in the integrity of the conflict-era trial process is also apparent in *McCartney*, [2007] NICA (Crim) 10, [32], [69], [95]–[96]. The court assumed that prosecuting counsel would have informed the trial judge, and the trial judge may not have admitted the confessions of McCartney and MacDermott, had prosecutors known that a witness who had testified about injuries sustained while in Castlereagh at the same time as McCartney and by one of the same officers as MacDermott had not been prosecuted because his injuries indicated that his own confession was not voluntary. *See also* *R v. Brown*, [2012] NICA (Crim) 14, [26], [29]–[30], [33]–[34] (overturning conviction of McDonald on the basis that he confessed to something that had not occurred, concluding that police interviewers “failed to recognise” and “did not realise” McDonald had invented the episode which would have been discoverable upon investigation, and declining to rely on allegations of mistreatment despite new evidence of complaints against the interviewing officers); *R v. Gorman*, LEXIS (NICA Oct. 29, 1999), [6] (overturning convictions after new ESDA evidence demonstrated that police notes had been rewritten but noting “[t]here might well be an innocent explanation of each instance of rewriting” and affirming trial judge’s assessment of alleged ill treatment of the appellants). *R v. Magee* is the only one of the CCRC-referred cases in which systemic problems are contemplated. The court implicitly acknowledged that the detention and interrogation system at Castlereagh could result in unfair prosecutions of some suspects. [2001] N.I. 217 (NICA) [231]–[232] (“The [ECtHR] has made a direct finding on the facts of this case that the denial of access to a solicitor, against the background of the conditions in Castlereagh, constituted a violation of [rights to a fair trial]. We consider that we would not be justified in concluding that the conviction was safe in the light of this finding.”). On *Magee* as exceptional, *see supra* note 321.

369. A review of the criminal justice system in Northern Ireland, provided for in the Good Friday Agreement and carried out between July 1998 and early 2000, made 294 recommendations, but it did not comment on the conduct of the judiciary and did not lead to extensive reform. The most significant outcome of the review vis-à-vis the judiciary related to changes in the judicial appointments procedure and the establishment of the Northern Ireland Judicial Appointments Commission (“NIJAC”). CRIMINAL JUSTICE REVIEW GROUP, REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND ch. 6 (2000); *see* Justice (Northern Ireland) Act, 2002, c. 26; Justice (Northern Ireland) Act, 2004, c. 4; Northern Ireland Act, 2009, c. 3; NIJAC, GENERAL INFORMATION LEAFLET 2012 (3d edition, 2012); *see also* Constitutional Reform Act 2005, c. 4 (establishing a Northern Ireland Judicial Appointments Ombudsman); *Role of the Ombudsman*, N. IR. JUD. APPOINTMENTS OMBUDSMAN, <http://www.nijao.gov.uk> (last visited Oct. 27, 2013), *archived at* <http://perma.law.harvard.edu/0BebnwJXsJa>.

370. [2009] NICA (Crim) 60.

371. BENNETT, *supra* note 159, ¶¶ 123, 129, 272.

372. *See supra* note 257.

E. Just-World Thinking?

If the [plaintiffs] win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence: and that the convictions were erroneous. . . . This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further.³⁷³

This 1980 quotation by Lord Denning, a leading English judge, in a case that a decade later was to become one of the most high-profile miscarriages of justice associated with the targeting of the Irish in Britain, provides rare insight into why appellate courts might be unwilling to interrogate lower court decisions, particularly when police abuse has been alleged.³⁷⁴ Might contemporary judges hold similar views? If so, do Lord Denning's words reflect a conviction that systemic abuses do not occur in the United Kingdom, or, rather, an unwillingness to publicly acknowledge and redress them?

Theorists in multiple disciplines have sought to explain the tendency of some courts to support the status quo³⁷⁵ and even uphold “wicked” law or the state's discriminatory implementation of neutral law.³⁷⁶ Judicial deci-

373. *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (EWCA) 323.

374. Lord Denning was the Master of the Rolls, the second most senior judge in England and Wales. *McIlkenny* was a civil suit following the murder convictions of six individuals for a bombing incident in England that resulted in the deaths of twenty-one people. The EWCA held that the trial judge's decision that confessions had been made voluntarily and without violence, and the jury's affirmation of that decision, barred the plaintiffs from bringing a civil action against police for the same alleged assaults. The plaintiffs were subsequently exonerated after sixteen years in prison. The case was one of several miscarriages of justice that served as impetus for the establishment of the CCRC.

375. See, e.g., DYZENHAUS, *supra* note 132, at 20–33 (considering judges' own theories of law as an influence on deferential decision making in emergency circumstances, including interpretation of counterterrorism legislation); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1164–68 (2006) (assessing judicial decision making on antidiscrimination law from a psychological perspective); Keith E. Whittington et al., *The Study of Law and Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 7 (Whittington et al. eds., 2010) (identifying judicial politics as a key area within the political science subfield of law and politics).

376. During periods of conflict or authoritarianism and when confronted with draconian law or practices, many courts seek to justify the legal regime rather than challenge it. See generally Helmke, *supra* note 17 (Argentina); HILBINK, *supra* note 17 (Chile); Tezcür (Turkey), *supra* note 17. David Dyzenhaus views decision making that upholds legality in “wicked legal systems” as exceptional but nonetheless integral, and he uses apartheid-era South Africa as a case study to understand the nature of law more broadly. He considers the realization of the rule of law to be aspirational even in liberal democratic systems, and that human rights instruments and institutional innovation are necessary but not sufficient to ensure legality. Judges have the capacity to decide hard cases in ways that align with fundamental legal principles such as the rule of law, dignity, equality, and freedom, but they “are not revolutionaries” and are committed to upholding the existing legal order and the status quo, with U.S. courts post-9/11 and twentieth-century national security decisions in the United Kingdom providing examples of weaker decision making. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* 293, ch. 10 (2d ed. 2010).

sion making has been described as a feature of “man’s eternal quest for certainty” in a chaotic world.³⁷⁷ The broader appeal of law, and therefore the reason it pervades social and political spheres of liberal societies, is that it “encourages a notion of a rational and ordered place”—an imagined universe of principle.³⁷⁸ The professional environment of the judiciary and legal culture may also reinforce the deferential approach of courts to the legal systems in which they work.³⁷⁹ J.A.G. Griffith argues that “[p]olitically, judges are parasitic,” serving prevailing political and economic forces.³⁸⁰

A tendency to uphold the status quo resonates with the concept of just-world thinking, studied by social psychologists seeking an explanation for why, in some circumstances, impartial observers denigrate victims of crime or injustices.³⁸¹ Rather than a malevolent explanation, empirical research supports the theory that certain individuals are more likely to “need to believe they live in an essentially ‘just’ world.”³⁸² Motivated by a concern with justice, people often reassess incidents or situations so that outcomes are understood as just,³⁸³ or refuse to consider an instance of suffering.³⁸⁴

377. Watson, *supra* note 21, at 937 (citing U.S. Judge Jerome Frank).

378. McEvoy, *supra* note 21, at 416; *see also* RONALD DWORKIN, *LAW’S EMPIRE* 227–28 (1986) (“law as integrity”); GEERTZ 2d ed., *supra* note 21, at 234.

379. Friedman, *supra* note 16, at 34–35. On U.K. judges’ social and educational backgrounds, *see*, for example, Brenda Hale, Kuttan Menon Memorial Lecture: Equality in the Judiciary 5 (Feb. 21, 2013), *available at* www.law.qmul.ac.uk/eji/docs/92279.pdf, *archived at* <http://perma.cc/3CKL-ZA5G> (regarding UKSC justices and citing data from the Milburn report, PANEL ON FAIR ACCESS TO THE PROFESSIONS, UNLEASHING ASPIRATION: THE FINAL REPORT OF THE PANEL ON FAIR ACCESS TO THE PROFESSIONS (2009), *available at* www.agcas.org.uk/assets/download?file=1208&parent=465), *archived at* <http://perma.cc/66CT-A5S7?type=pdf>); *see also* DERMOT FEENAN, *APPLICATIONS BY WOMEN FOR SILK AND JUDICIAL OFFICE IN NORTHERN IRELAND* (2005).

380. GRIFFITH, *supra* note 240, at 342. U.K. judges often emphasize their own neutrality and their opposition to making rather than interpreting the law, given the significance of parliamentary sovereignty to the U.K. constitutional system. *See, e.g.*, R v. Horncastle, [2009] EWCA (Crim) 964, [10], [20]–[23] (relying on parliamentary sovereignty to uphold the application of hearsay provisions despite a finding against the United Kingdom by the ECtHR); TOM BINGHAM, *THE RULE OF LAW* 167–69 (2010); Brenda Hale, *Beanstalk or Living Instrument? How Tall Can the ECHR Grow?* 4–5 (June 16, 2011), *available at* <http://www.gresham.ac.uk/lectures-and-events/beanstalk-or-living-instrument-how-tall-can-the-european-convention-on-human>, *archived at* <http://perma.cc/77FK-QCH7>. Yet simple interpretation of the law requires political choices to be made, and it is not uncommon for guidance in existing law to be inadequate or imprecise, requiring a judicial determination. Neither is it uncommon for judges to make decisions with the stated intention of promoting the public interest. GRIFFITH, *supra* note 240, at 290, 292–95. Judicial perspectives are influenced by judges’ social and professional backgrounds, and the judicial appointments process limits “unorthodoxy in political opinion.” *Id.* at 338. Griffith found that decision making on social issues is not consistently deferential to government, but that traditionally the U.K. judiciary has tended to support “conventional, established, and settled interests” within society. *Id.* at 336–41.

381. *See* Hafer & Bègue, *supra* note 20, at 128–29.

382. Melvin J. Lerner & Leo Montada, *An Overview: Advances in Belief in a Just World Theory and Methods*, in *RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD* 1 (Leo Montada & Melvin J. Lerner eds., 1998); *see also* Adrian Furnham, *Belief in a Just World: Research Progress over the Past Decade*, 34 *PERSONALITY & INDIVIDUAL DIFFERENCES* 795 (2003); Hafer & Bègue, *supra* note 20; Lerner & Simmons, *supra* note 20.

383. Leo Montada, *Belief in a Just World: A Hybrid of Justice Motive and Self-Interest?*, in *RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD*, *supra* note 382, at 217, 238.

The world is easier to cope with if others have deserved their fates rather than been subjected to unfairness.³⁸⁵

Judicial behavior has not been the subject of just-world scholarship, aside from the occasional anecdote,³⁸⁶ but there has been a focus on judicial attitudes by “behavioral realists”³⁸⁷ who suggest that the human tendency to support and defend the social status quo, also known as “system justification,” accounts for just-world thinking.³⁸⁸ System justification theory³⁸⁹ is posited as a common human trait (rather than the response of some individuals in some circumstances), but one that may be overridden by personality or environmental factors and can lead to varying responses because individuals are members of multiple social systems (e.g., family, workplace, and nation).³⁹⁰ Justifying the status quo can be psychologically useful because it satisfies peoples’ needs for consistency, certainty, and structure; it is thus particularly appealing when the system itself is under threat.³⁹¹ In fact, studies have demonstrated that people are more punitive toward perpetrators of crime when the crime appears to threaten the social system, and more supportive of the status quo when they feel their own mortality is threatened.³⁹² Terrorism tends to evoke both of these reactions.³⁹³

System justification theory, and just-world thinking as a form of it, provides a conceivable framework for understanding the recent NICA judgments in conflict-related CCRC referrals. This is particularly so if the integrity of the current NICA is assumed—if the decisions reflect what the judges believe to be good law rather than political expedience, ideology, or strategy.³⁹⁴ NICA decision making in these cases supports the status quo ante instead of the status quo.³⁹⁵ In effect, the jurisprudence sanctions the

384. See Melvin J. Lerner, *The Two Forms of Belief in a Just World: Some Thoughts on Why and How People Care About Justice*, in RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD, *supra* note 382, at 247, 255.

385. See Alan J. Lambert et al., *Belief in a Just World and Right-Wing Authoritarianism as Moderators of Perceived Risk*, in RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD, *supra* note 382, at 107, 109.

386. See Hafer & Bègue, *supra* note 20 (assessing research on the topic, which does not include studies of judiciaries); Melvin J. Lerner, *The Justice Motive: Where Social Psychologists Found It, How They Lost It, and Why They May Not Find It Again*, 7 PERSONALITY & SOC. PSYCHOL. REV. 388, 388 (2003) (discussing judicial decision making as an example).

387. See *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006).

388. See Blasi & Jost, *supra* note 375, at 1126, 1164–66.

389. See John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1 (1994); see also Blasi & Jost, *supra* note 375.

390. See Blasi & Jost, *supra* note 375, at 1131, 1137.

391. See *id.* at 1138.

392. See *id.* at 1139–40.

393. See *id.* (citing studies concluding that support for former President George W. Bush increased when subjects were primed to think about the terrorist attacks of 9/11 and when terror-alert levels were raised).

394. For other possible explanations, not all of which are explored in this Article, see *supra* text accompanying note 369 and *infra* text accompanying notes 421–22.

395. The conflict-era counterterrorism system reflects the interests of and decisions made by previous governments and Parliament, as well as legal rules accepted by the legal community at the time.

former counterterrorism regime, limiting the possibility of reversals and the victim status of the vast majority of those processed through the system. Part IV.B of this Article highlighted ways in which the NICA has done so: by demonstrating faith in decision making by police, prosecutors, and judges even when acknowledging irregularities;³⁹⁶ by accepting the approach taken by the courts to counterterrorism laws and procedures even when such approaches would not stand today;³⁹⁷ and by failing to assess conditions of detention when deciding whether confessions were properly admitted.³⁹⁸

The content of the judgments is consistent with just-world decision making. In most of the cases in which appellants were successful, the NICA held that, had the trial judge known of a particular circumstance or instance of misconduct, the outcome of the case may have been different.³⁹⁹ The emphasis was on missing information at the time of trial or at an initial appeal, rather than that the judge or the system erred. The court required supporting evidence of physical abuse, which indicates that the NICA considers wrongdoing by individual officers to be aberrational.⁴⁰⁰ The evidence of applicants was not sufficient, even though the Judges' Rules were violated in the cases and prosecutors bear the burden to prove beyond reasonable doubt that applicants were not abused.⁴⁰¹ Neither were prosecutors required to present evidence defending interrogators.⁴⁰² Instead, the emphasis in the judgments was on testing the applicants' arguments. Inconsistencies in applicants' statements were determinative with no latitude provided

From a technical, legal perspective, it might be argued that the system remains the status quo for old cases; changes in counterterrorism and criminal legislation do not apply retroactively.

396. See *supra* text accompanying note 368. The three conflict-era cases in which convictions were upheld also reveal this tendency. In relation to Brown and Wright, the court found violations of the Judges' Rules when the appellants, then teenagers, were interviewed by police. R v. Brown [2012] NICA (Crim) 14, [39], [46]. In R v. Latimer, [2004] NICA (Crim) 3, police had given false evidence at trial. See *supra* text accompanying note 305.

397. See *supra* text accompanying notes 290 and 319.

398. See *supra* text accompanying notes 321 and 358–60.

399. Thus the safety test, *supra* note 247, was interpreted in this way. See, e.g., *supra* note 321 (discussing R v. Mulholland, R v. McCartney, and R v. Gorman); see also R v. Morrison, [2009] NICA (Crim) 1, [3]–[6] (finding that material related to the investigation was not disclosed to prosecuting counsel or the appellants and that, if given in evidence at trial, it would almost certainly have led to acquittal had the appellants been prosecuted at all); R v. Green, [2002] NICA (Crim) 14 (concluding that new evidence may have caused the trial judge to reach a different conclusion on the credibility of police evidence); R v. Adams, [2006] NICA (Crim) 6, [23]–[25] (finding that new evidence regarding the alteration of a police officer's witness statement raises a concern not explored at trial, and that officers may "have been more persistent in their questioning than may have appeared to the trial judge"); R v. Livingstone, [2013] NICA (Crim) 33, [29] (new evidence may have affected assessment of police credibility). As discussed in Part III.B, successful CCRC referrals relied heavily on new evidence.

400. See *supra* text accompanying notes 312–14.

401. See, e.g., EPA 1973, § 6(2); Brown, [2012] NICA (Crim) 14, [38]–[39], [45]–[56] (Brown, Wright); *supra* note 210.

402. See, e.g., R v. Mulholland, [2006] NICA (Crim) 32, [36]–[43]; R v. McCartney, [2007] NICA (Crim) 10, [85]–[88]. In the cases of the most vulnerable defendants, the prosecution did not defend the convictions. See, e.g., Adams, [2006] NICA (Crim) 6, [4]; R v. Hinds, [2005] NICA (Crim) 36, [7].

for the passage of time.⁴⁰³ The judgments are notably silent on the fairness of emergency legislation and its interpretation by conflict-era judges. The only conviction overturned because of judicial error⁴⁰⁴ was based on the trial judge failing to give reasons for the judgment, as required by statute.⁴⁰⁵ In this and other cases, there was no criticism of the conduct of trial judges. The judgments do not explicitly take into consideration the circumstances of political conflict except in one instance, which cited violence in the early 1970s as an explanation for the introduction of exceptional rules in emergency legislation.⁴⁰⁶

NICA's faith in the status quo ante is surprising given the centrality of human rights discourses in post-conflict Northern Ireland. Criminal justice and policing reform is centered on human rights principles.⁴⁰⁷ In addition, the HRA introduced a sea of change in the recognition of rights throughout the United Kingdom.⁴⁰⁸ The earliest of the NICA miscarriage of justice decisions were referred shortly after the Good Friday Agreement was signed when a security mentality continued to influence the legal and judicial culture, as it did during the conflict.⁴⁰⁹ But in the years since the Agreement,

403. See, e.g., *Brown*, [2012] NICA (Crim) 14, [38]–[39], [45]–[56] (Brown, Wright).

404. See *R v. McCourt*, [2010] NICA (Crim) 6, [6].

405. See EPA 1973, § 2(5).

406. See *Brown*, [2012] NICA (Crim) 14, [9]–[11].

407. See CRIMINAL JUSTICE REVIEW GROUP, *supra* note 369; REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, *A NEW BEGINNING: POLICING IN NORTHERN IRELAND* 1, ch. 4 (1999); Colin Harvey, *Human Rights and Equality Northern Ireland*, 57 N.I.L.Q. 215, 215 (2006); Christopher McCrudden, *Northern Ireland and British Constitution Since the Belfast Agreement*, in *THE CHANGING CONSTITUTION* 227, 252–53 (Jeffrey Jowell and Dawn Oliver eds., 6th ed. 2007).

408. See DAVID HOFFMAN & JOHN ROWE, *HUMAN RIGHTS IN THE UK* 1–3, chs. 5, 22 (2003) (identifying the HRA as one of the most important statutes ever passed in the United Kingdom and explaining how ECHR rights can be relied on in U.K. courts); see also Brice Dickson, *The European Convention in Northern Ireland Courts*, EUR. HUM. RTS. L. REV. 496 (1996) (discussing the approach of Northern Ireland courts to the ECHR before the peace process). In addition, PACE 1984 improved procedural safeguards for suspects and defendants. For a discussion of debates related to the PACE 1984 regime, see David Dixon, *Authorise and Regulate: A Comparative Perspective on the Rise and Fall of a Regulatory Strategy*, in *REGULATING POLICING*, *supra* note 122, at 25, 30, 32–33, 43 (identifying PACE 1984 as providing formal rights to suspects and interacting with the HRA).

409. On conflict-era judicial culture, see Jackson, *supra* note 217, at 214, 222; Livingstone, *supra* note 211, at 144, 146 (assessing record of the Northern Ireland courts in counterterrorism cases, identifying “abhorrence of terrorism” as one influence (among contradictory influences) on judicial attitudes, and finding that “only in the rarest cases were . . . confessions excluded”); McEvoy, *supra* note 240, at 379–82 (identifying features of legal culture in Northern Ireland). The rate of successful appeals was significantly lower in terrorism cases as compared to non-terrorism criminal cases, although those who have studied the non-jury system have not come to a conclusion about why that is so. See DICKSON, *supra* note 33, at 208; JACKSON & DORAN, *supra* note 18; Dickson, *supra* note 229, at 136, 144. In terms of judicial scrutiny of counterterrorism trials, it is notable that the NICA belatedly overturned several convictions based on paramilitary informers who testified against multiple defendants in exchange for immunity or leniency (so-called “supergrass” witnesses). See STEPHEN GREER, *SUPERGRASSES: A STUDY IN ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND* 49–56, 173–74, chs. 3–4, 8 (1995); J.D. Jackson, *The Use of “Supergrasses” As a Model of Prosecution in Northern Ireland*, in *ANNUAL REPORT OF THE STANDING ADVISORY COMMISSION ON HUMAN RIGHTS FOR 1983–84* (1985). Not all of those convicted on the basis of supergrass evidence had their convictions overturned. See Dickson, *supra* note 16, at 204 & n.218; McColgan, *supra* note 11, at 199–200.

the NICA has kept pace with wider U.K. jurisprudential developments⁴¹⁰ in terms of judicial review and human rights–based analyses.⁴¹¹ In addition, the social system is no longer under immediate threat; neither are judges subjected to the physical dangers they were during the conflict.⁴¹² In effect, the center of gravity within the legal community and “prevailing political forces”⁴¹³ in Northern Ireland have changed from an atmosphere focused on protection from hostile members of the community⁴¹⁴ to one where human rights are at the fore of legal discourse if not legal practice.⁴¹⁵ Although the war is over, the state’s conflict-era counterterrorism apparatus retains its grip on the judiciary, and, in turn, on the most suspicious of those in the “old” suspect community—convicted terrorists.

Personal, political, and legal issues influence judicial decision making,⁴¹⁶ and the NICA’s jurisprudence can only be explained by considering a combination of factors.⁴¹⁷ For the purposes of this discussion, the judgments cannot simply be explained by ideology or the judges’ concerns with one dominant judicial audience, such as colleagues who were on the bench during the conflict, the government, or a segment of the population. This is for a number of reasons. First, the NICA is not hostile to human rights generally; the court’s human rights record instead could be characterized as mixed.⁴¹⁸ Second, the court overturned conflict-era convictions in CCRC-referred cases at a high rate. A few appellants were high-profile republicans, including a publicly known member of the IRA,⁴¹⁹ and the quashing of

410. See Kate Malleson, *The Evolving Role of the UK Supreme Court*, 2011 PUB. L. 754, 758–61.

411. See DICKSON, *supra* note 16, at 220; ANTHONY, *supra* note 107, at ix–xii (analyzing legal developments in judicial review and describing ways in which Northern Irish jurisprudence is on par with, and in some circumstances broader than, that in England and Wales); McQuigg, *supra* note 16, at 557, 561, 563–64; see generally Brice Dickson, *Northern Ireland*, in HUMAN RIGHTS LAW AND PRACTICE, 741, 741–84 (Anthony Lester et al. eds., 3d ed. 2009). For an analysis of conflict-related cases appealed from the NICA to the House of Lords between 1994 and 2005, see Brice Dickson, *The House of Lords and the Northern Ireland Conflict – A Sequel*, 69 MOD. L. REV. 383 *passim* (2006).

412. Judges can be targets in any society, but the danger for judges in Northern Ireland was significant during the conflict. See *supra* note 236 and accompanying text.

413. GRIFFITH, *supra* note 240.

414. See BOYLE ET AL., *supra* note 139, at 107–08; KEVIN BOYLE ET AL., *THE LAW AND STATE: THE CASE OF NORTHERN IRELAND* 79–80, 120–21 (1973).

415. See Dickson, *supra* note 16, at 218–20; McQuigg, *supra* note 16; Weiden, *supra* note 16. Decision making still can be deferential. In constitutional jurisprudence, it has been noted that the NICA has demonstrated “judicial reluctance to move beyond deciding cases on anything but the most narrow grounds.” John Morison & Marie Lynch, *Litigating the Agreement: Towards a New Judicial Constitutionalism for the UK from Northern Ireland?*, in JUDGES, TRANSITION, AND HUMAN RIGHTS 105, 138 (John Morison et al. eds., 2007).

416. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 21–23 (2006).

417. A comprehensive explanation of decision making by the NICA is beyond the scope of this Article.

418. See also Dickson, *supra* note 16, at 218–20; McQuigg, *supra* note 16; Weiden, *supra* note 16.

419. Raymond McCartney was an Officer Commanding of the IRA in the Maze prison during the conflict. McEvoy, *supra* note 270; *Journalist and Politician Cleared of 1977 Murders*, *supra* note 270.

their convictions received significant media attention.⁴²⁰ Positivism in the case law is subtle and would not clearly satisfy audiences who are hostile to miscarriage of justice claims. While the decisions restrict the possibility of reversals on a wide scale and support the status quo ante, they do, at the same time, acknowledge limited instances of wrongdoing.

Analysis of the jurisprudence cannot answer conclusively whether judges sincerely believed that errors rarely occurred in counterterrorism cases, or whether they were motivated by an objective to ensure that the law is perceived as having functioned properly and fairly during the conflict. Indeed, strategic explanations, such as a preference to maintain a low rate of successful appeals to signal system stability,⁴²¹ may plausibly account for the NICA jurisprudence. Strategic explanations also highlight a disadvantage of relying on just-world theory in the counterterrorism context: just-world thinking does not acknowledge judges' awareness of the political and legal consequences of decision making.⁴²² In relation to this study, political considerations would include matters particular to post-conflict Northern Ireland, such as social tensions regarding constitutional questions⁴²³ and whether and how to address past human rights abuses.⁴²⁴ The NICA may be reluctant to signal that the conflict-era courts were "part of [the state] armoury"⁴²⁵ or averse to going down a "slippery slope" that would require reconsideration of scores of convictions.⁴²⁶

420. See, e.g., Bowcott, *supra* note 270; *Journalist and Politician Cleared of 1977 Murders*, *supra* note 270.

421. The success rate is high but overall the cases restrict the prospects for future appeals. See generally DWORKIN, *supra* note 378, 141, 225–75; BAUM, *supra* note 416, at 6–7.

422. Lawrence Baum has argued that judges are influenced by and communicate through decision making to various judicial audiences. BAUM, *supra* note 416, at 22–23, 43–46.

423. The NICA may be seeking to avoid controversy among the general public by limiting appeals that might result in the quashing of convictions of convicted terrorists who had challenged the state. Such results would be unpopular, at least within the majority unionist community, or among colleagues in the judiciary, given that some serving members of the NICA were trial judges before the Good Friday Agreement. But recognition of past human rights and due process violations could promote confidence in the system for many in the republican and nationalist communities.

424. A more expansive jurisprudence could invite a wider reckoning regarding the functioning of the criminal justice system during the conflict. Judges may not want to be perceived as engaging in post-conflict justice or consider that it is a matter for politicians. For a discussion of the NICA and CCRC-referred cases in relation to post-conflict justice, see Quirk, *supra* note 280, at 969–79.

425. McEvoy, *supra* note 240, at 379–80. This resistance may be on ideological or political grounds. Judges may not believe the counterterrorism system should be discredited and consider that most convicted terrorists committed crimes, or may not want to vindicate those in Northern Ireland who maintained that the system was corrupt. Relationships with colleagues may also be relevant.

426. It is burdensome and costly for the post-conflict justice system to address problems of the past system. For example, several decades-old lethal force cases from the conflict are being reinvestigated by the Northern Ireland Coroner's Office in addition to the Coroner's present-day cases, Requa, *supra* note 364, at 619, and have been informally identified as a burden on that system. Other explanations for this decision making could include preventing challenges by the government, which has a financial interest in limiting appeals. But since the enactment of the HRA, U.K. courts have on occasion required significant changes in criminal processes to ensure compliance with article 6 of the ECHR. See, e.g., *Cadder v. H.M. Advocate*, [2010] UKSC 43, [2010] 1 W.L.R. 2601 (appeal taken from Scot.) (requiring modification of Scottish criminal procedure); *R v. A (No. 2)*, [2001] UKHL 25, [2002] 1 A.C. 45 (appeal taken from Eng.) (revising rules related to the questioning of complainants in sexual cases); *Re Mc-*

Such calculations may well influence the results in these cases, but they are not as apparent from the judgments as just-world thinking. System justification theory also aligns with a general view in the legal community that the court system was able to uphold the rule of law during the conflict and not become poisoned by the biases and motivations that influenced other state actors.⁴²⁷ At minimum, what could be called “institutional just-world thinking” is clear. Even if judges acted with varying motivations, the jurisprudence presents a veneer of certainty and confidence in the conflict-era system. Under this view, the vast majority of applicants deserved to be punished because they were found guilty; although some wrongful convictions took place, the system itself was just.

If just-world thinking has influenced decision making in CCRC-referred cases, then public discourse surrounding terrorism and the centrality of confession evidence in conflict-related cases are particularly problematic.⁴²⁸ Both paint suspected terrorists as deserving of punishment.

This Article began by identifying how popular discourse surrounding terrorism supported draconian policies and laws of successive British governments as they were faced with and engaged in political conflict in Northern Ireland. Although all parties to the conflict won battles in the propaganda war, the “taint” of the terrorist label remains.⁴²⁹ In contemporary political discourse, it is not uncommon for past membership in republican or loyalist paramilitary organizations to be linked to ruthlessness and the perpetration of or support for indiscriminate violence.⁴³⁰ At least two of the appellants in the cases referred from the CCRC are known to have been

Caughey’s Application, [2011] UKSC 20, [2012] 1 A.C. 725 (appeal taken from N. Ir.) (requiring investigations of lethal force cases to be compliant with article 2 of the ECHR); R v. Lambert, [2001] UKHL 37, [2002] 2 A.C. 545 (appeal taken from England) (interpreting the burden on a defendant to prove lack of knowledge of possession in drug cases as an evidentiary rather than legal burden).

427. See sources cited *supra* note 241.

428. See, e.g., Blasi & Jost, *supra* note 375, at 1137–39.

429. The label can serve to obscure harm suffered by terrorist suspects and former members of paramilitary organizations. See Kieran McEvoy & Kirsten McConnachie, *Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy*, 9 EUR. J. CRIMINOLOGY 527, 531–32 (2012) (arguing that, in societies undergoing political transition, “the politics of claims-making with regard to victimhood appear to require a ‘deserving’ victim” such that victims are understood in opposition to perpetrators and that victimhood requires “innocence”). Even in non-terrorism cases, U.K. courts have distinguished “innocent” from presumed “guilty” appellants when overturning convictions, which can indirectly impact financial compensation by the government. See Quirk & Requa, *supra* note 250, at 397–98 (citing R v. Davis, [2001] 1 Crim. App. 8 (EWCA) [95]).

430. For example, when the Commissioner for Victims and Survivors for Northern Ireland refused to identify members of the IRA and a loyalist paramilitary group as “terrorists” in October 2013, one politician questioned her fitness for the position by invoking the number of people “butchered” and “slaughtered” by terrorists. Sam McBride, *Victims’ Dismay at Commissioner’s IRA Comments*, NEWS LETTER (Oct. 3, 2013, 9:05 AM), <http://www.newsletter.co.uk/news/regional/victims-dismay-at-commissioner-s-ira-comments-1-5552143>, archived at <http://perma.law.harvard.edu/ORRcyM7zpam/>; Alex Kane, *Victims’ Commissioner Found Herself in a No-Win Situation*, BELFAST TELEGRAPH DEBATE NIBLOG (Oct. 5, 2013), <http://www.belfasttelegraph.co.uk/debateni/blogs/victims-commissioner-found-herself-in-a-nowin-situation-29635563.html>, archived at <http://perma.law.harvard.edu/OPnCmfyEe7Y/>.

members of the IRA.⁴³¹ The judiciary is not immune to the influence of government and media depictions of terrorists.⁴³² Even human rights scholars can be tentative in seeking to reform counterterrorism law, lest the project fail by becoming associated with a defense of terrorism.⁴³³ Under just-world theory, those convicted of terrorism “deserved what they got”; the threat they posed to the political system may have passed but continues to deserve punishment.

Moreover, the appellants in these cases must overcome the “seemingly irrefutable presumption of guilt” that follows a suspect from investigation to conviction and appeal after a confession.⁴³⁴ Researchers in the United States have found that criminal justice actors (including jurors) are biased against confessors and treat them more harshly at every stage of the criminal process,⁴³⁵ a view that aligns with just-world theory. Tunnel vision associated with police and prosecutorial zealotry to build a case against an identified suspect, particularly in high-profile cases, further stacks the odds against defendants, as inconsistent evidence may be disregarded during investigation and prosecution.⁴³⁶ Indeed, confession evidence, and related police officer testimony, has been identified as a form of police-generated testimony that is among the leading causes of wrongful convictions, especially when the defendant is a minor or otherwise vulnerable.⁴³⁷

In the U.K. context, it has been queried whether “police interrogation can ever be truly reliable when the whole system of police detention and interrogation is designed to elicit confessions from suspects.”⁴³⁸ Studies of

431. See MCEVOY, *supra* note 270 (regarding McCartney); Suzanne Breen, *McGuinness a Judas for Meeting Queen, Say Ex-IRA Men*, ULSTER NEWS LETTER (June 25, 2012), http://www.nuzhound.com/articles/breen/arts2012/jun25_McGuinness_a_Judas_for_meeting_Queen__SBreen_News-Letter.php, archived at <http://www.perma.cc/0ppVbL1D2e2/> (regarding a rally that included former IRA hunger-striker Gerard Hodgins). Danny Morrison was not a confirmed member of the IRA, but as a high-profile member of Sinn Féin, he coined the phrase “a ballot paper in this hand and an Armalite in the other.” Anisseh Van Engeland, *Political Movements in the Making: The Irish Republican Army and Sinn Féin*, in FROM TERRORISM TO POLITICS 51, 51 n.1 (Anisseh Van Engeland & Rachael M. Rudolph eds., 2008) (referring to a speech at the Sinn Féin *Ard Fheis* (Annual Conference) in 1981).

432. See BAUM, *supra* note 416, at 73, 135–39; WHITTY ET AL., *supra* note 28, at 112–17, 119, 155, 158; see also R v. Mullen, [2000] Q.B. 520 (EWCA) [535] (“This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A.”); DICKSON, *supra* note 33, at 175 (discussing R v. Chief Constable, *ex parte* McKenna, [1992] NI 116 (Q.B.) [140c] (“[T]he provisional IRA is a completely ruthless and unscrupulous terrorist organisation which would be fully prepared by force or threat . . . to compel [a defense lawyer] . . . to disclose to it what the applicants had told him in the course of [lawyer/client] consultations.”)).

433. See WHITTY ET AL., *supra* note 28, at 109.

434. Leo & Davis, *supra* note 29, at 19; see generally Leo & Ofshe, *supra* note 29 (examining police-induced false confessions).

435. See Leo & Ofshe, *supra* note 29, at 494; see also Leo & Davis, *supra* note 29, at 19–20.

436. See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291 (2006).

437. See generally Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329 (2012).

438. John Jackson, *Trial Procedures*, in MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR, *supra* note 242, at 182, 192; see also LUDOVIC KENNEDY, TRUTH TO TELL 308–11, 322–30 (1992)

conflict-era policing in Northern Ireland provide evidence of tunnel vision—such as RUC officers believing in a suspect’s guilt and working to build a case against him or her—as well as more deliberate wrongdoing.⁴³⁹ The CCRC-referred cases provide examples of misconduct and abuse of process, including alterations of statements made by suspects, and credible allegations of physical violence and fabrication of confessions.⁴⁴⁰ Counterterrorism convictions relied heavily on confession evidence, and it is difficult to contemplate that police abuse was prevalent during the conflict, but the judiciary was able to prevent wrongful convictions.

CONCLUSION

Parts I and II of this Article outlined the continuity between past and present counterterrorism policy in the United Kingdom, arguing that a thorough understanding of criminalization during the conflict is relevant to contemporary debates. Part III assessed the main features of the criminal justice system that diverged from normal practice in Northern Ireland, and Part IV focused on post-conflict decision making in past cases through an evaluation of cases referred from the CCRC. The NICA jurisprudence allows for divergence from ECHR fair trial principles, relying on different standards of fairness in past cases as compared to present-day appeals. Just-world thinking by appellate judges provides a credible explanation for this result. The phenomenon, as applied in the Northern Ireland context, assumes that judges have been influenced by popular discourse on terrorism, and that confession evidence is an indicator of guilt.

To return to the present, the broader conclusion of this study is that terrorist suspects should be provided with due process protections that ensure fair trials. Just-world thinking, if the theory explains decision making in the counterterrorism realm—or in criminal cases more generally—may be difficult to prevent. Instead, judicial discretion regarding the admissibility of evidence should be limited, confessions should be supported by additional evidence, and courts should be required to scrutinize the conditions in which evidence was obtained.

The use of the ordinary criminal justice system was not necessarily a negative factor in the NICA jurisprudence. Judges in military or special

(discussing the presentation of false evidence by English police in miscarriage of justice cases to secure convictions against those they think are guilty).

439. See TAYLOR, *supra* note 24, at 80–81, 155–56, 193 (concluding the RUC was obsessed with results in the battle against terrorism and kept a scoreboard of arrests and, separately at Castlereagh, a scoreboard of confessions, and reporting a senior officer’s claim that detectives were confident in the guilt of suspects during interviews); COBAIN, *supra* note 24, at 178, 183 (citing interviews with former Castlereagh interrogators regarding their confidence in the guilt of suspects and pressures to elicit confessions).

440. See, e.g., R v. Magee, [2001] N.I. 217 (NICA); R v. Mulholland, [2006] NICA (Crim) 32; R v. McCartney, [2007] NICA (Crim) 10.

counterterrorism courts could be similarly influenced; such courts are usually governed by distinct procedural rules and raise additional questions about independence, fairness, and transparency. Civilian courts are not, however, a panacea, and modifying criminal processes for counterterrorism suspects can turn the civilian courts into quasi-special courts. Such alterations can have a significant impact on public confidence in the criminal justice system and the manner in which courts adjudicate. Even after the threat of conflict-related terrorism has subsided significantly, the NICA defends and is influenced by the status quo ante. For those prosecuted under counterterrorism legislation in other contexts, the Northern Ireland cases provide an argument for documenting abuses and irregularities and engaging with the system—for example, by being examined by medical personnel, making use of appeals and complaint systems, and sustaining claims through all available processes, over the long term if necessary.

In the United Kingdom, enactment of the HRA and the establishment of the CCRC should respectively limit and respond to miscarriages of justice in counterterrorism cases. Systemic abuses, were they to occur today, might meet greater internal and external resistance. Yet considerable dangers for “new terrorism” suspects remain. Certain protections for all defendants have been weakened since the late 1980s.⁴⁴¹ Public fear surrounding global terrorism has resulted in tolerance for expansive, and in some circumstances mainstreamed, counterterrorism measures. The regime pervades civic life, uses civil processes to monitor individuals,⁴⁴² allows for longer periods of detention without charge,⁴⁴³ and maintains the forty-eight-hour delay in access to counsel.⁴⁴⁴ Reliance on false confessions is always possible, particularly if coercive interrogation tactics are employed⁴⁴⁵—an occurrence that is not unthinkable, given evidence of their use in counterterrorism investigations to date.⁴⁴⁶ Public interest immunity certificates can be used to prevent disclosure of material to the defense,⁴⁴⁷

441. Inferences can be drawn from silence, and rules against hearsay and anonymous witnesses have been relaxed. See Criminal Justice and Public Order Act, 1994, c. 33, §§ 34–38 (allowing for inferences to be drawn upon silence by a suspect or defendant in certain circumstances); Criminal Justice Act, 2003, c. 44, pt. 11, ch. 2 (providing for the admissibility of hearsay evidence); Coroners and Justice Act, 2009, c. 25, pt. III, ch. 2 (providing for anonymous witness orders); Criminal Evidence (Northern Ireland) Order, 1988, SI 1988/1987 (N. Ir. 20), arts. 1–6; Criminal Justice (Evidence) (Northern Ireland) Order, 2004, SI 2004/1501 (N. Ir. 10), pt. III. On inferences from silence, see Jackson, *supra* note 161. On changes in hearsay law, see Requa, *supra* note 351, at 212–14.

442. On terrorism prevention and investigation measures, see *supra* note 116 and accompanying text.

443. Pre-charge detention in terrorism cases is currently fourteen days. Protection of Freedoms Act, 2012, c. 9, § 57. See discussion *supra* note 113.

444. TA 2000, sched. 8, paras. 7, 8(2).

445. See C. RONALD HUFF ET AL, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY ch. 5 (1996); Leo & Ofshe, *supra* note 29, at 492–93; Thompson, *supra* note 437, at 343–45.

446. COBAIN, *supra* note 24.

447. The use of “closed material procedures,” in which a court considers and can rely on sensitive material during a portion of the proceedings closed to one party, is routine in civil terrorism-related matters and pre-charge detention hearings, but not in criminal trials in the United Kingdom. In con-

and secret evidence is admissible in civil proceedings.⁴⁴⁸ In Northern Ireland, trial without jury is still available in terrorism-related cases.⁴⁴⁹ In contrast, non-jury trials have not featured in counterterrorism efforts in the rest of the United Kingdom, although they can be authorized if there is either a risk of danger or evidence of jury tampering.⁴⁵⁰

Moreover, a new suspect community has been created⁴⁵¹—labeling a new group of innocents⁴⁵²—and the risk is that a new cycle of repression and alienation has begun, which will foment discontent and violence rather than eradicate it. There are already indications that counterterrorism measures and their application by the police have impacted the relationship of members of the Muslim community to wider British society.⁴⁵³ Popular portrayal of Muslims (individually and collectively) as connected with ter-

trast, public interest immunity certificates can be used in criminal proceedings to prevent the disclosure of material. If granted by a court, the material is not disclosed or relied on at trial notwithstanding that it may be significant in the matter and that the defendant may be denied access to information useful in challenging the case against him or her. *See generally* Edwards v. United Kingdom, (2005) 40 Eur. H.R. Rep. 24.

448. Justice and Security Act, 2013, c. 18 (royal assent Apr. 25, 2013). On compliance of this Act with article 6 of the ECHR, see John Jackson, *Justice, Security, and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?*, 2013 PUB. L. 720. On the use of secret evidence, see generally ERIC METCALFE, JUSTICE, SECRET EVIDENCE (2009).

449. Justice and Security (Northern Ireland) Act, 2007, c. 6, §§ 1–6, 9. These provisions allow for non-jury trials when, for example, the accused is suspected of having been a member of a proscribed organization or the offense was committed as a result of political or religious hostility and the Director of Public Prosecutions is satisfied that the administration of justice requires a non-jury trial. They will be in force at least through July 31, 2015. Justice and Security (Northern Ireland) Act, 2007 (Extension of duration of non-jury trial provisions) Order, 2013, SI 2013/1619.

450. Criminal Justice Act, 2003, c. 44, §§ 44, 46. It is anticipated that section 44 will be used in terrorism cases and that the statutory language could invite determinations based on hypothetical risk rather than specific evidence of jury tampering, made even more difficult to challenge when a defendant is not privy to information relevant to the decision. Nick W. Taylor, *R. v T; R. v B; R. v C; R. v H: Trial by Judge Alone – Trial on Indictment Conducted Without Jury – Jury Tampering*, CRIM. L. REV. 82, 85 (2010). (The court can consider sensitive material not disclosed to the defendant. *R v. Twomey* [2009] EWCA (Crim) 1035, [2010] 1 W.L.R. 630). To date, however, sections 44 and 46 have been invoked only rarely, with just two non-jury trials completed in England and Wales and a single section 44 trial initiated in Northern Ireland in which the defendants subsequently pleaded guilty. None of the cases were brought under terrorism legislation—instead they involved armed robbery, housing fraud, and cigarette smuggling respectively—and in each there was proof that jury tampering had occurred previously in the case. *See id.*; *R v. Mackle*, [2007] NICA (Crim) 37; *R v. Guthrie*, [2011] 2 Crim. App. 20 (EWCA). The EWCA thus far has set a high bar, in terms of proving danger of jury tampering and inadequate protective measures, deeming orders for non-jury trials “the decision of last resort” reserved for “extreme cases.” *R v. J*, [2011] 1 Crim. App. 5 (EWCA) [8].

451. *See* LOUISE DE MENTHON, ISLAMIC HUMAN RIGHTS COMM’N, BRITISH MUSLIMS: “THE SUSPECT COMMUNITY”? (2013), available at <http://www.ihr.org.uk/publications/briefings/10686-british-muslims-the-suspect-community>, archived at <http://perma.law.harvard.edu/0Ep7PNxaQE/> (assessing the implementation of the U.K. government’s “Channel” initiative as part of a strategy to prevent people (including young children) from engaging in terrorism and finding that it perpetuates a stereotype that Muslim communities are suspect and associated with terrorism).

452. *See* Nicholas Appleby, *Labelling the Innocent: How Government Counter-Terrorism Advice Creates Labels That Contribute to the Problem*, 3 CRITICAL STUD. ON TERRORISM 421 (2010). In the U.S. context, see Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525 (2005).

453. Pantazis & Pemberton, *From the “Old” to the “New” Suspect Community*, *supra* note 9, at 659–61.

rorism has led to hate crimes against non-whites and hostility between groups.⁴⁵⁴ Discriminatory application of counterterrorism laws further risks criminalizing communities and damaging the legitimacy of the state, which can be difficult to remedy.⁴⁵⁵

The NICA's miscarriage of justice jurisprudence, which only minimally interrogates the conflict-era criminal justice system, suggests that judicial discretion and deviation from due process standards are especially dangerous in the counterterrorism realm. Problems identified in counterterrorism investigations should not be assessed in isolation from prosecutions and adjudications. When mistakes are made and an individual wrongfully convicted, the injustice may not be rectified on appellate review and confidence in the system will be lost. Adequate procedural protections are necessary to avert such dangers and ensure laws and facts are not interpreted with undue deference under the fog of terrorism, given the politically charged nature of terrorism trials.

454. *Id.* at 661; GUELKE, *supra* note 44, at 261–62.

455. Restoring confidence in the system has been an arduous and time-consuming aspect of the Northern Ireland transition. Experts in policing argue that the procedures governing counterterrorism policing should be no different from ordinary policing; the long-term costs of repressive tactics, including loss of police integrity, outweigh any short-term advantages. *See* Matassa & Newburn, *supra* note 100, at 481, 485. In Northern Ireland, lost confidence in the police was addressed, dramatically, by the transformation of the RUC into a new police force after root-and-branch reforms were recommended by an independent commission. *See* REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, *supra* note 407, ch. 20. Sinn Féin did not formally accept the new police service, nor did it participate in policing oversight bodies, until 2007. Ellison et al., *supra* note 268, at 489; *see generally* John McGarry & Brendan O'Leary, *The Politics of Policing Reform in Northern Ireland*, in *THE NORTHERN IRELAND CONFLICT: CONSOCIATIONAL ENGAGEMENTS* 371 (2004).

