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TERRORISM AND HUMAN RIGHTS: COUNTER-INSURGENCY AND NECESSITY AT COMMON LAW

David R. Lowry*

I. Introduction

Emergency powers have existed in Northern Ireland from the beginning of the state in 1920.¹ Northern Ireland came into being as a result of the partition of Ireland by the British Parliament, whereby the six north-eastern counties of Ireland remained an integral part of the United Kingdom.² Following partition, one-third of the population of Northern Ireland were Catholics who were predominately Nationalist or Republican in ideology.³ As a consequence, partition was viewed as a huge gerrymander and a denial of self-determination of the enclosed Nationalist minority.⁴ Civil unrest has been a recurring feature in Northern Ireland⁵ and government has been conducted by the dominant group (Protestant), without consensus, since 1920.⁶

For the purposes of this article it is significant to note that elements of the minority have, from time to time, resorted to force of arms in pursuit of an irredentist political philosophy.⁷ Because of the state's monopoly of force, the

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1 The fifth statute enacted by the fledgling Northern Irish Parliament (Stormont) was a particularly wide and odious emergency powers statute. Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, c.5 (N.I.) *as amended by* 23 & 24 Geo. 5, c.12 (N.I.) (1932). For an analysis of the early operation of this statute see, National Council for Civil Liberties, *The Special Powers Acts of Northern Ireland* (1936). For an assessment of the operation of the act between 1944 and 1954 see Edwards, *Special Powers in Northern Ireland* CRIM. L. REV. 7 (1956). For a brief assessment of the role of the act in exacerbating the current conflict see K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND* 6-36 (1975) (hereinafter cited as *Law and State*).

2 The partition was created by a statute of the British Parliament, Government of Ireland Act, 1920, 10 & 11 Geo. 5, c.67. For a lucid account of the partition of Ireland see N. MANSERGH, *THE IRISH QUESTION 1840-1921* (3d ed. 1975) and N. MANSERGH, *THE GOVERNMENT OF NORTHERN IRELAND* (1936). An excellent succinct account of the constitutional history of Northern Ireland is now available: T. W. MOODY, *THE ULSTER QUESTION 1603-1973* (1974). An admirably eclectic survey of constitutional law and history is found in Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 *ANGLO-AMERICAN L. REV.* 368 (1972).

3 Several works chronicle the fate of the Catholic minority in the new state of Northern Ireland. In particular, see F. LYON, *IRELAND SINCE THE FAMINE* (1971); L. DE PAOR, *DIVIDED ULSTER* (1970); M. FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (1976). For a Marxian view of partition in an historical perspective, see T. JACKSON, *IRELAND HER OWN* (1947).

4 For an explanation of this viewpoint, see, e.g., S. MACSTIOFAIN, *MEMOIRS OF A REVOLUTIONARY* (1975). From 1970-1973 Mr. MacStiofain was Chief-of-Staff and founder of the newly formed Provisional I.R.A.

5 A short description of civil unrest since 1920 is found in A. BOYD, *HOLY WAR IN BELFAST* (2d ed. 1970). For an analysis of the much used internment power under the Special Powers Act, see J. MCGUFFIN, *INTERMENT* (1973).

6 On the precise nature of the devolved government in Northern Ireland, see R. ROSE, *GOVERNMENT WITHOUT CONSENSUS* (1971); D. BARRETT & G. CARTER, *THE NORTHERN IRELAND PROBLEM: A STUDY IN GROUP RELATIONS* (1962).

7 For a critical exposition of nationalist thinking see E. MCCANN, *WAR AND AN IRISH TOWN* (1974). For the role of the I.R.A., see J. BELL, *THE SECRET ARMY* (1970) and T. COOGAN, *THE I.R.A.* (1970).

activities of the militant irredentists have been confined to guerilla campaigns. And, since 1971,⁸ the Irish Republican Army (I.R.A.) has embarked upon a protracted guerilla campaign which has emphasized a shift from rural to urban guerilla warfare or urban terrorism.⁹ Such terrorism constitutes a shift from *direct* terror to *indirect* terror in that its primary objective is to demonstrate that the state cannot protect its citizens, cannot enforce the rule of law and is, consequently, ungovernable.¹⁰ Indirect forms of terror have led to new attritional policies of counter-terror (counter-insurgency) whereby the military and the police seek primarily to "contain" terror prior to its gradual elimination.¹¹ However, new systems of terrorism and counter-insurgency do not operate in a legal vacuum. The primary objective of this article is to examine the legal framework under which the continuing Northern Irish urban guerilla warfare and counter-insurgency tactics operate. Secondly, the recently developed and applied theories of counter-insurgency will be identified and analyzed. Finally, some conclusions will be drawn from the Northern Irish experience regarding, on the one hand, civil liberties and human rights and, on the other hand, legal controls over military behavior in a contemporary emergency situation.

II. Counter-Insurgency: The Legal Framework

During war or insurrection there is a manifest need for strong and effective government. Even liberal democratic systems of government reserve the right to concentrate power in the hands of the executive during an emergency or crisis.¹² Historically society responded to war and similar crises by declaring martial law by which the executive exercised the right to use force against force within the realm in order to suppress disorder.¹³ Under early English law, the monarch

8 For the origin of the present I.R.A. campaign, see C. O'BRIEN, *STATES OF IRELAND* (1972); Sunday Times Insight Team, *Northern Ireland* (1972); and R. DEUTSCH & V. MAGOWAN, *NORTHERN IRELAND 1968-1973: A CHRONOLOGY OF EVENTS*, vol. I 1968-71 (1973).

9 For an interesting comparative analysis see J. BELL, *ON REVOLT: STRATEGIES OF NATIONAL LIBERATION* (1976).

10 For a fuller explanation of direct and indirect forms of terrorism, see E. HYAMS, *TERRORISTS AND TERRORISM* ch. 1 (1974).

11 Modern theories of counter-terror or counter-insurgency are found in J. McCUEN, *THE ART OF COUNTER-REVOLUTIONARY WAR* (1966); R. THOMPSON, *DEFEATING COMMUNIST INSURGENCY* (1966); F. KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY, PEACEKEEPING* (1971) (hereinafter cited as *Kitson*). The latter work is of particular importance in the context of the present Irish crisis and has influenced military theory, strategy and response to the I.R.A. campaign. For an informative critical evaluation of Kitson's theories, see J. KELLY, *GENESIS OF REVOLUTION* (1976). Mr. Kelly was, until recently, head of Irish Army Intelligence for Northern Ireland.

12 One commentator has observed that war requires "totalitarian" government (K. WHEARE, *FEDERAL GOVERNMENT* 187 (4th ed. 1963)), while another has used the descriptive term "constitutional dictatorship" (C. ROSSITER, *Constitutional Dictatorship* at 4-5 (1948)).

13 There are various definitions of martial law but the most appealing is that of the Duke of Wellington: "Martial law is neither more nor less than the will of the General who commands the army. In fact, martial law means no law at all." HANSARD, col. 880 (1851). However, in this instance the Duke of Wellington was referring to the relationship of the military to alien enemies when abroad. Martial law also encompasses the right of the executive to suspend or supersede municipal law in order to suppress internal civil disorder. On the various meanings attributed to the term "martial law" see R. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 150-53 (2d ed. 1964); I. BROWNLIE, *THE LAW RELATING TO PUBLIC ORDER* 124-25 (1968). Perhaps the most extensive study of martial law is to be found in C. FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943) and C. FAIRMAN, *THE LAW OF MARTIAL RULE AND THE NATIONAL EMERGENCY*, 55 HARV. L. REV. 1253 (1941-42). Note that some American commentators use the term "martial rule" in preference to "martial law."

sometimes issued commissions to try subjects under martial law in peacetime.¹⁴ This practice was curtailed by the *Petition of Right* in 1628,¹⁵ and thereafter the Crown was prevented from using military courts rather than ordinary courts of law in times of peace.¹⁶ With the exception of an unused and short-lived statutory imposition of martial law in 1914,¹⁷ the executive has not resorted to martial law in Britain (as opposed to Ireland and the Colonies)¹⁸ since the eighteenth century.¹⁹ However, it is clear that the prerogative power to declare martial law in war was not extinguished by the *Petition of Right* and is now vested in the executive.²⁰ Additionally, some commentators take the view that the common law confers a duty upon the executive to use whatever force is necessary to suppress civil disorder.²¹

The justification for martial law is found in the doctrine of necessity.²² Once the courts have been satisfied that war exists,²³ they will not further scrutinize military actions or related executive acts *durante bello*.²⁴ One jurist has noted that: "Martial law arises from the State necessity, and is justified at the common law by necessity, and by necessity alone. . . ."²⁵ A major difficulty lies in the fact that, as martial law has rarely been used in Britain, there is a paucity of direct judicial and legislative authority prescribing the parameters of extremely wide and unfettered executive powers.²⁶ But it is clear that the courts do not regard martial law as "law"²⁷ and that military tribunals are not courts but advisory committees carrying out the orders of the military commander.²⁸ This policy of judicial abnegation ceases when war terminates, at which time the military authorities may be held liable *ex post facto* for actions in excess of the powers conferred.²⁹

14 F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 266-67 (1908), who asserts that this questionable practice of permitting martial law to exist in peacetime alongside regular courts was never subject to judicial review because "[t]he judges of the courts of common law were very distinctly the king's servants."

15 [1628] 3 Car. I, c. 1.

16 For an illuminating historical analysis of martial law see Holdsworth, *Martial Law Historically Considered*, 18 *LAW Q. REV.* 117 (1902).

17 Defense of the Realm Act (No. 2), 1914, 4 & 5 Geo.5 c.63. See also Bowman, *Martial Law and the English Constitution*, 15 *MICH. L. REV.* 93 (1916).

18 See also K. Roberts-Wray, *COMMONWEALTH AND COLONIAL LAW* 642-43 (1966).

19 "[M]artial law has never been attempted to be exercised [since the *Petition of Right*] in the realm of England by virtue of the prerogative." per Lord Cockburn C.J. in *R v. Nelson & Brand*, *F. Cockburn Sp. Rep.* (1867). For a contrary interpretation, see Pollock, *What Is Martial Law?*, 18 *LAW Q. REV.* 152, 155 (1902).

20 *Egan v. Macready* [1921], 1 *IR.* 265.

21 MAITLAND, *supra* note 14, at 267; HEUSTON, *supra* note 13, at 152.

22 For a lucid examination of the necessity doctrine see D. KEIR & F. LAWSON, *CASES IN CONSTITUTIONAL LAW* 434-40 (4th ed. 1954).

23 The courts have expressly reserved the right to review whether the crisis calls for a sufficient use of military power to justify a state of war, *R(Garde) v. Strickland*, [1921] 2 *IR.* 317.

24 KEIR & LAWSON, *supra* note 22, at 435-36.

25 Dodd, *The Case of Marais*, 18 *LAW Q. REV.* 143, 145 (1902).

26 Much of the case law and legislation judicially considered relates to colonial unrest or disturbances in Ireland. See also KEIR & LAWSON, *supra* note 22, at 432.

27 *Re Clifford and O'Sullivan*, [1921] 2 *A.C.* 570.

28 *R v. Allen*, [1921] *IR.* 241. Similarly the U.S. Supreme Court has ruled that it has no power to review the proceedings of a military commission, the commission not being part of the judicial system, *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

29 *Higgins v. Willis*, [1921] 2 *IR.* 386. Usually an Act of Indemnity is passed to retrospectively protect people who have acted in good faith. See, e.g., *Indemnity Act, 1920*, 10 & 11 Geo. 5 c. 48.

Thus, while direct precedent is scarce,³⁰ martial law allows for uncontrolled use of exceptional measures. The courts regard martial law as non-justiciable *durante bello* and refuse to balance the potentially tyrannical nature of unfettered military power against the rights and privileges of the citizen.³¹ Furthermore, in this century British courts have retreated from the traditional safeguard established in the *Wolfe Tone Case*,³² namely that civilians could not be tried by courts-martial while the ordinary courts were still open.³³

The modern reality of the sweeping nature of common law war powers makes martial law superfluous.³⁴ By prerogative,³⁵ common law³⁶ and, more

30 It would be wrong, however, to deduce that British history is free from violent protest and insurrection. One recent study analyzed such events between 1485 and 1976 and found that there had been 209 uprisings and insurrections. N. Pennick, *British Disaffection* (1976) (unpublished). For a short review of this study see *Peace News* (London), Feb. 11, 1977, at 12.

31 After analyzing the relevant case law KEIR & LAWSON, *supra* note 22, at 437, make the startling observation:

On the one hand, the citizen should not be subject to acts of tyranny at the hands of one who cannot be made responsible: on the other hand every argument against allowing the courts to interfere with the course of military operations weighs equally heavily against submitting every one of the commander-in-chief's acts to be judged by a common jury. These are matters for experts. . . .

This reflects the view in *R. v. Allen*, *supra* note 28 (Malony, C. J.), in which the Court refused to review a death sentence imposed by the British military commander in Ireland:

It is the sacred duty of this court to protect the lives and liberties of all His Majesty's subjects, and to see that no one suffers loss of life or liberty save under the laws of the country; but when subjects of the King rise in armed insurrection and the conflict is still raging, it is no less our duty not to interfere with the officers of the Crown in taking such steps as they deem necessary to quell the insurrection . . . [this court] . . . cannot, *durante bello*, control the military authorities, or question any sentence imposed in the exercise of martial law. . . . It seems competent, if war exists, for the military authorities to use special military Court machinery, and to impose any sentence, even death, without being disabled. . . . When peace is restored, acts in excess of what necessity requires . . . may require the protection of indemnifying legislation.

2 I.R. 241 at 264, 272.

32 27 State Tr. 759 (1798). For an interesting comment on this ruling see HEUSTON, *supra* note 13, at 36-38. *The Wolfe Tone* ruling was later reiterated in The Joint Opinion of the Law Officers of the Crown (Sir J. Campbell and Sir R. Rolfe), Re: Power of the Governor of Canada to proclaim Martial Law (1838), reprinted in KEIR & LAWSON, *supra* note 22, at 445-46.

33 *Ex parte Marais*, [1902] A.C. 109 (P.C.) later applied in *R. v. Allen*, [1921] 2 I.R. 241 (1921) and *R. (Childers) v. Adjutant-General*, [1923] I.R. 5. An interesting contrast with *Marais* is provided by the U.S. Supreme Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (Chase, C.J.), which relied upon British Constitutional practice prior to *Marais* and applied the *Wolfe Tone* ruling. The court formulated a markedly different test from *Marais*, namely: "The necessity must be actual and present: the invasion real, such as effectually closes the courts and deposes the civil administration." *Id.* at 127. The test in *Milligan* was later modified in *Moyer v. Peabody*, 212 U.S. 78 (1909) regarding a Governor's liability, but was reaffirmed in *Sterling v. Constantin*, 287 U.S. 378 (1932). See also *Duncan v. Kahanamoku*, 327 U.S. 304, 326 et seq. (1946) (concurring) (Murphy, J.). For a critique of *Milligan*, see Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942). On the use of martial law in Hawaii during World War II, see Farrell, *Civil Functions of the Military and Implications of Martial Law*, 22 U. KAN. CITY L. REV. 157 (1954) and Frank, *ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COL. L. REV. 639 (1944). For an excellent discussion of martial law in America in an historical perspective see F. WIENER, *CIVILIANS UNDER MILITARY JUSTICE* (1967).

34 This view is shared by some leading contemporary British constitutional lawyers. See, e.g., I. BROWNIE, *supra* note 13, at 125 and S. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 518 (2d ed. 1973).

35 Thus, e.g., the actual declaration of war is a prerogative power as are the powers to intern and deport enemy aliens; *R. v. Bottrill*, *ex parte Kuechenmeister*, [1947] K.B. 41; *R. v. Vine Street Police Station Superintendent*, *ex parte Liebmann*, [1916] 1 K.B. 268; *R. v. Commandant of Knockaloe Camp*, *ex parte Forman*, [1917] 117 L.T. 627. See also Garner, *Treatment of Enemy Aliens*, 12 A.J.I.L. 27 (1918). On the seizure of property by prerogative

usually, statutory emergency powers,³⁷ the executive possesses broad power to suspend civil liberties, deny access to judicial review,³⁸ and curtail parliamentary scrutiny of executive action³⁹ while concentrating control into its own hands. In fact, short of a nuclear war,⁴⁰ it is difficult to envisage the future use of martial law in Britain, since virtually identical "emergency powers" are readily available. Moreover, emergency powers of a statutory nature do not carry the stigma of martial law nor entail the likelihood of close international political and judicial scrutiny⁴¹ and opprobrium.⁴²

Appellate rulings arising out of the operation of emergency powers during World War I provide the basis for determining the limits upon executive power. The case law of this period of particular doctrinal importance reveals, on the one hand, judicial abnegation regarding the protection of civil liberty and, on the other hand, a cautiously responsive and protective judicial attitude toward the

power, see *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508; *Burmah Oil Co. Ltd., v. Lord Advocate*, [1965] A.C. 75; and *The Broadmayne*, P. 64 (1916). On the right of angary, see *Commercial and Estates Co. of Egypt v. the Board of Trade*, [1925] 1 K.B. 271. On the residual nature of prerogative power, see A. DICEY, *INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 430 *et seq.* (10th ed. 1965).

36 For example, the right of the Crown to enter private property and construct defense works to repel an invasion see *The Case of the King's Prerogative in Saltpetre*, 12 Co.Rep. 12 (1606). See also S.9, *Emergency Powers (Defense) Act*, 1939, 2 & 3 Geo. 6, c.62. For common law doctrine of the duty to suppress disorder, see the charge to the grand jury in the *Bristol Riots Case*, 3 State Tr. N.S. 1; 5 C & P 261 (1832) (Tindal, C. J.); *R v. The Inhabitants of Wigan*, 1 Wm.Bl. 47 (1749); *REPORT OF COMMITTEE ON FEATHERSTONE RIOTS*, PARL. PAPERS C.7234 (1893-94). For a brief resume of law relating to the use of the military in aid of the Civil Powers, see 2 *MANUAL OF MILITARY LAW*, S.V. (1951).

37 Emergency legislation, as enacted in this century, has usually delegated wide law-making powers to the Executive, see *The Defense of the Realm (Consolidation) Act*, 1914, 4 & 5 Geo.5, c.8; *Defense of the Realm (Amendment) Act*, 1915 5 Geo.5, c.34; *Emergency Powers Act*, 1920, 10 & 11 Geo.5, c.48; *Emergency Powers (Defense) Act*, 1939, 2 & 3 Geo. 6, c.62; *Emergency Powers (Defense) Act*, 1940, 3 & 4 Geo.6, c.20; *Emergency Powers (Defense) (No. 2) Act*, 1940, 3 & 4 Geo.6, c.45; *Emergency Powers Act*, 1964, c.38.

38 Although it should be noted that, following a discernible policy of judicial abnegation in emergency situations, the courts will refuse to question the *ultra vires* nature of the exercise of executive action in the absence of *mala fides*. See *McEldowney v. Forde*, [1971] A.C. 632; [1969] 3 W.L.R. 179 (H.L.). For the limits of judicial review of civil liberties in an emergency, see the landmark case *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.). See also *Greene v. Secretary of State for Home Affairs*, [1942] A.C. 284 and, more recently, *Employment Sec. v. ASLEF*, (No. 2), [1972] 2 Q.B. 455. On the doctrine *Salus Populi Suprema Lex*, see Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 *HUMAN RIGHTS* 261 (1976).

39 In constitutional theory the Executive is answerable to Parliament even on matters of national security. In reality, however, Cabinet Ministers usually refuse to answer to Parliament on the grounds of national security. For a study of parliamentary questioning concerning internment under wartime emergency conditions and the use of the national security rationale, see Cotter, *Emergency Detention in Wartime: The British Experience*, 6 *STAN. L. REV.* 238 (1954). However, parliamentary review of delegated legislation in normal times is hardly noticeable or, in the view of DE SMITH, *supra* note 34, such review "tends to be perfunctory" at 333.

40 For an interesting American analysis of the role of law in a modern nuclear war setting, see Cavers, *Legal Planning Against the Risk of Atomic War*, 55 *COL. L. REV.* 127 (1955). See also R. RANKIN & W. DALLMAYR, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR* 55-81 (1964).

41 On the international justiciability of emergency legislation under Article 15 of the European Convention of Human Rights, see *Lawless v. Ireland*, [1958] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS 308 (Eur. Comm. on Human Rights) and [1961] 4 Y.B. EUR. CONV. ON HUMAN RIGHTS 438. For an account of this ruling see A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 51-3, 111-14 & 212-21 (2d ed. 1977).

42 For an assessment of the significance of international public opinion and the role of international prestige in the enforcement of human rights see Bilder, *Rethinking International Human Rights: Some Basic Questions*, *WISC. L. REV.* 171, 193 *et seq.* (1969).

protection of property rights from arbitrary executive action under the guise of prerogative power.

Pursuant to wide powers conferred by the emergency legislation enacted for World War I, the Home Secretary (a cabinet officer) sought to authorize, by delegation legislation, extra-judicial preventive detention by executive action.⁴³ The use of this internment power was quickly challenged in a case which was to become a constitutional *cause celebre* and a leading authority confirming unlimited executive power in an emergency. In *R. v. Halliday, ex parte Zadig*,⁴⁴ certain internment provisions of the Defense of the Realm (Consolidation) Act⁴⁵ were challenged. Section 1(1) of the Act conferred power upon the executive during the duration of the War (World War I) "to issue regulations for securing the public safety and the defense of the realm" and Regulation 14B,⁴⁶ made in purported exercise of this power, empowered the Home Secretary to intern persons posing a threat to national security.

Under this Regulation the Home Secretary ordered the detention of one Zadig, who was a naturalized British subject of German birth. Zadig, having unsuccessfully argued before the Advisory Committee, applied for a writ of *habeas corpus* on the ground that Regulation 14B was *ultra vires* the Defense of the Realm (Consolidation) Act of 1914. The Court of Appeal unanimously dismissed his appeal on the basis that the regulation impugned was authorized by the express language of the Act, which was precise, clear, and free from ambiguity. Zadig appealed to the House of Lords.

The challenged Regulation had been passed as passions became inflamed with the escalation of World War I,⁴⁷ and the *Halliday* case demonstrates that the House of Lords was similarly subject to such feelings. The Lord Chancellor, Lord Finlay, delivered the majority judgment and affirmed the Court of Appeal.⁴⁸ Having noted that Parliament had power to pass the Act, Lord Finlay then examined the construction of the Act and dealt with the six main arguments of the appellants, which may be summarized: (1) that some limitation must be put upon the general words of the statute; (2) that there was no provision for imprisonment without trial; (3) that the provisions made by the Defense of the Realm Act 1914, for the trial of British subjects by a civil court with a jury strengthened the contention of the appellant; (4) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the constitution; (5) that the statute was in its nature penal and must be strictly

43 A brief note on the World War I legislation is found in H. BELLOT, *LEADING CASES IN CONSTITUTIONAL LAW* 126-29 (7th ed. 1934).

44 [1917] A.C. 260.

45 [1914] 5 Geo.5, c.8.

46 Defense of the Realm Consolidated Regulations, Reg. No. 14B, stated, *inter alia*:
Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety or the defense of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person . . . to be interned in such place as may be specified in the order.

47 See Garner, *Treatment of Enemy Aliens*, 12 AM. J. INT'L L. 27 (1918), for the legislative history of Regulation 14B.

48 Lords Dunedin, Atkinson and Wrenbury delivered separate concurring opinions.

construed; (6) that a construction that is repugnant to the constitutional traditions could not be adopted. Counsel for the appellant had also argued historically, recalling various interferences with *habeas corpus* in times of danger and questioned why historical precedent had not been followed.

Lord Finlay rejected all of the appellant's arguments. On the argument that untrammelled emergency powers could result in the use of the death penalty without judicial review, Lord Finlay responded:

It appears to me to be a sufficient answer to this argument that it may be necessary in time of great public danger to entrust great powers to his Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.⁴⁹

Thus, the *purpose* of the legislation, in the opinion of Lord Finlay, overrode the principles of construction and the requirement of meaningful judicial review in emergency situations.⁵⁰ The majority opinions show that the House of Lords was prepared to assume that Parliament had intended to devolve to the executive complete and unfettered discretion to implement whatever measures the executive might deem to be necessary for defense. The real or actual necessity for the measures thus chosen was not justiciable as the majority would not inquire into the executive definition of the threat to "public safety." Thus the majority saw the emergency powers possessed by the executive as analogous to the Crown Prerogative insofar as the only safeguard against abuse in the absence of *mala fides*⁵¹ is parliamentary scrutiny. Similarly, the majority took the view that the power conferred by the words of the statute was "subjective" to the Home Secretary and incapable of objective judicial oversight.⁵²

Lord Shaw delivered a lengthy and, in parts, obscure dissent.⁵³ His Lordship thought that the detention of "[persons] . . . of hostile origins and associations" was vague in the extreme⁵⁴ and took up counsel's point regarding unscrutinized summary execution by asking the question ". . . why, on the same principle and in the exercise power [of internment], may he not be shot out of hand?"⁵⁵ And on the constructive or implied repeal of constitutional guarantees of *habeas corpus* Lord Shaw concluded his dissent by restating the hitherto generally accepted

⁴⁹ See note 44 *supra*, at 268-69.

⁵⁰ The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, etc. had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. *Id.* at 269.

⁵¹ However, the difficulty in showing *mala fides* was illustrated in a case concerning Regulation No. 2 of the 1914 Act. In *Sheffield Conservative and Unionist Club Limited v. Brighton*, 32 T.L.R. 598, 85 L.J.K.B. 1669 (1916), the premises of a club were taken by the executive acting under powers conferred in Regulation No. 2. It was held that the purpose for which they were taken, even if only indirectly necessary for defense, was *intra vires* the Regulation. It had been argued that the military authorities had acted so unreasonably that they could not have acted in good faith, but Avory held that unless the court could say that the action of the authorities was so unreasonable as to be obviously not *bona fide*, the opinion of the military would be conclusive.

⁵² See Lord Finlay, *supra* note 44, at 269 and Lord Atkinson at 271-2.

⁵³ *Id.* at 276 *et seq.*

⁵⁴ *Id.* at 292.

⁵⁵ *Id.* at 291.

principles of statutory construction that constitutional safeguards must be expressly, rather than impliedly, repealed by a statute.⁵⁶ Lord Shaw took the view that, notwithstanding the breadth of the emergency powers granted by the legislature to the executive, it was incumbent upon the courts to strictly scrutinize the enabling statute prior to declaring delegated legislation to be *intra vires*. But only Lord Shaw, dissenting, thought that the fundamental issue of abuse of executive abrogation of civil liberty in an emergency was a justiciable issue. Thus a majority of the House of Lords abstained from examining the subjective exercise of discretion by the Minister of Home Affairs when detaining people without trial as a preventive measure during an emergency.

The outbreak of hostilities in 1939 caused the issue of internment to again provide the House of Lords with an opportunity to circumscribe emergency powers and yet again the court abrogated its duty to judicially scrutinize executive action. The source of the power to intern during World War II in Britain was the Emergency Powers (Defense) Act of 1939⁵⁷ which provided the Executive in the person of the Home Secretary with, *inter alia*, wide powers of internment.⁵⁸ Pursuant to these powers the executive passed Regulation 18B which gave the power to intern suspects "[I]f the Secretary of State has reasonable cause to believe any person to be of hostile origins or associations."⁵⁹ That the scope of this power to intern is very wide is obvious from the draftsman's use of "reasonable cause to believe" rather than the World War I term "satisfied."⁶⁰ The precise nature of the powers conferred and the courts' willingness to scrutinize executive acts of internment were quickly brought before the House of Lords in the landmark civil liberties ruling of *Liversidge v. Anderson*.⁶¹

In this case a detention order was made by the Home Secretary against Liversidge (alias Perlzweig) on the ground that he had reasonable cause to believe that Liversidge was a person of hostile associations, and that it was therefore necessary to exercise control over him. Liversidge was accordingly detained

56 In the latest edition of Maxwell on the Interpretation of Statutes, I find the law exactly as I view it stated thus: "Repeal by implication is not favored. A sufficient Act ought not to be held to be repealed by implications without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention." [1917] A.C. 260 at 268.

The construction I have ventured to propose appears to me to be not unreasonable, but to square with every familiar and accustomed canon. I think that the judgment of the Courts below is erroneous, and is fraught with grave legal and constitutional danger. In my opinion the appeals should be allowed, the regulation challenged should be declared *ultra vires*, and the appellant should be set at liberty.

[1917] A.C. 260 at 305.

57 [1939] 2 & 3 Geo.6, c.62.

58 "[Defense Regulations] . . . for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defense of the realm." *Id.* at S. 1(2)(9).

59 S.R. & O., 1939, No. 1681, Regulation 18B, ¶ 1. For a discussion of the origin of Regulation 18B, see COTTER, *supra* note 39, at 239-42.

60 See also C. K. ALLEN, LAW AND ORDERS 412-26 app. (3d ed. 1964).

61 [1942] A.C. 206. See also Heuston, *Liversidge v. Anderson in Retrospect*, 86 LAW Q. REV. 33 (1970); Heuston, *Liversidge v. Anderson: Two Footnotes*, 87 LAW Q. REV. 161 (1972).

in Brixton Prison, and the next year he sought a writ against the Home Secretary, containing a declaration that his detention was unlawful and claiming damages for false imprisonment. The Home Secretary did not make any affidavit showing why, or on what information, he had reached his decision, but merely produced the order purporting to be made under Regulation 18B. The action proceeded on a claim for particulars of defense: there was no suggestion that the Home Secretary had not acted in good faith; and the House of Lords, with Lord Atkin dissenting, held that the order was valid and the Home Secretary's answer sufficient.

The Lord Chancellor, Lord Maugham took the view that internment under the Regulations was a matter for executive discretion and that the Home Secretary was not acting judicially. Moreover, Lord Maugham recognized that a decision to intern must necessarily be based upon confidential information but that the Home Secretary was answerable to Parliament in this regard and not to the courts.⁶² His Lordship noted that Parliamentary scrutiny was envisaged by the Regulation as the Home Secretary had to give a monthly report to Parliament⁶³ and the internee's only redress was seen to be recourse to the Home Secretary's Advisory Board.⁶⁴ In Lord Maugham's view the words "reasonable cause to believe" meant that the Home Secretary should personally consider each case and the only requirement placed upon him by law was that he must act in good faith.⁶⁵ Lord Maugham's opinion, and the concurring opinions,⁶⁶ emphasize the fact that the powers conferred upon the executive were emergency executive powers at a time of great national peril and were necessary on grounds of national security. Thus the majority abrogated their duty to scrutinize executive acts on the grounds of *Salus Populi Suprema Lex*.⁶⁷

Lord Atkin, in a famous and spirited dissent, was far more conscious of the fundamental constitutional issue of civil liberty and refused to see the issue solely as one of technical construction.⁶⁸ Rejecting the majority's view that the words must be construed subjectively, Lord Atkin emphasized that the words "if he has reasonable cause to believe" did not mean "if he *thinks* he has reasonable cause to believe" and that consequently the words had an objective meaning giving rise to a justiciable issue.⁶⁹ Lord Atkin scathingly characterized the majority view

62 [1942] A.C. at 218.

63 But the Home Secretary could avoid particularized parliamentary questioning on the grounds of "national security." See *COTTER, supra* note 39.

64 "It seems to me that, if any . . . appeal had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Secretary's action, but without any obligation to communicate them to the person detained." [1942] A.C. at 222.

65 *Id.* at 219.

66 Lords MacMillan, Romer and Wright issued separate opinions concurring with Lord Maugham, L.C.

67 See also *R v. Home Secretary ex parte Lees*, [1941] 1 K.B. 72.

68 In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I. [1942] A.C. at 244.

69 *Id.*

and respondents' arguments as analogous to a children's fantasy.⁷⁰

However, Lord Atkin joined the majority in a subsequent case in which the House of Lords dismissed an appeal on an application for *habeas corpus* arising out of the same Regulation,⁷¹ and the *Liversidge* ruling became the authoritative decision regarding justiciability of executive actions affecting individual liberty during an emergency.⁷² The recent House of Lords ruling in *McEldowney v. Forde*⁷³ has reaffirmed *Liversidge* by holding that when individual liberty is curtailed by executive action under emergency legislation, the executive is immune from subsequent judicially imposed accountability in the absence of *mala fides*.

The House of Lords, as court of last resort, has demonstrated a consistent policy of judicial abnegation in failing to define the limits of executive discretion under statutory emergency powers and has ensured that executive incursions into the field of civil liberties remain non-justiciable in the absence of *mala fides*. By failing to afford the citizen a forum or redress against arbitrary use of unfettered executive powers the courts have blocked one important avenue of legitimate protest.

However, while the doctrinal cases reveal extreme reluctance on the part of the courts to scrutinize emergency executive actions in the area of individual rights or civil liberties, one field of constitutional rights benefitted from an assertive and protective judicial posture, namely the rights to private property. The courts adopted an activist stance in circumscribing executive emergency activities in the areas of taxation and acquisition of property.

This activist stance in proprietary matters is illustrated by controversial emergency legislation enacted during World War I which empowered the executive to requisition ships.⁷⁴ Pursuant to this power, the executive passed a regulation directing a shipping company to continue plying its trade but, henceforth,

70 I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." ("Through the Looking Glass," c.vi.) After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has." I am of opinion that they cannot, and that the case should be decided accordingly. *Id.* at 245.

71 *Greene v. Home Secretary*, [1942] A.C. 284. In this case the Home Secretary filed an affidavit setting out some particulars and stating that he had acted upon information obtained from responsible and experienced persons. Here Lord Atkin held this affidavit to be a sufficient answer and refused to inquire further into the necessity or justification of the appellant's internment.

72 See, e.g., *Budd v. Anderson*, [1943] 1 K.B. 642. However, *Liversidge* received a mixed reception from contemporary legal commentators. See, e.g., C. K. ALLEN, *supra* note 60; D. KEIR & F. LAWSON, *supra* note 22, at 262-64. Perhaps because of the controversy surrounding the *Liversidge* ruling the House of Lords, sitting as the Judicial Committee of the Privy Council on an appeal from Ceylon, was at pains to point out that *Liversidge* applied only to judicial review of executive acts in emergency conditions; *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66.

73 See note 38 *supra*. For an assessment of the contribution of this judicial posture to the escalation of the Northern Irish conflict, see T. HADDEN & P. HILLYARD, *JUSTICE IN NORTHERN IRELAND: A STUDY IN SOCIAL CONFIDENCE* 8-20 (1973). In Northern Ireland judicial abnegation regarding emergency powers has had the effect of tacitly reinforcing a repressive *status quo* while concomitantly closing the last outlet for legitimate protest. It was only after the *McEldowney* ruling that street protest and civil rights demonstrations grew in size and number.

74 Defense of the Realm (Consolidated) Regulations, Regulation 39B.

to do so on behalf of the government which was to be credited with all earnings which accrued. In *China Mutual Steam Navigation Co. Ltd. v. MacLay*,⁷⁵ the shipping company credited its own account with the profits, claiming that the government was not entitled to the earnings since the empowering regulation was *ultra vires*, being tantamount to taxation without the clear authority of Parliament. Although declaring the impugned regulation to be *intra vires*,⁷⁶ it was nevertheless held by Bailhache, J. that the executive directive which ordered the shippers to continue running the company *was*, in fact, *ultra vires*.⁷⁷ The learned judge took the view that power to requisition ships, while valid in itself, did not include the power to requisition the services of the owners. Bailhache, J. concluded by indicating that the owners should be subjected to "negotiations" rather than "command."⁷⁸

While *China Mutual* was not appealed beyond the trial stage, the Court of Appeal was soon presented with the opportunity to establish the parameters of the constitutionality of executive taxing powers during an emergency. In *Attorney-General v. Wilts. United Dairies Ltd.*,⁷⁹ the Court of Appeal examined the broad emergency powers of executive control over food supplies.

Pursuant to legislative enactment, the executive was empowered to, *inter alia*:

make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in or measures to be taken in relation to any article . . . when it appears to him necessary or expedient to make such order for the purpose of encouraging or maintaining the food supply of the country.⁸⁰

Under the purported exercise of this power, the executive, in the person of the Food Controller, sought to secure a levy of two pennies per gallon on milk prior to the grant of a license to any dairy. The Court of Appeal held that the tax was improper since the legislation did not expressly provide for executive taxing authority.⁸¹ In the opinion of Lord Justice Atkin:

[If] an officer of the executive seeks to justify a charge upon a subject made for the use of the Crown . . . he must show in clear terms, that Parliament has authorized the particular charge.⁸²

The court asserted that, notwithstanding the condition of war, the executive could not exclusively determine necessity, and, when such a measure eroded fundamental liberty under the Bill of Rights⁸³ the executive's case would be strictly scrutinized and must be permitted in "clear terms."

75 [1918] 1 K.B. 33.

76 *Id.* at 39.

77 *See also dicta* in *Lipton Ltd. v. Ford*, [1917] 2 K.B. 647 at 655.

78 *See* [1918] 1 K.B. at 41.

79 37 L.T.R. 884 (1921).

80 New Ministries and Secretaries Act, 6 & 7 Geo. 5, c.68, §§ 3 & 4; Defense of the Realm (Consolidated) Regulations, Regulation 2F.

81 *See* 37 L.T.R. at 885 (Scrutton, L.J.).

82 *Id.* at 886.

83 1 Will. & Mar. Sess.2, c.2 (1688).

This "clear terms" principle was also applied at this time by the Court of Appeal to restrain the executive from controlling the rights of landlords in *Chester v. Bateson*.⁸⁴ In this case the executive had sought to curtail the use of ejectment proceedings by landlords against munitions workers unless prior ministerial consent had been obtained.⁸⁵ The landlord maintained that the impugned regulation encroached upon the *Magna Carta* in that it deprived the landlord of his right of access to the courts.⁸⁶ It was held that such an encroachment could only be by "direct enactment"⁸⁷ which seemed to be a reformulation of the clear terms principle, albeit in more restrictive terms.

Inevitably the limits of executive power in regard to property rights came before the House of Lords and in *Attorney-General v. De Keyser's Royal Hotel Ltd.*,⁸⁸ the court did not hesitate to balance executive necessity against fundamental liberty. In *De Keyser* the War Office informed the hoteliers that the Army Council intended to take possession of their hotel, stipulating that *ex gratia* compensation would be paid but would be "strictly limited to the actual monetary loss sustained."⁸⁹ The Crown denied liability for full compensation by virtue of prerogative right and emergency enabling legislation, which provided:

Any such regulation may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making by-laws, or any other power under the Defense Acts, 1842 to 1875, or the Military Land Acts, 1891 to 1903.⁹⁰

The House of Lords held that the executive could not rely on the prerogative to justify requisition since statutory powers had superceded executive prerogative and, consequently, the prerogative was abated to the extent that the statute was operative.⁹¹ Since the prerogative power had been limited by statute, it fell to the court to determine whether it was for the executive or for the courts to divine if, in fact, the statute "directly dealt" with the same subject matter. In *De Keyser* the court opted for justiciability,⁹² notwithstanding its earlier but recent decision against justiciability of other fundamental rights in *Halliday*. Property rights were thus placed in a relatively advantageous position when set against individual rights.

In defining the limits of emergency executive power and discretion, the court forsook the opportunity to rearticulate the long-established constitutional principles enshrined in the *Magna Carta*, Petition of Right, and Bill of Rights, which protected citizens from the state acquisition of property without compensation.⁹³ Instead, the court relied upon a perceived "national sentiment" that

84 [1920] 1 K.B. 829.

85 Defense of the Realm (Consolidation) Act, 1914, 5 Geo. 5, c.8, § 1(1), Regulation 2A(2).

86 25 Edw.I, 1927, c.29.

87 See [1920] 1 K.B. at 833.

88 [1920] A.C. 509. See also *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*, [1919] A.C. 744.

89 [1920] A.C. at 510.

90 See note 85, *supra* at § 1(2).

91 See [1920] A.C. at 561.

92 *Id.* at 559.

93 For a commentary on the historical significance of these constitutional provisions, see F. MAITLAND, *supra* note 14.

“. . . it was equitable that burdens borne for the good of the nation” should be evenly distributed.⁹⁴ This activist stance resulted in the court departing from constitutional principles while establishing a new constitutional doctrine which Lord Sumner chose to call a presumption of interpretation:

The presumption must be, both that the executive action was taken under powers by which it can be justified, rather than beyond all powers whatever, and that the available powers have been exercised so as to prevent and not so as to cause avoidable injury to the subject.⁹⁵

Although the grant of power had been extremely wide on its face the discretion of the executive in war was only unfettered insofar as the powers executed the protective function of “public security and the defense of the realm” and, significantly, the court limited the general words to the specific means provided *and* necessary to achieve those ends.⁹⁶

In *De Keyser* the general empowering words “for the suspension of any restrictions” were narrowly construed so as “not to cause avoidable injury to the subject.” The power to acquire was deemed to be independent of the question of payment and is completed and exhausted prior to the time at which the obligation to pay arose. Accordingly, this narrow construction meant that the obligation to pay compensation was not a “restriction” within the meaning of the Act and could not, therefore, be suspended by the executive.⁹⁷ In this result *De Keyser* upheld the constitutional tradition of protecting private property from expropriation. More significantly, the House of Lords formulated the *De Keyser Doctrine*: that the courts, in the face of unfettered executive discretion via emergency powers, reserve the right to scrutinize executive acts to ensure that they are in fact necessary, and will limit the general words of an emergency statute to the specific means provided *and* necessary for the task. Thus, the *De Keyser Doctrine* established the justiciability of executive necessity in an emergency.

The *De Keyser Doctrine* may be distinguished from the *Halliday-Liversidge-McEldowney* approach in that *De Keyser* and the other emergency property rights cases dealt only with property rights and interests as opposed to internment of suspects. Jurisprudentially, the key difference is found in the opposing approaches to the *ultra vires* doctrine. In *De Keyser* the House of Lords unequivocally declared executive necessity in an emergency to be justiciable whereas in *Halliday* such an approach was rejected when it was deemed that “. . . no tribunal . . . can be imagined less appropriate than a Court of Law” to examine executive necessity.⁹⁸ Indeed, the *De Keyser* doctrine follows the spirit of the dissent in *Halliday* in which Lord Shaw declared that “fundamental rights [are] . . . exempt from infringement by delegated power unless Parliament has expressed itself with unmistakable clarity.”⁹⁹ Thus while judicial activism has ensured justiciability of property rights in emergencies, civil liberties have suffered

94 See [1920] A.C. at 553.

95 *Id.* at 559.

96 *Id.* at 529-30 (Lord Dunedin).

97 *Id.* at 558.

98 See [1917] A.C. at 269 (Lord Finlay, L.C.).

99 See generally [1917], A.C. 260.

at the hands of a clearly discernible policy of judicial abnegation perpetuating the problem aptly characterized by Neumann:

The state of siege, martial law, emergency powers—these merely indicate that reasons of state may actually annihilate civil liberties altogether. Common to these institutions in most countries is the fact that the discretionary power of those who declare an emergency cannot be challenged. It is they who determine whether an emergency exists and what measures are deemed necessary to cope with it.¹⁰⁰

The importance of the doctrine of necessity in the Northern Irish context is readily apparent when it is recalled that the fifth statute enacted by the fledgling Northern Irish Parliament (Stormont) was the notorious Special Powers Act of 1922¹⁰¹ which remained in force for 50 years until it was replaced by modified, yet equally repressive, British emergency legislation.¹⁰²

In recent years the British experience in Northern Ireland has inevitably placed heavy reliance upon emergency executive powers to deal with the newer and more complex problem of the urban guerilla. Because of these changes in the social context, it is necessary to examine the judicial attitude to the terrorist phenomenon in the light of the above doctrines. In fact only three cases are, for our purposes, of doctrinal significance as they indicate a sub-category of the concept of necessity, namely the doctrine of *operation necessity*.

In *R. v. Allen*¹⁰³ the Court of King's Bench Division of Ireland confronted the issue of the justiciability of extremely repressive military action during a period of martial law in Ireland. Although *Allen* has been regarded as a definitive analysis of military and executive powers during martial law, the pleadings of the military and the reasoning of Chief Justice Molony offer highly persuasive authority concerning the parameters of executive discretion in dealing with urban guerillas. In *Allen* the court declined jurisdiction to intervene so as to prevent a military court from executing a person found in possession of arms. The military argued, *inter alia*, that the court did not have jurisdiction and that the exercise of martial law powers, *durante bello*, was not justiciable.¹⁰⁴ The key issue in *Allen* was characterized by Chief Justice Molony to be: "What are the powers of the Executive Government in dealing with armed insurrection?"¹⁰⁵ although the court was also prepared to examine whether, in fact, a state of war existed justifying martial law.

After carefully reviewing the history of insurrection from the fourteenth century, Molony noted that the traditional approach had been to use severe repressive measures, including the suspension of *habeas corpus*, and to protect the military and executive from judicial review *post durante bello* by the vehicle of Indemnity Acts. The Chief Justice observed that none of these Acts had contemplated either courts-martial or death sentences. However, Molony distinguished all prior armed insurrections on the factual basis that the then extant

100 Neumann, *The Concept of Political Freedom*, 53 COL. L. REV. 901, 917 (1953).

101 See note 1 *supra*.

102 Northern Ireland (Emergency Provisions) Act, 1973, c.53.

103 [1921] 2 I.R. 241.

104 *Id.*

105 *Id.* at 244.

insurrection consisted "exclusively of warfare of a guerilla character."¹⁰⁶ It was noted that guerillas did not wear uniforms and often were ". . . posing as peaceful citizens."¹⁰⁷ As long as guerilla warfare of this type continued, the Chief Justice was of the opinion that ". . . the Government is entitled and, indeed, bound to repel force by force, and thereby put down the insurrection and restore public order."¹⁰⁸ Moreover, precedents which had emphasized the justiciability of martial law powers "while the ordinary courts were still open" were distinguished: "[It] may, however, be doubted whether they contemplated such a system of guerilla warfare as now described."¹⁰⁹ The military derived both its "sole justification and authority" from the existence of rebellion and also ". . . the duty of doing *whatever may be necessary* to quell it, and to restore peace and order."¹¹⁰ The death sentence for possession of arms was, in the opinion of the military and of the court, ". . . absolutely essential."¹¹¹ The court, therefore, accepted that which in modern parlance would be termed an argument of "operational necessity." In essence guerilla warfare was deemed to create a broader and more repressive category of necessity, namely operational necessity, emanating from the military commander and beyond the oversight of both due process of law and judicial review at an appellate level.

But if, in a guerilla war, the military can execute citizens via courts-martial on the basis of operational necessity, a further issue remains as to other legal or justiciable checks and balances or constraints placed upon the military during an emergency, such as the current Northern Irish emergency, in which the military and the executive are acting not under martial law but under sweeping and repressive emergency legislation. Two further cases are of relevance in this regard: *R. v. Smith*¹¹² and *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)*.¹¹³

In *Smith* a soldier ordered a civilian to produce equipment promptly as guerillas were known to be in the neighborhood. The civilian behaved in a dilatory fashion and when the accused soldier reported this fact to his superior officer, he was ordered to shoot the civilian if his dilatory demeanor did not change. The soldier, noting the further delay of the civilian, shot and killed the civilian and was later charged with murder. The soldier pleaded in defense that he was following superior orders. In this case it was admitted that the killing was deliberate and intentional and, therefore, the only issue for the court was whether or not the defense of obedience to orders made the killing justifiable homicide or murder. In acquitting the soldier of the charge the court declared that a soldier is not culpable if he, subjectively, believes he is obeying the commands of a superior and the order given is not "manifestly illegal" so that he ought to have known it to be unlawful.¹¹⁴ These twofold subjective and objective criteria enabled the court to sidestep the more thorny issue presented by the defense,

106 *Id.* at 268.

107 *Id.*

108 *Id.* at 252.

109 *Id.* at 270.

110 *Id.* at 271.

111 *Id.* at 272.

112 17 CAPE OF GOOD HOPE SUP. CT. REP. 561 (1900).

113 [1976] 3 W.L.R. 235 (H.L.).

114 *See* 17 CAPE OF GOOD HOPE SUP. CT. REP. at 563.

namely that in a period of guerilla warfare when guerillas were thought to be proximate “. . . the order was not altogether an unreasonable or unnecessary one.”¹¹⁵ While the court said that “there is a good deal to be said in favor” of this defense contention,¹¹⁶ it seems clear from the facts and the context of the case that the circumstances of guerilla warfare could well have determined the issue of lawfulness of the order had the question been reached. The problem remains, however, of determining, after the *Smith* ruling, just what, if any, superior orders are of a type as to be clearly illegal.

This dilemma has been posed by a leading constitutional text:

There is really no satisfactory authority on the point. On the one hand, the citizen should not be subject to acts of tyranny at the hands of one who cannot be made responsible: on the other hand, every argument against allowing the courts to interfere with the course of military operations weighs equally heavily against submitting every one of the Commander-in-Chief's acts to be judged by a common jury. These are matters for experts.¹¹⁷

Clearly the balancing of such “acts of tyranny” against operational necessity should speak strongly in favor of justiciability so as to provide impartial scrutiny. The impartiality of experts, presumably those trained in military expertise, is, it is submitted, highly questionable and, *prima facie* unlikely to provide the high degree of skepticism which would be appropriate in a liberal democratic system. Indeed the recent anti-guerilla operations in, for example, Vietnam and Northern Ireland, have sometimes revealed military experts to be deficient in matters of judgment involving the balancing of liberty against operational necessity.

The concept of operational necessity was recently before the House of Lords in *Attorney-General for Northern Ireland's Reference*.¹¹⁸ In this case a British soldier shot and killed an unarmed civilian whom, it was alleged, he honestly though mistakenly suspected of being a member of the I.R.A. The soldier had apparently ordered the deceased to halt and when he did not do so, he killed him. A judge, sitting without a jury, acquitted the soldier on the grounds that he had had no conscious intent to kill and that the killing was justifiable homicide. Perhaps in response to the great public outcry generated by this verdict, the Attorney General for Northern Ireland took the unusual step of appealing by way of a Reference via the Northern Irish Court of Appeal to the House of Lords. In the House of Lords the decision turned upon the jurisdictional point of whether the court could entertain the reference application and it was decided that jurisdiction would be assumed.¹¹⁹ However, it was further reasoned that the issue of criminal liability of the honest but mistaken belief of the soldier in killing the suspect was so framed that it did not raise a point of law but rather a question of fact and, as such, the court declined to review the matter.¹²⁰

The second question as to the nature of the killing was, therefore, not

115 *Id.* at 564.

116 *Id.*

117 D. KEIR & F. LAWSON, *CASES IN CONSTITUTIONAL LAW* 437 (4th ed. 1954).

118 *See* [1976] 3 W.L.R. 235.

119 For jurisdictional reasoning see *Id.* at 238-41 (Lord Diplock).

120 *Id.* at 248 & 256-57.

reached.¹²¹ Although the House of Lords continued its policy of judicial abnegation, it is clear from the *obiter* in the reasoning that the conditions of guerilla warfare weighed heavily in the minds of the judges. According to Lord Diplock the question of the guilt of the soldier would depend upon the circumstances in which the accused made his decision to use force and the amount of time available for such a decision.¹²² Lord Diplock then hypothesized that an escaping suspect could be attempting to join a band of armed terrorists who "might be lurking in the neighborhood" and, consequently, as the time for the decision to shoot was short "even a reasonable man could only act intuitively."¹²³ Thus, he continued, a court would have to balance "risk against risk" with the caveat that "the calm analytical atmosphere of a court-room" with the "benefit of hindsight" might be inappropriate if it was not recalled that the soldier's decision was made "but in the brief second or two" and "under all of the stresses to which he was exposed."¹²⁴

Lord Diplock concurred with the finding of fact by the trial judge that the soldier "may have acted intuitively or instinctively without foreseeing the likely consequences of his act [beyond preventing escape]."¹²⁵ In the circumstances the soldier had no choice as to the degree of force because shooting the suspect was the only means of preventing his escape. Consequently, arguments regarding the degree of force in self-defense were inapplicable.¹²⁶

At trial the judge found that the soldier had fired because he believed that the man who was seeking to escape *might* be a terrorist.¹²⁷ The reasonableness of the action would depend upon the circumstances and the trial judge took the view that mere failure to halt would not, *per se*, be sufficient grounds for using a rifle.¹²⁸ Clearly all courts in this case took the view implicitly that the circumstances extant in Northern Ireland are most unusual in that the possible proximity of armed guerillas mitigated the harshness of the soldier's actions:

[I]t would be open to the jury to take the view that it would not be unreasonable to assess the kind of harm to be averted by preventing the accused's escape as even graver—the killing or wounding of members of the patrol by terrorists in ambush, and the effect of this success by members of the Provisional I.R.A. in encouraging the continuance of armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed.¹²⁹

121 The Attorney-General indicated that it was his hope that this reference would lead to some general guidance being given as to the use of force. I regret that I do not see that that is possible, particularly as we are asked to give our opinion on the particular circumstances stated in the reference which may not be repeated. *Id.* at 257 (Viscount Dilhorne).

122 [A]re we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or reasonably believed by him to exist, (b) in the circumstances of the time available to him for reflection, (c) could be of the opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using? *Id.* at 246 (Lord Diplock).

123 *Id.* at 247.

124 *Id.*

125 *Id.* at 248.

126 *Id.*

127 *Id.* at 244, 255-56.

128 *Id.* at 255-56.

129 *Id.* at 247 (Lord Diplock).

A major difficulty presented by such reasoning is that, as the I.R.A. does not wear uniform, almost any citizen *might* be a member. Moreover, the proximity of terrorist activities as a major circumstance to be considered would, in the case of Northern Ireland, include vast geographic areas, some of which have a high population density. In other words, the reasonableness criteria of remote and unsubstantiated suspicion of terrorist involvement coupled with the geographic proximity of hostile areas put almost one-third of the population at risk and are an inadequate restraint upon the conduct of the armed forces against the unarmed civilian population. The result of the decision in this case and the *dicta* of the House of Lords are that killing unarmed civilians erroneously suspected of being guerillas may be justifiable homicide. This serves to show both the strains placed on the notion of emergency executive powers by the concept of operational necessity, and the failure of even modern courts to attempt to circumscribe the military or the executive during an emergency.

Thus the unwillingness of the courts to define the parameters of executive power over civil liberty in emergency situations, coupled with the inability to establish criteria other than operational necessity for military action in emergencies, necessitates a close scrutiny of military theory, if not tactics, currently applied to urban guerilla warfare. To what extent does this counter-insurgency theory, which provides the theoretical underpinning of the doctrine of operational necessity, respect or diminish civil liberties? Should the failure of the courts to advance criteria for the protection of liberty in emergencies and their reluctance to examine military and executive encroachment of fundamental personal rights be a major cause for concern?

III. Theories of Counter-Insurgency and the Common Law

During the last thirty years, since the end of World War II, the world has witnessed the growth and development of terrorism or guerilla warfare by revolutionary groups in various jurisdictions. A common feature is that the revolutionaries have often been indigenous, irregular soldiers utilizing stealth to attack civilian and military targets *within* the State, as opposed to fighting an openly declared interstate war as envisaged by the Geneva Convention.¹³⁰ This type of revolutionary warfare relies heavily upon assassination, bombing, intimidation and significant support from sections of the population.¹³¹ Consequently, the task of the military and the police in suppressing and containing guerilla warfare is extremely difficult for several reasons, not the least of which is that most standing armies have been trained and equipped to deal with external threats by other states, i.e., conventional warfare. This fact, when coupled with the inherent problem of fighting an indigenous enemy which is immediately reabsorbed into the population, makes counter-insurgency action a demanding task. In recent years new theories, strategies, and technology have been developed and utilized

¹³⁰ For an interesting analysis of the limits of the Geneva Conventions, the position of urban guerillas and the doctrine of necessity, see T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970).

¹³¹ An informative discussion of the modern terrorist phenomenon is found in: R. CLUTTERBUCK, *GUERRILLAS AND TERRORISTS* (1977).

by most nations faced with "internal subversion" in the form of guerilla warfare with varying degrees of success and failure.¹³²

Inevitably, the role of military theory is of crucial importance in determining both the attitude and the response of the State to internal subversion in that it accounts for any shifts in the concept of operational necessity. It is facile to examine the particular strategies and technology employed by the military in guerilla situations without first examining the theoretical premises upon which such strategies and tactics are based. In this connection a close examination of military theory and its implications for legal theory in Northern Ireland is particularly appropriate as, not only is the United Kingdom a liberal democracy, but also a modern civilized industrial state. Therefore, by looking closely at the evolution and development of socio-legal and theoretical norms in Northern Ireland during the current emergency, it may be possible to examine the fundamental implications for law and legal systems presented by the current theories of counter-insurgency.

This section will attempt briefly to outline the current guerilla theories and the counter-insurgency theory as developed and used in Northern Ireland. By outlining and elucidating the two opposing strategies, it is possible to obtain a deeper understanding of the changing role of law and legal systems in emergency situations short of martial law and to facilitate meaningful criticism of the justifications advanced for extreme measures.

The British military interest in guerilla warfare and counter-insurgency tactics emanates from the British experience in Ireland during the period from 1919 to 1921. During that time, the British army together with the police constituted over 80,000 men, and yet they were unable to maintain law and order during martial law. In particular, the urban environment became increasingly difficult to control in terms of security and for all other political purposes. It is now known that the guerillas during this phase (the I.R.A.) never numbered more than 3,000, of whom very few could be considered to be activists.¹³³ Nevertheless it was clear to British planners and strategists that, despite the government's overwhelming superiority, the guerillas had effectively made Ireland impossible to govern. The British withdrawal from the south of Ireland in 1921 constituted a victory for the guerillas because they had achieved their objective in demonstrating that the colonial power was unable to *effectively* govern.¹³⁴

This lesson was not lost on British military theorists, who between 1921 and the Second World War developed techniques for countering guerilla activities (insurgencies). As a result, various amendments were made to Field Service Regulations by the outbreak of the Second World War.¹³⁵ By 1940, for example,

132 On the role of science, innovation and technology, see C. ACKROYD, K. MARGOLIS, J. ROSENHEAD, & T. SHALLICE, *THE TECHNOLOGY OF POLITICAL CONTROL* 151-286 (1977).

133 R. TABER, *THE WAR OF THE FLEA: GUERRILLA WARFARE THEORY AND PRACTICE* 110 (1965).

134 The shift in emphasis in guerilla tactics from *direct* confrontation in the classical sense to indirect terror, the aim of which is to demonstrate the failure of a government to govern effectively, is a crucial change in the tactics of terrorism. Most contemporary guerilla groups cannot hope to win a direct confrontation and, therefore, concentrate on demonstrating the ineffectiveness of government. If successful this achieves, *inter alia*, a diminution of public social confidence in law and deleteriously affects social solidarity within the state. For an examination of indirect terror, see E. HYAMS, *TERRORISTS AND TERRORISM* 9, 10-11 (1975).

135 On the historical evolution of British theory see J. KELLY, *THE GENESIS OF REVOLUTION* 43-44 (1976).

the British army had established a Special Operations Executive under which agents were placed behind enemy lines and the training of these agents was based upon the lessons learned from Ireland in 1921.¹³⁶ British military publications of that date emphasized the need for a friendly population which was deemed to be necessary to protect both the identity and the operations of guerillas. Other publications outlined the technique and strategy of assassinations and the use of explosives.¹³⁷

The use of guerillas in German-Occupied Europe is generally regarded to have been a success, but immediately after the cessation of hostilities in 1945, Britain itself, as a colonial power, was faced with a growing number of guerilla movements against British interests throughout the world. Most notable among these was the outbreak of guerilla violence in Palestine immediately after the Second World War and the outbreak of guerilla hostilities in Malaya and Kenya during the early 1950's.

These revolutionary situations enabled the British to develop further strategies for countering guerilla activity.¹³⁸ By the 1960's military strategists had begun to look for a theory which would explain both the role of the army in the counter-revolutionary situation and the role of guerilla. Three military theoreticians have played predominant roles in the development of contemporary military theory. In particular, the writings of Lieutenant Colonel John J. McCuen (U.S. Army) in his book *The Art of Counter-Revolutionary War*¹³⁹ and the British theorist Sir Robert Thompson paved the way for the current contemporary theoretical model of Brigadier Frank Kitson which was propagated in his influential book *Low Intensity Operations*.¹⁴⁰

McCuen divides revolutionary war into four phases: (1) the period of organization (subversion); (2) the period of terrorism (and to a certain extent small-scale guerilla warfare); (3) the period of guerilla warfare; (4) finally, the period of mobile warfare.¹⁴¹

It is clear that McCuen bases his propositions upon the fact that revolutionaries have to start from virtually nothing. Essentially, McCuen's view is atheoretical and seems to regard guerillas as a modern form of "mindless gangster" operating without a cause or socio-political motivation. If guerillas are viewed as merely power-hungry individuals, then McCuen's theoretical model has a high degree of validity. If, on the other hand, guerillas have a clearly discernible political reason and motivation for taking up arms within a state, then McCuen's four-stage model is suspect. In the Irish context its validity is doubtful because of

136 *Id.*

137 *Id.*

138 Moreover, all of the development in strategy and tactics by military planners in Palestine, Kenya and other colonies has been wholly based upon the insight derived from the British experience in Ireland in 1921, in that it is essential to recognize that guerillas cannot function without the support of a sympathetic or friendly population. The British colonial wars, in countries such as Aden, Malaya, Kenya, Cyprus, Palestine and Ireland have contributed to the steady development of military technique and tactics; sometimes based upon ad hoc considerations which were seen to be necessary in the particular circumstances and at other times based upon new developments in theory and politics.

139 (1965) [hereinafter cited as McCUEN].

140 (1971) [hereinafter cited as KITSON]. After writing this book (and serving in Northern Ireland), Kitson was promoted and put in command of the British Infantry Training School.

141 See McCUEN, *supra* note 139, *passim*.

the strong irredentist reaction of the minority population to the partitioning of Ireland which excluded the six northeastern counties from independence.

Perhaps the McCuen model was unduly influenced by the events in Cuba during the Castro rebellion. It was because of the success of the Castro guerillas that the so-called "Foco theory" of guerilla warfare gained acceptance.¹⁴² According to this theory, it is not necessary to organize the population as a prelude to revolt. Foco theorists claim that a small group operating from a remote area could act as a focus of discontent in the country as a whole.¹⁴³ This theory runs essentially counter to the theory of Mao Tse-tung in that Mao laid emphasis on the fact that a population must be highly organized before a resort to arms.¹⁴⁴ When set against Mao's theory of guerilla warfare and Lenin's concept of objective and subjective revolutionary criteria,¹⁴⁵ the Foco theory in its pure form appears more akin to anarchism than a socialist or communist revolutionary theory. Moreover, neither the Foco theory nor McCuen's analysis emphasize or understand the fact that most forms of successful guerilla warfare have been predicated upon the common factor of existing discontent among the population in general, making the guerillas' cause socially and politically acceptable to the populace. It is clear that McCuen regarded his role as merely that of a tactician in the military sense and divorced himself from questions of social context when preparing his analysis. Thus McCuen's models, so carefully drawn in military terms, must be used with extreme caution in the context of urban guerilla warfare in a modern society.

142 For a full explanation and analysis of the "foco theory," see G. FAIRBAIRN, *REVOLUTIONARY GUERRILLA WARFARE: THE COUNTRYSIDE VERSION* (1974).

143 For the failure of this theory as used by Che Guevara in Bolivia, see *Id.* at 270-78.

144 *Id.* at 98-114.

145 V. LENIN, *THE WAR AND THE SECOND INTERNATIONAL* 13 (International Publishers ed. 1932):

For a Marxist there is no doubt that a revolution is impossible without a revolutionary situation; furthermore we know that not every revolutionary situation leads to revolution. What are, generally speaking the characteristics of a revolutionary situation? We can hardly be mistaken when we indicate the following three outstanding signs: (1) it is impossible for the ruling class to maintain their power unchanged; for there is a crisis "higher up," taking one form or another; there is a crisis in the policy of the ruling class; as a result there appears a crack through which the dissatisfaction and the revolt of the oppressed classes burst forth. If a revolution is to take place it is usually insufficient that "one does not wish down below," but it is necessary that "one is incapable up above" to continue in the old way; (2) the wants and sufferings of the oppressed classes become more acute than usual; (3) in consequence of the above causes, there is a considerable increase in the activity of the masses who in "peace time" allow themselves to be robbed without protest, but in stormy times are drawn both by the circumstances of the crisis and by the "higher-ups" themselves into independent historic action.

Without these objective changes, which are independent not only of the will of separate groups and parties but even of separate classes, a revolution as a rule is impossible. The co-existence of all these objective changes is called a revolutionary situation. (Emphasis supplied.)

And, after analyzing the failure of prior Russian and German revolutions, he concluded:

[B]ecause a revolution emerges not out of every revolutionary situation, but out of such situations where, to the above-mentioned objective changes, subjective ones are added, namely the ability of the revolutionary *classes* to carry out revolutionary mass actions *strong* enough to break (or to undermine) the old government, it being the rule that never, not even in a period of crises, does a government "fall" of itself without being "helped to fall." (Emphasis supplied.)

Id. at 13-14. See also, *GUERRILLA WARFARE AND MARXISM* (W. Pomeroy ed. 1969).

The current British theories of counter-insurgency are largely to be found in the writings of Sir Robert Thompson¹⁴⁶ and Brigadier Frank Kitson. The Thompson-Kitson approach emphasizes military intelligence as the key to any military theory dealing with guerilla warfare. The approach clearly assumes that guerillas cannot function effectively without the support of a friendly population and the resulting counter-insurgency theory and tactics revolve around breaking the relationship between the guerilla and the friendly population. Thompson establishes five basic principles which must be followed and within which all government measures must fall.¹⁴⁷ Thompson's first principle is that the government must have a clear political aim. He argues that civil courts must be allowed to function during a period of emergencies, but emphasizes that emergency laws can be passed to enable counter-insurgency to proceed while the civil courts are open.¹⁴⁸ He envisages the normal judicial process being amended and changed through changes in laws of procedure and evidence so that a government can pass very tough repressive laws. The only limitation on governmental discretion, which Thompson refers to as a "golden rule," should be that each new law must be fairly and firmly applied.¹⁴⁹ It is clear that by fair application of repressive emergency laws Thompson envisages that emergency powers should be applied equally to all the population. Within his concept of emergency laws Thompson lists, *inter alia*, laws imposing curfews, mandatory death penalties for carrying arms, life imprisonment for providing supplies to terrorists, restricted residence, detention without trial for suspected terrorist supporters, and judicially sanctioned preventive detention by use of "a tribunal presided over by a judge which advises the government."¹⁵⁰ In other words, Thompson's first principle is that the government must have a political aim and objective and must not shrink from passing repressive emergency laws which must be applied equally to all inhabitants—a principle which may be termed the "equality of repression" principle.

The second principle offered by Thompson is that the government must function in accordance with the law, albeit draconian law. Thompson explicitly regards governments as recipients of harsh measures as well as the repository of them.¹⁵¹ He argues that it is not only morally wrong for a government to be above the law but that it creates practical difficulties which will present insuperable problems. The third principle is that the government must have an overall plan.¹⁵² By this Thompson means that the plan must cover not just military-security measures but also political, social, economic, administrative, police and other matters which may have a bearing on insurgency. Implicit in this point is that the military should be involved to an intimate degree in civilian government

146 R. THOMPSON, *DEFEATING COMMUNIST INSURGENCY; THE LESSONS OF MALAYA AND VIETNAM* (1966). Thompson is the author of several books on insurgency and is a leading international strategist. He was recently a Presidential Advisor to President Nixon on the Vietnam war, a rare distinction for a retired British officer.

147 *Id.* at 50.

148 *Id.* at 50-52.

149 *Id.* at 53.

150 *Id.*

151 *Id.* at 53-54.

152 *Id.* at 55.

and political strategy—a concept of “total strategy.”¹⁵³ The fourth principle is that the government must give priority to defeating political subversion as opposed to merely defeating political guerillas.¹⁵⁴ It is in this context that Thompson makes the insight that all governmental operations should be designed to break the contact between the guerilla unit and subversive political organizations. In this way Thompson believes that guerillas can be cut off from their sources of supply.¹⁵⁵ The fifth principle envisaged by Thompson is that, in the guerilla phase of insurgency, a government must secure its base area. Such a view entails the virtual surrender of large remoter areas of the country and its population to the guerillas in the initial stages of counter-insurgency operations.¹⁵⁶

Although Thompson’s theories are vague on some points it is clear that, because of his success in defeating communist insurgency in Malaya, his tactics and strategy have been held in high regard by British and American theorists. The problem is, however, that Thompson pays little regard to the causes of unrest other than by enunciating a principle that the government must not be corrupt. Thus the social-economic or political causes of unrest are not deeply examined and merely relegated to a position whereby a government must pay attention to some of the more apparent effects without imposing the obligation of analyzing in any depth the *real* or underlying causes of unrest. Thus Thompson can be faulted for being apolitical and non-theoretical in his approach to defeating insurgency.¹⁵⁷

Kitson’s book, *Low Intensity Operations*, was written in 1971 after Kitson had been able to study closely the operations of the British army in Northern Ireland.¹⁵⁸ The book is important, therefore, because it emphasizes the role of counter-insurgency measures in the context of the modern urban guerilla. Much of the writing which had been used hitherto in counter-insurgency theory by military planners and strategists had been in response to Mao Tse-tung’s theory of rural guerilla warfare, whereas Kitson’s book establishes various insights into breaking the relationship between the guerillas and the friendly population in an

153 For a full explanation of the total strategy concept, see C. BARNETT, *STRATEGY AND SOCIETY* (1974). The total strategy concept would appear to be difficult to publicly achieve in a democratic state in which the separation of powers doctrine is operative.

154 See THOMPSON, *supra* note 146, at 55-57.

155 A disturbing feature of the Thompson-Kitson approach and, indeed, all modern military theorists, is the blurring of the distinction between lawful protest, civil disobedience and subversion (including treason). See KITSON, *supra* note 140, at 82-83. Subversion is never defined but is described as including lawful protest. The military panacea is close surveillance of protest groups as they are described as a form of incipient terrorists in a preliminary (subversive) state. See KITSON, *supra* at ch. 2, ch. 5. Given this basic failure to define subversion and to distinguish it from lawful protest, the recent revelations in the United States regarding sustained and illegal surveillance of political groups is comprehensible, albeit reprehensible. See C. PERKUS, *COINTELPRO: THE FBI’S SECRET WAR ON POLITICAL FREEDOM* (1975). It is, however, deeply significant that no British or American military theorist has felt the necessity or obligation to define “subversion,” a term which is freely used in delimiting the concept of surveillance and counter-insurgency theory and practice.

156 See THOMPSON, *supra* note 146, at 57-58.

157 Of course Thompson was primarily concerned with defeating communist insurgency and not with other forms of urban guerilla violence which have come to the fore since his book was written.

158 Kitson undertook the writing of his book after he had commanded a brigade in Belfast for a year. Kitson also had actively participated in counter-insurgency operations in Kenya in the 1950’s. See also F. KITSON, *BUNCH OF FIVE* (1977). Kitson can be fairly described as the most highly qualified counter-insurgency theorist in the British Army.

urban environment and as such is worthy of close scrutiny.¹⁵⁹

Like Thompson, Kitson emphasizes the overriding importance of intelligence gathering in dealing with guerilla unrest. While the Kitson approach is as politically unsophisticated as Thompson's, it does place emphasis on the fact that a joint military civilian command is necessary at the very highest level of government and he sees the army's role under three headings: first, advisory to the extent of deciding between defensive and offensive roles; second, the army may contribute towards organizing the population; and third, the collection of "background information" which the army can then develop into what is termed "contact information."¹⁶⁰ This third aspect, the collecting of background information, is crucial to the Kitson thesis. Basically it entails the collection and evaluation of what is termed "low level intelligence."¹⁶¹ By this is meant intelligence information which will not of itself be of very great importance but which, when collated and taken together, may form the basis for further inquiry. Kitson explicitly envisages intelligence organizations working together to collect information through informers, agents, and the interrogation of prisoners but does not preclude other "special operations" which may be necessary in the situation.¹⁶²

Briefly stated, Kitson's theory is that there are two separate functions involved in countering guerilla activities. The military commander must first of all establish an intelligence organization capable of producing background information or low level intelligence which is then fed to operational commanders who develop this information into "contact information" so that guerillas can be militarily engaged. The key to Kitson's theory, however, lies in its implementation. The intelligence network is not viewed as being separate from the counter-insurgency force itself. Rather, the collection of data is in fact conducted by the commanders in the field who also have the responsibility for establishing and maintaining contact with the guerillas. It is this unified command structure which has been tested in Northern Ireland.¹⁶³

Kitson is intriguingly vague in his explanation of how intelligence is in fact gathered. He lays emphasis on the capture of prisoners who are then "persuaded" to talk and, if possible, converted into informers.¹⁶⁴ But, as Kitson points out, the principal problem in fighting guerillas lies in establishing contact with them and the process of developing low level intelligence information into contact information he describes as "the basic tactical function of counter-insurgency operations."¹⁶⁵ To develop background information, Kitson emphasizes that part of

159 KITSON, *supra* note 140, at 85-89.

160 *Id.* at ch. 6.

161 *Id.* at 103-107.

162 *Id.* at 122-26, 191-96.

163 However, implicit in this new devolved or delegated military structure is the belief that commanders in the field be permitted to act speedily and on their own initiative. Thus, "operational necessity" decisions are delegated to low-ranking officers in the field which may help to explain the continuing patterns of brutality on a widespread basis in Northern Ireland.

164 KITSON, *supra* note 140, at 119-22.

165 *Id.* at 99. While envisaging that the developing of background information into contact information falls upon normal military units he notes that special skills are required for exploiting the characteristics of captured insurgents, and it is clear from the language used by Kitson that he sees a role for Special Forces, such as the Special Air Service (SAS) or Rangers. Moreover Kitson's training leads him to deduce that a special operations unit attached to normal infantry units might involve an elaborate operation of building up pseudo-gangs out of captured insurgents who are, in some way, persuaded to work the counter-insurgency forces.

the approach is to regain a measure of control over the population and subsequently to develop low level information into the type of information necessary for making contact with armed groups.¹⁶⁶

Kitson points out that four facets of counter-insurgency tactics might be used either singly or together. In this connection he envisages the concentration into villages of those people lying in scattered and remote areas of the countryside. This is reminiscent of both the concentration camp concept or, to use the modern euphemism, the strategic hamlet.¹⁶⁷ He also advocates a government role in psychological warfare by the dissemination of information which is carefully controlled and tailored to meet the military-security situation.¹⁶⁸ Another facet is the development of a census by which basic data can be collected from all the population, both hostile and non-hostile,¹⁶⁹ and Kitson favors the use of identity cards for each individual to implement this. But it is clear from Kitson's examples that he envisages the use of very detailed and basic information about the target group, such as the financial stability of inhabitants of the community, and any immediate change in their circumstances, so as to be able to identify even minor changes in the social relationships within a community which may indicate the presence of outside income or resources.

Interestingly, in one of his examples, Kitson notes that after a degree of background information has in fact been gathered it may be necessary to utilize what he terms "shock treatment"¹⁷⁰ whereby, having established a change in financial circumstances of a particular inhabitant of a community, the military commander may then decide "to interrogate four of the people who, from his investigations, seem *least* likely to be supporting [the communists]."¹⁷¹ Thus Kitson proposes the arrest of innocent people with a view to interrogation merely to establish low level intelligence. Moreover, within this scenario the army is seen as persuading each of the four innocent people to help to gather and corroborate information of this type. As he points out "in fact no one need know that any information has been given,"¹⁷² and envisages the army as prosecuting a

(There is some evidence that this approach was used in Algeria, Kenya, Cyprus and, more recently, in the United States.) See M. OPPENHEIM, *THE URBAN GUERRILLA* at 62 (1970).

166 KITSON, *supra* note 140, at 106.

167 *Id.* at 107.

168 *Id.* On the role of the press in Northern Ireland see E. MCGANN, *THE BRITISH PRESS IN NORTHERN IRELAND* (1972); J. MCGUFFIN, *INTERNMENT* ch. 15 (1973). On self-censorship of the press see S. WINCHESTER, *IN HOLY TERROR* (1975). Fisk, *British Clamp on Northern Ireland Propaganda*, Irish Times (Dublin) Mar. 25, 1975, at 6, col. 5; O'Clery, *Psychological Warfare Training Given to 262 Civil Servants*, Irish Times (Dublin), Oct. 28, 1976, at 5, col. 1; McHardy, *Black Propaganda Stopped*, Manchester Guardian Weekly, Mar. 6, 1977, at 5, col. 4; Blundy, *The Army's Secret War in Northern Ireland*, Sunday Times (London), Mar. 13, 1977, at 6, col. 3. This overt and covert abuse of freedom of expression has played a significant role in ensuring a lack of informed, skeptical public scrutiny of events in Northern Ireland. As noted above, judicial review *durante bello* is absent because of the policy of judicial abnegation and, therefore, the normal checks and balances of public opinion in a democracy skeptical of executive use and abuse of power is of special importance. The manipulation of the media advocated by Kitson, and the distortion of information which has recently been admitted to have been practiced for the past five years in Northern Ireland are a serious breach of the principle of freedom of expression.

169 KITSON, *supra* note 140. It should be noted that at common law, there is no established right to privacy.

170 *Id.* at 109.

171 *Id.* at 110.

172 *Id.*

case against the innocent individuals so that a small fine is exacted for the offense for which they had ostensibly been arrested. In this way intelligence information is consolidated. The moral and legal questions regarding the interrogation and punishment of innocent people apparently do not concern the author.¹⁷³

Other forms of interrogation are also noted by Kitson in that he proposes informal talks with captured guerillas so as to persuade them to talk but also less informal talks with captured insurgents.¹⁷⁴ In a later example Kitson does not explain how captured insurgents are to be persuaded to talk and to help the military authorities. However, it is clear, if only by omission, that "unusual" measures are contemplated.¹⁷⁵

Kitson does not differentiate between rural and urban terrorists. Rather, he asserts that the "important weakness" of both groups is that the actions of guerillas must be related to a particular purpose which in turn involves: (1) building up some degree of support among the population; and (2) at the same time causing the population to act in accordance with the program designed to achieve the aims of those running the political subversion campaign.¹⁷⁶ There must, therefore, be a point of contact between the guerillas and the political leaders controlling the subversive organization.

Kitson's scenario for gathering and developing low level intelligence into contact information is thought to be applicable in both rural and urban settings because of this central weakness in guerilla strategy. Thus, he envisages that when sufficient degrees of low level intelligence information have been gathered and a degree of background information on the target community collated, then various techniques can be used to develop such information.¹⁷⁷ For example, special operations can then be directed towards target groups and road blocks and checking of vehicles or searching of buildings can be conducted on a large scale.¹⁷⁸ But, as Kitson is quick to point out, this system for developing background information can only work if there is a good deal of information to develop. That is to say it is not as important that such information is *reliable* but

173 On the theory of punishing, that is, the punishment of innocent people, see Rawls, *Two Concepts of Rules*, [1955] *PHILOSOPHICAL REV.* 3; and H. HART, *PUNISHMENT AND RESPONSIBILITY* 11 *et seq.* (1968).

174 KITSON, *supra* note 140, at 119.

175 *Id.* at 122. Two British investigations have acknowledged the ill-treatment of suspected I.R.A. terrorists in Northern Ireland. See Report of the Enquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August 1971, CMND. 4823 (1972) and Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, CMND. 4901 (1972). See Lowry, *Ill-Treatment, Brutality and Torture: Some Thoughts upon the Treatment of Irish Political Prisoners*, 22 *DE PAUL L. REV.* 553 (1973). Recently the European Commission of Human Rights made a finding of torture against the British in Northern Ireland and the matter has now been referred for adjudication to the European Court of Human Rights. See Report of the European Commission of Human Rights: *Ireland v. United Kingdom*, Application No. 5310/71 (1976).

176 KITSON, *supra* note 140, at 127.

177 For the past three years low-level intelligence, that is, information gathered against suspects, terrorists and citizens at large, has been stored on a central computer facility at the British Army Headquarters, to which military patrols have immediate radio access. It must be emphasized that such accumulated, and often irrelevant, trivia is insufficient to form probable cause for a search or arrest warrant at common law. On the computerization process, see Fisk, *Army's computer has data on half of population in Ulster*, *The Times* (London), Dec. 5, 1974, at 1, col. 7; and ACKROYD *et al.*, *supra* note 132, at 41-42.

178 KITSON, *supra* note 140, at 130.

that there is a sufficient quantum of it so as to develop a full community profile.¹⁷⁹

Kitson is also far more subtle in his approach to the political aspects of counter-insurgency matters than previous theorists. He sees conditional concessions in a political sense being given by the government to moderate or passive supporters of the subversive organization. Such concessions are to have the effect of separating the more moderate supporters of protest from the hard core of subversives.¹⁸⁰ Essentially, Kitson would not shrink from co-opting such moderates into the government. Thus, Kitson sees a role in splitting the moderate support from the hard core support so as to effectively utilize a political manipulative "carrot and stick" campaign whereby reforms are conceded to the moderates while at the same time hard core dissent is repressed in counter-insurgency fashion.¹⁸¹

According to Thompson's first principle the government under attack must be seen to be fair and at least not corrupt, whereas Kitson develops the "total strategy" concept whereby concessions are made to elements of the insurgent group in such a way that moderate support is alienated from the insurgents.

A major question arises as to the role of the legal system in such an arrangement. Thompson explicitly argues that law should play a vital role in that, by statute, emergency laws can be simplified so as to insure that tough repressive laws are applied equally among the population. Clearly Thompson does not envisage due process in any accepted sense of the term, but rather a manipulation of the substantive law and procedural changes so that the appearance of fair and evenhanded justice is maintained while severe repression is implemented. Kitson, on the other hand, regards the role of law in a more sophisticated light in that he sees two possible uses for the law. On the one hand, law can be "just another weapon in the government's arsenal" and in such a case the law provides little more than a "propaganda cover" for the disposal of unwanted members of the public.¹⁸² However, for this to happen the legal system must be discreetly tied into the system of government, and the judiciary, in effect, must be controlled by the supreme military-civilian command.

Kitson's second alternative is that the law should remain impartial and administer the laws of the country without any direction from the government.¹⁸³ Moreover, Kitson, like Thompson, admits that such a government can introduce

179 However, it is clear that the military concept of relevance differs from the legal; for example, Fisk, *supra* note 177, notes that the Army computer stores such information as the color of furnishings in the homes of people they regard as political activists.

180 KITSON, *supra* note 140, at 82.

181 *Id.* at 87:

Although with an eye to world opinion and to the need to retain the allegiance of the people, no more force than is necessary for containing the situation should be used, conditions can be made reasonably uncomfortable for the population as a whole, in order to provide an incentive for a return to normal life and to act as a deterrent towards a resumption of the campaign.

Thus "necessary" force would here encompass the notion of deterrence which was expressed somewhat more concretely by a serving Army officer: "You know when we were in Ballymurphy [a Belfast Catholic ghetto], we had the people really fed up with us, terrified really. I understand what the refugees must feel like in Vietnam . . . after every shooting incident we would order 1,500 house searches—1,500!" Quoted in G. ACKROYD *et al.*, *supra* note 132, at 38.

182 *Id.* at 69.

183 *Id.*

very repressive legislation to deal with subversion which the law and the legal system can administer. But he questions the resulting situation because there is a danger that the legal system and its law officers might not recognize any difference between the forces of the government and that of the enemy. As a consequence, any violation of the law from whatever quarter would be treated in the same way.¹⁸⁴ Notwithstanding this problem Kitson prefers the second alternative, because he deems it to be both morally right and also expedient because it will help to maintain the allegiance of the population. Kitson does, however, recognize that the second alternative may impose unacceptable delays upon the efficiency of military operations and thus such a system might prove to be "unworkable."¹⁸⁵

Thus, both Thompson and Kitson regard law and the legal system merely as weapons in the armory of the government, and view the legal system and its law officers in a highly manipulative light. In the Northern Ireland context, the manipulation of law has followed the method advocated by Thompson in that the judicial system has been drastically affected by both substantive provisions passed so as to legitimate, *ex post facto*, repressive emergency powers,¹⁸⁶ and by procedural or systematic alterations which have, for example, abolished jury trials, imposed reverse onus upon the accused regarding the admissibility of coerced confessions, and allowed for detention without trial for prolonged periods.¹⁸⁷

Moreover, the judiciary has been overtly tied into the system of repression by the use of judicial inquiries into torture and murder by the security forces. In such a way, Lord Parker, the former Lord Chief Justice of England, and Lord Widgery, the Lord Chief Justice of England, have both been used by the vehicle of judicial inquiries to legitimate both the torture of suspected subversives¹⁸⁸ and the killing of unarmed and peaceful protesters.¹⁸⁹ It seems clear that this use of the judiciary to legitimate repressive actions falls within Kitson's first alternative for the legal system, but the government has been careful to maintain the facade of Kitson's second alternative.

It is also apparent that within the Thompson-Kitson theory the concept of

184 While Kitson does not evince an awareness of the concept of the rule of law in the classical sense, it is clear from his distaste for laws equally applied that the Diceyan concept has not been seriously considered. See also A. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW AND THE CONSTITUTION* (10th ed. 1959).

185 KITSON, *supra* note 140, at 69.

186 In *R v. Londonderry Justices, ex parte Hume*, [1972] N.I. 91, the Northern Irish Court of Appeal declared British Army action under the Special Powers Act to be *ultra vires* and hence unconstitutional. In a matter of hours, the Northern Ireland Act, 1972, c.10, was passed by the British Parliament retrospectively validating all such unconstitutional acts by the security forces. See also Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 *HUMAN RIGHTS* 261, 290-91 (1976).

187 Northern Ireland (Emergency Provisions) Act, 1973, c.53, §§ 5, 6 & 7; these measures were originally proposed in Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, CMND. 5185 (1972) [hereinafter cited as the *Diplock Report*]. The Diplock Commission relied exclusively on the submissions of the security forces and accepted the rationale of "operational necessity." See *Diplock Report*, ¶ 6.

188 See note 175 *supra*.

189 Report of the Tribunal Appointed to Inquire into the Events on Sunday 30th January 1972, H.L. 10 H.C. 220 (1972) [the Widgery Report]. For an excellent critique of this inquiry and its findings see S. DASH, *JUSTICE DENIED: A CHALLENGE TO LORD WIDGERY'S REPORT ON BLOODY SUNDAY* (1972).

strategic hamlets or protected areas is central to the development of background information. The rationale for this is given as protection of the population from the insurgents, but there is the rather obvious additional advantage of preventing the potentially hostile population from providing succor to the enemy.¹⁹⁰ Thus the concept of protected zone or strategic hamlet of necessity requires a restriction upon freedom of mobility or freedom of movement of the population as a whole and the target group in particular. Clearly such a diminution in the freedom of movement is more easily obtained in a system of society which does not possess a written constitution guaranteeing freedom of movement.¹⁹¹ The strategic hamlet concept thus implies the use of force against citizens who have not been proved, nor even suspected, of perpetrating an illegal act.

Crucial to Kitson's thesis is the use of psychological warfare by the government. It seems clear that psychological warfare not only encompasses the use of favorable positive propaganda but also the use of "black propaganda." This form of propaganda involves the manipulation of the media to such an extent that false information is in fact disseminated.¹⁹² In some jurisdictions this will prove to be difficult without constitutional change as the media are often protected by constitutional guarantees ensuring freedom of the press. In Northern Ireland, however, without the benefit of formal guarantees of freedom of expression, it is a relatively simple matter to manipulate the media and curtail freedom of expression. The role of psychological warfare has increased in importance with the changing role of urban guerilla warfare in recent years from direct terrorism to indirect terrorism. This change poses new problems because the latter seeks to demonstrate to the populace that the state cannot govern in order to undermine the social confidence in authority and in law.¹⁹³ This indirect form of terrorism relies upon the use of free and unfettered media which are at liberty to report the successes (and failures) of the insurgent group. Seen in this light, it becomes paramount that the government should be able to manipulate the media to such an extent as to curtail the impact of the success of terrorism upon the psyche of the populace. This should prevent the population at large from either panicking or giving support to what may be perceived as a successful insurgent force.¹⁹⁴ The use of propaganda weapons such as this inevitably entails

190 KITSON, *supra* note 140, at 107.

191 This has been achieved in Belfast by blocking access to urban ghettos and restricting access and egress, after dark, to two routes controlled by Army checkpoints. Intimidation of minorities within ghettos has forced massive shifts in population in Northern Ireland and, while this has not been perpetrated by the security forces, little action has been taken by the military to prevent the concentration of people into ghettos. On intimidation by officially tolerated Protestant para-military groups, see Holland, *The Newtownabbey Exodus*, Hibernia (Dublin), Aug. 20, 1976, at 8, col. 1.

192 See note 168 *supra*.

193 On the significance of social confidence in law, see T. HADDEN & P. HILLYARD, *JUSTICE IN NORTHERN IRELAND* (1973). On the sociological concept of social solidarity, see E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY*, (3d ed. Simpson trans. 1964).

194 The most spectacular being the "Bloody Friday" bombing campaign by the IRA in which the IRA, in accordance with its usual practice, gave three warnings to the police that bombs were about to go off in several locations in Belfast. For some inexplicable reason the military security authorities did not heed these warnings causing great loss of life and injury among the civilian population. The government then indicated that no warnings had in fact been given. The revulsion felt in most countries and, more importantly, by the civilian population, was very great indeed and it was not until Parliament reconvened and questions were asked some days later that it became apparent that warnings had in fact been given but had

both the curtailing of the freedom of the press and risking innocent lives so as to achieve a military objective.¹⁹⁵ None of these manifestations of psychological warfare are new and the important point for legal purposes is to clearly understand that a free press is antithetical to the maintenance of modern counter-insurgency tactics and strategy.¹⁹⁶ The implications of psychological warfare in an urban environment are great indeed and the recent revelations regarding the training of civil servants as well as military personnel in psychological warfare technique do not augur well for the future of freedom of the press.¹⁹⁷

The key stage in Kitson's thesis emerges when a high degree of low level intelligence information is collected to form background information. At some point in the procedure, according to the Kitson scenario, innocent people—those citizens acknowledged and known to be innocent—will be arrested without reasonable and probable cause and interrogated. Moreover, by the use of the holding charge such people will be interrogated, held incommunicado, and ultimately convicted of a minor offense. The problem here is that this technique is a clear and unequivocal manipulation of the legal system and judicial process. Assuming that Kitson's theory is accurate, it is at least questionable for military theoreticians to openly advocate subversion of both judicial process and civil liberties by the vehicle of holding charges.

By the vehicle of the Emergency Provisions Act of 1973, the British army in Northern Ireland was empowered to arrest innocent people and hold them incommunicado for up to four hours.¹⁹⁸ In this way not only was low level intelligence to be gathered under the guise of proving identity, but also background low level information against third parties could be sifted and checked by interrogation. "Screening" has been employed against whole sections of the community.¹⁹⁹ The problem with screening, however, is that whatever the intent of the security forces, it necessarily entails the dragnet arrest and detention of large numbers of innocent people without probable cause.²⁰⁰ The drawback from the military point of view is that, perhaps inevitably, many of the people so arrested

not been heeded by the security forces and thus the population put at considerable risk. For a full explanation of this event and the news management involved see KELLY, *supra* note 11, at 78-82. The reaction to the bombings enabled the British Army to remove the barricades around Catholic ghettos and occupy Catholic neighborhoods with no resistance. It has also been recently revealed that these bombings ended secret peace negotiations which were taking place, see *Bloody Friday Bombs Ruined MacBride Moves—O'Connell*, Irish Times (Dublin), Feb. 12, 1977, at 1, col. 1. Why the British Army psychological warfare unit should use this situation to effectively terminate peace negotiations has yet to be explained.

195 Similarly, the British military fraternization and support for counter gangs of vigilantes such as the UDA (Ulster Defense Association) and the UWC (Ulster Workers Council) have similarly placed suspected terrorists at risk. See BLUNDY, *supra* note 168; R. FISK, *THE POINT OF NO RETURN: THE STRIKE WHICH BROKE THE BRITISH IN ULSTER* (1975).

196 Recent research into the role of war correspondence would seem to support the view that the military in a war situation can quite easily control the dissemination of information without censorship due to the disadvantageous position of the war correspondent and the pressure for instant "copy" placed upon him by his superiors. See P. KNIGHTLEY, *THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST AND MYTH MAKER FROM THE CRIMEA TO VIETNAM* (1975).

197 See O'CLERY, *supra* note 168.

198 See note 187, *supra* at s.12(1).

199 BOYLE, HADDEN & HILLYARD, *supra* note 1, at 43-45.

200 Screening of communities must be examined in the light of the British Army practice of dragnet street and block searches, for example in 1974 a total of 71,914 house searches took place, C. ACKROYD *et al.*, *supra* note 132, at 38.

will become alienated from the forces of law and order and be unappreciative of the circumstances of their arrest and confinement. Moreover, if, as in the case of the Northern Irish unrest, many people so detained are harshly treated during detention, the screening policy runs the grave risk of being entirely counter-productive. In this way whole communities have become alienated from the forces of law and order.²⁰¹

The Kitson scenario relates to what is termed "containment" in military parlance.²⁰² Hostile areas are sealed off and house raids, block searches, and screening methods are conducted. Ostensibly, these are executed in a search for fugitives but they really serve to gather low level intelligence data. However, while this may contain a hostile community it does not necessarily bring terrorists into the open. The problem then becomes one of translating background information into contact information.

It is at this juncture that the most controversial aspect of counter-insurgency operations comes to the fore, as guerillas must be flushed out into the open. This was attempted in Northern Ireland by staging various military operations, the most famous being the so-called "Bloody Sunday" shootings in Londonderry.²⁰³ It was on this occasion that thirteen civil rights demonstrators were murdered during an anti-internment protest demonstration in Londonderry. According to Kitson's strategy, it would appear that these people were killed so as to make the I.R.A. break their cover and fight in the open. The purpose of the military strategy was to force the guerilla army to fight in the open and thus be subjected to superior fire power of the security forces who had staged the event and were fully prepared for it. It was the I.R.A., however, which scored a great propaganda victory by exposing the British army counter-insurgency tactics of killing innocent protestors while at the same time refusing to be provoked into the open.²⁰⁴

The events in Northern Ireland have revealed that the security forces use various methods, including torture and brutality, to persuade terrorists and suspected terrorists to give information. It would be a mistake to regard interrogation of suspected terrorists in this situation as merely following the classic pattern of brutality as used in Chile or Brazil.²⁰⁵ It is true that in many instances suspected terrorists have been routinely tortured upon capture, in some cases for information, and in other cases by way of reprisal.²⁰⁶ However, the significance of sensory deprivation techniques used in Northern Ireland seems to base its validity on the speed rationale.²⁰⁷ In other words captured guerilla suspects have

201 Normal policing is still impossible in many urban Catholic areas. In many areas the police will not patrol without Army protection and will not patrol after dark in very many more. See McKeown, *R.U.C. In Search of a Role*, Hibernia (Dublin), Nov. 28, 1975, at 8, col. 2 and Ryder, *Ulsterization: Plans are Speeded up for Troops to Hand Over to Police and U.D.R.*, Sunday Times (London), Apr. 25, 1976, at 3, col. 5.

202 KITSON, *supra* note 140, at 110.

203 See note 189 *supra*.

204 See also KELLY, *supra* note 11, at 28-31; WINCHESTER, *supra* note 168 *passim*.

205 For a world survey see AMNESTY INTERNATIONAL, REPORT ON TORTURE (1973).

206 AMNESTY INTERNATIONAL, REPORT OF AN ENQUIRY INTO ALLEGATIONS OF ILL-TREATMENT IN NORTHERN IRELAND (1972) and Lowry, *Draconian Powers: The New British Approach to Pre-Trial Detention of Suspected Terrorists*, COLUM. HUMAN RIGHTS L. REV. (forthcoming).

207 According to a British inquiry, speed made brutality and torture operationally necessary. See note 175 *supra*. See also KELLY, *supra* note 11, at 35.

been subjected to sensory deprivation techniques which quickly break down the will of the suspect. These techniques were originally developed by the Soviet KGB and are now in use by the intelligence service of the British army.²⁰⁸ This is separate and distinct from routine brutality in the sense that it requires special training for interrogators who use scientific techniques to shut off stimuli to the brain by the use of hooding and white noise. It must be conducted with some care so as not to induce insanity prior to the acquisition of information.²⁰⁹

The recent European Commission on Human Rights findings in the *Ireland v. United Kingdom* case in Strassburg have confirmed that Britain has used these techniques in the past on suspected terrorists and others.²¹⁰ While Kitson does not specify that sensory deprivation techniques should be used, it is clear from his experience in Kenya, Northern Ireland, and elsewhere that he was aware of its use by the British army in such situations.²¹¹

Kitson's theory is necessarily premised on methods which will speedily obtain either cooperation or information from suspected terrorists, and it is clear that in many situations nothing less than sensory deprivation and brutality may suffice. Thus, the acceptance of counter-insurgency theory as enunciated by Thompson and Kitson involves the use of torture by the authorities as an operational necessity unless it is assumed that every captured terrorist will be cooperative and, further, be speedily cooperative.²¹²

The mistake made by some analysts in the past has been to view torture in relative isolation.²¹³ Clearly, under the Thompson-Kitson theory torture becomes an integral part of the counter-insurgency strategy of the military and is inevitable once the political decision has been taken to adopt the counter-insurgency program.²¹⁴ As such, the legal system will be manipulated into either (a) accepting torture or (b) failing to recognize its use, or (c) investigating in an *ad hoc* manner particular cases of torture *without* reference to its role in military theory and strategy. All three alternatives have been utilized at various times in Northern Ireland and the net result has been to regard instances of torture as merely regrettable and isolated episodes resulting from the exigencies of a particular stressful situation or the narrow facts of a particular case. However, in the light of modern counter-insurgency theory, it can now be appreciated that torture and brutality are an ongoing component of prevailing military theory and tactics. The legal system, by merely awarding *ex post facto* civil damages²¹⁵ has

208 J. MCGUFFIN, *THE GUINEA PIGS* (1974). On sensory deprivation, see generally W. SARGENT, *THE BATTLE FOR THE MIND* (1957).

209 The pre-planning and special training of torturers were admitted by the second British inquiry, per Lord Gardiner minority report, *supra* note 175, at ¶ 6, p. 12. According to Amnesty International, the British continue to train approximately 240 soldiers per year in these newer techniques of interrogation. The Leveller (London), Dec. 1976, at 4-5.

210 See note 175 *supra*.

211 See note 175 *supra*, majority reports, ¶ 10 at 2-3.

212 Judge Conaghan in *Moore v. Ministry of Defense*, Armagh County Court, (Feb. 10, 1972) noted the "primitive circumstances" of arrest procedures and that they were "pre-conceived." This preconceived [brutality] was described as ". . . deliberate, unlawful and harsh." See also LOWRY, *supra* note 186, at 281-83. The *Moore* case was a civil suit for damages for assault during detention and wrongful arrest.

213 See Twining, *Emergency Powers and Criminal Process: The Diplock Report*, [1973] CRIM. L. REV. 406.

214 On the precipitate use of counter-insurgency tactics in Northern Ireland see LOWRY, *supra* note 186, at 265-68.

been found to be weak and unable to prevent torture because of its failure to view torture in its theoretical context.

After this stage of the operations is complete and guerillas have presumably come out into the open and been killed or captured and persuaded to cooperate, the Kitson model then considers the continued acquisition of background information which can be obtained by car and block searches and this is the current posture of the British army in Northern Ireland. The difficulty here is the clear derogation of the notion of "reasonable cause" and resulting ongoing breach of human rights. The random selection of cars and houses for search does not constitute reasonable cause and would not justify a search warrant under normal criminal process. Nevertheless, this seems to be the avenue envisaged by Kitson for keeping intelligence gathering at an optimum level.

The legal implication of the use of community groups, however, is somewhat difficult to assess as Kitson does not specify exactly how community groups could be used except to say that they should be set up "when plausible reasons" exist²¹⁶ and may be used to get to know the leadership of a community and the existing relationship within the community of prominent people in general. How and by whom are the "plausible reasons" created? In other words, special forces or the military in general could be used to create pretexts or to increase the level of security activities so that community groups would be invited to study a particular problem seemingly generated by the civil unrest.²¹⁷ Thus, if incidents reached a level in a community approaching a high degree of discomfort in Kitson's scenario, it would be appropriate for the community leaders to gather and channel grievances towards the military who would be kindly disposed to receive them. However, in doing so the military would in fact be acquiring information on the potential or emerging political and social leaders in the community and would be categorizing people for future surveillance and interrogation.²¹⁸

The problem here is that community-based social workers, priests, and others who have been used once in such a manner by the military authorities might be reluctant to allow themselves to be used in a subsequent matter. This might entail the further alienation of the military from the community workers and could lead to yet more entrenched alienation from the community as a whole. The morality of such a deception is yet another consideration.

VI. CONCLUSIONS

There are at least two readily identifiable alternative theories protective of human rights when society is faced with violent unrest in the form of urban guerilla activities. Initially, it is always open to society to identify and ameliorate the political *causes* of civil unrest. This recognizes that the people involved in

215 Subsequent to the *Moore* ruling *supra* note 212, over 978 damage suits have been initiated, less than one-third of which have been settled in agreed out of court terms. Apparently the British government prefers to settle out of court in all cases and no cases have been tried after the *Moore* decision. The Leveller (London), December 1976 at 4-5.

216 KITSON, *supra* note 140, at 129.

217 For an assessment of the use of assassination by the British army see M. DILLON & D. LEHANE, POLITICAL MURDER IN NORTHERN IRELAND at 292 *et seq.* (1973).

218 For past practice of the British Army in this regard see Sunday Times Insight Team (Ulster) (1972) at 236-43.

political violence or terrorism are not necessarily gangsters or merely unthinking individuals. In other words, a political approach necessitates the realization that there may be socio-economic or irredentist causes of unrest and such a political perspective presupposes that the problem of urban guerilla warfare is essentially political in nature and capable of political solution.

In the case of Northern Ireland, this theory would entail recognition of the problem presented—the denial of self-determination to one-third of the population—as one capable of political solution, albeit that radical means may be needed to achieve that end.²¹⁹ Nevertheless, it must be realized that often the causes of unrest are capable of amelioration or solution by non-revolutionary and non-violent means. This is not to say that governments will not regard guerilla campaigns by their very nature as antithetical to democratic process but rather to recognize that guerillas are not necessarily thugs and gangsters but rather an unpleasant symptom of a societal wrongs.²²⁰

Such societal wrongs are generally economic or political and permeate society to the extent that, in the case of Northern Ireland, a major section of the population labor under a deep and continuing sense of injustice against the established rule.²²¹ Thus when the civil rights campaign commenced in Northern Ireland in 1967-68 the immediate symptoms of unrest were the civil rights campaign for one man one vote and similar egalitarian reforms. The government was unable to respond to these needs, perceiving such reform to be counter to the interests of the state as a whole, and this resulted inevitably in intransigence by the majority and violence on the part of the deprived minority.²²² This in no way justifies the use of violence by the guerillas,²²³ but merely goes to explain that the cause was in many respects political in origin.

In a narrow sense, Kitson recognizes that political causes play a part when he seeks to drive a wedge between the moderates supporting a just cause and the hard core who seek to use that cause to obtain a further goal. Thus, according to Kitson, the I.R.A. and hard core nationalists must be separated from the moderate or the middle class civil rights activists. This separation could be accomplished, in theory, by acceding to the demands of the civil rights movement without the state being necessarily threatened.²²⁴ In some senses this may be true,

219 A British withdrawal is feasible if safeguards for the Northern Protestants are included in such a concept. Moreover, the British achieved a withdrawal in similar circumstances in Kenya in the 1950's after safeguarding the interests of the white minority. Similarly France faced such a problem in Algeria. A phased withdrawal with economic inducements for the Northern Protestants could ensure a minimal quantum of violence. Of course, the British army might have to enforce such a plan against the wishes of "hard core" Protestant extremists.

220 The rebirth of the I.R.A. in 1970 in the form of the Provisional I.R.A. is based on the reluctance of dominant Protestant politicians to reform society. See O'BRIEN, *supra* note 8, at 205; Sunday Times Insight Team, *supra* note 218 *passim*, and LOWRY *supra* note 186, at 261-75.

221 For a useful historical analysis see FARRELL, *supra* note 3 *passim*, and G. BELL, *THE PROTESTANTS OF ULSTER* (1976) which analyzes the nature and extent of Protestant privilege and its ideology and provides useful insights into the extent of entrenched patterns of discrimination against Catholics. See also Lowry, *Religious Discrimination in Northern Ireland*, J. INTERNAT. L. & POLITICS (forthcoming).

222 For an analysis of the early civil rights struggle see LOWRY, *supra* note 186, at 261-75.

223 On the justification of political violence see N. CHOMSKY, *FOR REASONS OF STATE* (1973); T. HONDERICH, *THREE ESSAYS ON POLITICAL VIOLENCE* (1976).

224 Such an attempt was made by the vehicle of the Sunningdale Agreement which was accepted by the Catholic middle class and moderate opinion but was rejected by the I.R.A.

but it becomes increasingly difficult for a government to accede to, for example, effective affirmative action programs in the field of employment discrimination since to do so would effectively undermine the rationale for the state of Northern Ireland and the hegemony of the Northern Protestants.²²⁵ The state of Northern Ireland was in part created to preserve a protected enclave of Protestant privilege for a minority of Irishmen who are Protestant. Thus, to provide for equal access to employment for Roman Catholics would be to sever the unique relationship between the Protestant working class and the Protestant elite²²⁶ which has sought to entrench its power in Northern Ireland through discrimination in various fields including employment. The whole *raison d'être* of the state was to seek to secure and entrench a privileged position for the Irish Protestant minority in a particular area of Ireland where it happened to be the majority.²²⁷

Thus, if ameliorative reforms were implemented encompassing affirmative action or positive discrimination in favor of Catholics in Northern Ireland in the area of employment, it would be tantamount to attack the underlying justification for the state. This seems to be one of the major dilemmas plaguing British policy makers since the recent civil rights unrest commenced in Northern Ireland. While the first alternative to counter-insurgency theory is always to seek a reformative solution, it must be recognized that reforms and compromise solutions of this sort can only be obtained at a price, and this price may be unacceptable to the ruling government.

The unique problem presented by Northern Ireland, or any other colonial power in an alien country, is that the issue of self-determination cannot be faced without alienating a significant proportion of the population who depend on the colonial power for their privileged position. However, common ground must be found between the privileged group of Protestants occupying power as the dominant group in Northern Ireland and the disaffected nationalist minority who support both the I.R.A. and the more acceptable nationalist consensual political parties supportive of irredentist ideology.

A second alternative which is always open to a government to utilize in a time of guerilla warfare or political violence is the due process model as envisioned by Packer.²²⁸ Packer creates two models—the crime control model and the due process model.²²⁹ While it is inappropriate to regard the Kitson approach as in any way analogous to Packer's crime control model, the due process model has been used by Britain in countering its only major threat presented by urban guerillas prior to the advent of the I.R.A.

In 1970 a group of anarchists in Britain known as the "Angry Brigade" embarked upon a series of sporadic bomb attacks upon the homes of prominent

as falling short of self-determination. Paradoxically the Sunningdale Agreement was wrecked by militant Protestants who thought too much had been conceded. *See* Ireland (Tripartite Conference) 866 H.C. Debs, col. 28, December 10, 1973, and for an explanation of the Protestant General Strike which led to its demise, see FISK, *supra* note 195.

225 *See also* LOWRY, *supra* note 221.

226 BELL, *supra* note 221. This is the recurrent theme in Bell's analysis of the creation and use of Protestant power in Northern Ireland.

227 FARRELL, *supra* note 3 *passim*.

228 Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

229 *Id.* at 8-16.

people and various other symbolic targets.²³⁰ At first the authorities were completely baffled by the appearance of this anarchist phenomenon about which little was known. However, as has been detailed in a recent study, the Special Branch of Scotland Yard quickly adapted itself to closely monitor and study the publications of anarchist groups and keep anarchists under general surveillance without violating their civil rights. This method ultimately paid dividends in that the violent anarchist group was arrested and convicted by normal process of law. The problem here is that it was necessary to devote considerable resources to effect continued surveillance of a relatively small group of anarchists. Nevertheless, it is clear that the due process model can in fact work if sufficient resources are allocated to the task in the form of continued surveillance and intelligent use of criminal charges such as conspiracy so that preventive measures can be taken without putting society at risk.²³¹ Thus, it may be argued that the only barrier to successful use of conspiracy charges and due process of law is the financial cost involved, which is admittedly high, in maintaining a highly organized police surveillance team and forensic squad necessary to gather and evaluate evidence against subversive groups.

However, the fact is that the due process model has never been seriously tried in Northern Ireland as emergency powers have in fact been in operation since the state came into being. This is unfortunate since the due process model has the built-in advantage of not provoking a backlash to repressive measures which almost inevitably emanates from counter-insurgency theory. There is no diminution of respect for law and social confidence in the legal system, and the rule of law is preserved. The due process model does not run the risk of the state losing control of counter gangs and vigilante groups such as the Ulster Defense Association (UDA).²³²

The other attribute which the due process model possesses, in contrast to the counter-insurgency approach of Kitson, is that while Kitson visualizes reforms as splitting moderates from the hard core insurgents in a manipulative "carrot and stick" fashion, Kitson does not fully comprehend that the "carrot" may become rapidly irrelevant due to the bitterness which the "stick" engenders in the target group. This certainly seems to be the case in the Northern Irish urban ghettos. Thus, if Kitson's theory is either misapplied or merely mistimed, the consequences are highly significant in that the reforms needed to divide the guerillas from their popular support will, in some instances, be viewed as a sign of weakness without the concomitant benefit of alienating the moderates from the extremists.²³³

Of special interest to lawyers, of course, is that the due process model pre-

230 For a full account of this episode, see G. CARR, *THE ANGRY BRIGADE* (1975).

231 The conspiracy offense in British law is wide and vague in the extreme and is about to undergo reform. On reform proposals see *The Law Commission Report on Conspiracy and Criminal Law Reform*, No. 76 (1976); on the scope of conspiracy see R. HAZELL, *CONSPIRACY AND CIVIL LIBERTIES* (1974); G. ROBERTSON, *WHOSE CONSPIRACY?* (1974) and J. SMITH & B. HOGAN, *CRIMINAL LAW* at 175-90 (3d ed. 1973).

232 The apparent powerlessness of the state to control Protestant para-military groups has been shown by FISK, *supra* note 195.

233 The prorogation of the devolved Stormont Parliament in 1972 has thus been widely held to be a "defeat" for the British and the Protestants by the I.R.A. rather than a political gambit or concession.

serves the integrity of legal institutions and law officers. If the due process model is maintained and seen to work, then social confidence in the law and in the legal system is fostered, whereas the use and manipulation of the legal system and its offices under the Kitson model run the grave risk of the public perceiving law and the legal system to be merely additional instruments of arbitrary repression. This problem of public perception has been particularly troublesome in Northern Ireland in that the transition from the civil rights campaign to guerilla warfare has been linked by some observers to the decline in social confidence in law and legal institutions.²³⁴ If legal institutions are not seen to behave impartially but instead are viewed merely as an arm of repression, then it becomes almost inevitable that dissidents will turn to violence to achieve political objectives.

One further problem with counter-insurgency theory as opposed to the due process model is that it is essentially a theory of containment rather than military victory. Thus, the forces of law and order are seen to be merely containing the guerillas, rather than vigorously pursuing the instigators of violence.²³⁵ This has a deleterious effect on the morale of the soldiers and of that portion of the civilian population which is supportive of the forces of law and order. Sometimes, as in Northern Ireland, this leads to the growth of counter-revolutionary terrorist organizations,²³⁶ some of which may be beyond the control of the forces of law and order.²³⁷

Thus, counter-insurgency theory, by placing the integrity of the legal system in jeopardy, also runs the grave risk of permitting vigilantes to usurp the policing function. This would not be so under a due process model in which the forces of law and order would be perceived as an impartial arm of the state and the judiciary would be kept separate from the state. Moreover, since the target group in the counter-insurgency theory is the so-called hostile population, it would seem that the repressive powers envisaged by counter-insurgency theory would not be applied equally but rather only to the target community. In the case of Northern Ireland this means that the Protestant majority are not subjected to the full panoply of military powers of repression as are the Catholic community, which is comprised of both dissident groups and their moderate supporters.²³⁸

The further and most important problem presented by counter-insurgency theory is the danger to civil liberty which is implicit in the use of emergency powers. These powers, when allied to modern counter-insurgency theory, negate any notion of the "right to be left alone" because of the reliance on dragnet arrests and the demise of reasonable cause. Moreover, largely unscrutinized and wholly repressive powers once enjoyed may not be easily discontinued.²³⁹ This "slippery slope" argument is of particular relevance to Northern Ireland when it

234 See T. HADDEN & P. HILLYARD, *supra* note 73, at 8-26.

235 It was just such a claim which contributed to the recent Protestant General Strike in Northern Ireland, see McHardy, *Loyalists 11-day Loser*, Manchester Guardian Weekly, May 22, 1977 at 5, col. 3.

236 Nelson, *Ulster: Gunmen in Politics*, New Society, May 1, 1975 at 255.

237 *Behind the Assassinations*, Hibernia, Oct. 25, 1974 at 4, col. 2.

238 See LAW AND STATE, *supra* note 1, at 78-151.

239 Already there is some evidence to suggest that some specific wide repressive powers may be unwarranted but, nevertheless, remain law. See Price, *Less and Less Temporary*, Hibernia, Dec. 12, 1975 at 11, col. 1.

is recalled that emergency powers have been in force continually since the origin of the state.

If nothing else the Northern Irish experience has demonstrated certain weaknesses in the operation of the European Convention on Human Rights.²⁴⁰ Although many of the enumerated rights are vague and drafted on a high level of generality, when taken together the Convention may fairly be said to reflect the minimum standards necessary to preserve the rule of law and due process from arbitrary abuse by the executive in a democratic state.²⁴¹ However, in an emergency, the executive can derogate from the constraints of the Convention²⁴² and the judicially imposed standard of executive abuse, "the margin of appreciation" test,²⁴³ is exceedingly wide and vague. This permits executive evasion of the European Convention in emergencies.²⁴⁴ But the use of the European Convention would at least assure judicial scrutiny of executive action in emergency, whereas British common law does not.²⁴⁵

Clearly the Northern Irish experience indicates the overriding need to devise a system in which executive action affecting human rights is justiciable. This is not to say that the judiciary should scrutinize any and all activities, but to emphasize the necessity for adequate controls on executive power and discretion. The *ultra vires* doctrine, as interpreted by British courts in emergency situations, has been an inadequate check upon the potential for arbitrary use and abuse of executive power.

A preferable criterion is to be found in the American "clear and present danger" test²⁴⁶ which has the advantage of ensuring that, at some point, the executive is put into a position in which it must justify its assumption of wide executive power. Moreover, a clear and present danger doctrine could dispense with the somewhat odious distinction between individual rights and property rights in emergencies under British common law. Such a test could also con-

240 *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome (1950), Cmnd. 2894 (1950); 156 Brit. & Foreign State Papers 915; I. BROWNLIE, *BASIC DOCUMENTS ON HUMAN RIGHTS* (1971).

241 For a full explanation, see A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (2d ed. 1977).

242 *Supra* note 240, at Article XV, but note that Article III provides an absolute right not to be tortured and nations may not derogate from this provision. However, due process can be suspended.

243 *Lawless v. Ireland*, Application No. 332/57, 4 Y.B. EUR. CONV. ON HUMAN RIGHTS 438. "Apprehended" emergencies are included in this criterion, see *Denmark, Norway, Sweden and Netherlands v. Greece*, Application No. 3321/67, 12 Y.B. EUR. CONV. ON HUMAN RIGHTS. See also ROBERTSON, *supra* note 241, at 39-41 & 111-12.

244 The breadth of this criteria was shown clearly in ROBERTSON, *supra* note 241, at 134.

The concept behind this doctrine is that Article 15 has to be read in the context of the rather special subject matter with which it deals: the responsibilities of a Government for maintaining law and order in times of war or public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favor of the legality of the Government's appreciation.

245 Unlike most international tribunals the European Commission and Court will receive individual applications, per Article 25. See also ROBERTSON, *supra* note 241, at 149-53.

246 *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Abrams v. United States*, 250 U.S. 616 (1919); Chafee, *Thirty-Five Years with Freedom of Speech*, 1 KAN. L. REV. 1 (1952).

tribute to the judicial definition of limitations on the use of dragnet arrest, search, interrogation and detention without trial favored by contemporary counter-insurgency theorists. A justiciable clear and present danger doctrine must, in the light of the Northern Irish experience, constitute a minimal criterion for balancing human rights against the necessity doctrine in an emergency.²⁴⁷

The prevailing policy of judicial abnegation may be thought to preserve judicial neutrality during upheaval, but it is suggested that judicial abnegation is socially dangerous, since the consequence of this policy is to deny a useful and desirable forum for impartial scrutiny and barriers to abuse of power. Thus, judicial abnegation may have the social effect of channeling protest and dissent towards violence.

The doctrine of necessity at common law has never been adequately defined but is, functionally, protective of the executive in emergencies. However, it does not follow that non-justiciable necessity does not have an identifiable content. By focusing on current military theory it is possible to discern a clear but unlimited content in the form of operational necessity. In *R. v. Allen*²⁴⁸ military trial and execution were justified, and legally upheld, on the specific ground of operational necessity. Similarly, the denial of due process in Northern Ireland seems to be firmly based on operational necessity in the *Diplock Report*²⁴⁹ which foreshadowed the Emergency Provisions (Northern Ireland) Act 1973.²⁵⁰ Brutality and torture of suspects have been accepted by a Judicial Inquiry explicitly on the grounds of operational necessity.²⁵¹ And the silence of the *Gardiner Report*²⁵² on "screening" or acquisition of low-level intelligence involving dragnet arrests of wholly innocent nonsuspects at least tacitly accepts the justification of operational necessity.

A close scrutiny of Kitson's work makes it possible to deduce that operational necessity in the urban guerilla context is less a factor of the exigencies of combat and more a predetermined theory with a discernible form and content. Significantly, Kitson's theory includes telishing,²⁵³ that is, the deliberate punishment of innocent people, which is the clearest denial of due process imaginable as well as the negation of all commonly accepted notions of human rights. Furthermore, the *Widgery Inquiry*²⁵⁴ into the shooting of unarmed demonstrators, and the House of Lords' ruling in the *Attorney-General's Reference*²⁵⁵ case, in no way inhibit the summary execution of either suspects or innocents mistaken for suspects.

247 On the doctrine *Salus Populii Suprema Lex* see LOWRY, *supra* note 186, at 314-22.

248 See note 193 *supra*.

249 See note 187 *supra*. It is clear that the Diplock Report merely reflects the advice of the security forces as the Inquiry did not receive any other evidence, see further LAW AND STATE, *supra* note 1, at 39-41.

250 See note 187 *supra*.

251 See note 187 *supra*.

252 *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland*, Cmnd. 5847 (1975). On the Gardiner Report in general, see LOWRY, *supra* note 186, at 308-14. For the tacit acceptance of screening, see *Security: The Missing Chapter*, *Fortnight Rev.* (Belfast) No. 98, Feb. 1975 at 5, col. 1.

253 See note 173 *supra*.

254 See note 189 *supra*.

255 See note 113 *supra*.

The current policy in Northern Ireland is to criminalize political violence.²⁵⁶ Suspected guerillas are now held for up to seven days incommunicado and often coerced into signing confessions.²⁵⁷ They are then tried without a jury and with a reverse onus placed upon an accused regarding the admissibility of the confession. Since, as a practical matter, it is impossible for an accused to show that he was tortured, he is convicted as a common criminal and usually sentenced to a long term of imprisonment. In this highly structured manner, society is able to dispose of *both* urban guerillas and political sympathizers or dissidents while publicly proclaiming that there are no political prisoners, merely convicted criminals. The continuing prison unrest and hunger strikes to obtain political prison status may be viewed, therefore, as a post-sentence effort to achieve internationally recognized minimum standards of treatment and a furtherance of the struggle for human rights.²⁵⁸ That society should structure its legal system in this way may be seen as a considered attempt to criminalize politically violent and non-violent dissenters so as to, within the Kitson scenario, split moderates from the "hard core" who have been elaborately processed and labelled as criminal deviants rather than political offenders. This too may be seen as a further use and abuse of the legal system by the executive and, in the long term, may irreparably harm social confidence in law and the legal system.

A major mistake, although an understandable error in a fluid situation, is to adopt an approach common to many civil libertarians and proponents of human rights in adopting an *ad hoc* view of terrorism and human rights. Many libertarians, although responsive to the last revelation or the latest atrocity, have not placed such incidents into a broader theoretical perspective. It is suggested that more can be learned by placing specific incidents and patterns of terror and counter-terror into a theoretical justificatory framework so as to measure and adequately balance the overall impact of counter-insurgency repression on civil liberties and human rights. In this way the principled efforts of successive Irish governments to expose and constrain the use of torture and discrimination before the European Court of Human Rights may be placed in their proper legal and societal perspective. The non-justiciable nature of the doctrines of necessity and operational necessity may be shown to give the executive carte blanche to ignore and abrogate human rights. As events have escalated and patterns of unscrutinized repression become refined and entrenched in Northern Ireland, there is the manifest danger that human dignity and life itself may be placed in even greater jeopardy.

Perhaps the only approach now open to proponents of human rights is to adopt an idea from the military theorists, that of "total strategy."²⁵⁹ Just as to the military total strategy means the unification of military, legal, and political structures and ideology, libertarians must adopt a "total strategy" for the propa-

256 RYDER, *supra* note 201.

257 For an analysis of current pre-trial detention law and practice, see Lowry, *supra* note 206.

258 On the treatment of Irish political prisoners in British jails, see Logan, *Treatment of Irish Prisoners Convicted of Terrorist Offenses*, 73 LAW GUARDIAN GAZETTE 980 (1976). For a first person account of prison brutality, see H. FEENEY, IN CARE OF HER MAJESTY'S PRISONS (1976).

259 See note 153 *supra*.

gation and preservation of human rights. Such a "total strategy" must be predicated upon a fuller understanding of the ideology of terror and counter-insurgency and should endeavor to enunciate a critical theory of executive power in an emergency so as to maximize liberty in a crisis. It is suggested that this is the major lesson to be learned from nine years of terror and counter-terror in Northern Ireland.