

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Blogs

Faculty Scholarship

1994

Law, Postmodernism and Resistance: Rethinking the significance of the Irish hunger strike, part I

Richard F. Devlin FRSC

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Law and Philosophy Commons](#), and the [Legal History Commons](#)

LAW, POSTMODERNISM AND RESISTANCE: RETHINKING THE SIGNIFICANCE OF THE IRISH HUNGER STRIKE

by
Richard F. Devlin*

In recent years legal scholars have drawn upon the insights of post-modernism and deconstruction as methods for the interpretation of legal texts. In this article the author attempts to assess the work of Baudrillard, Derrida and Lyotard not merely as interpretative strategies but as potential socio-legal theories. In order to ground the analysis, the author locates the assessment in the context of the hunger strike by Irish prisoners in 1981. Drawing on the insights of postmodernism and deconstruction the author proposes that the fast can be understood as the eruption of a pre-colonial juridical consciousness by means of which the prisoners, quite literally, embodied law. However, by highlighting the specifics of the hunger strike, the author cautions that an unmodified postmodernism may generate some significant hurdles for those who seek a progressive and empowering socio-legal theory.

La loi, le postmodernisme et la résistance: repenser la signification de la grève de la faim en Irlande

Depuis quelques années, les juristes ont utilisé les acquis du post-modernisme et de la déconstruction comme des méthodes pour interpréter des textes de loi. Le présent article tente d'évaluer les idées de Baudrillard, de Derrida et de Lyotard, non seulement comme des stratégies interprétatives, mais aussi comme des théories socio-légales potentielles. Pour fonder son analyse, l'auteur replace son évaluation dans le contexte de la grève de la faim faite par des détenus irlandais en 1981. À la lumière du post-modernisme et de la déconstruction, l'auteur suggère que la grève peut être comprise comme l'éruption d'une conscience juridique pré-coloniale au moyen de laquelle les détenus ont littéralement incorporé la loi. Toutefois, en soulignant les traits distinctifs de la grève, il avertit qu'un post-modernisme non modifié peut créer des obstacles importants pour ceux qui y cherchent une théorie socio-légale progressive et libératrice.

* Associate Professor of Law, Dalhousie Law School.

This article has benefitted enormously from the reflections of, and conversations with, Alexandra Z. Dobrowolsky. Many other friends, students and colleagues have also contributed. To acknowledge some, but not others, would be unfair. I am grateful to everyone who provided input, though I have been unable to respond to all of their suggestions. Earlier versions of aspects of this article were presented at Alberta, Carleton, Dalhousie and Harvard Law Schools, as well as at the American Law and Society Association and Canadian Association of Law Teachers Conferences.

The article is dedicated to the memory of Thomas Devlin and Justyn Dobrowolsky.

I. PREFACE: A CELTIC TRIPTYCH

Panel One

Imagine how you would feel to be locked up naked in solitary confinement, twenty four hours a day, and subjected to total deprivation of not only common, everyday things, but of basic human necessities, such as clothes, fresh air and exercise, the company of other human beings.

In short, imagine being entombed, naked and alone, for a whole day. What would it be like for twenty torturous months?

Now again, with this in mind, try and imagine what it would be like to be in this situation in surroundings that resemble a pigsty, and you are crouched naked upon the floor in a corner, freezing cold, amid the lingering stench of putrefying rubbish, with crawling, wriggling white maggots all around you, fat bloated flies pestering your naked body, the silence is nerve-racking, your mind in turmoil.

You are sitting waiting on the Screws coming to your cell to drag you out to be forcibly bathed. You have heard and seen results of this from many of your comrades at mass. You know only too well what it means: the skin scrubbed from your body with heavy brushes. The Screws have told you that you are next. You wait all day, just thinking. Your mind is wrecked. ...

Consider being in that frame of mind every day! Knowing in your mind that you're to be beaten nearly senseless, forcibly bathed, or held down to have your back passage examined or probed. These things are common facts of everyday H-Block life.

It is inconceivable to try to imagine what an eighteen-year-old naked lad goes through when a dozen or so screws slaughter him with batons, boots, and punches, while dragging him by the hair along a corridor, or when they squeeze his privates until he collapses, or throw scalding water around his naked body. It is also inconceivable for me to describe, let alone for you to imagine, our state of mind just waiting for this to happen. I can say that this physical and psychological torture has brought many men to the verge of insanity.

Bobby Sands¹

Panel Two

"And what will the British do with you when they find you?"

'Shoot me.'

Bakhtin lowered his voice respectfully, like a man suddenly advised that he is in a funeral parlour. 'You don't expect to live?'

¹ B. Sands, *Skylark Sing Your Lonely Song* (Dublin: Mercier, 1982) at 82-83 [hereinafter *Skylark*].

'I hope not to. Once the British shoot us they're done for.'

'Are we to take it,' Wittgenstein asked haughtily, 'that you're intent on becoming a martyr?'

'That's right.'

Wittgenstein stared violently into his left cuff and clutched a chunk of hair with his right fist.

'We Irish don't regard the condition as particularly unusual,' Connolly continued. 'There's an ancient tradition of hunger striking in this island. If a tenant was dispossessed of his cabin and land he might go and starve to death on his landlord's doorstep.'

'Where I come from,' said Wittgenstein tartly, 'that's known as suicide.'

Terry Eagleton²

Panel Three

"Will someone please tell me why they are on hunger strike? ... Is it to prove their virility?"

Margaret Thatcher³

II. INTRODUCTION

The opening triptych, to the extent that it blurs the distinction between "fact" and "fiction", foreshadows the central aspiration of this essay: to comprehend the incomprehensible, to consider the juridical and philosophical significance of the Irish hunger strike of 1981. I focus on this almost unreal, but tragically too real, "event" for several (closely connected) philosophical, political and personal reasons. First, on the basis of the representation that I offer in this article, the hunger strike provides an opportunity to reflect upon what is perhaps the most enduring and intractable question of social theory: the relationship between structure (necessity) and agency (freedom).⁴ Specifically, the hunger strike enables us to critically interrogate the aspirations and assumptions of an (English) colonial legal structure and the agentic resistance of the juridically colonized (Irish).

The second reason for my interest is more political. There is a widespread assumption in contemporary society that the rule of law is "an unqualified human good."⁵ For example, popular culture, in movies such as *In the Name of the Father*,⁶ while not exactly portraying the English legal system in its best light, still reinforces a belief in the promise and potential of law. Underlying such popular representations of the experiences of the "Guildford Four" is what might be called a "bad cop" theory of law. The basic idea

2 T. Eagleton, *Saints and Scholars* 97 (London: Verso, 1987).

3 D. Beresford, *Ten Men Dead* (New York: Atlantic Monthly Press, 1987) at 212.

4 See e.g., P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice (New York: Cambridge University Press, 1977) at 72-95; A. Giddens, *The Constitution of Society: Outline of The Theory of Structuration* (Berkeley: University of California Press, 1984); R.M. Unger, *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987) [hereinafter *Social Theory*].

5 E.P. Thompson, *Whigs and Hunters* (New York: Pantheon Books, 1975) at 266.

6 Universal City Studio Inc., 1993.

is that while there may be some personal misconduct and improper political interferences, if one can only find a good lawyer and a virtuous appeal court, in the end, Justice and Law will prevail. In this essay, I draw upon the insights of another non-legal space — the interpretive vehicle of literary criticism — to discuss another engagement between British Law and Irish subjects which suggests a more pessimistic theory of law than that of the “bad cop.” This theory interrogates the very idea of whether Law can be a cognate of Justice and suggests that it is more closely connected with conquest, colonization and exclusion: “a will to empire.”⁷

Third, and more personally, as I was a law student in Belfast at the time, the strike has been a key aspect of my formative context and thus a constitutive part of my identity. In particular, by bringing into sharp relief the relationship between law, domination, violence and death, the hunger strike has turned out to be a (not always conscious but pervasive) backdrop against which I have constructed both my political philosophy and my jurisprudence.⁸ As Marx reminds us, “social being ... determines consciousness.”⁹

I propose to tell this story in a dialect different from that which usually predominates in the mainstream discourses of the North Atlantic societies. More precisely, I will filter my interpretation through the insights of both postmodernism and deconstruction.¹⁰ My purpose will be to consider the intersections between postmodernism/deconstruction¹¹ and nationalism in order to inquire into the utility of such perspectives in helping to de-centre the hegemony of a dominant-British-legal discourse, and thereby to create space for the valorization of a marginalized and subordinated legal dis-

7 R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990) at 8. Williams' work is more historical, whereas my project is more contemporary. Juridical imperialism has continuing resonances for the present.

8 The primary focus of much of my scholarship over the last several years has been a negative critique of the relationship between law, state and violence in the self-satisfied western liberal democratic societies. See e.g., R.F. Devlin, “Nomos and Thanatos [Part B]: Feminism as Jurisgenerative Transformation or Resistance Through Partial Incorporation?” (1990) 13 *Dalhousie L.J.* at 123; R.F. Devlin, “Nomos and Thanatos [Part A]: The Killing Fields: Modern Law and Legal Theory” (1989) 12 *Dalhousie L.J.* at 298; R.F. Devlin, “Law's Centaur: A Preliminary Theoretical Inquiry into the Nature and Relations of Law, State and Violence” (1989) 27 *Osgoode Hall L.J.* at 219. In this essay, I seek to move beyond critique to reconstruction through the legitimization of anti-colonial juridical claims.

9 K. Marx, *Selected Writings*, ed. by D. McLennan (Toronto: Oxford University Press, 1985) at 389.

10 For some this “dialogue” between post-modernism and republicanism may appear oxymoronic. But it is not unprecedented. For a very different take on post-modernism and Ireland, see J. Smyth, “Weasels in the Hole: Ideologies of the Irish Conflict” in Y. Alexander & A. O'Day, eds., *The Irish Terrorism Experience* (Aldershot: Dartmouth, 1991) at 138, 143–150. See also, J. Derrida's (cryptic) reference to “a hunger strike in prison” in “Force of Law: The ‘Mystical Foundations of Authority’” (1990) 11 *Cardozo L. Rev.* 919 at 997 [hereinafter “Force”].

Moreover, as one commentator points out, “many dialogues are set in prison (Plato's *Phaedo*, *The Consolation of Philosophy* by Boethius or Sir Thomas More's *A Dialogue of Comfort Against Tribulation*.)” T. Clark, *Derrida, Heidegger Blanchot* (New York: Cambridge University Press, 1992) 18.

11 I want to note at the outset that I quote quite extensively from the work of postmodern and deconstructive theorists because I have found that many commentators attribute positions and arguments to authors with little textual support.

course.¹² One claim that I shall advance is that legal knowledge is itself a terrain of political struggle, and that dominant legal interpretations are only so because of their superior force, not because of their superior truth.¹³ Consequently, the British interpretation has no privileged access to the truth of the hunger strike.¹⁴ In short, historical meaning is socially constituted, and so, as Oscar Wilde reminds us, “the one duty we owe history is to rewrite it.”¹⁵

Although I shall argue that postmodernism and deconstruction enable us to think critically about power, knowledge, truth, history, self and language, this “case study” into the relationship between ethnicity and law will, however, highlight some of the weaknesses of postmodernism and deconstruction, and specifically their ability to “put the dissidents back into history.”¹⁶ In particular, I will suggest that the postmodern tendency to focus on texts and epistemology, while absolutely necessary, is insufficient and, therefore, needs to be supplemented by an emphasis on politics and ethics. An indirect¹⁷ suggestion will be that those groups — and, in particular, those theorists — in North American society who embrace postmodernism in the pursuit of difference and inclusion are excessively discursive in their conception of power and, therefore, incapable of adequately supporting a sufficiently destabilizing practice.¹⁸ My aim will be to walk the tightrope

12 As this sentence makes clear, mine is a particular characterization of postmodernism and deconstruction that is designed to consider its relevance for politico-judicial inquiry. Some may find this characterization contestable but, I hope, not a caricature.

13 As Norris notes, deconstruction can be understood as “a positive technique for making trouble; an affront to every normal and comfortable habit of thought”, C. Norris, (rev. ed.) *Deconstruction: Theory and Practice X* (New York: Routledge, 1991).

14 Said has adopted the methodology of deconstruction to demonstrate that “the West’s” approach to cultural history is partisan and ethnocentric, non-objective and downright racist. E. Said, *Orientalism* (New York: Random House, 1978). This essay pursues roughly the same project in the sphere of legal colonialism, based in part on Said’s ethico-discursive “right of formerly un- or mis-represented human groups to speak for and represent themselves in domains defined, politically and intellectually, as normally excluding them, usurping their signifying and representing functions, over-riding their informal reality”. E. Said, “Orientalism Reconsidered”, F. Baker *et al.*, eds., *Literature, Politics and Theory: Papers for the Essex Conference 1976-1984* (New York: Methuen, 1986) at 212.

15 Quoted in L. Hutcheon, (1988) *The Poetics of Postmodernism* 96.

16 C. Douzinas *et al.*, *Postmodern Jurisprudence* (London: Routledge, 1991) at 51.

17 I say indirect because too often scholars are tempted to develop rather grand speculations on the basis of some rather minor studies. And this, I think, has been a particular vice for jurists. My claim is that based upon the particular analysis offered in this essay, others might want to consider the relevance of my particular propositions for their particular interests. For a salutary critique of the academic tendency for “careless generalization”, see G. Wickham, “The Political Possibilities of Postmodernism” (1990) 19 *Econ. and Soc’y.* 121.

18 See *e.g.*, A. Botwinick, *Postmodernism and Democratic Theory* (Philadelphia: Temple University Press, 1993) at 229–231; D. Cornell, “Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation” (1988) 136 *U.Penn. L. Rev.* 1135; J. Handler, “Dependent People, The State and The Modern/Postmodern Search for Dialogic Community” (1986) 36 *U.C.L.A. L. Rev.* 999; A.C. Hutchinson, “Talking The Good Life: From Free Speech To Democratic Dialogue” (1989) 1 *Yale J. L. & Lib.* 17 (1989); F. Michaelman, “Law’s Republic” (1989) 47 *Yale L.J.* 1493; F.J. Mootz III, “Postmodern Constitutionalism or Materialism” (1992) 91 *Mich. L. Rev.* 515. See also, R. Devlin, “Demanding Difference but Doubting Discourse” (1994) 7 *C.J.W.L.* 156.

between those who posit that postmodernism and deconstruction are profoundly liberationist¹⁹ and those who argue that it is dangerously conservative.²⁰

The article is divided into four further sections. In Part III, by means of an introduction to certain works of Lyotard, Baudrillard and Derrida, I provide an overview of some of the key motifs of both postmodernism and deconstruction: otherness, pluralism, simulation, *différance* and incommensurability. My purpose in this section is not to provide a definitive or comprehensive account of these theories but rather to sketch a basic topography that will gain sharper relief as the essay progresses. In Part IV, I apply some of these insights to the events surrounding the 1981 Hunger Strike by Irish prisoners in British jails in the North of Ireland. I advance the juridically impertinent proposition that what was at stake was not merely a politically strategic, last ditch act of desperation, but “(an)other” indigenously Irish legal claim based upon a subordinated legal culture, the Brehon laws.²¹ As Foucault reminds us, “an act of popular justice cannot achieve its full significance unless it is clarified politically.”²² Restated jurisprudentially, I will argue that the hunger strike can be conceived of as a “jurisgenerative” act²³ through which the prisoners sought to embody law. In Part V, on the basis of this story, I will develop some reflections concerning the utility of postmodernism and deconstruction for others who aspire to the legal recognition of difference. My aim will be to resist the tendency towards disengagement and political quietism which may be engendered by some aspects of postmodernism and deconstruction. Finally, Part VI will provide some (in)conclusive thoughts.

19 See e.g., D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York: Routledge, 1991) [hereinafter *Beyond*]; I. Hassan, *The Postmodern Turn* (Columbus: Ohio State University Press, 1987); J.F. Lyotard, *The Postmodern Condition XXV* (1984) [hereinafter *Condition*]; N. Wakefield, *Post-Modernism: The Twilight of the Real* (London: Pluto Press, 1990); E. Laclau, “Politics and the Limits of Modernity”, A. Ross ed., *Universal Abandon: The Politics of Postmodernism* (Minneapolis: University of Minnesota Press, 1988) 63, 79–80; C. Mouffe, “Radical Democracy or Liberal Democracy” (1990) 20(2) *Socialist Rev.* 57; J. Derrida, *Of Grammatology*, trans. G. Spivak, 1st American ed. (Baltimore: Johns Hopkins University Press, 1976) at lxxvii [hereinafter *Grammatology*].

20 See e.g., A. Callinicos, *Against Postmodernism: A Marxist Critique* (New York: St. Martin’s Press, 1989); J. Ellis, *Against Deconstruction* (Princeton: Princeton University Press, 1989); G. Graff, *Literature Against Itself: Literary Ideas in Modern Society* (Chicago: University of Chicago Press, 1979); G. Binder, “Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie” (1989) 98 *Yale L.J.* 1321; T. Eagleton, “Capitalism, Modernism and Postmodernism” (1985) 152 *New Left Rev.* 60; J. Handler, “Postmodernism, Protest and the New Social Movements” (1992) 26 *Law & Soc’y. Rev.* 697; J. Habermas, “Modernity Versus Postmodernity” (1981) 22 *New German Critique* 3.

21 For another recent attempt to analyse a marginalized legal culture, see W.O. Weyranch & M.A. Bell, “Autonomous Lawmaking: The Case of the Gypsies” (1993) 103 *Yale L.J.* 323.

22 M. Foucault, “On Popular Justice: A Discussion with Maoists” in C. Gordon, ed. *Power/Knowledge* (New York: Pantheon Books, 1980) 1 at 31.

23 R. Cover, “The Supreme Court, 1982 Term: Forward, Nomos and Narrative” (1983) 97 *Harv. L. Rev.* 4 at 16.

III. POSTMODERNISM AND DECONSTRUCTION

There has been a proliferation of interest in the legal academy in recent years in the ideas of postmodernism and deconstruction.²⁴ However, most

24 See e.g., A. Carty, *Post-Modern Law* (Edinburgh: Edinburgh University Press, 1990) [hereinafter *Post-Modern Law*]; D. Cornell, *Philosophy of the Limit* (New York: Routledge, 1992); C. Douzinas et al., *Postmodern Jurisprudence* (New York: Routledge, 1991); Z. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988); P. Fitzpatrick, *Dangerous Supplements* (1990); M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992); P. Goodrich, *Languages of Law* (1991); M. Kramer, *Legal Theory, Political Theory and Deconstruction* (1991); D. Milovanovic, *Postmodern Law and Disorder* (1992); G. Rose, *Dialectic of Nihilism: Poststructuralism and Law* (New York: Basil Blackwell, 1984); C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989); A. Woodiwiss, *Social Theory After Postmodernism: Rethinking Production, Law and Class* (London: Pluto Press, 1990); M. Ashe, "Mind's Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence" (1987) 38 *Syracuse L. Rev.* 1129; M. Ashe, "Inventing Choreographies: Feminism and Deconstruction" (1990) 90 *Colom. L. Rev.* 1123; A. Austin, "Deconstruction: The Road to a Derridean Cul-de-sac where 'There is no There There' and 'There is no About About for Anything to be About'" (1994) 12 *Cardozo Arts & Ent. L.J.* 181; J.M. Balkin, "What is a Postmodern Constitutionalism?" (1992) 90 *Mich. L. Rev.* 1966 [hereinafter "Postmodern Constitutionalism"]; J.M. Balkin, "Transcendental Deconstruction, Transcendent Justice" (1994) 92 *Mich. L. Rev.* 1131; J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 *Yale L.J.* 758 [hereinafter "Deconstructive Practice"]; J. Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory" (1991) 62 *U. Colo. L. Rev.* 89; A. Carty & J. Mair, "Some Post-Modern Perspectives on Law and Society" (1990) 17 *J. Law & Soc'y.* 395; M. Clawson, "Prescription Adrift in A Sea of Servitudes: Postmodernism and The Lost Grant" (1994) 43 *Duke L.J.* 845; D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 *U. Pa. L. Rev.* 291; D. Cornell, "Time, Deconstruction, and the Challenge to Legal Positivism" (1990) 2 *Yale J. L. & Humanities* 267; C. Dalton, "An Essay on the Deconstruction of Contract Doctrine" (1985) 94 *Yale L. J.* 997; N. Duxbury, "Post-modern Jurisprudence and its Discontents" (1991) 11 *Oxford J. Legal Stud.* 589; M.J. Frug, "A Postmodern Feminist Legal Manifesto" (1992) 105 *Harv. L. Rev.* 1045; E.F. Hartigan, "Derridoz Law Written in Our Heartland: 'Powers Retained by The People'" (1993) 67 *Tul. L. Rev.* 133 (1993); A. Hunt, "Living Dangerously on the Deconstructive Edge" (1988) 26 *Osgoode Hall L.J.* 867; A. Hutchinson, "From Cultural Construction to Historical Deconstruction" (1984) 94 *Yale L. J.* 209; B. Johnson, "The Postmodern in Feminism" (1992) 105 *Harv. L. Rev.* 1076; I. Landau, "Early and Late Deconstruction in the Writings of Jacques Derrida" (1993) 14 *Cardozo L. Rev.* 1895; J.W. Mohr, "From Saussure to Derrida: Margins of Law" (1983) 18 *Queen's L. J.* 43; C. Norris, "Law, Deconstruction and the Resistance to Theory" in R.C. Davis & R. Schleifer, eds., *Deconstruction and the Interests of Theory*, vol. 4, Oklahoma Project for Discourse and Theory (London: University of Oklahoma Press, 1989) 126; D. Patterson, "Feminism, Postmodernism and Law" (1991-1992) 77 *Cornell L. Rev.* 254; P. Rush, "Killing Me Softly With His Words: Hunting the Law Student" (1990) 1 *Law and Critique* 21; P.C. Schanck, "Understanding Post-modern Thought and Its Implications for Statutory Interpretation" (1992) 65 *S. Cal. L. Rev.* 2505; P. Schlag, "Normative and Nowhere to Go" (1990) 43 *Stan. L. Rev.* 167 [hereinafter "Normative"]; P. Schlag, "Le hors de Texte C'est Moi" (1990) 11 *Cardozo L. Rev.* 1631 [hereinafter "Le Hors"]; P. Schlag, "The Problem of the Subject" (1991) 69 *Tex. L. Rev.* 1627 [hereinafter "Subject"]; P. Schlag, "Normativity and the Politics of Form" (1991) 139 *U. Pa. L. Rev.* 801; B. de S. Santos, "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14 *J. L. & Soc'y* 279; M. Schwartz & D. Friedrichs, "Postmodern Thought and Criminological Discontent: New Metaphors for Understanding Violence" (1994) 32 *Criminology* 221; B. Tingle, "Redeeming the Promise of Our Laws" (1992) 30 *Alta. L. Rev.* 1324; I. Ward, "In Search of a European Identity" (1994) 57 *Mod. L. Rev.* 315. There have also been several symposia: "Deconstruction and the Possibility of Justice" (1989) 11 *Cardozo L. Rev.* 919; "Necessity of Violence for Any Possibility of Justice" (1991) 13 *Cardozo L. Rev.* 1081; "The Politics of Postmodernism: The Presidential Address Symposium" (1992) 26 *Law & Soc'y Rev.*

approaches have tended to apply postmodern and deconstructive insights to legal "texts" such as constitutions, statutes, cases, government reports and politico-legal theory. The purpose of this essay is more ambitious: to interpret legal practices, legal institutions and legal structures through the grid of postmodernism and deconstruction, and to consider the adequacies of these modes of analysis not just as interpretive techniques, but also as potential juridico-social theories.²⁵ Moreover, I propose to consider Derrida's recent claim that deconstruction is "revolutionary", that is, "to the extent that it assumes the right to contest, and not only theoretically, constitutional protocols ... the right to contest established law in its strongest authority, the law of the State."²⁶

Although postmodernism as political philosophy and deconstruction as critical method²⁷ do not share an identity, there are certain elements of homology, continuity and overlap between them that are of interpretive value in the understanding of social phenomena.

693; "Feminist Critical Legal Studies and Postmodernism" (1992) 26 *New Eng. L. Rev.* 1173; "Transformative Discourses in Postmodern Social, Cultural and Legal Theory" (1991) XV *Legal Stud. Forum* 279; P. Schlag, "Forward: Postmodernism and Law" (1991) 62 *U. Colo. L. Rev.* 439.

25 The ambition of this paper is influenced, in part, by Geertz's "interpretive anthropology", that is, the application of "hermeneutics" and "text" to "social action, to people's behaviour to other people". Prefacing his proposition with some appropriate cautions, Geertz posits:

The key to the transition from text to text analogue, from writing as discourse to action as discourse, is ... the conception of "inscription": the fixation of meaning. ... The great virtue of the extension of the notion of text beyond things written on paper or carved into stone is that it trains attention on precisely this phenomenon: on how the inscription of action is brought about, what its vehicles are and how they work, and on what the fixation of meaning from the flow of events ... implies for sociological interpretation.

C. Geertz, *Local Knowledge* 5, (New York: Basic Books, 1983) at 31.

Similarly, Derrida seems to aspire to such a project for deconstruction when, replying to two of his critics, he argues:

But one thing at least I can tell you now: an hour's reading ... should suffice for you to realize that *text*, as I use the word, is not the book ... it is not limited to the *paper* which you cover with your graphism. It is precisely for strategic reasons ... that I found it necessary to recast the concept of text by generalizing it almost without limit, in any case without present or perceptible limit, without any limit that *is*. That's why there is nothing "*beyond* the text." That's why South Africa and apartheid are, like you and me part of this general text, which is not to say that it can be read the way one reads a book. That's why the text is always a field of forces. ... That's why deconstructive readings and writings are concerned not only with library books, with discourses, with conceptual and semantic contents. ... They are also effective ... interventions, in particular political and institutional interventions that transform contexts without limiting themselves to theoretical or constative utterances. ... That's why I do not go "*beyond* the text," in this *new* sense of the word text, by fighting and calling for a fight against *apartheid*. ... [T]he strategic re-evaluation of the concept of text allows me to bring together in a more consistent fashion ... theoretico-philosophical necessities with the "practical", political, and other necessities of what is called deconstruction.

J. Derrida, "But, Beyond" (Open Letter to Anne McClintock and Rob Nixon) (1986) 13 (1) *Critical Inquiry* 155, 167-168.

26 Derrida, "Force", *supra* note 10 at 995.

27 C. Norris, *Deconstruction: Theory and Practice* (London/New York: Methuen, 1982) at 31.

A. Postmodernism

Postmodernism (with its implied and sometimes explicit critique of “modernism”²⁸) is currently getting much play in the academic world, usurping the traditional debate between the “ancients” and “moderns.”²⁹ Given its complex and portmanteau character,³⁰ postmodernism is notoriously difficult to get a handle on. This is because it spans a variety of cultural and academic fields,³¹ it has advocates who frequently adopt profoundly incompatible perspectives,³² it revels in its ephemeral, splintered and fractured dynamism and — as a result of its predilection for being “post” — is reluctant to construct any determinative or homogeneous self image.³³ Nevertheless, in spite of its slipperiness, I do think that it is possible to provide an account (though not a definition) of postmodernism in which a few common motifs³⁴ stand out.

First, there is the historical and spatial dimension.³⁵ Although the term “postmodernism” first gained some currency in the 1930s,³⁶ it seems to be very much a phenomenon of the late twentieth century North Atlantic society.³⁷ Bubbling under the surface in the 1940s and 1950s, surfacing in the 1960s,

28 For some quite helpful overviews of modernism see M. Bradbury & J. Macfarlane, eds., *Modernism* (New York: Penguin, 1976); A. Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990); E. Lunn, *Marxism and Modernism: An Historical Study of Lukács, Brecht, Benjamin and Adorno* (Berkeley: University California Press, 1982).

29 As one, not particularly sympathetic, commentator has pointed out, “In recent years (postmodernism) has determined the standards of debate, defined the manner of ‘discourse’, and set parameters on cultural, political, and intellectual criticism”, D. Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change* (Oxford: Basil Blackwell, 1990) at viii.

30 See e.g., M. Rose, *The Post-Modern and the Post-Industrial* (1991) 3–20.

31 Featherstone identifies practitioners of postmodernism in music, art, fiction, film, photography, architecture, literary theory and criticism, philosophy, anthropology and geography. M. Featherstone, “Pursuit of the Postmodern” (1988) 5 *Theory, Culture and Soc’y* 195, 202. See also, S. Connor, *Postmodernist Culture: An Introduction to Theories of the Contemporary* (New York: Basil Blackwell, 1989); R. Boyne & A. Rattansi, eds., *Postmodernism and Society* (Basingstoke: MacMillan, 1990).

32 Compare C. Jencks, *What is Postmodernism?* (New York: St. Martin’s Press, 1989) with J.F. Lyotard, *The Post-Modern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984) [hereinafter *Condition*].

33 S.L. Winter, “For What It’s Worth” (1992) 26 *L. & Soc’y Rev.* 789.

34 Following A. Megill, *The Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (Berkeley: University of California Press, 1985) at 273 it may be more appropriate to talk of “motifs rather than themes” in that the former has stronger artistic and literary connotations and therefore may be closer to the postmodern mindframe. There may be a danger that the following may fall under the rubric of what Pierre Schlag, with characteristic aggressive wit, has called “postmodernism lite” [*Forms* unpublished manuscript 6]. In response, I would suggest that some of the more “classic” offerings have proved to be indigestible. As a result, and to switch the metaphor, the usual caveat applies: that the following is, of necessity, a very broad stroke of the brush.

35 For further discussions of this dimension see F. Jameson’s influential “Postmodernism, or the Cultural Logic of Late Capitalism” (1984) 146 *New Left Rev.* 53 and the quite excellent Harvey, *supra* note 29.

36 Featherstone, *supra* note 31 at 202; A. Huyssen, “Mapping the Postmodern” (1984) 33 *New German Critique* 5.

37 In this historical vein White argues that the “postmodern problematic” is “constituted by four phenomena: growing incredulity towards traditional metanarratives, new awareness of the costs of social rationalization, the explosion of informational technologies, and the emergence of new social movements”, S. White, *Political Theory and Postmodernism* (Cambridge: Cambridge University Press, 1991) at 1–12.

surging in the 1970s and cresting, perhaps, in the 1980s, there appears to be a correlation between postmodernism and the shifting sensibilities of what Unger has called “the rich western democracies.”³⁸ Specifically, it is suggested that due to the rapid changes induced by technology, de-industrialization and mediatization,³⁹ there have been crucial social shifts. This cultural moment is sometimes called “postmodernity” or “post-industrialism.”

Second, the prefix “post” though having an historical ring, also seems to introduce the essentially critical aspirations of the project, which is to say that it is easier to conceptualize what it is “against” — modernism and the false promises of enlightenment thought — than what it is “for.” Furthermore, although some commentators see the “post” as signalling a complete break with “modernism”, my understanding is that it is perhaps better to comprehend the relationship as one of a complicated but dependent critique of “modernism.”⁴⁰ Third, and bringing together these two ideas of the

38 *Social Theory*, *supra* note 4 at 2.

39 Balkin, “Postmodern Constitutionalism”, *supra* note 24 at 1989.

40 This, of course, begs the question of what we mean by “modernism.” One particularly helpful schematization of the relationship between modernism and postmodernism is to be found in the following parallel columns developed by Ihab Hassan. He draws on a variety of “fields” and “authors” including “rhetoric, linguistics, literary theory, philosophy, anthropology, psychoanalysis, political science, even theology”:

↕		↔
Modernism		Postmodernism
Romanticism/Symbolism		Pataphysics/Dadaism
Form (conjunctive, closed)		Antiform (disjunctive, open)
Purpose		Play
Design		Chance
Hierarchy		Anarchy
Mastery/Logos		Exhaustion/Silence
Art Object/Finished Work		Process/Performance/Happening
Distance		Participation
Creation/Totalization		Decreation/Deconstruction
Synthesis		Antithesis
Presence		Absence
Centering		Dispersal
Genre/Boundary		Text/Intertext
Semantics		Rhetoric
Paradigm		Syntagm
Hypotaxis		Parataxis
Metaphor		Metonymy
Selection		Combination
Root/Depth		Rhizome/Surface
Interpretation/Reading		Against Interpretation/Misreading
Signified		Signifier
<i>Lisible</i> (Readerly)		<i>Scriptible</i> (Writerly)
Narrative/ <i>Grande Histoire</i>		Anti-narrative/ <i>Petite Histoire</i>
Master Code		Idiolect
Symptom		Desire
Type		Mutant
Genital/Phallic		Polymorphous/Androgynous
Paranoia		Schizophrenia
Origin/Cause		Difference-Differance/Trace
God the Father		The Holy Ghost
Metaphysics		Irony
Determinacy		Indeterminacy
Transcendence		Immanence

historical moment and the negation of modernity, there is the conception of “postmodernism” as a mindframe, one that reflects a sense of disenchantment and disillusionment with our current social and cultural practices and the dominant discourses that reflect, constitute and sustain them. More precisely, postmodernists reject the idea that things are necessarily getting better. They point to “the new forms of central bureaucracy, mediaization, suburbanization and surveillance”⁴¹ which result in a further pacification of the citizenry.⁴² Moreover, they question whether the ambitions of modernity — and the correlative faith in humanist universals such as “mastery”, “growth”, “development” and “progress” — are as desirable or sustainable as we might once have thought. Specifically, they highlight our stalled economies and interrogate the price of our so called civilization.⁴³ The concern seems to be that for all our “advancements”, we have ended up with a culture of monotony, banality and sameness.⁴⁴

While the foregoing overview of the motifs of “postmodernity” and “postmodernism” may be helpful in identifying both the context in which postmodernism has emerged and some of the broad propositions that are associated with it, it is (predictably) abstract and ambiguous. Of greater relevance to this essay are several philosophical propositions attributed to postmodernism. First, postmodernists challenge the idea that we can ever have an immediate interaction with, or conception of, “reality.” They suggest that because our relationships with reality are always and already filtered — and therefore socially mediated — knowledge is a (once removed) representation rather than an (automatic) experience. If this is so, then reality and knowledge must be understood as lacking an objective or non-contingent foundation and are therefore flimsy, fragmentary, unstable, heterogeneous and plural.⁴⁵ In this light, “authenticity” and “reality” are re-encoded as “fabrication” and “simulation.”⁴⁶ Such an interpretive approach to knowledge

Hassan, *The Postmodern Turn*, *supra* note 19 at 91–92. For further discussions of the contradictory relationship between modernism and postmodernism see L. Hutcheon, *Poetics of Postmodernism*, (1988); J. Keane, *The Modern Democratic Revolution: Reflections on Lyotard's The Postmodern Condition in Judging Lyotard* 81, 91, A. Benjamin, ed., (New York: Routledge, 1992); A. Wellmar, “On The Dialectic of Modernism/Postmodernism” (1985) 4 *Praxis International* 337.

41 Balkin, “Postmodern Constitutionalism”, *supra* note 24 at 1989.

42 See e.g., J. Baudrillard, *Selected Writings*, M. Poster, ed., (Stanford: Stanford University Press, 1988) [hereinafter *Writings*]; J. Baudrillard, *In the Shadow of the Silent Majorities* (New York: Semiotext(e), 1983) [hereinafter *Shadow*]; J. Baudrillard, *Simulations* (New York: Semiotext(e), 1983) [hereinafter *Simulations*].

43 Baudrillard, “Consumer Society” in *Writings*, *id.* at 29.

44 *Supra* note 29 at 8–9.

45 S. Lash, *Sociology of Postmodernism* (London: Routledge, 1990) at 15.

46 Baudrillard argues in a famous passage that:

The very definition of the real has become *that which it is possible to give an equivalent reproduction ... the real is not only that which is reproduced, but that which is already reproduced ... the hyperreal. ... The hyperreal transcends representation only because it is entirely in simulation.*

Baudrillard, *Simulations*, *supra* note 42 at 146–147.

Foucault has stated, that “[a] number of us, I think, including myself, consider that reality does not exist, that only language exists” in B. Cooper, *Michel Foucault: An Introduction to the Study of his Thought* (Lewiston: Edwin Melten Press, 1982) at 28.

is sometimes called “perspectivism”⁴⁷ or “antifoundationalism”⁴⁸ in that it posits that there can be a plurality of mutually incommensurable perspectives each offering equally valid interpretations of reality. Thus, in the historical sphere, it is argued that “every representation of the past has specifiable ideological implications.”⁴⁹ Postmodernism dismantles “Truth”, at least with a capital “T.”⁵⁰ This epistemological revision of reality generates a postmodern embracement of “otherness” (a.k.a. alterity).⁵¹

Secondly, postmodernism is so radical in its disassembly and decomposition of conventional wisdom, it argues that the very idea of “the individual” or “the subject” is up for grabs. Having negated the possibility of unencoded representations, it posits that social structures and narratives are so pervasive that we can no longer be confident in the humanist faith in an essentialist, presocial, coherent, unified and autonomous self, because an ontology of this kind is based on “the fantasy of autogenesis.”⁵² Rather, because “language speaks the subject”,⁵³ the self is constructed to the core. Derrida, for example, talks about the “death” of the subject,⁵⁴ and Baudrillard calls for a “renunciation of the position of the subject.”⁵⁵ If postmodernists are accurate in this claim, then they obviously problematize traditionally received ideas about autonomy, freedom, choice, agency and responsibility.⁵⁶

Thirdly, postmodernists tend⁵⁷ to be sceptical of liberal humanism’s celebrations of “freedom”, “liberty”, “choice” and “opportunity”, positing instead that given the twentieth century’s less than impressive history (Auschwitz, Hiroshima, The Gulag and — I would add — Dresden) it may be better to think in terms of “imperialism”, “colonization”, “domination” and “control.” For some self-confessed postmodernists, this engenders a

47 F. Nietzsche, *On the Genealogy of Morals*, W. Kaufman, ed. (New York: Random House, 1969) at 119.

48 R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); K. Baynes, J. Bohman & T. McCarthy, eds., *After Philosophy: End or Transformation?* (Cambridge: MIT Press, 1987).

49 H. White, *Tropics of Discourse: Essays in Cultural Criticism* 69 (Baltimore: Johns Hopkins University Press, 1978).

50 H. Lawson & L. Appignanesi, eds., *Dismantling Truth: Reality in the Postmodern World* (London: Weidenfeld and Nicholson, 1989). Baudrillard, for example, claims, “[t]he secret of theory is, indeed, that truth doesn’t exist”, J. Baudrillard, “Forgetting Baudrillard” (1986) 15 *Social Text* 140, 141.

51 As Derrida posits, “[d]econstruction is, in itself, a positive response to an alterity which necessarily calls, summons or motivates it. Deconstruction is therefore a vocation — a response to a call.” Interview with Jacques Derrida (1981) reprinted in R. Kearney, ed., *Dialogues with Contemporary Continental Thinkers* (Manchester: Manchester University Press, 1984) at 117, 118.

52 J. Butler, “Contingent Foundations: Feminism and the Question of ‘Postmodernism’” in J. Butler & J. Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992) 3 at 9 [hereinafter *Theorize*].

53 Milovanovic, *supra* note 24 at 31.

54 Derrida, *Grammatology*, *supra* note 19 at 69.

55 *Shadow*, *supra* note 42 at 107.

56 See e.g., Schlag, *Normative*, *supra* note 24 at 173–174.

57 I say “tend”, because there are such self-identified people as “postmodern bourgeois liberals” and “post-modernist liberal communitarians”. See R. Rorty, “Postmodernist Bourgeois Liberalism” (1983) 80 *J. Philosophy* 585 and A. Botwinick, *Postmodernism and Democratic Theory* (Philadelphia: Temple University Press, 1993) at 55.

“corresponding ideological commitment to minorities in politics, sex and language.”⁵⁸

Fourthly, postmodernists argue that, in order to better understand our current condition and the foregoing problematics, it is necessary to shift the conceptual framework to what is sometimes called the “discursive paradigm”; hence, there is a focus on “language”, “language games”, “text”, “interpretation”, “discourse” and “discursive formations.”

Fifth, and finally, underlying all of these propositions is the sense that what is required is a reconceptualization of the nature and function of “power.” Specifically it is proposed that we should abandon our idea of power as concentrated, top down and unidirectional, and replace it with a dispersed, pluralistic and multi-directional conception of power.

These more general motifs and philosophical stances are reflected in, and elaborated upon, in the work of the two “popes of postmodernism”:⁵⁹ Lyotard⁶⁰ and Baudrillard.⁶¹

In *The Postmodern Condition: A Report on Knowledge*,⁶² “presented to the Conseil des Universities of the government of Quebec”,⁶³ Lyotard identifies the challenges posed by “the postmodern condition” to our dominant philosophical traditions and, in particular, to the project of the Enlightenment. He argues that in science and politics there has been a philosophical tendency to create what he calls a “master-narrative” or “meta-narrative” that is designed to be a super explanation of reality. Liberalism and Marxism would both fall within his critique of this reductionist quest. The problem, however, lies not so much in the explanatory aspirations (and, in Lyotard’s opinion, inevitable failures) of such a grand narrative, but in its legitimation function.⁶⁴ That is, by claiming that its interpretation is *the* account of reality, the master-narrative imposes an orthodoxy and framework of analysis that aspires to be total and, in so doing, denies legitimacy to alternative experiences and marginalizes other interpretations. As the commentators Fraser and Nicholson point out, such a metanarrative claims to be “meta” in a very stringent sense:

[I]t purports to be a privileged discourse capable of situating, characterising and evaluating all other discourses, but not itself infected by the historicity and contingency which render first order discourses potentially distorted and in need of legitimation.⁶⁵

58 I. Hassan as quoted in A. Wellmar, *supra* note 40 at 338. See also, Douzinas, *supra* note 16 at x, xii and H. Giroux, “Modernism, Postmodernism and Feminism” in H. Giroux, ed., *Postmodernism, Feminism and Cultural Politics* (1991).

59 *Supra* note 45 at 238.

60 For a very helpful bibliography of works by and about Lyotard see the compilation by E. Yeghiayan in J.F. Lyotard, *Peregrinations: Law, Form, Event* (New York: Columbia University Press, 1988) 77–112.

61 Baudrillard has, on occasion, attempted to distance himself from postmodernism. See M. Gane, *Baudrillard: Critical and Fatal Theory* (New York: Routledge, 1991) at 66.

62 Lyotard, *Condition* at *supra* note 19.

63 *Id.* at xxv.

64 *Id.* at 6.

65 N. Fraser & L. Nicholson, “Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism” in L. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990) at 19, 22.

In short, in its aspiration to be authoritative, the master narrative becomes authoritarian. Scientific discourse is Lyotard's star example.⁶⁶

Postmodernism, we are told, signals a legitimation crisis for all such metanarratives by calling for an "incredulity"⁶⁷ towards them. Lyotard's counter-argument to such totalizing interpretations is to embrace epistemological scepticism and to call for an espousal of heterogeneity, difference, contextualism and localism. By this he seems to mean that we should cease attempting to develop grand accounts and focus more on micro-analyses of the interstices of the complex realities of social being. More specifically, Lyotard calls for a proliferation of "language games" or "narratives" arguing that a heterogeneous and competitive plurality can destabilize and delegitimize the dogmatism of the dominant narrative. This pluralistic economy of narratives he calls "paralogy"⁶⁸ and posits that an embracement of dissensus avoids the totalitarian dangers inherent in all appeals to consensus: postmodernism "refines our sensitivity to differences and reinforces our ability to tolerate the incommensurable."⁶⁹ For Lyotard, difference, specificity, instability and incommensurability are the characteristics of the postmodern experience.

These ideas are further developed in two later books, *Just Gaming* (with J.L. Thébaud) and *The Differend*.⁷⁰ Pivotal to both texts, but nonetheless elusive, are Lyotard's conceptions of justice and injustice. Injustice, it seems, occurs when one "language game," "genre," or "narrative" gains such an absolute status that it effectively closes down all other narratives by claiming for itself a monopoly of "truth." Injustice is the failure to respect other narratives, an intolerance for alterity, the refusal to listen. Lyotard's preference is for a "justice of multiplicity"⁷¹ which favours an openness to a plurality of narratives⁷² which are incapable of being adjudicated by another narrative because there is no "universal" rule or narrative, "no common measure"⁷³ or, as jurists might say, no "grundnorm".⁷⁴

As opposed to a litigation, a *differend* would be a case of conflict between two parties (at least) which could not equitably be decided for lack of a rule of judgement applicable to both argumentations. That one argumentation be legitimate would not imply that the other was not. If however one applies that same rule of judgement to both to decide their *differend* as if it were a litigation, one causes one of them a wrong [*tort*] (at least to one of them, and

66 Lyotard, *Condition*, *supra* note 19 at 47.

67 *Id.* at xxiv.

68 *Id.* at 60.

69 Lyotard, *Condition*, *supra* note 19 at xxv.

70 J.F. Lyotard & J.L. Thébaud, *Just Gaming*, trans. W. Godzich (Minneapolis: University of Minnesota Press, 1985) [hereinafter *Gaming*]; J.F. Lyotard, *The Differend: Phrases in Dispute*, trans. G. Van Der Abbeele (Minneapolis: University of Minnesota Press, 1988) [hereinafter *Differend*].

71 Lyotard, *Gaming*, *id.* at 59, 100.

72 The legitimacy of each narrative is dependent upon a contingent configuration of internal conventions, procedures, norms or rules. *Id.* at 96.

73 *Id.* at 50.

74 H. Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967) at 8.

to both if neither admits this rule). A damage [*dommage*] is the result of an inquiry done to the rules of a genre of discourse and can be repaired in accordance with those rules. A wrong results from the fact that the rules of the genre of discourse according to which one judges are not those of the genre or genres judged. ... The title of this book suggests ... that a universal rule of judgement between heterogeneous genres is lacking in general.⁷⁵

Thus, for Lyotard, a wrong occurs when one's narrative is considered to be unintelligible to those who are judging, or when those who are judging fail to listen. This, as will become apparent, will be helpful in our quest to understand the juridical significance of the hunger strike.

Baudrillard appears to go even further in his rejection of the Enlightenment project.⁷⁶ He argues that such is the significance of technology — and in particular the mass medias⁷⁷ — that we have moved into a condition of what he calls “hyper-reality”, that is, “the generation of models of a real without origin or reality.”⁷⁸ For Baudrillard, we now live in a regime of the “code”, a “semiotic network”, where all we have is a proliferation of signs, the infinite reproduction of copies without originals.⁷⁹ As he elaborates:

Today, the entire system is fluctuating in indeterminacy, all of reality absorbed by the hyperreality of the code and of simulation. It is now a principle of simulation, and not of reality, that regulates social life. The finalities have disappeared; we are now engendered by models. There is no longer such a thing as ideology; there are only simulacra.⁸⁰

In Baudrillard's “precession of simulacra” all our points of reference have been “liquified”, meaning has “imploded”, “the reality principle” trashed and the “theology of truth” discarded.⁸¹ Any purported distinction between progress and reaction is epistemologically unfounded as is “the difference between ‘true’ and ‘false’, between ‘real’ and ‘imaginary’.”⁸² Values are indeterminate:

In truth, there is nothing left to ground ourselves on. All that is left is theoretical violence. Speculation to the death, whose only method is the radicalization of all hypotheses. ...

The era of simulation is thus everywhere initiated by the interchangeability of previously contradictory or dialectically opposed terms. Everywhere the same

⁷⁵ Lyotard, *Differend*, *supra* note 70 at xi.

⁷⁶ Baudrillard, *Writings*, *supra* note 42.

⁷⁷ J. Baudrillard, “The Masses: The Implosion of The Social in The Media” (1985) 16 *New Literary History* at 577–589.

⁷⁸ Baudrillard, *Simulations*, *supra* note 42 at 2.

⁷⁹ *Id.* at 83–115.

⁸⁰ Baudrillard, *Writings*, *supra* note 42 at 145. For Derrida's discussion of simulacra, see *Writing and Difference*, trans. A. Bass (Chicago: University of Chicago Press, 1978) 263, 284.

⁸¹ Baudrillard, *Simulations*, *supra* note 42 at 4, 5, 12, 25, 57, 152.

⁸² *Id.* at 5.

“genesis of simulacra:” the interchangeability of the beautiful and the ugly in fashion; of the right and the left in politics; of the true and false in every media message; of the useful and the useless at the level of objects; and of nature and culture at every level of meaning. All the great humanist criteria of value, all the values of a civilization of moral, aesthetic, and practical judgement, vanish in our system of images and signs. Everything becomes undecidable. This is the characteristic effect of the domination of the code, which is based everywhere on the principle of neutralization and indifference.⁸³

In such a world, the subject is but “a terminal of information.”⁸⁴

According to Baudrillard, two political consequences emerge from these epistemological, sociological and ontological propositions. First, he asserts that power needs to be reconceptualized:

No more subject, focal point, centre or periphery: but pure flexion or circular inflection. No more violence or surveillance: only ‘information’, secret with virulence, chain reaction, slow implosion and simulacra of spaces where the real effect comes into play.⁸⁵

Indeed, because “power is no longer present except to conceal that there is none”⁸⁶ then “*law and order themselves might be nothing more than a simulation.*”⁸⁷ All of which is to say that “the political sphere (and power in general) becomes empty”⁸⁸ so that “power pure and simple disappears.”⁸⁹ Secondly, and as a direct consequence of this dispersed conception of power, the idea — indeed the very possibility — of political praxis needs to be reconsidered. Contrary to the emancipatory aspirations of, for example, Liberalism and Marxism, we can expect little by way liberation or transformation.⁹⁰ Hyper-reality has had the effect of creating a condition of “hyper-conformity” where resistance, if a viable prospect at all, can only take the form of “indifference”, “silence”, “inertia”, “disaffection”, “entropy” and “passivity.”⁹¹ In short, according to Baudrillard, we are caught in a technological maze of mirrors from which there is no exit. Delirious from the reflections of reflections, we are so disoriented that not only can we not distinguish between forwards and backwards, we cannot even recognize ourselves. Overcome by vertigo, we drop.

B. Deconstruction

Deconstruction can be understood as a characteristic process of postmodern

83 Baudrillard, *Writings*, *supra* note 42 at 124, 128.

84 Baudrillard, *Shadow*, *supra* note 42 at 83. See also, his *Fatal Strategies* trans. B. Beitchman & W. Niesluchowski (New York: Semiotext(e), 1990) at 111–115 for a more extended conception of the subject.

85 Baudrillard, *Simulations*, *supra* note 42 at 53–54.

86 *Id.* at 40.

87 *Id.* at 38 [emphasis in original].

88 *Id.* at 128.

89 J. Baudrillard, *Forget Foucault* (New York: Semiotext(e), 1987) at 43.

90 Baudrillard, *Simulations*, *supra* note 42 at 109.

91 Baudrillard, *Shadow*, *supra* note 42, *passim*.

analysis and so, for the purposes of this paper, I will briefly outline some of the central arguments of the “deconstructive angel of contemporary thought”,⁹² Jacques Derrida.⁹³ Of pivotal importance are the ideas of “logocentrism”, “hierarchy”, “*différance*”, “trace”, “aporia”, “reversal”, “inscription”, “margin”, “supplement” and “alterity.”

For Derrida the most profound problem for (western) thought is the tendency to embrace the logic of what he variously calls “logocentrism”,⁹⁴ or “the metaphysics of presence.”⁹⁵ Logocentrism is the ideal that it is possible for human beings to have an immediate, transparent and uncontaminated interaction with the context in which they find themselves. Derrida is skeptical of the possibility of there being any primordial origin or presence that pre-exists representation.⁹⁶ Underlying such a presentist position, he argues, is the tendency to believe that there is some abstracted, absolute or anchor position, such as Truth or Reality. This is sometimes conceived of as foundationalism. The problem with such essentialist or foundationalist conceptions of reality, according to Derrida, is that in adopting a naturalistic and necessitarian belief structure, they become totalizing and hierarchal, thereby excluding other conceptions of reality or truth.⁹⁷

Derrida’s work, then, can be understood as an attempt to subvert foundationalism by arguing that all our interactions are filtered through interpretive grids and, therefore, distanced from any original reality.⁹⁸ He posits that our most basic norms, assumptions and theories are constructs and therefore dependent upon a plurality of conscious and unconscious factors. In pursuit of this strategy of ungrounding logocentrism, Derrida develops the practice of “deconstruction” and the (non)concept⁹⁹ of “*différance*.”

Deconstruction involves the process of “dismantling conceptual oppositions, the taking apart of hierarchal systems of thought which can then be *reinscribed* with a different order of textual signification ... operating as a kind of strategic reversible.”¹⁰⁰ As a form of internal critique,¹⁰¹ deconstruction

92 *Supra* note 34 at 291.

93 For an extensive bibliography of works by and about Derrida, see G. Bennington & J. Derrida, *Jacques Derrida* (Paris: Seuil, 1991) at 327–376. Given Derrida’s huge corpus of work, what follows is, unsurprisingly, a selective and partial interpretation.

94 Derrida, *Grammatology*, *supra* note 19 at 11–12; J. Derrida, *Positions*, trans. A. Bass (Chicago: University of Chicago Press, 1981) at 51.

95 Derrida, *Grammatology*, *supra* note 19 at 49.

96 *Id.* at 36.

97 “There is no such thing as truth in itself. But only a surfeit of it. Even if it should be for me, about me, truth is plural”, J. Derrida, *Spurs: Nietzsche’s Styles* (Chicago: University of Chicago Press, 1979) at 103.

98 Derrida, *Positions*, *supra* note 94 at 11.

99 Derrida has insisted that, “Differance ... is neither a word nor a concept,” see, J. Derrida, *Margins of Philosophy*, trans. A. Bass (Chicago: University of Chicago Press, 1982) at 7 [hereinafter *Margins*]; J. Derrida, *Speech and Phenomena: And Other Essays on Husserl’s Theory of Signs* (Chicago: Northwestern University Press, 1973) at 135 [hereinafter *Speech*]. See also, Derrida, *Positions*, *supra* note 94 at 9, 39.

100 C. Norris, *Derrida* (Cambridge, Mass.: Harvard University Press, 1987) 19 [emphasis in original]. As Derrida himself puts it:

On the other hand, we must traverse a phase of *overturning*. To do justice to this necessity is to recognize that in a classical philosophical opposition we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper

involves two stages, a “double gesture.”¹⁰² First, there is a reversal or overturning of the hierarchy to bring “low what was high”¹⁰³ so as to demonstrate the epistemological arbitrariness of such a prioritization. Secondly, there is a displacement of the (new) binary opposition in order to destabilize hierarchy itself and thereby to allow for a burgeoning of multiplicity.¹⁰⁴

“*Différance*”,¹⁰⁵ which draws on the French verb “différer”, suggests two things: “to defer, postpone or delay” as well as “to differ, to be non-identical.” As Balkin helpfully explains:

Différance simultaneously indicates that (1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term), and (3) each term in the hierarchy defers *to* the other (in the sense of being fundamentally dependent upon the other).¹⁰⁶

Différance, as an interpretive strategy, demonstrates how “the trace” of “the other” is irrepressible. It illustrates how every concept that has ascribed to it a hierarchical (and therefore latently logocentric) significance is, in fact, irrevocably entwined with that which is reputedly trivial. That which would be prioritized and superior is dependent upon that which is encoded as derivative and inferior. That which asserts its own autonomous, self-sufficient and pure identity can only do so by differentiating itself from its constitutive other. *Différance* is relational and comparative, not intrinsic or essential. Consequently, “meaning” in a strong sense is unachievable because it is premised upon undecidable ambiguities:

hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment. To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition. Therefore one might proceed too quickly to a *neutralization* that *in practice* would leave the previous field untouched, leaving one no hold on the previous opposition, thereby preventing any means of *intervening* in the field effectively. We know what always have been the *practical* (particularly *political*) effects of *immediately* jumping *beyond* oppositions, and of protests in the simple form of *neither this nor that*.

Derrida, *Positions*, *supra* note 94 at 41.

101 The movements of deconstruction do not destroy structures from the outside. They are not possible and effective, nor can they take accurate aim, except by inhabiting those structures. Inhabiting them *in a certain way*, because one always inhabits, and all the more when one does not suspect it. Operating necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, borrowing them structurally, that is to say without being able to isolate their elements and atoms, the enterprise of deconstruction always in a certain way falls prey to its own work.

Derrida, *Grammatology*, *supra* note 19 at 24. See also Derrida, *Positions*, *supra* note 94 at 24.

102 Derrida, *Positions*, *supra* note 94 at 41.

103 *Id.* at 42.

104 Derrida, *Margins*, *supra* note 99 at 329.

105 See e.g., Derrida, “*Différance*” in *Speech*, *supra* note 99 at 129.

106 J.M. Balkin, “Deconstructive Practice and Legal Theory” (1987) 96 *Yale L.J.* 743 at 752. As Derrida himself says, “On the one hand, [différer] indicates difference as distinction, inequality, or discernability; on the other, it expresses the interposition of delay, the interval of a *spacing* and *temporalizing* that puts off until “later” what is presently denied, the possible that is presently impossible”. Derrida, *Speech*, *supra* note 99 at 129. See also Derrida, *Positions*, *supra* note 94 at 8–9.

[T]he meaning of meaning ... is infinite implication, the indefinite referral of signifier to signifier ... its force is a certain pure and infinite equivocality which gives signified meaning no respite, no rest, but engages it in its own *economy* so that it always signifies again and differs.¹⁰⁷

By highlighting the antinomial, constructed and necessarily relational nature of that which would be incontrovertible, the technique of *différance* endangers and deflates logocentrism. Deconstruction — by emphasizing the relational nature of our concepts, by discovering the mutual dependency of centre and margin, by demonstrating that the primary and the secondary are mutually implicative, by bringing into sharp relief the play of *différance* — does not pursue a synergistic or dialectical third way. Rather, its aim is to uncover a plurality of possibilities and to demonstrate that what is centralized is dependent upon the repression of alternative contenders by relegating them to the margins. Derrida considers this process of foregrounding contradiction, anomaly and unjustifiable privileging to be empowering in that deconstruction creates the possibility for dismantling binary oppositions and revivifying that which has been submerged. In favouring cacaphony rather than harmony, deconstruction creates conditions hospitable to the “return of the repressed.”¹⁰⁸

One pragmatic consequence of deconstruction is that rather than having a false sense of certainty which, by necessity, is dependent on the repression of otherness, we are left with what Derrida calls an “aporia”, a sense of doubt.¹⁰⁹ It is this moment of hesitation and undecidability, this sense of uncertainty, openness and contradiction that enlarges a space for the emergence (and potential valorization) of “alterity.” For Derrida, “[t]he critique of logocentrism is above all else the search for the ‘other’ and the ‘other of language’.”¹¹⁰ These alternative perspectives he sometimes calls “dangerous supplements.”¹¹¹ They are “dangerous” in that by producing a different narrative, they signify not just an addition to a “text”, but an interrogation of the core assumptions of that text and, therefore, a decentering and ungrounding of a dominant interpretation:

But the supplement supplements. It adds only to replace. It intervenes or insinuates itself *in-the-place-of*; if it fills, it is as if one fills a void. If it represents and makes an image, it is by the anterior default of a presence. Compensatory... and vicarious, the supplement is an adjunct, a subaltern instance which *takes — (the) — place*.¹¹²

107 J. Derrida, *Writing and Difference*, trans. A. Bass (Chicago: University of Chicago Press, 1978) at 25 [hereinafter *Writing*].

108 F. Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991) at 199.

109 Aporia is derived from the Greek “unpassable path”.

110 *Supra* note 51 at 123.

111 Derrida, *Grammatology*, *supra* note 19 at 141. “Supplement” is derived from the French verb, *suppléer*.

112 *Id.* at 145. Elsewhere, Derrida defines *supplement* as an “undecidable”, something that cannot “be included within philosophical (binary) opposition,” something that resists and disorganizes philosophical binaries “without ever consisting a third term...; the

In sum, deconstruction offers the possibility (and that is all it is) of decentering conventional wisdom.

Having mapped out some of the conceptual terrain of postmodernism and deconstruction, I think we are in a better position to revisit and re-envision the nature and significance of the hunger strike. Most specifically, in its potential valorization of "alterity" — in its affirmation of the existence and legitimacy of otherness — postmodernism allows space for, at least, a hearing of alternative and deviant perspectives.¹¹³

IV. THE HUNGER STRIKE

A. A History

In this section, I develop a brief historical overview of events leading up to, and during, the Hunger Strike of 1981. History, as every good postmodernist knows, is contingent upon a choice of starting points and perspectives: it is partial (in both senses of the word) rather than total.¹¹⁴ Therefore, it is suggested that one can only fully appreciate the interpretation offered in this article if I am explicit about my understanding of the historical context out of which the hunger strike arose.¹¹⁵

The history of Ireland is a history of indigenous culture, invasion, domination, resistance, violence and tense accommodation. It is a history of Gaels, Vikings, Normans and Scots arriving in waves and awkwardly settling in. Prior to the first Norman invasion of 1167, Ireland was a relatively sophisticated society, divided into various kingdoms, with its own cultural

supplement is neither a plus nor a minus, neither an outside nor the complement of an inside, neither accident nor essence". Derrida, *Positions*, *supra* note 94 at 43.

113 As Bernstein has commented:

Learning to live with the instability of alterity; learning to accept and to encounter radical plurality which fully acknowledges *singularity* — is always fragile and precarious. It makes no sense to even speak of a "final solution" to this problem — *the* problem of human living. No one can ever fully anticipate the ruptures and new sites of the upsurge of alterity. This is a lesson that we must learn again and again. And it has been painfully experienced in our time whenever those individuals or groups who have been colonized, repressed, or silenced rise up and assert the legitimacy and demand for full recognition of their own non-reducible alterity.

R. Bernstein, *The New Constellation* (Cambridge: Polity Press, 1991) at 75.

114 As Hutcheon posits:

To challenge the impulse to totalize is to contest the entire notion of continuity in history and its writing. ... The particularizing and contextualizing that characterize the postmodern focus are, of course, direct responses to those strong (and very common) totalizing and universalizing impulses. But the resulting postmodern relativity and provisionality are not causes for despair; they are to be acknowledged as perhaps the very conditions of historical knowledge. Historical meaning may thus be seen today as unstable, contextual, relational, and provisional, but postmodernism argues that, in fact, it has always been so.

L. Hutcheon, *The Politics of Postmodernism* (New York: Routledge, 1989) at 66-67. See also D. Attridge *et al.*, eds., *Poststructuralism and the Question of History* (Cambridge: Cambridge University Press, 1987) and W.G. Forbath, H. Hartog & M. Minow, "Legal Histories From Below" (1985) *Wis. L. Rev.* 764.

115 Obviously, it is beyond the scope of this essay to provide a detailed overview of Irish history. What follows is designed to identify a broad context against which a more particular set of events can be understood.

codes and legal structures.¹¹⁶ However, as England's first colony,¹¹⁷ gradually over the course of eight centuries, these cultural norms and legal structures were modified and marginalized by an almost overwhelming military, cultural and juridical British presence.¹¹⁸ Nevertheless, resistance continued and, in December 1920, it was finally acknowledged by Britain that Irish independence was inevitable. The problem, however, was that given the depth of the infiltration, a large segment of the population — particularly in the northeastern counties of the country — sought to remain part of Britain. The “solution”, as it was then considered, was to partition Ireland: the southern twenty-six counties constituting an independent “Free State”, the northern six counties comprising the statelet of Northern Ireland. The former would have its own republican government, the latter its own devolved government: Stormont.¹¹⁹ From the early 1920s to the late 1960's, Britain remained relatively detached from Northern Ireland, allowing the local Parliament free reign over the affairs of the province. The result of this “protestant parliament for a protestant people” was “an orange state” in which “Loyalists” governed continuously in their own interests and Catholics were treated as second class citizens.¹²⁰ Despite several minor military campaigns over the years against the “orange state”, the IRA were a spent force.¹²¹

In the late 1960s, inspired by protest movements in both the United States and Europe, a coalition of relatively progressive groups came together to form the Northern Ireland Civil Rights Association (NICRA) to protest discrimination against Catholics.¹²² Although a few members of NICRA

116 F.H. Newark, “The Bringing of British Law to Ireland” (1972) 23 *N.I.L.Q.* 3.

117 W.J. Johnston, “The First Adventure of the Common Law” (1920) 36 *L.Q. Rev.* 9.

118 For an overview of some of the practices and discourses of colonialization adopted by England see *supra* note 7 at 136-150. Williams' point, in part, is that Ireland was an experiment for English colonialization of “American Indians”. See also H.S. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (New York: Cambridge University Press, 1985).

119 *Government of Ireland Act 1920*, 10 & 11 Geo. V. c. 67. A.G. Donaldson, “The Constitution of Northern Ireland: Its Origins and Development” (1955) 11 *U. Toronto L.J.* 1. C. Palley, “The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution” (1972) 1 *Anglo-Am. L. Rev.* 368.

120 J. Darby, *Conflict in Northern Ireland: The Development of a Polarized Community* (Dublin: Gill and MacMillan, 1976); J. Magee, *Northern Ireland: Crisis and Conflict* (Boston: Routledge, 1974); *Sunday Times Insight Team, Ulster* (Baltimore: Penguin, 1971). Even British Government Inquiries concur with this assessment. See e.g., *Disturbances in Northern Ireland* (Cameron Report) (1969) and Northern Ireland, House of Commons, Cond. 566 in *Violence in Northern Ireland and Civil Disturbances in Northern Ireland in 1969* (Scarman Report) (1972).

121 T.P. Coogan, *The I.R.A.* (London: Fontana, 1987).

122 As one commentator points out,

“the demands of the civil rights campaigns...centred on six main issues:

1. One-man-one-vote (sic) in local elections.
2. The removal of gerrymandered boundaries.
3. Laws against discrimination by local government, and the provision of machinery to deal with complaints.
4. Allocation of public housing on a points (*i.e.* objective) system.
5. Repeal of the *Special Powers Act*.
6. Disbanding of the ‘B Special’ police force. This was a wholly Protestant armed militia particularly hostile to the minority [population]...”

D.R. Lowry, “Interment: Detention Without Trial in Northern Ireland” (1976) 5 *Human Rights* 261 at 263-264.

were Republicans, the vast majority of those involved were socialists and liberal democrats.¹²³ In spite of the fact that the demands of NICRA were essentially reformist — in the sense that Catholics “sought equal citizenship within, not the destruction of Northern Ireland”¹²⁴ — the local state responded with unmediated police repression.¹²⁵ Worse still, was the collusion between the paramilitary police forces of Northern Ireland and segments of the loyalist community whereby the former enabled the latter to embark upon vigilantism and pogroms which were so widespread that (prior to the current civil war in the former “Yugoslavia”) they caused the greatest relocation of the civilian population anywhere in Europe since the Second World War.¹²⁶

Thus, it can be argued that it was the repressive activities of the state — both active and passive — which generated an upsurge in the legitimacy of the IRA,¹²⁷ because when the pogroms began, the only people even partially able to defend the catholic communities were very small numbers of IRA volunteers who had a few old rifles.¹²⁸ With no sign of the pogroms abating, and the Catholics very much under seige, the British government acknowledged that the local security forces were so partisan that they were undermining the legitimacy of the British presence in Northern Ireland. As a result, in August 1969, the British government decided to dispatch soldiers to carry out what was, in essence, a policing function.¹²⁹ For several months, there was a honeymoon period between the British troops and the nationalist

123 P. Bishop & E. Mallie, *The Provisional IRA* (Aylesbury: Corgi, 1987) at 48-53.

124 M. MacDonald, “Blurring the Difference: The Politics of Identity in Northern Ireland” in Alexander and O’Day *supra* note 10 at 81, 82. This was confirmed by a subsequent British Commission of Inquiry which not only acknowledged the legitimacy of most of the civil rights protestors’ claims (if not their actions), but also reported that their demands would not “in any sense endanger the stability of the Constitution”, *Cameron Report, supra* note 120 at 91.

125 Bishop & Mallie, *supra* note 123 at 55-58. K. Boyle, T. Hadden & P. Hillyard, *Law and State: The Case of Northern Ireland* (London: Martin Robertson, 1975); *Sunday Times Insight Team, supra* note 120.

126 F. Burton, *The Politics of Legitimacy: Struggles in a Belfast Community* (London or Boston: Routledge & K. Paul, 1978) at 69. C. Keena, *Gerry Adams: A Biography* (Dingle: Brandon, 1990) at 38.

127 C.C. O’Brien, *States of Ireland* (London: Hutchinson, 1972) at 207. Scott argues, that “(t)he most repressive regimes are, then, the most liable to the most violent expressions of anger from below if only because they have so successfully eliminated any other form of expression”, J.C. Scott, *Domination and the Arts of Resistance* (New Haven: Yale, 1992) at 217.

128 It is estimated that by the late 1960’s, there were somewhere between sixty to one hundred fully fledged IRA volunteers in Belfast, Bishop & Mallie, *supra* note 123 at 81-88, 108; Keena, *supra* note 126 at 26, 36. The response from the Catholic community to this defense was very mixed. While some members of the IRA seemed to have played quite a courageous role, the extent of the violence against the catholic communities resulted in a re-encoding of the acronym IRA as: I Ran Away.

129 This was part of a two pronged strategy hastily developed by the British state. The other strategy was to put pressure on the Stormont regime to introduce a series of police and local government reforms to reduce the manifest discrimination that had continued for 50 years. See e.g. D. Birrell & A. Murie, *Policy and Government in Northern Ireland: Lessons of Devolution* (New York: Barnes & Noble, 1980); Palley, *supra* note 119. Such reforms, I would suggest, came too late and were offset by the first and determinative strategy: military intervention. For a further discussion of “determinative” see Devlin, “Law’s Centaur”, *supra* note 8.

community. However, this began to deteriorate for several reasons. First, some soldiers started taking actions in favour of the loyalist community. Second, the IRA commenced a very tentative campaign against a reintensified British military presence on Irish soil.¹³⁰ Third, and most significantly, the British army imposed an extensive curfew and pursued house to house searches in the (predominantly catholic) Lower Falls area of Belfast in July 1970.¹³¹

Though tension began to rise in 1970 between the IRA and the British army, mostly in the form of rioting, it was not until February 1971¹³² that the first British soldier was killed in Northern Ireland since the 1920s and, in April, the IRA began to develop a bombing campaign.

As to the legal regime in place from 1920 to the early 1970s, so extreme was Britain's abdication of responsibility for Northern Ireland, and so strong was its faith in the local government, that it willingly devolved its criminal law power to the Stormont regime. This enabled the Northern Ireland parliament, in the pursuit of "peace, order and good government", to pass the *Civil Authorities (Special Powers) Act (Northern Ireland)*,¹³³ an extremely draconian set of permanent emergency powers laws.¹³⁴ Indeed, a South African Minister of Justice, John Vorster, once commented that he would be willing to "exchange all the [South African Coercion] legislation ... for one clause of the *Northern Ireland Special Powers Act*."¹³⁵ It was this *Act* and cognate legislation (and the plethora of regulations made pursuant to them) that created the local paramilitary police force and provided the patina of legal legitimacy for the violent repression of the Irish civil rights movement of the 1960s.

130 The IRA could not mobilize its resistance to this British military presence until after an acrimonious split between its "Official" and "Provisional" wings in January 1970. Bishop & Mallie, *supra* note 123 at 89-103; Keena, *supra* note 126 at 43.

131 *Sunday Times*, *supra* note 120.

132 Prior to this, several catholics had been shot and many more beaten by British troops. *Sunday Times*, *supra* note 120 at 290.

133 12 Geo. V c.5. This *Act* was first introduced in 1922, updated annually, and made permanent in 1934.

134 Walter Benjamin was one of the first to identify the phenomenon of "permanent exceptionalism" when he argued:

(t)he tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule. We must attain a conception of history that is in keeping with this. We still clearly realize that it is our task to bring about a real state of emergency...

Quoted in W. Hamacher, "Affirmative Strike" (1991) 13 *Cardozo L. Rev.* 1133, 1150. For an early, but rare, British critique of such laws see *National Council on Civil Liberties, Report of a Commission of Inquiry Appointed to Examine the Purpose and Effect of the Civil Authorities (Special Powers) Act (Northern Ireland, 1922 & 1933)* (1936).

135 G. Adams, *The Politics of Irish Freedom* 22 (Dingle: Brandon, 1987). Quite possibly Vorster was referring to s.2(4):

If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or the maintenance of order in Northern Ireland and not specifically provided for in the regulations he shall be deemed guilty of an offence against the regulations.

See also, *South African Department of Foreign Affairs, South Africa and the Rule of Law* (1968) which quotes extensively from the *Special Powers Act* in support of repression in the enforcement of apartheid.

When the IRA commenced the bombing campaign in 1971, the response of the Stormont government (consented to, and assisted by, the British Government¹³⁶) was to invoke Regulation 12 under *The Special Powers Act*¹³⁷ and introduce internment without trial. Three hundred and forty-two people, all Catholics, many of them without any connection to the IRA, were arrested in the first raid on August 9, 1971. Within six months, a total of 2,357 people had been arrested (although not all were interned), the vast majority of them again being Catholics.¹³⁸ As a Secretary of State for Northern Ireland subsequently explained:

The Stormont Government [thought] quite reasonably, in their view, if you were a Protestant you were a loyal figure, loyal to the government, loyal to the ethos of Northern Ireland against the South, against the Pope.... Therefore, you were a loyal person until proved otherwise. Whereas over the years the exact opposite was regarded of the minority community who (sic) was associated far more with the I.R.A. than many of them actually were. And they, of course, were guilty of being on the side of the I.R.A. until proved otherwise. The balance of proof was exactly the opposite way around, as one of the balances in the community to some extent still is. And therefore, there was no intelligence or very little intelligence about militant Protestant groups. Very little indeed. For the best of all possible reasons. The whole apparatus of the state wasn't directed against them.¹³⁹

A large number of these, "presumptive terrorists"¹⁴⁰ were sent to a deserted World War Two air base near Belfast — Long Kesh — confined in compounds, installed in dormitory huts, and allowed to wear their own clothes, receive parcels and organize their own educational programmes. In effect, they were treated as prisoners of war and had "political status."¹⁴¹

136 Bishop & Mallie, *supra* note 123 at 143; R.J. Spjut, "Internment and Detention Without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice" (1986) 49 *Mod. L. Rev.* 712.

137 S.R. & O. (N.I.) 1971, No. 309.

138 A. Feldman, *Formations of Violence* 86 (Chicago: University of Chicago Press, 1991); Spjut, *supra* note 136 at 735-736. In the following three and one half years a total of 2,158 people were interned. P. Hillyard, "The Normalization of Special Powers: From Northern Ireland to Britain" in P. Scraton, ed., *Law, Order and the Authoritarian State: Readings in Critical Criminology* (Philadelphia: Open University Press, 1987) 279 at 285.

139 W. Whitelaw, quoted in Spjut, *supra* note 136 at 736.

140 See also the discussion of presumptive criminals in P. Fitzpatrick, "'The Desperate Vacuum': Imperialism and Law in the Experience of Enlightenment", Carty, *Postmodern Law*, *supra* note 24 at 99, quoting Wolgar.

141 J. McGuffin, *Internment* (Tralee: Anvil, 1975). Bishop & Mallie describe the conditions as follows:

At Long Kesh they lived inside barbed wire compounds — 'the cages' — housed in Nissan huts. ... They were damp and hard to heat but they had their compensations. The cages were left to run themselves. Each one contained three huts housing about eighty men, a canteen, a shower hut and a Portakabin where the inmates could study. Internees and sentenced prisoners were in separate cages but shared the same regime. The life of the compound was controlled on loose military lines. Overall command was in the hands of the cage OC who was elected by all the men, and the huts in turn elected a leader. Each hut had a quartermaster in charge of gathering materials for

A much smaller number of “suspects” who were arrested and actually processed through the courts, were not sent to Long Kesh. Rather, on conviction, they were sent to the ordinary prisons and located in cells with no recognition of the political context for their “crimes”, nor for the fact that they were arrested and processed under the *Special Powers Act*. As a result, in mid-June 1972, about thirty republican prisoners who had been tried and convicted protested and, within a month, had gained not only recognition of their “special category status” — the government insisted on this term rather than “political status” — but also obtained transfers to Long Kesh prison camp where they were also allowed to structure themselves as if they were prisoners of war. Contemporaneously with the protest, there were negotiations between the IRA and the British government for a truce.¹⁴²

Internment and “political/special category” status created a fundamental contradiction for the British state. On the one hand, Britain prided itself on being the great fountainhead of Magna Carta,¹⁴³ of *habeas corpus*, and most recently, the home of freedom having saved Europe from Nazism. And yet, the existence of several thousand untried prisoners in Long Kesh and elsewhere¹⁴⁴ in Northern Ireland was an acute embarrassment. Thus in 1972, Lord Diplock (a senior member of the British judiciary) issued a *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*.¹⁴⁵ The primary goal of this report was to depoliticize the republican prisoners and to encode them “as criminals.” To this end, Diplock proposed to eliminate the (delegitimizing) system of internment without trial and replace it with a streamlined (legitimizing) judicial process that could convict on the basis of confessions. This was to be achieved by three quite fundamental propositions. First, Diplock recommended that the

escape and training, an education officer to organize lectures, and an intelligence officer. ... Into this little world the prison authorities barely intruded.

Bishop & Mallie, *supra* note 123 at 269-270. Locally, Long Kesh was known as “the Republican University.”

142 By 1972, Britain had regained plenipotentiary powers over the affairs of Northern Ireland. As pointed out previously, Britain’s response to “the troubles” was twofold: increased militarization and reform. The former alienated republicans, the latter unionists. In March 1972, the local unionist government resigned in protest against the reforms and Westminster passed *Northern Ireland (Temporary Provisions) Act 1972*, 20 & 21 Eliz. II, c. 22. This *Act* prorogued the Northern Irish Parliament, enabled Her Majesty in Council to make all laws for Northern Ireland by order in Council and provided for a Secretary of State for Northern Ireland who would act as chief executive officer for Northern Ireland. “Direct Rule”, as this became known, was planned to last for only one year. It is still in place in 1995.

It is also worth noting that the British government did not abandon internment after the commencement of “direct rule”; instead it relabelled it as “interim custody” and “detention” orders. [*Detention of Terrorists (Northern Ireland) Order 1972* S.I. (N.I. 15) No. 1632]. Significantly, “terrorism” was defined in Article 2 as “use of violence for political ends.” This acknowledgement of the politico-ideological dimension of dissent in Northern Ireland was carried over to the *Northern Ireland (Emergency Provisions) Act 1973* c.53, as we shall see.

143 25 Edw. I. 29 Ch. 1 (1297).

144 While Long Kesh was the primary camp, it was not the only one. For a short period several hundred male prisoners were also held at McGilligan camp near the city of Derry. Women prisoners were held in the women’s prison, Armagh. See N. McCafferty, *The Armagh Women* (1981).

145 Cmnd 5185, (1972) [hereinafter *Diplock Report*].

police should have power to detain suspects for questioning for up to three days. Secondly, those accused of "terrorist" offences were to be tried without a jury, in a single judge court.¹⁴⁶ Thirdly, and most importantly, the common law rules on the admissibility of confessions were to be radically changed so that the burden of proof was placed upon the accused to prove that the confession was "involuntarily" obtained. Moreover, the standard of involuntariness was to be that the accused must prove that s/he was *prima facie* subjected to "torture, inhuman or degrading treatment." Lesser levels of violence would not necessarily render a confession involuntary.¹⁴⁷

The underlying agenda of this three point strategy was to reassert the supremacy of the rule of law over the politicization of law. Diplock's recommendations were put into effect in a refurbished Special Powers Act, specifically, ss.2, 6, 10 *Northern Ireland (Emergency Provisions) Act 1973*.¹⁴⁸ In effect, this legislation created a conveyor belt criminal process,¹⁴⁹

146 The justification provided by the *Diplock Report*, *id.* at para. 15-17, was that jurors were subject to widespread intimidation in Northern Ireland. No reliable empirical data was ever provided for this assertion. For further discussion, see S. Greer & A. White, *Abolishing the Diplock Courts* (1986); D. Korff, *Diplock Courts in Northern Ireland: A Fair Trial?* (Utrecht: Netherlands Institute of Human Rights, 1983); J.W. Bishop, "Law in the Control of Terrorism and Insurrection: The British Laboratory Experience" (1978) 42 *Law & Contemporary Problems* 140; J.D. Jackson & S. Doran, "Conventional Trials in Unconventional Times" (1993) 4 *Crim. L.F.* 503; J.D. Jackson & S. Doran, "Diplock and the Presumption Against Jury Trial" (1992) *Crim. L. Rev.* 755; J. Hunter, "How Justice is Done According to Diplock", *Law Magazine* 28, (27 November 1987); W. Twining, "Emergency Powers and Criminal Process" (1973) *Crim. L. Rev.* 407.

147 In a classic of juridical casuistry that reflects the colonizer's assumption that the colonized are "presumptive criminals", Diplock suggested that interrogation should "build up an atmosphere in which the initial desire to remain silent is replaced by an urge to confide in the questioner", *Diplock Report*, *supra* note 145 at 30. For another example of self-imposed judicial myopia see Lord Gardiner's assertion: "But for the fact that there is no jury, the non jury courts are ordinary courts, sitting in public with variations in the law of evidence and procedures, which, on the whole, are not major ones." *Report of the Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland*, para 24 (1975) [hereinafter *Gardiner Report*]. This echoes Diplock's claim that the traditional common law rules for controlling the admissibility of inculpatory statements were simply "detailed and technical". *Diplock Report*, *supra* note 145 at para 87. McGonigal L.J. was even more candid in his assessment of the impact of the changes as they were cast in legislative form:

Treatment to come within Article 3 (of the European Convention) must be treatment of a gross nature. [*The Northern Ireland (Emergency Provisions) Act*] appears to accept a degree of physical violence which could never be tolerated by the courts under the common law test, and if the words in (section 6) are to be construed in the same sense as the words used in Article 3, it leaves it open to an interviewer to use a moderate degree of physical maltreatment for the purpose of inducing a person to make a statement. It appears to me that this is the way the words must be construed and that this is the effect of the section.

R. v. McCormick and Others, [1977] N.I. 105. He added, however, that there was still a residual and extra statutory judicial discretion to exclude evidence so obtained. Such judicial glosses became known as "the torturer's charter". See e.g. P. Taylor, *Beating the Terrorists?* (New York: Penguin, 1980) 77.

148 (1973) c. 53.

2.(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which the court would have had if they had been sitting with a jury, including power to determine any question and to make any

thereby rendering internment obsolete within a few years.¹⁵⁰

However, it was soon realized that the Diplock process of "criminalization" did not go far enough in delegitimizing the political integrity of the republican prisoners because, once convicted, they were entitled to "special category status." The system was merely one of

finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section...

6.(1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of subsection (2) below.

(2) If, in any such proceedings where the prosecution proposed to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfied them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement in question shall be inadmissible)...

10.(1) Any constable may arrest without warrant any person whom he suspects of being a terrorist.

(2) For the purpose of arresting a person under this section a constable may enter and search any premises or other place where that person is or where the constable suspects him of being.

(3) A person arrested under this section shall not be detained in right of the arrest for more than seventy-two hours after his arrest.

(4) Where a person is arrested under this section, an officer of the Royal Ulster Constabulary not below the rank of chief inspector may order him to be photographed and to have his finger prints and palm prints taken by a constable, and a constable may use such reasonable force as may be necessary for that purpose.

(5) The provisions of Schedule 1 of this Act shall have effect with respect to the detention of terrorists and persons suspected of being terrorists.

149 K. Boyle et al., *Ten Years in Northern Ireland: The Legal Control of Political Violence* (London: Cobden Trust, 1980) [hereinafter *Ten Years*]. For Sands' account of his own interrogation, prosecution and conviction under the Diplock System see, "The Crime of Castlereagh" and "Diplock Court" in *Skylark*, *supra* note 1 at 38-65. Two stanzas are indicative:

There was no jury, none at all,
The pig-in-the-wig was right,
And only fools saw fit to stand
And challenge him (sic) with fight.
For this court is a farce, my friends,
And justice knows no light.

And men ask why men rise to fight,
to violence do resort,
And why the days are filled with death
And struggles' black report.
But see they not, these blinded fools
Lord Diplock's dirty court.

Id. at 61, 65.

150 Note, however, that the power to intern remained under s.10. For a very informative table of statistics on the levels of internment and detention in Northern Ireland, 1971-1975, see Spjut, *supra* note 136 at 740. More precisely, once the Diplock system got underway, approximately 90% of the cases where guilty pleas were entered were based upon "confessions" made by prisoners. See e.g., Boyle et al., *Ten Years*, *supra* note 149 at 60-61 and D. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: Cobden Trust, 1983) at 92.

avoidance and confession. As a result, Lord Gardiner (a former Lord Chancellor) was called upon by the British government to prepare a report that would further "rationalize" the programme of criminalization. He duly obliged and, in a Report published in January 1975, acknowledged that "special category status" was a "serious mistake" and should not be available to those who were convicted of crimes committed after 1 March 1976.¹⁵¹

Central to the project of the removal of "special category status" and its replacement with a programme of "criminalization" and "normalization"¹⁵² were the elements of cellular rather than group confinement, and the wearing of prison uniforms.¹⁵³ When the first post-March 1st prisoner was given his uniform in September 1976 he replied, "If you want me to wear prison gear you will have to nail it to my back",¹⁵⁴ and being without clothes, he took refuge in the prison blankets. So began the "blanket protest." This was considered a breach of prison rules with the result that the prison governor imposed harsh penalties: "a complete removal of remission; twenty four hour lock-up; deprivation of mental stimulation of any sort — reading material, newspapers, books, television, radio, games, hobbies or writing material. This was combined with very intimate body searches"¹⁵⁵ and the reduction of visits to one half hour per month. By September 1977 there were about 160 republican prisoners "on the blanket."

This situation continued with an entrenchment of positions through to April 1978. At that point, in response to further "disciplining" in relation to washing, as well as "internal searches of the body, deprivation of letters, removal to punishment cells and beatings of young prisoners",¹⁵⁶ the prisoners refused to wash or co-operate in any way with the prison staff. But the spiral did not stop with this "no wash protest." As part of their policy of non-participation, the prisoners refused to slop out their chamber pots. These pots, in turn, became part of the contested process in that they were frequently kicked over by prison guards in the course of the frequent searches. To prevent this from happening, and specifically to avoid the soaking and soiling of their floor-based mattresses, the prisoners threw the contents of the pots out the windows and under the doors of their cells, but these were sloped back in by the prison guards. In turn, by the end of 1978, this led to the "Dirty Protest", where the prisoners spread their own

151 *Gardiner Report*, *supra* note 147 at 34-35. In February 1976, there were more than 1500 "special category status" prisoners. See *McFeely et al. v. The United Kingdom*, 20 *Council of Europe, Decisions and Reports* 44 (1980).

152 For further discussion of normalization see, M. Foucault, *Discipline and Punish: The Birth of the Prison*, 1st American ed. (New York: Pantheon Books, 1977) at 183.

153 Boyle *et al.* point out that "the requirement to wear a prison uniform... was originally introduced as much as a means of humiliating prisoners as to facilitate the recapture of escapees..." In support they cite the *Prison Act of 1779* (19 Geo. III c. 74 s.35), which provided that prisoners "be clothed with a coarse and uniform apparel with certain obvious marks or badges affixed to the same as well as to humiliate the wearers as to facilitate discovery in case of escape". Boyle *et al.*, *Ten Years*, *supra* note 149 at 96, 119.

154 L. Clarke, *Broadening the Battlefield* (Dublin: Gill and MacMillan, 1987) at 50.

155 D. Faul & R. Murray, *H-Block and its Background* (Belfast, 1980) at 483.

156 *Id.* at 484.

excrement on the walls of their cells.¹⁵⁷ By 1979, there were approximately 370 prisoners on the “Dirty Protest.”¹⁵⁸

As all the accounts of the “blanket”, “no wash” and “dirty” protests indicate, it was clear that it was the prisoners who were setting the agenda.¹⁵⁹ However, while there was a significant mobilization outside the prison by groups such as the “Relatives Action Committee” and the “Smash H-Blocks Campaign” to publicize the prison conditions, this was not generating sufficient pressure to force the British government to change its policy of total criminalization. In the face of the indifference shown by the British government as 1980 wore on, the prisoners decided that in pursuit of “political status” they would have to resort to a hunger strike to force the government to recognize their claims. However, the Army Council of the IRA objected to this intensification of the protest and Gerry Adams, as Vice-President of Sinn Féin,¹⁶⁰ communicated that the leadership of that organization was “tactically, strategically, physically and morally opposed

157 Former Archbishop (and subsequently Cardinal) O’Fiach — a harsh critic of the IRA, though a supporter of a united Ireland — visited the prison in July 1978 and reported:

Having spent the whole of Sunday in the prison I was shocked by the inhuman conditions prevailing in H Blocks 3, 4, and 5 where over three hundred prisoners are incarcerated. One would hardly allow an animal to remain in such conditions, let alone a human being. The nearest approach to it that I have seen was the spectacle of hundreds of homeless people living in the sewer pipes in the slums of Calcutta. The stench and filth in some of the cells, with the remains of rotten food and human excreta scattered around the walls, was almost unbearable. In two of them I was unable to speak for fear of vomiting....

Several prisoners complained to me of beatings, of verbal abuse, of additional punishments (in cold cells without even a mattress) for making complaints, and of degrading searches carried out on the most intimate parts of their naked bodies. Of course I have no way of verifying these allegations, but they were numerous.

Quoted in T.P. Coogan, *On the Blanket* (Dublin: Ward River Press, 1980) at 158-159 [hereinafter *Blanket*]. Sands’ account of his experiences *On the Blanket* is to be found in his *One Day in My Life* (Cork: Mercier, 1983) [hereinafter *Life*].

158 It is to be noted that women republican prisoners in the Armagh jail also participated in the dirty protest which, due to menstruation, was even more difficult than the men’s protest. Some women participated in the first hunger strike, but did not join the second hunger strike. See, Clarke, *supra* note 154 at 112-113, 125; and Coogan, *Blanket*, *supra* note 157 at 114-131, 213-224.

159 Clarke, *supra* note 154 at 84-85, 105, 107, 119, 121, 137; Coogan, *Blanket*, *supra* note 157 at 95, 118, 224; Keena, *supra* note 126 at 86, 89, 100-102; Bishop & Mallie, *supra* note 123 at 288, 295; Feldman, *supra* note 138 at 161-164, 222, 230, 300; and Beresford, *supra* note 3 at xi, 20, 25, 37, 208, 251, 266-267; T.P. Coogan, *The IRA* 623-627 (London: Fontana, 1987) [hereinafter *IRA*].

I emphasize this point for two reasons. First, it helps to lay the foundation for my discussion of agency in Part IV, B of this essay. Second, it is important to challenge the popular belief propagated by the British state that the Army Council of the IRA ordered the hunger strike. Consider, for example, Thatcher’s statement that:

The solution does not lie in our hands ... it lies with the leadership of the Provisional IRA, who have taken the cold-blooded decision that the unfortunate men now fasting in prison are of more use to them dead than alive.

Quoted in Beresford, *supra* note 3 at 148.

Another example of misrepresentation is when Humphrey Atkins (Secretary of State for Northern Ireland), on the occasion of Sands’ death, stated that the latter had committed suicide “under the instructions of those who felt it useful to their cause that he should die.” Quoted in Bishop & Mallie, *supra* note 123 at 296. The hierarchy of the catholic church also subscribed to this view. See e.g., Beresford, *id.* at 199-200, 298.

160 Sinn Féin is the un-prescribed political wing of the IRA.

to a hunger strike.”¹⁶¹ In spite of these objections, on 10th October 1980, the protesters announced a strike demanding “as of right, political recognition and that we be accorded the status of political prisoners...”¹⁶² On the 27th October, 1980, seven prisoners went on a hunger strike.¹⁶³ As the weeks progressed, despite the facade of intransigence on both sides, a series of secret negotiations proceeded through intermediaries.¹⁶⁴ The result was that, as one of the fasting prisoners seemed that he was about to die prematurely on the fifty-third day, the British government appeared to acquiesce in the prisoners’ demands by issuing a thirty four page document which seemed to suggest a step by step de-escalation process that would in effect reinstate “special category status.” The strike was called off. However, as became apparent in December 1980, the demands were not met and the prisoners felt outmaneuvered and betrayed.

Thus, in January of 1981, Sands took the initiative and announced (once again in spite of objections from the military leadership of the IRA) that a new strike would commence. On this occasion, however, there was a shift away from the focus on “political status” to what became known as “The Five Demands”: the right to wear their own clothing at all times; exemption from all forms of penal labour; free association with each other at all hours; the right to organise their own recreational and educational programmes; and full restoration of remission. It was thought that this change in the rhetoric would provide the British government with greater opportunity to compromise.¹⁶⁵ The second hunger strike began on March 1st 1981, and the rest is history. Ten prisoners died before a compromise was reached in October 1991.¹⁶⁶ But in the course of the fast, Sands — “the criminal” — was elected to the British Parliament, Sinn Féin garnered remarkable local political support and international attention was focused not just on the

161 Clarke, *supra* note 154 at 121. Note also that when, at a later stage, one of the strikers chose to terminate his fast because of a perforated ulcer, Sinn Féin supported his decision, *id.* 165. Furthermore, the Army Council of the IRA vetoed an attempt by the women prisoners in Armagh to join the second hunger strike, which would hardly be a wise move if propaganda was their only concern. Beresford, *supra* note 3 at 56.

162 Clarke, *supra* note 154 at 123.

163 Bobby Sands was not one of them as he was given the position of OC in the camp.

164 Beresford, *supra* note 3 at 3-5.

165 K. Kelley, *The Longest War: Northern Ireland and the I.R.A.* (London: Zed, 1988) at 332-333. It might also be noted that on 4th July 1981, after the deaths of the first group of four prisoners, the IRA once again issued an extremely conciliatory statement emphasizing the prisoners’ rights aspect of the impasse:

[I]n our view the issue wasn’t that the British should come out and say openly that we were entitled to political status ... but rather that they should move to negotiate a solution within the prison.

Quoted in Bishop & Mallie, *supra* note 123 at 296.

166 In effect, the prisoners gained most of their demands after the families of those who had not yet died, but were in a coma, exercised their rights as next of kin to terminate the fast. Given that the strike ended first, the British government was able to make concessions without losing face. Specifically, prisoners were allowed to wear their own clothes; prison work was minimal, consisting mainly in cleaning and maintaining their own living areas; a significant degree of freedom of association was achieved; 50% of remission was restored; and violence by the wardens decreased significantly. However, quite severe restrictions on the type of literature available to them remained in place. See Clarke, *supra* note 154 at 201-202; Beresford, *supra* note 3 at 332; J. Feehan, *Bobby Sands and the Tragedy of Northern Ireland* (Dublin: Mercier, 1983) 137-138.

strike, but the intransigent British attitude to Ireland in general.¹⁶⁷

B. An Interpretation: Fasting as (An)other Jural Claim

The previous section attempted to provide an historical narrative of events leading up to, during, and after the hunger strike. This section offers an interpretation of these events, drawing on some of the insights of postmodernism and deconstruction.

As the discussion of postmodernism and deconstruction in Part III attempted to demonstrate, the hierarchical construction of relationships is central to logocentric thought. Derrida argues that all oppositions invoke “a violent hierarchy. One of the two terms controls the other (axiologically, logically, etc.), holds the superior position.”¹⁶⁸ This is particularly pertinent for an understanding of the politics (and pretensions) of law. The point of logocentrism is to attempt to render that which is contingent incontrovertible. Thus, within the dominant jurisprudential conception, law is conceptualized as both different from and hierarchically superior to politics in that the latter is acknowledged to be contaminated by vulgar interests, but law is said to be beyond the contingencies of politics. Law, from the liberal logocentric perspective, is a cognate of the uncompromisable virtues of Truth and Justice. Stated slightly differently, Law, or more precisely the rule of law, is the apotheosis of liberalism’s commitment to rationality, order, progress and efficiency.¹⁶⁹

Thus, in relation to the hunger strike, one reason the British government was so keen to “criminalize” the prisoners was to draw on the logocentric legitimacy of law, so as to put the issue of nationalist claims for self-determination beyond debate; that is, to enforce closure by juridical fiat. Thatcher made much of this on a visit to Belfast after the deaths of several of the prisoners:

167 One commentator summarizes the media response as follows:

[At the beginning of the fast] the media, too, paid only passing attention to Bobby Sands, but when he was elected to Westminster on April 9th the issue could no longer be ignored. As his death neared, the world’s press flooded into Belfast. Some 23 nations sent camera crews, and the American TV networks, ABC, CBS and NBC, sent 16 camera crews. There were at least 400 reporters in the North, and 300 photographers covered his funeral.

When Bobby Sands died, on May 5th, the international reaction was spectacularly unflattering to the British government. There were demonstrations across the world, accompanied by widespread condemnation of the government’s failure to resolve the issue. At the end of May, *The Sunday Times* published a survey of foreign press reaction, titled ‘Is Britain Losing The Propaganda War?’, for which it had canvassed the views of 64 newspapers. *The Sunday Times*’ chief European correspondent, Keith Richardson, was quoted as saying, “General European impression ranges from pig-headed Thatcher obstinacy, through scandalous misgovernment, to outright genocide. In other words, it could not be worse.” The article concludes that: “world opinion has begun to shift away from the British government and in favour of the IRA. The image of the gunman has actually improved. And the general opinion is emerging that the time has come for Mrs. Thatcher to begin negotiations with Dublin leading to eventual union with the South.”

L. Curtis, “How The Media Reported It” in *Ten On Ten* 20 (Belfast: 1991) reprinted from L. Curtis, *Ireland — The Propaganda War* (London: Pluto, 1984).

168 *Grammatology*, *supra* note 19 at lxxvii.

169 See e.g., R. Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986).

Now what I am saying is we will uphold the law. We will do everything to help the people of Northern Ireland to help themselves out of this difficulty. I cannot pull solutions out of a hat. I will not depart from upholding the law....¹⁷⁰

As Michael Ryan reminds us, “[t]he authority of the sovereign’s law depends upon the establishing of unambiguous proper meaning for words.”¹⁷¹ In Northern Ireland of the mid-1970s and early 1980s, the contested terms were “law” and “criminal.” The republican prisoners, however, refused to acquiesce in this totalizing trope of criminalization. They sought to destabilize and invert this hierarchical move by demonstrating the inherently political and partisan nature of the British legal machinery. They called into question the rationalistic and progressive self-image of law, so as to tell a different story.

Three examples illustrate these strategies of resistance that sought to undermine the British state’s logocentric ambitions, and law’s “elective self-image.”¹⁷² First, the whole purpose of seeking “special category status” via the protests of 1972 was to demonstrate the profoundly political nature of the *Special Powers Act*, that it was precisely because of draconian politics that they were being held “at Her Majesty’s pleasure.” A second example of resistance is that the prisoners themselves (and contrary to the IRA leadership’s traditional policy of political abstentionism¹⁷³) came up with the idea of proposing Sands as a candidate for the British Parliament.¹⁷⁴ His election by over 30,000 voters — with a majority of 1,446 — not only legitimized the demands for political status but also gave notice to the Thatcher regime that political consciousness cannot simply be re-encoded by politico-judicial relabelling. Moreover, and seemingly learning nothing, when Sands died, the British government hurriedly passed the mendaciously entitled, *Representation of the People Act*¹⁷⁵ to prohibit any further prisoners from fulfilling a democratic mandate in “the mother of all parliaments.” But this also failed because in Sands place, his election agent increased the margin of victory by 786 votes. In sum, the British government attempted to use the law to privilege one ideological perspective; the prisoners resisted such a move by asserting a contradictory claim thereby shearing law of its metaphysical privileges. As Derrida posits “[t]o deconstruct the opposition ... is first to overthrow the hierarchy.”¹⁷⁶ Viewed in this light,

170 Beresford, *supra* note 3 at 179-180.

171 M. Ryan, *Marxism and Deconstruction: A Critical Articulation* (Baltimore: Johns Hopkins University Press, 1982) at 3.

172 Norris, *supra* note 100 at 80.

173 Traditionally, the IRA has adopted the position of political abstentionism on the basis that the Treaty of 1921, which recognized the division of Ireland into two distinct states, was a betrayal of the republican tradition. For the IRA any parliament in either the North or South of Ireland established under that Treaty was illegitimate, and therefore, should be boycotted.

174 Clarke, *supra* note 154 at 140.

175 *Representation of the People Act*, 1981, Ch. 34 in “Law Reports, Statutes 1981”, 29 & 30 *Elizabeth 2*, 1 at 501.

176 *Grammatology*, *supra* note 19 at lxxvii.

deconstruction helps us to dismantle the antinomian relationship of law and politics, enabling us to confirm that law is always and already constituted by politics. Or, if we invert Clausewitz's aphorism so that it reads, "politics is war by another means",¹⁷⁷ and supplement it with the proposition that law is politics by another means, then law is war by another means.

But I have a larger point that draws even more acutely on what might be called the "productive" rather than the "destructive" dimensions of deconstruction.¹⁷⁸ Derrida argues that "the task [of deconstruction] is ... to dismantle the metaphysical and rhetorical structures which are at work [in the text], not in order to reject or discard them, but to reinscribe them in another way."¹⁷⁹ A central step in this process is what he calls "overturning" or "reversal":

To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition. Therefore one might proceed too quickly to a *neutralization* that *in practice* would leave the previous opposition, thereby preventing any means of *intervening* in the field effectively.¹⁸⁰

The reinscription that I want to suggest is the reverse proposition that although the hunger strike demonstrated the politics of British law, it was also an indigenously Irish legal claim, the articulation of what Geertz has called an alterior "legal sensibility", another "form of juristical life."¹⁸¹

To elaborate: most of the conventional reviews of hunger striking in Ireland trace back only as far as the practice had been adopted by the Republican movement.¹⁸² Such an historical account identifies the hunger strike with the political ideology of Republicanism.¹⁸³ However, this is only a partial account.

Hunger striking is not a recent phenomenon in Ireland. It is not simply a Republican practice. On the contrary, its roots can be traced back to an ancient, pre-Christian, Celtic legal code, the Brehon Laws¹⁸⁴ and the practice

177 C. Von Clausewitz, *On War* (Harmondsworth: Penguin, 1968) at 87.

178 This is a point that I want to emphasize. Although in later parts of this essay I will criticize deconstruction, it is not because I identify it with destruction which is the facile critique offered by so many of its detractors. Rather, my point is that it is not *sufficiently* productive.

179 *Grammatology*, *supra* note 19 at xxv.

180 *Positions*, *supra* note 94 at 41.

181 C. Geertz, *Local Knowledge* (New York: Basic Books, 1983) at 175, 215, 185.

182 For example, it is usual to point to the deaths by hunger strike of Thomas Ashe and Terrance McSweeney in 1917 after the Easter Rising; Tony D'Arcy, Jack MacNeela and Sean MaCaughy in the 1940s in the Republic of Ireland; and Michael Gaughan and Frank Stagg in the 1970's as they sought repatriation from English jails to Ireland. See *e.g.*, Adams, *supra* note 135 at 70; Alexander & O'Day, *Introduction*, *supra* note 10 at 6; Coogan, *Blanket*, *supra* note 157 at 14-30; Clarke, *supra* note 154 at 107-108; Feldman, *supra* note 138 at 218.

183 Moran has noted that, "[s]ince 1916 nearly 9000 Irish republicans have gone on hunger strike, of whom at least 22 have starved themselves to death". S. Moran, "Patrick Pearse & Patriotic Soteriology" in Alexander & O'Day, eds., *supra* note 10, 9 at 20.

184 For an overview of the Brehon laws see *e.g.*, R. Grimes & P. Horgan, *Introduction to the Laws of the Republic of Ireland* (Dublin: Wolfhound, 1987) at 17-21.

of *cealachan* or *troscead*, that is, fasting. *Cealachan/troscead* is a component of the ancient Irish Law of *Athgabhail/Athgabail* which, in common law terms, one could consider to be analogous to distraint.¹⁸⁵ *Athgabhail* “is a general name for every coercion (lit. binding) through which each person enforces his [legal] interest.”¹⁸⁶ It is invoked, as Ginnell points out, so that “advantage is obtained after disadvantage ... truth after untruth, legality after illegality, justice after injustice ... right after wrong.”¹⁸⁷ *Troscead* — fasting — is the performative act that, in certain legally specified circumstances, triggers the action in distraint. Stated simply, if a person had been wronged by another who was more powerful — for example, a chieftain, brehon, bard, king, bishop, or even God by some accounts¹⁸⁸ — the wronged party, having given appropriate notice, was entitled to claim distress by fasting at the door of the wrongdoer. Responsibility for ending the fast vested in the perceived wrongdoer. If the latter allowed the plaintiff to starve to death, then the wrongdoer was held responsible for the death, and had to compensate the victim’s family.¹⁸⁹

A central proposition advanced by this essay is that, building upon not only the political tradition of previous republican hunger strikes, but also upon the *legal* tradition of the Brehon Law, at the margin of the British state in the H-Blocks, the prisoners rediscovered and reconstituted an almost silenced countervailing legal regime. The hunger strike, then, was not simply a desperate, last ditch propaganda stunt, as the dominant interpretation would have us believe.¹⁹⁰ Rather, the fast was a “painful re-

185 See S. Bryant, *Liberty, Order and Law Under Native Irish Rule* (Washington: Kennikat Press, 1970) at 259-287; L. Ginnell, *The Brehon Laws* (London: Fisher Unwin, 1894) at 161-164; F. Kelly, *A Guide to Early Irish Law* (Dublin: Institute for Advanced Studies, 1988) 177-188; D.A. Binchey, “Distraint in Irish Law” (1973) 10 *Celtica* 22. It is to be noted that Kelly, writing after the 1981 hunger strike, makes a point of emphasizing that “the use of fasting for political purposes in the hunger strike is distinct from legal fasting”, *id.* at 182. However, he provides no arguments or references for this positivistic assertion.

186 Binchey, *id.* at 29.

187 Ginnell, *supra* note 185 at 158.

188 There has been no systematic synthesis or review of the diverse situations in Irish myths and history when fasting has been invoked. The most extensive discussions that my research has discovered (in English) are D.A. Binchey, “Irish History and Irish Law” 15 *Studia Hibernica* 7, 24-27 and F.N. Robinson, “Notes on the Irish Practice of Fasting as a Means of Distraint”, S. Williams, ed., *Putnam Anniversary Volume 557* (New York: Ams Press, 1976).

189 It might also be noted that the practice of fasting can be traced to another pre-imperialist legal culture, the Indian practice of “sitting Dharna”. This practice was revived by Mahatma Gandhi who fasted seventeen times against the British Raj. Others have also adopted the practice, most notably the suffragettes and Martin Luther King. W. B. Yeats wrote a play about fasting in 1904, “The King’s Threshold,” at the conclusion of which the poet/plaintiff gave up his fast. After the Easter Rising in 1916, and the execution of many of the republican leadership, Yeats rewrote the last section so that the poet/plaintiff continued the fast until death. W.B. Yeats, “The King’s Threshold” in *The Collected Plays of W.B. Yeats* 105 (London: MacMillan, 1982). Sands also discovered his poetic side while in prison, see *Skylark*, *supra* note 1.

190 Of the “dirty protest” the Northern Ireland Office stated: “This protest action is the basis of a propaganda campaign which has been mounted by the IRA.” Quoted in Coogan, *Blanket*, *supra* note 157 at 162. This propagandist interpretation was also disseminated by the hierarchy of the catholic church and the political elite of the Republic of Ireland, *id.* at 178, 184, 186.

remembering, a putting together of a dismembered past to make sense of the trauma of the present.”¹⁹¹ In short, the hunger strike was an eruption of an alterior juridical regime, the espousal of a cultural difference, the exposition of a jural other, the assertion of a legal right.

It is important to note how this coming to consciousness came about. The agenda of the British state, as it always has been in Ireland, was to eliminate the foundations of Irish identity, to totally erase locations of resistance. It realized that internment (to a greater extent) and the Diplock courts (to a lesser extent) served to strengthen the integrity and legitimacy of the republican cause. It recognized that by taking activists from their communities, by imprisoning them through the ideological trope of criminalization, they could perhaps silence the nationalist “other.”¹⁹² But, at the same time, it was understood by the government that by continuing with “special category status” it was allowing the persistence of two contradictions within its policies. First, “special category status” was simply a euphemism for “political status” and therefore a discordant acknowledgement that there may be a certain legitimacy to the republican liberation struggle. Second, and just as important, “special category status” acknowledged the military structure of the IRA and allowed free association and control over the recreational and educational processes within Long Kesh to accrue to the military command of the IRA. In other words, the British government realized that internment and “special category status”, though they temporarily divorced the IRA from the Nationalist community, would have the effect of facilitating the emergence of what Sands would later describe as the:

politically educated armed guerilla fighter who will not only use his (sic) political mind to guide his weapon, but to guide and teach his politically undernourished countrymen to steer their own destiny....¹⁹³

It is also worthwhile to point out that the fasting prisoners had no illusions that this was a mere political gamble. It was clear to Sands, for example, that as a purely political lever, the fast would not change the attitude of the Thatcher regime. Moreover, as a political strategy, such a strike does not make instrumental sense because it sacrifices some of the best intellects of the organization, its leadership (both present and future) and its most dedicated members.

191 H. Bhabha, *Forward*, F. Fanon, *Black Skin, White Mask*, trans. C. Markmann (New York: Grove, 1968) at xxiii.

192 An analogy here might be drawn with J. Perlman, *The Myth of Marginality* (Berkeley: University of California Press, 1976) which argues, in the context of Rio de Janeiro, how the discourse of “marginality” serves the ideological and repressive purposes of the power elites. She argues that marginality theory constructs squatters as a blight or parasite on society; how it portrays them as deviant and uncivilized; how it structures them as a sort of folk devil, the cause rather than effect of poverty. Much the same, I would suggest, could be said about the “myth of criminality” in Ireland.

193 Sands, *Training Camp*, in *Skylark*, *supra* note 1 at 149. Sands continues in this piece to elaborate on how, through the Gaelic language, the prisoners developed their thinking about the creation of an Irish “Socialist Republic.” Commentators have described Long Kesh as “a research department for the Republican movement”, Bishop & Mallie, *supra* note 123 at 275. For a similar suggestion as to the experience of some Black prisoners in the United States see G. Jackson, *Soledad Brother: The Prison Letters of George Jackson* (New York: Coward McCann, 1971) at 30.

Consequently, it was determined by the British government that the repression would have to be intensified. First, in order to undermine the process of political radicalization fostered in Long Kesh (the “Republican University”) it was necessary to rethink the architecture of coercion so as to undercut the groupist solidarity that the traditional, military-type cage structure engendered. As a result, there emerged the idea of H-Block compounds which would isolate and atomize each prisoner.¹⁹⁴ These compounds were blocks of prison cells constructed in the shape of an H with four wings connected by an administrative cross-bar. Each block was capable of containing approximately eighty prisoners, each prisoner to be held in an eight foot by ten foot cell.¹⁹⁵ Second, deradicalization required that both the nationalist community and the prisoners themselves¹⁹⁶ cease accepting the code or signifier of “prisoners of war” and instead adopt the penal bureaucratic argot of “odc” (ordinary decent criminal) or “hac” (honest average criminal).¹⁹⁷ As Nietzsche reminds us, “[e]very society has the tendency to reduce its opponents to caricatures — at least in imagination — and, as it were, to starve them. Such a caricature is ... our ‘criminal’.”¹⁹⁸ It was this quest for the penal construction of “the criminal” that generated the Gardiner Report’s emphasis on uniforms, prison work, discipline and the curtailment of opportunities for association and education.

194 Although my claim in this essay is not to relate the rule of law to fascism, it is worth noting that the SS had a similar agenda of atomization in their concentration camps, B. Moore Jr., *Injustice: The Social Bases of Obedience and Revolt* (White Plains: M.E. Sharpe, 1978) at 62-63.

195 For a poetic account of the “architecture of coercion”, see L. McKeown, “Hardlines”, B. Campbell, ed., *H. Block: A Selection of Poetry from Republican Prisoners* 44 (Sheffield: South Yorkshire Writers, 1991). For another account of how the British security forces have an impact on the architecture of coercion, not in the prison but in relation to urban planning in Belfast, see P. Hillyard, *supra* note 138, 279 at 291.

196 Once again, Sands gives us an insight into the psychological dimensions of the penal encoding system:

I can hear heavy footsteps approaching. They stop quite near to me. There is someone or something nearby. I can hear it moving and breathing. It is watching me. More noise directly outside my tomb, a rattle of metal against metal. A square form of light begins to materialize, revealing an entrance as the door swings open. A figure stands in the grey dim light of the doorway. It is a human figure, dressed in what appears to be some sort of black uniform. It stands scrutinizing me in silence for several seconds before letting out a terrifying yell that sends shivers through my body. “I am Sir!” The words echo around my tomb. “I am Sir!” it bellows again. “I am Sir, you are 1066!” The door slams shut with a loud explosive boom, killing the dim light where the entrance had been. Still afraid to move I stand in total darkness.

What is 1066, I think? Obviously it is me, but I can think, speak, smell and touch. I have all my senses, therefore I am not a number, I am not 1066. I am human, I am not a number, I am not 1066! Who or what is a Sir? It frightened me. It was evil. I sensed its hatred of me, its eagerness to dominate me, and its potential violent nature. Oh, what will become of me? I remember I once had a family. Where are they now? Will I ever see or hear of them again?

Sands, “I am Sir, You are 1066”, *Skylark*, *supra* note 1 at 103-104. For a homologous account of how the law seeks to “encode the female body with meanings”, “terrorizing” it and thereby forcing it “to scurry, to cringe and to submit” see M.J. Frug, *supra* note 24 at 1049-1050.

197 Coogan, *Blanket*, *supra* note 157 at 6, 13.

198 F. Nietzsche, *The Will to Power*, trans. W. Kaufmann (New York: Random House, 1968) at 202.

But at the margins of the British state, almost absented from the dominant discourse and almost delegitimized within the Nationalist communities, the prisoners continued their resistance. First, drawing on the significant increase in the educational aspects of Republican tradition in the last years of “special category status”, the H-Blocks became both a conduit for the dissemination of Irish history and a school for reflection on leftist-inspired revolutionary strategies.¹⁹⁹ Secondly, and of crucial importance to this process of consciousness raising, was the switch to the use of the Irish language. This was required because the new cellular structure of the H-Blocks required that if the prisoners sought to communicate with each other they would have to shout. But shouting in English would, obviously, render their communications accessible to the prison guards. Shouting in Irish would only lead the guards to learn Irish. The solution was to encode the conversations in a modified version of the Gaelic language that the prisoners, with an earnest humour,²⁰⁰ called “jailic.”²⁰¹ Thirdly, this translation, in turn, engendered a greater familiarity with Irish history. Of particular significance was the interrogation of the legal foundations of British colonialism and the rediscovery of the ancient Irish Brehon laws and, most notably for the purposes of this essay, the practice of *troscéad*. Thus, having disinterred through praxis a “juridical unconscious”²⁰² (Brehon law) the prisoners located themselves in a counterhegemonic legal space, in a different legal culture.

As a result, when the announcement of the 10th of October 1980 claimed that the hunger strike was based on “a right”, it was not simply rhetoric. The prisoners did not base their claim solely on the terrain of political struggle, or the Republican tradition of self-immolative martyrdom,²⁰³ these being the two conventional interpretations given for the strike. Rather, the fast was a profound juridical claim premised upon a subordinated, and therefore ex-centric but not eliminated, legal culture.²⁰⁴ Indeed, a recently published interview with a former prisoner of the hunger strike period

199 Beresford, *supra* note 3 at 60; Sands, *Skylark*, *supra* note 1 at 149-150.

200 For insightful discussions of the politically progressive dimensions of humour and “carnival”, see M. Bakhtin, *Rabelais and His World*, trans. H. Iswolsky (Cambridge: MIT Press, 1968). The work of Sands, despite its understandable pessimism, continually manifests a wry humour. For example, when describing his last piece of fruit before embarking on the fast, he quips, “as fate had it, it was an orange, and the final irony, it was bitter”, Sands, *Skylark*, *supra* note 1 at 154.

201 Clarke, *supra* note 154 at 80; Feldman, *supra* note 138 at 225.

202 This idea is culled from F. Jameson, *The Political Unconscious* (Ithaca: Cornell University Press, 1981). For a further discussion of this dialectical conception of the relationship between praxis and consciousness, see R. Fantasia, *Cultures of Solidarity* (Berkeley: University of California Press, 1988) at 10-13.

203 Moran, *supra* note 183 at 9.

204 On a symbolic level, it might also be worth reflecting as to why only four prisoners were originally chosen for the second hunger strike, when seven were chosen for the first. The choice of seven has been explained as including one member of the IRA from each of the British-occupied six counties of the North of Ireland, plus one member of the Irish National Liberation Army (INLA). No explanation has been given for the choice of four. One conjectural suggestion that I might make is that, as one scholar points out, Atgabhal is based upon a multiplicity of four-part divisions and subdivisions, see, Binchey, *supra* note 185.

indicates just how important this juridical “landscape”²⁰⁵ was:

With the Gaelic you begin to get back in touch with political and ideological concepts. For instance *cealathan*, where in the Brehon laws to express a grievance against an injustice a guy sat outside the wrongdoer’s house and starved himself to death. Now *cealachon* [sic] had a whole moral import to it that it wasn’t a hunger strike as a protest weapon; it was the legal assertion of your rights. The hunger strike was a legitimate and moral means for asserting those rights, and it had legal precedents dating back to antiquity. You found that there was a literature that was untranslatable from the Gaelic that could never be expressed in the cold English.²⁰⁶

The particular difference is that rather than formulating their claim in some formalistic and bureaucratic cause of action — a form of encoding or translation that severs the plaintiffs from their claim — the fasting prisoners reconstituted their bodies as a jural template so that their claim was, literally, one of life or death. That this legal claim, this continuation of what one scholar has called “the long and winding river of Irish law”,²⁰⁷ was unintelligible — “untranslatable” — to the common law world should come as no surprise given legal colonialism’s long history that can be traced as far back as 1280 AD when King Edward I opined that the laws of Ireland were “so contrary to all laws that they ought not to be called laws.”²⁰⁸ The common law (like the “reasonable man”) is jealous and can tolerate “*no other order.*”²⁰⁹

Let me attempt to [re]write this wrong in a slightly different way. As the deconstructive approach points out, hierarchial dichotomies help structure understanding. British legal logocentrism operated on the following hierarchies: law/violence, law/politics, Common law/Brehon law, law/non law. Deconstruction, as we have seen, first operates a temporary reversal so that we can have a re-ordering: violence/law, politics/law, Brehon law/common law, non law/law. Then, deconstruction makes a second gesture (displacement) in order to demonstrate the arbitrariness of such a foundationalist strategy, thereby collapsing the categories. The result, however, is not synthesis or a dialectical third way. Rather it is a recognition of the mutual contamination and infiltration of: law and violence, of law and politics, of the non-legal and the legal, and of the plurality of the forms of law. The recognition of traces of each side of the dichotomies in the other generates uncertainty and hesitation: an aporia (doubt). The implicit suggestion generated by such doubt is to remind us that an appropriate response in such a situation might be modesty and a

205 For a discussion of the importance of “landscape” for aboriginal rights claims, see, J. [Sákéj] Youngblood-Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 *Dal. L.J.*

206 Feldman, *supra* note 138 at 214.

207 D.A. Binchy, “Irish History and Irish Law: II” (1967) 16 *Studia Hibernica* 7 at 33.

208 Quoted in K. Simms, “The Brehons of Later Medieval Ireland”, D. Hogan & W.N. Osborough, eds., *Brehons, Serjeants and Attorneys* (Dublin: Irish Academic Press, 1990) 51, 67.

209 Z. Bauman, *Intimations of Postmodernity* (New York: Routledge, 1992) at xv.

recognition of the vulnerability of our taken for granted assumptions. Therefore, rather than seeking to erase the other by solipsistically and ruthlessly enforcing one's own preferred hierarchy an alternative possibility is tolerance, reciprocity and openness. Such an "ethics of Otherness", as Balkin points out, "demands that we attempt to see things from the Other's point of view, using her vocabulary and her way of understanding the world."²¹⁰ The British legal system refused such an "ethics of otherness." The result: the expiration of the other.

To recap. The essentially rehabilitative claim that I have advanced in this section is not only that law is politically manipulative, but also that law is, in a strong sense, culturally contingent; that it is "local knowledge, not placeless principle."²¹¹ The hunger strike of 1981 represents and signifies a collision of incommensurable legal cultures in which one — the Brehon tradition of the disempowered fasting against the empowered — due to its marginalized status, was not encoded or intelligible as such because of the hegemonic ascendancy of the common law juridical psyche. As Milovanovic states in a slightly different context, "[t]wo worlds touch, but only one can speak the truth."²¹² My aim has been, through the deconstructive supplementary logic of reversal and displacement, to rehabilitate this almost erased ethico-juridical other, to reconceptualize fasting as a practice of juridical decolonization, and to posit that the refusal of the British state to recognize this other legal culture is but another form of violence. As Young points out:

Cultural imperialism, moreover, intersects with violence. The culturally imperialized may reject the dominant meanings and attempt to assert their own subjectivity, or the fact that their cultural difference may put the lie to the dominant culture's implicit claim to universality. The dissonance generated by such a challenge to the hegemonic cultural meanings can also be a source of irrational violence.²¹³

Perhaps this explains Thatcher's correlation of fasting with male prowess.

C. "Beyond Incrimination":²¹⁴ Fasting as a Jurisgenerative Act

In the previous section I argued that fasting was a "jurisgenerative" act,²¹⁵ a rights claim through which the prisoners sought to go beyond incrimination, to posit a juridical framework for their conduct. This section develops more precisely the nature of the rights claim advanced by the prisoners.

210 Balkin, "Transcendental Deconstruction: Transcendent Justice", *supra* note 24 at 1158.

211 *Supra* note 181 at 218.

212 Milovanovic, *supra* note 24 at 138.

213 I.M. Young, *Justice and the Politics of Difference* (Lawrenceville: Princeton University Press, 1990) at 63.

214 D. Milovanovic, "Rethinking Subjectivity in Law and Ideology: A Semiotic Perspective" (1992) 4 *J. of Human Justice* 31 at 34.

215 Cover, *supra* note 23 at 16.

Roberto Unger has suggested that we tend only to be able to understand a rights claim if it is modelled on what he has called “the consolidated property right.”²¹⁶ That is, rights are only intelligible if they are exclusivist in their orientation, or, as he says in one particularly poignant phrase, “a right is a loaded gun that the right holder may shoot at will in his corner of town.”²¹⁷ Unger argues, however, that we must break with this unidimensional, other-rejecting and totalizing conception of rights. In its place, he reconstructs a more diversified taxonomy of “market”, “immunity”, “destabilization” and “solidarity” rights.²¹⁸ Of particular importance to this essay is the possibility of interpreting the hunger strike as an invocation of either “destabilization” or “solidarity” rights.²¹⁹

Destabilization rights, in Unger’s scheme of things, are designed to ensure continued openness. Their aim is to guard against closure with the correlative dangers of the entrenchment of privilege, bureaucratic obduracy and the institutionalization of oppression. Destabilization rights enable the citizen to criticize and disturb the institutions and practices of domination without being subject to repression.²²⁰ Fasting can be encoded as such a right. It is a claim by the oppressed that they are aggrieved and disempowered. By putting their lives on the line, they show their belief that the relations of domination and subordination are so intense that the continuation of life is intolerable in such a condition.

Consider the way in which the British state sought to erase the Irish identity via the progressive erasure of the Irish body. Prisoners, once arrested, were held for lengthy periods of time, interrogated, and frequently abused — both physically and mentally.²²¹ Confessions, which were usually involuntary, were the sole basis of conviction by juryless courts and unionist affiliated judges.²²²

216 R.M. Unger, *False Necessity* (Cambridge: Cambridge University Press, 1987) at 511-513.

217 R.M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986) at 36.

218 *Supra* note 216 at 508-539.

219 For a further discussion of Unger’s project, see R. Devlin, “On the Road to Radical Reform” (1990) 28 *Osgoode Hall L.J.* 641. Some readers may find this turn to Unger to be most curious, given that he is often portrayed as an “archmodernist” and therefore profoundly at odds with the postmodernist orientation of this essay. Two points may be worth noting. First, as I have pointed out in footnote 40, I do not see modernism and postmodernism as being in absolute contradiction; rather I understand the relationship to be a complicated but dependent critique. Second, as will become apparent in Part V of this essay, I have several significant reservations about the pragmatic consequences of an uncritical adoption of postmodernist positions. The ensuing analysis, drawing on Unger, foreshadows some of these reservations.

220 Unger, *supra* note 216 at 530-535.

221 For official accounts of these practices, see *Ireland v. United Kingdom*, [1978] 2 E.C.H.R. 55 (Eur. Court of Human Rights); *Report of Amnesty International Mission to Northern Ireland* (1977); *Bennett Report on Police Interrogation Procedures in Northern Ireland*, (1979). For other, more critical, accounts see D. Faul & R. Murray, *The Castlereagh File* (1978) and P. Taylor, *Beating the Terrorists?* (New York: Penguin, 1980). For a prisoner’s account, see Sands, *Life*, *supra* note 157, and Sands, *Skylark*, *supra* note 1.

222 P. Hillyard, “Political and Social Dimensions of Emergency Law in Northern Ireland”, A. Jennings, ed., *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (London: Pluto Press, 1988) 191 at 200; M. Miller, “The Orange Judiciary” (1976) 40 *Hibernia Rev.*, 6.

Imprisonment meant subjugation to, and control by, the oppressor, to the very clothes you were entitled to wear. If you refused to wear the “badge of criminality” — uniforms — you were deprived of all clothing and subjected to frequent beatings. If you sought interaction with the outside world your body was subjected to penetrating searches by four prison guards — including rectal mirror, finger and sponge searches — and, if you resisted, again beatings were inflicted. When you remained steady in your resistance the state determined to further humiliate you. To make you feel even more vulnerable, you were not allowed to have two towels for the shower, thereby exposing you to the abuse of the guards; when you protested you were denied the right to shower and, indeed, the right to go to the washroom. Increasingly, your very body was becoming a terrain of political struggle. On their routine searches the guards kicked over your chamber pot, so that the floor and your mattress were covered in urine and excrement. To avoid this, you slopped out the human waste under the door of your cell or out the window, only to have it gratuitously returned. And then, you spread your excrement on the walls. You lived like this for several years: naked, beaten, searched and perennially punished. In such a context, the conventional wisdom that life and death are binary opposites becomes manifestly false.²²³ In these conditions, life is a form of death. In such a situation you have nothing left but your life itself with which to protest the state’s pervasive and invasive subjugation of your body. You seek to destabilize such a juridical regime by reconstituting your body itself into a form of a legal claim: a hunger strike. Quite literally, you embody law.²²⁴

Alternatively, the hunger strike could be interpreted as the assertion of a “solidarity right.” Unger claims that the basic purpose of a solidarity right

223 As Sands himself reflects while he was on the “dirty protest”:

But there were times when Milltown [Cemetery] would have been a preferable alternative when things became so unbearable that you really just couldn’t care less whether you lived or died just as long as you could escape the hellish nightmare. Aren’t we dying anyway, I thought? Aren’t our bodies degenerating to a standstill? I am a living corpse now. What will I be like in six months time? Will I even be alive in another year? I used to worry about that, churning it around in my mind for hours on end. But no more! Because that is the only thing left they can do to me: kill me. I have known this for some time and God knows that it isn’t for the want of trying that they haven’t achieved that on some one of us yet! But I am determined that I shall never give up. They can do what they will with me but I will never bow to them or allow them to criminalize me.

Sands, *Life*, *supra* note 157 at 54-55. See also, Sands, “Christmas Eve”, and “And so Life in This Hell Goes On” in *Skylark*, *supra* note 1 at 97, 127.

224 For further helpful discussions of how the body itself can be a terrain of political struggle and mode of communication see Young, *supra* note 213 at 87 and D. Levin, “The Body Politic: The Embodiment of Praxis in Foucault and Habermas” (1989) 9 *Praxis International* 115.

Foucault’s work on “the micro-physics of power” focuses on how various state and quasi-state apparati seek to construct and encode the body with certain significations, a process which he conceptualizes as the “political economy of the body”. [M. Foucault, *Discipline and Punish: The Birth of the Prison*, 1st American ed., (New York: Pantheon Books, 1977) at 26]. My concern is more with how the oppressed reconstitute their bodies to resist state repression.

is to “give legal form to social relations of reliance and trust.”²²⁵ Due to the quasi-fiduciary nature of such relationships, Unger argues that the “people bound by solidarity rights are prevented from taking refuge in an area of absolute discretion within which they can remain deaf to the claims others make upon them.”²²⁶ Whereas Unger has an unduly narrow conception of solidarity rights and would confine them to the (“private”) realms of “the family”, and “continuing business relationships”, I would suggest the idea has even larger potential, particularly as a claim against (“public”) bureaucratic power.

To the extent that the idea of solidarity rights is based upon relations of dependency, it can be drawn upon as a foundation for seeking good faith consideration of a petitioner’s claim. In Martha Minow’s terms, it might be called the right to “*equality of attention*.”²²⁷ The fasting prisoners exhausted every option. They had appealed to higher courts²²⁸ on the basis that many of the convictions had been dependent upon illegally obtained confessions, only to be turned down in the face of substantial evidence supporting their claims.²²⁹ They had negotiated with the government only to be misled and betrayed. They had refused to wear uniforms, gone “on the blanket”, on the “no wash protest” and eventually, on the “dirty protest”, but to no avail. They had exhausted all their domestic legal remedies²³⁰ and had even gone to the European Commission on Human Rights, only to be told that they were without cause.²³¹ The hunger strike, drawing on the ancient tradition of *troscéad*, was the ultimate claim of the dispossessed to the solidarity right to be heard. It forwarded a rights claim, or more specifically, a prisoners’ rights claim. The fast was an appeal by the disempowered to the humanity of the empowered, which was facetiously dismissed as, at best, propaganda, at worst, a manifestation of gender relations. Although the prisoners sought to embody law, the British state rejected an “ethics of otherness” and refused to listen.

Moreover, it was not only the British state that was contemptuous of such jurisgenerative rights claims. As the next section will demonstrate, the European Commission on Human Rights was equally dismissive, but perhaps for different reasons. To develop this analysis I will draw upon several deconstructive and postmodern arguments.

D. Mandarin Antipathy

In August 1978, during the “dirty protest”, four prisoners permitted a Belfast lawyer and law professor (and subsequent law dean in Eire) to make an application on the former’s behalf to the European Commission on Human Rights. The basis of the claim was that the physical conditions of

225 *Supra* note 216 at 535.

226 *Id.* at 537.

227 M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 297.

228 Beresford, *supra* note 3 at 242, 282.

229 See *supra* note 221.

230 *McFeely*, *supra* note 151 at 71-75.

231 *Id.* For a full discussion of the *McFeely* decision, see *infra* Part III, D.