

Journal of Legislation

Volume 26 | Issue 1

Article 9

February 2015

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Recommended Citation

Linn, Alexander C. (2015) "Reconciliation of the Penitent: Secretarian Violence, Prisoner Release, and Justice under the Good Friday Peace Accord; Note," *Journal of Legislation*: Vol. 26: Iss. 1, Article 9.
Available at: <http://scholarship.law.nd.edu/jleg/vol26/iss1/9>

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Reconciliation of the Penitent: Sectarian Violence, Prisoner Release, and Justice under the Good Friday Peace Accord

I. Introduction

Woe to him that claims obedience when it is not due;
Woe to him that refuses it when it is.¹

On April 10, 1998, the British and Irish governments announced agreement on a plan to end the political and military conflict in the six counties² of Northern Ireland.³ If successful, the Good Friday Peace Accord ("Good Friday")⁴ will end the so-called "Troubles"⁵ in Northern Ireland – a conflict that has claimed over three thousand lives in the past three decades.⁶ The chance for success looks good: a majority of voters in the Republic of Ireland and in Northern Ireland recently endorsed Good Friday in popular referendums.⁷

Nevertheless, obstacles remain. Good Friday is vague on some of the most contentious issues that political leaders must confront to create a lasting peace.⁸ Furthermore, dissenters threaten a return to hard-line positions and violent paramilitary operations.⁹ Earlier attempts at bringing peace in Northern Ireland have not met with lasting success.

1. CHALMERS JOHNSON, *REVOLUTIONARY CHANGE* (cover page) (1982) (quoting Thomas Carlyle).

2. The island of Ireland is politically divided: the six counties of Northern Ireland are part of the United Kingdom; the twenty-six counties of the South constitute the Republic of Ireland. *See, e.g.*, Christopher A. Callanan, Note, *Does Peace Have a Chance? Protection of Individual Rights as the Foundation for Lasting Peace in Northern Ireland*, 15 B.C. THIRD WORLD L.J. 87, 88 (1995) (discussing the political and geographic divisions of Ireland in their historical context).

3. *See* T.R. Reid & Dan Balz, *The Irish Vote on Peace Accord*, WASH. POST, May 23, 1998, at A17 (noting that the April 10, 1998 agreement represents the conclusion of 22 months of negotiation between eight political parties and the British and Irish governments).

4. Belfast Agreement, April 10, 1998, Ir.-U.K. (visited June 12, 1998) <<http://www.irish-times.com/irish-times/special/peace/agreement/agreement.html>> [hereinafter Good Friday].

5. The conflict in Northern Ireland is often referred to simply as "the Troubles." *See, e.g.*, T.R. Reid & Dan Balz, *Ireland's Twin Referendums*, WASH. POST, May 22, 1998 at A35 (discussing recent developments in the peace process in Northern Ireland).

6. *See id.* (noting that the conflict in Northern Ireland has claimed 3,400 lives since 1969). Estimations of the death toll resulting from the Troubles range from approximately 3,000 to 3,600. *See, e.g.*, John Hume, *Essay: Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L.J. 967, 968-69 (1994) (assessing the human cost of the Troubles at approximately 30,000 maimed and 3,000 killed, 1,700 of whom were innocent civilians); Carl Honore, *Risks Ahead Reigning in Northern Ireland's Joy*, HOUS. CHRON., May 25, 1998, available in 1998 WL 3579267 (assessing the human cost of the Troubles at approximately 3,600).

7. *See* T.R. Reid & Dan Balz, *Irish Peace Plan Wins by Big Margin*, WASH. POST, May 24, 1998 at A1 (analyzing the popular referendums that took place in the Republic of Ireland and in Northern Ireland on May 22, 1998); *see also infra* text Part II: Background (discussing the recent developments in the peace process).

8. *See* Reid & Balz, *supra* note 7 (noting that the accord "includes a somewhat vague plan for disarming the various paramilitary groups within two years and promises the eventual release of hundreds of sectarian fighters locked up in Irish or British prisons." *Id.*); *IRA Political Wing says Decommissioning arms "Dead-End Issue"*, AGENCE FR.-PRESSE, May 25, 1998, available in 1998 WL 2288625 (noting that political leaders from different sides of the debate have disparate views on the requirements for the decommissioning of paramilitary units).

9. *See* Honore, *supra* note 6 ("Terrorist splinter groups on both sides of the sectarian divide have sworn to derail [Good Friday] with bombs and bullets.").

In 1993, the British and Irish governments announced the Downing Street Declaration ("Downing Street")¹⁰ to bring an end to the Troubles.¹¹ In 1994, the Irish Republican Army ("IRA") announced a military cease-fire to facilitate negotiations that would end the conflict.¹² In 1996, the IRA became dissatisfied with the British approach to negotiations¹³ and ended the cease-fire by detonating two bombs in London.¹⁴ In the investigations that followed the bomb attack, police discovered that hard-liners within the IRA had gained legitimacy during the cease-fire stemming from Republican dissatisfaction with the British position; hard-liners were therefore able to convince their fellow terrorists to initiate a strike on London. Some investigators drew the conclusion that the attack was done to quell dissent within the ranks of the IRA.¹⁵

This comment evaluates the approach to justice developed under Good Friday by analyzing the Northern Ireland Sentences Act of 1998 ("Sentences Act").¹⁶ A product of Good Friday, the Sentences Act releases paramilitary prisoners convicted for terrorism. Part II summarizes the historical background of the conflict in Northern Ireland and the recent movements towards peace. Part III assesses the viability of Good Friday and delineates systemic-level obstacles to the obtainment of justice. Part IV evaluates the effect these obstacles have on the Sentences Act by utilizing jurisprudential paradigms of justice. Part V concludes that, although the Sentences Act may be part of a process towards ending paramilitary violence, the Sentences Act has not yet achieved any meaningful construction of justice for Ulster.

II. Background

A. The Origins of the British Presence in Ireland

The British presence in Ireland dates from the era following the Norman Invasion of 1066.¹⁷ In 1154, Pope Adrian IV granted Ireland to England's King Henry II.¹⁸ Four hundred years later, England became a Protestant nation under the successors of King Henry VIII,¹⁹ while Ireland remained predominantly Roman Catholic.²⁰ Britain's control

10. Joint Declaration, Dec. 15, 1993, Ir.-U.K., reprinted in JOHN HUME, *A NEW IRELAND* 167 (1996) [hereinafter *Downing Street*]. The Joint Declaration is commonly referred to as the Downing Street Declaration. See Hume, *supra* note 6, at 972 n.2 (discussing the nomenclature of Downing Street).

11. See Clive Walker & Russell L. Weaver, *A Peace Deal for Northern Ireland? The Downing Street Declaration of 1993*, 8 EMORY INT'L L. REV. 817 (1994) (analyzing Downing Street as a means to peaceful resolution of the Troubles).

12. See Ronald A. Christaldi, Comment, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. TRANSNAT'L L. & POL'Y 123, 158 (1995) (noting that the IRA initiated a cease-fire to enhance the democratic peace process).

13. See Suzanne Breen, *Even Senior IRA Members Not Aware Bombing Was Planned*, IRISH TIMES, Feb. 15, 1996, at 5. ("The British were given 18 months to sort out this problem but they did nothing.")

14. See Karen Donfried, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, NORTHERN IRELAND: THE PEACE PROCESS 2 (updated April 20, 1998) (discussing the background to Good Friday).

15. See Breen, *supra* note 13 ("It might well have been only a matter of time before some [IRA members] broke away and resumed violence independently. The hard-liners said there was a need to strike...in order to avoid a split.")

16. Northern Ireland (Sentences) Act, 1998 (U.K.).

17. See JONATHAN BARDON, *A HISTORY OF ULSTER* 32 (1992) (discussing the history of Northern Ireland); Christaldi, *supra* note 12, at 125 (describing the beginning of the Anglo-Irish conflict); J.M. ROBERTS, *A HISTORY OF EUROPE* 174 (1996) (analyzing the effect of the Norman Invasion on England).

18. See BARDON, *supra* note 17, at 32 (discussing the history of Northern Ireland); Christaldi, *supra* note 12 at 125 (describing the beginning of the Anglo-Irish conflict).

19. See Christaldi, *supra* note 12, at 128-29 (describing the English Reformation, which made the Church of England independent from Roman authority).

20. See JOHN F. GALLIHER & JERRY L. DEGREGORY, *VIOLENCE IN NORTHERN IRELAND: UNDERSTANDING THE PROTESTANT PERSPECTIVE* 2 (1985) (noting that the English Protestants endeavored to

of Ireland's economic resources amplified religious tensions between the two regions.²¹ Additionally, British rule allowed large numbers of Protestants from Britain to settle in Northern Ireland.²² This pattern of immigration, known as "the Plantation of Ulster,"²³ created a divided society in which Protestants held political and economic power throughout all of Ireland, forcing Catholics to endure repression until Britain initiated reforms in the early-nineteenth century.²⁴ British reform centered on the Roman Catholic Relief Act, which granted religious toleration and political equality to Roman Catholics in England and Ireland.²⁵

B. The Dawn of Irish Independence

Like other British colonies in the twentieth century, Ireland gained independence from Britain. During Easter Week of 1916, revolutionaries in Ireland allied with Germany in an attempt to expel British rule.²⁶ Although the Easter Rising failed, it garnered Irish hostility towards British rule.²⁷ As Irish nationalism intensified, two organizations emerged to counter the British power: the Irish Republican Army ("IRA") and Sinn Fein.²⁸ The IRA formed as a paramilitary organization to wage guerilla warfare against advocates for Britain's presence in Ireland.²⁹ Sinn Fein emerged from those advocating peaceful resistance to the British presence in Ireland.³⁰

C. The Formulation of Partition

The early IRA and Sinn Fein achieved their goal of independence, but only for part of Ireland. In 1920, the British Parliament passed the Better Government of Ireland Act,³¹ dividing Ireland into two provinces. The six counties in the northern province of Ulster contained a majority of Protestants who were loyal to Britain.³² The southern region of Ireland was essentially nationalist and sought greater independence from Brit-

extend Anglicanism (i.e., the Church of England) to Ireland, but "[t]he native Irish remained committed to their Catholicism and to their resistance to Crown rule."); Duncan Morrow, *Church and Religion in the Ulster Crisis, in FACETS OF THE CONFLICT IN NORTHERN IRELAND* 154 (Seamus Dunn ed., 1995) ("The 'reformation' in Ireland was not, in the main, a question of the mass indigenous conversion of natives but of the influx of large numbers of Protestants into Ireland.").

21. See Christaldi, *supra* note 12, at 130 (describing the Irish resentment to the English exploitation of Irish property in the seventeenth century). In the seventeenth century, the British transferred land titles from the Catholic Irish to the Protestant English, creating a Protestant upper class. *See id.* at 133 (describing the violent and cruel policies that Oliver Cromwell, the English Civil War leader, inflicted upon Ireland). When famine struck Ireland in 1845, the British attempt at relief proved to be inadequate; notably, "huge quantities of food were exported from Ireland to England throughout the period when the people of Ireland were dying of starvation." *See id.* at 140.

22. *See id.* (describing English efforts to colonize Ireland and convert its population to Anglicanism); Hume, *supra* note 6, at 967 (noting that colonists who came to Northern Ireland were Protestants).

23. See Morrow, *supra* note 20, at 154 (describing the economic history of Ireland).

24. See Christaldi, *supra* note 12 at 135-37 (describing the Protestant composition of the Irish Parliament and its effects on Ireland's Catholic population). Notably, many Irish deemed Britain's attempt at reform—the Roman Catholic Relief Act—to be insufficient. *See id.* at 137 ("[P]olitical equality had been delayed too long, granted under pressure and not as an act of justice. . . . It therefore failed to merit gratitude of Irish Catholics or divert them from nationalism.") (quoting THOMAS E. HACHEY ET AL., *THE IRISH EXPERIENCE* 65 (1989)).

25. *See id.* (describing the evolution of the British position towards Roman Catholics within the United Kingdom).

26. *See id.* at 143-44 (noting that the Irish revolutionaries conspired with the Germans during the World War I to plot against England).

27. See Callanan, *supra* note 2, at 90 (setting forth the political history of the Irish Republic).

28. See Christaldi, *supra* note 12, at 147-148 (outlining the history of Sinn Fein and the IRA).

29. *See id.* at 148 (describing the origins of the IRA).

30. *See id.* at 146 (describing the origins of Sinn Fein).

31. See BARDON, *supra* note 17, at 477 (providing the history of the partition of Northern Ireland).

32. See Hume, *supra* note 6, at 968 (1994) (noting that the British partitioned Ireland to keep the North within the United Kingdom based on its Protestant majority).

ain.³³ Consequently, the Act demarcated north from south, giving each region its own parliament with jurisdiction limited to regional affairs, while London retained central authority.³⁴ Irish nationalists in the south were not satisfied and violence continued.³⁵ In 1921, both sides declared truce and the southern region of Ireland became the Irish Free State, giving it dominion status with minimal ties to Britain.³⁶ In 1922, the Irish Free State ratified a constitution that maintained limited political ties to Britain.³⁷ In 1937 the Constitution was rewritten to reflect complete independence.³⁸ Notably, the Irish Constitution has continuously enshrined Catholicism as the basis for its laws.³⁹

D. Modern Stratification in Northern Ireland

Today, Northern Ireland remains part of the United Kingdom, along with England, Scotland, and Wales.⁴⁰ Commonly referred to as "Ulster," it contains two factions that seek to define its political and cultural identity: Unionist and Nationalist.⁴¹

Unionists are predominantly Protestant descendants of British immigrants who came to Ireland during British rule.⁴² Today, they seek to maintain Northern Ireland as part of the United Kingdom.⁴³ Their Protestant identity influences this outlook, as "there is genuine apprehension that the perceived religious hegemony of the Catholic church in the Republic of Ireland would inevitably result in the restriction of the religious freedom of Protestants within any form of united Ireland."⁴⁴ Staunch Unionists, often called "Loyalists,"⁴⁵ constitute a hard-line fringe that continues to gravitate towards violence in the face of diplomatic efforts to bring peace to Ulster.⁴⁶

33. See Christaldi, *supra* note 12, at 142 (noting that nationalism flourished in the Southern region of Ireland while the North feared the dissolution of ties with Britain).

34. See BARDON, *supra* note 17, at 477 (detailing the structure of political governance derived from partition); Callanan, *supra* note 2, at 91 (delineating Irish history).

35. See Callanan, *supra* note 2, at 88 (assessing the Nationalist reaction to British power).

36. See *id.* at 91 (analyzing Ireland's political history).

37. See *id.* at 92-93 (describing the Irish Free State's constitutional history).

38. See *id.* at 92-93 (describing the constitutional history of the Irish Republic).

39. See *id.* at 94-95 (describing the ascendancy of Catholic values in the Irish Constitution).

40. See, e.g., THE CAMBRIDGE ENCYCLOPEDIA 1247 (David Crystal ed., 1990) (defining the United Kingdom).

41. See, e.g., Angela Hegarty, *Observing the Rule of Law: Experiences from Northern Ireland*, 66 FORDHAM L. REV. 647, 648-49 (1997) (outlining the demographics of modern-day Northern Ireland).

42. See e.g., Hume, *supra* note 6, at 967 (describing the distinct political and religious backgrounds between the Protestant and Catholic residents of Northern Ireland); Dominic Murray, *Culture Religion and Violence in Northern Ireland*, in FACETS OF THE CONFLICT IN NORTHERN IRELAND 215 (Seamus Dunn ed., 1995) (delineating Protestant fears of a united Ireland).

43. See, e.g., John Darby, *Conflict in Northern Ireland: A Background Essay*, in FACETS OF THE CONFLICT IN NORTHERN IRELAND 15, 19-20. (Seamus Dunn ed., 1995) (outlining the main entities which influence the affairs of Northern Ireland).

44. See Murray, *supra* note 42, at 216 (delineating Protestant fears of being overwhelmed by Catholicism). See generally Hume, *supra* note 6, at 969-70 (noting that Northern Irish Protestants want to preserve their heritage by excluding others); John Hume, *Acceptance of Diversity: The Essence of Peace in the North of Ireland*, 18 FORDHAM INT'L L.J. 1084, 1086 (developing further his analysis of the Unionist outlook); GALLIHER & DEGREGORY, *supra* note 20, at 144-63 (describing the sermons of Ian Paisley, a fanatical Loyalist parson in Northern Ireland).

45. See, e.g., Hegarty, *supra* note 41, at 648 (describing the nomenclature of divisions in Northern Ireland).

46. See Karen Donfried, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, NORTHERN IRELAND: THE PEACE PROCESS 6 (updated June 2, 1998) (discussing violent Loyalist splinter groups as a threat to the peace process).

In contrast, Nationalists are usually Catholic⁴⁷ and seek to dissolve Northern Ireland's political ties with Britain and bring Northern Ireland into the Irish Republic.⁴⁸ Historically, Catholics suffered discrimination and repression by Protestants, who controlled the political and economic resources of Ulster.⁴⁹ This discrimination makes Nationalists unwilling to accept rule from Westminster,⁵⁰ the home of the British Parliament in London.⁵¹ Countering the Loyalist fringe within the Unionist camp, extreme Nationalists, often called "Republicans,"⁵² have a history of resorting to violence to achieve their political goals.⁵³

E. The Origin and Effects of Paramilitary Activity

The tension between the Unionist and Nationalist populations of Northern Ireland erupted into violence over three decades ago. In the late 1960s, Catholics initiated a civil rights movement that brought civil unrest in Northern Ireland.⁵⁴ The largely Protestant police force, known as the Royal Ulster Constabulary (RUC),⁵⁵ was unable to quell disorder, causing the British government to deploy military personnel in Northern Ireland to bolster security.⁵⁶ Ironically, Ulster Catholics initially welcomed Britain's troops, which had been deployed to protect the Catholic minority from violence by loyalist paramilitary forces.⁵⁷ Thus, modern paramilitary organizations developed as extremists

47. See *id.* (describing Ulster Nationalists).

48. See, e.g., Darby, *supra* note 43, at 19 ("The basic tenet of [N]ationalists is the aspiration to unify the island of Ireland.").

49. See, e.g., DAVID MCKITTRICK, *ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND* 11-52 (1994) (describing the political repercussions of anti-Catholic discrimination by Protestants); Hume, *supra* note 6, at 968 ("In order to maintain their position and to protect their heritage the Unionist people discriminated against the Catholic minority in housing, jobs[,] and voting rights."). *But cf.*, Mary Hickman, *Racism and Identity: Issues for the Irish in Britain*, in *CULTURE, IDENTITY AND POLITICS* 26 (Terence Ranger, et al. eds., 1996) (analyzing British prejudice against Irish Catholics); THOMAS CAHILL, *HOW THE IRISH SAVED CIVILIZATION* 6 (1995) (analyzing British prejudice against the Irish and asserting that Irish monks played significant role in preserving the writings of classical civilization during the Middle Ages in Europe).

50. See Hume, *supra* note 6, at 970 (asserting that Britain did nothing to help end discrimination in Northern Ireland for most of its recent history).

51. See, e.g., THE CAMBRIDGE ENCYCLOPEDIA, *supra* note 40, at 1295 (noting that Westminster is a borough of London, England, the administrative center for the United Kingdom, and the location of the Houses of Parliament). The British Parliament consists of the House of Lords and an elected House of Commons. See *id.* at 909.

52. See, e.g., Hegarty, *supra* note 41, at 648 (describing the nomenclature of divisions in Northern Ireland).

53. See Donfried, *supra* note 46, at 6 (discussing violent Republican splinter groups as a threat to the peace process).

54. See Adrian Guelke, *Paramilitary forces, Republicans and Loyalists*, in *FACETS OF THE CONFLICT IN NORTHERN IRELAND* 115-16 (Seamus Dunn ed., 1995) (describing the origins of sectarian violence in Northern Ireland). See generally, BOB PURDIE, *POLITICS IN THE STREETS: THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT IN NORTHERN IRELAND* (1990) (describing the political underpinnings of the civil rights movement in Northern Ireland).

55. See, e.g., Hegarty *supra* note 41, at 652 (explaining that the RUC draws its membership largely from the Protestant Community); Honore, *supra* note 6 ("Catholics want a new police force. They regard the present royal Ulster Constabulary, which is 93 percent Protestant, almost as an occupying army, and accuse its members of harassment and worse.").

56. See Guelke, *supra* note 54, at 116 (explaining the role of paramilitary operatives in Northern Ireland). Notably, Guelke argues that paramilitary organizations have played only a limited role in the conflict. See *id.* See generally, KEVIN TOOLIS, *REBEL HEARTS* (1995) (providing an extensive history of the IRA in Northern Ireland).

57. See Hume, *supra* note 6, at 981-82 (describing the origins of paramilitary violence); GEULKE, *supra* note 54, at 116 (noting that Catholics initially welcomed the arrival of British troops because the troops were being sent to protect Catholics from Loyalist mobs hostile to the civil rights movement). In more recent times, Sinn Fein President Gerry Adams has used the presence of British troops in Northern Ireland as a justification for the activities of the IRA, arguing "it is not the Protestant people we are against, it is the British presence we

on both sides of the conflict and began using terrorism to achieve their political goals.⁵⁸ Loyalist groups include the Ulster Defense Association (UDA) and the Ulster Volunteer Force (UVF).⁵⁹ A number of Protestant/Loyalist political parties have been successful in recent elections.⁶⁰ Nationalists are more cohesive, centralizing their paramilitary efforts in the modern "Provisional" IRA⁶¹ with political leadership centralized in Sinn Fein.⁶²

Paramilitary activity has yielded a diverse range of victims, including civilians and children.⁶³ Moreover, the line between a seemingly innocent bystander and a political target is intentionally blurred in the eyes of some paramilitary forces, especially those motivated by hatred more than politics.⁶⁴ IRA explosions have killed women and children⁶⁵ and left hundreds homeless in the war against "legitimate targets," a category that includes any citizen in Northern Ireland who provides a good or service to Britain's

are against. *And the British are here defending their own interests by force.*" Hume, *supra* note 6, at 971 (italics added) (quoting Gerry Adams).

58. See Anthony M. Gallagher, *The Approach of Government: Community Relations and Equity, in FACETS OF THE CONFLICT IN NORTHERN IRELAND 27* (Seamus Dunn ed., 1995). Gallagher provides illustrative statistics on the violence resulting from the conflict from 1972 to 1992: (1) over 3,000 people have been killed; (2) 34,000 shootings have been recorded; (3) 1400 bombs have been planted; (4) over 100 tons of explosives have been seized (and it is estimated that over 100 tons of explosives have been exploded); (5) over 15,000 people have been charged with terrorist offenses; (6) nearly 50% of the population has experienced the death of a friend or acquaintance because of the conflict; (7) nearly 10% has experienced the death of a family member. See *id.* As of 1994, Loyalist paramilitary forces were responsible for 30% of the death toll, Republican groups were responsible for 60%, and the British army and the RUC were responsible for 10%. See Hume, *supra* note 6, at 982 (itemizing the human cost of the Troubles). The British Army's presence in Northern Ireland has included MI5, MI6, and the SAS. See RAYMOND MURRAY, *THE SAS IN IRELAND 103* (1990) (analyzing the history of British forces in Ireland). The SAS is an elite unit of the British Army; MI5 is Britain's domestic intelligence service; MI6 is Britain's overseas intelligence service. See, e.g., TOOLIS, *supra* note 56, at xiv-xv (listing organizations involved in the Troubles).

59. See David McKittrick, *Young Turks are blamed for rise in Loyalist Violence*, INDEP., Aug. 11, 1990 reprinted in DAVID MCKITTRICK, *ENDGAME 137* (1994) (describing the upsurge in Loyalist terrorist activity). McKittrick notes that Loyalist paramilitary forces have killed approximately 400 people, most of whom were civilians. See *id.* David McKittrick, the Ireland Correspondent for *The Independent*, has written two books which are compilations of his newspaper articles on the Troubles: (1) DAVID MCKITTRICK, *ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND* (1994) and (2) DAVID MCKITTRICK, *DISPATCHES FROM BELFAST* (1989).

60. See, e.g., Donfried, *supra* note 14, at 2 (analyzing recent elections in Ulster). Donfried points out that several political parties exist in Northern Ireland, with varying approaches to how the Troubles should be resolved. This spectrum includes a centrist party comprised of both Catholics and Protestants. See *id.*

61. See Hume, *supra* note 6, at 968 (noting that the modern form of the IRA is a product of the non-violent civil rights movement and is referred to as the 'Provisional' Irish Republican Army); TOOLIS, *supra* note 56, at xiv (noting that the 'Provisional IRA' is synonymous with the 'IRA'). The term 'Provisional IRA' distinguishes the modern-day IRA from a splinter group known as the 'Official IRA,' which split from the Provisionals in 1969 and have since played an extremely limited role in Northern Ireland. See *id.* Members of the Provisional IRA are called 'Provos.' See *id.* at xv. See generally David McKittrick, *Loyalist Killers Have Criminal Element*, INDEP., Sept. 8 1993, reprinted in David McKittrick, *ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND 127* (1994) (contrasting the military ethos of the IRA with the criminal ethos of the Loyalist paramilitary forces). The IRA thinks of itself as a genuine army. See *id.* Thus, Sinn Fein, the political ally of the IRA, argues that it is mindful of the human cost of violence, while simultaneously "acknowledg[ing] the selfless contribution which successive generations of Irish men and women have given to their country by taking up arms in the pursuit of liberty." Sinn Fein, *The Nature of the Problem, in PATHS TO A POLITICAL SETTLEMENT IN IRELAND: POLICY PAPERS SUBMITTED TO THE FORUM FOR PEACE AND RECONCILIATION 37* (Blackstaff Press Limited 1995).

62. See, e.g., TOOLIS, *supra* note 56, at xv (describing Sinn Fein as the legal political wing of the IRA).

63. See Reid & Balz, *supra* note 5 ("Victims have ranged from retirees in wheelchairs to toddlers who happened to be playing on the wrong sidewalk at the wrong time . . .").

64. See, e.g., *infra* text accompanying note 67 (describing how Loyalist paramilitary activists chose to rape three nurses because the nurses were Roman Catholics).

65. See, e.g., David McKittrick, *The Scars of Violence, in ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND 141* (1994) (detailing testimonials from the medical community in Northern Ireland who had cared for injured victims).

security forces.⁶⁶ This outlook is not limited to Republicans. Loyalists convicted of rape chose their victims because they believed the women were Catholic.⁶⁷ Thus, religious prejudice undoubtedly influences the conflict.⁶⁸ Still, the primary divisions are said to derive from politics, not religion.⁶⁹

F. Recent Movements Toward a Diplomatic Solution

1. The Anglo-Irish Agreement of 1985

Against the backdrop of this human tragedy, political leaders in Britain and Ireland have sought to bring a diplomatic resolution to the Troubles. In 1985, the Anglo-Irish Agreement between Britain and Ireland mandated that popular consent must form the basis for Northern Ireland's political affiliation.⁷⁰ The Agreement created an intergovernmental council between the two countries, thereby giving Ireland a voice in the politics of Ulster.⁷¹ More importantly, it provided a political and diplomatic mandate to resolve the conflict.⁷² The Agreement was received with severe protest from the Unionist/Loyalist communities of Northern Ireland, which felt betrayed by the British government.⁷³

2. The Downing Street Declaration of 1993

In 1993, the British Prime Minister John Major and the Irish Taoiseach⁷⁴ Albert Reynolds concluded negotiations that resulted in the Downing Street Declaration.⁷⁵

66. See TOOLIS, *supra* note 56, at 53 (explaining that the IRA decided that anyone who provided services or materials to security forces [such as the RUC or British troops stationed in Northern Ireland] was a viable target for an IRA attack). According to Toolis, this includes the grocer, gas station owner, and building contractor who profited by selling goods or services to British forces. See *id.*

67. See *id.* at 152 (remarking that Republican paramilitaries think of themselves as political prisoners but feel this status does not apply to Loyalist paramilitary activists). One incarcerated IRA man summarizes his views of Loyalists:

In general, I would say Republicans know what they are fighting for, Loyalists don't. They came across as street boys, thugs with tattoos, who would attack when they were drunk. They were not brave men, just uneducated, working-class yobs. None of them could articulate why they were in jail.

Id.

68. See Murray, *supra* note 42, at 215 (stating that religion is used as a proxy for political divisions).

69. See *id.* ("[O]ften the conflict in Northern Ireland is presented in terms of a religious war which it certainly is not . . . 'Catholic' and 'Protestant' simply provide convenient, and often misleading, labels under which the conflict can be compartmentalized."); Reid & Balz, *supra* note 7 (noting that the conflict in Northern Ireland has been primarily political, not religious, with tensions heightened by violence).

70. See Callanan, *supra* note 2, at 92 (analyzing the Anglo-Irish Agreement).

71. See *id.* (analyzing the Anglo-Irish Agreement).

72. See *id.* ("The Agreement can be credited for enabling more recent progress because it set in motion a process for a constitutional solution to the ethnic conflict.").

73. See J. BOWYER BELL, THE IRISH TROUBLES 711 (1993) (describing the Unionist reaction to Westminster's willingness to appease Ulster nationalists); Guelke, *supra* note 54, at 124 (affirming that virtually the entire Protestant community was against the 1985 Anglo-Irish Agreement, triggering civil unrest).

74. The Irish Taoiseach is the Head of Government – a Prime Minister – and is appointed by the President, who is the Head of State. See Department of Foreign Affairs, Constitution and Government of Ireland (visited Jun. 9, 1998) <<http://www.irlgov.ie/liveagh/foreignaffairs/facts/congov.html>>.

75. Downing Street, *supra* note 10. Downing Street resulted from the dialogue between John Hume, co-founder and leader of the Social Democratic and Labour Party, and a member of the British Parliament, and Gerry Adams, the leader of Sinn Fein. See Hume, *Acceptance of Diversity: The Essence of Peace in the North of Ireland*, *supra* note 44, at 1089-90 (arguing that both Republicans and Unionists in Ulster cultivate mindsets that impede the peace process). The agreement grew out of these talks and secret discussions between the British government and Sinn Fein. See *id.* (analyzing the diplomatic history of Downing Street). Various British Governments had maintained a public position that it would not negotiate with the IRA, thus Britain subsequently denied any negotiations with Sinn Fein. When the negotiations were exposed, it reduced the credibility of the British government in Ireland. See David McKittrick, *Troubles Cloak Long History of Secret*

Downing Street reaffirmed the commitment of both governments to consent as a basis for political rule in Ulster.⁷⁶ Furthermore, both governments expressed a strong willingness to seek a resolution to the Troubles.⁷⁷ Each government made a mild but vague retreat from its historical approach to Ulster. Ireland acknowledged the Unionist's resentment of elements of the Irish Constitution without specifying which elements were sources of contention.⁷⁸ Britain declared that it had "no selfish strategic or economic interest in Northern Ireland."⁷⁹ Ireland seemed to be willing to revise its Constitution (perhaps Articles 2 and 3),⁸⁰ in which the Republic proclaims its sovereignty over all of Ireland, including Ulster and its Protestant majority.⁸¹ Britain appeared willing to withdraw from Northern Ireland altogether if these actions would lead to peace in Ulster.⁸²

To facilitate an end to paramilitary violence, Downing Street limited access to political dialogue to parties committed to exclusively peaceful methods of political change.⁸³ This represented an invitation from the British government to Sinn Fein to sit at the negotiating table if it dissociated itself from Republican paramilitary activity.⁸⁴ Britain later published a clarification of its position in response to Sinn Fein's request, stating that Sinn Fein and the IRA would need to make a "public and permanent renunciation of violence as a means of achieving political ends, and [a] commitment to peaceful and democratic means alone."⁸⁵ The IRA announced a suspension of all military activity.⁸⁶ Loyalist paramilitaries promptly announced they would join a temporary

Meetings, INDEP., Nov. 18, 1993, in DAVID MCKITTRICK, *ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND* 310 (1994) (describing Britain's history of secret negotiations with the IRA); David McKittrick, *Mayhew Stumbles, the Documents don't match, and British credibility in Ireland Reaches a New Low*, INDEP., Dec. 5, 1993, in DAVID MCKITTRICK, *ENDGAME: THE SEARCH FOR PEACE IN NORTHERN IRELAND* 311 (1994) (describing the Irish reaction to Britain's denial of negotiating with the IRA). Notably, John Hume was one of the driving forces behind Good Friday. His efforts at bringing a lasting peace to Northern Ireland led to his recent nomination for and acceptance of the Nobel Peace Prize, which he shares with David Trimble, another political leader and peace activist. See Doug Mellgren, *Irish Leaders Win Nobel Peace Prize*, WASH. POST, Oct. 16, 1998, in *Irish Leaders Win Nobel Prize* (visited Oct. 17, 1998) <http://www.washingtonpost.com/wpsrv/inatl/longterm/nireland/n_ireland.htm>.

76. See Downing Street, ¶ 7.

77. See *id.* at ¶ 2.

78. See *id.* at ¶ 7.

79. See *id.* at ¶ 4.

80. Cf., Callanan, *supra* note 2, at 103 (arguing that Downing Street creates the possibility of altering articles 2 and 3 of the Irish Constitution).

81. See *id.* at 96 (describing articles 2 and 3 of the Irish Constitution).

82. See Walker & Weaver, *supra* note 11, at 820 ("The 1993 Declaration basically affirms British interests to be in harmony and peace rather than in sovereignty and occupation.").

83. See Downing Street at ¶ 10 (stating that parties committed to "exclusively peaceful methods and which have shown that they abide by the democratic process" are welcome to engage in and participate in democratic politics). A central problem with this provision of Downing Street was that it was deemed vague by Republican groups. See Walker & Weaver, *supra* note 11, at 828 (arguing that the invitation to participate in politics if violence is renounced is one of 1993's most uncertain aspects).

84. See Donfried, *supra* note 14, at 1 ("The two [British and Irish] leaders held out the possibility for Sinn Fein, the political wing of the [IRA], to participate in multiparty talks on Northern Ireland's future, if Sinn Fein were to renounce violence.").

85. *British Response to Sinn Fein Request for Clarification*, available in JOHN P. DUNNIGAN, *DEEP-ROOTED CONFLICT AND THE IRA CEASE-FIRE*, 83, 92 (1995) (outlining the prerequisites set forth by the British government necessary for Sinn Fein to participate in a political dialogue on Northern Ireland). The British Government reiterated the time frame necessary to show sufficient commitment to peace: a dialogue could begin within three months of a commitment to peaceful change. See *id.* ("The reason for the time lapse between a permanent cessation of violence and exploratory dialogue is to enable the commitment to exclusively peaceful and democratic methods to be fully demonstrated.").

86. See Donfried, *supra* note 14, at 1 (outlining the diplomatic history of movements to eliminate sectarian violence in Ulster).

cease-fire.⁸⁷ Negotiations continued but the IRA became dissatisfied with the slow pace of progress.⁸⁸ As a result, paramilitary activity resumed when the IRA detonated bombs in London in 1996.⁸⁹ An IRA activist asserted “[w]e’ve finally got our pride back. The bomb was long overdue. I hope there are more.”⁹⁰ This outlook may have led to the decision to resume paramilitary activity; the IRA felt it was better to resume violence than to risk alienating its hard-liners.⁹¹

3. The Good Friday Accord of 1998

April 10, 1998 marks the most recent chapter in the quest for peace in Ulster. The Good Friday Peace Accord endeavors to establish a framework for resolution of political and military conflict in Northern Ireland by creating a series of political institutions designed to address the concerns of Unionists and Loyalists in Ulster, as well as those of the British and Irish governments.⁹² A majority of the residents in both Northern Ireland and the Irish Republic recently endorsed Good Friday in popular referendums.⁹³ Catholics in both provinces overwhelmingly supported the agreement, while a significant minority of Ulster Protestants voted against it.⁹⁴ Specifically, Good Friday mandates the following:

(1) POLITICAL TIES: Northern Ireland will retain political ties to Britain unless a majority of the population eventually chooses a different political affiliation.⁹⁵

(2) GOVERNANCE: Now Northern Ireland is largely governed by the new Northern Ireland Assembly, which has significant latitude to govern independently of Westminster.⁹⁶ The first Assembly was elected under a system of proportional repre-

87. See *id.* at 1 (noting that the IRA cease-fire of August 31, 1994, was followed by a Loyalist cease-fire on October 13, 1994).

88. See, e.g., Suzanne Breen, *Even Senior IRA Members Not Aware Bombing Was Planned*, IRISH TIMES, Feb. 15, 1996, at Home News5. (noting that IRA members believed that “[t]he British were given 18 months to sort out this problem but did nothing;” and “[t]hey wouldn’t talk to Sinn Fein, they wouldn’t release the prisoners. They were just intent on humiliating us.”).

89. See Donfried, *supra* note 14, at 2 (explaining that the IRA ended its cease-fire on February 9, 1996 with a bomb attack on London in which two people were killed and 100 people were injured).

90. See Breen, *supra* note 88, at Home News5 (providing the response of typical IRA members, some of whom were kept unaware of the plan to resume paramilitary activity).

91. See Breen, *supra* note 88, at Home News5 (“It might well have been only a matter of time before some [IRA members] broke away and resumed violence independently. The hard-liners said there was a need to strike now in order to avoid a split.”).

92. See generally, *Preparing for an end to Violence*, IRISH POST, April 18, 1998, at 3 (summarizing the major political power structures created by Good Friday); *The Road to Peace*, WASH. POST. (visited May 27, 1998) <<http://washingtonpost.com/wp-srv/inatl/longterm/nireland/roadtopeace.htm>> (summarizing the major political power structures created by Good Friday and providing brief biographies of political actors pertinent to Good Friday and the peace process).

93. See Reid & Balz, *supra* note 7, at A1 (noting that the Good Friday vote had the highest voter turnout ever in Northern Ireland). Reid and Balz also provide statistics on Good Friday’s approval by jurisdiction: in Northern Ireland, 71.1% (676,966 voters) voted for Good Friday, while 28.9% (274,879 voters) voted against it. In the Republic of Ireland, 94.4% (1,442,583) voted for Good Friday, while 5.6% (85,748) voted against it. See *id.* (noting that Good Friday’s high approval “suggests that the plan won majority support across the community – from Protestants as well as Catholics.”).

94. See T.R. Reid and Dan Balz, *Pact Approved, Northern Ireland Turns to Picking Assembly*, WASH. POST, May 25, 1998, at A24 (noting that exit polling revealed that Catholics favored Good Friday by a margin of 96 to 4, while Protestants favored Good Friday by a margin of 55 to 45).

95. See Good Friday, *supra* note 4, Annex A 1.(1) (providing draft legislation for Britain mandating that Northern Ireland remains part of the United Kingdom unless voters choose otherwise).

96. See Good Friday, *supra* note 4, Strand One, Democratic Institutions in Northern Ireland (outlining the structure the Northern Ireland Assembly); *Preparing for an end to Violence*, *supra* note 92, at 3 (“The Assembly will have legislative and executive powers in six areas: financial affairs, economic development, education, health and social services, environment, and agriculture. Control over policing and justice may be included in the future.”). The British Parliament at Westminster will retain power to legislate for non-devolved

sentation.⁹⁷ This system is advantageous for small parties⁹⁸ and facilitates a balance of power between Catholics and Protestants.⁹⁹

(3) INTER-IRISH RELATIONS: A North-South Ministerial Council will be created, which will provide a forum for ministers from the Republic of Ireland to facilitate joint policy-making with the Northern Ireland Assembly.¹⁰⁰

(4) BRITISH-IRISH RELATIONS: A British-Irish Council will be created, whereby representatives from the Republic of Ireland, Britain, Northern Ireland, Scotland, and Wales will meet regularly.¹⁰¹ Although this will allow council members to discuss matters of common concern, the British-Irish Council will have no legislative authority.¹⁰²

(5) IRISH CONSTITUTIONAL REFORM: Resulting from the popular referendum endorsing Good Friday, the Irish Republic has amended Articles 2 and 3 of its Constitution, thereby relinquishing its territorial claim to Northern Ireland.¹⁰³

(6) PARAMILITARY DECOMMISSIONING: Incarcerated terrorists (both Republican and Loyalist) will be released over the next two years.¹⁰⁴ Paramilitary forces will be decommissioned.¹⁰⁵

issues. See Good Friday, Strand One, Democratic Institutions in Northern Ireland, 33 (outlining the scope of British power in Northern Ireland).

97. See Shailagh Murray, *Politics and Policy: Northern Ireland's Election Produces Pro-Peace Assembly, Splits Protestants*, WALL ST. J. EUR., June 29, 1998, available in 1998 WL-WSJE 12725817 (noting that the elections produced an Assembly which is in favor of the peace process but contains a sizable minority of anti-Good Friday Assembly members). Specifically, "opponents of the agreement came up two seats shy of the 30 needed to obstruct assembly business." *Id.*; see also *infra* note 99 (analyzing the new Assembly).

98. See *id.* ("Under the election's proportional-representation system, voters marked candidates in order of choice, and as leaders were declared, their excess votes were distributed to others on the same ballot according to voter preference, helping smaller parties gain seats.")

99. See Ray Moseley, *Ulster Peace Factions Hail Vote as Setback for Hawks but Opposition Claims it has Blocking Power*, CHI. TRIB., June 28, 1998, at Sec. 1, p. 6, available in 1998 WL 2871108 ("The Assembly will be set up under rules that will prevent the dominant Protestants from having things all their own way. The rules require that measures can be adopted only with the approval of a majority of Protestant delegates and a majority of Catholic delegates."). The first round of elections took place on June 25, 1998. Pro-Good Friday party candidates, from Catholic and Protestant parties, won 80 seats. See *id.* (summarizing election results). However, 28 anti-Good Friday Unionists were also elected. See Vanora Bennett, *New N. Ireland Assembly Chooses Protestant Leader*, LOS ANGELES TIMES, July 2, 1998 at A4 (noting that these "28 Protestants will form a die-hard anti-agcord voice against proposals for relations with the Irish Republic."). Anti-Good Friday Unionists have a strong voice in the Reverend Ian Paisley and his Democratic Unionist Party, who may seek to block any attempts by the Assembly that they feel will "lead us closer to the Republic of Ireland." Ray Moseley, *Ulster Peace Factions Hail Vote as Setback for Hawks but Opposition Claims it has Blocking Power*, CHI. TRIB., June 28, 1998, at Sec. 1, p. 6, available in 1998 WL 2871108 (noting that Paisley's Democratic Unionist Party placed third in the Assembly elections). Such a policy could threaten the Good Friday peace process. Real power will shift from the British Parliament to the Northern Irish Assembly only if the Assembly establishes "several cross-border bodies with the Irish Republic." See Vanora Bennett, *New N. Ireland Assembly Chooses Protestant Leader*, LOS ANGELES TIMES, July 2, 1998 at A4 (noting that pro-Good Friday moderates have been elected to the two top positions in the new Assembly: David Trimble, a Protestant, was elected First Minister, while Seamus Mallon, a Catholic, was elected Deputy First Minister); *infra* note 100 and accompanying text (noting that Northern Irish Ministers must participate in the North-South Council).

100. See Good Friday, *supra* note 4, Strand Two, (2) (noting that participation in the Council is a required responsibility of Ministers in the administrations of the Republic of Ireland and in Northern Ireland).

101. See Good Friday, *supra* note 4, Strand Three (2) (describing membership for the British-Irish Council).

102. See Good Friday, *supra* note 4, Strand Three (6) (noting that individual members of the British-Irish Council may choose not to participate in common policies); *The Road to Peace*, *supra* note 92 (describing the three new political structures created by Good Friday).

103. See Good Friday, *supra* note 4, Constitutional Issues, Annex B, (providing the text of the amendments to the Articles 2 and 3 of the Irish Constitution). Under the amendments: (1) "it is the entitlement and birthright of every person born in the island of Ireland . . . to be part of the Irish nation;" and (2) "a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people...in both jurisdictions." See *id.*; *supra* notes 72-73 and accompanying text (noting that the unamended Articles 2 and 3 of the Irish Constitution made a territorial claim to sovereignty over all of Ireland).

(7) CIVIL AND ECONOMIC RIGHTS: Both the British and Irish Governments will initiate efforts to bolster civil and human rights.¹⁰⁶ Current standards of policing and justice will be reviewed.¹⁰⁷ In addition, Britain will implement policies designed to enhance economic prosperity within Northern Ireland, including policies to end discrimination and alleviate economic disparity.¹⁰⁸

III. The Viability of Good Friday

A. Good Friday's Efficacy

Good Friday represents a major step towards facilitating peace in Northern Ireland, but several obstacles have a potential to thwart any sustainable manifestation of peace and justice.¹⁰⁹ This section describes these systemic obstacles; Part IV will address the way these obstacles impact justice by evaluating the Sentences Act.

B. The Problem of Vagueness and Splintering

Good Friday contains one of the major flaws that plagued Downing Street: it is vaguely worded on some of the most contentious issues that stand in the way of reconciling the Loyalist and Republican populations.¹¹⁰ More importantly, these ambiguities can trigger disputes over implementation which lead paramilitary organizations to splinter into factions – with some factions willing to renounce violence, while other factions continue armed struggle in an effort to achieve their political objectives.¹¹¹ Ultimately, Good Friday must be judged by whether it ends sectarian violence in Ulster. Against this backdrop, Good Friday contains two provisions that may undermine the peace process: (1) the decommissioning of paramilitary organizations,¹¹² and (2) the release of paramilitary prisoners incarcerated for sectarian violence.¹¹³

104. See Good Friday, *supra* note 4, Prisoners (2) (noting that only prisoners affiliated to organizations maintaining a cease-fire will benefit from early release).

105. See Good Friday, *supra* note 4, Decommissioning (noting that paramilitary forces will be disarmed under procedures to be set forth by an Independent International Commission on Decommissioning); see *infra* text Part III: Viability (asserting that the vagueness of this provision may be an obstacle to the peace process).

106. See Good Friday, *supra* note 4, Rights Safeguards and Equality of Opportunity (describing (1) the intentions of the British Government to obligate public agencies to promote equality of opportunity in relation to religion and political opinion; (2) the plan to create a new Northern Ireland Human Rights Commission; and (3) the intention of the Irish Government to strengthen human rights and employment equality).

107. See Good Friday, *supra* note 4, Policing and Justice (noting that an independent Commission will recommend changes to current policing arrangements to achieve widespread community support).

108. See Good Friday, *supra* note 4, Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues, 1 (describing Britain's intention to pursue policies of "sustained economic growth and stability in Northern Ireland and for promoting social inclusion. . ."); see Good Friday, *supra* note 4, Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues, 2 (iii) (describing Britain's intention to strengthen anti-discrimination legislation).

109. Cf. *Northern Ireland: Ballois boxes and Armalites*, ECONOMIST, June 20, 1998, at 66, available in WL 11698729 (commenting that the referendum endorsing Good Friday furthered the peace process but that crucial steps remain to be taken, especially on the decommissioning of paramilitary organizations and the release of prisoners).

110. See Reid & Balz, *supra* note 7 (noting that Good Friday's vagueness creates the potential for conflict as different political actors seek to resolve contentious issues).

111. See Donfried, *supra* note 46, at 6 ("The major paramilitary groups...are observing cease-fires, but splinter groups continue to carry out acts of violence.").

112. See *supra* note 105 and accompanying text (describing decommissioning).

113. See Good Friday, *supra* note 4, Prisoners (describing paramilitary prisoner release).

C. The Decommissioning of Paramilitary Organizations

Good Friday mandates that paramilitary organizations are to be disarmed within two years of the referendums endorsing the agreement.¹¹⁴ The decommissioning of paramilitary organizations will take place under the guidance of the Independent International Commission on Decommissioning and the British and Irish Governments.¹¹⁵ In addition, members of the Northern Ireland Assembly can be removed from office for failing to live up to a pledge to show "commitment to non-violence and exclusively peaceful and democratic means[.]"¹¹⁶

Decommissioning poses two problems for the peace process: First, there are no clear standards for how decommissioning is to be conducted or evaluated.¹¹⁷ Since any system of disarmament entails some reliance on good-faith compliance by paramilitary organizations, there is no way to ensure that paramilitary organizations will turn in all their weapons.¹¹⁸ If a paramilitary organization splinters, some members may comply with decommissioning, while others secretly maintain their weapons.¹¹⁹

Second, paramilitary splintering poses special problems to political actors. If a commitment to peace is a prerequisite to office, candidates can distance their political parties from sectarian violence, while splinter groups continue to wage violence – with or without the open support of politicians who share their beliefs.¹²⁰ In addition, splintering opens the possibility that a politician committed to peaceful change may still be supported by paramilitary activists.¹²¹

114. See Good Friday, *supra* note 4, Decommissioning.

115. See *id.* Canadian Air Force Officer John de Chastelain manages the International Commission. See *IRA Political Wing Says Decommissioning Arms "Dead-End Issue,"* AGENCE FRANCE-PRESSE, May 25, 1998, available in 1998 WL 2288625 (describing Sinn Fein's initial rejection of attempts to reconstruct the decommissioning provisions of Good Friday, asserting that decommissioning "is not the issue. The issue is the document that we voted for on Friday. Let's not be pursuing dead-end issues." *Id.*); *U.K. Govt. Welcomes Signals of IRA Decommissioning*, (visited July 20, 1998) <<http://www.yahoo.co.uk/headlines/980716/news/900617640-0000013199.html>> (noting that de Chastelain doubted that decommissioning procedures would be initiated in the summer of 1998).

116. See Good Friday, Stand One, Democratic Institutions in Northern Ireland (describing the requirements for the Northern Ireland Assembly).

117. See Editorial, *Disarming in Northern Ireland*, WASH. POST, May 31, 1998, at 66, available in 1998 WL 11583471 (noting that no conditions or qualifications were inserted into the Good Friday provision to decommission paramilitary units to avoid weakening the mandate for peace).

118. See *e.g.*, Martin Fletcher and Nicholas Watt, *Unionists Welcome IRA Move on Arms*, LON. TIMES, June 18, 1998, at 25, available in 1998 WL 4840880 (noting that a high-ranking IRA prisoner believes "'voluntary' de-commissioning would be a natural development of the peace process once [the IRA has] a sense that the arrangements envisaged in the agreement are beginning to function." *Id.*). For a discussion of the problems stemming from reliance on good-faith decommissioning efforts, see "*IRA 'Ready to Hand Over Weapons,'*" available in 1998 WL 2321941 (stating that "The [British] [G]overnment sources conceded that the handover would raise questions about what proportion of the IRA's arsenal it represented. But [it] maintained that the important thing was that a gesture was made. We all know [the IRA] could hand over equipment and buy more the next day. But what is important is the symbolism of the action[.]").

119. See "*IRA 'Ready to Hand Over Weapons,'*" available in 1998 WL 2321941 (noting that Unionist distrust of Republican decommissioning has split Unionists into separate camps, some of whom would refrain from decommissioning as a result of their distrust).

120. For example, the Reverend Ian Paisley is a fierce Loyalist – and also a current Member of the Westminster Parliament. He has openly supported paramilitary violence by Loyalists against Republicans, frequently using his analysis of Protestant theology as a justification. It seems illogical to presume he would choose either (1) to remove himself from political power by refraining to represent his district in the Northern Ireland Assembly, or (2) To adopt a tolerant attitude toward a movement he has made a career of hating. See, *e.g.*, GALLIHER & L. DEGREEGORY, *supra* note 20 (analyzing Paisley's fanaticism).

121. Concededly, this can be immaterial to the obtainment of peace in Ulster. Which candidate a terrorist supports for the Assembly is not dispositive of whether the terrorist continues to engage in criminal acts. But the central point remains that – secretly – a terrorist may have a sympathetic ally in the Assembly.

D. The Release of Paramilitary Prisoners

Good Friday requires that both British and Irish governments implement procedures to release prisoners incarcerated for acts of sectarian violence.¹²² Within two years, each government will release prisoners affiliated with organizations that are maintaining a “complete and unequivocal cease-fire.”¹²³

Unionists are concerned that IRA prisoners will be released before the IRA decommissions its weapons.¹²⁴ Although the IRA recently announced a willingness to give up its weapons as a gesture of support for the peace process, there remains no way to ensure that all weapons are surrendered.¹²⁵ In addition, splintering continues to pose a systemic-level obstacle to peace: splinter factions of paramilitary organizations may try to maintain weapons, thereby allowing for only a partial decommission of the organization’s total arsenal.¹²⁶

The problems of decommissioning and prisoner release are exacerbated by the fact that Good Friday demands that the two issues cannot be linked in a diplomatic *quid pro quo*.¹²⁷

IV. Prisoner Release and Justice under Good Friday

A. The Northern Ireland Sentences Act

The British Government enacted the Sentences Act pursuant to its obligations under Good Friday.¹²⁸ Under the Act, “approximately four out of every five [paramilitary] prisoners who are currently serving sentences for [paramilitary] offenses will be released within two years[.]”¹²⁹ About half of these prisoners would have been released within a two-year time frame regardless of the Act.¹³⁰ Labour Party members passed the Act after

122. See Good Friday, Decommissioning.

123. *Id.*

124. See, e.g., “IRA ‘Ready to Hand Over Weapons,’” *supra* note 119 (describing Unionist mistrust of the IRA). Several incidents of paramilitary activity have occurred after Good Friday and its referendums, targeting both Republicans and Loyalists. This suggests that both Loyalists and Republicans may have cause for concern. See also John Mullen, *Ulster Crisis: More Troops Sent In*, LON. GUARDIAN, July 9, 1998, available in 1998 WL 3097684 (noting that Britain had to deploy 800 additional Royal Army troops to Northern Ireland in order to quell Loyalist paramilitary violence in July of 1998).

125. See “IRA Ready to Hand Over Weapons,” *supra* note 119 (noting that the IRA has easy access to weapons). If the IRA has easy access to weapons, it follows that at least some members would likely be able to obtain new weapons if they splintered from another portion of the IRA that sought to adhere to a cease-fire.

126. See *id.*

127. Conservatives in the Westminster Parliament were unsuccessful in their attempt to explicitly link the early release of paramilitary prisoners to decommissioning. See, e.g., Frank Millar, *Prisoner Release Order Carries Comfortably*, IRISH TIMES, Jul. 30, 1998, at 6 (“The [G]overnment victory came after a markedly bitter debate which heard a succession of Conservative and Unionist MPs condemn [the British Secretary for Northern Ireland’s] decision to proceed with the early-release scheme, in light of accumulating evidence of IRA involvement in...murder.”). Notably, however, Britain also passed legislation that makes it easier for the Government to convict terrorists. See Polly Newton, *New Bill Will Deal with “Evil Men who Seek to Wreck Peace,”* LONDON TIMES, Sept. 3, 1998, at 11 (noting that the Blair Government strongly endorsed the legislation). Prime Minister Blair said:

The aim of the [Omagh] bombers was not just to kill innocent people but was to strike at the heart of the peace process. The best response we can give is not therefore to abandon the Good Friday agreement but to carry it forward vigorously, to deny them the very objective they seek, and to continue to work for a better future for Northern Ireland that puts the past behind it.

Id. For a discussion of the Omagh bombing, see *infra* note 139 and accompanying text.

128. See, e.g., Millar, *supra* note 127, at 6 (describing Westminster’s passage of the Act).

129. Hansard, 29 Jun. 1998: Column 446, (visited Jul. 24, 1998) <<http://www.parliament.thestatione...ansrd/pdvn/lds98/text80629-04.htm>> (quoting Lorde Holme).

130. *Id.*

suppressing an attack by Conservative and Unionist Members of Parliament (“MPs”), who sought to make prisoner release expressly contingent upon decommissioning.¹³¹ Unionist dissent was summarized by one MP who speculated “[i]t is beginning to look as if the [Blair] [G]overnment is prepared to do anything Sinn Fein demands.”¹³²

The Sentences Act attempts to prevent violent paramilitary prisoners from receiving the benefits of early release. Any prerequisites for release mandate that any prisoner benefiting from the Act must: (1) have committed his offense before the announcement of Good Friday on April 10, 1998;¹³³ (2) not support terrorism;¹³⁴ (3) be unlikely to support a terrorist organization upon early release;¹³⁵ (4) not be a danger to the public;¹³⁶ and (5) must not be affiliated with any organization that is not “maintaining a complete and unequivocal cease-fire.”¹³⁷ In addition, the Act allows the Government to consider whether the paramilitary prisoner’s sponsoring organization is in compliance with any on-going decommissioning procedures (it may be useful to recall that Good Friday mandates that paramilitary decommissioning is designed to be a *process* that takes place under an international commission).¹³⁸ However, there are no objective criteria to link prisoner release with decommissioning.

Paramilitary violence has not ended in Northern Ireland. On August 15, 1998 (seven weeks after Good Friday was endorsed by popular referendum) disgruntled Republicans detonated a bomb in county Omagh, which resulted in “by far the worst casualties of any single bomb attack in [Ulster].”¹³⁹ The bomb was detonated by a paramilitary splinter group – the “Real IRA.”¹⁴⁰ Paramilitary splinter factions, such as the “Real IRA,” reject the cease-fire and continue “the slaughter of civilians...to place all dissident groups outside the terms of the peace process and to ensure a continuation of the armed struggle.”¹⁴¹ To hard-liners, old loyalties die slowly, even in the face of peace. One Nationalist remarked “look...[the bombers] are bastards, worse than that, much worse, but they’re our bastards.”¹⁴²

131. See Millar, *supra* note 127, at 6. When the House of Commons were considering the Sentences Act for final approval, the MPs supported or rejected the Act mindful of the fact that there was no link to decommissioning, and attempts to link the two issues were ultimately rejected. See *Draft Northern Ireland Arms Decommissioning Act 1997* (Amnesty Period) Order 1998 (visited Jul. 24, 1998) <<http://www.parliament.the-stationery-office.com/stand/deleg2/st980311s01.htm>> (“[D]ecommissioning. . . is a voluntary exercise. The Government have [sic] always recognised that. It is not in the Government’s gift to say when decommissioning will occur, but occur it must.” (quoting Mr. Adam Ingram, Minister of State, Northern Ireland Office)).

132. See Millar, *supra* note 127, at 6. The Blair Government had been facing criticism from Unionist and Conservative critics from the moment Good Friday was announced on April 10, 1998. To bolster public support for Good Friday in the referendum, Blair had offered pledges that prisoners would only be released if violence was “given up for good.” *Id.* See T.R. Reid & Dan Balz, *Blair Woos N. Ireland Protestants*, WASH. POST, May 21, 1998, at A39 (noting that Blair campaigned for the Good Friday in Northern Ireland by offering five handwritten pledges which were enlarged and displayed as posters reading “Prisoner[s] kept in unless violence is given up for good.”).

133. Northern Ireland (Sentences) Act, 1998 (U.K.), sec. 7(7)(a).

134. Northern Ireland (Sentences) Act, 1998 (U.K.), sec. 3(4).

135. Northern Ireland (Sentences) Act, 1998 (U.K.), sec. 3(5).

136. Northern Ireland (Sentences) Act, 1998 (U.K.), sec. 3(6).

137. Northern Ireland (Sentences) Act, 1998 (U.K.), sec. 8(a).

138. See *supra* notes 105 and 115 (analyzing Good Friday and decommissioning as a *process* towards achieving peace).

139. *The Omagh Bombing*, IRISH TIMES, Aug. 17, 1998, at 9, available in 1998 WL 13616578 (delineating the history of Ulster’s bloodiest bomb attacks).

140. *Id.* at 11, available in 1998 WL 13616589 (analyzing the formation of factions within the IRA).

141. *Id.*

142. Dick Walsh, *Opinion*, IRISH TIMES, Aug. 29, 1998, at 14, available in 1998 WL 13618627 (criticizing as counterproductive the hawkish backlash of Unionist politicians against the reemergence of sectarian violence).

Good Friday achieved popular support for the same reason the Sentences Act passed – paramilitary prisoner release was seen as a necessary step in the peace process.¹⁴³ The Omagh bombing suggests that Ulster's population is enduring the burden of peace – early prisoner release – yet peace is not at hand. In light of this development, it seems fair to address whether the citizenry of Northern Ireland receives justice under the Sentences Act.

B. The Utilitarian and Kantian Paradigms of Justice

Two distinct jurisprudential approaches to criminal law create useful lenses through which “justice” can be evaluated: (1) the Utilitarian paradigm and (2) the Kantian paradigm.

1. The Utilitarian Paradigm of Justice

The Utilitarian paradigm of justice predicates the state's right to punish the criminal on the social benefit gained by the deterring effect that punishment has on criminal activity.¹⁴⁴ In practical terms, a system of criminal punishment creates three social benefits: (1) the threat of punishment can deter the potential criminal from malignant acts; (2) the administration of punishment can rehabilitate the criminal, either by teaching him his act was wrong, or by forcing him to recognize that his misdeeds entail the loss of his liberty; and (3) the incarceration of the criminal prevents him from participating in criminal behavior during the duration of his confinement.¹⁴⁵

This deterrence rationale solidifies the notion that criminal punishments are a service to the state itself. As Professor H.L.A. Hart notes:

[T]he moral justification for punishment lies in its effects—in its contribution to the prevention of crime and the social readjustment of the criminal. It is essentially forward-looking: it considers the future good we can do to society including the crimi-

143. Prisoner release was the bitter pill swallowed by the British Lords who felt a mandate to protect British subjects from crime. The legislative history of the Sentences Act reveals as much:

I know that many noble Lords are uncomfortable with this legislation. I share that discomfort....Many people in Northern Ireland and Great Britain have suffered greatly at the hands of the terrorists, including some noble Lords who are here today. The security forces who have pursued the terrorists with vigour have also paid a high price over the years, in many cases with their lives. People have said that those who have committed such terrible crimes should not receive any special consideration at this time. I acknowledge and have sympathy for that sentiment, but it cannot be allowed to determine the issue. *The release of prisoners is part of the price to be paid for long-term peace in Northern Ireland.* That prisoners would be part of the settlement was recognised in the negotiations that led to the conclusion of the Good Friday Agreement.

Draft Appropriation (No. 2) (Northern Ireland) Order 1998 (visited Jul. 24, 1998) <<http://www.parliament.thestatione...stand/nirelg/st980702/80702s01.htm>> (quoting Lord Dubs) (emphasis added).

144. See Stanley I. Benn, *Punishment*, in JEFFRIE G. MURPHY, PUNISHMENT AND REHABILITATION 11 (1985) (analyzing various philosophical theories of criminal punishment). According to Benn's analysis of utilitarianism, “[p]unishment is only an unfortunate consequence of the fact that...threats, which are the true operative elements in the system, are partially ineffective and would be wholly ineffective if they were not carried out when they failed to deter.” *Id.* at 14.

145. See RICHARD B. BRANDT, *The Utilitarian Theory of Criminal Punishment*, in READINGS IN THE PHILOSOPHY OF LAW 315, 316 (John Arthur & William H. Shaw eds., 1993) (analyzing the traditional utilitarian theory of criminal law). See also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION 11-16 (J.H. Burns and H.L.A. Hart, eds. 1970) (1789) (providing a philosophical basis for the principle of happiness). The principle of happiness, also referred to as the principle of utility, can be summarized as “the greatest good of the greatest number.” See, e.g., SAMUEL STUMPF, PHILOSOPHY: HISTORY & PROBLEMS 335 (1983) (analyzing utilitarian philosophy in political and legal domains).

nal. . . . So, if what we do to him is to advance any rational social purpose, we must understand his crime; but it cannot by itself dictate the kind or severity of punishment.¹⁴⁶

Thus, punishment is justified by deterrence. As a logical consequence it follows that it can be just to forgo or commute the criminal's punishment when either (1) punishment will not provide a deterrent to criminal activity, or (2) the utility of deterring future crime is outweighed by another more compelling social gain. In either case, the normal imposition of criminal sanctions is nullified by the invalidation of its presumed consequence: an increase in social utility.

From a societal perspective, the Utilitarian paradigm's primary value is that it prioritizes social utility, with criminal punishment following as a means to this end. Structurally, this would seem to maximize social welfare.

2. The Kantian Paradigm of Justice

In contrast to the utilitarian approach, Immanuel Kant presented a theory of criminal punishment predicated on the "metaphysical" elements of justice, independent of any utilitarian rationale.¹⁴⁷ Frequently referred to as a "retributivist,"¹⁴⁸ this approach counters the utilitarian rationale: criminal punishment exists to "guarantee that criminals will get their just deserts, even in cases where this would be clearly disutilitarian."¹⁴⁹ As

146. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 159-60 (1968) (presenting a positivist and utilitarian to criminal punishment).

147. "Metaphysics" can be an ambiguous term. Two definitions may help clarify its meaning. "Metaphysics" can be defined as the branch of philosophy that examines the nature of reality and the relationship between mind and matter. See AMERICAN HERITAGE DICTIONARY 1134 (3d ed. 1996). It can also be defined as the branch of philosophy concerned with the question of the ultimate nature of reality . . . going:

beyond particular things to inquire about more general questions such as what lies beyond nature, how things come into being, what it means for something to be, and whether there is a realm of being which is not subject to change and which is therefore the basis of certainty in knowledge.

STUMPF, *supra* note 145, at G-3 (1983).

Kant entitles one of his pieces "The Metaphysical Elements of Justice," which conveys that he seeks to discern the elements of justice as they exist in a manifestation of reality outside of human experience. For a normative explanation of "metaphysics" from a primary source, see IMMANUEL KANT, CRITIQUE OF PURE REASON 54-55 (Norman Kemp Smith trans., Macmillan & Co. St. Martin's Press Inc. 1933) (1781). In his work, Kant states:

[E]ven if we look upon [metaphysics] as having hitherto failed in all its endeavours, [it] is yet, owing to the nature of human reason, a quite indispensable science, and ought to contain a priori synthetic knowledge. For its business is not merely to analyse concepts which we make for ourselves a priori of things, and thereby to clarify them analytically, but to extend our a priori knowledge. And for this purpose we must employ principles which add to the given concept something that was not contained in it, and through a priori synthetic judgments venture out so far that experience is quite unable to follow us, as for instance, in the proposition, that the world must have a first beginning, and such like. Thus metaphysics consists, at least in intention, entirely of a priori synthetic propositions.

Id. See also, Stumpf, *supra* note 145, at 294-95 (describing Kant's analysis of judgments as Synthetic a Priori, meaning judgements in which the "predicate is not contained in the subject," (synthetic) and in which meaning is not dependent upon "experience of any particular cases or events since they are independent of any observations." (a priori)). Kant's quandary was to determine how a judgment can rely on external predicates and simultaneously have meaning independent of specific cases. He reconciled this paradox by hypothesizing that "objects . . . conform to the operation of the mind, not the other way around." *Id.* at 297.

148. JEFFRIE MURPHY AND JULES COLEMAN, *Crime and Punishment*, in LAW AND JUSTICE 472, 483 (Dale A. Nance ed., 1994) (contrasting the utilitarian and Kantian approaches to criminal justice).

149. *Id.* at 486. The fact that Kant's retributivist approach posits that criminal punishment is justified on grounds independent of any social utility also leads to the conclusion that criminal punishment can (and must) exist even when the pursuit of social utility is suspended:

Kant asserts:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for society, but instead it must in all cases be imposed on a person solely on the ground that he has committed a crime; for a human being can never be confused with the objects of the law of things...he must first be found to be deserving of punishment before any consideration can be given to the utility of this punishment for himself or his fellow citizens.¹⁵⁰

It is important to emphasize that this approach is not vindictive.¹⁵¹ Rather, it is a manifestation of reverence to law. Notably, Kant argues that the concept of "law," and presumably reverence to it, is good in and of itself.¹⁵² The criminal's punishment can be justified even to the criminal, if he is rational, since his punishment comports with the law, a pre-eminent good, rather than with any less compelling social gain of deterrence.¹⁵³

C. Jurisprudential Analysis of the Act

Thus far, the Sentences Act has failed to achieve justice under either the Utilitarian or the Kantian paradigms. This assessment must be qualified by the fact that the Utilitarian paradigm allows for the possible validation of the Sentences Act. Specifically, the Utilitarian paradigm suggests an on-going calculation of net social utility.¹⁵⁴ Conse-

Even if civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Id. at 483 (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, trans. John Ladd (Indianapolis, Bobbs-Merrill 1965), 99-106.

150. J.G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 75 (1979) (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*).

151. See Murphy and Coleman, *supra* note 148, at 483.

152. See, e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 69 (H.J. Paton trans., Barnes & Nobles, Inc. 1963) ("[N]othing but the *idea of the law* in itself . . . can constitute that pre-eminent good which we call moral[.]").

153. One interpretation of the Kantian paradigm is that it does not seek to justify punishment in the same way the Utilitarian paradigm does. Instead, it sets forth an explanation of punishment as a good in and of itself. Consequently, it denies that punishment needs a justification. See Benn, *supra* note 144, at 10 (analyzing retributivist theories of punishment). Of course, this does not preclude Kantian arguments emphasizing the benefits of retributivism. The Kantian can argue that retributivism facilitates moral rehabilitation:

Because it was associated with shame and rejection, punishment could bring the criminal up short and force him to reconsider his life in the light of society's condemnation of his actions. But the remorse which was a necessary condition for self-reformation was entirely dependent on the criminal's recognition that his punishment was deserved. Without that there could be no inward reformation, no reassertion of moral standards, but only a sense of resentment and injustice. Accordingly, punishment can yield the benefits of reform only if it is thought of . . . as retributive.

Benn, *supra* note 144, at 19.

It follows that the Kantian paradigm presumes the punished criminal must be deemed guilty of the crime for which he is punished. The guilt requirement is not a prerequisite to the Utilitarian paradigm, in that society may enjoy a social gain of reduced crime by punishing the innocent along with guilty, to bolster the harshness of criminal justice and thereby bolster its deterrent effect. See Murphy and Coleman, *supra* note 148, at 484-85 (analyzing the guilt requirement under the Kantian paradigm).

154. The fact that utilitarianism suggests a continuing calculation of the social utility is derived from the fact that criminal punishment stems from utilitarianism's "forward-looking" outlook. There are a series of litmus tests the Utilitarian must ask in evaluating the efficacy of government-induced punishment:

quently, if Ulster eventually reaches a point when it collectively gains more utility (in the form of peace) than it loses (in the form of lost deterrence to paramilitary activists) the Sentences Act is validated.¹⁵⁵ In light of the attack on Omagh, this validation may be distant and overly optimistic in the short term; the long-term consequences remain to be seen.

Under a Kantian paradigm, two problems stem from the Sentences Act. First, the Sentences Act releases paramilitary criminals pursuant to the democratic will. As such, it is a *prima facie* violation of Kant's premise that "justice" has a metaphysical construction that exists independently of anything as decidedly synthetic and non-metaphysical as the democratic will.

Second, the Kantian, still smarting from the fact that his construction of metaphysical justice has been rejected, must now also accept two bitter pills: (1) the paramilitary criminal escapes his 'just deserts' because society decides this is a necessary price to pay to achieve the anti-Kantian goal of enhancing social utility by, let us say, ending paramilitary violence and bringing peace to Ulster,¹⁵⁶ and (2) after Omagh, it is evident that the paramilitary criminal's release fails to achieve the proffered anti-Kantian goal of enhancing social utility in Ulster by ending paramilitary activity. Sadly, the Kantian proves his case by emphasizing the fact that Omagh was one of the worst manifestations of sectarian violence in the modern history of the Troubles. Ulsterians, riving in the aftershock, can hardly be deemed to be enjoying an enhanced social utility of peace.¹⁵⁷

From the Utilitarian paradigm, two problems stem from the Sentences Act. First, the Sentences Act undermines the deterrent effect of criminal punishment.¹⁵⁸ The would-be paramilitary criminal can now look to the fact that incarcerated criminals, through their political allies at the diplomatic bargaining table, are able to escape full liability under the criminal legal system. Although the Sentences Act does not apply to paramilitary activists who commit their offense after April 10, 1998, the paramilitary actors who committed their offense(s) before this date have escaped full criminal liability because citizens decided that early prisoner release was a fair price to pay to end sectarian vio-

Will punishing this person bring about more good than bad consequences for society as a whole? That is will it deter, incapacitate, or reform? If so, will this result in benefits sufficient to outweigh the misery that punishment will cause? If the answer is *no*, then we should not punish even if, in some obscure sense, the criminal "deserves" it; for this would be productive of no useful consequences.

MURPHY, *Introduction*, *supra* note 144, at 7.

155. The Irish Republic's Taoiseach (Prime Minister) Bertie Ahern expressed this sentiment insofar as he envisioned that Good Friday would be a catalyst that would convince paramilitary activists to turn to peaceful means of political change. See Robert P. Connolly, *Ireland Here & There*, BOSTON HERALD, May 24, 1998, at 2, available in 1998 WL 7346201 (expressing the pre-referendum support for Good Friday).

156. As one British Lord noted during the legislative deliberations on the Sentences Act, "[w]e cannot will the ends of the Good Friday Agreement without willing the means. . . . We cannot have the agreement without [the Sentences Act]." *Hansard*, *supra* note 129 (quoting Lord Holme of Cheltenham).

157. The Kantian viewpoint was reflected in the attitude of the Conservative MPs who voted against the Act while it was being debated in the House of Commons and the House of Lords. Conservatives felt that the Act thwarted justice and did little to enhance a long-term end to sectarian strife:

I oppose this Bill for the violence it does to the concept of justice. This Bill gives special treatment to political criminals. I speak for the victims of these criminals who have shown no repentance, no contrition. The victims of the past would not wish to stand in the way if it will mean that there will be no more victims. But there can be no lasting peace without justice.

James Landale, *Tebbit in Attack on 'Victory for Bullet'*, LONDON TIMES, Jun. 30, 1998, at 8, available in 1998 WL 4844987 (quoting Lord Tebbit).

158. This is a weighty problem for the Utilitarian, since "deterrence has always been the mainstay of the utilitarian position," even beyond other social goals of either incapacitating or reforming criminals. See Murphy and Coleman, *supra* note 148, at 481 (analyzing deterrence as an asset of the Utilitarian paradigm).

lence. Thus, the would-be paramilitary criminal now recognizes that as long as paramilitary violence continues, paramilitary activists will always have a bargaining chip that they can present to a society that craves peace: Free my comrades and I'll cease violence.¹⁵⁹ This reduces the deterrent effect of incarcerating paramilitary activists.¹⁶⁰

Second, Ulster has not gained more utility than it had before abandoning deterrence. Omagh suggests that Ulster has paid the price for peace – it has taken the difficult but necessary step of reconciling incarcerated paramilitary prisoners – without gaining even a small reduction in its level of paramilitary violence. The Sentencing Act appears to beguile constructions of utilitarian and Kantian justice. While there appears to be no way to reconcile the Sentencing Act with the Kantian paradigm, the Utilitarian paradigm's focus on deterrence or other forms of social utility allows for the possibility of utilitarian justice.

The Sentencing Act's nullification of utilitarianism's criminal deterrence may be salvaged by the societal rejection of paramilitary violence as a means to achieve political objectives. Ulster's referendum to endorse Good Friday and release paramilitary prisoners may result in the marginalization of paramilitary activists. Before the referendum, Ulster's cultural identity had not been democratically resolved. In addition, Nationalists felt the British presence in Ireland was illegitimate. Consequently, Britain's imposition of criminal sanctions for Republican paramilitary activity was illegitimate as well. In short, the wellspring of justice – the state – was the source of injustice, rather than the remedy.

The referendums alter this dynamic. Ulster's identity has now been democratically resolved: Ulster retains political ties to Britain with wide latitude to govern itself through the new Assembly. As a consequence, the state is now legitimate, and therefore the justification for sectarian violence is nullified. Of course, nullifying the justification only applies to Republican paramilitary activity. Theoretically, this should be sufficient to nullify the justification for all sectarian violence. Republican violence can no longer exist because the state is legitimate. Britain's continued presence in Ulster is a consequence of the democratic will, rather than British imperialism. If Republican violence is now illegitimate, the Loyalist violence it triggered is now illegitimate as well. Thus, the legitimization of the state, and the corresponding legitimization of criminal sanctions for sectarian violence, trigger the following result: neither side has a viable justification to continue with sectarian violence. Both Republicans and Loyalists are now "relegated" to political avenues for change. As a result, paramilitary activists are marginalized because

159. Reverend Ian Paisley feared the consequences of Good Friday for this reason. In addressing the release of paramilitary prisoners he asks, "what happens then? Then you get a gun on your head again, and the IRA says, 'We want something more.'" *Northern Ireland Secretary Mo Mowlam*, ASSOCIATED PRESS, Jun. 10, 1998, available in 1998 WL 6679373. This sentiment is partially justified. Some Nationalists have been hesitant to rush to decommissioning. See Honore, *supra* note 6 (noting that Nationalists feel that they "want to know [the IRA] still has some guns around the place...you never know how things will turn out here.").

160. It is hard to criticize the logic behind the idea that "[t]he people of Northern Ireland do not accept the bona fides of terrorists." Rachel Donnelly, *Tories Vote Against Bill on Prisoner Releases*, IRISH TIMES, Jun. 10, 1998, at 8 available in 1998 WL 6248060 (describing the Conservative MPs in Westminster who voted against the Sentences Act). Although many citizens of Ulster endorsed Good Friday, it is easy to understand why victims (typically Unionist) of sectarian violence have been skeptical of claims from paramilitaries that paramilitary prisoners no longer pose a threat to society.

161. See, e.g., JOHNSON, *supra* note 1, at 147 ("[G]uerrilla warfare basically derives from the masses and is supported by them, it can neither exist nor flourish if it separates itself from their sympathies and cooperation." *Id.* (quoting Mao Tsetung)). As a normative model, we hope Tsetung's statement is true for two reasons. First, it suggests the possibility that peace will be at hand once the community supporting terrorism receives justice. This allows us to assume terrorism is a malignancy that can be cured when the state offers the proper remedy. Second, perhaps sub-consciously, it allows us to reconcile the tragedy of terrorism with the belief that, though tragic, these steps were supported by a community that was acting to keep the government in check.

terrorist organizations are dependent upon popular support to survive.¹⁶¹ Thus, now that Ulster's citizens have paid the "price" for ending sectarian violence, they may now demand the product.¹⁶²

In addition, the degree to which utilitarianism's criminal deterrence is nullified under the Sentencing Act is proportional to the political bargaining power that paramilitaries have in Ulster. If potential paramilitary activists construe the Sentencing Act to suggest that incarcerated activists are released when they have political allies who can bargain for their release (completely nullifying deterrence), it follows that deterrence remains intact when paramilitary activists lose their political allies, or when their political allies lose their power at the bargaining table. Thankfully, Omagh suggests that the bargaining power of paramilitaries is in fast decline.¹⁶³ Conceivably, the deaths from Omagh may trigger a backlash in the law-abiding but previously paramilitary-supporting

Johnson notes that terrorist groups such as the IRA are so reliant on terrorism as a means to their political ends that they have little chance of ever exercising legitimate authority:

[O]ne wonders whether the . . . IRA, . . . would ever be able to overcome the heritage of their own past and exercise genuine political authority A social system in equilibrium is a moral community, one based on mutual trust and on values that define roles and legitimate a division of labor. Political terrorism is a form of tyranny, not something to which people can become accustomed and thereby orient their own behavior. Can revolutionary terrorists abandon their own earlier activities? More to the point, can citizens of a regime dominated by ex-terrorists fail to repeat Cassius's question: "Upon what meat doth this our Caesar feed that he is grown so great?" Political terrorism, in short, is as likely to cause a revolution against those who use it as it is to serve them.

Id. at 168.

While Johnson may be right to assume that "the IRA" will be unable to abandon violence once it achieves power, he ignores that legitimate governments rely on force to maintain authority. The central question is whether the polity supports the legitimacy of the government, and therefore the government's right to force as an instrumentality of order, peace, and security. In Ulster, neither side has clean hands. Both Unionist and Loyalist political factions have killed innocent civilians, and many Republicans would extend this indictment to the British government as well. The fact that a state actor – Britain – has used the coercive power inherent in its authority to perpetuate order and punish criminality furthers justice; but it furthers justice not because it punishes the violent act, but because the majority of the community supports the use of state power to punish the violent act.

162. Of course, this argument does not address the fact that paramilitary activists may simply continue to operate without any popular basis for their activity. They could choose to simply be disgruntled regardless of their waning support in the population. But if this is the case, paramilitary activity is no longer political crime, its simply crime based on a malignant *mens rea*. By definition, this crime exists without popular support in almost all societies. Once popular support is gone, the structural base of sectarian violence is gone. The optimistic hope is that the lack of popular support will end Ulster's structural political problem, which should at least reduce the actual amount of sectarian violence Ulster endures.

163. Ireland's Taoiseach (Prime Minister) Ahern said that Ireland is ready to "crush" the paramilitary campaign of splinter groups such as the 'Real IRA'. His opposition in the Dail (the Irish parliament) "called for an all-Ireland security initiative and said those responsible for the bombing were addicted to violence and had no place in a civilised society." Michael O'Regan, *Those Behind Bombing 'Addicted to Violence,'* IRISH TIMES, Aug. 17, 1998, at 11. The fact that opposing political parties in Ireland are united in their denunciation of paramilitary splinter violence suggests that it has the popular support to take stringent efforts at countering paramilitary violence. In addition, Britain recently passed anti-terrorist legislation designed to counter any attempts to thwart the peace process. See Newton, *supra* note 127 (describing British Prime Minister Blair's support for the anti-terrorist legislation). If these political trends continue, it suggests that political leaders may begin to turn a deaf ear to the arguments of paramilitary actors. Furthermore, an earlier episode of post-Good Friday paramilitary violence resulted in the death of three small boys. Their house had been fire-bombed by Loyalists because their mother was in a "mixed" relationship – she was co-habiting with a Catholic man. The mother and one of her four sons survived. The polity was so riveted by the event that the responsible terrorists were marginalized; one commentator noted: "even members of whatever religious community or political group those responsible may belong to will be unlikely to protect them." T.R. Reid, *Tiny Coffins in N. Ireland,* WASH. POST, Jul. 15, 1998, at A22 (describing the attack).

community.¹⁶⁴ The referendum endorsing Good Friday suggests that Ulster is becoming exhausted by paramilitary violence and increasingly intolerant of sectarian violence that now exists *in violation of a democratic mandate for the provisions of Good Friday*.

In addition, the Utilitarian paradigm utilizes a valuation of the net change in societal utility to evaluate the Sentencing Act.¹⁶⁵ The Sentencing Act could conceivably fail to increase social utility on its own terms. However, this does not eradicate the possibility that early prisoner release may be part of a long-term process whose final stage will pacify paramilitary violence, creating a net increase in social utility. Admittedly, this does little to salve the wound of Omagh. But it does not need to. The Sentencing Act applies to paramilitary activists convicted before the announcement of Good Friday.¹⁶⁶ Only *those* criminals were released. Ulster may justifiably maintain or even increase the criminal sanctions against post-Good Friday paramilitary activity in order to comply with the democratic mandate for peaceful political change.

V. Conclusion

Justice without force is impotent;
Force without justice is tyranny.¹⁶⁷

To many who revere the rule of law, the Sentences Act was a disillusioning example of legitimate government catering to terrorists. On the floor of the House of Lords, Lord Tebbit lamented the Sentencing Act, saying “[t]here can be no peace without justice and [the Sentences Act] reeks and stinks of injustice.” It is easy to understand his sentiments. Releasing incarcerated terrorists because free terrorists demand it does little to perpetuate standard constructions of justice under the law. Simultaneously, this assessment is tempered by the fact that prisoner release was approved by the society victimized by sectarian violence. These voters believed what Sinn Fein President Gerry Adams had told them: “[p]art of a peace settlement has to involve the release of all of the prisoners.”¹⁶⁸

Justice lies in eye of the observer. While Immanuel Kant might have envisioned a definition of justice that could exist independent of human observance, communities cannot be pressed to comport their decisions with Kant’s metaphysical notion of justice above their own. Ulsterians have chosen to release prisoners that would have faced a death sentence in many parts of the world. While it is hard for an outside observer to view this release as being a healthy or judicial choice, it is equally hard for an outside observer to imagine life in a society riddled with sectarian violence. The Sentences Act flies in the face of standard constructions of justice, but the standard paradigm is invalid in Northern Ireland: throughout most of the Troubles, criminal punishment in Northern Ireland was seen by many as part of the oppression that causes the violence, rather than part of the cure. Ulster’s acceptance of Good Friday and prisoner release reveals the majority’s will to endure steps it deems necessary to initiate peace because these steps legitimize the exercise of government authority and criminal sanctions. The cure begins

164. Mr. Blair emphasized the fact that post-Good Friday paramilitary activity now exists in contravention of the democratic will. *See id.* (“[Good Friday] had been endorsed by people, North and South, and it had to be implemented. A small, fanatical, unrepresentative group could not be allowed to wreck the future of the people of Northern Ireland.”).

165. *See* BENTHAM, *supra* note 145 (describing utilitarian methodology of evaluating policy).

166. *See* Northern Ireland (Sentences) Act, *supra* note 133 (stating prerequisites of a prisoner’s release).

167. Margaret Miner and Hugh Rawson, *THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS* 164 (1993). (quoting Pascal).

168. T.R. Reid and Dan Balz, *supra* note 132, at A39.

to counter the disease, rather than exacerbate its symptoms. In this context, the primary gain from the Sentences Act is that the state's imposition of criminal sanctions is legitimized in the eyes of all Ulsterians. Once state authority is legitimate, the Sentences Act, rather than paramilitary activity, becomes the ascendant instrumentality of justice.

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* A.B., University of California at Berkeley, 1995; Juris Doctor Candidate, the College of William and Mary School of Law, 2000. I would like to thank my friends, family, and Professor Dickerson of the College of William and Mary School of Law for their encouragement throughout this project. This Note is dedicated to my grandmother, Mary Linn, a daughter of Omagh.