The Legality of the Pardoning of Paramilitaries under the Early Release Provisions of Northern Ireland’s Good Friday Agreement

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The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement

Daniel F. Mulvihill*

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34 Cornell Int'l L.J. 227 (2001)
Introduction

On April 10, 1998, Irish and British participants signed the Agreement Reached in the Multi-Party Negotiations (Good Friday Agreement or Agreement) in Belfast, Northern Ireland, establishing a new framework for peace and democracy in that beleaguered area. The Good Friday Agreement established the democratically elected Northern Ireland Assembly, an executive and legislative authority that would give the province a home-rule government to represent both the pro-British, Protestant majority and the Catholic minority. Almost three years later, however, the peace process remains incomplete, and many of the promises of the Good Friday Agreement are still unfulfilled. Decommissioning, or the surrender of paramilitary arsenals, has occurred only minimally. Without further movement in this area, the power-sharing agreement could be curtailed, or even scuttled completely, resulting in a restoration of direct rule by London.

One of the most controversial aspects of the Good Friday Agreement is the provision for the early release of prisoners convicted of offenses related to the political problems of Northern Ireland. This provision was so heavily debated that it threatened the continued existence of the Good Friday Agreement. Under this provision, convicted members of paramilitary organizations were eligible for release if their respective organizations “established or ... maintain[ed] a complete and unequivocal ceasefire” as defined by the Good Friday Agreement. Over 400 prisoners, both nationalist and unionist, obtained their release through this provision, despite

1. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Good Friday Agreement]. The Good Friday Agreement is also commonly referred to as the Belfast Agreement.
4. Good Friday Agreement, supra note 1, Prisoners, ¶ 2, 37 I.L.M. at 774.
5. Paramilitary organizations in Northern Ireland are either loyalist (Protestant) or republican (Catholic). The Irish Republican Army (IRA) has led republican violence since the creation of a separate Northern Irish State in 1920. The IRA has long held the belief that the British government split Ireland against the wishes of a majority of its people. The goal of the IRA has been to end British “occupation” of Northern Ireland and to bring about a United Ireland. Brian Gormally et al., Criminal Justice in a Divided Society: Northern Ireland Prisons, in 17 CRIME AND JUSTICE 51, 59-61 (Michael Tonry ed., 1993). The Irish National Liberation Party (INLA) and the Continuity Army Council of the IRA (Continuity IRA) are other republican organizations that were formed by dissatisfied IRA members. See MICHAEL VON TANGEN PAGE, PRISONS, PEACE AND TERRORISM 51-52 (1998). The two main loyalist organizations are the Ulster Defense Association (UDA) and the Ulster Volunteer Force (UVF). Loyalists, also known as Unionists, support Northern Ireland’s place in the United Kingdom, yet sometimes have committed crimes against the state when they deemed it within their interests. Gormally et al., supra, at 90. Loyalists, however, see their actions as defensive measures taken in response to republican violence. See id. at 64. Other loyalist paramilitary organizations include the Ulster Freedom Fighters (UFF) (a sister organization of the UDA) and the Loyalist Volunteer Force (LVF). John Mullin, Terrorist Mastermind Freed from the Maze,
the fact that few other provisions of the Good Friday Agreement have been implemented.\textsuperscript{7} While the early release provisions of the agreement, which are a concession to the paramilitary organizations, are followed faithfully, there is little progress in the decommissioning of arms, as required by the agreement.\textsuperscript{8} In 1998 opponents of the Good Friday Agreement questioned the logic behind the early release provision because it was uncertain whether the ceasefire would last, and suggested that releases should only occur when it became clear that peace was permanent.\textsuperscript{9} Three years later peace in Northern Ireland remains uncertain, and thus the reintroduction of dangerous players to this fragile landscape could have dire consequences.

This Note questions the legality and prudence of the early release provisions of the Good Friday Agreement at such a crucial moment in the history of Northern Ireland. Part I summarizes the history of the conflict in Northern Ireland and explores the pattern of periodic internment and release of paramilitaries during "The Troubles,"\textsuperscript{10} as well as the British government's attempt to criminalize paramilitary activity in the 1980s. Part II describes the Good Friday Agreement and the early release process. Part III analyzes the legality of the early release scheme in light of customary law regarding political violence and examines the philosophical aspects of pardons, their advantages, and disadvantages. Part IV discusses recent events threatening the Good Friday Agreement and questions the logic behind the release of some of Northern Ireland's most dangerous terrorists at a time when paramilitary organizations have yet to demonstrate wholehearted support for the peace process. Finally, this Note concludes that although the early release provisions were a political necessity, there was little precedent for these provisions in international law, and the releases significantly endanger peace in Northern Ireland.


\textsuperscript{9}Morning View: Release of Prisoners Put in Doubt, BELFAST NEWS LETTER, Jan. 12, 2000, at 8; see also Woodcock, supra note 8.

I. A History of Internment and Release in 20th Century Ireland

A. Internment

The practice of releasing political prisoners has played an important role in the Anglo-Irish conflict of the twentieth century, both north and south of the border. Following the Easter Rebellion of 1916, the British government agreed to release all of the Irish rebels who were still imprisoned in England, even those serving life sentences. After the Anglo-Irish War and partition of the island in 1920-21, a civil war raged in the Irish Free State between those who supported the Articles of Agreement for a Treaty between Great Britain and Ireland, and those who did not. The Indemnity (British Military) Act of 1924 absolved all parties at the conclusion of the civil war, releasing anti-treaty Irish Republican Army (IRA) prisoners.

In April 1922, the Northern Ireland Parliament passed the Civil Authorities (Special Powers) Act in response to sectarian violence in Belfast. The Special Powers Act conferred onto the Minister of Home Affairs the power to "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order." In effect, the Special Powers Act allowed for internment, the indefinite jailing of anyone who threatened the government, without charge or trial. By 1924, however, IRA violence in the North had abated, and all internees were released.

An outbreak of IRA violence in 1938 led to another period of internment in both the South and the North. The Irish government declared a state of emergency in order to deal with the violence and the beginning of World War II. The Northern Ireland government also re-introduced internment in December 1938, a policy which lasted until 1946. Both governments released their internees following the war, although the Northern Ireland government conditioned the release of politically motivated prisoners on their promise to refrain from violence.

The IRA triggered another period of internment when it launched its 1956 "Border Campaign." The Irish government instituted internment in July 1957, but released many of its prisoners by March 1959. Others, however, stood trial and were sentenced; the Irish government did not release these prisoners until after the IRA announced its ceasefire, in Feb-

12. Id. at 348-49.
15. Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 6, c. 5, § 1(1) (N. Ir.).
16. FARRELL, supra note 14, at 93-94.
17. McEvoy, supra note 13, at 1546.
18. Id. at 1544; see also JOSEPH J. LEE, IRELAND 1912-1985: POLITICS AND SOCIETY 223 (1989).
19. FARRELL, supra note 14, at 94.
21. Id. at 1547.
22. The Irish Free State left the British Commonwealth in 1949, renaming itself the Republic of Ireland, or Éire. VON TANGEN PAGE, supra note 5, at 49.
23. McEvoy, supra note 13, at 1545.
ruary 1962. The Northern Ireland government also implemented internment procedures in December 1956, which lasted until 1961. As in the South, the Northern Ireland government released internees, as well as some sentenced prisoners, upon the IRA's ceasefire, again conditioning the release upon a renunciation of violence.

B. Special Category Status

The escalation of sectarian violence at the outset of the Troubles in the late 1960s changed the way the British government dealt with politically motivated offenders. By August 1971, Official IRA and Provisional IRA violence was out of control, and the British government, fearing a substantial Protestant backlash, was forced to implement internment procedures. The Northern Ireland government again implemented internment under the authority of the Special Powers Act, and again allowed the executive to bypass the courts and permit the police to arrest any person whom they believed to be a member of a paramilitary organization. Violence was so widespread by this point, however, that internment proved to be ineffective, if not counter-effective. The government held a large number of internees in prisoner of war-like camps; it held those actually sentenced (without juries) of schedule crimes in compounds, or "cages," segregated by paramilitary affiliations. The prisoners convicted of scheduled terrorist-type crimes were given "special category status," a de facto prisoner of

24. Farrell, supra note 14, at 94.
25. Within eighteen months of the end of the Border Campaign, the North released all republican prisoners sentenced for criminal offenses during the campaign on the belief that it was "unfair to continue their imprisonment while their comrades were quietly released." Trimble, supra note 3, at 1165.
26. McEvoy, supra note 13, at 1547.
27. The IRA commenced its modern campaign in August 1970 by killing two RUC officers with a car bomb. Conor Gearty, Terror 118 (1991). In February 1971, the IRA added the newly-arrived British Army to its list of targets by killing a soldier with a machine gun. Bew & Gillespie, supra note 10, at 32.
28. On December 28, 1969, dissenting members of the IRA announced the formation of the IRA Provisional Army Council in response to the IRA's decision to recognize the Ulster Parliament and its apparent failure to protect Belfast Catholics during the early years of the Troubles. This new faction has historically been referred to as the Provisional IRA, while the original members were referred to as the Official IRA. Bew & Gillespie, supra note 10, at 24. By 1972, however, the Official IRA had decided to end its campaign of violence "as it increasingly felt that it was more important to unite the working class in Ireland rather than deal with the issue of the [partition]." von Tangen Page, supra note 5, at 51. After the Official IRA completely ceased its violent activities, remaining hard-liners left to form the Irish National Liberation Army (INLA). Id. For purposes of clarity, any references to the IRA herein refer to the Provisional IRA.
30. von Tangen Page, supra note 5, at 54.
31. Gormally et al., supra note 5, at 73.
32. Id. at 72-73. Internes, or "suspected terrorists," could only be held for 28 days. The purpose of internment during this period was to hold suspected members of the IRA where they could not do any harm, and to gain information about the organization.
33. Id. at 70-71; von Tangen Page, supra note 5, at 57.
34. "Scheduled offenses . . . included murder, manslaughter, serious offenses against the person, arson, malicious damage, riot, offenses under the Firearms Act
Neither of these procedures matched the control and discipline associated with traditional prisons, and, as a result, the government had no control over the prisoners inside. Prisoners were held apart from prisoners of opposing paramilitary organizations. However, they could freely associate with members of their own organizations, and, as a result, continued to participate in paramilitary training and strategy.

C. Criminalization

By 1974, the British government had given up on internment and special category status. A committee set up to review the government’s effectiveness regarding terrorism recommended, in 1975, that prisoners convicted of terrorist acts should be treated as ordinary criminals, and not be awarded special category status. The British government adopted this policy at the same time that it reduced the role of the army in favor of strengthening the police. The government gave a cut-off date of March 1, 1976, after which anyone found guilty of a terrorist crime would be considered a “normal criminal.” Both nationalist and loyalist prisoners objected to the new policy. Enforcement of prison rules, the wearing of prison uniforms, and compulsory prison work were among the policies designed to demoralize the paramilitaries. This shift in policy demonstrated the British government’s intention to portray the situation not as a political crisis, but as one of law and order. It also marked the end of the internment and release era.

D. Post-Criminalization

Criminalization did not last. On March 1, 1981, the fifth anniversary of the ending of the special status, IRA prisoner Bobby Sands began a hunger strike in the Maze prison. Sands’s hunger strike, and the hunger strikes

(Northern Ireland) of 1969 and the Explosives Substances Act of 1883, robbery and aggravated burglary, intimidation, membership of proscribed organizations, and collecting information likely to be of use to terrorists.” Gormally et al., supra note 5, at 75 n.6.

35. Id. at 70. There are five prisons in Northern Ireland: Crumlin Road, the Maze, Maghaberry, Magilligan, and the Young Offenders Centre. The Maze Prison, formerly known as Long Kesh, is the main prison for paramilitary offenders. Inside the Maze, the segregated organizations elected commanding officers and established command structures, which were generally recognized by the authorities. Id. at 53-55.

36. von Tangen Page, supra note 5, at 58 (“Life behind the wire was comparatively relaxed; indeed, the republican prisoners would sometimes talk of the place as the ‘lazy K’ and direct much of their time into preparing to continue the fight once they left, or thinking about escape.”).

37. Gormally et al., supra note 5, at 70.

38. Id. at 70-71.

39. Id. at 77.

40. von Tangen Page, supra note 5, at 59.

41. Id. at 60.

42. McEvoy, supra note 13, at 1540.

43. See id.

44. Bew & Gillespie, supra note 10, at 144.
of other prisoners, was an attempt to resurrect special category status.\textsuperscript{45} By the end of the year, it was apparent that the hunger strikes had succeeded in part: prisoners could wear their own clothes; they had regained their remission time; and they were no longer required to work in the prison.\textsuperscript{46} The hunger strikers, however, were unsuccessful in regaining political status.\textsuperscript{47}

Although the British government was able to resist succumbing to the demand of political status during the hunger strikes, the 1980's did witness a move towards political recognition and away from Criminalization.\textsuperscript{48} One aspect of this trend was the emergence of the Life Prisoner Review Board. In January 1985, the Northern Ireland Office announced that it would review life sentences of prisoners and evaluate each individual case for release.\textsuperscript{49} Prisoners were to be released "on license," which means that they would return to jail and serve their original sentences if they were to commit further offenses or otherwise associate themselves with "risky conduct."\textsuperscript{50} By 1995, 374 life prisoners were released from prison.\textsuperscript{51}

\textsuperscript{45} The hunger strikers hoped to achieve five goals through the protests: the right to wear their own clothes; to avoid prison work; to freely associate within the prisons; organized recreational facilities; and restoration of remission time lost due to the "Dirty Protests." Gormally et al., supra note 5, at 83; see also VON TANGEN PAGE, supra note 5, at 60. IRA protests during the Criminalization period were known as the "Dirty Protests" because prison rules required a prisoner to wear his prison uniform in order to leave his cell. As many Republican prisoners refused to wear these uniforms at all, they were confined to their cells. As the protest escalated, prisoners refused to leave their cells to wash or to go to the toilet. Because the protesters did not follow prison rules, they were no longer entitled to the fifty percent remission program afforded to Northern Irish prisoners at the time. Gormally et al., supra note 5, at 80-81.

\textsuperscript{46} Id. at 85.

\textsuperscript{47} See VON TANGEN PAGE, supra note 5, at 64 ("These concerns had been addressed without conceding the point of political recognition.").

\textsuperscript{48} See Gormally et al., supra note 5, at 57-58 (referring to this period as "normalization," because it reflected the acceptance of political violence and division as being part of "normal" life in Northern Ireland). According to Gormally, "the main principles of normalization derive from a number of political decisions:

- The first is an acceptance that the prison system, at any rate, is not a mechanism that can “defeat” political violence; rather it is a mechanism for managing some of its consequences, and an abandonment of the policy of criminalization, insofar as it is designed to coerce prisoners into a practical and symbolic acceptance of the status of common criminals.

- The second is a recognition that political conflict and division are permanent . . . and hence must be seen as “normal.”

- The third is an acceptance . . . [that the] structures that have been adapted to contain political violence . . . are . . . just one specialized part of the ‘normal’ criminal justice system."

\textit{Id.}

\textsuperscript{49} Factors to be considered included the original crime, the prisoner's role in the crime, and the prisoner's age and background. VON TANGEN PAGE, supra note 5, at 74. Prisoners, however, were not required to renounce violence or their allegiance to violent organizations. Gormally et al., supra note 5, at 101.

\textsuperscript{50} Gormally et al., supra note 5, at 100.

\textsuperscript{51} VON TANGEN PAGE, supra note 5, at 76 (stating that only eleven prisoners were returned for revoking their licence).
The releases authorized by the Life Sentences Review Board silently reflected a return to special category status for paramilitary prisoners. Under that system, paramilitary prisoners with life sentences served, on average, only twelve to thirteen years for their crimes; life prisoners in England serve a minimum of twenty years.\(^{52}\) Supporters of this policy perceived a return to politicization in what they characterized as "constructive engagement" with the paramilitary prisoners, viewing imprisonment not as a means to eliminate violence, but rather a means to controlling those who committed it.\(^{53}\)

Others saw the release scheme, as well as the granting of other privileges such as Christmas and summer paroles, as a means to "secure a more peaceful society in Northern Ireland through the use of liberal and humanitarian penal policy."\(^{54}\) In any event, these measures appeared intended to appease paramilitary organizations in the hopes of achieving a reduction in violence. The British government thus began to bring paramilitaries back into the political process, concomitantly abandoning their Criminalization policies.

In August 1994, the major republican and loyalist paramilitary organizations declared a ceasefire and immediately demanded the release of prisoners as a reward for their actions.\(^{55}\) The Republic of Ireland initiated the release process by freeing nine prisoners in December 1994.\(^{56}\) Parliament, through the Northern Ireland (Remission of Sentences) Bill of 1995, raised the remission of sentences from one-third to one-half, facilitating the release of eighty-eight prisoners in November 1995.\(^{57}\) The ceasefire, however, did not endure, largely due to the government's insistence that decommissioning occur before paramilitary organizations could enter the peace talks.\(^{58}\) The Republic of Ireland suspended its release program, but the British government did not repeal its new remission standard.\(^{59}\) Ultimately the failure of the ceasefire proved that the IRA and the Loyalists demanded political recognition, and that peace in Northern Ireland would come only at the cost of political compromise.

\(^{52}\) Gormally et al., supra note 5, at 100.
\(^{53}\) Id. at 101.
\(^{54}\) VON TANGEN PAGE, supra note 5, at 77.
\(^{55}\) Id. at 78-77; see also McEvoy, supra note 13, at 1548-52.
\(^{56}\) The Republic of Ireland, however, did place conditions on its release policy such as refusing to release any prisoner convicted for the murder of a member of its national police force, the Garda, or any prisoners who were members of an anti-peace process organization such as the INLA or Continuity IRA. VON TANGEN PAGE, supra note 5, at 76, 79-80.
\(^{57}\) Id. at 82-83. Since the fifty percent remission only affected ten percent of the paramilitaries in prison, Sinn Fein criticized the government for not setting a higher remission rate. Id. at 82.
\(^{58}\) See id; see also McEvoy, supra note 13, at 1551. McEvoy does suggest, however, that the prisoner issue did create resentment within the IRA that played a part in its return to violence. Id. at 1551-52.
\(^{59}\) The British most likely stuck with the new remission rate because most Loyalists were maintaining their ceasefire. VON TANGEN PAGE, supra note 5, at 85.
II. Mechanisms for Release

A. The Good Friday Agreement

The Good Friday Agreement was the result of over a decade's worth of negotiation and peacemaking. Its roots trace back to the Anglo-Irish Agreement of 1985, in which the United Kingdom granted the Republic of Ireland a consultative role in the governance of Northern Ireland. The Anglo-Irish Agreement, however, was forged without the advice or consent of Ulster Unionists, most likely because concessions to the South were so fundamentally inconsistent with their political status. Though the agreement might have spurred an increase in unionist paramilitary activity, its inclusion of the Irish government did force unionists to reassess Parliament's direct rule of Ulster. As First Minister Designate of the new Northern Ireland Assembly and leader of the Ulster Unionist Party (UUP), David Trimble wrote: "the desire to restore a measure of local control over local decisions became stronger, even if acquiring such control could only be achieved at the price of a compromise with northern nationalism." Of course, any compromise with the nationalists meant including Sinn Fein, the political wing of the IRA, in the compromise. Nationalists would view any agreement between Unionists, Nationalists, and the government, and any accompanying ceasefire, as an end to the war that had been raging since 1968. As always, Sinn Fein and the IRA expected to be rewarded

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60. Trimble, supra note 3, at 1145.
61. See Bew & Gillespie, supra note 10, at 187-89. The Anglo-Irish Agreement was widely hated by Unionists because it did not affirmatively define the status of Northern Ireland, except that its status could be changed only by a consent of the majority of the Northern Irish people. Critics also objected to the establishment of the Inter-Governmental Conference, which gave the Republic of Ireland a voice in Northern Irish matters. Id.
62. See Trimble, supra note 3, at 1145.
63. Id.
64. Id. at 1152.
65. Id.

Sinn Fein recognized that progress required honest dialogue between the participants, good faith in seeking agreement, and Irish republicans becoming agents for change and working to manage that change peacefully and democratically . . . .

. . . a successful process of negotiation that will lead to a settlement requires a number of essential elements: . . . it requires a good faith engagement on all sides; it must be inclusive, with all parties treated as equals and their mandates respected. . . .

Id.
67. The Good Friday Agreement "is an attempt not only to redefine the politics of the region but also, more importantly, to end a 300-year-old cycle of political violence and community conflict, and finally remove the gun from Irish politics for good . . . . The paramilitaries, however, would never be willing to simply hand over their weapons over to the UK or Irish government, as this would constitute to them a surrender." Michael von Tangen Page, Arms Decommissioning and the Northern Ireland Peace Agreement, 29 Security Dialogue 409, 409-10 (1998).
with the release of their imprisoned members at the end of the conflict.\textsuperscript{68}

The Good Friday Agreement provides "for the release of [qualifying] prisoners . . . convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences."\textsuperscript{69} Early release in the United Kingdom came about under the Northern Ireland (Sentences) Act of 1998.\textsuperscript{70} Ordinary prisoners in the United Kingdom are entitled to remission of sentences, similar to the U.S. practice of granting parole.\textsuperscript{71} Since 1995, prisoners in Northern Ireland were entitled to one-half reductions of their sentences, but the Northern Ireland Act increased this reduction to two-thirds for qualifying prisoners.\textsuperscript{72} The Good Friday Agreement also provides for the release of any qualifying prisoner who is still incarcerated upon the two-year anniversary of the beginning of the early release program.\textsuperscript{73}

The Good Friday Agreement contains implied safeguards regarding the early release program. Paragraph two of the Prisoner's section of the Good Friday Agreement also maintains that the situation shall be "kept under review,"\textsuperscript{74} implying that a change in the stance of a paramilitary organization would halt the release of its prisoners. Paragraph three of the Prisoner's section directs each government to initiate a review process to determine the release dates in which the reviewers must take into account "the need to protect the community."\textsuperscript{75} Writing in 1999, David Trimble, leader of the Ulster Unionist Party, stated that this term directed the reviewing boards to come to the conclusion that the released prisoner is not likely to revert to terrorism upon his or her release.\textsuperscript{76} Trimble also maintained that the Good Friday Agreement allows the government to recall released individuals to finish their terms if they join organizations not complying with the ceasefire or take part in terrorist acts.\textsuperscript{77} Although the terms of the Good Friday Agreement do not contain language support-

\begin{itemize}
  \item \textsuperscript{68} Because of the tradition of releasing interned prisoners at the end of the earlier conflicts, peace-talk participants, most notably the IRA, "were aware of the precedent, which reinforced the expectation that early releases would occur." Trimble, \textit{supra} note 3, at 1165.
  \item \textsuperscript{69} \textit{Good Friday Agreement, supra} note 1, Prisoners, ¶ 1, 37 I.L.M. at 774.
  \item \textsuperscript{70} Trimble, \textit{supra} note 3, at 1165. No enabling legislation was needed in the Republic of Ireland, where all prisoner releases are a matter of government discretion. \textit{Id.}
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{72} \textit{See} \textit{id.}
  \item \textsuperscript{73} \textit{Good Friday Agreement, supra} note 1, Prisoners, ¶ 3, 37 I.L.M. at 774. Prisoners who committed scheduled crimes before April 10, 1998 but who were sentenced afterwards must serve a minimum of two years. Consequently, a small number of inmates remained in prison after July 28, 2000, the two-year anniversary of the commencement of the early releases. \textit{See} Ruth O'Reilly, \textit{Rioting Prisoners Cause 'Substantial' Damage}, Press Ass'n Newsfile, Jan. 4, 2000, \textit{available at LEXIS}, News Library, PANEWSS File. Three such prisoners were released in October 2000. \textit{See} Northern Ireland Prison Service, \textit{Early Releases Under the Northern Ireland (Sentences) Act, available at} http://www.niprisonservice.gov.uk (last visited Feb. 20, 2001).
  \item \textsuperscript{74} \textit{Good Friday Agreement, supra} note 1, Prisoners, ¶ 2, 37 I.L.M. at 774.
  \item \textsuperscript{75} \textit{Good Friday Agreement, supra} note 1, Prisoners, ¶ 3, 37 I.L.M. at 774.
  \item \textsuperscript{76} Trimble, \textit{supra} note 3, at 1165.
  \item \textsuperscript{77} \textit{Id.} at 1165-66.
\end{itemize}
ing these assertions, its enabling statute, the Northern Ireland (Sentences) Act of 1998 requires that prisoners be released subject to a “licence,” which allows the Secretary of State to recall any prisoner that resumes terrorist activity.\(^7\) Trimble also interpreted the second sentence of Paragraph two of the Good Friday Agreement as giving the governments the ability to abandon their early release programs if circumstances “generally change[d].”\(^7\) Such a reading, however, has been shown to be false, as the early releases continued during the crisis over decommissioning.\(^8\)

The current crisis in Northern Ireland centers on the IRA’s failure to hand over its arsenal pursuant to the Good Friday Agreement’s “Decommissioning” section.\(^8\) By signing the Agreement, “[a]ll participants accordingly reaffirm[ed] their commitment to the total disarmament of paramilitary organisations . . . within two years following endorsement . . . of the agreement.”\(^8\) The Agreement authorizes the Independent International Commission on Decommissioning (IICD) to “monitor, review and verify progress on decommissioning of illegal arms.”\(^8\) At the insistence of the non-paramilitary parties to the Agreement, republican inclusion in the new democratic government is dependent on decommissioning.\(^8\)

The Good Friday Agreement, however, does not contain a provision that ties decommissioning to the early release provisions: it only contains language that allows the Irish and British governments to review which organizations are “maintaining a complete and unequivocal ceasefire,” which is completely independent of decommissioning.\(^8\) The IRA’s resistance to decommissioning is, in a large part, due to its belief that “the symbolism of their handing over weapons before the end of the process [is] too much like a surrender.”\(^8\)

B. The Northern Ireland (Sentences) Act of 1998

The Northern Ireland (Sentences) Act of 1998 serves as the enabling statute for the early release provisions of the Good Friday Agreement.\(^8\) Prisoners serving life sentences are eligible for release if they satisfy four conditions.\(^8\) First, a prisoner’s sentence must have been passed in North-
ern Ireland for a “qualified offence.” Second, the prisoner must not be a supporter of a paramilitary organization, or a “specified organisation.”

Third, the prisoner may no longer be a member of a specified organization, or must not be likely to “become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.” Finally, the prisoner must not pose a danger to the public.

“Qualified offences,” for purposes of the first condition, are offences committed before April 10, 1998, the date of the Good Friday Agreement, and which, when committed, were “scheduled offences” within the meaning of the Northern Ireland (Emergency Provisions) Act of 1973, 1978, 1991, or 1996. “Scheduled offences” under these acts include a wide range of offences including murder, manslaughter, riot kidnapping, false imprisonment, wounding with intent to cause grievous bodily harm, causing explosion likely to endanger life or damage property, manufacturing or possessing explosives, and hijacking.

“Specified organisations” are to be determined by the Secretary of State and include any organization that is involved in promoting, or encouraging a terrorist campaign concerning Northern Ireland, and “has not established or is not maintaining a complete and unequivocal ceasefire.” The Act instructs the Secretary of State to consider whether an organization is committed to democratic processes, whether it has ceased committing or preparing for violent acts, is promoting violent acts, and is cooperating with the Commission on Decommissioning. These provisions mirror Paragraph two of the Good Friday Agreement, which states that no prisoner who is a member of an organization that has not “established or [is] not maintaining a complete and unequivocal ceasefire” shall receive an early release. As a result, any prisoner convicted of a scheduled offence committed before April 10, 1998, could apply for early

89. Id. § 3(3)(a).
90. Id. § 3(4); see also infra text accompanying note 95.
92. Id. § 3(6). This final condition does not apply to prisoners sentenced to a fixed term, who are only required to fulfill the first three conditions, so long as they were sentenced for at least five years. Id. § 3(2)(a)-(3)(b).
93. Id. § 3(7)(a)-(b).
96. Northern Ireland (Sentences) Act 1998, c. 35, § 3(9).
97. Good Friday Agreement, supra note 1, Prisoners, ¶ 2, 37 I.L.M. at 774.
release except those who were members of the Real IRA.98

The Northern Ireland (Sentences) Act of 1998 also contains many of the safeguards written into the Good Friday Agreement. Most importantly, the Act releases both fixed term and life prisoners on licence.99 The licences are subject to certain conditions: that the prisoner does not support a paramilitary organization, does not become concerned with terrorist activity, and does not become a danger to the public.100 The Secretary of State may revoke a licence if he believes the prisoner has, or is likely to, break a condition, and such prisoner will be detained to finish his sentence.101 The Act also authorizes the Secretary of State to suspend, and revive, the early release program.102 A suspension order prevents a prisoner from obtaining eligibility for release, and also prevents the release of any prisoner already deemed eligible for release.103 Suspension orders, however, have no effect on any licenced prisoners who have already been released from prison.104

However, the Good Friday Agreement’s reliance on the safeguards in the licence program is misleading. For example, in February 2000, when the new Northern Ireland government temporarily collapsed,105 over three hundred prisoners had received their release under the Sentences Act, yet the Secretary of State could have revoked the licences of only ninety-five of the released prisoners.106 Most of these licensees were serving life sentences, are subject to the licence for the remainder of their lives, and could be returned to jail merely upon suspicion of renewed terrorist activity.107 The remaining released prisoners, who were not sentenced to life imprisonment, are only subject to their licence until the time at which they would have served fifty percent of their sentence, and many had already

98. Vincent Kearney, Terrorists May Have Last Laugh, SUNDAY TIMES (London), Feb. 6, 2000, available at http://www.sunday-times.co.uk/cgi-bin/BackIssue? (last visited Mar. 2, 2001). Although Kearney lists Continuity IRA, the Red Hand Defenders, and the Orange Volunteers among the organizations that were ineligible for release, these organizations had been added to the list of Proscribed Organizations by amendments to the Northern Ireland (Emergency Provisions) Act of 1996. See supra note 95.


100. Id. § 9(1).

101. Id. § 9(2)-(3); see also Northern Ireland (Sentences) Bill, 313 Parl. Deb., H.C. (6th ser.) (1998) 1083 ("If released prisoners break the licence in any way, they will be taken back and serve their full sentence." (quoting Marjorie Mowlam, Secretary of State for Northern Ireland)) [hereinafter Northern Ireland (Sentences) Bill], available at http://www.parliament.the-stationary-office.co.uk/pa/cm/cmvo313.htm.

102. Northern Ireland (Sentences) Act 1998, c. 35, § 16(1). Then Secretary of State for Northern Ireland, Marjorie Mowlam, assured Parliament that the Sentences Act included this safeguard: "As a further safeguard, if circumstances deteriorate in Northern Ireland, the programme of release will be stopped and prisoners will not be released." Northern Ireland (Sentences) Bill, supra note 101.

103. Northern Ireland (Sentences) Act 1998, c. 35, § 16(2).

104. Id. § 16(4).


107. Id.
passed that point by February 2000.\textsuperscript{108} The only constraint upon these individuals is that, should they commit new offenses and be convicted of those crimes, they will once again return to internment.\textsuperscript{109} If the peace process had broken down after the two-year anniversary of the early releases, and violence had resumed, the Secretary of State could, at best, have halted further releases and recalled the 143 prisoners who had been sentenced to life.\textsuperscript{110} The other 255 paramilitaries would have been untouchable, posing a huge threat to public safety at a very volatile time.

The Secretary of State's power to issue orders suspending the release program did not give opponents of the program the assurances that they demanded. Not only would suspension orders during the release period not affect those already released,\textsuperscript{111} but also the decision to issue such an order would have been a political decision with grave consequences. In February 2000, the IRA broke off its talks with the IICD, yet Secretary of State Mandelson did not issue such a suspension order.\textsuperscript{112} Perhaps Mandelson did not do so because he knew that such an order would have done more harm than good. Sinn Fein stated that it would oppose any such order, and that doing so would reduce the likelihood of IRA decommissioning.\textsuperscript{113} Accordingly, the power to issue suspension orders under the Sentences Act has yet to be exerted, and it is unlikely that it ever will be. The IRA could stall on decommissioning\textsuperscript{114} for as long as it cared to, and if the Secretary of State were to suspend the release, the IRA would walk away from the Agreement with most of its members out of jail. The Secretary thus is in a no-win situation: if he suspends the release program, the IRA walks away from the Agreement; yet he cannot force the IRA to adhere to the Agreement if he cannot suspend the program.

III. Politically Motivated Violent Offenders and International Law

The Good Friday Agreement represents, to the IRA and other paramilitaries, the final step for which they have been waiting. The freedoms of the

\textsuperscript{108} Id.
\textsuperscript{109} Id. So far, one prisoner has been brought back for violating his licence. Since releases began pursuant to the Good Friday Agreement, thirteen other licensees have been charged with offenses, none of which were terrorist-related. These offences are not violations of the terms of the licences, so the licensees will be treated as normal criminals. Northern Ireland Prison Service, News & Information, at http://www.niprisonservice.gov.uk (last visited Feb. 20, 2001).
\textsuperscript{110} 'Don't Betray Peace' Pleads Mum, BELFAST NEWS LETTER, July 28, 2000, at 4.
\textsuperscript{111} See supra text accompanying note 104.
\textsuperscript{112} Christopher Walker, Unionists Anger as Terrorist Jail Releases Go On, TIMES (London), Feb. 12, 2000, available at LEXIS, News Library, TTIMES File ("The Northern Ireland Secretary said yesterday that prisoner releases would not necessarily be halted with the reimposition of direct rule.").
\textsuperscript{113} Id.
\textsuperscript{114} Most paramilitary organizations, not just the IRA, have not initiated plans for decommissioning. The main focus remains on the IRA, however, because unionist organizations such as the UVF and UFF have conditioned their decommissioning on the IRA's. Id. Only the LVF has begun decommissioning, as it handed over weapons to the IICD in December 1998. John Mullin & Ewen MacAskill, Loyalists File on the Pressure, GUARDIAN (London), Aug. 31, 1999, at 1.
Special Category Status days have returned, and paramilitaries have achieved the political acceptance that they have been seeking since the days of Criminalization. Under the Good Friday Agreement, paramilitary prisoners are treated as true political prisoners, perhaps even prisoners of war.\(^{115}\) If the Good Friday Agreement is to treat paramilitary terrorists as political prisoners or prisoners of war, however, one must make sure that they genuinely qualify for these categories. Additionally, the Good Friday Agreement and the Northern Ireland (Sentences) Act can be seen as granting post-conflict pardons to the prisoners. If so, the logic behind pardons in these circumstances should also be investigated.

A. Prisoner of War Status

It is imperative to consider whether the paramilitaries indeed attained “prisoner of war” status under international law. Paramilitaries were not “prisoners of conscience” deserving freedom\(^ {116}\) because they were not imprisoned for their beliefs or associations alone,\(^ {117}\) but rather for having committed “scheduled offences” as set out in the various emergency provisions acts.\(^ {118}\)

Under the Geneva Convention Relative to the Treatment of Prisoners of War of August, 12 of 1949 (Geneva Convention), “prisoners of war” are to be “released and repatriated” at the conclusion of hostilities.\(^ {119}\) North-

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\(^{115}\) There are many in the United Kingdom who do not realize that they have granted this status to the paramilitary prisoners. Conservative Party leader William Hague denounced the February 2000 IRA initiative: a national day of reconciliation on which the IRA would begin to hand over its arms and the British Army would begin its withdrawal from Northern Ireland. Hague wrote that such a gesture would “bestow moral equivalence and equal legitimacy” on IRA murders, and “would concede the totally false and perverted IRA argument that it has engaged in a ‘legitimate struggle’ against an ‘army of occupation.’” William Hague, Comment: Don’t Treat Terrorists Like Soldiers, DAILY TELEGRAPH (London), Feb. 23, 2000, at 28.

\(^{116}\) See STATUTE OF AMNESTY INTERNATIONAL art. 1 (amended 1983).

\(^{117}\) See supra text accompanying notes 93-94.

\(^{118}\) See supra text accompanying notes 93-94.

ern Irish paramilitaries, however, were not prisoners of war as defined in the Geneva Convention.\textsuperscript{120} Article four of the Convention defines prisoners of war as members of the regular armed forces of a party to the conflict or members of militias or voluntary resistance movements belonging to a party to the conflict.\textsuperscript{121} Members of militias or resistance movements, however, must meet four additional conditions to achieve prisoner of war status: they must be commanded by a person responsible for his subordinates; they must have a distinct symbol, recognizable at a distance; they must carry their arms openly; and they must conduct their operations within the laws and customs of war.\textsuperscript{122} While paramilitary leadership structures may satisfy the first of the four conditions, Republican and Loyalist terrorists rarely wear uniforms or carry their arms openly, and, by attacking civilians, have not followed the customs of war.\textsuperscript{123} Accordingly, under the Third Geneva Convention, Northern Irish paramilitaries should not be afforded prisoner of war status and the associated right to automatic release at the conclusion of the conflict.\textsuperscript{124} Yet the Good Friday Agreement confers prisoner of war status and its benefits on the prisoners even before a lasting peace has been achieved.

\textsuperscript{120} Id. art. 4.

A. Prisoners of war, in the sense of the present convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict . . .

(2) Members of other militias and members of other voluntary corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if its territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations with the laws and customs of war.

\textit{Id.}

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{123} See \textsc{von Tangen Page}, supra note 5, at 36-37.

\textsuperscript{124} It is additionally doubtful that Republicans or Loyalists could rely on the 1977 Protocol to the Geneva Convention which liberalized the conditions for recognition as a party to an armed conflict because they have not been "visible to the adversary while [they have been] engaged in a military deployment preceding the launching of an attack to which [they are] to participate." Protocols Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, \textit{adopted} June 8, 1977, art. 44, 16 I.L.M. 1391. Neither the Republic of Ireland nor the United Kingdom has ratified the treaty. \textsc{von Tangen Page}, supra note 5, at 37-38; see also Walker, supra note 117, at 208-25.
B. Political Offenders and the Political Offense Exception

1. "Purely" versus "Relative" Political Offenses

The Good Friday Agreement, while not declaring the paramilitaries prisoners of war, must recognize the prisoners as political offenders in order to justify their release. The Agreement, however, does not make an important distinction that has evolved in the common law: the distinction between "purely political offenses" and "relative political offenses." Simply put, a "purely political offense" is an action conducted against a sovereign, constituting a threat to its political ideology, but lacking the elements of a common crime. Purely political crimes which do not cause a private harm include sedition, treason, and espionage. A "relative political offense," on the other hand, is either a purely political offense that does have the elements of a common crime, or a common crime with ideological motives. The beneficiaries of the early release provision must be classified as "relative political" offenders because their actions have caused private harm and resemble common crimes more frequently than they resemble sedition, treason, and espionage.

2. Varying Theories Behind the Political Offense Exception

In the context of extradition there has been great variance in the breadth of offenses covered by the political offense exception. Under one such application of the political offense exception, the "political-incidence" exception, States refuse to extradite political offenders to states where they might be persecuted for their political actions, his analysis of the distinction provides a relevant principle for the analysis in this Note. An offender is deemed not blameworthy and not extraditable when his or her conduct falls under the political offense exception. A prisoner who is not extraditable if found in another State should also be released at the conclusion of hostilities if he is imprisoned within the State in which the conflict exists. Id. at 412.

125. For a comprehensive definition of PMOVs, see generally von Tangen Page, supra note 5, at 1-17. Von Tangen Page, however, classifies all Northern Irish terrorist activity as "absolute" political offenses, i.e., crimes the target of which is the "ruling power's value system as a whole ... motivated for ideological or political rather than selfish or personal reasons." Id. at 2. This Note, however, rejects the position that all terrorist activity for which the early release prisoners were convicted targeted the "ruling power's value system." Loyalists by definition are not attacking such a system, and it is questionable whether IRA attacks on other paramilitaries would qualify either. Id.

126. M. Cherif Bassiouni, The Political Offense Exception in Extradition Law and Practice, in International Terrorism and Political Crimes 405 (M. Cherif Bassiouni ed., 1975) Although Bassiouni describes the differences between "purely political offenses" and "relative political offenses" as they pertain to extradition treaties and their respective "political offense exceptions" (in which many states refuse to extradite political offenders to states where they might be persecuted for their political actions), his analysis of the distinction provides a relevant principle for the analysis in this Note. An offender is deemed not blameworthy and not extraditable when his or her conduct falls under the political offense exception. A prisoner who is not extraditable if found in another State should also be released at the conclusion of hostilities if he is imprisoned within the State in which the conflict exists. Id.

127. Id.; see also In re Richard Eckermann, 5 Ann. Dig. 293, 295 (Sup. Ct. Just. Guat. 1929) ("Universal law qualifies as political crimes sedition, rebellion and other offenses which tend to change the form of government or the person who comprise it; but it cannot be admitted that ordering a man killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime.").

128. Bassiouni, supra note 126, at 408.

129. See id. at 412.
to and formed part of a political disturbance. An English court adopted this standard when it refused to extradite one individual sought for the murder of a Swiss government official, admitting that only case-by-case analysis was suitable for such determinations (although it refused to announce an exact definition of the exception). The House of Lords did, however, later add that for the exception to apply, the offense must be directed against the opposition government. This additional requirement provides an important distinction for Ulster prisoners. If the same logic applied to the prisoners, the only prisoners whose actions could have been excused would have been those who directed their violent acts at the British government. This would have automatically eliminated most Loyalist prisoners, who, because of their allegiance to the United Kingdom, usually did not commit violence against the State. It would have also eliminated the many Republican or Nationalist prisoners whose actions were committed against Loyalist and Protestant paramilitary targets and civilians.

A second approach to the determination of the political offense exception is the "injured rights" theory. This theory focuses on the nature of the rights injured rather than the motives of the offender. To constitute a political offense, conduct must be directed against the government or sovereign and affect the political organization of the State. While this theory receives some acceptance in Europe, it provides little insight to the Good Friday Agreement beyond that provided by the political-incidence theory.

A third theory, the "political motivation" theory, developed in Europe, seeks to modify the English political-incidence theory. The political motivation theory attempts to "correlate the ideological beliefs of the offender and the proportionate effect of his acts or offenses and the political purpose in trying to reach an equitable result which locks in the other theories." If the political offense is murder, for example, it must be shown that this was the sole means to attain the political aim. Use of this theory would render many paramilitary crimes unextraditable. The

130. Id.
131. In re Castioni, 1 Q.B. 149 (1891).
132. Cheng v. Governor of Pentonville, 2 All E.R. 204 (1973); see also Bassiouni, supra note 126, at 414.
133. In the first twenty years of the Troubles, approximately one-third of the over 2700 deaths caused by the IRA were of members of security forces, one-third of the dead were civilians, and the final third were members of other paramilitary organizations. Gearty, supra note 27, at 118. Although the IRA has tried to limit its campaign to "legitimate targets," it sees civilian deaths as part of its overall political strategy to drive the British out of Northern Ireland. Id. at 120-23.
134. Bassiouni, supra note 126, at 422.
135. Id.
136. Id. at 421-22.
137. Id. at 423.
138. Id. at 424. European courts, however, have been inconsistent in their application of this theory.
crimes of Johnny Adair, a Loyalist paramilitary leader, exemplify the types of offenses that would not qualify as a political defense in the extradition context. The random murders of Belfast's Catholics\textsuperscript{140} certainly were not the sole means for the UFF to achieve its political goals.

3. The Political Offense Exception and British Extradition Policy

The early release of prisoners was not controlled by the customs of extradition. In both extradition and early release contexts, however, prisoners who commit politically motivated crimes are treated differently from ordinary criminals. The political offense exception to extradition became a part of customary international law during the rise of constitutionalism and popular government.\textsuperscript{141} With it came the idea that citizens have "a moral right to rebel against tyranny, [and] those who fail in the attempt should find a place of refuge in a foreign land."\textsuperscript{142} This ideal was not universally accepted: Thomas Aquinas felt that overthrowing a tyrant was justified only if the revolution caused less damage to the public than the tyrant.\textsuperscript{143} Others reject terrorism as a means to achieve political gains, as it undermines the sanctity of human life.\textsuperscript{144} The foundations for the political offense exception, however, are the same as those for granting special treatment to politically motivated offenders who are held in their own nations.\textsuperscript{145} Since not all politically motivated offenders fall into the political offense exception (their crimes do not advance their political aims), special status should be withheld from those prisoners whose crimes were inadequate to achieve a political aim.

Britain's recent extradition policy has attempted to limit the breadth of the political offense exception. Strangely, its extradition policy contradicts its special status policy and its move away from Criminalization. In the past, Republican terrorists were able to rely on the political offense exception to block their extradition from the United States when their crimes were directed against the British military.\textsuperscript{146} The United Kingdom sought

\textsuperscript{140} One of the favorite activities of Adair's Ulster Freedom Fighters was to "drive through a Catholic quarter of Belfast and shoot anyone they saw," when Adair was asked "if he ever had a Catholic in his car, he replied: 'Only a dead one.'" \textit{Loyalist Leader Freed from N. Ireland Jail, AGENCIE FRANCE PRESSE, Sept. 14, 1999, available at LEXIS, News Library, AFP File}. Adair was convicted for directing terrorism, and it is believed that he was responsible for up to thirty Catholic killings. Monika Unsworth, \textit{Loyalist Leader Freed from Maze, IRISH TIMES, Sept. 15, 1999, at 7}.

\textsuperscript{141} MANUEL R. GARCIA-MORA, \textit{INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT} 74 (1956).

\textsuperscript{142} Id. During this period, Liberal thinkers emphasized the right to rebel against oppression. This principle is problematic for the justification of any Loyalist crimes, since they are not rebelling against what they perceive to be governmental tyranny.

\textsuperscript{143} VON TANGEN PAGE, \textit{supra} note 5, at 12.

\textsuperscript{144} PAUL WILKINSON, \textit{TERRORISM AND THE LIBERAL STATE} 65 (1977).

\textsuperscript{145} VON TANGEN PAGE, \textit{supra} note 5, at 11.

\textsuperscript{146} See \textit{In re Extradition of McMullen,} 989 F.2d 603, 610 (2d Cir. 1992) (citing an unrecorded decision from the Northern District of California, in which the court held that McMullen fulfilled the political offence exception under the original treaty because the PIRA was engaged in a political uprising against the British, that McMullen's crimes were committed at the behest of the PIRA, and that they were in furtherance of its politi-
to reduce the number of such exceptions by amending its extradition treaty with the United States, and narrowed the number of political offense exceptions by specifically excluding crimes such as murder, manslaughter, and crimes using explosives. This hard line approach against Ulster terrorists runs counter to the practice of granting terrorists special status: crimes that are not considered offenses with a political character in the Ulster Treaty are essentially the same crimes classified as scheduled offenses in the Northern Ireland (Emergency Provisions) Acts. At the same time, the British government both recognizes (in the Good Friday Agreement and the Emergency Provisions and Sentences Acts) and denies (in the United States-United Kingdom Supplementary Extradition Treaty of 1985 (Supplementary Treaty)) the idea that political motivation can play a role in an offender’s culpability.

British extradition policy after the Supplementary Treaty abandons all analysis of the nexus between the criminal act and the political aims of the offender. The treaty specifically names crimes in article I(e) – (l), and does not grant discretion to decision-makers. Crimes deemed unextraditable in Cheng v. Governor of Pentonville are now excluded from the political offense exception. Under this treaty, only “purely political” offenders will be able to rely on the political offense exception and “relative political”


For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of political character:

(e) murder;
(f) manslaughter;
(g) maliciously wounding or inflicting grievous bodily harm;
(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
(i) the following offenses relating to explosives:
   (1) the causing of an explosion likely to endanger life or cause serious damage to property;
   (2) or conspiracy to cause such an explosion; or
   (3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
(j) the following offenses relating to firearms or ammunition:
   the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
   (1) or the use of a firearm by a person with intent to resist or prevent the arrest or detection of himself or another person;
   (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
   (l) an attempt to commit any of the foregoing offenses.

Id.

148. See supra text accompanying notes 93-94.
149. See Supplementary Treaty, supra note 147.
150. See supra text accompanying note 132.
offenders will be treated as ordinary criminals. It was possible that during the releases such a relative political offender could be returned to Northern Ireland and incarcerated as an ordinary criminal, only to become subject to the Good Friday Agreement, and thus be given special status and rights as a political prisoner. In fact, in September 2000, after most of the prisoners were released, Secretary Mandelson announced that terrorist fugitives could return to Northern Ireland and seek release under the Good Friday Agreement.¹⁵¹

C. Pardons

When paramilitary prisoners were freed through the early release provisions of the Good Friday Agreement, they were essentially granted pardons for their crimes. A pardon, as opposed to an amnesty, occurs after an offender’s guilt has been determined; an amnesty is a determination not to prosecute.¹⁵² Thus, the Good Friday Agreement is not an amnesty because it is not a decision to forgive actors who have not yet been prosecuted. It specifically does not cover any politically motivated acts of violence commenced after the date of the agreement.¹⁵³ Instead the Good Friday Agreement reduces the sentences of those whose guilt has already been established through trial and conviction under a democratic criminal justice system.¹⁵⁴ While the Good Friday Agreement might not forgive the prisoners that it releases,¹⁵⁵ it clearly imitates acts of pardoning, not amnesties.

The case against pardons centers on the idea that forgiveness undermines the criminal justice system. Immanuel Kant denounced the use of pardons as unjust to society.¹⁵⁶ Kant’s objections are based on the theory

¹⁵¹. Fury at Freedom Deal for Provos on Run, BELFAST NEWS LETTER, Sept. 30, 2000, at 1. Mandelson also announced that many extradition requests would be abandoned stating, “It is clearly anomalous to pursue the extradition of people who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commission, have little if any of their original prison sentence to serve.” Id.

¹⁵². ALFONSO J. DAMICO, DEMOCRACY AND THE CASE FOR AMNESTY 5 (1975). In an amnesty, the state essentially “forgets” that the offender has committed a crime, or makes a decision not to judge past behavior. Id. at 5. A pardon represents an act of forgiveness or charity on behalf of the state. Id. Quite often pardons are included in a larger amnesty proclamation. See id. at 5. For example, United States President Andrew Johnson’s Christmas Amnesty of 1868 stated an unconditional decision not to prosecute those who acted in rebellion, and pardoned all those already convicted for political acts during the war. Id. at 30; see also KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989).


¹⁵⁴. Good Friday Agreement, supra note 1, Prisoners, ¶ 2, 37 I.L.M. at 774.

¹⁵⁵. Quite to the contrary, many see the early release program clearly as a result of paramilitary politics, and in no way an act of forgiveness, or the removal of a stigma. See generally McEvoy, supra note 13.

¹⁵⁶. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 337 (Jonathan Ladd trans., 1965) (1797). According to Kant, a sovereign’s pardon of a crime (either by reducing or ending the sentence) committed by one subject against another constituted “the greatest injustice toward his subjects,” and therefore argued that the sovereign should not have absolute power to pardon such crimes. Id. at 108. Kant would grant
that the law makes a promise to law-abiding citizens to punish wrongdoers. Pardons thus are unfair to citizens who obey the law because wrongdoers enjoy an unfair advantage over them. Retributivists also argue that pardons bring about injustice, but base their criticism on the offender escaping the punishment that he or she deserves. On the one hand, the strongest objections to pardons derive from the principles of expressive retributivism, which holds that society inflicts punishment in order to eliminate the appearance of the offender’s superiority and promote the value of the victim. On the other hand, general utilitarian objections to pardons are premised on the belief that, to deter crime, punishment must be distributed without exceptions.

Expressive retributivism provides the most sobering perspective on the early release scheme, as it is the victims of paramilitary violence who lose the most under this scheme. Nowhere is this perspective better illuminated than in the anti-release campaign of Michelle Williamson. Williamson’s parents were killed when a bomb ripped through a fish market on Belfast’s Shankill Road. Yet her parents’ killer, Sean Kelly of the IRA, was released on July 28, 2000, one of the last prisoners to be released under the early release scheme. Kelly also benefited from the Christmas parole in

Kant subscribed to a retributivist theory of criminal law, stating that “[o]nly the Law of retribution (jus talionis) can determine exactly the kind and degree of punishment. . . . All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.” At 101. For Kant, “judicial punishment,” which was necessary for legal justice, could not be used for any purposes other than that the offender had committed a crime that made him unfit to be a citizen. At 99-100. (“The law concerning punishment is a categorical imperative, and woe to who rummages around in the winding paths of theory of happiness looking for some advantage to be gained by releasing the criminal punishment or by reducing the amount of it . . . . [(Legal)] justice ceases to be justice if it can be bought for a price.”).

See Moore, supra note 152, at 31-32.

[A] simple, indeed a crude, model of retributive theory . . . will assert three things: first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of the offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.

See Moore, supra note 152, at 75 (“The punishment . . . must be commensurate with what the offender deserves, and what the offender depends on the offense committed. The more serious the crime, the more serious the punishment. . . . [T]he seriousness of a crime is measured by the amount of harm generally done by acts of that sort and by the degree of culpability.”).

See Moore, supra note 152, at 38. A pardon can undermine deterrence because it may lead one to infer that he will be able to escape punishment for his crimes. Id.

Id.

‘Don’t Betray Peace’ Pleads Mum, supra note 110. The explosion that killed Williamson’s parents killed seven others, which means that Kelly will serve less than one
The early release scheme undermines the values of expressive retributivism: society appears to value Kelly's Christmas with his family more than it values Michelle's rights as a victim. As Williamson states, her crusade to keep Kelly and similar prisoners in jail was "not political but simply a clear cut case of right and wrong." 

IV. Recent Events and the Logic Behind the Early Release Program

On February 11, 2000, Secretary of State for Northern Ireland, Peter Mandelson, suspended the Northern Ireland Assembly, the province's new institution established by the Good Friday Agreement. Mandelson based his decision to do so on the IRA's failure to comply with the decommissioning provisions of the Good Friday Agreement, returning power over the province to the British Parliament. The IRA claimed that it had until May 2000 to comply with the decommissioning provisions as that is the date set out in the text of the Good Friday Agreement. The IRA, incensed over the return to direct rule, broke off its negotiations with the decommissioning commission on February 15. Despite the return to direct rule, Mandelson did not halt the release process, a move that drew heavy criticism from Northern Irish unionists. Since the onset of the releases, the logic of the program has been questioned, even undermined, by the consequences of releasing the region's most dangerous citizens. This section selects a few of these consequences, and scrutinizes the compromise the Irish people made for peace.

1999. Gemma Murray, Michelle's Battle Moves to the Court of Appeal, BELFAST NEWS LETTER, Jan. 7, 2000, at 9. "Festive cheer was practically eliminated from her heart days before Christmas when broken-hearted Michelle watched Sean Kelly walk through the turnstile free from the Maze prison into the welcoming arms of his mother." Id. Northern Ireland Secretary Peter Mandelson extended the Christmas parole in 1999 to all of the prisoners in the Maze, even those who would not normally have qualified. John Mullin, Cancelled Parole Left One Costly Inmate with Maze All to Himself, GUARDIAN (London), Jan. 4, 2000, at 5.


165. "Victims of Northern Ireland's violence have empty seats at their dinner tables. How could he go out and enjoy himself and recover from hangovers while I lay flowers at the grave of murdered parents?" Murray, supra note 164 (quoting Michelle Williamson).

166. Id.

167. See Good Friday Agreement, supra note 1, Strand 1, Democratic Institutions in Northern Ireland, ¶1, 37 I.L.M. at 756 ("This agreement provides for a democratically elected Assembly in Northern Ireland . . . capable of exercising executive and legislative authority.").


169. Hoge, supra note 81.

170. CNN, supra note 168.

171. Walker, supra note 112. Peter Mandelson did, however, state on February 20, 2000, that he might soon review the early release scheme "alongside the ceasefires and progress on decommissioning." John Murray Brown, Mandelson Hints at Further Cuts in Ulster Troops, FINANCIAL TIMES (London), Feb. 21, 2000, at 4 (quoting Peter Mandelson).
A. The Beneficiaries of the Early Release Program

1. The Mad Dog

Considerable criticism of the program emerged following the release of Johnny "Mad Dog" Adair, the two hundred and ninety third prisoner to be released under the Good Friday Agreement, on September 14, 1999. Many considered Adair, a member of the UFF, to be the most notorious loyalist paramilitary, so much so, that then Northern Secretary Maureen Mowlam at first challenged the Sentence Review Commission. Adair had only served four years of a sixteen-year sentence. One commentator stated, "Adair's freedom is a stark illustration of the price Northern Ireland is being asked to pay for peace. To keep the political talks going, mass murderers, Loyalist and Republican, are being released."

Adair's crimes, and the campaign of terror that he led, are undeserving of political status. It is believed that the UFF under his leadership was killing more people than the IRA. Adair's philosophy was "that, by killing Catholics, pressure would be brought on the IRA by the nationalist community to stop its attacks on the security forces and loyalists." Claiming that every Catholic was a target, Adair once told a reporter, "The UFF put the fear of God into the republican movement. We were attacking their homes, their safe houses, their drinking dens." Adair’s crimes were in some ways politically motivated: his goal was to deter IRA activity through retributive violence. Certainly the UFF attack of Sinn Fein headquarters in 1993 could be labeled a politically motivated crime. The majority of Adair’s victims, however, were killed in retaliation for republican attacks. Even if Adair did have political motives for his crimes, the motives do not mask the ruthlessness and sectarian hatred that embodied his crimes, crimes that were excused by the Good Friday Agreement.

Critics of Adair’s release believed that the IRA and many loyalist factions received the benefits of the Good Friday Agreement without giving anything in return. Many Unionists, as well as conservative members of the British Parliament, also called for the end of the releases because of continued violence from republican and loyalist organizations. Upon Adair’s release, opponents lamented that his parole "illustrated, perversely, ...

172. Unsworth, supra note 140.
173. Id. Dr. Mowlam withdrew her objection after receiving loyalist complaints that no prisoner be discriminated against.
174. Id. Adair could have received a life sentence for his conviction. See infra note 185.
176. Id.
177. Id.
178. Id.
179. Id.
180. See id. ("Most of the Adair unit's victims met their fate in the name of revenge.").
181. UFF terrorists, under Adair’s command once murdered a Catholic, William Johnston, for living with his Protestant girlfriend. Id.
182. Id.
183. McKittrick, supra note 78.
a rare efficiency in efforts to honor the terms of the Good Friday peace accord of 1998.\textsuperscript{184}

Adair's release exposed a flaw in the Northern Ireland (Sentences) Act of 1998. Since Adair was serving a fixed term (sixteen years for "directing terrorism"\textsuperscript{185}), the Secretary of State was not required to determine if he was a danger to the public, as is required for life prisoners.\textsuperscript{186} Yet there was serious concern for the public safety regarding his release.\textsuperscript{187} The Royal Ulster Constabulary (RUC) told Secretary Mowlam they believed that Adair had continued to run terrorist activities from within the Maze, and it was likely that he could become involved in terrorist activity upon his release.\textsuperscript{188}

Adair's notoriety caused a potential flare-up between paramilitary organizations. Adair has survived multiple attempts on his life, and, as Vincent Kearney has written:

Dissident republicans could pose the biggest threat. The Real IRA . . . and two other republican groups, the Continuity IRA and INLA, are believed to have joined forces in a coalition that is preparing for a return to war. Dissidents could view an attack on Adair as a means of establishing their credibility.

Such an attack would spark a massive retaliation against the Catholic community. That in turn would present the dissidents with an opportunity to portray themselves as defenders of the nationalist community, just as the Provisional IRA attempted to do so at the start of the Troubles.\textsuperscript{189} Yet, Secretary of State Mowlam ignored such possibilities, or at least felt that the political consequences of offending the loyalist groups outweighed such possibilities.\textsuperscript{190}

Although Adair vowed, upon his release, that he would support the peace process and refrain from paramilitary activity,\textsuperscript{191} old habits die hard. In July 2000, Adair participated in loyalist protests during which uniformed members of the LVF fired shots into the air.\textsuperscript{192}


\textsuperscript{185} See Kearney, \textit{supra} note 175; Northern Ireland (Emergency Provisions) Act 1996, c. 22, § 29 ("Any person who directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism is guilty of any offense and liable on conviction to imprisonment for life.").

\textsuperscript{186} See \textit{supra} text accompanying note 92.

\textsuperscript{187} Kearney, \textit{supra} note 175.

\textsuperscript{188} Id. ("In January 1998 UFF units were involved in a spate of murders of Catholics in retaliation for the INLA's murder in the Maze of Billy Wright, the Loyalist Volunteer Force leader, a friend and mentor of Adair.").

\textsuperscript{189} See id. The IRA and INLA have tried, and failed several times to kill Adair, including the bombing that claimed the lives of the parents of Michelle Williams.

\textsuperscript{190} See id. In January 1998, the Secretary Mowlam met with Adair and other loyalist leaders in the Maze in order to ensure the continuance of the loyalist ceasefire in the wake of Billy Wright's murder, "overlooking that Adair was clearly involved in the reprisals." Id.


\textsuperscript{192} Campaign Fueled by Venomous Hate, \textit{Belfast News Letter}, Aug. 23, 2000, at 2.
participation in the protests prompted Secretary Mandelson to revoke Adair's license and return him to prison.¹⁹³ Although Adair challenged Mandelson's decision, the Sentences Review Board upheld the revocation of his license, stating that Adair, if released, was "likely . . . to breach the terms of his license."¹⁹⁴

2. Above the Law

One disturbing effect of the early release program is the possibility that some offenders may never even see the inside of a British prison for their offenses committed during the Troubles, resulting in a quasi-amnesty. Such fears were voiced in December 1999, as critics accused Ulster Secretary Peter Mandelson of ordering authorities to refrain from apprehending "wanted" IRA terrorists who had returned to Northern Ireland since the agreement.¹⁹⁵ According to human rights campaigners, up to ninety-three men who had fled Ulster to avoid prosecution had returned to the province, yet Mandelson decided to ignore these returns in order to maintain the fragile peace process.¹⁹⁶ In January 2000, the Republic of Ireland's High Court blocked the extradition of IRA gunman Angelo Fusco under pressure from Sinn Fein, outraging many in the North.¹⁹⁷ Eleven months later, the Northern Ireland government further infuriated critics of the Good Friday Agreement when it essentially pardoned Fusco by announcing that he and three other former prisoners were free to return to Northern Ireland.¹⁹⁸ So too did Mandelson's September 2000 announcement that he would abandon extradition requests for fugitives who would be eligible for early release upon their return to the province.¹⁹⁹ If, as Prime Minister Blair promotes, the people of Northern Ireland must "start to treat each other like normal people,"²⁰⁰ must they ignore the principles of criminal justice that apply to "normal people"? The price of freeing Angelo Fusco, and turning a blind eye to fugitives, is that the victims of their crime never receive justice. Resentment and mistrust of the Good Friday Agreement may remain in their eyes forever.

¹⁹³. Why Adair is Back in Jail, BELFAST NEWS LETTER, Aug. 24, 2000, at 1-2. Mandelson also based his decision on intelligence reports that Adair was linked to gun running and drug operations, as well as sectarian intimidation. See id.
¹⁹⁶. Id. Critic Vincent McKenna bemoans that it "is simply unbelievable that the RUC has made no arrests because it doesn't know these people are back in Northern Ireland . . . . It is sickening for victims of violence to see wanted terrorists walking the streets with apparent immunity." Id. The RUC has denied that it is ignoring the return of such terrorists. Id.
¹⁹⁹. Fury at Freedom Deal for Provos on Run, supra note 151.
A sad consequence of the early release program is that some paramilitaries have lost all respect for their criminal justice system. On February 2, 2000, loyalist terrorists Stephen McClean and Noel McCready were convicted of murdering two men in a pub in Poyntzpass, County Armagh, in March 1998. McClean and McCready laughed because they knew since they committed their crime before the signing of the Good Friday Agreement, they would be released in less than six months, having served a total of over just two years. But were their crimes political? What ends were they trying to achieve? At trial their motives were described as “mindless bigotry,” not the promotion of loyalist ideals. Their crimes cannot be seen as part of a loyalist campaign against republican rebels, because the IRA had already begun their ceasefire at the time of the murders. If the Good Friday Agreement is, as McEvoy asserts, “an acceptance of the political motivation of paramilitaries,” it does not follow that McClean and McCready should be afforded the rights normally reserved to politically motivated offenders for their crimes of bigotry.

B. The Victims

The victims also lose under the early release system because there is no requirement that republican or loyalist paramilitaries express contrition or denounce their membership in their terrorist organizations. As Johnny Adair told a reporter, “I don’t regret inflicting hurt on the republican community.” Yet victims and their families must sit by and watch the prisoners enjoy their freedom. Upon Adair’s release a spokesman for Families Against Intimidation and Terror announced, “It is a very difficult time for victims when prisoners are released. They worry about meeting the person on the street.”

Contrition has been at the heart of many other release programs. Spanish “reinsertion” of Basque nationalists serving prison sentences for

201. David Sharrock, Loyalist Killers Treat Life Sentences as Joke, DAILY TELEGRAPH (London), Feb. 3, 2000, at 14. McClean and McCready, along with two others, allegedly targeted the pub because it was their belief that only Catholics frequented the pub. Ironically, Poyntzpass Catholics and Protestants frequented the pub harmoniously, and the two murdered men were best friends: one a Catholic, the other a Protestant. Id.

202. Id.

203. Id. McClean and McCready are reportedly members of the LVF. Stones, Jonathan, No Wonder the Killers of Two Best Friends Were Joking... They Know They’ll Be Out of Prison in Six Months, MIRROR, Feb. 3, 2000, at 8.

204. Disgust as Killers in Line for Early Release: Mums Express Anger at Sons’ Murderers, BIRMINGHAM EVENING MAIL, Feb. 3, 2000, at 17. It is not clear who described their motives as such, but it appears as if either the judge or the prosecution made this statement.


208. Magee, supra note 191.
their acts required both that the prisoner renounce violence, break all links with the organization that he belonged to, declare that he would respect law and democracy, and acknowledge the suffering that he had caused.209 The example of Adair shows that the Sentences Act does not even consider such a possibility. The danger of this is that "[e]xperience has shown that if we do not deal with the anger and the pain which still exist in both communities, they will return to poison the hopes of progress in the future."210

C. Additional Threats to the System

The early release scheme has threatened the safety of the region, and events subsequent to the releases have forced the Northern Ireland leadership to rethink the effectiveness of the early release scheme. On January 11, 2000, police arrested several people, including some LVF members, in Portadown, County Armagh, for the January 10 murder of Richard Jameson, believed by some to be a local UVF leader.211 It was alleged that Jameson led an attack on three LVF prisoners who were free on the Christmas parole at a Portadown social club.212 Many demanded a cessation of releasing LVF prisoners under the early release scheme, including UUP leader David Trimble,213 since eight LVF members were still imprisoned at the time.214 UVF retaliation for Jameson's death, which would have broken its five-year ceasefire, could have endangered the early-release scheme and the entire peace process as well.215 Any exclusion of LVF members from future releases, however, would not have been based on theories of political violence, but rather on the LVF's blatant disregard for the ceasefire.

Richard Jameson's murder is proof that many paramilitary members are imprisoned for sectarian violence that has little political value. Many of the imprisoned or released prisoners were imprisoned for similar crimes.216 Loyalist killings of other loyalists resemble gang violence more than they resemble violence directed at political aims. It is doubtful that

209. See von Tangen Page, supra note 5, at 139.
212. Id. The victim's family denied Jameson's association with the UVF, stating that his feud with the LVF was based on his stand against drug dealers in Portadown, and his belief that the LVF controlled the Portadown drug trade. See Rosie Cowan, Murdered Man's Brothers Deface Loyalist Murals, Press Ass'n Newsfile, Jan. 16, 2000, available at LEXIS, News Library, PANews File; Release of Prisoners Put in Doubt, Belfast News Letter, Jan. 12, 2000, at 8 ("[I]t can be no coincidence that the feud intensified following the generous dispensation of the Christmas parole programme, which left only a handful of paramilitary prisoners in jail.").
214. Mullin, supra note 197.
215. See id.
216. See supra note 133 and accompanying text.
such an offense would be extraditable, even in the pre-Supplementary Treaty era, because it is an offense of "ordinary criminals"; yet such violence has, and may continue, to warrant early release.

The greatest threat to peace is the possibility that the decommissioning deadlock will push the paramilitaries on both sides into breaking their ceasefires. The fear of a failed ceasefire intensified immediately after the last of the prisoners were released on July 28, 2000, as violence between paramilitary organizations erupted. The protestant Shankill Road area of Belfast witnessed, in August 2000, a deadly "turf-war" between loyalist organizations.\(^{217}\) It is unknown if this violence was perpetrated by released prisoners, but it does signify that paramilitary organizations benefited from the Good Friday Agreement, and that their peaceful neighbors received nothing. The Northern Ireland Human Rights Bureau released figures in the 2000 summer that loyalist and republican terrorists had killed fifty-five men, women, and children since the signing of the Good Friday Agreement.\(^{218}\) The loyalist feud of August 2000 also led to reports that the republican terrorists squads "were being put on standby in the case the loyalist feud erupts in sectarian violence."\(^{219}\) Of course, the greatest cause for the threat of continued paramilitary violence is the failure to enforce the decommissioning provisions of the Good Friday Agreement. An end to the ceasefires would signify the ultimate failure of the Good Friday Agreement, and the only beneficiaries of the whole process would be the violent organizations that secured the early, and unwarranted, release of its members.

Conclusion

The early-release provisions were indeed a political necessity in the formation of the Good Friday Agreement,\(^{220}\) and it is not the purpose of this Note to second-guess the non-paramilitary signatories of the Good Friday Agreement. Releases following previous conflicts on the island set a dangerous precedent, as paramilitaries came to expect that they were entitled to releases. The Good Friday Agreement ends a conflict that was inherently different from the previous conflicts, one characterized by violence directed against both military and civilian targets.

International law, however, did not require the early release provisions of the Good Friday Agreement, as many of the paramilitary prisoners did


\(^{219}\) Mervyn Pauley, *Pauley on Politics: Loyalist Feud Could Wreck Institutions*, BELFAST NEWS LETTER, Aug. 28, 2000, at 6. Reports in March 2000 speculating that the IRA had established a division in Glasgow, Scotland, and that the IRA would use this base to launch attacks in Britain, underscored the fear that the IRA has yet to abandon its violent agenda. See *Security Scare as IRA Sets Up Unit in Glasgow*, PEOPLE, Mar. 5, 2000, at 2. These reports were prompted by an increase in the travel of republicans to Glasgow after the onset of the early release program. *Id.*

\(^{220}\) See generally Trimble, supra note 3; McEvoy, supra note 13.
not fit into the traditional definition of prisoners of war or political prisoners. The crimes that were excused under the Good Friday Agreement were at best quasi-political: ruthless, sectarian violence committed in the name of a "cause." These crimes resemble gang wars more than they resemble revolution.

Though releases have occurred, other components of the agreement, such as those pertaining to the decommissioning process and the Northern Ireland Assembly, have not been realized. And although the ceasefires have held, localized sectarian violence continues. If the Good Friday Agreement and the ceasefires do not survive the crucial next few months, it would be extremely easy to attribute the failure to the early release program.