

# Walking the Queen's Highway: Peace, Politics and Parades in Northern Ireland\*

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## I. INTRODUCTION

A presumption in favor of freedom of assembly is firmly rooted in western liberal democratic theory: The freedom to join with others to voice political grievances and messages. However, the need for government restraints aimed not specifically at assemblies, but generally at keeping the peace, adversely affects the peoples' freedom to assemble.<sup>1</sup> Unfortunately, the number of restraints available should not be surprising. The range of important state interests affected by free assembly is wider than those affected by other acts of expression. Assembly involves the potential for violence against individual citizens and for broad civil disorder caused by mob activities. In addition, while violent protest may bring about change, civil governments cannot survive if they allow the use of such methods. These concerns explain the general acceptance of freedom of assembly as a non-absolute right.

Thus, the state's legitimate interest in maintaining order in a free society creates a fundamental tension with the freedom of citizens to assemble. As one commentator suggests, both politicians and their constituencies treat freedom of assembly and public order in a schizophrenic manner.<sup>2</sup> The line between protection of the peoples'

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1. The effect of public safety considerations on the freedom to assemble has been well recognized by courts. See *Hague v. Committee for Indust. Org.*, 307 U.S. 496 (1938). For example:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

*Id.* at 515-16.

2. See Conor Gearty, *Freedom of Assembly and Public Order*, in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 39 (Christopher McCrudden and Gerald Chambers

right to assemble, and the State's duty to maintain the public order, is often arbitrarily drawn and influenced by unprincipled political and social considerations.

The evolution of the law defining freedom of assembly in England attests to the difficulty of maintaining a stable balance between public order and the freedom to assemble. English common law has experienced periods where the right to freely assemble in the form of parades and marches was nearly absolute. However, in the recent past, Westminster<sup>3</sup> has certified an approach favoring public order that leaves free assembly susceptible to politically and socially motivated repression. While reprehensible to the civil libertarian, statutes such as the Public Order Act 1986<sup>4</sup> have arguably succeeded in maintaining peace and social harmony in Britain, albeit at the expense of unpopular speech. The same cannot be said for Northern Ireland, which operates under a nearly identical statutory instrument.<sup>5</sup>

The history of Northern Ireland is marred by sectarian conflict between the Catholic and Protestant communities. Seventy-five years of exclusion from participation in government has left Catholics with, "a burning sense of grievance reinforced by both institutional and informal discrimination."<sup>6</sup> Similarly, Protestants "see themselves confronted by a sullen minority which they believe wants to destroy their Constitution and put them in the hands of a state they fear to be both economically underdeveloped and one of Europe's most reactionary theocratic states."<sup>7</sup> Essentially, Protestants see themselves as the last vestige of all the Protestant ideals that they have historically associated with "Britishness." This bi-cultural dynamic creates civil instability. Since Northern Ireland's political birth in 1921, the Province has experienced all manners of civil unrest—from local vigilantism, to massive scale rioting and guerrilla warfare.<sup>8</sup> In many cases, one community's exercise

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eds., 1994).

3. "Westminster" refers to the English Parliament housed at Westminster. See *infra* text, Part III.

4. Public Order Act, 1986, ch. 64 (Eng.).

5. See Public Order (Northern Ireland) Order 1987 S.I. 1987, No. 463.

6. HAROLD JACKSON, REPORT: THE TWO IRELANDS: THE PROBLEM OF THE DOUBLE MINORITY—A DUAL STUDY OF INTER-GROUP TENSIONS 3 (1979).

7. *Id.*

8. From 1969-93, an estimated 3,466 deaths have been attributed to sectarian violence. See MALCOLM SUTTON, AN INDEX OF DEATHS FROM THE CONFLICT IN IRELAND (1994) (excerpt available on the internet at the Conflict Archive on the Internet Web Service (CAIN), located at <<http://cain.ulst.ac.uk/sutton/>>). CAIN is an ongoing conflict

of the right to parade on the public highway, much to the discomfort of the other community, has touched off these sectarian "fires."<sup>9</sup>

Though the ferocity of "the Troubles"<sup>10</sup> has subsided over the past few years, arguably, the conflict has not altogether disappeared, but instead smolders beneath the surface. Paramilitary cease-fires and broad-based support of the most recent peace initiatives have created a new atmosphere of tenuous understanding between the polarized Catholic and Protestant communities. With the advent of the Good Friday Peace Accord,<sup>11</sup> and the long-delayed convening of Northern Ireland's new assembly,<sup>12</sup> the future political stability of Northern Ireland looks more promising than ever. However, the social stability of the province at the street level is questionable. Although the leaders of Northern Ireland's major political parties have reached an agreement for a peaceful way forward, that agreement was reached with much apprehension and intense political pressure from the international community.<sup>13</sup>

In truth, the real test of Northern Ireland's new broad-based government will come from the population of Northern Ireland at "ground zero" of the troubles, which has personally sacrificed for, and suffered at the hands of sectarian strife. Annual conflict between institutions such as the Orange Order, and the organizations that oppose expressions of Ulster Protestantism, pose a real threat to the reluctant peace reached by leaders of Northern Ireland. Moreover, these populist

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study project developed by a partnership of the University of Ulster, Queen's University Belfast, and Linen Hall Library, Belfast.

9. See *infra* Part VII.

10. The "Troubles" are generally understood to refer to the sectarian strife that has existed for the last thirty years in Northern Ireland between Protestants loyal to the British Crown and Catholics who support Irish Republicanism or nationalism. See TIM PAT COOGAN, *THE TROUBLES: IRELAND'S ORDEAL 1966-1996 AND THE SEARCH FOR PEACE* 1 (1996).

11. See *infra* Part IX.

12. See *Direct Rule in North Due to End At Midnight*, IRISH TIMES, Dec. 1, 1999. However, just before this Article went into print, the British Government suspended the Northern Ireland Assembly and re-imposed direct rule over the province. See *Political Uncertainty Returns to North as Direct Rule Is Reimposed*, IRISH TIMES, Feb. 12, 2000.

13. The Good Friday Peace Accord was reached between Northern Ireland's political parties only after long, intense negotiations chaired by U.S. Senator George Mitchell, and after President Bill Clinton's personal intervention in the process. See *How Can We Best Repay Our Debt to Mitchell*, IRISH TIMES, Apr. 24, 1998. See also, *Clinton Saw Need to Play Down Vital Role in Northern Ireland*, IRISH TIMES, Apr. 11, 1998. Moreover, the new Northern Ireland assembly was not convened until after Sinn Féin reluctantly agreed to Ulster Unionists' insistence that it could back out of the Northern Ireland Assembly if the IRA did not decommission its weapons by February 2000. See *Agreement Allows Trust to Grow and Escape Hatch*, IRISH TIMES, Nov. 27, 1999. Apprehension was also the primary factor in the British government's suspension of the new Assembly on February 15, 2000 over the issue of paramilitary arms decommissioning. See *Political Uncertainty Returns to North as Direct Rule Is Reimposed*, IRISH TIMES, Feb. 12, 2000.

organizations on both sides of the sectarian divide are not as susceptible to international pressure as their leaders may be. This is clearly demonstrated by the history of Northern Ireland, which includes a tradition of fierce independence at the popular grass roots level.<sup>14</sup>

Despite social and political progress, the two communities in Northern Ireland remain culturally, politically, socially, and geographically distinct.<sup>15</sup> While some of the rural areas are to a certain degree "mixed," "many individual streets or estates in working-class areas are designated or acknowledged as identified with one faith or the other."<sup>16</sup>

This history of segregation and intolerance is resurrected and re-examined annually during the traditional Orange Order marching season, when ancient social animosities are revived. Given the "enclave" make-up of Northern Ireland's larger cities, often an Orange parade will pass through a Catholic Nationalist neighborhood, to the great dismay of its residents. These Orange parades either intentionally or inadvertently serve two purposes. First, they symbolize and strengthen cultural identity in the Protestant Community and have become a linchpin to a culture under attack. Second, they serve to remind Catholics of centuries of discrimination including their relegation to second class citizenship at the hands of their parading neighbors, and indirectly reaffirm traditional support for militant Irish Nationalism.

Thus, the tentative atmosphere of understanding is, and will continue to be, severely tested each summer as Protestant Orangemen and Catholic neighborhood groups take to the streets. However, under the current legal machinery, civil authorities, in attempting to maintain public order, only placate one community at the expense of the other. If the state allows a contentious Protestant Loyalist parade to march unrestricted through a Catholic Nationalist neighborhood, invariably, the march requires the protection of a full-scale police action, which often includes hundreds of heavily-armed police officers in armored Saracen cars and riot gear.<sup>17</sup> In many instances, Catholic residents are forcibly cordoned off in their homes until the parade passes.<sup>18</sup> Most Catholics perceive the excesses of official protection of free assembly as just another indignity in a long history of Protestant abuse and discrimination

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14. See *infra* Part VII.

15. See NEIL JARMEN, MATERIAL CONFLICTS 87 (1997).

16. *Id.*

17. See *Catholics Riot After Orange Marchers Win*, TIMES (London), July 12, 1996 (available at <<http://www.sunday-times.co.uk/>>).

18. See *id.*

against the Catholic minority. Yet, if the same parade is restricted from the Catholic neighborhood, Protestant Loyalists believe the state is pandering to Nationalist terrorists and insurgents. Protestants also perceive overtures to the Catholic community to be at the expense of their right to walk on the street and to foreshadow the re-integration of Protestant Northern Ireland into the predominately Catholic Republic of Ireland, with the consequential severance of economic and cultural ties with Great Britain.<sup>19</sup> Thus, the balance between free assembly and public order needs to be re-examined in a broader social and historical context. Not only is the comfort of the community disrupted by the exercise of the right of free speech and assembly, but arguably, the fragile peace in Northern Ireland is threatened as well.

The authorities in Northern Ireland continue to operate under a statutory regime similar to, if not more authoritarian than, the system employed in England.<sup>20</sup> Though armed with impressive legal weaponry, as discussed herein at Part VII, this power was frequently used at the expense of individual civil liberties for discriminatory and political purposes. Where authorities have tried to act impartially, the use of police powers has done little to preserve public order, and in many situations, has had the opposite effect.<sup>21</sup> Conversely, attempts to reform Northern Ireland's police powers seem to elicit a similar level of anger. The recent report of the Patten Commission on Police Reform has, in reality, proposed only symbolic change. Yet public reaction to it has been doubtful at best and simply abusive at worst. The latest enactment, the Public Processions Act 1998,<sup>22</sup> may have removed some of the bugs in the legal machinery, but many see this as too little, too late.<sup>23</sup> As will be demonstrated, the history of parade regulation in Northern Ireland resembles a knot. The State's use of police powers in either direction, to protect the rights of marchers, or alternatively to prevent disorder by banning such marches, increases the tension between antagonistic

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19. See NORMAN PORTER, *RETHINKING UNIONISM: AN ALTERNATIVE VISION FOR NORTHERN IRELAND* (1996) (excerpt available at <<http://cain.ulst.ac.uk/issues/politics/docs/porter.htm>>). Porter points out that since the Anglo-Irish Agreement in 1985 and the Downing Street Declaration of 1993, Britain has been perfectly content in a sort of neutrality with respect to Northern Ireland, and has given the Republic of Ireland a larger role in the government of the province, thus making good on promises Lloyd George, then Prime Minister of Great Britain, made when trying to reassure Michael Collins and Arthur Griffith of the temporary character of the division of Ireland, "in order to persuade Ulster to come in there is an advantage in her having a Catholic population. I think you will get Ulster into an Irish unit on agreed terms. We promise to stand aside and you will not only have our neutrality but our benevolent neutrality." *Id.*

20. See *infra* Parts IV, VII.B.

21. See *infra* Part VII.

22. Public Processions (Northern Ireland) Act, 1998, ch. 2 (Eng.).

23. See *infra* Part VIII.

groups and complicates efforts to relax hostilities.

This Comment will discuss Northern Ireland's contentious Orange marching season and will review the history of Northern Ireland and its significance to the present day antagonists. It will further explore the law of Northern Ireland that is designed to protect the right to parade while preserving the public order, and consequently the related British legal machinery and its common law development. This Comment will also discuss the failure of Police Powers with respect to contentious parades in Northern Ireland, and will analyze the Parades Commission's prospects for success in diffusing sectarian animosity and violence associated with parading in Northern Ireland as its new government embarks on a long and rocky road to a permanent peace.

## II. THE ORANGE ORDER AND ORANGE PARADES

Named in commemoration of William of Orange, who in 1690 secured Protestant rule in Ireland with his victory over the Catholic King James II, the Orange Order celebrates William's victory at the Battle of the Boyne each year on the Twelfth of July.<sup>24</sup> Formed in 1795, the Orange Order is a fraternal society dedicated to preserving the Protestant identity in Northern Ireland, and consequently, is opposed to the Catholic Church.<sup>25</sup> Wearing orange sashes and bowler hats, the uniform of their forefathers, Orangemen march in honor of their heritage, part of which includes the oppression of Catholics.<sup>26</sup>

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24. See JARMEN, *supra* note 15, at 94.

25. One of the most zealous religious leaders within Northern Ireland and a frequent supporter of the Orange Order and the Loyalist movement is the Reverend Ian Paisley. Paisley's zealotry is perhaps best exemplified by his behavior at a meeting of the European Parliament in 1988 addressed by the Pope. He was removed from the chamber after holding up a sign that read: "John Paul II Antichrist," and shouting "I renounce you as Antichrist." COOGAN, *supra* note 10, at 397.

26. See JARMEN, *supra* note 15, at 101. But see *The Grand Orange Lodge of Ireland* (available at <<http://www.grandorange.org.uk/>>) (for a discussion the Orange Order's sentiment towards its Catholic neighbors). For instance, according to the Derrykeevan Temperance Loyal Orange Lodge 352, an Orangeman

should love, uphold, and defend the Protestant religion, and sincerely desire and endeavour to propagate its doctrines and precepts; he should strenuously oppose the fatal errors and doctrines of the Church of Rome, and scrupulously avoid countenancing (by his presence or otherwise) any act or ceremony of Popish worship; he should, by all lawful means, resist the ascendancy of that Church, its encroachments, and the extension of its power, ever abstaining from all uncharitable words, actions or sentiments towards Roman Catholics.

*Id.*

The Order confirms to the faithful that Ulster remains a Protestant state for a Protestant people. In addition, Orange parades have several deeper layers of importance. As one commentator points out, “[a] parade is more than just a marking of territory, it is a central cultural icon. It is not taking place simply to give an aggressive message to the Nationalist community, but is, for many, symbolic of the identity of the Protestant community.”<sup>27</sup> It plays a specific political role within that community and is therefore a political resource within the politics of unionism. As MacDonald notes, the Order’s “sectarianism has at times been so intense that its members were occasionally expelled for attending funerals in Catholic churches.”<sup>28</sup> Although the Orange Order is only one of several Protestant orders which conducts parades, Orange parades have become the most significant.<sup>29</sup> The phrase “Orange parades” is generically used to refer to all Protestant Loyalist parades.<sup>30</sup>

During the earlier stages of Northern Ireland’s devolved government, known as Stormont,<sup>31</sup> Orangemen routed their annual parade through Catholic enclaves as a test of the status quo, namely, the continued Catholic acquiescence to Protestant hegemony.<sup>32</sup> As MacDonald notes, “[i]f the provocation of the Orange parades met with Catholic rock-throwing, stern oppressive measures were called for; if the parade met

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27. DOMINIC BRYAN, ET AL., *POLITICAL RITUALS: LOYALIST PARADES IN PORTADOWN* (1995) (available at <<http://cain.ulst.ac.uk/csc/reports/rituals.htm>>).

28. MACDONALD, *CHILDREN OF THE WRATH: POLITICAL VIOLENCE IN NORTHERN IRELAND* 64 (1986).

29. See *infra* Part II.

30. NEILL JARMAN, *MATERIAL CONFLICTS: PARADES AND VISUAL DISPLAYS IN NORTHERN IRELAND* (1997) (excerpt available at <<http://cain.ulst.ac.uk/issues/parade/jarman.htm>>). There are several other Loyalist organizations that parade. The Blackmen, from Counties Armagh and Down, host a large parade and gathering on July 13 at Scarva, Co. Down, reputedly on the route that William of Orange’s army took on its way south. The Black parades continue through August, until their main demonstration on the last Saturday of that month, which marks the traditional end to the parading calendar. Where the Orange Order represents working class secularism and Protestant paramilitary emblems, the Black parades give less emphasis to the military history of Protestantism, and are heavily dominated by religious themes. Alongside membership of the Orange and Black some men also belong to the Apprentice Boys of Derry, which, with a membership of around 12,000 men, is the smallest of the three main orders. The Apprentice Boys are based in the city of Londonderry; their main purpose is to commemorate the events of the siege of the city in 1688-89. The three senior loyal orders are responsible for organizing the major annual parades that commemorate the Williamite and Somme anniversaries. They also organize a wide range of smaller parades, which have increased in number to such an extent that the period from Easter to the end of August is now known as the marching season. See *id.*

31. The Partition of Ireland established two governments for the island. In 1932, Stormont became the seat of Northern Ireland’s devolved Parliament. The Stormont parliament maintained control over the six counties of the Province until its suspension in 1972, when the British government announced direct rule over Northern Ireland. See JONATHAN BARDON, *A HISTORY OF ULSTER*, 467, 513, 689-90 (1992).

32. See MACDONALD, *supra* note 28, at 64-65.



with nothing more than grudging resentment, the status quo was considered secure for another year."<sup>33</sup> In this respect, arguably the annual Orange parades reinforced Protestant social and political unity by insuring the existence of Catholic resentment to the Protestant State.

The Orange Order was, and to a large extent still is today,<sup>34</sup> intimately connected to the Unionist Party,<sup>35</sup> traditionally appointing a quarter of the members of the Ulster Unionist Council, the Unionist Party's caucusing body.<sup>36</sup> In Northern Ireland's early years, the informal power of the Order within the party was even greater, as membership at the upper levels of the two organizations was relatively indistinguishable. All but a few leading Unionist members of government were Orangemen.<sup>37</sup> Also, Orange Halls were generally the meeting places for local Unionist constituency associations, forming both the structure and substance of the Unionist Machine.<sup>38</sup> Arguably, the upper class of Unionism exercised control over the Orange Order in the early years. This, however, has been changing because the majority of the Orange Order's members, the Protestant laboring classes, have recently become more politically aware and have substantially influenced Unionism's policies.<sup>39</sup>

33. *Id.*

34. The political rise of a disenchanted Loyalist working class has recently strained Unionist solidarity, so that some movements within the Orange Order have drifted away from the traditional allegiance to mainstream Unionist politics. See BRYAN, *supra* note 27.

Significantly higher rates of unemployment and the reduced ability of the local private sector to provide employment, and the disempowerment of the political elite after 1972—caused by the collapse of Stormont—seems to have created greater alienation within the Protestant working class such that the parades, particularly in the industrialized towns, could become an expression of opposition to the state.

*Id.*

35. The Unionist Party is used herein to mean the loose alliance between the several different parties that share Unionism as a political ideology, including the Ulster Unionist Party (UUP), Northern Ireland's largest political party. Other member groups are lined up at various points on the right side of the political spectrum. The UUP provided each government at Stormont from Partition until suspension. See *id.* See also COOGAN, *supra* note 10, at 546; MACDONALD, *supra* note 28, at 58.

36. See MACDONALD, *supra* note 28, at 64-65.

37. See JARMEN, *supra* note 15, at 72.

38. See MACDONALD, *supra* note 28, at 65.

39. See *supra* note 34. An excellent example of Protestant working class influence is found in the Ulster Workers' Council Strike of 1974. After the Province's political leaders reached an agreement to create a new power-sharing government for Northern Ireland, working class Loyalists staged strikes throughout Northern Ireland that paralyzed the province and brought down the Sunningdale power sharing executive as it

In exchange for its influence, the Orange Order helped integrate Protestant workers into the traditionally conservative Unionist Party. The Orange Order militated against class conflicts within the Protestant community by attracting the working class to a “populist” organization that was nonetheless controlled by the conservative business and professional classes. Arguably, the Order coaxed Protestant workers into a political system controlled by their traditional social “superiors” by bringing the working classes together with the industrialists in a fraternal setting. Thus the Orange Order helped to blur otherwise politically divisive social issues, and provided cohesiveness to the Protestant community.<sup>40</sup> Cohesiveness, though, was not cheap; Conservatives had to pay a price for Orange support. That support came in the form of traditional colonial privileges provided to Protestants over Catholics.<sup>41</sup>

The Orange Order has traditionally showcased its political and social significance with public parades. Today, the Twelfth of July remains the centerpiece of the marching season, and the climax of most Orange parades.<sup>42</sup> The Twelfth of July generates the biggest parades and crowds and the most color and noise, as well as the most disruption and protests.<sup>43</sup> One of the most surprising features of the Orange tradition is that it still manages to retain a diversity of features within a single organization. Virtually all denominations within the Protestant faith come together within the framework of Loyalist parades. This is possible because that framework, while nominally religious, is principally about a collective national identity.<sup>44</sup>

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was known. *See also* BARDON, *supra* note 31, at 707-12.

40. *See infra* Part V.B.

41. This system of patronage arguably led to the social inequities of the mid-twentieth century as evidenced by discrimination against Catholics in employment, housing and public office. *See* John Whyte, *How Much Discrimination Was There Under the Unions Regime, 1921-1968?*, in CONTEMPORARY IRISH STUDIES (Tom Gallagher, James O’ Conner, eds. 1983) (excerpt available at <<http://cain.ulst.ac.uk/issues/discrimination/whyte.htm#chap1>>). As MacDonald argues:

This could have cost Protestant workers dearly, however, for it divided the working class and prevented it from claiming the benefits brought by class solidarity. But as citizens of the United Kingdom, Protestant workers received the full entitlements of the British welfare state. Thus they were cushioned from the consequences of their sectarianism; although divided from Catholic workers, Protestant workers still enjoyed the benefits won by the unity of the British working class—The post Second World War Welfare state.

MACDONALD, *supra* note 28, at 65.

42. *See* JARMEN, *supra* note 15, at 114.

43. *See id.* at 101-06.

44. *See id.* at 108. Jarmen also notes that this Protestant unity is also, “created in opposition to those who are excluded from the day’s events, the Roman Catholic population, who are allowed no part in the proceedings, and are in some cases virtually imprisoned for the day, as the daily routine is put on hold.” *Id.*

The Orange parades are no small affairs. During the annual Twelfth of July parades, Northern Ireland comes to a virtual standstill as hundreds of small parades feed into larger ones throughout the day. Although there are eighteen main parades on the Twelfth of July, the total number of notifications, and therefore legally recorded parades, on the Twelfth in 1995 was 547. Over 20 percent of all Loyalist parades are held on a single day.<sup>45</sup> In more recent years the number of Loyalist parades have grown,<sup>46</sup> and although the body charged with regulating these parades has imposed a larger number of restriction on a larger number of parades, the numbers of illegal parades and disorderly parades have skyrocketed.<sup>47</sup>

In the past, the elaboration of Loyalist parades and displays occurred largely in response to perceived political threats; parading was a way of displaying and affirming communal strength and local dominance.<sup>48</sup> More recently, with the signing of the Anglo-Irish Agreement in 1985,<sup>49</sup> which gave the predominantly-Catholic Republic of Ireland a say in

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45. See ROYAL ULSTER CONSTABULARY, CHIEF CONSTABLES' ANNUAL REPORT 1996 (available at <<http://www.ruc.police.uk>>).

46. In 1986 there were 1731 Loyalist parades, and in 1996 there were over 3000. For official statistics, see *Royal Ulster Constabulary* (visited Mar. 17, 2000) <<http://www.ruc.police.uk>>.

47. According to the statistics published by the Royal Ulster Constabulary, in 1996 there were 2405 Loyalist parades, 28 were either conditioned or re-routed, 8 were deemed illegal, and disorder was observed at 15. In 1997, Loyalist parades grew to 2586, 30 were conditioned or re-routed, only 1 was deemed illegal and disorder occurred at 6. By contrast, in 1998, there were 2659 Loyalist parades, 59 of which were re-routed and a further 9 were conditioned. More notably, the number of illegal parades soared to 75, and the number that became disorderly grew to 18. See *id.*

48. See JARMEN, *supra* note 15, at 56-57. Jarmen argues that Ireland saw an increase in Protestant parading during the early 1800's in response to O'Connell's growing campaign for political emancipation. He states that the "parades were local expressions of power and dominance," and the "growing culture of parading also served both to build more connections between people and places of similar faith, and at the same time to intensify the social distance from those of the other faith." *Id.*

49. See GARY MCMICHAEL, *ULSTER VOICE* 16-17 (1999). The Anglo-Irish Agreement, otherwise known as the Hillsborough Treaty, gave the Irish Republic a "structural role in the affairs of Northern Ireland," but as McMichael points out, "it was negotiated over the heads of the people of Northern Ireland." *Id.* See also BRYAN, *supra* note 27.

During 1985 and 1986, the town of Portadown, in County Armagh was shaken by a series of violent civil disturbances which were significant even in terms of the recent troubled history of Northern Ireland, and perhaps unique given the town's relatively small population of 30,000. In the period from the spring of 1985 to the autumn of 1986 there were six major riots.

*Id.*

Northern Ireland's internal affairs, Protestants have come to regard Northern Ireland's constitutional link with England at its weakest since the political turmoil surrounding the Partition of Ireland.<sup>50</sup> The response is more parades.<sup>51</sup>

Parading is historically linked to the Protestant community and is sometimes referred to as the finest expression of Orange culture.<sup>52</sup> Protestant Loyalists perceive parading as a cultural "rallying point" and an expression of their civil rights. Yet, Nationalists have often used parading to express their culture and heritage as well,<sup>53</sup> though to a lesser degree. From the Easter rising of 1916, various Republican organizations expanded the use of parading as a form of expression.<sup>54</sup> In spite of the insistence on the importance of parading as a tradition, with all the implications of continuity and lack of change that that word suggests, police records<sup>55</sup> show that there has been a steady increase in Loyalist parades over the past ten years. The figures also show a vast imbalance between the number of parades that are held by the two dominant communities: Loyalist parades outnumber Republican parades by a ratio of around ten to one.<sup>56</sup>

The discrepancy between the number of Loyalist and Nationalist parades is related to the broader political history of Ireland. Protestants have historically used the imbalance of power in the north to constrain Nationalist and Republican parades. Loyalists expect to be able to march where and when they wish in their country, but they regard Nationalist parades as a threat to public order. Loyalist parades are inevitably presented as cultural and traditional rather than political, while Nationalist, and in particular Republican, parades are seen as

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50. See JARMEN, *supra* note 15, at 120. According to McMichael, The Unionist population perceived the Anglo-Irish agreement as a betrayal. He quotes one Unionist M.P. as saying: "I stood outside Hillsborough, not waiving a Union flag—I doubt whether I will ever again—not singing hymns, saying prayers or protesting, but like a dog and asked the government to put in my hand the document that sold my birthright." MCMICHAEL, *supra* note 49, at 10.

51. See MCMICHAEL, *supra* note 49, at 120.

52. See *id.* at 121.

53. The marching season is dominated by the parades of the loyal orders; but there is also a distinct Nationalist parading tradition that is part of the wider culture of parading. The Nationalist parading bodies, the Ancient Order of Hibernians (AOH) and the Irish National Foresters (INF), as well as the Republican movement, organize many parades throughout the marching season, and in recent years the Republican movement has readily taken up the practice of parading as an element of its own culture of remembrance. See JARMEN, *supra* note 15, at 136.

54. See *id.* at 136-68, for an excellent discussion of the Nationalist parading tradition.

55. See ROYAL ULSTER CONSTABULARY CHIEF CONSTABLE, *supra* note 43.

56. For example, in 1998, there were a total of 2659 Loyalist parades and 229 Nationalist parades. See *supra* note 47.

political and therefore provocative and confrontational. For example, Loyalists perceive their parades as akin to Fourth of July Parades in the U.S.; Nationalist parades are perceived as something closer to Marxist demonstrations. Loyalists invoke "tradition" wherever possible, and the language of politics is avoided. Traditional parades are presented as unproblematic and non-contentious, whereas political parades need to be carefully policed and constrained. The opportunity to demand and to exercise the right to march is thus a symbol of the distribution of political power in Northern Ireland, and is used as a means of confirming that Ulster is British.

Nationalists, on the other hand, see Loyalist parades as triumphant expressions of superiority, as coat trailing, and as an indicator of the continuing differences in communal civil rights. Residents' groups opposing Orange parades began to appear in 1995 in various Catholic neighborhoods in Northern Ireland.<sup>57</sup> These residents' groups generally demand that Orange marchers seek the neighborhood's consent before parading through these sensitive areas. Failing such efforts, they demand that the Orange parades be re-routed.<sup>58</sup> The Loyalists have generally refused to negotiate with these groups, and have shown even less consideration to requests to voluntarily re-route these parades. The perception is that such actions would be a capitulation to Sinn Féin and other forms of Republicanism.<sup>59</sup> In the end, both perspectives are valid. Parades are expressions of culture, displays of faith, and acts of domination; but they are also intimately linked to the wider political domain. This paradox renders it impossible to denounce either community's position on the parades issue as irrational.

The insistence by the Orangemen that they have a right to walk anywhere in Northern Ireland, and that Ulster is primarily a Protestant province, is annually put into practice, and the entire six counties are encapsulated within the trace of "traditional" Orange parade routes. During the summer, centuries of resentment and antagonism boil to a head as Loyalist Orangemen square off against Catholic Nationalists. While a majority of Loyalist parades are more like community social gatherings,<sup>60</sup> a small number of parades are contentious.<sup>61</sup> These

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57. See JARMEN, *supra* note 15, at 130.

58. See *id.*

59. See *id.* at 131.

60. As the Irish Catholic writer Ruth Dudley-Edwards noted, one greatly under-appreciated aspect of many of the Orange parades is their sense of fun. Many parades are family occasions with a strong sense of community and pageantry—men, women and

contentious parades draw the ire of Catholics that live along the path of the parade route. Often times, Catholic Nationalists will stage counter-demonstrations or Gaelic cultural events nearby that draw Nationalists from all corners of Ireland.<sup>62</sup> The high concentration of antagonists in proximity to the parade routes escalates tensions between the two communities, and despite the presence of the police, often lead to violence. The decision to allow or ban a single Orange Parade has pitched Northern Ireland into chaos, marked by Province-wide rioting, burning, looting and murder.<sup>63</sup>

While both Loyalists and Nationalist blame each other for the predicament, and the Police attempt to maintain a much-desired appearance of civility and impartiality, the perception that each group wishes the world to receive hardly represents reality. A cross section of the parade issue is found in the factual summary in *Scullion v Chief Constable of the Royal Ulster Constabulary*.<sup>64</sup>

On 12th July 1986 an Orange procession made its way from Dungannon to a field outside the town. The only practicable route from Dungannon to the field lay along the Ballygawley Road past the Housing Estate, which is predominantly, if not exclusively, a Roman Catholic estate. When such processions have passed along this route in other years, there has been trouble. Various bands taking part in the procession take pleasure in stopping at the entrance and taunting the residents. Some supporters are keen to make their way into the estate in order to cause trouble or throw stones and bottles into the estate. Some of the residents take pleasure in shouting abuse and in throwing stones and bottles at the procession. These are a regular feature of processions on 12th of July and other days.

Superintendent Johnston of the Royal Ulster Constabulary and a number of other police officers went at about nine a.m. to the front of the estate in order to keep the peace. As the day wore on a crowd of 25 to 30 youths gathered in the estate armed with stones and bottles and intending to attack the procession. A tricolor was produced by them and waved provocatively as the procession passed. Supporters of the procession had stopped at the entrance to the estate and stones and bottles were exchanged. Superintendent Johnston did everything

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children take part. See *Derrykeaven Temperance Loyal Orange Lodge* 352 <<http://www.grandorange.org.uk/>>.

61. See *supra* notes 47, 48. In many instances, the contentiousness of the parade is not necessarily the parade itself, but certain aspects of the parade. Commenting on a Parades Commission decision to allow an Orange Parade through a Nationalist neighborhood, Conor Murphy, a Sinn Féin member of the new Northern Ireland Assembly, voiced the concern of residents: "They object to many of these bands, especially those who carry paramilitary LVF and UVF logos, and the 'kick the Pope' band." *Commission Looks At SF Proposal For March Route*, THE IRISH TIMES, Aug. 26, 1999.

62. See NEIL JARMEN & DOMINIC BRYAN, PARADE AND PROTEST: A DISCUSSION OF PARADING DISPUTES IN NORTHERN IRELAND, pt. 4 § 13 (1996) (excerpt available at <<http://cain.ulst.ac.uk/csc/reports/parade.htm>>). See also MICHEL SAVARIC, CONFLICTING SYMBOLS, SYMBOLS OF CONFLICT AND SYMBOLIC CONFLICT—THE DRUMCREE CRISES (1998).

63. See *infra* Part VII.

64. Transcript (Q.B. June 10, 1988) (available on LEXIS).

in his power to prevent a disturbance and acted even-handedly as between those connected with the procession and the residents of the housing estate.

Mr. Scullion is thirty-three years of age and is a free lance press photographer. Mr. Scullion took a number of photographs of the procession as it left Dungannon and a number of photographs from the housing estate. He saw missiles being thrown from the direction of the procession at the residents and missiles being thrown at the procession by youths in the estate. He witnessed for the first time a baton charge by police to disperse the gang of youths in the housing estate who were throwing missiles and took a photograph of that baton charge. He saw a person being grabbed by the police and taken into the bushes in Braeside in the estate and apparently set upon by the police. I am satisfied that this was a middle aged man called Eugene Faloon who subsequently brought a claim against the police and that it was not a youth whom Sergeant Wilson of the Royal Ulster Constabulary observed as involved in the disturbance and arrested. This youth was subsequently convicted of disorderly behavior and assault.

Mr. Scullion moved forward from his position behind the baton charge to observe the incident involving Mr. Faloon, intending to take further photographs. I am satisfied that a police officer struck him with two blows of his fist on the right side of the face as Mr. Scullion moved forward, that at this time Mr. Scullion had two cameras around his neck and a camera bag on his shoulder and was known to the police as a press photographer. He had already produced his press card on occasions to police officers at the estate.

I am satisfied that Mr. Scullion was knocked off balance by the blows; that another police officer grabbed his coat and kneed him in the testicles or area of the groin; that three or four police officers gathered round him, pushing and shoving and punching and one of them said: "Get that fucker out of here"; that he was seized and forced away from the area where Mr. Faloon was in fact being unlawfully assaulted; that a police officer with a riot gun put the gun to Mr. Scullion's face and said: "If you lift those cameras again, I will fucking kill you." I am satisfied as I have said that all these assaults were made by police on a person whom they knew to be a press photographer.<sup>65</sup>

Theoretically, the authorities have broad police powers at their disposal to head off collisions between the two communities. In practice, however, either using or restraining to use these powers acts as a catalyst for public disorder and violence. This begs the question: What can be done in the short run to prevent these contentious parades from degrading into or touching off sectarian violence, yet in the long run, promote, or at least not inhibit, community reconciliation?

### III. THE LEGAL MACHINERY FOR CONTROLLING PARADES IN GREAT BRITAIN AND NORTHERN IRELAND

In Great Britain, and consequently Northern Ireland, there is no requirement to seek permission to hold a parade—it is considered to be a

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65. *Id.*

civil right.<sup>66</sup> However, under the Public Order (Northern Ireland) Order 1987 ("1987 Order"), several formalities were observed.<sup>67</sup> Under article 3, parade organizers had to notify the police of their intentions to hold a parade, and indicate the route and the probable number of participants at least seven days in advance.<sup>68</sup> This was, and still is, done by filling out a detailed form known as an "11 / 1." Parade organizers are not required to receive permission from the police, and most parades follow their intended routes with little or no regulation.<sup>69</sup> However, violation of the notice requirement carries stiff consequences. If the notice did not comply with article 3, a person who organizes or takes part in the procession is guilty of an offense defined in article 3(5) and they may be punished under article 3(8).<sup>70</sup>

Under the 1987 Order, if the Senior police officer was of the opinion that the parade could cause serious public disorder he or she could impose constraints (on music played, on flags displayed, etc.) or order that the parade take a different route.<sup>71</sup> The Senior Police officer is defined under the 1987 Order as "a member of the Royal Ulster

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66. The law recognizes the right of persons to demonstrate or process along a public highway subject to such restrictions as are imposed by statute. *See* WHYTE, *supra* note 41. *See also* R v. Secretary of State ex parte Breen, Transcript (Q.B. July 7, 1992) (available on LEXIS):

It is important to bear in mind that before a parade takes place the organisers thereof do not require the permission as such of the police to proceed with such a parade. They have to serve a notice of their intention to do so pursuant to Article 3 of the Public Order (Northern Ireland) Order 1987.

*Id.*

67. Public Order (Northern Ireland) Order 1987, S.I. 1987, No. 463. This Act remained law until March 1998, when the Public Processions Act, 1998, went into effect. The changes are significant. *See infra* Part VII.B. However, the notification formalities for the relevant part remained unchanged.

68. *See* Public Order (Northern Ireland) Order 1987, art. 3.

69. *See* JARMEN, *supra* note 15, at 119.

70. *See* In the Matter of an Application by Patricia White for Leave to Apply for Judicial Review, Transcript (Q.B. July 11, 1996) [hereinafter *Patricia White*].

71. *See* Public Order (Northern Ireland) Order, 1987 art. 4(3)(b). Article 4(1) reads:

If a senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—

- (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or
- (b) the purpose of the persons organizing it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

Also, he may give directions imposing on the persons organizing or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any place specified in the directions.



Constabulary ("RUC") not below the rank of superintendent."<sup>72</sup> Violating the directions of the Senior Police Officer may result in a six month sentence and/or a statutory fine for a summary conviction, or 2 years for conviction under indictment.<sup>73</sup>

Under article 5 of the 1987 Order, the Secretary of State had the discretion to ban all processions in the area for up to three months, or allow the parade in question and prohibit all other parades in the area for one month.<sup>74</sup> This power was exercised when the Secretary of State, after receiving information from the RUC, believed the Section 4 powers would be inadequate to prevent serious disorder, or would result in undue burden on the military or police.<sup>75</sup> The Secretary of State was not obliged to make an order under article 5, and power to do so only arose if he or she forms the requisite opinion.<sup>76</sup>

There are other remedies available to residents, however these remedies offer no long term solution to prevent the same disruption on the next scheduled parade. Where parade participants abuse, or threaten to abuse, the right to parade, an action for nuisance may provide the aggrieved individuals civil law remedies. Where criminal violence erupts, criminal sanctions may be warranted. However, "the courts cannot under the law as it currently stands arbitrate on disputes between those wishing to process and those opposed to such processions."<sup>77</sup> Moreover, prosecutions pose their own problems. Often times, evidence is hard to obtain and successful prosecutions may stir up more violence than that created by the original offense.<sup>78</sup> Furthermore, post-event remedies are only temporary and by no means remedial, in that the same parade will be scheduled again the next year, pitching the antagonists against each other once again with an added year of resentment.

The discretion of the Police and the Secretary of State in imposing prior restraints appears to be nearly absolute. If someone applies for judicial review of the decision to restrict, or to allow a parade go through unrestricted, the law is fairly clear. The standard of review is very

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72. *Id.* art. 4 (3)(b).

73. *See id.* art. 4(5),(6)(a, b).

74. *See id.* art. 5.

75. *See id.* art. 5(1), (2).

76. *See An Application by McManus for Judicial Review*, Transcript (Q.B. May 4, 1990) [hereinafter *McManus*].

77. WHYTE, *supra* note 41.

78. When Ian Paisley was jailed for "parade excesses" his supporters rampaged through Belfast, fighting running battles with the RUC. *See infra* Part V.F.

deferential, as the reviewing court is not to decide whether a particular procession should or should not take place. The court is only entitled to review the decision-making process material to that particular decision.<sup>79</sup>

A relatively common feature of English law is that the courts must trust the administrative decisions of the authorities. In addition, judges also seem to recognize the dilemma the authorities face, namely, selecting a course of action that implicitly favors one community over another, regardless of the actual decision reached.<sup>80</sup> Even when judges disapprove of the ultimate decision, they recognize that the law allows the Chief Constable to form his own subjective opinion on the relevance of the factors pertinent to the decision making process and, consequently, will defer to that opinion.<sup>81</sup>

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79. See *Patricia White*, *supra* note 70. See also *McManus*, *supra* note 76: "The purpose of judicial review is to ensure that an individual receives fair treatment by the decision making authority—it is not to ensure that the authority, after according fair treatment, reaches a conclusion the Court considers to be right." *Id.* (citing *Chief Constable v. Evans*, 1 W.L.R. 1155, 3 All E.R. 141 (1982)). This type of judicial review is commonly referred to as *Wednesbury Reasonableness*. It applies to a decision,

which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (1948).

80. See *WHYTE*, *supra* note 41.

In exercising the powers conferred by Article 4 and Article 5 the police and the Secretary of State respectively have very difficult decisions to make in given cases. Any given situation requires a careful consideration and weighing-up of many factors. The police and the Secretary of State will be privy to much information, some of it possibly of a highly confidential nature, which will inform their decision. In the highly charged situation currently prevailing in Northern Ireland it is inevitable that whatever decision is reached by the police or Secretary of State in any given case it will attract criticism from one side of the community or the other. It is highly regrettable that this should be so. It is even more regrettable that those opposed to the decision in any given case consider it appropriate to take the type of violent and anarchic actions which the community in Northern Ireland have had to suffer over the last few days.

*Id.*

81. See *Re Armstrong*, Transcript (Q.B. 1992) (available on LEXIS). The case involved a petition by Catholic residents to compel the RUC to ban or impose conditions upon a parade along the Catholic Lower Ormeau Road of Belfast. A similar parade that had passed down the road a month earlier became very disruptive. The RUC forced 300 protesters off the street and cordoned them off in adjoining alleys. Many of the parade participants paused to shout abuses in front of a bookmakers shop, where 5 months earlier, members of the Loyalist Ulster Volunteer Force killed 5 Catholics. The abuses shouted included the slogan "Five-Nil" referring to the sectarian murders. Justice Nicholson, in refusing the petition, stated,

There is no doubt that there was disruption to the life of the community. That can be seen quite clearly on the video tape. The annoyance and upset felt by the community must be given careful consideration, not least when there had

This statutory scheme had the practical effect of placing the final decision to ban or alter a contentious parade on the local police. If the police did not object to a parade, it continued as planned. Where the police did perceive a threat to public order, the parade could be restricted or restrained.

Britain attempted to address some of these concerns through the recently enacted Public Processions Act.<sup>82</sup> The act created a commission of appointed officials charged with the task of deciding whether to restrict parades. However, the Parades Commission has no authority to issue an outright ban, only the British Secretary of State for Northern Ireland has that authority. Moreover, the Parades Commission works closely with, and is dependent upon the local police for advice in rendering a determination. The Chief Constable may also seek an appeal of the Commission's determination when he believes a different outcome is warranted. Both communities have doubts about this arrangement. Catholics resent the involvement of the RUC which they have historically perceived as "militarized unionism."<sup>83</sup> Protestants, on the other hand, have become increasingly skeptical over Britain's ability and desire to protect their civil rights. As discussed further herein, the statutory framework is still vulnerable to political and social abuse, and

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been sectarian murders committed in February and persons in the procession behaved so unforgivably at the scene where the murders were committed. Disruption does not have to be long-lasting in order to be serious. Serious disruption can occur temporarily. But it seems to me that the phrase 'serious disruption to the life of the community' or "serious damage to property" and that there is more likely to be a genuine difference of opinion as to whether the life of a community is affected than there is about the other 2 phrases in the Article. For instance, the protesters' lives were more disrupted than was the community. Accordingly, I consider that the Chief Superintendent is entitled to his opinion that the life of the community was not seriously disrupted on that date. Others are entitled to have a different opinion.

*Id.*

82. Public Processions (Northern Act) 1998, ch. 2 (Eng.). See *infra* Part VII.B for a discussion of this Act.

83. See BRYAN, *supra* note 27.

Most RUC members come from the unionist tradition, and the force's main mission, upholding the security of Northern Ireland, matches unionism's principal political goal. As the RUC became a major victim of republican violence in pursuit of this goal, unionist identification with the police force has strengthened. The RUC, through its membership and through its symbolism, also reflected core unionist values of the preservation of the existing order, respect for monarchy and the British system of government. . . . In a sense, the RUC has adopted the characteristics of a 'paramilitary' force.

*Id.*

fails to address the issue of parades in a manner conducive to a continuing peace.

Civil rights in Northern Ireland are historically linked to English common law, and the right to march in Northern Ireland has evolved simultaneously with its English cousin. However, the purposes and manners in which the right was exercised and the governments' reaction thereto eventually diverged. For these reasons, it is important to examine the evolution of the right to march in England to obtain an understanding of the legal factors that address this important social issue in Northern Ireland.

#### IV. THE RIGHT TO MARCH IN ENGLAND

The freedom to assemble is derived from the more substantive constitutional presumption in favor of free speech. Essentially, free assembly can be characterized as more than one person exercising his or her right to free speech in unison. As Gearty points out: "[i]ts importance lies in the belief that there is truth as well as safety in numbers."<sup>84</sup> Because the methods used to effectively amplify speech are limited (*i.e.*, television, radio, and the press), the freedom to assemble insures that despite limits on communication resources, everyday people will have a forum in which their ideas may be heard, namely the streets.<sup>85</sup> While parading along the street may be festive and innocuous, parading may also be intimately linked to the more significant aspects of freedom of assembly: The right to extol one's shared beliefs in a communal and public manner. Yet, free assembly also poses a threat to civilized society by endangering an individual's right to security and protection under the law. In this respect, exercising the right of free assembly often comes at a cost to public order and an individual's right to be free from the excesses of the masses.

Northern Ireland draws most of this legal framework from English common law. In many respects, the treatment accorded the right to parade in Northern Ireland is no different than in the rest of the United Kingdom. The maintenance of public order conditions the right to march; the police are in charge of determining when public order is threatened; the police or civil authorities may impose conditions or restrictions on a march; and judicial review of these decisions is limited and deferential.

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84. Gearty, *supra* note 2, at 39.

85. See *id.* at 40. Thus, Gearty argues that "freedom of public assembly represents the ultimate safeguard for democracy." *Id.*

A. *Evolution of the Common Law*

In Britain, the nineteenth century decision of *Beatty v. Gillbanks*<sup>86</sup> created the modern representation of the common-law presumption in favor of free assembly. In *Beatty*, the local authorities prevented a march by the appellant and others who were members of the Salvation Army after their peaceful procession encountered violent opposition from an antagonistic group. The key question for the court, on appeal, was the propriety of the so-called "Hecklers Veto." Whether the violence of their opponents (the "Skeleton Army") could effectively veto the Salvationists' freedom of assembly. The answer was no. The court reasoned that,

[w]hat has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition.<sup>87</sup>

However, in the United Kingdom, free assembly is by no means absolute. Several factors, that in many respects are quite unique, contour the right. First, the need for public order conditions assemblies that threaten public peace and tranquillity.<sup>88</sup> Second, the right of others to use public streets and highways, or the right of passage, provides both justification for, and a limitation to, free assembly in the form of street demonstrations and marches.<sup>89</sup> Third, and perhaps most significantly, English law allows the balancing of these competing rights to be undertaken by the police and local administrators.<sup>90</sup>

While the *Beatty* decision represents the high-water mark for freedom of assembly in Britain, more recent cases have diluted the strength of this language by striking a balance between free assembly, the right to passage, and the public order, expressed as follows: "[C]ourts have long recognized the right to free speech to protest on matters of public concern and to demonstrate on the one hand, and the need for peace and good order on the other."<sup>91</sup> As applied, the balance seems to favor public

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86. 9 Q.B.D. 308 (1882).

87. *Id.* at 314.

88. *See infra* Part IV.A.

89. *See infra* Part IV.A.

90. *See infra* Part IV.B.

91. *Hirst and Agu v. Chief Constable of West Yorks*, 85 Cr. App. R. 143, 151 (1987).

order. The paramount concern is social harmony, not the free exercise of individual liberty.<sup>92</sup> Thus, one commentator remarked that “[t]he maintenance of the Queen’s peace is perceived as the primary function of the law.”<sup>93</sup>

After *Beatty*, courts articulated compelling public order justifications for giving the authorities the power of prior restraint to restrict or ban potentially violent or disorderly assemblies in advance. In a case decided just after *Beatty*, the Irish appellate court<sup>94</sup> acknowledged the existence of a heckler’s veto. The court upheld a decision by a magistrate to disperse an otherwise peaceful meeting in order to prevent an attack by its opponents. The officer’s paramount duty was to preserve the peace by whatever means were available for the purpose:

Accordingly, in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff and his friends, still, if the defendant believed and had just grounds for believing that the peace could only be preserved by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was I think the duty of the defendant to take that course.<sup>95</sup>

Thus, the officer’s “paramount duty was to preserve the peace unbroken, and that by whatever means were available for the purpose.”<sup>96</sup>

This tug-of-war between free assembly and public order is replicated in nearly every liberal democracy. An absolute guarantee of assembly would be chaotic and anarchistic. At the same time, a total preoccupation with peace would be politically stifling and authoritarian. In several countries, including the U.S., a legal compromise is reached by guaranteeing a right of assembly, qualified by exceptions.<sup>97</sup> In Britain and Northern Ireland, by contrast, the law does not favor assembly as a positive right. The emphasis is instead on the freedom to assemble as a negative liberty; as something citizens are free to do to the extent that they are not restricted by any law, whether administrative, statutory, or

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92. See Gearty, *supra* note 2, at 41.

93. *Id.* Gearty notes:

The law on Public order has to be wide enough to catch the rioters, the hooligans, the disorderly football fans, and the aggressive drunkards. But it necessarily also extends to people who have gathered together in pursuit of their freedom to assemble . . . large protests have often degenerated into looting and criminal damage, and even well-organized pickets have on occasion become pitched battles between strikers and workers.

*Id.*

94. Ireland was under direct rule by Westminster at this time in history.

95. O’Kelly v. Harvey, 15 Cox CC 435, 445-46 (1883).

96. *Id.* at 446.

97. See NEIL JARMEN, ET AL., *POLITICS IN PUBLIC: FREEDOM OF ASSEMBLY AND THE RIGHT TO PROTEST—A COMPARATIVE ANALYSIS*, pt. 3, § 1 (1998) (excerpt available at <<http://cain.ulst.ac.uk/dd/report8/report8.htm>>). The authors cite the jurisdictions of Canada, Ireland, Italy, South Africa and the United States for this proposition. *Id.*

judge-made.<sup>98</sup>

Further contouring the right of free assembly in British common law is the concept of the right of passage. According to Vorspan, "[t]he right of passage is arguably the only positive right recognized in English common law."<sup>99</sup> The justifications for this right have served as boundaries for the expressive mediums of demonstrations and processions. While in its earliest stages, the right served to restrict public demonstrations.<sup>100</sup> Later, through various social movements' reliance on protest marches, the right seemed to merge with free assembly at least as far as parades and processions were concerned.<sup>101</sup> Like freedom of assembly, the right of passage is linked to public order, yet unlike free assembly, the right of passage is also limited by the simultaneous exercise of the right by others.

Essentially, English common law evolved to recognize the public's right to use the highways "reasonably" and "free from obstruction."<sup>102</sup> Both qualifiers significantly affected the legality of all forms of street activity. The right to passage originated in the Middle Ages and was derived from two features of the English concept of highway. First, the highway was considered to be an easement over private property rather than a road.<sup>103</sup> Second, highways were private property even though they might be "owned" by the Crown rather than a private party.<sup>104</sup> By the eleventh century, most major roads were known as "King's Highways."<sup>105</sup> The right of passage incorporated two further concepts: "reasonable use" and "obstruction." Thus, using the street in a manner both obstructive and unreasonable was considered an illegal exercise of the right of passage and contrary to the public good.<sup>106</sup>

Through its evolution, however, the English government invoked the right of passage to mask its attempts to suppress unpopular speech.

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98. See *id.* "Rights exist only at common law in so far as that which is not prohibited or restricted is permitted. It has been suggested that any constitutional settlement in Northern Ireland should include a Bill of Rights." *Id.*

99. Rachel Vorspan, *Freedom Of Assembly and The Right To Passage In Modern English Legal History*, 34 SAN DIEGO L. REV. 921, 923 (1997).

100. See *infra* Part IV.A.

101. See *infra* Part IV.A.

102. See *Harrison v. Duke of Rutland*, 1 Q.B. 142 (1893); *Hickman v. Maisey*, 1 Q.B. 752 (1900).

103. See Vorspan, *supra* note 99, at 927.

104. See *id.*

105. See *id.* at 927-28.

106. See *id.* at 930 (citing *Harrison v. Duke of Rutland*, 1 Q.B. 142 (1893); and *Hickman v. Maisey*, 1 Q.B. 752 (1900)).

Beginning in the mid-nineteenth century, outdoor rallies and processions became increasingly important forms of political expression, thus a right implicating the permissible uses of the streets became a cornerstone of the regulation of popular protests.<sup>107</sup> “If applied restrictively, nuisance doctrines defining street demonstrations as ‘obstructions’ to passage could easily become devices for inhibiting freedom of assembly.”<sup>108</sup> Thus, in the late 1880’s, the British Government used right of passage concepts in an effort to muffle increasing grass-roots social movements while maintaining a sense of political neutrality.<sup>109</sup> By invoking the public’s right to pass along the Highway unobstructed, the authorities were able to appear politically indifferent, and maintained steadfastly that they were prosecuting criminal acts rather than effectively suppressing political speech.<sup>110</sup> By classifying demonstrations or processions as obstructions, authorities disclaimed responsibility for arrests and prosecutions by contending that local police, and not the government, had the discretion to prosecute such charges.<sup>111</sup> For example, local authorities relied upon obstruction charges to suppress unpopular Salvation Army street meetings.<sup>112</sup>

While street *demonstrations* interfered with the public’s right to pass along the highway, the right of passage simultaneously justified street *processions*.<sup>113</sup> Because obstruction law was premised upon the public’s

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107. See Vorspan, *supra* note 99, at 944-47.

108. Vorspan, *supra* note 99, at 924. Obstruction Law employed the right of passage to justify prosecuting those responsible for street gatherings that were considered nuisances or “obstructions.” *Id.*

109. See *id.*

110. See Vorspan, *supra* note 99, at 945-46.

111. See *id.* at 946-47. Vorspan notes as an example:

[I]n 1882 the Liberal Home Secretary, William Harcourt, maintained that he could do no more than “offer advice” about obstruction prosecutions as he had no authority over constables or magistrates. Two years later, when Booth sent a blistering memo to the Home Office charging that the Worthing magistrates had consistently refused to issue summonses to opponents of the Salvation Army, Harcourt again insisted that he lacked power over the local authorities.

*Id.*

112. See *id.* at 962-63. Obstruction law proved even more significant in suppressing the socialist movement.

Indeed, the Salvationists commanded considerable sympathy from the public, the courts, and the central government for the abuse inflicted on them by the Skeletons and provincial officials. In contrast, the meetings of the unemployed in the heart of London were part of a radical political campaign that, while perhaps not perceived as revolutionary, nonetheless generated pervasive and acute public alarm. Differing social threats, differing public pressures, and differing governmental responses accentuated and entrenched the conceptual bifurcation in legal doctrine.

*Id.* For an excellent articulation of suppression of the Socialist movement, see *id.* at 962-76.

113. See *R. v. Carlile* 6, C. & P. 636, 172 Eng. Rep. 1397 (Cent. Crim. Ct. 1834).



right to proceed on the highway, the legal machinery could not possibly prevent the free passage of such groups on the "King's Highway." Processions, or "moving demonstrations," presented a complex problem. For arguably political reasons, the distinction between meetings and processions had evolved into a recognition that because marches were exercises of the right to passage, they deserved protection.<sup>114</sup> Thus, demonstrators, as members of the public, could rely upon the right to pass in order to conduct political processions on the public roads. Though the principles of obstruction remained available to suppress street meetings of the Salvation Army and the Socialists, applying these principles to street processions was logically difficult.

Accordingly, the right of the State to maintain public order in the context of public processions required clarification.<sup>115</sup> The paradox posed by the justification of the right to parade simultaneously required protection of the right of others to also pass unobstructed. In the early 1930's, marches and counter marches strained the patience of the English public, and the local authorities faced increasing logistical difficulties in maintaining the peace.<sup>116</sup> These dilemmas fueled demand for a centralizing statute that would supersede local regulation and bring the issue of prior restraints within an authoritative national framework.<sup>117</sup> To meet these demands, Parliament enacted the Public Order Act 1936.<sup>118</sup>

The Public Order Act 1936 gave the police expansive new powers,<sup>119</sup>

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114. See Vorspan, *supra* note 99, at 950.

115. See *id.* at 990.

116. See *id.* at 998.

117. See *id.* at 991-99.

118. See Public Order Act, 1936, 1 Edw. 8, 1 Geo. 6, ch. 6 (Eng.). Under subsection 3(1), a chief of police could impose restrictions on a procession if he had reasonable grounds for apprehending "serious public disorder." This provision was relatively non-controversial because it only generalized powers that the police already exercised in many parts of the country. Under 3(2), if a police chief was "of opinion" that imposing conditions would be insufficient to prevent serious disorder, he could apply to the local council for a ban on all public processions, or any specified class of processions, in a particular area for a period of up to three months. See *id.* §3. The Act confers upon authorities the same powers found in the Public Order (Northern Ireland) Order, 1987, S.I. 1987 No. 463.

119. See Vorspan, *supra* note 99, at 1000. As Vorspan notes, after the Act went into effect,

[T]he Metropolitan Police Commissioner banned all political marches in the East End for six weeks and renewed the restriction at intervals thereafter. There was, in fact, an almost continuous ban on processions in London from 1937 until after World War II. As a result of the Act, paramilitary marches

but did not correct the traditional problem of administrative deference. The Public Order Act 1936 (and all subsequent Public Order acts) did not address the fundamental problem that discretion to restrict the right of passage and free assembly remained with the police.<sup>120</sup> Thus, the police could continue to use the power selectively based on the ideology of the group seeking to assemble. Even worse, advocates of unpopular speech had little judicial recourse. Courts refused to treat selective prosecution as a legally cognizable defense.<sup>121</sup>

### B. Recent Developments

Beginning in the mid 1970s, a conceptual separation of the right to protest and the right of passage gained acceptance.<sup>122</sup> The deference paid to street processions over street demonstrations began to fade, and proponents of public order advocated a new qualifier to add to the existing requirements of reasonable and non-obstructing use of the Highway. This new requirement was called "Purpose of Use" and was explained as follows:

There is a conflict of interest between those who seek to use the streets for the purpose of passage and those who seek to use them for the purpose of demonstration. English law recognizes as paramount the right of passage: a demonstration which obstructs passage along the highway is unlawful.<sup>123</sup>

Thus, two people could be walking down a street with different purposes for doing so, and these purposes would characterize the lawfulness of each person's conduct. The person who was headed for the train station could proceed on her way because she was exercising her affirmative right of passage. Yet, the person who was protesting nuclear energy would be accorded less protection in the exercise of her

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soon disappeared from English life.

*Id.*

120. See Public Order Act, 1936, § 3(1).

121. For example, in *Arrowsmith v. Jenkins*, 2 Q.B. 567 (1963), a peace activist was charged with and convicted of obstruction because the anti-nuclear demonstration she organized partially obstructed a highway. On appeal she argued that she had "lawful authority" for the obstruction because the police had previously condoned the use of the particular street for open-air meetings. Paying deference to the authority of the police and local magistrates in such matters, the court expressly announced that police apparent consent to similar meetings did not confer "lawful authority" on Arrowsmith's actions. *Id.*

122. The catalyst for the reassessment was the riot in London's Red Lion Square in 1974, in which one person died and numerous participants and police officers were injured. The riot resulted from the collision of marches of two antagonistic groups. See Vorspan, *supra* note 99, at 1013.

123. *Id.* at 1014, (citing REPORT OF INQUIRY BY THE RT. HON. LORD JUSTICE SCARMAN INTO THE RED LION SQUARE DISORDERS OF 15 JUNE, 1974, 1975, cmd. 5919, at para. 122).

right to protest.<sup>124</sup> Ordinary use of the streets was to be accorded more protection than political use.<sup>125</sup>

This reformulation of the “right to passage” was codified in the implementation of new public order legislation. In 1980, rising public alarm<sup>126</sup> at an apparent epidemic of domestic violence sparked official inquiries into the effectiveness of existing public order controls.<sup>127</sup> The resulting Public Order Act 1986 changed the 1936 Act. First, procession organizers had to give written notice to police at least six days before the processions were due to take place.<sup>128</sup> Second, the Act expanded the criteria for imposing restrictions on parades. In addition to the grounds allowed under the 1936 Act,<sup>129</sup> police could restrict a procession under a number of new grounds as follows: (1) if it creates the apprehension of serious public disorder; (2) where the purpose of a protest is the intimidation of others “with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do;” or (3) where the police reasonably believe that a procession is likely to cause “serious damage to property” or “serious disruption to the life of the community.”<sup>130</sup> The police could only restrict time, place, route or

124. Distinguishing the right of passage from the right to demonstrate based upon the motivations of the traveler is logically troubling. Consider the case of a political activist that travels upon a road in order to reach a demonstration in a different town. How is such a person different from another activist that “parades” upon a road to reach a rally along with several other similar persons? A distinction based upon motivation also breaks down when the notion of political motivation is unclear. For some persons, the use of certain public streets by a group of Irish Catholics is a political statement, while for others the same use may be merely an effort to enjoy the safety and companionship of a group while traveling for non-political purposes.

125. See Vorspan, *supra* note 99, at 1014-15.

126. During the entire decade of the 1970s the police issued only eleven banning orders in England. In the four year period from 1981-84 alone there were seventy-five. See Vorspan, *supra* note 99, at 1026.

127. See *id.* at 1028.

128. See Public Order Act, 1986 ch. 64, § 11 (Eng.).

129. See *supra* note 120 and accompanying text.

130. Public Order Act, 1986, §§ 12, 14. Neither ‘intimidation’ nor ‘serious disruption of life of the community’ are defined in the Act. In a telling statement outlining the possible factors police should take into consideration, Lord Denning explained in the House of Lords why he supported the phrase “serious disruption to the life of the community:”

I can illustrate the point by referring to the sometimes long and tedious processions which obstruct the traffic and life of the community. A little while ago I hired a cab to take me from Lincoln’s Inn to Victoria Station and allowed 25 minutes for the purpose. But, lo and behold, when we got towards Whitehall there was going along a procession of indefinite length, and I missed my train. Surely that is, “serious disruption to the life of the community.”

circumstances in which the procession will occur. If the Chief Constable or Senior Officer believed that imposing conditions would be inadequate, he or she could apply to the local town or district council for a banning order.<sup>131</sup>

Courts continued to apply minimal scrutiny in reviewing the validity of these orders.<sup>132</sup> For instance, the case of *Kent v. Metropolitan Police Commissioner*,<sup>133</sup> reviewed a banning order that covered 786 square miles and lasted for 28 days. The ban was issued shortly after large scale rioting in Brixton in April 1981. The court found that the processions previously conducted by the applicants "occasioned no public disorder." The Court further stated that the Commissioner should not have considered the likelihood that the procession would be used by the organizers' antagonists as a pretext for causing public disorder. Despite this broad pronouncement, the Court deferred to the judgment of the Police Commissioner and affirmed the Commissioner's determination, further highlighting the permissiveness of the "Wendesbury Reasonableness Doctrine."<sup>134</sup>

Arguably then, legal protection of the public's right to free assembly is left to the discretion of the police. As long as the police exercise their discretion in a reasonable manner, the courts will defer to their judgment regardless of the results.<sup>135</sup> For example, in one case, protesters occupied a potential site for a nuclear power plant.<sup>136</sup> The power company sought to have the protesters removed, however, the police refused to do so.<sup>137</sup> Lord Denning believed the police had the authority to remove the protesters if they chose to exercise this power, but decided that the matter was "a policy decision with which the courts should not interfere . . . . Police constables are no one's lackeys."<sup>138</sup> Another judge was emphatic that the "police on the spot must decide when to intervene."<sup>139</sup> Such deference prompted one commentator to conclude that in this

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Vorspan, *supra* note 99, at 1033 (citing 480 Parl. Deb., H.L. (6th ser.) 10-11 (October 6, 1986)).

Lord Denning's comments are significant in the fact that Denning served as an Appellate Court judge during this debate and ruled in deference to the police on at least one occasion. See *Kent v. Metropolitan Police Comm'r*, Transcript (C.A. May 14, 1981). See also Vorspan, *supra* note 99, at 1033.

131. See Public Order Act, 1986, §13.

132. See Vorspan, *supra* note 99, at 1027.

133. *Kent v. Metropolitan Police Comm'r*, Transcript (C.A. May 14, 1981).

134. See *id.* See also Vorspan, *supra* note 99, at 1027-28. See *supra* Part III for a discussion of the Doctrine of Wednesday Reasonableness.

135. See Gearty, *supra* note 2, at 67.

136. *R. v. Chief Constable of the Devon and Cornwall Constabulary, ex parte Central Electricity Generating Board*, 3 W.L.R. 967, 3 All E.R. 826 (Q.B. 1981).

137. See *id.*

138. *Id.*

139. *Id.*

branch of civil liberties British citizens have freedom under the police rather than freedom under the law.<sup>140</sup>

In sum, the three most notable developments in English law with respect to processions are: (1) a procession may be restricted if there is reason to believe that it would cause public disorder; (2) since the right to march is founded in part upon the public's right to pass freely along the highway, a procession must not unduly restrain the rights of others to pass along freely; and (3) the institutions charged with making these "reasonableness" determinations are not the courts, but the local police force and town council. In balancing the broad range of interests affected by parades in England, such developments have created minimal legal or social obstacles. In Northern Ireland, by contrast, the same obstacles appear insurmountable.

#### V. HISTORY'S EFFECT ON THE DEVELOPMENT OF CIVIL LIBERTIES IN NORTHERN IRELAND

The same police powers that govern the control of public processions in England also apply to Northern Ireland. However, their effect in Northern Ireland has been different as a result of the creation of a zero-sum situation among the antagonistic groups. Northern Ireland, though cut from the same cloth of common law, has an added twist. The Province's history includes examples of the same governmental reliance upon the heckler's veto as a pretext to suppress the free speech and assembly rights of the minority. At the same time, however, when majority groups, such as the Orangemen, march through minority neighborhoods, raising the ire at Catholic residents, the principle behind the heckler's vote is discredited as the unjust attempts of the few to silence the voice of many.

The allowance of a contentious parade to proceed through a Catholic neighborhood invariably sparks violent widespread Catholic protest; yet, re-routing or banning an Orange parade elicits the same reaction from the Protestant community.<sup>141</sup> Ironically, either choice, both rationally

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140. See Gearty, *supra* note 2, at 55.

141. See SAVARIC, *supra* note 62, for a discussion of the events surrounding the Drumcree parade in 1996. Prior to the parade, the RUC warned the Orangemen that they would not be allowed down the Nationalist Garvaghy road. The RUC blockaded the entrance to the road, and the Orange Order vowed to remain at the blockade until it was lifted, thereafter, the members Protestant community set up road blocks throughout Northern Ireland, essentially cutting off many Catholic areas, and waves of riots swept

based on preserving peace, leads to the public disorder that often paralyzes all of Northern Ireland.

Although a part of the United Kingdom, civil liberties in Northern Ireland have taken a distinct and distasteful path in their evolution. In the seventy-five years of its history as a state,<sup>142</sup> Northern Ireland has experienced nearly continuous violent upheaval, in part because of the clash between the right to protest and the need for public order. The same factors that contoured the right of assembly in England,<sup>143</sup> exacerbated ancient animosity between the two communities, promoting violence rather than peace. A look at the history of Northern Ireland will shed some light on this paradox.

The importance of some consideration of the history surrounding the conflict stems from the distance between most readers and the situation in Northern Ireland. While Americans and others may be quite ill informed about the reality of the situation in Northern Ireland at the street level, America and other countries have played important roles in the "Peace Process."<sup>144</sup> Common opinions regarding the current political situation tend to be colored by a historical attachment to the Nationalist opinions, as well as a concerted effort by Northern Ireland Nationalists to tap into this "Irish" sentimentality. While the history of Northern Ireland reflects a pattern of injustice and discrimination that offends modern ideas of fairness, the judgment of outsiders must be tempered by an awareness that our societies have also been built upon racial and ethnic discrimination that we have yet to fully rectify. The history of the United States renders judgments by its citizens particularly self-righteous. As such, the current position of both the Nationalist and Loyalist communities in Northern Ireland cannot be evaluated solely by regrettable periods in history; rather, history must be explored in order to determine effective ways to better conform reality to our modern notions of fairness and justice.

The history of Northern Ireland is the history of a society divided between those who consider themselves Irish and those who consider

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many Loyalist neighborhoods. The RUC eventually succumbed to the Loyalist pressure and allowed the parade to proceed. Immediately thereafter, Catholics throughout the Province expressed their rage at the RUC's about face and staged massive demonstrations that eventually led to large-scale rioting. *See id.*

142. The formal state of Northern Ireland is quite young compared to the English state and is therefore legally and culturally shaped by the centuries of English presence and government in Ireland.

143. To refer to discussions of the issues of public order, the right to pass, and administrative discretion, see *supra* at Part IV.A.

144. *See infra* Part IX. The involvement of the international community has resulted in a significant peace dividend in the form of increased foreign investment and tourism in Northern Ireland.

themselves British. Colonial history has left Northern Ireland with a legacy shared by many of the world's trouble spots: the problem of the double minority. Within their own enclave of Northern Ireland, Protestants outnumber Catholics by a ratio of five to four.<sup>145</sup> However, in the wider context of Ireland, Protestants are easily outnumbered by a ratio of three to one.<sup>146</sup> As expressed by one commentator, "[t]he inevitable and disastrous result was the advent of a ruling establishment with the reins of power in its hands but acting under the stresses of a besieged minority."<sup>147</sup> Thus, two competing, and often mutually exclusive, traditions formed at the extremes, Catholic Nationalism and Protestant Loyalism. The clash of these two cultures created a polarized population, the consequences being social and civil instability, and repeated periods of violent conflict. The problem with the standard explanations for violence is they fail to explain how small terrorist factions have captured the support of two otherwise civil communities.<sup>148</sup> As one commentator recognized, "the gunmen would have passed into oblivion by now were they not sustained by entrenched social and political structures."<sup>149</sup>

For all of its political life, Northern Ireland was ruled by a single party, invariably consumed with the single issue of maintaining the relationship with Britain and preserving the border with the Irish republic to the south. Any real attempt at political or social change has been swamped by this obsession. As a result, Northern Ireland suffers from "a deep psychosis in which rational thought and action are inevitably overtaken by emotional spasms the moment it comes under stress."<sup>150</sup>

The metaphysical truth of historical fact is significant to the conflict in Northern Ireland, but its importance is often exaggerated. Each community's rendition of history supports respective claims of moral right, and fosters mutual consternation. It is impossible for nine hundred years of history to pass without embellishment, and therefore the author

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145. See JARMEN, *supra* note 15, at 87. According to the 1991 census, the population of Northern Ireland was 38.4% Roman Catholic, and 50.7% percent Protestant. See *id.*

146. See JACKSON, *supra* note 6, at 3.

147. *Id.*

148. See JARMEN, *supra* note 15, at 3. Jarmen generally answers this question by asserting that paramilitary groups have appealed to "abstract ideals of nationality and the precedent of history." *Id.*

149. MACDONALD, *supra* note 28, at ix.

150. JACKSON, *supra* note 6, at 3.

cannot guarantee the perfect accuracy of the history contained herein, but can only report on those facts that are widely agreed to be true among thoughtful commentators. In truth, history as retold, while embellished and selectively remembered, is perhaps more important to the antagonistic groups and is more essential for an understanding of the current conflict and parade issues. Selective memory and affinity to historic social and political divisions results in a powerful phenomenon in which living individuals conceptualize themselves as the most recent extension of a long and painful history. Mythical as well as legendary heroes have assumed a sort of immortality, so that the passage of nearly nine hundred years of history is felt by the current participants to have occurred within their own lifetimes.<sup>151</sup> While each community has its immortal heroes, each community similarly feels that ancient atrocities, suffered at the hands of the other, occurred within the current generation. This collective memory phenomenon results in an odd cartoonish sense that time has stood still; contemporary Orangemen feel themselves to march alongside their orange forefathers, while contemporary Nationalist neighborhood groups feel themselves to stand with the nationalist rebels and protesters of the last four hundred years to oppose such marches.<sup>152</sup> This time warp of history has blinded each community to its own dark acts. No one group may benefit from the support of moral right, yet both communities continue to proclaim their moral authority. "The fact that each community's fears are often based on incorrect assumptions does not mean that they are any less strongly felt."<sup>153</sup> As a result, for both participants and witnesses, parades are not mere expressions of political and social arguments. Instead, they must be understood as the collective action of the past and the present upon the living. The emotional power of the parade vastly complicates its legal regulation and political importance.

#### A. *Early Roots*

Irish history passed through three stages in a period that stretched from the Elizabethan conquests to partial independence, culminating with Partition in 1921-22. The first stage was that of conquest, marked

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151. See *infra* note 152.

152. Jarmen refers to this as "social memory." He states: "The writing of history is concerned with imposing some sense of narrative and direction on the past, while a collective memory is more concerned with emphasising the sense of repetition, of situating the event or experience within a pre-existing category." See JARMEN, *supra* note 15, at 4, 6-10. Thus, ritual parading not only links the present participants to the past, but "re-deifies" past heroes and martyrs, helping to cause the phenomenon of the past living in the present while the present simultaneously lives in the past. See *id.*

153. *Id.* at 3.



by England defeating Irish resistance militarily, challenging cultural authorities, and seizing the land.<sup>154</sup> The second stage was that of consolidation. Through repressive legislation, the Crown attempted to dismantle Gaelic culture and to assimilate the native Irish into the colonial society that Northern Ireland had become.<sup>155</sup> The final stage was that of reform. Failing to squelch the native Irish culture, England attempted to equalize the population through social reform.<sup>156</sup> However, Protestants resisted such attempts and their reluctance, along with other factors, led Britain to divide Ireland into two states in order to preserve the colonial system existing in the North.

During the first stage, England more or less conquered and occupied Ireland for strategic reasons: Ireland's importance to Britain rested in the fact that Ireland was Britain's left flank.<sup>157</sup> But because the Reformation culturally split the British Isles, the occupation of Ireland had taken on a religious tone.<sup>158</sup> The Irish, which included the Norman conquerors of the 1100's<sup>159</sup> and the "old" Irish, as the descendants of the original settlers became known, continued to follow the Roman Catholic Church. This religious difference added to a paranoia in England of disloyalty from within, especially relating to England's conflicts with continental, and often Church-backed, European powers.<sup>160</sup>

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154. See *infra* Part V.

155. See *infra* Part V.A.

156. See *infra* Part V.A.

157. During the late 1500's the ships of the Spanish Armada anchored off the West Coast of Ireland and received assistance from the native Anglo-Irish lords much to Queen Elizabeth's dismay. The subsequent tightening of British control under Cromwell was meant to secure the loyalty of the native population. See BARDON, *supra* note 29, at 89-98. Coogan points out that due to geopolitical rivalries between England, Spain and France, Ireland posed the threat of a strategic and sympathetic ally to England's enemies. He refers to Ireland's relation to England during this period as a "green Cuba." COOGAN, *supra* note 10, at 5. See also MACDONALD, *supra* note 28, at 21.

158. See COOGAN, *supra* note 10, at 5-6. See also BARDON, *supra* note 31, at 132, who notes that Franciscans and other European priests, "instilled a new zeal amongst Old English and Native Irish Catholics alike; in Ulster, therefore, the uncompromising spirit of the Counter-Reformation faced the inflexible determination of the Puritan settlers. Hostility, suspicion and uncertainty created a dangerously unstable atmosphere of fear in the province." *Id.*

159. The Norman Invaders made up the backbone of the Irish Aristocracy, and though considered the Royal authority in Ireland, they had become more Irish than the Irish themselves. See MACDONALD, *supra* note 28, at 34.

160. After William the Conqueror's departure from Ireland, the Protestant Settlers, who retained administration of Ireland, generally believed that 'Catholic' equaled 'treacherous.' See COOGAN, *supra* note 10, at 6. See also BARDON, *supra* note 31, at 91-114.

The Elizabethan conquest of Ireland in the late 1500's was followed by the first colonial plantation of Ulster.<sup>161</sup> In the early 1600's, James I embarked on a system designed to ensure loyalty to the Crown. He set out to replace what remained of the native population with loyal British subjects.<sup>162</sup> However, the influx of English settlers failed to eradicate the native population as influxes of settlers had eradicated native peoples elsewhere in the world. When the initial settlement of Ulster faltered,<sup>163</sup> the Ulster Irish wreaked savage vengeance on the Planters in 1641.<sup>164</sup> The English Civil War and the frequency of native uprisings in Ireland "authorized" Cromwell's subsequent re-conquest of Ireland in the mid to late 1600's and his ensuing military campaigns and land confiscation against the native Catholic Population.<sup>165</sup> At the end of the re-conquest, Ireland's Protestant aristocrats and landlords firmly held the island's land and its political power.<sup>166</sup>

Waves of Protestants, mostly Scottish Presbyterians, emigrated to the six counties of modern Northern Ireland, under the restored system of Plantation. Because resistance to conquest was stiffest in the northeast, England concentrated its seventeenth century plantation efforts in Ulster, hoping to solve its Irish problem by uprooting the native Catholic population.<sup>167</sup> The planters with the biggest holdings were forbidden to have Irish tenants. Smaller estate holders were permitted to take Irish tenants but, if they did, their rents were increased.<sup>168</sup> The colonizers of Northern Ireland never fully drove out or defeated the "natives," so that Ulster became what it is today, a province of two mutually antagonistic populations.<sup>169</sup> Spurned on by the loss of ancestral lands, the native Irish

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161. See BARDON, *supra* note 31, at 124.

162. The conditions for Plantation required that Planters take an "oath of supremacy," that is, the Planters had to be Protestant. See BARDON, *supra* note 31, at 125.

163. See BARDON, *supra* note 31, at 132-34.

164. See *id.* at 135-37.

165. See *id.* at 140-42. As Jarmen notes, "in 1641, the Irish rebelled under Rory O'More, and in many places revenge was taken and settlers were put to the sword. But retribution followed, as Oliver Cromwell arrived in Ireland in 1649 and slaughtered, confiscated lands, and banished Irish landowners to the barren western area of Connacht." JARMEN, *supra* note 15, at 32.

166. See Roger Myers, *A New Remedy For Northern Ireland: The Case For United Nations Peacekeeping Intervention In An Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 17 (1990). "By 1703, the Protestant ascendancy was complete: native Catholics owned less than 14 % of all of Ireland, and in eight of Ulster's nine counties, Protestants owned 95 % of the land." *Id.*

167. This strategy was remarkably similar to the promotion of Settlerism in the United States as a method to reduce the power of Native Americans. See *id.* at 16.

168. See COOGAN, *supra* note 10, at 6.

169. See *id.* To accomplish these ends as cheaply as possible, England employed Protestant settlers to serve as surrogates for British royal authority. See also MACDONALD, *supra* note 28, at 21-23.

aristocracy reacted to the plantation system with sporadic uprisings throughout the 1600's.<sup>170</sup> However, the Plantation of Ulster flourished, despite social instability, until the accession of the Catholic James II to the English throne in 1685.<sup>171</sup>

James II assumed executive power in England and began to restore Catholics to public positions throughout the Kingdom.<sup>172</sup> This "rebirth" of the Catholic ascendancy in England prompted several leading Protestants to request the Dutch Protestant William Prince of Orange to invade England and restore the Protestant monarchy.<sup>173</sup> Upon William's arrival in England, James fled to Ireland where he rallied his supporters with the help of a formidable French army.<sup>174</sup> Fearing a replay of the 1641 rebellion, Ulster's Protestant Lords raised militias to defend against the Catholic forces.<sup>175</sup> Soon, Jacobite armies, as King James' Catholic supporters were known, mounted a rather successful campaign against the Protestant ascendancy, and Ireland nearly fell under the complete control of the Catholic King James.<sup>176</sup> However, two important Protestant "victories" took place, reversing Catholic gains, and had a lasting effect upon the population of present day Northern Ireland.

The first important event was the Siege of Derry, which would become a historical metaphor for the Protestant culture and sensibilities in Ireland.<sup>177</sup> In December 1688, a Catholic regiment marched toward the city of Derry, but before they could cross the river Foyle, thirteen "Apprentice Boys" raised the drawbridge and closed the gates in front of the advancing army.<sup>178</sup> Lieutenant-Colonel Robert Lundy, the military governor of Derry, ordered a general withdrawal of Protestant garrisons to the walled city.<sup>179</sup> Thereafter, Jacobite armies took up positions around Derry, cutting the city off. Catholic forces enjoyed military successes against retreating Protestant garrisons aided by Lundy's possible hesitance in repelling the Jacobite armies, if not his outright complicity with the Catholic campaigners.<sup>180</sup> Soon, belief in Lundy's

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170. See COOGAN, *supra* note 10, at 6. See also BARDON, *supra* note 31, at 145-47.

171. See BARDON, *supra* note 31, at 148-49.

172. See *id.* at 150.

173. See JARMEN, *supra* note 15, at 32.

174. See BARDON, *supra* note 31, at 150-52.

175. See *id.* at 152.

176. See *id.* at 153.

177. See JARMEN, *supra* note 15, at 76.

178. See BARDON, *supra* note 31, at 152.

179. See *id.* at 153.

180. See *id.* at 154. See also JARMEN, *supra* note 15, at 78 n.1.

betrayal became widespread and he was overthrown.<sup>181</sup> Although near starvation, the people of Derry withstood the 105 day siege, and in July of 1689, English forces sailed up the river and successfully broke the Jacobite ring.<sup>182</sup> This epic defense gave Ulster Protestants inspiration, as well as a constant perception of being besieged by the native Catholics, for more than three centuries to come.<sup>183</sup> Each summer, the Apprentice Boys mark the Relief of Derry by parading the walls of the ancient city, and to this day, to be called a “Lundy,” a traitor to one’s own people, is a “withering insult” in the Protestant community.<sup>184</sup>

The next year, buoyed by their victory and the establishment of a home base at Derry, William of Orange landed in Ireland to lead his army against the Jacobites.<sup>185</sup> The two armies met at the River Boyne on July 1, 1690, and though the “Battle of the Boyne” was not decisive, the Irish armies were driven south and James fled Ireland for France.<sup>186</sup> A year later, on July 12, 1691, William’s forces struck the final blow against the Jacobites at the Battle of Aughrim, which consolidated the Protestant “Glorious Revolution.”<sup>187</sup> While the Battle of Aughrim marked final victory, “the symbolic importance of the two monarchs leading their armies into battle, and James’s defeat and subsequent flight from Ireland meant that the Battle of the Boyne would be remembered as the key event” in Protestant culture.<sup>188</sup>

Despite English and Protestant victory, the English settlers were dissatisfied with their tenuous hold of power and had a general feeling of insecurity brought on by periodic rebellions of the seventeenth

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181. See BARDON, *supra* note 31, at 154.

182. See *id.* at 157.

183. See *id.* at 158. See also JARMEN *supra* note 15, at 76.

Londonderry has long been the most potent symbolic place in Ulster for unionists, and the story of the siege remains the most powerful metaphor of Protestant sensibilities in Ireland. The narrative is used to illustrate the need for decisive action, the unity in adversity; and it can be used as a justification for resistance to the law. It is also used as a warning of the danger of compromise and to justify fear of the traitor within. Parading the walls of Derry is not just about maintaining tradition and celebrating loyalist culture, it is also about reaffirming the principles on which Protestant power was structured in Ulster: never trust the enemy within, exclude them from power and authority. But Derry is also a city in which Catholics have long been the majority. Under Stormont, gerrymandering of the local government wards ensured that Unionists retained control of the city council. The city therefore had a special significance for the nationalists too: it was a symbol of their second class status in Northern Ireland.

*Id.*

184. *Id.* at 78 n.1, 117.

185. See BARDON, *supra* note 31, at 162.

186. See BARDON, *supra* note 31 at 163-64.

187. See JARMEN, *supra* note 15, at 32-33. See also BARDON, *supra* note 31, at 164.

188. JARMEN, *supra* note 15, at 32-33.

century, so the settlers attempted to assimilate the native population. Thus begun the second stage of Irish colonialism. The Crown's local administration, following the Protestant aristocracy's lead, attacked any and all Irish institutions that preserved the coherence of Irish traditions by enacting a series of repressive laws.<sup>189</sup> The "Penal laws,"<sup>190</sup> as they were known, were enacted with the purpose to assimilate the native Irish population into the Protestant kingdom by making the practice of Catholicism unlawful, in order to remove "the 'Romish' influence from the countryside."<sup>191</sup> However the Penal laws were not as successful as was hoped. The laws drove both the Catholic Church and its followers underground and reinforced the importance of the Church to the native Irish.<sup>192</sup>

Protestant attempts to assimilate the native Catholic population had the effect of ensuring Catholic disloyalty, creating a sort of "job security" for the Protestant aristocracy whose duties included maintaining civil authority over the dissenting natives.<sup>193</sup> "Unfortunately for Protestants, this led to seemingly constant agrarian violence, bloody 'native' uprisings,"<sup>194</sup> as well as the start of grass-roots political movements, which eventually necessitated social reforms.

189. The Penal Law began,

Whereas it is Notoriously known, that the late Rebellions in this Kingdom have been Contrived, Promoted and Carried on by Popish Archbishops, Jesuits, and other Ecclesiastical Person of the Romish Clergy. And forasmuch as the Peace and Publick Safety of this Kingdom is in Danger . . . which said Romish Clergy do, not only endeavour to withdraw his Majesty's Subjects from their Obedience but do daily stir up, and move Sedition, and Rebellion, to the great hazard of the Ruine and Desolation of this Kingdom.

BARDON, *supra* note 31, at 168. See also Myers, *supra* note 166, at 17-18.

190. Under the Penal laws, Catholics could do none of the following: vote or hold any administrative, judicial or political office; join the bar; teach at or attend the university; establish their own schools; own land or a horse worth more than five pounds. All Catholic bishops and higher church officials were banished from the country and executed upon return. Myers, *supra* note 166, at 18.

191. Edmund Burke was said to describe the penal code as a, "machine of wise and elaborate contrivance and as well fitted for the oppression, impoverishment and degradation of a people, and the debasement in them of human nature itself, as ever proceeded from the perverted ingenuity of man." COOGAN, *supra* note 10, at 7.

192. See Meyers, *supra* note 166, at 18. The church's grip on the Irish remains unshaken to this day, effectively undermining proposals for political resolutions to the Irish problem, since northern Protestants fear that inclusion in the Republic of Ireland would force them into a theocracy historically opposed to Protestant social beliefs and traditional English liberties such as secular education, divorce, abortion, and birth control. See *id.*

193. See MACDONALD, *supra* note 28, at 54.

194. *Id.*

In order to restore some sense of stability, Britain enacted a series of reforms including Catholic Emancipation, land reform, disestablishment of the Church of England, and eventually Home Rule.<sup>195</sup> These reforms of the third stage were designed to level the playing field, but only widened the gap between Irish Catholics and English Protestants, and started the fissure between Crown and its surrogates in Ireland. Colonialism is based on privileges and deprivations, not rights. As MacDonald argues, “for Catholics to receive effective citizenship would at once have blurred the contrast between native and settler, and undercut the rationale for settler supremacy.”<sup>196</sup> Originally, Protestants had rejected cooperation because Catholic demands were considered too radical, but later rejected egalitarianism on principle.<sup>197</sup> Thus, as MacDonald argues, Protestants resisted Britain’s proposals that contemplated any change in Ireland’s social and political order to include loyal Catholics.<sup>198</sup> The idea was that as long as the natives were restless, someone needed to be on hand to quell insurrection, and thus the Protestant role as governor in Ireland was secure. Hoping the problem would simply go away, the British government left the colonial system in place for most of the 19th century, cementing within Catholics the perception of British and Protestant indifference to their plight.<sup>199</sup>

The segregation of English settlers and Irish natives survived well into the twentieth century. The Partition of Ireland in 1920-21 simply acknowledged these divisions. Instead of reforming political, religious

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195. *See id.*

196. *Id.*

197. *See id.*

198. *See id.*

199. Some commentators argue that an example of British indifference is found in the British reaction to the Great Irish Famine of the mid to late 1840’s. As a result of the Great Famine of 1845-47, an estimated one million Irish died and another one million emigrated to the United States. Landless, poor, and overly dependent upon the potato, Catholics were disproportionately affected. Many commentators maintain that the manner in which Catholics were forced to live and the slow reaction of the British government to the crop failure contributed greatly to the magnitude of the disaster. A commission established to investigate land holdings in Ireland reported in 1845: “In many districts, their only food is the potato, their only beverage water . . . their cabins are seldom a protection against the weather . . . a bed or a blanket is a rare luxury . . . nearly in all cases their pig and manure heap constitute their only property.” *See* Blaine Whipple, *Ireland: Why They Left The Emerald Isle* (available at <<http://www.heritagequest.com/genealogy/europe/features/html/ireland-1.html>>). Since the British government concerned itself with Ireland only in the event of a threat to English security, and since the famine actually had the opposite effect by reducing the population of potential agitators against the Crown, London did little to ease the situation, and did nothing substantial until 1847, too late to avert catastrophe. *See id.* But *see* Conrad Jay Blacey, *The Potato Famine In History* (last visited Mar. 17, 2000) <<http://www.toad.net/~sticker/nosurrender/chistory.html>>.

and social relations, Partition institutionalized the original conflict.<sup>200</sup> From this dynamic sprouts a supportable generalization. "Politically, the natives were Nationalists and the settlers unionists; socially, the Nationalists were deprived and the unionists privileged; and religiously, the deprived were Catholic and the privileged were Protestant."<sup>201</sup> With the two communities mired in impasse, Britain, led by the liberal-minded Gladstone, proposed a "neo-colonial" solution to a colonial problem: a devolved Irish government, better known as "Home Rule."<sup>202</sup> But because the independence of Ireland jeopardized Protestant hegemony, considering that Protestants were being significantly outnumbered on the Island, Home Rule encountered the fierce opposition of Unionists. Unionists believed Home Rule would lead to "Rome Rule."<sup>203</sup>

Fearing civil war, and a potential Protestant massacre at the hands of Irish Nationalists, Britain proposed that Ireland be partitioned into two states with separate devolved governments. The six counties in the North were severed from the rest of Ireland, and became the present state of Northern Ireland.<sup>204</sup> With a Protestant majority by design, Northern Ireland became the last refuge of Protestant domination in Ireland.<sup>205</sup>

While the colonial history of Northern Ireland is important for understanding how Northern Ireland's divided society was formed, it does not fully explain why the division continues to exist. Considering the advent of the Industrial Revolution and the consequential rise of class consciousness and social reform in the early part of the twentieth century, one would expect that the importance of religious sectarianism would have been overridden by the importance of economic divisions between rich and poor. The ultimate failure of class unification in Northern Ireland suggests that other factors beside religious differences perpetuate sectarian conflict. Ultimately, as will be discussed below, Unionists' loyalty to the Britain, Nationalists' contrasting disloyalty, and

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200. See *infra* Part V.B.

201. MACDONALD *supra* note 28, at 54.

202. The Home Rule movement of the mid to late 19th century presented the British government with a method to extricate itself from Ireland. See *infra* Part V.B.

203. See MACDONALD *supra* note 28, at 55. See also ARTHUR AUGHEY & DUNCAN MORROW, NORTHERN IRELAND POLITICS 4 (Arthur Aughey & Dean Marrow, eds. 1996); BARDON, *supra* note 31, at 407.

204. See *infra* Part V.B.

205. See *infra* Part V.B.

the British government's attempts to distance itself from Northern Ireland altogether created an atmosphere where two largely similar communities, nominally separated by religion, remain locked in conflict.

### *B. Towards Partition*

The Partition of Ireland into two devolved governments was Britain's first step towards separating itself from Ireland. The act had the effect of further disenchanting Irish Catholics. It also raised Protestant fears of abandonment by the country to which they pledged their loyalty, with the feared result being consequent envelopment of the Protestant state into the Catholic Irish Republic to the south and the loss of Protestant culture and advantages. Thus, ancient sectarian animosity and distrust arguably reduced the impact in Northern Ireland of the socio-economic upheaval experienced throughout much of the world at the time, despite the rise of socialism and class consciousness in the beginning of the twentieth century.

Still, in the aftermath of World War I, Belfast was rife with labor agitation, especially among the most skilled sectors of the industrial working class—the Protestant Shipyard workers.<sup>206</sup> By January 1919, their demands erupted into a series of major strikes, which in turn led to a short-lived Protestant working class defection to the Labour Party in subsequent elections.<sup>207</sup>

The traditionally conservative Unionist Party represented the interests of Northern Ireland's industrialists and capitalists, and suffered directly as a result of the temporary working-class defection from Protestant conservatism. Fortunately for the Unionist Party, the political independence of the Protestant working class was vulnerable to the growing threat Republicans posed to all Protestants. Led by Charles Stewart Parnell, Irish Nationalism became politicized and turned to the ballot box first over the issue of land reform, then later over the issue of a Home Rule Parliament for Ireland.<sup>208</sup> Parnell's Irish Parliamentary Party became very influential at Westminster, eventually holding "the balance of power in the governing assembly of the world's . . . most extensive empire."<sup>209</sup> Gladstone's Liberal government, needing Parnell's support to maintain control of Westminster, soon took up the cause of devolution,<sup>210</sup> and Ulster Unionists with the support of the Orange Order

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206. See BARDON, *supra* note 31, at 463-64.

207. See MACDONALD, *supra* note 28, at 59.

208. See BARDON, *supra* note 31, at 369-80.

209. *Id.* at 375.

210. See *id.* at 375-76.



allied with the Conservative Party in opposition to Home Rule.<sup>211</sup> The debate over Home Rule consumed Irish politics from the 1880's through the 1920's and the people of Ireland took up opposing positions on the issue as the rest of Europe marched towards the First World War.

To say that Ireland was polarized over the issue of Home Rule is an understatement. Ulster Unionists rallied popular support against the measure, going so far as to orchestrate the signing of the Solemn League and Covenant in September 1912, where more than 250,000 Ulster Protestants signed a document pledging themselves to use "all means which may be found necessary to defeat the present conspiracy to set up a Home Rule Parliament in Ireland."<sup>212</sup> Thereafter, Ulster Unionists established the Ulster Volunteer Force, a paramilitary organization, with 100,000 members by some accounts,<sup>213</sup> which began importing arms in anticipation of civil war.<sup>214</sup> In response, a movement among Irish Nationalists militarized, emerging as the Irish National Volunteer Force. The rebirth of militant Irish nationalism set the stage for the Easter Rising of 1916.<sup>215</sup>

Before the Easter Rising, militant Nationalism did not enjoy popular support. However, Britain's brutal repression of the Rising<sup>216</sup> delivered the Irish population to the revolutionary Nationalist organization, Sinn Féin, which soon replaced the Irish Parliamentary Party as the dominant Nationalist political party.<sup>217</sup> The Irish Volunteers renamed themselves the Irish Republican Army, and soon thereafter, the IRA began a bloody guerrilla campaign against British influences throughout Ireland.<sup>218</sup>

The Nationalist campaign for an independent republic only added to these fears. Even though Republicans were relatively inactive in the North, the backbone of the Republican Movement was its claim that the six northeastern counties of Ireland were rightfully part of an independent and united Ireland.<sup>219</sup> The primary threat of a united and

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211. See AUGHEY & MARROW, *supra* note 203, at 4.

212. *Id.* at 5.

213. See COOGAN, *supra* note 10, at 18. Coogan also maintains that more than 470,000 persons signed the Ulster Covenant. See *id.*

214. See AUGHEY & MARROW, *supra* note 203, at 5.

215. See *id.*

216. See COOGAN, *supra* note 10, at 22-23.

217. See AUGHEY & MARROW, *supra* note 203, at 5. See also, COOGAN, *supra* note 10, at 23-24.

218. See COOGAN, *supra* note 10, at 24.

219. This claim was embodied in the Republic's Constitution, articles 2 and 3. See IR. CONST. preamble (*Bunreacht na hEireann*). The Constitution was not amended until

independent Ireland was that Catholics would become the overwhelming majority in a new self-governed state. Not only would Protestants lose citizenship in what they regarded as their rightful nation, but they also would suffer economically in two ways. First, Belfast's industrial economy was directly connected to the wider British economy so that political separation from Britain meant the risk of a weakened economy through the loss of British trade.<sup>220</sup> Secondly, a weaker economy meant the loss of Protestant jobs. Since Protestants generally were employed in more and better jobs,<sup>221</sup> integration into the independent and Catholic Republic of Ireland meant social reform at the expense of Protestant privileges.<sup>222</sup> Thus, Unionist elites were able to effectively use the threat of a modern rebirth of a Catholic Ascendancy to "convert class-conscious militancy into pro-colonial, anti-Catholic sectarianism."<sup>223</sup> Such was the start of Ulster's dilemma of a zero-sum conflict.

Moreover, events during World War I only added to popular Protestant apprehension of the Nationalist agenda. Just a few months after Irish Nationalists staged the Easter rebellion against the Crown, a British Army Division made up almost entirely of members of the Protestant Ulster Volunteers was massacred at the Battle of the Somme in France.<sup>224</sup> Thus, Unionist animosity towards Irish Nationalism was further strengthened by the image of Nationalist treachery juxtaposed against the great sacrifice paid by Ulster's loyal subjects in defense of the Crown.<sup>225</sup>

In order to appease militant Irish Republicanism and similarly committed Ulster Unionism, and to prevent an all-out blood bath, Britain passed the Government of Ireland Act in 1920,<sup>226</sup> establishing one home-rule government<sup>227</sup> for the 26 southern counties, and another for the six northern counties. However, Sinn Féin was resolute in its anti-

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1998 to remove the territorial claim. *See infra* note 451.

220. *See* MACDONALD, *supra* note 28, at 59.

221. For example, 90% of the lucrative and prestigious shipyard jobs were held by Protestants. *See id.*

222. *See id.*

223. *Id.* The post-World War I global depression only added to Protestant working class insecurity. In Ulster, unemployment reached 25% with a rise in sectarianism its consequence. With soaring unemployment looming, Protestant workers decided better than us. In July 1920, Protestant workers, with the aid of the Unionist party, forced the expulsion of 10,000 of Belfast's 90,000 Catholics from their jobs. The Protestant working class restored its traditional allegiance to the Unionist Party. Thus, "the very economic hardships that originally contributed to working-class militancy eventually fueled sectarianism; Catholics became scapegoats for the downturns of the business cycle." *Id.*

224. *See* BARDON, *supra* note 31, at 454-56.

225. *See* JARMEN, *supra* note 15, at 71.

226. Government of Ireland Act, 1920, 10211 Geo. 5, ch. 67 (Eng.).

227. The one home-rule government is known as "Stormont."

compromise position over independence, and consequently, Irish Nationalists split over Partition, eventually engaging in war over the issue.<sup>228</sup> Ulster Catholics, who were turned into captives of the Protestant majority, dreaded the partition of Ireland, and soon the cause of their apprehensions became clear. Undercover hit squads, drawn from the British Army and Northern Ireland's new police force appeared to be able to murder Catholics at will.<sup>229</sup> Soon after, the election of a Catholic mayor in Derry touched off riots that soon spread throughout Northern Ireland.<sup>230</sup> Thus, by the use of violence and intimidation, the newly reformulated Protestant alliance between workers and elites reaffirmed the "pecking order" in Northern Ireland: Protestant privileges would remain intact at the cost of Catholic equality.<sup>231</sup>

The irony of Partition is that in the newly created Northern Ireland, the minority-controlled colonial system with all of its inequalities suddenly became a colonial system under majority control. While the overwhelming majority in the South was Catholic and Nationalist, Protestants constituted roughly two-thirds of the population in the Northern six counties.

Partition reinforced the anomaly of minority rule in an apparently democratic society. For hundreds of years in Ireland, the vast Catholic masses were governed by the minority Protestant landowners. Arguably, Partition democratically laundered the system of subjugation of the majority to permanent minority rule. Ulster Protestants, who had been quite accustomed to the colonial system, found themselves in the ruling majority, and thus democratically justified in remaining the politically and socially dominant community in the new State of Northern Ireland.<sup>232</sup>

Arguably, Partition also indirectly sheltered Northern Ireland from the divisiveness of social conflict, by increasing the influence of sectarianism as a substitute motivating force. A brief digression clarifies this point. To secure their continued loyalty to Unionism, Protestant

228. See COOGAN, *supra* note 10, at 25-26.

229. *Id.* at 26.

230. See MACDONALD, *supra* note 28, at 60.

231. See *id.* See also *infra* Part V.B-D.

232. See MACDONALD, *supra* note 28, at 55-56. In 26 of Ireland's 32 counties before Partition, Unionists lacked the base to prevent the rise of the Catholic elite, but in Ulster, Unionists mobilized the Protestant majority to reject Home Rule for outright colonialism. Colonialism derived its strength in Ulster from the pattern of the original plantation. In most of Ireland, English settlers were few and scattered, but in Ulster, they were numerous and concentrated. See *id.*

elites had conceded material privileges to the working class Protestants<sup>233</sup> throughout the eighteenth and nineteenth centuries.<sup>234</sup> This reinforced colonialism in two important ways. First, surpluses from the tightly controlled agrarian economy eventually gave rise to an industrial economy tied to the British markets. Thus, both the Protestant laboring classes as well as the economic elites relied on the colonial connection with Britain.

Second, the benefits generated by Ulster's economy were directed disproportionately to Protestants. Class was arguably stratified along colonial lines: the Protestant elites and industrialists formed the upper class; the middle class was composed of the Protestant working class and farmers with a few Catholic landowners and professionals thrown in; and "on the bottom, menacing those above," was the Catholic working class.<sup>235</sup> The privileges, which generally consisted of more available and better paying jobs, arguably provided Protestants with a higher standard of living. Though not all Protestant workers clearly benefited from the privileges generated by sectarianism, a substantial portion of the Protestant working class developed a material stake in supporting the colonial order that favored them over their historic adversaries, reinforcing the legacy of antagonism separating Protestants from Catholics.<sup>236</sup>

Social diversity within Unionism did, in fact, strain its cohesiveness.<sup>237</sup> However, these internal fractures paled in comparison to sectarian strife between Protestants and Catholics. In demanding political power, Catholics threatened settler hegemony and the privileges accorded to the Protestant laboring class, as well as the Protestant aristocracy.<sup>238</sup>

Thus, Unionists maintained popular Protestant support and consequently political control over the government of Northern Ireland

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233. Initially, these privileges were doled out under the system of State patronage and later through the bequest of better jobs from Protestant industrialists.

234. *See id.* In fact, this point is the crux of MacDonald's argument that purposeful sectarianism existed primarily to maintain unity within the Protestant community. Arguably this system of patronage affected the 20th century as well. As Farrell argues, a continuing pattern of discrimination in employment was evident as late as 1961. At that time, the average unemployment figure for Northern Ireland was 7 %. The employment exchange areas in Northern Ireland with the five highest rates of unemployment were solidly Catholic; all nearly twice the average or more. The five lowest areas were solidly Protestant; each have the average or lower. In Belfast, the average rate for the 14 Catholic districts was twice the overall average, with some districts registering in at 33 percent. MICHAEL FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* 91-92 (1976).

235. MACDONALD, *supra* note 28, at 55.

236. *See id.* at 59-60.

237. *See id.* at 63-64. As MacDonald notes, "In the city, workers and capitalists disputed industrial issues, while in the countryside small landowners resented the supremacy of the large ones." *Id.*

238. *See id.* at 64.

by providing the Protestant working class with material privileges at the expense of Catholics. However, in order to maintain “unity” within Unionism, the Unionist leadership had to ensure that sectarian conflict always took center stage over social and class conflict. To accomplish this, the Unionist government at Stormont used its power to maintain, if not widen the divide between Protestant and Catholic. Finding themselves out of power, Catholic Nationalists suffered politically, socially, and economically as a result.

### C. *The New Northern Ireland State and Its Police Powers*

From its inception, the Northern Ireland State operated under some of the most repressive legislation of any modern western democracy. On April 7, 1922, the Civil Authorities (Special Powers) Act<sup>239</sup> came into force, which gave the government and the RUC unrestrained authority. The Special Powers Act had been rushed through Stormont in April 1922 at the height of massive rioting in Belfast, and was intended to last for only one year; however, it has continued to remain on the books in one form or another and still endures today.<sup>240</sup>

The Special Powers Act conferred upon the government the absolute power to do whatever was necessary to maintain public order. It expressly provided for the introduction of the death penalty for some offenses, for flogging and imprisonment for others, for the prohibition of inquests, and for arrest without warrant.<sup>241</sup> It also gave the Prime Minister power to make further regulations, each with the force of law, without consulting parliament.<sup>242</sup> The Prime Minister could also delegate his powers to any policeman at any time.<sup>243</sup>

Essentially, the “Home Secretary shall have power to do whatever he likes, or let someone else do what he likes for him.”<sup>244</sup> The Act’s

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239. Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, ch. 5 (Eng.). It was an extraordinary Act. The first sentence reads:

The Civil Authority (the minister of Home Affairs) shall have power, in respect of persons, matters and things within the jurisdiction of the Government of Northern Ireland to take such steps and issue all such orders as may be necessary for preserving the peace and maintaining order.

*Id.*

240. See BARDON, *supra* note 31, at 513.

241. See *id.* at 490.

242. See FARRELL, *supra* note 234, at 93.

243. See *id.*

244. BARDON, *supra* note 31, at 490. See also FARRELL, *supra* note 234, at 93. As if the Special Powers Act were not enough, the Northern government later reinforced it

reputation in the political world is telling of its breadth. The then South African Minister for Justice, when introducing a new coercion bill in the South African Parliament in April 1963, commented that he “would be willing to exchange all the legislation of that sort for one clause of the Northern Ireland Special Powers Act.”<sup>245</sup>

In the tradition of British deference to the police with regards to matters of public order, the newly created Stormont government charged the RUC and the Special Constabulary with enforcement of these draconian laws. However, unlike the rest of Great Britain, Stormont, later termed “a Protestant government for a Protestant people,”<sup>246</sup> had incentives to provide for the biased enforcement of these laws to keep Catholic Nationalists socially and politically impotent. Thus, armed with immense and unchecked power, the RUC did little more than the Unionist Party’s bidding, for the Police in Northern Ireland began as, and as Nationalists argue, continue to be, a Protestant and Loyalist military force.

#### *D. The Role of the Constabularies: The Police Issue*

The composition of the police force may be the most important factor leading to the differing treatment of unpopular expression between Northern Ireland and the United Kingdom. In the U.K., the constabulary is considerably more representative of the society at large than the RUC in Northern Ireland. Though reforms have recently attempted to alter the composition and the mandate of the RUC,<sup>247</sup> historically, the Police in Northern Ireland were almost entirely Protestant, and accordingly, influenced by the same sectarian pressures affecting civilians.<sup>248</sup> Moreover, popular anti-Catholic undercurrents influenced reserve and paramilitary branches within the official Police force, known as the Special Constabulary.<sup>249</sup> This history of biased enforcement of Northern Ireland’s laws created a feeling of vulnerability and mistrust of the Police within the Catholic Community. This mistrust has proven difficult to alter, and continues to affect the Parade issue today.<sup>250</sup>

In the summer of 1920, as both sides positioned themselves for partition, Protestants attacked Catholics indiscriminately, “burning

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with the Public Order Act 1951 and the Flags and Emblems Act 1954, giving itself control over purely political opposition to the regime. Stormont further amended and strengthened the Public Order Act as late as 1969.

245. FARRELL, *supra* note 234, at 93-94.

246. COOGAN, *supra* note 10, at 49.

247. *See infra* Part V.D.; *see also infra* note 265.

248. *See infra* Part V.D.

249. *See infra* Part V.D.

250. *See infra* Part VIII.

Catholic homes, driving Catholic workers from their jobs and murdering Catholics randomly.”<sup>251</sup> Catholics retaliated and Britain was forced to intervene.<sup>252</sup> However, Britain was waging a battle against Irish Republicans, including the IRA, throughout Ireland at the time, as were various Protestant paramilitary groups.<sup>253</sup> Consequently, Britain allied itself with these illegal organizations, including the Ulster Volunteer Force (UVF).<sup>254</sup> This de facto alliance between Britain and Unionist paramilitaries was officially recognized in late 1920 when Westminster converted the illegal UVF into an official organization: the Ulster Special Constabulary.<sup>255</sup> After Partition, the “Specials” became the reserve police force in Northern Ireland. They were divided into three branches (A, B, and C) with recruiting focused on UVF members. All branches were entirely Protestant, highly undisciplined, and detested by the Catholic community. Some, including the British Commander-in-Chief in Ireland, thought them so undisciplined as to be counter-productive.<sup>256</sup> Arguably, their excesses were useful in intimidating the Catholic population, though at the expense of strengthening Catholic resentment of the new state. Consequently, Protestants were legally armed while Catholics were not officially permitted to possess weapons. As the most influential Unionist leader explained, “in Ulster owing to the system of the A, B, and C Constabulary, there is no reason why every Loyalist should not have arms to his hand, legally agreed to by the Government.”<sup>257</sup>

The Specials were Protestants and only responsible to the Stormont government. That government, in turn, was controlled by the same Unionists who “had threatened rebellion against home-rule, formed the UVF, and condoned highly sectarian acts including murder, against the Catholic community.”<sup>258</sup> With the arguably unwitting assistance of the

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251. MACDONALD, *supra* note 28, at 60. For an excellent discussion of these events, including the large-scale rioting, see COLM FOX, *THE MAKING OF A MINORITY: POLITICAL DEVELOPMENTS IN DERRY AND THE NORTH 1912-25* (1997) (excerpt available at <<http://cain.ulst.ac.uk/othelem/fox.htm>>).

252. See MACDONALD, *supra* note 28, at 60.

253. See *id.* at 60-61.

254. See *id.* The UVF was essentially a Protestant paramilitary/vigilante group that acted as the unofficial enforcers of Protestant supremacy. The Army and the UVF even patrolled together. See *id.* at 61.

255. See *id.*

256. See FARRELL, *supra* note 234, at 35-36.

257. MACDONALD, *supra* note 28, at 61 (quoting Lord Craigavon, also known as James Craig, was Northern Ireland's first Prime Minister).

258. *Id.*

British army, the Protestant alliance between militias and the official government beat the Catholic population into submission. Out of a Catholic population of 93,000, in Belfast alone, 250 had been killed, 11,000 driven from their jobs, and 22,000 forced from their homes.<sup>259</sup> The new Catholic minority in the Northern Ireland State found itself unprotected, terrorized, and eventually denied exercise of any meaningful political power.<sup>260</sup>

After devolution of power to Stormont, the Northern government continued to strengthen its Police forces. On April 4, 1922, Stormont disbanded the RIC<sup>261</sup> and the new 3,000 member RUC was formed. It composed of 1,000 A Specials and 2,000 ex-RIC men.<sup>262</sup> It was contemplated that one-third of the RUC would be made of Catholic ex-RIC members; however, less than half the proposed number of Catholics came forward.<sup>263</sup> Therefore, the balance was made up by recruiting more Specials. The new Northern Ireland State, aided by Catholic disloyalty and mistrust, had effectively co-opted the Loyalist paramilitary movement into its police force with two related results. First, Protestant sectarianism influenced and tainted the institution, and, consequentially, Catholics were less likely to join up. During the RUC's history, the Catholic proportion never significantly increased and an independent commission found that in 1969 only about 11% of the force was Catholic.<sup>264</sup> The religious make-up of the RUC was most recently addressed by a commission chaired by the former Governor of Hong Kong, Chris Patten. The report recommended that the force, 92% of which is Protestant, should be reduced, with recruitment focused on Catholics for the next 10 years.<sup>265</sup>

The RUC also acted as a quasi-military force. Unlike their colleagues in Britain, they were always armed, trained, and supplied with rifles, machine guns, and armored cars.<sup>266</sup> As Farrell notes, from the 1950's onward "the RUC included a special Commando reserve force whose functions were almost entirely paramilitary."<sup>267</sup>

In August 1922, the Minister of Home Affairs,<sup>268</sup> Dawson Bates,

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259. *See id.*

260. *See id.* *See also infra* Part V.E.

261. RIC refers to the Royal Irish Constabulary, the RUC predecessor.

262. *See* FARRELL, *supra* note 234, at 54.

263. *See id.* at 96. As Farrell notes, "In 1922, Catholics were unlikely to join a force so much identified with the new state." *Id.*

264. *See id.*

265. *See* THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, 1999 (the full Report is available at <<http://www.belfast.org.uk/report.htm>>).

266. *See* FARRELL, *supra* note 234, at 96.

267. *Id.*

268. The Minister of Home Affairs is in charge of the police.



clarified the connection between the RUC and Orangeism by permitting the formation of a special RUC Orange Lodge.<sup>269</sup> Although public participation in politics was later discouraged, many RUC men remained active members in the Orange Order.<sup>270</sup> The RUC could hardly be impartial when the Orange Order or Unionist party was concerned, as membership was for the most part interchangeable.

The tone of the Special Constabulary was even worse. Upon the formation of the Specials, the Ulster Unionist Council passed a resolution "strongly recommending all Loyalists to join and give the new force their support in every way possible."<sup>271</sup> This policy for the creation of an entirely Protestant private army was expounded upon by at least two notable figures. Sir Henry Wilson noted that, "[t]he Specials are now all Protestants," while Prime Minister James Craig said that, "[i]t is also from the ranks of the Loyal Orange Institution that our splendid Specials have come."<sup>272</sup>

The nearly exclusive Protestant membership of the RUC and the Specials combined with the use and enforcement of the draconian Special Powers Act, led Catholics to perceive the RUC as nothing more than the militarized arm of the Unionist party.<sup>273</sup> As will be discussed, this perception remains.

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269. See FARRELL, *supra* note 234, at 96.

270. See *id.*

271. *Id.* at 95.

272. *Id.* Farrell notes that the Manchester Guardian, May 19, 1921, describes the Specials role in the Troubles,

The unionists have an important ally . . . they have a coercive police force of their own. . . . They (the Specials) have become what everybody who knows Ulster perceived they would become—the instruments of a religious tyranny. . . . Some of them, the Class A, become regular RUC, the rest, the B and C classes parade their districts at night with arms, harassing, threatening, beating, and occasionally killing their Catholic neighbors and burning their homes.

*Id.* Farrell also notes that, "The A and C Specials were disbanded when the boundary question was settled at the end of 1925, but the B Specials were kept on with an average membership of between 11,000 and 12,000. They were eventually disbanded only in October 1969. They retained their peculiar characteristics throughout." *Id.* William Grant MP said at Stormont in 1936 that, "I would like to point out the Special Constabulary are composed entirely of loyal Protestant working men. . . . There are no Roman Catholics among the Special Constabulary." *Id.* In 1969, the Hunt Committee on the Reorganization of the Police in Northern Ireland commented that, "while there is no law or official rule that precludes any person, whatever his religion, from joining the Ulster Special Constabulary ("USC") the fact remains that, for whatever reasons, no Roman Catholic is a member." *Id.* They recommended the disbanding of the USC. See *id.*

273. See *id.* at 97.

### *E. The Stormont Era*

After the initial tumult of Partition, Catholics slowly realized that they could not overturn Protestant supremacy.<sup>274</sup> Protests, whether parliamentary or extra-parliamentary, only backfired, intensifying the Protestant solidarity that fostered their grievances in the first place.<sup>275</sup> Thereafter, a tradition of abstentionist politics evolved within the Nationalist community.<sup>276</sup> With many Catholics believing themselves doomed to permanent political impotence, Protestants ruled unimpeded so long as they maintained unity under the auspices of the Unionist Party. From 1921 to 1968, Unionists remained united, turning Northern Ireland into an effective single-party system. Meanwhile, Britain, relieved of the difficult task of “governing” Ireland, turned a blind eye to the behavior of the Stormont government.

From its foundation until its suspension in 1972, Stormont was governed exclusively by Unionists.<sup>277</sup> Moreover, the government and the Unionist party were entirely Protestant, and almost all Unionist Members of Parliament and nearly all ministers were members of the Orange Order who paraded and regularly spoke at Orange Parades.<sup>278</sup> Thus, the Unionist Party was “shamelessly sectarian.”<sup>279</sup> The definitive statement of Unionist policy came from the Minister of Agriculture, Sir Basil Brooke. Speaking in March 1934:

I recommend those people who are Loyalists not to employ Roman Catholics, 99 percent of whom are disloyal. I want you to remember one point in regard to the employment of people who are disloyal. . . . You are disenfranchising yourselves in that way . . . . You people who are employers have the ball at your feet. If you don't act properly now, before we know where we are we shall find ourselves in the minority instead of the majority. I want you to realize that, having done your bit, you have got the Prime Minister behind you.<sup>280</sup>

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274. See *infra* Part V.H.

275. Nationalist protests against the government could not escape the perception that they simply wanted out of Great Britain, and they did not appear to try to change this perception, which further cemented Unionist fears of the “traitor within.” See *infra* Part V.H.

276. See BARDON, *supra* note 31, at 507, 510.

277. See FARRELL, *supra* note 234, at 62. “Every government was Unionist; every member of every government was a Unionist of one stripe or another; and every parliament had a unionist majority, with 32 out of 52 seats the low-water mark for the Unionist Party.” *Id.* at 62.

278. See *id.* at 62-63, 65.

279. MACDONALD, *supra* note 28, at 62-63. The comments of Northern Ireland's first Prime Minister illustrate the point. Lord Craigavon, Prime Minister from 1921-40, summed up the ethos of the state in 1934 when he stated: “I have always said that I am an Orangeman first and a politician and a member of this Parliament afterwards. . . . All I boast is that we have a Protestant parliament and a Protestant State.” *Id.*

280. FARRELL, *supra* note 234, at 90-91.

Terence O'Neill, Prime Minister from 1963-69, explained at the end of his career that "[i]f you treat Roman Catholics with due consideration and kindness, they will live like Protestants."<sup>281</sup> This statement, though insulting, was in fact indicative of a liberalization of Unionist orthodoxy; previous Unionist governments had preferred that Catholic culture remain segregated and in a state of dissention. "Better that Catholics sustain their traditional disloyalty, and thus justify Unionist Sectarianism"<sup>282</sup> had been the prevailing sentiment.

The Nationalist Party is the perfect opposite of the Unionist Party, as it is, "Catholic rather than Protestant, anti-partitionist rather than partitionist, and powerless rather than powerful."<sup>283</sup> For example, no Nationalist ever held a cabinet post during Stormont's existence and only one Nationalist bill concerning wild birds ever past into law.<sup>284</sup> The Nationalist party's primary focus, as its name implies, precludes it from garnering majority support in the Province. Its weakness stemmed from an obvious contradiction; advocacy of the unification of Ireland through electoral means was destined to fail, considering that two-thirds of Northern Ireland's electorate strongly opposed unification.<sup>285</sup>

The Nationalist Party's politics changed very little from Partition to the late 1960's. It was staunchly, but peacefully opposed to partition, instead favoring a 32-county Republic of Ireland. For the most part, the Nationalist party represented the aspirations of the city-dwelling Catholic middle class. Anxious to develop a Catholic ascendancy and fearful that Protestant professionals (such as doctors and lawyers) might offer advice inconsistent with Catholic beliefs (*e.g.* abortion, divorce), the Church put its full support behind the Catholic middle class and thus the Nationalist party.<sup>286</sup> In fact, there is evidence of Catholics believing that it was a sin to vote against the Nationalist Party.<sup>287</sup> It is clear that the party was closely associated with the church. For example, the local parish and not the electoral district acted as the basic unit of the party's organization and the parish priest would generally chair the caucus to select a candidate.<sup>288</sup> This is, of course, consistent with the Protestant

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281. MACDONALD, *supra* note 28, at 63.

282. *Id.*

283. *Id.* at 67.

284. *See id.*

285. *See id.*

286. *See id.* at 68.

287. *See id.* at 69.

288. *See id.*

fear of a theocracy and is an example of the blurry line between religion and politics in Northern Ireland. The Catholic Church had always been a central political and social force in Ireland. With the rise of the Irish Free State, and the consequent guerrilla-style civil war that followed, the stirrings of militant Catholic Nationalism just beyond the border arguably prompted Ulster Protestants to maintain a constant defensive posture.

When the Unionist Party proclaimed each election to be a referendum on partition, rather than on social issues, the Nationalist Party agreed and rallied Catholic support of dissolving the border. However, the Party's position on partition and the involvement of the Catholic Church in the party machinery only bolstered Protestant support for the Unionist Party.

The ease with which it won elections encouraged the Unionist Party to stick to the proven electoral platform of preserving the cultural and economic union with Britain. With elections focusing on the constitutional status of Northern Ireland, a vote against Unionism was deemed tantamount to a vote for inclusion of the six counties into the "papist state" to the south.

The tactics of some southern Nationalist politicians assisted this manipulation of the Protestant electorate immeasurably. Periodically the dominant southern party (Fianna Fail) initiated campaigns to abolish the border separating north from south.<sup>289</sup> Although rarely amounting to anything more than propaganda for an inattentive international audience, they nonetheless lent credibility to the Republican specter which tied the Protestant working class to Unionism.

Simultaneously buoyed by and beholden to the support of the Protestant working class, Unionists wielded political power in a manner that overtly discriminated against the Catholic population. Northern Ireland's Catholic minority was deprived of political power through gerrymandering<sup>290</sup> and economic power through discrimination in state housing and jobs.<sup>291</sup> The Special Powers Act 1922,<sup>292</sup> and later the Public

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289. See BARDON, *supra* note 31, at 542, 677.

290. The Unionist Party used its supremacy to control local governments, even in areas of Catholic majorities, by limiting the franchise to heads of households, thus eliminating poorer tenants and lodgers, predominately Catholic, from the rolls. Furthermore, the government allowed owners of business property (invariably Protestants) plural votes, up to a maximum of six. Unionists were able to use these artificial majorities to appoint Protestants to nearly all high level public offices. Unionists also protected their majority's grip by gerrymandering local electoral districts. As a result, many Catholic areas were governed by Unionists despite the demographics. See Myers, *supra* note 166, at 19-22. But see WHYTE, *supra* note 41. Whyte argues that discrimination was not as widespread and institutionalized as some scholars suggest. He agrees that gerrymandering kept Catholics out of power at the local level, but did not have the same affect with regards to the national or provincial elections. *Id.*

291. See *supra* note 234. But see WHYTE, *supra* note 41, for other factors that

Order Act 1936,<sup>293</sup> prevented extraparlimentary agitation for redress. In 1966, the British National Commission on Civil Liberties ("NCCL") commented that the Unionists had created, "under the shadow of the British constitution a permanent machine of dictatorship."<sup>294</sup> As Farrell notes, the NCCL equated Northern Ireland with recent fascist dictatorships in Europe. Farrell argues that, "[i]n so far as the unity of party and state was one of the hallmarks of European fascism, the comparison was apt."<sup>295</sup>

From this history developed the structure of sectarian relationships in the new state of Northern Ireland. A long history of Protestant colonial occupation of a predominately Catholic Ireland, either provoked or sustained by the credible threat of Irish disloyalty and Catholic treachery, cast a dark shadow over "community relations." Within this system grew two distinct cultures and traditions that were diametrically opposed to each other. Eventually the instability of British colonialism required a transition from colonial rule to a more democratic system, but rather than devolving power to the whole island, Britain split Ireland in two to prevent civil war between the Unionists in the North and the burgeoning Irish Nationalist movement in the South. As a result, Unionists found themselves in a peculiar position. They were now the majority of a democratic system of government. Home Rule meant they were no longer constrained by British pluralist politics, and they now faced the threat of Catholic disloyalty from both within the new state and from just across the border to the south. But to maintain a cohesiveness, and thus political power, Unionism had to bridge the socio-economic gap between the staunchly conservative philosophy of the party elites and the Protestant working class. They accomplished this by maintaining and confirming the history of sectarian conflict.

As a result, the Orange Order, the government, and the RUC became closely connected. Laws passed by the Unionist-controlled government had the desired affect of rendering the Catholic minority politically and socially powerless. The Orange Order maintained Protestant working class support of the government, in exchange for a system that favored Protestants over Catholics. And the RUC, susceptible to anti-Catholic

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affect disparate employment and housing figures among Protestants and Catholics.

292. See *supra* Part V.B.

293. Public Order Act, 1936, 1 Edw. 8, 1 Geo. 6, ch. 6 (Eng.).

294. FARRELL, *supra* note 234, at 97. The NCCL refers to the British National Commission on Civil Liberties.

295. *Id.*

sentiment, made sure Catholics accepted the arrangement. Northern Ireland's Catholics soon felt the historical grip of Unionism grow tighter. Perhaps this is most evident by the manner in which parades were regulated during the Stormont era.

*F. Policing Processions: The Orange Order's Internal Influence*

The Orange influence on the RUC is apparent in its role of regulating parades and demonstrations. In the late 1940's, Northern Nationalist efforts to organize parades and demonstrations were met with government restrictions and bans. In March 1948, the Minister of Home Affairs banned an Anti-Partition League St. Patrick's Day parade in Derry where marchers had planned to carry the flag of the Irish Republic, the acknowledged symbol of the Nationalist/Republican movement.<sup>296</sup> Local Loyalists threatened a massive counter-demonstration and consequently, the parade was banned under the Special Powers Act.<sup>297</sup> In banning the Parade, the minister in charge stated that, "[s]o long as this government lasts and so long as I am minister of Home Affairs, I shall not permit the Republican flag to be carried through Derry City . . . No Surrender."<sup>298</sup> A local Orange leader and activist, commented that, "The minister was perfectly right in suppressing that demonstration for if he had not done so we [The Derry Unionists] would."<sup>299</sup> The government's cooperation with the demands of the Local Loyalists fostered deep resentment among the Derry Catholic majority, which was made worse by the fact that the government allowed the Loyalist Apprentice Boys to march the walls of Derry every year.<sup>300</sup>

After the Westminster election in February 1950, Nationalists, buoyed by a victory, marched through the streets of Enniskillen carrying the Irish tricolor.<sup>301</sup> The RUC charged the crowd, and after fierce fighting, seized the tricolor. Later in March, the government banned a St. Patrick's day parade from Monymore in County Derry.<sup>302</sup> In Aughnacloy in County Tyrone, the RUC charged a Nationalist parade and seized the Irish flag.<sup>303</sup> In August, a Loyalist crowd attacked and stoned a procession of cars, buses, and a band going through Cookstown, County Tyrone, to a Gaelic football match in Magherafelt

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296. *See id.* at 199.

297. *See id.*

298. *Id.*

299. *Id.*

300. *See id.*

301. *See id.*

302. *See id.*

303. *See id.*

while the RUC stood by and refused to stop the excesses of the crowd.<sup>304</sup>

In July 1951, Stormont quickly drafted a Public Order bill requiring 48 hours notice of all non-traditional<sup>305</sup> parades, and giving the government or the RUC power to ban or re-route parades if the authorities believed that parades might lead to a breach of the peace.<sup>306</sup> Again, there was no appeal permitted from a ban or a re-routing order. Despite the opposition's denouncement of the bill, it was quickly passed by parliament.<sup>307</sup>

Before the bill was passed into law, the RUC attacked an AOH<sup>308</sup> parade, beating male and female paraders and seizing the Irish tricolor.<sup>309</sup> Later, the RUC cut down tricolors from several private houses in town. Farrell argues that, "the government was responding to pressure from local Loyalists."<sup>310</sup> The Unionist MP for Enniskillen, remarked that, "[h]ad the Minister for Home Affairs refused to forbid the tricolor being carried through Enniskillen then we would have taken steps to see it wasn't carried."<sup>311</sup> To punctuate this statement, three hundred club-carrying Loyalists prevented a local Catholic band from parading through the village of Tempo near Enniskillen a few days later.<sup>312</sup>

The Flags and Emblems Act 1954 gave the RUC a considerable amount of discretion, and it tended to use this discretion inconsistently.<sup>313</sup> The discretionary application of the law took on a sectarian flavor.<sup>314</sup> For the most part, though, the RUC had given up banning the Irish flag in

304. *See id.*

305. This meant that annual Orange parades were excluded from the provisions of the bill.

306. Public Order Act, 1951, 14 & 19 Geo. 6, ch. 19 (Eng.). *See FARRELL, supra* note 234, at 200.

307. *See FARRELL, supra* note 234, at 200.

308. Ancient Order of Hibernians, a Gaelic and quasi-Nationalist organization.

309. *See FARRELL, supra* note 234, at 200.

310. *Id.*

311. *Id.*

312. *See id.*

313. *See* Flags and Emblems (Display) Act, 1954, 2 & 3 Eliz. 2, ch. 10 (Eng.). The RUC banned the use of the tricolor in parades in the Falls Road area of Belfast in 1963, and in Easter Rising commemoration parades in Newry and Armagh in 1964. However, the tricolor was allowed to be carried in similar parades in Belfast in 1965. *See* BOB PURDIE, *POLITICS IN THE STREET, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT IN NORTHERN IRELAND* 30-31 (1990).

314. *See* PURDIE, *supra* note 313, at 30-31. In 1965, an Orange procession was allowed to pass through Nationalist areas in Co. Antrim. The Chief Inspector, in reply to questions about the decision not to tone down the parade said that, "[the police] would never interfere with people who were carrying the 'flag of this country.'" *Id.* at 31.

Nationalist areas, unless Loyalists forced their hands. In 1965, Sinn Féin placed a tricolor in the window of its election headquarters on Divis Street, located in the middle of the Falls road, the most famous of the Catholic Nationalist areas of Belfast. The Reverend Ian Paisley announced that if the RUC did not remove the flag then he and his supporters would march into the Falls and remove it himself.<sup>315</sup> Without doubt, if this had actually happened the city would have erupted in violence. The day after, the Minister of Home Affairs pleaded with Paisley to call off the March while the RUC chief inspector in the company of 50 officers broke into the headquarters and took down the flag.<sup>316</sup> Not surprisingly, for the next three days, intense rioting racked the Nationalist areas of Belfast.<sup>317</sup>

Even when the RUC acted against Loyalist interests, they could not win. On the rare occasions when the government acted against Loyalist parades and demonstrations, such action had little effect. In 1935, after a Loyalist festival spawned fierce rioting, then Minister of Home Affairs, Dawson Bates issued a ban on all parades including the traditional Orange Parades marking July 12.<sup>318</sup> On June 23, Orangemen marched through the streets of Belfast in defiance of the parade ban and the RUC took no action.<sup>319</sup> On the same day, the Orange Grand Master, said:

You may be perfectly certain that on the 12 July the Orangemen will be marching throughout Northern Ireland . . . I do not acknowledge the right of any government, Northern or imperial, to impose conditions as to the celebration.<sup>320</sup>

Locked in conflict with its primary supporters, Bates caved in and lifted the ban.<sup>321</sup> The Glorious 12th parades went ahead as planned, and regular attacks and shootings in Catholic areas soon followed.<sup>322</sup>

In June 1966, Paisley supporters, after parading through the Catholic Cormac Square, resulting in a riot, proceeded to attack the Governor of Northern Ireland.<sup>323</sup> Paisley was prosecuted and sent to jail for three months, and his supporters reacted quickly and violently, fighting with the RUC outside the prison, and rampaging through downtown Belfast.<sup>324</sup> In response, the government issued a 3-month ban on all

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315. See FARRELL, *supra* note 234, at 233.

316. *See id.*

317. *See id.* at 234. Three hundred and fifty RUC officers in riot gear stormed the Falls Road, causing nearly fifty residents to require hospitalization. *See id.*

318. *See id.* at 138.

319. *See id.*

320. *Id.*

321. *See id.*

322. *See id.*

323. *See id.* at 235.

324. *See id.*



meetings and parades in Belfast and authorized the RUC to break up gatherings of three or more people.<sup>325</sup>

Though the native Irish Catholics have historically made poor British subjects, the reliance of Unionism on the constitutional issue, the Orange Order, and sectarianism during the Stormont era cemented modern Catholic disloyalty. Strangely enough, Catholic acknowledgment of their British citizenship ignited the "Troubles" of the last 30 years. Rather than embracing a traditional Nationalist-abstentionist role in politics, a movement started among Catholics premised on the idea that as members of the United Kingdom, Northern Ireland's Catholics were entitled the same civil rights afforded to all of Britain's subjects.<sup>326</sup> Inspired by the civil rights movement currently then under way in the American South, the civil rights groups, including the Northern Ireland Civil Rights Association ("NICRA"), assembled in the mid 1960s in order to redress the government with their grievances.<sup>327</sup>

### G. Police Powers and the Civil Rights Movement

Terence O'Neill entered office as Northern Ireland's Prime Minister during a period of economic decline and an increasing rate of unemployment. O'Neill wanted to protect Protestant jobs to insure the Orange Order's continued political support of the Unionist Party. For this reason, O'Neill, with the aid of his chief rival within the Unionist Party, Brian Faulkner, attempted to lure foreign investors to Northern Ireland for the benefit of the Protestant working class. They did this by building factories and other forms of infrastructure in heavily Protestant populated areas, thereby insuring that new jobs would be created for the local Protestant population.<sup>328</sup>

However, foreign investment presented problems to the Unionist Party because Northern Ireland was generally perceived internationally as backward. O'Neill realized that sectarianism was not conducive to foreign investment, but he could not include Catholics in the political system without triggering a dangerous backlash.<sup>329</sup> To quell sectarian tensions, O'Neill embarked on a campaign of outreach to the Catholic

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325. *See id.*

326. *See* PURDIE, *supra* note 313, at 1-3.

327. *See id.* at 2-4.

328. *See* BARDON, *supra* note 31, at 623-27.

329. *See* MACDONALD, *supra* note 28, at 72-73.

community offering symbolic,<sup>330</sup> rather than substantive reform, by making pacifying overtures to Catholics without raising the ire of the Protestant population.<sup>331</sup>

The steady loss of Protestant jobs in Northern Ireland's traditional industries and O'Neill's gestures to the Catholic community struck a nerve in the newly underemployed Protestant working class. The result was the birth of the Ultra-Loyalists, led by the Reverend Ian Paisley.<sup>332</sup> Denouncing O'Neill's softness towards Catholics, Paisley blamed worsening conditions to Unionists on the thawing of Unionist-Catholic relations.<sup>333</sup> Paisley warned of a Catholic conspiracy to rid Ireland of Protestants and continued his provocative antics, which included throwing snowballs at the Republic's Prime Minister after a meeting with O'Neill and publicly demonstrating against Protestants involved in ecumenicalism.<sup>334</sup>

Meanwhile, Catholics, their expectations raised by O'Neill's gestures, began to demand more substance and less symbolism. They pointed out that the Catholic unemployment rate remained disproportionately high and that Catholic political power was non-existent.<sup>335</sup> The impossibility of satisfying mutual grievances demonstrated the zero-sum dilemma of politics in Northern Ireland. Protestants believed Catholic ascendancy would lead directly and proportionally to their economic decline. Catholics blamed generations of Protestant hegemony for their political and economic suffering; therefore, any privilege conferred upon the Protestant community, whether purposeful or not, was deemed just one more example of the evils of colonialism. The kindling for the "troubles" was stacked awaiting just a single spark.

The Catholic Civil Rights movement provided that spark by exercising a quintessential English civil liberty—the exercise of free assembly. In the mid-1960's, many Catholics, realizing that partition was unassailable, rejected both nationalism and Republicanism in favor of a popular struggle for civil rights. Essentially, the movement argued that it was better to accept partition and to make the best of a bad situation than to protest against a border that would not be changed no matter how indignant their complaints.<sup>336</sup> The civil rights protesters contended that if Northern Ireland was to belong to the United Kingdom, then they were

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330. See *id.* O'Neill made a point to visit Catholic schools and hospitals, and to meet with Catholic clergy. See *id.* at 73.

331. See *id.*

332. See *id.*

333. See *id.*

334. See COOGAN, *supra* note 10, at 397. See also MACDONALD, *supra* note 28, at 73.

335. See MACDONALD, *supra* note 28, at 76-77.

336. See PURDIE, *supra* note 313, at 2.

entitled to their rights as British citizens.<sup>337</sup> This departure from the habitual Catholic rejection may, as Unionists claim, have been only a ruse to disarm them of their traditional justification for the exclusion of Catholics from political power, but it succeeded anyway. Instead of reinforcing Protestant solidarity (as protests against partition had done), the civil rights movement exploited the divisions in the Unionist Party that had surfaced in the early 1960s. It trapped reformists, like O'Neill, into backing their earlier gestures with substantive reforms, while confirming the more traditional Unionist majority that one concession merely fueled demands for more.<sup>338</sup> In discrediting the justification for Protestant domination, Catholics also shattered the formerly monolithic unity of the Unionist party. In one year, the civil rights movement destroyed Unionist unity, shook the Catholic community from 50 years of quiescence, and forced Britain to commit its regular army to Northern Ireland.

In essence, the civil rights movement was protesting against official discrimination at the local level, and against repressive legislation at the provincial level.<sup>339</sup> Yet no matter how innocuous the civil rights demands were in themselves, they seemed subversive to the political power structure of Northern Ireland.<sup>340</sup> By demanding the rights of British citizens, rather than claiming allegiance to the Irish Republic, civil rights demonstrators discredited Protestant supremacy. By implicitly accepting the Britishness of Northern Ireland, Catholics shed the label of "treachery" that Unionists had offered as the reasons for their oppressive policies towards the Catholic community. Thereafter,

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337. *See id.*

338. *See* MACDONALD, *supra* note 28, at 77-78.

339. The movement pressed for the following rights:

- 1) universal franchise in local government elections in line with the franchise in the rest of the United Kingdom;
- 2) the redrawing of electoral boundaries by an independent commission in ensure fair representation;
- 3) legislation against discrimination in employment at the local government level and the provision of machinery to remedy local government grievances;
- 4) a compulsory points system for housing which would ensure fair allocation;
- 5) the repeal of the Special Powers Act;
- 6) the disbanding of the B-Specials, and the disarming of the RUC;
- 7) and later the withdrawal of the Public Order Bill.

COOGAN, *supra* note 10, at 67.

340. *See* COOGAN, *supra* note 10, at 67. "The NICRA (Northern Ireland Civil Rights Association) shopping list was like a red flag to a bull in the eyes of Unionist fundamentalists, constituting a root-and-branch attack on the whole idea of a Unionist state." *Id.*

Unionists slowly divided between those willing and those refusing to entertain Catholic grievances.<sup>341</sup>

Catholic civil rights demonstrations were met with Protestant counter-demonstrations. Citing the threat of violence from hecklers that these demonstrations created, O'Neill's rivals banned the original protests.<sup>342</sup> The police were dispatched to clear the roads of defiant protestors, which resulted in riots.<sup>343</sup> The civil disorder and subsequent excessive force of the police, compelled Britain to pressure O'Neill for reforms in employment, the allocation of housing, and political districting.<sup>344</sup>

NICRA planned a civil rights march for October 5, 1968, through the streets of Derry.<sup>345</sup> The proposed route took the marchers from the Catholic area of the Waterside, across Craigavon Bridge, and into the city center. The inner walls of Derry, sacred to the Apprentice Boys, had not been breached by Catholic protesters since the RUC beat the Anti-Partition league off the road in the early 1950s.<sup>346</sup> Unionists were furious. Four days before the scheduled march, the Apprentice Boys gave notice of an "annual march" planned for the same route, though no one had ever heard of the "annual" parade.<sup>347</sup> Nonetheless, the government banned all parades, except in the Catholic ghetto of the Waterside, and Craig raised a massive police force including reserves and water cannons.<sup>348</sup>

In defiance of the ban, the marchers set off from the Waterside but found themselves trapped in the narrow streets by two lines of police. The police proceeded to beat the protesters savagely, and chased random groups of demonstrators into the Catholic Bogside. Fighting broke out throughout the night as barricades were set up in the ghetto, and Molotov cocktails were launched from within.<sup>349</sup>

On January 1, 1969, NICRA began another march from Belfast to Derry, patterned after the Selma-Montgomery march in Alabama in

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341. See PURDIE, *supra* note 313, at 32-35.

342. See MACDONALD, *supra* note 28, at 77. See also BARDON, *supra* note 31, at 653-55 (discussing the events surrounding Derry Civil Rights march of October 5, 1968); *id.* at 655-59 (discussing the events between October and December); *id.* at 659-61 (discussing the ambush at Burntollet in January, 1969); *id.* at 666-69 (discussing the Battle of the Bogside).

343. See MACDONALD, *supra* note 28, at 77.

344. See PURDIE, *supra* note 313, at 69-71. See also BARDON, *supra* note 31, at 657; COOGAN, *supra* note 10, at 82.

345. See BARDON, *supra* note 31, at 653.

346. See FARRELL, *supra* note 234, at 246.

347. See BARDON, *supra* note 31, at 653. See also FARRELL, *supra* note 234, at 246.

348. See FARRELL, *supra* note 234, at 246. See also PURDIE, *supra* note 313, at 139-41.

349. See FARRELL, *supra* note 234, at 246-47.

1966.<sup>350</sup> When the march reached Antrim, a handful of Paisleyites began to gather. The RUC immediately stopped the march as the Paisleyites summoned more Loyalists counter demonstrators.<sup>351</sup> The stalemate lasted until the next morning. As the march proceeded over the next several days, the RUC halted the marchers on several occasions claiming that hostile crowds were ahead, when in fact, crowds of Loyalists were gathering on the alternative routes the RUC had proposed.<sup>352</sup> On January 4, the RUC again stopped the march and warned of "stone throwers" ahead, then suddenly the RUC allowed the marchers to proceed.<sup>353</sup> As the march approached an underpass, dozens of Loyalist hurled rocks and bottles, then charged with clubs and iron bars, beating the marchers off the road and severely injuring several.<sup>354</sup>

The RUC apparently knew an ambush had been set. Stones were piled the night before and crowds of club-wielding men had gathered early while members of the RUC were seen laughing and chatting amongst them.<sup>355</sup> During the ambush, some even joined in. After the attack, no arrests were made.<sup>356</sup>

In November 1968, O'Neill offered a package of reforms that resolved several, but not all of the grievances of the civil rights movement.<sup>357</sup> In appeasing Britain, however, O'Neill had only antagonized Protestants without satisfying the more militant Catholics.<sup>358</sup>

350. See PURDIE, *supra* note 313, at 213.

351. See *id.* at 213-14.

352. See *id.* at 214. See also BARDON, *supra* note 31, at 659-61.

353. See PURDIE, *supra* note 313, at 214. See also BARDON, *supra* note 31, at 659-61.

354. See PURDIE, *supra* note 313, at 214. See also BARDON, *supra* note 31, at 659-61.

355. See PURDIE, *supra* note 313. See also BARDON, *supra* note 31, at 659-61; FARRELL, *supra* note 234, at 250-51.

356. See FARRELL, *supra* note 234, at 250-51. The march eventually made it to Derry, beaten and bruised, but was stopped once more on the outskirts of town where marchers were pelted with rocks and bottles. That night, members of the RUC reserve force, apparently furious that the march had actually reached the town, rampaged through the Catholic Bogside, breaking windows and beating up pedestrians. The residents were outraged and Free Derry was born. Free Derry designates a "No Go" area, where the authority of the police was not recognized. Barricades went up and the RUC was kept out of the Bogside for a week. See *id.*

357. See COOGAN, *supra* note 10, at 76. O'Neill's reform package contained five points: the abolition of the Derry Corporation; the appointment of an ombudsman; a new system of housing allocation; a promise that the Special Powers Act would be abolished when it was safe to do so; and an end to the company vote. See *id.*

358. See MACDONALD, *supra* note 28, at 77. "Civil rights militants only pointed out that the reforms were merely proposed, not implemented; that no commitment to the

Amid Unionist losses in the February 1969 election and a splintering party, which amounted to a referendum on his proposals, O'Neill resigned.<sup>359</sup> A Unionist moderate, James Chichester-Clark assumed the Premiership, and conceded to ultra-Loyalist demands.<sup>360</sup> Britain went along with Chichester-Clark in the fear that without British support, he might be replaced by a more radical Unionist.<sup>361</sup> With Britain's reluctant consent, Chichester-Clark was able to push Ultra-Loyalist demands from a fairly moderate position. Specifically, he persuaded Westminster to allow contentious Orange parades during the socially and politically explosive months of July and August, 1969. Catholic Civil rights marches were met with violent Protestant resistance, the Orange parades were more triumphal and taunting than usual, Catholics obliged Protestant provocation by overreacting, and the resulting riots were more ferocious than usual.<sup>362</sup> When Stormont civil authority and control vanished, the British government sent in the army to quell the sectarian strife.<sup>363</sup>

The official reaction to the protest marches and demonstrations and the ferocity of violence that swarmed around them were, perhaps, the most shocking aspects of the civil rights movement in Northern Ireland. The violence of the 1960s foreshadowed even worse violence in the next three decades.<sup>364</sup>

#### *H. The Collapse of Stormont*

As the civil rights movement degraded into chaos, nonprotesting Catholics bore the brunt. Of the eight people killed in Belfast riots on August 14 and 15, 1969, six were Catholics. Eighty-three percent of the homes damaged or destroyed during the riots were Catholic, as Catholic neighborhoods had no protection from Protestant and police campaigns.<sup>365</sup>

For the first time since Partition, the British army was deployed to keep the peace in Northern Ireland. Initially Catholics welcomed the

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principle 'one man, one vote' had been offered; that the Special Powers Act remained intact; and that the larger problem of unemployment was not even broached." *Id.*

359. See BARDON, *supra* note 31, at 661-64. See also MACDONALD, *supra* note 28, at 79.

360. See BARDON, *supra* note 31, at 665, 672-73. See also MACDONALD, *supra* note 28, at 79.

361. See MACDONALD, *supra* note 28, at 79.

362. See *id.*

363. See *id.*

364. After British troops were called in to maintain public order, the IRA re-emerged and began its now infamous guerrilla campaign prompting Loyalist paramilitary groups to follow suit. See BARDON, *supra* note 31, at 675-85.

365. See Myers, *supra* note 166, at 24.

British Army to protect their neighborhoods from roving Protestant gangs.<sup>366</sup> But, the Army's welcome soon wore out. Within a year, the British army's reactionary tactics led to repeated confrontations with mobs in Catholic areas of Derry and Belfast and to the deaths of Catholic protesters.<sup>367</sup> These tactics drove, "the most moderate Catholics to press for communal self-protection."<sup>368</sup> The IRA was reborn as the defenders of Catholic neighborhoods, and it soon gained broad support in the Catholic community.<sup>369</sup>

The Prime Minister and the British Home Secretary instituted a policy of confrontation with the Catholic community by declaring war on the IRA, and pursuing a system of official crackdown on Catholic ghettos. The Army and the RUC engaged in broad "security sweeps" of Catholic ghettos, rounding up men and boys on the thinnest suspicion of IRA involvement.<sup>370</sup> Matters only became worse when on August 9, 1971, British Prime Minister Heath and the new Northern Irish Prime Minister Brian Faulkner initiated internment, without charges or trial, of any suspected terrorists or terrorist sympathizers.<sup>371</sup> Thereafter the IRA appeared to assume an offensive and indiscriminately bloody posture.

Internment<sup>372</sup> provoked the IRA into a full-scale bombing campaign. More than 100 explosions ripped through Belfast in August 1971 and thirty-five people were killed. Catholics of all political persuasions

366. See COOGAN, *supra* note 10, at 123. The IRA had not been a factor, other than a motivator for Loyalist vigilantism, since the 1950's. Catholics, feeling abandoned by the IRA, openly welcomed the British troops as guarantors against further Protestant and police attacks. During this period, murals and graffiti in Catholic areas of Belfast bore the slogan: "IRA: I Ran Away." See *id.*

367. See BARDON, *supra* note 31, at 672-78. See also Myers, *supra* note 166, at 25-26.

368. Myers, *supra* note 166, at 25.

369. See *id.* at 25-26.

370. See Myers, *supra* note 166, at 26-29. Two thousand, one hundred and fifty eight people, mostly Catholic males, were interned during the ensuing four years. A majority of detainees were held without charges for more than a year and hundreds of cases of physical abuse at the hands of the RUC and the British Army were reported. In 1976, Ireland brought Britain before the European Commission of Human Rights claiming that Britain violated the European Convention on Human Rights by committing or condoning acts of torture and inhuman and degrading treatment of Republican prisoners. The European Court of Human Rights affirmed the Commission's findings as to inhuman and degrading treatment. Subsequently, the British government admitted to authorizing techniques of physical and psychological torture in the interrogation of prisoners. See *id.*

371. See BARDON, *supra* note 31, at 681-84.

372. Internment refers to the system of arrest and confinement without trial for suspected offenses under the Special Powers Act. See *id.*

came together in opposition to Stormont. "Moderate Catholics joined huge Republican protests, held despite an official ban, and the Catholic opposition to the Protestant government and its British overseers crystallized in a massive civil disobedience campaign, including tax and rent strikes that lasted more than three years."<sup>373</sup>

On January 30, 1972, Catholic protesters staged a massive anti-internment demonstration in the City of Londonderry, the symbolic birthplace of the Protestant siege mentality.<sup>374</sup> The British army opened fire on an estimated 20,000 unarmed marchers, killing thirteen, seven of these teenagers.<sup>375</sup> Immediately after "Bloody Sunday," Catholics rioted throughout Ireland, both north and south of the border.<sup>376</sup> The IRA began a new, more violent campaign. By March 20, the IRA had killed 56 British soldiers and four days later the British Prime Minister ordered the Stormont government suspended, reimposing direct rule of Northern Ireland from London.<sup>377</sup>

## VI. THE RISE OF DISENCHANTED LOYALISM

While Nationalists had traditionally suffered the indignities of second-class citizenship at the hands of a Unionist-dominated government, Loyalists were not completely free from such indignities, nor were the majority of Loyalists economically better off. As one commentator points out:

The Loyalist story of the conflict in Northern Ireland is not one of domination, but one of poverty, disenfranchisement, and marginalization. It is the story of the Protestant working-class community, which has been on the front-line of the conflict by virtue of sharing the poorer neighborhoods of Belfast, Lisburn and Portadown as well as rural mid-Ulster with the Catholic working class.<sup>378</sup>

Moreover, Loyalists and Nationalists are equal targets of indiscriminate terrorist violence. As the leader of the Loyalist fringe Ulster Democratic Party, Gary McMichael argues, in areas along the border, the IRA has been involved in a campaign of ethnic cleansing, killing the male family members in small Protestant communities, in attempts to force the Protestants out of the area.<sup>379</sup> Arguably in response to the IRA's bloody campaigns, many Loyalist themselves lent their support to paramilitary organizations as a method of empowering a

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373. Meyers, *supra* note 166, at 29-30. The civil disobedience campaign included tax and rent strikes that lasted for more than three years. *See id.*

374. *See* BARDON, *supra* note 31, at 686-88.

375. *See* Myers, *supra* note 166, at 30. *See also* BARDON, *supra* note 31, at 687-88.

376. *See* Myers, *supra* note 166, at 30.

377. *See id.* at 30.

378. MCMICHAEL, *supra* note 48, at 1.

379. *See id.* at 36.



threatened and marginalized community.<sup>380</sup> While these two communities exchanged gunfire, in the early 1990's it was revealed that the British government had been engaged in secret dialogue with the IRA for years.<sup>381</sup>

Thus, Loyalism has transformed itself from a movement concerned with the maintenance of Northern Ireland's constitutional status in the United Kingdom, to a movement with all the hallmarks of ethnic self-determination. In this respect, Ulster Loyalism has become "conditional." An ironic development of Loyalist/Orange collusion with the RUC is that any sign of softening attitude towards the Catholic community was, and continues to be perceived as the beginning of the end of Protestant dominance: the "selling out" of Protestant ideals. The result of this development is the Orange alliance with the RUC, and its alliance with the government is rendered conditional, often leading to the Orange Order confronting the RUC rather than exercising its will through the civil authorities.

Orangemen claim that being able to walk along traditional routes is an essential feature of their civil rights. Any challenge to this is viewed as symptomatic of the creeping influence of Dublin and of the threat of compromise over the status of Northern Ireland. The range of towns and villages in which the Orangemen parade regularly implies that these rights are being actively maintained, and that no territory is abandoned as an integral part of Protestant Ulster.

Protestant fears are not irrationally based. "[T]he [Catholic] Church . . . [has had a] practical stranglehold on the regulation of morality in the South,"<sup>382</sup> though social reforms have since distanced the State from the Church. The Republic's 1937 constitution ordained an, "'ecclesiastical imperialism' of the Catholic Church in Ireland."<sup>383</sup> It begins:

In the name of the Most Holy Trinity, from Whom all Authority flows and to Whom as our first end all actions both of men and states must be referred. We, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . do hereby adopt, enact, and give to ourselves this Constitution.<sup>384</sup>

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380. See *id.* at 1.

381. See *id.* at 43.

382. Myers, *supra* note 166, at 20 (citing SCOTT BELFRAGE, *LIVING WITH WAR* 290-91 (1987)).

383. *Id.*

384. IR. CONST. arts. 2,3 (*Bunreacht na hEireann*).

This statement, promulgated by its founders, confirms the Irish Republic's allegiances in many respects to the Catholic Church in the eyes of both Protestants and Catholics alike.<sup>385</sup>

A further cause of Loyalist anxiety has been the Republic of Ireland's official position towards Northern Ireland. Until just recently,<sup>386</sup> the Irish Constitution laid claim to all of Ulster. Article 2 claimed national jurisdiction over the whole island, while Article 3 contemplated reintegration of the six counties of the North.<sup>387</sup>

Since 1985, when the Anglo-Irish Agreement gave the Republic of Ireland a nominal role in easing community relations in Northern Ireland, Loyalists have felt even more threatened.<sup>388</sup> Part of the concerns of the loyal orders over the growing Nationalist protests at their parades is that the areas where they are no longer able to walk freely will only increase. The fight to maintain traditional routes in areas with a large Catholic population is an attempt to deny or to ignore the demographic and political changes that have been taking place in Northern Ireland in the past few decades.

## VII. THE STRUCTURE OF PARADE REGULATION IN NORTHERN IRELAND AND THE INHERENT PITFALLS OF HISTORY

History demonstrates the animosity between Catholics and Protestants, Loyalists and Nationalist. However, the zero-sum dilemma is influenced by other factors as well. The hallmark of English judicial restraint is the most important of all. Ultimate discretion on who is allowed to march is left with the RUC. However, historical manipulation of the RUC by Unionists and the Orange Order, and the

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385. See *id.* at art. 40.3.3. Though abortion was already illegal, it became unconstitutional by a referendum approved by 67% of the voters in March 1984. The Irish Constitution severely restrains the availability of divorce, which until recently was unlawful. Article 40.6.1.i permits the government to ban any expression in the interest of morality. See *id.* at art. 40.6.1. See generally, JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 317-21, 345-49, 493-504 (1987).

386. As part of the Good Friday Peace Accord, the Republic of Ireland repealed articles 2 and 3 of the Constitution on Dec 3, 1999. *Lifting of Claim to North Opens New Chapter of History*, SUNDAY TIMES, Dec. 3, 1999 (available at <<http://www.sunday-times.com.uk>>).

387. IR. CONST. arts. 2, 3 (*Bunreacht na hEireann*). See BARDON, *supra* note 31, at 542.

388. Proof of this trend is the violent Protestant reaction to the Anglo-Irish Agreement. Then Prime Minister Thatcher announced that the agreement ensured that, "there will never be a united Ireland." After the Agreement was signed and the details of the Irish Republic's involvement in Northern Ireland's affairs became clear, Protestants attacked British officials, rioted against the RUC, and renewed attacks against the Catholic population. As a result, Britain was compelled to send in army reinforcements. Myers, *supra* note 166, at 58.

subsequent mistrust of the Catholic community, made this arrangement untenable.

A. *Policing Processions: The Portadown Parades*

The most recent example of the zero-sum approach to parades and protests centers around a small Catholic neighborhood fronting the Garvaghy road in Portadown. July of 1996 witnessed a resurgence of the annual "Drumcree stand-off." On July 7, 1996, Orangemen attempted to march down the Garvaghy Road although they had been forbidden to do so by an order made by the Chief Constable of the RUC under the Public Order Act 1986.<sup>389</sup> The decision by the police led to several days of Loyalist roadblocks and rioting.<sup>390</sup> The object of the blockades was to paralyze the economic life of the province, to stretch the resources of the security forces so that presumably they would be unable to contain the marchers at Drumcree who were being encouraged to assemble there in large numbers.<sup>391</sup> Unionist leaders complained bitterly about the way in which the Unionist and Loyalist community had been treated prior to Drumcree, that Drumcree was the last stand; and that if Loyalists did not take a stand at Drumcree then Ulster would be lost.<sup>392</sup> Loyalists were incensed and rioting broke out in Protestant areas throughout the province. The Chief Constable deplored the action by Orangemen and their supporters, declaring that their behavior "constituted a threat to paralyze the state."<sup>393</sup> The disorder and road blockades continued until July 11. During this period, the Unionist and Orange leaders, while going through the motions of condemning violence, continued to refer to the threat of violence and issued dire warnings to the Government of the chaos that would ensue if the parade at Drumcree was not allowed to pass.<sup>394</sup>

The RUC finally caved in. When the police reversed their decision, the Nationalist community reacted in a similar way.<sup>395</sup> The dispute

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389. See SAVARIC, *supra* note 62.

390. See *id.*

391. See *id.*

392. JARMEN, *supra* note 30.

393. *Id.*

394. See *id.*

395. See SAVARIC, *supra* note 62: "All Catholic areas of Northern Ireland exploded with rage. Riots in particular broke out in Armagh, Ballycastle, Ballymena, Bellachy, Bushmills, Coalisland, Coleraine, Cookstown, Downpatrick, Dromore, Dungiven . . ."  
*Id.*

polarized the two communities in a manner that had rarely been seen before, even during the height of the Troubles. The political middle ground disappeared, and a return to paramilitary violence was anticipated. In the end, the two sides pulled back, although the protests against the parades continued. The dispute continued to smolder with a campaign of consumer boycotts, intimidation, sporadic arson attacks, increases in residential segregation, picketing of Catholic churches, and a general rise in tension.

Though predominantly drawn from the ranks of working class Protestants, members of the RUC became *personas non gratas* to their parading neighbors. At Drumcree, crowds labeled the police as traitors even though some of the police were close relatives of the protesters. Orange supporters intimidated RUC officers by announcing the names and addresses of officers' family members over loudspeakers near their homes.<sup>396</sup> As Coogan notes, "[o]ne police officer who had allegedly suffered a miscarriage, was threatened that she would 'never give birth to another living thing.'"<sup>397</sup>

Thus, the authorities charged with keeping public order find themselves in a no-win situation. Desperately needing to disassociate themselves with a biased and sectarian past, the RUC must stand firm on parade decisions unfavorable to the Loyalist community. Yet the RUC is still vulnerable to Loyalist influences, that either push or pull the RUC into capitulation. This merely re-enforces the deeply held belief in the Catholic community that the government cannot protect their rights.

#### B. Public Parades and the Processions Act

The Drumcree standoff highlighted the inherent incompatibility of existing public order regulation in the context of Northern Ireland, and prompted Westminster to do something to correct the flaws. Nearly as soon as the rioting subsided in 1996, Westminster created an independent body to study the parades issue and make recommendations. On January 30, 1997, the Independent Review of Parades and Marches (North Report) was released.<sup>398</sup> The Report stated, "that the right to peaceful free assembly should (subject to certain qualifications) be protected," but that, "the exercise of that right brings with it certain responsibilities; in particular, those seeking to exercise that right should take account of the likely effect their actions would have on their relationship with other parts of the community and be

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396. See COOGAN, *supra* note 10, at 516.

397. *Id.*

398. Jim Cusack, *Chairman Says Consensus is the Cure*, IRISH TIMES, Jan. 31, 1997.

prepared to temper their approach accordingly.”<sup>399</sup> The report also recommended negotiation and accommodation, and the renunciation of criminal acts.

The North Report’s most significant recommendation was the creation of an independent Parades Commission, appointed by the Secretary of State for Northern Ireland that would:

- (a) allow interested parties to put their views forward about proposed parades;
- (b) encourage them to settle difficulties locally and, where that proved impossible;
- (c) itself come to a view on what, if any, conditions should be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions.<sup>400</sup>

The report promoted broad-based and transparent mediation among all actors, including the RUC and the British government.<sup>401</sup> The Parades Commission was to be given power to impose restriction on contentious parades as well. However, the ultimate decision on such restrictions still lay with the Secretary of State, upon recommendation by the RUC.<sup>402</sup>

Ultimately, the North Report received wide support. The Labour Party in Westminster, through its shadow Secretary of State for Northern Ireland, Dr. Mo Mowlam, indicated that, if in power, Labour would implement the report’s recommendations.<sup>403</sup> Her statements came amid the Conservative government’s reluctance to go ahead. The U.S. State Department strongly urged that the report’s recommendations be implemented within the year.<sup>404</sup> Right wing Loyalists were of a different opinion, however.<sup>405</sup> The Chief Executive of the Grand Lodge (Orange), Mr. George Patton, said, “It is obvious that anyone who believes in freedom of assembly and freedom of movement must reject the draconian powers being given to the commission through the Public

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399. INDEPENDENT REVIEW OF PARADES AND MARCHES, FIRST REPORT, 1997, Recommendation §§1(a), 1(b) [hereinafter NORTH REPORT] (available at <http://www.nio.gov.uk/press/north.htm>).

400. NORTH REPORT, *supra* note 396, recommendation §§ 2(a), 2(c).

401. See Jim Cusack, *Chairman Says Consensus is the Cure*, IRISH TIMES, Jan. 31, 1997.

402. See NORTH REPORT, *supra* note 396, recommendation §§ 19(a), 19(c).

403. See Frank Millar, *Mowlam Backs Parades Body*, IRISH TIMES, Jan. 31, 1997.

404. See Joe Carroll, *US Wants Commission In Operation This Year*, IRISH TIMES, Feb. 1, 1997.

405. See Suzanne Breen, *Magee May Be Hard To Replace on Commission*, IRISH TIMES, Dec. 20, 1997.

Processions Bill.”<sup>406</sup>

The report was later codified in the Public Processions Act 1998<sup>407</sup> after the Labour Party, led by Tony Blair, assumed the government. The primary aim of the new law is to seek accommodation at the local level. The British government has conceded, “that the support of the whole community is needed to find an agreed resolution to an increasingly contentious issue that has generated distressing scenes of confrontation in recent years.”<sup>408</sup> To reach community-based resolution, the Act authorized the creation of the Parades Commission independent from the British government.<sup>409</sup> The government is correct in theory, though it failed to follow the theory in practice.

The Parades Commission has a statutory responsibility for issuing determinations in respect of proposed public processions and may impose certain conditions upon such parades with respect to the time, place and manner of the parade.<sup>410</sup> Members of the Commission are appointed by the Secretary of State for Northern Ireland. The Act further requires the Secretary of State to exercise her powers of appointment so as to insure that, as far as is practicable, the membership of the Commission is representative of the community in Northern Ireland.<sup>411</sup>

Essentially, the Parades Commission will review a parade only when accommodation between those who wish to parade and those who wish to protest cannot be reached. In that event, the Commission will gather background information itself and take direct evidence from interested parties.<sup>412</sup> The information to be gathered includes the details of past parades, the demographic mix of the local community, and facts about the local area and the key points on the parade route such as churches and any landmarks of sensitive historical significance.<sup>413</sup> The Commissioners will consider advice from the RUC about the extent to which the parade in its proposed form would result in public disorder or damage to property. Having taken into account all the relevant information, evidence and advice, the Commission then meets to decide

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406. *Id.*

407. Public Processions (Northern Ireland) Act, 1998, ch.2 (Eng.).

408. NORTHERN IRELAND INFORMATION SERVICE, A GUIDE TO THE PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT 1998 (Feb. 24, 1998) (available at <<http://www.nio.gov.uk/press/980224d-nio.htm>>).

409. *See* Public Processions Act 1998, ch. 2, Sched. 1.2.

410. *See* Public Processions Act 1998, ch. 2, §§ 8, 10.

411. *See* Public Processions Act 1998, ch. 2, sched. 1.3.

412. *See* PARADES COMMISSION FOR NORTHERN IRELAND, PROCEDURAL RULES §§ 1, 2 (available at <<http://www.paradescommission.org/pubs/proc.htm>>). Alistair Graham is the current Chairman of the Parades Commission.

413. *See id.* at § 2.

whether or not to impose conditions.

Section 8(6) of the act proposes that in determining whether to impose such conditions on a parade, the Commission should have regard to:

- (a) any public disorder or damage to property which may result from the procession;
- (b) any disruption to the life of the community which the procession may cause;
- (c) any impact of the procession on relationships within the community;
- (d) any failure to comply with the Code of Conduct (whether in relation to the procession in question or any previous procession); and
- (e) the desirability of allowing a procession customarily held along a particular route to be held along that route.<sup>414</sup>

Though, no longer the chief decision-maker, the RUC continues to play an important role. The police will work closely with the Parades Commission and when the Commission decides to issue a determination on a parade, the Chief Constable may, if he is unhappy with the determination, ask the Secretary of State to review it. The Secretary of State must then either confirm, amend or revoke the determination.<sup>415</sup> The police may also continue to use the powers they already have to impose conditions on any protest meeting or counter demonstration where they believe that the meeting may lead to serious public disorder, serious damage to property or serious disruption to the life of the community.<sup>416</sup> The police also retain their existing powers to take whatever action they consider necessary on the day of the parade to prevent loss of life, injury, damage to property and so on.<sup>417</sup>

The Act leaves the Secretary of State with the ultimate veto power over the Parade Commission's decisions, and advises her to seek the RUC's counsel when exercising that power.<sup>418</sup> The Secretary of State will also consider the evidence given the Commission in connection with the parade and whatever additional evidence the Chief Constable has provided. The Secretary of State then considers the same factors that were taken into account by the Commission, including any undue demands which the procession may make on the police or military forces.<sup>419</sup> If it is necessary in the public interest to do so, she may order

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414. Public Processions Act 1998, § 8(6).

415. See NORTHERN IRELAND INFORMATION SERVICE, *supra* note 408.

416. See *id.*

417. See *id.*

418. Public Processions Act 1998, ch. 2, § 11

419. Public Processions Act 1998, ch. 2, § 8.11(2)(d).

any and all parades banned for a period of up to 28 days.<sup>420</sup>

### VIII. WHERE THE PUBLIC PROCESSIONS ACT FAILS

The Public Processions Act offers many fresh ideas to solve the apparent zero-sum dilemma. It creates a forum in which grievances can be heard and addressed. It fosters dialogue between the two communities, while at the same time, it forces both to share the burdens that free assembly and the right of passage necessarily entail. Moreover, because both communities have a greater voice in the decision-making process, the finger-pointing that occurs when the authorities take unfavorable action carries much less weight and stubbornness appears more irrational.

However, the Act still leaves the ultimate power with the police, thus ignoring the phenomenon in Northern Ireland that helped to create the need for the act. After the Drumcree incident in 1996, the U.S. State Department issued a blistering report on the condition of human rights in Northern Ireland. The report stated that the decision to allow the Orange march at Drumcree, "damaged the RUC's reputation as an impartial police force."<sup>421</sup> It further stated that security personnel unduly harassed citizens in areas where terrorist activity appeared to be strong. Without credibility, any structure dependant upon police enforcement will be ultimately rejected. Catholics who are continually rebuffed by the RUC in attempts to re-route Orange parades away from their neighborhoods, may withdraw from the process of reconciliation currently underway. If the new structure is simply a mirror image of the old, very little support will be forthcoming, especially from the ultra-Nationalist IRA and its supporters, who feel they must see a positive return on the all the sacrifices its members have made "for the cause." Conversely, if the RUC clamps down on the Orange parades, Loyalists will attempt to exercise its influence. At the point in time where the Orange Order loses all influence on the parades issue, it too will withdraw, and like the ultra-Nationalists, reconsider physical force.

The events leading up to the 1997 stand-off at Drumcree near the town of Portadown are the best indicators of the remaining flaws. Though the Public Processions Act was not yet in operation, the Secretary of State for Northern Ireland and the Chief Constable of the RUC followed the tenets of the Act, by engaging in proximity talks with the Portadown

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420. See *id.*

421. Joe Carroll, *Drumcree Damaged RUC Reputation Says US Report*, IRISH TIMES, Jan. 30, 1997. Arguably, there was not much of a reputation of impartiality to tarnish.



Orangemen and the Garvaghy Road Residents Association.<sup>422</sup> The talks were stalled, but no official pronouncement about the future of the parade was made. At the eleventh hour, Ronnie Flannagan, the Chief Constable, made a statement to the effect that the parade would go down the road. He also said that banning the parade would create a worse threat to disorder than letting it pass.<sup>423</sup> Soon after, a convoy of armored cars and troop carriers swarmed the Garvaghy road. Soldiers and RUC battoned protesting residents off the road and held them in their houses at gunpoint until the Orange parade had passed. Violence erupted in Catholic areas throughout Northern Ireland, bringing the region to a near standstill for 3 days.

A week later, a document was leaked indicating that the decision had been made nearly two weeks before to let the parade pass if no accommodation was reached.<sup>424</sup> The document, dated June 20th, says that at the time it was being written the Chief Constable of the RUC, Mr. Ronnie Flannagan, had “genuinely” not taken a decision on the parade. His decision was finally revealed on Sunday morning. Nevertheless, the document added that, “the consensus among the key players—the Secretary of State, the Minister of State, the Chief Constable, the GOC (General Officer Commanding the British army in the North), the Parades Commission Chairman—is that, if there is no local accommodation, a controlled parade on the Garvaghy Road is the least worst outcome.”<sup>425</sup> Thereafter, Nationalists were arguably left to believe that by simply refusing to negotiate with Nationalist residents groups, the Orangemen would ultimately prevail and be permitted to march through contentious areas.

While invariably these tough decisions must be made, the history of Northern Ireland tells us that making these decisions behind closed doors only adds to the atmosphere of paranoia and mistrust.

Nationalists are still deeply troubled by the RUC’s involvement in the decision-making process. Breandan MacCionnaith of the Garvaghy Residents’ Coalition made the following statement,

The Processions [Act] recognizes the right to march, with some qualification, but it doesn’t give the same recognition to the rights of residents, the rights of

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422. See *RUC May Prevent Parade Through Garvaghy*, IRISH TIMES, July 5, 1997.

423. See *id.*

424. See Deaglan De Bredan, *March Permission ‘Best Option’*, IRISH TIMES, July 8, 1997.

425. *Id.*

marchers take absolute precedence. The North Commission had not addressed the RUC's religious and political make-up or its behavior last year. . . . Thirty per cent of RUC officers are members of the Orange Order, the Apprentice Boys or the Black Perceptory. The [Act] ignores that and the mass disaffection and virtual mutiny of the RUC at Drumcree last year. The RUC quite clearly cannot implement the law impartially, yet the [Act] allows it to have the final say on the parades issue.<sup>426</sup>

The RUC is the only actor that may in reality appeal a decision by the Parades Commission. The Chief Constable, if unhappy with a determination, may appeal to the Secretary of State, who then relies on the Chief Constable to provide the justifications for overturning the Parades Commission.<sup>427</sup> Though the Parades Commission is an independent body, its will is still potentially subject to political maneuvering and sectarian pressures.

The Unionist reaction to the Parades Commission is even more troubling. Speaking at the Ulster Unionist Party Conference in October 1998, the first Prime Minister of the newly re-organized Northern State and a co-recipient of the 1998 Nobel Peace Prize, Mr. David Trimble made the following statements:

It is also with regret that we must remind government that the statutory arrangements [Westminster] put in place to regulate the traditional events of the summer failed, and failed abysmally. As we predicted, the Parades Commission has been an abject failure. They made no attempt, no attempt at all, to discharge their conciliation and mediation function. Their misconceived regulatory function has been exercised in a high-handed and unfair manner. Indeed, my one meeting with that body left me astonished at the arrogance of some commission members. There must be radical changes before next year. . . . Those on the Garvaghy Road who are responsible for creating the problem and whose intransigence in prolonging it are probably the only ones pleased. Thanks to Alistair Graham and his commission, they need do nothing and consequently cannot expect much to be done by them.<sup>428</sup>

Mr. Trimble also made clear his and the Government's continued support of the Orange Order:

Government has to resume the responsibilities it abdicated. It must also show that full respect for civil and cultural rights and parity of esteem for the identity and ethos of the community are not just empty words, but have real meaning for the largest cultural organization in Northern Ireland.<sup>429</sup>

Moreover, one must question Mr. Trimble and the new government's commitment to accommodation and reconciliation. As summarized in

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426. Suzanne Breen, *RUC Role In Policing Parades "Ignoring"*, IRISH TIMES, Jan. 31, 1997.

427. See Public Processions Act 1998, ch. 2, § 11.

428. *The Offer Of Partnership Stands, But Only If Past Is Left Clearly Behind*, IRISH TIMES, Oct. 26, 1998.

429. *Id.*

the *Irish Times*:

The Irish territorial claim is gone. . . To put it another way, look at what Sinn Féin were saying at the beginning of this year. They said there would be no change to articles 2 and 3 [of the Irish Constitution]. They have changed. They said there would be no return to Stormont. We are back there. . . Sinn Féin said there would be joint authority. There isn't. Sinn Féin said there would be powerful cross-Border bodies with no unionist veto. The North/South council will have no executive authority and any agreements made in it will require the approval of the Assembly. On all these matters Sinn Féin were driven below their bottom line.<sup>430</sup>

In the context of regulating contentious parades, the Unionist Party seems ready to pressure the Secretary of State (Northern Ireland) to exercise her veto power over the Parades Commission. If this pressure is exerted, the Secretary of State (Northern Ireland) may have little choice but to capitulate, lest she risk the collapse of the peace process, despite the inevitable Catholic retaliation. If there is no real power-sharing and oversight of the government's actions, as Mr. Trimble claims, Catholics will have no official avenues of recourse, and may find themselves left out once more.

Furthermore, membership on the Parades Commission is not protected from political pressure either. In April 1998, two of the seven Commissioners resigned. Glen Barr, a prominent Loyalist leader, stepped down after just two months on the Commission. A week before, Ulster Unionist leader, David Trimble, was apparently informed that, "the Commission was about to reveal in a 7,000-word preliminary analysis of the marching season and that it was inclined to take the view that the controversial Orange march from Drumcree Church along the Garvaghy Road in Portadown should be rerouted."<sup>431</sup> There had been speculation that the Commission had decided to ban the Drumcree parade and there were suggestions that Mr. Barr was about to step down as a result of this decision.<sup>432</sup> Mr. Barr stressed he had no difficulties with the Commission, the concept on which it has been established or

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430. *Id.* See also *Political Uncertainty Returns To North As Direct Rule Is Reimposed*, IRISH TIMES, Feb. 12, 2000. By threatening to resign as the First Minister if the IRA did not decommission arms pursuant to a Unionist imposed time table, David Trimble essentially threatened to withdraw Unionist support for the new power-sharing executive, if Unionist demands were not met. Arguably, such a position reflects very poorly on Unionists' willingness to accommodate. See *id.*

431. *Commission's Credibility Vanishing With Its Members*, IRISH TIMES, Apr. 24, 1998.

432. See *id.*

the decisions it was likely to make, but further added, "that he was stepping down because of enormous pressure from the media and others," and could, "anticipate a situation in which I would become the focus of speculation in every future decision of the Commission."<sup>433</sup> That same afternoon another Loyalist member of the Commission, Tommy Cheevers, of the Apprentice Boys, tendered his resignation as well.<sup>434</sup>

Even well-wishers of the Commission, who are hard to come by in either community, admitted the situation was "a real mess." The Irish Times commented that "[I]t will be extremely difficult to get anyone with a shred of 'street cred.' to serve on the commission in place of Messrs. Barr and Cheevers."<sup>435</sup>

Finally, the Public Processions Act contemplates mediation between both communities, but the Commission is not in the best position to foster such mediation. The Act provides that the Commission may "facilitate mediation between parties to particular disputes . . . and take other steps as appear to the Commission to be appropriate for resolving such disputes."<sup>436</sup> However, the Commission cannot effectively mediate between parties if it must later make a ruling against one side if the mediation should fail. The goal of mediation is to promote compromise, which is undermined when the final arbiter acts as mediator. Unfortunately, when appearing before a mediator with adjudicative authority, the parties will be more likely to adopt an adversarial posture rather than reveal areas of potential concession as required in the process of effective mediation.

## IX. CONCLUSION

The challenges posed by Northern Ireland's history render the present system of parade regulation imperfect. Distrust, whether rational or irrational, continues to keep the two communities apart despite the current success of the peace process. This mistrust flares up and threatens to engulf the province in tit-for-tat violence each summer as ancient animosities are trotted out during the Orange parading season. At this point, the two authorities with the ultimate authority to ban or restrict parades lack the trust of both sides of the controversy. The British government, as represented by the Secretary of State, has repeatedly snubbed Ulster Unionists by making overtures to the IRA, by including the Irish Republic, and by statements implying that United

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433. *Id.*

434. *See id.*

435. *Id.*

436. Public Processions Act 1998, § 2(2)(a).

Kingdom has no real interest in Northern Ireland. Similarly, the local authority, the RUC, is so closely associated with the Unionist party, and perhaps guilty of historical complicity with Unionist oppression of the Catholic population, that Catholic Nationalists resent any involvement of the RUC in local matters. Yet, the Public Processions Act has cemented their role in the parade regulation process, when that process reaches impasse. Thus, a decision by either of these authorities is subject to blame-laying by the "losing" party, and a subsequent dismissal of the appropriateness of the process itself. When these two authorities flip-flop, both communities become further disenchanted. Moreover, the system of regulation doesn't address the greater problem of mutual distrust. The ultimate decisions regarding contentious parades are not made by the actors themselves. Thus, those creating and maintaining sectarian tensions may avoid responsibility for the consequences of their actions. The current system allows each opposing community to act within a moral vacuum.

Moreover, the structure and powers of the new Northern Ireland Assembly leave the role of the Secretary of State and the RUC uncertain with regards to future parade regulation. On November 30, 1999, David Trimble and Gerry Adams moved their parties into a power sharing government in Northern Ireland, pursuant to the Good Friday Peace Accord.<sup>437</sup> Thereafter, Westminster transferred power over domestic issues, excluding police and security, to the new Northern Ireland Assembly.<sup>438</sup> Thus, with legislative and regulatory power now shared across community lines, one would think that the stage is now set for future discussion, if not compromise about the parades issue among those on both sides. However, despite devolution, the Secretary of State for Northern Ireland has retained responsibility for constitutional and security issues in Northern Ireland, in particular law and order, policing and criminal justice policy.<sup>439</sup> The Secretary of State is also, "empowered to set key policing objectives . . . approves the appointment of senior RUC officers . . . [and] appoints the members of the Police Authority."<sup>440</sup> Arguably, the members of the new Assembly can easily distance themselves from the consequences of a particular Parades

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437. *Impossible Dream Comes True*, IRISH INDEPENDENT, Nov. 30, 1999.

438. *See id.*

439. *See British Government, Northern Ireland Office* (last visited Mar. 20, 2000) (available at <<http://www.nio.gov.uk/>>).

440. Public Processions Act 1998.

Commission decision. They officially lack the power to do anything about it. Complete control to restrict or ban any given parade rests with the Parades Commission and the RUC, both officially beholden to a British Cabinet post. Thus, the political leaders of Northern Ireland, who were pressured into what is perhaps a reluctant compromise, officially lack the constitutional authority to address an issue that annually symbolizes the reasons for this reluctance in reaching peace. Because ultimate authority in this matter still rests with institutions that lack the popular support of both communities in Northern Ireland, future unrest surrounding parade regulation offers those leaders who are still wary of a permanent peace an easy excuse for following ancient patterns of sectarian conflict.

The Public Processions Act 1998 is imperfect, but it may be the least-worst solution to maintaining peace and public order. The summer of 1998 saw a few promising developments in this respect. The Parades Commission prevented a repeat of the administrative fiascos occurring at Drumcree in 1996 and 1997, by banning the Orangemen from marching down the Garvaghy road. And while Loyalists protested the Commission's decision for weeks, the authorities held firm to their decision. Moreover, Northern Ireland saw the rebirth of the political middle, represented by the overwhelming "yes" registered by referendum, in support of the Peace Process and a new Northern Ireland Assembly.<sup>441</sup>

Yet the most significant event of the entire summer occurred in Derry. Loyalist Apprentice Boys and the Nationalist Bogside Residents Group reached an agreement on the contentious Derry Relief Day parade scheduled every August. The deal was reached after three days of intensive "shuttle negotiations" facilitated by the authorized officers of the Parades Commission.<sup>442</sup> The Apprentice Boys agreed that local parent clubs would parade the walls on Saturday morning behind a single band, but that the band would not play when passing the stretch over the Nationalist Bogside.<sup>443</sup> The BRG, in return, canceled a mass Nationalist demonstration, originally planned to confront the 10,000 Apprentice Boys converging on Derry for the main parade on Saturday afternoon.<sup>444</sup> A Loyalist demonstration to confront the Nationalist

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441. See Deaglan De Breadun, *79% Of NI Voters Back Agreement Parties*, IRISH TIMES, June 18, 1998.

442. See Gerry Moriarty, *Nationalists And Loyalists In Derry Agree On Parade Deal to Allow March on Walls Was Revealed After Three Days*, IRISH TIMES, Aug. 4, 1998.

443. See *id.*

444. See *id.*

protest was also canceled.<sup>445</sup>

A representative of the Apprentice Boys said the Orange Order must make its own decisions on parades, but added, "I think the rest of the people of Northern Ireland have to take note of what has happened here. If we can strike an agreement where we will have a trouble-free city on Saturday, then surely it sets the stage for other areas."<sup>446</sup>

While the Public Processions Act contemplates such local accommodation, parade regulation and the peace process as a whole would be better served if the Act took a more definitive step towards requiring direct negotiation. The Act itself presumes negotiation between the parties involved in a contentious parade, though does not expressly require this.<sup>447</sup> The Commission itself has acknowledged the importance of direct negotiations,<sup>448</sup> yet seems ill equipped to foster or promote local accommodation.

Essentially, the system needs to require both the organizers of a particular parade and its protesters to negotiate an accommodation before any final decisions are reached by an authority equally respected, or at least not reviled, by both communities. Representatives from each side should meet and negotiate an accommodated agreement with the assistance of an independent mediator. The mediator's primary task would be to facilitate dialogue between the two sides, and to ensure that both parties negotiate in good faith. As a secondary consideration, if

445. *See id.*

446. *Id.*

447. *See supra* Part V.G. Chapter 2, section 2(2)(a) of the Public Processions Act 1998 provides that the Parades Commission may, "facilitate mediation between parties to particular disputes concerning proposed public processions and take such other steps as appear to the Commission to be appropriate for resolving such disputes." Public Processions Act 1998, § 2(2)(a).

448. Recent Commission rulings on contentious parades have contained language that sets forth the importance of direct dialogue. *See* PARADES COMMISSION, DETERMINATION IN RELATION TO THE PORTADOWN DISTRICT LOL NO 1 PARADE IN PORTADOWN ON SUNDAY, 19 DECEMBER 1999 (available at <<http://www.paradescommission.org/sept99/dec99.htm>>).

In our determination on the Drumcree church parade on 4 July 1999 we stated, 'The Commission expects both parties to maintain direct dialogue as a demonstration of mutual respect and as the only means of securing local accommodation for future years.' The Commission has been formally advised that the talks under the chairmanship of Adam Ingram to resolve the parades dispute in Portadown have broken down. The Commission continues to expect both parties to seek to maintain dialogue with a view to addressing their respective legitimate concerns and reaching a local solution.

*Id.*

negotiations should fail, the Parades Commission should seek the opinion of the mediator as to each side's good faith negotiating efforts, and consider this as a factor in determining whether to order a parade restricted or prohibited. This step in between a parade application and the Commission's final determination, though not calculated to resolve all problems, would at least require historical adversaries to sit at the table first. Unionist and Nationalist political leaders reached a settlement for a peaceful way forward only through negotiation and pressure from outside. Why should Unionists and Nationalists at the street level be treated any differently?

Understandably, there may develop an impasse in negotiations in which some individual must have the ability to make a decision. In this respect, the current role of the Parades Commission must be preserved. Regrettably, the situation is not conducive for a "baby-splitting" solution in which the threat of ultimate decision forces concessions from both sides. However, to ensure accountability, all parties must agree to a minimum standard of civility towards each other to apply during every parade or protest, enforced through the civil and criminal law. At a minimum, each side must recognize the other's legitimate right to parade or to protest. Both parade organizers and protesters must provide their own stewards to ensure that all mandated guidelines are followed, and both parade organizers and protesters must be held accountable for violations of the law and the decisions of the Parades Commissions. Thus, should local accommodation fail, certain unchangeable safeguards will remain in place regardless of, and wholly independent from, the Parades Commission's final determination.

In any event, compelled mediation or arbitration prior to the Parades Commission decision may have positive results, such as peaceful accommodation and resolution of contentious parades. In this respect, mediated conflict resolution takes a step forward to the primary goal of heading off the sectarian confrontations that often lead to province-wide civil unrest.

However, mandatory mediated negotiation contains a deeper importance, by providing a forum in which the actors themselves can work to remove the zero-sum effect that has plagued community relations in Northern Ireland for centuries. Both sides of the community suffer from long held misconceptions about the other. For loyal Protestants, Irish Nationalism continues to pose the specter of treachery from within. For Catholic Nationalists, history has left them with a firm belief that the Protestants desire to treat Catholics as second-class citizens. Thus, both communities are equally wary and distrustful of the intentions of the other. Dialogue at the grass-roots community level could relieve those responsible for communal entrenchment of their



persistent “must prevail” mind-set. Neighborhood sectarian movements, most often the catalysts of communal conflict, will be forced to talk to the other. Each side ought to be able to voice its grievances and educate the other side while simultaneously receiving an education, and ultimately an understanding of the “other culture.” The current system of parade regulations maintains the zero-sum formula by causing every parades decision reached to be disfavored by at least one community, if not both. Without a structured mediation step interposed between the “grievance” stage and the “decision” stage, the current system stalls the period of mutual education necessary to create a lasting peace, and provides those resistant to progress with ample reasons to return to the days of the gun.<sup>449</sup>

While the political leaders were pressured into negotiating the Good Friday agreement and the Framework Documents, no similar process has been forced on the primary actors in the troubles: the neighborhood associations, the populist organizations, the paramilitary groups and those they influence. In this sense, the peace process should be treated more homeopathically. The political leaders will certainly wrangle over the direction of the new Assembly, and will attempt to garner support for their anti-accommodating positions.<sup>450</sup> Yet such support may be less forthcoming from constituencies which are no longer insulated by so-called “Peace Walls.” The healing process may never begin if the troops on the ground are never forced to confront their collective pasts.

One important question remains: why would forced negotiation work now when it has failed in the past? The mechanics of the current peace

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449. See BRYAN, *supra* note 27. They argue that the parading creates a sort of political capital,

A number of political figures follow certain strategies to maximise their ‘political capital.’ The Rev. Ian Paisley has no role within the Orange Institution, but nevertheless played a prominent role in the debate. When, on the Twelfth of 1986, Paisley described Portadown as a dispute about, ‘obedience and submission to Dublin.’

*Id.*

450. In December 1999, the Ulster Unionist Party only agreed to convene the new power-sharing assembly on the condition that the IRA disarm pursuant to a Unionist timetable. David Trimble, the Assembly’s First Minister and the leader of the Ulster Unionist Party vowed he would resign if the IRA had not made significant arms decommissioning efforts by February 2000. Upon convening the new Assembly, the IRA began a dialogue with Gen. John de Chastelain. However, unsatisfied with the progress, Unionists threatened to pull out of the Northern Ireland Assembly. As a result of these threats, Britain suspended the Assembly and reimposed direct rule over Northern Ireland’s affairs, plunging the Peace Process into deep crisis. See *Political Uncertainty Returns To North As Direct Rule Is Reimposed*, IRISH TIMES, Feb. 12, 2000.

process provide the answer. Northern Ireland's political leaders, with the majority support of their constituencies, have accepted the principles of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, ("Good Friday Peace Accord"), and with the advent of devolution, a "three strand" approach towards governing Northern Ireland has begun.<sup>451</sup> Strand one involves the creation of democratic institutions within Northern Ireland, such as the popularly elected Northern Ireland Assembly. Strand two creates a North/South ministerial council made up of representatives from both sides of the border. The council is primarily concerned with providing a forum for discussion of cross-border issues. Strand three creates a British-Irish Council to "promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands."<sup>452</sup> As indicated earlier, as a result of the Good Friday Peace Accord, the Republic of Ireland has dropped its constitutional claim to the whole island.<sup>453</sup> With effective power in the hands of the people of Northern Ireland, and the insult of articles 2 and 3 removed, Unionists may be comforted by the fact that they ultimately control the constitutional destiny of Northern Ireland.<sup>454</sup> Similarly, the Unionist fear that Britain will unilaterally abandon Ulster is rendered moot by the Agreement.<sup>455</sup> For Catholics, the executive power-sharing government and the official role that Dublin will play in Northern Ireland arguably assures them that the Province will not return to the "bad old days" of Unionist Stormont. Thus, parade regulation reform will work now if it will work at all. More importantly, the threat contentious parades pose to Northern Ireland's social fabric is particularly ominous this year due to the current uncertainty in the Peace Process.

The current crisis stems from the impasse over the arms

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451. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, April 10, 1998 [hereinafter the Good Friday Peace Accord]. The text of the Good Friday Peace Accord is available at <<http://www.ni-assembly.gov.uk/agreement.htm>>.

452. The Good Friday Peace Accord, strand 3, § 1.

453. See *Direct Rule In North Due To End At Midnight*, IRISH TIMES, Dec. 1, 1999.

454. The Good Friday Peace Accord codified the principle set forth in the Downing Street Declaration, namely the signatories, both Unionist and Nationalist acknowledge, [T]hat while a substantial section of the people of Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that which; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.

Good Friday Peace Accord, constitutional issues, § 1 (iii).

455. See *id.*

decommissioning issue. Essentially, Unionists and Nationalist disagree over the time-table for turning in paramilitary weapons. Unionists have always asserted that the IRA must decommission weapons before Sinn Féin is allowed a seat in the new Northern Ireland cabinet. Nationalists contend that decommissioning must be an ongoing process synchronized with the Northern Ireland Assembly's exercise of its newly devolved powers. In February, 2000, Unionist leader, David Trimble, threatened to carry out his promise to resign if the IRA had not significantly disarmed. In order to prevent the Peace Process from being scuttled by this impasse, Westminster passed legislation suspending the Northern Ireland Assembly, presumably until a new compromise is reached. The decommissioning issue is an ideological disagreement between the polar ends of Northern Ireland's political spectrum. The issue may have the affect of dividing the rest of the population who is otherwise united in their desire for peace. It is unclear whether the Peace Process will get back on track anytime soon. However, the current political decisiveness will almost certainly influence social attitudes for and against this year's contentious parades. Since public opinion is all that seems to be currently carrying the Peace Process forward, steps must be taken now to ensure that momentum towards a lasting peace does not swing back the other direction. A lack of dialogue between Orange marchers and Catholic residents' groups during the coming parading seasons may certainly have this undesired effect.

Perhaps, it is easy to point out the shortcomings of the law in this context, but alternatives are very hard to find. Accommodation and reconciliation are paramount to building a lasting peace in Northern Ireland, yet in the absence of tough public order law that invariable cuts one way or the other, peace and stability—prerequisites for reconciliation—cannot exist. The Government's police powers cannot be used to stop the bleeding; Northern Ireland's history has made this all too clear. The police powers then must be viewed as a temporary bandage, designed to slow the bleeding while the wounds heal. In this regard, Britain and Northern Ireland's political leaders, if truly committed to peace, should reform parade regulation in Northern Ireland to spread the healing process beyond political leaders and down to the street.

BRIAN P. WHITE

