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Pamela Loughman

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CARRON *v.* McMAHON: THE WIDENING SCOPE OF THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION

I. INTRODUCTION

A state is obligated to return fugitive offenders to the place of their crime when it enters into an extradition treaty with that country.¹ However, extradition treaties may contain grounds for legitimately refusing extradition, such as the political offense exception.² Two categories of crimes may be considered political offenses: "pure" offenses which are solely political acts³ and "related" offenses which are criminal acts assimilated with a political act.⁴ In addition, another criminal offense may be so closely associated with either type of political offense that the criminal offense becomes a "connected" political offense in the eyes of the judiciary.⁵ The policy which underlies the political offense exception is based on three concerns:⁶ humanitarian issues,⁷ the principle of neutrality,⁸ and the international public order.⁹

1. A state may choose to limit its right to grant asylum by the express acceptance of legal obligations. States elect to limit their sovereignty in order to regulate their relations with other states. The modern era of interdependent states has curtailed absolute sovereignty. SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 30-31 (1968).

Customary international law imposes no obligation upon a state to surrender fugitives accused of a crime unless it has contracted to do so It is a reasonable exercise of its exclusive right of jurisdiction within its own domain, and a state is believed to violate no legal duty in declining, in the absence of a treaty, to surrender a fugitive criminal found within its territory to any demanding state. [citations omitted]

Id. at 34.

2. Political, military and fiscal offenses are grounds for denying extradition relating to the offense charged. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 368 (1974); *see also* ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 15 (1980).

3. CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION* 2-3 (1980).

4. *Id.* at 108-10.

5. *Id.* at 110.

6. *Id.* at 106-08.

7. The possibility of unfair judicial treatment in the requesting state raises concerns about the rights of the fugitive offender. *Id.*

8. States may prefer to grant asylum to political offenders to remain neutral; otherwise, an inquiry into the political crime may be perceived as a judgment about the political situation in the requesting state. This is not desirable when governments may change and the requested state wishes to remain on good terms with new governments of the requesting state. *Id.*

9. Political offenses are thought to violate only the domestic public order, since they are aimed at one state's government rather than at the international public order. *Id.*

The ancient concept of asylum was one of protecting individuals from extraterritorial prosecution for common crimes.¹⁰ In the eighteenth century, this concept was enlarged to include political offenses when the American and French revolutions¹¹ established the right to rebel.¹² Shortly thereafter, the political offense exception was codified in an extradition treaty in 1833¹³ and subsequently was incorporated into extradition treaties adopted by most western countries.¹⁴

Despite its wide usage, the term "political offense" remains largely undefined in treaties.¹⁵ At best treaties may contain negative definitions which exclude certain crimes from being considered political offenses.¹⁶ Without clear guidelines from treaties or legislatures as to what constitutes a political offense, the judiciary is given ample discretion to determine whether a fugitive offender has committed a political offense.¹⁷

In *Carron v. McMahan*,¹⁸ the Irish Supreme Court established a new test for connected political offenses and thereby affirmed a recent lenient posture in extradition cases. Extradition to Northern Ireland was denied in this case because the Court found that the defendant committed a connected political offense based solely on his identical actus reus with a political offender. This was the only basis of a connection because the defendant had neither the mens rea nor any political motivations for the crime. Whereas only disparity of action between the of-

10. *Id.* at 4-5.

11. See *Quinn v. Robinson*, 783 F.2d 776, 792-93 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986) which discusses the following: The Declaration of Independence states "whenever any form of government becomes destructive to these ends, it is the right of the people to alter or abolish it . . ." para. 1 (U.S. 1776); similarly, La preamble de la Constitution de 1791 (Fr.), reprinted in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, 33 (S. Godechat ed. 1970) declares an inalienable right "la resistance a l'oppression."

12. See also *VAN DEN WIJNGAERT*, *supra* note 3, at 8-9 (discussing the effect of the French Revolution).

13. The Belgian Extradition Act of October 1, 1833. See *Research in International Law Under the Auspices of the Faculty of the Harvard Law School*, 29 AM. J. INT'L L. 113, 362-63 (Special Supplement 1935) [hereinafter *Harvard Research*].

14. *VAN DEN WIJNGAERT*, *supra* note 3, at 1.

15. Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962); IVAN ANTHONY SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 169 (1971).

16. War crimes, genocide, terrorism, attempts on the lives of heads of state, and crimes involving bombs and automatic weapons have all been excluded from designation as political offenses in various treaties. *VAN DEN WIJNGAERT*, *supra* note 3, at 2.

17. *BASSIOUNI*, *supra* note 2, at 371.

18. *Carron v. McMahan* [1990] I.R. 239.

fenses would previously have been permitted under a finding of connected political offense, the precedent set by this decision allows disparity of intent between the political offense and the connected crime.

The basis of this decision was a new test for connected offenses which examines the proximity of the connected offense to the political offense, in addition to the political element of the connected offense. In light of other recent extradition cases, it is clear that the Irish Supreme Court adopted a low standard for the political offense exception because of a changing view of what constitutes "political" activity and humanitarian concerns for the offender. However, the leniency of this test widens the political offense exception so greatly that the "good faith" principle of honoring treaties appears to have been circumvented.¹⁹ This perceived breach jeopardizes relations between the Republic of Ireland on the one hand and Great Britain and Northern Ireland on the other hand.

This Comment argues, however, that lowering the standard for connected political offenses has not come at the expense of the good faith principle in the Anglo-Irish Extradition Agreement. Courts are given discretion to invoke any test for determining whether a criminal offense is a political offense²⁰ and the good faith principle only requires fair application of the test pursuant to the treaty.²¹ In *Carron* the Irish Supreme Court created a low, but discriminating, standard for the political offense exception and fairly applied it under the extradition agreement. Notwithstanding the court's good faith, it would benefit the Republic of Ireland to expose criminal offenders who escape extradition to judicial proceedings in their country.²² Without such action the Republic of Ireland may be perceived as attempting to avoid international responsibility.

This Comment will examine the political offense exception as it is applied in *Carron v. McMahon* in light of British and Irish statutory and case law. These states' common goal of

19. *Pacta sunt servanda* is the international law principle that treaties will be honored. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 496 (1966).

20. "The courts must ascertain the degree of connection between the common crime and the political act . . . [T]he degree of connection required for the entire act to be political, and thus non-extraditable, depends entirely on the test adopted by each individual country." Garcia-Mora, *supra* note 15, at 1239.

21. GRAHL-MADSEN, *supra* note 2, at 37.

22. The principle of *au dedere aut judicare* (extradite or try) advocates such action. See VAN DEN WIJNGAERT, *supra* note 3, at 7-8.

preventing terrorism and their points of divergence in regard to the political offense exception will be discussed. Recent case law, including the *Carron* decision, prevents extraditions to Great Britain and Northern Ireland through the political offense exception and a civil liberties defense. This Comment explores reasons for preventing extraditions to those states and raises potential problems with the new posture of the Supreme Court of Ireland toward the political offense exception.

II. STATUTORY BACKGROUND ON EXTRADITION

From 1801 until 1922, the entire island of Ireland was part of the British Commonwealth.²³ During that time period Great Britain first opposed extradition of political offenders²⁴ and enacted the Extradition Act of 1870 which reserved the right not to extradite them.²⁵ However, the Extradition Act of 1870 did not apply to extradition requests between Great Britain and Ireland. Instead, a warrant system between the states facilitated extradition.²⁶

In 1965 reciprocal legislation was implemented in the Republic of Ireland²⁷ and Great Britain²⁸ to update the backing of warrants system.²⁹ The language regarding the political offense exception differs in the two pieces of legislation. Great Britain's Backing of Warrants (Republic of Ireland Act 1965) reiterates

23. In January 1922 the Irish Parliament accepted the Anglo-Irish Treaty which established independent rule in the Irish Free State. The Irish Free State was comprised of the 26 southern counties of the Irish island. The four northern counties remained under British rule. See W. ALISON PHILLIPS, *THE REVOLUTION IN IRELAND* 26-27, 233 (1923).

24. See 1 V.E. HARTLEY BOOTH, *BRITISH EXTRADITION LAW AND PROCEDURE* 73-75 (1980).

25. The Extradition Act of 1870 stated "a fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character or if he proves . . . that the requisition for his surrender has, in fact, been made with a view to try to punish him for an offense of a political character." 33 & 34 Vict. ch. 52, 3(1).

26. Indictable Offenses Act 1848, 11 & 12 Vict. ch. 42; Petty Sessions (Ireland) Act 1851, 14 & 15 Vict., ch. 93. Under the backing of warrants system, one state issued a warrant for a fugitive offender which was executed in the other state. See HARTLEY BOOTH, *supra* note 24, at 209-12.

27. The Extradition Act of 1965, No. 17 (Ir.).

28. The Backing of Warrants (Republic of Ireland) Act 1965, C 45 (Gr. Br.).

29. The backing of warrants system was updated because the Republic of Ireland questioned the continuing validity of a practice which preexisted its independence [see Paul O'Higgins, *The Irish Extradition Act 1965*, 15 INT'L & COMP. L.Q. 369 (1966)] and to facilitate the large number of extraditions between the two countries, see HARTLEY BOOTH, *supra* note 24, at 212.

the wording of the Extradition Act of 1870 with regard to political offenders. It states that warrants for "offenses of a political character"³⁰ are not extraditable. Ireland's Extradition Act of 1965 states that extradition will be refused for "a political offense or an offense connected to a political offense."³¹ The difference in wording gives the Irish law a broader scope despite the intention for the reciprocal legislation to have the same effect.³²

The reciprocal legislation of 1965 regarding extradition was amended in 1987 to give effect to the European Convention on the Suppression of Terrorism.³³ Ireland enacted the Extradition (European Convention on the Suppression of Terrorism) Act in 1987, which restricted the political offense exception by explicitly excluding offenses "involving the use of an explosive or an automatic firearm, if such use endangers persons."³⁴ Although the political offense exception was narrowed, an additional safeguard was included in an amendment of the 1987 Extradition Act. This provision requires that the Attorney General conclude that the intention to prosecute the fugitive offender was founded upon sufficient evidence before signing the extradition warrant.³⁵ This requirement of presenting a prima facie case before extraditing the offender was not included in the 1965 Extradition Act.³⁶ The restricted definition of political offenses was considered necessary to discourage specific forms of terrorism.

III. CASE LAW

A. *Great Britain*

British case law developed the "political incidence" theory in decisions regarding the political offense exception to extradition.³⁷ Under this theory, an offense has a "political character" if it was committed during a political disturbance and was incident-

30. Section 2(2).

31. No. 17 of 1965 Part III, 50.

32. Alexander McCall-Smith & Philip Magee, *The Anglo-Irish Law Enforcement Report in Historical and Political Context*, 1975 CRIM. L. REV. 200, 206-07 [hereinafter McCall-Smith]. Margaret McGrath, *Extradition: Another Irish Problem*, 34 N.I.L.Q. 292, 298 (1984).

33. European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90 (entered into force Aug. 4, 1978).

34. No. 1 of 1987, § 3.

35. Extradition (Amendment) Act 1987, § 2(1).

36. See O'Higgins, *supra* note 29, at 390-92.

37. VAN DEN WIJNGAERT, *supra* note 3, at 111. See generally SHEARER, *supra* note 15, at 170-71.

tal to and in furtherance of the disturbance.³⁸ In its original form,³⁹ this test is extremely objective⁴⁰ because it considers the context of the offense, but not the motivation for it.⁴¹

The first extradition case decided under the Extradition Act of 1870 was *Re Castioni*.⁴² It concerned Switzerland's request for the extradition of a Swiss national who killed a man during a political uprising in Switzerland and fled to Great Britain. Extradition was refused because under the political incidence test the murder was "incidental to and formed part of a political disturbance."⁴³

The political incidence test was later refined to exclude acts of anarchy in *In re Meunier*.⁴⁴ The "political disturbance" element was narrowed to acts committed during political disturbances between two or more political parties.⁴⁵ Anarchy and terrorism are not recognized as political parties and thus offenses committed in their names cannot qualify for the political offense exception to extradition.⁴⁶

The "incidental" element of the political incidence theory was liberally defined in *R. v. Governor of Brixton Prison ex parte Kolczynski*.⁴⁷ A common crime was found to be an offense of political character because "the revolt of the crew was to prevent themselves from being prosecuted for a political offense."⁴⁸

38. This definition was supplied by Mr. Justice Stephen, who subsequently judged the *Castioni* case. See *Re Castioni* [1891] 1 Q.B. 149. His definition was preferred over John Stuart Mill's definition that a political offense was any offense committed in the course of or furthering a civil war, insurrection or riot. SHEARER, *supra* note 15, at 169-70.

39. See discussion *infra* of *Castioni* and *Muenier*.

40. VAN DEN WIJNGAERT, *supra* note 3, at 111.

41. In later cases the British Courts began to assess motive to a slight degree. VAN DEN WIJNGAERT, *supra* note 3, at 115.

42. [1891] 1 Q.B. 149.

43. *Id.* at 165-66; see James Fitzjames Stephen, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 71 (1883).

44. [1894] Q.B. 415.

45. "There must be two or more parties in the state, each seeking to impose the government of their choice on the other." The offenses must be committed "in pursuance of that object," not in pursuance of anarchy which is "the enemy of all governments." *Id.* at 419.

46. See Charles L. Cantrell, *The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 786 (1977).

47. In this case Polish sailors aboard a ship wrested control from their superiors and brought the ship to an English port, where they requested asylum. [1955] 1 Q.B. 540, 542.

48. The sailors were charged with mutiny, a common crime, but if returned to Po-

Citing "reasons of humanity" the court widened the incidental element to include indirect acts against a totalitarian government.⁴⁹

The relationship between the state and the offender was examined in *Schtraks v. Government of Israel*.⁵⁰ The court held that the individual must be at odds with the state requesting extradition in order for his offense to be a political offense.⁵¹ The fugitive and the state are seen as competing political entities in keeping with the holdings of *Castioni* and *Muenier*.⁵² Also, the criminal offense must be "in furtherance of," not merely "in the course of" a political disturbance.⁵³

The location where a political offense occurs was further elucidated in *Cheng v. Governor of Pentonville Prison*.⁵⁴ The House of Lords, following the dicta of *Schtraks*, imposed a territorial requirement and held that the fugitive must be at odds with the state requesting extradition. Thus, as a Taiwanese national who was convicted of the attempted murder of a Chinese Government official in New York, Cheng could not prevent his extradition to the United States.

The political incidence test remains relatively intact since

land the court inferred the sailors would be charged with treason, a political crime. *Id.* at 550.

49. *Id.* at 551.

50. [1962] 3 All E.R. 529.

51. Schtraks lived in England and knew where his nephew was hidden in Israel. The child was hidden from his parents so that he would be educated under Orthodox Jewish principles. The extradition case in England grew into a large political debate in Israel. Because of this resulting political furor in Israel, Schtraks requested a political offense exception to extradition. The House of Lords decided that the offense in question did not have political character because it was motivated by personal reasons and the political dispute occurred after the fact. *Id.*

52. Viscount Radcliffe said :

in my opinion, the idea that lies behind the phrase "offense of a political character" is that the fugitive is at odds with the state that applied for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner." It does indicate, I think, that the Requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call common or international aspect.

Id. at 540.

53. SHEARER, *supra* note 15, at 170-71 (quoting *Re Castioni* [1891] 1 Q.B. 149).

54. [1973] 2 All E.R. 204. Cheng, a Taiwanese national was politically motivated to attempt the murder of a government official from Nationalist China in New York. When he fled to Great Britain the United States requested his extradition. He was extradited because his political act was directed at Nationalist China, not at the state which requested extradition. *Id.*

Castioni's definition of an act of political character being one committed "during the course of and in furtherance of a political disturbance." It has been slightly refined by subsequent case law in terms of acceptable types of political disturbances, as in *Muenier*; what is incidental to a political disturbance, as in *Kolczynski*; between whom the political disturbance must occur, as in *Schtraks*; and at whom the offenses are directed, as in *Cheng*. However, the subjective intent of the offender remains excluded from consideration of whether an offense is a political offense.

B. Ireland

The Irish Supreme Court has employed a variety of tests for political offense since the enactment of the Extradition Act of 1965. The different tests result from the judiciary shifting its emphasis among many elements which may comprise a political offense.⁵⁵ Intrastate relations also have an impact on the judiciary's standards for the political offense exception. There is a noticeable trend of judicial standards rising in accordance with amiable state relations between the Republic of Ireland, Great Britain and Northern Ireland. Conversely, judicial standards have fallen when the legal system of Great Britain or Northern Ireland is suspected of wrongdoing in the extradition process. The mutability of the test for the political offense exception stands in sharp contrast with Great Britain's steadfast political incidence test.

The Supreme Court originally used a flexible standard to determine political offenses⁵⁶ under the 1965 Act which evaluated the motivation and objective of the alleged offender and the context of the act.⁵⁷ Employing this test, in *the State (Magee) v.*

55. Seven elements which the courts have considered in determining a political offense: motive of the offender, purpose of the offender, target, nature of the conduct, the political structure of the requesting state circumstances of the offense, motive of the requesting state, and treatment of the returned offender. See Alpha Connelly, *Ireland and the Political Offense Exception to Extradition*, 12 J.L. & Soc'y 153, 156-69 (1985) [hereinafter Connelly, *Political Offense Exception*].

56. Van Den Wijngaert calls this a "continental" approach which is less strictly applied than the "political incidence" test. The continental approach is a comprehensive theory which lays stronger emphasis on subjective elements and examines other criteria as well. Foremost, the continental approach is a flexible standard of interpretation. VAN DEN WIJNGAERT, *supra* note 3, at 119-26. For a general discussion of the "continental" theories, see VAN DEN WIJNGAERT, *supra* note 3, at 120-26.

57. See Connelly, *Political Offense Exception*, *supra* note 55, at 173.

*O'Rourke*⁵⁸ the Supreme Court refused extradition for a criminal offense and expressed fear that extradition would result in the defendant's prosecution for a political offense.⁵⁹ The political offense exception was granted when the lack of evidence put forth by the requesting government⁶⁰ was interpreted in a light most favorable to the defendant.⁶¹ Additionally, a lack of good faith was imputed to the Government of Northern Ireland.⁶² This was an early signal that the Court would scrutinize the motive of the state requesting extradition.

The "connection" between a political offense and a related offense⁶³ was examined in *Bourke v. The Attorney General*.⁶⁴ Bourke helped a communist spy escape from prison in Great Britain. The spy's offense was found to be a pure political offense since he escaped to resume espionage. Bourke's connected offense was found to be criminal, but not political because he did not share the spy's ideology. (Bourke helped the spy escape because of a general sense of sympathy for him and a great dislike for the government which imprisoned them both.)⁶⁵ The Supreme Court held that there were no legislative limitations on which criminal offenses could be connected to political offenses,⁶⁶ and therefore the judiciary must interpret the connec-

58. [1971] I.R. 205, 207.

59. Northern Ireland requested the extradition of Magee for four common crimes (housebreaking, use of an uninsured vehicle, malicious damage to property and assault). Magee contended that he was actually wanted for questioning about a raid on the Hollywood military barracks in Northern Ireland since he had access to the barracks before the raid. *Id.* at 207-09.

60. Although the Extradition Act of 1965 does not require a prima facie case to be put forth by the requesting government, the Court here expected admissible substantiation of the charges on the extradition warrant. Northern Ireland submitted evidence which was not allowed as hearsay, and also claimed ignorance of easily discovered facts relating to the charges on the warrant. *Id.* at 210.

61. The Court found it had no valid reason to disbelieve the uncontradicted evidence of Magee. He admitted to IRA sympathies and involvement in the raid. In addition, Magee had been questioned several times by Northern Irish authorities about the raid. *Id.* at 209-11.

62. The Court concluded that the extradition request was a pretense to obtain Magee and try him for the raid on the military barracks which was a political offense. *Id.* at 211.

63. *Bourke v. The Attorney General*, [1972] I.R. 36, 48.

64. [1972] I.R. 36.

65. *Id.* at 49-53.

66. *Id.* at 57-61. In the absence of a definition of a connected political offense, the Supreme Court looked to the European Convention on Extradition for guidance, since the Extradition Act of 1965 is based on this convention. That convention did not define the term either, and an examination of the draft articles clearly showed that an exact definition of connected political offenses was rejected and the term was purposely unde-

tion in the most lenient manner.⁶⁷ The Supreme Court found a connection between the offenses because of the offenders' mutual intent, evidenced by the fact that the same degree of planning is required to escape from prison and to help someone escape from prison.⁶⁸ As a result, a connection based on mutual intent of the offenders was sufficient to grant the political offense exception to extradition.⁶⁹

There was a dramatic shift in the attitude of the Irish judiciary following the 1973 Sunningdale Conference attended by Ireland, Great Britain and Northern Ireland.⁷⁰ The states issued a communique addressing the increasing partisan violence in Ireland and the propensity of the Irish judiciary not to grant extradition.⁷¹ "It was agreed by all parties that persons committing crimes of violence in any part of Ireland, however motivated, should be brought to trial irrespective of the part of Ireland in which they are located."⁷² In this atmosphere of increased cooperation⁷³ the seeds of the 1976 Criminal Jurisdiction Act were planted.⁷⁴ Shortly afterwards the Irish Supreme Court adopted more stringent test for political offenses and voiced disagreement with IRA tactics.

A solely objective test for the political offense exception was

fined. The High Contracting parties were satisfied that "there should simply be a connection between the offense in question and the political offense." *Id.* at 57. Furthermore, the Irish Parliament (which ratified the Extradition Act of 1965) never stipulated that a connected offense must also be a political offense. *Id.* at 61.

67. The legislature "has left the connection to be spelt out by the Courts in the widest possible manner." *Id.*

68. *Id.* at 62.

69. *Id.*

70. The Sunningdale Conference was held in December 1973 in Surrey, England. See generally McCall-Smith, *supra* note 32, at 200.

71. Cantrell, *supra* note 46, at 801 ("The O'Rourke (Magee) decision, coupled with the increasing terrorism of the seventies, prompted leaders of Ireland and Great Britain to convene a conference at Sunningdale.") See also Alpha Connelly, *Non-Extradition for Political Offenses: A Matter of Legal Obligation or Simply a Policy Choice?*, 17 THE IRISH JURIST 59, 59-60 (1982) [hereinafter Connelly, *Non-Extradition for Political Offenses*].

72. Joint Communique, December 1973 § 10.

73. The Sunningdale Conference also established a power sharing Executive and led to an agreement to establish a Council of Ireland. McCall-Smith, *supra* note 32, at 209.

74. Criminal Law (Jurisdiction) Act, 1976; No. 14 of 1976. The Act allowed a state to confer extraterritorial jurisdiction on another state instead of requesting extradition. It was successfully used to prosecute a fugitive offender in the Tuite case. See William Francis O'Brien, *Irish Terrorists and Extradition: The Tuite Case*, 18 TEX. INT'L L.J. 249, 260-72 (1983).

articulated in *McGlinchey v. Wren*.⁷⁵ The Supreme Court held that a crime was a political offense if a reasonable person thought it was political activity.⁷⁶ The "reasonable man" test was an objective standard of interpretation which switched emphasis from the offender's motivation to an average person's feelings about political crimes.⁷⁷ Motivation was disregarded because some crimes are so shocking to a normal person that they "assuredly dishonor any cause that might have been espoused by its perpetrators."⁷⁸ Furthermore, the Court rejected contentions that IRA actions were implicitly political offenses because "modern terrorist violence . . . is often the antithesis of what could reasonably be regarded as political."⁷⁹

Although *Shannon v. Fanning*⁸⁰ involved the murder of political figures⁸¹ rather than civilians, it closely followed the *McGlinchey* precedent. The Court described the murders carried out by the IRA as "so brutal and cowardly that it would be a distortion of language if they were to be accorded the status of political offenses."⁸² More disapproval for the IRA was espoused by the Court because they "abjured normal political behavior in favor of violence."⁸³ However, some members of the Supreme Court voiced dissatisfaction with the "reasonable man" test but did not reach a consensus for a new test.⁸⁴

75. [1982] I.R. 154. Northern Ireland requested McGlinchey's extradition from the Republic of Ireland. He was wanted for the murder of an elderly woman during an IRA raid on her home. McGlinchey admitted that he was a former IRA member and produced evidence that the IRA was responsible for the raid. *Id.* at 157-59.

76. *Id.* at 160.

77. The "reasonable man" test is like the "political incidence" test because they both evaluate objective elements of the offense. However, under the "reasonable man" test a very serious offense might be part of and incidental to a political disturbance but would not be a political offense because a reasonable person would not regard it as political activity. The moral and legal perspective are taken into consideration in the "reasonable man" test. For further discussion see *infra* notes 80-83 and accompanying text.

78. *McGlinchey*, [1982] I.R. at 159.

79. *Id.* at 159.

80. [1984] I.R. 569.

81. Sir Norman Strong and his son had previously been members of the House of Commons in Northern Ireland. They were murdered in an IRA raid on their home. *Id.* at 572.

82. The Court said it decided what constituted a political offense by viewing the facts and circumstances of the crime in light of the standards and values existing in Ireland at the time of the crime. *Id.* at 581.

83. *Id.*

84. Justice Hederman stated that the reasonable man test was too objective. He suggested the decisive criteria for when a criminal offense becomes a political offense is whether the perpetrator acted with a political motive or purpose. *Id.* at 587. Justice Mc-

The political relationship of the British and Irish Governments was enhanced by the Supreme Court's extradition decisions under the "reasonable man" test since it facilitated their joint fight against terrorism. The pinnacle of relations between the two states was reached in 1985 "Hillsborough" agreement⁸⁵ where the Republic of Ireland was given a consultative role in Northern Ireland's affairs⁸⁶ in return for promising to ratify the multilateral 1977 European Convention on the Suppression of Terrorism⁸⁷ to which Great Britain was a party.⁸⁸ There soon followed another change in the standard for the political offense exception which immeasurably increased the difficulty of qualifying for the political offense exception.

The "constitutionality" test was first espoused in *Quinn v. Wren*.⁸⁹ Under this test, a criminal offense which is found to be unconstitutional activity⁹⁰ precludes the offender from receiving the political offense exception. A unanimous Supreme Court judgment held that the defendant's actions, undertaken to create a thirty-two county workers republic (composed of Northern Ireland and the Republic of Ireland), "necessarily and inevitably involves the setting aside of the Constitution."⁹¹ Since the words "political offense" in the Extradition Act of 1965 cannot be given an unconstitutional meaning,⁹² the Supreme Court refused to grant the political offense exception to extradition to an

Carthy proposed a new test which took into account the motivation and nature of the offense, the identity of the victim and considered these factors in light of their proximity to the overall political aim of the offense. *Id.* at 588. See Colm Campbell, *Extradition to Northern Ireland: Prospects and Problems*, 52 MOD. L. REV. 585 (1989) at 598; see also Connelly, *Political Offense Exception*, *supra* note 55, at 155.

85. Also known as the 1985 Anglo-Irish Agreement.

86. The Republic of Ireland's Constitution claims sovereignty over the entire island, including Northern Ireland. See IR. CONST. arts. 2 & 3.

87. European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90 (entered into force Aug. 4, 1978), discussed *supra* note 33 and accompanying text.

88. Previously, Ireland had refused to ratify this treaty because it automatically excluded some offenses from the political offense exception to extradition. This exclusion was thought to infringe upon Ireland's sovereign right to deny extradition. See Connelly, *Non-Extradition for Political Offenses*, *supra* note 71.

89. [1985] I.R. 323.

90. In this case Great Britain requested extradition of Quinn on charges of fraud. Quinn admitted he was a member of INLA whose purpose was to establish "a thirty-two County Workers Republic by force of arms." *Id.* at 328. He further stated that he fraudulently deceived the bank in order to obtain funds for the INLA to use in their campaign. *Id.* at 327-35.

91. *Id.* at 337.

92. *Id.*

INLA⁹³ member whose purpose was to “facilitate the overthrow, by violence, of the Constitution and the organs of the State therein.”⁹⁴

The Supreme Court extended the constitutionality test to exclude persons with unconstitutional objectives from the political offense exception in *Russell v. Fanning*.⁹⁵ The objective of the IRA to reunite Northern Ireland with the existing Republic of Ireland was found unconstitutional because under the Constitution,⁹⁶ only authorized organs of the state could take actions toward achieving reintegration.⁹⁷ Therefore, the IRA objective to attempt the reunification of Ireland “without the authority of the organs of the state established by the Constitution is to subvert the Constitution and usurp the function of government.”⁹⁸

Two dissents which questioned the extent of the judiciary’s role in extradition matters and the conduct of the government receiving extradited offenders foreshadowed the demise of this strict standard for the political offense exception. Justice Hederman thought Russell’s escape was connected to the political offense for which he was imprisoned.⁹⁹ He wrote that since IRA activity was directed outside the Court’s jurisdiction, it did not threaten the Republic of Ireland and was not unconstitutional.¹⁰⁰ Additionally, he wrote that only the legislature may say armed rebellion in Northern Ireland amounts to armed rebellion in the Republic of Ireland.¹⁰¹ In a separate dissent Justice Mc-

93. Irish National Liberation Army.

94. *Quinn*, [1985] I.R. at 337.

95. [1988] I.R. 505. Russell was part of a mass escape from the Maze prison in Northern Ireland during which a prison guard died. Northern Ireland sought his extradition the charge of attempted murder. *Id.* at 507. Russell claimed the charge in the warrant was a political offense because he escaped prison to resume IRA activities which would reunify Ireland and establish the Irish Constitution as “the sole governing principle of the political structure and organization of the entire island of Ireland.” *Id.* at 511. For this reason Russell thought his case was distinguished from *Quinn* where the objective was the overthrow of the government of the Republic of Ireland and usurpation of its constitution. *Id.* at 516.

96. Article 6, §§ 1 & 2; *Russell*, [1988] I.R. at 530.

97. *Russell*, [1988] I.R. at 530.

98. *Id.*

99. *Id.* at 542, 554. Russell was imprisoned for the attempted murder of a Northern Ireland Policeman. He disclaimed involvement in the offense, but asserted it was the work of the IRA of which he was a member. *Id.*

100. *Id.* at 530.

101. *Cf. Cheng* discussed *supra*, note 54. The majority’s reasoning in *Russell* was an inverse of the *Cheng* territoriality requirement that the offender must be at odds with the state requesting his extradition. In *Russell* the relationship of the offender and the state granting extradition was scrutinized. *Russell*, 2 All E.R. 529, 539.

Carthy expressed doubts about the treatment by Northern Irish authorities of extradited offenders¹⁰² and expressed concern about Northern Ireland's lack of reciprocity upon receiving extradited offenders.¹⁰³ Justice McCarthy cited breaches of the reciprocity principle following the extraditions of McGlinchey¹⁰⁴ and Shannon.¹⁰⁵

In January 1987 the Republic of Ireland ratified the 1977 European Convention on the Suppression of Terrorism in the Extradition Act of 1987.¹⁰⁶ This new extradition agreement between member states of the Council of Europe both narrowed¹⁰⁷ and expanded¹⁰⁸ the political offense exception. However, it was not retroactive and several cases remained to be decided under the Extradition Act of 1965. In these remaining extradition cases, the majority of the Supreme Court expressed doubt about the good faith of the Northern Ireland government and reversed its stance on the constitutionality of IRA objectives. As a result, the standard for political offenses was eased and subjective elements, such as motive, were readmitted to consideration.

The related cases *Finucane v. McMahon*¹⁰⁹ and *Clarke v. McMahon*¹¹⁰ were decided by the Supreme Court on March 13,

102. Six other men who participated in the prison escape with Russell were mistreated during their recapture, and deprived of clothing when they were returned to prison. McCarthy criticized the Northern Irish authorities for not punishing those who inflicted this mistreatment. *Russell*, [1988] I.R. at 555-56.

103. Under the doctrine of reciprocity both the requesting government and the extraditing government will observe the guidelines in the extraditing country's extradition act. *Id.* at 557.

104. McGlinchey was handed over to the RUC (Royal Ulster Constabulary) on March 17 and was questioned by police until March 19 when he was finally arraigned in court. Under the Extradition Act of 1965 arraignment must take place as soon as possible after extradition. *Id.* at 555-56.

105. Shannon was interrogated following his extradition about other crimes than the one for which he was extradited. He was also subjected to an untimely delay before he was arraigned. These are both breaches of the Extradition Act of 1965. *Id.* 555-558.

106. No. 1 of 1987 [IR].

107. European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90 (entered into force Aug. 4, 1978), Article 1, § 3 (offenses involving automatic weapons and bombs are exempt from the political offense exception). Article 2 gives each state the option whether to regard other violent crimes as political offenses. *Id.* § 3.4.

108. Extradition to the United Kingdom is not permitted where there are grounds for believing the warrant was issued because of race, religion, nationality or political opinion. *Id.* §§ 8 & 9.

109. Additionally, the Attorney General must be satisfied that the requesting state has demonstrated a prima facie case against the defendant. Extradition (Amendment) Act 1987, § 2(1). *Finucane v. McMahon*, [1990] I.R. 165.

110. [1990] I.R. 228.

1990.¹¹¹ Finucane was imprisoned for weapons violations and Clarke was imprisoned for attempted murder when they escaped from jail in Northern Ireland during a mass breakout. During the breakout a guard was stabbed and shortly thereafter died. The men fought extradition on two grounds: (1) that under section 50(2) of the Extradition Act of 1965, their offenses were political offenses or offenses connected to political offenses, and (2) that under article 40(2) of the Constitution, extradition was likely to result in their mistreatment.

In a complete reversal of recent decisions, the Supreme Court overturned *Russell*¹¹² and held that IRA objectives are constitutional.¹¹³ Relying on *Bourke*¹¹⁴ as precedent, the prison escapes by Finucane and Clarke were found to be "closely connected" to the political offenses for which they were imprisoned.¹¹⁵ The unanimously upheld civil liberties claims of the offenders¹¹⁶ lends further significance to these cases. Finucane and Clarke alleged that extradition would lead to their mistreatment in prison.¹¹⁷ The Court agreed that the defendants' civil rights would be at risk if extradited because other prisoner's civil rights were flagrantly disregarded after the prison escape. In support of this conclusion, the court discussed the remaining prisoners who were assaulted by prison guards and bitten by dogs, and then refused medical treatment for ten days by prison

111. *Finucane* and *Clark* were similar cases and the Supreme Court used *Finucane* as the leading case. Both men were imprisoned IRA members in Northern Ireland; Finucane was convicted of weapons violations, and Clarke was convicted of attempted murder. Finucane and Clarke escaped during a mass breakout in which a prison guard was stabbed and died shortly thereafter. *Finucane*, [1990] I.R. at 222. Northern Ireland issued warrants for their extradition from the Republic of Ireland.

112. *See supra* notes 95-105 and accompanying text.

113. The Supreme Court said it wrongly decided in *Russell* that the objectives of the IRA are unconstitutional. This has the effect of discriminating against IRA members rather than evaluating the nature of their offense. However, the Supreme Court did not overturn *Quinn* where the judgment rested upon the activities of the INLA, which were found to be unconstitutional. *Finucane*, [1990] I.R. at 224-25.

114. In *Bourke* the Supreme Court found that there simply must be a connection between a political offense and a connected offense to qualify them both as political offenses. *See supra* notes 63-66.

115. *Finucane*, [1990] I.R. at 217.

116. Article 40 of the Republic of Ireland's Constitution protects the rights of all Irish citizens, whether they are subjects of Northern Ireland or the Republic of Ireland. This is consistent with Articles 2 & 3 of the Constitution which claim sovereignty over the island of Ireland, including Northern Ireland. *See IR. CONST. [Constitution of The Irish Free State (Saorstát Eireann) Act, 1922] arts. 2, 3 & 40.*

117. A prison document fixed blame for the stabbing on Finucane. Finucane and Clark feared retribution if they were returned to prison.

authorities. The Supreme Court was most disturbed by the apathetic response of Northern Ireland's Government which never disciplined the prison guards for their abuse of power.¹¹⁸

Under *Finucane* and *Clarke*, the constitutionality issue as it pertains to objectives is rejected as a barrier to the political offense exception. By implication, the Supreme Court has accepted the IRA as a political organization so long as its activities do not threaten the Republic of Ireland. Additionally, the scope of inquiry into elements of the political offense exception is expanded by admitting motivation and anticipated treatment of the returned offender into consideration. These cases demonstrate that the Supreme Court questions the reciprocity of the British and Northern Irish governments in extradition cases, as well as the judicial mechanism of these countries. Against this backdrop of events, the extradition case of Owen Carron was decided.

IV. CARRON v. McMAHON

A. *Facts*

In December of 1985, Owen Carron was driving his car in Northern Ireland with James Maguire as a passenger.¹¹⁹ Maguire had an assault rifle and fifty-eight rounds of ammunition in his possession.¹²⁰ Carron denied knowledge of the gun and ammunition when the Royal Ulster Constabulary stopped the car and arrested both Carron and Maguire.¹²¹

Carron was a member of Sinn Fein, the political wing of the Irish Republican Army.¹²² As a Sinn Fein candidate, he was elected a Member of British Parliament from 1981 to 1983.¹²³ In court, Carron denied that he supported the use of violent means

118. In *Pettigrew v. Northern Ireland Office*, a Northern Ireland court awarded damages for injuries suffered by a prisoner at the hands of guards in the same escape. *Pettigrew v. Northern Ireland Office*, [1989] 3 B.N.I.L. 83.

119. *Carron v. McMahon*, [1990] I.R. 239.

120. *Id.* at 265.

121. *Id.*

122. Kieran Cooke, *Irish Court Refuses Fresh Extradition*, *FIN. TIMES (Eng.)*, Apr. 7, 1990, § 1, at 1. The origins of Sinn Fein and the IRA are discussed in PHILLIPS, *supra* note 23, at 53-54 & 125-27.

123. Carron was the parliamentary election agent for Bobby Sands, the imprisoned IRA hunger striker who was elected MP. Sands died from his hunger strike in 1981, causing a by-election won by Carron. Edward Gorman, *Ex-MP at Centre of Latest Maelstrom*, *THE TIMES (Eng.)*, Apr. 7, 1990, § Home News.

to achieve political change in Northern Ireland.¹²⁴ Maguire also denied being an IRA member, however, he averred in an affidavit to the Supreme Court that his political objective was to achieve political change in Northern Ireland through violent means.¹²⁵ The High Court and Supreme Court both concluded that Maguire was an IRA member since he shared their objectives.¹²⁶

Carron fled to the Republic of Ireland after being released from custody on bail.¹²⁷ He was subsequently arrested by the Republic of Ireland's police, and the authorities in Northern Ireland issued two warrants for his extradition.¹²⁸ Carron sought to escape extradition and raised two claims in his defense.¹²⁹ Under the Extradition Act of 1965, Carron claimed he was charged with political offense or offenses connected with political offenses.¹³⁰ Under the Irish Constitution, Carron claimed his detention was unlawful because his extradition would result in treatment which would deprive him of his constitutional rights.¹³¹

B. High Court Decision

The High Court held that Carron did not qualify for a political offense exception.¹³² Using Justice McCarthy's proposed test (espoused in *Shannon*), the true motivation of the perpetrator, nature of the offense, and identity of the victim were considered in light of the desired political goal.¹³³ The court concluded Carron's crime was not a political offense since Carron claimed he had no knowledge of the weapons within his car, nor any motivation for a political goal to be achieved through his criminal offense.¹³⁴ Absent these elements, the Court concluded that Car-

124. *Carron*, [1990] I.R. at 266.

125. *Id.*

126. *Id.* at 240, 270.

127. Gorman, *supra* note 123, § Home News.

128. The warrants related to charges of possession of a firearm and ammunition with intent to endanger life or cause serious injury to property and possession of a firearm and ammunition under circumstances which give rise to the reasonable suspicion that they were not in possession for a lawful object. *Carron*, [1990] I.R. at 265.

129. Carron raised only the § 50 claim in district court and failed to prove his case. *Id.*

130. § 50 of the Extradition Act of 1965. *Id.*

131. Article 40 of the Republic of Ireland's Constitution. *Id.* at 267. The article 40 claim was upheld in *Finucane*, see *supra* notes 116-17.

132. *Carron*, [1990] I.R. at 240.

133. See *Shannon v. Fanning*, [1984] I.R. 569, 588.

134. *Carron*, [1990] I.R. at 257.

ron's criminal offense was not a political offense.¹³⁵

Similarly, the court did not find Carron's criminal offense to be an offense connected to a political offense. This was because Maguire's offense was unconstitutional and, therefore, not a political offense.¹³⁶ Maguire's offense was considered unconstitutional based upon the court's "reasonable inference" that, in light of his admitted objective of reintegrating Ireland through violence, Maguire possessed the gun and ammunition for the purpose of causing serious injury to the British forces in Northern Ireland.¹³⁷ Therefore, not only did Maguire have unconstitutional objectives under the *Russell* standard, but the gun and ammunition pointed to unconstitutional activity under the *Quinn* standard as well.¹³⁸ The political offense exception was also not available to Carron since his criminal offense was connected to Maguire's criminal, not political, offense.¹³⁹

Finally, the High Court found that Carron did not discharge the burden of proof that his constitutional rights would be violated if he was extradited to Northern Ireland.¹⁴⁰ The High Court concluded that the chance of a violation was improbable¹⁴¹ and found Carron to be an "unreliable witness" to events which supported his constitutional claim.¹⁴²

During the time the High Court decision was under appeal, the Supreme Court handed down rulings in *Finucane* and *Clarke* which invalidated *Russell*, and held that IRA objectives are constitutional. The *Finucane* decision was potentially influential on the *Carron* case because the High Court found Maguire's offenses unconstitutional and, therefore, nonpolitical under *Russell*. However, the *Quinn* holding that political activities committed to subvert the constitution and usurp the functions of government are unconstitutional remained good law.¹⁴³

135. *Id.*

136. *Id.* at 258.

137. *Id.* at 259.

138. *Id.* at 258.

139. *Id.* at 259.

140. *Id.* at 263.

141. *Id.* at 262, 263.

142. Carron was considered unreliable by the High Court because of discrepancies between his written affidavit and oral testimony, which Carron blamed on the transcriber of the affidavit. *Id.* at 262.

143. *Id.* at 267.

C. Supreme Court Decision

The Supreme Court agreed with the High Court that Carron's offense was not in itself a political offense.¹⁴⁴ This conclusion was reached through an examination of Carron's motive and intent for the criminal offense.¹⁴⁵ Carron's denial of knowledge of the gun and ammunition in his car and his lack of a political objective negated the possibility that his was a political offense.¹⁴⁶

A different conclusion was reached regarding whether Carron's crime was a connected political offense. The Supreme Court declared that a connected offense did not need to be "political [in] nature" to be connected with a political offense.¹⁴⁷ Instead, the test of a connected offense was "whether there is a causal or factual relationship of sufficient strength to be properly described as a connection between the two offenses concerned."¹⁴⁸ Evaluation of the two elements "causal or factual relationship" and "of sufficient strength" does not explicitly take the intent or motive of the connected offense into account.

Applying this new test, the first consideration is whether the nature of Maguire's offense renders it a political offense. Consistent with *Finucane* and *Clarke*, the Court held that Maguire's "intention to engage in paramilitary activity"¹⁴⁹ was not an unconstitutional objective.¹⁵⁰ As an IRA member, Maguire had a political objective for transporting weapons. Further, the weapons had not been used in a context excluded from the political offense exception, such as constitutionally subversive¹⁵¹ or unreasonable political¹⁵² activity.¹⁵³ For these reasons the Supreme Court found that Maguire's offenses were political offenses.

Next, the Supreme Court found "the closest possible con-

144. *Id.* at 266.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 267.

150. *Russell's* conclusion that "evidence of a political objective to expel the British forces out of Northern Ireland by force of arms is not a subversion or usurpation is overturned by *Finucane*." *Id.* at 267. See David McKittrick, *Trend of a Decade Overturned by New Approach of Judges*, THE INDEPENDENT, Apr. 7, 1990, § Home News, at 3.

151. The *Quinn* standard remains good law in *Carron*.

152. The *McGlinchey* standard remains good law in *Carron*.

153. *Carron*, [1990] I.R. at 267.

nection between the offenses of which James Maguire was convicted and the offenses with which the applicant is charged."¹⁵⁴ This finding could only be based on their nearly identical actus reus since Carron was found to be without mens rea for either a political or criminal offense.¹⁵⁵ Therefore, similar actus reus must qualify as "a causal or factual relationship of sufficient strength" to connect a criminal offense to a political offense.

D. Analysis

In response to mounting concerns about the good faith, reciprocity and judicial systems of Northern Ireland and Great Britain in extradition cases, the Irish Supreme Court has rethought its strict position on political offenses. A new view has manifested itself in the success of civil liberties claims and lower standards for the political offense exception as methods to deny extradition. The standard is lowered by admitting many new elements of the crime charged into consideration and subjecting them to lenient evaluation for the political offense exception. Although these are distinct defenses to extradition, the lowered standard is intertwined with the civil liberties approach because both are concerned with treatment of the returned offender.¹⁵⁶ Thus, in addition to admitting more elements of the crime into consideration of the political offense exception, undoubtedly the judiciary is also concerned with the well being of the offender. In *Carron*, these considerations lead to the finding of a connected political offense for a man who did not even know he committed a crime.

While the *Carron* decision may appear to eradicate any standard for the political offense exception, several restraints remain intact to prevent the exception from swallowing the rule. Furthermore, this low standard is not an act of bad faith on the part of the Irish judiciary toward Great Britain and Northern Ireland in extradition hearings. The judiciary's only duty is to fairly try extradition cases under any standard they select. Given that this standard espoused in *Carron* was discriminating and the case was carefully decided, this duty has not been breached.

Concern for the individual is one of the traditional bases of

154. *Id.* at 266.

155. *Id.*

156. VAN DEN WIJNGAERT, *supra* note 3, at 2.

the political offense exception as it anticipates poor treatment of an extradited political offender.¹⁵⁷ This is because an individual who has challenged the political order in the requesting state is a likely target for discrimination when tried by the government of the requesting state.¹⁵⁸ Therefore, the motive and judicial procedures of the requesting state may provide reason to grant the political offense exception. Justice Walsh of the Irish Supreme Court defended this position in a recent decision:

Our statutory provisions do not permit the courts to ignore the motive of the requesting state or the fairness of the procedure by refusing to consider the treatment the fugitive will receive if returned. Neither should our courts ignore the answerability of the State to the organs of the European Convention of Human Rights and Fundamental Freedoms if a fugitive offender is handed over to any other State . . . where the courts are not satisfied that his treatment there would not be in breach of the rights protected by the Convention.¹⁵⁹

Justice Walsh's opinion points out that the link between human rights and the political offense exception has the potential to reinforce the political offense exception as it is increasingly restricted by international agreements aimed against terrorism.¹⁶⁰

The Irish judiciary has been concerned with judicial mechanisms of the Governments of Great Britain and Northern Ireland because of events which cast doubt on their good faith. Where such events have occurred, the Irish judiciary has a pattern of responding by broadening the political offense exception. Elements of bad faith were found in *Magee*¹⁶¹ and a broad ruling

157. VAN DEN WIJNGAERT, *supra* note 3, at 2.

158. VAN DEN WIJNGAERT, *supra* note 3, at 2.

159. Finucane v. McMahan, [1990] I.R. 165, 216.

160. European Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). This human rights convention may provide a loophole for the 1987 Extradition Act which absolutely excludes certain offenses from the political offense exception. The Irish Courts are especially able to benefit from this potential loophole as the Republic of Ireland was the only signatory of the European Convention on the Suppression of Terrorism not to sign article 13 which requires a prima facie case before extradition. (The 1987 Extradition Act is based on the European Convention on the Suppression of Terrorism.) Since the Irish judiciary has lost power to determine political offenses because of restricted offenses under the treaties, and they have also lost power because the Republic of Ireland's executive and legislature did not sign article 13, the courts may turn to the human rights convention as a way to deny extradition.

161. See *The State (Magee) v. O'Rourke*, [1971] I.R. 205.

in *Bourke* soon followed. Similarly, in *Finucane*,¹⁶² the Court discussed at great length examples of bad faith on the part of British authorities after the extraditions of McGlinchey and Shannon and the sympathetic decision in *Carron* followed within a month.

The Supreme Court evaluated the motive of Northern Ireland's government in *Magee*. Extradition was requested for several common crimes, but the lack of evidence during the trial pointed to a hidden motive of wanting to charge the defendant with political crimes. Thus, the extradition of Magee was denied on the basis of bad faith.¹⁶³ Northern Ireland also displayed bad faith in terms of reciprocity after the extraditions of McGlinchey and Shannon. They deviated from normal extradition procedure and waited two days before arraigning McGlinchey upon his return to Northern Ireland. Similarly, when Shannon was extradited, Northern Ireland delayed his arraignment and then questioned him about crimes other than those for which he was extradited.¹⁶⁴

The issue of unfair judicial procedures in Great Britain and Northern Ireland, also influences the Irish judiciary. In Northern Ireland suspected terrorist crimes, including offenses committed by extradited IRA members,¹⁶⁵ are tried in Diplock courts.¹⁶⁶ These courts were created by the Northern Ireland (Emergency Provisions) Act of 1973¹⁶⁷ to avoid partisan jury verdicts.¹⁶⁸ Ironically, however, they have the potential to permit the Government of Northern Ireland to discriminate against a

162. See *Finucane*, [1990] I.R. 165.

163. The Court found that Magee was likely to be charged with political offenses if extradited. *Magee*, [1971] I.R. 205, 211-12.

164. See *Finucane*, [1990] I.R. 165. In international law the principle of specialty is observed in extraditions. It says that a person may not be tried for a crime other than the one for which the person was extradited. See *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986).

165. Two IRA members were extradited from Holland to Northern Ireland in 1986. Kelly and McFarland were subsequently tried and convicted before a Diplock court on charges of escape from prison, murder, and their remaining prison sentences. Campbell, *supra* note 84, at 608.

166. Diplock Courts are nonjury courts presided over by a single judge who applies special rules of evidence. More than 85% of all convictions are based on a statement or confession. Michael P.P. Simon, *The Political Offense Exception: Recent Changes in Extradition Law Appertaining to the Northern Ireland Conflict*, 1988 ARIZ. J. INT'L & COMP. L. 244, 258.

167. Campbell, *supra* note 84, citing the Northern Ireland (Emergency Provisions) Act 1973.

168. Simon, *supra* note 166, at 258.

limited class of republican offenders because the judge who solely decides the question of fact and law and determines the offender's guilt,¹⁶⁹ is also from Northern Ireland. This problem led the Irish legislature to seek changes in Northern Ireland's judicial system before signing the 1987 Extradition Act.¹⁷⁰

The failure to reform this court system has led to a general consensus among the Irish public that Irish citizens receive unfair trials; the Irish Judiciary reflects this consensus.¹⁷¹ Two controversial cases in Great Britain have exacerbated the mistrust of British courts; the Birmingham Six and the Guilford Four cases confirmed that Irish citizens were unfairly convicted in British courts.¹⁷² Furthermore, extradited offenders may be subjected to intense interrogation under the Prevention of Terrorism (Temporary Provisions) Act of 1989.¹⁷³ This Act allows seven days of detention without criminal charges for persons suspected of terrorist offenses in Northern Ireland.¹⁷⁴ The Irish judiciary has condemned the act as "devoid of any legal basis in international law."¹⁷⁵ Similarly, the European Court of Human Rights has found the act to be in derogation of the covenant of the European Convention on Human Rights.¹⁷⁶

In light of these concerns, the civil liberties of Irish citizens

169. JOHN JACKSON ET AL., CALLED TO COURT, A PUBLIC REVIEW OF CRIMINAL JUSTICE IN NORTHERN IRELAND 165-67 (1991).

170. Campbell, *supra* note 84, at 608.

171. McKittrick, *supra* note 150. One prominent commentator has concluded that the Irish Courts are reflecting the fact that Irish people generally do not have much confidence in the British justice system. Additionally, one Irish Attorney General refused to extradite Ryan to Great Britain because he believed a fair trial was impossible. Campbell, *supra* note 84, at 612.

172. The "Guilford Four" and "Birmingham Six" cases involved pubs which were bombed in Great Britain. In both cases the Irish defendants' convictions were based on forced confessions and police misconduct. Years later, both cases were reversed and the defendants were freed. The Guilford Four convictions were overturned in 1989. Connie Maxwell, *Amnesty Criticizes Britain's Criminal Justice System*, UPI, June 8, 1991, available in LEXIS, Nexis Library, UPI File. The Birmingham Six convictions were overturned in 1991. *R. v. McKenny & Others* [1992] 2 All E.R. 417.

173. Prevention of Terrorism (Temporary Provisions) Act 1989.

174. *Id.*

175. *Finucane v. McMahon*, [1990] I.R. 165, 215. The imprecise definition of "terrorism" and the restricted territory to which the act applies (Northern Ireland) makes this an "ad hoc definition for the purpose of detaining persons" suspected of terrorism. There is no corresponding offense of terrorism, so this act allows persons to be detained and then interrogated about other crimes.

176. *Brogan & Others v. U.K.*, 145-B Eur. Ct. H.R. (ser. A) (1988). This court held that the seven day detention power of the Prevention of Terrorism (Temporary Provisions) Act 1989 violates article 5(3) of the Convention.

have become a major consideration in extradition cases.¹⁷⁷ The civil liberties element of extradition cases is evaluated in light of the Irish Constitution, rather than the Extradition Act of 1965.¹⁷⁸ Past instances of prisoner mistreatment have become a basis for denying extradition where an offender's civil rights may be violated in the requesting country's penal system. The dissent by Justice McCarthy in *Russell* expressed concern for the treatment of the defendant because six prisoners who escaped with the defendant were mistreated upon their recapture and deprived of clothing.¹⁷⁹ Potential mistreatment in prison was also one ground for denying extradition in the *Finucane* and *Clarke* cases. There the Court was influenced by the circumstances which followed Finucane's and Clarke's escape from the Maze prison. The remaining prisoners in Maze were beaten, bit by guard dogs and then refused medical treatment. In addition, no prison guard was ever disciplined for these actions.¹⁸⁰ Based on their concern about mistreatment, the Court decided these cases solely on its own authority, but was also influenced by a Northern Ireland Court decision in which the wrongful behavior of prison guards following the escape of a prisoner was recognized and the plaintiff, an unescaped prisoner, was awarded damages.¹⁸¹

In response to these concerns the Irish Supreme Court has become willing to consider more elements of the criminal offense in determining whether to grant the political offense exception. These elements, such as political objective and intent, are similar to those originally considered under tests for the political offense exception in the early extradition cases decided under the 1965 Act. Some of these elements were considered in *Carron* to determine the nature of the primary and connected offenses. Additionally, a renewed trend of reducing the scrutiny of the defendants' credibility emerges in *Carron*.

The credibility of the defendant seeking extradition has been closely scrutinized under the more restrictive tests for the

177. See *Pettigrew v. Northern Ireland Office*, [1989] 3 B.N.I.L. 83, discussing *Finucane* and *Clark*.

178. Article 40, § 4, subsection 2 of the Republic of Ireland's Constitution says the Constitution protects the civil rights of all Irish citizens.

179. *Russell v. Fanning*, [1988] I.R. 505, 554-55.

180. *Finucane v. McMahon*, [1990] I.R. 165, 219-21; *Clarke v. McMahon*, [1990] I.R. 228, 236-38.

181. See *Pettigrew*, [1989] 3 B.N.I.L. at 83 (the cause of action in this case arose out of the same prison escape and was persuasive to these decisions).

political offense exception, but was lightly considered under the more lenient standards of recent cases. For example, under the narrow "reasonable man" test, the Court in *McGlinchey* and *Shannon* did not believe the defendants' claims of noninvolvement in their respective crimes.¹⁸² Similarly, the Court was reluctant to believe defendants who admitted involvement in crimes which they claimed were perpetrated for the IRA.¹⁸³ In contrast, the early *Magee* decision was decided under the lenient "continental test" and the Court held that the defendant was to be believed in the absence of contradictory evidence.¹⁸⁴ Similarly, in *Carron*, the High Court found Carron's claim of ignorance of the gun and ammunition in his car to be credible.¹⁸⁵ It stated that they "must deal with the actual and not the hypothetical facts surrounding the alleged offense."¹⁸⁶ Likewise, the Supreme Court did not speculate about the matter other than to restate Carron's assertion of ignorance.¹⁸⁷ The easy acceptance of Carron's credibility is one of many signs that the Court has returned to a very lenient standard.

Motivation, in particular republican¹⁸⁸ political objectives, has been reintroduced as an element of the crime considered in Irish extradition cases.¹⁸⁹ Under the two preceding tests for the

182. *McGlinchey v. Wren*, [1982] I.R. 154, 159-60; *Shannon v. Fanning*, [1984] I.R. 569.

183. *Hanlon v. Fleming* and *Maguire v. Keane* were pre-*Russell* decisions where the defendants applied for the political offense exception claiming their offenses were committed on behalf of the IRA. Hanlon had explosives in his London apartment and the Supreme Court found that there was no "acceptable evidence" that the explosives were for the IRA's use. *Hanlon v. Fleming*, [1981] I.R. 489. In *Maguire*, the Supreme Court affirmed a trial judge's decision that the defendant gave contradictory testimony and did not prove that the train robbery was for the benefit of the IRA. *Maguire v. Keane*, [1986] ILRM 235, 236-37.

184. The Supreme Court stated that the President of the High Court "had no valid reason to disbelieve the uncontradicted testimony of Magee. This Court, in my view is in the same position." *The State (Magee) v. O'Rourke*, [1971] I.R. 205, 211.

185. *Carron v. McMahon* [1990] I.R. 239, 257. If Carron did know about the weapon and ammunition in his car's trunk, their presence in that context would point to a possible political objective. A political objective would not have jeopardized Carron's case under *Finucane*, so in actuality, Carron's credibility is a moot point.

186. *Id.* at 257.

187. *Id.* at 266.

188. Republican is a descriptive term for those groups which seek a reunited Republic of Ireland. Loyalist, on the other hand, is a descriptive term for groups which seek the continuance of British rule in Northern Ireland.

189. "Being a member of the IRA does not by itself disqualify any activity of a member from the political offense exception." *Finucane v. McMahon*, [1990] I.R. 165, 210.

political offense exception, the Court would not consider political objectives in its determinations. The "constitutional test" denied the political offense exception to a defendant with the IRA's political objectives. The "reasonable man" test was strictly objective, therefore a subjective factor like the defendant's political objective was not considered for the political offense exception.¹⁹⁰ By reversing itself and allowing political objectives to be considered in extradition cases, the Supreme Court has recognized the IRA as a political group and broadened the scope of its inquiry.¹⁹¹

This wider inquiry into political objectives worked to Carron's favor when Maguire's offense was examined for political nature. Carron himself claimed he had no political motivations for possessing the weapon and ammunition.¹⁹² However, Maguire's admitted political objective,¹⁹³ along with his possession of a weapon, led the Supreme Court to conclude that Maguire committed a political offense. Subsequently, Carron's criminal offense qualified for the political offense exception by virtue of its connection to Maguire's political offense.

The High Court's decision in *Carron* reintroduced intent as an element in determinations of the political offense exception. Intent for a political crime is separate from the motivation for the crime.¹⁹⁴ It is argued that in a true political crime the political motivation must dominate the intent of the offender to commit the crime and outweigh the significance of the common crime.¹⁹⁵ Intent was not a factor for consideration under the "reasonable man" and the "constitutional" tests for the same reasons political motivation was not a factor under those tests. The last time intent was closely examined in determining the political offense exception was the 1971 *Bourke* case, which the

190. Justices Hederman and McCarthy both wrote in their opinions in *Shannon* that motivation should be considered in determining the political offense exception. *Shannon v. Fanning*, [1984] I.R. 569, 587-88. No agreement about this was reached and instead of broadening the test for the political offense exception in future cases, the more restrictive constitutional test was instituted.

191. As a political group the IRA may still engage in unconstitutional behavior under *Quinn*, but the courts will evaluate this on a case by case basis. *Finucane*, [1990] I.R. at 210.

192. *Carron v. McMahon* [1990] I.R. 239, 257.

193. Maguire averred that his political objective was to reintegrate Ireland through force. *Id.* at 258.

194. See Connelly, *Political Offense Exception*, *supra* note 55, at 156-57.

195. Cantrell, *supra* note 46, at 781 (quoting BASSIOUNI, *CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER* 250 (1969)).

Supreme Court used as precedent in its *Carron* decision.

By implication, *Carron* has established intent as an element for consideration in the primary offense which does have to exist in the connected offense. The High Court drew a "reasonable inference" that Maguire's intent was to cause serious injury to British forces in Northern Ireland.¹⁹⁶ The Supreme Court agreed with this inference about Maguire's intent and found that the sum of the elements considered indicated a political offense. Carron was found not to have intent for the criminal offense by virtue of his ignorance of the weapon. But the Supreme Court made its unlikely conclusion that a political offense may be connected to a concurrent criminal offense on the basis of "a causal or factual relationship of sufficient strength."¹⁹⁷ Since Carron did not have mens rea, the Supreme Court is asserting that such a relationship may exist solely on the basis of similar actus reus. Therefore, while intent is a consideration in fixing the nature of the primary offense, it is not a required element in the connected political offense.

The Supreme Court relied on the broad *Bourke* decision to find Carron's connected crime qualified for the political offense exception. However, an examination of mens rea in both crimes reveals *Carron* as a broader holding. In *Bourke*, the offenses of aiding a prisoner escape from prison and escaping from prison were considered "complimentary offenses" which were practically "a single operation."¹⁹⁸ An escape planned by two parties requires agreement of mens rea, so Bourke clearly had a criminal motive although he lacked a political motive.¹⁹⁹ *Carron* can be distinguished in that Carron's ignorance of the weapon and ammunition meant he had neither a criminal nor a political motive. Without a consideration of mens rea, "a factual or causal relationship of sufficient strength" between Carron's and Maguire's offenses can only be based on similar actus reus. Thus, the outcome of their offenses is solely determinative of a connection between the crimes. In this manner, Carron's crime, while devoid of criminal mens rea, is colored by the political attributes of Maguire's offense as a simultaneous event.

196. A reasonable inference of intent was drawn when weapons possession was considered in light of Maguire's political objective. *Carron*, [1990] I.R. at 259.

197. *Id.* at 266.

198. *Id.* (quoting *Bourke v. The Attorney General*, [1972] I.R. 36).

199. Bourke knew he was committing a crime in helping the spy escape prison, but he was not acting out of political motivation. *Id.*

This does not necessarily mean the new test for a connection is grossly inclusive of any simultaneous criminal activity. The most serious types of criminal activity are prevented from qualifying for the political offense exception. Specifically, the holdings of *McGlinchey* and *Quinn* will discourage unreasonable or unconstitutional political acts. These have been interpreted respectively as civilian murders and attempts to overthrow the government of the Republic of Ireland. This is a reasonable restriction because these activities are the furthest removed from expelling British forces from Northern Ireland and pose the greatest threat to civilians.

There is the possibility that the low standard for a connected political offense set in *Carron* is overly inclusive of less serious criminal offenses. To use a modified *Bourke* scenario as an example, suppose an unwitting taxi cab driver was hailed in front of the prison and gave the spy a means to escape. The taxi cab driver would then be able to claim that his actions were connected to a political offense. This is solely based on simultaneous time and place of occurrence of the offenses. But these acts are also connected because the political offender (the spy) manipulated the action of the criminal offender (the taxi cab driver) to implement his own political offense. The criminal offender's ignorant state of mind is incorporated into the political offender's mens rea for the political offense.

It is doubtful that a "relationship of sufficient strength" between a political offense and an unwitting criminal offense would exist without this element of manipulation. To return to our example, suppose a large commotion followed the spy's escape and a prisoner seized the opportunity to steal from others while they were distracted. The outcome of the prison escape did not depend on the theft and thus the offenses are not strongly connected from an objective perspective. Nor are they strongly connected from a subjective perspective because there has been no incorporation of the mental states. Instead, these are two remotely related offenses which are unlikely to support a connection which would qualify both as political offenses.

While the test for a connected political offense in *Carron* was potentially overly inclusive, it is likely that the Supreme Court was motivated to institute a low standard because of its concerns that Northern Ireland would view Carron's offense as a political offense and therefore, Carron would not be treated fairly if extradited. Since Maguire's offense was considered a po-

litical offense and he was imprisoned in Northern Ireland, it is not unlikely Carron's extradition would have resulted in a similar fate. Accordingly, there was a great possibility that an unfair trial would follow extradition because Carron's political motive was disputed by Northern Ireland;²⁰⁰ although, the Supreme Court found Carron's denial credible.²⁰¹ It is questionable whether the Northern Irish Government was interested in Carron's political opponent status as a member of Sinn Fein or Carron's criminal offense. If the former is the case, the "political" nature of the offense may come from the motive of the requesting state rather than from the actions of the offender.²⁰² Therefore, it is possible that the Irish Supreme Court found a political connection between the two offenses because a court in Northern Ireland might also see a political connection and use it against the offender. A very broad interpretation of a connected political offense counteracts the likelihood that an individual will be treated unfairly in the requesting country.²⁰³

The Irish Supreme Court has not breached the principle of *pacta sunt servanda* by adopting a low standard for connected political offenses.²⁰⁴ The 1965 Extradition Act only requires that a state fairly try an extradition case under the standard it chooses to adopt.²⁰⁵ The good faith principle has not been breached because the Irish judiciary has upheld its duty to exercise discretion in selecting and applying a standard. Since primary political offenses are subject to reasonable standards and there are compelling reasons for lowering the standard for the connected political offense,²⁰⁶ the Supreme Court has lived up to

200. *Id.* at 268.

201. *Id.*

202. See VAN DEN WIJNGAERT, *supra* note 3, at 2; Connelly, *Political Offense Exception*, *supra* note 55, at 167.

203. "Irish legal and political attitudes are coloured by history but also by a judgment on the quality of the system to which suspects are handed over;" McKittrick, *supra* note 150. "Irish law is too squeamish about civil liberties; the British lock up the innocent with the guilty;" Brian Cathcart, *Spanner in the Anglo-Irish Works: The Irish and Extradition*, THE INDEPENDENT, Apr. 15, 1990, at 17.

204. *Pacta sunt servanda* is a customary principle in international law that treaties will be honored. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 496 (1966).

205. The Extradition Act of 1965 is based on the European Convention on Extradition. Under the European Convention's article 3(1), a state may apply objective or subjective criteria as it thinks best to determine a political offense. As long as the state applies their chosen criteria in good faith, it is not answerable to other states for its decision. See GRAHL-MADSEN, *supra* note 2, at 37.

206. The connected political offense is implicitly subject to the same reasonable standards as the primary offense. This is because the primary offense first must pass the

its word not to treat extradition as foreign policy despite political and diplomatic pressures to do so.²⁰⁷ The current trend in extradition cases is grounded in international law as concern for the individual is recognized justification for granting the political offense exception.

V. CONCLUSION

The Irish Supreme Court has not failed to exercise discretion in choosing and interpreting the term political offense in *Carron v. McMahon*. Recently, it has returned to a broad test for a political offense which hinders extradition. In addition, it has devised an even broader test for an offense connected to a political offense. This new test for a connected political offense as formulated in *Carron* is criticized as too objective and overly inclusive. However, these flaws were necessary to protect the offender from unfair treatment by the requesting government.

It is unlikely that this recent trend in extradition cases will change because the Irish judiciary is determined to preserve the political offense exception. Only a successful system of trial in the requested country, or recourse for breaches in the treatment of returned offenders in an international court of law may balance the competing interests of the requesting and requested countries in extradition. In the absence of such effective measures, the *Carron* decision has aggravated relations between the Republic of Ireland and Great Britain and Northern Ireland and there are calls to abandon the 1985 Anglo-Irish Agreement which represented a high point in diplomatic relations.²⁰⁸

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"reasonableness" test before the connected offense is subject to the broader test for connection between the offenses.

207. *Finucane v. McMahon*, [1990] I.R. 165, 216.

208. See Simon Lee, *Law: Don't Blame the Irish Judges*, THE INDEPENDENT, Apr. 13, 1990, at 19.