

## Republicans, Martyrology, and the Death Penalty in Britain and Ireland, 1939–1990

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**Abstract** This article examines the relationship between politically motivated murder, martyrdom, and the death penalty in Britain and Ireland in the period from 1939 to 1990. First, it investigates the nexus between historical experience and memory, political martyrdom, and capital punishment as it applied to Irish Republicans in Britain during the Second World War. Secondly, it examines the use of extraordinary legal powers to impose the death penalty in the Irish state during the “Emergency,” and charts the processes through which the threat of capital punishment continued to be perceived as an essential instrument of security in both Irish jurisdictions in the postwar period. Thirdly, it evaluates the effectiveness of the death penalty in deterring politically motivated murder and explores the anomalous, paradoxical decision to abolish capital punishment at the height of subversive killing in Northern Ireland. The essay concludes that the national security issue and the potential martyrdom of Irish Republicans were pivotal factors in dissuading successive British governments from reintroducing the death penalty for politically motivated offenses in Britain and Northern Ireland.

There is not a single pub in Ireland where one cannot hear every verse of Kevin Barry sung. Who now remembers, who can tell us the name of, the young soldier ... who was shot by Kevin Barry? We do not remember the victims. We tend to remember the man who goes to the gallows. I believe these people should be given the anonymity of a life sentence, a real life’s sentence, one which means just that. They should not be given the glory of the gallows, as they would see it.<sup>1</sup>

**K**evin Barry was hanged in Mountjoy Prison, Dublin, in the winter of 1920. No ammunition had been seized in the ill-fated morning raid of an army lorry the previous autumn, but three British soldiers had been mortally wounded, and the murder of a soldier, under the optimistically titled Restoration of Order in Ireland Act, 1920, was a capital offense. Ever since his conviction in October 1920, Republican propagandists had advocated commuting Barry’s sentence to life imprisonment, but as the *Sunday Times* put it, an “example” had to “be made.”<sup>2</sup> Barry, nevertheless, was easy to empathize with. He

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<sup>1</sup> Philip Whitehead, 11 December 1974, Parliamentary Debates, Commons, 5th ser., vol. 883 (1974), col. 594.

<sup>2</sup> Sean Cronin, *The Story of Kevin Barry* (Cork, 1965), 23.

was only eighteen years old, a Jesuit-educated medical student, and from a reasonably well-off family. But clemency was denied. “Here is a clean cut case of murder without any doubt, where three soldiers lost their lives,” insisted General Nevil Macready, “and if the man is not hung, how on earth can we prevent troops making reprisals?”<sup>3</sup> Although the British Home Secretary, John Anderson, confidently claimed in 1941 that “he was not aware that the effects in that case had been other than good,”<sup>4</sup> the execution of Kevin Barry was not soon forgotten.<sup>5</sup> Throughout the Second World War, when Republican petitioners required examples of the barbarity of capital punishment for Irish political prisoners both in Ireland and in the United Kingdom, they circled back to the likes of Barry and to others—Robert Emmet, Michael Larkin, and Roger Casement, to name a few—who were Irish martyrs executed on English scaffolds. Indeed, there is a temptation to remark of Barry as Stuart Banner has remarked of Stephen Clark in his 2003 monograph, *The Death Penalty: An American History*. Had Barry been “imprisoned for the killing,” to use Banner’s words, no one would probably have “remembered him a year later,” but because of his death sentence Barry “dangled in public memory far longer than he had lived on earth, as an image invested with meanings of which he himself could never have dreamed.” Barry was not the first Republican converted into a “debating point after having been punished with death, and he would certainly not be the last.”<sup>6</sup>

After partition, capital punishment was routinely held as a vital safeguard against subversion. Politicians in both Irish jurisdictions, and subsequently in Britain, continuously couched arguments favoring the retention (and later the reintroduction) of capital punishment, on the premise of its perceived efficacy as a deterrent to potential subversives despite the fact that the death penalty had been imposed, almost exclusively in the post-partition period, for nonpolitical civilian murder.<sup>7</sup> Successive governments in both the North and South could have spared any condemned person from death, but they chose not to do so on forty-six occasions between 1922 and 1966, all but seven of which involved nonpolitical actors.<sup>8</sup>

While much of the rationale underpinning the enduring political support for capital punishment was embedded in its perceived efficacy as a deterrent to potential subversive activity, the Irish government, and later the British government, fulminated at the ineffectiveness of the ordinary criminal courts.<sup>9</sup> This was particularly encapsulated in the South during the Second World War—a period when emergency

<sup>3</sup> Quoted in Martin A. Doherty, “Kevin Barry and the Anglo-Irish Propaganda War,” *Irish Historical Studies* 32, no. 126 (November 2000): 217–31, at 228.

<sup>4</sup> TNA, CAB 65/56/11, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>5</sup> Therese Elizabeth McIntyre, “Another Martyr for Old Ireland’: Historical ‘Fact’ v. Folk Memory. Kevin Barry as a ‘Hero’ in the Irish Ballad Tradition” (MA diss., National University of Ireland, Galway, 2009).

<sup>6</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA, 2002), 4.

<sup>7</sup> See, for instance, the views of the secretary of state for the home department in the House of Commons in 1983. Leon Brittan, 13 July 1983, Parliamentary Debates, Commons, 6th ser., vol. 45 (1983), col. 885–93.

<sup>8</sup> There were eleven executions in Northern Ireland between 1922 and 1961, of which only one involved a politically motivated offender. Of thirty-five executions in Southern Ireland between 1923 and 1954, only six involved politically motivated offenders. The civil war executions (1922–23) in the Irish Free State are omitted from this analysis.

<sup>9</sup> David M. Doyle and Ian O’Donnell, “The Death Penalty in Post-Independence Ireland,” *Journal of Legal History* 33, no. 1 (March 2012): 65–91.

legislation, internment, and special tribunals were introduced to counteract the subversive threat.<sup>10</sup> In other words, when it came to safeguarding both the integrity and security of the southern state, the political refrain was that the criminal justice system was inadequate to the task and that the circumstances necessitated extraordinary measures. As the secretary of the department of justice, Stephen Roche, put it in 1941:

“Political” murder ... and generally the use of the gun as a political argument—is a deadly and highly infectious disease. It is too dangerous to be tolerated at all. The appropriate penalty is death, inflicted with as little delay as possible. Such cases should not go before the ordinary Courts at all, because of the factors of delay, intimidation and prejudice.<sup>11</sup>

At the point in time when the Irish government was formulating and introducing emergency powers to impose the death penalty, *inter alia*, for “grave anti-state offences,” it petitioned for the reprieve of two Irish Republican Army (IRA) men sentenced to death in Britain.<sup>12</sup> What is more, the taoiseach (prime minister), Eamon de Valera, lobbied Winston Churchill on behalf of a Republican awaiting death in Northern Ireland during a period in which his own administration was sanctioning the execution of IRA men in the South. De Valera, the taoiseach whose government used the ultimate sanction most frequently, had himself been sentenced to death in 1916, an experience that might have been expected to temper his willingness to permit his countrymen to face the hangman or a firing party.<sup>13</sup> He, together with other ministers and taoisigh who were prepared to allow executions to go ahead, had not only been comrades with men executed during the revolutionary period; many themselves had also been sentenced to death. As Deputy Dunne aptly pointed out in 1951 motion on the abolition of capital punishment: “This Dáil is peculiarly well qualified to discuss this matter, because ... there is quite a respectable number of Deputies who at some time or other of their political career have had the death sentence hanging over them.”<sup>14</sup>

Although the threat of political violence contributed significantly to the retention of capital punishment on the statute book in the two Irish jurisdictions until 1973 and 1990 respectively, the premise that politically motivated offenses were the product of a more definable criminal calculus that was likely to be deterred by the threat of death is particularly peculiar in light of Republican hunger strikes in Ireland and Britain, both historically and contemporaneously.<sup>15</sup> Modern Irish history, after all, is replete with prison protests and hunger strikes, actions, as Peter

<sup>10</sup> Seosamh Ó Longaigh, *Emergency Law in Independent Ireland, 1922–1948* (Dublin, 2006).

<sup>11</sup> Re. Trials for Murder, 25 August 1941, DT S7788A, National Archives of Ireland (NAI).

<sup>12</sup> Earl of Longford and Thomas P. O’Neill, *Eamon de Valera* (Boston, 1971), 359; Tim Pat Coogan, *The IRA* (London, 2002), 130; John Maguire, *IRA Internments and the Irish Government: Subversives and the State 1939–1962* (Dublin, 2008), 24.

<sup>13</sup> Doyle and O’Donnell, “The Death Penalty in Post-Independence Ireland,” 68.

<sup>14</sup> Sean Dunne, 5 December 1951, Parliamentary Debates, Dail Éireann, vol. 128 (1951), no. 3, col. 417.

<sup>15</sup> The Irish Republic abolished the death penalty for murder in 1964, but not for all crimes until 1990. Northern Ireland abolished capital punishment for “ordinary murder” in 1966 and for all but a few esoteric offenses in 1973. The death penalty remained on the statute book as a possible penalty for treason and piracy with violence until 1998.

Hodgkinson asserts, that hardly suggest that Republican dissidents with “such strength of commitment were susceptible to being deterred.”<sup>16</sup> This is also peculiar insofar as there must have been serious skepticism concerning the potency of the death penalty for subversive elements who were not only willing to embark on self-inflicted starvation, but also to risk death at the hands of police and security forces. It certainly seems plausible to surmise that in terms of martyrology, there was bound to be very little qualitative difference in the mode of death and that capital punishment was never going to be a deterrent to those with a “pathological fixation with sacrifice and death.”<sup>17</sup> Surely, in this context, the unlikely prospect of judicial execution would hardly have influenced subversive calculations.<sup>18</sup>

This article examines the relationship between politically motivated murder, martyrdom, and the death penalty in Britain and Ireland in the period from 1939 to 1990. First, it investigates the nexus between historical experience and memory, political martyrdom, and capital punishment as it applied to Irish Republicans in Britain during the Second World War. Secondly, it examines the use of extraordinary legal powers to impose the death penalty in the Irish state during the “Emergency” and charts the processes through which the threat of capital punishment continued to be perceived as an essential instrument of security in both Irish jurisdictions in the postwar period.<sup>19</sup> Thirdly, it evaluates the effectiveness of the death penalty in deterring politically motivated murder and explores the anomalous, paradoxical decision to abolish capital punishment at the height of subversive killing in Northern Ireland. The essay concludes that the national security issue and the potential martyrdom of Irish Republicans were pivotal factors in dissuading successive British governments from reintroducing the death penalty for politically motivated offenses in Britain and Northern Ireland.

### THE COVENTRY BOMBING, 1939

In August 1939, five people were killed and fifty passersby injured when an IRA bomb exploded in Coventry. The consequent criminal proceedings centered on the fatality of a twenty-one-year-old woman who had been “passing at the time and had been blown to pieces.” It had only been possible to identify her remains by a ring and some clothing. Five people were indicted in connection with the bombing, but only Peter Barnes and James Richards (alias McCormick) were convicted and sentenced to death at the Birmingham Assizes that December. Although the secretary of state for home affairs conceded that there was “probably no intention that the bomb should explode in the place where it did,” the explosion nonetheless had been one of “great violence.” At trial, Barnes had emphatically refuted any association with the IRA but Richards, by contrast, sought to conceal neither his subversive sympathies nor the calculated objective of his commission in England. Prior to

<sup>16</sup> Peter Hodgkinson, “The United Kingdom and the European Union,” in *Capital Punishment: Global Issues and Prospects*, ed. Peter Hodgkinson and Andrew Rutherford (Winchester, 1996), 193–213, at 195.

<sup>17</sup> Ian McBride, “The Shadow of the Gunman: Irish Historians and the IRA,” *Journal of Contemporary History* 46, no. 3 (July 2011): 686–710, at 699.

<sup>18</sup> Clive Walker, *The Prevention of Terrorism in British Law* (Manchester, 1992), 305.

<sup>19</sup> The Second World War was referred to in the Irish state as the “Emergency.”

the customary judicial articulation of a capital sentence, Richards brazenly declared, “What I did I did for Ireland.”<sup>20</sup>

Despite this assertion to the contrary, much of the extant correspondence suggests that the general consensus in Ireland was that the condemned men were not culpable for depositing the lethal device.<sup>21</sup> It was “easy to understand Richards’ silence,” observed writer and activist, Peadar O’Donnell.<sup>22</sup> Deemed in British governmental circles to be one of the more responsible Irish Republicans, O’Donnell wrote that, “[t]o say that he [Richards] knew the bomb was to be used to make one further headline but with the utmost care not to endanger life would, he fears, appear to be an appeal to English public opinion to rescue himself and his fellow patriot from the hangman.”<sup>23</sup> Richards would, according to O’Donnell, “dwarf [his] own stature by permitting the impression to go abroad that the bomb which caused the tragic deaths was intended to explode in a public street” and will thereby not risk the “appearance of lowering his flag in this extremity.”<sup>24</sup>

The Irish government responded to the widespread compassion for Barnes and Richards by pressuring the British government to grant a reprieve. Writing to Anthony Eden, the British secretary of state for dominion affairs, in 1940, the Taoiseach admonished that an execution would add Barnes and Richards to the long list of Republican martyrs whose memory would be manipulated by the IRA as an inspiring stimulus for future ventures. In doing so, the Taoiseach reminded the British government of the detrimental impact that the executions might have on Anglo-Irish relations. He wrote:

The history of the relations between our two countries has already been much stained with blood. Each succeeding generation of your countrymen have deplored the unwisdom of their predecessors and themselves fallen into the very errors they condemned. Ought you not to make sure that you avoid doing likewise, and should we not on both sides endeavour with all our strength to prevent the old round of violence and counter-violence beginning afresh.<sup>25</sup>

It was not merely De Valera who held grave misgivings about the deterrent value of executing Barnes and Richards. There was anxiety on both sides of the Irish Sea that the IRA would be roused, not suppressed, by the execution of the condemned men. Cognizant of unofficial representations furnished, it was counseled that the execution of these men would be the best possible advertisement for the IRA and that ultimately, as one British government memorandum put it, they might “stimulate fresh and worse outrages.”<sup>26</sup>

<sup>20</sup> TNA, CAB 65/56/15, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>21</sup> For a variety of correspondence relating to the death sentences, see DFA S113 (a) and DT S 11575A, NAI.

<sup>22</sup> TNA, CJ-6130, Peadar O’Donnell to J. L. Maffey (copy), December 1939.

<sup>23</sup> TNA, CJ-61, Memorandum, 5 January 1940; TNA, CJ-6130, Peadar O’Donnell to J. L. Maffey (copy), December 1939.

<sup>24</sup> *Ibid.*

<sup>25</sup> TNA, CJ-622, Eamon De Valera to Anthony Eden, 9 January 1940.

<sup>26</sup> TNA, CJ-61, Memorandum, 5 January 1940; see also TNA, CJ-62, Cahir Davitt to John Morris, 2 February 1940.

The surviving archival material suggests that the British cabinet was far from unanimous on the fate of Barnes and Richards. There was considerable concern that the executions would engender sympathy for the IRA and that an uninformed and unsympathetic Irish public opinion could be readily channeled into popular support not just for the condemned, but for the IRA more generally. According to British diplomatic sources, the overwhelming consensus in the Irish state was that the Republican movement was “misjudged and mischievous,” but as the UK Representative to Eire, John Maffey, surmised, this “attitude” would “probably change if the guilty men were executed.”<sup>27</sup> As with Kevin Barry two decades previous, “[t]he circumstances would be forgotten and the men would be regarded as Irish ‘martyrs.’”<sup>28</sup> That Maffey felt it incumbent upon himself to counsel that the IRA still possessed the potential to rouse resentment intimates that Irish popular sentiment remained volatile and that the execution of Barnes and Richards could, analogous to the executions of 1916, culminate in an intensification of nationalist feeling well beyond the rank and file of the IRA: “There can be no question but that the I.R.A. movement in Ireland to-day is receiving a powerful stimulus from the fact that two of its members are lying under sentence of death in an English jail,” he observed.<sup>29</sup>

It appears that the Irish public were ambivalent towards the IRA until its members faced execution, whereupon their ambivalence hardened into support, however temporary. This support inevitably intensified when the British were the executioners. De Valera, nonetheless, seemed to have a good sense of this ambivalence, which may partially explain his subsequent and apparently illogical behavior, as did the High Commissioner to London, John Dulanty, who espoused concern that a predominantly apathetic public opinion could be transmuted and that the flames of anti-British sentiment could be stoked if the condemned men were executed. Dulanty cautioned that if “these men were executed that would be used by the I.R.A. to excite opinion against this country” and that the “merits of the case” would be completely obscured. All that would be remembered was that “Irishmen had once again been executed in an English prison.”<sup>30</sup> There was, however, an “elementary irony” at play in much of this discourse. Although the proposed execution of Barnes and Richards inevitably appealed more to nationalist sentiment than to logic or justice, it was not simply a matter of transfiguring ambivalent emotion into popular support. The slumbering Irish habitus, after all, could not be galvanized in this manner unless it was already predisposed in this direction.<sup>31</sup>

A number of reasons underlay the apprehension in Westminster about the repercussions of executing Barnes and Richards. First of all, the condemned men were acting, to use the words of eminent death penalty scholar Hugo Bedau, in the “name of an ideology that honors its martyrs.”<sup>32</sup> Hence there was an awareness that the scaffold remained, at least in the popular consciousness, “the altar of Irish

<sup>27</sup> TNA, CAB 65/56/15, 1 February 1940, W. M. (40) 29th Conclusions; TNA, CJ-61, Memorandum, 5 January 1940.

<sup>28</sup> Ibid.

<sup>29</sup> TNA, CJ-61, J. L. Maffey to Eric Machtig, 1 January 1940.

<sup>30</sup> TNA, CJ-61, Copy (Intld.) A.E., 5 January 1940.

<sup>31</sup> J. J. Lee, *Ireland 1912–1985: Politics and Society* (Cambridge, 1989), 223–24.

<sup>32</sup> Quoted in Ted Gottfried, *The Death Penalty: Justice or Legalized Murder?* (Brookfield, CT, 2002), 51.

nationality.”<sup>33</sup> Second, there was a fear of converting “a not altogether unsatisfactory situation into one of undisguised hostility like that of 1916.”<sup>34</sup> As the chancellor of the exchequer, John Simon, put it, it was “well to remember that there had been cases in the past where the view had been taken that it was not wise to commute a death sentence, but where, looking back, it seemed clear that the infliction of the death penalty had not been justified by the results.”<sup>35</sup> Although the chancellor explicitly referred to one of the “Manchester Martyrs,” Michael Larkin, the cautionary tone in much of this discourse inevitably stemmed from the historical irony that the executions in the aftermath of the 1916 Rising had transformed Irish public opinion and engendered sympathy for the rebel cause that they had been administered to undermine.<sup>36</sup> The dead rebels became “martyrs and national heroes” and the ghosts of 1916 “movingly and lastingly haunted political Ireland.”<sup>37</sup> They also, as Maffey wrote in 1940, etched their way into the British political consciousness:

The Cause has always thrived on its martyrs and to-day after a long interval the ghosts come trooping back to the stage ... Public opinion against the miscreants would, I think, have won the day completely. Then suddenly there comes into the picture that old spectre of Irish history—the English scaffold for Irish patriots. The halo of martyrdom is the greatest asset to the cause of the I.R.A. and comes to them at a time when they were obviously losing grip.<sup>38</sup>

While acknowledging that the IRA would encounter difficulties in assimilating the Birmingham executions into the Irish revolutionary tradition as the “audience” was “thinner and less convinced,” Maffey nonetheless concluded that the “halo of martyrdom is maintaining the courage of the condemned men,” and that it would give “others the courage and the call to follow them.”<sup>39</sup> It was deemed inevitable that the IRA would endeavor to exploit historical Republican martyrology and to re-invent it with the newly immolated names of Barnes and Richards, albeit in a changed and contested context.

Elements in the British government were also sensitive to the potential for the execution of Irish Republicans to impact Anglo-American relations negatively.<sup>40</sup> “Opinion in the United States,” as the Lord Privy Seal articulated, “mattered a great deal,” and thus there was apprehension in the British foreign office that the executions would “antagonize Irish-American opinion.”<sup>41</sup> In early February, the

<sup>33</sup> D. George Boyce, “A Gallous Story and a Dirty Deed”: Political Martyrdom in Ireland Since 1867,” in *Ireland’s Terrorist Dilemma*, ed. Yonah Alexander and Alan O’Day (Dordrecht, The Netherlands, 1986), 7–28, at 20.

<sup>34</sup> TNA, CJ-61, Hugh Montgomery to McDonald, 15 December 1939.

<sup>35</sup> TNA, CAB 65/56/15, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>36</sup> Richard English, *Armed Struggle: The History of the IRA* (Oxford, 2003), 5. The rebels of 1916 received a soldier’s execution by shooting, rather than being hanged by the neck as common criminals. Roger Casement, by contrast, was hanged for treason in Pentonville Prison, London.

<sup>37</sup> TNA, CJ-61, Hugh Montgomery to McDonald, 15 December 1939; English, *Armed Struggle*, 6.

<sup>38</sup> TNA, CJ-61, J. L. Maffey to Eric Machtig, 1 January 1940.

<sup>39</sup> *Ibid.*

<sup>40</sup> TNA, FO 371/24252, Irish Executions: Effect on Irish-American Opinion, 31 January 1940.

<sup>41</sup> TNA, CAB 65/56/16, 1 February 1940, W. M. (40) 29th Conclusions; TNA, FO 371/24252, Decypher. The Marquess of Lothian (Washington), 31 January 1940. TNA, FO 371/24252, Irish Executions: Effect on Irish-American Opinion, 31 January 1940.

foreign office was duly informed that “it would be advisable from the point of view of Anglo-Irish relations to commute the death sentences of IRA murderers” as they had the potential to provoke “a wave of popular indignation amongst the powerful Irish-American communities in New England and New York City.”<sup>42</sup> This was also the assessment of the cabinet’s most trusted confidants in Ireland, who conveyed that grave corollaries could arise “indirectly in the form of an outburst of anti-British feeling among Irish sympathisers abroad, especially in the U.S.A.”<sup>43</sup> Maffey, too, counseled against rousing “foreign opinion, notably in the U.S.A., by a new chapter of trouble in Ireland,” but this discourse failed to persuade the First Lord of the Admiralty, Winston Churchill, who avowed that “Irish opinion in the United States was of very limited effect.”<sup>44</sup> It was “useless,” he continued, to “think that any action on our part would placate the small secret societies” and, in any case, “he strongly deprecated the idea that, in order to placate opinion in the United States, we should fail to give His Majesty’s lieges their due protection.”<sup>45</sup>

Even a last-minute appeal from President Roosevelt exhorting a “six months reprieve to Richards and Barnes” failed to convince the British government to alter its position. Roosevelt implored the British government that ephemeral clemency could be extended for an additional six months “in view of [the] seriousness of the international situation and probability of effect of execution in this country.”<sup>46</sup> But although regretful of “possible ill-feeling over this case in the United States,” the prime minister, Neville Chamberlain, imparted that there was no procedure in English law to facilitate the temporary suspension of a death sentence and thus the law must take its course.<sup>47</sup> While Chamberlain justified the imminent executions as an unavoidable concomitant of English criminal law, the First Lord of the Admiralty deemed them necessary to gratify an English audience enduring the exigencies of war. It would be “impolitic,” Churchill observed, to “fail to execute justice according to law in a case of this kind. Such action would not square with an equal standard of justice, especially at a time when men were risking their lives daily for their country.”<sup>48</sup>

The Irish government manipulated newspaper coverage of the case with the censorship board, countenancing “all matter likely to influence a favourable decision,” but censoring “anything likely to militate against a reprieve.”<sup>49</sup> This ensured “mass coverage” of the protest campaign, particularly in the *Irish Press*, but Maffey still suspected that there was a “vast deal of humbug” in the Coventry agitation insofar as it was described as “nation-wide.”<sup>50</sup> The Lord Privy Seal, Clement Attlee, asserted that

<sup>42</sup> Ibid., J. Belton to Mr. Scott, 2 February 1940.

<sup>43</sup> TNA, CJ-61, Memorandum, no date.

<sup>44</sup> TNA, CJ-61, J. L. Maffey to Eric Machtig, 1 January 1940; TNA, CAB 65/56/16, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>45</sup> Ibid.

<sup>46</sup> TNA, FO 371/24252, Decypher. The Marques of Lothian (Washington), 3 February 1940.

<sup>47</sup> TNA, FO 371/24252, Decypher Telegram to The Marques of Lothian (Washington), 6 February 1940.

<sup>48</sup> TNA, CAB 65/56/16, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>49</sup> Donal O’Drisceoil, *Censorship in Ireland 1939–1945: Neutrality, Politics and Society* (Cork, 1996), 237.

<sup>50</sup> For newspaper coverage, see Liam O’Callaghan, *The History of the Death Penalty in Ireland since the Civil War* (MPhil diss., University College Cork, 2003). TNA, CJ-62, Decypher Telegram from the United Kingdom Representative to Eire, 8 February 1940.



“in time of war it was necessary to accept unpleasant consequences,” but that it was necessary to undertake whatever “action was best calculated to help ... win the war”; thus he was “not so much influenced by what would be said in Eire.” We “were always being told that if we would make this or that concession to Eire they would adopt a more friendly attitude to us; and in the event they did not do so,” he bemoaned.<sup>51</sup> The home secretary was also dubious that the condemned men would be lauded as martyrs. Recounting “his own experiences in Ireland when he had been Under-Secretary at the end of the Great War,” Anderson endeavored to dispel the inevitability of Republican martyrdom: “It was not true that every Irishman who was hanged became a martyr. One rarely heard the names of the two men who had murdered Sir Henry Wilson,” he recalled.<sup>52</sup>

But in Ireland, there was apprehension that the Second World War presented an opportunity for resurgent radical separatist-nationalism, much in the same way as the Great War had in the period 1914–16. This historical memory and the fact that Ireland, as a post-civil war society, was potentially vulnerable to another schism under the duress of an international crisis was encapsulated by circuit court judge Cahir Davitt, albeit he was dismissive of the attempt to assert historical continuity between the executed of 1916 and the wartime IRA. So far “the present generation of extremists have no martyr to sanctify their cause,” he observed. Fretful that Britain would once again “supply the deficiency,” the circuit court judge furnished a reminder that conciliation had been the primary political casualty of 1916.<sup>53</sup>

De Valera and the Irish government seemed to have a contradictory stance towards the death penalty; they appealed against the executions of IRA volunteers in Britain and Northern Ireland while at the same time they introduced emergency powers to impose the death penalty, and refused to commute certain Republican death sentences in the South. But given the realpolitik of the Irish state, it seems reasonable to surmise that the contradictory behavior of De Valera and the Irish government may have been part of an ongoing process since 1933 of delegitimizing the IRA, while simultaneously reinforcing Fianna Fail as the new Republican legitimacy in Ireland.<sup>54</sup> Furthermore, if one recognizes the “existence of a southern nationalist ideology” and agrees with John Regan’s assertion that De Valera adopted a policy of “pragmatic partition,” it could also be contended that De Valera lobbied against the execution of Republicans in Britain, and subsequently in Northern Ireland, in an endeavor to pacify the Catholic minority in the North and to prevent the violence spreading over the border.<sup>55</sup> Yet whatever the underlying rationale, that the constitutional movement in Ireland had been damaged irreparably by executions during World War I carried little emphasis with the British home secretary during World War II. The “present case,” as Anderson pointed out, was neither the “first, nor an isolated case; nor was there any reason to suppose that the I.R.A. would be influenced to desist from crime by clemency.”

<sup>51</sup> TNA, CAB 65/56/16, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>52</sup> *Ibid.*, 11. Reginald Dunn and Joseph O’Sullivan were convicted of the murder and executed on 10 August 1922.

<sup>53</sup> TNA, CJ-62, Cahir Davitt to John Morris, 2 February 1940.

<sup>54</sup> Caoimhe Nic Dháibhéid, “Throttling the IRA,” in *From Parnell to Paisley: Constitutional and Revolutionary Politics in Modern Ireland*, ed. Caoimhe Nic Dháibhéid and Colin Reid (Dublin, 2010), 116–38.

<sup>55</sup> John M. Regan, “Southern Irish Nationalism as a Historical Problem,” *Historical Journal* 50, no. 1 (March 2007): 197–223, at 199–200.

A proportionate penalty for continual provocation, the ultimate sanction was deemed “necessary to convince those who were conducting the I.R.A. campaign that they must stop their activities.”<sup>56</sup>

On 7 February 1940, Barnes and Richards faced Thomas and Albert Pierrepont in Birmingham Prison.<sup>57</sup> These were hangings that provoked the type of emotional reaction in Ireland that De Valera had been trying to circumvent.<sup>58</sup> The nation descended into “mourning”: shops and businesses were shut down; theaters and cinemas were closed; flags were flown at half-mast and sporting fixtures were cancelled.<sup>59</sup> In addition to these signs of grief, the aftermath acquired a quasi-religious aspect as requiem masses were offered for the condemned men.<sup>60</sup>

The representation furnished by De Valera on behalf of the two men, and his reputed “violent reaction” to the executions, seemed inspired by his fear of an upsurge of anti-British feeling in Ireland.<sup>61</sup> Such sentiment, as De Valera was only too mindful, could potentially create an environment in which the gunman could operate.<sup>62</sup> Thus, it may have been diplomatically expedient to evoke the tenets of Irish nationalist martyrology when lobbying for the lives of Barnes and Richards—Republicans striving to end partition on the British mainland—but the same degree of clemency would not subsequently be afforded to six of their counterparts in the Irish state. Rather than “find common ground with their old and bitter enemy” thereafter, the De Valera government would deploy the death penalty against the IRA as part of a package of strategic legal measures introduced to crush subversive activity and “secure the state.”<sup>63</sup>

## EMERGENCY POWERS AND MILITARY COURTS, 1939–1945

An important dimension to the study of capital punishment in post-partition Ireland is the use of military courts and the almost unseemly haste with which politically motivated offenders in the South were tried, sentenced, and put to death. The time intervals between crime, conviction, and execution encapsulate the brevity facilitated by the use of nonjury courts, with conviction typically following crime within a fortnight; within another fortnight, the condemned man had met his end. As these prisoners had only a limited right of appeal in a context where the government was resolute and the execution carried out by local soldiers, there were few potential obstacles to overcome.<sup>64</sup>

<sup>56</sup> TNA, CAB 65/56/16, 1 February 1940, W. M. (40) 29th Conclusions.

<sup>57</sup> For the hiring of English Executioners in Ireland, see Ian O'Donnell and David M. Doyle, “English Hangmen and a Dublin Gaol, 1923–54,” *New Hibernia Review* 18, no. 4 (Winter 2014): 101–18.

<sup>58</sup> Sean Cronin, *Washington's Irish Policy 1916–1986* (Dublin, 1987), 76.

<sup>59</sup> *Ibid.*; Coogan, *The IRA*, 130–31; O'Drisceoil, *Censorship in Ireland*, 237.

<sup>60</sup> For a similar semi-religious response in the aftermath of the executions in 1916, see Michael Laffan, *The Resurrection of Ireland: The Sinn Féin Party 1916–1923* (Cambridge, 2004), 53.

<sup>61</sup> TNA, CJ-62, Decypher Telegram from the United Kingdom Representative to Eire, 8 February 1940; Longford and O'Neill, *Eamon de Valera*, 359–60.

<sup>62</sup> Boyce, “A Gallous Story and a Dirty Deed,” 23.

<sup>63</sup> TNA, CJ-62, Decypher Telegram from the United Kingdom Representative to Eire, 8 February 1940; Mary Rogan, *Prison Policy in Ireland: Politics, Penal-Welfarism and Political Imprisonment* (London, 2010), 54–71.

<sup>64</sup> Doyle and O'Donnell, “The Death Penalty in Post-Independence Ireland,” 75–76. Appeals were permitted from the Special Criminal Court, but no such right existed for those convicted by the Military Court.

For political prisoners whose death sentences were commuted, there was significant cross-jurisdictional variation in the time served before release. In the South—with the exception of Thomas MacCurtain—IRA men who were reprieved tended to be released relatively quickly, emphasizing that the threat they posed was very context dependent. IRA men whose sentences were commuted in the North served more than twice as long as their southern counterparts—seven years on average—but the range in the South was wider (one year and nine months to seven years and nine months).<sup>65</sup> For example, Michael Walsh and Patrick Davern each served three years in southern jails for their involvement in what became known as the “Devereux Affair,” a case that illustrates the extraordinary emergency powers adopted and utilized in the southern state throughout the Second World War.<sup>66</sup>

In August 1940, Michael Devereux, a quartermaster of the IRA’s Wexford battalion, was detained for three days after a Garda raid on a “trap-house” in Dublin.<sup>67</sup> Devereux was subsequently released without charge, but a “short time afterwards the police discovered a dump of arms in Co. Wexford” in circumstances that suggested to the IRA that while in custody Devereux had revealed its whereabouts.<sup>68</sup> Convinced that Devereux had “talked” before his release, the IRA made the decision to execute him.<sup>69</sup> Amidst a broader internal IRA crisis conventionally referred to as the “Hayes Affair,” it was never established conclusively “who gave the order for the murder of Devereux,” but the consensus among the Gardaí at the time was that it was the “personal decision of Stephen Hayes of Wexford, the then Chief of Staff of the IRA.” An extant memorandum for government also disclosed that “Joseph O’Connor, Divisional O/C of the organisation in the area embracing Co. Wexford, received a dispatch from a higher authority in Dublin ordering Devereux’s ‘execution’ and that he chose a local training officer, Michael Walsh, and George Plant, a member engaged full time on IRA activities, to carry out the order.” Accordingly, on the night of 23 September, the two men, with accomplices, lured Devereux away from his home on the pretext that his help was needed on IRA matters. After a few days reputedly hiding from the Gardaí, a safe location was found for his murder in the Slievenamon Mountains. It appears, however, that certain local accomplices spoke too openly about the matter and that “police in Co. Wexford were aware of rumours to the effect that Devereux had been shot by the I.R.A. as a police agent.” By September 1941, the police seemed to have “unravelling the threads of the murder conspiracy.” Walsh and Davern allegedly broke down under cross-examination, admitted their guilt, and implicated Plant and O’Connor in the murder. Davern also reputedly brought the Gardaí to the remote location where Devereux’s remains were buried.<sup>70</sup>

<sup>65</sup> I am much obliged to Angela Jones, Public Record Office of Northern Ireland (PRONI), for this information.

<sup>66</sup> Death sentences after 1964 were also imposed by the nonjury Special Criminal Court.

<sup>67</sup> J. Bowyer Bell, *The Secret Army: The IRA 1916–1979* (Dublin, 1990), 187.

<sup>68</sup> Memorandum for Government in connection with petition for release of Michael Walsh and Patrick Davern who are serving commuted sentences for life for the murder of Michael Devereux, 7 November 1945, DT S12741, NAI (hereafter cited as Memorandum Walsh and Davern).

<sup>69</sup> See Michael Moroney, *George Plant and the Rule of Law: The Devereux Affair 1940–1942* (Tipperary, 1989).

<sup>70</sup> Memorandum Walsh and Davern.

After the unearthing of Devereux's body, Plant and O'Connor were charged with the murder and arraigned before the Special Criminal Court.<sup>71</sup> The State case against Plant and O'Connor rested entirely on the statements furnished by Walsh and Davern, but the prosecution collapsed when both witnesses refused to testify, claiming that they had been cowed into giving incriminating evidence. The government reacted swiftly to the situation. On 11 December 1941, the attorney general entered a *nolle prosequi* before the Special Criminal Court, and the government promulgated Emergency Powers (No. 41 F) Order, transferring the trial to the Special Military Court. Plant and O'Connor were promptly rearraigned and tried before the military court for the murder.<sup>72</sup> Walsh and Davern were also, on this occasion, charged with a capital offense, although the surviving evidence reveals that it was believed that they had not the same degree of involvement as Plant and O'Connor and that the charges against them could be more appropriately decided upon when the other cases had concluded. The prosecution in the Special Criminal Court had been directed to ensure that Plant and O'Connor did not evade punishment, but Davern and Walsh were unwilling to give evidence verifying the statements that they had previously made to the Gardaí. Consequently, the four men were tried, jointly, for the killing before a military court.<sup>73</sup>

Confronted with the IRA's alleged intimidation tactics, the government responded by altering the laws of evidence as to the admission of statements and by not binding the military court to any rule of evidence, whether statutory or common law. They also promulgated controversial Emergency Powers (No. 139) Order that provided, *inter alia*, that the military court could take "cognisance of such voluntary statements as those of Walsh and Davern even though the authors of such statements refused to give evidence in Court."<sup>74</sup> Thus while awaiting trial before the military court, the defense sought orders of *habeas corpus* and prohibition in the High Court. Although recognizing that the relevant orders were "a radical departure from the recognised rules of procedure," the court dismissed the applications after a four-day hearing. That conclusion was subsequently affirmed by the Supreme Court and the trial before the military court proceeded.<sup>75</sup> After an eleven-day hearing, Plant, Walsh, and Davern were convicted and sentenced to death. O'Connor was acquitted as the "court held that he had not been identified in the case to its satisfaction."<sup>76</sup> On 2 March 1942, the cabinet commuted the sentences of Davern and Walsh to life imprisonment, the latter regarded by the Bishop of Ossory as more a "dupe and tool" than a "murderer."<sup>77</sup> Three days later, George Plant stood before a firing party in Portlaoise Prison.

The wheels of justice moved faster for Tom Williams in Northern Ireland, with just under four months between the murder of Royal Ulster Constabulary constable, Patrick Murphy in April 1942, and his conviction in July 1942, and another thirty-three days between conviction and sentence.<sup>78</sup> Although his five accomplices

<sup>71</sup> Coogan, *The IRA*, 157.

<sup>72</sup> See [1942] IR 112.

<sup>73</sup> Memorandum Walsh and Davern.

<sup>74</sup> *Ibid.*

<sup>75</sup> [1942] IR 112, at 118.

<sup>76</sup> Memorandum Walsh and Davern.

<sup>77</sup> Bishop of Ossory, Patrick Collier, to Eamon De Valera, 27 February 1942, DT S12741, NAI.

<sup>78</sup> Thank you to Angela Jones, PRONI, for this information.

were reprieved after the largest agitation initiated by the IRA during the Second World War, Williams was hanged on 2 September, despite a last-minute appeal from De Valera to Churchill.<sup>79</sup> Widespread publicity was permitted to the clemency campaign in the South, but, as O'Drisceoil asserts, “unhelpful matter” which exposed the hypocrisy of the Irish government’s position” was censored, like the remarks of one observer who commented that “the government’s arguments to the British were lessened in force because the British could point to the same actions by them.” Even the American ambassador, David Gray, commented on the inconsistency: “[a]pparently ... murder by the IRA is murder only in Eire and not when committed north of the border.”<sup>80</sup> Williams, for his part, went to his death bravely and, in the words of Richard English, became a “celebrated part of Belfast republican folkloric and balladic culture, a lasting icon from grim years for the IRA.”<sup>81</sup> Remembered by one of his accomplices—the “notorious Joe Cahill”—as “a man of great determination, courage and bravery,” Williams was nonetheless dealt with in death like a common criminal, his last sensation being the tightening of the noose rather than the sound of a fusillade.<sup>82</sup>

At the other end of the spectrum, the wheels of justice ground slowly for Charles Kerins, with more than two years elapsing between the murder of Detective Sergeant Denis O'Brien and Kerins's conviction; another fifty-three days elapsed between conviction and sentence.<sup>83</sup> At the time of the murder, Kerins was deputy chief of staff of the IRA, and head of “the dwindling IRA” in Dublin.<sup>84</sup> During trial, the prosecution submitted that “the duties of the late Det.-Sergt. O'Brien furnished a motive for his murder, and that the murder was planned by the I.R.A. and carried out by members of that organisation.”<sup>85</sup> Whether this was the case or not, the court only heard the prosecution's version. Kerins, like McGrath and Harte before the military court four years previous, refused to submit any defense or appoint counsel, and offered “no attempt to refute the evidence for the prosecution by cross-examination or otherwise.”<sup>86</sup> Even after the court adjourned for three days to give the accused “an opportunity to consider his position” and to “obtain legal assistance,” Kerins declined to “answer the case made against him.”<sup>87</sup> In the absence of a defense, the court unsurprisingly convicted him of the “diabolical act” and the conviction was upheld by the Court of Criminal Appeal, with expressions of approval of the “careful trial, during which every consideration was shown to the prisoner.”<sup>88</sup>

<sup>79</sup> Coogan, *The IRA*, 179; Longford and O'Neill, *Eamon de Valera*, 399.

<sup>80</sup> O'Drisceoil, *Censorship in Ireland*, 240.

<sup>81</sup> English, *Armed Struggle*, 69.

<sup>82</sup> TNA, CJ 4/2497, T. A. Cromeey to I. M. Burns, 29 May 1979; Jim McVeigh, *Executed: Tom Williams and the IRA* (Belfast, 1999), xix.

<sup>83</sup> Doyle and O'Donnell, “The Death Penalty in Post-Independence Ireland,” 76.

<sup>84</sup> Oliver Sheehy Skeffington to Eamon De Valera, 1944, DT S13567-1, NAI; Bell, *Secret Army*, 234.

<sup>85</sup> Charles Kerins: Sentenced to Death, undated, DT S13567, NAI.

<sup>86</sup> See Doyle and O'Donnell, “The Death Penalty in Post-Independence Ireland,” 83–89; Trial of Charles Kerins for Murder of Detective Sergeant O'Brien, DT S13567, NAI.

<sup>87</sup> *Ibid.*

<sup>88</sup> Telegram addressed to the Executive Council, Government Buildings, 29 November 1944, DT S13567-1, NAI; Coogan, *IRA*, 192; Charles Kerins: Sentenced to Death, undated, DT S13567, NAI; [1945] IR 339.

Yet despite the contemptuous attitude of the accused, sympathizers contended that he had not been afforded a fair trial and that had he introduced a defense, the “facts might have been elicited which might have secured his acquittal.”<sup>89</sup> But it was not just the trial and the sentence that provoked resentment. Press censorship coalesced with rigorous police activity to ensure that any information advocating a commutation of the sentence was robustly repressed.<sup>90</sup> Indeed, there is more than a little irony in the fact that there was “marked difference” in the level of press coverage and publicity permitted in the campaign to secure a reprieve for Kerins and other IRA members in the twenty-six counties, especially when juxtaposed with the exposure that had hitherto been afforded to the clamor for clemency in relation to the death sentences imposed on Barnes and Richards in Britain, and Williams in Northern Ireland.<sup>91</sup> But amidst claims and counter-claims of intimidation, the Department of Justice was adamant that if the country was “to be preserved from anarchy,” the government had to take “a firm stand” against such political dissidents.<sup>92</sup>

But the government, of course, could not stifle the cornucopia of letters beseeching mercy. “The old ‘Free’ State gang are sitting back enjoying the fun,” one correspondent observed. “They are having a quiet laugh up their sleeves. Yes, they are wondering if you shall ever catch up on their number—Seventy Seven. Please disappoint them this time.”<sup>93</sup> Another pleaded, “[w]e appeal to you in the name of God and in the name of the men, and women, of Ireland, who have given their lives for the Complete Independence of Ireland not to put the English hangman’s rope round the neck of Charles Kerins.”<sup>94</sup> The postulation that De Valera would “not let him hang” proved entirely misjudged.<sup>95</sup> Sentenced to death by the Special Criminal Court rather than by the then-obsolete military court, Kerins was “hanged by the neck” in Mountjoy Prison.<sup>96</sup> The governor of Mountjoy paid Kerins the following grim tribute:

He was the bravest man I ever saw die by hanging. . . . Much as I hated the murder of my friend Dinny O’Brien I admired Charles Kerins for his courage and his idealism and never more than during the moments before his death when he stood at attention on the scaffold and submitted himself to the hands of his executioners.<sup>97</sup>

To borrow lines from Shakespeare’s *Macbeth*, “Nothing in his life / Became him like the leaving it,” but Kerins, like Williams, was dealt with in death like a common

<sup>89</sup> For a variety of correspondence on this issue see DT S13567, NAI. See also, Copy of Resolution passed by the Kerry County Council on the 23rd November 1944, DT S13567-1, NAI.

<sup>90</sup> O’Drisceoil, *Censorship in Ireland 1939–1945*, 240–41.

<sup>91</sup> Brian Hanley, *The IRA: A Documentary History 1916–2005* (Dublin, 2010), 102.

<sup>92</sup> Read for Taoiseach on 1st inst—probably supplied to him by Dept. of Justice, 4 December 1944, DT S13567, NAI.

<sup>93</sup> W. B. Dwyer to Eamon De Valera, 28 November 1943, DT S13567-1, NAI. According to Gerard O’Brien, “For many, it is clear, capital punishment, at least when aimed at the IRA, was a practice associated with the evils of British rule and the ‘misguided’ Cumann na nGaedheal policies of the civil war period.” See Gerard O’Brien, “Capital Punishment in Ireland,” in *Reflections on Law and History*, ed. Norma M. Dawson (Dublin, 2006), 223–58, at 238.

<sup>94</sup> Bridget and Walter Dudley Edwards to Eamon De Valera, 29 November 1944, DT S13567-1, NAI.

<sup>95</sup> Josephine Whelan to Eamon De Valera, undated, DT S13567-1, NAI.

<sup>96</sup> Eire Special Criminal Court, DT S13567, NAI.

<sup>97</sup> “Memories of Mountjoy Jail as told by Governor Sean Kavanagh to Liam MacGabhann.” I am much obliged to Sean Reynolds, Mountjoy Prison Museum, for providing me with a copy of this article.

criminal rather than the soldier he believed himself to be.<sup>98</sup> Indeed, it is difficult not to feel some empathy for Kerins and the five other IRA men who were executed by the Irish state between September 1940 and December 1944, by one method or another, for “they could not unreasonably claim to be the logical products of the political culture which now sought to suppress them.”<sup>99</sup> Kerins may have “died game” in one last act of defiance to the state whose legitimacy he did not accept, but his demise also symbolized the steady erosion of the Republican vision with the government now only paying “lip-service to the ideals of 1916.”<sup>100</sup>

### THE POSTWAR PERIOD, 1945–1990

The utilitarian justification that nothing less severe than the death penalty would act as a sufficient deterrent to those who committed politically motivated crimes would continue to surface routinely whenever capital punishment was debated in the postwar period. In 1956, for instance, J. LL J. Edwards wrote that the “constant threat of armed violence by those imbued with the idea of ending Partition, a step resolutely opposed by the presently constituted Parliament, must be met, so it is argued, by the deterrent of the death penalty.”<sup>101</sup> The threat of capital punishment thus was regarded as an essential instrument of security in both jurisdictions, the abandonment of which would be interpreted as a sign of weakness in the apparatus of state control both in peacetime and in times of political unrest. As an Irish government memorandum pointed out in 1956, “[n]o one who is acquainted with recent history can have any illusions on this subject or entertain the slightest doubt that so long as there is an organised attempt to achieve political objects by violence—it is really a form of warfare—the death penalty is still necessary.”<sup>102</sup>

Although both Irish jurisdictions anticipated Britain and many other western countries in abandoning the death penalty for ordinary offenses, there was particular reluctance in both jurisdictions throughout the 1960s, but particularly in the South, to embrace abolition *de jure* for political offenses in peacetime.<sup>103</sup> As one civil servant put it in 1962:

I have considered the question again and I do not think it would be practical for full abolition in peace time. The exceptions—in the cases of deaths caused by violence in an I.R.A. campaign + mutiny by violence in an army revolt—are necessary, at any rate, as far as police control of the I.R.A. is concerned. If the death penalty were to be abolished at this stage for I.R.A. murders it would undoubtedly have a revivifying effect on the organisation.<sup>104</sup>

<sup>98</sup> William Shakespeare, *Macbeth*, ed. Joseph Pearce (San Francisco, 2010), 17.

<sup>99</sup> Lec, *Ireland 1912–1985*, 224.

<sup>100</sup> Clair Wills, *That Neutral Island: A Cultural History of Ireland during the Second World War* (London, 2007), 311.

<sup>101</sup> J. LL. J. Edwards, “Capital Punishment in Northern Ireland,” *Criminal Law Review* (1956): 750–58, at 752.

<sup>102</sup> Memorandum for the Government, 12 April 1956, DT S7788B, NAI.

<sup>103</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford, 2008), 405–9.

<sup>104</sup> Abolition of death penalty in certain cases, 31 December 1962, DJUS 2004/32/20, NAI.

The publication of *Amnesty International Resolution to Postpone Capital Punishment for Political Offences in Peacetime* evoked a similar response in Northern Ireland in 1966. There “is no doubt,” wrote one government official, that “experience in Ireland, both North and South, has shown that retention of the death penalty is essential if the community is to be defended against the tyranny of the political murderer.”<sup>105</sup> To acquiesce with this resolution, he observed, “would mean that the law would cease to be an effective deterrent and would encourage all kinds of subversive murders.”<sup>106</sup> Yet despite its perceived efficacy as a deterrent to the potential political murderer, capital punishment was abolished at the height of subversive killing in the North a mere five years thereafter, as the British government feared that an execution in this context would be “wholly counterproductive.”<sup>107</sup> Indeed, there is a notable contradiction here—the death penalty was perceived to be a deterrent in Northern Ireland when subversive killing was minimal, but it ceased to fulfil this utilitarian function once politically motivated killing escalated.<sup>108</sup>

The Criminal Justice (Northern Ireland) Act, 1966, abolished the death penalty for most types of murder; however, the death penalty was the mandatory sentence for any person who killed a police officer or Crown servant, or who assisted in such a murder. The death penalty also remained on the statute book for killings committed in the course or furtherance of any seditious activities. Only two persons—Albert Edward Browne (Protestant) and William Gerald Holden (Catholic)—were convicted of “capital murder” under the 1966 legislation, but both were reprieved.<sup>109</sup> Implementing these death sentences, according to advice furnished by the Army and security forces to secretary of state William Whitelaw would have, to use the words of Humphrey Atkins, MP, made the “task of maintaining law and order even more difficult.”<sup>110</sup> Thus, in 1973, the British government elected to end the theoretical existence of the death penalty in Northern Ireland, by incorporating an abolitionist clause into the Northern Ireland (Emergency Provisions) Bill, which was principally concerned with repealing the Special Powers Act and the introduction of nonjury “Diplock courts.”<sup>111</sup> The timing, however, was quite peculiar given the “appallingly high levels of killing in the early 1970s.”<sup>112</sup> As a confidential document stated in 1973, “[i]n terms of the situation in Northern

<sup>105</sup> Mr. A. Leitch to H. Black, Secretary to the Cabinet, 8 September 1966, HA/8/1953, PRONI.

<sup>106</sup> Ibid.

<sup>107</sup> Douglas Hay, “Hanging and the English Judges: The Judicial Politics of Retention and Abolition,” in *America’s Death Penalty: Between Past and Present*, ed. David Garland, Randall McGowen, and Michael Meranze (New York, 2011), 129–65, at 156.

<sup>108</sup> The number of politically motivated killings in the Irish Republic remained low. See Enda Dooley, *Homicide in Ireland 1972–1991* (Dublin, 1995), 16.

<sup>109</sup> William Gerald Holden was convicted on 19 April 1973 for the murder of a soldier in September of 1972. His conviction was quashed by the Court of Appeal in Belfast in June 2012. He served seventeen years in prison before being released on license in 1989. See *Irish Times*, 22 June 2012. Albert Edward Browne, a member of the Ulster Defence Association, was convicted on 14 February 1973 for the murder of a policeman in October of the previous year. See PRONI, BELF/1/1/2/250/102, R V Browne & Harrison (Redacted Copy), 1973.

<sup>110</sup> TNA, CJ 4/2497, Letter from David Madel to Humphrey Atkins, 10 May 1979.

<sup>111</sup> Gavan Drewry, “The Politics of Capital Punishment,” in *Law and the Spirit of Inquiry*, ed. Gavin Drewry and Charles Blake (The Hague, 1999), 137–60, at 146.

<sup>112</sup> There were 969 deaths between 1970 and 1973, with 497 deaths in 1972 alone. See English, *Armed Struggle*, xxiii, 379.



Ireland it may be argued that it seems strange to abolish the death penalty for the murder of a Crown servant when terrorism is rife and individuals are being shot by the security forces for actions which do not always extend as far as actual murder.”<sup>113</sup> That said, if the security forces in Northern Ireland were genuinely operating a “shoot-to-kill” policy against paramilitaries (and there is at least anecdotal evidence to suggest that they were), capital punishment would have been rendered somewhat superfluous in any case.<sup>114</sup>

Yet although there was “virtually no evidence on which to judge the effectiveness of the death penalty,” there appears to have been a reluctance to embrace international treaties to ban capital punishment in the United Kingdom post-abolition with the “Northern Ireland factor” never far from political discourse on the matter.<sup>115</sup> In toto, between 1969 and 1993, there were thirteen attempts to reintroduce the noose in the United Kingdom for certain categories of murder (including causing death through terrorist acts), when restoration amendments were debated and defeated with increasing majorities.<sup>116</sup> There was also a motion moved by MP Brian Walden in the House of Commons in December 1974 affirming that the “introduction of the death penalty would neither deter terrorists nor increase the safety of the public.”<sup>117</sup> Peter Hodgkinson has observed that a variety of strategies were adopted by those seeking the reintroduction of capital punishment; in the parliamentary debates of the 1980s, the “terrorist murderer” was one for whom restoration was particularly sought, together with the killers of police and prison officers.<sup>118</sup> In the 1983 debate, for instance, six restoration amendments were proposed for these offenses, although all were subsequently thwarted.<sup>119</sup>

Many contemporary observers deemed that the focus on terrorists was “emotional or even irrational” when the amendment, which was endorsed by the home secretary, Leon Brittan, was defended on grounds of its supposed deterrent effect.<sup>120</sup> Statistical evidence for or against this claim is, as Clive Walker has pointed out, incredibly difficult to find, but there were grave reservations concerning the efficacy of the death penalty for politically motivated offenders, who already risked death at the hands of security forces.<sup>121</sup> As William Whitelaw observed in 1973, there was bound to be very little qualitative difference in the terrorist psyche between execution and other potential modes of death:

[I]t is obvious that there are people in Northern Ireland, however small in numbers they may be, who are obviously prepared to face death, whether by firing at a soldier and risking death at his hands, or killing an unarmed member of the UDR [Ulster

<sup>113</sup> TNA, PREM 15/1736, Capital Punishment in Northern Ireland, 10 April 1973.

<sup>114</sup> Helsinki Watch, *Human Rights in Northern Ireland: A Helsinki Watch Report* (New York, 1991), 48–51.

<sup>115</sup> TNA, CJ 4/2497, Death Penalty in Northern Ireland, 3 April 1973; Drewry, “The Politics of Capital Punishment,” 137–59; Hood and Hoyle, *Death Penalty*, 46–47.

<sup>116</sup> Hood and Hoyle, *Death Penalty*, 46.

<sup>117</sup> Parliamentary Debates, Commons, 5th ser., vol. 883 (1974), col. 518–19 (11 December 1974). The motion was approved by 361 votes to 232.

<sup>118</sup> Hodgkinson, “The United Kingdom and the European Union,” 195.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Walker, *The Prevention of Terrorism in British Law*, 305.

Defence Regiment] in his home and risking execution by sentence in the courts. This does not prove that the death penalty is no deterrent; but it does cast considerable doubt on the premise.<sup>122</sup>

Yet even if one assumes that the core basis of the “unique deterrent force attributed to the death penalty” lay more in the example furnished by “actual hangings rather than in the threat of execution if detected and convicted,” it is questionable whether the existence of the death penalty ever effected to any degree the number of politically motivated killings committed in Northern Ireland.<sup>123</sup> As a confidential memorandum stated, between January 1969 and April 1973 there were only thirteen persons charged with capital murder in Northern Ireland, of which only one was convicted and sentenced to death. By contrast, thirty-six policemen, including reservists, and 193 soldiers, including members of the Ulster Defence Regiment, were murdered in the same period.<sup>124</sup> The remote possibility of judicial execution certainly appeared to be “particularly ineffective as a deterrent” in “dealing with political fanatics” who were clearly “prepared to put their lives at risk in carrying out their actions.”<sup>125</sup>

Thus, despite strong public opinion and pressure within the Conservative party to reinstate capital punishment for terrorist offenses, it appears that successive governments endorsed William Whitelaw’s opinion in 1973 that capital punishment “was not an effective deterrent in a terrorist situation.”<sup>126</sup> Unsurprisingly, the subsequent appalling spate of wrongful and unsafe convictions for terrorist bombings such as the “Guildford Four” and the “Birmingham Six” helped put an end to these debates.<sup>127</sup> This, of course, would not have been the case if they had been executed.<sup>128</sup> As Lord Denning put it, “[t]hey’d have been forgotten” and the “whole community” would reputedly have been “satisfied.”<sup>129</sup>

## A DIFFERENT TYPE OF DEATH

In *The Irish Story*, Roy Foster recalls that a number of Irish historians lobbied the British government against the reintroduction of capital punishment when they seemed that way inclined in the aftermath of the assassination of Airey Neave in 1979.<sup>130</sup> The public letter, prefiguring some of what is written in this article,

<sup>122</sup> TNA, FC 087/265, Northern Ireland (Emergency Provisions) Bill, New clause abolishing the death penalty for murder.

<sup>123</sup> Edwards, “Capital Punishment in Northern Ireland,” 752; TNA, CJ 4/2497, Death Penalty in Northern Ireland, 3 April 1973.

<sup>124</sup> TNA, CJ 43/49, Death Penalty in North Ireland, 3 April 1973.

<sup>125</sup> TNA, CJ 4/2497, Capital Punishment, 29 March 1973.

<sup>126</sup> TNA CAB/128/52/21, Conclusions of a Meeting of the Cabinet held at 10 Downing Street, 12 April 1973.

<sup>127</sup> Hood and Hoyle, *Death Penalty*, 47.

<sup>128</sup> Malcolm Coulthard, “The Official Version: Audience Manipulation in Police Records of Interviews with Suspects,” in *Texts and Practices: Readings in Critical Discourse Analysis*, ed. Carmen Rosa Caldas-Coulthard and Malcolm Coulthard (London, 1996), 166–78, at 166.

<sup>129</sup> *Ibid.* Denning also remarked that had the Guildford Four been executed they would have “probably hanged the right men.”

<sup>130</sup> R. F. Foster, *The Irish Story: Telling Tales and Making It up in Ireland* (Oxford, 2001), 45–46. The Irish National Liberation Army claimed responsibility for the murder.

made the case that the reintroduction of the death penalty would create a “martyr-culture of the kind which had sabotaged Anglo-Irish relations in 1867 (the Manchester Martyrs) and 1916 (the Easter Rising) and would give a great propaganda victory to the IRA.”<sup>131</sup> It is difficult to ascertain the degree to which this intervention influenced subsequent political discourse, but it does appear that the preponderance of British politicians, albeit many belatedly, had come to terms with the “protean power of martyrdom” in Ireland, where the “stark and depressing facts of abject failure and death can be mysteriously transfigured into triumph by the powerful but perplexing interplay between history and memory, belief and imagination.”<sup>132</sup>

The shift in emphasis—from deterrence to martyrdom—was an emergent outcome of a “specific sequence of events, in a specific historical context.”<sup>133</sup> As David Garland puts it, contingent historical events, specific to a time and place, gave rise to a sequence of actions and reactions and British parliamentarians no longer wished to risk “creating martyrs, especially in the Irish context,” where they enjoyed a “long history.”<sup>134</sup> Michael Larkin, Kevin Barry, Terence MacSwiney, Tom Williams, inter alia, remained powerful reminders of a historical continuity in Ireland—North and South—where the “best heroes [*sic*]” were the “dead ones.”<sup>135</sup> Although the power of political martyrdom in Ireland (like the latent distaste of capital punishment itself) was grounded in the “raw materials of pre-existing conflicts,” the threat of capital punishment was no longer regarded as a deterrent or as an essential instrument in the security of the Northern Irish province.<sup>136</sup> At last, contingency, context and history counted, and the national security issue thus, paradoxically, became the chief rationale for opposing the reintroduction of capital punishment for terrorist killings in Britain and Northern Ireland.<sup>137</sup> All told, it was widely acknowledged that an execution, like internment, would prove to be a “colossal blunder” and engender instantaneous support and sympathy for the condemned terrorist and his contemporaneous cause.<sup>138</sup>

Indeed, it was envisaged that the various benefits an execution would confer on the terrorist cause could potentially “create martyrs whose death might be a more potent force among the nationalists than a whole H-Block of protesting prisoners” and perhaps even transcend what was subsequently attained by the self-inflicted hunger strikes in Long Kesh in 1981.<sup>139</sup> In such a politically charged context, the death penalty was never going to deter “sinister” organizations that were not only

<sup>131</sup> Ibid., 47.

<sup>132</sup> Alan Ford, “Martyrdom, History and Memory in Early Modern Ireland,” in *Memory and Meaning in Modern Ireland*, ed. Ian McBride (Cambridge, 2001), 43–66, at 43. See also Parliamentary Debates, Commons, 5th ser., vol. 856 (1973), col. 1084–141 (14 May 1973); 5th ser., vol. 883 (1974), col. 522–631 (11 December 1974); 5th ser., vol. 902, col. 669–718 (11 December 1975); 5th ser., vol. 970 (1979), col. 2030–120 (19 July 1979); 6th ser., vol. 23 (1982), col. 609–64 (11 May 1982); 6th ser., vol. 45 (1983), col. 905–53 (13 July 1983).

<sup>133</sup> David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Oxford, 2010), 254.

<sup>134</sup> Ibid.; TNA, CJ 4/2497, Capital Punishment for Terrorism.

<sup>135</sup> TNA, CJ 4/2497, Death Penalty, 31 May 1979.

<sup>136</sup> Garland, *Peculiar Institution*, 255.

<sup>137</sup> Ibid., 254.

<sup>138</sup> Lee, *Ireland 1912–1985*, 437.

<sup>139</sup> TNA, CJ 4/2497, Ministers Case No 4169: Death Penalty, 21 May 1979; Walker, *The Prevention of Terrorism in British Law*, 306.

consciously choosing martyrdom as a political strategy, but also undoubtedly would “value the aura of martyrdom which the prospect of execution would bring.”<sup>140</sup> Of course, this brand of martyrology was not, by any means, a peculiarly Irish phenomenon.<sup>141</sup> All violent campaigns, after all, find it valuable to create and lionize martyrs.<sup>142</sup>

<sup>140</sup> TNA, CJ 4/2497, Capital Punishment, 29 March 1973.

<sup>141</sup> Although the prospect of martyrdom was not a pivotal factor in the abolition of the death penalty in the Irish Republic, it did feature en passant in the parliamentary debates. See, for instance, Parliamentary Debates, Dail Éireann, vol. 399 (1990), no. 6, col. 1206, 1226; Parliamentary Debates, Seanad Éireann, vol. 96 (1981), no. 3, col. 238–39, 246–47; vol. 399, col. 1226, 1206; vol. 125 (1990), no. 11, col. 1308–9, 1319, 1351; vol. 125 (1990), no. 15, col. 1824.

<sup>142</sup> Adam Dolnik and Rohan Gunaratna, “On the Nature of Religious Terrorism,” in *Routledge Handbook of Religion and Politics*, ed. Jeffrey Haynes (New York, 2008), 343–50, at 347.