

ARTICLE
THE EMPIRE STRIKES BACK:
BREXIT, THE IRISH PEACE PROCESS, AND THE
LIMITATIONS OF LAW

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I. INTRODUCTION

On June 23, 2016, the United Kingdom voted in a public referendum to leave the European Union. The margin of victory for the Leave Campaign was slight, 51.9% to 48.1%, and the fallout from the contentious and polarizing campaign has created perhaps the greatest rupture in British politics in over a century.¹ David Cameron, the Conservative Prime Minister who initiated the referendum and led the unsuccessful campaign to remain in the European Union, resigned, stating that “fresh leadership was needed to enact Brexit.”² In March 2017 his successor, Theresa May, triggered Article 50 of the Treaty on European Union (“TEU”), the process by which a member state may leave the EU.³ The latter afforded the UK government two years to negotiate an exit deal.⁴ After failing to secure an overall majority in 2017, the May government was forced to rely (by virtue of a “confidence and supply” arrangement) on support from the largest unionist party in Northern Ireland, the Democratic Unionist Party (“DUP”).⁵ After lengthy negotiations with the European Union, May brought a Withdrawal Agreement before the British House of Commons but on three successive occasions she failed to secure parliamentary approval for the deal. She too resigned in June 2019.⁶

1. See GEOFFREY EVANS & ANAND MENON, *BREXIT & BRITISH POLITICS* ix (2017); THE ROUTLEDGE HANDBOOK OF THE POLITICS OF BREXIT 1, 15 (Nedergaard et al. eds., 2018); Will Jennings & Martin Lodge, *Brexit, the Tides and Canute: The Fracturing Politics of the British State*, 26 J. OF EUR. PUB. POL’Y 772 (2019); Nick Pearce & Gavin Kelly, *Brexit and the Future of the British Model of Democratic Capitalism*, 90 THE POL. QU. 1 (2019).

2. DAVID CAMERON, FOR THE RECORD 680 (2019).

3. Article 50 provides that “[a]ny Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements,” and “In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.” Consolidated Version of the Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 13, 31 [hereinafter TEU].

4. A member state can withdraw even if no agreement is reached providing that two years have elapsed from the time that the member state has notified the EU of its intention to withdraw. See Jochen Herbst, *Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties?”*, 6 GER. L.J., 1755 (2005); Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, LEGAL WORKING PAPERS SERIES, 24, Dec. 2009.

5. The DUP secured ten seats in the 2017 Westminster general election. Sinn Féin, the largest nationalist party in NI, has an abstentionist policy towards Westminster. See generally Mary Murphy & Jonathan Evershed, *Between the Devil and the DUP: The Democratic Unionist Party and the Politics of Brexit*, 1 BRITISH POLITICS (2019).

6. Oliver Wright & Francis Elliott, *Theresa May in Tears as She Resigns*, TIMES, May 24, 2019, <https://www.thetimes.co.uk/article/theresa-may-resigns-qnt625hgf>

May was replaced as Prime Minister by Boris Johnson, a former leader of the Leave Campaign who pledged to “get Brexit done.”⁷ At the time of writing, having agreed to a new Withdrawal Agreement with the European Union, Johnson has been forced to request a further extension to the original two-year deadline for the departure of Britain from the European Union. In October 2019, Johnson called a general election with the express intention of securing a large enough majority to finally secure passage of the Withdrawal Agreement.⁸ He secured a large majority in that election and the Withdrawal Agreement was passed in January 2020.

Although the consequences of Brexit for the peace process in Northern Ireland did not feature prominently in the referendum campaign in Britain, the issue has since moved front and center in Irish, British, and EU politics.⁹ Recognizing the widespread consensus amongst not just northern nationalists but also key figures in business and agriculture, and indeed the security services, that a hard border in Ireland should be avoided, the UK government agreed to a compromise with the European Union in November 2017. The so-called “Irish backstop” refers to a protocol appended to the 2017 draft Brexit Withdrawal Agreement. It provided that, in the event of the United Kingdom and European Union not agreeing to a future trade deal after the transition period had ended, the whole of the United Kingdom would enter a “single customs territory” with the European Union until

[<http://perma.cc/F4SB-EAY7>]; Heather Stewart, *Theresa May Announces She Will Resign on 7 June*, GUARDIAN, (May 24, 2019), <https://www.theguardian.com/politics/2019/may/24/theresa-may-steps-down-resigns-tory-leader-conservative-brexit> [<https://perma.cc/W9HL-BT3H>].

7. The Conservative Party slogan for the December 2019 General Election was “Get Brexit Done.” Billy Perrigo, ‘*Get Brexit Done.*’ *The 3 Words That Helped Boris Johnson Win Britain’s 2019 Election*, TIME (Dec. 13, 2019), <https://www.time.com/5749478/get-brexit-done-slogan-uk-election/> [<https://perma.cc/3TYA-YRPT>]. Heather Stewart, *Boris Johnson Elected New Tory Leader*, GUARDIAN (July 23, 2019), <https://www.theguardian.com/politics/2019/jul/23/boris-johnson-elected-new-tory-leader-prime-minister> [<https://perma.cc/PB6Q-Z62W>].

8. To date three extensions of the original “two year” deadline have been requested by the UK government and granted by the European Union – the most recent at the time of writing extending to Jan. 31, 2020. Gordon Rayner, *Boris Johnson to Use Huge Majority to Enshrine Brexit Date in Law – With or Without a Trade Deal*, TELEGRAPH (December 16, 2019), <https://www.telegraph.co.uk/politics/2019/12/16/boris-johnson-use-huge-majority-enshrine-2020-brexit-date-law/> [<https://perma.cc/C4TL-8XLX>].

9. See generally Cathy Gormley-Heenan & Arthur Aughey, *Northern Ireland and Brexit: Three Effects on the Border in the Mind*, 19 BR. J. POL. INT. REL. 497 (2017); see TONY CONNOLLY, *BREXIT AND IRELAND* 6-9 (2018); Paul Teague, *Brexit, the Belfast Agreement and Northern Ireland: Imperilling a Fragile Political Bargain*, in press, POL. QU. (2019).

such times as an alternative was agreed.¹⁰ This agreement was effectively superseded and replaced by the revised Withdrawal Agreement made between Prime Minister Boris Johnson and the European Commission in October 2019 and, as noted above, was finally passed into law in January 2020. A new protocol controversially provides for checks on what is effectively a customs border between Great Britain and the island of Ireland (a border down the Irish sea). As discussed further below this amounts in the eyes of many unionists to a “betrayal.” For his part, Johnson’s compromise is consistent with his earlier stated belief that the Irish border issue has permitted, “the tail to wag the dog” and that it is allowing the “whole of our agenda to be dictated by this folly.”¹¹ This had never been the intention of those advocating Brexit. As one senior advisor to the Leave Campaign tweeted:

... [a]lmost everyone’s tried to avoid saying, up to now, the Irish Border is not a top priority. No one wants to be responsible for any future unrest or lawlessness. But it is the blunt truth. What happens to the Irish border is far less important than that we truly leave the EU.¹²

As is discussed further below, the Irish government and the pro-remain majority of political parties in Northern Ireland have been solidly supported by the European Union in their determination to avoid a “hard border” in Northern Ireland lest it undermine the peace process.¹³ A key effect of the peace process was the removal of the physical border in Ireland. This was enabled partly by an improved security situation but also by virtue of the fact that both the United

10. See generally Eileen Connolly & John Doyle, *Brexit and the Irish Border*, Special Issue, *EUR. J. OF L. STUD.* 153 (2019).

11. Unattributed, *Boris Johnson: Irish Border “Tail Wagging the Dog” Over Brexit*, NEWS LETTER (June 8, 2018), <https://www.newsletter.co.uk/news/boris-johnson-irish-border-tail-wagging-the-dog-over-brexit-1-8526555> [<https://perma.cc/UM84-MH4F>]. Pat Leahy, *‘This Folly’: Boris Johnson on the Border Issue*, IRISH TIMES, (July 20, 2019), <https://www.irishtimes.com/news/politics/this-folly-boris-johnson-on-the-border-issue-1.3961728> [<https://perma.cc/DTN7-XUA7>].

12. Andrew Lillco (@andrew_lilico), TWITTER (Nov. 13, 2018, 1:42 AM), https://twitter.com/andrew_lilico/status/1062279529476038656 [<https://perma.cc/9L3D-CDAD>].

13. Fifty-six percent of the electorate in Northern Ireland voted to remain in the 2016 referendum versus forty-four percent who voted to leave. Rory Carroll, *Barnier Pledges EU Support for Backstop in Event of No-Deal Brexit*, GUARDIAN, (April 8, 2019), <https://www.theguardian.com/world/2019/apr/08/barnier-eu-support-backstop-ireland-no-deal-brexit> [<https://perma.cc/TMV3-RWH7>].

Kingdom and Ireland were members of the European Union.¹⁴ With security installations and customs posts removed, to all intents and purposes, the border between Northern Ireland and the Republic became invisible.¹⁵ Thirty thousand people cross this invisible border each day to work or attend school and approximately 1.8 million cars cross it each month.¹⁶ Successive British governments have stressed that they too are committed to avoiding a hard border in Ireland. They have, however, failed to persuade the European Union, the Irish government, or the pro-remain majority in Northern Ireland that such an outcome is feasible (e.g., through the use of technology) in a context whereby one part of the island of Ireland (the Republic) remains in the EU Single Market and Customs Union and the other (Northern Ireland) leaves.¹⁷ The difficulties associated with resolving this conundrum have been at the center of the British government's negotiations and discussions with Ireland and the other EU member states since the Brexit referendum. Moreover, Brexit has thrown into sharp relief a range of important human rights and legal considerations concerning not just trade and commerce but also contested political and national identity issues which lay at the heart of the conflict in the first place.

The research which underpins this article arises from two projects. The primary source is a project funded by the Economic and Social Research Council ("ESRC") which focused on a range of Brexit related themes in Northern Ireland including the impact on the peace process.¹⁸ Following an extensive interdisciplinary literature review, original data was gathered using a range of methodologies between April 2017 and

14. See Gormley-Heenan & Aughey, *supra* note 9.

15. See Katy Hayward, *The Pivotal Position of the Irish Border in the UK's Withdrawal from the European Union*, 22 *SPACE & POLITY* 238 (2018).

16. Etain Tannam, *Brexit and British Irish Relations*, 163 *RUSI J.* 4, 4 (2018).

17. The European Single Market is the trading area described by the European Commission as "one territory without any internal borders or any regulatory obstacles." It is built upon the "four freedoms" of the EU which permit the free movement of goods, capital, services and labor. The EU Customs Union applies to countries within which customs (tariffs and duties) have been removed from goods and ensures that countries charge the same import duties to countries outside of the single market. For a detailed discussion, see generally CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2016).

18. *Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences (Grant Reference ES/R001499/1)*, UK RES. AND INNOVATION, <https://gtr.ukri.org/projects?ref=ES/R001499/1> [<https://perma.cc/WYW6-NVLC>] (last visited Nov. 21, 2019). As well as the Authors, the project team included Professor Colin Harvey (Queen's University), Professor Rory O'Connell (Ulster University), and the staff of the local human rights NGO, the Committee on the Administration of Justice.

March 2019. Using a purposeful sampling methodology, twenty semi-structured qualitative interviews were conducted with legal, political and policy experts across the United Kingdom and Ireland. Forty-four informal bilateral meetings were also carried out as well as six public “townhall” meetings across Northern Ireland. All qualitative data were coded using NVivo software. In addition, two of the authors conducted specific peace process focused interviews with key interlocutors (including mainstream and “dissident” republicans, loyalists, as well as policing and security experts) as part of a project on the role of apologies in dealing with the legacy of the past.¹⁹

Our central thesis in this Article is that the Leave Campaign and the determination to enact Brexit at all costs by sections of the British Conservative party has re-energized a variant of English nationalism and nostalgia for empire which has had a direct consequence on the peace process in Northern Ireland and upon relations across the island. In order to test the veracity of that proposition, we examine in detail a number of key components of the relationship between the peace process and the European Union.

First, drawing from the literature on imperialism and post-colonialism, we suggest how such a perspective helps us to make sense of elements of Brexit. We then explore in more detail how Brexit has impacted on aspects of the peace process in Ireland. Having reviewed the ways in which EU membership helped improve Anglo-Irish relations, we chart the deleterious consequences of Brexit. We then examine the role of the European Union in the peace process, the Good Friday Agreement and the transition from conflict since 1998. Next, we explore the impact of Brexit on political relations within Northern Ireland, including the mainstreaming of the debate on Irish reunification. We then examine the relationship between Brexit and the risk of future political violence and the challenges to the governance of security. In the final section, we argue that law in general and human rights guarantees, in particular, were central to the peace process. In analyzing the major Brexit-related legal challenges, we examine some notable government defeats concerning UK parliamentary sovereignty. However, we argue that law has largely failed to protect the peace

19. *Apologies, Abuses and Dealing with the Past: A Socio-Legal Analysis* (Grant Reference ES/N010825/1), UK RES. & INNOVATION, <https://gtr.ukri.org/projects?ref=ES%2FN010825%2F1> [<https://perma.cc/2VBQ-TUSD>] (last visited Nov. 21, 2019). That project is ongoing but to date a total of thirty conflict related interviews have been conducted.

process from the reckless imperial impulses provoked by Brexit. We conclude by considering what lessons can be learned from the Brexit experience concerning the role of law in general and human rights guarantees in particular as the constitutional conversations about a united Ireland gather momentum.

II. BREXIT, EMPIRE NOSTALGIA, AND THE PEACE PROCESS

On the one hand, Brexit is fueled by fantasies of “Empire 2.0”, a reconstructed global mercantilist trading empire in which old white colonies will be reconnected to the mother country. On the other, it is an insurgency and therefore needs to imagine that it is a revolt against intolerable oppression. It therefore requires both a sense of superiority and a sense of grievance. Self-pity is the only emotion that can bring them together.²⁰

A detailed analysis of the political origins of Brexit and the success of the Leave Campaign is beyond the space available here. Such a discussion would include unpicking the complex interplay between English nationalism and English national imagination, populism, structural exclusion in the neo-liberal global economy, xenophobia, the cumulative influence of a largely anti-EU press over several decades, opportunistic venture capitalism, “dark money” and Russian interference in the campaign, the complacency of the British political establishment and the lure of British nostalgia for empire.²¹ In this Article, we have chosen to focus on the imperial nostalgia element as being the most useful in offering insights into the attitude of Brexiteers to the Irish peace process. Of course, at one level, the fact that English nationalists didn’t care/weren’t interested in Northern Ireland in pressing for Brexit is not entirely surprising. It has long been a truism of politics in Northern Ireland (admitted mostly only in private by unionists) that there is limited interest or understanding in Britain of

20. FINTAN O’TOOLE, HEROIC FAILURE: BREXIT AND THE POLITICS OF PAIN 3 (2018).

21. See generally ARRON BANKS, THE BAD BOYS OF BREXIT: TALES OF MISCHIEF, MAYHEM AND GUERRILLA WARFARE IN THE EU REFERENDUM CAMPAIGN (2016); HAROLD CLARKE ET AL., BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION (2017); GEOFFREY EVANS & ANAND MENON, BREXIT & BRITISH POLITICS (2017); DANNY DORLING & SALLY TOMLINSON, RULE BRITANNIA: BREXIT & THE END OF EMPIRE (2019); INFORMATION COMMISSIONER’S OFFICE, INVESTIGATION INTO THE USE OF DATA ANALYTICS IN POLITICAL CAMPAIGNS 7 (Nov. 6, 2018), <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf> [<https://perma.cc/6WJC-G3EJ>] (last visited Nov. 15, 2019).

the complex politics of this island.²² There have been periodic episodes when Northern Ireland featured prominently in British politics, including those related to particular security crises during the conflict, key moments of the peace process, and (as recently) when the arithmetic at Westminster meant that the Northern Ireland votes mattered to governments with a thin majority. However, as Catterall and McDougall have argued, one constant of British policy has been to marginalize as far as possible the place of Northern Ireland in British politics.²³ Taking such a lack of curiosity as a given, we would nonetheless argue that Brexit has thrown into sharp relief some previously obscured imperial dimensions to the relationship.

For current purposes, we propose that at least three interrelated empire nostalgia themes impacted directly on the peace process. These were the *blind spots* in Britain with regard to the consequences of Brexit in Ireland,²⁴ the curious political footwork involved in framing the former imperial power as a victim of EU entrapment, and the particular version of sovereignty asserted in the Brexit mantra to “take back control.”²⁵ This Article will not deploy a colonial or post-colonial lens to analyze politics in Northern Ireland *per se*.²⁶ Rather, we use this perspective to better understand *British* disregard for the Irish peace process.

In the short time since the Brexit referendum, there has been significant discussion in the more left-leaning press in the United Kingdom and Ireland about the relationship between Brexit and memory of the empire. While some of this criticism is undoubtedly “saddling Brexit” with “as much odious baggage as its enemies can muster,”²⁷ to be fair, the advocates of Brexit have given their critics rich material with which to work. For example, Boris Johnson (former Foreign Secretary, now Prime Minister) has deliberately invoked

22. As John Morison frequently reminds us, for a British audience, the “two most boring words run together in the English language are Northern and Ireland.”

23. THE NORTHERN IRELAND QUESTION IN BRITISH POLITICS 9 (Peter Catterall & Sean McDougall eds., 1996).

24. Ian Manners, *Political Psychology of European Integration: The (Re) Production of Identity and Difference in the Brexit Debate*, 39 POL. PSYCHOL. 1213, 1223 (2018).

25. See generally Andrew Gamble (2018) *Taking Back Control: The Political Implications of Brexit*, 25 J. EUR. PUB. POL’Y 1215 (2018).

26. For competing accounts of the utility of such an approach to understanding Northern Ireland, SEE BRENDAN O’LEARY, A TREATISE ON NORTHERN IRELAND: COLONIALISM (2019); LIAM KENNEDY, COLONIALISM, RELIGION & NATIONALISM IN IRELAND (1996).

27. Stuart Ward & Astrid Rasch, *Introduction Greater Britain Global Britain*, in EMBERS OF EMPIRE IN BREXIT BRITAIN 4 (Stuart Ward & Astrid Rasch eds., 2019).

Britain's imperial past—appealing directly to the ingenuity of a people “who used to run the biggest empire the world has ever seen.”²⁸ As discussed further below, leading Brexiteer Member of Parliament (“MP”), Jacob Rees-Mogg, published a book in 2019 titled “The Victorians,” celebrating prominent British figures led by the woman he describes as “Her Imperial Majesty Queen Victoria.” In his view, they comprised a generation “who had confidence in their civilizing effort, a belief in the goodness of their own nation and the drive necessary to finish the job.”²⁹ In the short time since the Leave Campaign got underway, a rich sociological, political and anthropological literature has emerged linking the growth of Euroscepticism in Britain with imperial nostalgia, culminating in the Brexit vote.³⁰

The practical expressions of Euroscepticism in Britain have been evident in Britain for decades. Although it was founded in 1957, the United Kingdom declined to join the European Economic Community (“EEC,” a predecessor to the European Union) until 1973.³¹ In the subsequent 1975 European referendum, support for EEC membership was relatively high, with a majority of 62.7% voting that the United Kingdom should stay in the EEC and a minority of 32.8% voting to leave.³² Despite this initial majority support, segments of the two largest UK political parties (Conservatives and Labour) have remained “ambivalent or hostile to European integration.”³³ A former Conservative British Prime wrote after leaving power that “Europe as a whole is fundamentally unreformable,” continuing later that the European Union is “a classic utopian project, a monument to the vanity of intellectuals, a programme whose inevitable destiny is failure.”³⁴ This political wariness was evidenced in the United Kingdom's somewhat semi-detached approach to the European Union, as reflected

28. Boris Johnson, Opinion, *There is Only One Way to Get the Change We Want: Leave the EU*, THE TELEGRAPH, March 16, 2016, <https://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/> [https://perma.cc/Y6LS-WNNT].

29. JACOB REES-MOGG, *THE VICTORIANS* xvii (2019).

30. See generally BENJAMIN GROB-FITZGIBBON, *CONTINENTAL DRIFT: BRITAIN & EUROPE FROM THE END OF EMPIRE TO THE RISE OF EUROSCEPTICISM* (2016).

31. Andrew Gardner, *Brexit, Boundaries & Imperial Identities: A Comparative View*, 17

32. See results at: Richard Nelson, *Archive: How the Guardian Reported the 1975 EEC Referendum*, GUARDIAN (June 15, 2015), <https://www.theguardian.com/politics/from-the-archive-blog/2015/jun/05/referendum-eec-europe-1975> [https://perma.cc/8YC4-74E8].

33. Gardner, *supra* note 31, at 5.

34. MARGARET THATCHER, *STATECRAFT: STRATEGIES FOR A CHANGING WORLD* 320, 359 (2002).

in its successfully negotiated opt-outs to the Euro currency, the “Schengen area” (obviating the need for passports and border controls within twenty-six EU countries), and a number of Justice and Home Affairs measures.³⁵ Within British politics, the emergence in 1993 of the single issue United Kingdom Independence Party (“UKIP” recently usurped by the Brexit Party) made the management of the Eurosceptic wing of the Tory party all the more challenging—what former Prime Minister David Cameron has referred to as “the Nigel Farage Factor” (the ubiquitous leader of first UKIP, then the Brexit party).³⁶ This in turn contributed significantly to Cameron’s decision to commit to a campaign pledge of an in/out referendum on EU membership in the 2015 general election.³⁷

At a theoretical level, the relationship between Euroscepticism and the imperial afterlife in the collective English imagination is of course quite complex. For some commentators, the most interesting element was the Leave Campaign’s “tendency to romanticise the days of the British Empire, a time when Britannia ruled the waves and was defined by her racial and cultural superiority.”³⁸ When Prime Minister Theresa May gave her first speech after the leave vote, she referred to “global Britain” no less than twelve times.³⁹ In 2017, when the Secretary of State for International Development, Liam Fox, traveled to former African colonies (now members of the British Commonwealth) to boost post-Brexit trade links, it was the staff from his office who branded the visits as “Empire 2.0.”⁴⁰ For others, the

35. See generally JULIE SMITH, *THE UK’S JOURNEYS INTO AND OUT OF THE EU* (2018).

36. CAMERON *supra* note 2, at 511.

37. See generally ANDREW GLENCROSS, *WHY THE UK VOTED FOR BREXIT: DAVID CAMERON’S GREAT MISCALCULATION* (2018).

38. Nadine El-Enany, *Brexit is Not Only an Expression of Nostalgia for Empire, it is also the Fruit of Empire*, LONDON SCHOOL OF ECONOMICS (Nov. 5, 2017), <https://blogs.lse.ac.uk/brexit/2017/05/11/brexit-is-not-only-an-expression-of-nostalgia-for-empire-it-is-also-the-fruit-of-empire/> [<https://perma.cc/4XKK-PEW6>]. One vox pop TV interviewee, seemed to capture this mood well when he said, “We’re British. We stood alone for years. I was watching a thing with the Queen, there was billions of people in the Empire. Let’s get back to being a British Empire again . . . [t]hat’s what it’s all about, you know? It’s about being a British Empire.” News Report, *Leave Voter: ‘Let’s be a British Empire Again,’* SKY NEWS (Oct. 20, 2018), <https://news.sky.com/video/lets-get-back-to-being-a-british-empire-11530606> [<https://perma.cc/AE4J-GDVT>].

39. Theresa May, *The Government’s Negotiating Objectives for Exiting the EU: PM Speech*, PRIME MINISTER’S OFFICE (Jan. 17, 2017), <https://www.gov.uk> [<https://perma.cc/Y9FA-F2WF>].

40. Sam Coates, *Ministers Aim to Build “Empire 2.0” With African Commonwealth*, TIMES (Mar. 6, 2017), <https://www.thetimes.co.uk/article/ministers-aim-to-build-empire-2-0->

yearning for past greatness—what Paul Gilroy has termed the “aching loss” of empire⁴¹—was skillfully wedded by Brexiteers to promises of a post-Brexit utopia wherein the health service would be better funded by money that would otherwise be absorbed by the European Union and a plethora of new trade deals would transform communities hard hit by austerity.⁴² Even less savory were the undoubtedly racialized efforts by the Leave Campaign to frame migrant workers as a threat to the white working classes and to brand people of color more generally as undesirables and potential terrorists who were committed to entering Britain because of what Nigel Farage termed “the EU’s open borders.”⁴³

Some of those involved in the Leave Campaign have been quite honest about how little Northern Ireland and the peace process featured in the Brexit deliberations.⁴⁴ This Article holds that this “blind spot” had undoubted imperial dimensions. The imperial gaze is inevitably drawn to the farthest horizon of the empire. It is the scale, reach, distance and “otherness” of the lands and people who fall under the control of an empire—what Homi Bhabha calls the relationship between “cultural difference and colonial nonsense”—that reinforces

with-african-commonwealth-after-brexit-v9bs6f6z9 [https://perma.cc/23DS-GJSZ]. See also DAVID THACKERAY & RICHARD TOYE, *EMBERS OF EMPIRE IN BREXIT BRITAIN* 15 (Stuart Ward & Astrid Rasch eds., 2019).

41. PAUL GILROY, *AFTER EMPIRE: MELANCHOLIA OR CONVIVIAL CULTURE?* 95 (2004).

42. See Craig Calhoun, *Populism, Nationalism and Brexit in* BREXIT SOCIOLOGICAL RESPONSES (William Outwaite ed., 2017) at 60. See also Arshad Isakjee & Colin Lorne, *Bad News From Nowhere: Race, Class and the “Left Behind”* 37 ENVIRONMENT AND PLANNING C: POL. AND SPACE 1, 7 (2019).

43. See Macer Hall, *Cut Ties With Brussels or Risk Being Trapped in a Turkish-Dominated EU, Warns Farage*, DAILY EXPRESS (Apr. 22, 2016), <https://www.express.co.uk/news/politics/665771/nigel-farage-eu-referendum-brexit-turkey-leave-vote-speech> [https://perma.cc/4Q7S-N4ME]. one infamous Leave campaign poster pictured Middle Eastern refugees queuing at the EU borders with a strap line that read, “We must break free of the EU and take back control.” See Satnam Virdee & Brendan McGeever, *Racism, Crisis, Brexit*, 41 J. ETHNIC AND RACIAL STUDIES 1802, 1802 (2017). Unattributed, *EU referendum: Nigel Farage Tells Leave Campaign to Focus on Migration*, BBC NEWS (Apr. 29, 2016), <https://www.bbc.co.uk/news/uk-politics-eu-referendum-36167329> [https://perma.cc/NLX3-4GPB].

44. As one former Vote Leave staffer has written, “Those of us who made the case for leaving the European Union did not sufficiently take into account the interests of Northern Ireland, nor indeed did we estimate the significance of the role played by the Border within the Brexit negotiations . . .” Oliver Norgrove, *Why Brexiteers Forgot About the Border*, IRISH TIMES (Mar. 20, 2019) <https://www.irishtimes.com/opinion/why-brexiteers-forgot-about-the-border-1.3831635> [https://perma.cc/NF5J-CRAQ].

the superiority of those who rule and administer it.⁴⁵ Ireland was Britain's oldest and closest colony. We would argue further that the duration and proximity of the colonial relationship with Ireland—"the tall kingdom over your shoulder" as the poet Seamus Heaney described it—helps explain the oversight.⁴⁶ Ireland's relative smallness, superficial "sameness," yet dreary complexity and durable conflict all contributed to Ireland being literally *overlooked* in the expansive Brexit imperial fantasy.⁴⁷

Ireland has also become enmeshed with the Brexit-inspired notion of Britain as a *victim* of colonialism. In the wake of the referendum, particularly as the realization that the Irish border had assumed a pivotal position in preventing *getting Brexit done*,⁴⁸ Ireland became an increasing source of irritation and exasperation for those who wished to cut free from the entanglements of the European Union. As late as January 2019, despite over two and a half years of negotiation, Boris Johnson continued to assert that the Irish border problem was "easily capable of solution."⁴⁹ In reality, however, the border came to symbolize the ways in which the breezy self-confidence of leading Brexiteers was being thwarted by the real-world complexities of unpicking multi-tiered legal, economic, financial, institutional and diplomatic relationships developed over more than four decades. Frustrated by the unanticipated complexity of leaving the European Union, leading Brexiteers repeatedly cast Britain as a victim of EU

45. HOMI K. BHABHA, *THE LOCATION OF CULTURE* chapt. 7 (1994). See generally BERNARD PORTER *THE LION'S SHARE; A HISTORY OF BRITISH IMPERIALISM 1850-2011* (2012); SHASHI THAROOR *INGLORIOUS EMPIRE; WHAT DID THE BRITISH DO IN INDIA* (2017). For a more sympathetic account, see NIALL FERGUSON, *EMPIRE; HOW BRITAIN MADE THE MODERN WORLD* (2003).

46. This phrase is used by Seamus Heaney in his poem *Act of Union* published in the collection *NORTH* (1975). Seamus Heaney, *Act of Union*, in *NORTH* (1975).

47. Winston Churchill, an unapologetic imperialist, famously opined that, as one looked across the radically altered landscapes after World War One, "Europe has changed. The position of countries has changed . . . but as the deluge subsides and the waters fall, we see the dreary steeples of Fermanagh and Tyrone once again. The integrity of their quarrel is one of the few institutions that had been unaltered in the cataclysm which has swept the world." PAUL BEW, *CHURCHILL AND IRELAND* 113 (2016). For an interesting discussion on Ireland historical place within British view of empire see STEPHEN HOWE, *IRELAND AND EMPIRE* chapt. 5 (2001).

48. See generally Katy Hayward, *The Pivotal Position of the Irish Border in the UK's Withdrawal from the European Union* 22 *SPACE AND POLITY* 238 (2018).

49. Political Staff, *Solution to Irish Border Backstop Problem is an Easy One: Boris Johnson*, BELFAST TELEGRAPH (June 15, 2019), <https://www.belfasttelegraph.co.uk/news/northern-ireland/solution-to-irish-border-backstop-problem-is-an-easy-one-boris-johnson-38220922.html> [<https://perma.cc/4EHS-T5QU>].

colonialism.⁵⁰ Fintan O’Toole has insightfully and wittily captured the curious psycho-political rationale at play in the framing of Britain’s membership of the European Union as the painful submission of a once-great colonial power to the clamps of the EU empire.⁵¹ The Irish government’s insistence upon a legally binding “backstop” in the 2017 Agreement in order to avoid a hard border in Ireland—which for many Brexiteers was to risk continued colonial entrapment—was beyond infuriating. One particularly naïve alternative offered by the former Conservative Chancellor of the Exchequer and chair of the Leave Campaign, Sir Nigel Lawson, was that the Irish Republic would “say we made a mistake in getting independence in 1922, and come back within the United Kingdom. That would be great.”⁵²

Brexiteers have also engaged in an inversion of what Bhabha has termed mimicry - except in this case the former colonizer adapts and utilizes the language and tactics of the historically subaltern (the Irish) and “. . . appropriates the other as it visualizes power.”⁵³ In reaching for historic analogies for noble efforts at resistance to the colonial yoke of the European Union, Brexiteers have drawn approvingly from Irish republican history. Brexiteer Member of the European Parliament, Daniel Hannan, in rationalizing his approval of a compromise proposal from Theresa May in 2018, likened Theresa May’s 2018 compromise proposal to the stance taken by the pro-Treaty Irish Republican Army (“IRA”) in “grabb[ing] what looked like an imperfect independence

50. See for example BBC News Report, *UK Must Not be EU “Colony” After Brexit* (Dec. 16, 2017). In his resignation letter from Theresa May’s cabinet before successfully running to replace her, Boris Johnson stated, that Britain was “headed ‘for the status of a colony.’” See Heather Stewart, Pippa Crerar, & Dan Sabbagh, *May’s Plan ‘Sticks in the Throat,’ Says Boris Johnson as He Resigns Over Brexit*, *GUARDIAN* (July 9, 2018), <https://www.theguardian.com/politics/2018/jul/09/boris-johnson-resigns-as-foreign-secretary-brexit> [<https://perma.cc/QU8Q-MK8P>].

51. O’Toole states that: “The political erotics of the imaginary domination and imaginary submission are the deep pulse of the Brexit psychodrama . . . In the bondage games of the playing out in the English reactionary imagination, Britain has spent forty-five years hanging from the ceiling in the Red Room of Pain, with clamps on its nipples and a gag in its mouth.” O’TOOLE, *supra* note 20, at 25.

52. Lord Nigel, *Lawson Hopes Irish Republic Realizes its “Mistake” and Rejoins UK Following Brexit* *NEWSTALK* (Feb. 24, 2016), <https://www.newstalk.com/news/lord-nigel-lawson-hopes-irish-republic-realises-its-mistake-and-rejoins-uk-following-brexit-612949> [<https://perma.cc/C8NS-68WF>].

53. BHABHA, *supra* note 45, at 86. Bhabha uses mimicry to describe the ways in which the colonised sometimes appropriate the language, mores, values etc. of imperial power, albeit subverting its power at the same time. See *id.* chapt. 4.

and then buil[ding] on it rather than risking the entire process.”⁵⁴ In a similar vein, hardline Tory Brexiteer MP, Owen Patterson,⁵⁵ quoted from a 1921 speech by the pro-Treaty IRA leader Michael Collins to rationalize his acceptance of the Johnson compromise in October 2019.⁵⁶ The irony of Brexiteers casting Britain as the victim of EU colonialism and then drawing inspiration from previous IRA leaders to justify their escape plans has not surprisingly generated some mirth in Ireland.⁵⁷

The third related imperial dimension to the relationship between the Brexit project and the Irish peace process is the version of sovereignty promoted by Brexiteers. Sovereignty within the Brexit project is encapsulated in the Leave slogan “take back control.”⁵⁸ As Freedon and others have argued, making this the center-piece was key to the success of the campaign.⁵⁹ There is, of course, a rich interdisciplinary literature on the concept of sovereignty across law, politics, sociology, and other disciplines, and indeed a rich stream of scholarship specifically on sovereignty and the European Union.⁶⁰ For

54. Daniel Staunton, *Brexit: Two Tory Vice-chairs Quit Roles Over Chequers Agreement*, IRISH TIMES (July 10, 2018), <https://www.irishtimes.com/news/world/uk/brexit-two-tory-vice-chairs-quit-roles-over-chequers-agreement-1.3560520> [<https://perma.cc/N2AE-6VCN>].

55. Political Report, *In Full: Former Tory Minister Owen Paterson’s Letter Calling for Theresa May No Confidence Vote*, SKY NEWS (Dec. 12, 2018) <https://news.sky.com/story/in-full-former-tory-minister-owen-patersons-letter-calling-for-theresa-may-no-confidence-vote-11578383> [<https://perma.cc/KVJ9-LS35>]. Owen Paterson, *Why I Lost Faith in Theresa May – Owen Paterson’s Remarkable Letter of No Confidence in Full*, TELEGRAPH (Dec. 11, 2018), <https://www.telegraph.co.uk/politics/2018/12/11/have-handed-letter-no-confidence-prime-minister/> [<https://perma.cc/58RG-D6JB>].

56. Paterson stated: “Michael Collins said something in Dáil Éireann on 19 December 1921 that pretty reflects much reflects my views this evening.” He then quoted Collins directly: “In my opinion it gives us freedom, not the ultimate freedom that all nations desire and develop to, but the freedom to achieve it.” HANSARD HOUSE OF COMMONS DEBATE, Oct. 22, 2019, Vol 666, Col 893.

57. See Ronan McGreevy, *Parnell and now Michael Collins – What’s With Tory Brexiteers Quoting Irish Heroes?*, IRISH TIMES (Oct. 23, 2019) <https://www.irishtimes.com/news/ireland/irish-news/parnell-and-now-michael-collins-what-s-with-tory-brexiteers-quoting-irish-heroes-1.4060216> [<https://perma.cc/23ZX-UCSY>]. Fintan O’Toole, *Brexiteers Evoking Ireland’s Civil War Should be Careful What They Wish For*, GUARDIAN (Nov. 5, 2019), <https://www.theguardian.com/commentisfree/2019/nov/05/brexiteers-ireland-civil-war-troubled-past> [<https://perma.cc/CL25-33FM>].

58. See Gamble *supra* note 25, at 1218.

59. Michael Freedon, *After the Brexit Referendum: Revisiting Populism as an Ideology*, 22 J. POL. IDEOLOGIES 1, 5-8 (2017).

60. For a useful overview, see generally DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF POLITICAL AND LEGAL CONCEPT (2015); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

current purposes, we are most interested in the ways in which what King has called “sovereignty hysteria”⁶¹ illustrated by the claim that leaving the European Union would amount to “Independence Day” for the United Kingdom,⁶² resonated with imperial and popular notions of sovereignty rather than the complex legal understanding of the term which most UK constitutional lawyers have become familiar since devolution (discussed further below in the concluding section). Indeed we would argue that sovereignty has been deployed politically in the Brexit debate as a populist imperial slogan—“the will of the people”⁶³—deliberating obfuscating distinctions between internal and external notions of sovereignty, parliamentary sovereignty, and the national sovereignty of the United Kingdom as a state engaging in supranational and international relationships.⁶⁴ Although the primacy of parliamentary sovereignty featured heavily in Brexiteer slogans during the campaign, as parliament proved a major obstacle to implementing the Brexit vision, it was ultimately and unlawfully prorogued by the Johnson administration.⁶⁵ Popular sovereignty, as expressed through the narrow Leave victory, has been interpreted by pro-Brexit advocates as a *one off* expression of the will of the people and they have fought a relentless and successful campaign against a second referendum wherein the detail of the deal agreed with the European Union and its economic and political consequences could be considered in a final referendum.⁶⁶

From such a vantage point, the refusal by the Irish government and the other twenty-six EU member states to countenance a hard border in Ireland in order to facilitate Brexit has been an abrogation of the sovereignty of *the people* in Britain. A key complicating factor, and

61. See further Michael Gordon, *The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond*, 27 KING'S L. J. 333, 334 (2016).

62. Jon Stone, *EU Referendum: Boris Johnson Says Thursday Could Become Britain's "Independence Day"*, INDEPENDENT (June 21, 2016), <https://www.independent.co.uk/news/uk/politics/eu-referendum-boris-johnson-independence-day-live-debate-bbc-vote-leave-brexit-remain-a7094531.html> [https://perma.cc/NZ6W-RT2B]. Yasmine Serhan, *Ready or Not, a New Independence Day Awaits the U.K.*, ATLANTIC, (February 27, 2019), <https://www.theatlantic.com/international/archive/2019/02/uk-prepare-brexit-day-march-29-eu/583630/> [https://perma.cc/Z6RZ-G8XY].

63. For a more benign reading, see generally Vernon Bogdanor, *Europe and the Sovereignty of the People*, 87 POL. Q. 348 (2016).

64. See Gordon, *supra* note 61, at 335.

65. *Id.* at 56.

66. See also Christopher Bickerton, *Parliamentary, Popular and Pooled: Conflicts of Sovereignty in the United Kingdom's Exit from the European Union*, 41 J. EUR. INTEGRATION, 887 (2019).

one with an obvious colonial dimension, is that this fails to take account of the fact that fifty-six percent of the people of Northern Ireland voted *remain* in the Brexit referendum.⁶⁷ Former British Prime Minister, Margaret Thatcher, famously declared in 1981 that Northern Ireland was as much a part of the United Kingdom as her own constituency of Finchley.⁶⁸ Echoing this, Boris Johnson has compared the Irish border to the boundaries between different boroughs of London.⁶⁹ Of course, Northern Ireland is neither Finchley nor Camden. The entire peace process is premised on the uniqueness of Northern Ireland. The requirement for a devolved Assembly with bespoke voting requirements for cross-community consent, the North South Ministerial Council between Northern Ireland and the Republic, and all of the other elements of the complex constitutional architecture of the Good Friday Agreement speak to the post-conflict need for what Anthony has termed a “diffuse conception of sovereignty”⁷⁰ Having explored the ways in which “empire nostalgia” illuminates the Brexit crisis, we now consider the detailed out-workings of Brexit with regard to the peace process in Ireland. To begin, we offer an overview of Anglo-Irish relations before and after the EU referendum.

III. ANGLO-IRISH RELATIONS AND THE EUROPEAN UNION

Brexit has resulted in what O’Brennan describes as a “reverse asymmetry” of power in Anglo-Irish relations, with Dublin now seemingly in the ascendency for the first time ever.⁷¹ It has also

67. See *Results and Turnout at the EU Referendum*, THE ELECTORAL COMMISSION, <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum> [https://perma.cc/J68L-4WXE].

68. Margaret Thatcher’s statement in parliament that “Northern Ireland is part of the UK - as much as my constituency is” is often misquoted as “Northern Ireland is as British as Finchley”. Anglo-Irish Bilateral Talks, Debate in the British House of Commons, Nov. 10, 1981, HANSARD vol. 12, cols. 421-428.

69. Political Report, *Boris Johnson Likens Irish Border Challenge to Congestion Charge*, BBC NEWS (Feb. 27, 2018), <https://www.bbc.co.uk/news/uk-politics-43210156> [https://perma.cc/9RT8-F5FY]. Aidan Lonergan, *Boris Johnson Slammed After Comparing Irish Border to Boundaries Between London Boroughs*, IRISH POST, (Feb. 27, 2018), <https://www.irishpost.com/news/boris-johnson-slammed-comparing-irish-border-boundaries-london-boroughs-150486> [https://perma.cc/UF3X-DH44].

70. Gordon Anthony, *Sovereignty, Consent and Constitutions: The Northern Ireland References in THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND 200* (Mark Elliott, Jack Williams & Alison L. Young eds., 2018).

71. John O’Brennan, *Requiem for a Shared Interdependent Past: Brexit and the Deterioration in UK-Irish Relations*, 43 *CAPITAL & CLASS* 157 (2019).

significantly emboldened both northern and southern variants of Irish nationalism, reenergizing discussions on Irish unity that were assumed to be largely settled under the 1998 Good Friday Agreement.⁷² In a remarkable reversal of policy, key figures in the Irish center-right have stated publicly that constitutional change must now be considered. For example, former Minister for Justice, Michael McDowell, told the BBC in 2017 that, “[t]en years ago I would have thought that a united Ireland was a very distant possibility, now I think it’s more of a real possibility.”⁷³ This rupturing of Anglo-Irish relations in the wake of Brexit has inevitably begged questions about the depth of Britain’s underlying commitment to the peace process.⁷⁴ Although the joint stewardship approach first formally enshrined in the 1985 Anglo-Irish Agreement by Margaret Thatcher and Garret Fitzgerald was motivated in large part by security considerations,⁷⁵ few would question the sincerity of the investment in the peace process by successive British governments, most notably the Labour administration led by Tony Blair. The ease with which Brexit has diminished collective British memory of that investment, and the likely repercussions, is perplexing.⁷⁶ Given the pace and complexity of the political, parliamentary and constitutional debates provoked by Brexit, it is fiendishly difficult to grasp the underlying dynamics of change.

A generous reading of the British government’s shift in policy calls attention to a generational gap: only one-sixth of current Westminster MPs were present when the Good Friday Agreement was

72. Interview with republican activist, South Armagh, May 24, 2018.

73. Ajay Nair, *Brexit Makes a United Ireland “A Real Possibility”*, *Warns Former Irish Justice Minister*, EXPRESS (May 12, 2017), <https://www.express.co.uk/news/uk/803911/United-Ireland-real-possibility-warns-former-Irish-Justice-Minister-Michael-McDowell-bbc> [<https://perma.cc/UEP2-JL6C>].

74. See Katy Hayward & Mary C. Murphy, *The EU’s Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit*, 17 ETHNOPOLITICS 276 (2018); Duncan Morrow, *Walking Away From the Good Friday Agreement may Look Easy. Picking up the Pieces Will Take Decades*, LONDON SCHOOL OF ECONOMICS BREXIT BLOG SERIES (Feb. 28, 2018), <https://blogs.lse.ac.uk/brexit/2018/02/28/walking-away-from-the-good-friday-agreement-may-look-easy-picking-up-the-pieces-will-take-decades/> [<https://perma.cc/SJV5-KQB8>].

75. See Brendan O’Leary, *The Anglo-Irish Agreement: Folly or Statecraft?*, 10 WEST EUR. POL. 5, 5 (1987); ARTHUR AUGHEY & CATHY GORMLEY-HEENAN, *THE ANGLO-IRISH AGREEMENT: RETHINKING ITS LEGACY* 13 (2011).

76. As the eminent Irish historian, Roy Foster, stated, “Among the many dishonest and slipshod characteristics of the Leave Campaign was its determined ignoring of the implications for Northern Ireland.” See Roy Foster, *The Return of the Repressed: Roy Foster on Brexit and “the Irish Question,”* TIMES LITERARY SUPPLEMENT (July 11, 2017).

signed in 1998.⁷⁷ It also allows for a measure of naivety—the notion that British MPs firmly believed that the Irish question had been *settled*. Fears that a new generation of politicians underestimated the fragility of what had been achieved prompted former British Prime Ministers, John Major and Tony Blair, to travel to the Irish border to make a symbolic joint statement during the 2016 Brexit referendum campaign.⁷⁸ In 2019 they were again moved to warn MPs not to “wreck” the peace process in Northern Ireland. Blair stated that it was “a shame and an outrage” that peace in Northern Ireland was being treated as “some disposable inconvenience to be bartered away in exchange for satisfying the obsession of the Brexiteers with wrenching our country out of Europe.”⁷⁹

A more scathing interpretation is that the more extreme Brexiteer members of the British government simply did not care.⁸⁰ Bearing in mind the increasing centrality of “empire nostalgia” in pro-Brexit discourse discussed above, it was perhaps not too difficult to choose between risking the peace process in Ireland and the bilateral relationship with the Irish Republic and escaping from the European Union. In order to probe the veracity of this admittedly cynical assessment, it is necessary to recap on the key stages in the Anglo-Irish relationship, and in particular, on the role of the European Union therein.

There is a general consensus that Anglo-Irish relations in the decades following partition were largely characterized by a “failure of

77. Leaving the DUP aside, only 105 of more than 600 remaining Westminster MPs were present when the GFA was signed in 1998. See Jonathan Freedland, *Peace in Ireland is Precious. Brexit Has Made Us Forget That*, GUARDIAN (Oct. 4, 2019), <https://www.theguardian.com/commentisfree/2019/oct/04/peace-ireland-brexit-boris-johnson-good-friday-agreement> [https://perma.cc/T4UG-W3BR].

78. Heather Stewart, *Tony Blair and John Major: Brexit Would Close Irish Border*, GUARDIAN (June 9, 2016), <https://www.theguardian.com/politics/2016/jun/09/tony-blair-and-john-major-brexit-would-close-irish-border> [https://perma.cc/9XBT-US3T]. Jayne McCormack, *Brexit: How the Irish Border Issue was Viewed During Campaigning*, BBC NEWS (Oct. 12, 2019), <https://www.bbc.co.uk/news/uk-northern-ireland-politics-49988057> [https://perma.cc/M3NF-EAE2].

79. Andrew Woodcock, *Brexit: Blair and Major Urge MPs to Block Deal Which “Threatens Peace Process” in Northern Ireland*, INDEPENDENT (Oct. 18, 2019), <https://www.independent.co.uk/news/uk/politics/brexit-deal-vote-tony-blair-john-major-northern-ireland-border-boris-johnson-a9162216.html> [https://perma.cc/TER3-Z5KB].

80. Jonathan Freedland argues, “The most charitable explanation is that, after 1998, most politicians simply considered the issue done, to be filed away. But there’s more to it than that. The truth is, they were casually dismissive of Ireland because it simply didn’t matter to them.” Freedland, *supra* note 77.

mutual comprehension” and the capacity to “generate mutual mistrust.”⁸¹ By the time the “modernizer,” Sean Lemass, came to power as Taoiseach in 1959 much of the heat had gone out of the “burn everything British except their coal” attitude that underscored the “Economic War” of 1932 to 1938. Heralding a new approach to the issue of partition, Lemass declared in 1963 that, “[w]e see our task now as reuniting the Irish people, as well as reuniting Irish territory.”⁸² With the outbreak of widespread violence in 1968, however, the fundamental fragility of both the North-South and Anglo-Irish relationship was laid bare. Television footage of nationalists being driven out of their homes in the “Battle of the Bogside” in Derry in August 1969 enraged moderate opinion in the South and brought increasing pressure to bear on Lemass’s successor, Jack Lynch. In an effort to demonstrate that he would no longer “stand by” as Northern nationalists and civil rights activists were attacked by both loyalists and the police, Lynch requested an urgent meeting of the United Nations Security Council.⁸³ This, together with a disputation of the UK claim to domestic jurisdiction in Northern Ireland by his Minister for Foreign Affairs, not surprisingly gave rise to a series of barbed exchanges with British counterparts.⁸⁴ Escalating violence, internment and the imposition of direct rule all contributed to a further deterioration of diplomatic relations. The impact of common membership of the EEC became all the more significant in light of these strains on Anglo-Irish relations.⁸⁵

81. Paul Arthur, *Anglo-Irish Relations and the Northern Ireland Problem*, 2 IR. STUD. INT’L AFF. 37, 37 (1985).

82. NAI: Department of the Taoiseach, S16272 E/63, interview given by Lemass to T. P. Coogan, (Sept. 5, 1963); Lemass to Horgan, (Oct. 25, 1963) (quoted in ANNA BRYSON, NO COWARD SOUL: A BIOGRAPHY OF THEKLA BEERE 122 (2009)).

83. In a broadcast on radio and television, Jack Lynch asked the British government to request a peace-keeping force from the UN as the “RUC is not accepted as an impartial police force.” He added that: “[i]t is clear also that the Irish government can no longer stand by and see innocent people injured and perhaps worse.” RTÉ broadcast, *Statement by the Taoiseach Mr J. Lynch* NAI DT 2000/6/657, (Aug. 13, 1969).

84. As then Minister of Foreign Affairs, later President, Patrick Hillery told the United Nations, “[a]lthough we in Ireland have lived for some time with the reality of British control over the North of our country, we do not in any way concede to them the right to exercise jurisdiction there.” Patrick J. Hillery, Irish Minister of Foreign Affairs, *Address at UNSC 1503d mtg*, (Aug. 20, 1969).

85. BREXITLAWNI, BREXIT AND NORTH-SOUTH RELATIONS (Sept. 2018), <https://brexitlawni.org/library/resources/policy-report-north-south-relations/> [https://perma.cc/F3XB-AF5L]. See also Edward Burke, *Who Will Speak for Northern Ireland?: The Looming Danger of an Ulster Brexit* 161 RUSI J. 4 (Mar. 3, 2016).

Ireland and the United Kingdom joined the European *Common Market* together in 1973. Former British Prime Ministers, Irish Taoisigh, foreign ministers and senior officials have all stressed the importance of the European framework in the evolution and normalization of British/Irish relations and, in particular, in embedding a notion of “joint stewardship” of the NI peace process.⁸⁶ Ireland now had a seat on the nine-strong Council of Ministers on an equal footing with Britain and, for the first time since 1949, Irish and British ministers, civil servants, and key figures in business, agriculture and trade unions converged together in Brussels.

There were at least three practical manifestations of the maturing of the Anglo-Irish relationship. In economic terms, the opening up of European markets and the cushioning effect of targeted subsidies gradually lessened the economic dependency of Ireland on Britain that had persisted since independence and enabled the Irish government to move into a more confident phase of the political relationship.⁸⁷ Secondly, the very fact that a cross-section of civil servants and politicians now had cause to co-operate on issues such as education, the environment and agriculture enabled the development of important relationships. Theorists of negotiation have long since acknowledged the centrality of individual personalities and interpersonal relations.⁸⁸ In the context of the peace process, it is, for example, significant that two of its key architects, future Irish Taoiseach, Albert Reynolds, and future British Prime Minister, John Major, first become acquainted through bi-lateral European meetings when Major was the British Chancellor of the Exchequer and Reynolds was Irish Minister for Finance. Thirdly, the fact that European meetings provided opportunities to meet at some physical remove from domestic parliaments was also significant. In his seminal study of symbolic politics, Edelman notes that political settings are often plotted and manipulated to ensure a departure from quotidian political pressures. In particular, he notes that the gravity of the political setting and the dramaturgical features of negotiation are important in terms of future

86. See for example, Martin Mansergh, *The New Context of British-Irish Relations in IRELAND IN INTERNATIONAL AFFAIRS* 97 (Ben Tonra & Eilís Ward eds. 2002).

87. See Brigid Laffan, *Ireland: From Interdependence to Dependence*, in *THE NEW POLITICAL GEOGRAPHY OF EUROPE* 4 (N. Walton & J. Zielonka eds., 2013).

88. See R. Donley and D.G. Winter, *Measuring the Motives of Public Officials at a Distance*, 15 *BEHAVIOURAL SCIENCE* 227 (1970); M.G. Hermann, *Explaining Foreign Policy Behaviour Using the Personal Characteristics of Leaders*, 24 *INT’L STUD. Q.* 7 (1980).

legitimization with wider audiences.⁸⁹ Over time, meetings at EU summits and the like provided opportunities for separate bilateral discussions on peace process-related matters between the British Prime Minister, Irish Taoiseach and other senior politicians and officials. This developed into what the current Irish Minister for Foreign Affairs has characterized as “a habit of cooperation.”⁹⁰

It is important to acknowledge that Anglo-Irish relations in the post-EU membership era were hardly problem free. Issues such as cross-border security, extradition, and alleged collusion between the security forces and loyalist and republican paramilitaries all created serious tensions in the relationship. However, the overall gravitational pull was always to return to negotiation and respectful co-operation on issues of mutual concern.⁹¹ In contrast to the heated exchanges of the late 1960s and early 70s, officials in Dublin and London developed guarded interpersonal trust and an ever-expanding portfolio of collaboration.

In particular, the British developed a deeper understanding of the threat that the northern conflict posed to the southern state. This is reflected in the fact that, until the early 1990s, all major Anglo-Irish efforts to reach a settlement were premised on the acceptance of a common enemy (the IRA) and the related principle of refusing to negotiate with paramilitaries.⁹² Secret talks were of course proceeding behind the scenes (the British held discussions with republicans in 1972 and 1975 and thereafter maintained a secret channel) but, although the unveiling of these negotiations rattled relations, the fundamental principle of joint stewardship of the peace process carried forth into the Good Friday Agreement of 1998.

89. MURRAY EDELMAN, *Constructing the Political Spectacle (1988)* in CONSTITUTING RELIGION 91-123 (Tamir Moustafa ed., 2018).

90. See Simon Coveney, *Irish Tánaiste, British-Irish Relations – Past, Present and Future, Tánaiste’s Speech at Chatham House* (Jan. 31, 2018), <https://www.chathamhouse.org/event/british-irish-relationship-past-present-and-future> [<https://perma.cc/CHS8-QBMX>].

91. BREXITLAWNI, *BREXIT AND THE PEACE PROCESS* (Sept. 2018), <https://brexitlawni.org/assets/uploads/Brexit-and-the-Peace-Process.pdf> [<https://perma.cc/6SAC-29N5>].

92. Eamonn O’Kane, *Anglo-Irish Relations and the Northern Ireland Peace Process: From Exclusion to Inclusion*, 18 CONTEMPORARY BRITISH HISTORY 78, 78 (2006). Garret Fitzgerald was quite open in his pronouncements about what he perceived to be the need to arrest the growth of Sinn Féin and to restore the standing of the more moderate SDLP. See for example, GARETT FITZGERALD, *ALL IN A LIFE: AN AUTOBIOGRAPHY* 473-474 (1991).

The blossoming of the Anglo-Irish relationship in the decades after 1998 was reflected in numerous grand gestures, not least the visit of Queen Elizabeth to Dublin Castle in May 2011. In stark contrast to the angry exchanges of the late 1960s, she celebrated “the ties between our people, the shared values, and the economic, business and cultural links that make us so much more than just neighbors, that make us firm friends and equal partners.”⁹³ The Irish President Mary McAleese in turn noted that the importance of the British and Irish governments “deepening engagement as equal partners in the European Union” in improving relations.⁹⁴

In spite of the apparent depth of and firmness of this friendship and trust, it is clear that Brexit has succeeded in driving a wedge between Britain and Ireland, at the level of politics, diplomacy and civil society.⁹⁵ On the face of it, all of the key actors stress their ongoing commitment to the Good Friday Agreement and the peace process. Throughout the Brexit campaign, the Irish government has made clear its profound concerns regarding the potential impact on peace.⁹⁶ Albeit less forcefully, senior British politicians and officials have also voiced concern for the peace process and pledge to honor commitments made in 1998. For example, in her March 29 letter triggering Article 50, then Prime Minister, Theresa May, acknowledged her responsibility to “make sure that nothing is done to jeopardize the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.”⁹⁷ Such statements have, however, proved increasingly incompatible with parallel commitments to prioritize “global Britain” and “get Brexit

93. See video: *The Queen in Ireland: Dublin Castle speech in full*, THE TELEGRAPH (May 18, 2011), <https://www.telegraph.co.uk/news/uknews/queen-elizabeth-II/8522318/The-Queen-in-Ireland-Dublin-Castle-speech-in-full.html> [<https://perma.cc/KN4B-KN7S>].

94. See *Text of President Mary McAleese’s Dublin Castle Speech*, IRISH ECHO (May 25, 2011), <https://www.irishecho.com/2011/05/text-of-president-mary-mcaleeses-dublin-castle-speech/> [<https://perma.cc/XM4T-FC47>].

95. See generally John O’Brennan, *Requiem for a Shared Interdependent Past: Brexit and the Deterioration in UK-Irish Relations*, 43 CAPITAL & CLASS 157 (2019).

96. See video: *Enda Kenny and Theresa May Hold Joint Press Conference in Dublin*, IRISH TIMES (Jan. 30, 2017), <https://www.irishtimes.com/enda-kenny-and-theresa-may-hold-joint-press-conference-in-dublin-1.2957203> [<https://perma.cc/7QK4-JT64>]; Enda Kenny, *Why Ireland is so Fearful of our Closest Neighbour Leaving the EU*, GUARDIAN, (June 20, 2016), <https://www.theguardian.com/commentisfree/2016/jun/20/ireland-fearful-neighbour-leaving-eu-northern-ireland> [<https://perma.cc/4XV5-MXAM>].

97. Letter from Theresa May, UK Prime Minister, to Donald Tusk, European Council President, (Mar. 29, 2017), <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> [<https://perma.cc/4H7X-U52Z>].

done.”⁹⁸ We have noted above that there is a growing consensus that a resurgence of English nationalism is at the heart of the issue and we considered the root cause of this in light of various facets of *empire nostalgia*.⁹⁹ A key related question in the context of Anglo-Irish relations and the Irish peace process concerns the extent to which Brexit unmasked an essentially superficial commitment to peace on the part of the British state.

A classical realist perspective on the current British government’s apparent disregard for the Good Friday Agreement would suggest that there is nothing particularly surprising in the realignment of state policy in line with state interests.¹⁰⁰ Viewed in this light, it is logical that, when the concerns of the Irish peace process chimed with Britain’s security, economic and political concerns, it assumed joint custody. Later, as noted above, when the need to satisfy the demands to “get Brexit done” jarred with these commitments, the Irish peace process was reassigned to the “tail of the dog.”¹⁰¹ It is important to note that the Irish government’s recent pronouncements on Irish unity can also be viewed through the prism of what (to paraphrase James C. Scott) might be dubbed as “seeing like a state.”¹⁰² Thus, for example, when the Irish Republican Army’s campaign was deemed to threaten peace and security in the Republic, government policy was resolutely anti-Sinn

98. As noted above, when Prime Minister Theresa May gave her first speech after the leave vote, she referred to “global Britain” no less than twelve times. Theresa May, *The Government’s Negotiating Objectives for Exiting the EU: PM speech*, PRIME MINISTER’S OFFICE (Jan. 17, 2017), <https://www.gov.uk> [<https://perma.cc/JJ99-YVJZ>]. May was replaced as Prime Minister by Boris Johnson who pledged to “get Brexit done.” Martyn Brown, *Respect the Will of the People and Let’s Move On*, DAILY EXPRESS (Oct. 19, 2019), <https://www.pressreader.com/uk/daily-express/20191019/281479278187573> [<https://perma.cc/C8R4-W8F9>].

99. See, e.g., Fintan O’Toole, *Brexit is Being Driven by English Nationalism. And it Will End in Self-Rule*, GUARDIAN (June 19, 2016), <https://www.theguardian.com/commentisfree/2016/jun/18/england-eu-referendum-brexit> [<https://perma.cc/859K-HXGD>]. John Denham, *Nationalism in England is Not Just a Rightwing Nostalgia Trip*, GUARDIAN (Aug. 13, 2019), <https://www.theguardian.com/commentisfree/2019/aug/13/english-nationalism-brexit-remain-and-reform> [<https://perma.cc/4AEN-DYGC>].

100. The role of realism in political theory has been diversely theorized by scholars including Machiavelli, Hobbes, Nietzsche and Weber. For our purposes we posit realism simply as the explanation of political change based on the assumption that power is the primary dynamic of political behavior and that nation states will inevitably act to maximize and defend their self-interest. See generally HANS MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST (1951).

101. See *supra* note 11.

102. See generally James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1999).

Féin—with the Irish government maintaining a much tougher line than their British counterparts on the issue of “talking to terrorists.”¹⁰³ Arguably what has changed in the context of Brexit is that the Irish state’s economic and political priorities now align more closely with the prospect of a united Ireland than with partition.

Whilst state-centric impulses may go some way towards explaining the current state of Anglo-Irish relations, they do not adequately account for the scale of the vitriol that has been unleashed. As the Irish government, buoyed up by its allies in Europe, dug in its heels and held firm in the Brexit negotiations, a torrent of anti-Irish sentiment was unleashed. David Yelland, a former editor of the famously nationalistic British tabloid newspaper, *The Sun*, tweeted in July 2019:

I’ve been shocked at two dinners recently when Tories of influence have told me privately “Varadkar isn’t bright” and “the Irish will blink” and it seems, amazingly, that this is the actual policy of HMG under Johnson. They are anti-Irish, arrogant, dangerous and wrong.¹⁰⁴

Regardless of the source of such views, Brexit has undoubtedly placed a considerable strain on carefully nurtured relationships between the British and Irish governments. It remains the publicly stated desire of both governments to protect this relationship but a key challenge will be to either devise new mechanisms or improve or rejuvenate existing structures to ensure that the “habit of [Anglo-Irish] cooperation” and a shared sense of responsibility are maintained during and after Brexit.¹⁰⁵ We have considered thus far the ways in which EU membership indirectly facilitated Anglo-Irish co-operation and the advancement of peace in Northern Ireland. In the next section, we

103. In spite of unionist and loyalist protestations that the Republic provided a “safe haven for terrorists,” the Irish government historically held a much tougher line with republicans than either Northern Ireland or British authorities. See Brian Hanley, “*But Then They Started All This Killing*”: Attitudes to the IRA in the Irish Republic since 1969, 38 *IRISH HISTORICAL STUD.* 439 (2013).

104. David Yelland (@davidyelland), TWITTER (July 29, 2019), <https://www.twitter.com/davidyelland/status/1155890580884512770?lang=en> [<https://perma.cc/6E8J-6M4S>].

105. Coveney, *supra* note 90. In this 2018 Speech the Irish Minister for Foreign Affairs and Trade, Simon Coveney, stated that, whereas the habits of cooperation around the EU table will be lost, the two governments will now have to “use our existing bilateral mechanisms to great effect.” *Id.*

consider in more detail the European Union's direct involvement in the peace process before and after the Brexit referendum.

IV. THE EU AND THE NORTHERN IRELAND PEACE PROCESS

Besides facilitating Anglo-Irish cooperation in the emerging peace process, the European Union in time became a direct contributor. The origins of direct EU engagement in the NI peace process can be traced at least to the late 1970s. In 1979 then the leader of the Social and Democratic Labour Party (“SDLP”), John Hume, encouraged the European Parliament to produce a report on the NI conflict.¹⁰⁶ The document called for a coordinated British-Irish approach—a forerunner of the joint stewardship principle that underpinned all subsequent peace agreements. Indeed the Anglo-Irish Agreement—which provided the template for precisely such a joint approach—referred to the EEC in its preamble and drew significantly from the language, findings, and recommendations of the Haagerup Report.¹⁰⁷ Following the signing of the Agreement both the European Parliament and the Council of the European Union formally congratulated the two governments on the achievement. To further underline their support, the European Union contributed fifteen million European Currency Units (“ECUs”) (the forerunner to the Euro) in 1989 to the International Fund for Ireland which was established as a result of the Agreement.¹⁰⁸

As Moxon Browne, Hayward and Murphy, and others have argued, the “European dimension” internationalized and legitimized the joint British approach to the conflict in Northern Ireland and made it more difficult for either party to attempt to “go solo” on peace process-related matters.¹⁰⁹ The 1993 Downing Street Declaration

106. Nils Haagerup, Report Drawn up on Behalf of the Political Affairs Committee on the Situation in Northern Ireland, EUR. PARL. DOC., (COM 1-1526/83).

107. See Katy Hayward, *Reiterating National Identities: The European Union Conception of Conflict Resolution in Northern Ireland*, 41 COOP. CONFL. 261, 262 (2006).

108. See Sean Byrne, Chuck Thiessen, Eyob Fissuh, Cynthia Irvin, & Pauline Tennent, *The Role of the International Fund for Ireland and the European Peace II Fund in Reducing Violence and Sectarianism in Northern Ireland*, 47 INT'L POL. 229 (2010). EU Press Release, International Fund for Ireland (2006): *EP Favours Continued EU Funding, But with New Legal Basis*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20061211IPR01365+0+DOC+PDF+V0//EN&language=BG> [https://perma.cc/RK95-YJSK].

109. See generally Edward Moxon-Browne, *The Impact of the European Community*, in NORTHERN IRELAND: POLITICS & THE CONSTITUTION (Brigid Hadfield ed., 1992). Katy Hayward & Mary Murphy, *The (Soft) Power of Commitment: The European Union and Conflict Resolution in Northern Ireland*, 11 ETHNOPOLITICS 439, 443 (2012).

signed by John Major and Albert Reynolds, which paved the way for the IRA and loyalist ceasefires in 1994, states “the development of Europe will, of itself, require new approaches to serve interests common to both parts of the island of Ireland, and to Ireland and the United Kingdom as partners in the European Union.”¹¹⁰ Following the ceasefires, the 1995 Framework for Agreement produced by the two governments made even more significant reference to the importance of the “European dimension” as a template for enabling the evolving peace process.¹¹¹ In addition, as discussed further below, the 1998 Good Friday Agreement made explicit reference to the European Union as reflected both in the terms of cooperation in the international treaty signed by the British and Irish governments and in the working of the North South Ministerial Council between Northern Ireland and the Republic.¹¹²

Mindful of the political sensitivities involved in being seen to “interfere,” the key thrust of EU policy has been to emphasize the link between improved social and economic conditions and the momentum towards peace. The original peace funding program—launched in 1994 by European Commission President Jacques Delors—stated that it was important to “convince those on the ground that the peace process can yield real dividends to their lives.”¹¹³ Since then, the financial contribution from the European Union to Northern Ireland and the border counties has been substantial. In addition to several European Structural and Investment Programs, there have been three EU Peace and Reconciliation (“PEACE”) programs—involving a financial contribution of EUR€1.3 billion from the European Union and the British and Irish governments.¹¹⁴ A fourth program (“PEACE IV”) was

110. Joint Declaration by An Taoiseach, Mr. Albert Reynolds, T.D., and the British Prime Minister, the Rt. Hon. John Major, M.P., Dec. 15, 1993, para. 3.

111. Paul Teague, *The European Union and the Irish Peace Process*, 34 J. COMMON MKT. STUD. 549, 550 (1996).

112. The Belfast Agreement, U.K.-Ireland, Preamble and Code of Conduct, sec. 17, Apr. 10, 1998.

113. European Commission Press Release IP/94/1165, Delors Peace Package for Northern Ireland Sent to EC Leaders (Dec. 6, 1994), https://europa.eu/rapid/press-release_IP-94-1165_en.htm [<https://perma.cc/8NYF-QUTQ>].

114. EUROPEAN COMMISSION, COOPERATION PROGRAMMES UNDER THE EUROPEAN TERRITORIAL COOPERATION GOAL (2016), <https://www.europarl.europa.eu/factsheets/en/sheet/102/northern-ireland-peace-programme> [<https://perma.cc/5D7Q-EKTD>]. It should be noted that the bulk of the funding comes from the EU, for example, see Jodie Carson & Colin Pidgeon, *European Funding in Northern Ireland*, NORTHERN IRELAND ASSEMBLY (Aug. 20, 2010),

launched in January 2016—with a total value of EUR€270 million.¹¹⁵ These programs are broadly aimed at ensuring “cohesion between communities involved in the conflict in Northern Ireland and the border counties of Ireland; [and] economic and social stability.”¹¹⁶ They have funded investment programs, cross-community and cross-border initiatives, urban and rural regeneration schemes, shared spaces and services, and initiatives designed to nurture positive relations at a local level.¹¹⁷ Additionally, the border regions in Northern Ireland and the Republic of Ireland have benefitted from the EU INTERREG program. This aims to support “cross-border co-operation for a more prosperous and sustainable region,” by addressing “the economic and social problems resulting from the existence of borders”.¹¹⁸ Since 1991, EUR€1.13 billion has come into the Border region as a result of this program and the INTERREG VA Program for 2014-2020 is worth EUR€283 million.¹¹⁹

Given the scale of its investment to date, it is not surprising that EU officials have expressed concern about the potential impact of Brexit on the peace process. In a joint press conference with Taoiseach Leo Varadkar in March 2018, the President of the European Council, Donald Tusk, said that “risk of destabilising the fragile peace process

<http://www.niassembly.gov.uk/globalassets/Documents/RaISe/Publications/2010/General/15010.pdf> [<https://perma.cc/MLM6-67W3>].

115. Special EU Programmes Body, *PEACE IV Programme Overview*, <https://www.seupb.eu/piv-overview> [<https://perma.cc/HD2A-QNRR>].

116. DIÁNA HAASE & MAREK KOŁODZIEJSKI, EUROPEAN PARLIAMENT, NORTHERN IRELAND PEACE PROGRAMME 1 (2019), http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.1.9.pdf [<https://perma.cc/D7BY-XRV8>]. See also Linda Racioppi & Katherine O’Sullivan, *Grassroots Peace-Building and Third-Party Intervention: The European Union’s Special Support Programme for Peace and Reconciliation in Northern Ireland*, 32 PEACE & CHANGE 361, 370 (2007); *PEACE IV Programme Overview*, SPECIAL EU PROGRAMMES BODY, <https://www.seupb.eu/piv-overview> [<https://perma.cc/J2PP-2D36>] (last visited Dec 6, 2019).

117. See BREXITLAWNI, *supra* note 91.

118. Scottish EU Funding Portal, *Cross-Border Programme for Northern Ireland, Border Region of Ireland & South Western Scotland* (2014-2020), <https://portal.funding-portal.eu/funding-programmes/the-cross-border-territorial-cooperation-programme-for-northern-ireland-the-border-region-of-ireland-and-western-scotland> [<https://perma.cc/PUS3-BF2J>].

119. N./S. INTER-PARLIAMENTARY ASS’N, PAPER 1: IMPACT OF BREXIT ON CROSS-BORDER ACTIVITY 40 (2016), <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/northsouth/8816.pdf> [<https://perma.cc/WNP9-LXR3>].

must be avoided at all costs.”¹²⁰ The chief Brexit negotiator for the European Union, Michel Barnier, has been equally resolute on the need to safeguard the peace process and in particular the key tenets of the Good Friday Agreement. In May 2017, he offered reassurance that “nothing should put peace at risk” in the upcoming negotiations with the UK.¹²¹ Indeed, the European Commission Brexit Negotiation Task Force included in its guiding principles a commitment to protect “the gains of the peace process and of the Good Friday Agreement.”¹²²

The European Commission has also pledged to continue funding “cross-border programmes supporting peace and reconciliation”¹²³ in spite of Brexit, proposing to contribute EUR€120 million between 2021-2027—if mechanisms for appropriate matching monies can be agreed with the UK and Irish governments.¹²⁴ Whilst there has been a general commitment on the part of the United Kingdom to “match” funding levels previously delivered across the United Kingdom by EU programs, little detail has been provided with regard to Northern Ireland-specific peace funding. In an article published in the mainly nationalist newspaper *The Irish News*, then British Prime Minister Theresa May stated that “there may be specific and valuable EU programmes (including peace funding in Northern Ireland) for which

120. European Council, *Remarks by President Donald Tusk After His Meeting with Taoiseach Leo Varadkar* (Mar. 8, 2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/03/08/remarks-by-president-donald-tusk-after-his-meeting-with-an-taoiseach-leo-varadkar/> [<https://perma.cc/BG56-PM7B>]; Órla Ryan, ‘Ireland First’: Donald Tusk Says Every EU Leader ‘Wants to Protect Peace Process and Avoid Hard Border,’ *JOURNAL* (Mar. 8, 2018), <https://www.thejournal.ie/donald-tusk-brexit-ireland-3892678-Mar2018> [<https://perma.cc/M7CZ-XXBA>].

121. Lisa O’Carroll, *Brexit Will Not Jeopardise Peace in Ireland, EU’s Chief Negotiator Says*, *GUARDIAN* (May 11, 2017), <https://www.theguardian.com/world/2017/may/11/michel-barnier-brexit-will-not-jeopardise-peace-in-ireland-eu-chief-negotiator-says> [<https://perma.cc/SY82-QHA3>]. Michael O’Regan & Marie O’Halloran, *Barnier says Brexit Will Come At a Cost but ‘We Are Where We Are’*, *IRISH TIMES* (May 11, 2017), <https://www.irishtimes.com/news/politics/oireachtas/barnier-says-brexit-will-come-at-a-cost-but-we-are-where-we-are-1.3079612> [<https://perma.cc/C75K-85WE>].

122. European Comm’n, Task Force for the Preparation & Conduct of the Negotiations with the U.K. Under Article 50 TEU, Guiding Principles Transmitted to EU27 for the Dialogue on Ireland/Northern Ireland, TF50 (2017) 15, at 2-3 (Sept. 6, 2017).

123. John Campbell, *Cross-border European funding to continue post-Brexit*, *BBC NEWS* (May 2, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-43977811> [<https://perma.cc/3T9Z-RD6A>].

124. John Campbell, *EU Proposes to Continue NI Peace Funds*, *BBC NEWS* (May 29, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-44295917> [<https://perma.cc/6642-Y2XE>]. Northern Ireland Office, *Bradley Confirms £300 million to Secure Peace Funding for Northern Ireland* (Jan. 11, 2019), <https://www.gov.uk/government/news/bradley-confirms-300-million-to-secure-peace-funding-for-northern-ireland> [<https://perma.cc/UJ5J-7MPT>].

we want to agree continuation of funding,” but the current British government has to date refrained from making a firm commitment to cover the direct costs of all such projects.¹²⁵ It thus seems likely that these programs would have to compete for UK budget funds with key areas such as health and education.¹²⁶

In sum, the involvement of the European Union (formerly EEC) has been a *given* in the evolving peace process in Northern Ireland. Indeed, that axiom—the “European dimension”—became an important component in the language and context of all of the major peace process-related papers from the Anglo-Irish Agreement (1985) until the Good Friday Agreement (1998). Underpinning this commitment to the political process, the EU has invested heavily in peace funding for Northern Ireland and the border regions of the Republic of Ireland. Whether or not the British government will uphold this very significant financial contribution in the aftermath of Brexit remains uncertain. The real challenge will be when hard choices need to be made, particularly on the part of the UK government, between policies that will have a direct and deleterious effect on the peace process and the type of Brexit arrangements they seek to implement. Such hard choices will have the most obvious impact within Northern Ireland itself and it is that subject to which we now turn.

V. BREXIT, POLITICAL RELATIONSHIPS AND IDENTITY POLITICS IN NORTHERN IRELAND

The UK referendum result in favor of Brexit has had quite profound implications for political relationships in Northern Ireland given that fifty-six percent of the electorate there voted to remain in the European Union.¹²⁷ The voting pattern within Northern Ireland reveals

125. Unattributed, *Platform: Theresa May on Brexit, the Border, and Irish Citizenship*, IRISH NEWS (Aug. 16, 2017), <https://www.irishnews.com/news/2017/08/16/news/platform-theresa-may-1111504/> [<https://perma.cc/LVC5-KVLG>].

126. Ian Graham, *UK Says to Consider Replacing EU Peace Funds for Northern Ireland*, REUTERS (Aug. 16, 2017, 3:11 AM), <https://uk.reuters.com/article/uk-britain-eu-ireland-may/uk-says-to-consider-replacing-eu-peace-funds-for-northern-ireland-idUKKCN1AW0HC> [<https://perma.cc/BNQ2-RLA6>]; Theresa May, *Platform: British Prime Minister Theresa May*, IRISH NEWS (Aug. 16, 2017, 1:00 AM), <https://www.irishnews.com/news/2017/08/16/news/platform-theresa-may-1111504/> [<https://perma.cc/KGT4-H97A>].

127. See Results and Turnout at the EU Referendum, Electoral Commission, <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum> [<https://perma.cc/Q6HX-3F9Q>].

a clear ethnonational divide.¹²⁸ Catholics overwhelmingly voted to remain by a proportion of 85% to 15% whilst Protestants voted to leave by a proportion of 60% to 40%;¹²⁹ correspondingly, “two-thirds of self-described ‘unionists’ voted to leave, while almost 90% of self-described ‘nationalists’ voted to remain”.¹³⁰ In such a context, as Gormley-Heenan and Aughey have argued, the referendum result “was bound to be taken as a victory for one community at the expense of the other.”¹³¹ There were other issues involved in the decision by Sinn Féin to collapse the Northern Ireland Executive and Assembly in January 2017 but, then Deputy First Minister, Martin McGuinness, made clear in his resignation letter that Brexit was a contributing factor.¹³² Moreover, the uncertainty regarding Brexit undoubtedly delayed the re-establishment of the power-sharing executive – which did not happen until January 2020. At this juncture, it may be useful to offer a brief synopsis of the attitudes of the main political parties in Northern Ireland towards Brexit and their views as to whether or not it represents a threat to the Good Friday Agreement and the peace process.

The Democratic Unionist Party (“DUP”), the largest unionist party, remained true to their Eurosceptic tradition and supported Brexit.¹³³ As noted above, having secured ten seats at Westminster in the 2017 general election, they entered into a “supply and demand” arrangement with Theresa May and became centrally important to a series of attempts to steer a Brexit deal through parliament.¹³⁴ The party

128. See JOHN GARRY, *THE EU REFERENDUM VOTE IN NORTHERN IRELAND: IMPLICATIONS FOR OUR UNDERSTANDING OF CITIZENS’ POLITICAL VIEWS AND BEHAVIOUR 2* (2016), <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,728121,en.pdf> [<https://perma.cc/4VVD-WJ7Y>].

129. *Id.*

130. *Id.*

131. See Gormley-Heenan & Aughey, *supra* note 9, at 502.

132. Martin McGuinness, *Martin McGuinness’ Resignation Letter in Full*, BELFAST TELEGRAPH (Jan. 9, 2017), <https://www.belfasttelegraph.co.uk/news/northern-ireland/martin-mcguinness-resignation-letter-in-full-35353349.html> [<https://perma.cc/JPL3-XMZG>]. For an overview of the other factors which precipitated the collapse of the power-sharing institutions, see generally SAM MCBRIDE, *BURNED: THE INSIDE STORY OF THE CASH FOR ASH SCANDAL AND NORTHERN IRELAND’S SECRETIVE NEW ELITE* (2019); Deirdre Heenan & Derek Birrell, *Between Devolution and Direct Rule: Implications of a Political Vacuum in Northern Ireland?* 89 POL. Q. 306 (2018).

133. See Gladys Ganiel, *‘Battling in Brussels’: The DUP and the European Union*, 24 IRISH POL. STUD. 575, 585-86 (2009); Murphy & Evershed, *supra* note 5, at 7.

134. Cabinet Office, *Confidence and Supply Agreement Between the Conservative and Unionist Party and the Democratic Unionist Party* (Jan. 23, 2020), <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and->

has insisted that Brexit does not represent a threat to the peace process. For example, DUP deputy leader Nigel Dodds has argued that “to use the peace process as an excuse to either thwart Brexit or to shape it in the way some people want is quite frankly outrageous and disgraceful.”¹³⁵ Although the DUP appeared to successfully hold first Theresa May and then her successor, Boris Johnson, to the pledge that there would be no diminution of the position of Northern Ireland within the United Kingdom, the deal struck between Johnson and the European Union in September 2019 was classed as a “hammer blow” and a “betrayal” by seasoned unionist commentators.¹³⁶ As discussed elsewhere in this Article, paranoia about betrayal by the British has been a key feature of unionist politics since the formation of the state.¹³⁷ The following junctures have all been regarded with suspicion and in some instances contempt, by Ulster unionists: the proroguing of Stormont in 1972, the Sunningdale Agreement 1973, the Anglo-Irish Agreement 1985, the Downing Street Declaration 1993 and (in the eyes of some within the DUP at least), the Good Friday Agreement of 1998.¹³⁸

The smaller Ulster Unionist Party (“UUP”) opposed Brexit in the referendum but subsequently shifted its position, stating that it accepted

unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament [https://perma.cc/73AA-H2NK]; see also ITV Report, *How Did the DUP Become a Key Player in the Brexit process?* ITV (Oct. 16, 2019), https://www.itv.com/news/2019-10-16/how-dup-became-key-player-in-brexit-process/ [https://perma.cc/UV5U-DBPJ]; see Jane McCormack, *Brexit Deal: Why Does the DUP's Opinion Matter?* BBC NEWS (Oct. 17, 2019) https://www.bbc.co.uk/news/uk-northern-ireland-50086035 [https://perma.cc/HCS6-6Q9J].

135. Harriet Line, *Using Peace Process to “Thwart” Brexit Outrageous, says Nigel Dodds*, IRISH NEWS (Feb. 28, 2018), https://www.irishnews.com/news/brexit/2018/02/28/news/using-peace-process-to-thwart-brexit-outrageous-says-nigel-dodds-1266918 [https://perma.cc/N42J-QZKB].

136. See Alex Kane, *Boris Johnson's Betrayal Will Leave the DUP With One Option – To Back Remain*, GUARDIAN, (Oct. 28, 2019) https://www.theguardian.com/commentisfree/2019/oct/28/boris-johnson-dup-remain-arlene-foster-union-northern-ireland [https://perma.cc/YRA9-KPSY]. Emilio Casalicchio, *DUP Deals Brexit Hammer Blow to Boris Johnson Ahead of Crucial EU Summit* POLITICO (Oct. 17, 2019), https://www.politico.eu/article/dup-deals-brexit-hammer-blow-to-boris-johnson-ahead-of-crucial-eu-summit/ [https://perma.cc/YK85-FBPW].

137. See A.T.Q. STEWART, EDWARD CARSON 125 (1981). For example, Edward Carson, one of the most revered figures in Unionism complained bitterly that he had been betrayed by the Tory Party during the campaign against home rule in Ireland. The Tories agreed to the Anglo-Irish Treaty in 1921 which, in effect, granted a version of home rule to 26 of the 32 counties. Carson said “[w]hat a fool I was! I was only a puppet, and so was Ulster, and so was Ireland, in the political game that was to get the Conservative Party into Power.” See *Id.*

138. JON TONGE ET AL., THE DEMOCRATIC UNIONIST PARTY; FROM PROTEST TO POWER 2, 5, 89 (2014).

“the will of the British people” and that it would thus support Theresa May in her efforts to “get the best deal for Britain and Northern Ireland.”¹³⁹ Following this shift of position, the UUP produced a paper that focused upon Northern Ireland post-Brexit.¹⁴⁰ There was no explicit reference in this document to a perceived threat to the peace process but one UUP Member of the NI Assembly (“MLA”) interviewed by the authors expressed concerns about the prospect of dissident republican violence in the context of a hard border.¹⁴¹

Both major nationalist parties in Northern Ireland have remained firm in their opposition to Brexit. Sinn Féin, formerly the political wing of the IRA and now the voice of the majority of northern nationalists, historically viewed increased European integration as a threat to Irish sovereignty.¹⁴² However, in recent years its increasingly pragmatic approach to the European Union was evidenced in its opposition to Brexit. Several Sinn Féin representatives interviewed by the authors were concerned to highlight what they perceived to be the grave implications for the peace process, adding that any hardening of the border would inevitably invite physical force resistance from dissident republicans (discussed further below).¹⁴³

The smaller of the nationalist parties, the SDLP, has always been a strong supporter of the EU.¹⁴⁴ Not surprisingly, it has maintained a clear anti-Brexit stance. SDLP leader Colum Eastwood has been clear in his view that Brexit undermines the legacy of the Good Friday Agreement, warning that it “carries with it the potential to dismantle the architecture of our peace process.”¹⁴⁵ Another SDLP MLA

139. Sean O’Driscoll, *UUP Ends Anti-Brexit Stance and Sides with DUP to Oppose Sinn Féin*, BELFAST TELEGRAPH (May 11, 2017), <https://www.belfasttelegraph.co.uk/news/general-election-2017/uup-ends-antibrexit-stance-and-sides-with-dup-to-oppose-sinn-fein-35702386.html> [<https://perma.cc/D5CV-WTKC>].

140. See generally ULSTER UNIONIST PARTY, *A VISION FOR NORTHERN IRELAND OUTSIDE THE EU* (2016).

141. Interview with Member of the N. Ir. Legislative Assembly, Ulster Unionist Party, in Belfast, N. Ir. (Jan. 9, 2018).

142. Agnès Maillot, *Sinn Féin’s Approach to the EU: Still More “Critical” Than “Engaged”?* 24 *Irish Pol. Stud.* 559, 561 (2009).

143. Interview with *Ard Chomhairle* (governing body) member, Sinn Féin (Sept. 18, 2018); interview with Member of the European Parliament, Sinn Féin, in Derry, N. Ir. (Feb. 16, 2018).

144. Peter McLoughlin, *The SDLP and the Europeanization of the Northern Ireland Problem* 24 *IRISH POL. STUD.* 603, 603 (2009).

145. Lesley-Anne McKeown, *Don’t Let Brexit Ruin Labour’s Legacy*, *TIMES* (Feb. 19, 2018), <https://www.thetimes.co.uk/article/don-t-let-brexit-ruin-labour-s-legacy-vv9h5wqsl> [<https://perma.cc/Z7R8-JUWY>]. Unattributed, *Jeremy Corbyn Warned of Potential to*

expressed concerns that Brexit has not only emboldened republican dissidents but that it has “made being a part of the UK very uncomfortable for a lot of nationalists.” He added: “It has just put identity and the constitutional question right back into politics in a way that the Good Friday Agreement had tried to minimise for decades . . . it has agitated it in a very serious way.”¹⁴⁶

Finally, the centrist Alliance party is opposed to Brexit and has expressed clear concern regarding the impact of Brexit on the peace process. It calls for a special arrangement for Northern Ireland in order to protect the Good Friday Agreement. Alliance’s concerns about the impact of Brexit on political and intercommunal relations mirror very closely those expressed by the SDLP interviewee in terms of a perceived hardening of positions amongst both nationalists and unionists and the undermining of what Alliance term a “shared Northern Ireland.”¹⁴⁷ This brief overview of the stance taken on Brexit by the five main political parties in Northern Ireland highlights a number of key impacts that are worthy of closer examination. In the following section, we explore two closely related contemporaneous developments—the re-energizing of *identity politics* and the re-emergence of *Irish unity* as a live political debate.

It would be naive to suggest that the Good Friday Agreement somehow dissolved identity politics in Northern Ireland. The electoral rise of Sinn Féin and the DUP—and their usurping of the ostensibly more moderate counterparts of the SDLP and UUP—suggest that the post-Good Friday Agreement electorate wants to be represented by the strongest political voices from within their two communities.¹⁴⁸ Indeed, the decision by then Deputy First Minister of Northern Ireland, Martin McGuinness, to collapse the Stormont executive was motivated at least in part by what he saw as the DUP’s inability to come to terms with expressions of Irish identity and culture including the Irish

Destablise Peace Process With Hard Brexit, BELFAST TELEGRAPH (Feb. 18, 2018), <https://www.belfasttelegraph.co.uk/news/northern-ireland/jeremy-corbyn-warned-of-potential-to-destabilise-peace-process-with-hard-brex-36617702.html> [<https://perma.cc/2PZV-CWVE>].

146. Interview by BrexitLawNI with Member of the N. Ir. Legislative Assembly, Soc. & Democratic Labour Party, in Belfast, N. Ir. (Feb. 20, 2018).

147. Interview by BrexitLawNI with Member of the N. Ir. Legislative Assembly, All. Party of N. Ir., in Belfast, N. Ir. (Mar. 21, 2018).

148. See Jan Erik Mustad, *From Protest to Power: The Rise of the DUP*, in THE LEGACY OF THE GOOD FRIDAY AGREEMENT: NORTHERN IRISH POLITICS, CULTURE AND ART AFTER 1998 73, 78-79 (Charles I. Armstrong, David Herbert & Jan Erik Mustad eds., 2019).

language.¹⁴⁹ That said, the peace agreement undoubtedly succeeded in reducing the communal focus on the constitutional question. The various strands of the Agreement were developed precisely to accommodate individuals who wished to identify as either British or Irish – or both / neither or indeed European – and to embed the complexities of both North-South and East-West relations.¹⁵⁰ It can thus be argued that the Good Friday Agreement was less about reconciliation than “agreement to differ amid a sharing or division of power between the rival ethnic blocs.”¹⁵¹ It was this element of “constructive ambiguity” that allowed both sides to claim that they were successfully “working” the deal and “transforming Northern Ireland.”¹⁵² As Bell and Cavanaugh argue, “each side knows that it is a ‘fudge’ but can live with it, and ‘sell’ it to their own constituents as victory, or at least not a defeat.”¹⁵³

Todd suggests that the combination of the Good Friday Agreement, devolution, the opening up of the border, the development of key institutions such as the Special EU Programmes Body (SEUPB) and the North South Ministerial Council, and the myriad benefits of mutual British and Irish EU membership combined to diminish the extent to which British sovereignty shaped the cultural identification and constitutional allegiance of nationalists.¹⁵⁴ These factors managed to secure the assent of pragmatists within northern nationalism—people who were willing to live in Northern Ireland as part of the United Kingdom “. . . so long as their rights are respected and they have a secure sense of identity, but with no emotional or sentimental attachment to either Britishness or to the political institutions of the

149. Brendan O’Leary, *The Twilight of the United Kingdom & Tíocfaidh ár lá: Twenty Years After the Good Friday Agreement*, 17 *ETHNOPOLITICS* 223, 230 (2018).

150. See generally JORG NEUHEISER & STEFAN WOLFF (EDS.), *PEACE AT LAST?: THE IMPACT OF THE GOOD FRIDAY AGREEMENT ON NORTHERN IRELAND* (2003); JONATHAN POWELL, *GREAT HATRED, LITTLE ROOM: MAKING PEACE IN NORTHERN IRELAND* (2008).

151. Jonathan Tonge, Peter Shirlow, & James McAuley, *So Why Did the Guns Fall Silent? How Interplay, Not Stalemate, Explains the Northern Ireland Peace Process*, 26 *IRISH POL. STUD.* 1, 4 (2011). See also JOHN MCGARRY & BRENDAN O’LEARY, *EXPLAINING NORTHERN IRELAND: BROKEN IMAGES* 320-26 (1995); Paul Gillespie, *The Complexity of British-Irish Interdependence*, 29 *IRISH POL. STUD.* 37, 47 (2014).

152. Tonge et al *Id.* at 14.

153. Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination - Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 *FORDHAM INT’L L. J.* 1345, 1356 (1998).

154. See generally JENNIFER TODD, *THE VULNERABILITY OF THE NORTHERN IRELAND SETTLEMENT: BRITISH IRISH RELATIONS, POLITICAL CRISIS AND BREXIT* (2015).

United Kingdom.”¹⁵⁵ Although many unionists struggled with the reality of seeing Sinn Féin in government, fears gradually eased as the IRA proceeded to decommission its weapons and (for the most part) exited the stage. The return (albeit intermittently) of power to Stormont was also welcomed by unionists and the fact that initial fears that the North South Ministerial Council (a key feature of the Good Friday Agreement) would become a “Trojan horse” to reunification proved unfounded combined to broadly reassure most that the union with Great Britain and British identity for unionists, whilst requiring constant vigilance, was secure.¹⁵⁶ One UUP MLA summed up well the impact of Brexit on many northern nationalists’ identity:

Their perception post the Brexit referendum of this was that English nationalists had come in over their heads and denied that part of their identity which was critical to them feeling comfortable about living here.¹⁵⁷

In addition, for some interviewees, the loss of a sense of “Europeanness” was acutely felt. This issue was to the fore in our public meetings with young people, with respondents emphasizing that they welcomed their European identity as a means of avoiding having to identify themselves as either British or Irish.¹⁵⁸

VI. BREXIT AND THE “MAINSTREAMING” OF IRISH REUNIFICATION

The other closely related impact of Brexit has been the energizing of debates on the prospect of a united Ireland. Since the Brexit referendum, this issue has moved center-stage, attracting a level of scrutiny on both parts of the island not seen since the time of partition. Although reunification was the formal position of all of the nationalist parties in Ireland prior to the Brexit referendum, in reality it was not a major priority for any of them with the exception of Sinn Féin.¹⁵⁹ As noted above, since Brexit, there has been a discernible sea-change in

155. Cathy Gormley-Heenan & Arthur Aughey, *Northern Ireland and Brexit: Three Effects on “the Border in the Mind,”* 19 BRITISH J. POL. 497, 503 (2017).

156. JON TONGE ET AL., *THE DEMOCRATIC UNIONIST PARTY: FROM PROTEST TO POWER* (2014).

157. BREXITLAWNI, *BREXITLAWNI POLICY REPORT: BREXIT AND THE PEACE PROCESS* 22 (2018) (quoting BrexitLawNI, Interview with UUP MLA, Belfast, Jan. 9, 2018).

158. *Id.* at 23 (quoting Brexit Café, Belfast, Dec. 8, 2017).

159. *See generally* Gareth Ivory, *Revisions in Nationalist Discourse Among Irish Political Parties*, 14 IRISH POL. STUD. 84 (1999).

attitudes towards a united Ireland.¹⁶⁰ At the MacGill Summer School in July 2016 then Taoiseach Enda Kenny stated that, in relation to the upcoming Brexit negotiations, the EU needs to prepare for a United Ireland.¹⁶¹ The Fine Gael led government in the Republic successfully argued for the inclusion of provisions in the EU negotiations guidelines to permit Northern Ireland to re-join the European Union as part of a united Ireland.¹⁶² In August 2017, a cross-party parliamentary committee in the Dáil endorsed a 450pp report detailing how a united Ireland by consent could be achieved in light of Brexit.¹⁶³

Although unionists have not surprisingly rejected calls for a border poll on Irish unity, it is notable that even some members of the DUP have reluctantly accepted that the issue is unlikely to go away. In 2018 former NI First Minister and DUP leader, Peter Robinson, suggested that, in light of the Brexit referendum and its aftermath, “generational border polls” would be “the least divisive and disruptive” means to address the question of a united Ireland.¹⁶⁴ Certainly, for those within the business community, the prospect of disruption to trade and economic wellbeing has caused many to re-examine their political compass. A UUP MLA told us: “Well, for the first time I’ve had friends who would be unionists but are business

160. See generally DONNACHA Ó BEACHÁIN, FROM PARTITION TO BREXIT: THE IRISH GOVERNMENT AND NORTHERN IRELAND (2019).

161. Pat Leahy, *Kenny Says Border Poll Should be Considered in Brexit Talks*, IRISH TIMES (July 18, 2016), <https://www.irishtimes.com/news/politics/kenny-says-border-poll-should-be-considered-in-brexit-talks-1.2726382> [<https://perma.cc/9JKC-6AVQ>]; Gabriel Samuels, *Brexit Negotiators Should be Prepared for a United Ireland Referendum, says Irish Prime Minister*, INDEPENDENT (July 20, 2016), <https://www.independent.co.uk/news/uk/politics/brexit-eu-referendum-ireland-unity-irish-prime-minister-enda-kenny-what-it-means-a7145731.html> [<https://perma.cc/W2J6-Z2ZV>].

162. Denis Staunton & Pat Leahy, *Brexit summit: EU Accepts United Ireland Declaration*, IRISH TIMES, (Apr. 29, 2017), <https://www.irishtimes.com/news/world/europe/brexit-summit-eu-accepts-united-ireland-declaration-1.3066569> [<https://perma.cc/CK6U-BYTG>]. Jennifer Rankin, *Europe Could Allow a United Ireland to Join EU After Brexit*, GUARDIAN (Apr. 28, 2017), <https://www.theguardian.com/uk-news/2017/apr/27/eu-to-debate-recognising-united-ireland-to-allow-swift-return-for-north> [<https://perma.cc/4LLD-D3LJ>].

163. JOINT COMMITTEE ON THE IMPLEMENTATION OF THE GOOD FRIDAY AGREEMENT, BREXIT AND THE FUTURE OF IRELAND UNITING IRELAND & ITS PEOPLE IN PEACE & PROSPERITY (32/JCIGFA/02, Aug. 2017) (Ir.); see *Irish Brexit Report Sets Out United Ireland Proposal*, BBC NEWS (Aug. 2, 2017), <https://www.bbc.co.uk/news/uk-northern-ireland-40799475> [<https://perma.cc/5N9B-VLAR>].

164. Peter Robinson *Queen’s University Speech: Full Text*, BELFAST TELEGRAPH (June 9, 2018) <https://www.belfasttelegraph.co.uk/news/northern-ireland/peter-robinsons-queens-university-speech-full-text-36992405.html> [<https://perma.cc/64P8-ME3A>].

people who trade with Dublin, with the Republic, just asking the question, ‘what would be wrong with a united Ireland?’”¹⁶⁵

Two recent polls conducted in Northern Ireland suggest that Catholic support for a united Ireland would increase in the event that the United Kingdom leaves the EU Customs Union and Single market and, in particular, in the context of a “hard border” being imposed on the island.¹⁶⁶ Spurred on by this apparent change in public opinion, key figures in northern nationalism have come together in a group titled “Ireland’s Future” to campaign and lobby for serious debate on constitutional change on the island of Ireland.¹⁶⁷ Whatever the reliability of competing polls, as the intervention of Peter Robinson illustrates, discussion on a united Ireland is now a firmly established element of political discourse across the island. The prominence given to these debates has not surprisingly had an unsettling effect within (largely pro-Brexit) working-class loyalist communities.

Some unionist and conservative politicians have warned that the Irish government “saying silly things about the border and the constitutional issues” could provoke a violent reaction from Loyalist paramilitaries.¹⁶⁸ Whilst loyalist leaders have to date exercised a degree of cautious restraint with regard to such threats, as is discussed further below, some individuals within their ranks have clearly been alarmed both by debates on Irish unity and the apparent “betrayal” inherent in the 2019 iteration of the Withdrawal Agreement.

165. BREXITLAWNI, *supra* note 146, at 24 (quoting BrexitLawNI interview with UUP MLA, Belfast, Jan. 9, 2018).

166. See John Garry et al, *What do People in Northern Ireland Think About Brexit?* In BREXIT AND THE ISLAND OF IRELAND 5, 7, available at <http://ukandeu.ac.uk/wp-content/uploads/2018/05/Brexit-and-Island-of-Ireland.pdf> [<https://perma.cc/JAZ3-97VN>]. See also Gerry Moriarty, *Brexit Would Boost Support for a United Ireland*, IRISH TIMES (Sept. 3, 2018), <https://www.irishtimes.com/news/ireland/irish-news/brexit-would-boost-support-for-united-ireland-poll-finds-1.3616129> [<https://perma.cc/5FKX-3DTP>].

167. Freya McClements, *Open Letter Began With “Recurring Theme” Around Denial of Rights in North: Brexit “Changed Everything” and Dialogue on Reunification of Ireland now “Centre Stage”*, IRISH TIMES (Nov. 4, 2019) <https://www.irishtimes.com/news/ireland/irish-news/open-letter-began-with-recurring-theme-around-denial-of-rights-in-north-1.4071181> [<https://perma.cc/FC7C-XQNE>].

168. Henry McDonald, *David Trimble: Ireland Risks Provoking Paramilitaries Over Post Brexit Border*, GUARDIAN (Apr. 6, 2018), <https://www.theguardian.com/world/2018/apr/06/david-trimble-ireland-risks-provoking-paramilitaries-over-post-brexit-border> [<https://perma.cc/95AC-P966>]. Fiach Kelly, Simon Carswell, & Steven McCaffrey, *Government Rejects Trimble’s Warnings Over its Brexit Stance*, IRISH TIMES (Apr. 7, 2018), <https://www.irishtimes.com/news/politics/government-rejects-trimble-s-warnings-over-its-brexit-stance-1.3453289> [<https://perma.cc/2HAP-5WNR>].

In sum, despite the strong advocacy of the largest unionist party in Northern Ireland (the DUP) for Brexit, one clear consequence of the Brexit referendum result has been the increased prominence of the issue of Irish reunification. This reflects significant levels of anger on the part of northern nationalists, shifts in attitudes amongst politicians in the Republic, and acceptance at least on the part of some elements within the unionist community that the issue requires “contingency planning.”¹⁶⁹ Given the seriousness of the consequences should discontent provoked by Brexit spill over into civil disobedience and violence, we now examine more closely the scale of that threat.

VII. BREXIT, POLITICAL VIOLENCE AND THE GOVERNANCE OF SECURITY

In this Part, we focus primarily on the risks presented by dissident republicans as this has been the primary preoccupation of government and security experts. In light of the loyalist reaction to the most recent agreement between the British government and the European Union, we also consider the likely impact on that community before turning to examine the challenge of responding to such threats on both sides of the Irish border. These are of course complicated by Brexit given the centrality of the European Union to the governance and regulation of security. Before exploring these contemporary security concerns, it is necessary to provide some background on the relevant groups, their history and capacity for violence, levels of community support and the symbolic importance of borders within and between Ireland and Britain.

The twentieth-century variants of Irish republicanism typically trace their origins to a series of unsuccessful armed uprisings from 1798 onwards. The best known of these was the Easter Rising of 1916. Although it failed militarily, the execution of the leaders and mass imprisonment that followed, galvanized anti-British sentiment in Ireland and laid the foundations for the Irish War of Independence (1919-21).¹⁷⁰ Since the 1920s different republican groupings—

169. Peter Robinson, *Some Refuse to Talk About the Elephant in the Room . . . but it is Positioning Itself to Squat on their Laps*, BELFAST TELEGRAPH, (Aug. 3, 2018), <https://www.belfasttelegraph.co.uk/news/northern-ireland/peter-robinson-some-refuse-to-talk-about-the-elephant-in-the-room-but-it-is-positioning-itself-to-squat-upon-their-laps-37179957.html> [<https://perma.cc/6DVP-DDAK>].

170. See generally DIARMUID FERRITER, *A NATION NOT A RABBLE: THE IRISH REVOLUTION 1913-23* (2015).

particularly variants of the Irish Republican Army (IRA)—have engaged in what they term “armed struggle against British occupation in Ireland.”¹⁷¹ Following the War of Independence and the ensuing negotiations and Anglo-Irish Treaty, the island of Ireland was partitioned into the Irish Free State (granted self-government over 26 counties albeit within the ambit of the British Empire) and Northern Ireland (comprising the six north-eastern counties). The partition of Ireland subsequently became the primary focus for republican armed struggle. Their efforts include the bombing campaign in England (1939-40), the “Border Campaign” (1958-62), and the more widespread guerrilla warfare campaign of 1969-1994.¹⁷²

In common with all political movements, the fusing, splitting, and realignment of allegiances has been an enduring feature of Irish republicanism.¹⁷³ Given that long history of often violent schisms, the republican leadership expended considerable energy from the 1990s onwards on managing their constituency in an effort to minimize the risks of splinter organizations emerging to undermine the peace process.¹⁷⁴ Whilst that strategy was largely successful, a small cohort remained fundamentally opposed to the cessation of the campaign of political violence. That cohort has in turn sub-divided but the term “dissident republican” is employed collectively to refer to those republican groupings who disagree with the peace strategy being advanced by Sinn Féin and the mainstream republican movement. It includes those who support the continuation of an armed campaign and those who reject violence but express political opposition to the Sinn Féin’s republican strategy.¹⁷⁵

171. See generally BRIAN HANLEY, *THE IRA: A DOCUMENTARY HISTORY* (2010); RICHARD ENGLISH, *THE HISTORY OF THE IRA* (2003).

172. TOMMY MCKEARNEY, *THE PROVISIONAL IRA: FROM INSURRECTION TO PARLIAMENT 110-14* (2011).

173. See generally J. BOWER EELL, *THE SECRET ARMY: THE IRA* (1997).

174. The Provisional Irish Republican Army, later known generally as the IRA, was the largest and most lethal republican paramilitary organization operating in Northern Ireland from 1969 onwards. Sinn Féin, led from 1983 until 2018 by Gerry Adams, was the political wing of the IRA. The IRA called a cease-fire in 1994, briefly returned to violence in 1996 and then reinstated its cease-fire in 1997. In 2005 the IRA’s ruling Army Council issued a statement announcing, “a formal end to the armed campaign.” That year the Independent International Commission on Decommissioning announced that the “totality of the IRA’s arsenal” has been decommissioned. See Eamonn O’Kane, *After 35 years of Bombs and Blood a Quiet Voice Ends the IRA’s War*, *GUARDIAN* (July 29, 2005); Eamonn O’Kane, *Decommissioning and the Peace Process: Where Did It Come From and Why Did It Stay So Long?* 22 *IRISH POL. STUD.* 81 (2007); ED MOLONEY, *A SECRET HISTORY OF THE IRA* (2003).

175. *DISSIDENT IRISH REPUBLICANISM* (P.M. Currie & Max Taylor eds., 2011).

In general, dissident republicans regard the Sinn Féin peace strategy as a “sell-out” and a betrayal of the sacrifices of past generations of republicans.¹⁷⁶ The three most prominent “dissident” groups are the Real IRA (“RIRA”), the Continuity IRA (“CIRA”) and Óglaigh na hÉireann (“ONH”). The smaller republican vigilante group, Republican Action Against Drugs (“RAAD”) voted in 2012 to merge with the Real IRA (“RIRA”) to form what is often referred to by journalists as the New IRA.¹⁷⁷ In 2017 a new dissident group calling itself *Arm na Poblachta* (“Army of the Republic”) claimed responsibility for a roadside explosive device in Belfast. In the twenty years since the signing of the Good Friday Agreement, more than fifty people have been killed by these various dissident republican organizations.¹⁷⁸ Twenty-nine people died and over 200 were injured in one incident when the Real IRA detonated a bomb in the center of Omagh, Co. Tyrone, in 1998. This provoked widespread condemnation and led the British and Irish governments to introduce additional anti-terrorism legislation designed to counter the organization.¹⁷⁹ The organization’s capacity was significantly reduced in the aftermath of Omagh but sporadic fatal attacks against police, army and prison personnel persisted. Between 2009 and 2019, dissidents were responsible for the deaths of two PSNI officers, two British soldiers, two prison officers and a journalist.¹⁸⁰ MI5 continue to classify the threat from dissident republicans as “severe” meaning that an attack is highly likely.¹⁸¹

It is important to stress that the capacity of these groups to engage in violence is significantly less than their Provisional IRA

176. See generally JOHN F. MORRISON, *THE ORIGINS AND RISE OF DISSIDENT IRISH REPUBLICANISM: THE ROLE AND IMPACT OF ORGANIZATIONAL SPLITS* (2014); MARISA MCGLINCHEY *UNFINISHED BUSINESS: THE POLITICS OF “DISSIDENT” IRISH REPUBLICANISM* (2019).

177. See generally ANDREW SANDERS, *INSIDE THE IRA: DISSIDENT REPUBLICANS AND THE WAR FOR LEGITIMACY* (2011).

178. Jon Tonge, *A Campaign Without End?: “Dissident” Republican Violence in Northern Ireland*, 5 *POL. INSIGHT* 1, 14 (2014).

179. Michael White, *MPs Recalled to Match Dublin Anti-Terror Law*, *GUARDIAN* (Aug. 25, 1998), <https://www.theguardian.com/politics/1998/aug/25/houseofcommons.uk> [<https://perma.cc/67BQ-TZJL>].

180. *Northern Ireland: Dissident Republican Terrorist Groups*, SECURITY SERVICE MI5, (2018), <https://www.mi5.gov.uk/northern-ireland> [<https://perma.cc/A86S-R5NL>].

181. Karen Bradley, ‘Security Situation in Northern Ireland: Written Statement’, *HOUSE OF COMMONS* (Dec. 17, 2018), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-17/HCWS1187/> [perma.cc/EWE9-QVQC].

predecessors. All dissident groups are heavily monitored by the police and security services—a task made easier by their much smaller size and relatively low level of community support.¹⁸² It would nonetheless be foolish to dismiss the potential for increased republican dissident violence as a result of Brexit. It is also important to remember that, historically, widespread popular support has not been a pre-requisite for armed republican action in Ireland. For example, the IRA had been reduced to a very small cadre of committed activists in the aftermath of the Second World War but this did not preclude a resurgence of the organization in the 1950s.¹⁸³ Interestingly, some of the republicans interviewed by the authors highlighted the IRA “Border Campaign” of “by way of caution against dismissing the potential threat of dissident republicanism post-Brexit”.¹⁸⁴

Most dissident republican groups supported Brexit in the belief that the European Union represents the interests of capital rather than working-class people and that it infringes on Irish sovereignty.¹⁸⁵ In particular, as the authors have previously argued:

Brexit is broadly viewed [by dissident republicans] as ideological confirmation of Britain’s imperialist attitude and a classic example

182. After the mainstream republican movement adopted the conjoined strategy of “the armalite and the ballot box” in the early 1980s, Sinn Féin’s political support in Northern Ireland plateaued in the nationalist republican community at approximately thirty-three percent while the conflict was ongoing, with the SDLP picking up the bulk of the remaining sixty-six percent. By way of comparison, at the moment political parties linked to dissident republicanism would only be able to point to a handful of independent councilors elected, with a share of the overall vote in the last council elections (2014) of just 1.5% of the total votes cast. By contrast, in the same election, Sinn Féin polled 24% of the total of first preference votes and the other nationalist party the SDLP polled 13.5%. See CAIN WEB SERVICE, *Local Government Elections (NI) Thursday 22 May 2014*, <http://cain.ulst.ac.uk/issues/politics/election/2014lg/rd2014.htm> [<https://perma.cc/QLH9-SGBR>]; BRIAN FEENEY, *SINN FEIN: A HUNDRED TURBULENT YEARS* (2003); Bernadette Hayes & Ian McAllister, *Public Support for Political Violence and Paramilitarism in NI and the Republic of Ireland* 17 *TERRORISM & POL. VIOLENCE* 599 (2005).

183. See ANNA BRYSON, *THE INSIDER: THE PRISON DIARIES OF EAMONN BOYCE 1956-1962* 10-11 (2008); BARRY FLYNN, *SOLDIERS OF FOLLY: THE IRA BORDER CAMPAIGN 1956-62* 11-33 (2009).

184. BREXITLAWNI, *supra* note 147, at 31 (discussing interview with veteran republican, May 24, 2018); See generally the excellent play concerning the symbolic link between the border and intergenerational armed struggle MICHAEL J. MURPHY, *MEN ON THE WALL* (1961).

185. Paddy Hoey, *Dissident and Dissenting Republicanism: From the Good Friday/Belfast Agreement to Brexit* 43 *CAPITAL & CLASS* 73 (2019); Henry McDonald, *Dissident Republicans in Northern Ireland Seize Moment to Fight Partition*, *GUARDIAN* (June 25, 2018), <https://www.theguardian.com/politics/2016/jun/25/hardline-republicans-sense-northern-ireland-chance-break-away-derry-eu-referendum> [<https://perma.cc/87LW-AHSA>].

of the usurpation of Ireland's right to sovereignty and self-determination.¹⁸⁶

In view of the fact that Brexit is proceeding against the wishes of the majority of people in Ireland, North and South, one life-long republican suggested that it is: “[t]he embodiment of Britain’s colonial mindset towards Ireland, ignoring what the Irish people want, or what is in the interests of the Irish people and simply pursuing their own selfish and strategic interest which is based on narrow British jingoism”.¹⁸⁷ “Invoking an age-old republican dictum,” a leading dissident republican told the authors that “from a republican perspective, we always look at England’s disadvantage as our advantage.”¹⁸⁸ Although he was personally skeptical about the benefits of EU membership he explained that: “You are getting to the point where you don’t care what happens as long as Britain breaks up, or the union breaks up [. . .] we will take national sovereignty whatever way it comes to us.” He thus delighted in what he viewed as the “marred swamp of British constitutional politics” since the Brexit vote and adding that, “everybody is just sitting waiting for the so-called ‘United Kingdom’ to implode.”¹⁸⁹

The most welcome aspect of Brexit from a dissident republican perspective is the spotlight that it has placed on the existence of the border. A spokesperson for the dissident group, Saoradh, suggested that Brexit had exposed “. . . what basically has been since 1998 a soft occupation in the North.”¹⁹⁰ This, in his view, was “manna from heaven.”¹⁹¹ When questioned about the views of republican dissidents on the respective merits of a “hard” versus “soft” Brexit, he suggested, “the harder the better.”¹⁹² In particular, he noted that any kind of military presence or infrastructure on the Irish border would be “highly antagonistic” to Irish republicans.¹⁹³

186. See BREXITLAWNI, *supra* note 91, at 31.

187. BREXITLAWNI, *supra* note 147, at 32 (quoting interview with veteran republican, May 24, 2018).

188. *Id.*

189. BREXITLAWNI, *supra* note 147, at 32 (quoting interview with dissident republican spokesperson, Dungannon, May 24, 2018).

190. *Id.*

191. *Id.*

192. See reports of the Saoradh Ard Fheis (annual party conference); Leona O’Neill, *Dissident Group Saoradh in Pledge to “Exploit” Brexit*, BELFAST TELEGRAPH (Nov. 20, 2017), <https://www.belfasttelegraph.co.uk/news/northern-ireland/dissident-group-saoradh-in-pledge-to-exploit-brexit-36334512.html> [<https://perma.cc/W6TB-GLMW>].

193. *Id.*

Amongst the interviews carried out by the authors with republicans (including dissident republicans) in border areas in Northern Ireland, there was widespread consensus that Brexit and the prospect of a hard border, in particular, would indeed be a potential mobilizing agent for not only protest and violence but also illegal smuggling activities. Other studies suggest that there would be increased support for violence in the nationalist community well beyond the border regions in the event of a hard border.¹⁹⁴ This latter risk—of Brexit radicalizing previously mainstream nationalists—was raised by a veteran Provisional IRA leader and now senior Sinn Fein member who is widely respected for his work in implementing the peace process. He told the authors:

I am less worried by the dissidents than I am about mainstream republicans, particularly a new generation of younger republicans and how they will react if there is some form of a hard border. This may become a serious challenge for us [mainstream republican leaders] trying to stop people reacting to this.¹⁹⁵

Fears of a potential security risk in the event of a hard border are clearly shared by the Police Service of Northern Ireland (“PSNI”). In May 2018 then Chief Constable, Sir George Hamilton, announced that a business case was being drawn up to fund the recruitment of up to four hundred additional officers to serve along the Irish border.¹⁹⁶ Mr. Hamilton explained that he needed to ensure that his organization was

194. Garry et al. found that more than almost three quarters of Catholics and eighty-two percent of Sinn Féin supporters would find it “almost impossible to accept” customs installations being protected by British soldiers. JOHN GARRY, ET AL., NORTHERN IRELAND AND THE UK’S EXIT FROM THE EU: WHAT DO PEOPLE THINK? (2018). See John Garry & Brendan O’Leary, *While May Must Decide What to do About Northern Ireland and Brexit, Here’s What the People Themselves Think*, HUFF. POST, (May 21, 2018), https://www.huffingtonpost.co.uk/entry/northernireland_uk_5b028f02e4b07309e05a36e1?guc_counter=1&guce_referrer=aHR0cHM6Ly91a2FuZGV1LmFjLnVrL3doYWxILW1heS1tdXN0LWRIY2lkZS13aGF0LXRvLWRvLWVib3V0LW5vcnRoZXJULWlyZWxhbmQtYW5kLWJyZXhpdC1oZXJlcy13aGF0LXRvZS1wZW9wbGUtdGhlbXNlbHZlcy10aGluay8&guce_referrer_sig=AQAAAKbZ4IRZtwWpyPeNi4gP7RZ_fQZMbDTIfDZWDvcDj3g3eH0WnTEb58KUSvcIAI20eqZkNyIVKj6I2JsARKI5A9foCudEXmmHZCeX_3iFHwp_KfklIntLjPvTXyquo2NOKWyAcy6lFaj8tX-tBRTd5Ejlf6ag00k4n0EHhDGAYxl [https://perma.cc/8RBH-DFLQ].

195. BREXITLAWNI, *supra* note 147.

196. Vincent Kearney, *Police ask for More Resources Ahead of Brexit*, BBC NEWS (May 31, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-44320401> [https://perma.cc/D2YC-FZDJ]. Gerry Moriarty, ‘Hundreds’ of extra PSNI Officers Needed for Border After Brexit, IRISH TIMES (Nov. 28, 2018), <https://www.irishtimes.com/news/crime-and-law/hundreds-of-extra-psni-officers-needed-for-border-after-brexit-1.3713680> [https://perma.cc/GTF3-PLUB].

“match fit” for the post-Brexit era.¹⁹⁷ More recently, his successor Simon Byrne told the *Guardian* newspaper that, “We are very clear here. We do not support the establishment of checkpoints or monitoring cameras right near the border and we’d be very reluctant to be drawn there because of the threat to our officers.”¹⁹⁸

While much of the focus since Brexit has been on the risk posed by dissident republicans, political developments since the details of the proposed Johnson deal with the EU in 2019 have concentrated attention on the possibility of violence or civil disobedience emanating from loyalist sources. By way of background, loyalist paramilitaries carried out a violent campaign in support of the maintenance of the union with Britain and the perceived failure of the government to deal effectively with Republican “terrorism.”¹⁹⁹ The main loyalist paramilitary groupings are the Ulster Defence Association (“UDA”) (also sometimes referred to as the Ulster Freedom Fighters), the Ulster Volunteer Force (“UVF”), the Red Hand Commando (“RHC”) and the now-defunct splinter group, the Loyalist Volunteer Force (“LVF”).²⁰⁰ Their targets were traditionally uninvolved Catholic civilians, economic or civilian targets in the Irish Republic and republican activists.²⁰¹ Regarding themselves as primarily defensive in nature, they consider that they were driven to the use of political violence by the IRA, defending not only the link with the United Kingdom but also their own community from republican violence.²⁰²

Whilst the major loyalist organizations announced a ceasefire in 1994, they (in common with their republican counterparts) have continued to be involved in political violence.²⁰³ Much of that violence

197. *Id.*

198. Vikram Dodd, *Hard Border Would put Officers Lives at Risk says Northern Ireland Police Chief*, *GUARDIAN* (Sept. 18, 2019), <https://www.theguardian.com/uk-news/2019/sep/18/hard-brexite-would-put-officers-lives-at-risk-says-northern-ireland-police-chief> [<https://perma.cc/4JGE-DM2C>].

199. STEVE BRUCE, *THE RED HAND: PROTESTANT PARAMILITARIES IN NORTHERN IRELAND* 62, 189 (2002); AARON EDWARDS, *UVF: BEHIND THE MASK* 47-48 (2017).

200. JIM CUSACK & HENRY McDONALD, *UVF* 303 (1997); HENRY McDONALD & JIM CUSACK, *UDA: INSIDE THE HEART OF LOYALIST TERROR* 20-25 (2005).

201. See Christina Steenkamp, *Loyalist Paramilitary Violence After the Belfast Agreement*, 7 *ETHNOPOLITICS* 159, 160-61 (2008).

202. IAN WOOD, *CRIMES OF LOYALTY: A HISTORY OF THE UDA* 2-3 (2006).

203. CAROLYN GALLAHER, *AFTER THE PEACE: LOYALIST PARAMILITARIES IN POST-ACCORD NORTHERN IRELAND* 8-12 (2007); JAMES MCCAULEY & GRAHAM SPENCER EDS., *ULSTER LOYALISM AFTER THE GOOD FRIDAY AGREEMENT* 176-99 (2011); JAMES MCCAULEY, *VERY BRITISH REBELS: THE CULTURE AND POLITICS OF ULSTER LOYALISM* 123-39 (2015).

has been directed inwards at other loyalists.²⁰⁴ There have been conspicuous acts of political leadership by individual loyalists but the three main loyalist organizations have also been heavily involved in criminal activity including drug dealing, extortion and robberies.²⁰⁵ While Sinn Féin has emerged as the largest nationalist political party, the political wings of the two largest loyalist paramilitary organizations (the Progressive Unionist Party and the Ulster Democratic Party) failed to make significant electoral inroads after the Good Friday Agreement.²⁰⁶ As pro-state paramilitary groups, Loyalist have had an ambivalent relationship with that state, often expressed as a strong sense that their “loyalty to queen and country” is insufficiently recognized.²⁰⁷ In addition, there is a deep-seated fear within both loyalist and unionist politics and culture that they are always vulnerable to betrayal by the British.²⁰⁸ This has, as noted, been inflamed by Boris Johnson’s recent apparent U-turn on the question of a trade border along the Irish sea.²⁰⁹ Unsurprisingly, unionist politicians and some

204. In total forty-one loyalist paramilitaries have been killed since the 1998 Good Friday Agreement. All of those deaths were at the hands of other loyalist paramilitaries. See Paul Noal, *The Cruel Peace: Killings in Northern Ireland Since the Good Friday Agreement*, DETAIL NETWORK, (Apr. 28, 2018), <https://www.thedetail.tv/articles/the-cruel-peace-killings-in-northern-ireland-since-the-good-friday-agreement> [https://perma.cc/VVK2-Z9JY]. Unattributed, “158 Security-Related Deaths” Since Good Friday Agreement, BBC NEWS (Apr. 23, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-43862294> [https://perma.cc/LM7M-NNR8].

205. Vincent Kearney, *Loyalist Paramilitary Groups to Support Rule of Law*, BBC NEWS, (Apr. 9, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-43698164> [https://perma.cc/2YR8-FE2J]. In 2019, the Police Service of Northern Ireland reported that the UDA and UVF remain heavily involved in criminality. Vincent Kearney, *Loyalist Paramilitaries: Once You Join it’s Impossible to Get Out*, BBC NEWS, (Feb. 1, 2019), <https://www.bbc.co.uk/news/uk-northern-ireland-politics-47072147> [https://perma.cc/XC2Z-A4VT].

206. In 2019 the Progressive Unionist Party has no seats in the Northern Ireland Assembly and three local council seats. By comparison, Sinn Féin has twenty-seven Assembly seats and 105 council seats. The Ulster Democratic Party dissolved in 2001. See Northern Ireland Assembly, *Statistics*, <http://aims.niassembly.gov.uk/mlas/statistics.aspx> [https://perma.cc/EWX7-X5RG]; Unattributed, *Ulster Democratic Party Dissolved*, GUARDIAN (Nov. 28, 2001), <https://www.theguardian.com/uk/2001/nov/28/northernireland> [https://perma.cc/AED8-F7YA].

207. PETER TAYLOR, *LOYALISTS* (1999); Brian Graham, *The Past in the Present: The Shaping of Identity in Loyalist Ulster* 16 *TERRORISM & POL. VIOLENCE* 3, 483 (2004).

208. See generally Cheryl Lawther, *The Truth About Loyalty: Emotions, Ex-combatants and Transitioning from the Past*, 11 *INT’L J. TRANSITIONAL JUSTICE* 484 (2017); PAMELA CLAYTON, *ENEMIES AND PASSING FRIENDS: SETTLER IDEOLOGY IN 20TH CENTURY ULSTER* (1996).

209. At the 2018 DUP Annual Conference then Foreign Secretary Boris Johnson stated, “[n]o British government could or should sign up to border in the Irish sea between mainland

loyalist paramilitaries have decried this act as part of the “slippery slope” towards a united Ireland.²¹⁰ Hundreds of loyalists (including prominent paramilitaries) have attended public meetings on the “great betrayal,” and one prominent activist has claimed there will be “mass resistance” if the deal is enacted.²¹¹ While there is some evidence of other senior loyalists exercising a restraining influence, the PSNI Chief Constable has indicated that (in a mirror image of nationalist anger towards any hard border) “you can anticipate a lot of emotion in loyalist communities and the potential for civil disorder.”²¹²

Regardless of the source, Brexit has presented a number of legal and practical problems for the governance of security in Northern Ireland and between Northern Ireland and the Republic. In particular, many aspects of cross-border cooperation between police and security agencies in the two jurisdictions have been done through the EU

UK and Northern Ireland.” As noted above, his 2019 agreement nonetheless includes provision for a *de facto* border down the Irish Sea. See Andrew Quinn, *Watch Boris Johnson Tell the DUP in 2018 He Would Never Put Border in the Irish Sea - Today He Put a Border in the Irish Sea*, NEWSLETTER (Oct. 17, 2019), <https://www.newsletter.co.uk/news/politics/watch-boris-johnson-tell-the-dup-in-2018-he-would-never-put-border-in-the-irish-sea-today-he-put-a-border-in-the-irish-sea-1-9110754> [<https://perma.cc/RP9S-EQNB>].

210. Siobhan Fenton, *Boris Johnson’s Deal has Left Northern Irish Loyalists Uneasy, but Will it Lead to Violence?*, NEW STATESMAN (Oct. 25, 2019), <https://www.newstatesman.com/politics/northern-ireland/2019/10/boris-johnsons-deal-has-left-northern-irish-loyalists-uneasy-will> [<https://perma.cc/YW3W-TRG8>]; Ceylan Yeginsu, *In Northern Ireland, Brexit Deal is Seen as ‘Betrayal’*, N.Y. TIMES, (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/world/europe/northern-ireland-brexit.html> [<https://perma.cc/KK5U-7GRX>].

211. Suzanne Breen, *Brexit: Loyalist Bryson Warns of “Mass Resistance” from Unionist Community*, BELFAST TELEGRAPH (Oct. 23, 2019), <https://www.belfasttelegraph.co.uk/news/brexit/brexit-loyalist-bryson-warns-of-mass-resistance-from-unionist-community-38622504.html> [<https://perma.cc/TS7M-ABBP>]; Allison Morris, *Loyalists Meet in Unprecedented Show of Unity over Brexit Betrayal*, IRISH NEWS (Oct. 22, 2019), <https://www.irishnews.com/news/brexit/2019/10/22/news/loyalists-meet-in-unprecedented-show-of-unity-over-brexit-betrayal-1744947/> [<https://perma.cc/TTG8-CDXX>].

212. *Brexit: PSNI Chief says Potential for Loyalist Disorder if Brexit Threatens Union*, BBC NEWS (Oct. 23, 2019), <https://www.bbc.co.uk/news/uk-northern-ireland-50157743> [<https://perma.cc/SRA7-9MNB>]. Bimpe Archer, *‘Loyalist Community can Mobilise Large Numbers for Public Disorder’ – PSNI Chief Constable Simon Byrne*, IRISH NEWS (Oct. 25, 2019), <http://www.irishnews.com/paywall/tsb/irishnews/irishnews/irishnews//news/northernirelandnews/2019/10/25/news/if-loyalists-believe-brexit-deal-threatens-union-loyalist-community-can-mobilise-large-numbers-for-public-disorder-psni-1748072/content.html> [<https://perma.cc/36Z5-A95K>].

regulatory framework.²¹³ A key challenge identified by police and security professionals was the insistence from the UK government that ending the jurisdiction of the Court of Justice of the European Union (“CJEU”)—the EU’s supreme judicial authority—was a “red line” issue.²¹⁴ Given that all security related disputes on the interpretation of the EU framework are ultimately resolved by the CJEU, this presents a serious problem for security and policing officials. While this position appeared to soften slightly with the 2019 EU Withdrawal Agreement, there has been no fundamental change in relation to justice and security issues. Under Article 89 of that Agreement, the jurisdiction of the CJEU persists throughout the transition period, but it (largely) ends thereafter. For eight years following the transition period, UK courts will only be able to send cases to the CJEU if they concern EU citizens living in the United Kingdom,²¹⁵ or if they relate to some of the protocols on Northern Ireland and Cyprus.²¹⁶ The CJEU will not have jurisdiction for justice and security matters.

By way of illustration of the practical and legal challenges involved, the European Arrest Warrant (“EAW”) facilitates the extradition of individuals between EU member states, including between the Republic of Ireland and the United Kingdom. This legal framework, which has operated since 2004, has no provisions for third-country membership, meaning that the United Kingdom is very unlikely to be able to remain within it after it leaves the European Union.²¹⁷ The loss of the EAW is a particularly important issue in the context of the relationship between the United Kingdom and Ireland, and more specifically, between Northern Ireland and the Republic of Ireland. Historically, extraditions were a source of significant tension between the Republic and the United Kingdom resulting in multiple

213. For more on this, see Amanda Kramer, Rachael Dickson & Anni Pues, *Evolving Justice Arrangements Post-Brexit*, IRISH HUMAN RIGHTS & EQUALITY COMMISSION AND NORTHERN IRELAND HUMAN RIGHTS COMMISSION (Aug. 2019).

214. David Green, *Brexit: Why did the ECJ Become a UK “Red Line”?* FINANCIAL TIMES (Apr. 12, 2017), <https://www.ft.com/content/32cd1e87-c7d1-3026-86fc-bce5229711d1> [<https://perma.cc/GWG5-84ML>]. Dan Roberts, *Not Much Remains of Theresa May’s Red Lines After the Brexit Deal*, GUARDIAN (Dec. 8, 2017) <https://www.theguardian.com/politics/2017/dec/08/not-much-remain-theresa-may-red-lines-brexit-deal> [<https://perma.cc/3VL4-29LU>].

215. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community, art. 89, Oct. 19, 2019 (Gr. Br.) [hereinafter October Withdrawal Agreement].

216. *Id.* art. 182.

217. Kramer et al. *supra* note 213.

time-consuming and expensive legal challenges.²¹⁸ The introduction of the EAW shifted the focus away from bilateral arrangements between the British and Irish states to an EU one, reducing the political sensitivities and making the process much more efficient and less costly. Whereas previously extradition cases were sometimes held up for years in the Irish courts, the average extradition time under the EAW has been reduced to 48 days.²¹⁹ The Chief Constable of the PSNI has warned that the EAW is “critical” in its efforts to counter crime and terrorism,²²⁰ a fact also acknowledged by the former UK Prime Minister Theresa May,²²¹ the Irish Minister for Justice, Charlie Flanagan,²²² and the head of the police in the Republic.²²³

Similarly, data sharing between policing, security, and prosecution officials via EU databases is premised on EU

218. See generally MICHAEL FARRELL, *SHELTERING THE FUGITIVE: THE EXTRADITION OF IRISH POLITICAL OFFENDERS* (1985); Colm Campbell, *Extradition to Northern Ireland: Prospects and Problems*, 52 *MODERN L. REV.* 585 (1989); Kieran McEvoy, *Law, Struggle, and Political Transformation in Northern Ireland*, 27 *J. OF L. AND SOCIETY* 542 (2000).

219. Kramer et al *supra* note 218, at 4.

220. Mark Bain, *Brexit: Northern Ireland Security at Risk if UK Kicked Out of EU Extradition System, Warns Police Chief*, *BELFAST TELEGRAPH* (June 20, 2018), <https://www.belfasttelegraph.co.uk/news/northern-ireland/brexit-northern-ireland-security-at-risk-if-uk-kicked-out-of-eu-extradition-system-warns-police-chief-37029094.html> [<https://perma.cc/PVK5-S8UW>]. EUROPEAN UNION COMMITTEE, *BREXIT: THE PROPOSED UK-EU SECURITY TREATY, 2017-2019*, HL 164 (UK) at 165.

221. Philip Oltermann, *Theresa May Wants New Security Treaty With EU Next Year*, *GUARDIAN* (Feb. 17 2018), <https://www.theguardian.com/politics/2018/feb/17/theresa-may-wants-new-security-treaty-with-eu-next-year> [<https://perma.cc/X43F-5N2Z>]. Tim Shipman, *Brexit: Theresa May Pledges to Keep EU Arrest Warrant and Europol Links*, *TIMES* (Feb. 11, 2018), <https://www.thetimes.co.uk/article/theresa-may-pledges-to-keep-eu-arrest-warrant-and-europol-links-lj2pkx6lg> [<https://perma.cc/KRG4-Y3K2>].

222. Barry Roche, *Flanagan Urges UK to Maintain Extradition Arrangements Post-Brexit*, *IRISH TIMES* (Feb. 19, 2019), <https://www.irishtimes.com/news/ireland/irish-news/flanagan-urges-uk-to-maintain-extradition-arrangements-post-brexit-1.3797165> [D8V8-E9N4]. Ralph Riegel, *Flanagan Warns that Brexit Must Not Impact on Anglo-Irish and EU Judicial security co-operation*, *INDEPENDENT* (Feb. 18, 2019), <https://www.independent.ie/business/brexit/flanagan-warns-that-brexit-must-not-impact-on-anglo-irish-and-eu-judicial-security-co-operation-37825468.html> [<https://perma.cc/43U4-2TZA>].

223. Unattributed, *Police Chiefs Pledge Continued Border Co-operation Whatever Brexit Brings*, *BELFAST TELEGRAPH* (Nov. 7, 2018), <https://www.belfasttelegraph.co.uk/news/northern-ireland/police-chiefs-pledge-continued-border-cooperation-whatever-brexit-brings-37503123.html> [<https://perma.cc/Z2RH-87S9>]. Niall O'Connor, *Garda Commissioner Drew Harris Tells Summit that Brexit Will Not Harm Cross-Border Policing Efforts*, *IRISH TIMES* (Nov. 7, 2018), <https://www.irishmirror.ie/news/irish-news/garda-commissioner-drew-harris-tells-13550656> [<https://perma.cc/RJJ7-6NKH>].

membership.²²⁴ It is clear that the United Kingdom has placed high value on these databases as it is part of the Schengen Information System (“SIS II”), the European Criminal Record Information System (“ECRIS”), the Passenger Name Records (“PNR”), Europol Information System (“EIS”), and Prüm.²²⁵ The reason why the risks of the UK having limited access to such databases are real are because of the lack of third-party membership precedents, the removal of CJEU jurisdiction, concerns about the adequacy of data protection and the loss of Article 8 protections under the Charter of Fundamental Rights of the European Union.²²⁶ It raises a number of problems for practical policing and prosecutorial cooperation, particularly given the increasingly cross-border nature of criminal activity.²²⁷

As demonstrated above, the United Kingdom’s decision to leave the European Union creates a significant challenge for the governance of security. The potential for border infrastructure or border checks between Northern Ireland and the rest of the United Kingdom or Northern Ireland and the Republic of Ireland has been met with threats from dissident republicans and more recently some loyalist groups. Both Brexit “solutions” put forward have the potential to incite paramilitary violence and raise serious challenges to the governance of security in the United Kingdom. What is clear is that both the May and Johnson Conservative governments have prioritized “sovereignty” concerns (illustrated here by ending the jurisdiction of the CJEU) over the warnings from police figures and legal experts about the consequences of losing access to many essential tools for policing, justice, and security cooperation.

VIII. CONCLUSION: BREXIT AND THE LIMITATIONS OF LAW

In this final section, we wish to examine the role of law in general and rights discourses in particular in the context of Brexit. The centrality of human rights protections to the Good Friday Agreement

224. STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (3rd ed. 2011); EUROPEAN UNION COMMITTEE, *BREXIT: FUTURE UK-EU SECURITY AND POLICE COOPERATION*, 2016-17, HL 77 (UK), Valsamis Mitsilegas, *European Criminal Law After Brexit* 28 CRIM. L. F. 219 (2017).

225. Kramer et al., *supra* note 213, at 61.

226. See generally Lokke Moerel & Ronan Tigner, *United Kingdom: Data Protection Implications of Brexit* 2 EUR. DATA PROTECTION P. REV. 381 (2016); UK Home Affairs Committee, *UK-EU SECURITY COOPERATION AFTER BREXIT* (2018).

227. Interview with Senior Legal Practitioner, Nov. 9, 2018.

and the broader peace process in Northern Ireland has been much discussed elsewhere.²²⁸ As McCrudden has argued, the source of these rights are diverse—“with devolved, national, international and supranational elements layered on top of each other”—and their object was to protect the dual national makeup of the local population as well as the broader human rights and equality provisions which “transcend the issue of differing national allegiances.”²²⁹ The Good Friday Agreement explicitly commits to “the protection and vindication of the human rights of all” (para 2) and notes the obligations of the “sovereign government” in relation to “the principles of full respect for and equality of civil, political, social and cultural rights” (para 1v). This latter part of the Agreement also includes reference to the right of the people of Northern Ireland “to identify themselves and be accepted as Irish or British or both, as they may so choose” (para 1vi).

In addition, as noted above, Irish and UK membership of the European Union is clearly assumed as axiomatic both in the key antecedent agreements and the Good Friday Agreement itself. This international treaty affirms in its preamble the desire of the British and Irish governments to: “develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union.”

Article 17 of the Agreement also commits the North South Ministerial Council to considering “the European Union dimension of relevant matters, including the implementation of EU policies and programmes under consideration in the EU framework.”²³⁰ We argue that these rights are fundamentally affected by Brexit and that, despite the apparent promises of the Good Friday Agreement and its enabling legislation, law has failed to protect these rights and by extension the broader peace process. We will also argue that the manifest limitations of legalism provide a useful corrective to the risks of overselling human rights in the broader political and legal conversations concerning both

228. See generally Paul Mageean & Martin O’Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement* 22 *FORDHAM INT’L L.J.* 1499 (1998); HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND (Colin Harvey ed., 2001); JENNIFER CURTIS, HUMAN RIGHTS AS WAR BY OTHER MEANS: PEACE POLITICS IN NORTHERN IRELAND (2014).

229. Chris McCrudden, *The Belfast-Good Friday Agreement, Brexit & Rights*, *ROYAL IRISH ACADEMY/BRITISH ACADEMY* 3 (2017).

230. The Belfast Agreement, U.K.-Ireland, Code of Conduct, sec. 17, Apr. 10, 1998.

the governance of Northern Ireland and indeed with regard to the potential of a united Ireland.

One direct legal consequence of Brexit will be that people in Northern Ireland will not have the ability to use the EU Charter of Fundamental Rights (“ECFR”) as a means of asserting the rights developed in the European Union since the 2007 Lisbon Treaty. Although the ECFR is an instrument of comparative infancy, it contains important additional provisions to the European Convention on Human Rights concerning economic and social rights—effectively, the single-market rights—of living, traveling, working and claiming benefits around the European Union, plus the democratic rights of engaging with the European Parliament.²³¹ These rights are ultimately enforceable through the CJEU. Although the UK (along with Poland) secured what they believed to be an opt-out to Charter (Protocol 30 of the Lisbon Treaty), in practice it affirms many of the fundamental rights already recognized in EU laws to which the UK government has signed up.²³² A central challenge will be whether Irish passport holders in Northern Ireland will be able to access the same services in the Republic and throughout the European Union as their fellow Irish citizens who live south of the border—a concern which has featured prominently for nationalists.²³³

More generally, Brexit has been the subject of a number of important legal challenges to the power of the Executive in the UK

231. Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 645, 681 (2011).

232. For a useful overview see, Human Rights Consortium, *Rights at Risk, Brexit, Human Rights and Northern Ireland* (2018).

233. Equality Commission for Northern Ireland, *UK’s Decision to Leave the EU: Recommendations on the EU (Withdrawal) Bill* (2017). In Sept. 2018 the prominent nationalist commentator Brian Feeney observed, “As Britain ignores the EU Charter of Fundamental Rights and leaves the European Court of Justice, this Conservative government begins to unravel the network of rights-based provisions in the GFA. It was never envisaged that the final arbiter of human rights and equality here would be the UK Supreme Court. Nationalists looked to the international clout of the EU as a final court of appeal. Northern nationalists turned their backs on Westminster in last year’s election when the British kicked away these two pillars of the peace process; neutrality, and EU guarantees of rights and equality.” Brian Feeney, *Polls Show Final Alienation of Northern Nationalists from the British Government*, IRISH NEWS (SEPT. 5, 2018), <http://www.irishnews.com/paywall/tsb/irishnews/irishnews/irishnews//opinion/columnists/2018/09/05/news/brian-feeney-polls-show-final-alienation-of-northern-nationalists-from-the-british-government-1423812/content.html> [https://perma.cc/J89L-VJZ4]. See also Newton Emerson, ‘Brexit and Rights a Route for Republicans to Closer Unity with the EU’, IRISH TIMES (July 12, 2018), <https://www.irishtimes.com/opinion/brexit-and-rights-a-route-for-republicans-to-closer-unity-with-eu-1.3561538> [https://perma.cc/P24C-3M7C].

courts. In *R v Miller*,²³⁴ the government lost (8-3) in the UK Supreme Court on the key question as to whether or not it could trigger withdrawal from the European Union as prescribed by Article 50 of the TEU without an Act of Parliament using the Executive's 'Foreign Affairs Powers.' Having lost, the government was forced to bring the first EU (Notification of Withdrawal) Bill 2017 before the House of Commons two days later. Further, in August 2019, in an apparent effort to avoid detailed parliamentary scrutiny of his Brexit plans, the new Conservative Prime Minister, Boris Johnson, prorogued parliament for five weeks, reconvening just seventeen days before the United Kingdom's scheduled departure from the European Union. In the ensuing legal challenge which eventually reached the Supreme Court, the government again lost (11-0).²³⁵ The government losses on both of these major cases before the Supreme Court were understandably celebrated in Britain by those opposed to Brexit as evidence of the courts upholding parliamentary sovereignty and the rule of law.²³⁶

However, from the vantage point of the Irish peace process, the Good Friday Agreement and the devolution settlement, the limitations of the law have been laid bare. This is apparent in a number of Northern Ireland related legal challenges to Brexit brought by politicians and civil society activists. These cases focus on the central question as to whether or not authorization from Parliament is required before the British government can trigger Article 50 and thus exit the European Union.

In *Agnew* and *McCord* (heard together in the High Court in Belfast), a key argument put forward was that the prerogative power is not available in relation to the triggering of Article 50 because it is displaced by the Northern Ireland Act 1998 and the Good Friday Agreement and British-Irish Agreements that underpin it. In their view the provisions of the Northern Ireland Act 1998 are "inextricably

234. *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5.

235. *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41.

236. Gina Miller, the lead applicant in both cases said on the steps of the Supreme Court after her second victory, "Today is not a win for any individual or cause, it's a win for Parliamentary sovereignty, the separation of powers and the independence of our British courts. Crucially, this ruling confirms that we are a nation governed by the rule of law." Gina Miller, *Who is Campaigner Behind Brexit Court Cases?*, BBC NEWS (Sept. 25, 2019), <https://www.bbc.com/news/uk-politics-37861888> [<https://perma.cc/79AZ-MU6F>].

woven” with continuing membership of the European Union.²³⁷ McCord’s lawyers argued further that, since a majority in Northern Ireland had voted to remain in the European Union, the withdrawal process effectively amounted to a change in the constitutional status of Northern Ireland - again contrary to the Good Friday Agreement and section 1 of the Northern Ireland Act 1998.²³⁸ In respect of all of these issues, Justice Maguire dismissed the applications, stating the consent principle related only to the question of whether or not Northern Ireland should remain part of the United Kingdom and not to other constitutional changes such as leaving the European Union.²³⁹

Part of the first Miller judgment before the Supreme Court also examined whether any legislation authorizing the triggering of Article 50 would require the granting of a Legislative Consent Motion by the devolved Assemblies.²⁴⁰ The judges were unanimous in finding that there is no legal requirement to secure the consent of the devolved institutions (in Scotland and Northern Ireland). They concluded that neither Section 1 nor Section 75 of the Northern Ireland Act is of assistance in this case, and that the Sewel Convention - that Westminster should not legislate for devolved matters without the consent of the devolved legislature - was precisely that, a convention rather than a legally enforceable obligation.²⁴¹ In the second Miller case, the Supreme Court also heard arguments (from Ronan Lavery QC again on behalf of Mr. McCord) that a *no deal* Brexit would lead to chaos, economic misery and would fundamentally undermine the peace

237. Reported as *Re McCord’s Application* [2016] NIQB 85. Steven Agnew was the leader of the Green Party in Northern Ireland which is vehemently opposed to Brexit. He and a number of other anti-Brexit party leaders and civil society activists acted together in this challenge to the legality of Brexit. Their judicial review was conjoined with another challenge from Mr Raymond McCord, a prominent victims’ rights campaigner whose son was killed by loyalist paramilitaries. *Id.*

238. The Northern Ireland Act (1998) enacted the Good Friday Agreement. The Northern Ireland Act Chpt. 47 of 1998. Section 1 (i) states “It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.” *Id.* sec. 1(i). Schedule 1 (3) states that “the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.” *Id.* sec. 1(3). Such a border boll can only happen after seven years since the last one.

239. *Re McCord’s Application* [2016] NIOB 85, at 44-45.

240. *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5.

241. *Re McCord’s Application* [2017] UKSC 5.

process. Given that the focus of the case was on the prorogation of parliament, Mr. Lavery was told by the judges during the hearing (correctly in our view) that his submissions were not sufficiently relevant and the issue does not feature in the judgment.²⁴²

In a separate legal challenge heard by the Northern Ireland Court of Appeal (again involving Mr. McCord as one of the litigants and Mr. Lavery QC as counsel) the court heard arguments that some of the UK government's proposals in negotiating with the European Union on withdrawal did not protect the Good Friday Agreement and/or were not compatible with the Northern Ireland Act 1998.²⁴³ In particular, this case focused on the Section 10(1) of the EU Withdrawal Act 2018, on the "Continuation of North-South co-operation and the prevention of new border arrangements," which requires that, "[i]n exercising any of the powers under this Act, a Minister of the Crown or devolved authority must (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998."²⁴⁴ The Lord Chief Justice of Northern Ireland, Sir Declan Morgan, who heard the appeal with two other senior judges, acknowledged the applicants' submission that:

a UK withdrawal from the EU without an agreement would give rise to the very considerable risk of a deterioration in the security situation in Northern Ireland, an adverse impact on the Northern Ireland economy and a severe limitation on the work of the implementation bodies operating with the support of the North-South Ministerial Council.²⁴⁵

Nonetheless, he and his fellow judges concluded that the Executive is exercising prerogative powers in its negotiations with the European Union and that "Section 10 of the EU Withdrawal Act 2018

242. *Supreme Court: Ex-PM's Lawyer Argues Against Prorogation*, BBC NEWS (Sept. 19, 2019). Mr Lavery was told by Supreme Court President Lady Hale that the court was "solely concerned" with the lawfulness of the Prime Minister's decision to prorogue parliament, not arguments about the nature of Brexit. *Id.*

243. *Re McCord, JR83 and Waring (Brexit JRs)* [2019] NICA 49.

244. The latter section emerged as a result of amendment by Lord Chris Patten in the House of Lords (the UK's upper house) as the Withdrawal Bill 2018 progressed. He said the purpose of the amendment was to "ensure that Brexit does not mean the emergence, at any level, of any new conflict about the border because that would be both economically catastrophic and politically lethal, that's why this amendment is so vital." *Id.* at 12. Lord Patten is a former Conservative Minister in Northern Ireland, he chaired the independent commission on policing which shaped the policing transition in the jurisdiction, and he is a prominent campaigner against Brexit.

245. *Id.* at 27.

does not expressly or by necessary implication abrogate that exercise of prerogative power.”²⁴⁶

In sum, the courts have undoubtedly reasserted the authority of the UK parliament over the Executive in the two Miller cases. As Elliott has argued, while the first Miller judgment may be viewed as a “progressive blow against the archaism of Crown prerogative” it also represents a defense of a rather traditional approach—seeing the UK constitution exclusively as a contest between the Executive and the Westminster Parliament—a vision that is “myopically bilateral in nature.”²⁴⁷ In reviewing the earlier Northern Ireland cases, as well as the devolution facing aspects of Miller 1, Anthony has similarly argued that the very traditional notions of sovereignty adopted by the courts in these cases—in effect that the sovereignty of Westminster trumps all of the complexities of the competing claims and allegiances contained in the Good Friday Agreement and Northern Ireland Act—illustrate that Brexit has taken “. . . power-hoarding to its logical – and perhaps even undemocratic - conclusion.”²⁴⁸ McCrudden and Halberstam have been even more critical of the performance of the courts in these cases. They refer to the “cursory” and “cavalier” nature of the first Miller judgment on the issues relating to Northern Ireland—a judgement which (they argue) ignored the political circumstances of devolution in Northern Ireland, the international underpinnings of the NI constitution, the effects of Brexit on the North-South bodies and which failed to address the myriad rights issues raised in Northern Ireland

246. *Id.* at 36. A further Brexit-related case worthy of note is that of Emma DeSouza. In 2015 she applied as and Irish citizen born in Northern Ireland for a residence card for her American husband. The UK Home Office ruled that she would have to either reapply identifying herself as British or first renounce her British citizenship and reapply as an Irish citizen. On appeal, the Upper Tribunal found that DeSouza is a “British citizen by automatic operation of law under the British Nationality Act” and that “the British Nationality Act rules that anyone born in Northern Ireland was automatically British until such time as they renounce that citizenship”. Ms DeSouza argues that the issue is Brexit-related because it speaks to the uncertainty of how people who identify as Irish and EU citizens in Northern Ireland will be treated after the UK leaves the EU. Her appeal is pending. See Simon Carswell, *What is the Emma DeSouza Case About? Ruling Means NI people are British Citizens Under UK Law Even if They Identify as Irish*, IRISH TIMES (Oct. 15, 2019).

247. Mark Elliott, *The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle* 762 CAMBRIDGE L.J. 257, 282 (2017).

248. GORDON ANTHONY, *Sovereignty, Consent and Constitutions: The Northern Ireland References*, in THE UK CONSTITUTION AFTER MILLER 201 (Mark Elliott, Alison L. Young & Jack Williams eds., 2018)

based Brexit litigation.²⁴⁹ We agree. In short, law has largely failed to protect the Good Friday Agreement, some key rights guaranteed therein, and more broadly, the peace process in Ireland.

That said, perhaps one should not have expected anything different. A central plank of the Vote Leave campaign and the subsequent “let’s get Brexit done” approach has been to dismiss experts and expertise as “naysayers” getting in the way of the great Brexit vision. In light of numerous warnings from authoritative economic sources about the consequences of Brexit, one of the Vote Leave leaders, Conservative MP Michael Gove, famously declared, “people in this country have had enough of experts.”²⁵⁰ This has become a mantra amongst Brexiteers. Regardless the empirical facts, Brexit leaders have adopted a deliberately demotic style of speaking, claiming to be at one with “ordinary people,” addressing their fears and anxieties, breaking taboos and “telling it like it is on issues like immigration” and of course “taking back control.”²⁵¹

Fuller has argued persuasively that the “anti-expert revolution” evident in the Brexit process speaks to what he terms a “post-truth” phenomenon, part which of resonates with the Rousseauian idea that “there is a special wisdom to be found in crowds, especially when they are agreed on a course of action, even if it remains radically unclear how it might be brought about and what its outcomes might look like.”²⁵² In such a context, any truth, fact, expert opinion, or indeed legal finding which impedes Brexit is inevitably subject to hysterical reactions concerning the will of the British public.²⁵³ For example,

249. CHRIS MCCRUDDEN & DANIEL HALBERSTAM, *Miller and Northern Ireland: A Critical Constitutional Response*, in *THE UK SUPREME COURT YEARBOOK* 31, 37 (Daniel Clarry, ed., 2018).

250. Henry Mance, *Britain has had Enough of Experts, Says Gove*, *FINANCIAL TIMES* (June 3, 2016), <https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c> [<https://perma.cc/77NB-CZ2N>]. Gove made this statement during a SKY NEWS Question and Answer session when refusing to name any economists who backed Britain’s exit from the EU.

251. See generally John Clarke & Janet Newman, *People in This Country Have had Enough Of “Experts”*: *Brexit and the Paradoxes of Populism*, 11 *CRITICAL POL’Y STUD.* 101, 111 (2017).

252. STEVE FULLER, *POST-TRUTH, KNOWLEDGE AS A POWER GAME* 21 (2018).

253. James Slack, *Enemies of the People: Fury Over “Out of Touch” Judges Who Have Declared War on Democracy by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, *DAILY MAIL* (Nov. 3, 2016), <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> [<https://perma.cc/KYC4-RKY5>]. Similar stories appeared in *THE SUN* and *THE DAILY EXPRESS*. Jon Lockett, *“This is Exactly Why We Voted Out” Fury Over “Unelected Judges” Who Derailed Brexit Plans with Bombshell Court Ruling*, *SUN* (Nov. 3,

when the High Court delivered the first Miller judgment, the British *Daily Mail* front-page headline (complete with pictures of the three judges) was, “Enemies of the People: Fury Over ‘Out of Touch’ Judges who Have ‘Declared War on Democracy’ by Defying 17.4 million Brexit Voters and who Could Trigger Constitutional Crisis.”²⁵⁴ When judges experienced such a reaction to a judgment which after all reasserted traditional British parliamentary sovereignty, perhaps expecting a judgement which said that the Good Friday Agreement could trump Brexit and thwart the United Kingdom from leaving the European Union was really quite an ask.

As we have noted above, one of the direct consequences of Brexit has been the re-energizing of discussions on a united Ireland. Like Brexit, a united Ireland would represent quite a seismic constitutional and political change on these islands and its advocates have rightly argued that it requires careful debate, discussion and planning.²⁵⁵ There are important lessons to be learned from the experience of Brexit concerning the role and limitations of law in such a process—particularly with regard to human rights and the notion of sovereignty, two central components of the Brexit project.

With regard to human rights, as the eminent anthropologist Clifford Geertz has suggested, part of the lure of law is that it represents a way of seeing the world not necessarily as it is but rather as we would

2016), <https://www.thesun.co.uk/news/2111725/fury-over-unelected-judges-who-derailed-brex-it-plans-with-bombshell-court-ruling/> [<https://perma.cc/GLV3-2P7M>]. Macer Hall, *Brexit: EU Ruling on Article 50 is “An Affront to British People”*, EXPRESS (Nov. 3, 2016), <https://www.express.co.uk/news/politics/728591/Brexit-EU-ruling-Article-50-affront-British-people-High-Court> [<https://perma.cc/9SME-RQZV>]. The more “highbrow” DAILY TELEGRAPH headline was, *The Judges Versus the People* – again with the three judges pictured. Peter Dominiczak, Christopher Hope, & Kate McCann, *Judges vs the People: Government Ministers Resigned to Losing Appeal Against High Court Ruling*, TELEGRAPH (Nov. 3, 2016), <https://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brex-it-the-judges-versus-the-people/> [<https://perma.cc/4WKT-GD46>]. One month after the Miller judgment had been delivered, the President of the Supreme Court, Lord Neuberger, criticized the media for undermining the rule of law and politicians for not responding quickly enough in defense of the independence of the judiciary. News Report, *Attacks on Judges Undermine Law – Supreme Court President*, BBC NEWS (Feb. 16, 2017), <https://www.bbc.co.uk/news/uk-38986228> [<https://perma.cc/EBK3-6WPB>].

254. James Slack, *Enemies of the People: Fury Over “Out of Touch” Judges Who Have “Declared War on Democracy” by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, MAIL ONLINE (Nov. 4, 2016), <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> [<https://perma.cc/PB92-9GDB>].

255. See generally COLIN HARVEY & MARK BASSETT, *THE EU AND IRISH UNITY; PLANNING AND PREPARING FOR CONSTITUTIONAL CHANGE IN IRELAND* (2019).

like it to be—“the sense, without which human beings can hardly live at all, much less adjudicate anything, that truth, vice, falsehood, and virtue are real, distinguishable, and appropriately aligned.”²⁵⁶ One of the authors has written previously about the limitations of legalism in post-conflict societies like Northern Ireland.²⁵⁷ Drawing from research in a range of transitional societies, and influenced by “critical friends” to the human rights movement such as Baxi, Ignatieff, and Kennedy,²⁵⁸ McEvoy argued against a version of rights discourses wherein the real world of confusion, messiness, and tough choices is translated through rights discourses into the legalese of international standards and legal certainty.²⁵⁹ McEvoy did not suggest *throwing the baby out with the bathwater*. Human rights can and should provide a practical and normative framework for the hard graft of political persuasion and argumentation. Of course, framing the legal and constitutional architecture of what a united Ireland would look like, particularly in terms of guaranteeing the political identity, culture and human rights of Ulster unionists would be a central part of such a process.²⁶⁰ However, human rights guarantees are, as Harvey has also argued, “only a beginning” rather than an end in itself.²⁶¹ They certainly cannot magically resolve fundamentally political contests on profoundly complex matters of political identity.

Similar lessons should be learned from the ways in which sovereignty has been understood and deployed by Brexiteers. In his widely critiqued book on eminent Victorians,²⁶² the leading Brexiteer and unapologetic advocate of empire nostalgia, Jacob Rees-Mogg, includes a chapter on Professor Albert Venn Dicey, Vinerian Professor

256. CLIFFORD GEERTZ, LOCAL KNOWLEDGE; FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 231 (1983).

257. See generally Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & SOCIETY 411 (2007).

258. See generally UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002), MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001); David Kennedy, *The International Human Rights Movement; Part of the Problem*, 15 HARV. HUM. RTS. J. 101 (2002).

259. Kieran McEvoy, *supra* note 257, at 418-419.

260. PAUL GOSLING, A NEW IRELAND: A NEW UNION, A NEW SOCIETY 93-96 (2018).

261. Colin Harvey, *Bringing Humanity Home: A Transformational Human Rights Culture for Northern Ireland?*, in CRIMINAL JUSTICE IN TRANSITION: THE NORTHERN IRELAND CONTEXT 61 (Anne-Marie McAlinden and Clare Dwyer eds., 2015).

262. JACOB REES-MOGG *supra* note 29.

of English Law at Oxford.²⁶³ Dicey is best known for his exposition of the legal theory of parliamentary sovereignty. He was also an enthusiastic imperialist,²⁶⁴ an ardent unionist,²⁶⁵ and is described by Rees-Mogg as the “father of the referendum” in British politics (Dicey believed that a referendum could prevent Home Rule in Ireland).²⁶⁶ In short, Dicey embodies the fusion of imperial delusion, hard-line unionism, a convenient belief in referenda when deployed in favor of one’s own cause, and the narrow understanding of sovereignty that underpins the Brexit project.

If Irish republicans and nationalists are to succeed in persuading their unionist countrymen and women of the benefits of a united Ireland, they will have to do so much better than the Brexiteers. Misty-eyed republicanism is as likely to resonate with Ulster unionists as did the empire nostalgia of Rees-Mogg and his Brexiteer colleagues amongst Irish nationalists. As discussed above, whilst the Good Friday Agreement provides the mechanism by which a border poll on a united Ireland can take place, unlike Brexit, such a poll should not be an end in itself but rather one stage in a carefully thought-through plan. More broadly, the related discussions on sovereignty will have to be more intellectually ambitious than that which posits sovereignty as a constitutional arrangement between the Executive, Parliament (or Executives and Parliaments if the devolved government and Assembly in the North were retained) and the people.

As Morison has argued, it is important to stop considering sovereignty as only “a thing in itself” and rather to view it as a way of thinking about power and governance more generally, recognizing that the constitutional “big fix” is but one element of a broader mosaic of innovative small fixes beyond the state.²⁶⁷ Brexit and its fall-out have provided the road map for how not to do it. Perhaps, we will all be grateful for that in the final analysis.

263. See A.N. Wilson, *The Victorians by Jacob Rees-Mogg Review*, “A Staggeringly Silly Piece of History”, *TIMES* (May 15, 2019), <https://www.thetimes.co.uk/article/the-victorians-by-jacob-rees-mogg-book-review-zqltrw5rz> [<https://perma.cc/6EPB-LT7F>].

264. Dicey argued “. . . the material advantages accruing to millions of British subjects from the Imperial power of England may more and more tend to produce that growth of loyalty and goodwill towards the Empire which in 1914 is a characteristic and splendid feature both of England and of her colonies.” *THE LAW OF THE CONSTITUTION: A.V. DICEY* 466 (J.W.F. Allison ed., 2013).

265. ALBERT VEN DICEY, *ENGLAND’S CASE AGAINST HOME RULE* 6 (1887).

266. JACOB REES-MOGG, *supra* note 29, at 361 (kindle edition).

267. John Morison, *A Sort of Farewell: Sovereignty, Transition and Devolution in the United Kingdom*, in *SOVEREIGNTY AND THE LAW* 123 (Richard Rawlings ed., 2013).

