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David Kenny

Always, inevitably local:
Ireland's strange populism and the trouble with theory

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Always, inevitably local:
Ireland's strange populism and the trouble with theory

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Abstract

Austerity and economic hardship are common themes in the narratives about the causes of contemporary populism. Ireland, having endured a decade of austerity and a very severe EU-IMF bailout, might therefore seem to be a fertile bed for populism. But Ireland has (so far) seen the effects of populism only in a limited and unusual form. Populism manifested chiefly in a movement – powerful and influential in its limited way – to resist payment of water charges. This is a strange story of populism. On the one hand, many of the risks often associated with populism – government capitulation to populist demands, creep of mainstream parties towards populist causes, a splintering of the parliament – actualised in Ireland. On the other hand, they actualised in an unusual way that has left the political establishment largely intact: the party that led the imposition of austerity remains in power; political and structural reforms have been minor; concessions to populism have been largely limited to the issue of water. It seems as though populism was contained. In this paper, I first map the idiosyncratic Irish experience, so that it can be considered in discussions of populism; and secondly, I argue that Ireland's unique experience shows the irreducible complexity and locality of populism. Populism is always contingent and local, reacting the peculiarities of political culture and circumstance. The best way to study populism is not through theory and search for similarity, but through observation of diversity. While we might see some similarity, pattern, and convergence in populism around the world, this is largely happenstance, and populism will always be recast and remade in each and each place to produce distinct and often unpredictable results. It is, even if while it seems to sweep the world, fundamentally a local phenomenon.

Ireland suffered from severe financial, banking and sovereign problems in crisis of the late 2000s, and endured years of austerity under a harsh EU-IMF bailout. This was accompanied by a crisis of faith in politics, with gross political mismanagement blamed for many of these problems. In undergoing both economic and political crisis,[1] Ireland presented "the perfect... conditions for the emergence of a populist party".[2] But Ireland has – at least to date – experienced the effects of populism in a very mild way. There has been neither a great left-wing populist rise, nor a new nationalist, populist right. Populism manifested chiefly in a movement – powerful and influential in its limited way – to resist payment of water charges.

The introduction of domestic water charges resulted in massive backlash, far greater than those against more severe austerity measures. It spawned a populist political movement, leading to massive demonstrations, obstruction of workers installing water meters, and large scale refusal to pay water bills.

This is a strange story of populism. Many of the risks often associated with populism –capitulation to populist demands, creep of mainstream parties towards populist causes, a splintering of the parliament – actualised in Ireland. But they actualised in a low key way that left the political establishment largely intact: the party that led the imposition of austerity remains in power; political and structural reforms have been minor; concessions to populism have been limited to the issue of water. It seems as though populism was contained.

I have two goals in this paper. First, I wish to map the idiosyncratic Irish experience, so that it can be considered in discussions of populism; and secondly, I wish to use this example to make a broader point about the local nature of populism.

[1] Populism is often said to be a phenomenon of crisis. Cas Mudde, "The Populist Zeitgeist" (2004) 39 Government and Opposition 541 at 547-8**.** Though as Taggart argues, it might be the *sense* of a crisis that is key; Paul Taggart, "Populism and representative politics in contemporary Europe" (2004) 9 Journal of Political Ideologies 269 at 275. It is thought to be particularly acute if these two types of crisis coincide. Hanspeter Kriesi and Takis S. Pappas "Populism in Europe During Crisis: An Introduction" in Kriesi and Pappas (eds.) *European Populism in the Shadow of the Great Recession* (ECPR, 2015) 1 at 11.

[2] Eoin O'Malley and John FitzGibbon, "Everywhere and Nowhere: Populism and the Puzzling Non-Reaction to Ireland's Crisis" in Kriesi and Pappas (eds.) *European Populism in the Shadow of the Great Recession* (ECPR, 2015) 281 at 281.

What might we learn from this unusual, tame form of populism? Can we find, in the Irish example, a recipe for limiting and controlling populism with public law or political culture? My case is that we cannot.

Far from offering general lessons, I wish to argue that Ireland provides a potent illustration of the opposite point: you cannot draw useful general lessons about populism. Populism is always, inevitably local – caused, inflamed, calmed or prevented by irreducibly complex, local, contingent factors that will rarely if ever play out the same way in different places or times. This being so, there is a limit to what we can reliably do to combat populism, as attempts to replicate one country's success (or avoid one country's failures) will be frustrated by the irreducible differences between places. Attempting to harness public law to prevent or combat populism is therefore very difficult, and we should embark upon this project with an awareness of these limits.

This paper proceeds in three parts. In Part I, I describe the Irish Water movement and its impact on Irish politics. In Part II, I discuss why it is properly described as a populist movement, why it attached to the issue of water, and I offer some tentative suggestions about some aspects of Irish politics, political culture and public law that might explain the unusual and limited nature of this populism. In Part III, I argue that this experience supports a localist, contextualist view of populism, that advocates against general theories and limits what we can know – and what we can do – about populism.

Part I: Irish Water and the Right2Water movement

Crisis and Austerity

The Irish economy underwent a period of unprecedented economic growth in the 1990s and 2000s, popularly known as the Celtic Tiger. Accompanying this growth, however, was a massive property boom. House prices soared, fuelled by vast lending from Irish financial institutions enjoying cheap credit in the aftermath of the introduction of the Euro. Irish banks lent to developers to build homes and to buyers to purchase them, often with minimal or no down payments. The county's finances became dependant on

this sector; the total tax revenue from property, construction, and related activities ultimately constituted almost 20% of annual tax revenues. [3]

This system fell apart spectacularly in 2008. Irish banks, highly leveraged and with largely undiversified assets in Irish property lending, found it difficult to borrow as the global credit crisis began. The Irish State guaranteed secured and unsecured bonds of the major financial institutions in the hope that this would shore up faith in them. Under the misapprehension that the banks were suffering from a short term liquidity crisis rather than a fundamental problem with capital and asset portfolios, the government did not expect this to be costly. Two major institutions had to be completely nationalised and liquidated at huge cost to the taxpayer; the county's two largest banks had to be taken substantially into state ownership. The cost of this bank bailout was roughly €64 billion, a vast sum for a country of less than 5 million people. GDP tumbled by 10% between 2008 and 2009; the collapse of the construction sector and other property related activity was ruinous to public finances. This, combined with the cost of the bank bailout, caused Ireland's debt-to-GDP ratio to skyrocket from less than 25% in 2007 to almost 120% by 2012. Unemployment rose to over 15% by 2011, having stood at less than 5% in 2007, and even this figure was salved by substantial emigration. House prices collapsed by almost 50% from their peak, and many people who bought homes during the boom were left in significant negative equity.

Interests rates for Irish sovereign bonds rose precipitously. In November 2010, unable to continue borrowing on the open market, Ireland entered into a bailout programme from the "Troika" – the European Commission, the ECB, and the IMF. Austerity budgets were introduced even before this, with large new taxes and major spending cuts introduced to try to close the significant gap in public finances, which were further strained by rising unemployment. These continued and expanded under the bailout programme.

In 2011, the government – led by Fianna Fáil, one of Ireland's two dominant political parties and the party in government throughout the boom and bust – collapsed. After the ensuing election, a new government was formed by Fine Gael – Ireland's other

[3] See generally, Report of the Joint Committee of Inquiry into the Banking Crisis, Houses of the Oireachtas, January 2016; Patrick Honohan, "The Irish Banking Crisis Regulatory and Financial Stability Policy 2003- 2008", 31st May 2010.

major party – and the smaller, centre-left Labour Party. This coalition had the largest parliamentary majority in the history of the State. These were very much mainstream political parties, but they did promise political reform; to renege to some extent on the bank guarantee payments; and renegotiate terms of the bailout programme. However, under pressure from the Troika, the new government was unable to do much of this, largely conforming to the bailout and honouring the bank guarantee. Austerity continued.

This election at the height of austerity had not seen the emergence or ascendency of any populist movement or party.[4] Through significant cuts in all public expenditure, including various social welfare benefits and public sector pay and pensions, and very significant tax increases, Irish people acquiesced. There was huge distrust in politics, and some substantial anger at politicians and the EU but there was a "distinct lack of protest movement mobilisation" with only very modest exceptions.[5] The lack of protest or populist movement is surprising, given the conditions: "total economic collapse brought about by a cosy, establishment elite".[6]

The Irish Water Movement

Stranger still is when and how populism came eventually about. The height of austerity was between 2008 and 2012;[7] after this, cuts were less significant and good economic growth eased budgetary constraints. But it was only later that the populism took root, and on an unusual issue: water charges.

Ireland's water infrastructure is not of a high standard. It was administered locally my local government bodies. A great deal of water was lost through leaks and investment in the infrastructure was not forthcoming. In the past, local taxes known as rates paid for domestic water, but these were abolished in the 1970s, and water was paid

[4] The only big gain outside the parties that formed the government was Sinn Féin increasing their seats in parliament quite substantially off the back of a fairly small increase in the vote share. See O'Malley and FitzGibbon (n 2) 287.
[5] *Ibid* 287-289. The only exceptions were protests against cuts to old age pensions, students protesting against the possibility of tuition fees, and some minor trade union activity. There was no widespread or sustained protest in this period.
[6] Ibid 281. See Daragh Brophy, "Five years older and deeper in debt... So why don't the Irish protest more?" 29th September 2013, TheJournal.ie, available at <http://www.thejournal.ie/protests-ireland-why-1102930-Sep2013/>.
[7] O'Malley and FitzGibbon (n 2) 289.

for from general taxation.[8] In the December 2009 budget, however, it was announced that domestic water charges based on usage would be reintroduced, with water meters installed to monitor this. This was one of many austerity measures in this budget, attracting little attention at the time.

In late 2010, this policy found its way into the Memorandum of Understanding that formed the basis of the EU-IMF bailout, with the promise of a centralised water utility replacing local government bodies, overseeing meter installation and imposing charges.[9] The new government, taking office in 2011, continued this plan. The new utility, now called Irish Water, was set up in the Water Services Act 2013.[10] Charges were to be introduced in 2014, when almost all meters would have been installed.

Various minor political controversies followed, including revelations that €86 million would be spent on consultants and legal advice for Irish Water's establishment; that bonuses would be paid even to underperforming employees of Irish Water; that those who did not pay water charges might suffer reduced water pressure.[11] In mid 2014, it was revealed that the expected annual charge for a household of two adults and two children would be €278, with rates set at €4.88 for 1,000 litres of water. Household were obliged to register for the service, but registration numbers were reportedly much lower than anticipated. It is at this juncture, in early-to-mid 2014, that the anti-Water Charge movement began in earnest. Protests began at the installation of water meters; some protestors were arrested;[12] and this protest movement grew, preventing installation of meters and confronting politicians.

In the autumn of that year, a more formal Irish water movement began to take shape. It started with a vast protest in Dublin, organised by a new group, Right2Water. This umbrella group, founded by, amongst others, leaders of Unite trade union,

[8] There was an alternative local taxation arrangement which helped pay for water in the late 1980s and early 1990s, but this too was abolished in 1996.
[9] "EU/IMF Programme of Financial Support for Ireland", 16th December 2010 at 26, available at <http://www.finance.gov.ie/sites/default/files/euimfrevised.pdf>.
[10] A second bill, amending the legislative framework, was later rushed through the legislature in a few hours with little or no opposition input. Marie O'Halloran, "Opposition says water Bill was 'forced' through Dáil" The Irish Times, July 1st 2015.
[11] Sinead O'Carroll, "Hogan: 'Water pressure will be turned down to a trickle for people who don't pay'" May 6th 2014, TheJournal.ie, available at <http://www.thejournal.ie/water-charges-3-1450138-May2014/>. Concerns were also raised about how personal data would be gathered and there was confusion about whether landlords or tenants would be liable for the charges.
[12] Sinead O'Carroll, "First arrest for blocking water meter installation" May 28th 2014, TheJournal.ie, available at <http://www.thejournal.ie/irish-water-protest-arrest-1489206-May2014/>.

eventually served to bring together a range of left-leaning political groups – political parties and hundreds of informal, local bodies – to oppose water charges.[13]

Mass Protest

Right2Water organised a protest in October, which they expected to draw 10,000 people.[14] In the end, the actual turnout was probably as high as 80,000 to 100,000, vastly exceeding expectations.[15] In terms of Irish protests, this was a colossal turnout, speaking of a deep national dissatisfaction and demand for change. In the aftermath of the protest, the government attempted to stem the tide of opposition by announcing that it would give every household a €100 "Water Conservation Grant", which was paid without regard to conservation, or indeed payment of water bills. The government also introduced a capped charge instead of a metered charge until the end of 2018, setting a maximum charge per household of €260. Factoring in the grant, that meant the charge was functionally reduced to €160 until 2018. This did little to dampen a second massive protest in November, estimated to draw 100,000 people to Dublin, and according to organisers, 200,000 people nationwide.[16]

Alleged False Imprisonment

Later in November, the Tánaiste (Deputy Prime Minister) and Labour Party Leader Joan Burton was travelling from an event in Jobstown, Dublin when her car was accosted by water protesters, including Paul Murphy, a leading political figure from prominent left wing party the Anti-Austerity Alliance. She had drawn ire when she had noted how many protestors had "extremely expensive phones, tablets, video cameras"[17] which was taken to be a comment on how the protestors could, despite their case to contrary, afford to pay the charges. That the Labour Party – supposedly a centre-left party – supported the government's imposition of this austerity charge also caused

[13] Brendan Ogle, *From Bended Knee to a New Republic: How the Fight for Water is Changing Ireland* (Liffey Press, 2016) at 72-3.
[14] Ibid 65.
[15] Paul Hosford, "Tens of thousands take to the streets of Dublin to protest against water charges" October 11th 2014, TheJournal.ie, available at <http://www.thejournal.ie/water-charge-protest-in-dublin-1718557-Oct2014/>.
[16] Ogle (n 13) 78-80.
[17] Marie O'Halloran, "Water protesters 'all have expensive phones' – Burton" October 9th 2014, The Irish Times.

much discontent. She was ultimately moved out of the area by the police after allegedly being trapped in the car for two hours. Murphy and several others were later arrested, questioned, and charged with false imprisonment. This sparked allegations of political policing – that the police were being used to protect the establishment and inhibit protest.[18] The controversy persisted when the case came to trial in 2017. Ultimately, the first group prosecuted for false imprisonment were acquitted by a jury in June 2017, with further controversy about police statements being contradicted by video evidence.[19]

Following this incident, establishment political figures spoke in stark terms about the movement. Then Minister, now Taoiseach (Prime Minister), Leo Varadkar described the movement as having "sinister", "nasty" and "violent" elements.[20] One government TD (MP) compared the water movement to ISIS.[21] This was, to say the least, an inapt analogy; while there were a few arrests at the protests because of disorder, they were on the whole very peaceful.

Turning to electoral politics

Massive protests continued through 2015, as did widespread boycotting of the charges. It is difficult to know precisely as official figures are not forthcoming, but one major news organisation suggests that as many as 70% of Irish households did not pay the charges.[22] Organisers believed that this was only "an emergent phase of developing a more participative and representative democracy" and attempted to build it into "something more permanent".[23] This became Right2Change, a loose umbrella group

[18] Daragh Brophy, "I'm not some sort of master criminal that deserves to have six gardaí at my door" February 9th 2015, TheJournal.ie, available at <http://www.thejournal.ie/paul-murphy-arrest-comments-1929015-Feb2015/>. Ogle (n 13) 92.
[19] Isabel Hayes, "Jobstown protest: TD Paul Murphy and 5 others found not guilty" June 29th 2017, TheJournal.ie, available at <http://www.thejournal.ie/courts-jobstown-jury-3469624-Jun2017/>.
[20] Quoted in Martin J. Power, Amanda Haynes and Eoin Devereux, "Reasonable People v The Sinister Fringe: Interrogating the Framing of Ireland's Water Charge Protestors through the Media Politics of Dissent" (2016) 3 Critical Discourse studies 261 at 268.
[21] The TD said the State would face an "ISIS situation" if water protests were not "nipped in the bud". He also said the protesters "act like parasites and live off country people." Hugh O'Connell "Fine Gael TD says Dublin protesters 'act like parasites and live off country people'" November 20th 2014, TheJournal.ie, available at <http://www.thejournal.ie/fine-gael-td-noel-coonan-water-charges-isis-situation-1790877-Nov2014/>.
[22] Dan MacGuill, "How many people boycotted water charges?" December 1st 2016, TheJournal.ie, available at <http://www.thejournal.ie/irish-water-charges-payment-statistics-boycott-3112027-Dec2016/>.
[23] Ogle (n 13) 7; 126.

with a set of principles that would articulate a new vision for Irish politics. Its principles included some significant constitutional changes, including a clause guaranteeing public ownership of water; new rights to collective bargaining and housing; and some electoral reforms, including expanded direct democracy and recall elections.[24] Most of the groups involved in the movement signed up to this platform in advance of the February 2016 general election, as did many independent candidates.[25] However, the group's focus was policy that could undergird a progressive coalition, rather than forming one political party, and there was in any event little time to put a strong electoral infrastructure in place.[26]

In the end, the election results were only a modest success for the populist group. Labour – the centre-left minority government party – collapsed, winning only 7 seats, down from more than 30. This decimation was in part a result of water charges, but also a function of the broader perception – fair or unfair – that they had broken election promises and collaborated in the austerity agenda they promised to oppose. Fine Gael, the majority party, lost seats, but still easily formed a minority government with support from the other mainstream party, Fianna Fáil. Fianna Fáil enjoyed a resurgence after a disastrous election in 2011, getting almost the same percentage of the vote as Fine Gael, and gaining 23 seats. Despite water charges originally being a policy of Fianna Fáil government, the party opposed water charges in the run up to the election and promised to end them.

This mainstream co-option of the populist cause may have hindered the appeal of anti-water charge candidates. As political commentator Noel Whelan puts it, these groups "made surprisingly little ground" in 2016.[27] One of the major groups, AAA-PBP (Anti-Austerity Alliance–People Before Profit) went from 4 seats to 6 – a gain, but not a huge surge.[28] There were some more independent candidates elected, but again the

[24] See ibid 156-164.
[25] The group included Sinn Féin, The People Before Profit Alliance, the Communist Party, Direct Democracy Ireland, The National Citizen's Movement, and several sitting independent TDs. Ibid 209.
[26] Ibid 222.
[27] Noel Whelan, "Far left's high profile contrasts sharply with modest electoral reach" July 7th 2017, The Irish Times.
[28] Though Whelan notes "spectacular surges in individual constituencies"; ibid. This raises the suggestion of the electoral system or the division of constituencies working against the parties, but this is not really the case; in multi-seat Proportional Representation by Single Transferable Vote, sufficiently large shifts in individual constituencies can easily translate into multiple seats.

increase was not huge. The only Right2Change party to make significant gains was the "increasingly mainstream" [29] Sinn Féin.

Leaders of the movement still claimed this as a victory since the government was not re-elected[30] but this is a thin claim: the Labour Party was badly hit, but the major partner in the coalition remained in power, albeit with a minority arrangement. They also believe that future elections will bring more success and will even lead to the formation of a government.[31] However, they face an uphill struggle; in Whelan's words, the centre may have lost some support in Ireland, but there is "no evidence that the alternative left will be a major beneficiary."[32]

The End of Water Charges

The co-option of the issue by Fianna Fáil proved decisive. Fine Gael formed a minority government with the support of Fianna Fáil, and one of the key concessions demanded for this support was the abolition of water charges. This was complicated by EU law,[33] so it was agreed to suspend the charges pending a review by a commission of independent experts. Eventually, after the commission report, a special parliamentary committee, and some political brinksmanship, a deal was finally reached between Fine Gael and Fine Fáil.[34] Charges would be abolished, save for excessive use charges for households that used more than 1.7 times the average amount of water. Those who paid charges were refunded. Many members of the leftist parties associated with Right2Water saw this as a capitulation from Fianna Fáil, but the party claimed it had abolished water charges for almost everyone. These were, despite the reservations of the more ardent opponents of Irish Water, substantial political victories.

Part II: An Unusual Populist Movement

[29] Ibid.
[30] Ogle (n 13) 234.
[31] Ibid 210.
[32] See Whelan (n 27).
[33] The Water Framework Directive in essence said there must be a conservation incentive for users, but that if the established practice was not paying for water, charges did not have to be introduced (Article 9.4). This raised the possibility that, having introduced the charges, EU law might not let them be undone.
[34] Sarah Bardon, "Last-minute deal on water charges agreed as FG demands met" April 11th 2017, The Irish Times. Fine Gael had said this solution being suggested by the Committee might not be legal under EU law and it could not support it. Right2Water held another major protest on the eve of the Committee's decision.

A Populist Movement?

The water charges movement was a broad, grassroots, and diverse leftist movement, started by unions but encompassing multiple small political parties and local and informal groups. It lacks many features commonly associated with populism, such as ethno-nationalism and a charismatic leader. However, it is, I think, clearly a populist movement.

The lack of nationalism in Irish populism is not problematic; as Mudde notes, there is often "an incorrect conflation of populism and xenophobia".[35] Mudde also observes that a charismatic leader, so commonly discussed, is a facilitator of populism rather than a constituent feature.[36] I would use Mudde's oft-cited definition: populism is "an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the volonté générale (general will) of the people."[37] Contrary to some suggestions, the contrast of people and elite is not necessarily class based. The people are not a clear, identifiable group, but an idealised and perhaps "mythical and constructed sub-set of the whole population".[38]

Ireland has little history of populism. O'Malley and FitzGibbon claim that Fianna Fáil – historically Ireland's most significant political party – are populist, and they are

[35] Cas Mudde, The Problem with Populism, February 17th 2015, The Guardian, available at <https://www.theguardian.com/commentisfree/2015/feb/17/problem-populism-syriza-podemos-dark-side-europe>. I would also disagree with O'Malley and FitzGibbon's (n 2) attribution of the lack of the nationalist sentiment in Ireland's movement to Ireland's prevailing nationalism relating to Northern Ireland. These are very different sorts of nationalism, and the latter could readily coexist with more xenophobic national impulses.

[36] Mudde (n 1) 545, 556.

[37] Ibid 543. This accords broadly with Margaret Canovan's approach in *Populism* (Junction, 1981). Jan-Werner Müller *What is Populism?* (UPenn Press, 2016) takes a similar approach but introduces a complication: populists are anti-pluralist, claiming that they and they *alone* represent the real people or the silent majority. I think the Irish case could meet Mueller's criterion: only those who supported the water movement and its broader political goals and who were not sullied by mainstream politics could be said to represent the people by the lights of this movement. But in any event, this aspect of Mueller's definition seems problematic, as it comes close to including by stealth other traits, such as a unified figure, a strong leader, who can make this specific, exclusive representational claim. This would exclude movements that are too diffuse to articulate this claim clearly on behalf of any one identifiable representative group, rather than the movement as a whole. But badly organised populists are still populists.

[38] Mudde (n 1) 546. The people are, Taggart argues, in a mythical "heartland", where *real* people live, which is often a romanticised vision of the past. Taggart (n 1) 274. The Right2Water movement denied that the divide was class based, arguing that the numbers of people attending their protests showed that opposition was common across class lines. Ogle (n 13) at 80.

certainly referred to as such in Irish political discourse.[39] However, this is a misapplication of the term. Mudde notes a tendency to conflate populism with political pandering or opportunism, exploiting the whims and desires of the people for political gain.[40] When Irish people refer to Fianna Fáil as populist, they mean that they are unprincipled and pander; they are not populist in any relevant sense, and fit no element of Mudde's definition.

The Right2Water movement, by contrast, comfortably fits it. The movement is an attempt to represent and return power to an oppressed, repressed people, who have been unfairly dominated by corrupt and incompetent elites that have protected themselves at the people's expense. The movement is littered with the staples of populist rhetoric.[41] Brendan Ogle, one of the founders of Right2Water, describes it as "a people's movement" and a people's cause. It was the "people themselves... getting off their knees at last and fighting back". Right2Water, and its successor movement Right2Change, instantiate "politics as it should be, but not as it has been in Ireland for a long time, if ever": drawing its power and its ideas and policies from the people themselves.[42] A common refrain was that "the people have spoken" in the movement's protests,[43] and that the protests were about "ordinary people", those who were the victims of austerity.[44]

These ordinary people were contrasted with the corrupt, aloof elite, which had many elements: the EU, a neo-liberal elite that imposed harsh austerity measures and huge banking debts on Ireland;[45] the political establishment that acquiesced in and

[39] O'Malley and FitzGibbon (n 2) 282. Indeed their otherwise excellent paper uses a broad and somewhat vague definition of populism, branding as populist lots of passing rhetorical references to the people and appeals to heartland that would not fit Mudde's or Canovan's definitions.
[40] Mudde (n 1) 543.
[41] There have been some interesting efforts to use some more formalistic textual analysis etc. for trying to prove the existence of populism. See Kirk A. Hawkins, Is Chavez Populist, (2009) 42 Comparative Political Studies 1040, A. C Armony & V. Armony, "Indictments, myths, and citizen mobilization in Argentina: A discourse analysis" (2005) 47 Latin American Politics & Society 27. This seems like a worthwhile endeavour (though it might present some problems) but in any event would be difficult to perform on diffuse movements such as the Irish Anti-Water Movement rather than one with a single leader who gives formal speeches etc.
[42] Ogle (n 13) 194; 75; 173. Right2Change policies came "directly from the people themselves"; Ibid 179.
[43] Ibid 107.
[44] Rachel Flaherty, "Anti-water charge protests to be held across the country" January 30th, 2015, The Irish Times, quoting a representative from a local protest group.
[45] Ogle (n 13) 35, 240. There was also a more general anti-globalism, with global trade etc. seen as a vice of neoliberalism. Ibid 241.

abetted this agenda; the builders and bankers who were the beneficiaries of this. Members of the movement envisaged a sort of "secret society" of bankers, builders and politicians; all of these elites got bailed out while ordinary people were left to suffer.[46] As Sinn Féin leader Gerry Adams put it at one protest, the government did not listen to ordinary people, just the corrupt elites at the top.[47] Political corruption, which has been a significant problem in Ireland in decades past, understandably featured. So disdainful was the movement of the corrupted elite of party politics that it was an active concern that it not be "infected" by parties such as Fianna Fáil, which was desperate to reconnect with the people having been tainted by the crisis.[48] Finally, the news media were also part of this elite, particularly because of dissatisfaction with how the movement was portrayed.[49]

This readily fits the definition of a populist movement. It was a concerted and vocal attack on elite governance; claimed to be a true representation of ordinary people, long repressed; and had deep and grand political aspirations and goals, not being merely "civic participation".[50] Excluding this movement from a definition of populism would mean ignoring a distinctive and unusual instantiation of populism, and would display a problematic selection bias that I discuss below.

Why Water?

Why did Ireland's populist movement attach to this unusual issue? The charges were, in the scheme of austerity, not large, and domestic water is paid for directly almost everywhere else. Even one of the founding members of Right2Water admitted that "at first glace it seems a strange issue on which the Irish people would take their first and

[46] Ibid 149-150, quoting a member of the movement.
[47] "Thousands attend anti-water charge protest in Dublin", 11th December 2014, RTÉ News, available at <https://www.rte.ie/news/2014/1210/665801-irish-water/>, paraphrasing Sinn Féin leader Gerry Adams. The full speech can be seen on youtube: https://www.youtube.com/watch?v=qQGw2cRJgCI
[48] Ogle (n 13) 75-77.
[49] Ibid 116. However, the dissatisfaction with media coverage may have had some grounding. Power et al. (n 20) describe how media coverage of water protests fell into the well-known "protestor paradigm": without conscious bias, the media focuses on violence and disruption, privileges government sources and tends to invoke opinion against the protestors.
[50] See Jan-Werner Müller, "Populist Constitutions – A contradiction in terms" ICONNECT, April 23rd 2017, available at <http://www.iconnectblog.com/2017/04/populist-constitutions-a-contradiction-in-terms/>.

biggest stand against austerity".[51] The reasons why water charges may have been the flash point for populism are complicated and one can only attempt to offer some possible factors.

First, policies of this sort have attracted ire in the past in Ireland. Introduction of household refuse charges in the early 2000s began a (much more modest) opposition movement among left wing parties.[52] Charges for public services not previously paid for directly – referred to as "double taxation" – are not popular. It was a "visceral" policy, in O'Malley and FitzGibbon's words, as it was universal and had clear effects.[53] The fact that it was associated with the Troika and the hated bailout programme made it even more unpopular.

Secondly, the movement was seen not just as opposition to public water charges but to what protesters saw as an inevitable slippery slope towards privatisation.[54] Promises from politicians that this was not so were not sufficient; it was believed that the EU might later push privatisation.[55] There were repeated calls for a constitutional amendment guaranteeing public ownership of water infrastructure.[56] This framed the protests as combatting privatisation and neoliberalism. Some saw this as "fundamentally at the heart of the protests"[57]. Thirdly, and relatedly, the campaign framed opposition to Irish Water a human rights question, rather than merely an opposition to taxation.[58] Even though there was no immediate threat of water being cut off, the common belief amongst campaigners was that even if charges started off small,

[51] Ogle (n 13) 9.
[52] See Louise Dunne, Frank Convery and Louise Gallagher, "An investigation into waste charges in Ireland, with an emphasis on public acceptability" (2008) 28(12) Waste Management 2826.
[53] O'Malley and FitzGibbon (n 2) 290. The endowment effect – or divestiture aversion – may play a role in resistance to the withdrawal of free services provided by the State. This phenomenon, observed in behavioural economics, is the additional weight placed by individuals on something because of the idea of ownership. See generally Carey K. Morewedge and Colleen E. Giblin "Explanations of the endowment effect: an integrative review" (2015) 19(6) Trends in Cognitive Sciences 339. I am grateful to Rosalind Dixon for this suggestion, which would benefit from further consideration.
[54] Ogle (n 13) 19, 28-9. See also Change News, Febrary 2016, a campaigning newspaper distributed by Right2Change, available at https://issuu.com/mandate/docs/change_feb_2016_web>.
[55] Ogle (n 13) 28-9. The EU does encourage privatisation in various utility sectors where this is efficient.
[56] This was first proposed by the Greens Party, which was not affiliated with Right2Water, and then adopted by many, including Right2Change. The proposal proved popular; Daniel McConnell, "Huge majority support Irish Water referendum, survey shows" December 16th 2004, Irish Independent, available at: <http://www.independent.ie/irish- news/politics/huge-majority-support-irish-water-referendum-survey-shows- 30839862.html>.
[57] Ogle (n 13) 87.
[58] Ogle (n 13) 137.

they would be increased until eventually people could not pay and there would, eventually, be shutoffs.[59] Access to water as a human right became one of the core rhetorical planks of the movement.

Fourthly, timing probably played a role. O'Malley and FitGibbon argue that mainstream opposition parties in early years of austerity may have vented some of the urges that would drive populism, with criticism of bankers and the Troika, and a promise of a new, better politics.[60] These parties were untainted by the crisis and its political failures, having been in opposition. Perhaps it was when these parties entered government and continued the policies of austerity that people turned away from mainstream politics. Water charges arrived in that moment, serving as a focal point for renewed disaffection.

Finally, water charges were, as one protester put it, the straw that broke the camel's back.[61] Then Taoiseach (Prime Minister) Enda Kenny said of the protests in 2014: "It's not about water, is it?"[62] Water charges were one of the final impositions of a hated austerity regime. Right2Water movement was not just about water but about the entire "violence of austerity".[63] Water was the primary focus, but the entire austerity agenda was at issue. Be that as it may, focusing on water had consequences. The great victories of the movement were limited to overcoming of those charges, and its larger political legacy seems likely to be muted.

Explaining Ireland's Unusual Populism

Why did this populist movement, for all its support, have minor effects on Irish political life, leaving the structures and practices of Irish politics – for the moment at least – largely intact? There are many possible reasons, and as I will argue later, it is impossible to know for sure, but I offer some tentative suggestions here.

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[59] Ogle (n 13) 2-3.
[60] O'Malley and FitzGibbon (n 2) 287-290. Power et al. (n 20) 264 describe it as "an electoral optimism [that] proved short lived".
[61] Quoted in Michelle Hennessy, "Protesters have 'all the time in the world' to stop water meter work today" April 24th 2014, TheJournal.ie available at <http://www.thejournal.ie/raheny-water-meter-1430184-Apr2014/>.
[62] Stephen Collins, "Enda Kenny says protests 'not about water'" November 17th, 2014, The Irish Times.
[63] A member of the movement, quoted in Ogle (n 13) 149.

First, it was easy for mainstream parties to co-opt the issue of water charges, and they did so. It did not require any radical departure for mainstream political parties; charges could be relatively easily undone.[64] Fianna Fáil could thus co-opt the issue with little cost, and ultimate delivered on a promise to ensure their abolition. Sinn Féin – the largest party formally involved in the Right2Water movement and the only one to have substantial electoral success in 2016 – is "increasingly mainstream"[65] and less steeped in populist rhetoric than the rest of the movement. By picking this issue to be the focal point of the populist stand against austerity, the movement allowed establishment (and quasi-establishment) politics to take the wind from its sails.

Secondly, the timing of the movement perhaps also took some of its momentum. It was just gaining traction as economic growth returned and gave the government some leeway in reducing the severity of austerity measures. Had the movement risen earlier, with numerous austerity measures still to implement, it might have more easily broadened its scope and support. Thirdly, and relatedly, with the campaign focussing on water charges, it might have been difficult to pivot the movement to broader issues. Though it clearly drew on and spoke to a broader opposition to austerity, it was not easy to shift focus from water, which became the movement's totem. Some of the movement's supporters may also have been happier with a narrower, more practical focus rather than larger, more disruptive aims. [66]

Fourthly, the organisation was a genuine, grass-roots movement, and was thus diffuse. Organisers had a sense that they had stumbled upon a major political moment, and had a highly receptive audience.[67] Potentially, this could have been captured by a movement that had a charismatic leader, say, or a more formally organised group. The movement was organised in the main by trade union officials and local grassroots

[64] Though there was a possible EU law concern, it was ultimately just a change of the law and a loss of revenue that was required. Compared to other austerity measures – major income tax hikes, spending cuts, or the nationalisation of the bank debt, this was not a difficult policy to undo.
[65] Whelan (n 27).
[66] While many water protesters did desire much broader outcomes, perhaps others did not. The lack of protest in the early years of austerity shows Irish people to have been reasonably pragmatic and resigned to some very severe cuts being imposed, but that did not mean they were happy about it. Rather than challenging the core of austerity – which would have led to a faceoff with the Troika and perhaps severe economic consequences if this failed – the water movement focused on a more minor component of austerity, allowing the venting of deep frustration in a relatively safe manner that did not rock the boat. Its mass appeal might be attributable in part to the fact that it did not really threaten the established orthodoxy.
[67] Ogle (n 13) 66.

groups. Small political parties participated, but only Sinn Féin had any real significance in the political system. Given Sinn Féin's complex history with the IRA and Irish nationalism, some were not comfortable with the movement being too attached to that party.[68] Many participants in the movement were not previously politically engaged and were anti-hierarchical, resisting attempts to formally organise the movement.[69] Therefore, its electoral organisation was diffuse too, limited to a set of common principles and some common publicity.

Finally, and most importantly, the structure of Irish political culture and public law did the movement no favours. Ireland has long been dominated by two centre-right parties, formed from opposite sides of the Irish Civil War of the 1920s, which (though they might deny this) are broadly similar in most areas of policy. No party other than these two have ever led a government, so there is very little by way of left-right divide.[70] Left-wing parties have never been dominant. Though small parties regularly enter into government as minor coalition partners, they invariably are secondary to dominant a centre-right party with a centre-right agenda, and there is often huge electoral backlash against them afterwards.[71] The legislative process has historically been almost entirely executive dominated, giving little role for opposition parties in policymaking or legislation.[72] In Irish politics, significant change to the status quo never seems a likely outcome of any political process.

Ireland also has "a cartel party system with rules in place on party financing which make breaking into the party system increasingly difficult."[73] There are very strict limits on private financing, and quite significant public funding given to political parties based on past electoral performance. This presents a major hurdle to any new political movements hoping to capitalise on a political moment. Politics is highly localist,

[68] Ogle (n 13) 207 reports "messages from people with no party affiliation who espoused the view that they just could not support any platform that had Sinn Féin involvement" noting it was emblematic of "a certain toxicity many people feel for that party".
[69] Ibid 68.
[70] Former Taoiseach Fine Gael Leader John Bruton noted: "Fine Gael and Fianna Fáil have complimented each other through Irish history. In Ireland, we have had consensus about major long-term policies largely because we haven't have a sharp left/right or ideological divide." Quoted in Colette Sexton, "The Week in Business" November 8th 2015, The Sunday Business Post.
[71] This happened to Labour after their 2011 Coalition; the Green Party after their 2007 coalition; and to the Progressive Democrats after two being part of two coalition governments from 1997 to 2007.
[72] Michael Gallagher, "The Oireacthas: President and Parliament" in Coakley and Gallagher (eds.) *Politics in the Republic of Ireland* (5th ed. Routledge, 2010) at 201.
[73] O'Malley and FitzGibbon (n 2) 292.

focusing on local matters rather than national issues, with a consequent emphasis on candidates rather than parties or policies.[74] There is also a strong tradition of electing independent candidates, who are affiliated with no party.[75] This system and culture work against any attempt to set up a new political party, making it very difficult to capture a moment, to turn a general political movement into an electoral one.[76]

In a system as complex as politics, causal relations are hard to decipher. All of these factors (and more) played a role in stymieing Right2Water/Right2Change; it is impossible to know which of them (or which combination of them) were decisive. Was the public law and political culture of Ireland such that more political success was never likely, or could such a movement – in a slightly different set circumstances – have overcome these obstacles, breaking the public law strictures that might have inhibited it? We will never know, and in this we find the problem for the project of taming populism with public law.

Part III: The inevitable localism of populism

An Anti-Theory of Populism

Populism is a product of public law, and so as public law scholars, we feel the need to understand how it comes about and what we can do about it. Even while saying that there are no easy answers, most discussions of populism confidently diagnose causes and conclude with general lessons to draw for remedial action.[77] Constitutional design or judicial action are looked to for answers to the threat of populism.[78] Kriesi and

[74] Ibid. A total lack of government engagement with opposition, and a whip system that is strict even by the standards of Westminster-style democracies makes it hard for candidates to get elected by concentrating on national issues. See Gallagher (n 72) 209-214; John O'Dowd, "Parliamentary Scrutiny of Bills" in Muiris MacCarthaigh and Maurice Manning (eds) *The Houses of the Oireachtas* (IPA, 2012) 322.

[75] Liam Weeks "Minor parties in Irish political life" (2010) 25 Irish Political Studies 473. This is enabled – as is the more general localism – by small electoral constituencies and Proportional Representation by Single Transferable Vote, so that a relatively small number of votes are needed to get elected.

[76] Two prominent new parties formed in the aftermath of the crash: Renua Ireland, which won no seats in the 2016 election, and the Social Democrats, who held three seats occupied by their previously independent party founders, but won no other seats.

[77] Some scholars fall somewhere in the middle. Taggart is not far from Canovan's view ("populism is de facto substantially contextually contingent" Taggart (n 1) 275) but he identifies features – e.g. populism adopts a view of the heartland that relies on romanticised past, something that Ireland lacks – that are general, which one can use this to form a general "approach" to populism. Ibid 278-9.

[78] Michaela Hailbronner and David Landau, "Introduction: Constitutional Courts and Populism" ICONNECT Blog, April 22nd 2017, available at: <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/>.

Pappas say that their task is "to offer a theoretically robust ... evaluation of contemporary European populism, and make credible predictions about its future course."[79] Pappas suggests that assessing charisma of leaders can help us predict populism and its success.[80] Müller's book concludes with seven theses about populism that make strong predictions about how populists will behave.[81] Places that escape the pull of populism are looked to for wisdom.[82]

Ireland's is a story of safe passage through crisis, having experienced populism yet avoided its worst effects: collapse of the party system, intense social unrest or violence, rise of political extremism.[83] So what can we learn from this Irish experience? It is my case that we can learn nothing general, nothing very useful to the desired ends. The surprising and peculiar characteristics of Irish populism in fact illustrate the invariably local, idiosyncratic nature of populism, which makes it very difficult to draw generalisable, reliable lessons about the phenomenon and makes it hard to know what to do about it.

Political science has long debated the coherence and utility of populism as a concept, whether it can or should be captured in theory. Canovan, in her influential 1982 article, observed the extraordinary breadth of movements that attract the term "populist". Good definitions of populism have to be broad and include great diversity, and this, Canovan argues, frustrates efforts to create a theory of populism. Such a theoretical account must "reduce this diversity to order" to explain and predict the phenomenon. Theorists will acknowledge local diversity, but believe that once "the right variables are added to explain local differences" general accounts will work. But Canovan persuasively argues that theorists are doomed to be too wide ranging to be clear or too restrictive to be persuasive.[84] A theorist will either offer a theory broad

[79] Kriesi and Pappas (n 1).
[80] Takis S. Pappas, "Are Populist Leaders "Charismatic"? The Evidence from Europe" (2016) 23 Constellations 378.
[81] See Müller (n 37), Chapter 4.
[82] See Amanda Taub, "Canada's Secret to Resisting the West's Populist Wave" June 27th, 2017, The New York Times, available at <https://www.nytimes.com/2017/06/27/world/canada/canadas-secret-to-resisting-the-wests-populist-wave.html>.
[83] See Kriesi and Pappas (n 1).
[84] Margaret Canovan, "Two Strategies for the Study of Populism" (1982) 30 Political Studies 544 at 545-546. Umberto Eco made a similar argument about fascism is his essay "Ur-Fascism", New York Review of Book, June 22nd 1995: "the word *fascism* become a synecdoche, that is, a word that could be used for different totalitarian movements. This is not because fascism contained in itself... all the elements of any

enough to accommodate all that might be "populist", and in so doing create something so general and vague as to be devoid of explanatory/predictive power; or they will postulate one so narrow that it will exclude a great many populist movements, undermining its explanatory/predictive claim.[85]

These days, the risk of an underinclusive selection bias is particularly acute. Contemporary discussions of populism seem – expressly or implicitly – to define out many movements in an effort to leave us with the set of worrisome contemporary cases that seem to be most worthy of attention.[86] But then we are not talking about populism; we are talking about a subset of populism with particular characteristics, ignoring that there are lots of other variants and perhaps even similar contemporary cases might be notable for their different outcomes or features.

All this adds up to anti-theoretical argument. If by theory we mean something that can explain a phenomenon in a general, context-transcendent manner that will have predictive power, then there can be no theory of populism.[87]

The only sensible way to study populism, Canovan argues, is to develop a descriptive typology of populism – sorting, categorising and describing populist

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later form of totalitarianism. On the contrary, fascism was a *fuzzy* totalitarianism, a collage of different philosophical and political ideas, a beehive of contradictions."

[85] Canovan notes that "almost any generalization about [populists] can be defeated by a counter-example". Margaret Canovan, "'People Politicians and Populism" (1984) 19 Government and Opposition 312 at 313. Or new populist movements will someday spring up that the theory cannot explain and did not predict. The fact that a certain version of populism has not yet materialised does not mean it cannot or will not. Black swans, etc.) See also Ben Stanley's account of populism as a Thin Ideology, drawing on Canovan, suggesting that populism is useful in a limited analytic context to illustrate certain things about politics, but nothing more; Ben Stanley, "The Thin Ideology of Populism" (2008) 13 Journal of Political Ideologies 95.

[86] As Hailbronner and Landau (n 78) put it: "Most work explicitly or implicitly agrees with the view that populism is a threat to liberal democratic constitutionalism". I think this is the problem with Müller's account (n 37), (n 50) of populism, which might rule out many groups that we should consider to be populist to leave us with a topical, very unpleasant, bunch. This leaves him able to assert that all populists are a threat to democracy in being anti-pluralist. But he does that by, for example, excluding any group willing to allow an exclusively representational claim be refuted by empirical evidence or subsequent developments, such as election results. This seems problematic; surely this *was* a populist party, but ceased to be one. But, with it safely defined as non-populist, the attention turns to the troubling remaining cases. He asserts that populist invariably must become corrupt or authoritarian in power, but again, this defines out any otherwise-populist movement that moderates in power, engages in ordinary politics and probably disappoints many of its supporters. There is no sense in saying they were never populists; they were, and they changed.

[87] I take Canovan to embrace something like Stanley Fish's definition of theory: "an account... that is once comprehensively abstract, strongly normative, and predictive of outcomes". Stanley Fish, "Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin" in *There's No Such Thing As Free Speech* (Oxford University Press, 1994) 200 at 200.

movements – rather than a theory that would explain it. The problem with this approach is that it cannot tell us "what are the essential features of populism, or why and under what conditions it will occur". Populist movements are "related to each other only contingently, not tied into a grand theoretical structure". Populism, on this view, is only a "common rhetoric" of corrupt elites and pure people.[88] Nothing else necessarily links populist movements.

Without such a theory, it is not clear how we can find general remedies and prophylactics. Lessons we can learn from Canovan's approach cannot guide our response to populism. For example, in her later work, Canovan argues that populism is an inevitable product of the pragmatic and redemptive faces of democracy. Some will see democracy simply as a pragmatic mechanism of bargaining between competing groups to avoid conflict. Others will see it as more aspirational and grandiose, working towards a higher goal of realisation of true popular will.[89] Bureaucratic institutions of democracy are probably necessary for the former, but seeing the sausage made will interfere with the vision of democracy as a higher good. She argues that both visions of democracy are necessary: pragmatic achievements need a romantic narrative to keep working, or democracy will eventually seem like corrupt, unprincipled bargaining.[90] But this bargaining is necessary to maintain peace and stability in a democracy, and idealists, once elected, will engage in it or else fail to deliver practical results. Therefore, democracies will invariably produce populism whenever pragmatism is too overt or too disliked and renewed idealism turns to realising the people's will.[91] Populism "accompanies democracy like a shadow".[92]

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[88] Canovan (n 84) 550-552. Canovan offers a non-exhaustive list of seven types of populism then being discussed the literature, which she admits to be diverse and "frustratingly unsystematic" Cf **Stanley (n 85);** Ernesto Laclau, *'Towards a Theory of Populism' Politics and Ideology in Marxist Theory: Capitalism—Fascism—Populism* (New Left Books, 1977); Ernesto Laclau, "Populism: What's in a Name?" in Francisco Panizza (ed.) *Populism and the Mirror of Democracy* (Verso, 2005) 32.

[89] Margaret Canovan, "Trust the People! Populism and the Two Faces of Democracy" (1999) 46 Political Studies 2 at 10, drawing on Michael Oakenshot, *The Politics of Faith and the Politics of Scepticism* (Yale, 1996).

[90] Ibid 11-13. See also ibid 15-16: "any attempt to banish the redemptive side of democracy is likely to be self-defeating. As a way of interpreting democracy, it is rather like trying to keep a church going without the faith". That is, a loss of faith will breed corruption and corruption will breed a revivalist politics.

[91] Populism is the most common (most popular, if you will) rhetoric to attach to one side of this perpetual clash. It might have other forms, but the rhetoric and promise of democracy as government by and for the people invites a rhetoric of populism when it fails to live up to this promise.

[92] Canovan (n 89) 16.

But this fascinating account is not *useful*, because it cannot tell us how much pragmatism/redemption is needed in any given place and time. It cannot tell us what sort of populist movement may emerge in a place, because this will depend on the various local circumstances that prevail in that democracy that shape that particular clash between the pragmatic and redemptive faces of democracy. It cannot tell us how to reliably communicate a tame redemptive message that might assuage populist movements, or how to avoid excessive pragmatism. It cannot even tell us what excessive pragmatism looks like; it will be different in each place and time.[93]

Almost all aspects of populism, then, are contingent. Populism may feature a charismatic leader, or it may not. It may be anti-expert and anti-technocrat, or may not. It may demand much more direct democracy, or it may not.[94] It may centralise power in the executive, and attack the judiciary and the constitutional order, or may not.[95] It may be ethno-nationalistic or anti-minority, or it may not. It may be an outsider movement, but it may not be.[96] It may rail against constitutional checks on majorities, or it may suggest new ones.[97] It may rail against tradition, or it may seek a return to it.[98] It might be self-defeatingly anti-organisational,[99] or it may be able and willing to govern. All of this, and much more, depends on complicated local realities.

No reliable guide for action

In contemporary discussions of populism there is the sense that we have to figure out what to do to reliably combat it, to preserve liberal democracy. Here, a project like

[93] See a similar point in Benjamín Arditi, "Populism as a Spectre of Democracy: A Response to Canovan" (2004) 52 Political Studies 135 at 139-140.
[94] Mudde (n 1) 556, 547, 558-9.
[95] See Andrew Arato, "Populism and the Courts" 25th April 2017 ICONNECT Blog available at <http://www.iconnectblog.com/2017/04/populism-and-the-courts/> suggests attacks on apex courts. But Mudde (n 1) 559 notes that depending on the circumstance Populism may have few suggestions about the structure of public law.
[96] Canovan notes that insiders can avail of the techniques of populism just as outsides can; Margaret Canovan "Populism for political theorists?" 2004 9 Journal of Political Ideologies 241 at 243. Populism may be used to appeal for maintenance of a certain leadership, as illustrated by Weyland's work on Latin America; Kurt Weyland, "Clarifying a Contested Concept: Populism in the Study of Latin American Politics" (2001) 34 Comparative Politics 1.
[97] As Dixon seems to suggest, it will be difficult to know how to judge whether a particular constitutional change is legitimate or illegitimate by reference to any theory of populism. Rosalind Dixon, "Populist Constitutionalism & The Democratic Minimum Core" April 26th 2017, ICONNECT Blog, available at <http://www.iconnectblog.com/2017/04/populist-constitutionalism-the-democratic-minimum-core/>.
[98] Canovan (n 96) 247 notes that tradition could quite easily be a populist slogan.
[99] This is suggested by Taggart (n 1).

Canovan's descriptive typology will be of little help. Any lessons we think we might draw from one place and time will likely be frustrated by the differences that will exist when they are applied in another place and time.

The links between populism and public law are plural, bidirectional, and massively complex. Some are small and intricate while others are grand and sweeping. It is a complex system where minor changes in circumstances might have a colossal impact on outcomes. Populism will be shaped by public law structures (and public law by populism), but in a way that is idiosyncratic, local, *distinct*. We can try to deliberately shape public law as a response to prevent, pre-empt or combat populism, but we may not succeed. We may make things worse.

The Irish example or other examples of tame or centrist populist movements[100] are interesting because they show us an unusual way that populism can play out, but they cannot shape public law to create this result. Ireland's populist movement illustrates this point well precisely because it is so distinctive, shaped by the "substantial idiosyncrasies" of Ireland's crisis[101] and the oddities of Ireland's politics and political culture. It just so happens that the Irish people are somewhat docile, and seemingly loath to conduct mass protest. It just so happened that Ireland's anti-austerity movement crystallised around the unusual issue of water charges, ripe to be cannibalised by mainstream politics and to be conceded to without great cost. It just so happened that the movement was scrappy and diffuse, without a charismatic leader, and reluctantly political.[102] It just so happened that it developed without any great nationalist sentiment.[103] It just so happened that the Irish political system and political

[100] Ucen talks about a "centrist populism", an anti-establishment sentiment with no other ideology in east central Europe. Peter Ucen, "Parties, Populism, and Anti-Establishment Politics in East Central Europe" (2007) 27 SAIS Review of International Affairs 49. *Cf* Sean Hanley and Alan Sikk, "Economy, Corruption or Floating Voters? Explaining the Breathroughs of Anti-Establishment Reform Parties in Eastern Europe" (2014) 22 Party Politics 522.

[101] O'Malley and FitzGibbon (n 2) 282.

[102] Taggart claims this is a *feature* of populism, and makes it self-limiting, as they are hindered in coalition building. Taggart (n 1) 276, 280. Does this have to be so? Müller (n37) argues that populists can take power but will end up attacking democratic institutions. But it seems to be you could have a populist movement that happened to suit the electoral system, the main goal of which was to remove the elites from the corridors of power using current electoral means.

[103] Ireland is not at all immune from anti-immigration sentiment; a 2004 referendum was held to change the basis of Irish citizenship from *jus sanguinis* to *jus soli* was based on a perception that immigrants were coming to Ireland while pregnant and using their Irish citizen children to stay in the State without other entitlement. , and Anti-Establishment Politics in East Central Europe"

culture is a difficult environment for new parties and movements. And it just so happened that many other factors that played a role – they are too complex and numerous to know them all – were as they were.

You cannot use Ireland to predict the course of populism elsewhere or to replicate Ireland's taming of populism, because all these things happened to be the case, and all this happened, in context, to result in the curbing of the populist movement. Any of these things might have been otherwise, or reaction to them could have been (or could yet be) different.[104] For example, the fact that Ireland's populist movement came late in the austerity period might – rather than curbing it – have made it all more vociferous, extreme and difficult to respond to as anger had accumulated over years. Had Ireland's recovery come slightly later or not been as strong, the result may have been different. Ireland's cartelised party system probably happened, in context, to stifle the populist political movement, but it could instead have fuelled it, stoking anger about an unmovable political elite and creating a more extreme populist backlash.[105]

There are thus no steps we can take to guarantee that populism will not come about, no sure strategies to address it. No country's experience offers either a clear example to follow or a clear example to avoid. No general proposal will reliably work. The system is so complex that even smaller differences might play out in radically different experiences of populisms, with a lot more unpredictability that we would like to admit. If you take lessons from Ireland and apply them elsewhere, you might get a similar result, but this "success" would be happenstantial and contingent, as much a

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(2007) 27 SAIS Review of International Affairs 49. *Cf* Sean Hanley and Alan Sikk, "Economy, Corruption or Floating Voters? Explaining the Breathroughs of Anti-Establishment Reform Parties in Eastern Europe" (2014) 22 Party Politics 522.

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[104] Moreover, the end of Ireland's story is as yet unwritten; nothing guarantees that the factors that kept Ireland's populism in check will continue to do so, particularly if there were any significant shifts in Ireland's economic outlook.

[105] Indeed, Mudde (n 1) at 552-553. suggests that cartelised party systems – where political options become similar and centrist – are a driver of populism.

result of luck as of insight.[106] Our prophylactic and responsive efforts to shape public law to oppose populism might help, but they might not, depending on local idiosyncrasies too many to list and too complex to fully understand.

Moreover, this uncertainty means that in trying to remedy or pre-empt populism, we might exacerbate or create it. Attempts to address populism with militant democracy,[107] for example, could create the appearance of the elite-dominated state that populists abhor, compounding and exacerbating populist movements.[108] Constitutional courts attempting to combat populism[109] may typify the unwillingness of elitist institutions to accede to popular will that populists feed off.[110] Mandatory voting could combat populism, or it could create "support and legitimacy for those forces it seeks to oppose".[111]

Conclusion: Pragmatism, not paralysis

Populism is always, inevitably local. All instantiations of populism are different; its responses to particular public law structures or political circumstances are contingent, as are its reaction to attempts to combat it. It is irreducibly local – local all the way down.

What does this insight, if accurate, mean for our response to populism? It means, following Canovan, that we should not purport to have grand, predictive theories of populism that would reliably tell us why it comes about, predict its rise, and help prescribe solutions. This might present problems for our project here, studying the new populism and its relationship to public law. It suggests that new populism is not a

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[106] As Canovan (n 84) 551 puts it: links between populism movements are possible but "they are not inevitable".

[107] See generally Jan-Werner Müller "Militant Democracy" in Michel Rosenfeld and András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012).

[108] Mueller (n37) warns of treating populism as a pathology and excluding populists from debate entirely for this reason.

[109] See Arato (n 95).

[110] Blokker notes inadequacy of courts; Paul Blokker, "Populist Constitutionalism" May 4th 2017, ICONNECT Blog available at <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>. Isacharoff notes this risks, while saying courts are vital in the attempt to combat populism. Samuel Issacharoff, "Safeguarding Democratic Institutions" April 29th 2017, ICONNECT Blog, available at < http://www.iconnectblog.com/2017/04/safeguarding-democratic-institutions/>.

[111] Ursus Eijkelenberg, "Be Careful What You Wish For – A Short Comment on 'Mandatory Voting as a Tool to Combat the New Populism', May 19th 2017, ICONNECT Blog, available at <http://www.iconnectblog.com/2017/05/be-careful-what-you-wish-for-a-short-comment-on-mandatory-voting-as-a-tool-to-combat-new-populism/>.

coherent phenomenon, but many broadly related phenomena with some similarities and many complex differences. It might not have common causes or common remedies. It has been put to me that this is a pessimistic account that disempowers and paralyses us in our efforts to combat populism. This is not exactly true; it counsels not paralysis but pragmatism.

Embracing Canovan's insight that populism is inextricably bound up with democratic governance and cannot be completely avoided seems disempowering as it gives us no roadmap for what do to about those forms of populism that we distrust and fear. That does not mean that there is nothing we can do about it. Such a conclusion supposes that action requires a theoretical surety that we will never have.

What we need, instead, is a willingness to act without warrant;[112] that is, to take the steps we deem necessary to prevent the forms of populism that we think dangerous even if we are not sure of ourselves; even if we might be wrong; even if we might make things worse. Even without theory, we can develop heuristics and rules of thumb – simplified (even inaccurate) observations that can help us make complex decisions more effectively.[113] Heuristics are pragmatic, not theoretical,[114] guiding action without explanation because a full explanation is lacking. We can observe that certain actions may generally work in certain situations even if we do not understand exactly why, or grasp the full complexity of the situation.

The diversity of populism is such that we should be deeply sceptical of any solutions that purport to be general and not entirely specific to context and be cautious about drawing up heuristics. This might make public lawyers less useful and make us feel less important than if we could provide grand theories. But the choice, if I am right, is not to provide useful grand theories or not, but to pretend to provide such theories or

[112] I borrow this phrase from Pierre Schlag, "The De-differentiation Problem" (2009) 41 Continental Philosophy Review 35 who takes it from Duncan Kennedy.

[113] Whether or not academic discussion of populism will be likely to produce good heuristics, or whether the general term "populism" might even hinder an effort to develop good heuristics for specific sort of movements are real questions, but must await another occasion. It is unclear if what academics have in our favour – time, breadth of interest, comparative inclinations – outweighs that which constrains us – our lack of situatedness in the political systems that shape the reality of populism.

[114] See generally Stanley Fish, 'Dennis Martinez and the Uses of Theory', 96 Yale L.J. 1773 (1987). To put it another way: "It is the vocabulary of practice rather than the vocabulary of theory... in which one can say something useful about truth." Richard Rorty, The Consequences of Pragmatism, (University of Minnesota Press, 1982) at 162.

to admit that we cannot. In the circumstance, I think we do more good by the latter approach.[115]

One thing this approach would countenance is a focus on the particular rather than the general: looking at the detail of local examples, exploring the oddities, peculiarities, and unexpected features of various populist movements rather than the grand trends that seem to link waves of populism.[116] Grand theories seek broad similarities that will reveal the truth of populism, but given the complexity of the phenomenon will end up offering inaccurate, cherry-picked narratives.[117] We would be better off trying to find the differences, reveal the complexity of the populism and the difficulties of knowing it for sure.[118]

One such heuristic that we might glean from the Irish experience and the diversity of populism is that we might not use populism as a *per se* pejorative term.[119] It is not always a grave threat. It sometimes will be, but it may also be centrist; it may be mild in its ultimate effects; it may moderate significantly when in power. Sometimes, as Mudde notes, the cause of populism is that the populists have a point, and a corrupt elite is ruling unjustly.[120] I am not an apologist for various sorts of harmful populism; rather I think that, pragmatically, we should not regard every populist movement as something toxic to be extirpated. Sometimes they might be better tolerated, allowed to

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[115] This again does not mean that we can do nothing. It could mean that we make more cautious and limited recommendations. Dixon and Landau's tiered constitutional design, for example, seem like an interesting way for constitutional designers to pre-empt some facets of populism (and lots of other threats). But we must recognise the limits of this approach, as its authors do, and act with caution: it is entirely context dependent as to what should be in what tier (we might later realise that some feature needed more entrenchment); whether or not the tiers are effective will be impossible to predict; and the tiers could, at some point, create a sense of elite governance and the rigidity of the constitutional order could be its undoing. The context-dependency is perhaps particularly acute at the point of initial constitutional design, when the political and legal culture of the new constitutional settlement will not yet have taken shape, and when most decisions about tiering must presumably be made. See Rosalind Dixon and David Landau, "Tiered Constitutional Design", available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953755>.

[116] Canovan's typology project would suit us in this effort. See Canovan (n 85) at 323, looking at the detail of Great Britain in the 1980s, and argued that while "few generalisations can be safely made about populism as such, however, it may be possible to be a good deal more specific about the political attitudes that lend themselves to expression in populist language at a particular time and place".

[117] See generally Pierre Schlag, "Law and Phrenology" (1997) 110(4) Harvard Law Review 877.

[118] See generally the work of Pierre Legrand. I have recently explored this theme in another context; David Kenny, "Proportionality and the Inevitability of the Local: a comparative localist analysis of Canada and Ireland" (2017) American Journal of Comparative Law (forthcoming).

[119] Ucen (n 100) 60 notes that populism is a dynamic phenomenon that might even be "benign and transient". Ucen 60

[120] Mudde (n 1) 552.

run their course, or even partially embraced lest we cause the very problem we seek to avoid.[121]

Populism at the present moment is a name that we attach to that in contemporary politics which we fear and wish to stop. But the more we put onto that word our fears (and our hopes for salvation), the more it ceases to be a meaningful object of academic study and becomes a totem of political discourse. As for our fears, in the end, there is only so much we can do. For as long as democracy persists, populist movements will shadow it. Some of them will be, by our lights, profoundly dangerous and we will try our best to stop them. We may or may not succeed. And then, as ever, something else will happen.

[121] Even Müller (n 37), whose seems to take a narrower definition and a darker view of populism than me, thinks that some engagement is appropriate.

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