

Natural Law in Irish Constitutional Jurisprudence

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Natural law theory has been undergoing something of a renaissance in academic circles for some years now. Several factors have contributed to this renewed interest: the publication in 1980 of John Finnis's very influential, *Natural Law and Natural Rights*, the playing out of moral issues like abortion, euthanasia, and sexual conduct in the courts, and most spectacularly, the confirmation hearings of now Justice Clarence Thomas in 1991 which were initially focussed on Thomas's interest in natural law theory and its possible influence on his jurisprudence. While Thomas repudiated the use of natural law theory in constitutional jurisprudence, the idea became the subject of heated discussion in both popular¹ and academic circles.² One thing those discussions lacked was a comparative dimension. In many areas of constitutional jurisprudence we now have a considerable body of primary sources and scholarly literature from which to draw comparisons with the practices of other constitutional democracies. The object of such comparison is not slavish imitation of other courts or regimes, but a wider perspective on our own problems.³ In thinking through the possibilities and problems in applying natural law theory to constitutional jurisprudence, recourse to comparative study may be helpful.

What follows is a brief account of the place of natural law in the constitutional jurisprudence of one jurisdiction which has made sustained use of it, Ireland. A couple of caveats are in order concerning both natural law theory and the nature of the comparative enterprise. Those who advocate the use of natural law in constitutional jurisprudence face formidable obstacles. For one thing, the U.S. Constitution says nothing directly about natural law. Similarly, many disagree about just what the natural law requires and there are entirely different versions of natural law theory competing with one another. None of this means that there is no natural law or that it ought not have any influence over constitutional interpretation. It just means that advocates of its use have a difficult task in convincing others of their position. One indication of the complexity involved in the issue is that conservative justices like Antonin Scalia have publicly opposed the use of natural law theory in constitutional jurisprudence, while liberals like former justice William Brennan have occasionally spoken in support of it.

While one missing element in the debate has been empirical investigation into the use of natural law theory by actual courts and judges in real cases, such data will not, of course, decide an issue which is ultimately theoretical and practical, but it can provide a context in which to more accurately assess

the practical consequences of natural law jurisprudence as well as some data with which to answer some of the speculative arguments for or against natural law jurisprudence. So one thing I do not want to do is suggest that the U.S. Supreme Court simply adopt Ireland's natural law jurisprudence, though I do think that natural law theory provides a way of thinking about moral and political questions that is indispensable if one is to avoid the problems caused by legal positivism, problems which are all too familiar to people living at the end of the twentieth century. At the end of the paper I suggest some of the lessons we should take from the Irish experience.

Similarly, there are, as we shall see, important structural and substantive difference between the Irish Constitution and the Constitution of the United States and between the political and legal cultures of the U.S. and Ireland. At the same time, Ireland provides a potentially fruitful comparison since it shares with the United States both its English common law heritage and its un-English written constitution.

The present constitution of Ireland, the *Bunreacht na hÉireann*, dates from 1937 and is largely the work of one man, Eamon de Valera, whose political vision the document attempts to instantiate in much the way that the Constitution of the French Fifth Republic gives effect to Charles DeGaulle's "certain idea of France."⁴ The *Bunreacht na hÉireann* was intended to make a clean break between Ireland and England after the War of Independence secured home rule in Ireland through the Anglo-Irish Treaty of 1922 (which made Ireland a "dominion" like Canada and Australia) and the bloody civil war between the government of the Irish Free State established by the treaty and those who would be satisfied only by complete political independence from Britain. The latter group, led by de Valera, a hero of the Easter Rising of 1916 and a leader in the War of Independence, entered politics again in 1926 and gained enough representation in the Dáil, the Irish legislature, to form a government in 1932. For over four years, de Valera amended the Free State Constitution until he had cut the British crown out of everything save the accreditation of foreign diplomats in Ireland. Finally he moved on a new Constitution which would make Ireland a republic with an elected president to replace the king.⁵

That Constitution had even broader goals, however. It was to be truly Irish and to represent the aspirations of Irish people to a politics which was adequate to their own culture and values. It began with an extraordinary preamble which read:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, and seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the digni-

ty and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, do hereby adopt, enact, and give to ourselves this Constitution.

The Constitution, written in both English and Irish, aimed to establish an Ireland which was different from other nations, one centrally informed by Catholic social teaching,⁶ Gaelic in its culture, and rural in its economy.

But a central part of the Catholic social thought which it embodied was concerned with securing human dignity through the protection of fundamental human rights as understood in the tradition of natural law. Rights were seen as a necessity of free moral action but also understood in the overall context of the common good. And both were seen as part of a larger natural order, the order of God's creation. Here already, one can see something of a complication. Natural law is not necessarily an explicitly "theological" notion, but one based on "nature" itself. Ireland inherited the moral scheme of natural law as part of its Catholicism, however, and the two were never entirely separated from one another. This is important in the account that follows.

Natural law as a method of constitutional interpretation has mainly been concerned with the fundamental rights provisions in the Irish Constitution. These are contained in Articles 40-44. Art. 40.3.1 states that "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." Sub-section 2 of that article reads "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." These sections are of particular importance here, because it is in them that the Court has built up its natural law jurisprudence. Before considering that, however, it is worth looking at the other guarantees. Sub-section 3 protects the right to life of the unborn. Art. 40.4 protects the right to habeas corpus; Art. 40.5 establishes the inviolability of the home; Art. 40.6 guarantees rights to free expression, peaceable assembly, association and unionization, all subject to "public order and morality." Art. 41 recognizes the "Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Art. 43 recognizes that "man, in virtue of his rational being, has the natural right, antecedent to positive law, to private ownership of external goods." The influence of specifically Catholic moral teaching is also seen in Art. 45 which lays out Directive Principles of Social Policy intended to promote social justice, though the text makes these provisions explicitly non-justiciable: they can only be interpreted by the Oireachtas, the national legislature.

While the natural law was always seen as inspiring the constitution,⁷ it did not become a major issue in the courts until 1965 in the case of *Ryan v. the Attorney General*,⁸ a case the circumstances of which can only seem very odd to Americans. A Dublin housewife challenged a law mandating the fluoridation of the public water supply. There were several grounds for her challenge,

but the most important was that she thought fluoridation a threat to the health of her children and claimed that it violated a right to “bodily integrity” under Art. 40.3.1. That article does not mention any such right, but her attorneys claimed that that article protected rights which were “unspecified” in the text. The High Court accepted her claim of an unspecified right, though held at great length that it was not violated by fluoridation. The judge ruled that since Art. 40.3.2 specified its explicit protections of the “life, person, good name, and property rights” of citizens by the phrase “in particular,” those rights must be seen as included in the more general protection guaranteed by Art. 40.3.1 and thus that that article protected other rights not stated “in particular” in the Constitution. More importantly, the court held that such a notion followed from what Justice Kenny called “the Christian and democratic nature of the state.”⁹ In order to show that the Christian and democratic character of Ireland protected such “unspecified” rights, Kenny appealed to *Pacem in Terris*, an encyclical letter of Pope John XXIII which stated that bodily integrity was a natural human right.¹⁰ His judgment was upheld by the Supreme Court as was his argument about unspecified rights protected by Art. 40.3.1. In Chief Justice Ó Dálaigh’s opinion, though, the unspecified rights were said to be due to one’s status as a human person.¹¹ There was no reference to Christianity. The doctrine of unspecified rights has since been invoked to protect many other rights: among them marital privacy,¹² privacy in personal communication,¹³ earning a living,¹⁴ and fair procedures in government decision-making.¹⁵

The seemingly subtle difference between Kenny’s High Court ruling and Ó Dálaigh’s Supreme Court ruling would become more apparent in the marital privacy case which is somewhat analogous to the U.S. case of *Griswold v. Connecticut*.¹⁶ That case, *McGee v. the Attorney General*,¹⁷ decided in 1974, concerned Ireland’s ban on the sale and importation of contraceptives—not on their use. Mary McGee, a married mother of four had been advised by her doctor to avoid further pregnancies due to several health problems. She and her husband decided to use contraceptives which their doctor prescribed and ordered from England. They were seized by customs officials and McGee applied for a declaration that the statute in question violated her family’s rights under Art. 42 and her personal rights under Art. 40.3.1. Her claim was that the family rights created a right to privacy in the sexual lives of married couples and the prohibition on contraceptives created an unconstitutional risk to her own health. The High Court upheld the law, but was reversed by the Supreme Court which ruled in McGee’s favor accepting the substance of the two claims mentioned (a third, based on her claim that the law violated her right to conscience was rejected). In his opinion, Justice Brian Walsh explicitly referred to the unspecified rights under Art. 40 as following from natural law.¹⁸ Furthermore he argued that Art. 40 protected rights that were not created by law but anterior to it. The Constitution, then, recognized these rights under natural law, but did not create them. He concluded that marital privacy was such a right and that the state could not interfere with it.¹⁹

Walsh's opinion was more complicated though, since in the course of it, he took the occasion to reflect on the problems of natural law interpretation in an increasingly pluralistic society. He acknowledged that the natural law content of the Constitution was inseparably linked to the Christian element in the Constitution most forcefully expressed in the preamble.²⁰ He also observed that there were differing interpretations of the natural law and that these differences were conditioned by religious differences. In this situation the courts could not "as a matter of Constitutional law be asked to choose between the differing views...of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law."²¹ Only the judges can interpret the natural law elements of the Constitution, Walsh concluded. As a guide in this process, Walsh suggested principles arising out of a new interpretation of the preamble which stressed not so much its Christian content as the role of one of the theological virtues affirmed in the preamble—that of charity—in interpreting the document's moral claims. He concluded: "The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with *their* ideas of prudence, justice, and charity." The full radicalism of Walsh's suggestion here was not immediately evident—his use of the possessive pronoun "their" lent a distinct subjectivity to his constitutional hermeneutic of charity and explicitly conditioned the meaning of these terms in such a way that judges could use them to read the Constitution in light of contemporary values.²² Both of these factors would be extremely important in later opinions, after Walsh left the Court.

That it was not immediately embraced is clear from the *Norris* case decided in 1984. The law challenged here was Ireland's criminal statute against sodomy which the plaintiff contended violated his right to privacy. Chief Justice Thomas F. O'Higgins, writing for a 3-2 majority, rejected the complaint which he saw as a challenge to the notion that the state could regulate private morality. O'Higgins held that the state had every right to do this and that the morality of Irish law was essentially Christian and that since Christianity had always condemned sodomy, no law prohibiting it could possibly be unconstitutional absent a specific constitutional provision stating otherwise.²³ Justices Seamus Henchy and Niall McCarthy both wrote dissenting opinions and the differences between them are revealing. Henchy admitted the Christian influence on the Constitution, but, interpreting this along the lines suggested by Walsh's notion of Constitutional Charity, argued that in prohibiting immoral acts the onus was on the state to show that the common good required such prohibition.²⁴ He also criticized the Chief Justice for relying too much on the opinions of the major churches in Ireland about the possible social ill-effects of decriminalizing sodomy, and not enough on the expert testimony from psychologists and social scientists.²⁵ Justice McCarthy wanted to detach the Constitution from any specific account of Christian morality arguing that the understanding of the Constitution of 1937 could not be reasonably held in 1983. He seized on Walsh's thesis about the historical development of consti-

tutional values and argued that the Constitution's protection of unenumerated rights should rest on an account of "the human personality" itself.²⁶

These tensions came fully to the surface in a series of decisions dealing with rights to information and travel associated with abortion. Though abortion had always been illegal in Ireland, unease with the judiciary's guarantee of a personal right to privacy and the use made of a similar unenumerated constitutional right in the U.S. led Irish voters to overwhelmingly approve a Constitutional amendment protecting the right to life of the unborn in 1983.²⁷ About 4,000 women a year travelled to England for abortions since none were performed in Ireland unless medically necessary to save the life of the mother. Two women's counselling centers in Dublin were advising women on foreign abortions and in some cases arranging for their travel to England. An anti-abortion group brought this to the attention of the Attorney General who obtained an injunction prohibiting this counselling as a violation of the right to life provision of the Constitution. The injunction was sustained by the Supreme Court in the case of *The Attorney General v. Open Door Counselling* (1988).²⁸ A similar ruling enjoined a student group at University College Dublin from distributing abortion information as well.²⁹ In both cases the Court stated that the right to life amendment was merely the Constitution's recognition of a natural right which was anterior to positive law.³⁰ There is one slightly new wrinkle here. In both the *Norris* and *Open Door Counselling* cases, there was disagreement in the judiciary (dissents in *Norris*, and in the information cases the Supreme Court had to overrule the High Court), and an added European dimension. In both cases the losing party appealed to the European Court of Human Rights and was there vindicated.³¹ While the European Convention, unlike the Maastricht Treaty, does not have the status of domestic law in Ireland and the European Court could only award the winning parties damages, these decisions did have an effect on elite public opinion. In the case of *Norris*, four years after the European Court ruling, Ireland's anti-sodomy laws were abolished.³² This was not so in the Information cases, but in 1992, a further case would change this too.

This was *The Attorney General v. X* (1992).³³ The "X" case is now regarded as one of the most important in the history of modern Ireland. It concerned a fourteen year old girl who had been raped by a friend's father. During the course of the criminal investigation of the rape, her parents let the police know that she planned to travel to England for an abortion which she was then enjoined from doing by the Attorney General. The young girl was under an extraordinary amount of stress and had stated on numerous occasions that she would commit suicide if forced to carry the pregnancy to term. She claimed a right to travel under the general guarantee of personal liberty in Art. 40.4 of the Constitution which the High Court refused, holding that the right to life of the unborn child outweighed this.³⁴ The Supreme Court overruled the High Court here ruling that since the right to life provision of the Constitution also protected the life of the mother and since the preponderance of psychological evidence in this case established a "real and substantial risk to the life, as distinct

from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible.”³⁵

The decision created relief in Ireland, but posed a number of difficult problems: First, absent evidence of “real and substantial risk” to the mother’s life, demonstrable in court, other women could be enjoined from travelling to England; and, second, the “X” case did establish a constitutional allowance for abortions necessary to protect the life of the mother and if this was so, then the earlier rulings on abortion information would be called into doubt since women who could claim medically necessary abortions would need such information. And all of these created uncertainty about Ireland’s status in the EEC, soon to become the EU. The government tackled these problems through referenda. First they secured approval for the Maastricht Treaty (opposed by both sides of the abortion debate). Next they offered three referendum questions: (1) refining the language of the right to life provision specifying that abortion could only be performed to save the life of the mother; (2) guaranteeing a right to information; (3) guaranteeing a right to travel. The first was defeated; the other two approved. The second of these required enabling legislation, and the resulting bill, the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995, was narrowly drawn to allow restricted distribution of information on overseas abortions.

The bill was passed in the legislature and then referred by the president to the Supreme Court under procedures specified in Art. 26 of the Constitution which allows the reference of legislation, the constitutionality of which may be in doubt, to the Court for an opinion. If the Court approves the legislation, it can never again be challenged on constitutional grounds. The Supreme Court assigned two sets of counsel to argue against the bill since it was opposed by both anti-abortion groups and women’s rights organizations (who thought it too restrictive). The anti-abortion side argued that insofar as the bill permitted the circulation of names, addresses, and phone numbers of English abortion clinics, rather than simply basic information about abortion procedures, it promoted abortion and thus contravened the right to life provision of the Constitution and, more importantly, natural law.

The Court’s ruling was extraordinary in that it answered the arguments about natural law directly and concluded that they were inapplicable given that the information amendment which grounded the legislation in question was approved in a valid constitutional referendum. The Court argued that the Constitution enshrined principles of popular sovereignty limited only by the *express* provisions of the Constitution itself which could themselves be changed in any way whatsoever by referendum.³⁶ Similarly, the Court applied what it took to be the substance of Walsh’s thesis about the historical development of the constitution and the hermeneutic principles of prudence, justice, and charity.³⁷ There was no mention of Christianity here, save in the quotations from Walsh’s *McGee* opinion, and the Court stated that “The Courts, as they were and are bound to, recognized the Constitution as the fundamental law of the State to which all organs were subject and at no stage recognized the provi-

sions of the natural law as superior to the Constitution.”³⁸ This was an amazing reversal.³⁹

The Court, then, began with an understanding of natural law implied by the “Christian and democratic nature of the state” in *Ryan*. From there it moved to an account which stressed the rights stemming from the nature of human personality and interpreted in light of the principles of prudence, justice, and charity as historically conditioned in *McGee*; and, finally, to interpretations of rights found in express constitutional provisions as interpreted in light of those principles, entirely detached from natural law in the *Abortion Information Bill Case*. This development seems to be driven by an increasing volume of conflicts between the claims of traditional morality and those of modern pluralist democracy. As the traditional consensus has broken down, the understanding of natural law has become increasingly vague and abstract and thus less well-suited to the business of adjudication. This has led elite opinion and many judges to reject it as a legitimate canon of interpretation.⁴⁰

The story I have tried to tell here suggests a couple of further implications which need to be thought out and which I hope to pursue in further research. First, one should recognize that the implications of the *Regulation of Information* case are not entirely clear. Debate over the status of natural law in Irish legal circles has continued⁴¹ and the specific constitutional provisions which mention natural law are secure, *for the time being*,⁴² which brings me to the second point: The Irish legal profession, like most classes of professionals, has a largely secular view of the profession of law. As William Binchy, the Regius Professor of Laws at Trinity College Dublin, and a major force behind the constitutional amendment which banned abortion, has stated, Irish lawyers were educated in an overwhelmingly positivist English legal profession (which we also have in the U.S.) and learned from it to be skeptical of natural law argument.⁴³ Here it is noteworthy that the Constitution was drafted by De Valera, a non-lawyer, and a small group of nationalist advisors. There was a brief effort in the 1940s and 50s to map out a distinctive Irish philosophy of law (Justices Gavan Duffy and Lavery were the leading lights of this) which saw itself in opposition to the English view of law, though this never gained wide currency in the legal profession.⁴⁴ As the process of secularization, especially among Irish elites,⁴⁵ has proceeded, the natural tendencies of the legal profession have only been magnified. And we must not underestimate the cultural issue here. In order to be really effective, the natural law must have its first home not in the judiciary, but in the population at large and in a constitutional democracy this means in the populace as represented in legislatures. That legislation and not adjudication should be the primary forum for the application of the natural law seems to have been recognized by no less an authority than St. Thomas Aquinas.⁴⁶ Here it is noteworthy that the application of natural law by Irish judges has largely been in the context of fundamental rights jurisprudence, for it is precisely when the substantive structures and ethos of community begin to break down that legal issues become primarily issues of rights.⁴⁷ So here the debate over natural law may ironically be a

function of the secularization process itself and suggests the larger question of the extent to which cultural problems lend themselves to judicial answers. Is it a coincidence that the increase in the activity of constitutional courts in the realm of personal rights, an increase which visible on a global scale,⁴⁸ is taking place in a time of increasing secularization and cultural dislocation? Finally there is the large issue of Ireland's integration into the larger political and legal culture of the European Union, which I cannot discuss here.⁴⁹

Let me conclude, then, with the not terribly optimistic, though perhaps overly obvious, conclusion that the efficacy of natural law in constitutional jurisprudence seems largely dependent first, on the explicit acknowledgment of the authority of natural law principles in the constitution itself, and second, on the efficacy of natural law reasoning in both the political and legal culture at large. When this latter factor becomes attenuated, the judicial use of natural law can promote rather than stem the tide of secularization both through the multiplication of conflicting moral perspectives and the resulting pressures to reject moral reasoning entirely in constitutional jurisprudence.

Notes

1. See, for example, the March and May 1992 issues of *First Things*.
2. Symposia on natural law have been published in *U.C. Davis Law Review* 26 (1993), *Michigan Law Review* 90 (1992), and *Catholic Social Science Review* 1 (1996). See also the two excellent anthologies edited by Robert P. George, *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) and *Natural Law, Liberalism and Morality* (Oxford: Clarendon Press, 1996).
3. See Donald P. Kommers, "The Value of Comparative Constitutional Law," *John Marshall Journal of Practice and Procedure* 9 (1976): 685-95.
4. See Ronan Fanning, "Mr de Valera Drafts a Constitution," in *De Valera's Constitution and Ours*, ed., Brian Farrell (Dublin: Gill and Macmillan, 1988), 33-45, and Basil Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration, 1991), ch. 3.
5. On the history of this period see J.J. Lee, *Ireland 1912-1985: Politics and Society* (Cambridge: Cambridge University Press, 1989), chs. 1-3, and Dermot Keogh, *Twentieth-Century Ireland: Nation and State* (New York: St. Martin's Press, 1994), chs. 1-2.
6. The initial draft of the proposed constitution was done by John Hearne, legal advisor in the Department of External Affairs. Hearne, a diplomat, had a background in both civil and ecclesiastical law and had once studied for the priesthood. Lesser roles in the drafting were played by Jesuit Father Edward Cahill and Father John Charles McQuaid, a Holy Ghost priest who would later become Archbishop of Dublin. See Dermot Keogh, "The Irish Constitutional Revolution: An Analysis on the Making of the Constitution," in *The Constitution of Ireland: 1937-1987*, ed., Frank Litton (Dublin: Institute of Public Administration, 1988), 4-84; The Earl of Longford and Thomas P. O'Neill, *Eamon de Valera* (Boston: Houghton Mifflin, 1971), 295-96. The constitution

was also influenced by the social encyclicals of Leo XIII and Pius XI as well as work by Catholic social thinkers generated by those encyclicals. J.H. Whyte points, in particular, to the *Code of Social Principles* (Malines, 1929) produced by the International Union for Social Studies which was founded in 1920 under the direction of Cardinal Mercier. See *Church and State in Modern Ireland: 1923-1979*, 2d ed. (Dublin: Gill and Macmillan, 1980), 50-56.

7. See, e.g., Vincent Grogan, "The Constitution and the Natural Law," *Christus Rex* 8 (1954): 201-218; Declan Costello, "The Natural Law and the Irish Constitution," *Studies* 45 (1956): 403-14; Seamus Henchy, "Precedent in the Irish Supreme Court," *The Modern Law Review* 25 (1962): 549-50, 557-58; David Gwynn Morgan, *Constitutional Law of Ireland*, 2d ed. (Dublin: The Round Hall Press, 1990), 30. See also the critical discussion in John M. Kelly, *Fundamental Rights in the Irish Law and Constitution*, 2d ed. (New York: Oceana, 1968), 62-73.

8. [1965] I.R. 294. In citing Irish cases, I will refer either to the *Irish Reports* (I.R.) or the *Irish Law Report Monthly* (I.L.R.M.). The volumes are conventionally referred to by their year of publication in brackets. If there are more than one volume that year, the abbreviation is preceded by a roman numeral indicating which volume of that year's reports are referred to. The last number refers to the first page of the actual opinion.

9. *Ibid.*, 313.

10. *Ibid.*, 314; see *Pacem in Terris*, n. 11.

11. Ryan, [1965] I.R. 294, 348.

12. *McGee v. The Attorney General* [1974] I.R. 284, and see discussion below.

13. *Kennedy v. Ireland* [1987] I.R. 587.

14. *Murtagh Properties v. Cleary* [1972] I.R. 330.

15. *Garvey v. Ireland* [1980] I.R. 75. In general, the provisions of Art. 40.3.1 now function somewhat like the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. See G.W. Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated," *Irish Jurist* 25-27 (n.s.) (1990-92): 95-116.

16. 381 U.S. 479 (1965).

17. [1974] I.R. 284.

18. *Ibid.*, 310, 317-18.

19. *Ibid.*, 313.

20. *Ibid.*, 317-18.

21. *Ibid.*, 318.

22. *Ibid.*, 318-19.

23. *Norris v. Attorney General* [1984] I.R. 36, 61-65.

24. *Ibid.*, 71-72.

25. *Ibid.*, 78.

26. *Ibid.*, 99-100.

27. Ann Sherlock, "The Right to Life of the Unborn and the Irish Constitution," *Irish Jurist* 24 (n.s.) (1989): 13-50.

28. [1988] I.R. 593.

29. *S.P.U.C. v. Coogan* [1989] I.R. 734. In a March 1997 judgment, the Supreme

Court lifted the injunction against the student group on grounds of the “X” case ruling and the results of the travel and information referenda discussed below. *Irish Times*, 7 March 1997

30. *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593, 598-99.

31. *Norris v. Ireland* E.H.R.R. 186 (1989); *Open Door Counselling and Dublin Well-Woman Centre v. Ireland* 15 E.H.R.R. 244 (1992).

32. Criminal Law (Sexual Offenses) Act, 1993.

33. [1992] I.R. 1.

34. *Ibid.*, 12-13.

35. *Ibid.*, 54-55.

36. *In re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for the Termination of Pregnancies)* Bill 1995 [1995] 2 I.L.R.M. 81, 102-04.

37. *Ibid.*, 104-108.

38. *Ibid.*, 107.

39. As of this writing the issue of abortion in Ireland remains cloudy. The government’s initial pledge to settle the ambiguities surrounding “therapeutic” abortions raised by the “X” case by legislation has never been honored. The temporary calm brought about by the travel and information amendments to the Constitution was shattered in early March 1997 when police raided a Dublin hospital after a woman who underwent an abortion there in 1995 lodged a complaint against it (*Irish Times*, 1 March 1997, 5 March 1997, 6 March 1997). Pro-life forces have demanded a new referendum to clarify the Constitution’s language.

40. On this see the very brief discussion of natural law as compared to other canons of interpretation in the most recent edition of J.M. Kelly, *The Irish Constitution*, revised by Gerard Hogan and Gerry Whyte (Dublin: Butterworths, 1994), cxviii.

41. See The papers by Gerard Quinn, Seán Freyne, William Duncan, Diarmuid Rossa Phelan, and Gerry Whyte in *Doctrine and Life* 45 (1995): 96-134, 481-89; Adrian F. Twomey, “The Death of the Natural Law?” *Irish Law Times and Solicitor’s Journal* 13 (1995): 270-73; and Rory O’Connell, “Natural Law: Alive and Kicking?” *Ratio Juris* 9 (1996): 258-82.

42. On 3 July 1996, the Constitutional Review Group (also referred to as the Whitaker Commission) released its completed recommendations for overhauling the Bunreacht na hÉireann. Among those recommendations were some which could imply the removal of any Catholic elements in the document, especially the preamble, but also the religion clauses and the section on property rights. Such reports are often ignored and initial indications are that that will be the fate of this one as well, though there has been public discussion on some of these issues. See generally the reportage in *Irish Times*, 4 July 1996, as well as Garret FitzGerald, “Time to exorcise the ghosts of past British concerns,” *Irish Times*, 27 July 1996, and Gerry Whyte, “Archbishop’s criticism of CRG may be opening shot,” *Irish Times*, 5 September 1996.

43. William Binchy, “Marking a Watershed in Irish Family Law,” *Irish Times*, 8 January 1996.

44. Henchy, "Precedent in the Irish Supreme Court," and Gerard Hogan, "Irish nationalism as a Legal Ideology," *Studies* 75 (1986): 528-38. For the thrust of this jurisprudence, see Gavan Duffy's opinions in, e.g., *Exham v. Beamish* [1939] I.R. 336, 248; *Cook v. Carrol* [1945] I.R. 515, 519-23; *In re M* [1946] I.R. 334, 344-45; *In re Tilson Infants* [1951] I.R. 1; and Lavery's judgment in *O'Byrne v. Minister for Finance* [1959] I.R. 1, 43. In the *M* case, Gavan Duffy went so far as to refer to English common law practices with regard to child-welfare as "barbarous," and inappropriate to a "Christian polity."

45. See the data presented in Christopher T. Whelan, ed., *Values and Social Change in Ireland* (Dublin: Gill and Macmillan, 1994), as well as the following papers: Tom Garvin, "The Destiny of the Soldiers: Tradition and Modernity in the Politics of de Valera's Ireland," *Political Studies* 26 (1978): 328-47; Brian Girvin, "Social Change and Moral Politics: The Irish Constitutional Referendum 1983," *Political Studies* 34 (1986): 61-81, "Social Change and Political Culture in the Republic of Ireland," *Parliamentary Affairs* 46 (1993): 380-98, "Moral Politics and the Irish Abortion Referendums, 1992," *Parliamentary Affairs* 47 (1994): 203-21.

46. Russell Hittinger, "Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?" *Review of Politics* 55 (1993): 5-34.

47. See Alasdair MacIntyre, "Community, Law, and the Idiom and Rhetoric of Rights," *Listening* 26 (1991): 96-110.

48. See *The Global Expansion of Judicial Power*, ed., C. Neal Tate and Torbjörn Vallinder (New York: New York University Press, 1995).

49. For some discussion of this topic and its relevance to Irish constitutionalism, see Chub, *Politics of the Irish Constitution*, ch. 8; Paul Gallagher, "The Constitution and the Community," *Irish Journal of European Law* 2 (1993): 129-45; John Gleeson, "The European Convention on Human Rights: Its Practical Relevance," *Irish Journal of European Law* 2 (1993): 248-65; Desmond M. Clarke, "Freedom of Thought and Educational Rights in the European Convention," *Irish Jurist* 22 (n.s.) (1987): 28-54.