

## Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate

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Jacques Maritain is justly celebrated by Thomists for the role he played in the revival of Thomistic philosophy in the twentieth century. He is also famous for his attempt to reconcile Thomistic ideas about ethics and politics with modern liberal democracy.<sup>1</sup> The first of these achievements has borne rich fruit. One can entertain doubts about the second achievement, especially given Maritain's apparent optimism about the possibility of radical moral disagreement coexisting peacefully under the aegis of agreement about political institutions.<sup>2</sup> The liberal distinction between substance and procedure often has the effect of excluding and/or changing a great deal of non-liberal "substance" by subjecting it to liberal "procedure."<sup>3</sup> I will not be explicitly concerned here with Maritain's thought, but with events that would seem to challenge any optimism about the congruence of a politics grounded in the tradition of classical natural right and Thomistic natural law with modern liberal democracy. My purpose is not to contribute to that already large genre of literature, the dyspeptic Catholic critique of modernity, but rather to raise to consciousness some of the moral complexities of contemporary law and politics so to enable deeper reflection on our current situation.

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<sup>1</sup> On Maritain's political legacy with respect to liberal democracy see Paul E. Sigmund, "Catholicism and Liberal Democracy," in *Catholicism and Liberalism: Contributions to American Public Philosophy*, eds. R. Bruce Douglass and David Hollenbach, (Cambridge: Cambridge University Press, 1994), 217-41, especially pp. 225-26; John P. Hittinger, "Jacques Maritain and Yves R. Simon's Use of Thomas Aquinas in Their Defense of Liberal Democracy," in *Thomas Aquinas and His Legacy*, ed. David M. Gallagher, (Washington, D.C.: The Catholic University of America Press, 1994), pp. 149-72; James V. Schall, *Jacques Maritain: The Philosopher in Society* (Lanham, Maryland: Rowman and Littlefield, 1998), chapter 6.

<sup>2</sup> There are passages in the fifth chapter of Maritain's *Man and the State* (Chicago: The University of Chicago Press, 1951) that are strikingly similar to John Rawls's notion of "overlapping consensus" in *Political Liberalism* (New York: Columbia University Press, 1993), Lecture IV.

<sup>3</sup> This is so much so that some liberal theorists have explicitly renounced the claim advanced by Rawls and others that a hallmark of liberalism is its neutrality with respect to conceptions of the good life. See especially the extraordinary paper by Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Political Theory* 26 (1998), pp. 56-80, as well as his "Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?" *Ethics* 105 (1995), pp. 468-96. Rawls's original argument for neutrality is in *A Theory of Justice* (Cambridge: Harvard University Press, 1971), chapter 7.

More specifically, this paper examines the efficacy of natural law argument in the public discourse and constitutional jurisprudence of modern liberal democracies by looking at the recent jurisprudence of the one jurisdiction in which natural law has been incorporated into actual decisions: Ireland.<sup>4</sup> The Irish case is noteworthy in itself and in the larger theoretical context mentioned above. It is also useful to examine in the context of the more parochial debate among American legal scholars and activists over the place of natural law in constitutional jurisprudence. The question surfaced in a very public way during the 1991 confirmation hearings of now Justice Clarence Thomas<sup>5</sup> and in the aftermath of a 1997 speech delivered by Justice Antonin Scalia in Rome, in which he seemed to advocate a form of legal positivism.<sup>6</sup> These events, as well as the exploration of moral questions in the courts themselves, have led to a continuing controversy over the role of natural law in public debate and constitutional adjudication.<sup>7</sup>

While there is a venerable tradition of constitutional scholarship that holds the American founding to have been informed by some version of natural law theory,<sup>8</sup> it is difficult to defend the thesis that American judges have ever deployed what one could plausibly call a natural law theory in deciding cases.<sup>9</sup> The American experience, then, is of limited value in assessing the possibility of a serious jurisprudence of natural law. The Irish case is a different matter, as we shall see below. Nevertheless, in May of 1995 the Irish Supreme Court issued an

<sup>4</sup> German judges and legal scholars flirted briefly with natural law theories after World War II. See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, North Carolina: Duke University Press, 1989), pp. 54-55, pp. 312-14.

<sup>5</sup> Thomas seemed to support recourse to some natural law ideas in constitutional interpretation in several articles and speeches: "Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation," *Howard Law Journal* 30 (1987), pp. 983-95; "Why Black Americans Should Look to Conservative Policies," *Heritage Lectures* 119 (18 June 1987); "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law and Public Policy* 63 (1989), pp. 63-70. Thomas, of course, repudiated this view during his confirmation hearings.

<sup>6</sup> The speech is reprinted as "Of Democracy, Morality and the Majority," *Origins* 26 (27 June 1996), pp. 81, 83-90.

<sup>7</sup> See the exchange between Robert Bork, Hadley Arkes, Russell Hittinger, and William Bentley Ball in the March and May 1992 issues of *First Things* as well as the symposia published in the *Michigan Law Review* 90 (1992), *University of California, Davis Law Review* 26 (1993), *Southern California Interdisciplinary Law Journal* 4 (1995), and *Catholic Social Science Review* 1 (1996).

<sup>8</sup> Most famously, Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (1928): pp. 149-85, 365-409. See also Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," *Stanford Law Review* 30 (1978), pp. 843-93 and more recently Michael P. Zuckert, *The Natural Rights Republic* (Notre Dame, Indiana: University of Notre Dame Press, 1996).

<sup>9</sup> Some of the early contract clause cases as well as those manifesting in the now defunct doctrine of economic substantive due process are often said to rest on natural law arguments, though in most cases they seem more directly grounded in historical interpretation. The standard view is evinced in, e.g., J.E. Nowak, R.D. Rotunda, and J.N. Young, *Constitutional Law*, 3d ed. (St. Paul: West, 1986), p. 331ff.; Lawrence H. Tribe, *American Constitutional Law*, 2d ed. (Minneapolis: Foundation Press, 1988), p. 560ff. Against it see Matthew J. Frank, *Against the Imperial Judiciary* (Lawrence, Kansas: University Press of Kansas, 1996); and Lane Sunderland, *Popular Government and the Supreme Court* (Lawrence, Kansas: University Press of Kansas, 1996). One confusing aspect of the scholarship is that "natural law" is often used as a label for values that the critics of whatever opinion is under consideration claim are extratextual. "Natural law," then, becomes an invidious label for whatever is *not* in the positive law. The greatest practitioner of this method of argument would seem to have been Justice Hugo Black, who frequently referred to views he opposed (views often grounded in history or tradition) as "natural law" (see, e.g., Black's dissents in *Adamson v. California* 332 U.S. 46 (1946), pp. 68-92 and *In re Winship* 397 U.S. 358 (1969), pp. 377-86) and has been followed—often unwittingly, I suspect—by many commentators.

extraordinary ruling that seemed decisively to reject natural law as an authority in its jurisprudence.<sup>10</sup> Before and after that ruling, Irish legal scholars, politicians, and pundits debated the role of natural law in Irish public life.

This Irish debate sheds light not only on the American case, but on the larger theoretical question of just what role natural law argument is likely to play in contemporary liberal democracies. To anticipate conclusions, I argue here first, that that role cannot be other than small in jurisprudence, and second, that that role is likely to be increasingly small in other areas of public life because of what one could call the cultural dynamic of liberalism. Pining after a jurisprudence of natural law, then, often looks like a desperate attempt to repair damage done to the culture at large in an arena not at all suited to the resolution of cultural questions.<sup>11</sup> However, I also want to suggest that the thoughtful reexamination of the tradition of natural law theory serves what may be a more important function in our present circumstances, that is, as part of an evaluative social science from the perspective of which contemporary cultural and political questions can be fruitfully assessed. In the first section, then, I sketch the sense in which Thomistic natural law suggests the outlines of an evaluative social science. In the second section, I want to discuss more fully the Irish case in light of natural law theory. Finally, in the third section I will suggest the conclusions of such an analysis and propose a few hypotheses and further questions.

## I

There is at least one immediate objection to the idea of a Thomistic social science, namely that there was no such thing as “social science” in the thirteenth century, and, of course, there was not. Why there was no such thing is itself instructive. The categories of medieval thought about ‘social life’ were still predominantly those of antiquity, and the horizon of such thought was political and not sub-political as it is in modern social science.<sup>12</sup> Indeed, modern social science is in the first instance the result of a rebellion against classical natural right within philosophy initiated by Machiavelli and Hobbes and later developed by Hume and Mill,<sup>13</sup> intended first to lower the goals of political life and second to reduce politics to the natural sciences. The modern social sciences aimed to replace natural right as the most important component of a science of human affairs.

By classical natural right, I mean, most basically, the theses first, that the soul should rule over the body; second, that the soul should itself be formed by the

<sup>10</sup> *In re Article 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. p. 81. Irish cases are conventionally cited by reference to either of the two major Irish law reports, the *Irish Law Report Monthly* (I.L.R.M.) and the *Irish Reports* (I.R.). Numbers before the abbreviations refer to the volume of the reports for that year.

<sup>11</sup> On this one might examine Justice Scalia’s dissent in *Romer v. Evans* 517 U.S. 620 (1996), pp. 636-53.

<sup>12</sup> See, e.g., Aristotle *Nicomachean Ethics*, 1094a26-b15, 1095a14-17; cf. Aquinas, *In decem libros Ethicorum expositio* I, lect. 2, pp. 26-31.

<sup>13</sup> See, e.g., Niccolo Machiavelli, *The Prince*, ch. 15; Thomas Hobbes, *Leviathan*, ch. 15 (last three paragraphs); David Hume, *A Treatise of Human Nature*, Introduction; J. S. Mill, *A System of Logic*, book VI.

moral and intellectual virtues; and third, that this order should be the basis of the political order of society in both its recognition of claims to rule and in the norms that govern common life.<sup>14</sup> From within the tradition of classical natural right, the project of modern social science can be seen as, at best, the necessary preliminary collection of useful information,<sup>15</sup> and, at worst, unintelligible.<sup>16</sup> This is because classical natural right takes its stand from the perspective of the actor faced with the question of what action to take,<sup>17</sup> rather than from some external standpoint. It is a crucial characteristic of Aquinas's account of human affairs that it is not like modern moral theories, that is, a set of prescriptive rules about moral conduct separated from empirical descriptions of moral life. Natural law theory is not only evaluative, but also descriptive, thus combining two enterprises which modern thought characteristically separates: ethics and social science.<sup>18</sup> Aquinas himself provides the best illustrations of this.

What we first have to notice is that Aquinas's account of natural law is presented neither as a contribution to jurisprudence nor to political theory, nor can it be said to constitute a free-standing philosophical ethics.<sup>19</sup> Rather, it functions as a way of talking about the sense in which man's natural inclinations reveal a horizon to moral and political life<sup>20</sup> and the place of that horizon within the still-larger context of God's providential government of the universe.<sup>21</sup> What is most important about this account for our present purposes is that it holds the moral life to be present in human beings *potentially*

<sup>14</sup> This characterization is a drastic summary of the substance of classical political philosophy and it is also crucial that the classics recognized the impossibility of any perfect realization of such a scheme. For some important versions of the three theses see Plato *Gorgias* 464b-465d, 502e-503a, 504d, 506c-507a, 521d; *Laws* 631b-e, 650b, 689b, 690a-e, 697b-c, 705d, 713c-714b, 726a, 896c, 967d-968a; Aristotle *Politics* 1323a14-b36. The best synthetic discussion is Leo Strauss, *Natural Right and History* (Chicago: The University of Chicago Press, 1953), chapter 4.

<sup>15</sup> Aristotle *Nicomachean Ethics* 1181a12-b23.

<sup>16</sup> Compare Aquinas, *Summa Theologiae* 1-2.1.1 with B.F. Skinner, *Science and Human Behavior* (Glencoe, Illinois: The Free Press, 1965), pp. 36, 87-90.

<sup>17</sup> Aristotle, *Nicomachean Ethics* 1095a5-6, 1103b26-29, 1179a35-b4. Consider also *Politics* 1260b27-36, 1282b14-17, 1288b10-1289a25 and Aquinas, *In Libros Politicorum Aristotelis Expositio*, proemium.

<sup>18</sup> See Leo Strauss, "Political Philosophy and the Crisis of Our Time," in *The Post-Behavioral Era: Perspectives on Political Science*, eds. G.J. Graham and G.W. Carey (New York: David McKay Company, 1972), pp. 217-42 and the recent discussion in John M. Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), chapter 2. I have discussed this matter in more detail in "Modernity, Morality, and the Social Sciences: A Look at MacIntyre's Critique in Light of *Fides et Ratio*," *Communio* 26 (1999), pp. 104-21.

<sup>19</sup> On the place of natural law in Aquinas's overall understanding of ethics see E. A. Goerner, "On Thomistic Natural Law: The Bad Man's View of Thomistic Natural Right," *Political Theory* 7 (1979), pp. 101-22 and "Thomistic Natural Right: The Good Man's View of Thomistic Natural Law," *Political Theory* 11 (1983), pp. 393-418; and more recently Denis J.M. Bradley, *Aquinas on the Twofold Human Good: Reason and Human Happiness in Aquinas's Moral Science* (Washington, D.C.: Catholic University of America Press, 1997).

<sup>20</sup> The political character of the natural law is discussed more below. This aspect has been illuminated by Ernest Fortin, "Natural Law and Social Justice," *American Journal of Jurisprudence* 30 (1985), pp. 1-20.

<sup>21</sup> See Thomas W. Smith, "The Order of Presentation and the Order of Understanding in Aquinas's Account of Law," *The Review of Politics* 57 (1995), pp. 607-40, and Russell Hittinger, "Veritatis Splendor and the Theology of Natural Law," in *Veritatis Splendor and the Renewal of Moral Theology*, eds. J. A. DiNoia and Romanus Cessario (Chicago: Midwest Theological Forum, 1999), pp. 97-127.

and needs to be *brought* to completion.<sup>22</sup> The way we come to know the natural law is partly through reflection on our own actions,<sup>23</sup> and partly (probably mostly) by being taught—by our parents and by the habits and practices of our society.

More specifically, this education takes place, according to Aquinas, in four ways. First, we receive moral instruction from our parents.<sup>24</sup> Second, knowledge about the natural law comes from reflection on morality by the wise, who discover truths that were not known before (94.3, 5 ad3). Third, the natural law articulates itself in the positive law, through specification and through the punishment meted out to wrongdoers (95.1, 2; and cf. 92.2 ad4, 96.2 ad2). Finally, many learn about the natural law primarily from the church and its teaching of those elements of the divine law that contain parts of the natural law (91.4; 99.2; 100.1, 3). Taking all of these things together we can see them as a set of moral indicators about the general state of what we would now call a culture.

Talk about “cultures” may, at first blush, seem a bit odd in a Thomistic natural law context. The idea that culture is an important analytic category is usually associated with romanticism and the historicist attack on the very notion of natural right.<sup>25</sup> Part of the problem is linguistic. To speak of cultures suggests fuzzy and even morally suspect notions like “folk minds” or “blood knowledge,” rightly brought into disrepute during the first half of the twentieth century. One need not have truck with such notions, however. Nor need it imply relativism or historicism. One only need acknowledge the obvious, that people living in different times and places have different habitual ways of pursuing the particular goods that make up the human good. A contemporary Thomistic Aristotelian, Alasdair MacIntyre, has discussed this in terms of what he calls “practices.”<sup>26</sup> One can also see the term “culture” as a contemporary translation for the classical notion of regime (*politeia*). Leo Strauss defined the notion this way:

Regime is the order, the form, which gives society its character. Regime is therefore a specific manner of life. Regime is the form of life as living together, the manner of living of society and in society, since this manner depends decisively on the predominance of human beings of a certain type, on the manifest domination of

<sup>22</sup> On the relationship between natural law and the human person as constituted by “dispositional properties” that must be realized, see Anthony J. Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford: Oxford University Press, 1996), chapter 4. While I am entirely in sympathy with Lisska’s Aristotelian views on this point, it remains less than clear how much of this can be accounted for within the horizon of natural law as such.

<sup>23</sup> See Robert Sokolowski, “Knowing Natural Law,” *Tijdschrift Voor Filosofie* 43 (1981), pp. 625-41; and Alasdair MacIntyre, “Plain Persons and Moral Philosophy: Rules, Virtues and Goods,” *American Catholic Philosophical Quarterly* 66 (1992), pp. 3-19.

<sup>24</sup> *Summa Theologiae*, 1-2.95.1. Subsequent references to the *Prima secundae* in this section are given parenthetically in the text.

<sup>25</sup> One thinks in particular of Vico and Herder, as well as those who followed them. See the differing accounts in Leo Strauss, *Natural Right and History*, pp. 9-34; Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer and D.G. Marshall (New York: Crossroad, 1989), pp. 173-264; Isaiah Berlin, *The Crooked Timber of Humanity* (Princeton: Princeton University Press, 1990), pp. 70-90.

<sup>26</sup> Alasdair MacIntyre, *After Virtue*, 2d ed. (Notre Dame, Indiana: University of Notre Dame Press, 1984), pp. 187-203.

society by human beings of a certain type. Regime means that whole, which we are today in the habit of viewing primarily in fragmented form: regime means simultaneously the form of life of a society, its style of life, its moral taste, form of society, form of state, form of government, spirit of laws.<sup>27</sup>

The concept of regime was a central one in classical political philosophy.

While Aquinas takes for granted much that is in Aristotle's account of politics, his approach is sometimes different—or perhaps more accurately, differently accented.<sup>28</sup> While Aristotle is concerned to distinguish regimes in the service of answering the question “What is the best regime?”, Aquinas is concerned to highlight features of all regimes in the service of his larger account of human action, itself part of a larger account of God's providential government of the cosmos. More central to Aquinas's account than regime is the more general concept of the common good (*bonum communae*). As a kind of law, the natural law has as its aim the common good and can itself be defined as the set of minimum necessary requirements for the efficacious pursuit of the common good by rational and political animals.<sup>29</sup>

As a minimum, however, the natural law is not sufficient for the operation of a political community (91.3). Human law is the specification of the general precepts of the natural law appropriate to particular political communities and is the province of legislators, the wise who have in their particular care the common good of the community (95.1 ad2). How are laws to be drawn up and who are the legislators? What claims to wisdom and rule are authoritative? An answer to questions like these points to the regime, which, while not discussed explicitly by Aquinas, must be a necessary component of his account.<sup>30</sup>

Aquinas's view is most clearly suggested by two discussions, one dealing with the distinction between the natural and human laws, the other dealing with the

<sup>27</sup> Leo Strauss, *What is Political Philosophy?* (Glencoe, Illinois: The Free Press, 1959), p. 34. Stephen G. Salkever has suggested “culture” as a more contemporary translation of *politeia* in *Finding the Mean: Theory and Practice in Aristotelian Political Philosophy* (Princeton: Princeton University Press, 1990), pp. 81-88.

<sup>28</sup> On some of the characteristic differences between Aristotle and Aquinas see Ernest L. Fortin, “Thomas Aquinas as Political Thinker,” *Perspectives on Political Science* 26 (1997), pp. 92-96. With respect to natural law and Aristotle see Harry V. Jaffa, *Thomism and Aristotelianism* (Chicago: The University of Chicago Press, 1952) along with the papers by Goerner and Smith cited above in notes 19 and 21.

<sup>29</sup> This formulation is indebted to Alasdair MacIntyre, “Plain Persons and Moral Philosophy,” and *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago: Open Court, 1999), p. 111. That the precepts of the natural law, as precepts of law understood more generally, are directed to the common good (though this aspect is often overlooked) is stated in Aquinas's celebrated definition of law as “nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community” in *Summa theologiae* 1-2.90.4. While the language of “law” is one thing that differentiates Aquinas from Aristotle (a not inconsiderable point that cannot be discussed here), the *substance* of what Aquinas calls the natural law (*lex naturae*) as described above is quite similar to the account of natural right (*phusei dikaion*) given by Aristotle in *Nicomachean Ethics* 5.7. What the two accounts have in common—their suggestion of a natural basis to political life—is more important for my present purposes than their differences.

<sup>30</sup> That it was not an explicit subject of Aquinas's attention is a reminder that he was not concerned with constructing a free-standing account of politics, but rather with the role of law in his theologically contextualized account of the moral life. Had he completed his commentary of Aristotle's *Politics*, he would have had to treat regimes in detail.

notion of custom. The natural law urges on men two particular ends: knowing the truth about God and living in society (94.2). In a certain sense, the former, although more important, depends on the latter, since knowing requires that one achieve the sort of perfection one can only achieve in the society of others. Human beings cannot perfect themselves alone. The most common precepts of the natural law are general, and their specification must take into account a large number of particular circumstances. So one function of the human law is to provide the specification required by the natural law (91.3, 95.2, 97.1 ad1); another is to correct the failures of paternal instruction in the natural law through civil punishment (95.1).

Now given that the human law must specify the general precepts of the natural law in particular places and times, that specification must be appropriately tailored, and this Aquinas discusses in his treatment of custom (*consuetudo*).<sup>31</sup> Custom itself can have the force of law “promulgated in deed” rather than in word (97.3). It is important precisely because the same laws cannot apply to all men (95.2 ad3) given their peculiar circumstances, but should be tailored according to custom (95.3) and the decisions of different communities as communities (95.3). Of course, where judgment is involved the possibility of error exists and laws can be drawn up unjustly (96.4). Similarly the people themselves can become corrupt through bad habits (94.4, 6), though the most general principles cannot be effaced, even in the midst of great corruption (94.6).

The natural law, then, is instantiated in customs and in the human law in varying degrees. What the degree is depends on all four of the ways the natural law is taught, and all of these go into making up part of what is distinct about different cultures. The precepts of the natural law, then, must themselves be understood in a larger context that includes customs and mores and those institutions and practices that make up the classical notion of regime. Moreover, the efficacy of natural law argument is dependent on such contexts. I do not mean to imply anything like moral relativism or historicism, but rather the fact that people’s willingness to listen to moral arguments is often crucially influenced by the formation of their opinions and characters and that these things are often a function of the type of society they live in, of the regime. Discussions of the natural law are often incoherent and advocacy of natural law arguments often falls on deaf ears in regimes that have developed on the basis of the rejection of natural right as is often the case in contemporary liberal democracies.

This suggests, albeit in a very general and inadequate way, the framework of an evaluative social science with both interpretive and nomological<sup>32</sup> elements. The great advantage of such a science is in its subtle dialectic between institutions,

<sup>31</sup> While *consuetudo* is the word Aquinas uses, the sense of the concept is also indicated in the authority he quotes in 97.3, St. Augustine (*Epistles*, 36.1 [*Patrologia Latina* 33, 136]), who writes of the *mos populi*, the “ways” or “mores” of the people. On the role of custom in Aquinas’s understanding of political institutions see Mark C. Murphy, “Consent, Custom and the Common Good in Aquinas’s Account of Political Authority,” *The Review of Politics* 59 (1997), pp. 323-50.

<sup>32</sup> Understood to include the Aristotelian qualification “characteristically and for the most part,” and not to imply the formal nomological-deductive model common in the philosophy of natural science. See Alasdair MacIntyre, *After Virtue*, chapter 8.

culture, and nature, where modern theories usually attempt to reduce human affairs to one of these dimensions. This account also suggests the necessary framework of natural law. I want now to turn to the instantiation of natural law in contemporary Irish political culture with particular reference to constitutional jurisprudence.

## II

The adoption of the Irish Constitution of 1937 (*Bunreacht na hÉireann*) represented an important moment in the history of Catholicism's relationship with liberalism. For most of the nineteenth century, the Church fought a pitched battle with liberalism, the documentation of which is available in a string of encyclical letters of which Pius IX's *Quanta cura* (1864) is only the most well-known. The pontificate of Leo XIII signaled some softening. In *Immortale Dei* (1885) Leo endorsed elements of liberal democracy including the protection of rights and freedoms rightly ordered, though he repeated earlier criticisms in *Libertas humana* (1888).<sup>33</sup> When Eamon de Valera oversaw the drafting of the 1937 Irish document, he incorporated a good bit of what Leo took to be acceptable as well as some of the social doctrines promulgated in *Rerum novarum* (1891) and Pius XI's *Quadragesimo anno* (1931) and went out of his way to secure the approval of the Holy See.<sup>34</sup> Since the articles dealing with religion did not officially establish the Roman Catholic Church, Pius XI was unwilling to endorse the document, though several years later Pius XII praised the *Bunreacht na hÉireann* for its foundation in natural law.<sup>35</sup> No constitution save the Austrian constitution of 1934 so thoroughly attempted to incorporate Catholic social and political thought into its provisions.

There are several features of the 1937 Constitution that indicate its debt to Catholic thought. The most straightforward evidence of this is contained in the extraordinary preamble:

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 dignity 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 ourselves this Constitution.

<sup>33</sup> Peter Steinfels, "The Failed Encounter: The Catholic Church and Liberalism in the Nineteenth Century," in *Catholicism and Liberalism*, pp. 19-44.

<sup>34</sup> See Ronan Fanning, "Mr. de Valera Drafts a Constitution" in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill & Macmillan, 1988), pp. 33-45; Dermot Keogh, "The Irish Constitutional Revolution: An Analysis of the Making of the Constitution" in *The Constitution of Ireland: 1937-1987*, Frank Litton, editor, (Dublin: Institute of Public Administration, 1988), pp. 4-84; and The Earl of Longford and Thomas P. O'Neill, *Eamon de Valera* (Boston: Houghton Mifflin, 1971), pp. 295-96.

<sup>35</sup> "Ireland," weekly bulletin of the Department of External Affairs, No. 421, 13 October 1958, quoted in J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution*, 2nd ed. (New York: Oceana, 1968), p. 64, n. 175.



Numerous other features of the constitution also suggest its decidedly less secular character, though one must acknowledge their “aspirational” qualities: all governmental powers are explicitly said to derive “under God, from the people” (6.1);<sup>36</sup> God is incorporated into the three oaths prescribed for the president, members of the Council of State, and judges (12.8, 31.4, 34.5.1); a 1983 amendment guarantees that the government will protect the right to life of the unborn (40.3.3); the constitution’s guarantee of free speech is “subject to public order and morality,” with blasphemous and indecent material explicitly denied protection; the family is recognized 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” (41.1.1); the state is pledged to endeavor “to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home” (41.2.2); the state pledges to “guard with special care the institution of marriage, on which the family is founded, and to protect it against attack” (41.3.1 through 41.3.2 originally contained a prohibition on divorce which was repealed by referendum in 1995.); the state “acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical, and social education of their children” (42.1); the right to property is said to be a “natural right, antecedent to positive law,” and held in virtue of man’s “rational being” (43.1.1); the article guaranteeing religious freedom also says that “the state acknowledges that the homage of public worship is due to almighty God,” pledging “to hold His Name in reverence, and shall respect and honor religion” (44.1). A non-justiciable provision commits the state to social policies that “promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life,” endorsing in principle the living wage, just distribution of resources, and to “safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged” (45). Somewhat more ambiguous is Art. 40.3, by which 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.” Section 2 goes on to read:

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” (emphasis added).

The open-ended “personal rights” in 40.3.1 and the “in particular” in subsection 2 have created a space for the discovery of unenumerated rights, the main area where natural law theory has been deployed by judges.

<sup>36</sup> In the next paragraph I cite the English text of the Bunreacht na hÉireann by article, section, and sometimes subsection.

Historians and legal scholars are in agreement that the Bunreacht na hÉireann is grounded in a natural law perspective on political morality.<sup>37</sup> What is more remarkable is that Irish courts have decided cases partly on the basis of claims about the content of natural law.<sup>38</sup> In 1965 the Irish High Court invoked “the Christian and democratic nature of the state” as justification for recognizing an “unspecified personal right” to bodily integrity.<sup>39</sup> Interestingly, the link between the “Christian and democratic nature of the state” and the unspecified personal right to bodily integrity was the High Court justice’s appeal to John XXIII’s encyclical letter, *Pacem in Terris*.<sup>40</sup> In another case, the issue of the severity of the offense of drunk driving was settled when the same judge took expert testimony from a moral theologian on the severity of drunk driving according to the natural law.<sup>41</sup>

The role of natural law was more explicitly and directly explored nine years later in a case dealing with the sale and importation of contraceptives. In that case the Irish Supreme Court vindicated a married woman’s right to access to contraceptives that she claimed were necessary to prevent pregnancy that would pose a serious danger to her due to a heart condition. The court held that the law violated marital privacy and endangered the woman’s life under articles 40.3.1 and 42. Justice Brian Walsh’s opinion was remarkable first for the very narrow ground on which he invalidated the law in question, going so far as to suggest that in other circumstances the state could validly outlaw contraceptives, but that they just could not do it under these circumstances.<sup>42</sup> More importantly, Walsh used his opinion in the case to reflect, in almost anguished terms, about the role of natural law. First he acknowledged the place of natural law in the constitution, writing:

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<sup>37</sup> Vincent Grogan, “The Constitution and the Natural Law,” *Christus Rex* 8 (1954), pp. 201-18; Declan Costello, “The Natural Law and the Irish Constitution,” *Studies* 45 (1956), pp. 403-14; Colum Gavan Duffy, “The Irish Constitution and Current Problems,” *Christus Rex* 12 (1958), pp. 99-121; Seamus Henchy, “Precedent in the Irish Supreme Court,” *Modern Law Review* 25 (1962), pp. 549-50, 557-58; Michael Bertram Crowe, “Human Rights, the Irish Constitution and the Courts,” *Notre Dame Lawyer* 47 (1971), pp. 281-96; F.F.V.R. von Prondzynski, “Natural Law and the Constitution,” *Dublin University Law Journal* 1 (1977), pp. 32-37; David Gwynn Morgan, *Constitutional Law of Ireland*, 2d ed. (Dublin: Round Hall Press, 1990), p. 30; Mary Redmond, “Fundamental Rights in the Irish Constitution,” *Morality and the Law*, ed. Desmond M. Clarke (Dublin: Mercier/RTE, 1982), pp. 93-102; Enda McDonagh, “Philosophical-Theological Reflections on the Constitution,” *The Constitution of Ireland: 1937-1987*, ed. Frank Litton (Dublin: Institute of Public Administration, 1988), pp. 192-205

<sup>38</sup> I have given a fuller account of this jurisprudence in “Natural Law in Irish Constitutional Jurisprudence,” *Catholic Social Science Review* 2 (1997), pp. 171-82.

<sup>39</sup> *Ryan v. The Attorney General* [1965] I.R. 294. On this basis a number of other unspecified rights have been admitted, e.g., marital privacy (*McGee v. the Attorney General* [1974] I.R. 284), begetting of children (*Murray v. Ireland* [1985] I.R. 532), privacy in personal communications (*Kennedy v. Ireland* [1987] I.R. 587), earning a livelihood (*Murtagh Properties v. Cleary* [1972] I.R. 330), access to courts (*Maccauley v. Minister for Posts and Telegraphs* [1966] I.R. 345), and fair procedures in government decisions (*Garvey v. Ireland* [1980] I.R. 75).

<sup>40</sup> *Ryan v. the Attorney General*, 313-14.

<sup>41</sup> *Conroy v. the Attorney General* [1965] I.R. 411, 419-420. This High Court judgment was sustained in the Supreme Court. The justice who wrote the opinion supported the High Court’s view that the severity of the offense was a matter of natural law. *Ibid.*, 78.

<sup>42</sup> *McGee v. the Attorney General* [1974] I.R. 284, , 308-14. Justice Walsh’s caution has not been shared by others. The Irish parliament legalized the production and distribution of contraceptives albeit under careful regulation in 1979. Amendments to the law in 1985, 1992, and 1993 have abolished nearly all of the remaining restrictions.

Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.<sup>43</sup>

Justice Walsh later went on to reflect on the status of natural law more generally, suggesting some of the difficulties facing a judge in his position:

The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many who argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgment of Christianity in the preamble and in view of the reference to God on Article 6 of the constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgment of the ethical content of law in its ideal of justice. What exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed. While the Constitution speaks of certain rights as being imprescriptible or inalienable, or being antecedent and superior to all positive law, it does not specify them.<sup>44</sup>

Notice the conundrum pointed to here: there is no denying, Walsh seems to say, the natural law basis of the constitution's protection of fundamental rights, yet there is nothing like a specific set of rights, nor criteria by which a judge might determine how to strike a balance in particular cases. If there were, then the judge would become with respect to the law a kind of casuist. But judges have no such training: they are neither philosophers nor theologians. This might be puzzling enough, but the problem is further complicated by the sociological reality of disagreement about fundamental moral questions:

In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, 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 ... In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable.<sup>45</sup>

Judges cannot determine the content of the natural law, Walsh seems to say, nor can they adjudicate disputes between different philosophers or theologians in different religions about the content of the natural law. Yet they must make

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<sup>43</sup> *Ibid.*, 310.

<sup>44</sup> *Ibid.*, 317-18.

<sup>45</sup> *Ibid.*, 318.

determinations in specific cases as to whether a right in question which is not specified in the constitution should be specified. But how?

Again Justice Walsh:

In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure of the Articles dealing with fundamental rights clearly indicates that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The virtue of prudence was also esteemed by Aristotle as by the philosophers of the Christian world. But the great additional virtue introduced by Christianity was that of charity—not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. 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.<sup>46</sup>

The constitutional hermeneutic of charity seems to emerge from the specifically Christian character of the constitution, though we can see that this too is subject to change. One final quote:

It is natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.<sup>47</sup>

As evidence for this Walsh pointed to the Ninth Amendment of the U.S. Constitution.<sup>48</sup> While natural law has made appearances in several other Irish cases,<sup>49</sup> we need not examine them here, since Walsh's *McGee* opinion states the issue precisely. The internal conflicts of Walsh's *McGee* opinion become more clear when we turn to the academic debate in Ireland.

As we have seen, natural law was mainly treated as a source of unenumerated constitutional rights, the discovery of which was licensed by Art. 40.1.1 as interpreted in *Ryan's* case. This Article, then, plays a role analogous to that of the

<sup>46</sup> *Ibid.*, 318-19.

<sup>47</sup> *Ibid.*, 319.

<sup>48</sup> Justice Walsh later defended his views in several subsequent articles, though never again with the concentrated drama of the *McGee* judgment. See "The Judicial Power and the Protection of the Right to Privacy," *Dublin University Law Journal* 1 (1977), p. 3; "Existence and Meaning of Fundamental Rights in Ireland," *Human Rights Law Journal* 1 (1980), pp. 171-81; "The Constitution and Constitutional Rights" in *The Constitution of Ireland*. Frank Litton, editor, (Dublin: Institute of Public Administration, 1988), pp. 86-109.

<sup>49</sup> I discuss several of them in "Natural Law in Irish Constitutional Jurisprudence." The most important decisions are *Norris v. the Attorney General* [1984] I.R. 36; *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593; *Article 26 of the Constitution and the Regulation of Infirmation (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 2 I.L.R.M. 81 (This case will be further discussed below).

due process clause of the fourteenth amendment to the U.S. Constitution, and the American debate over constitutional law has loomed over the Irish. As early as 1961, some legal scholars expressed doubts about the natural law language in the *Bunreacht na hÉireann*. The late J.M. Kelly, considered one of the foremost authorities on the Irish constitution, wondered what the judicial significance of such language could be, suggesting that it amounted to no more than “the precept of loving justice and hating iniquity, of avoiding evil and doing good.”<sup>50</sup> Such discussions became even more pointed following the courts’ rulings in *Ryan, McGee*, and other cases where the natural law provisions were interpreted. Some commentators objected to the philosophical basis of natural law theory, taking particular aim at the equivocity of the term “nature” and the lack of any universally acceptable version of natural law theory.<sup>51</sup> Others have attacked it as providing a ready cloak for illicit judicial activism. The most prominent of this latter group is Gerard Hogan of Trinity College Dublin. Hogan has generally advocated what American legal scholars used to call “strict constructionism,” writing that:

... if important constitutional decisions are based on what amounts to a subjective interpretation of an amorphous higher law this will ultimately lead to a lack of respect for the judicial process. Judicial decisions will be perceived as resting on personal whim and the pragmatic subjective judgment. This is why the natural law or higher law approach must be viewed with reserve.<sup>52</sup>

Interestingly, Hogan is one of the first Irish scholars to try and bring American constitutional theory to bear on the dilemmas faced by Irish judges. In a detailed critique of the *Ryan* decision, he commends the work of both Robert Bork and John Hart Ely, even going so far as to compare *Ryan* to the U.S. Supreme Court’s infamous decision in *Lochner v. New York*.<sup>53</sup> He similarly criticizes Walsh’s *McGee*

<sup>50</sup> *Fundamental Rights in the Irish Law and Constitution*, 2d ed. (New York: Oceana, 1968; 1st ed. 1961), p. 69. Kelly did not question the idea that natural law could supply a basis for opposing patently unjust legislation, though he did not expect such a thing to happen much (pp. 67, 71) and speculated that a legislature willing to pass really unjust laws would not be stopped by judges (pp. 71, 73). Declan Costello, later president of the High Court, reviewed the first edition of Kelly’s book and defended the natural law basis of the constitution’s list of rights and argued that it would make the guarantees more effective in practice. See *Studies* 51 (1962), pp. 201-203.

<sup>51</sup> The most consistent such critic has been Desmond M. Clarke, a philosopher at University College Cork. See “Natural Law and Dynamics of the Will,” *Philosophical Studies* 27 (1980), pp. 40-54; “Moral Disagreement,” in *Morality and Law*, ed. D.M. Clarke (Dublin: Mercier/RTE, 1982), pp. 10-19; “The Role of Natural Law in Irish Constitutional Law,” *The Irish Jurist* 17 (1982), pp. 187-220; and “Natural Law and Constitutional Consistency” in *Justice and Legal Theory in Ireland*, ed. G. Quinn, A. Ingram, and S. Livingstone (Dublin: Oak Tree Press, 1995), pp. 22-36. Philosophically, Clarke has attacked natural law as committing the naturalistic fallacy and failing to supply judgments on which most people can agree. From a jurisprudential standpoint he writes: “The promised determinacy and objectivity of natural law is an unintended camouflage for judicial indiscretion, poor judgment, unreasonable or unreasoned decisions and, at least in principle, the subversion of democratically enacted laws in deference to the subjective views of members of the judiciary” (“The Role of Natural Law,” p. 219).

<sup>52</sup> “Constitutional Interpretation” in *The Constitution of Ireland: 1937-1987*, ed. Frank Litton (Dublin: Institute of Public Administration, 1988), pp. 173-91, 181. Hogan concluded that “Of all the methods surveyed, the approach that seeks to construe the Constitution from within its corners and upholds only those guarantees protected either expressly or by necessary implication is the one which may best satisfy this test” (p. 188). What complicates matters is, of course, that natural rights *are* expressly referred to in the constitution, a fact discussed more below.

opinion as “practically tantamount to an open invitation to the judiciary to become latter-day philosopher-kings via the guise of constitutional adjudication.”<sup>54</sup> Hogan concludes by suggesting that since there is no “precise, objective” standard for evaluating unenumerated rights claims, judges should refrain from accepting them absent support from constitutional provisions other than Art. 40.3, even suggesting that amending the constitution may be the only solution.<sup>55</sup>

Natural law jurisprudence has also had its defenders. Among the most prominent is Richard Humphreys of University College Dublin, whose work specifically criticizes Hogan. Humphreys’ central point is that natural rights are mentioned in the text of the *Bunreacht na hÉireann*, making them a “positivistic fact.”<sup>56</sup> Moreover, Humphreys, like Costello, believes that the natural law basis makes the rights provisions stronger than they otherwise would be.<sup>57</sup> Humphreys is critical of the theological aspect given natural law by Justice Walsh arguing that the theory implicit in the constitution must be “effectively a secular one.”<sup>58</sup> In interpreting the content of natural rights Humphreys suggests that Irish judges look to international law, particularly to American constitutional law and the jurisprudence of the European Court of Human Rights.<sup>59</sup> Irish legal scholars, then, have argued both for strict constructionism and natural law. One position that has not gained much enthusiasm is the intentionalism favored by many American conservatives.<sup>60</sup>

Up to this point the discussion had largely been academic and was concerned first and foremost with the issue of constitutional hermeneutics and the discovery and protection of unenumerated rights. In late 1992 this would change, and the issue of

<sup>53</sup> 198 U.S. 45 (1905). This is the case in which the court invalidated a law intended to protect bakery workers on the basis of *laissez-faire* economic theory.

<sup>54</sup> “Unenumerated Personal Rights: *Ryan’s Case* Re-Evaluated,” *The Irish Jurist* 25-27 (n.s.) (1990-92), pp. 95-116, 110.

<sup>55</sup> *Ibid.*, pp. 115-16.

<sup>56</sup> “Constitutional Interpretation,” *Dublin University Law Journal* 15 (1993): pp. 59-77, 70. See also “Interpreting Natural Rights,” *The Irish Jurist* 28-30 (n.s.) (1993-95), pp. 221-30, 222, where Humphreys writes: “One can like it or not, but the existence of God and natural law are given constitutional facts ... what is significant is that the judge who is asked to interpret the Constitution must set his or her skepticism about natural rights aside. ... For the purpose of any practical exercise in constitutional interpretation, natural rights exist because the Constitution says they do.” The point has also been made by Declan Costello, “The Irish Judge as Law-Maker” in *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O’Higgins*, D. Curtin and D. O’Keeffe, editors, (Dublin: Butterworths, 1992), pp. 159-67: “A judge may be a legal positivist and have no use for natural law concepts, but if the Constitution (as it does) explicitly recognizes the existence of rights anterior to positive law these jurisprudential views must yield to the clear conclusions which are to be drawn from the construction of the constitutional text” (p. 161).

<sup>57</sup> Indeed, he thinks this is the case regardless of whether there is anything like natural law, writing that “if natural rights are a fiction, they are a necessary fiction” (“Interpreting Natural Rights,” pp. 224-25).

<sup>58</sup> “Constitutional Interpretation,” pp. 69-70, 77. The reason is this: “Indeed to give any legal force to the Constitution’s somewhat rhetorical pronouncements on the deity would introduce a note of divisiveness if not indeed provincialism into the debate, a result which is not warranted by the text” (. 69). It seems difficult to argue this given that the first words of the Constitution are “In the Name of the Most Holy Trinity ...”

<sup>59</sup> “Constitutional Interpretation,” pp. 72-75; “Interpreting Natural Rights,” p. 230. See also Clarke, “The Role of Natural Law,” p. 218.

<sup>60</sup> See Hogan, “Constitutional Interpretation,” p. 176; Humphreys, “Constitutional Interpretation,” pp. 63-64. What Hogan admires in Bork is his attack on judicial activism, not his theory of “original understanding,” which he says very little about.

the natural law basis of the constitution would be thrust to the center of public debate. Here parallels to the American experience are obvious, for the issue that reoriented the debate was abortion. Abortion has been prohibited by statute in Ireland since the mid-nineteenth century, and even before the eighth amendment to the constitution was ratified in 1983 Irish judges considered unborn life protected by Art. 40.3.2.<sup>61</sup> The amendment seemed to end the question until a 1992 case, *The Attorney General v. X*,<sup>62</sup> opened up the issue. The case concerned a fourteen-year-old girl raped and pregnant by a family friend. After she said that she would commit suicide rather than carry the pregnancy to term, her parents decided to take her to England for an abortion. An injunction, however, prevented her travel on grounds of the constitutional mandate to protect unborn life. The girl, whose identity was shielded by the initial "X," pleaded that this was a violation of her liberty, and her family stressed her earlier talk of suicide. The Supreme Court agreed, holding that "if it is established as a matter of probability that there is 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."<sup>63</sup>

While this holding relieved the intense political tension of the *X* case, it left much else in doubt. The courts had earlier ruled that even the dissemination of information about procuring foreign abortions was unconstitutional, and the *X* ruling suggested that in similar cases the right to travel abroad for an unconstitutional abortion had to be allowed. The government's response, after much controversy, was to propose three constitutional amendments for referenda: first, a new wording to the prohibition on abortion specifically allowing for abortion in cases of threats to the life of the mother; second, that the abortion prohibition could not infringe the right to travel outside the state; and third, that it could not preclude the dissemination of information about constitutionally permissible abortions. The first amendment was defeated, while those relating to travel and information were approved. The information provision required enabling legislation, which was approved three years later in 1995. The Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 was narrowly drawn, and before signing it then President Mary Robinson referred it to the Supreme Court for review under Art. 26 of the Constitution, which allows referrals of legislation in cases where the constitutionality of the law is questioned. If the court approves the law, it can never be challenged on such grounds again.

The court assigned two counsels to argue against the law, one representing the interests of women and one representing the interests of the unborn. The former counsel opposed the law as too restrictive. The latter took the bold strategy of

<sup>61</sup> See the dicta in *Ryan v. the Attorney General* [1965] I.R. 294, 314; *McGee v. the Attorney General* [1974] I.R. 284, 312; and *G. v. An Bord Uchtála* [1980] I.R. 32, 69. On the subject of the right to life in Irish constitutional law more generally see Ann Sherlock, "The Right to Life of the Unborn and the Irish Constitution," *The Irish Jurist* 24 (n.s.) (1989), pp. 13-50.

<sup>62</sup> [1992] I.R. 1.

<sup>63</sup> *Ibid.*, 54-55.

arguing that it was invalid in so far as it contravened the natural law in permitting any direct abortions at all. Moreover, he argued that the *X* case itself was wrongly decided for the same reason.<sup>64</sup> The Supreme Court rejected these arguments explicitly, writing first, that the constitution enshrined the principle of popular sovereignty limited only by the express provisions of the constitution, all of which are subject to amendment,<sup>65</sup> second, that their understanding of the values in the constitution was conditioned by historical development,<sup>66</sup> and third, interpreting their own past decisions, that “The Courts, as they were bound to, recognized the Constitution as the fundamental law of the State to which all organs were subject and at no stage recognized the provisions of the natural law as superior to the Constitution.”<sup>67</sup> Thus the justices seemed to end the Irish experiment with natural law jurisprudence.

Reaction to the court’s judgment in Ireland was strong on all sides. In the weeks before the court announced its judgment, one strand of public debate identified natural law with the Catholic Church’s traditionally strong hold over Irish life and urged the court to reject it for that reason. After the decision was announced, this sentiment was given prominent voice in a lead editorial by the *Irish Times*, the principal voice of elite opinion.<sup>68</sup> Shortly before the ruling an *Irish Times* columnist wrote what many of the new Irish elite already thought, that natural law is an instrument of ecclesiastical control at variance with liberal democracy.<sup>69</sup>

Between the three referenda and the Supreme Court’s *Abortion Information* ruling, another debate broke out among scholars. Judge Roderick O’Hanlon of the High Court (and a former professor at University College Dublin) argued that the referenda were themselves of doubtful constitutional validity since they conflicted with the right to life of the unborn guaranteed by Art. 40.3.3, that is, he argued for a doctrine of what has been called unconstitutional constitutional amendments.<sup>70</sup> Given the place of natural law in the structure of the *Bunreacht na*

<sup>64</sup> The lawyer assigned to represent the interests of the unborn, Peter Kelly, lectured the court for three hours, pressing into service discussions of natural law in Aristotle, Cicero, Aquinas, and Martin Luther King, Jr. *The Irish Times*, 5 April 1995, City Edition.

<sup>65</sup> *In re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 2 I.L.R.M. 81, 102-04.

<sup>66</sup> *Ibid.*, 104-08.

<sup>67</sup> *Ibid.*, 107.

<sup>68</sup> *The Irish Times*, 13 May 1995, page 15. Denis Coghlan, the *Times*’s chief political correspondent, in an infelicitous metaphor, wrote that the ruling “cut away the umbilical cord of Catholic control inherent in the concept of natural law” (page 7), concluding that the “closure of the ‘natural law’ door, with its inherent threat of Catholic control and of a paternalistic/theocratic society, represents the most important step forward” (*ibid.*).

<sup>69</sup> “... although the idea of the natural law originated with pre-Christian Greeks and was developed by Cicero, the pagan pre-Christian Roman philosopher, it has become essentially a Catholic instrument. The natural law doctrine is the device whereby Catholic teaching is infused into the fundamentals of our basic law in a way that undermines claims to pluralism in this state.” Vincent Browne, “Will the country be run under natural law?” *Irish Times*, 26 April 1995, p. 14.

<sup>70</sup> See Walter F. Murphy, “An Ordering of Constitutional Values,” *Southern California Law Review* 53 (1980), pp. 703-60; and “Consent and Constitutional Change” in *Human Rights and Constitutional Change: Essays in Honour of Brian Walsh*, James O’Reilly, editor, (Dublin: Round Hall Press, 1992), pp. 123-46.



hÉireann, O'Hanlon argued that "no law could be enacted, no amendment of the Constitution could lawfully be adopted, and no judicial decision could lawfully be given, which conflicted with the natural law."<sup>71</sup> O'Hanlon's argument was answered by scholars who saw in it primarily antidemocratic sectarianism.<sup>72</sup> For them, the Irish Constitution was primarily a document securing a liberal democratic politics for a dynamic modern society, just emerging from its ecclesiastically dominated childhood.<sup>73</sup> Since this latest controversy, the secularization of Irish public life has accelerated. Open public demonstrations in support of abortion rights, a phenomenon unthinkable as late as the early 1990s, have taken place in Dublin and public discussion of amending the constitution to remove its 'sectarian' language and provisions is common.<sup>74</sup>

### III

While the last word has by no means been spoken in this debate,<sup>75</sup> a few things are clear. There is no question that the constitution was written by men whose basic political attitudes included a kind of natural law theory, that is, the one they learned from either the Jesuits or Christian Brothers in school (most likely in the old and unsatisfactory manual tradition). That theory made sense of the constitution and the political order in such a way that it did not often need to be made explicit. When judges were faced with claims that were made on the basis of individual rights unspecified by the constitutional text, as they were beginning in the mid-1960s and increasingly in the 1970s and 1980s, they naturally turned to what they understood to be the natural law for guidance. That understanding was doubtless vague and abstract, as reflected in the opinions judges produced. Moreover, these rights cases were being decided at precisely the time that the cultural instantiation of the natural law in Ireland began to change.

If one recalls the four ways that natural law is spread throughout society in Aquinas's account as summarized in section I above, one can see in every case that those factors are becoming increasingly attenuated in contemporary Ireland. First the role of parents in the moral formation of children has become complicated by

<sup>71</sup> "Natural Rights and the Irish Constitution," *Irish Law Times and Solicitor's Journal* 11 (January 1993), pp. 8-11, 10

<sup>72</sup> See Tim Murphy, "Democracy, Natural Law and the Irish Constitution," *Irish Law Times* 11 (April 1993), pp. 81-83; Roderick J. O'Hanlon, "The Judiciary and the Moral Law," *Irish Law Times* 11 (June 1993), pp. 129-32 and Desmond M. Clarke, "The Constitution and Natural Law: A Reply to Mr Justice O'Hanlon," *Irish Law Times* 11 (August 1993), pp. 177-80.

<sup>73</sup> An interesting study could be made of the replacement of England by the Church as the oppressive force from which Ireland must free itself in the rhetoric of Irish nationalism.

<sup>74</sup> In July of 1996 a commission charged with recommending amendments to the constitution released its report. The recommendations, many of which would remove Catholic elements of the document, are discussed at length in Francis X Beytagh, *Constitutionalism in Contemporary Ireland* (Dublin: Round Hall/ Sweet and Maxwell, 1997), chapter 5.

<sup>75</sup> See, e.g., Gerard Quinn, "Legal Change, Natural Law and the Authority of Courts," *Doctrine and Life* 45 (1995) pp. 97-118 with responses in the same issue; Ruth Cannon, "Matters of Irish Constitutional Debate: Originalism Democracy and Natural Law," *Irish Student Law Review* 5 (1995), pp. 22-38; Rory O'Connell, "Natural Law: Alive and Kicking? A Look at the Constitutional Morality of Sexual Privacy in Ireland," *Ratio Juris* 9 (1996), pp. 258-82; Adrian F. Twomey, "The Death of Natural Law?" *Irish Law Times* 13 (November 1995), pp. 270-73; and, most interesting of all, G.F. Whyte, "Natural Law and the Constitution," *Irish Law Times* 14 (January 1996), pp. 8-12.

the increasing penetration of Irish life by first the British and more recently the global mass media. This process has been promoted by the integration of Ireland into both the European Union and the global economic order. Second, the increasing democratization of Irish life has decreased the influence of traditional elites (the "wise" in Aquinas's account) and replaced it by the influence of public opinion and media elites. Third, the influence of the law on the formation of public morality has been radically altered, especially with respect to the decriminalization of moral offenses. Finally, the influence of the church as a teacher of the natural law has been attenuated by all of the factors just mentioned (secularization for short) and in an even more concentrated form by the infamous pedophilia scandals which have drastically eroded the Irish Church's moral authority in recent years.

Under the circumstances it is difficult for many to see the judicial use of natural law as anything other than the willful imposition of traditionalist values on a population in the process of throwing off just those values. This, I think, explains Justice Walsh's anguished meditation in the *McGee* case and the surrender of natural law by the Supreme Court in the *Regulation of Information* case. It also seems significant that the public (as distinct from the academic) debate over natural law really began only after abortion opponents appealed to natural law against the X judgment and the referenda and legislation that followed. There was no popular resistance to the idea when it was used exclusively as a means of defending unenumerated personal rights of citizens.

Two hypotheses are suggested on the basis of the preceding account. First, natural law can serve little if any role in constitutional jurisprudence absent important cultural conditions that legitimate such judgments understood in both theological and political (i.e., with reference to the regime) contexts. Detached from such contexts, natural law theory used in jurisprudence tends to undermine the legitimacy of the judiciary and of natural law itself.<sup>76</sup> Second, this has already happened in significant ways in Ireland. Perhaps it is also worth mentioning that according to the latest census upwards of 90 per cent of the population of the Irish Republic is Roman Catholic. The pluralism that Irish intellectuals discuss is not the pluralism of different sects (except when one takes into consideration the still separated north), but the pluralism of Catholicism and secularism. In all of this Ireland has arrived late at the conditions of modernity that characterize the public life of other liberal democracies in North America and Western Europe. The quickness of the change allows one to witness the process as a whole in a striking way.

This does not, of course, mean that the natural law is inoperative or in danger of being completely effaced. This is impossible since the most important precepts of the natural law are the very conditions of political association. Nevertheless, the substantive end towards which the natural law is directed, the common good, is

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<sup>76</sup> Even Aquinas seems to recommend a limited role for judges in these matters. See Russell Hittinger, "The Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?" *The Review of Politics* 55 (1993), pp. 5-34.

greatly attenuated in contemporary liberal democratic nation states both because of their size and their proceduralist claims.<sup>77</sup> Moreover, the efficacy of moral and political arguments based on natural right and natural law face two other obstacles in modern liberal democracies: first the popular (and political) culture dominated by a mass media that is, to say the very least, uninterested in substantive moral argument and unwilling to recognize as authoritative anything that conflicts with its sense of public opinion as determined by the latest techniques of market research; and second, the authority of modern science in its rejection of any notion of natural teleology.<sup>78</sup> Both of these obstacles point back to the original context of classical natural right and suggest the most important task for those who identify themselves with this tradition. That task is the disciplined recovery of the original premises of natural right as well as those of its early modern opponents, sustained inquiry into the context of natural right with respect to regime and teleology, and the honest application of these researches to our own culture and institutions. The execution of these tasks would entail the construction of a social science that is the modern analogue of Aristotle's philosophy of human affairs, which is to say, the recovery of political philosophy "in its own full dignity."<sup>79</sup>

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<sup>77</sup> This attenuation has been recognized by a number of critics of liberalism, though understood in different ways. Alasdair MacIntyre has argued that the modern state, as a political form, is inconsistent with the pursuit of the common good in "Politics, Philosophy and the Common Good," in *The MacIntyre Reader*, ed. Kelvin Knight, (Notre Dame, Indiana: University of Notre Dame Press, 1998), pp. 235-52 and *Dependent Rational Animals*, chapter 11. Alternatively, John Finnis has argued for the instrumentality of the "political common good," in "Is Natural Law Theory Compatible with Limited Government?" in *Natural Law, Liberalism, and Morality*, ed. Robert P. George (Oxford: Clarendon Press, 1996), pp. 1-26. Unlike MacIntyre, Finnis holds this instrumentality of the common good not to be a character of the modern nation state as such, but as a fundamental principle of political association, based on his reading of church documents and of Aquinas. See Finnis's *Aquinas: Moral, Political, and Legal Theory*, chapter 7.

<sup>78</sup> There are, of course, versions of natural law theory that claim not to be based on natural teleology, most notably that of John Finnis. The adequacy of that theory is a large and important topic that cannot be treated here. Nevertheless, the least one can say is that (1) the status of the theory as natural law is controversial, and (2) its rhetorical success in public debate does not appear substantially greater than that of the more traditional teleological accounts.

<sup>79</sup> Cf. John Paul II, *Fides et Ratio*, § 6.