

# LEGAL POSITIVISM, NATURAL LAW AND THE CONSTITUTION

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The jurisprudential debate between legal positivism and Natural Law is entrenched. The strands of Natural Law thinking go back to the Greek philosophers and St Thomas Aquinas. More recently, theorists such as Robert George, Germaine Grisez and John Finnis have adapted and revitalised Natural Law thinking about law.<sup>1</sup> Legal positivism is a more recent development. It developed in the seventeenth, eighteenth and nineteenth centuries as part of the philosophies of Thomas Hobbes, Jeremy Bentham and John Austin. It was restated in the twentieth century by legal philosophers such as Hans Kelsen, HLA Hart and Joseph Raz.<sup>2</sup> There are as many variations among the natural lawyers and among the legal positivists as there are between the natural lawyers and the legal positivists. Accordingly, it is difficult (and beyond the scope of this article) to provide an account of the differences between Natural Law and legal positivism. As a brief generalisation, natural lawyers are more likely than legal positivists to be sympathetic to the following claims: any description of law cannot be neutral but must be guided by a sense of correct morality; the best example of a legal system is a morally just legal system; an unjust law is (in some special sense) not a law. Despite the differences between them and among them, these theorists are all primarily involved in a description or analysis of what law is. Secondly, they may be involved in a prescription of what law ought to be and how it ought to be interpreted.

A different debate about the Natural Law has occurred within the Irish legal system, most obviously in the constitutional debate over the unenumerated rights doctrine. For approximately 30 years, the Irish courts engaged in a process of enumerating constitutional rights, often by reference to Natural Law theories. At times, this debate has adopted the jurisprudential language of Natural Law and legal positivism. In particular, it has been suggested that the Irish legal system is in some way inconsistent with legal positivism.

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1. See for instance Robert George, *In Defense of Natural Law* (Oxford University Press, 1999), Germain Grisez, *The Way of the Lord Jesus* (Franciscan Press, 1984), and John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).
2. See for instance, Hans Kelsen, *The Pure Theory of Law* (University of California Press, 1967), HLA Hart, *The Concept of Law* (Oxford University Press, 1961) and Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979).

The purpose of this article is to argue that such a position is fundamentally mistaken, being based on a confused understanding of the claims made by legal positivists and natural lawyers. In particular, three points of confusion affect this debate as conducted within Irish constitutional law. First, there is confusion between theoretical claims about what law is and doctrinal claims about what a particular law says. It does not follow from the fact that a particular law (or even legal system) asserts a Natural Law position that that law (or legal system) cannot be understood in a legal positivist manner. Second, there is confusion between the descriptive and prescriptive claims of legal positivists. Apart from one relatively recent development, legal positivists have tended to confine themselves to descriptive claims about what law is rather than make prescriptive claims about what law ought to be. Third, there is an unwillingness to consider the possibility that there might be good Natural Law reasons for a legal system not to make references to the Natural Law in its doctrines.

In this article, I shall first briefly review the contours of the unenumerated rights doctrine, before outlining the most coherent version of the view that the Irish legal system is inconsistent with legal positivism. I shall then seek to disentangle the sources of confusion mentioned above with a view to advancing the following propositions. There is nothing in the Irish Constitution which is inconsistent with legal positivism as generally understood. The Irish legal system can be explained by legal positivist accounts of law, notwithstanding the references to the Natural Law in the Irish Constitution. There is a strand of normative legal positivism with which the development of the unenumerated rights doctrine was inconsistent. However, the existence of the unenumerated rights doctrine can equally be seen as inconsistent with Natural Law theory. Ultimately, the unenumerated rights doctrine can perhaps be best understood as a judicial attempt to deal with the problem of unjust laws; however, there are several reasons to be concerned about the wisdom of that attempt.

#### THE UNENUMERATED RIGHTS DOCTRINE

Article 40.3 of the Constitution provides as follows:

1° 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.

2° 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.

In *Ryan v Attorney General*,<sup>3</sup> Kenny J seized on the fact that Article 40.3.2° enumerates a number of specific rights that are protected, prefaced by the phrase “in particular,” to infer that there were other rights protected by Article

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3. [1965] IR 294.

40.3.1° that were not enumerated. This approach was approved by the Supreme Court on appeal. Kenny J himself relied on the Christian and Democratic nature of the State (partly using a papal encyclical to identify some characteristics of a Christian state) to identify a right to bodily integrity. However, he held that the fluoridation of the water supply did not breach Mrs Ryan's right to bodily integrity. The courts have also relied on this Christian and Democratic approach to identify a right to travel<sup>4</sup> and a right to privacy.<sup>5</sup>

The courts developed two other approaches to identify rights under the guise of Article 40.3.1°. Henchy J relied on the human personality approach, for instance in *McGee v Attorney General* holding unconstitutional the ban on the importation and sale of contraceptives:

[T]he unspecified personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when [Article 40.3.1°] is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible.<sup>6</sup>

Henchy J also applied this approach (dissenting) in *Norris v Attorney General* to hold that Mr Norris had a right to privacy, which right precluded the criminalisation of consensual sexual activity between men.<sup>7</sup>

The third approach for identifying new constitutional rights was the Natural Law approach, principally used by Walsh J. Again in *McGee*, he offered the following account of why Natural Law rights were protected by the Constitution:

Articles 40, 41, 42 and 44 of the Constitution all fall within that section of the Constitution which is titled "Fundamental Rights." 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

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4. *State (M) v Attorney General* [1979] IR 73.

5. *Kennedy v Ireland* [1987] IR 587.

6. [1974] IR 284, at 325.

7. [1984] IR 36.

confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control. . . . Both in its preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. 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 to 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 in 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.<sup>8</sup>

Both Henchy J's and Walsh J's approaches can be seen as variants of Natural Law theory. Walsh J's is in the traditional, Thomistic line of Natural Law thought. Henchy J's is in line with the more secular, Enlightenment account of Natural Law.

At times, the courts used Article 40.3.1° simply as a repository for rights that were textually implicit in other parts of the Constitution. This approach was doctrinally less interesting than the other three approaches and is not the focus of this article. Ultimately, the unenumerated rights doctrine ran aground. In *re Article 26 and Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*, the Supreme Court rejected the contention that the people's power to amend the Constitution was subject to the Natural Law, as interpreted by judges.<sup>9</sup> Subsequently, in *O'T v B*, Keane J cogently articulated several concerns with the unenumerated rights doctrine, which concerns appear to have since been adopted by a majority of the Supreme Court.<sup>10</sup> Nevertheless, the unenumerated rights doctrine remains a significant aspect of Irish constitutional law, if only for its legacy of cases. More fundamentally, however, given the central importance of the doctrine in teaching Irish constitutional law, many people's introduction to terms such as "legal positivist" and "Natural Law" occurs through the rather odd prism of the Irish constitutional debate. It is partly for this reason that it is important to reassess the terms of that debate. A confused use of the terms in the Irish constitutional debate leads to a more general confusion about the nature of law itself.

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8. [1974] IR 284, at 310, 317–318.

9. [1995] 1 IR 1. For an analysis of this case broadly consistent with the argument advanced here, see Oran Doyle, "Legal Validity: Reflections on the Irish Constitution" (2003) 25 *DULJ* 56.

10. [1998] 2 IR 321.

## THE UNENUMERATED RIGHTS DOCTRINE AND LEGAL POSITIVIST THEORY

In *McGee v Attorney General*, Walsh J commented that the Constitution rejects legal positivism as a jurisprudential guide,<sup>11</sup> apparently on the basis that the Constitution recognises the existence of rights other than those that are explicitly mentioned in its text. Writing extra-judicially, Mr Justice Costello comes close to making the same point:

It has more than once been judicially observed that it can clearly be inferred that the Constitution rejects legal positivism as a basis for the protection of fundamental rights and suggests instead a theory of natural law from which those rights can be derived.<sup>12</sup>

These assertions must rest on an unstated understanding of what legal positivism is. A detailed examination of Costello's essay provides some clues to that understanding.

Costello's essay is a considered exploration of constitutional law and the judicial role. There is a tension in the article between a Natural Law theory of rights and an inherited English idea of the judicial function. Costello begins by making an important point about the limits of the judicial role:

In cases where this problem has been directly addressed it is clear that the courts have been careful to ask, "What rights did the Constitution intend to protect by Article 40.3.1?" rather than the more general philosophical question, "What are the rights of man?" This approach accords with the traditional notion of the judicial function for, by adopting it, the judge endeavours to avoid imposing his own political, moral or religious views on the issues which are raised for adjudication and instead seeks assistance in answering the problems posed by referring to the text of the Constitution itself. It means that by agreeing that a right claimed by a plaintiff is a personal right within the meaning of the Article the court is deciding that the right is one which can reasonably be implied from the provisions of the Constitution, rather than one which in the opinion of the court the citizen should enjoy.<sup>13</sup>

Costello accepts that the general nature of constitutional provisions leaves a "very large area of judicial discretion" and notes that judges may be accused of covertly or unconsciously departing from this self-discipline. However, he suggests that this approach demands a "reasoned explanation for a conclusion"

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11. [1974] IR 284, at 318–319.

12. Declan Costello, "Natural Law, the Constitution and the Courts" in Lynch and Meenan eds, *Essays in Memory of Alexis Fitzgerald* (The Incorporated Law Society of Ireland, 1987) 105, at 109.

13. Costello, "Natural Law, the Constitution and the Courts," note 12, at 107.

and “tends at least to minimise the element of personal predilection in the judicial process.”

He then notes the different methods of enumerating rights under Article 40.3.1°. Although he does not rule out methods such as the “Christian and Democratic” approach, he places most emphasis on Thomistic Natural Law. Although not explicitly referenced, this is probably a response to Desmond Clarke’s 1982 article pointing out the different forms of Natural Law reasoning. Clarke criticised the unenumerated rights doctrine partly on the basis that the courts were unclear as to which Natural Law argument they were using.<sup>14</sup> Costello responds to this criticism by arguing that it is clear that one variant of Natural Law argumentation should be used. His first question is to ask which Natural Law theory has been adopted by the Constitution:

An answer to the first question can reasonably be found in the Preamble. For if the Constitution is one which has been adopted for a Christian people it would be reasonable to conclude that the theory of law which it has adopted and the philosophical basis for the fundamental rights which it sought to protect should be in accord with the views of Christian philosophy rather than those of Roman lawyers or eighteenth century rationalist thinkers. The classical exposition of natural law in the Christian tradition is that contained in the writings of Thomas Aquinas and his theory of law is obviously the most relevant for the purpose of considering the role of natural law in the Irish Constitution.<sup>15</sup>

In a similar vein, Mr Justice Walsh himself argues (extra-judicially) that judges must give effect to the philosophical principles underlying the Constitution:

[T]he justice or otherwise of the expropriation of property or even the interference with property without adequate or any compensation could be judged differently by persons holding different philosophies. Thus a law enacted to give effect to such a purpose might in some jurisdictions have to be implemented and applied strictly according to its terms. But if by reason of constitutional provisions, such as those found in the Irish Constitution, which permit the courts to condemn such a law it is because the courts are permitted to and have the duty under the Constitution to judge and condemn by extra-legal standards of justice. Thus each of our judges must work from a philosophical conviction which does not differ from the philosophy underlying the Constitution.<sup>16</sup>

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14. Desmond Clarke, “The Role of Natural Law in Irish Constitutional Law” (1982) 17 *Irish Jurist* 187.

15. Costello, note 12, at 110.

16. Brian Walsh, “The Judicial Power, Justice and the Constitution of Ireland” in Curtin and O’Keeffe eds, *Constitutional Adjudication in European Community and National Law: Essays for the Hon Mr Justice TF O’Higgins* (Butterworths, 1992) 145, at 147. The

Walsh thus implies that judges in other legal systems might be required to apply unjust laws. For Walsh, it is unquestionably the Constitution's references to justice which legitimise the courts' recourse to justice in opposition to law.

Costello in his article proceeds to note certain features of Aquinas's Natural Law thinking that he considers most relevant to questions of Irish constitutional law. Law must be made by someone in authority and promulgated, but it must be directed to the common good. The will of the sovereign has the force of law as long as it accords with reason. Because man is endowed with reason, he can partake in the Eternal Law. This is the Natural Law, nothing more than "a body of precepts established by reason:"

Firstly and basically, man in common with all created substances has a natural inclination to the preservation of his being; and reason, considering this natural inclination, dictates what means are necessary for the preservation of human life. These dictates are part of the precepts of the Natural Law.<sup>17</sup>

However, Costello notes other aspects of the relationship between Natural Law and positive law:

Reason shows that it is desirable that positive enactments should exist which would, for example, clearly define the law of murder and the sanctions which are to be attached to it. The function of the law-maker in human society is to define and make explicit the natural law and to make it effective. Human positive law must not go contrary to the natural law. If it does it is a "perversion" of law. It would follow then that the basic rights which are derived from the precepts of the natural law obtain their validity from that law and not from human positive law, and that they are superior to it. Any human law which would deprive the human person of them would be a perversion.<sup>18</sup>

There are several interesting points within this account of the relationship between Natural Law and positive law. First, Costello notes the role of positive law in making the Natural Law "explicit" and "effective." However, he omits to mention the role that positive law plays in regulating matters on which the Natural Law is silent. On many issues, the Natural Law quite simply has nothing to say. Nevertheless, some Natural Law theorists, such as Finnis, consider that even in those situations the Natural Law requires that there be some co-ordination and regulation, a need that is met by the institutions of

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subsequent paragraphs make clear that Walsh considered Thomistic Natural Law to be the principles underlying the Constitution.

17. Costello, note 12, at 111.

18. *Ibid*, at 112.

positive law.<sup>19</sup> Costello would likely agree with this proposition if it were put to him.

Second, Costello observes that human positive law that goes contrary to the Natural Law is a perversion of law. He also suggests that the basic rights which are derived from the precepts of the Natural Law obtain their validity from that law, not from positive law. These rights are superior to positive law. Although he does not fully flesh out the implications of this, he seems to consider that the natural rights have a “validity” that allows them to resist – perhaps even at the level of positive law – acts of positive law that are contrary to them. Accordingly judges could disapply and citizens disregard any positive laws that breach the natural law. In the Irish context, this is presumably achieved by judges enforcing the natural rights through Article 40.3.1° against the perversions of positive law. How it should happen (if at all) in other legal systems is not at all clear. In contrast, Walsh does not consider that judges in other legal systems necessarily have the power to deal with unjust laws. As noted above, for Walsh it is unquestionably the Constitution’s references to justice which legitimise the courts’ recourse to justice in opposition to law. Costello, however, is equivocal on this point. In another article, Walsh comments that constitutional rights traceable to Natural Law are not rights created or purported to be created by the Constitution: they are acknowledged to exist independently of positive law, and the Constitution binds the State not merely to recognise them but enforce them.<sup>20</sup> Again for Walsh, whatever status Natural Law may have, it is the text of positive law (the Constitution) that makes it relevant within the legal system. Costello is more equivocal on this point.

Third, it is interesting that Costello specifies that it is the role of the “law-maker” to make the Natural Law explicit and effective. This raises the question of whether judicial enforcement of natural rights through Article 40.3.1° amounts to law-making. It would seem to be a process of making the Natural Law explicit and effective. There is nothing necessarily wrong with judges having a law-making role, but it is inconsistent with Costello’s earlier endorsement of the traditional judicial function.

Costello concludes his account of the relevance of Natural Law for Irish constitutional interpretation in the following way:

There are three points to be made about this theory in the context of the courts’ role in adjudicating in controversies concerning Article 40.3.1. Firstly, if indeed it is a correct construction of the Constitution that this theory of law has been adopted by it then, having ascertained that this is

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19. For instance, the Natural Law has nothing to say about whether people should drive their cars on the left hand side or the right hand side of the road. However, it is important for the Natural Law that one side of the road be stipulated by positive law as the appropriate side on which to drive. The Natural Law requires some coordination of human activity, but is often indifferent as to the precise content of that coordination.

20. Brian Walsh, “The Constitution and Constitutional Rights” in Frank Litton ed, *The Constitution of Ireland 1937–1987* (Institute of Public Administration, 1987) 86, at 89.



so, it is not the courts' function to evaluate it. An individual judge may be dissatisfied by the proofs of the existence of God or he may be on the side of those who hold that all natural law theories are vitiated by a fallacy which purports (wrongfully, it is claimed) to derive norms of human behaviour from the facts of human nature, or, like Bentham, he may believe that "natural rights is simple nonsense; natural and imprescriptible rights rhetorical nonsense-nonsense upon stilts." But judges are lawyers not philosophers and must, be they Benthamites or orthodox Thomists, take and apply the Constitution as they find it. If it can correctly be inferred that the Constitution has adopted a theory of law which derives fundamental rights from natural law, it is not the function of judges to debate the merits of the theory.

Secondly, in pursuing an inquiry under Article 40.3.1 as to whether a right claimed by a plaintiff is a "personal" right which obtains the protection of the Article, the courts are not required to consider theoretical questions as to the source of men's rights or why fundamental rights are superior to positive law. These have been answered for them. Their task, as lawyers, is to consider whether, by reference to the human person and the social and political order envisaged in the Constitution, it can be said that the right is one which is constitutionally acknowledged and protected.

Thirdly, the "personal" rights to which Article 40.3.1 refers may be more numerous than those basic fundamental natural rights which the practical reason derives from the precepts of the Natural Law. But these rights could not be inconsistent with "natural" rights, both being the product of reason reflecting on a human person with a nature and characteristics identical in both legal orders.<sup>21</sup>

In this concluding section, Costello reverts to the strong positive law basis for a natural rights doctrine within Irish constitutional law. It is the statements made by Irish positive law that ground the authority of Natural Law within the Irish legal system. This suggests that it would not necessarily be permissible or appropriate for a judge in another constitutional order to strike down positive perversions of law as being in breach of natural rights. However, it seems that under Costello's account of the Irish situation, Irish judges face no such dilemma. Because of Article 40.3.1<sup>o</sup>, unjust laws are *ipso facto* unconstitutional. The human positive laws that are "perversions of law" cease to be law in any sense (perverted or otherwise) by reason of the effective incorporation of the Natural Law by Article 40.3.

The picture thus painted of Irish law suggests an unusual legal system where conflicts between law and justice do not arise. Unusually perspicacious, the framers of the Constitution understood and took to heart the Natural Law proposition of *lex iniusta non est lex*, effectively providing that laws must be

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21. Costello, note 12, at 112–113.

just in order to be constitutional and therefore legally valid. Walsh makes a similar point:

The Constitution itself places the emphasis upon justice, not merely in relation to the judges' functions but in relation to the administration of the State itself, as is evidenced in Article 40. Therefore if there is a conflict between the law and justice the law must yield place to justice.<sup>22</sup>

It is perhaps for this reason that Walsh and Costello speak of legal positivism not being a jurisprudential guide to the Irish Constitution. They view legal positivism as a philosophy that subordinates justice to law. The Natural Law position allows for the incorporation of justice into law, thereby avoiding this subordination; it is therefore morally desirable. In contrast, legal positivism (in their view) denies such recourse to morality, subordinates justice to law, and is therefore morally undesirable. Walsh writes:

The concept of natural law and natural rights for many years was overshadowed by the positivist legal philosophy, of which the arch exponent was Jeremy Bentham. Bentham summed it up by saying "rights are the fruit of the law and of the law alone. There are no rights without law, no rights contrary to the law, no rights anterior to the law." The eager adoption of this philosophy in South Africa, to displace the Roman-Dutch natural law heritage, has lent legal support to a regime of racist inequality which natural law concepts would not have tolerated. The apotheosis of the positivist position came in Nazi Germany where, it is said, the German positivist philosophy of law delivered the German judiciary, bound hand and foot, into the toils of Nazism. In both South Africa and Nazi Germany, positivism led to a mechanical approach to the judicial function, so that no law could be invoked to invalidate the barbaric acts undertaken in each of those countries. However, the experience of Nazi Germany also proved to be the ultimate absurdity of positivism and led to its downfall.<sup>23</sup>

Walsh then characterises the post-War adoption of instruments such as the United Nations Charter and the Universal Declaration of Human Rights as a rejection of positivism. This reflects an understanding of legal positivism as a normative position which can be accepted or rejected by instruments of positive law, be they international agreements or national constitutions. The Irish

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22. Walsh, note 16, at 147.

23. Brian Walsh, note 20, at 92, citing Jeremy Bentham, *Works* Vol III, at 221. No sources are cited to support Walsh's other views on the ills of positivism. It is far from clear, however, whether Nazi judges or South African judges were positivists. Conversely, allowing judges to use the words "Natural Law" is no guarantee against theories which incorporate racial and ethnic limitations into the concept of human nature.

Constitution was designed in such a way as to incorporate a positive law guarantee of natural rights,<sup>24</sup> thereby ensuring – in Walsh’s view – that the horrors of Nazi Germany or Apartheid era South Africa would not come to pass. The principle that an unjust law is not a law gains expression within the positive legal system itself. This, for Walsh, is an attractive position of legal morality, leaving no choice to the jurist in such a system but to apply the Natural Law.<sup>25</sup> It is the antithesis of legal positivism, as he understands it. This view is shared by Costello, commenting in a later article:

A judge may be a legal positivist and have no use for natural law concepts, but if the Constitution (as it does) explicitly recognises 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.<sup>26</sup>

It is clear from this comment that Costello regards legal positivism as a normative position which could be adopted in relation to either the design of a constitutional system or – depending on the terms of that system – as a judicial attitude to interpretation within that system. In short, the term “legal positivism” is used in relation to particular doctrines in particular systems. Legal positivist doctrines are, for both Costello and Walsh, those that reject the notion of rights anterior to positive law. As the Irish Constitution explicitly accepts that there are rights anterior to positive law, it is inconsistent with legal positivism. The difficulty, however, is that this is not how the term “legal positivism” is generally used and understood.

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24. Writing in 1962, Costello observed, “There can be no doubt that a conscious and deliberate attempt was made at the time the Irish Constitution was drafted to revitalize the concept of the natural law and give it the sanction of positive law in the Constitution.” By concept of natural law, Costello appears to have meant “a strong body of legal theory which declared that an unjust law was no law and which refused to accept that the mere will of the sovereign was law.” Declan Costello, “Book Review of *Fundamental Rights in the Irish Law and Constitution* by JM Kelly” (1962) *Studies* 201, at 201, 202.

25. Walsh accepts that this application of the Natural Law by judges allows for a wide amount of judicial discretion, but does not consider this to be problematic:

It has been objected that “justice” or “injustice” are vague criteria. The citizen has a natural right not to be subject to injustice. It is difficult perhaps to define justice or injustice in the abstract, but it is much less difficult to recognise it in the concrete and that is what the courts are there for. In so far as this involves the individual judge (and indeed the legislator) in exploring and expounding the collective conscience or concept of justice, he or she must rely upon instinct or intuition, which, in short, means on his own moral sense and his own intelligence. Walsh, note 20, at 106.

26. Declan Costello, “The Irish Judge as Law-Maker” in Curtin and O’Keeffe eds, *Constitutional Adjudication in European Community and National Law: Essays for the Hon Mr Justice TF O’Higgins* (Butterworths, 2002) 159, at 161.

## LEGAL POSITIVISM AS A JURISPRUDENTIAL GUIDE

There is nothing in Costello and Walsh's account of the Irish legal system that cannot be explained from the perspective of legal positivism. Writing in 1958 (several years before the commencement of the unenumerated rights doctrine and nearly three decades before Costello's analysis of that doctrine), HLA Hart summed up the positivist position on the separation of law and morals in the following way:

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.<sup>27</sup>

This is fully consistent with Costello's account of the Irish constitutional position. Costello accepts (on the basis of Natural Law thinking) that law must be promulgated by a person in authority. Positive law must be positively made. However, Costello is equivocal on whether – for Irish lawyers – Natural Law gains its positive authority from the positive provisions of the Irish legal order or from its own status as a higher law. At times, he speaks of Natural Law rights gaining their validity from Natural Law which is superior to positive law. If this is the case, Natural Law is superior regardless of what positive law says. At other times, however, he places heavy emphasis on the positive provisions of the Irish Constitution. If this is the case, Natural Law's authority derives from the positive legal system itself. (This is also the approach taken by Walsh.) Three aspects of Costello's article support this reading of his views: first, his apparent endorsement of the traditional judicial role combined with his assertion that the courts are careful to ask what rights does the Constitution intend to protect rather than what rights does man have. Second, his repeated references to the textual authorisation for the natural rights doctrine. Third, his conclusion that – because judges are lawyers not philosophers – they must accept the natural rights doctrine “if indeed it is a correct construction of the Constitution that this theory of law has been adopted by it.”

If Costello believes (with Walsh) that the Irish courts' references to Natural Law are necessarily authorised by the constitutional text, then he accepts one of the most basic propositions of HLA Hart. The legal validity of normative propositions does not necessarily depend on their moral content, although it may do so – the provisions of a particular legal system may contingently establish that the morality of normative propositions is relevant to their legal validity. If, on the other hand, Costello believes that the constitutional

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27. HLA Hart, “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review* 593, at 599 (1958).

references to Natural Law are irrelevant and that all legal systems must import Natural Law thinking, then Costello is committed to a Natural Law theory of law that is inconsistent with legal positivism: positively valid rules lose their validity where they conflict with the Natural Law, simply because Natural Law is superior. Even this reading does not pose difficulties for the aims of this article, however, because this reading does not make any particular claim about the Irish legal system. It purports to be a claim about all legal systems. The central thesis of this article would still stand: there is nothing peculiar to the Irish legal system that counts against a legal positivist understanding of law.

Underlying this discussion is a general concern that Costello has misidentified his target when he speaks of legal positivism. For legal positivism aims to describe and explain legal systems, not to provide directions as to the substantive content of any particular legal system. In the first edition of *Concept of Law* Hart describes his book as an essay in descriptive sociology.<sup>28</sup> In his posthumously published postscript, he elaborates on this:

My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.<sup>29</sup>

It is unlikely that Irish law is so unique that legal positivism would prove unable to explain it and yet remain as a plausible explanation of other legal systems. Costello's misidentification lies in misunderstanding legal positivism as a normative claim about legal doctrines rather than a descriptive claim about legal systems. This is a curious error as most legal positivists have emphatically asserted that they are concerned with describing law. To adopt the catch-phrase, in their legal positivism they are concerned with the law as it *is* rather than the law as it *ought to be*. Legal positivism is capable of describing the reality of Irish law, including Irish law's own conception of how it ought to be. Legal positivism does not deny that there may be natural rights. It simply denies that those natural rights are of themselves a litmus test for the validity of law in all legal systems. A particular legal system might positively make such natural rights a litmus test of validity, but there need be no such test. Put another way, a system of rules that provides no moral criterion of validity may still be a legal system. This is the soft positivist position which HLA Hart came to endorse.

A hard positivist, such as Joseph Raz, must maintain either that a legal system which appears to make legal validity depend on compatibility with moral criteria is not a legal system or (more plausibly) that the application of those moral criteria is not an application of law. The reason for this, in Raz's view, is that the incorporation of moral criteria into the law is incompatible with

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28. Hart, note 2, at vi.

29. *Ibid*, at 240. Emphasis original.

the authoritative nature of law. The law is authoritative in that it provides exclusionary reasons for action – reasons which exclude the force of other reasons. These reasons are presented as a mediation of the unrestricted reasons that might have applied before a legal determination was made. It is in this sense that law is authoritative, but that authority is undermined if the interpreted import of moral criteria (such as justice or “free speech”) is considered also to be law.<sup>30</sup> Of necessity, any such interpretation was never provided as an authoritative resolution of competing moral concerns.

Both the soft and the hard version of legal positivism are compatible with Costello’s view that Article 40.3 requires Irish judges to make reference to principles of morality and justice in deciding cases. As noted above, the only claim of Costello that may be incompatible with a legal positivist account is his possible claim that all immoral laws are invalid by reason of their immorality. On balance, it seems unlikely that Costello is making this claim. In any event, the claim is incompatible with legal positivism in general, as it asserts that the legal validity of rules necessarily depends on compliance with correct morality. But it is not problematic for the thesis of this article, because it is not a claim that derives from the Irish legal system but is instead a general (if rather improbable) claim about law.

This is not to argue that legal positivism offers the best account of the Irish legal system. It may be that there are general defects in legal positivism which undermine its account of all legal systems (including the Irish legal system). Rather, the argument is that there is nothing special about the Irish legal system which renders legal positivism inapposite as a description of it. If legal positivism provides a good account of law in general, it provides a good account of the Irish legal system.

#### A BIOGRAPHICAL AND BIBLIOGRAPHICAL ASIDE

The main purpose of this Article is to identify and critique a commonly held Irish view about legal positivism. I have focused on Walsh and Costello purely as exemplars of this view and not out of any particular interest to trace the development of the legal thought of those two pre-eminent jurists. However, one curious point of intellectual history is why both Walsh and Costello in the late 1980s and early 1990s continued to understand the term “legal positivism” in a manner that was so far removed from general usage of that term, at least since HLA Hart began to revitalise the term in the English speaking world in the 1950s. A possible clue is found in an earlier article by Costello. Writing in 1956, Costello lamented the corruption in Natural Law thinking that had occurred with the move from Thomistic to Enlightenment conceptions of the Natural Law: man’s nature and relationship with God was replaced with man’s

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30. See generally Joseph Raz, “Authority, Law and Morality” in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994), at 210.

place in the state of nature; the natural duties of man were replaced with the natural rights of man.<sup>31</sup> In this vein, he addressed the question of legal positivism:

Twentieth century legal thinking not only reflects the false eighteenth century theories of natural law and natural rights, but also the nineteenth century's rejection of natural law as a basis both for law and human rights. The legal philosophy of the nineteenth century mirrored faithfully the current adherence to scientific progress and the laws of science, to empirical reasoning as against *a priori* ideas. Austin taught that the science of jurisprudence was "concerned with positive laws, or with laws strictly so called as considered without regard to their goodness or their badness."<sup>32</sup>

It thus appears likely that Costello's understanding of legal positivism drew largely on the work of Austin, rather than on the work of HLA Hart. Austin took an apparently strong line on the separation of law and morality:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. ... This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Sir William Blackstone, for example, says in his *Commentaries* that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original. [Austin considered and rejected several – in his view, unproblematic – readings of Blackstone before continuing.]

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law *is a law* for a law without an obligation is a contradiction in terms. ... Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense.<sup>33</sup>

Costello's understanding of legal positivism may well have been gleaned from passages such as this. However, even Austin cannot be taken to committing himself to the sort of doctrinal legal positivism with which Costello

31. Declan Costello, "The Natural Law and the Irish Constitution" (1956) *Studies* 403, at 403. I am grateful to Donal Coffey for bringing this article and line of inquiry to my attention.

32. *Ibid.*, at 404.

33. David Campbell and Philip Thomas eds, *The Province of Jurisprudence Determined by John Austin* (Ashgate, 1998), at 132–133.

disagrees. First, Austin's main target in this passage is Blackstone's contention that an unjust law is not a law. As noted above, the better reading of Costello is that he would take similar issue with Blackstone. Certainly, the Thomistic tradition of Natural Law did not make an assertion about unjust laws in such stark terms.<sup>34</sup> Second, Austin was quite clearly not considering judicial review based on a bill of rights.<sup>35</sup> Accordingly, his conception of legal positivism did not account for the sorts of situation which Costello addresses.

The work of Jeremy Bentham, to whom both Costello and Walsh refer, is another point of reference. The fuller extract from Bentham is as follows:

Rights are, then, the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law. Before the existence of laws there may be reasons for wishing that there were laws—and doubtless such reasons cannot be wanting, and those of the strongest kind;—but a reason for wishing that we possessed a right, does not constitute a right. To confound the existence of a reason for wishing that we possessed a right, with the existence of the right itself, is to confound the existence of a want with the means of relieving it. It is the same as if one should say, *everybody is subject to hunger, therefore everybody has something to eat.*

There are no other than legal rights;—no natural rights—no rights of man, anterior or superior to those created by the laws. The assertion of such rights, absurd in logic, is pernicious in morals. A right without a law is an effect without a cause. We may feign a law, in order to speak of this fiction—in order to feign a right as having been created; but fiction is not truth.

We may feign laws of nature—rights of nature, in order to show the nullity of real laws, as contrary to these imaginary rights; and it is with this view that recourse is had to this fiction:—but the effect of these nullities can only be null.<sup>36</sup>

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34. See Finnis, note 1, at 363. Finnis notes that St Augustine in his early dialogue on Free Will made one of his protagonists say, "a law that was unjust wouldn't seem to be a law." However, Aquinas preferred to say that unjust laws were "more outrages than law", "not law but a corruption of law" and "not a law *simpliciter* but rather a sort of perversion of law." To the extent that Costello maintains that an unjust law is not a law, he is ironically far closer to the English common law tradition than the continental Natural Law tradition.

35. Austin was writing in the British parliamentary context. Even in the United States, although *Marbury v Madison* 5 US (Cranch 1) 137 (1803) famously established the power of judicial review, the power was not exercised by the US Supreme Court in favour of a plaintiff until *Dred Scott v Sandford* 60 US 393 (1857). One would thus not expect legal theories of this time to address specifically the sorts of issues that are raised by the judicial interpretation of positively stipulated moral standards in order to strike down laws.

36. Jeremy Bentham, *The Works of Jeremy Bentham Volume 3* (1843), at 395. [http://files.libertyfund.org/files/1922/Bentham\\_0872-03\\_EBk\\_v4.pdf](http://files.libertyfund.org/files/1922/Bentham_0872-03_EBk_v4.pdf) (visited 28 July 2009). Emphasis original.



Again, however, it is questionable whether Bentham's legal positivism is the correct target for Walsh. For both Walsh and Bentham perceive a distinction between the positive law and the normative principles that lie behind positive law. Their fundamental disagreement is rather over the content of those normative principles that lie behind the positive law. Walsh perceives there to be principles of natural law (human rights) antecedent and superior to positive law. For him, therefore, there are rights without law. For Bentham, there is only the principle of utility – the greatest happiness of the greatest number. For him, therefore, rights only exist as a construct of positive law – they are not the normative antecedent to law. But for Walsh and Bentham respectively neither the principles of Natural Law nor the principle of utility becomes *ipso facto* law. Just as Walsh accepts that some legal systems may not give effect to theories of natural law, so Bentham would presumably have considered that a legal system which purported to incorporate natural rights actually created those rights as legal rights, even to the extent of allowing judges strike down positively enacted laws by reference to those legal rights.<sup>37</sup>

In short, the earlier versions of legal positivism espoused by Austin and Bentham, with which Costello and Walsh may have been more familiar, are not incompatible with the Irish Constitution either. The Irish jurists' use of the term "legal positivism" remains unconnected with any general use of that term.

#### NORMATIVE LEGAL POSITIVISM

The main critique of the Walsh/Costello view that legal positivism is not a jurisprudential guide to the Irish Constitution is that it misunderstands what legal positivism is. Both Walsh and Costello treat legal positivism as a normative theory about the sort of legal systems we ought to design and as to the sorts of interpretation which judges ought to give when confronted with constitutional rights provisions. As it is most commonly used, however, the term "legal positivism" has nothing to do with such issues. Rather, it is a descriptive term about the nature of legal systems: legal systems are not necessarily just; a validly posited law remains (in every sense) a law, even if it is unjust. However, there is another, more recently articulated, variant of legal positivism that is closer to what Walsh and Costello appear to have had in mind.<sup>38</sup>

In outline, normative legal positivism sees value in the features of law that legal positivists purport to describe, most importantly the absence of any stipulation that laws must conform to moral criteria in order to be legally valid. In particular, normative legal positivists believe that law can better serve its authoritative function (noted by Raz, above) if it avoids reference to moral

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37. Bentham was never required to consider such a system.

38. I am grateful to David Prendergast for bringing this variation of positivism to my attention. His paper and subsequent discussion at the Irish Jurisprudence Society in November 2007 prompted this article.

criteria in tests for legal validity. Jeremy Waldron argues that it is in the nature of law that it may be immoral. However, given substantive moral disagreement in the political community, it is necessary to have a fixed, identifiable position of the community even if that position may be immoral. This position requires to be enforced even where it is unjust:

Hence, there is the need for a single, determinate community position on the matter – one whose enforcement is consistent with the integrity and univocality of justice. Certainly, justice is affronted in another way if the position identified and enforced as that of the community ... is morally wrong. But given the inevitable disagreement on [the] issue and given the symmetry, for all practical purposes, of the rival positions on the matter ... there is no *political* way in which the prospect of this substantive affront can be precluded. All we can do, politically, for the sake of the integrity of justice is ensure that force is used to uphold one view and one view only – a view that anyone may readily identify as that of the community, whatever his substantive opinions on the matter. The integrity of justice, then, evokes the concept of positive law and the philosophical doctrine of legal positivism: law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.<sup>39</sup>

Writing in this vein, Tom Campbell advocates “the prescriptive separation thesis.” This is the view that law and morals ought to be separate at the point of application. He argues that legal rules ought to be recognisable by their empirically identifiable sources and that the acceptable content of formally good laws is such that they can be applied without reference to the moral opinions of the judiciary.<sup>40</sup> The difficulty is not with laws adopting moral positions (such as that intentional killing is wrong, for instance). Rather, the difficulty lies in laws incorporating moral values which then require moral interpretation by the law-applier in any particular case (such as a law guaranteeing the right to life, for instance). In this latter case, the judge is called on to give a moral interpretation; this undermines the purpose of law, which was to determine those moral issues itself, leaving judges with the more limited task of applying that determination.

On its own terms, normative positivism appears to be just as consistent with dictatorial as with democratic politics. Provided the dictator adopts laws which do not incorporate moral standards, normative positivism *per se* is not offended. Perhaps more realistically, a system of constitutional governance which allows for pre-enactment (but not post-enactment) judicial review would not appear to offend normative positivism.<sup>41</sup> In such a system, the judges' moral assessment

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39. Jeremy Waldron, “Kant’s Legal Positivism” 109 *Harvard Law Review* 1535, at 1540 (1996).

40. See Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996), at 69–73.

41. I am grateful to Aislinn Lucheroni for this point.

of a law would be completed prior to its enactment and application, thereby ensuring that its application does not involve the resolution of moral questions. However, normative positivists tend to be committed to democratic theories and, in particular, to the notion that it is inappropriate to have unelected judges making important decisions, based on moral criteria, about what legal positions pertain in the community. Concerns about legal certainty, therefore, tend to go hand-in-hand with concerns about democracy.

The Irish legal system is thus inconsistent with normative legal positivism: the unenumerated rights doctrine leaves open the possibility that *all* unjust rules can be overturned once they are sought to be applied. The avoidance of an injustice is considered more important than the general need for law to have and maintain a determinate position that can be identified in a way that does not call for moral judgment. Of course, this does not just undermine the certainty of laws only when a particular law is overturned: it leaves open a standing possibility that any law can be overturned. The test for overturning such a law is “the Natural Law,” thereby directly engaging the type of moral disagreement that it is, on Waldron’s view, the function of law to avoid. If legal positivism is equated with normative legal positivism, it is accurate to say that the Irish Constitution rejects legal positivism as a jurisprudential guide. Normative positivism is a guide to the desirable content of a legal system. It emphasises certainty and the need to avoid moral disagreement in rule identification above all else. (Moral disagreement in rule creation, as noted above, is not a problem.) The Irish Constitution assuredly does not adopt this approach. As with all bills of rights, moral guarantees such as equality, respect for family and property rights invite moral disagreement in some form back into the identification of law. But the unenumerated rights doctrine went far further because it did not even identify any specific moral criteria that required to be interpreted.

A normative legal positivist would not have designed the Constitution in this way. The fundamental rights provisions – in particular, the open-ended incorporation of morality by Article 40.3.1° – would have been avoided. However, it is less clear what relevance normative positivism has for the interpreters of law. Once the design of the Constitution introduces the need for moral interpretation, restrictive interpretations are just as offensive to the normative positivist as expansive interpretations. Against this, it could be argued that the courts should systematically adopt restrictive interpretations in the expectation that this will – over time – reduce the need for moral interpretations at all. As a strong example of this, the decision in *Ryan v Attorney General* that there were unenumerated rights was perhaps akin to a design decision, opening up the need for many moral interpretations in the future. On this analysis, the normative legal positivist would support the view taken by Keane J in *O’T v B*. Normative legal positivism was thus at odds with the unenumerated rights doctrine but may have been adopted as a guide for Irish constitutional law by a newer generation of judges.

## THE NATURAL LAW AND THE NEED FOR CERTAINTY

The unenumerated rights doctrine was inconsistent with a normative positivist prescription for a legal system. It allowed the content of law to be identified by means of judicial interpretation of an unlimited set of moral concepts. The irony, however, is that the incorporation of Natural Law into the positive law in this way may also be incompatible with a Natural Law prescription for a legal system. This is because Natural Law values positive legal certainty in much the same way and for much the same reasons as normative positivism does. Costello at times comes close to recognising this possibility:

Reason shows that it is desirable that positive enactments should exist which would, for example, clearly define the law of murder and the sanctions which are to be attached to it. The function of the law-maker in human society is to define and make explicit the natural law.<sup>42</sup>

However, Costello then asserts that positive law “must not go contrary to natural law.” Any such human law is “a perversion.” As noted above, Costello may be arguing for a conception of law which allows immoral positive laws to be corrected. This undermines certainty. The question is whether Natural Law’s desire for positive law to be certain extends to allowing for the positive validity of immoral laws. Put another way, to what extent is a natural lawyer prepared to allow moral concerns feed back into positive law. Finnis has addressed this issue:

[L]egal thought does not banish altogether those considerations, touching the common good, which in general are scarcely more closely definable than the basic values and principles [of the Natural Law], but which in particular circumstances can lead reasonable men to agree on a course of action *not* provided for by the existing legal rules or the network of contractual or other obligatory arrangements subsisting under those rules. Nevertheless ... the legal system does not allow an unrestricted feedback of such “value” or “policy” considerations from the justificatory level of straightforward practical reasonableness back into the level of practice. Instead, the legal system systematically restricts such feedback by establishing institutions, such as courts, arbitrators and legislatures, and then requiring that any shifting of the obligations imposed by existing rules and subsisting arrangements only by those institutions. Moreover, the institutions are themselves placed under legal rules (differing according to the nature and functions of the institutions) which make it obligatory that only in certain circumstances, and according to defined procedures and within certain limits, may they admit, accept, or act upon

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42. Costello, note 12, at 112.

the “extra-legal” policies, or upon the legally indeterminate (or not fully determinate, e.g. justificatory rather than strictly obligatory) principles.<sup>43</sup>

The unenumerated rights doctrine can be seen as a method of allowing moral concerns seep back into the application of law, militating against possibly unjust decisions that may have been taken by legislatures in enacting the law. It is doubtful whether the procedures of the Irish courts for moral feedback are restrictive enough to satisfy Finnis. If this is correct, the Irish constitutional Natural Law doctrine is – ironically – problematic from a Natural Law perspective. The Natural Law values legal certainty as a means for ensuring a framework in which individuals can coordinate their activities and authentically flourish. Legal certainty is best secured by ensuring that the law does not require further moral interpretation in order to ascertain its meaning. Thus when considering what legal provisions we ought to have and how judges ought to interpret those provisions, the Natural Law itself may require that it not be incorporated in an open-ended way into positive law. The positive law – when enacted – ought to adopt positions consistent with the Natural Law, but the positive law ought not allow judges to strike down properly enacted positions simply because they conflict with the Natural Law.

#### CONCLUSION

There is a commonly held view that the Irish legal system (because of its constitutionally protected rights, in particular Article 40.3.1<sup>o</sup>) is inconsistent with legal positivism. This view only holds up if one understands legal positivism not in its most predominant sense (as a description of legal systems) but in its more peripheral sense (as normative directions in relation to constitutional design and interpretation). However, when one considers normative questions relating to constitutional design and interpretation, it also becomes plain that an authentic Natural Law position may reject the proposition that judges should be empowered to strike down democratically enacted laws by reference to the Natural Law.

The attraction of the unenumerated rights doctrine was that it allowed judges to deal with the problems of unjust laws. It required them to incorporate an extra-constitutional standard of justice and strike down unjust laws, thereby removing their status as laws, even their status as “positive laws.” There seem to be two types of reason as to why one might consider such an approach attractive. First, one might consider that *ex post facto* decisions are likely to be better than anticipated decisions. Second, one might consider that judges have a better sense of justice than elected representatives. These two types of reason may combine in different ways. The difficulty is that the first reason militates

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43. Finnis, note 1, at 311, 312.

against having any legal system at all while the second reason, when stated so baldly, is difficult to accept. Apart from the concerns over legal certainty and democracy (shared by normative legal positivism and the Natural Law), the Irish doctrine of unenumerated rights placed an inordinate amount of faith in the capacity of judges – more than legislators – to know what justice truly is. The facility to utter the words “Natural Law” does not guarantee that what is said will be consistent with the Natural Law. Even if objective standards of justice do exist, there is no particular reason to think that judges – more than any other group of people – will know what they are. It is unsurprising that the courts appear to have abandoned the unenumerated rights doctrine.