# PRIVACY AND CONTRACEPTION IN THE AMERICAN AND IRISH CONSTITUTIONS

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To an American constitutional lawyer, *McGee v. Attorney General*[1] is the most intriguing of the Irish Supreme Court cases that Gerard Whyte has discussed. The initial fascination of the case comes from its obvious kinship with the United States Supreme Court's decision in *Griswold v. Connecticut*.[2] Both decisions overturned laws that prohibited use or availability of contraceptives by married couples.[3] Both decisions, moreover, were based on a constitutional right to privacy that was not explicitly recognized in the text of either the Irish or the United States Constitutions. Indeed, two of the Irish Justices drew direct support for finding a privacy right in the Irish Constitution from the American interpretation of the United States Constitution in *Griswold*.[4]

Notwithstanding these doctrinal similarities, however, there are substantial differences between *McGee* and *Griswold*, and I find these differences even more interesting than the similarities. The differences between the two cases arise from the contrasting political context and social significance of the anti-contraception statutes in the United States and Ireland.

The first clue to the contextual differences is the fact that the Connecticut statute at issue in *Griswold* was enacted in 1879 while the *McGee* statute was passed in 1935. Accordingly, when the two courts considered the constitutional question, in 1965 and 1974 respectively, the Connecticut prohibition was a less direct contemporaneous expression of public opinion than the Irish act. Moreover, and even more significantly, contraceptives were in fact widely and even openly available in Connecticut notwithstanding the statute. Indeed, four years before *Griswold*, the United States Supreme Court had dismissed a constitutional challenge to the Connecticut act on the ground that the statute

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1. 1974 I.R. 284.

2. 381 U.S. 479 (1965).

3. The Connecticut statute directly forbade contraceptive use, 381 U.S. at 480, while the Irish act prohibited access by proscribing sale or importation of contraceptives, 1974 I.R. at 285-86.

4. 1974 I.R. at 326-28 (Henchy, J.); 1974 I.R. at 335-36 (Griffin, J.).

was, as a practical matter, virtually never enforced.[5] Following this dismissal, the Planned Parenthood League of Connecticut opened a birth control clinic explicitly dedicated to dispensing contraceptives; the state prosecution followed from this intentional public provocation.

As this enforcement background made clear, the central practical question under the Connecticut act was whether openly publicized clinics could be established to promote the use of contraceptives. The statute did not significantly obstruct the availability or use of contraceptives by married or unmarried couples in the state. By contrast, the Irish anti-contraceptive statute was pervasively effective. When *McGee* was decided in 1974, it was difficult for anyone in Ireland to obtain contraceptive devices of any kind.

Beyond these contrasting enforcement patterns between the Connecticut and Irish statutes, there was another even more important difference in the character of the two jurisdictions. In Ireland, Catholics constituted some ninety-three percent of the population. Catholics were not so overwhelmingly represented in Connecticut but they were a substantial proportion of the state—forty-five percent of its population in 1965, when *Griswold* was decided. Connecticut was, however, almost unique among the American states in this regard; only two other states had a larger proportion of Catholics—Connecticut's adjacent neighbors of Rhode Island (sixty-two percent Catholic) and Massachusetts (fifty-three percent Catholic). By comparison, Catholics constituted only twenty-four percent of the entire population of the United States in 1964.[6]

The impetus in 1879 for enactment of the Connecticut anti-contraceptive use statute had not come from Catholics as such but was rather part of a national campaign against sexual "libertinism" through the imposition of state restrictions on adultery, fornication and prostitution, as well as abortions and contraceptive use.[7] By 1965, the political and social significance of the Connecticut anti-contraceptive statute had changed. By that time Connecticut was the only state that retained the prohibition on contraceptive use (though a few others, such as Massachusetts, still prohibited general public sale of contraceptives),[8] and efforts in the Connecticut state legislature to repeal the statute were effectively blocked by the opposition of the Catholic Church to artificial means of birth control.

Whatever the strength or the sources for support of the anti-con-

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5. Poe v. Ullman, 367 U.S. 497 (1961).

6. THE OFFICIAL CATHOLIC DIRECTORY, 1965 GENERAL SUMMARY (1965).

7. *See* S. ROTHMAN, WOMAN'S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT 82-83 (1978).

8. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972). A similar statute was in force in New York, *see* Carey v. Population Services, 431 U.S. 676 (1977); New York also had a substantial Catholic representation, constituting 37% of its population in 1965. CATHOLIC DIRECTORY, *supra* note 6.

traception statute in Connecticut, it was clear when the Supreme Court decided *Griswold* that such a measure had very little popular support in the United States generally. Justice Stewart's depiction of the Connecticut statute, in his dissenting opinion in *Griswold*, as an "uncommonly silly law" and even (at least implicitly) as "asinine,"[9] reflected the widespread view that this law was contrary to the dominant popular assumptions in American society at the time. The specific result in *Griswold* is overwhelmingly approved in the United States today. Even the non-textual method of constitutional interpretation on which the decision was based has become quite popular, as Judge Robert H. Bork learned to his dismay in his confirmation hearings.

In Ireland today, by contrast, I would venture that no judge or political leader would publicly describe the law overturned in *McGee* as "silly" or "asinine." The popular Irish response to the *McGee* decision itself was, moreover, much more negative than the American response to *Griswold*. Though the Irish Parliament did grudgingly enact legislation five years after *McGee* regarding importation and distribution of contraceptives,[10] popular reaction against the decision was powerfully revealed in the referendum approval of the pro-life amendment to the Irish Constitution in 1983.[11]

The principal public argument favoring this amendment was that the American pro-abortion decision in *Roe v. Wade* had been based on *Griswold*, and the Irish decision in *McGee* had been based on *Griswold*; therefore, the Irish Supreme Court could not be trusted to uphold legislation protecting fetal life. This argument disregarded the explicit contrary assurances of several Justices in *McGee*.[12] The constitutional amendment was clearly intended as a preemptive strike against the apparent judicial liberalism revealed in *McGee*.[13] In America, as Bork's rejection makes clear, *Griswold* is generally viewed as a beneficial decision even if its application in *Roe v. Wade* is more controversial. In Ireland, however, *McGee* itself is widely regarded as intrinsically dangerous.

This sharp divergence in popular reaction to the respective judicial decisions points to further differences between *McGee* and *Griswold*. At first glance, the Irish and Connecticut laws appear to present the

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9. 381 U.S. at 527.

10. *See* Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day*, 35 AM. J. COMP. L. 47, 69 (1987).

11. *Id.* at 75-77, 82-83.

12. *See* the observations of Walsh, J., 1974 I.R. at 312, and Griffin, J., 1974 I.R. at 325.

13. As Gerard Whyte observes, the more recent Irish referendum overwhelmingly defeating a proposal for even limited availability of divorce is further evidence of popular reaction against the underlying liberal assumptions of the Irish high court's decision in *McGee*. Whyte, *The Family and the State—Irish Constitutional Law*, 7 ST. LOUIS U. PUB. L. REV. 237, 251 (1988).

same issue of principle—whether a legislative majority could impose its sexual morality derived from its theological beliefs on an unwilling and unbelieving minority. However, the framework for considering this issue of principle had a markedly different appearance in the supreme courts of Ireland and the United States. The Connecticut legislation overrode minority views in that state. Nonetheless, this one state, with its substantial Catholic population, was a distinct minority in the entire United States. If the United States Supreme Court was intent on protecting a vulnerable minority against a historically hostile majority, it was not clear which minority—the Catholics clustered in Connecticut or the contraceptive users in that state—was more deserving. Indeed, the very uniqueness of the Connecticut law in the United States suggested that it was an expression of cultural pluralism that might deserve constitutional protection as such. Moreover, even if the state law were simply characterized as a majority acting against a minority, the fact that public proselytizing rather than private use or even general availability of contraceptives was the practical enforcement target of the Connecticut law itself suggested that a rough accommodation had been reached between protecting the moral sensibilities of devout Catholics in Connecticut and safeguarding nonbelievers against direct impositions to control their sexual conduct or childbearing choices.[14]

Whatever the weight of these rationales for an American judge in considering the constitutionality of the Connecticut statutes, none of them even plausibly applies in Ireland. The Irish statute could not possibly be justified as an expression of minority views in a fundamentally unsympathetic nation or, in practical terms, as a rough accommodation between a majority's claim to regulate conduct in public forums and a minority's claim to freedom in intimate matters of sexual practice. The Irish statute was unambiguously an imposition of majority wishes on a dissenting minority and equally impinged on public and private behavior.

The apparent similarity of the rationales offered by the American and Irish courts thus masks an important difference. The explicit rationale itself—that the anti-contraception statutes violated "fundamental values" rooted in the traditions of each country—had a more convincing empirical foundation in the United States than in Ireland. If it were not so clear, however, that the statute violated the deep-rooted traditions and current moral beliefs of the people of Ireland, there was another and quite different reason for invalidating the statute in the Irish Constitution.

This reason arises from a provision in the Irish Constitution that appears extraordinary and even virtually without precedent, at least to an American constitutional lawyer. The provision is article 2, defining

14. *See* Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 392-93 (1979).

the Irish nation to which the Constitution applies: "The national territory consists of the whole island of Ireland, its islands and the territorial seas."[15] This provision thus disregards—indeed, it was intended to repudiate—the political boundaries between the Irish Republic and Northern Ireland that had been drawn by the 1925 treaty with Great Britain recognizing Irish independence.[16]

Article 2 was apparently meant to have aspirational more than immediate practical implications. Article 3 of the Constitution adds the qualification that, "pending the reintegration of the national territory," governmental acts shall apply in the Irish Republic within the treaty boundaries.[17] This qualification does not resolve the critical question for the judiciary in interpreting the rights conferred by the Constitution.

In one sense, article 2 might appear irrelevant for judges. If that article were taken literally, an Ireland comprising the "whole island" would have a population with a substantial Protestant minority, some twenty-five percent of the total. Even if judges were obliged by article 2 to assume this statistic as an accomplished fact, this would not in itself necessarily demonstrate that the anti-contraception statute was more oppressive simply because the non-Catholic minority was twenty-five percent rather than seven percent of the population. If the constitutional issue is conceived in essentially individualistic terms, majority invasion of the rights of one person is as offensive as the oppression of multitudes.

This is, however, not the only way to frame the issue. From another perspective, article 2 may be a highly relevant guide for judicial conduct. That article can be read as a constitutional directive that governmental actions must be consistent with the fundamental aspiration for ultimate union of Northern Ireland with the South. If this is the meaning of article 2, more is at stake in the anti-contraception statute than its interference with an individual's "right to marital privacy." With such an interpretation of article 2, the close connection between the statute and the teachings of the Catholic Church becomes relevant for judicial evaluation of constitutionality.

The anti-contraception statute can be characterized, in the context of Irish political life, as an instance when the dominant Catholic majority imposed its theologically-based moral beliefs on a disbelieving and perpetually vulnerable minority.[18] The statute has both a practical and a symbolic implication for the Protestants who are the current majority in Northern Ireland and who would be transformed into a minority in a

15. IRELAND CONST. art. 2.
16. Hogan, *supra* note 10, at 48 n.3.
17. IRELAND CONST. art. 3.
18. *See* C. O'BRIEN, STATES OF IRELAND 125 (1972). *See also* Hogan, *supra* note 10, at 52, 67.

re-integrated Ireland.[19] The statute signifies the Protestant vulnerability in a united Ireland because it disregards the tenet of tolerance for differing moral beliefs—the core value of liberal, pluralistic democracy. The concept of tolerance may indeed be too mild to capture the problem raised by the anti-contraception statute in the Irish context. The statute might more aptly be characterized as a denial of mutual respect from Catholic to Protestant, and therefore as a denial of equal protection of the laws.

Viewed from this perspective, there is a more direct parallel for the *McGee* decision in American constitutional law than *Griswold v. Connecticut*. That parallel is *Brown v. Board of Education*.[20] The immediate question in *Brown* was, of course, the constitutionality of racial segregation laws. If a court narrowly focused attention on the individual rights apparently affected by racial segregation laws, the court would see the inhibitions on individuals' "freedom of association" (in this instance, that blacks were prohibited from freely associating with whites). With this narrow focus, however, the Court would have missed the larger and more dispositive implications of the racial segregation laws.[21]

The context that gave meaning to *Brown* was the questions raised but not adequately resolved by the American Civil War. This War apparently answered two questions: that the North and South were part of a unified nation notwithstanding the wishes of the white South to withdraw from that nation; and that in this one nation, the black minority could not be enslaved. These answers were imposed by force of arms; and precisely for this reason, I would say, the answers were not accepted as the final disposition by anyone. In little more than a generation's time, blacks were effectively re-enslaved. The white South embraced a cultural definition of itself that exaggerated its differences from the rest of the United States, perhaps even in more caricatured form than before the Civil War; and so the question whether blacks were free and whether the United States was one or two nations remained formally answered (both by the War and by the resulting constitutional amendments), but practically unresolved.

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19. Compare William Butler Yeats' observation, as a member of the Irish Senate in 1925: "If you show that this country, Southern Ireland, is going to be governed by Catholic ideas alone, you will never get the North. You will create an impassable barrier between South and North, and you will pass more and more Catholic laws . . . . You will not get the North if you impose on the minority what the minority consider to be oppressive legislation." *See* Hogan, *supra* note 10, at 47.

20. 347 U.S. 463 (1954).

21. This narrow focus lay beneath Herbert Wechsler's obtuse criticism of *Brown* that, because "freedom of association" was the only value implicated, no "neutral principle" could give priority to some blacks' wish to associate with whites over some whites' wish to refuse association with blacks. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

In 1954, when the Supreme Court invalidated the racial segregation laws in *Brown*, "freedom of association" was not the core value at stake. The Court acted on the aspiration for national unity expressed in the Civil War amendments—and with the hope that this time the conflict between the hostile forces could be resolved without violence. It was not clear in 1954 that this hope would be realized. During the uncertain course of implementing *Brown*, there were many times when this hope appeared futile. The aspiration in the *Brown* decision was for unity based not simply on respect for law, which can imply coerced unity, but unity based on respect for equality of individuals, which implies tolerance, and even mutuality, that coercion cannot assure. In *Brown*, the Court clearly depicted how the regime of racial segregation and its underlying premises of racial subjugation were inconsistent with this ideal of uncoerced unity. The Court in effect challenged the white South and the rest of the country either to conform its conduct to this aspired ideal or to admit that it had abandoned the aspiration.

The American racial segregation laws could not be understood except as a response to our Civil War. Similarly the Irish anti-contraception statute must be read against the background of civil warfare between Catholic and Protestant in that country. In the Irish context, the division between North and South means continued disadvantage of the Catholic minority in the North, and even the oppression of this minority as they and their Southern co-religionists see it. Moreover, it appears, possible elimination of this division inspires fear among the Northern Protestant majority of disadvantage and even oppression based on retaliatory impulses. In the American context, the division between North and South both before and after the Civil War had the same implications, except that the boundaries for hostility were racial rather than religious. The decision of the Irish Supreme Court in *McGee*, though on a smaller scale and in a more subdued way, has the same implications as *Brown* in the United States.

The ambivalent, and perhaps even hostile response, of the Irish populace to *McGee* in their enactment of the pro-life constitutional amendment and defeat of the divorce reform amendment also has direct parallels in the American popular response to *Brown* at least in its first decade.[22] Popular resistance in Ireland, moreover, has a constitutional significance that to an American lawyer at least seems quite odd. Unlike the United State Constitution, the Irish Constitution is easy—I would say even amazingly easy—to amend. An act must be passed by an ordinary majority of both Houses of Parliament and then ratified by an ordinary popular majority at a referendum.[23] There is not even provision for any minimum time lapse between parliamentary and popular referendum action or indeed between judicial decision construing the

22. *See generally* B. MUSE, TEN YEARS OF PRELUDE (1964).
23. IRELAND CONST. arts. 46-47.

Constitution and invocation or completion of the amendment process. In recent years, two constitutional amendments have been enacted to overrule constitutional interpretations of the Irish Supreme Court within six weeks[24] and eighteen weeks,[25] respectively, of the judicial decisions. While these specific constitutional amendments have addressed somewhat technical and relatively unimportant issues, the same formal process is obviously available for amendments of great significance. To an American, the unchecked speed of the amendatory process seems antithetical to one basic rationale for a written constitution as a bulwark against ill-considered action by momentary, impulsive majorities.

Paradoxically, however, this very ease of the amendatory process in the Irish Constitution may have salutary implications for judicial conduct. This ease does ameliorate one problem that has obsessed many American judges and even more American academic commentators—the problem that in finding "fundamental rights" beyond those explicitly specified in the constitutional text, judges are likely to confuse their merely idiosyncratic values with their cultural heritage. If the Irish Supreme Court strays too far from common cultural understanding, this errant course can readily be corrected.[26] Constitutional interpretations by which Irish judges proclaim their understanding of the highest ideals of the Irish culture are accordingly more like educative acts of moral leadership than authoritative impositions by unapproachable and infallible black-robed icons.

Education often takes time; however, it can require learners to yield their comfortable prejudices and illusions which is a painful and often mightily resisted process. For this reason, the easy rapidity of the amendatory process in the Irish Constitution can too readily sabotage the educative potential in constitutional adjudication; and this seems regrettable to me. There may, nonetheless, be one element in the context of Irish constitutional adjudication that serves as a powerful corrective to this problem. Because of the overwhelming electoral dominance of devout Catholics in the Irish Republic, the interests of the

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24. On April 9, 1987, the Irish Supreme Court decided Crotty v. An Taoiseach, 1987 I.L.R.M. 400, constitutionally invalidating a treaty entered by the Government with the other members of the European Economic Community; a constitutional amendment overriding the decision was approved by popular referendum on May 25, 1987.

25. On February 8, 1984, the Irish Supreme Court decided In the Matter of Article 26 of the Constitution and in the Matter of the Electoral [Amendment] Bill 1983, 1984 I.R. 268, invalidating a parliamentary act enfranchising British subjects residing in Ireland; a constitutional amendment overturning this decision was approved by popular referendum on June 16, 1984.

26. This practical reality might in itself encourage Irish judges toward boldness in their constitutional interpretations; it might equally inspire timidity among judges who do not enjoy being overruled.

minority of Protestants or disbelievers are always vulnerable. If, however, Irish judges resolve to protect this minority against oppressive impositions, through the interpretation of constitutional rights, the judges can enlist one powerful ally for this protective purpose. That ally is the knowledge among Catholics in Ireland that by imposing on their minuscule resident minority, they are effectively undermining any possible means of protecting their vulnerable co-religionists in the North. Such impositions may indeed provoke the Northern Irish Protestants to retaliate against their Catholic minority.

This is the background knowledge on which Irish judges can rely and implicitly invoke when they challenge the Irish populace to restrain their electoral power as an act of respect—or, at the least, of tolerance—toward a vulnerable minority in their own midst. The vulnerability of the Catholic minority in the North can itself serve as an educative instrument toward protecting an empathic identification with minorities residing in the South, whether those minorities are portrayed in terms of their religion, their apparently deviant sexual practices[27] or some other socially scorned attribute.[28]

In one sense, this kind of identification with the Catholic minority in the North may seem too narrowly sectarian and too obviously linked to the political goal of national integration—more crudely utilitarian than truly moral in its import. If, moreover, this identification rests on nothing more than a crude utilitarian foundation, this might suggest that the Irish Supreme Court should gauge the intensity of its commitment to a constitutional norm of tolerance based on its practical assessment of the realistic likelihood of ultimate political integration between South and North.[29]

But this view of moral reasoning and of the educative role of constitutional adjudication is itself too crude. The sectarian identification and political alliance of Catholics in the South and North provide practical hooks for engaging the popular conscience, for leading the populace toward the transcendence of narrow partisanship and sectarianism and toward a more universally encompassing empathy for vulnerable outcasts. Drawing this universal lesson from homely analogies was a central purpose and technique of Christ's parables; both the purpose and the technique also have a proper role in secular constitutional adju-

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27. *Compare* Norris v. Attorney General, 1984 I.R. 37, where the Irish Supreme Court failed to act on this premise in upholding, by a three-to-two vote, criminal penalties for private consensual homosexual acts.

28. *Compare* O'B. v. S., 1984 I.R. 316, where the Irish Supreme Court failed to act on this premise by dismissing a constitutional challenge to discrimination against illegitimate children in laws governing intestacy.

29. For doubts about the practical attainability of national integration, and about the depth of public support for this goal in the Irish Republic, *see* O'BRIEN, *supra* note 18, at 296-98.

dications.[30] In the specific context of the current violent struggles in Northern Ireland, sectarian prejudices may be too passionately inflamed and may therefore doom any realistic hope for the success of moral leadership toward universalist goals. But even here, in these bitter and apparently endlessly escalating conflicts, an object lesson regarding the destructiveness of narrow sectarian impulses can be drawn by a skilled and courageous teacher.

If the Justices of the Irish Supreme Court interpret their constitutional mandate toward the service of this moral educative goal, their success is not assured. The very ease of popular amendment itself casts doubt on their practical capacity. At the same time, however, this patent vulnerability can clarify for Irish judges what American judges too easily overlook in the exercise of their constitutional authority: That the protection of minorities against majority oppression in practice cannot, and in principle should not, rest on coercion by judges against the majority oppressors; that this protection takes firm hold only when the majority understands that if it coerces a minority, it ultimately creates nothing more than a shared state of oppression; and that judges through constitutional interpretation must lead, but cannot force, the majority toward this understanding.

30. For an exploration of this proposition, *see* Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L. J. 455 (1984). For consideration of a similar role for constitutional adjudication in fostering fellow-feeling, *see generally* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986). For an illuminating exposition of the analogy generally between a sacred text and the United States Constitution, *see* S. LEVINSON, CONSTITUTIONAL FAITH (1988).