

Brown v. Board of Education: An Irish Perspective: “The Better Angels of Our Nature”

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I. INTRODUCTION

*Prejudice, we are beginning to understand, rises not from malice or hostile animus alone . . . [prejudice] may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.*¹

This quote from Justice Kennedy in the *Board of Trustees v. Garrett*² case is fitting. It is also the source of the title to this article: “the better angels of our nature.”³ There is, according to Justice Kennedy, a struggle between “our own human instincts” on the one hand and “the better angels of our nature” on the other.⁴

In 1954, the United States Supreme Court, in a unanimous opinion written by Chief Justice Warren, overturned the infamous doctrine of “separate but equal” in the sphere of public education, which had emerged in the decision of *Plessy v. Ferguson*⁵ some sixty years earlier. That decision concerned the uncertain interpretation of the Fourteenth Amendment to the United States Constitution adopted after the Civil War, during the period of Reconstruction. The Fourteenth Amendment prohibits the states from depriving anyone of “the equal protection of the laws.”⁶

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1. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring).

2. 531 U.S. 356 (2001).

3. *Id.* at 375 (Kennedy, J., concurring).

4. *Id.* (Kennedy, J., concurring).

5. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (upholding a statute requiring the provision of separate train accommodations for blacks and whites, holding that the Fourteenth Amendment did not abolish distinctions based upon color, and permitting separate treatment of races provided that the exercise of the power was reasonable, not designed to oppress, and made in good faith to promote the public good); *see also* Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553, 589 (1973).

6. U.S. CONST. amend. XIV.

In full, section one of the Fourteenth Amendment states,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁷

Although on the surface the wording appears clear, there was some argument as to its exact extent.⁸ Certainly, it prohibited any action whereby either federal or state authorities treated people unequally.⁹ However, another understanding would confine the interpretation of the clause to equality of treatment only, thereby permitting segregation, provided each grouping was treated equally.¹⁰ Thus, the “separate but equal” approach took hold. This doctrine allowed for state segregation of the races provided that there was equality of treatment between these two segregated groups.¹¹ There are a number of important points to note about this approach.

First, although much is made of the focus on emancipation as the cause of the Civil War, at heart it might be seen as an economic war. Simply put, the South feared that the emancipation of the slaves would denude its economic foundation. Whereas the northern states’ economic foundation rested on raw materials and industrialization, the South had invested its wealth in slaves to run its predominantly agriculturally based economy, with the resultant high demands of manpower.¹² The emancipation proposals, although surely pursued for lofty goals, would of course also have ancillary benefits. The northern industrial states needed vast quantities of labor to feed their

7. *Id.* § 1.

8. *Strauder v. West Virginia*, 100 U.S. 303 (1879) (deeming statute prohibiting blacks from jury participation invalid as contrary to the Fourteenth Amendment). *But cf.* *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding a statutory provision providing for more severe penalties for adultery between mixed race couples than applied between adulterers of the same race and basing decision on equal impact on black and white races). *See also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down a regulation that prohibited running a laundry from a wooden premises as contrary to the Fourteenth Amendment since it had no other purpose than hostility towards the Chinese population). Perhaps most damaging of all was the holding in the *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment could not apply to individuals but only to state action). *But see id.* at 26 (Harlan, J., dissenting) (viewing the Amendment as granting full equality to blacks).

9. *See generally* *The Civil Rights Cases*, 109 U.S. 3.

10. *Louisville, New Orleans & Tex. Ry. v. Mississippi*, 133 U.S. 587, 592 (1890) (upholding a state law, which required that separate cars be available on trains for whites and blacks because there was no impact on interstate commerce). *But see* *Hall v. DeCuir*, 95 U.S. 485, 490-91 (1877) (striking down similar legislation since compliance would have had interstate consequences).

11. There is evidence that the separate-but-equal doctrine was utilized prior to the Civil War. *See* *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209-10 (1849) (upholding statute that required black children to attend an all-black school across the city rather than the all-white local school since in all other aspects other than location the schools were equal).

12. For an interesting account, see generally WILLIAM L. BARNEY, *FLAWED VICTORY: A NEW PERSPECTIVE ON THE CIVIL WAR* (1975).

production facilities. Emancipated slaves provided such labor. Emancipation was therefore an economic imperative, not necessarily a social imperative. Indeed there is considerable evidence that the treatment of African-Americans in the North was as bad, if not worse, than that meted out to their southern counterparts, irrespective of their emancipation.

Second, the interpretation of this provision, forged in the heat of victory, cooled rapidly in the light of the post-Civil War Reconstruction. Although the Union had won militarily, the price had been high, the victory somewhat pyrrhic. The Civil War had been about preservation of the Union more than emancipation, and this was reflected in the management of the peace.¹³ The southern states, albeit the subject of carpetbaggers from the North, were reinstated quickly into the Union, their state rights re-asserted as equivalent with that of their northern compatriots. The Union had little stomach to look too closely into what was actually happening within the defeated South. The Union was secure. The slaves were emancipated. The economic imperatives were resolved. It was now time for the South to restructure their society to accommodate these new realities. No matter how unsavory a route taken by these states, better that it should be accommodated than the whole issue raised again.¹⁴

Although this article concentrates on the parallels of *Brown v. Board of Education*¹⁵ in Irish jurisprudence, it is interesting to note that exactly the same approach of disinterest was adopted by the United Kingdom following the Irish War of Independence. In the negotiated settlement between the United Kingdom and the Irish insurgents, the island was divided into two entities: the Republic of Ireland, which was constituted with the same status as the Dominions,¹⁶ and Northern Ireland, which remained an integral part of the United Kingdom.¹⁷ However, Northern Ireland was to have its own parliament and control over its own internal affairs. The Irish question that had caused so much bloodshed and had so vexed London in trying to find a resolution resulted in London virtually ignoring the activities of the Northern Ireland legislature as it effectively set about the establishment of a segregated society between Catholics and Protestants.¹⁸

13. See generally DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* (Kermit L. Hall ed., 1991).

14. For background information on post-Civil War Reconstruction, see generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (2002) and STETSON KENNEDY, *AFTER APPOMATTOX: HOW THE SOUTH WON THE WAR* (1996).

15. 347 U.S. 483 (1954).

16. The Irish Free State was established under the Government of Ireland Act of 1920.

17. See The Government of Ireland Act, 1920. See generally DAVID FITZPATRICK, *THE TWO IRELANDS 1912-1939* (1998).

18. See generally *DISCRIMINATION AND PUBLIC POLICY IN NORTHERN IRELAND* (Robert J. Cormack & Robert D. Osborne eds., 1991); *DIVIDED SOCIETY: ETHNIC MINORITIES AND RA-*

Until the bloody civil rights movements of the late 1960s and early 1970s, London simply closed its eyes to the issue¹⁹ in much the same way as Washington closed its eyes to the segregation being enacted in the South from the end of the Civil War to the early 1960s.²⁰

Finally, the courts of the United States were faced with the difficult issue of resolving the perennial conundrum in any federal entity: wherein lies the balance of power—the states or the center? The forces of the Union had prevailed, but this was only with respect to secession from the Union. Far more problematic was whether the military result had altered the federal/state balance. Arguably, it had not, and accordingly, the Constitution had to be interpreted in a manner that would maintain this balance of power between federal and state responsibility. This may be one explanation why such a narrow interpretation of the Fourteenth Amendment was chosen in *Plessy*.

With that background, it is not difficult to see why the separate-but-equal doctrine emerged in the late 1890s. The nation was healing, and this allowed the last of the wounds to be papered over with both sides saving face. On the one hand, equality before the law was ensured; on the other, segregation would permit the South to hold on, at least, to a vestige of its unique way of life. Lost in all this, of course, was the simple goal of true emancipation and a failure to adequately root out and deal with the true emotional and societal underpinnings of slavery.²¹

Having said that, the doctrine of separate but equal did not always operate to bar a successful action on behalf of African-Americans. In many instances, relief was granted in accordance with the doctrine where the facilities in public education were held not to be equal.²² This was certainly the case with regard to some graduate schools.²³ Indeed, in one of the cases that was reviewed with *Brown*,

CISM IN NORTHERN IRELAND (Paul Hainsworth ed., 1998) (showing that racism spreads beyond religion).

19. By the time the London government would again become interested, the problems would become more intractable. See generally DAVID McKITTRICK & DAVID McVEA, MAKING SENSE OF THE TROUBLES: THE STORY OF THE CONFLICT IN NORTHERN IRELAND (2002).

20. See BRIAN DOOLEY, BLACK AND GREEN: THE FIGHT FOR CIVIL RIGHTS IN NORTHERN IRELAND & BLACK AMERICA (1998) for an account of the similarities between the United States and Northern Ireland on the issue of civil rights.

21. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (viewing the Amendment as granting full equality to blacks).

22. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that segregation of a black graduate student within an all-white graduate school, including separate desk at class, restaurant, and library, violated equal treatment); *Sweatt v. Painter*, 339 U.S. 629, 633 (1950).

23. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (striking down a Missouri decision to pay for out-of-state tuition so that a colored individual could attend a law school outside Missouri rather than be admitted to the State's all-white law school and holding that the measure did not provide for equal opportunity within the State). *But cf. Sweatt*, 339 U.S. at 633 (continuing a similar case where the trial court allowed the State to provide an all-black law school). On appeal in *Sweatt*, the Court held that the two law schools were not substantially equal. *Id.*; see

the courts in the State of Delaware found for the plaintiff and ordered that the plaintiff be allowed to attend a “white” school since it was superior to the “black” school.²⁴ However, in all cases, the doctrine of separate but equal had never been questioned or reversed. The cases before the Court, therefore, all presented the starkest of choices. The evidence suggests that in all cases where segregation had been upheld, it was on the basis that there was, or soon would be, equality between the school facilities and other intangibles. Separate but equal would clearly permit the segregation of the races. The Court chose to give its seminal judgment in a case from the state of Kansas, *Brown v. Board of Education*, and it is to this that we now turn.

II. *BROWN V. BOARD OF EDUCATION*

Determining this question through the use of a Kansas case was either an inspired choice or fate’s glorious unseen hand.²⁵ Prior, during, and after the Civil War, the state of Kansas represented in microcosm the overall approach to racial issues within the United States. Kansas was an abolitionist state and joined the Union having abolished slavery. In contrast, its geographic neighbor, Missouri, was a slave state. The tension between these two states was palpable, spilling over into outright expressions of physical violence.²⁶ What is more interesting, however, is that while Kansas was antislavery, this did not translate as pro-equality. The inference that much of Kansas society was racially intolerant is difficult to avoid.²⁷ Although Kansas was a free state and opposed slavery, Kansas adopted segregation legislation that accorded with many of the most extreme measures in the deep South.²⁸

This brings us to a deeper question as to what exactly *Brown* decided. At its narrowest, *Brown* represented the victory of people of one race to share equally in the educational system of their country

also *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (striking down statute segregating city blocks between whites and blacks for residency and assembly on the grounds that the statute arbitrarily denied the citizens access to their constitutionally protected property rights).

24. *Gebhart v. Belton*, 349 U.S. 294 (1955), *aff’g* 91 A.2d 137 (Del. 1952).

25. The use of *Brown* may also have been appropriate since the issue of equal facilities between the white and black schools was fairly close in the Kansas case, forcing the Court to deal squarely with the separate element of the *Plessy* decision as distinct from the lack of equality between the two facilities.

26. See generally ALBERT CASTEL, *CIVIL WAR KANSAS: REAPING THE WHIRLWIND* (1997); JAY MONAGHAN, *CIVIL WAR ON THE WESTERN BORDER 1854-1865* (1985).

27. The Free State Party of Kansas (later merged with the Republican Party) declared that the “best interests of Kansas require a population of free white men, and that in the organization we are in favor of stringent laws excluding all Negroes, bond or free, from the Territory.” D.W. WILDER, *THE ANNALS OF KANSAS, 1541-1885*, at 76 (new ed. 1886). The Kansas Constitution permitted suffrage to whites only, although the federal constitution rendered this element inoperative for most of its history until its formal repeal. See CRAIG MINER, *KANSAS: THE HISTORY OF THE SUNFLOWER STATE 1854-2000*, at 126 (2002).

28. See generally GRETCHEN CASSEL EICK, *DISSENT IN WICHITA: THE CIVIL RIGHTS MOVEMENT IN THE MIDWEST 1954-1972* (2001); MINER, *supra* note 27.

and not to be denied this right simply based on the color of their skin.²⁹ There is, however, a difficulty with precedent in the common law legal systems. Like days of old, uncritical and nonreflective use of precedent can often blind us to the underlying realities with which many of our decisions are imbued.³⁰ At a more abstract level, *Brown* stands for a prohibition on treating people differently for no valid reason. *Brown* cannot be said to support the abolition of different treatment per se. Equal treatment often requires treating people differently. Indeed, justice demands differential treatment if right is to prevail. Can we be said to have done justice if we were to treat the blind equally with the sighted? Of course not, yet there is no doubt that it is enormously complex as to the limit of the differential treatment that is required to achieve justice. It would be equally as unjust if one were to elevate the blind above the sighted, for this would simply be an imposition of injustice in reverse. The trick is to provide sufficient differential treatment between the sighted and the blind so as to allow both the same access to opportunity that would otherwise be denied one. *Brown* was a clear instance where the differential treatment was itself the cause of the injustice, but it must also be accepted that the logical corollary of the *Brown* decision is that at times the lack of differential treatment may be the cause of injustice. It is with that in mind that any analysis of the Irish perspective on *Brown* needs to be addressed.

III. THE IRISH SITUATION

A. Introduction

It is this corollary argument, that the lack of differential treatment causes injustice, that is more applicable in an Irish context and where the parallels of *Brown* have strong echoes in Irish policy and jurisprudence. It is not hard to see why. Race problems in America, as elsewhere, pose very visible acts and consequences. Society discriminates against a significant minority on the basis of fear because minorities are different in an obvious and unavoidable way: the color of their skin is different. Although claims may often be made that this is based on a perceived inferiority of those with different skin color,

29. The key element in *Brown* was the treatment of equality in intangible factors. Even where there was, or soon would be, equality with respect to tangible items, segregation based on race was itself a denial of equal opportunities to minority children. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). This ruling was quickly extended beyond the sphere of public education to include other areas. *See, e.g.*, *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom seating); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurants); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches). It would take significantly longer for antimiscegenation statutes to be ruled unconstitutional. *See Loving v. Virginia*, 388 U.S. 1 (1967).

30. *See generally* RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* (1979).

the true underlying reality is fear of the difference and fear of what accepting that difference may mean. Whether this be based on skin color, or something more difficult to ascertain such as religion, it is, for those who want to see, blindingly obvious that the basis of the discrimination is not sustainable.

It is usually easier to see the horror of such discrimination as a disinterested onlooker, although one's reactions are remarkably different when faced with the reality of living in the particular society. The Republic of Ireland has created a myth unto itself of being an oasis of open liberalism where intolerance and discrimination based on race is spurned by most, if not all, of society.³¹ As a nation, the Republic has often taken the high road in international affairs, standing up for the oppressed around the world. Yet an anthropological study of Irish people would surely find that as a race, Irish people are no less prone to racism and discrimination than others are. Two easy examples would be the strong history of racism of the Irish in Boston³² and the bitter internal disputes among the Irish with respect to differences in religion. Although much prominence is placed by Irish nationalists on the discrimination of Irish Catholics by Irish and English Protestants, this is partially because in the vicious religious wars that swept Europe between Catholicism and Protestantism, the Protestants won in England.³³ There is strong evidence to suggest that had Catholicism prevailed, the very same discrimination would have been applied in reverse. Protestant discrimination towards Catholics was simply the outcome of a war that could have gone either way. In some parts of Europe, Catholics prevailed, and similarly brutal regimes imposed upon the vanquished Protestants.

In Northern Ireland, society remained sharply divided between Catholics and Protestants. The Protestants, however, were in the ascendant, and with support from their allies in Scotland and England, they managed to carve out a state with a substantial Catholic minority. That minority caused great fear in the majority, and the emergence of new discriminatory measures against Catholics was a natural, albeit despicable, consequence.

But the Republic of Ireland is a different story. On the surface it was, at its creation, a homogenous society both in terms of race and in terms of religion. Very few Protestants remained in the population. The people shared a common race, a common religion, and a common

31. See generally MÍCHEÁL MAC GRÉIL, *PREJUDICE AND TOLERANCE IN IRELAND* (1980).

32. See RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970s* (1991); THOMAS H. O'CONNOR, *THE BOSTON IRISH: A POLITICAL HISTORY* (1995).

33. See NORMAN HOUSLEY, *RELIGIOUS WARFARE IN EUROPE, 1400-1536* (2002); RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS, 1559-1715* (2d ed. 1979).

sense of a shared history. Those who were different in not sharing these features, mostly religion and the sense of a shared history, were a very small percentage of the population. Any analysis of the Irish perspective of *Brown* needs to take this into account. If it is accepted that the true construction of *Brown* is that discriminatory treatment of people without proper cause is unjust, then an analysis of the Irish perspective must analyze not merely the de jure potential for discrimination but also the de facto result of state action with respect to minorities.

B. *The Irish Constitution—1937*

Any discussion of Irish law really has to begin with the Irish Constitution, known in Gaelic as Bunreacht na hÉireann.³⁴ Adopted by plebiscite in 1936, it is the true representation of the Irish people without external British interference. Its primary author, Eamonn de Valera,³⁵ is said to have modeled it on the United States Constitution, including judicial review. However, he incorporated a parliamentary- rather than presidential-type executive. The Irish Constitution has a strong commitment to fundamental human rights in Articles 40-44, again said to be heavily influenced from the United States Bill of Rights.³⁶ However, it is also true to say that many of these fundamental right provisions first appeared in the Irish Free State Constitution, which was effectively imposed by the British on the twenty-six counties as part of the settlement arising from the War of Independence.³⁷

The failure of the Irish Free State Constitution, which the British saw as safeguarding the rights of the protestant minority, arises strictly from parliamentary machinations of the new Irish State, which allowed for the Free State Constitution to be amended by the legislature for a specific period following its enactment.³⁸ As the Free State came into being, it was plunged into a civil war with those who would not accept the Treaty provisions between the United Kingdom and the

34. Pursuant to Article VIII of the Constitution, the Irish language version is the authentic version in the event of any conflict between the two versions. Art. 8, Constitution of Ireland, 1937.

35. Generally regarded as the leading Irish politician, elected as President of the first Dail, de Valera opposed the 1921 Treaty with the United Kingdom, which partitioned the State and led the ultimately defeated anti-Treaty forces in the ensuing Civil War. By 1927, he had accepted the de facto reality of partition and the Irish Free State and proceeded to take his seat in Parliament. By 1932, his statewide popularity saw him elected as Prime Minister where he began dismantling the last vestiges of British rule, capstoned by the adoption of a purely Irish Constitution. See TIM PAT COOGAN, EAMON DE VALERA: THE MAN WHO WAS IRELAND (1993).

36. These Articles provide for rights to equality, free speech, property, due process, etc. See generally JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND (3d ed. 2000); J.M. KELLY, THE IRISH CONSTITUTION (4th ed. 2000).

37. See Irish Free State Agreement Act, 1922.

38. PADRAIG DE BURCA & JOHN F. BOYLE, FREE STATE OR REPUBLIC? PEN PICTURES OF THE HISTORIC TREATY SESSION OF DÁIL ÉIREANN (1922); DENIS PRINGLE, THE STATUTE LAW OF THE FREE STATE (1999).

Free State. The new state portioned the land into two entities: northern Ireland, which would remain within the United Kingdom albeit as a self-governing entity with its own parliament; and southern Ireland, which would leave the United Kingdom, although it would retain its ties in the form of a dominion similar to that of Canada and Australia. As the Civil War developed, the Free State legislature made a mockery of the Constitution, continually extending its ability to modify it, particularly in light of the military requirements to secure the very existence of the State. The Civil War was won by the Free State, but the toll was extensive. Those opposed to the Free State were given amnesty and eventually achieved political rehabilitation, taking their seats in the legislature in 1927. When in 1932, de Valera and those who had opposed the Treaty gained control of the legislature, they set about slowly dismantling the Free State and what was left of its Constitution until, in 1936, it put forward a new constitution for adoption by the people.³⁹

One of the key provisions of the Constitution is the enshrined right that all citizens are equal: “Art 40.1 All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”⁴⁰ However, despite this promise of equal treatment, did the new Constitution discriminate against minorities? The answer is a resounding yes. First, the Constitution can, at best, be said to be a Christian-biased document and more significantly, a Catholic-biased document. From the preamble to specific provisions, the strong hand of Catholicism can be seen not reaching out in compassion but curled into a fist of oppression against those who would disagree with its views. The Preamble states,

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end all, actions both of men and States must be referred, We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial⁴¹

This must obviously have been startling news to the Jews, Protestants, agnostics, and atheists! Even in more recent times, the courts

39. The passage of the Statute of Westminster in 1931, permitting any Dominion status territory to amend or repeal any Westminster statute applying to them, conferred upon the Irish State the power to amend or repeal the Irish Free State Agreement Act 1922. However, the Plebiscite (Draft Constitution) Act of 1937 makes no reference to the Free State Act but appears instead to be the exercise of a sui generis power of the Irish people. There was therefore some argument as to whether the new Constitution is a true successor to the Free State. See *Moore v. Attorney Gen.*, [1935] I.R. 472. Curiously, the American courts examined this issue in *Irish Free State v. Guaranty Safe Deposit Co.*, 222 N.Y.S. 182, 194 (N.Y. Sup. Ct. 1927).

40. Art. 40, Constitution of Ireland, 1937.

41. Pmbl., Constitution of Ireland, 1937.

have referred to the Preamble as informing their decisions. In *Attorney General ex rel. Society for the Protection of the Unborn Children v. Open Door Counseling*,⁴² Hamilton P. endorsed a statement by Chief Judge O'Higgins in *Norris v. Attorney General*⁴³ that "[i]t cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."⁴⁴

Second, in Article 44.2, the Catholic Church was given a special place in the role of the state. It states that "[t]he state recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."⁴⁵ This particular provision was subsequently removed by a referendum in 1972.⁴⁶ However, whether the legacy of such an approach is diminished remains doubtful. The most recent controversy surrounding the interaction between the State and the Catholic Church involved the allegations of child abuse, including sexual abuse, made against members of the Catholic ministries who were charged with the care of certain children on behalf of the State. A recent agreement, seemingly entered into by the Government without legal counsel being present, provided the Catholic Church with an unlimited State indemnity against all such claims in return for the transfers of property to the value of €150 million. Estimates of the total potential liability exceed €1 billion. Moreover, many of the properties to be transferred were properties that the Church sought to offload. The properties are essentially the Church's rejects and have been refused by the State. The Minister responsible at the time, Dr. Woods, admitted that he negotiated the agreement without the presence of state lawyers, whom he accused of being incapable of dealing with the Church authorities. Dr. Woods further stated that his religion (Catholic) and his prior work with the Catholic Church before he became a government Minister was an "asset" in the transaction.⁴⁷ The then-Attorney General (currently the Minister for Justice) has indicated that his office objected to the outcome of the negotiations but was overruled by the Minister concerned.⁴⁸ A subsequent court case found that the State was not liable where the abuse of children had been undertaken by members of the religious orders, despite the clerics operating institu-

42. [1988] I.R. 593 (Ir. S.C.).

43. [1984] I.R. 36 (Ir. S.C.).

44. *Id.*

45. Art. 44.2, Constitution of Ireland, 1937.

46. Amend. 5, Constitution of Ireland, 1937.

47. *See* IRISH INDEP., Oct. 15, 2003.

48. *Id.*

tional care on behalf of the State.⁴⁹ The implication is that, in fact, the State owed no liability for the unauthorized acts of abuse by the religious, and the indemnity deal was unduly favorable to the Catholic Church. In Article 44.3, the Constitution goes on to state that “[t]he state also recognizes the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.”⁵⁰

Clearly, a new messiah was not welcome! Had this article not been repealed, today might have seen the courts trying to ascertain whether a particular religion was present in Ireland in 1937. Fortunately, this provision, together with the special position of the Catholic Church, is gone, but not before its existence would once again reveal a latent pro-Catholic bias on the part of the judiciary. In *In re Tilson, Infants*,⁵¹ a claim by a Catholic mother for custody of children placed into care by her Protestant husband skirted with an argument that Article 44.2 would provide the Catholic mother with a preferential treatment when compared to her Protestant husband. Although not necessary to the decision, the vagueness of the wording by the majority caused alarm on the part of Judge Black, the minority dissenter.

It is not, in my view, enough to say that we are not now holding that [Art. 44] confers any privileged position etc.; for that might be read as admitting of a mental reservation that these articles do confer such a privileged position, and that although not now held to do so, they may at some future time be held to do so.⁵²

Judge Black wanted to wholeheartedly disassociate himself from any such inference, expressly stating that such a privileged position was not sustainable. But he did so alone.

The Constitution does protect against discrimination based on religious grounds, and there is also a constitutional provision that prohibits endowing any church.⁵³ Very often, a contrast is drawn between this provision and the establishment of the church in England. This

49. This case is still in litigation. In Ireland the Law Reports only report High Court and Supreme Court decisions. A copy of the lower court decision is on file with the author.

50. Art. 44.3, Constitution of Ireland, 1937.

51. [1951] I.R. 1. There is ample history of discriminatory treatment meted out by the Catholic majority against the rather insignificant Protestant minority. In a small rural village known as Fethard-upon-Sea, a Protestant woman married a local Catholic farmer. The mother objected to having the children sent to a Catholic school, a demand of the local Catholic clergy. The mother fled to Belfast with her children, which resulted in a Catholic boycott of the few remaining Protestant businesses. The boycott strongly divided the country along a religious divide. It was subsequently made into a film, *A Love Divided*.

52. *Id.* at 18.

53. Art. 44.2, Constitution of Ireland, 1937. Article 44.2.2 states, “The State guarantees not to endow any religion.”

again is disingenuous; Catholicism does not seek to become an established church in any state, since it considers itself above states and to be an established church is a hallmark of Protestantism that is locally based. Catholicism has a strong central authority emanating from Rome and the Pope. The Reformation in England under Henry VIII arises not from a break in ideology but rather a break in administrative leadership: the Pope or the Crown.

But there is an important element here that should be recognized. On the surface at least, the State may not favor one religion over another through the disbursement of funds. But how one distinguishes between endowing a church and in other ways advancing it money is a fine line. A straightforward subvention to any church falls afoul of the prohibition, but money given to fund a school operated by a religious order does not.⁵⁴ The education system in Ireland has been delegated to primarily the religious orders and has, traditionally, been segregated between two religions, Catholic and Protestant. The State itself provides hardly any public school system but instead funds the provision of these religious-run schools. Even in the face of fewer and fewer actual clerical teachers, the local Bishop and priests retain considerable authority over the Board of Management of such schools, chairing the Board and controlling to a significant extent the composition of such Boards. Although not litigated, it appears that the judiciary does not regard funding of such segregated schools as being contrary to Article 44.2. Moreover, funding to teach religious education, or the funding of chaplains, or the funding of a curriculum infused heavily with religious overtones also appears to be permissible. The net effect, therefore, is that the State actually provided, and provides, a large income stream to the Catholic Church through the Department of Education, which pays for the education provided. When the vocations were rich in numbers, many Catholic priests and brothers were effectively receiving a salary from the State in their work as teachers and headmasters. These funds, under the principles of relig-

54. *McGrath v. Trs. of Maynooth Coll.*, [1979] I.L.R.M. 166 (Ir. S.C.) (Kenny J., in dictum) (stating that since the seminary was also a constituent college of the National University, this did not constitute an endowment). Justice Walsh of the Supreme Court, writing extra-judicially stated that

there seems to be no objection to the state providing religious education if the parents wish it for their children, and to the state providing the type of religious education requested by the parents. As taxpayers, parents should be free to require some of their tax be devoted to the teaching of what they wish for their children to learn. This is not a contravention of the provision of Art. 44, whereby the state guarantees not "to endow any religion." The teaching of religion, or of any particular religion, as a subject in education is not to be confused with the endowment of a religion.

The Constitution and Constitutional Rights, in THE CONSTITUTION OF IRELAND 1937-1988 (Litton ed., 1988).

ious orders, are remitted back to the Catholic Church.⁵⁵ This was, de facto, if not de jure, an endowment of the Catholic church, albeit only to the extent that remuneration was received in excess of the cost incurred in supplying the service. No other church had, or could have, access to such a vast income stream. Protestant schools, relying upon a small and dispersed population, could claim little in comparative terms of the money going to the Catholic Church. Smaller religious establishments could claim even less.

There are two important features that this gives rise to. First, the Catholic Church diversified its operations and extended them beyond the standard educational establishment to include specialized schools for the disadvantaged, the physically and mentally challenged, and “disruptive” youth. It is in these franchised operations that the State has now assumed full indemnity for any potential liability incurred by the Church arising from their systematic and institutionalized abuse, physical and sexual, of these disadvantaged children. Second, the sheer dominance of Catholic schools meant that whatever religion one came from, the national curriculum followed was specifically Catholic in orientation, so even Protestant or Jewish schools would have to teach a Catholic ethos.⁵⁶ That Catholic ethos continued on the concept of segregation and nationalism that had little time for the nuances of two opposed traditions and even less time for those from outside either tradition. To cite an example, for many years the neutrality in World War II in the face of the evidence of the holocaust⁵⁷ and the condolences offered by Prime Minister de Valera on the death of Hitler,⁵⁸ was regarded in the national curriculum as evidence of the cunning of de Valera with little mention made of the moral imperatives that should have arisen in Irish minds in the deaths of six million Jews. But this approach is highly consistent with the concurrent Papal interaction with the Nazi regime during this period.⁵⁹ Irish neutrality reflected Catholic neutrality in the face of evil, and the State effectively paid the Catholic Church to impose this view on its people in the educational system.

55. Order priests generally have their salary mandated to the Order they serve and in return receive a small stipend. Parish priests on the other hand do not take a vow of poverty and are free to retain any earned income for their own benefit.

56. See the National Curriculum, which mandates the curriculum to be followed in all academic subjects from primary school through high school education. The text of the most recent curriculum is available at <http://www.education.ie/home/home.jsp?maincat=17216&category=17216&feature=curriculum&language=EN>.

57. See generally JOHN P. DUGGAN, *NEUTRAL IRELAND AND THE THIRD REICH* (1985).

58. De Valera appears to have been the only head of state to offer such condolences, although a subsequent British assessment charitably refers to it as being based on abstract principle. His commentary on the passing of Sir Winston Churchill is illuminating. See *De Valera 'Never Forgave Churchill,'* TELEGRAPH.CO.UK (Aug. 15, 2001) at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/08/15/npro115.xml>.

59. See JOHN CORNWELL, *HITLER'S POPE: THE SECRET HISTORY OF POPE PIUS XII* (1999).

Finally, within the document itself are copious examples of substantive Catholic ideology that permeate its entire fabric. A classic example was the constitutional prohibition on divorce,⁶⁰ repealed only as late as 1985, that represented a uniquely Catholic, as distinct from necessarily Christian, ethos.

C. Court Jurisprudence

The courts have a poor record as being anything other than subject to the same ethos of discrimination that permeates the Constitution. In *Quinn's Supermarket v. Attorney General*,⁶¹ the complainant challenged the constitutionality of a ministerial order prohibiting the opening of any butcher shop after 6:30 p.m. on Saturday until 8:00 a.m. the following Monday. The complainant argued that this discriminated against the Jewish community who observed a different Sabbath. The court, in rejecting the claim based on the right to equality under Article 40.1, went on to say that

this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow.⁶²

Yet construed narrowly, this opinion would limit the scope of equality to relatively rare instances, for in a modern society our value and worth as a human being in large part finds expression in the lawful activities, trades, or pursuits that we engage in. As Maine put it, society has moved "*from Status to Contract*,"⁶³ and, yet, this decision saw the issue in terms of status as distinct from the activities that we enjoy by virtue of our humanity. It is not hard, therefore, to see where this sort of logic leads. In *Murtagh Properties v. Cleary*,⁶⁴ members of a trade union picketed the property of the plaintiffs in an at-

60. Art. 41.3.1, Constitution of Ireland, 1937. This provision overturned the long-held jurisdiction of the common law courts to grant divorces and, in particular, the jurisdiction that has existed since 1922 under the Free State Constitution. The prohibition was repealed in 1996 and replaced with a constitutional divorce process.

61. [1972] I.R. 1 (Ir. H. Ct.).

62. *Id.* (emphasis added).

63. HENRY SUMNER MAINE, *ANCIENT LAW* 165 (1963).

64. [1972] I.R. 330 (Ir. H. Ct.).

tempt to prevent the continued employment of female workers. The claim based on equality failed. Judge Kenny stated that Article 40.1 is

not a guarantee that all citizens shall be treated by the law as equal for all purposes It relates to their essential attributes as persons, those features which make them human beings. It has, in my opinion, nothing to do with their trading activities or with the conditions on which they are employed.⁶⁵

With respect, if Judge Kenny is unwilling to view one's gender as an essential attribute as a person, it is difficult to envisage exactly what would qualify. The alternative inference is that Judge Kenny regards a person's gender as an element of his or her trading activity, a proposition that would simply beggar belief.

Admittedly, the narrow construct of the concept of equality to essential attributes of a human being, which excludes all sorts of activities that define us in a modern society, is tempered by the conferral of specific constitutional rights that often result in a greater protection than that afforded by the general equality provision within the Constitution. Moreover, in recent times, some of the judges have indicated that equality might refer to aspects broader than those posited by the earlier case law and might include ancillary economic rights that make us what we are in society. However, there is no rush from the bench to elaborate on the scope of equality, and it remains somewhat of a backwater in legal jurisprudence.

The decisions on equality clearly state, sensibly, that equality does not necessarily mean treating everyone the same. As Judge Walsh stated in *The State (Nicolaou) v. An Bord Uchtala*,⁶⁶

[Article 40.1] is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes . . . inequality may or must result from some special abilities or from some deficiency or from some special need and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens.⁶⁷

In *In re Philip Clark*,⁶⁸ the court held that provided there was no discrimination within a distinct group, treating that group differently from others was justifiable.⁶⁹ It presupposed that the reason for the creation of the group was itself justifiable but did not explain on what basis such group creation would be allowed or condoned. The devil is in this particular piece of detail. Testing for equality, therefore, re-

65. *Id.* at 334-35.

66. [1966] I.R. 567 at 629 (Ir. S.C.).

67. *Id.*

68. [1950] I.R. 235 (Ir. S.C.).

69. *Id.* at 248; *see also* O'Brien v. Mfg. Eng'g Co., [1973] I.R. 334 (Ir. H. Ct.) (“[The lower court's decision] overlooks the second sentence of Article 40 [section 1] of the constitution which envisages that citizens may be divided into different classes. Therefore, it would appear that there is no unfair discrimination provided that every person in the same class is treated in the same way.”).

quires an analysis of the righteousness, or otherwise, of defining the group into which an individual can be placed. One interpretation is that in a homogeneous society, the court can confer considerable discretion on the state in defining groups that can be treated in different ways from others in society. This is presumptive permissive discrimination.⁷⁰ The court views different groups as being established only for predominantly “good” reasons.⁷¹ Obviously, the creation of a group required to further a constitutional imperative would fall within this category. Thus, the minority opinion in *de Burca v. Attorney General*⁷² pointed out that the prohibition on women serving as jurors can be justified on the basis that males and females can be classified into different groups and treated differently. As Chief Judge O’Higgins stated,

When one considers the special recognition of women and mothers in Article 41 of our Constitution, it does not appear inappropriate that the State in its laws should give some preference to woman; particularly when the exercise of her right in relation to jury service also involves the acceptance of a burden . . . some preferential treatment of women citizens seems to be contemplated by the Constitution.⁷³

O’Higgins also felt that the distinction could be justified under Article 40.1, which permits discrimination based on social or physical capacity. In *Dillane v. Ireland*,⁷⁴ Judge Henchy stated that

[w]hen the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons on the express or implied ground of a difference of social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious or other-

70. There is in fact only one explicit mention of the need to justify the creation of the group as distinct from ensuring equal treatment within. See *Brennan v. Attorney Gen.*, [1983] I.L.R.M. 355. The court stated that “it might be prudent to express what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be fairly treated.” *Id.*

71. In *O’Brien v. Keogh*, [1972] I.R. 144 at 150 (Ir. S.C.), the term “invidious discrimination” was used as the standard whereby a group classification would become unconstitutional. The term “invidious” has an unsettled history in Irish jurisprudence. In *Murphy v. Attorney Gen.*, [1982] I.R. 241 at 279 (Ir. S.C.), the court stated that

[t]hroughout the argument . . . the phrase “invidious discrimination” was used to indicate the type of inequality which is prohibited by [Article 40.1]. According to the 1979 edition of the Collins English Dictionary, “invidious” means “1. incurring or tending to arouse resentment, unpopularity 2. (of comparisons or distinctions) unfairly or offensively, discriminatory.” While the second meaning can be used to describe the inequality prohibited by [Article 40.1], the primary meaning of the word is the first, and its use in discussing Article 40.1 is more likely to mislead than to help.

Id. The term “invidious” appears to have an American origin. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (describing the test as an arbitrary or capricious standard); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (holding the test is whether the difference in treatment is invidious discrimination); *Allied Store of Ohio, Inc. v. Bowers*, 358 U.S. 522, 529 (1959) (using invidious to mean “palpably arbitrary”).

72. [1976] I.R. 38 at 57 (Ir. S.C.).

73. *Id.*

74. [1980] I.L.R.M. 167 (Ir. S.C.).

wise not reasonably capable, when objectively viewed in the light of social function involved, of supporting the selection or classification complained of.⁷⁵

Thus, other categorizations that might fall outside constitutional imperatives were also permitted. The key test, therefore, is that the categorization based on social function and physical or moral capacity is not arbitrary. Thus in *Norris v. Attorney General*,⁷⁶ the court held that a distinction between homosexual males and females was justifiable. O'Higgins held that

[the Legislature was] perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as being not only different but as posing no such social problem.⁷⁷

It is interesting to note here that the court could not rely upon the morality exception to equality of treatment because same-sex relations pose identical moral issues irrespective of the gender of that sex.⁷⁸ The court in trying to uphold the legislative criminalization of homosexuality and the permissiveness with respect to lesbianism, could only resort to the social problems arising from each that permitted them to be categorized and thereby treated differently. Although similar reasoning was used in a German court in 1957, the Irish case arose thirty years later in the mid-1980s. Further, while this reasoning can arguably refer to the social problems arising from same-sex relations in general, it cannot be that male relationships threaten the social order more than female relationships unless, whatever the express wording of the judgment, the underlying rationale is either (a) males are of more value to society or (b) the female choice can be overridden through force whereas the male choice cannot. Both possibilities are highly unsavory, yet there is little else. It would take a decision by the European Court of Human Rights to decriminalize male homosexuality in Ireland⁷⁹ combined with more than four long years of procrastination by the legislature for this to happen.⁸⁰

75. *Id.* at 169.

76. [1984] I.R. 36 (Ir. S.C.).

77. *Id.*

78. *Id.* The court referred consistently to moral themes:

[I]n the very act [of adopting a Constitution consistent with religious conviction and Christian beliefs] the people [could not have intended to render] inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. . . . I regard the State as having an interest in the general moral well being of the community and being entitled, where it is practicable to do so, to discourage conduct which is morally wrong and harmful to a way of life and to the values which the State wishes to protect.

Id.

79. *Norris v. Ireland*, App. No. 10581/83, 13 Eur. H.R. Rep. 186 (1991) (Eur. Ct. H.R.).

80. Criminal Law (Sexual Offences) Act, 1993, § 14 repeals the criminalization of male homosexual acts.

Perhaps most worrying of all has been the courts' original basis for the establishment of further unenumerated rights within the Constitution. In *Ryan v. Attorney General*,⁸¹ the court was asked, inter alia, to establish that the plaintiff had a constitutional right to bodily integrity. Ms. Ryan argued that she relied upon the public water supply and that the state, without her consent, had adulterated the water supply through the addition of fluoride. The state readily admitted that it had added this chemical to the drinking water supply as part of a campaign to raise hygiene among the people. It argued, inter alia, that there was no express provision within the Constitution that bestowed a right to bodily integrity on any individual. The state further argued that it was entitled to add this chemical over the protestation of Ms. Ryan since it was charged with exercising its functions for the common good.

The judgment in this case is illustrative. The court first held that the Constitution was neither exhaustive nor exclusive with respect to the fundamental rights enjoyed by the citizenry. Thus, there were unenumerated rights that the court could infer into the Constitution. These rights were antecedent to positive law, indeed antecedent to that of the Constitution itself. That there were unenumerated rights was clearly established from the very nature of the Constitution itself. It was a Christian Constitution, and Christians subscribed to natural law, which was higher than positive law. The issue then became how these unenumerated rights could find expression. This was clearly the role of the judiciary, but such a right was not an absolute power of the judiciary. Instead the judiciary would be guided and informed by this natural law.

On analysis, the court was satisfied that the natural law upon which the people had enacted the Constitution was that of Catholic natural law. Thus, in defining the unenumerated rights, the court was justified at looking at Catholic teaching. The court then cited a papal encyclical where the Pope referred to, inter alia, the right to bodily integrity as one of the rights as a human being.⁸² Having found in theory that Ms. Ryan did in fact have a constitutional right to bodily integrity as an unenumerated right under the Constitution, the court rejected her claim on the basis that this right was subject to the common good, and the state had exercised its powers for the common good. Thus, fundamental rights are basically those of the Catholic

81. [1965] I.R. 294 (Ir. H. Ct.).

82. The court argued that "there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Art. 40 at all—the right to free movement within the State and the right to marry are examples of this." *Id.* In fact, the court found that one of the fundamental rights of all men was a right of bodily integrity. *Id.*

Church. For the non-Catholic citizens of Ireland, there was little to be done.

This view is reflected in a diverse number of areas. The court has defined the family narrowly within the strict confines of the Catholic heterosexual union for procreation. And as we saw in *Norris*, the laws prohibiting homosexuality have been upheld with some vigor on the part of the courts.

It is clear, therefore, that both the Constitution itself and the judicial interpretation thereof constitute a disguised policy that favors the dominant Roman Catholic majority, both in its express provisions and in the underlying application of the rules. Seldom did this discriminatory treatment find open expression, but at times the façade of civility slipped.

*Schlegel v. Corcoran & Gross*⁸³ stands as one of the most shocking decisions in the Irish legal system but may also open a light into the true inner workings of a nation that prides itself on its liberalism and tolerance of other races and creeds. In this case, a landlord had received a request to approve the assignment of an existing lease to a new tenant. Pursuant to relevant legislation, the landlord could not unreasonably refuse this request. The landlord refused to consent based on the fact that the new tenant was Jewish. The action came before the courts to determine whether this refusal was unreasonable. The court, under Judge Gavan Duffy, refused to hold the landlord's actions as being unreasonable. To use his own words,

The plaintiff's objection has been characterised as a caprice and as a mere prejudice; but caprice is not the right word for an anti-Semitism, which, far from being a peculiar crotchet, is notoriously shared by a number of other citizens; and, if prejudice be the right word, the antagonism between Christian and Jew has its roots in nearly 2,000 years of history and it is too prevalent as a habit of mind to be dismissed off-hand, in a country where religion matters, as the eccentric extravagance of a bigot, without regard to the actual conditions under which consent was withheld.⁸⁴

Judge Gavan Duffy, therefore, upheld the right of the landlord to discriminate based on religious grounds. Many argue that the legal argument is incorrectly founded, that the case would be decided differently today and that it was wrongly decided at the time. But all these exculpatory justifications or excuses fail to address the core issue: How could a legal system tolerate individuals who hold such beliefs, and if such an individual felt strongly enough to express those beliefs in a very public manner, how does this reflect upon society? Neither can we confine this to its historical moment in the mid-1930s,

83. [1942] I.R. 19 (Ir. H. Ct.).

84. *Id.* at 25. See generally DERMOT KEOGH, *JEWS IN TWENTIETH-CENTURY IRELAND: REFUGEES, ANTI-SEMITISM AND THE HOLOCAUST* (1998).

an era of growing anti-Semitism. The failure of the courts even at this late stage to condemn roundly this judgment, coupled with the continuing latent preference for Catholic, or at the very least Christian, religion in the application of constitutional imperatives should sound a series of warning notes. While anti-Semitism might well have been the fashionable prejudice in the 1930s, there are emerging signs that racial intolerance based on skin color may be its unfortunate replacement within modern Ireland. Moreover, there are antecedents to racial discrimination in the form of an existing distinct grouping within Irish society.⁸⁵

What is clear from the foregoing survey is that, despite a relatively homogenous society, the Irish state, both in its laws and in its ethos discriminated extensively against non-Catholic nationalists. It adopted a constitution unduly favorable to the majority religious grouping. The application of those constitutional provisions was consistently undertaken in a manner that aggressively protected and enhanced that discrimination, and finally we saw that this legal culture simply reflected the underlying societal values present in the jurisdiction. We turn now to see how this *de facto* societal discrimination found expression outside legal constraints against minority communities, both traditional minorities and emerging minorities.

IV. BREAKING IRISH HOMOGENEITY

We have seen that the laws and jurisprudence of Ireland operated a disguised form of discrimination that favored Catholics over those from other religions. We analyzed this on the assumption that Irish society was not amenable to immediate segregation based on blindingly obvious distinctions. However, there has always been a group of people set apart from the population on grounds other than religion, namely the Travellers or Itinerants. Moreover, in recent times, that diversity within society has grown as a result of net inflows of people from other jurisdictions, and it is to these groups that we now turn.

A. *The Itinerants*

Itinerants represent an ethnic grouping of people who elect to have no fixed abode but travel the countryside depending upon the seasons and live in mobile homes drawn behind today's equivalent of the horse: the SUV.⁸⁶ This is an elective choice, although some are probably the legacy of dispossessed tenants who lost their land in the

85. See *infra* Part IV.

86. See generally IRISH TRAVELLERS: CULTURE AND ETHNICITY (May McCann et al. eds., 1994). There are approximately 21,000 such travellers in Ireland at present. The Travellers: Ireland's Ethnic Minority, at <http://www.qub.ac.uk/en/imperial/ireland/travellers.htm> (June 23, 1999).

great agrarian struggle between landlords and tenants, and their composition as a group is as diverse as that of their settled counterparts. Some are exceptionally poor, some quite wealthy, some are unskilled workers, others craftsmen, still more are merchants. Despite this, for the most part, they form a recognizable and distinct grouping within Irish society. These itinerants live a nomadic existence essentially on the side of the road. In addition to a distinct linguistic dialect of the English language, they have their own set of customs, traditions, and moral codes, few of which the settled population would be comfortable with. They may also be identified by appearance through either facial characteristics, accent, or indeed mode of attire. In public perception, they are associated with a lack of hygiene, violence, and evasion of the law.

For these reasons, the settled community has generally taken a jaundiced view of the Travellers. They are regarded with disdain and excluded from locations and events that the settled community would be allowed into. There never was any statutory scheme of segregation,⁸⁷ but a fairly rigid social segregation existed and still exists today.⁸⁸ Most recently, the Bishop of Killaloe, Willie Walsh, offered an

87. In fact, the Report of the Commission on Itinerants in 1963 sought assimilation of the itinerants into the settled community:

[A] substantial amount of the state and local authority assistance . . . given to those itinerants who have not settled down in a fixed abode or who are not . . . on an approved camping site provided for them . . . should be paid in voucher form exchangeable for food and clothing so as to overcome abuse by dissipation on intoxicating liquor . . . Those who settle down should, after a probationary period . . . be paid and treated in every way the same as members of the settled population . . . It will be vitally necessary for the success of any scheme for the absorption and rehabilitation of itinerants, to have . . . local authority committees . . . who are prepared . . . to obtain [the Travellers'] confidence and then encourage them to learn and adopt the ways of settled life . . . All efforts directed at improving the lot of itinerants and at dealing with the problems created by them . . . must always have as their aim the eventual absorption of the itinerants into the general community.

Government of Ireland, Report of the Commission on Itinerancy 106 (1963).

88. Explaining this rigid structure, one commentator noted,

Consider the following recent article from the *Galway Advertiser* (a local newspaper): A Western Health Board member [the local state agency charged with the provision of health services such as hospitals etc.] who called for Travellers to be tagged like livestock to monitor their movements is to be disciplined by his party for his "racist and inflammatory" comments. Fine Gael Councillor John Flanagan (Mayo)—a member of a Traveller committee . . . for 17 years . . . told this month's meeting of the WHB that some tracing mechanism, such as the microchips used to tag animals, should be used to keep tabs on Travellers as they move from county to county. This would prevent them "abusing the system," he said. "There is no knowing what number of them are in the country . . . Our livestock are traceable. Every known animal is traceable whether a pedigree animal or a flapper. We should know at any time where they [Travellers] are . . . They . . . should not have the privilege of lying in the sun "like a pedigree dog, stretching themselves": . . . fellow Mayo councillor and WHB member Padraic Cosgrove shares some of Flanagan's concerns. The settled community is "bending over backwards" to accommodate Travellers but they do not want to be housed, he told the same WHB meeting." (14 May 1998: 1). Councillor Flanagan was cleared of an incitement to racial hatred charge in April 1999 arising from the above statement.

"Citizens of a Kind": An Examination of Newspaper Articles on Travellers from the Founding of the Irish State to the Present Day, at <http://www.qub.ac.uk/en/imperial/ireland/citizens.htm> (June 23, 1999) (alteration in original).

itinerant couple the use of his grounds to hold their wedding reception when the hotel, which had taken the booking, cancelled the event upon discovering their ethnic background.⁸⁹ Such actions against itinerants on the part of the general public are not uncommon.⁹⁰ Let us be very clear here. It is a fact that many in the itinerant community consistently break the law. They cause environmental damage in terms of the haphazard disposal of their waste along the national roads. Many itinerants are not licensed by the state authorities to drive their vehicles; they do not pay road license fees, nor do they carry mandatory insurance coverage as required by law. Many itinerants get involved in public brawls leading to assault and battery against innocent victims. A number are unscrupulous business persons who will swindle innocent customers. A few are certainly straightforward thieves. It would be irresponsible to deny these allegations against members of the itinerant community. But, it would also be irresponsible to deny similar allegations against members of the settled community.

What is of concern here is not that itinerants should be relieved of the obligation to obey the same laws that apply to all citizens of the state, for it is a cardinal principle of our legal system that none are above the law. What is troubling is that because there is a perception that such activities are widespread in the itinerant community, that all members of the itinerant community should be tarred with the same brush, including those law-abiding members. The couple referred to above were unwelcome in the hotel not because they had been guilty of unlawful activities, but because they came from a group perceived to be more inclined to commit such unlawful activities at a greater rate than their settled counterparts. What arises, therefore, is clear segregation into the bulk of establishments that refuse to have anything to do with Travellers and a small remnant of establishments into which the Travellers are confined. Thus, some bars are known to accept Travellers and which the settled community avoids; schools to which Traveller children are more easily accepted and from which settled community parents remove their children. If not a *de jure* application, this is clearly a *de facto* application of the separate but equal doctrine destroyed in the *de jure* sense in *Brown*, although admittedly still alive in its *de facto* application within the United States.

89. See *Wedding Feast on Bishop's Lawn*, IRISH TIMES, May 7, 2003, at 2.

90. Some government officials expressed unfortunate proposals.

In June 1973, Fintan Coogan, West Galway TD (Parliamentary Representative) proposed that an electric fence be used to keep Travellers out of public shelters in Galway city's central square at night. In March 1974, a Mayo Urban Council member suggested that Travellers should be sterilized and then banished to the Aran Islands.

"Citizens of a Kind," *supra* note 88.

There are some who would romanticize this different ethnic and cultural group, seeing within them something noble, rugged, and fundamental in a way that modern society cannot express. For these, the settled society has failed to vindicate and preserve this grouping or to adapt the settled ways to those of the itinerants. There are others who would believe that if the itinerants choose not to assimilate into the settled community, they should be ostracized and placed “beyond the pale.” Neither extreme is, of course, valid. Presumably, most individuals consider their culture nobler, more worthy of preservation than others—this would be necessary for survival. However, there is nothing to indicate in an objective sense that any one societal grouping has more value than another does. Furthermore, discrimination against any group is unjust. Elevating one grouping above others is the corollary of this sort of discrimination. Neither should a society set its values as being sufficiently overpowering so as to obliterate other properly held values by a smaller and different group.⁹¹

A proper analysis in this area is limited by the lack of any legislative basis for segregation that existed in *Brown*.⁹² The segregation is strongly built into society despite the absence of legal rules to the extent that it is perhaps more effective absent these legal rules than it would be if they existed. Since it is societal, rather than legal, the analysis becomes less familiar to lawyers; it is less concerned with authority and precedent, more concerned with anecdotal evidence, perceptions, and so forth. This cannot excuse us as lawyers from the task of ridding the system of this invidious discrimination and, as we shall see below, it is here that laws are being enacted to force societal change. Therefore, we shall return to this issue later.

B. *Immigrants*

Ireland is properly associated with emigration or the flight *from* the land. The history of the famine, the great exodus to North America, and the United States in particular, is well mythologized.⁹³ The romantic Atlantic crossing hides the reality that in fact emigration to England far outweighed the spurt of emigration to the United States during these years. Emigration was not a choice issue, but something forced upon the Irish people through economic necessity. The former President of Ireland, Mary Robinson, attempted a some-

91. The clear intent of the Report was to “rehabilitate the itinerant community.” *Id.* Rehabilitation was to occur through assimilation with the settled community and the eventual extinction of the itinerants as a distinct ethnic identity. *See id.*

92. As we have seen earlier, the legislative and constitutional basis exists with respect to Protestantism, although even here it is an insidious discrimination that effectively “re-educates” the non-Catholic/nationalist in the correct thought pattern.

93. *See generally* KERBY MILLER & PATRICIA MULHOLLAND MILLER, *JOURNEY OF HOPE: THE STORY OF IRISH IMMIGRATION TO AMERICA* (2001).

what cynical re-branding of this emigration into a diaspora, attempting to retain the sense of persecution important to the Irish culture whilst portraying it as an act of selfless love. This idea would be the genesis of what would become that immortal classic: *How the Irish Saved Civilization!*⁹⁴ Although an attempt at self-importance, this demeans the true reality underlying the emigration. Like most emigrations, the failure of the State, both the United Kingdom when it was in control and the Republic in more recent times, to provide the economic environment necessary to retain its population, led them to leave in vast numbers. Emigration further denuded the “wealth” of the country through the transfer of human talent to other nations. The treatment afforded the Irish by other countries to which they emigrated is also part of that mythology.⁹⁵ The classical version has signs on the homes and businesses of London and New York saying, “Irish need not apply.” There are some who would question the validity of the more excessive of these claims, and the evidence is inconclusive. But it is true to say, like any immigrant group, the Irish would have had to fight their way into acceptance by the locals. But fight they did, and like other successful groups, they carved out a niche for themselves in most jurisdictions to which they were attracted.⁹⁶

By the 1990s, through a variety of factors, the Irish economy was performing exceptionally well,⁹⁷ and the tide had turned. Not merely had emigration slowed to a trickle, existing emigrants were now being tempted to return home to the improved environment.⁹⁸ More surprisingly, Ireland itself became a magnet for immigration from nationals of less well-developed economies. We became a net importer of people, something that had not happened for a long time previously.⁹⁹ Now would be the time to judge us on our reaction to those with whom we would, or should, have an empathic understanding: the economic migrant.

94. See THOMAS CAHILL, *HOW THE IRISH SAVED CIVILIZATION: THE UNTOLD STORY OF IRELAND'S HEROIC ROLE FROM THE FALL OF ROME TO THE RISE OF MEDIEVAL EUROPE* (1995); SONYA PERKINS, *THE IRISH TODAY: A CELEBRATION OF IRELAND AND THE IRISH DIASPORA* (2000).

95. See generally REGINALD BYRON, *IRISH AMERICA* (1999); TIMOTHY J. MEAGHER, *INVENTING IRISH AMERICA: GENERATION, CLASS AND ETHNIC IDENTITY IN A NEW ENGLAND CITY, 1880-1928* (2002).

96. See THOMAS H. O'CONNOR, *THE BOSTON IRISH: A POLITICAL HISTORY* (1995).

97. Phillip J. O'Connell, *Astonishing Success: Economic Growth and the Labour Market in Ireland: ILO Employment and Training Paper No. 44*, at <http://www.ilo.org/public/english/employment/strat/publ/etp44.htm>; see also O'CONNOR, *supra* note 96.

98. Although, not all view the fruits of the Celtic Tiger as being equally spread. See PEADAR KIRBY, *THE CELTIC TIGER IN DISTRESS: GROWTH WITH INEQUALITY IN IRELAND* (2002).

99. There were net inflows equivalent to seven percent of the population. In United States terms this population shift would be the equivalent of nearly twenty million people! For a comprehensive report on the new immigration trends, see <http://www.migration.ucc.ie/irelandfirstreport.htm> (last visited Oct. 20, 2003).

Many of the economic migrants come from a different ethnic background.¹⁰⁰ Simply put, they look different. The homogeneity of our society was about to be broken. Different skin colors would appear on our streets. What then would be our response? Intuitively, one might have expected a nation that knows first hand the pain of economic migration to reach out with open arms to aid those in a similar plight, particularly when from a practical point of view our economic well-being was hitting heights never imagined possible.¹⁰¹ Such was not to be.

Although no laws are enacted that segregate people on racial grounds, the de facto discrimination that runs through Irish society has found fertile ground within the new economic paradigm.¹⁰² In August 2001, a report by Amnesty International Ireland found some worrying statistics.¹⁰³ A sampling of ethnic groupings found that over three quarters had experienced more racism, and over a third had frequently overheard or seen people making insulting comments about their ethnicity. The most frequent situations involving discrimination concerned accommodation or dealings with landlords; using public transport; gaining entry to pubs, clubs, and restaurants; and dealing with banks. One presumes that these difficulties would not have been out of place in the *Brown* era, or perhaps even today.

For international students, a 1998 report found that this grouping had suffered a relatively high level of racist, ethnicist, or nationalist xenophobic discrimination, particularly off campus. Almost ninety percent of nonwhite students had experiences of racism. At least two-thirds of the offending acts occurred in the general community with only one-sixth occurring on campus.¹⁰⁴ There is anecdotal evidence of segregation similar to that which emerged with the Travellers. Cultural diversity in Ireland may yet yield, if left untreated, a legacy of civil rights abuse that *Brown* ended fifty years ago in the United States.

100. Estimates are that immigrants from outside the European Union or United States constitute twelve percent of total inflows, or approximately 29,000 people. See CENTRAL STATISTICS OFFICE, POPULATION AND MIGRATION ESTIMATES 8 (2000). However, many commentators claim the figure refers to official records only and underestimates significantly the true situation.

101. See generally Bryan Fanning, *Reluctant Hosts: Refugee Policy in Twentieth-Century Ireland*, ADMIN. WINTER 2000-01, at 83; GOVERNMENT OF IRELAND, COMMISSION ON EMIGRATION AND OTHER POPULATION PROBLEMS 1948-1954: REPORTS (1956).

102. See *New Incitement of Hatred Act Sought*, IRISH TIMES, Mar. 14, 2001, at 4; *Visas for Immigrant Workers Sought by SIPTU*, IRISH TIMES, Mar. 22, 2001, at 3; Cormac O'Keeffe, *Immigrants Treated Little Better than Bonded Labour, Claims Union*, IRISH EXAMINER, Mar. 22, 2001, available at http://archives.tcm.ie/irishexaminer/2001/03/22/current/ipage_7.htm.

103. See AMNESTY IRELAND, THE VIEWS OF BLACK AND ETHNIC MINORITIES (Sept. 2001) (on file with author); AMNESTY IRELAND, RACISM IN IRELAND: A SUMMARY OF RESEARCH (July 2001) (on file with author).

104. See THE VIEWS OF BLACK AND ETHNIC MINORITIES, *supra* note 103; RACISM IN IRELAND: A SUMMARY OF RESEARCH, *supra* note 103.

V. POSITIVE DEVELOPMENTS IN RECENT TIMES

It is clear that there is within Irish society a consistent trend towards discrimination despite a façade to the opposite. In the beginning, this discrimination finds expression in constitutional and juridical pronouncements against non-Catholics. Over time, the homogeneity of society, together with a latent racism, is reinforced. Moreover, the de facto discriminatory nature of Irish society finds considerable expression in the treatment of itinerants and in more recent times, that of foreigners. But the news is not all bad. Today's judiciary, although not perhaps rushing to disavow the jurisprudential legacy of their predecessors, has clearly demonstrated a changed ethos, less inclined to tolerate the discrimination of the past. Membership in the European Union (EU) has reinforced societal values of tolerance for difference. This has occurred in the legal context through the passage of many laws mandated by membership in the EU; it has also occurred as a result of the resultant openness in our society that membership in the EU confers. The passage of the Equality Act represents for the first time a comprehensive legislative base to deal with all forms of discrimination. Further, the establishment of a new Equality Agency has shown itself to be aggressive in ensuring equality of treatment that had previously been missing. Segregation at a de facto level is being challenged albeit with mixed results.

There was an election slogan during the last campaign advertised by the ruling Fianna Fail political party: Lots done; Lots more to do. It is a fitting epitaph on the current Irish position. Significant strides have been made in the area of discrimination and segregation, but there is an awful lot more to do. The increasing diversity of our society is forcing us to see that tolerance and equality require more than mere words. A diverse society requires forthright governmental action to ensure that the "better angels of our nature" come to the fore.

VI. CONCLUSION

The analysis of Ireland's response to discrimination may seem unduly critical, but with respect, this is not the case. Ireland had a unique opportunity. It did not have to contend with the obvious and blatant forms of discrimination that blighted countries like the United States and the United Kingdom. Ireland could not practice racism because it had no one on whom to practice. Freed from these difficulties, it was possible to have taken the opportunity to become more self-analytical, to test whether the hidden boundaries of tolerance also required work when there was no visible presence of discord. For too long this willingness simply was not there. In fact, there was a hidden

form of discrimination designed to confine the society to even narrower homogeneous roots.

In the last ten years, Ireland has become a very different country from its early genesis, and yet, in many ways, it remains the same. The material wealth of the Irish people has forged ahead, the infrastructure has improved immeasurably, and the quality of life is on a par with the wealthiest nations in the world. Yet at heart, Ireland and its people remain unchanged. Rich in a transient welcome, it is a society closed to those who are different or to those who would change the fabric of its self-engineered construct. But this may be about to change. Membership in the European Union imposes obligations to open society to diverse cultures and individuals. The silence of homogeneity appears to be crumbling from the sound of diverse voices who have come from outside, or whose voices have been freed from within. There are signs that the State, faced with the strident voices of diversity, will now begin to change and adapt. There is hope that the State will adopt many of the lessons it stridently sought to impose on others, but which it has been slow to use itself.

This article is titled “the better angels of our nature.” Sometimes we forget that it is easier to see the absence of the “better angels of our nature” in the acts of others than to see the same in ourselves. Sometimes a culture can be so consumed with the wrongs of others that it misses the glaring faults in itself. A homogenous culture is especially prone to that. As Ireland moves slowly but inexorably away from this type of society, it must seek its own epiphany. There is no judicial equivalent of *Brown* in Irish jurisprudence, and until there is, Ireland will miss out on the true impact of the lessons that this case teaches us. If *Brown* teaches us anything fifty years hence, it is that discrimination should not wait to be discovered or exposed. Discrimination is something with which we must struggle every day of the week; it is a struggle that we cannot dismiss simply because it has no obvious constituency that faces us day in and day out. *Brown* teaches us to open our minds to the discrimination that lies in the heart of humanity and to conquer it in all its forms. From Ireland, lessons may need to be learned that despite the absence of overt signs of discrimination, the invidiousness of covert discrimination is ever present.

