

1998

Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Abuse Context

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Anthony T. Barnes, Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Abuse Context, 31 *Vanderbilt Law Review* 641 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol31/iss3/1>

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NOTES

Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Abuse Context

ABSTRACT

On November 24, 1995, the Irish population voted to ease Ireland's constitutional ban on divorce by means of a constitutional amendment. The new amendment and the bill that effectuates it give Irish citizens a limited legal right to end their marriages for the first time in Ireland's history. The limits surrounding Irish divorce consist of a significant waiting period, a living-apart requirement, and a slant toward mediation.

This Note explores the predicaments of abused spouses and the unique risks that Ireland's divorce limitations pose to spousal abuse victims seeking to end their marriages. This Note argues that the limitations of Ireland's newly created right of divorce potentially violates battered Irish spouses' rights to equal protection and bodily integrity under Irish constitutional jurisprudence, the European Convention on Human Rights, and developing international norms articulated in the Women's Convention.

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I. INTRODUCTION

In 1937, Eamon de Valera drafted the Irish Constitution using text that explicitly highlighted the favored status of the Roman Catholic Church within Ireland.¹ Although Ireland ultimately dropped this express language of favoritism, its Catholic-based tenets remained in the Constitution.² One such tenet, found in Article 41, provided that “[n]o law shall be enacted providing for the grant of a dissolution of marriage.”³ Operating under this prohibition, Ireland was, excepting Malta, the only European country outlawing divorce.⁴

On November 24, 1995, the Irish population voted on a referendum proposing to ease the prohibition on divorce by constitutional amendment.⁵ The opposing sides of the

1. John Macleod, *Faithful Daughter of Mother Church*, HERALD (Glasgow), Nov. 28, 1995, at 23, available in LEXIS, News Library, GHERLD File.

2. *See id.*

3. IR. CONST. art 41, § 3, cl. 2.

4. *See* Ray Moseley, *A Changing Ireland Votes on Divorce; Many Have New Partners but Can't End Old Marriages*, CHI. TRIB., Nov. 24, 1995, at 1, available in LEXIS, News Library, CHTRIB File. For a discussion of the practical effect of the divorce ban in Ireland as well as a description of alternative separation mechanisms, see generally ALAN JOSEPH SHATTER, *FAMILY LAW IN THE REPUBLIC OF IRELAND* 1 (1977).

5. For an overview of the history of divorce in Ireland, see Anna Margaret McDonough, *When Irish Eyes Aren't Smiling—Legalizing Divorce in Ireland*, 14 DICK. J. INT'L L. 647, 647-55 (1996).

proper accommodation is provided, that removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."¹⁴² Additionally, protected persons shall not be detained "in an area particularly exposed to the dangers of war unless the security of the population or imperative reasons so demand."¹⁴³

Several of these rights and prohibitions are mirrored in Articles 5 ("Persons Whose Liberty Has Been Restricted") and 17 ("Prohibition of Forced Movement of Civilians") of Protocol II to the 1949 Geneva Conventions, which is applicable in an armed conflict not of an international character and reaches one's own nationals.¹⁴⁴ In all cases, persons protected by Geneva law are to be treated humanely.¹⁴⁵ In no case is murder permitted.¹⁴⁶

V. CONCLUSION

Serious violations of basic human rights and humanitarian law occur in Sri Lanka when food, medicine, and medical supplies are used as political weapons. Those least able to cope, especially children, are the primary victims of such criminal tactics. Such denials must be exposed, and the Country Reports should address the misuse of food and medicine and medical supplies in Sri Lanka and wherever else such illegal weapons are employed.

Arbitrary and inhumane detention and controls of persons also occur in Sri Lanka, mostly at the hands of government officials, officers, or agents. These are partially reported, but greater effort should be made to report all suspected violations of human rights and humanitarian law relevant to non-arbitrary and humane treatment of persons as well as their impact on children and others exposed to grave danger.

Under Article 56 of the U.N. Charter, members have a legal obligation to respect and to ensure respect for human rights such as the rights to food and basic medical care. Similarly, under common Article 1 of the 1949 Geneva Conventions, signatories have an obligation to respect and to ensure respect for Convention precepts "in all circumstances."¹⁴⁷ It is time for the international community to recognize that, in addition to

142. *Id.*

143. *Id.*

144. See Geneva Protocol II, *supra* note 3, arts. 5 & 17.

145. See, e.g., Geneva Civilian Convention, *supra* note 2, art. 3.

146. *Id.* (prohibiting "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"); Geneva Protocol I, *supra* note 1, art. 75(2)(a), (b); Geneva Protocol II, *supra* note 3, art. 4(2)(a); Geneva Civilian Convention, *supra* note 2, arts. 32, 147.

147. Geneva Civilian Convention, *supra* note 2, art. 1.

medicine and medical supplies, food should always be treated as neutral property during an armed conflict. Because of highly predictable consequences, both short-term and long-term, food should never be used as a weapon of war. Moreover, the international community should strive to assure that corridors for the free passage of food and medicine and medical supplies are negotiated or imposed during any armed conflict. For the children and others who suffer, criminal and civil sanctions are inadequate and come too late, if at all.

referendum warred throughout the pre-vote stage of the process.⁶ On the "anti" side of the referendum, Catholic fundamentalists campaigned that a favorable vote would (1) erode the family-based morals of Ireland, (2) encourage divorce, and (3) unjustly harm the children and non-earning spouses of the first marital unit,⁷ many of whom entered into the familial relationship with constitutionally supported expectations of permanence.⁸

On the "pro" side, the government argued that the referendum would allow large numbers of already separated citizens to obtain marital benefits in more promising subsequent relationships.⁹ Furthermore, referendum proponents argued that a "yes" vote would facilitate the peace process in Northern Ireland by making the country more inclusive of non-Catholic ideals.¹⁰ To buttress its position, the government emphasized in informational materials that the Irish divorce law would protect the "first family" by maintaining existing separation benefits.¹¹

The referendum passed by the closest margin of any such vote since the inception of the 1937 Constitution.¹² After

6. For an analysis of the contentious atmosphere surrounding the referendum process, see generally Boyd Tonkin, *Dublin's Splitting Headache*, NEW STATESMAN & SOC'Y, Dec. 1, 1995, at 22.

7. See Ad Hoc Commission on Referendum Information, Cases for and Against Divorce (1995) (visited Mar. 24, 1998) <<http://nis.rtc-tallaght.ie/sig/law.home/divorce2.html>> [hereinafter Cases for and Against].

8. For an elaboration on the "contractual" flavor of this argument against divorce, see McDonough, *supra* note 5, at 664 (analogizing the expectation of a permanent marriage length to an agreed contractual term of duration found in any other contract).

9. See Cases for and Against, *supra* note 7. The family of the first marriage was termed the "first family" throughout the referendum process.

10. See generally Michael J. Farrell, *Irish Vote for Divorce Ends Era of Church's Social Dominance*, NAT'L CATH. REP., Dec. 8, 1995, at 19 (stating that the question of Northern Ireland "loomed like a dark cloud over the debate"). The problems within Ireland are largely the result of religious difference and are entrenched firmly in the history of that nation. A full analysis of these problems and the impact the Divorce Bill will have on them is largely speculative and beyond the scope of this Note. For an analysis of the roots of the violence problem in Ireland, see Ronald A. Christaldi, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. TRANSNAT'L L. & POL'Y 123, 124-53 (1995).

11. See, e.g., *Ireland to Vote on Whether to Legalize Divorce* (NPR radio broadcast, Nov. 23, 1995), available in LEXIS, News Library, NPR File.

12. Richard Savill, *Irish Vote for Divorce Faces Legal Challenge*, DAILY TELEGRAPH, Nov. 27, 1995, at 1, available in LEXIS, News Library, TELEGR File. The margin of victory was 9114 of 1.6 million voters. A previous referendum that sought to amend Article 41 of the Constitution failed with 63% against and 36% in favor. *Id.*

surviving a court challenge, divorce became the Fifteenth Amendment to Ireland's Constitution.¹³

On November 20, 1996, the Irish legislature passed the Family Law Divorce Bill (Divorce Bill) to effectuate the new amendment.¹⁴ Among the dictates of the Divorce Bill, Section 5 provides that, prior to the grant of divorce, the spouses seeking divorce must have lived apart for a total of four of the previous five years. In addition to Section 5 and numerous provisions surrounding spousal support issues, the Divorce Bill also contains safeguards to ensure that spouses are advised of the alternative of private settlement via mediation.¹⁵

In Ireland, the problem of domestic abuse is severe and pronounced,¹⁶ yet the interests of spousal abuse victims were noticeably absent from the debate surrounding the Divorce Bill's passage.¹⁷ At first glance, the introduction of divorce seems to create a new weapon for Irish women seeking escape from an abusive marital predicament;¹⁸ however, on closer examination, the Divorce Bill arguably discriminates against battered spouses in a fashion that subjects them to a risk of continued and increased violence. This apparent discrimination exists because the Divorce Bill, by virtue of its broad application to all divorcing spouses, subjects battered spouses to the same waiting periods and mediation possibilities as non-battered spouses. In an abusive domestic environment, such divorce delays and court-suggested dispute alternatives have a deleterious impact not found in abuse-free marital contexts.¹⁹

Part II of this Note focuses on the equality guarantees under Article 40.1 of the Irish constitution²⁰ and analyzes the ways in which Irish notions of equality are at odds with the Divorce Bill in a domestic abuse context. The analysis centers on the Irish jurisprudence that shaped the contours of Article 40.1 and ways in which the Divorce Bill's waiting period and mediation

13. The court action against the referendum hinged on the government's expenditure of tax revenue in an attempt to sway the outcome of the vote. *Hanafin v. Minister for the Env't* (Ir. S.C. 1996), available in LEXIS, Ireland Library, CASES File. While the Supreme Court of Ireland did hold that the government acted unconstitutionally in its funding of a pro-divorce information campaign, it held that such action was not shown to have materially affected the referendum outcome. *Id.*

14. Family Law (Divorce) Bill, No. 32(c) (1996) [hereinafter Divorce Bill].

15. *Id.* §§ 6, 7.

16. See *infra* note 49.

17. See generally *Cases for and Against*, *supra* note 7 (outlining the arguments for divorce legislation—highlighting restrictions and economic considerations).

18. See generally IR. CONST. art. 41, § 3, cl. 2.

19. See *infra* Part II.

20. IR. CONST. art. 40, § 1; see *infra* Part II.

provisions potentially depart from Ireland's historic ideals of equality. Part II also examines the same provisions with regard to traditional Irish notions of the right to life and bodily integrity guaranteed by Article 40.3 of the Irish constitution.²¹ This analysis concludes that the waiting period and mediation sections of the Divorce Bill conflict with bodily integrity and right to life jurisprudence decided prior to the passage of the Divorce Bill.

Part III of this Note examines the same legislative sections under the European Convention on Human Rights, with particular focus on Article 8 and its provisions protecting private and family life.²² This Part argues that, in light of European Court of Human Rights case law and international human rights norms, the Divorce Bill is inconsistent with the European Convention on Human Rights with regard to battered spouses.

II. THE DIVORCE BILL AND THE IRISH CONSTITUTION

A. *Equality Under the Law*

Article 40.1 of the Irish Constitution provides that "[a]ll 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."²³ Akin to the Equal Protection Clause of the U.S. Constitution, Article 40.1 addresses state action²⁴ that discriminates against certain classes of individuals that fit within the judiciary's interpretation of the article.²⁵ Eamon de Valera, the drafter of the constitutional language,²⁶ described the mandate of the article as twofold: (1) a guarantee of impartiality of judges and (2) a recognition of the notion that differences of capacity and social function within classes can

21. IR. CONST. art. 40, § 3, cls. 1, 2; see *infra* Part II.C (discussing the divorce bill and the constitutional right of bodily integrity).

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, § 1, art. 8, 213 U.N.T.S. 220 [hereinafter European Convention]. See *infra* Part III.

23. IR. CONST. art. 40, § 1.

24. See GERARD HOGAN & GERRY WHYTE, *THE IRISH CONSTITUTION* 716-17 (J.M. Kelly ed., 3d ed. 1994) (analyzing who the addressees of Article 40.1 are, and concluding that this provision is primarily addressed to the State).

25. Some argued the general nature of the provision's language would lead to unclear standards for decision-making. *Id.* at 712.

26. See *supra* note 1.

mandate the need for differing legal treatment.²⁷ This section is interpreted as applying not only to the actual application of laws, but also to the process of enactment.²⁸

As a practical matter, determining exactly what de Valera's guarantee ensures is a diffuse and, at times, contradictory undertaking;²⁹ however, an analysis of cases decided prior to the passage of the Divorce Bill establishes the contours of the equality doctrine relevant for a discussion of the bill in a spousal abuse context.

As a general rule, Irish jurisprudence surrounding Article 40.1 addressed the permissibility of legislation treating individuals differently on the basis of some sort of classification.³⁰ The general question in those cases was whether the constitution allowed the classification at issue.

In *State (Nicolaou) v. An Bord Uchtála*, a natural father brought suit under the Adoption Act of 1952 (Adoption Act) alleging that it violated the Article 40.1 guarantee of equality under the law.³¹ The father argued that the statute discriminated against him because it allowed only the mother to be heard in adoption cases involving illegitimate children.³² Interpreting the second sentence of Article 40.1, the court held that the Adoption Act did not violate the equality principle.³³ The court stated that a natural father, in an "out of wedlock" context, differed in social function and moral capacity from individuals who had hearing rights under the Adoption Act. This difference in social function and moral capacity justified the difference in treatment.³⁴

Similarly, in *O'Brien v. Keogh*, Section 49 of the Statute of Limitations was challenged under Article 40.1. The plaintiff argued that the statute discriminated because it treated children

27. See HOGAN & WHYTE, *supra* note 24, at 712 (discussing de Valera's reply to critics during constitutional debates concerning Article 40.1).

28. *Id.*

29. See, e.g., *Brennan v. Attorney Gen.* [1983] I.L.R.M. 449 (Ir. H. Ct. 1983), available in LEXIS, Intlaw Library, IRECAS file (stating that equality is a "most difficult and elusive" concept).

30. See *infra* notes 32-41 and accompanying text. See generally *In Re Philip Clarke* [1950] I.R. 235 (Ir. S.C. 1951), available in LEXIS, Intlaw Library, IRECAS File; *Landers v. Attorney Gen.*, 109 I.L.T.R. 1 (Ir. H. Ct. 1975), available in LEXIS, Intlaw Library, IRECAS File; *Mhic Mhatuna v. Ireland* [1989] I.R. 504 (Ir. H. Ct. 1989), available in LEXIS, Intlaw Library, IRECAS File (all cases upholding differences in treatment based on differences in capacity or social function).

31. *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 (Ir. H. Ct. 1966), available in LEXIS, Intlaw Library, IRECAS File.

32. *Id.* at 641.

33. *Id.*

34. *Id.* The court stated that the purpose of the legislation in question was to "redress the inequalities imposed by circumstances on orphans and illegitimate children." *Id.* at 642.

in parental custody differently than children who were not in parental custody.³⁵ The court held that the distinct treatment afforded to children not in parental custody was consistent with Article 40.1 because the children at issue were under a "disability" compared to children under parental care.³⁶

In both cases, the court used an equality-based doctrine to uphold differing treatment for individuals in distinct moral, social, or physical predicaments. The relevant question with regard to the Divorce Bill is whether the equality doctrine mandates distinct treatment for those who are in such predicaments. De Valera's comments surrounding *Nicolaou*, *O'Brien*, and the drafting of 40.1³⁷ all seem to answer this question in the affirmative.

Irish legal scholars have interpreted de Valera's statements surrounding the drafting of Article 40.1 as requiring distinct treatment of individuals of different capacity or social function.³⁸ The court in *Nicolaou* supported this analysis when it interpreted Article 40.1 as follows:

Section 1 of Article 40 is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes . . . [.]nequality may or must result 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. To do so regardless of the factors mentioned would be inequality.³⁹

The court reiterated this interpretation in *O'Brien*, quoting the passage above in its entirety.⁴⁰ From these sources, it appears that the Irish Constitution embodies the notion that equality before the law requires distinct treatment of individuals in different situations by reason of capacity or social function.⁴¹

35. *O'Brien v. Keogh* [1972] I.R. 144, 154 (Ir. S.C. 1972), available in LEXIS, Intlaw Library, IRECAS File.

36. *Id.* at 154-56. Again, as in the *Nicolaou* case, the *O'Brien* court found that the distinct treatment at issue served to better "establish equality between the two groups." *Id.* at 150.

37. See *supra* note 27 and accompanying text.

38. See HOGAN & WHYTE, *supra* note 24, at 724-26 (discussing the concept of equality before the law as mandating differential treatment in certain situations).

39. *Nicolaou* [1966] I.R. at 639.

40. *O'Brien* [1972] I.R. at 148-49.

41. *But see* *O'Brien v. Mfg. & Eng'g Co.* [1973] I.R. 334, 364-66 (Ir. S.C. 1973); *State (Hartley) v. Governor of Mountjoy Prison* (Ir. S.C. 1967), available in LEXIS, Intlaw Library, IRECAS File; *East Donegal Coop. v. Attorney Gen.*, [1970] I.R. 317, 350-351 (Ir. S.C. 1970), available in LEXIS, Intlaw Library, IRECAS File (both cases arguing that if all members of a determined class are treated equally then the equality principle is satisfied). For a critique of these cases, see HOGAN & WHYTE, *supra* note 24, at 735-37 (implying that such cases are wrongly decided because of the court's failure to state that before an examination of equality of

B. *The Traditional Equality Doctrine and the Divorce Bill
in the Context of Domestic Abuse*

Under the Divorce Bill, battered spouses seeking divorce are subject to the same waiting period⁴² and mediation possibilities⁴³ as spouses who are not abuse victims. Arguably, this differential conflicts with the apparent constitutional ideal that differences in individual capacity may mandate distinct treatment under the law.⁴⁴

Battered women often have different physical and mental capacities than women who have not been abused.⁴⁵ These differences make battered women particularly vulnerable in divorce contexts where long waiting periods and mediation are part of the divorce regime. The Divorce Bill, however, treats all spouses seeking divorce as a class subject to the same treatment. This equality of treatment includes a minimum four-year delay before a grant of divorce as well as provisions providing for mediation.⁴⁶ Therefore, the Divorce Bill appears to treat dissimilar individuals in a like manner—a result arguably contrary to Ireland's constitutional notions of equality.

Spousal abuse is a serious problem that escalates yearly within Ireland, particularly with regard to violence perpetrated by husbands⁴⁷ against their wives.⁴⁸ Not surprisingly, Irish courts

treatment is properly made, the class to which the law applies must first be properly drawn).

42. Family Law (Divorce) Bill, No. 32(c), § 5 (1996) [hereinafter Divorce Bill].

43. *Id.* §§ 6, 7.

44. See *supra* note 39 and accompanying text. While scholars have noted that differences in capacity should mandate different treatment under equality principles, the Irish judiciary embraced this concept in dicta in cases such as *Nicolaou and O'Brien*. Indeed, some Irish Supreme Court opinions indicate that similar treatment of a broad class satisfies the equality doctrine. These opinions, however, ignore the reality that some classes are improperly drawn by incorporating individuals laboring under physical or social obstacles that render their inclusion within the broad class unrealistic. Scholars challenge these somewhat illogical decisions by arguing that equality under the law mandates valid construction of classes subject to statutory treatment.

45. See *infra* notes 58-71 and accompanying text for a discussion of unique difficulties encountered by battered spouses who contemplate or attempt termination of abusive marriages.

46. Divorce Bill, §§ 5-7 (1996).

47. The analysis regarding the Divorce Bill and domestic violence frequently discusses spousal abuse against women because of practicality considerations. The sources on the subject of domestic abuse and mediation focus predominantly on battered women. This does not mean, however, that the relevant equal protection or subsequent bodily integrity arguments apply only to cases in which domestic violence victims are female.

48. See Padraig O'Morain, *Violence Against Women Debated*, IR. TIMES, Nov. 27, 1996, at 4 (stating that a quarter of all murders of women in Ireland involve

issue more restraining orders in domestic abuse cases every year.⁴⁹ It is within this context that the Divorce Bill operates. One of the major aspects of the Divorce Bill is its emphasis on mediation and reconciliation. Including these provisions can be seen as an effort by pro-divorce campaigners to make the Divorce Bill more attractive to the anti-divorce faction,⁵⁰ an attempt to ease the case load of a struggling family law system,⁵¹ or a combination of both. In domestic violence cases, however, mediation works an injustice against the battered spouse, who usually is the wife.

Generally, in mediation, the divorce dispute is resolved between the spouses in face-to-face meetings⁵² that usually are cheaper than traditional litigation methods.⁵³ Within this dispute resolution system, discussions on issues of fault are typically deterred by steering the parties away from discussing blame and past conduct.⁵⁴ These sessions usually are not attended by attorneys.⁵⁵ Successful mediation is premised on equal bargaining power, mediator neutrality, and confidentiality.⁵⁶

Battered women, however, are not equals for mediation purposes. Men who batter women often do so to attain and exercise dominance and control over them.⁵⁷ Within these

the killing of a wife by a husband); Lorna Siggins, *Domestic Violence Against Women Increases*, IR. TIMES, Dec. 28, 1996, at 4 (reporting that one in five Irish women suffers from domestic abuse).

49. See Kathy Sheridan, *It Was a Year When Ireland Seemed a More Dangerous Place to be a Woman*, IR. TIMES., Dec. 28, 1996, at Supp. at 4. (showing that restraining orders increased by over 50% in less than one year with the introduction of new restraining order legislation).

50. See Cases for and Against, *supra* note 7 (suggesting that the legislation avoided "quickie" divorce).

51. See Carol Coulter, *Family Law Systems Now "Chronic"*, IR. TIMES, Apr. 18, 1996, at 7 (suggesting that mediation is the preferred course in Irish family law due to a system-wide lack of resources).

52. See David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 MEDIATION Q. 331 (1990) (discussing the mediation process).

53. See *id.* at 332.

54. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1563 (1991).

55. See *id.* at 1599-1600 (analyzing the negative impact the absence of counsel in mediations can have); see also Chandler, *supra* note 52, at 332 (stating that counsel are usually not present in mediation proceedings).

56. See Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 318 (1990) (describing equality of bargaining power in the mediation context); see also Mary Pat Treuthart, *In Harms Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 729-31 (1993) (providing an analysis of neutrality and confidentiality in mediation).

57. See Hart, *supra* note 56, at 318 (citing numerous studies regarding power and control as central characteristics of the batterer).

relationships, the abused party often succumbs to the abuser's wishes out of a fear of, and a desire to avoid, subsequent or increased violence.⁵⁸ Over time, the battered woman develops feelings of a "learned helplessness" marked by traits of passivity she uses as a survival tactic.⁵⁹ In such situations, a cycle commonly develops in which the battered woman leaves the abusive setting only to return out of a sense of love, as a result of promises by the abuser to reform, or as a result of threatened additional violence.⁶⁰ Often, battered women suffer feelings of guilt that they have somehow ruined the marriage, thereby increasing their conciliatory propensities.⁶¹

On the other hand, abusers are often control-oriented⁶² and possess the ability to deceive outside observers.⁶³ Their behavior, far from passive, is marked by skilled manipulation, threats, and coercion. This power is often exercised in a fashion only understood by the wife as controlling behavior.⁶⁴

This marked imbalance in power renders mediation in such circumstances largely unworkable.⁶⁵ Where violence is part of a relationship, bargaining power is not equal, but instead is slanted toward the control-oriented abuser.⁶⁶ Battered women in such situations give up legal rights either out of fear⁶⁷ or out of an inability to articulate what they want.⁶⁸ This danger is

58. See *id.* at 319. The author included a description of a woman who complied with mediation out of fear arising from past abuse. *Id.*

59. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 33 (1984).

60. See DEL MARTIN, *BATTERED WIVES* 72-82 (1981).

61. See *id.* at 81-82.

62. See Hart, *supra* note 56, at 319; see also Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303, 305 (1990) (discussing the extent to which batterers exhibit control over the victim).

63. See Hart, *supra* note 56, at 320 (describing the persuasive capabilities of abusers).

64. See *id.*

65. See *supra* note 56 and accompanying text.

66. See Treuthart, *supra* note 56, at 729.

67. See *supra* note 58; see also M.D.A. Freeman, *England: Back to Basics*, 33 *U. LOUISVILLE J. FAM. L.* 329, 341 (1995) (articulating that mediation is a way for the abuser to get what he wants through violence).

68. See generally William L.F. Felsteiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *L. & SOC'Y REV.* 631, 633 (1980-81). This work describes the inability of certain parties to "name" injuries because they cannot identify wrongs committed against them. *Id.* Additionally, people often cannot "blame" others for injuries either as a result of their capacity or existing barriers. Both "naming" and "blaming" are elements of the "claiming" portion of dispute resolution. See also Grillo, *supra* note 54, at 61 (analyzing the above framework in a mediation context where "blaming" is excluded from the process, making "claiming" problematic, if not impossible). Even without such process barriers to "blaming," battered women might not be

exacerbated when parties are not represented⁶⁹ and where discussions of past abuse are off limits in the spirit of negotiation.⁷⁰

Furthermore, the ideal of neutrality in mediation is strained in domestic abuse cases. In such situations, claims of past conduct are generally discouraged. If the mediator tolerates claims of past abuse, however, the mediator must then either accept or disbelieve the claims. In so doing, the mediator jeopardizes neutrality because accepting one version of the abuse story implies disbelief of the other. Furthermore, the abused party would perceive a neutral stance toward the abuse as the tacit condoning of violence by the mediator.⁷¹ In such a circumstance, neutrality is largely impossible.

Additionally, the concept of confidentiality within mediation disadvantages battered women. The mediation process, by maintaining a nondisclosure stance, serves as a form of systemic privatization of the violence—a result that further subjects the abused to unfair process.⁷² It is not surprising, then, that the idea of mediation in domestic violence situations is widely chagrined⁷³ and has been aptly labeled an “oxymoron.”⁷⁴

The Divorce Bill’s mediation provisions institutionalize these injustices. By generally encouraging mediation, the Divorce Bill subjects battered spouses, particularly women, to the risk of losing legal rights and personal safety in face-to-face confrontations with their abusers. The statute thus exposes battered women to dangers other women do not face. This situation is contrary to Ireland’s traditional notions of equal protection, which include the positive requirement that the government treat individuals in different situations (by reason of capacity) differently.⁷⁵

Furthermore, it is of little intellectual value to claim that the Divorce Bill’s mediation provision avoids these risks to battered women because the mediation is voluntary. In domestic contexts where abuse is the norm, battered women are “not free to choose.”⁷⁶ Where a relationship is marked by an imbalance of power, mediation that is summarily labeled as “voluntary”

able to “name” or “blame” by virtue of their “learned helplessness” and other self-esteem issues. *See supra* notes 59 & 60 and accompanying text.

69. *See supra* note 56 and accompanying text.

70. *See Grillo, supra* note 54, at 1563.

71. For the argument regarding neutrality, see Treuthart, *supra* note 56, at 729-30.

72. *See id.* at 730.

73. *See id.* at 721.

74. *See Hart, supra* note 56, at 320.

75. *See supra* note 39 and accompanying text.

76. Hart, *supra* note 56, at 321.

becomes, in reality, "coercive."⁷⁷ For impoverished spouses, the risks of "coerced" mediation are more pronounced due to the lower costs involved in mediation.⁷⁸ Additionally, the Divorce Bill arguably is slanted toward mediation. A party seeking or responding to a filing for divorce is under an obligation to explore mediation alternatives. Each party must demonstrate, to the court's satisfaction, that the alternative has been explored, and failure to make such a demonstration will result in the adjournment of proceedings until the parties address such matters.⁷⁹

To remedy this inequality in treatment, Ireland's legislature should revise the Divorce Bill's mediation provisions to treat abused spouses as a special class by virtue of their unique capacity or disability. Such treatment should provide that no mediation occur in cases of domestic violence and that courts screen for domestic violence to ensure that such mediation does not take place.⁸⁰ Such distinct treatment would better comport with Irish concepts of equality as seen in case law decided before the Divorce Bill.

The Divorce Bill is also suspect, for equal protection purposes, by requiring that spouses live apart for four years before the grant of divorce.⁸¹ This amounts to a minimum five-year waiting period for spouses seeking marital dissolution. This discriminates against battered spouses in two respects: (1) battered spouses tend to leave and return home cyclically,⁸²

77. *Id.*; see also Grillo, *supra* note 54, at 1550 n.12 (articulating the dangers inherent in voluntary mediation where there is a power imbalance).

78. See Freeman, *supra* note 67, at 340 (discussing the negative effect economic considerations have in a voluntary mediation scheme).

79. Family Law (Divorce) Bill, No. 32(c), §§ 6, 7 (1996).

80. It is crucial that systems are in place during a divorce proceeding to detect spousal abuse. Some scholars call for the use of a conflict assessment protocol to detect spousal abuse. This process involves specific questioning of the spouses separately before the start of mediation. For a general overview of conflict assessment protocol, see Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (1990).

Many scholars believe the presence of domestic abuse should foreclose mediation as an alternative. Other scholars believe mediation is appropriate in such cases. Those who advocate use of mediation in domestic abuse contexts agree that such cases must be closely screened and monitored. Along with such close scrutiny of domestic abuse, advocates of abuse mediation also call for a form of mediation different from traditional models. For one such opinion, see Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 MEDIATION Q. 377 (1990). For an overview of mediation, its risks to abused wives, and the need for rigorous abuse screening, see Lisa C. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 61-71, 81-88, 100-110 (1984).

81. See Lerman, *supra* note 80, at 85 (discussing the Divorce Bill).

82. See MARTIN, *supra* note 60, at 82.

and (2) battered spouses are at risk of continued violence and, therefore, need to terminate the relationship more quickly than spouses who are not battered.⁸³

A crucial step in getting out of an abusive marriage is obtaining a divorce. In such cases, the need for a rapid divorce is paramount.⁸⁴ Mandatory waiting periods are often rationalized as the preferred course in divorce because they provide for improved reflection and may serve to dissuade couples from divorce.⁸⁵ In Ireland, the government touted waiting periods as a means to make divorce more difficult.⁸⁶ This argument, however, fails to take account of the dangers battered spouses face as well as their predilections for returning to their abusers. Women in such situations face greater risks of serious injury the longer the marriage continues.⁸⁷ These risks are particularly pronounced under the Divorce Bill because the bill requires not only a mandatory waiting period, but also that the period consist of four years of separation time. As previously discussed, permanently leaving home is contrary to the general nature of the battered woman and, as a consequence, makes divorce even more unlikely. Therefore, the Divorce Bill's waiting period places battered spouses in a disadvantaged position compared to the non-abused spouse. This result conflicts with Irish notions of differing treatment for individuals with distinct capacities.

Proponents of extended waiting periods argue that such periods are justified when the government provides alternative separation mechanisms.⁸⁸ This argument lacks "common sense, not to mention common decency."⁸⁹ Ireland has such a mechanism in the Judicial Separation and Family Law Reform Act of 1989 (Separation Act);⁹⁰ however, the equal protection

83. Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1442 (1992).

84. *Id.* at 1445.

85. See generally Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 92-93 (1990) (discussing the need for higher cost consequences in failed marriages).

86. See Cases for and Against, *supra* note 7. The promotional material states that there will be no "quickie" divorce. *Id.* This material also lists the restrictive nature of the Divorce Bill as one of its attractive elements.

87. See Lacey, *supra* note 83, at 1444-45 (citing WILLIAM A. STACEY & ANSON D. SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 47 (1983)). Many feel that irrational feelings of hurt or anger motivate spouses to terminate marriages. Scott, *supra* note 85, at 92-93. Lacey argues that such characterizations discourage legal systems from adequately defending the bodily rights of abused spouses. Lacey, *supra* note 83, at 1443-46.

88. Lacey, *supra* note 83, at 1444-46.

89. MARTIN, *supra* note 60, at 166 (maligning the availability of alternative separation mechanisms as impractical).

90. Judicial Separation and Family Law Reform Act, No. 6 (1989).

arguments applicable against the Divorce Bill also militate against the Separation Act in domestic violence contexts. The Separation Act contains the same mediation language and presents the same procedural dangers and inequities to battered women as does the Divorce Bill.⁹¹ Additionally, the separation requirement also considers periods of living apart prior to the grant of separation.⁹² Again, this requirement ignores the battered spouse's conciliatory nature and makes such a separation harder to attain. Generally, a final divorce and settlement is the most feasible way to best protect a battered woman and help her escape the violent home.⁹³

It is facially attractive to argue that the Divorce Bill does not violate traditional equality principles because divorce was previously unavailable. Article 40.1 provides that the guarantee of equality applies to the legislative product of Ireland.⁹⁴ Therefore, it is incumbent on the legislature to produce laws that treat individuals even handedly, regardless of whether the subject matter addressed by the laws constitutes a newly formed right. The Divorce Bill does not treat battered spouses equally because, by requiring divorcing spouses to wait a minimum of four years, the statute exposes abused spouses to risks that other spouses do not face. Furthermore, by requiring divorcing spouses to live apart, the statute discriminates against abused spouses, particularly women, by failing to take account of their distinct incapacity to avoid returning to the home.

To make the Divorce Bill more consistent with Irish equality principles, the government should significantly reduce the waiting period and waive the living-apart requirement. This approach would better equalize the treatment of a class of citizens currently at a disadvantage in Irish family law because of their unique incapacity. Such provisions exist in the legislative regimes of other jurisdictions and would better serve Ireland's historic equality principles.⁹⁵

91. *Id.* at § 5.

92. *Id.* at § 52(c), -(d), -(e), § 4(2). Particularly noteworthy is § 4(2), which allows the court to consider cohabitation periods greater than six months as evidence that the applicant can reasonably be expected to continue to cohabit with the respondent.

93. See Lacey, *supra* note 83, at 1445.

94. IR. CONST. art. 40, § 1.

95. See Rachel Borrill, *Four Cabinet Members Revolt Over Divorce*, IR. TIMES, Apr. 26, 1996, at 11 (describing a British bill that provides for shorter waiting periods in cases of domestic violence).

C. *Personal Rights of Life and Bodily Integrity
and the Divorce Bill at Odds*

The waiting period and mediation provisions of the Divorce Bill arguably conflict in a domestic abuse context, with personal rights, guaranteed by Article 40.3 of the Irish constitution. Article 40.3 provides:

(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

(2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.⁹⁶

Initially, the judiciary viewed this article as a general proclamation to the legislature that presented no decipherable criterion for judicial review;⁹⁷ however, the judiciary altered this non-interventionist approach and subsequently used Article 40.3 to articulate the nature of personal rights and the extent to which those rights mandate legislative protection.⁹⁸ Among the rights in Article 40.3, the right to life and the related right to bodily integrity are at issue for battered spouses seeking a divorce under the new bill.

The Irish judiciary, in the course of its Article 40.3 doctrinal development, created two classes of rights that fall under the aegis of the article: specific and unspecified.⁹⁹ Among the specific rights listed in the second clause of Article 40.3 is the right to life. The first case that gave the right to life doctrinal form was *McGee v. Attorney General*.¹⁰⁰ In *McGee*, a woman suffered from a physical condition that rendered pregnancy highly dangerous.¹⁰¹ The woman sought to eliminate the criminality of

96. IR. CONST. art. 40, § 3, cls. 1, 2.

97. See HOGAN & WHYTE, *supra* note 24, at 745-46. In fact, for the first 25 years after the Constitution was ratified, the rights discussed in the first clause went undefined. See *id.* at 746. The Irish Supreme Court stated that any attempt to ascertain the meaning of the first clause would constitute a "usurpation of [legislative] authority." *Id.* at 745 (quoting *In re Article 26 and the Offences Against the State (Amendment) Bill, 1940*, [1940] I.R. 470)).

98. See HOGAN & WHYTE, *supra* note 24, at 746-48.

99. Generally, the specified rights are found in the second clause of Article 40.3. The right to life is included therein. See *id.* at 749. Unspecified rights are those the judiciary deems ancillary to those specified in the second clause or that the judiciary deems latent in the term "personal rights" in the first clause. See *id.* at 755.

100. *McGee v. Attorney Gen.* [1974] I.R. 284, available in LEXIS, Intlaw Library, IRE CAS File.

101. The woman suffered from a tendency to toxemia. *Id.* at 289.

contraception in her case because of the risks that pregnancy posed to her life.¹⁰² The court held that the woman did have a right to life and articulated the nature of the protection that such a right deserves, stating:

One of the personal rights of a woman in plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of the opinion that not only has the State the right to do so, but, by virtue of the . . . terms of 53 of Article 40, the State has the *positive obligation* to ensure by its laws . . . that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which was likely to put her life in jeopardy might be avoided . . .¹⁰³

The court also cautioned that such a right must be balanced against any countervailing rights, which, in that case, were the personal rights of the unborn.¹⁰⁴

Following *McGee*, battered spouses have a strong argument that the waiting period and mediation provisions of the Divorce Bill violate their constitutionally protected right to life. Battered spouses, like the woman in *McGee*, suffer from a condition that makes compliance with a law a physically dangerous proposition.¹⁰⁵ In a domestic abuse setting, the statutorily mandated behavior that gives rise to physical danger is the continuation of the marital union and the face-to-face negotiation of the divorce. The Divorce Bill, like *McGee's* contraception prohibition, actively hinders at-risk citizens from protecting themselves by subjecting them to a framework that does not provide adequate consideration of the special dangers they face. The court in *McGee* established that the State has a positive duty to remove such barriers to personal safety with regard to individuals who suffer from particularized risks.¹⁰⁶ Therefore, the Irish legislature arguably is obligated to remove, for abused spouses, the waiting period and mediation alternatives in the Divorce Bill. Such action would protect battered spouses' right to life as articulated in *McGee*.

102. At issue was a law providing a maximum six-month prison sentence for "importation" of contraceptives. *Id.*

103. *Id.* at 315-16. The court also found that such distinct treatment would satisfy equality principles because of differences in physical capacity. Therefore, Article 40.3 mandated distinct treatment to protect life, and the disparate risks of harm to life justified the Article 40.3 mandate under equality principles. *Id.* at 313-15.

104. *Id.* at 312. This concern for the rights of the unborn was expanded later. See *G. v. An Bord Uchtala* [1980] I.R. 32, available in LEXIS, Intlaw Library, IRECAS File.

105. See *supra* Part II.

106. *McGee* [1974] I.R. 284 at 314.

In fact, the argument for legislative revision of the Divorce Bill may be stronger than that found with regard to the contraception legislation in *McGee*. In *McGee*, the court balanced the woman's right to life with the personal rights of the unborn.¹⁰⁷ In a spousal abuse context, speedier and less restrictive divorce does not present any such countervailing personal considerations. Although the abuser could argue that speedier divorce interferes with his constitutional right to have a family,¹⁰⁸ such an argument is unworkable.

In *State (Bouzagoti) v. Station Sergam, Fitzgibbon Street Garda Station*,¹⁰⁹ a woman did not want to readmit her husband to the family.¹¹⁰ At issue was whether the State should readmit him to ensure his constitutional right to family life.¹¹¹ The court held that a claim of a right to family life is inappropriate in cases of family division and that the proper analysis in such cases involves an assessment of individual personal rights as opposed to collective family rights.¹¹² Similarly, in *L. v. L.*, the court held that the constitutional right to family life applies to the protection of the family from external action as opposed to interfamily behavior.¹¹³

A spouse who files for divorce creates a family division like that found in *Bouzagou*. Therefore, the spouse's individual personal rights are subject to the court's consideration. In a domestic abuse setting, the battered spouse's individual right to life is offset only by the abuser's collective interest in a right to family life. Therefore, removal of the waiting period and mediation requirements in the Divorce Bill would protect the abused's individual right and would not affect any individual right of the abuser. Furthermore, the protection of the family from external forces, as in *L. v. L.*, is inapplicable in the private,

107. *McGee* [1947] I.R. at 284.

108. See IR. CONST. art. 41. This article provides that the government protect the family from attack. *Id.*

109. *State (Bouzagou) v. Station Sergeant* [1985] I.R. 426, available in LEXIS, Intlaw Library, IRECAS File. The court stated: "[I]t is not a question of asserting the rights of a family, or even of the parents, as against the outside world but of reconciling the rights of individual members of the family when the family itself is divided." *Id.* at 433. For a discussion of the case, see HOGAN & WHYTE, *supra* note 24, at 1005.

110. *Station Sergeant* [1985] I.R. at 431. The husband was the subject of a restraining order due to spousal abuse.

111. The husband brought claims under Articles 41 and 42. *Id.* at 433.

112. *Id.* (finding that this was not a case of "rights of a family . . . against the outside world" but rather of "reconciling the rights of individual members of the family").

113. See *L. v. L.*, [1992] I.R. 77 (Ir. S.C. 1992), available in LEXIS, Intlaw Library, IRECAS File.

interfamily action of divorce. Therefore, because the abused has no countervailing personal rights, the court would be more compelled to find the Divorce Bill more seriously violative of Article 40.3 than the statute reviewed in *McGee*.

A closely related doctrine to right to life is the unspecified right to bodily integrity. In *Ryan v. Attorney General*,¹¹⁴ a plaintiff challenged an Irish statute providing for the fluoridation of water.¹¹⁵ The plaintiff argued that fluoride was dangerous to human health and that the government, by compelling consumption of fluoridated water, violated her right to bodily integrity implicit in Article 40.3.¹¹⁶ The court acknowledged that such an implicit right exists¹¹⁷ but held it was not violated on the facts.¹¹⁸ The court explained the right of bodily integrity as a mandate that "no process which is or may, as a matter of probability, be dangerous or harmful to the life or health of the citizens or any of them may be imposed (in the sense of being made compulsory) by an Act of the Oireachtas."¹¹⁹ This interpretation of the right to bodily integrity is the foundation of the doctrine and has been cited favorably in subsequent cases.¹²⁰

The mediation and waiting period provisions of the Divorce Bill threaten bodily integrity of battered spouses by prolonging the abusive relationship and subjecting the abused to a potential face-to-face confrontation with the abuser. Under *Ryan*, the Irish Constitution is violated when an act of the legislature subjects citizens to the mere probability of danger.¹²¹ The provisions of the Divorce Bill in question subject battered spouses to an increased probability of danger. The legislature should amend the Divorce Bill to better protect battered spouses' right to bodily integrity.

As in the equal protection context, it is attractive to argue that because divorce was not previously legal, its introduction on a limited scale cannot violate the Constitution's guarantees to

114. *Ryan v. Attorney Gen.*, [1965] I.R. 294 (Ir. H. Ct. 1965), available in LEXIS, Intlaw Library, IRECAS File.

115. *See id.*

116. *Id.* at 308. The plaintiff also brought claims under Articles 41 and 42. *Id.*

117. *Id.* at 313-14.

118. *Id.* at 347-49. The plaintiff did not establish that fluoride levels in Irish water rose to the point of causing bodily harm. This failure in proof defeated the claim. *Id.* at 347.

119. *Id.* at 314. The court saw bodily integrity as derivative of the right to life.

120. *See HOGAN & WHYTE, supra* note 24, at 759 (discussing a subsequent interpretation of the bodily integrity doctrine in *State (C.) v. Frawley* [1976] I.R. 365).

121. *Ryan*, [1965] I.R. at 294.

right to life and bodily integrity. Logically, an act is not automatically constitutional merely because it creates a previously unrecognized right. The language of the constitution in Article 40.3 applies to legislation. Therefore, if the legislature creates a new right through a statute, the law must create that right with respect to citizens' personal safety. In a domestic abuse setting, the Divorce Bill threatens the personal safety of the abused and, as a result, the Bill may fail to comport with the obligations inherent in Article 40.3.

III. THE DIVORCE BILL AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS

The European Convention for the Protection of Human Rights (European Convention) is a powerful instrument of international law providing for the protection of individual rights.¹²² In its text, the European Convention protects numerous rights¹²³ of the citizens of contracting states.¹²⁴ In application, tribunals interpret the European Convention in a fashion that responds to social changes in the area of human rights as those changes develop.¹²⁵ Generally, this interpretive function entails an assessment of developing norms of human rights measured against a desire to remain adequately deferential to the individual states' domestic legislation.¹²⁶ Tribunals tend to forego such deferential concerns, however, where it is clear that a right guaranteed by the European Convention expands or develops new aspects.¹²⁷ To decide if a human rights norm exists, tribunals have the power to consult many sources. Among the sources

122. European Convention, *supra* note 22, 213 U.N.T.S. at 222. For a discussion regarding the power of this document as a human rights tool, see Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 133 (1993) (discussing the almost universal acceptance of the European Convention); WARWICK A. MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 204 (1983) (discussing the European Convention's effectiveness).

123. Rights protected are life; freedom from torture, inhuman treatment or slavery; liberty; fair public hearings; freedom from retroactive criminal convictions; respect for private and family life, home, and correspondence; freedom of thought, religion, expression, and association; freedom to marry and found a family; and freedom to enjoy the Convention's rights without discrimination. European Convention, *supra* note 22, § 1, arts. 2-14, 213 U.N.T.S. at 224-32.

124. For a list of contracting states, see Helfer, *supra* note 122, at 134 n. 3.

125. See *id.* at 134 (discussing the concept of "European Consensus" as a mechanism giving rise to increased human rights protection).

126. See *id.* at 136-37.

127. See generally *id.* at 138.

available to the court are international treaties¹²⁸ and European Court of Human Rights precedents.¹²⁹

Freedom from domestic violence is a right that exists in the European Convention. In the case of *Airey v. Ireland*,¹³⁰ the European Court of Human Rights recognized the existence of the right of freedom from domestic violence under Article 8 of the European Convention, which respects private and family life.¹³¹ This right is established further by the 1980 Convention for the Elimination of all Forms of Discrimination Against Women¹³² (Women's Convention), an international treaty ratified by every country in Europe.¹³³ The Women's Convention, therefore, is a developing norm in Europe with regard to European Convention guarantees and, as such, its principles should guide the European Court with regard to domestic violence.¹³⁴

The Divorce Bill violates Article 8 of the European Convention because it infringes a battered spouse's ability to extricate herself from a dangerous situation. *Airey* supports this conclusion. Furthermore, under the Women's Convention, the Divorce Bill clearly violates domestic violence norms developing internationally. Under *Airey* and the Women's Convention, Article 8 of the European Convention dictates that governments proactively prevent risks associated with domestic violence. Because long waiting periods and mediation increase domestic violence risks, the Divorce Bill fails to meet the demands of Article 8. These provisions of the Divorce Bill should be modified to comport with the European Convention as delineated by case precedent and developing international norms.

128. See *id.* at 139-40 (listing international treaties as one of three sources of finding "European consensus").

129. See *id.* at 141-42 (describing the power of a tribunal precedent articulating a "rights protective" interpretation of the convention with regard to domestic law).

130. 32 Eur. Ct. H.R. (ser. A) at 4 (1979).

131. European Convention, *supra* note 22, § 1, art. 8, 213 U.N.T.S. at 230.

132. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res 34/1880, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. No. A/34146 (1979) [hereinafter Women's Convention].

133. See Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 541 (1993) (stating that the only countries in the Western hemisphere not to ratify are the United States and Bahamas).

134. See Helfer, *supra* note 122, at 140. Helfer argues that international treaties should be consulted by the European Court of Human Rights when there are close cases regarding to what extent a human rights norm has developed. *Id.* at 161.

A. *Airey v. Ireland*

In *Airey*, a woman sought to separate from her husband due to alleged physical and mental abuse perpetrated against her and her children.¹³⁵ Her attempts were unsuccessful, however, because of the prohibitive costs of attaining a legal separation in Ireland.¹³⁶ As a result, the woman lodged a complaint with the European Commission of Human Rights (Commission) alleging that the high costs of separation violated Article 6 of the European Convention by denying her that right of access to court and Article 14 of the Convention by making judicial separation "more easily available" to those who can afford to pay for it. She also argued Articles 8 and 13 were violated.¹³⁷ Because the Commission found that Ireland's separation procedures violated Article 6, it did not examine the remaining claims.¹³⁸

The European Court of Human Rights agreed with the Commission's finding that Ireland breached Article 6 and stated that the European Convention imposes a positive duty on contracting states to ensure effective right of access to the courts.¹³⁹ Additionally, the court found that the complaint established a violation of Article 8.¹⁴⁰ The court held that, under Irish law, where a spouse is entitled to a separation, the government has positive obligations to ensure that a spouse can effectively use the separation mechanism to realize the protection of Article 8.¹⁴¹ Because of the high costs of separation, it was inaccessible to individuals, such as the complainant, who could not afford it. As a result, the court mandated that Ireland

135. *Airey*, 32 Eur. Ct. H.R. at 6. Allegedly, Mrs. Airey's husband was an alcoholic who frequently threatened her and occasionally subjected her to physical abuse. *Id.*

136. *See id.* at 7 (outlining the expense of the process).

137. *See id.* at 8-9; *see also* European Convention, *supra* note 22, § 1, arts. 6, 14, 213 U.N.T.S. at 228, 232.

138. *See Airey*, 32 Eur. Ct. H.R. at 8.

139. *Id.* at 12-16. The court held that contracting states must provide counsel to the poor seeking protection of rights covered by the European Convention if such legal assistance is necessary or effective to the courts. *Id.* at 14-16.

140. *Id.* at 17 (citing the Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 15, as authority for the proposition that a government's failure to act can constitute a violation of Article 8 of the European Convention).

141. Although the court used the terms "effectively accessible" in its opinion, the opinion refers to the cost elements of the Article 8 argument. *Id.* For an overview of the case, see Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779, 794-96 (1990).

alleviate the costs to ensure that the complainant could realize the protection of private and family life guaranteed by Article 8.¹⁴²

In *Airey*, the European Court of Human Rights established that contracting states must make their protections of private and family life accessible to those who desire to take advantage of the protection offered.¹⁴³ In Ireland, the availability of divorce, like the availability of a legal separation, falls within the protections of private and family life contemplated by Article 8 of the European Convention. Therefore, under *Airey*, divorce must be made accessible to those who seek it. The Divorce Bill fails to meet the mandates of Article 8 because the Bill makes divorce inaccessible to victims of domestic violence. The waiting period and mediation provisions of the Divorce Bill create a barrier to divorce for battered spouses, much like the high costs that hindered separation for the poor in *Airey*.

Following *Airey*, contracting states are under a positive obligation to remove barriers inherent in domestic laws addressing issues covered by the European Convention.¹⁴⁴ In *Airey*, Article 8 required that Ireland, a contracting state, alleviate the high costs of separation when a citizen could not bear those costs.¹⁴⁵ It follows, therefore, that Article 8 requires Ireland to alleviate the waiting period and mediation requirements of the Divorce Bill when those provisions limit an individual's ability to realize the protection divorce offers. In a domestic abuse setting, the mediation and waiting period provisions limit the abused spouse's access to divorce.¹⁴⁶ Therefore, Article 8 requires Ireland to alter those provisions in cases of domestic abuse.

Arguably, the decision of the European Court of Human Rights in *Johnston v. Ireland*¹⁴⁷ militates against this conclusion. In *Johnston*, an unmarried couple challenged Ireland's ban on divorce. The couple, who had been cohabiting at for fifteen years, wanted the court to recognize the husband's right to end his previous marriage.¹⁴⁸ The couple claimed Ireland's constitutional ban on divorce violated the guarantee of respect for private and family life afforded by Article 8.¹⁴⁹ The court found that Article 8 does require contracting states to make divorce

142. *Airey*, 32 Eur. Ct. H.R. at 17.

143. *Id.* at 18.

144. *See id.*

145. *Id.* at 17.

146. *See supra* Part II.B (discussing the fact that abused spouses are subject to control in mediation and are subject to increased danger the longer an abusive marriage continues).

147. *Case of Johnston and Others*, 112 Eur. Ct. H.R. (ser. A) at 5 (1986).

148. *Id.* at 10-12.

149. *Id.* at 19.

available.¹⁵⁰ Although this result is controversial,¹⁵¹ it could lend support to an argument that limited divorce cannot violate the European Convention when the Convention does not guarantee any right to divorce. This argument, however, misconstrues the *Johnston* holding and disregards the substance of the Article 8 doctrine established in *Airey*.

In *Johnston*, the European Court of Human Rights found that contracting states do not have to include divorce as a protection of Article 8. Under this reasoning, contracting states have some freedom to decide what mechanisms they will use to respect private and family life. Therefore, because Ireland had no divorce, the court deferred to Ireland's judgment that divorce was not necessary to protect private and family life. The passage of the Divorce Bill, however, marks a change in the protections recognized by Ireland and subsequently governed by the European Convention. Under *Airey*, when a contracting state establishes a protection covered by the European Convention's articles, that protection must be accessible to all who seek it.¹⁵² The Divorce Bill, through its waiting period and mediation provisions, limits abused spouses' access to divorce. These barriers to divorce must be removed. Therefore, while the European Convention does not require contracting states to allow divorce, it does require contracting states that allow divorce to make that right accessible.

B. *The Women's Convention*

In *Airey*, the European Court of Human Rights established that contracting states must act affirmatively to ensure effective access to domestic protections afforded to individuals under Article 8 of the European Convention.¹⁵³ The *Airey* opinion, however, left somewhat unclear the extent to which a government

150. The court reasoned that respect for family life means access to the protections afforded families. Because the cohabitants could exercise family rights, their family life was adequately respected even though they could not marry. *See id.* at 26-28.

151. For an analysis of how *Johnston* was wrongly decided, see generally Note, *Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in Johnston v. Ireland*, 22 CORNELL INT'L L.J. 63 (1989).

152. *Airey*, 32 Eur. Ct. H.R. at 12.

153. *See Cook, supra* note 141, at 817 (stating that the court decisions explained in her essay "note that the states have positive obligations to ensure an effective right to private and family life . . ."). Cook argues that states immediately must reform laws adversely affecting women's rights (as conceptualized by international instruments) rather than await a court challenge. *Id.*

must act in a domestic abuse setting.¹⁵⁴ The Women's Convention clarifies international expectations regarding governmental action in domestic violence cases such as *Airey*.¹⁵⁵ Often, the European Court of Human Rights uses such international materials to ascertain the scope of consensus concerning developing rights covered by the European Convention.¹⁵⁶ Therefore, the Women's Convention expands the protection articulated in *Airey* because it constitutes an international consensus of governmental expectations in domestic abuse cases.

The Women's Convention both confirms and enlarges *Airey's* protection of human rights. First, analysis of the Women's Convention supports *Airey's* foundational concept that governments must amend legislation that restricts access to human rights protection.¹⁵⁷ Additionally, the Women's Convention bolsters *Airey's* conclusion that domestic abuse is an infringement of a personal human right.¹⁵⁸ The Women's Convention, however, goes further than *Airey* in specifying international expectations regarding domestic violence and

154. See *Airey*, 32 Eur. Ct. H.R. at 14-17. A litigant could contend that *Airey* is limited to financial barriers created by the State as opposed to barriers inherent in the status of individuals. While it is difficult to see why *Airey* should be so limited, such an argument is plausible given the facts of *Airey*. International norms, however, support the inference that *Airey* applies to all barriers to protection from domestic violence. See General Recommendation, No. 19, Committee on the Elimination of All Forms of Discrimination Against Women, 11th Sess., U.N. Doc. (CEDAW/C/1991/L.1/Add. 15 (1992), at para. 24(b) [hereinafter General Recommendation] (recommending that state parties ensure protection against gender-based and family violence).

155. The Women's Convention call for elaborate legislative reform is not limited to the removal of barriers to protection from spousal abuse. See *infra* notes 161-63.

156. See Helfer, *supra* note 122, at 139 n.23. Helfer argues that such reference to international materials is useful in ascertaining the existence of human rights consensus, particularly when there is wide ratification. Helfer also argues, however, that such external referencing should be limited to cases where regional ratification is particularly strong. *Id.* at 162. Given the Women's Convention's wide acceptance in the western hemisphere, the Convention is strong evidence of consensus even within Helfer's limited model. See *supra* note 129.

157. See Culliton, *supra* note 133, at 511 (showing that the right to freedom from domestic violence is not limited to the Women's Convention, but is also virtually a part of other international legal instruments and customary international law).

158. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) interprets the Women's Convention as condemning domestic violence as a violation of "general human rights norms." General Recommendation, *supra* note 154.

governments' role in protecting against such violence.¹⁵⁹ Therefore, the Women's Convention, ratified in the same year *Airey* was decided,¹⁶⁰ helps define the scope of Article 8 protection contemplated by the European Court of Human Rights in *Airey*.

The Women's Convention establishes the principle that women's fundamental rights include that of State protection from domestic violence.¹⁶¹ Under the Women's Convention, family violence includes any act of physical, mental, or sexual violence occurring within the family unit.¹⁶² In a domestic violence context, the fundamental rights at issue under the Women's Convention are the right to bodily integrity and the right to equality before the law.¹⁶³ The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), the organization monitoring compliance with the Women's Convention, interprets that instrument as requiring state protection from domestic violence carried out or tolerated by public or private actors.¹⁶⁴

159. The Women's Convention calls for judicial and legislative assistance on all fronts where domestic violence is an issue. Women's Convention, *supra* note 132, at 193. This result is far more strident than the general "access" issues presented in *Airey* because it also incorporates governmental responsibility to expand current protection, with the ultimate goal being elimination of domestic violence instead of merely improved access to protection. See Culliton, *supra* note 133, at 511 (explaining that the Women's Convention mandates a fundamental right of women to free from domestic violence). This process is referred to as Forward Looking Strategy.

160. Both items came into existence in 1979. See *Airey*, 32 Eur. Ct. H.R. at 16; Women's Convention, *supra* note 132.

161. Such a right is encompassed by the Universal Declaration of Human Rights and the Women's Convention. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948), art. 8; General Recommendation, *supra* note 154, at para. 24(b); see also Culliton, *supra* note 133, at 513-14, 526 (discussing state responsibility for domestic violence under the Universal Declaration, the Women's Convention, and customary international law).

162. See General Recommendation, *supra* note 154, at para. 23 (describing types of abuse against women in family contexts).

163. See Culliton, *supra* note 133, at 514. Culliton points out an argument that a failure to protect against domestic violence discriminates against women. *Id.* Even without such a discrimination argument, however, a failure to protect against domestic violence could violate the right to bodily integrity. *Id.* Culliton finds that such a discrimination argument bolsters the bodily integrity claim and the overall conclusion that failure to protect against domestic violence constitutes a violation of fundamental human rights. *Id.*

164. See General Recommendation, *supra* note 154, at para. 10 (stating that, under the Convention, there is an "obligation to eliminate discrimination in all its terms"); see also Culliton, *supra* note 133, at 513 (stating that the Women's Convention obligates States to "protect individuals from human rights violators" (emphasis in original)). In domestic violence cases the human rights violators are the abusers. See Culliton, *supra* note 133, at 513 (referring to domestic abuse as a human rights problem). Some argue that "private" acts of domestic abuse are

The overall purpose of the Women's Convention is to motivate governmental change with regard to all forms of discrimination against women.¹⁶⁵ For example, Article 1 of the Women's Convention prohibits de facto discrimination by states that violate women's fundamental rights.¹⁶⁶ The CEDAW interpretation of this article reaches domestic violence that affects women disproportionately.¹⁶⁷ While the Women's Convention focuses specifically on women's rights, the instrument generally recognizes that the right to protection from domestic violence is a universal fundamental right. The right to protection from domestic violence implicates the right to freedom from discrimination.¹⁶⁸ The right to bodily integrity also resides within the right to protection from domestic violence.¹⁶⁹

Through insistence on these rights as fundamental, the Women's Convention recognizes that domestic violence constitutes an affront to international human rights norms. The mandate of the Women's Convention is equally clear. Under this instrument, domestic governments must reform aspects of their legislative regimes that inadequately protect female victims of domestic abuse.¹⁷⁰ This reform mandate entails not only the revision of current legislation, but also the enactment of legislation that ensures effective access to civil and criminal relief.¹⁷¹ Additionally, the Women's Convention requires states to prosecute domestic violence adequately and to protect against continued abuse.¹⁷²

The Divorce Bill fails to provide the protection for domestic abuse victims required by the Women's Convention. The Bill subjects abused spouses, the majority of whom are women,¹⁷³ to

truly vestiges of legislative or political tolerance of violence against women. See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486, 491 (1990) (noting that feminists have argued this).

165. See Culliton, *supra* note 133, at 528.

166. Women's Convention, *supra* note 132, art. 1.

167. Culliton, *supra* note 133, at 514 n.29 (quoting the General Recommendation).

168. See General Recommendation, *supra* note 154, at para. 7.

169. *Id.* at para. 7(b) (including torturer in its discussion of gender-based violence). For a discussion regarding the similarities between the CEDAW interpretation of torture and the European Court of Human Rights interpretation, see Culliton, *supra* note 133, at 553-55.

170. See Culliton, *supra* note 133, at 540 (explaining that stock must enact measures to eliminate discrimination against women).

171. See General Recommendation, *supra* note 154, at para. 24(r)(l). The provision provides for "[c]riminal penalties where necessary and civil remedies in case of domestic violence." *Id.*

172. See Culliton, *supra* note 133, at 539.

173. See *supra* note 49 for a discussion of the prevalence of spousal abuse against women in Ireland.

the same waiting period and mediation provisions that non-abused spouses face.¹⁷⁴ This requirement discriminates against abused spouses because they face unique physical dangers exacerbated by prolonged marriages and face-to-face confrontations.¹⁷⁵ This result, in itself, renders the Divorce Bill violative of the Women's Convention.¹⁷⁶ The Women's Convention requires governments to protect proactively the victims of domestic violence by sweeping legislative reform.¹⁷⁷ Therefore, with regard to marital unions marked by domestic violence, Ireland must amend the Divorce Bill's waiting period and mediation provisions to bring the Bill into compliance with the Women's Convention.

The Women's Convention's viability as an enforcement mechanism, however, is questionable. The Women's Convention and CEDAW recommendations are enforced proactively through State-provided reports.¹⁷⁸ CEDAW uses these reports to exert political pressure on noncomplying States, but CEDAW has no additional enforcement powers.¹⁷⁹ Therefore, it is unlikely that the Women's Convention, standing alone, could compel Ireland to amend the Divorce Bill.

In contrast, the Women's Convention does expand on notions expressed by the European Court of Human Rights in *Airey*. The court's explicit recognition of the Women's Convention would provide binding force to the ideals articulated within that instrument.¹⁸⁰ Such recognition plausible. The Women's Convention, like *Airey*, recognizes that protection from domestic

174. Family Law (Divorce) Bill, No. 32(c) (1966).

175. For a discussion of the discriminatory effect of mediation and extensive waiting periods on abused spouses, see *supra* Part II.B.

176. Because most abused spouses are female, the Divorce Bill will give rise to violent behavior that "affects women disproportionately." This result is contrary to the Women's Convention's antidiscrimination stance. See General Recommendation, *supra* note 154. Resultant violence against women could also be seen as a vestige of a "patriarchy" that tacitly accepts such violence. See Bunch, *supra* note 164, at 491. For a general discussion of discrimination questions with regard to the Women's Convention, see generally Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

177. General Recommendation, *supra* note 154, at para. 12.

178. For a discussion of the Women's Convention as an enforcement tool, see Culliton, *supra* note 133, at 528.

179. *Id.* The Culliton article cites the problem the CEDAW has in obtaining state reports. *Id.* at 528 n.99 (citing Bunch, *supra* note 164, at 496).

180. See Helfer, *supra* note 122, at 133-34. Contracting states respect European Court of Human Rights decisions by taking any number of governmental actions, including legislative reform. See generally Fredrik G.E. Sundberg, *The European Experience of Human Rights Proceedings: The Value of the European Court's Decisions*, 20 AKRON L. REV. 629, 633-42 (1987).

abuse is a fundamental right. *Airey* required the government to remove financial barriers to assertions of rights guaranteed by the European Convention. While *Airey* implies that governments must remove other barriers to such rights, the question remains as to what extent the government must act. The Women's Convention outlines international expectations regarding legislation that fails to protect domestic violence victims.¹⁸¹ The European Court of Human Justice uses such documents in delineating both the scope of fundamental rights and the protections those rights merit. Therefore, while the Women's Convention has little enforcement value, it supports a finding that the Divorce Bill violates the European Convention under *Airey*.

IV. CONCLUSION

Ireland took a step toward becoming a more progressive nation by providing for divorce. Due to its restrictive nature, however, this step disserves those who arguably have the most compelling need for divorce—the victims of spousal abuse. The Irish government should expedite the divorce procedure in Ireland for abused spouses and eliminate divorce mediation systems at the abuser's disposal. This recommendation comports with traditional Irish notions of equality, bodily integrity, and right to life. Additionally, such reform would conform better to Article 8 of the European Convention and international human rights norms articulated by the Women's Convention.

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181. See *supra* note 163.

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