

1996

Ireland's Abortion Information Act of 1995

Keith S. Koegler

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [European Law Commons](#), and the [Health Law and Policy Commons](#)

Recommended Citation

Keith S. Koegler, Ireland's Abortion Information Act of 1995, 29 *Vanderbilt Law Review* 1117 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol29/iss5/5>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Thu Oct 26 13:18:20 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Keith S. Koegler, Ireland's Abortion Information Act of 1995, 29 VAND. J. Transnat'l L. 1117 (1996).

ALWD 7th ed.

Keith S. Koegler, Ireland's Abortion Information Act of 1995, 29 Vand. J. Transnat'l L. 1117 (1996).

APA 7th ed.

Koegler, K. S. (1996). Ireland's abortion information act of 1995. *Vanderbilt Journal of Transnational Law*, 29(5), 1117-1150.

Chicago 17th ed.

Keith S. Koegler, "Ireland's Abortion Information Act of 1995," *Vanderbilt Journal of Transnational Law* 29, no. 5 (November 1996): 1117-1150

McGill Guide 9th ed.

Keith S. Koegler, "Ireland's Abortion Information Act of 1995" (1996) 29:5 Vand J Transnat'l L 1117.

AGLC 4th ed.

Keith S. Koegler, 'Ireland's Abortion Information Act of 1995' (1996) 29(5) *Vanderbilt Journal of Transnational Law* 1117

MLA 9th ed.

Koegler, Keith S. "Ireland's Abortion Information Act of 1995." *Vanderbilt Journal of Transnational Law*, vol. 29, no. 5, November 1996, pp. 1117-1150. HeinOnline.

OSCOLA 4th ed.

Keith S. Koegler, 'Ireland's Abortion Information Act of 1995' (1996) 29 Vand J Transnat'l L 1117
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Ireland's Abortion Information Act of 1995

ABSTRACT

On May 12, 1995, the Supreme Court of Ireland upheld an act making it legal to disseminate information concerning abortion services abroad, provided that the information does not advocate or promote the termination of the pregnancy. While the Abortion Information Act of 1995 is likely to make it easier for an Irish woman to obtain an abortion overseas, it does not change the circumstances under which a woman may obtain an abortion in Ireland. Under the Eighth Amendment to the Irish Constitution, as interpreted by the Irish Supreme Court, abortion is illegal except where the pregnancy poses a substantial risk to the life of the mother.

Given the pervasive influence of the Catholic Church in Ireland, pro-choice activists are unlikely to bring about further liberalization of Ireland's abortion law using the domestic political process. It is possible, however, that the European Court of Human Rights will find that the privacy clause in the European Convention on Human Rights protects the right to have an abortion. If this were to occur, Ireland, as a signator to the Convention, would be obligated to change its abortion law to conform with the Court's decision.

This note offers an overview of Irish abortion law after the passage of the Abortion Information Act and identifies several issues left unresolved by the act that are likely to be the source of controversy in the future. It also examines the merits of a claim that Ireland's strict abortion law violates the European Convention on Human Rights and explores the legal precedent that the European Court of Human Rights is likely to rely on in deciding this question.

TABLE OF CONTENTS

I.	INTRODUCTION	1118
II.	THE RIGHT TO LIFE UNDER THE EIGHTH AMENDMENT .	1119
	A. <i>The Road to the Eighth Amendment</i>	1119
	B. <i>The Eighth Amendment</i>	1125
	C. <i>Treatment of the Eighth Amendment by the Courts</i>	1126
	1. <i>Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and Dublin Wellwoman Centre Ltd.</i>	1127
	2. <i>Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan</i>	1130
	3. <i>Attorney General v. X</i>	1132
III.	THE THIRTEENTH AND FOURTEENTH AMENDMENTS	1134
IV.	THE ABORTION INFORMATION ACT OF 1995	1137
	A. <i>The Provisions of the Act</i>	1137
	B. <i>The Supreme Court's Decision in In the Matter of Abortion Information Act of 1995</i>	1139
V.	IRISH ABORTION LAW AFTER IN THE MATTER OF ABORTION INFORMATION ACT OF 1995	1142
VI.	CONCLUSION.....	1150

I. INTRODUCTION

On May 12, 1995, the Supreme Court of Ireland upheld an act¹ making it legal, under specified conditions, to disseminate information concerning abortion services available abroad.² The Court's decision warrants attention because the Irish Constitution has explicitly recognized the right to life of the unborn since the enactment of the Eighth Amendment³ in 1983. The Irish

1. For purposes of this note, this author refers to the act as the Abortion Information Act of 1995. The full name of the Act is, "An act to prescribe the conditions subject to which certain information regarding services lawfully available outside the state for the termination of pregnancies and persons who provide such services may be given to individual women or the general public, amending the Indecent Advertisements Act of 1889 and the Censorship Publications Act 1929 to 1967[.]" (1995) (Ir.).

2. In the Matter of Article 26 of the Constitution and in the Matter of the Reference to the Court of The Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995, [1995] 2 I.L.R.M. 81 (Ir. S.C.) [hereinafter In the Matter of the Abortion Information Act].

Supreme Court historically had construed the distribution of abortion information as a violation of that right.

This note explores the constitutional dimensions of the Ireland Supreme Court's decision upholding the Abortion Information Act of 1995 (hereinafter 1995 Act) and evaluates the law's likely effect upon society. Section II examines the forces that led to the enactment of the Eighth Amendment and analyzes the Amendment itself and its subsequent treatment by the Irish courts. This section also examines the role of two international tribunals, the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ), in resolving conflicts stemming from Ireland's strict abortion law. Section III looks at the Thirteenth and Fourteenth Amendments to the Irish Constitution. Those two amendments respectively created a right to travel abroad to obtain an abortion and a qualified right to receive information relating to abortion services available abroad. Section IV discusses the 1995 Act, which defines and limits the right identified in the Fourteenth Amendment, and focuses on the Supreme Court's decision upholding the 1995 Act. Finally, Section V identifies several issues left unresolved by the 1995 Act that are likely to be the source of controversy in the future.

II. THE RIGHT TO LIFE UNDER THE EIGHTH AMENDMENT

A. *The Road to the Eighth Amendment*

The Offenses Against the Person Act of 1861 (hereinafter Act of 1861) has long provided that anyone who obtains an abortion in Ireland is guilty of a felony and liable for life imprisonment.⁴

3. The Eighth Amendment, which was incorporated at Article 40.3.3, provides: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." IR. CONST. art. 40.3.3.

4. Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 59 (Eng.). This Act was incorporated into Irish law because Ireland at that time was ruled by England. See John A. Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. REV. 371, 372-73; see also, Jeffrey A. Weinstein, Comment, "An Irish Solution to an Irish Problem": *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 170 (1993); Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 373-74 (1994). See Weinstein, *supra*, at 169. Until the early nineteenth century, it was a misdemeanor under British law for any citizen to obtain or administer an abortion. *Id.* See Cathleen M. Colvin, Comment, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*:

As early as the 1930s, however, Irish pro-life activists began to worry that the Act of 1861 insufficiently protected the unborn child. As other western nations liberalized their abortion laws, Irish pro-life activists became increasingly convinced of the need for a constitutional amendment memorializing the right to life as a way of preventing similar developments within Ireland.

The English Supreme Court's 1939 decision in *Rex v. Bourne* fueled fears that the Act of 1861 was an insufficient protection for the unborn.⁵ In *Bourne*, the Court held that a physician who had performed an abortion was not liable under the Act of 1861 where the abortion was necessary to keep the woman from becoming a "physical or mental wreck."⁶ While the Court's ruling was not binding on Irish courts, it gave pro-life activists cause for worry because Irish courts often follow English courts, and the English Supreme Court was interpreting a statute that was identical to one on the Irish books.⁷

Pro-life activists were also bothered by *Bourne* because any liberalization of Britain's law regarding abortion would mean that Irish women could more easily obtain an abortion outside of

Irish Abortion Law and the Free Movement of Services in the European Community, 15 FORDHAM INT'L L.J. 476, 491 (1992). In 1803, the British Parliament upgraded the crime substantially by passing an act that imposed the death penalty upon anyone who facilitated or procured an abortion. 43 Geo. 3, ch. 58 (1803) (Eng.). See Weinstein, *supra*, at 169-70; see also, Colvin, *supra*, at 491. British law shifted yet again with the passage of the Offenses Against the Person Act which, besides providing that anyone who obtains or administers an abortion is guilty of a felony and liable for life imprisonment, stipulates that anyone who supplies an abortifacient would be guilty of a misdemeanor and liable for up to three years in prison. Offences Against the Person Act, *supra*, at § 59. The state of British law regarding abortion remained essentially unchanged for the remaining sixty years of British control over Ireland. When independence finally came in 1921, Ireland found itself grappling with the task of having to create a constitution. Although abortion would eventually become the subject of national debate, the original Constitution of 1922 (Saorstát Éireann) and its twenty-seven amendments did not address the issue. See Quinlan, *supra*, at 373; see also Weinstein, *supra*, at 170-71. The Constitution of 1937 also failed to deal directly with the abortion issue. See Quinlan, *supra*, at 373-74; see also Weinstein, *supra*, at 171. However, it contained a provision stipulating that all laws previously in effect, and not inconsistent with the new Constitution, would continue to be in full force unless they were amended by the Irish legislature. See Quinlan, *supra*, at 373. Thus, the abortion provisions of the Offenses Against the Person Act were carried over under the Constitution of 1937. *Id.* at 373-74. See also, Thompson, *supra* at 373 n.7; Weinstein, *supra*, at 171.

5. *Rex v. Bourne*, 1 K.B. 687 (Eng. 1939). See Paul Ward, *X+Y=?!*, 33 U. LOUISVILLE J. FAM. L. 385, 387-388 (1995); see also, Quinlan, *supra* note 4, at 374-76; Weinstein, *supra* note 4, at 171.

6. *Bourne*, 1 K.B. at 694. In so ruling, the Court found innocent a doctor who had performed an abortion on a fourteen year old rape victim under the Offenses Against the Person Act. *Id.* at 695-96.

7. Quinlan, *supra* note 4, at 375-77.

Ireland.⁸ During the 1920s and 30s, Irish women traveled to England in considerable numbers to have backstreet abortions, which were more widely available there than in Ireland.⁹ After *Bourne*, there was every reason to think that Irish women would travel to England in greater numbers to terminate unwanted pregnancies.¹⁰

If Irish pro-life activists were disturbed by the English Supreme Court's ruling in *Bourne*, they were particularly concerned¹¹ by the passage of England's Abortion Act of 1967.¹² This act provides, among other things, that a woman can lawfully terminate her pregnancy during the first twelve weeks after conception if at least two "registered medical practitioners" find that an abortion would be appropriate.¹³ Specifically, the practitioners must find either 1) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the woman . . . greater than if the pregnancy were terminated;" or 2) that there is a substantial risk that the child would be born with "serious physical or mental abnormalities."¹⁴ Irish pro-life activists grew increasingly concerned as most European countries during the 1970s and 1980s followed England in enacting laws which at least partially legalized abortion.¹⁵

However instrumental foreign events may have been in shaping the fear among Irish pro-life activists that Ireland might

8. *Id.* at 376-77.

9. Alexis Guillbride, *A Woman's Crime*, IR. TIMES, Oct. 30, 1995, at 10, available in LEXIS, World Library, Itimes File.

10. *Id.* In fact, the number of women traveling abroad initially decreased after *Bourne* due to the passage of the Emergency Powers Act during World War II, which generally restricted the international travel of Irish citizens. However, once the Emergency Powers Act was repealed, Irish women flocked to England in increasing numbers to terminate their unwanted pregnancies. *Id.*

11. See Weinstein, *supra* note 4, at 171; see also, Quinlan, *supra* note 4, at 375-77; Glenn Frankel, *Abortion Issue Divides Ireland*, WASH. POST, Jan. 8, 1990, at A18 (stating that anti-abortion groups "grew alarmed after Britain eased its abortion restrictions in 1967"). This alarm was apparently well-founded, for the number of Irish women traveling abroad to obtain an abortion jumped from fewer than 100 in 1968 to almost 4000 in 1981. Quinlan, *supra* note 4, at 377 n.32 (citing MEDICO-SOCIAL RESEARCH BOARD, TERMINATION OF PREGNANCY, ENGLAND 1983, WOMEN FROM THE REPUBLIC OF IRELAND 9 (1984)).

12. Abortion Act, 1967, ch.87 (Eng.).

13. *Id.* at § 1(1) (a)-(b).

14. *Id.*

15. Colvin, *supra* note 4, at 493-94; see Weinstein, *supra* note 4, at 171; see Mary Ann Glendon, *Abortion and Divorce in Western Law* 10-62 & app. A-B (1987); Vicky Randall, *The Politics of Abortion in Ireland*, in *The New Politics of Abortion* 67, 69-70 (Joni Lovenduski & Joyce Outshoorn eds. 1986); CHRISTOPHER TIETZE & STANLEY K. HENSHAW, *INDUCED ABORTION: A WORLD REVIEW* 11-28 (6th ed. 1986).

liberalize its abortion laws, activity on the home front ultimately proved most disturbing to the pro-life activists. They were concerned by the Irish Supreme Court's new willingness to strike down certain laws on the grounds that they violated the right to privacy.¹⁶ The Court stated that such a right emanated from Article 40.3.1¹⁷ of the Irish Constitution or, in the alternative, from the general nature of the Irish government and society.¹⁸

The Supreme Court's willingness to recognize a right to privacy began in 1963 with its decision in *Ryan v. Attorney General*.¹⁹ *Ryan* involved a suit to enjoin the government from putting fluoride in drinking water, on the ground that such conduct violated the right to "bodily integrity." In upholding the injunction granted by the High Court, the Supreme Court first quoted the language of the High Court's opinion: "[T]he personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40[,] but include all those rights which result from the Christian and democratic nature of the state."²⁰ The Court then held that the right to bodily integrity was included among these rights.²¹

The Supreme Court's 1974 decision in *McGee v. Attorney General*²² magnified fears that the right to privacy might be used to strike down the Act of 1861 and related anti-abortion legislation.²³ In *McGee*, a woman who was prosecuted under an act making it illegal to import contraceptive jelly (even under the advice of a physician) sought a declaration that the law violated

16. Pro-life activists were also concerned that violations of the Offenses Against the Person Act not prosecuted more vigorously. See Quinlan, *supra* note 4, at 374 (citing P. JACKSON, THE DEADLY SOLUTION TO AN IRISH PROBLEM—BACKSTREET ABORTION 2 (the Women's Right to Choose Campaign 1983) (stating that there were 58 illegal abortion cases investigated or tried between 1926 and 1974)).

17. Article 40.3.1 provides: "The State guarantees in its laws to respect and as far as practicable defend and vindicate the personal rights of the citizen." IR. CONST. art. 40.3.1.

18. The Court has not always been clear about the source of rights that are not explicitly mentioned in the Constitution. At times, the Court has held that a right must be, in fact, specifically enumerated. At other times, the Court has held that such rights derive from the nature of Irish government and society. See BRIAN DOOLAN, CONSTITUTIONAL LAW AND CONSTITUTIONAL RIGHTS IN IRELAND 156 (1994). For a discussion of the Court's willingness to recognize unenumerated personal rights, see *infra* notes 151-53 and accompanying text.

19. [1965] I.R. 294 (Ir. S.C.); see Quinlan, *supra* note 4, at 378.

20. [1965] I.R. at 312.

21. *Id.* at 295.

22. [1974] I.R. 284 (Ir. S.C.).

23. See JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 320 (1992); see also Ward, *supra* note 5, at 389-90; Thompson, *supra* note 4, at 374.

the right to marital privacy.²⁴ In ruling for the woman, a majority of the Court found that there was in fact a right to marital privacy deriving from Article 40.3.1 of the Constitution.²⁵ The Court then held that the right to marital privacy extended to cover the importation of contraceptive jelly on the advice of a physician.²⁶

Among the Irish Supreme Court's privacy jurisprudence, the *McGee* decision proved especially disturbing to pro-life activists because of the Court's express reliance on two U.S. Supreme Court decisions regarding the right to privacy,²⁷ *Griswold v. Connecticut*²⁸ and *Eisenstadt v. Baird*.²⁹ This concern derived from the fact that the U.S. Supreme Court had recently relied on *Griswold* and *Eisenstadt* to strike down a state law restricting abortion in *Roe v. Wade*.³⁰ Many in Ireland feared a similar development in Ireland.³¹

Even if Irish pro-life activists had reason to believe that the Irish Supreme Court would not extend the right to privacy to include the right to obtain an abortion, they did not rest comfortably. Since the enactment in 1953 of the Convention for the Protection of Human Rights and Fundamental Freedoms,³² to which Ireland is a signatory, Irish pro-life activists had feared that Ireland might be obligated to change its laws regarding abortion. Article Eight³³ of the Convention explicitly

24. *Id.* Section 17 of the Criminal Law Amendment Act, No. 6 (1935) provides: "It shall not be lawful for any person to sell, expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstát Éireann for sale any contraceptive." *Id.* at 285-86.

25. *McGee*, [1974] I.R. at 284-285.

26. *Id.*

27. *CASEY*, *supra* note 22, at 320.

28. 381 U.S. 479 (1965) (holding invalid a state statute denying married persons access to contraceptives).

29. 405 U.S. 438 (1972) (holding invalid a state statute prohibiting the distribution of contraceptives to unmarried persons). Traditionally, Irish courts have looked upon the decisions of the U.S. Supreme Court "with the greatest of respect." *O'Brien v. Stoutt*, [1982] I.L.R.M 327 (Ir. H. Ct); see *Quinlan*, *supra* note 4, at 380; *Thompson*, *supra* note 4, at 374 n.12; William Binchy, *The Need for a Constitutional Amendment*, in *ABORTION & LAW* 116, 121 n.16 (Austin Flannery ed., 1983).

30. 410 U.S. 113 (1973). In *Roe*, the Court established a trimester framework regulating abortion. In the first trimester, the state cannot infringe upon a woman's right to choose whether or not to have an abortion in any manner. In the second trimester, the state may interfere only where it is necessary to protect the woman's health. In the third trimester, the state may regulate abortion to the point of completely outlawing it. *Id.* at 164-65.

31. See *CASEY*, *supra* note 23, at 320; see also *Quinlan*, *supra* note 4, at 380 and *Thompson*, *supra* note 4, at 374 n.12.

32. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *Convention on Human Rights*].

33. *Id.* at art. 8. See *infra* note 69 and accompanying text.

acknowledges the right to privacy.³⁴ This concern persisted even though the Irish legislature had not³⁵ (and has not) incorporated the Convention into domestic law as required by Article 29.6³⁶ of the Constitution.³⁷

In addition, beginning in 1972, when Ireland joined the European Economic Community (EEC), pro-life activists worried that domestic restrictions on abortion might be construed by the ECJ as an impermissible restriction on a service in contravention of Article 59 of the Treaty³⁸ that established the EEC.³⁹ Ireland's membership in the European Community was particularly nettlesome to anti-abortionists since, unlike the Convention on Human Rights, the EEC Treaty is "self-executing in that it automatically becomes the law within a member state once it has been ratified."⁴⁰ Given these external and internal influences in Ireland, pro-life activists would soon seek an amendment to the Irish Constitution that would prohibit abortion.⁴¹

34. Quinlan, *supra* note 4, at 382.

35. See *infra* notes 67-83 and accompanying text.

36. Article 29.6 provides: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." IR. CONST. art. 29.6.

37. Quinlan, *supra* note 4, at 382-83. Because the Legislature has not incorporated the Convention into Irish law, Irish courts have often indicated that they are not bound by the Agreement. See *infra* note 171. Nevertheless, if the ECHR identified a right to an abortion in the Convention, Ireland would almost certainly change its strict abortion law to comport with the Court's decision. See *infra* note 172.

38. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S 11 [hereinafter EEC TREATY].

39. See *infra* notes 87-95 and accompanying text.

40. Seth S. Stoffregen, Comment, *Abortion and the Freedom to Travel in the European Economic Community: A Perspective on Attorney General v. X*, 28 NEW ENG. L. REV. 543, 547 (1993). In this regard, Ireland amended Article 29.6 of the Irish Constitution to provide that community law would automatically become part of Irish domestic law so that Ireland could be admitted to the EEC. *Id.* Article 29.3.4 now provides: "No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the full force of law in the State." IR. CONST. art. 29.3.4.

41. In 1979, the Irish legislature passed the Health (Family Planning) Act which authorized the sale of certain types of contraceptives, but only where the purchaser had obtained a prescription from a doctor. See Weinstein, *supra* note 4, at 172 n.53 referring to Health (Family Planning) Act of 1979, no. 20 (1979) (Ir.). Section 10 of the Act provides: "Nothing in this Act shall be construed as authorizing (a) the procuring of abortion, (b) the doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offenses Against the Person Act, 1861 . . . or the sale, importation into the state, manufacture, advertising or display of abortifacients." *Id.* Though the act reaffirmed the Offenses Against the Person Act, pro-life activists remained convinced that stronger protection of the right to life of the unborn was needed. See *id.* at 172-73.

B. *The Eighth Amendment*

The political battle for a constitutional amendment that would explicitly recognize the right to life of the unborn began on April 28, 1981, with the formation of the Pro Life Amendment Campaign (PLAC).⁴² An umbrella organization composed of thirteen smaller groups,⁴³ each dedicated to preventing the legalization of abortion in Ireland,⁴⁴ the PLAC made the abortion issue a central feature in each of the three national elections during the years 1981-83.⁴⁵ Hesitant to be seen as endorsing a "culture of death"⁴⁶ by an electorate composed almost entirely of Roman Catholics, each of the major political parties announced support for an amendment which would recognize the right to life of the unborn during these close elections.⁴⁷ After much political wrangling over the appropriate wording, the Irish legislature submitted a bill containing the actual language of the Eighth Amendment for a referendum of the people.⁴⁸ On September 7, 1983, "in one of the smallest voter turnouts in history,"⁴⁹ the electorate voted nearly two-to-one to include the amendment in the Irish Constitution.⁵⁰

The Eighth Amendment to the Irish Constitution, which is incorporated at Article 40.3.3 provides, "[T]he State acknowledges the right to life of the unborn and, with due regard to the life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁵¹ On its face, the amendment does not recognize an absolute right to life of the fetus. Rather, it requires that such a right be balanced against the right to life of the mother. Moreover, the amendment

42. See Colvin, *supra* note 4, at 496; see also, Weinstein, *supra* note 4, at 172.

43. Colvin, *supra* note 4, at 495-96 n.119. Society for the Protection of Unborn Children [SPUC], an organization which would feature prominently in subsequent litigation involving the Eighth Amendment, was among the most radical of the groups.

44. *Id.*

45. *Id.* at 496.

46. "Culture of Death" is an appellation given to the Abortion Information Act of 1995 (discussed *infra*) by the Archbishop of Dublin, Dr. Desmond Connell. See Owen Bowcott, *Irish Bishop Attacks Abortion Compromise*, GUARDIAN, June 5, 1995, at 5.

47. Colvin, *supra* note 4, at 496.

48. Under Article 46.2 of the Irish Constitution, an amendment begins as a bill in the Dáil (house of representatives) and must be passed by both houses of the legislature before being submitted by referendum to the people. IR. CONST. art. 46.2.

49. Quinlan, *supra* note 4, at 390.

50. *Id.*; see also Weinstein, *supra* note 4, at 173.

51. IR. CONST. art. 40.3.3.

suggests that where it would be impracticable to protect the right to life of the fetus, the state should not undertake to do so.

C. Treatment of the Eighth Amendment by the Courts

While many Irish citizens hoped for legislation that would delineate the scope of the right to life, it ultimately fell to the Irish courts to interpret the new amendment. Until the enactment of the Thirteenth and Fourteenth Amendments in December of 1992, these courts consistently held that abortion was illegal except where the pregnancy posed a direct threat to the life of the mother.⁵² They also held that dissemination of information related to abortion services abroad violates the Eighth Amendment.⁵³ In so ruling, the courts explicitly or implicitly found that the unenumerated right to privacy and any right to give or receive information, which might be ancillary to the right to freedom of expression under Article 40.6.1 of the Constitution,⁵⁴ must be subordinated to the right to life of the unborn.⁵⁵ The courts also found that the right to travel abroad, which the Irish Supreme Court had recently acknowledged as an unenumerated constitutional right,⁵⁶ could not be invoked where the purpose of traveling was to have an abortion.⁵⁷

Several cases regarding the freedom of expression and the right to travel were appealed to the ECJ and the ECHR. As explained below, however, these international tribunals often were reluctant to overturn the findings of the Irish courts. Moreover,

52. See *infra* note 107 and accompanying text.

53. See *infra* notes 65 and 92 and accompanying text.

54. Article 40.6 provides:

The State guarantees liberty for the exercise of the following rights subject to public order and morality:

1. The right of citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

IR. CONST. art. 40.6.1.

55. See *infra* notes 65 and 92 and accompanying text.

56. The right to travel freely was first identified in *State (K.M.) v. Minister for Foreign Affairs*, [1979] I.R. 73, 80-81 (Ir. H. Ct. 1979). See *infra* note 108 and accompanying text.

57. See *infra* note 106 and accompanying text.

while the ECJ and the ECHR did render decisions contrary to Irish common law, meaningful relief for the aggrieved party was not always immediately forthcoming.

1. Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and Dublin Wellwoman Centre Ltd.

The first legal challenge to the Eighth Amendment⁵⁸ came in *Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd.*⁵⁹ In this case, Society for the Protection of Unborn Children (SPUC), a grass roots organization dedicated to safeguarding the right to life of the unborn, sought an injunction⁶⁰ against two Irish women's health clinics that provided non-directive counselling regarding abortion.⁶¹ The SPUC sought to prevent the clinics from directing patients, who had decided to obtain an abortion, to hospitals in Great Britain that provided abortions.⁶² While it was clear that the clinics neither encouraged nor discouraged abortion, the High Court issued an injunction on the grounds that the clinics' activities violated the Eighth Amendment.⁶³ In issuing the injunction, the High Court summarily dismissed the clinics' claims that the counselling they provided was protected by the rights of free expression and privacy.⁶⁴ Judge Hamilton, writing for the Court, stated that "the qualified right to privacy [and] the rights of association and freedom of expression . . . cannot be invoked to interfere with such a fundamental right as the right to life of the unborn."⁶⁵

On appeal, the Irish Supreme Court unanimously affirmed without explaining why the defendants' freedom of expression and privacy rights were inferior to the right to life of the unborn.⁶⁶ Chief Justice Finlay, speaking for the court, stated in conclusory terms, "I am satisfied that no right could constitutionally arise to

58. Weinstein, *supra* note 4, at 174.

59. [1988] I.R. 593 (Ir. H. Ct.).

60. "The case was later converted to an action by the Attorney General on behalf of the interest group. This was done presumably to circumvent any objection to the interest group's standing to bring this action." Thompson, *supra* note 4, at 380 n.50.

61. In the context of abortion, "non-directive" counselling refers to counselling that makes a woman aware of all her options concerning her pregnancy but does not endorse a particular option. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 13 (1992); see also Thompson, *supra* note 4, at 381.

62. [1988] I.R. at 593.

63. *Id.* at 617.

64. *Id.* See Thompson, *supra* note 4, at 382.

65. [1988] I.R. at 617.

66. *Id.* at 624.

obtain information the purpose . . . of which was to defeat the constitutional right to life of the unborn child."⁶⁷

The judgment of the Supreme Court ended the clinics' hopes that the Irish courts would find that the rights to free expression and privacy trump the right to life of the unborn. Undaunted, the clinics appealed the decision of the Irish Supreme Court to the European Commission on Human Rights⁶⁸ on the grounds that the injunction violated provisions in the European Convention on Human Rights protecting freedom of expression (Article 10),⁶⁹ the right to privacy (Article 8),⁷⁰ and the right to Equal Protection of the laws (Article 14).⁷¹

67. *Id.* at 625.

68. *Open Door Counselling Ltd. v. Ireland*, Apps. Nos. 14234/88 & 14235/88, 14 Eur. H.R. Rep. 131 (1991) (Commission report). Article 26 of the Convention of Human Rights provides: "The Commission may only deal with the matter after all domestic remedies have been exhausted . . . and within a period of six months from the date on which the final decision was taken." *Convention on Human Rights*, *supra* note 32, 213 U.N.T.S. at 238.

69. Article 10 provides:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention on Human Rights, *supra* note 32, 213 U.N.T.S. at 230.

70. Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

71. Article 14 provides:

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Commission ultimately decided the case solely on free expression grounds.⁷² Having established that the injunction issued against the clinics actually interfered with the clinics' right to free expression,⁷³ the Commission asked whether the interference was "prescribed by law"⁷⁴ as required by Article 10.⁷⁵ Under clear precedent, a restraint is "prescribed by law" if it is adequately accessible and reasonably foreseeable.⁷⁶ The Commission concluded that the clinics could not have foreseen that Irish law prohibited their actions.⁷⁷ Accordingly, it held that the injunction was not "prescribed by law" and therefore violated Article 10.⁷⁸ The Commission then referred the matter to the ECHR.⁷⁹

The ECHR found that the injunction against the clinics violated Article 10 of the Convention, but for different reasons than the Commission had articulated.⁸⁰ In that regard, the Court found that the injunction was prescribed by law, but concluded that the restriction on the dissemination of information was "'over broad and disproportionate' in relation to its purpose of protecting morals."⁸¹ The Court deemed the restriction to be overbroad because it proposed a "'perpetual' restraint on the provision of [such] information . . . regardless of [a woman's] age or state of health or . . . reasons for seeking counselling on the termination of pregnancy."⁸²

Id. at 232. The clinics claimed that the injunction "discriminated against women since men were not denied information 'critical to their reproductive and health choices.'" *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 32 (1992).

72. *Thompson*, *supra* note 4, at 383. Because the injunction violated the right to free expression, the Commission did not find it necessary to reach the privacy issue, though it stated in dicta that the clinics themselves had not demonstrated that they had a protectable private life within the meaning of Article 8. *Open Door Counselling*, 14 Eur. H.R. Rep. at 140 (Commission report). The Commission also indicated that the clinics had not made out a claim on equal protection grounds. *Id.*

73. *Open Door Counselling*, 14 Eur. H.R. Rep. at 136 (Commission report).

74. *Id.* at 135-37.

75. *See supra* note 68.

76. *See, e.g.*, *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (1979). The purpose of this rule is "to enable individuals to regulate their conduct in the light of the foreseeable consequences of a given action." *Open Door Counselling*, 14 Eur. H.R. Rep. at 136 (Commission report).

77. *Open Door Counselling*, 14 Eur. H.R. Rep. at 137 (Commission report).

78. *Id.* at 137-38.

79. Under the Convention, human rights claims may only be considered by the Court after the Commission has "acknowledged the failure of efforts for a friendly settlement." *Convention on Human Rights*, *supra* note 32, 213 U.N.T.S. at 243. Traditionally, the Court has deferred to the decisions of the Commission. *Thompson*, *supra* note 4, at 386.

80. *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser A) at 32 (1992).

81. *Id.* at 30.

82. *Id.*

Because the ECHR found that the restriction on the dissemination of information violated Article 10 of the Convention, it did not decide whether a right to abortion is guaranteed under Article 8 or Article 14.⁸³ The Court has yet to revisit these issues.⁸⁴

2. Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan

Within a year of the Irish Supreme Court's initial ruling in *Open Door Counselling*, upholding the injunction granted by the High Court, the Irish courts encountered another case involving the Eighth Amendment. In *Society for the Protection of Unborn Children v. Grogan*,⁸⁵ the SPUC sought to enjoin three student organizations⁸⁶ from disseminating information about where abortion services could be obtained abroad, arguing that such conduct violated the right to life of the unborn as it had in *Open Door Counselling*.⁸⁷ The student groups defended on the ground that under Articles 59 and 60 of the EEC Treaty, which prohibit restrictions on services provided in member states, they were entitled to publish and distribute such information.⁸⁸

83. *Id.* at 28.

84. See *infra* notes 170-96 and accompanying text. The ECHR holding in *Open Door Counselling* generated a mixed reaction from the Irish public. Aoife Mac Eoin, *Mixed Reaction in Ireland on European Abortion Decision*, UPI, Oct. 30, 1992 available in LEXIS, Nexis Library, UPI File. The Court's failure to hold that the right to privacy under Article 8 of the Convention includes the right to have an abortion subdued any joy that pro-choice activists may have experienced over the decision. See Thompson, *supra* note 4, at 391-92. Moreover, the Irish Supreme Court ultimately refused to repeal the injunction because the clinics had petitioned the Supreme Court directly to remove the injunction but the Supreme Court can act only on appeals from the High Court. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd.*, [1994] 1 I.L.R.M. 256, 9 (Ir. S.C.) (page numbers refer to full-page LEXIS printouts). The Court's refusal to overturn the injunction came after the enactment of the Fourteenth Amendment, which established a right to disseminate information concerning abortion. See *infra* note 124 and accompanying text. Nevertheless, the Court indicated in dicta that despite the "appeals" issue, the Court would not be compelled to remove the injunction because the original case pre-dated the Amendment. [1994] 1. I.L.R.M. at 9.

85. [1989] I.R. 753 (Ir. H. Ct.).

86. The student groups were the Union Students of Ireland, the Students' Union of University College Dublin, and the Students' Union of Trinity College Dublin. *Id.* at 762.

87. [1989] I.R. at 760.

88. Article 59 calls for the progressive abolition of "restrictions on the supply of services within the European Economic Community." EEC TREATY art. 59. Article 60, in turn, provides that "service" for purposes of the Treaty "shall be deemed to be services normally supplied for remuneration" and shall "include in particular: (a) activities of an industrial character, (b) activities of a commercial

Rather than rule on the community law issue itself, the High Court referred the case immediately to the ECJ⁸⁹ pursuant to Article 177 of the EEC Treaty.⁹⁰ The High Court requested a determination as to whether abortion was a "service" under Article 60 of the EEC Treaty and whether Ireland might nevertheless be able to impose restrictions on the distribution of materials describing the availability of abortion services abroad.⁹¹

The SPUC appealed to the Irish Supreme Court before the ECJ could render an opinion. Based on its finding that the High Court had essentially denied the injunction by referring the case to the ECJ,⁹² the Supreme Court accepted the appeal and held that the students' distribution of the abortion information violated the right to life of the unborn under *Open Door Counselling*.⁹³

character, (c) artisan activities and (d) activities of the liberal professions." EEC TREATY art. 60.

89. Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, [1991] E.C.R. 4685, 4733, 2 CEC (CCH) 539, 576 (1991).

90. Article 177 provides in relevant part:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of the Treaty;

(b) the validity and interpretation of acts of the institutions of the Community; and

(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon . . .

EEC TREATY art. 177.

91. Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, [1991] E.C.R. 4685, 4740-41, 2 CEC (CCH) 536, 579-80 (1991), available in LEXIS, Ireln Library, Cases File.

92. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, [1989] I.R. 753, *5 (Ir.) available in LEXIS, Ireln Library, Cases File. The Court noted that "to defer . . . reaching a decision on such an application for a period which certainly equals and probably . . . exceeds the time necessary to bring the action to hearing is . . . to decline or refuse to make an interlocutory injunction. *Id.* at *5. The Court further observed that "where the courts of a member state decide to refer a question pursuant to Article 177 of the Treaty for a preliminary ruling by the European Court of Justice . . . the question as to the stage of the action in the member state at which that reference is made and what steps the courts of the member states may take pending that determination is peculiarly a matter for the national courts to be considered and decided in accordance with national law." *Id.* at *8.

93. *Id.* at 765. The Court rejected "the contention that the activity involved in this case of publishing in the students' manuals the name, address and telephone number . . . of abortion clinics in the United Kingdom, and distributing such manuals in Ireland, can be distinguished from the activity condemned by this Court in the *Open Door Counselling Case*." *Id.* at *6.

The appeal to the Supreme Court turned out to be unnecessary since the ECJ ultimately ruled against the student groups.⁹⁴ After considering the issues referred to it by the High Court, the ECJ held that abortion was a "service" under Article 60 of the EEC Treaty and thus was not subject to restrictions.⁹⁵ The Court, however, held that the link between the activity of the student groups and those actually providing the abortion services was "too tenuous" for the restriction on the provision of information to be considered a violation of Articles 59 and 60.⁹⁶ The Court's decision left open the possibility that if the "providers of information were affiliated with the providers of abortion services" or perhaps if the intended recipients of the information were to bring suit, the restrictions might not stand.⁹⁷

3. Attorney General v. X

At the time of the *Grogan* decision, events were occurring that would provide the back-drop for a case that would test the bounds of the Eighth Amendment in unprecedented ways. In *Attorney General v. X*,⁹⁸ a fourteen year old girl who had been raped and impregnated by her friend's father fled with her parents to England for the purpose of obtaining an abortion.⁹⁹ After the Attorney General petitioned the Court to enjoin the girl from terminating her pregnancy, the girl returned home to argue her case in Court.¹⁰⁰ At various points throughout her ordeal, the girl manifested an intent to take her own life if she was not permitted to terminate her pregnancy.¹⁰¹

Before the High Court, the girl argued that there was a right to travel abroad to obtain a service lawfully available in another

94. *Grogan*, 1991 E.C.R. at 4740, 2 CEC at 579.

95. *Society for the Protection of Unborn Children*, [1991] E.C.R. at 4739, 2 CEC (CCH) at 579.

96. *Id.*

97. Dena T. Sacco & Alexia Brown, *Regulation of Abortion in the European Community—Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, 33 HARV. INT'L L.J. 291, 297 (1992). It is now unlikely that Articles 59 and 60 of the Treaty of Rome could be used to strike down Irish laws restricting abortion. Before signing the Maastricht Treaty in 1992, Ireland insured that it contained a provision stipulating that nothing in the treaties of the EEC would be construed as interfering with Ireland's domestic law regarding abortion. See *infra* notes 113-17 and accompanying text.

98. [1992] I.L.R.M. 401 (Ir. H. Ct.), available in LEXIS, IreInd Library, Cases File.

99. *Id.* at 2 (page numbers refer to full-page LEXIS printouts).

100. *Id.*

101. *Id.* at 2-3.

state under *State (K.M.) v. Minister for Foreign Affairs*,¹⁰² and that such a right must trump the right to life of the unborn.¹⁰³ She also argued that the right to life of the unborn must be subordinate to the right to life of the mother, even if the threat to the life of the mother is self-imposed.¹⁰⁴ The High Court nevertheless granted the injunction, finding that the right to travel must be subordinated to the right to life of the unborn and that the threat to the girl was of a "different order and magnitude than the certainty that the fetus would die if an injunction were not granted."¹⁰⁵ Although the ECJ had determined that abortion was a "service" under Article 59 of the EEC Treaty, the Court noted that it was unlikely to interfere with the Ireland abortion issue given its tendency to defer to member states regarding matters of public security and public health.¹⁰⁶

The Supreme Court reversed the judgment of the High Court.¹⁰⁷ Four of five justices who heard the case held that abortion is permissible if the pregnancy presents a real and substantial threat to the mother's life.¹⁰⁸ The same four found that the girl's promises to take her own life, under the circumstances, posed such a threat.¹⁰⁹ In addition, all five justices agreed that there is an unenumerated constitutional right to travel.¹¹⁰ However, three of the five argued that, absent a real and substantial risk to the life of the mother, such a right would be subordinated to the right to life of the unborn.¹¹¹

The holdings in *X* made clear that a woman was legally permitted to obtain an abortion in Ireland only if the pregnancy posed a substantial risk to her life. It also made clear that the threat of suicide might constitute such a risk in the event that the woman was forced to carry the pregnancy to term. It was unclear, however, whether a woman's promises to kill herself alone would amount to a "substantial risk," or whether

102. [1979] I.R. 73 (Ir. H. Ct.). The right to travel was also upheld in *Lennon v. Ganley*, [1981] I.L.R.M. 84 (Ir. H. Ct.) and *Kane v. Governor of Mountjoy Prison*, [1988] I.L.R.M. 724 (Ir. H. Ct.).

103. *X*, [1992] I.L.R.M. at 5.

104. *Id.* at 5.

105. *Id.* at 6-7. As to the right to travel, the Court noted that: "If a Constitutional right is being abused by exercising it to commit a wrong (as would be the case when traveling abroad to procure an abortion) then the court may restrain the wrongful act even though this may involve the curtailment of the exercise of a constitutional right." *Id.*

106. *Id.* at 8.

107. [1992] I.L.R.M. 414 (Ir.) available in LEXIS, Ireln Library, Cases File.

108. *Id.* at 17, 37, 42 & 46 (page numbers refer to full-page LEXIS printouts).

109. *Id.*

110. *Id.* at 18, 31, 40, 43 & 46.

111. *Id.* at 19, 31 & 46.

corroborative evidence would be needed to establish such a risk. In *X*, several of the opinions finding a "substantial risk" of suicide appear to rely heavily on the report of a psychologist to the effect that the girl was capable of suicide.¹¹² Nevertheless, at least one commentator has suggested that "mere verbal threats of suicide suffice to meet the real and substantial risk test."¹¹³

While all the justices on the Supreme Court recognized an unenumerated constitutional right to travel, in the wake of *X* it has appeared that a majority of the Court believed that the right should be subordinated to the right to life of the unborn, except where the pregnancy constituted a substantial risk to the life of the mother. This principle effectively meant that after *X*, Irish authorities could prevent a woman from going abroad to obtain an abortion unless the pregnancy posed a substantial risk to the life of the mother. As a result, Irish women were only permitted to do abroad what they could do, at least in theory, in Ireland.

III. THE THIRTEENTH AND FOURTEENTH AMENDMENTS

The disturbing factual background and ultimate disposition of *X* set in motion a chain of events that would forever change the complexion of Irish abortion law. Prior to *X*, Ireland had signed the Maastricht Treaty,¹¹⁴ which was designed to further develop ties within the European Community, only after the other members had agreed to a provision¹¹⁵ stipulating that nothing in the Maastricht Treaty would be construed to limit the right to life of the unborn found in the Irish Constitution.¹¹⁶ Within a month of the *X* decision, the Irish Prime Minister sought to have this provision modified to incorporate the Court's holdings.¹¹⁷ While the provision was never changed for fear that it might start a

112. See, e.g., *id.* at 16 (opinion, J. Finley). The report stated that the girl "was capable of . . . (suicide), not so much because she is depressed but because she could calculatingly reach the conclusion that death is the best solution." [1992] I.L.R.M. at 3 (Ir.H.Ct.).

113. Sabina Zenklich, *X Marks the Spot While Casey Strikes Out: Two Controversial Abortion Decisions*, 23 GOLDEN GATE U.L. REV. 1001, 1013 (1993).

114. Treaty on European Unity and Final Act, February 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty].

115. The "Irish Exception" Protocol provides: "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland." *Id.* at 362.

116. See Stoffregen, *supra* note 40, at 572-73; see also Zenklich, *supra* note 111, at 1009.

117. See Stoffregen, *supra* note 40, at 573; see also Zenklich, *supra* note 111, at 1007.

domino effect which would unravel the Maastricht Treaty, ministers from the member states met and agreed to a "solemn declaration" that the provision would not be interpreted "to restrict the free travel of [Irish] women" to obtain an abortion (at least where the life of the mother was at stake).¹¹⁸

More importantly, the *X* case made clear that a majority of Irish citizens favored some liberalization of the country's abortion law. By the end of the year, three proposed amendments regarding abortion were submitted to the people for referendum.¹¹⁹ The first of these three, which would have solidified the holding in *X* that abortion be allowed only where the pregnancy poses a substantial risk to the life of the mother, was resoundly defeated.¹²⁰ This was virtually assured by the fact that both pro-life and pro-choice activists encouraged their constituencies to vote against the proposal—pro-life activists because they opposed any infringement on the right to life of the unborn, and pro-choice activists because they believed the proposal did not go far enough.¹²¹

By contrast, the second and third proposals passed easily, which recognized the right of a woman to travel abroad to terminate her pregnancy and to have access to information about the availability of abortion services abroad respectively.¹²² On December 3, 1992, they were incorporated into Article 40.3.3 of the Irish Constitution as Amendments Thirteen and Fourteen.¹²³ The Thirteenth Amendment provides that the right to life of the unborn as protected by the Eighth Amendment "shall not limit the freedom to travel between the state and another state."¹²⁴ The Fourteenth Amendment in turn provides that the Eighth Amendment "shall not limit the freedom to obtain or make available, in the State, subject to such conditions as may be established by law, information relating to services lawfully available in another state."¹²⁵

118. See Stoffregen, *supra* note 40, at 573.

119. See Jill Serjeant, *Irish Voters Reject Proposal to Life Blanket Ban on Abortion*, Reuters North American Wire, Nov. 28, 1992, available in LEXIS, Nexis Library, US File.

120. *Id.* The final tally for the proposal was 34.6% for and 65.4% against. *Id.*

121. Jill Serjeant, *Ambiguous Abortion Vote Produces Bizarre Alliance*, Reuters Library Report, Nov. 24, 1992, available in LEXIS, Nexis Library, US File.

122. Serjeant, *supra* note 118. 62.3% of those who voted for the proposal regarding the right to travel (as opposed to 37.7% against) and 59.8% voted for the proposal regarding access to information (as opposed to 40.2% against). *Id.*

123. Weinstein, *supra* note 4, at 196.

124. IR. CONST. amend. XIII (incorporated at art. 40.3.3).

125. IR. CONST. amend. XIV (incorporated at art. 40.3.3).

The full impact of the Thirteenth and Fourteenth Amendments will not be appreciated for some time. Nevertheless, the enactment of the amendments had several immediate consequences for Irish law and society. After the referendum, it was still permissible for a woman to obtain an abortion in Ireland if the pregnancy posed a real and substantial risk to her life under X. But the Thirteenth Amendment appeared on its face to guarantee that the Eighth Amendment could never again, under any circumstances, be interpreted as prohibiting a woman from traveling abroad to terminate her pregnancy. This marked a radical departure from the majority view in X that travel abroad for the purpose of obtaining an abortion would only be allowed where the pregnancy posed a substantial risk to the life of the mother.

The Fourteenth Amendment offered the hope that Irish women would be able to legally obtain information about abortion services lawfully available abroad. However, the "subject to such conditions" language contained in the amendment left open the possibility that legislation could all but eliminate the right to receive information relating to abortion and reinstate an *Open Door Counselling* and *Grogan* regime. In response, as early as five days after the passage of the amendment, some governmental officials called publicly for new legislation that would protect the newly created right.¹²⁶

The fact that it took until March of 1995 for such legislation to materialize testifies to the strength of the pro-life lobby¹²⁷ and to the unwillingness of most politicians to place their reputations and their jobs on the line for such a controversial issue as abortion.¹²⁸ It was only with the entrenchment of a coalition government (consisting of members of the Labour Party, Fine Gail, and Democratic Left) that new legislation ensuring access to such information showed signs of becoming a reality.¹²⁹ By the

126. Geraldine Kennedy, *Abortion Issue is Heavily Defeated*, IR. TIMES, Nov. 30, 1992, at 6, available in LEXIS, World Library, Itimes File (noting that as of November 30, 1992, some members of the Labour Party were advocating that "new abortion legislation . . . be referred to the Supreme Court for a test of its constitutionality.")

127. Philippe Bernes-Lassere, *L'avortement enflamme de nouveau la vie politique irlandaise*, [Abortion Again Inflames Irish Political Debate], AGENCE FR. PRESSE, March 7, 1995, available in LEXIS, Nexis Library, Non-Eng File.

128. Patsy McGarry, *Passing of Abortion Information is Welcome Step*, Says Church Publication, IR. TIMES, March 24, 1995, at 5, available in LEXIS, World Library, Itimes File.

129. *Id.*

middle of March, both houses of the legislature had approved a bill which extends a limited right to receive such information.¹³⁰

IV. THE ABORTION INFORMATION ACT OF 1995

A. *The Provisions of the Act*

The 1995 Act grants Irish women a qualified right to receive information regarding to abortion services available abroad. The 1995 Act delineates how and under what circumstances publishers of abortion material, and organizations rendering pregnancy counselling, can disseminate information concerning abortion. Overall, the 1995 Act reflects the belief that while Irish women are entitled to receive information that will help them make intelligent decisions about their pregnancies, under no circumstance should such information be presented in a way that advocates or encourages abortion.

Section 3 of the 1995 Act relates to the publication of materials concerning abortion services available abroad.¹³¹ It provides that it shall not be unlawful to publish, or procure the publication of, Act information if: (1) the information relates only to services which are lawfully available in the country in which they are rendered; (2) the information and the manner of its publication are in compliance with the laws of that country; (3) the information is truthful and objective; and (4) the information does not advocate or promote the termination of the pregnancy.¹³² The means of distribution of such information are not limited in any way except that under Section 4, it is illegal to display a public notice containing such information or to otherwise distribute unsolicited such information concerning abortion services available abroad.¹³³

Section 5 sets forth the responsibilities of anyone who gives advice or provides counselling to individual members of the public regarding pregnancy.¹³⁴ Under this provision, where such a person¹³⁵ is approached by a woman (or someone acting on behalf

130. Bernes-Lassere, *supra* note 126. The Dáil passed the bill by a vote of 85 to 67 on March 10, 1995. *Id.* The Senate passed the bill without vote on March 14, 1995. Chris Parkin, *Irish Senate Passes Abortion Bill*, UPI, Mar. 14, 1995, available in LEXIS, Nexis Library, UPI File.

131. Abortion Information Act, *supra* note 1, at § 3.

132. *Id.*

133. *Id.* at § 4.

134. *Id.* at § 5.

135. Section 5 applies to corporations and other kinds of social organizations. "Person" for purposes of the section is defined under section 1(i)

of the woman) seeking information concerning pregnancy, he or she must fully inform the woman of all the courses open to her in relation to her particular circumstances.¹³⁶ Furthermore, the counsellor cannot advocate or promote the termination of the pregnancy under any circumstances.¹³⁷

As an additional precaution, Section 6 attempts to eliminate any financial incentives a person engaged in giving pregnancy counselling might have to encourage the woman to seek an abortion.¹³⁸ The Section does this in part by making it illegal to obtain "directly or indirectly any financial or other benefit from any person who provides [abortion] services outside the state or has an interest in the body providing such services."¹³⁹ The Section also prevents the counsellor from obtaining, either indirectly or directly, any financial benefit from the woman in connection with obtaining information regarding abortion services available abroad or the utilization by the woman of abortion services outside the State.¹⁴⁰

Section 8 further restricts the freedom of persons who give abortion counselling by making it unlawful for them, or their employers or principals, to make an appointment or any other arrangement for an abortion on behalf of a woman who has decided to terminate her pregnancy.¹⁴¹ The Section, however, also stipulates that nothing in the 1995 Act should be construed as prohibiting a counsellor from communicating with the abortionist once the appointment has been made.¹⁴² In addition, Section 8 provides that the counsellor may give the woman any "medical, surgical, clinical, social or other like records" which she might need in undergoing the abortion procedure.¹⁴³ Finally, Section 10 provides that anyone who violates any provision of the 1995 Act shall be liable for an amount not to exceed One Thousand Five Hundred Pounds.¹⁴⁴

The general thrust of the 1995 Act was clear from the moment it passed the Senate: While Irish women are to be permitted to receive information relating to abortion services lawfully available in another country, the information cannot be

as any entity that "engages in, or holds himself, herself or *itself* out as engaging in, the activity of giving information, advice or counselling to individual members of the public in relation to pregnancy." *Id.* (emphasis added).

136. *Id.*

137. *Id.*

138. *Id.* at § 6.

139. *Id.*

140. *Id.*

141. *Id.* at § 8.

142. *Id.*

143. *Id.*

144. *Id.* at § 10.

presented in a way as to encourage or promote abortion. It was decidedly less clear whether the new legislation would pass constitutional muster in light of the Fourteenth Amendment and the Supreme Court's recent abortion holdings in *Open Door Counselling*, *Grogan*, and *X*.

In the United States, it invariably takes years for a case testing the validity of an act of Congress to reach the Supreme Court. But the Irish Constitution avoids this delay by allowing the President to refer certain acts of the legislature¹⁴⁵ directly to the Supreme Court for a determination as to their constitutionality.¹⁴⁶ Relying on this provision, on March 18, 1995, President Mary Robinson asked the Court to examine the 1995 Act for constitutional defects.¹⁴⁷ On May 12, 1995, the Court handed down an eighty-page opinion upholding the 1995 Act.

B. *The Supreme Court's Decision in In the Matter of Abortion Information Act of 1995*

Before the Supreme Court, counsel "for the unborn" and counsel for the mother each made several arguments challenging the 1995 Act. By far the most important argument advanced by counsel for the unborn was that the 1995 Act is unconstitutional for failing to contain a provision requiring that parents of minors and husbands be informed when the mother seeks information pertaining to abortion services available abroad.¹⁴⁸ This

145. Article 26 applies to "any Bill passed or deemed to have been passed by both houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution." IR. CONST. art. 26.

146. Article 26.1.1 states that "the President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof." IR. CONST. art. 26.1.1.

147. *Ireland May Review Abortion Gag Rule*, TIMES UNION (Albany, NY), March 19, 1995, at A77, available in LEXIS, News Library, Atmsun File.

148. Counsel for the unborn also advanced a natural law argument against the 1995 Act. In essence, counsel argued that even if the 1995 Act was valid under the Fourteenth Amendment, it must be struck down as violating natural law because the right to life is a natural right and the 1995 Act interferes with that right. In the Matter of the Abortion Information Act [1995] 2 I.L.R.M. 81, 21 (Ir. S.C.), available in LEXIS, Ireland Library, Cases File (page numbers refer to full page LEXIS printouts).

To most observers in the United States, the idea of making a natural law argument before the country's highest court would seem absurd. But Ireland, unlike the United States, historically has been subject to competing sources of authority—positive law and natural law. In this regard, Article 41.1 of the Irish

argument contained essentially two steps. First, counsel contended that under the Supreme Court's interpretation of Article 41 of the Constitution, which generally acknowledges the family as the fundamental unit of society, parents of minors and husbands have a right to know when the mother is seeking abortion information. Having made this argument, counsel next contended that any legislation that does not contain a provision expressly acknowledging this right is constitutionally defective.

The Supreme Court summarily rejected the second portion of this argument on the grounds that the legislature was entitled to assume, under *Donegal Co. Operative Livestock Mart Ltd. v. Attorney General*¹⁴⁹ and related cases,¹⁵⁰ that the 1995 Act would be interpreted in accordance with "constitutional justice."¹⁵¹ However, in so holding, it seems that the Court implicitly recognized that "constitutional justice" would require that persons giving pregnancy counselling must inform parents of minors and husbands, as the case may be, of the mother's decision to seek abortion information. The Court came close to acknowledging this idea when it stated "Constitutional justice requires that in the giving of . . . [abortion] information . . . and advice regard be

Constitution provides that the "State recognizes the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights *antecedent and superior to all positive law.*" IR. CONST. art. 41.1. (emphasis added). The Supreme Court's own jurisprudence likewise has recognized that some "fundamental personal rights are not conferred by the Constitution" but derive from natural law. William Binchy, *Abortion Ruling One of the Most Significant Legal Decisions Since Foundation of the State*, IR. TIMES, May 15, 1995 at 12, available in LEXIS, World Library, Itimes File. In that regard, one might recall the Court's statement in *Ryan* to the effect that "personal rights . . . are not limited to those specified in (the Constitution) but include all those rights that flow from the Christian and Democratic nature of the state." *Ryan*, [1965] I.R. at 312.

Despite the existence of authority supporting the primacy of natural law, the Supreme Court held that for a democracy to function effectively, positive law must trump natural law. In the Matter of the Abortion Information Act, 2 I.L.R.M. at 17. In so ruling, the Court relied heavily on several provisions in the Constitution such as Article 34.1, which provides that "justice shall be administered in Courts established by law by judges appointed in the manner provided by this Constitution." IR. CONST. art. 34.1. It also relied on language in certain of its own opinions stating that "the State is not internally sovereign but, in internal affairs, subject to the Constitution which limits, confines and restricts its power." *Byrne v. Ireland*, [1972] I.R. 241, 299 (Ir.); In the Matter of the Abortion Information Act, 2 I.L.R.M. at 27.

149. [1970] I.R. 317 (Ir.).

150. See, e.g., In the Matter of the Adoption (No.2) Bill, 1987, [1989] I.R. 656 (Ir. S.C.), available in LEXIS, Ireln Library, Cases File ("[I]t must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the bill are intended to be conducted in accordance with the principles of constitutional justice. . . .").

151. In the Matter of the Abortion Information Act, 2 I.L.R.M. at 28.

had to the rights of persons likely to be affected by such information . . . and advice."¹⁵²

For its part, counsel for the mother attacked the constitutionality of the 1995 Act on the ground that it insufficiently vindicates the right to life of the mother.¹⁵³ Section 5 of the 1995 Act on its face seems to prevent a physician or other adviser who had formed an opinion that a pregnancy posed a real and substantial risk to the mother, from advising the mother to have an abortion.¹⁵⁴ In counsel's view this provision might jeopardize the mother's life to the extent that patients tend to look for advice from a physician, not merely a diagnosis.¹⁵⁵ In the absence of a clear recommendation to abort the fetus, counsel argued that a woman might conclude that such a step was unnecessary and thereby put her life at risk.

In a similar vein, counsel for the mother contended that the provision in Section 8 prohibiting physicians and other advisers from making abortion appointments on behalf of the mother amounts to an "unreasonable interference with the protection of the right to life of the mother" where the pregnancy poses a risk to the mother's life.¹⁵⁶ In counsel's view, the dangers lurking behind the no-appointment-making rule are not rendered harmless by the adjoining provision that a physician or other adviser is permitted to communicate freely with the physician performing the abortion procedure once the appointment is made. Nor, it was argued, does the provision in Section 8, allowing physicians to transfer to the woman any medical records necessary for the procedure, adequately vindicate the right to life of the mother.¹⁵⁷

The Court dismissed these arguments largely on the ground that sufficient safeguards for a woman's life can be found in Section 5's provisions providing that a physician or other advisor is not precluded from giving full information about the consequences of the pregnancy to the woman.¹⁵⁸ In essence, the Court concluded that, once appraised of the likely consequences of seeing a high-risk pregnancy to term, a woman can make her

152. *Id.*

153. *Id.* at 25.

154. *See supra* note 136 and accompanying text.

155. In the Matter of the Abortion Information Act, 2 I.L.R.M. at 25.

156. *Id.*

157. *Id.*

158. The Court also dismissed summarily the contention that Section 7 (which prohibits physicians or any other advisor from having a direct or financial interest in an entity which provides abortion services) is unconstitutionally vague. The Court observed simply that Section 7 is "quite clear, so that . . . [anyone providing abortion information] would have no difficulty in understanding what it is that the Section makes unlawful." *Id.* at 26.

own decision as to appropriate action and can undertake such action without assistance. Moreover, unlike counsel for the mother, the Court concluded that Section 8's "communication" and "records" provisions go a long way toward vindicating the right to life of the mother.¹⁵⁹

V. IRISH ABORTION LAW AFTER IN THE MATTER OF ABORTION INFORMATION ACT OF 1995

In the wake of *Open Door Counselling*, *Grogan*, *X*, and *In the Matter of the Abortion Information Act of 1995*, several aspects of Ireland's abortion law seem clear. A woman seeking to terminate an unwanted pregnancy may obtain an abortion in Ireland only if the pregnancy poses a substantial risk to her life.¹⁶⁰ Under *X*, the threat of suicide in the event that the woman is forced to carry the fetus to term may constitute a "substantial risk."¹⁶¹ It is not clear, however, whether a mere expression of an intent to kill oneself would suffice or whether such threats would need to be corroborated by the sworn statement of a psychologist or physician.¹⁶²

Absent a "substantial risk" to her life, an Irish woman seeking an abortion is relegated to traveling overseas to undergo the procedure. The Thirteenth Amendment should prevent Irish authorities from stopping a woman from leaving the country, even if they have reason to believe that she will terminate the pregnancy while abroad.¹⁶³

Moreover, Irish women should find it easier to obtain information relating to abortion services available abroad in light

159. *Id.* at 25-26.

160. *See supra* note 107 and accompanying text.

161. *See supra* note 108 and accompanying text.

162. *See supra* notes 111-12 and accompanying text.

163. *See supra* note 123 and accompanying text. One should be aware of convoluted language in *In the Matter of the Abortion Information Act* to the effect that "[t]he provisions of the Thirteenth Amendment . . . do not give a right to abortion . . . where none existed prior to [its] enactment." *In the Matter of the Abortion Information Act*, 2 I.L.R.M. at 24. A skillful lawyer for the right to life of the unborn might argue in a future action that such language suggests that the Thirteenth Amendment does not give Irish women an unqualified right to travel abroad to obtain an abortion. Rather, it would be argued, the Amendment does nothing more than solidify *X*'s holding that the right to travel only trumps the right to life where there is a substantial risk to the right to life of the mother. In fact, it appears from the full context of the Court's statement that the Court was only addressing whether or not the Thirteenth Amendment created a right to obtain an abortion in Ireland where none existed before. In the final analysis, the right to travel abroad is fully protected even if the purpose of traveling abroad is to obtain an abortion.

of the holding in *In the Matter of the Abortion Information Act of 1995*. Under the 1995 Act, the dissemination of names and addresses of abortion clinics and other information related to abortion services abroad is permitted, provided that the information is not presented in a way that promotes or encourages abortion.¹⁶⁴

Though the Supreme Court's decision in *In the Matter of the Abortion Information Act of 1995* shed light on the state of abortion law in Ireland, several problems persist. First, it is not clear whether the Irish Courts will require that parents of minors and husbands be informed that the girl or woman has sought information regarding abortion. The Supreme Court seemed to suggest in *In the Matter of the Abortion Information Act of 1995* that "constitutional justice" would require that parents and husbands be so informed, without saying so explicitly.¹⁶⁵ A requirement that the parents and husbands be told of the pregnant mother's decision to seek abortion information might well deter the mother from seeking such information and thwart the primary purpose of the 1995 Act.¹⁶⁶

Unfortunately, in the wake of the Irish Supreme Court's decision upholding the 1995 Act, there is also likely to be some confusion as to the boundary between advocacy and non-advocacy in the context of pregnancy counselling. For example, it is unclear to what extent a physician may be liable for advising a patient that she is highly likely to give birth to a child with abnormalities and also that abortion services are available

164. See *supra* notes 130-43 and accompanying text.

165. See *supra* notes 147-58 and accompanying text.

166. The U.S. Supreme Court addressed this concern in *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992). In *Casey* the Court held that prior to fetal viability, the state cannot place an "undue burden" on a woman's right to have an abortion. *Id.* at 877. After the onset of viability, however, the state may regulate abortion to the extent it sees fit as long as the state allows for the termination of pregnancies that endanger a woman's life or health. *Id.* at 846. The U.S. Supreme Court went on to find that a requirement that the parents of a minor be informed of their daughter's decision to have an abortion does not place an undue burden on the daughter's right to choose because such a requirement will allow "the parent or parents of [the daughter] the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family." *Id.* at 899-900. The Court also held, however, that a requirement that the father of the child be notified of the woman's decision to have an abortion does place an undue burden on the woman's right to choose. *Id.* at 893-94. In so ruling, the Court noted that "[a] state may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.* at 898. It also found that a notice requirement as to the father would be especially hard on women in abusive relationships because such women might fear that their decision to have an abortion would subject them to physical or psychological abuse and thus decide not to seek an abortion. See *id.* at 897.

abroad. Ordinarily, a physician might not be concerned about such a scenario because authorities would be unlikely to gain access to the substance of the conversation between the physician and the patient. But under Section 9 of the 1995 Act, a district court can authorize the seizure of certain documents in the physician's possession if the court believes that the documents will be relevant in a prosecution under the 1995 Act.¹⁶⁷ Therefore, physicians have every incentive to take the utmost care to avoid advice which might be construed as improper counselling.

As to the future of the law itself, it is unlikely that pro-choice activists will be able to use the Irish political process to give women a broader right to obtain an abortion in Ireland in the foreseeable future. The Thirteenth and Fourteenth Amendments relate only to a woman's right to obtain information about abortion services available outside of Ireland and her right to travel abroad to use such services. The amendments do not in any way authorize legislation which will make abortions more widely available within Ireland itself. Consequently, the only domestic channel available to those who wish to see greater inroads into the right to life of the unborn is another constitutional amendment. Given the pervasive influence of the Catholic Church, it seems unlikely that the Irish people would vote to make abortion more widely available in Ireland, particularly so soon after they memorialized the right to life of the unborn under the Eighth Amendment of the Constitution.¹⁶⁸

Given the uncertainty they face at home, those who support a woman's right to choose may look to international law for authority favoring a woman's right to have an abortion. Unfortunately, the treaties of the EEC are unlikely sources of such authority. For a while, it looked as if the EEC Treaty might offer some hope because the ECJ had determined that abortions

167. Abortion Information Act, *supra* note 1, at § 9.

168. On the other hand, Ireland is undergoing a period of unprecedented social change reminiscent of what the U.S. experienced in the 1960s and 1970s. Perhaps most indicative of this is the recent referendum on divorce. Since the Constitution was enacted in 1937, Article 41.3.2 had provided that "no law shall be enacted providing for the grant of a dissolution of marriage." IR. CONST. art. 41.3.2. On November 24, 1995, the Irish people voted by a slim margin to allow divorce in cases in which the couple has been separated for four of the previous five years, and there is no reasonable prospect for reconciliation. See Carol Coulter, 'No-fault' Divorce Basis Not Debated, IR. TIMES, June 21, 1996 at 14, available in LEXIS, World Library, Itimes File. Most remarkable about this event is the fact that the Irish people had rejected a similar challenge to Article 41.3.2 by a margin of nearly two-to-one only nine years earlier. See *Easing of Irish Divorce Laws Loses Support as Vote Nears*, ARIZ. REPUBLIC, Nov. 24, 1995, at A25, available in LEXIS, News Library, Azrep File.

were "services" for purposes of Article 60 and accordingly could not be subject to undue restrictions.¹⁶⁹ The Maastricht Treaty of 1992, however, which superceded the EEC Treaty, contains a provision stipulating that nothing in the Treaty should be construed as interfering with Ireland's domestic law regarding abortion.¹⁷⁰

By contrast, the European Convention on Human Rights (hereinafter Convention) might still be used to force Ireland to liberalize its abortion law. Because the legislature has never formally incorporated the Convention into domestic law as required by Article 29.6 of the Irish Constitution,¹⁷¹ Irish Courts may find that they do not have jurisdiction over matters arising under the Convention.¹⁷² But this does not necessarily mean that an Irish woman who believes that her rights under the Convention have been violated has no recourse, for the woman may appeal her case to the Commission on Human Rights and ultimately to the ECHR. A decision by the ECHR finding a right to abortion in the Convention would almost certainly be honored by Ireland.¹⁷³

169. See *supra* note 94 and accompanying text.

170. See *supra* notes 113-17 and accompanying text.

171. See *supra* note 36 and accompanying text.

172. The courts have refused to accept the Convention as binding authority on several occasions. See *In re O'Laighléis* [1960] I.R. 93, 125 (Ir.) ("[T]his [Supreme] Court can not give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law."); see also *Norris v. Attorney General*, [1984] I.R. 36, 66 ("The Convention is an international agreement As such, however, it does not and cannot form part of [Ireland's] domestic law, nor affect in any way questions which arise thereunder."). This is not to say that Irish courts always ignore the convention. "Occasionally, the Irish courts will use the jurisprudence of the Convention to bolster their own reasoning on a matter of domestic law, and some judges have gone so far as to suggest that there is a presumption that certain aspects of Irish law . . . are in conformity with the requirements of the convention." Gerard Quinn & Donncha O'Connell, *Symbolic Day for European Law Should Prompt Review of Irish Rights*, IR. TIMES, June 30, 1995, at 12, available in LEXIS, World Library, Itimes File. For a further exploration of these issues, see Thompson, *supra* note 4, at 378. But cf. G.F. Whyte, *The Application of the European Convention on Human Rights Before the Irish Courts*, 31 INT'L & COMP. L.Q. 856, 860-61 (1982) ("[T]he Irish courts have, for the most part, refused to take cognisance of the provisions of the Convention in domestic cases.").

173. Thompson, *supra* note 4, at 378. Article 46 of the Convention provides that the signators to the Convention have the option to declare at any time "that (they) recognize as compulsory *ipso facto* and without special agreement, the jurisdiction of the Court in all matters concerning the interpretation and application of the . . . Convention." IR. CONST. art. 46. Ireland recognized the compulsory jurisdiction of the Court at the same time it signed the Convention. See Thompson, *supra* note 4, at 378 n.39; ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 170 (1983). Further, Ireland has proved willing to modify its domestic law to make it consistent with decisions of the ECHR. For example, in late June of 1993, the Irish legislature passed a law

Within the Convention, the most likely source of authority for a right to abortion is Article 8, which provides:

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁷⁴

While the ECHR has avoided the issue of whether the right to abortion is encompassed within Article 8,¹⁷⁵ it might so hold if it were presented with an appropriate case. Under applicable precedent, the ECHR would first ask whether Ireland's anti-abortion law "interferes" with the complainant's right to maintain respect for her private life.¹⁷⁶ To the extent that the complainant is a woman in need of an abortion, the ECHR would almost certainly find this prong of the test met.¹⁷⁷

After establishing that the government in fact interfered with the complainant's private life, the ECHR would then be likely to ask whether or not the interference was "in accordance with the law" and whether it had a legitimate aim.¹⁷⁸ The ECHR would

decriminalizing homosexual activity after the ECHR had found in *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 1718 (1988) that laws against homosexuality violate the right to privacy found in Article 8 of the Convention. See Marie O'Halloran, *Bill on Homosexuality Passes Second Stage*, IR. TIMES, June 30, 1993 at 4, available in LEXIS, World Library, Itimes File. Similarly, in late June of 1996, the legislature passed a law giving fathers of children born outside marriage a say in the child's adoption in order to make Irish adoption law consistent with the ECHR holding in *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) (1994).

174. Convention on Human Rights, *supra* note 32, 213 U.N.T.S. at 230.

175. See *supra* note 82 and accompanying text. By contrast, in *Bruggeman v. Germany*, the Commission on Human Rights found that a woman's decision as to whether or not to terminate her pregnancy did not fall within the scope of Article 8. *Bruggeman v. Germany*, App. No. 6959/75, 3 Eur. H.R. Rep. 244, 253-54 (1977) (Eur. Comm'n on H.R.).

176. See, e.g., *Kroon v. Netherlands* 297 Eur. Ct. H.R. (ser. A) at 46, 56-57 (1994); *Keegan*, 290 Eur. Ct. H.R. at 19-20; *Norris*, 142 Eur. Ct. H.R. at 17; *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 18 (1981).

177. There can be little doubt that one's sexual practices and preferences fall within the scope of "private life". See *X and Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 6, 11 (1985) (finding that for purposes of Article 8, "private life" "covers the physical and moral integrity of the person, including his or her sexual life"); see also *Dudgeon*, 45 Eur. Ct. H.R. at 21 (holding that homosexual activity "concerns a most intimate aspect of private life"). Moreover, a law that limits a woman's right to have an abortion would seem to "interfere" with her sexual practices and preferences.

178. See, e.g., *Norris*, 142 Eur. Ct. H.R. at 18; *Dudgeon*, 45 Eur. Ct. H.R. at 19.

probably find that the interference was "in accordance with the law', since it arises from the very existence of the impugned legislation."¹⁷⁹ It is unclear, however, whether the ECHR would find that the interference has a legitimate aim. The Court has often held that the views of domestic lawmakers concerning public morality must be given special deference.¹⁸⁰ It has also noted that the "margin of appreciation" to be afforded domestic lawmakers in matters concerning public morality depends both upon "the nature of the aim of the restriction [and] . . . the nature of the activities involved."¹⁸¹ At times, the ECHR seemingly has indicated that the "margin of appreciation" given to domestic lawmakers will be low where the underlying interest is sexual freedom.¹⁸² Thus, in *Dudgeon v. United Kingdom*, the Court struck down a law that criminalized homosexual activity, stating, "[t]he present case concerns a most intimate aspect of private life. Accordingly, particularly serious reasons must exist before interferences on the part of the public authorities can be legitimate. . . ."¹⁸³ Arguably, however, the ECHR has refused to lower the "margin of appreciation" when the matter before the Court concerns women's reproductive rights.¹⁸⁴ In *Open Door Counselling*, for example, the Court seemingly indicated that a wide "margin of appreciation" must be given to domestic lawmakers in matters concerning public morality, even where a woman's right to control her own body is implicated. The Court stated in dicta:¹⁸⁵

[I]t is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the

179. See *Norris*, 142 Eur. Ct. H.R. at 18; *Dudgeon*, 45 Eur. Ct. H.R. at 19.

180. Such court deference is usually referred to as the "margin of appreciation" doctrine. Cf. *Keegan*, 290 Eur. Ct. H.R. at 18 ("Contracting States enjoy a wide margin of appreciation in the area of adoption."); *Open Door and Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 29 (1992) ("[N]ational authorities enjoy a wide margin of appreciation in matters of morals"); *Dudgeon*, 45 Eur. Ct. H.R. at 21 ("[a] margin of appreciation is left to [the national authorities]."); and, *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 753 (1976) ("[T]he Court has only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation").

181. *Dudgeon*, 45 Eur. Ct. H.R. at 21.

182. See, e.g., *Norris*, 142 Eur. Ct. H.R. at 19; *Dudgeon*, 45 Eur. Ct. H.R. at 21.

183. *Dudgeon*, 45 Eur. Ct. H.R. at 21.

184. See Thompson, *supra* note 4, at 392-405; see also Kathleen M. McCauley, Comment, *Women on the European Commission and Court of Human Rights: Would Equal Representation Provide More Effective Remedies?*, 13 DICK. J. INT'L L. 151, 169 (1994) (arguing that reproductive rights would benefit from the presence of more female members on the Court).

185. Thompson, *supra* note 4, at 399.

international judge to give an opinion on the exact content of the requirement of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.¹⁸⁶

Assuming that the ECHR finds that Ireland's abortion law does have a "legitimate aim," it would then be likely to ask whether the law was "necessary in a democratic society."¹⁸⁷ Among the factors to be considered in determining whether the interference was "necessary in a democratic society" includes whether the "interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued."¹⁸⁸ As to the first of these factors, there appears to be substantial overlap with the requirement that the interference pursue a "legitimate aim." In fact, the two requirements might easily be collapsed into one. As to proportionality, it is unclear what would suffice. Because abortion arguably implicates competing rights (the right to privacy of the mother and the right to life of the unborn), the Court might draw a distinction, as some nations have,¹⁸⁹ between abortions carried out before the fetus is viable and those performed after the fetus is viable. Such a distinction would turn on the notion that the mother's privacy interest is more important than the unborn child's right to life pre-viability, while the opposite is true post-viability. Alternatively, the Court might hold that Ireland's abortion law must take into account factors such as the woman's age, the health of the fetus, and whether the woman would be able to care for the child if were she to carry it to term.¹⁹⁰

A woman seeking to challenge Ireland's strict abortion law may also argue that the law violates Article 14 of the Convention in conjunction with Article 8. Article 14 provides:

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as

186. *Open Door and Dublin Well Women*, 246 Eur. Ct. H.R. at 29 (citations omitted).

187. *See, e.g., Kroon v. Netherlands*, 297 Eur. Ct. H.R. (ser. A) at 46, 56-57 (1994); *Norris*, 142 Eur. Ct. H.R. at 18.

188. *Norris*, 142 Eur. Ct. H.R. at 18; *see Olsson v. Sweden*, 130 Eur. Ct. H.R. (ser. A) at 31 (1988).

189. In the U.S., for example, under *Casey*, the state may not place an "undue burden" on a woman's right to have an abortion in the pre-viability period. In the post-viability period, however, the state may regulate abortion to the extent it sees fit, provided the state allows for termination of pregnancies that endanger a woman's life or health. *See supra* note 165.

190. Such a decision would be consistent with the Court's finding in *Open Door Counselling* that Ireland's blanket prohibition on the dissemination of abortion information violated Article 10 of the Convention because it places a "perpetual" restraint on the provision of [such] information . . . regardless of [a woman's] age or state of health or . . . reasons for seeking counselling on the termination of pregnancy." *See supra* note 81 and accompanying text.

sex, race, colour, language, religion, or other opinion, national or social origin, association with a national minority, property, birth or other status.¹⁹¹

The provision itself has "no independent existence."¹⁹² That is, one cannot violate Article 14 taken alone. Nevertheless, Article 14 "may play an important autonomous role by complementing the other normative provisions of the Convention."¹⁹³ If one of the rights found in the Convention is only made available to some, rather than to all persons, then those who are discriminated against may have a claim for violation of Article 14 taken in conjunction with the right at issue. Article 14 only becomes important to the extent that the domestic law touches one of the rights protected by the Convention, but generally comports with the provision protecting that right.¹⁹⁴ To the extent that the law interferes with a right under one of the normative provisions, relief will be granted on that basis rather than on the basis of a violation of Article 14 taken in conjunction with the normative provision.¹⁹⁵

Under existing precedent, a woman challenging Ireland's abortion law under Article 14, taken in conjunction with Article 8, would have to show that the law treats men and women differently and that there is no "objective and reasonable justification" for doing so.¹⁹⁶ In essence, the woman could argue that the law discriminates against women to the extent that it limits women's health options in a way that it does not men. Unfortunately, the Court may well find that the law has an "objective and reasonable justification" since it is based on a genuine difference between men and women (women get pregnant, men do not) and not on a mere stereotype.¹⁹⁷ In the end, it seems unlikely that the Court would find that Ireland's

191. Convention on Human Rights, *supra* note 32, 213 U.N.T.S. at 232.

192. *Schmidt v. Germany*, 291 Eur. Ct. H.R. (ser. A) at 26, 32 (1994); *X and Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 14 (1985); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 15 (1979).

193. *Marckx*, 31 Eur. Ct. H.R. at 15.

194. See *Schmidt*, 291 Eur. Ct. H.R. at 32; *Marckx*, 31 Eur. Ct. H.R. at 15.

195. See *X and Y*, 91 Eur. Ct. H.R. at 14 ("[A]n examination of the case under Article 14 is not generally required when the Court finds a violation of one of the former Articles taken alone.").

196. Cf. *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 35 (1991) (addressing different treatment of foreign and domestic newspaper); *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 10, 39 (1985) (addressing different treatment for taking property from nationals versus non-nationals); *Marckx*, 31 Eur. Ct. H.R. at 16 (addressing different treatment for adoption based on whether the child is legitimate or illegitimate).

197. For example, one can imagine that the Court would be less likely to find that a law prohibiting women from holding political office on the grounds that women are irrational has an objective and reasonable justification.

abortion law violates Article 14 taken in conjunction with Article 8.

VI. CONCLUSION

At a time when most of the civilized world at some level has recognized a woman's right to choose, Ireland's strict abortion law stands as a symbol of a by-gone world in which the Roman Catholic Church wielded tremendous influence over secular government. But even in Ireland, the Church can feel its hold beginning to loosen. With the passage of the 1995 Act, Ireland for the first time has recognized that Irish women should have some control over whether or not a fetus is carried to term. Although the 1995 Act does not change the circumstances under which a woman may lawfully terminate her pregnancy in Ireland, it does make it easier for a woman to obtain information about where and how an abortion may be obtained abroad. Only time will tell whether or not more Irish women will make the four-hour boat ride to England to do there what Irish law still precludes, except where the pregnancy poses a threat to the woman's life.¹⁹⁸

Keith S. Koegler*

198. Preliminary evidence suggests that Irish women have not traveled to England in increased numbers since the passage of the 1995 Act. See Peter Allen, *4,500 Fly to UK for Baby Ops; Irish Women Traveling to Britain for Abortions*, DAILY MIRROR, July 10, 1996 at 8, available in LEXIS, News Library, Mirror File. This probably reflects the fact that much of Irish society still attaches a stigma to having an abortion and that it may be very hard for a woman, particularly a young woman, to travel to England undetected.

*This Article is dedicated to my late father, who burned bright, but burned too fast.