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Ireland's Constitutional Protection of the Unborn: Is It in Danger

G. Diane Lee

IRELAND'S CONSTITUTIONAL PROTECTION OF THE UNBORN: IS IT IN DANGER?

G. Diane Lee[†]

"A society's respect for its most defenceless human life is a mark of that society's level of civilisation."[1]

I. INTRODUCTION

While the world watches as the struggle between Protestants and Catholics continues in Northern Ireland, little less noticed is the struggle of an entire population in the southern Republic of Ireland. There, amid the mountains and serene rolling hillsides of green velvet, lies a line that has and continues to polarize the population. The line is drawn between abortion and protecting the unborn. In the last two decades, abortion has been at the forefront of political, religious, social, legal, and international discourse in the Republic of Ireland (Ireland).[2] With forces both inside and outside Ireland continuing to evolve and shape the battleground, it is certain abortion will remain a controversial issue.

The issues surrounding abortion are numerous. They include the right to privacy, the right to reproductive health, the right to family planning, the freedom of information, the freedom to travel, the rights of adolescents, adolescent pregnancy, and restrictions under the Council of Europe, European Union, and United Nations agreements and treaties. Additionally, with neonatology pushing the definition of life earlier within pregnancy, and ultrasound and fetology expanding the concept of

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† J.D., University of Tulsa College of Law, May 2001; Bachelor of Liberal Studies, The University of Oklahoma, *with distinction*, 1998.

1. DR. ANDREW RYNNE, ABORTION: THE IRISH QUESTION 90 (1982). In preparation for his book, Dr. Rynne sent a questionnaire covering some of the most controversial issues in the abortion debate that raise medical, social and ethical problems. One of the questions asked for a response to this statement.

2. *See* Jo Murphy-Lawless & James McCarthy, *Social Policy and Fertility Change in Ireland: The Push to Legislate in Favour of Women's Agency*, 6 THE EUR. J. WOMEN'S STUD. 69, 71 (1999).

the patient in utero,[3] these issues become more complex, and the medical and scientific communities are drawn into the debate.

During the past decade, traditional ideologies and value systems in Ireland began to clash with the progressive forces of change.[4] The soul of this nation, where values are derived from a strong, traditional Catholic root, has been plagued by the increase of women in Ireland's workplace demanding termination of unwanted pregnancies and by the younger generations' spurning of rigid, religious morality. Like other countries in the world, Ireland's dilemma over abortion is painful and controversial. As a member state of the European Union and the Council of Europe, Ireland strives to abide by international norms while also preserving historical values. The clash between traditional and progressive values came to an apex when Ireland's Supreme Court ruled in *Attorney General v. X* [5] that abortion was legal in certain circumstances.[6] What followed was a debate that not only consumed the country for months but demonstrated that the Irish people regard abortion as a critical element that defines their society and culture.[7]

Unlike citizens in other nations, the people of Ireland actively amend their Constitution to protect their rights. The rights of life to the unborn, freedom to travel, and freedom of information were enacted by passage of the Eighth, Thirteenth, and Fourteenth Amendments to the Irish Constitution. The limited right to protection of the unborn reflected in the proposed Twelfth Amendment was rejected. These amendments reflect the people's views on abortion in light of Ireland's obligations under international human rights agreements. Because of this awareness and active involvement in political and international affairs, abortion prohibition or legalization reflects the will of the people. As indicated by the government's recently released *Green Paper on Abortion*,[8] future constitutional amendments and legislation are expected as the battle to protect the unborn's right to life rages on.

Part II of this paper discusses the historical, cultural and religious

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3. *See* Sidney Callahan, *Abortion and the Sexual Agenda: A Case for ProLife Feminism*, *in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL BIOETHICAL ISSUES 168, 171 (Carol Levine ed., 7th ed. 1997). *See generally* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE (Marianne Githens & Dorothy McBride Stetson eds., 1996) (discussing abortion and medical reproductive technologies).

4. *See* Ailbhe Smyth, *Preface* to THE ABORTION PAPERS, IRELAND 4 (Ailbhe Smyth ed., 1992). Ms. Smyth has published widely on Irish feminism issues.

5. [1992] 1 I.R. 1.

6. *See id.* at 5. The Supreme Court is responsible for interpreting Ireland's Constitution.

7. *See id.*

8. *See* INTER-DEPARTMENTAL WORKING GROUP ON ABORTION, GOV'T OF IR., GREEN PAPER ON ABORTION ¶ 3.02 (visited Nov. 5, 1999) <http://www.irlgov.ie/taoiseach/publication/greenpaper/contents.html> [hereinafter GREEN PAPER ON ABORTION].

influences on abortion in the Republic of Ireland. Part III summarizes the cases brought before the Irish courts dealing with abortion in the contexts of marital privacy, freedom of information and expression, and freedom to travel. Part IV features the renowned *Attorney General v. X* ruling and its impact on Ireland, including the government's *Green Paper on Abortion*. Part V spotlights the influence of European Union and Council of Europe laws and conventions, while Part VI discusses abortion laws in the international community. Lastly, Part VII describes the influence of United Nations agreements and conventions.

II. HISTORICAL, CULTURAL AND RELIGIOUS INFLUENCES

A. Ireland – A Sovereign State

1. The First Law

Great Britain governed Ireland during the 1800s.[9] However, in 1926 a treaty was signed between these two countries making southern Ireland the Irish Free State.[10] Ireland incorporated into its new Constitution the British law prohibiting abortion, The Offenses Against the Person Act of 1861 (Act of 1861).[11] Section 58 of the Act states:

> [e]very woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or

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9. *See* Natalie Klashtorny, Comment, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 421 (1996).

10. *See id. See generally* THE WORLD ALMANAC AND BOOK OF FACTS 2000, 810 (1999) [hereinafter WORLD ALMANAC.] In December 1921, Great Britain offered British dominion status to southern Ireland. Southern Ireland became the Irish Free State, and it adopted a constitution on December 11, 1922. The six northern counties became Northern Ireland and remained a part of the United Kingdom. (This is referred to as the partitioning of Ireland.) A new constitution was adopted December 29, 1937 declaring the dominion a sovereign, democratic state named Ireland (Éire). On December 21, 1948, the entire country was declared a republic, and Ireland withdrew from the British Commonwealth. Both declarations were recognized by Great Britain in 1949; however, Great Britain later reclaimed six northeastern counties. *See id. See also* Republic of Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) (highlighting the social, constitutional and political background of the current conflict in Northern Ireland where a united Ireland is supported by Catholics but opposed by Protestants). A peace settlement was reached April 10, 1998 and approved by the Republic of Ireland on May 22, 1998. *See* WORLD ALMANAC, *supra*.

11. *See* Klashtorny, *supra* note 9, at 421.

> other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . .[12]

No one has ever been prosecuted under this Act in the Irish courts.[13] In 1938, however, the Act was challenged in an English court.[14] In the case of *Rex v. Bourne*,[15] Dr. Bourne was charged under the Act for procuring an abortion for a thirteen-year-old patient who was a victim of multiple rape[16] violently committed by officers of the Royal Horse Guards.[17] The case centered on the words "shall unlawfully use any instrument" contained in the Act.[18] Justice Macnaghten's opinion was based on the view that the Act's reference to *unlawful* procurement implied there could be *lawful* procurement.[19] He instructed the jury that the word "unlawful" meant "other than done in good faith for the purpose only of preserving the mother's life."[20] In addition, the jury was instructed that "if a doctor is of [the] opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical and mental wreck," they could find that the "doctor, who under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."[21] Because these instructions could be broadly construed to mean the mother's right to life encompassed a quality of life, not mere physical existence, the jury found the doctor not guilty.[22] The door was thereby opened allowing slow evolution of the law into England's current abortion-on-demand law.[23] This type of judicial interpretation is not what protectors of the unborn wanted to see rendered in Ireland's courts.

2. Article 40 of the Irish Constitution

Article 40 of Ireland's Constitution addresses fundamental rights, and section 3 specifically deals with personal rights.[24] Article 40.3 gives

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12. The Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 58 (Eng.).
13. *See* RYNNE, *supra* note 1, at 26-27.
14. *See id.* at 27.
15. 1 K.B. 687 (1939).
16. *See* RYNNE, *supra* note 1, at 27.
17. *See* JANET HADLEY, ABORTION: BETWEEN FREEDOM AND NECESSITY 35 (1996).
18. RYNNE, *supra* note 1, at 27.
19. *See id.*
20. *Id.* at 27-28.
21. Rex v. Bourne, 1 K.B. 687, 694 (1939).
22. *See* RYNNE, *supra* note 1, at 28.
23. *See id.* at 14.
24. *See* J.M. KELLY, THE IRISH CONSTITUTION v (1980).

protection to citizens as having a right to life.[25]

> [40.3.1] The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> [40.3.2] The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.[26]

Similar wording is contained in the constitutions of other countries and in United Nations declarations.[27] Whether the unborn life was a citizen, however, remained open to debate,[28] and supporters of the unborn wanted assurance that no door for debate was left open.

3. The Reinforcing Referendum

The move in Ireland towards a constitutional amendment began on the heels of the English *Bourne* challenge, with those supporting the unborn's right to life desiring to "specify the unborn child, from the moment of conception, as deserving full rights to life as a citizen of the Irish State."[29] These supporters believed this additional wording in the Constitution would make it impossible for Ireland's courts to interpret the Act of 1861 in any way that would allow abortion in Ireland.[30] Its effect would be to close any door of opportunity for abortion-on-demand. It is important to note that precedential case law in Ireland supported the unborn's right to life.[31] Many argued that this right is derived from natural law, and under this reasoning, the constitutional provision could not be modified by a referendum, which is positive law.[32] This deviation from natural law to positive law is the greatest threat to the unborn's right to life.

Supporters of the unborn were also concerned the Act of 1861 might

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25. *See* RYNNE, *supra* note 1, at 31.

26. William Binchy, *The Need for a Constitutional Amendment*, *in* ABORTION AND LAW: A DOCTRINE & LIFE SPECIAL 116, 118 (Austin Flannery ed., 1983).

27. *See* discussions *infra* Parts V, VII.

28. *See* RYNNE, *supra* note 1, at 31.

29. *Id.* at 14; *cf.* "THE ABORTION REFERENDUM:" THE CASE AGAINST 13 (Mavis Arnold & Peadar Kirby eds., 1982) (stating that the need for a referendum grew out of a decline in ethical values as perceived by members of the Irish Catholic Doctors' Guild).

30. *See* RYNNE, *supra* note 1, at 14.

31. *See* Madeleine Reid, *Abortion Law in Ireland after the Maastricht Referendum*, *in* THE ABORTION PAPERS, IRELAND 25, 36 (Ailbhe Smyth ed., 1992).

32. *See* Gerry Whyte, *Abortion and the Law*, 42 DOCTRINE AND LIFE 253, 261 (1992).

be interpreted as a violation of a woman's right to privacy.[33] This concern resulted from the 1973 United States Supreme Court decision in *Roe v. Wade*,[34] which recognized:

> the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as to the decision whether to beget or not beget a child. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.[35]

Prior to this case, the U.S. Supreme Court was content to let the people and their elected representatives govern the issue of abortion via legislation.[36] The right to abortion arises from the U.S. Constitution's 14th Amendment due process clause that forbids any state to deprive persons of life, liberty or property.[37] It is suggested that the only certain constitutional remedy for the abortion problem in the United States is a constitutional amendment.[38] The people of Ireland also thought this was the best remedy to their abortion problem.

It is important to note also that there was an emerging influence of the women's movement during the 1970s. The availability of contraception was a major legal issue for Irish women during this time.[39] It was finally addressed in *McGee v. Attorney General*[40] where the plaintiff, a married woman, was advised by her physician that a pregnancy could "have serious physical repercussions and could put her life at risk."[41] Ireland's Supreme Court ruled that the use of contraceptives was a private matter between spouses; therefore, their use was lawful[42] and a right guaranteed by the Constitution.[43] Justice Walsh stated a woman in the plaintiff's state of health had a right to state-provided means [contraception] that would avoid placing her life in jeopardy when conception was a

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33. *See* JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 345 (1992).

34. 410 U.S. 113 (1973).

35. RYNNE, *supra* note 1, at 30 (quoting Roe v. Wade, 410 U.S. 113 (1973)).

36. *See* Robert H. Bork, *Again, a Struggle for the Soul of the Court, in* THE ETHICS OF ABORTION: PRO-LIFE VS. PRO-CHOICE 86 (Robert M. Baird & Stuart E. Rosenbaum eds., rev. ed. 1993).

37. *See id.* at 87.

38. *See* CHARLES E. RICE, BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE 104 (1979).

39. *See* Smyth, *supra* note 4, at 4.

40. [1974] I.R. 284 at 298.

41. ALAN JOSEPH SHATTER, SHATTER'S FAMILY LAW 55 (4th ed. 1997).

42. *See* RYNNE, *supra* note 1, at 30.

43. *See* SHATTER, *supra* note 41, at 56.

risk over and above the ordinary risks inherent in pregnancy.[44] He did not suggest that abortion was, or could be, a state-provided means, but rather he concurred with the reasoning of Justice Kenny in *Ryan v. Attorney General*[45] and stated that action by a husband, wife, or the State to limit family sizes by endangering or destroying human life was an offense against both the common good and the guaranteed rights of the unborn.[46] In *G. v. An Bord Uchtála*,[47] Justice Walsh stated a child has the right to be guarded against all threats to its existence before or after birth.[48] In ruling on marital right to privacy, the issue was a right to contraception, not a right to abortion. However, because of the concern that privacy rights might apply to the right to abortion, the call for a constitutional amendment was made.

The referendum for an Eighth Amendment to the Constitution was held on September 7, 1983 and approved by the people.[49] The constitutional provision added a new subsection guaranteeing the right to life of *both* the unborn and the mother.[50]

> [40.3.3] 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.[51]

Abortion, however, would continue to be an issue causing Ireland discord. Now the door was opened for the Irish courts to balance the life of the unborn with the life of the mother.

B. The Influence of Religion

A problem every society must deal with is embodying moral value in the law.[52] In a pluralistic society the question is whose morality to apply and what law is valid.[53] Most societies place morality within the church

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44. *See* KELLY, *supra* note 24, at 373-74.

45. [1965] I.R. 294 (Ir. H. Ct.).

46. *See* KELLY, *supra* note 24, at 374.

47. [1980] I.R. 32 at 52.

48. *See id.*; *see also* KELLY, *supra* note 24, at 374.

49. *See* SHATTER, *supra* note 41, at 49 n.227. "From a total electorate of 2,358,651 the total poll was 1,265,994 (53.7%). In favour totalled 841,244 (67%) and against totalled 416,135 (33%). There were 8,625 spoilt votes. The Bill was signed by the President on [October 7,] 1983." *Id.*

50. *See* Smyth, *supra* note 4, at 4.

51. Whyte, *supra* note 32, at 253.

52. *See* Patrick Hannon, *The Conscience of the Voter and Law-maker*, *in* 42 DOCTRINE AND LIFE 244 (1992).

53. *See id.*

and law within the state.[54] In Ireland, where the majority of citizens are Catholic,[55] a church-state matter becomes an issue involving both the church and the state.[56] Religion, therefore, plays an important factor. It is significant that the Catholic Church was previously recognized in the Constitution.

> [44.1.2] The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.[57]

However, the people in 1972 decided to remove this religious recognition in a referendum.[58]

While Ireland is predominantly Catholic, there are indications that the Irish people are turning away from what they perceive to be the rigidity of the religion.[59] Nevertheless, the Catholic Church is not silent when it comes to proposals to change the law. On the contrary, its views are made well known to the people.[60] These views, however, may surprise those who perceive the Church as tyrannical. Consider the following statement made by the Church at its 1976 Bishops' Conference prior to the 1983 referendum: "[i]t is not the view of the Catholic hierarchy that, in the law of the State, the principles peculiar to *our* faith should be made binding on people who do not adhere to that faith."[61] The task for the Catholic is the same as for every citizen, regardless of his or her moral or religious convictions: to harmonize individual freedoms with the common good.[62]

The Catholic Church allows abortion under two exceptions: ectopic

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54. *See id.*

55. *See* WORLD ALMANAC, *supra* note 10, at 809. Ninety-three percent of the 3,632,944 population is Catholic, while only three percent is of the Anglican faith. *See id.*

56. *See* Hannon, *supra* note 52, at 244-45.

57. Carolyn A. McKee, Can European Institutions Influence National Social Policy? The Politics of Abortion in the Republic of Ireland 13 (1993) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Library).

58. *See id.* The Preamble to Ireland's Constitution still reads:

> In the Name of the Most Holy Trinity, from whom is all authority and to Whom, as our final end, all actions both of men and State must be referred, we, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ . . . .

Id. at 14.

59. *See* Kieron Wood, *Catholic Only In Name?*, THE CATHOLIC WORLD REPORT, Feb. 1997, at 28.

60. *See* Hannon, *supra* note 52, at 245 (examining the secular and religious influences on a Catholic voter).

61. *Id.*

62. *See id.*

pregnancy and carcinoma of the womb.[63] Because ectopic pregnancy abortions were cases of indirect intent, that is, ending the pregnancy was secondary to saving the mother's life, they were being performed in Ireland and were nothing new.[64] Many believe that exceptions for these type abortions should be expressly written into Ireland's Constitution or provided by legislation.[65]

While the Catholic Church supported the referendum, the Protestant churches in Ireland, as well as the Jewish community, opposed it, not on grounds of favoring abortion, but rather its attempt to "enshrine a Catholic principle" into a constitution that governs a pluralistic society.[66] The predominance of Catholicism in a country, however, does not guarantee abortion will not be legalized, nor does a majority's view against it.[67] It is somewhat axiomatic that "legali[z]ation of abortion is more often the result of a Supreme Court ruling than it is a reflection of public opinion."[68] Accordingly, the discussion that follows examines the legalization of abortion as a result of Ireland Supreme Court rulings, European Court of Human Rights rulings, local public opinion of the Irish people, public opinion in other European Union member states, and the influence of the United Nations. The examination indicates that *both* judicial interpretation and public opinion influence legalization or prohibition of abortion.

III. THE CASES INTERPRETING ARTICLE 40.3.3

A. Attorney General ex rel. Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and The Dublin Wellwoman Centre Ltd.[69]

Ireland's courts considered Article 40.3.3 for the first time in *Attor-*

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63. *See* RYNNE, *supra* note 1, at 33; *see also* Nell McCafferty, *As Far As Practicable*, *in* THE ABORTION PAPERS, IRELAND 157, 161 (Ailbhe Smyth ed., 1992). Ectopic pregnancy results when the fertilized egg does not travel to the womb but remains in the fallopian tube to grow. Physicians remove the fallopian tube and the egg. The Catholic Church supports this operation because its primary intent and effect is the removal of a diseased organ (fallopian tube). The unintentional effect is termination of the pregnancy. If the operation is not performed, the fetus grows to the point of bursting the fallopian tube and causing death to the fetus and serious injury or death to the mother. *See id.*

64. *See* Reid, *supra* note 31, at 27.

65. *See* RYNNE, *supra* note 1, at 33. The Church of Ireland echoed this in their statement following *Attorney General v. X*, *see infra* note 147. *See infra* Part IV.E which discusses providing for the exceptions by legislation.

66. *Id.* at 53.

67. *See id.* at 21. *See* discussion *infra* Part VI for information on the abortion rights afforded in other Catholic nations.

68. RYNNE, *supra* note 1, at 21.

69. [1988] I.R. 619.

ney General v. Open Door Counselling Ltd., which dealt with disseminating information on abortion services.[70] Ireland's Supreme Court granted the Attorney General an injunction prohibiting Open Door Counselling from informing pregnant women of the location of abortion clinics outside the Republic's jurisdiction, or assisting these women with travel abroad to abortion clinics.[71] The Court did not address whether the injunction violated Articles 59 and 60 of the Treaty Establishing the European Economic Community (EEC Treaty).[72] It left the issue alone because the pleadings did not challenge the right to abortion services information in other member states, only to such information provided in Ireland.[73] In the lower court's opinion, Justice Hamilton powerfully stated that the right to life of the unborn must be protected.[74]

Following this ruling, Open Door Counselling brought its case to the European Commission of Human Rights (Eur. Comm'n H.R.),[75] alleging that the Article 40.3.3 constitutional provision violated Article 10 of the European Convention on Human Rights (Eur. Conv. H.R.) that guarantees freedom of expression.[76] The Eur. Conv. H.R. was signed by member

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70. *See* Whyte, *supra* note 32, at 255.

71. *See id.*

72. *See* Kristin E. Carder, Note, *Liberalizing Abortion in Ireland: In Re Article 26 and the Passage of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill*, 3 TULSA J. COMP. & INT'L L. 253, 259 (1996). This treaty is also known as the Treaty of Rome, signed March 25, 1957 and effective January 1, 1958. *See id.* at 260. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; *see also* Whyte, *supra* note 32, at 265 (indicating that Articles 59 and 60 deal with the right of member states to unrestricted movement of persons providing services); *cf.* Reid, *supra* note 31, at 29-30. European Union case law may allow a member state to restrict freedom to travel rights for public policy reasons. The public policy rationale "has only been claimed by the state where the service was based, and it is not clear whether the [Court of Justice of the European Communities] would extend it to a state trying to keep out services based in another country." *Id.*

73. *See* Carder, *supra* note 72.

74. *See* Reid, *supra* note 31, at 27. *See* Attorney General ex rel. Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd., [1987] I.L.R.M. 477 (Ir. H. Ct.).

> [T]he right to life of the unborn includes the right to have that right preserved and defended and to be guarded against all threats to its existence before and after birth, and that it lies not in the power of a parent to terminate its existence and that any action on the part of any person endangering that life [is] necessarily not only an offence against the common good but also against the guaranteed personal rights of the human life in [question].

Id.

75. *See* Open Door Counselling Ltd. v. Ireland, App. Nos. 14234/88 & 14235/88, 14 Eur. H.R. Rep. 115, 131 (1992).

76. *See* Whyte, *supra* note 32, at 255. *See generally* GREEN PAPER ON ABORTION, *supra*

states of the Council of Europe in 1950,[77] and it established two bodies, the Eur. Comm'n H.R. and the European Court of Human Rights (ECHR).[78] Under the Eur. Conv. H.R., a citizen of a member state may bring a complaint to the Eur. Comm'n H.R., a mediating body,[79] for determining whether there has been a violation of the Eur. Conv. H.R..[80] If the parties reach no resolution, the complaint may be referred to the ECHR in Strasbourg[81] within three months for an authoritative decision on whether a violation has occurred.[82] The ECHR can award compensation, and its judgments are binding.[83]

The Eur. Comm'n H.R. determined that Open Door Counselling's activities were not expressly prevented by the terms of Article 40.3.3,[84] and a ban on information was ineffective in protecting the unborn without a ban on travel.[85] In addition, the Eur. Comm'n H.R. determined that the injunction "went beyond what was necessary in a democratic society"[86] because its restrictions were not prescribed in Article 40.3.3.[87] Other Eur. Comm'n H.R. members found this analysis weak.[88] Although he concurred with the majority, Mr. Schermers' opinion clearly supports the right of a member state to protect the unborn.

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note 8, ¶ 3.02. ("The [Eur. Conv. H.R.] guarantees . . . the right to life and the right to respect for private and family life.").

77. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention]. *See also* Whyte, *supra* note 32, at 255 n.4; *see also* Paul O'Higgins, *International Social Policy: Its Impact on Irish Legal Practice, in* LAW & SOCIAL POLICY, SOME CURRENT PROBLEMS IN IRISH LAW 9, 16 (William Duncan ed., 1987). The Council of Europe is one of the two main European international bodies of which Ireland is a member state. The other body is the European Union. *See id.*

78. *See* GREEN PAPER ON ABORTION, *supra* note 8, ¶ 3.03. These two bodies have recently been replaced by a new ECHR, and decisions of the new court will also be legally binding on the parties. *See id.*

79. *See* O'Higgins, *supra* note 77, at 15.

80. *See* Whyte, *supra* note 32, at 255 n.4.

81. *See* McKee, *supra* note 57, at 84.

82. *See* Whyte, *supra* note 32, at 255 n.4.

83. *See* O'Higgins, *supra* note 77, at 15; *cf.* Reid, *supra* note 31, at 31. The ECHR findings are not binding on the Irish courts. The government is, however, supposed to remedy any legislation that violates the Eur. Conv. H.R. In reality, any remedial action is often long-delayed. *See id.*

84. *See* Whyte, *supra* note 32, at 255.

85. *See id.* at 269.

86. *Id.*

87. *See* Gerard Hogan, *The Right to Life and the Abortion Question Under The European Convention on Human Rights, in* HUMAN RIGHTS A EUROPEAN PERSPECTIVE 104, 109 (1994).

88. *See id.*

> I note that in the member-States of the Council of Europe there is a wide divergence of thinking as to the stage at which unborn life requires legal protection, whether it be from conception onwards, as under Irish law, or whether some notion of the viability of the foetus is required, as under English law. In such a controversial area I consider that a High Contracting Party is entitled to confer the protective status of 'other,' within the meaning of Art. 10(2) of the Convention, upon the life of the unborn. I am also of the view that the issues in the present cases fall within the notion of the protection of morals.[89]

The Eur. Comm'n H.R. ruling, nevertheless, struck down the ruling of Ireland's highest court.

The case was then argued before the ECHR in March of 1992.[90] In October 1992, the ECHR rejected the Eur. Comm'n H.R. analysis and held that the injunction served the Irish government's legitimate aim of protecting the rights of the unborn which are guaranteed in Ireland's Constitution.[91] Therefore, the injunction was proper within the meaning of Article 10, and the ECHR did not need to address whether the unborn life's right to life was guaranteed under Article 2.[92] However, the ECHR then examined whether the injunction was a proportionate restriction considering Ireland's legitimate aim to protect the unborn.[93] The ECHR held that the restrictions were disproportionate to the aim sought because the large number of women traveling to Great Britain for abortions were already receiving information on abortion services outside Ireland.[94] Based on the ECHR holdings, it appears the Eur. Conv. H.R. does not protect the right to life of the unborn as hoped by proponents of the Eighth Amendment.[95] However, it does allow a member state to legislate an abortion ban when deemed necessary to protect morals, and it allows information and travel for abortion purposes to be banned provided the ban

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89. Open Door Counselling v. Ireland, 14 Eur. H.R. Rep. 115, 142 (1992); *see also* Hogan, *supra* note 87, at 110.

90. *See* Open Door Counselling v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992); *see also* Hogan, *supra* note 87, at 111.

91. *See* Hogan, *supra* note 87, at 111.

92. *See id.* Article 2 provides in part:

> [e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.

Id. at 104.

93. *See id.* at 111.

94. *See id.* at 113.

95. *See id.* at 115.

is applied proportionately.[96]

Most significant to Ireland is the fact that the Eur. Conv. H.R. is not part of Ireland's domestic law.[97] Although rulings of the ECHR bind a member state on the international level, "they do *not* override conflicting decisions of the Irish courts."[98] Unyielding to international norms, however, can result in pressure from other western democracies, as well as the largest overseer of human rights – the United Nations.[99]

B. Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan and Others[100]

Ireland's Supreme Court had occasion again in 1989 to examine the issue of disseminating information on abortion services in *SPUC v. Grogan*.[101] This time, before deciding whether to grant an injunction to restrain student unions from distributing information about abortion services outside Ireland, the lower Irish High Court sought advice on aspects of European Union (EU) law from the Court of Justice of the European Communities[102] (ECJ) in Luxembourg, the supreme court of EU law.[103] The Irish court can identify a possible point of EU law in the case before it then, at its discretion, ask the ECJ to give it a formal interpretation.[104] The last court of appeal, however, is obliged under EU law to refer to the ECJ if either party requests.[105]

A problem with bringing claims before the ECJ is its heavy workload, which causes judicial hearing delays of eighteen months or longer.[106] For this reason, SPUC decided to appeal directly to Ireland's Supreme Court, which did grant the injunction pending receipt of the ECJ

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96. *See* Hogan, *supra* note 87, at 115-16.

97. *See* CASEY, *supra* note 33, at 349.

98. *Id.*; *see also* O'Higgins, *supra* note 77, at 16 (discussing international social policy as a primary source for social legislation change in Ireland).

99. *See infra* Parts V, VII.

100. [1989] I.R. 760.

101. *See* Whyte, *supra* note 32, at 256.

102. *See id. See generally* EMILY O'REILLY, MASTERMINDS OF THE RIGHT 122 (1992).

103. *See* Reid, *supra* note 31, at 28. *See* GREEN PAPER ON ABORTION, *supra* note 8, app. 3. The EU (formerly the European Community) includes the member states of Austria, Sweden, Finland, France, Germany, United Kingdom (Great Britain and Northern Ireland), Italy, Belgium, Netherlands, Luxembourg, Denmark, Spain, Portugal, Greece, and the Republic of Ireland. *See id.*

104. *See* Reid, *supra* note 31, at 28.

105. *See id.; See also* O'Higgins, *supra* note 77. Under the system of the EU, the remedy depends on whether the EU law is directly effective or not. If so, proceedings can be brought in Irish courts to obtain the benefit of EU law. If not, the only remedy is to complain to the Commission of the European Communities which may take legal proceedings before the ECJ. *See id.*

106. *See* Whyte, *supra* note 32, at 256.

opinion.[107] When the opinion arrived,[108] the ECJ ruled that an abortion performed according to the law of the member state in which it is performed constitutes a service within the meaning of Article 60 of the EEC Treaty.[109] The ECJ held that under this Article, abortion is a service that Irish women have a right to obtain from any member state lawfully providing it.[110] On the other hand, the ECJ held that Irish law did not violate EU law by prohibiting the dissemination of information about abortion clinics abroad when the clinics providing such services are not involved in distributing the information.[111] Because the Irish student unions were not United Kingdom agencies providing abortion services and they had no economic or commercial interest in the matter, they could not distribute abortion information.[112] Additionally, and more importantly, the ruling was based on the EEC Treaty, Articles 36, 56, and 66, that allow a member state the freedom to legislate in moral or philosophical matters that fundamentally affect its society.[113] Nonetheless, what the ECJ implied was that an abortion clinic operating outside Ireland could advertise its services in Ireland.[114]

C. The Maastricht Treaty[115]

In December 1991, member states of the EU met in Maastricht in the Netherlands and replaced the 1957 Treaty of Rome with a new treaty.[116] The intent of the Maastricht Treaty was to unite the states into a federalist system and reduce individual state sovereignty in several social and economic areas.[117] The aim of the EU is integration of the member states into a common market to ensure "freedom of movement of goods, services, persons, and capital."[118] As such, the EU has potential jurisdiction over economic, social, and cultural activities within its territory.[119]

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107. *See id.*

108. *See* Case C-159/90, Soc'y for the Protection of Unborn Children Ir. Ltd. v. Grogan, 3 C.M.L.R. 849 (1991).

109. *See* Whyte, *supra* note 32, at 256.

110. *See* Reid, *supra* note 31, at 29.

111. *See* Whyte, *supra* note 32, at 271.

112. *See* Reid, *supra* note 31, at 29; *see also* Whyte, *supra* note 32, at 271.

113. *See* Carder, *supra* note 72, at 263. *See* O'REILLY, *supra* note 102, at 124.

114. *See* Whyte, *supra* note 32, at 271.

115. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 (1992) [hereinafter Maastricht Treaty].

116. *See* O'REILLY, *supra* note 102, at 126.

117. *See id. But cf.* Reid, *supra* note 31, at 29. EU law deals primarily with market economic law rather than "social, moral or health issues," which are matters for the individual state. Therefore, although abortion is illegal in Ireland, it is not affected by EU law. *Id.*

118. Jost Delbrück, *Globalization of Law, Politics, and Markets-Implications for Domestic Law-A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 25 (1993).

119. *See id.*

Because of the ruling in *SPUC v. Grogan*, the government of Ireland sought a provision to the Maastricht Treaty that would preclude EU law overturning Ireland's constitutional protection of the unborn.[120] The provision, Protocol No. 17 (Protocol), was annexed to the Treaty, signed on February 7, 1992, and states:

> [n]othing in the Treaty on [the] 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.[121]

The only problem with the effect of the Protocol, however, was that the Maastricht Treaty had not yet been ratified by the people of Ireland. Because of the public's sentiment in a new case dealing with abortion, *Attorney General v. X*, ratification of the Maastricht Treaty was jeopardized.[122]

IV. ATTORNEY GENERAL V. X – THE CASE THAT ROCKED THE NATION

A. Bourne Arrives in Ireland

Ten days following the signing of the Protocol, Ireland's High Court was presented with an abortion case involving a fourteen-year-old, pregnant girl[123] who had been sexually molested for months, then ultimately raped, by a friend's father.[124] *Attorney General v. X and Others*[125] dramatically illustrates the extent of judicial power to interpret the law.[126] In *X*, the High Court granted an injunction prohibiting X from traveling to England to obtain an abortion.[127] Judge Costello stated that even though X told her parents and the police that she felt suicidal, "the risk to her life was not equal to the real and imminent danger to the life of the unborn" because the unborn life was biologically dependent on X.[128] Therefore,

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120. *See* Whyte, *supra* note 32, at 256-57.

121. Maastricht Treaty, *supra* note 115, at 362.

122. *See* Whyte, *supra* note 32, at 257.

123. *See id.*

124. *See* THE ATTORNEY GENERAL V. X AND OTHERS: JUDGMENTS OF THE HIGH COURT AND THE SUPREME COURT WITH SUBMISSIONS MADE BY COUNSEL TO THE SUPREME COURT 9 (Sunniva McDonagh ed., 1992) [hereinafter THE ATTORNEY GENERAL V. X AND OTHERS].

125. [1992] I.L.R.M. 401 (Ir. H. Ct.); [1992] 1 I.R. 1.

126. *See* Whyte, *supra* note 32, at 271. *See generally* THE ATTORNEY GENERAL V. X AND OTHERS, *supra* note 124 (containing official opinions from the individual Justices of the High Court and the Supreme Court).

127. *See* Whyte, *supra* note 32, at 257.

128. Ailbhe Smyth, *A Sadistic Farce, Women and Abortion in the Republic of Ireland, in* THE ABORTION PAPERS, IRELAND 7, 11 (Ailbhe Smyth ed., 1992).

the unborn life was entitled to protection of the law while the threat of suicide by X "could be averted by the love and care of her family during the difficult months ahead."[129] Judge Costello also argued that abortion constituted public policy and was immune to EU challenge even when it had extraterritorial implications.[130]

The lower court's holding resulted in an eruption of opposing public opinion.[131] Additionally, international media coverage painted Ireland as backward and barbarous.[132] Because the government of Ireland was concerned with its reputation in the international economic community, it pressured X's family to appeal the injunction to Ireland's Supreme Court.[133] The family agreed to appeal, and the government paid all legal expenses.[134] Ireland's Supreme Court lifted the lower court's injunction holding "that the right to life of the unborn had to be balanced against the right to life of the mother."[135] Because the mother was threatening suicide, the Supreme Court ruled the law should allow her to obtain an abortion.[136]

The Supreme Court Justices varied in their interpretations of Article 40.3.3. Justice O'Flaherty stated that enactment of the Article did not fundamentally change the law; Justice McCarthy believed the Act of 1861 absolutely banned abortion; and Chief Justice Finlay stated the test for lawful abortions was when a real and substantial risk to the *life*, not *health*, of the mother was involved.[137]

The Supreme Court's decision was based on the threat to the mother's actual physical *existence*, rather than the threat to her *quality of life*,[138] or her right to travel to a state lawfully permitting abortion. The government conceded that the ruling in *X* now meant that when the life of the mother is threatened, the mother is entitled to receive information about abortion services in other states.[139] None of the Justices looked to EU law for guidance.[140] Although three members of the Supreme Court commented that travel outside Ireland to seek an abortion could be re-

129. *Id. See* GREEN PAPER ON ABORTION, *supra* note 8, ¶ 1.25 (Suicide during pregnancy is rare and more common during post-delivery.).

130. *See* Smyth, *supra* note 128, at 12.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. Whyte, *supra* note 32, at 257.

136. *See id.*

137. *See id.* at 259 n.10.

138. *See id.* at 259 n.10.

139. *See id.* at 258.

140. *See* Whyte, *supra* note 32, at 257.

strained under domestic law,[141] the majority's holding clearly set precedence allowing travel for the narrow purpose of obtaining an abortion when the mother's life is threatened.

The Supreme Court's words resonate those of Justice Macnaghten in the *Bourne* decision: the life of the unborn can be terminated if the mother's life is threatened because the pregnancy makes her a physical or mental wreck. The Supreme Court's reasoning in *X* opened the door of circumstances allowing for lawful abortion. Furthermore, the implication of the Supreme Court's ruling is the endangered mother now has a right to obtain information about abortion services outside Ireland, as well as a right to travel to another EU member state to obtain a *lawful* abortion.

If Ireland's Supreme Court had upheld the lower court's injunction, X could have appealed to the ECHR or ECJ, just as plaintiffs did in *Open Door Counselling* and *Grogan.* Unlike *Open Door Counselling* and *Grogan*, however, *X* dealt with a woman in a state of pregnancy. A claimant in this condition could not wait eighteen months before her case was heard. This factor cannot be ignored when looking to the European courts for resolution of this type issue.

B. The Implications of X

So what are the implications of *X*? The physician performing the abortion must have a bona fide belief that an abortion is necessary to save the mother's life, and the prosecution must prove beyond a reasonable doubt that the physician did not have this requisite belief.[142] Justice McCarthy stated that "the right of the unborn is to a life contingent . . . on survival in the womb until successful delivery."[143] Accordingly, if there is no alternative other than abortion in order to save the mother's life, abortion is allowed.[144] Conversely, when there are alternatives, abortion is not allowed. An example is when the baby is near the stage of viability outside the womb, labor can be induced, and the baby saved.[145] This line of reasoning follows that of the U.S. Supreme Court in *Roe*. There the Court reasoned that abortion is a constitutional right until the fetus is viable and can live outside the womb.[146]

Following the Supreme Court's judgment in *X*, the Standing Committee of the General Synod of the Church of Ireland sent an official statement to the Taoiseach, Ireland's Prime Minister, supporting the

141. *See id.*

142. *See id.* at 260.

143. *Id.* at 261 n.13.

144. *See id.* at 261.

145. *See* Whyte, *supra* note 32, at 261.

146. *See* Ronald Dworkin, *The Center Holds!*, *in* THE ETHICS OF ABORTION: PRO-LIFE VS. PRO-CHOICE 96 (Robert M. Baird & Stuart E. Rosenbaum eds., rev. ed. 1993).

Court's test of real and substantial risk to the life of the mother.[147] The statement further acknowledged the Church's belief that the "Constitution is an inappropriate instrument for solving complex moral and social problems,"[148] and it urged that provision be made for:

> 1. A means of determining whether a 'real and substantial risk' to the life of the mother exists. 2. Fixing a stage in pregnancy beyond which its termination would be absolutely prohibited. 3. Information and counselling services as recommended by the Commission on the Status of Women.[149]

X also raises issues as to what kinds of evidence are necessary to justify abortions, and what protection is given to the moral and religious rights of hospital staff who choose not to participate in abortions.[150] Ireland's Medical Council released its updated Guide to Ethical Conduct and Behaviour on November 25, 1998.[151] The "deliberate and intentional destruction of the unborn child is professional misconduct."[152] To date, no

147. *See* Standing Committee of the General Synod of the Church of Ireland, *Reaction to the Supreme Court Judgement*, *in* 42 DOCTRINE AND LIFE 346, 346-47 (1992).

148. *Id.* at 347.

149. *Id.* Statements from the Bishops of Ireland, Archbishops of Great Britain, and the Irish Catholic Bishops' Conference are also included in the Documents section of this special issue.

150. *See* Whyte, *supra* note 32, at 261.

151. *See* Karen Birchard, *New Ethical Guidelines on Abortion Released in Ireland*, THE LANCET, Dec. 5, 1998, at 1840.

152. *Id.; see also* GREEN PAPER ON ABORTION, *supra* note 8, ¶¶ 2.27-.28; *cf.* The World Medical Association's Statement on Therapeutic Abortion (also known as The Oslo Declaration 1970) adopted by the 24th World Medical Assembly in Oslo, Norway in 1970 and amended by the 35th World Medical Assembly in Venice, Italy in October 1983, which states:

> 1. The first moral principle imposed upon the physician is respect for human life from its beginning.
> 2. Circumstances which bring the vital interests of a mother into conflict with the vital interests of her unborn child create a dilemma and raise the question whether or not the pregnancy should be deliberately terminated.
> 3. Diversity of response to this situation results from the diversity of attitudes towards the life of the unborn child. This is a matter of individual conviction and conscience which must be respected.
> 4. It is not the role of the medical profession to determine the attitudes and rules of any particular state or community in this matter, but it is our duty to attempt both to ensure the protection of our patients and to safeguard the rights of the physician within society.
> 5. Therefore, where the law allows therapeutic abortion to be performed, the procedure should be performed by a physician competent to do so in premises approved by the appropriate authority.

Irish physician has performed a legal abortion.[153]

C. Amendment to Protocol No. 17

Because *X* now allowed Irish women to obtain abortions when their lives were endangered by real and substantial risks, the Irish government sought an amendment to the Protocol to ensure that women had the right to obtain travel and information under EU law if the treaty was ratified.[154] Because the other EU member states did not wish to reopen the debate, the Irish government had to settle for a Declaration[155] signed on May 1, 1992 that interpreted the Protocol.[156]

The Declaration purports that under the Protocol, the freedom to travel within the EU should not be limited.[157] Some agree that the Declaration is only a political statement, and it is not legally binding,[158] but there are others who believe it is binding.[159] Its purpose, however, implies that an Irish constitutional amendment to Article 40.3.3 would not be

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> 6. If the physician considers that his convictions do not allow him to advise or perform an abortion, he may withdraw while ensuring the continuity of medical care by a qualified colleague.
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> 7. This statement, while it is endorsed by the General Assembly of the World Medical Association, is not to be regarded as binding on any individual member association unless it is adopted by that member association.

World Medical Association, *Declaration on Therapeutic Abortion* (visited Mar. 6, 2000) <http://www.wma.net/e/ policy/17-d_e.html>.

153. *See* Birchard, *supra* note 151.

154. *See* Whyte, *supra* note 32, at 258.

155. *See id.*

156. *See* Declaration of the High Contracting Parties to the Treaty on European Union, 1992 O.J. (C 191) 109. The Declaration states:

> [t]hat it was and is their intention that the Protocol shall not limit freedom to travel between Member State or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States. At the same time the High Contracting Parties solemnly declare that, in the event of a future constitutional amendment in Ireland which concerns the subject matter of Article 40.3.3 of the Constitution of Ireland and which does not conflict with the intention of the High Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so request[s].

Id.

157. *See* Whyte, *supra* note 32, at 266.

158. *See id.* at 263.

159. *See id.* at 272.

covered by the Protocol unless the Protocol is amended.[160] The result is Ireland's immunity from EU law.[161] Another implication is that an amendment to the Protocol will only be supported if it does not conflict with EU law, which allows freedom to travel and disseminate or receive information.[162]

The Attorney General assured the people of Ireland that approval of the Maastricht Treaty would preclude his granting injunctions preventing pregnant women from traveling outside Ireland to obtain an abortion.[163] This assurance was based on interpreting the Declaration of the Protocol to mean that Irish citizens are free to move between EU member states for an abortion.[164] The Irish people voted by referendum to ratify the Maastricht Treaty on June 18, 1992.[165]

Because the Protocol appears to guard Article 40.3.3 from any rights available to Irish women under EU law, and the Eur. Conv. H.R. is unenforceable in Ireland, Ireland's constitutional protection of the unborn appears immune to a challenge from any other legal system.[166] No consensus exists, however, on the effect of the Protocol to Irish law, and the people will have to wait until the ECJ rules on the matter.[167] It should be noted that the ECJ would likely promote the supremacy of EU law and its uniform application to all member states; therefore, Irish citizens would be allowed to travel to another member state to obtain lawful abortion services.[168]

D. Twelfth, Thirteenth and Fourteenth Amendments to Article 40.3.3

As a result of the decisions in the cases discussed above, three constitutional amendments to Article 40.3.3 were proposed in a referendum held November 25, 1992.[169] The Twelfth Amendment proposed to add the following:

> It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-

160. *See id.* at 263.
161. *See id.*
162. *See* Whyte, *supra* note 32, at 263.
163. *See id.* at 266-67.
164. *See id.* at 267.
165. *See* Reid, *supra* note 31, at 32.
166. *See id.* at 35.
167. *See* Whyte, *supra* note 32, at 268.
168. *See id.*
169. *See* SHATTER, *supra* note 41, at 49.

destruction.[170]

This amendment was rejected because of its "explicit acknowledgement that direct, intentional interference with the right to life of the unborn could ever be justified."[171] The Thirteenth and Fourteenth Amendments, however, were passed.[172] By passing these amendments, the Irish people said Article 40.3.3 would no longer prevent information concerning abortion services lawfully available in other EU member states from being distributed, nor could it prevent these women from traveling to those states to procure abortions.[173] As a result of these two amendments, it is unlikely Irish abortion laws will be presented before the Eur. Comm'n H.R. or the ECHR.[174] Nevertheless, safeguarding the unborn's right to life remains an issue besetting the people of Ireland.

E. The Government's Green Paper on Abortion

The Irish government on September 10, 1999 released the long-awaited *Green Paper on Abortion* (*Green Paper*).[175] Its purpose is to "stimulate and . . . facilitate informed public discussion on the options in relation to the issue of abortion in the light of the range of constitutional, legal, medical, moral, social and ethical issues involved."[176] The *Green Paper* compiles all these issues in hopes of "seek[ing] the broadest possible consensus on the way forward" and "lay[ing] the foundations for a better and more reasoned understanding of the issues."[177] The government was especially concerned that because these issues are so complex, it is essential the Irish people understand the implications of any future

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170. GREEN PAPER ON ABORTION, *supra* note 8, ¶ 2.18.

171. *Id.* ¶ 7.31.

172. *See* SHATTER, *supra* note 41, at 49. Added to Article 40.3.3 was the following language of the Thirteenth and Fourteenth Amendments, respectively:

> This subsection shall not limit freedom to travel between this State and another State.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

Id.

173. *See id.* at 72.

174. *See* Hogan, *supra* note 87, at 116.

175. *See* Gov't of Ir., *Press Release* (Sept. 10, 1999) <http://www.irlgov.ie/taoiseach/press/current/10-09-99.htm> [hereinafter Gov't of Ir.]; *see also* U.N. Committee on the Elimination of Discrimination against Women, *Press Release of 441st Meeting, WOM/1143* (June 21, 1999) <http://www.un.org/News/Press/docs/1999/19990621.wom1143.html> [hereinafter *Press Release 1143*]. The *Green Paper* was published "in response to questions posed by the [twenty-three]-member expert body regarding Ireland's abortion laws." *Id.*

176. Gov't of Ir., *supra* note 175.

177. *Id.*

changes to either the Constitution or the law.[178] The government promised to develop a program that would strengthen contraception and counseling services, provide support structures for women experiencing crisis pregnancy, and promote responsible sexual behavior in adolescents.[179] The government received numerous comments from citizens and persons representing various sectors of society; however, it regrettably did not receive many comments from medical bodies or medical organizations.[180]

Addressed in Chapter 3 of the *Green Paper* are Ireland's obligations under EU and international law.[181] These obligations arise under several conventions to which Ireland has subscribed and are discussed further in Parts V and VII.

Appendix 3 of the *Green Paper* covers the abortion laws in other countries and the situations by which abortions are allowed in these countries.[182] Grounds for a legal abortion include rape, incest, congenital malformations, economic and social reasons, preservation of physical or mental health, or lastly, to save the mother's life.[183] The *Green Paper* indicates the majority of submissions received from the Irish population rejected the idea of abortion on physical or mental health grounds.[184] It also recognized the medical community's opinion on abortion and cited guidelines issued in November 1998 by the medical profession's regulatory body, the Medical Council:

> [t]he deliberate and intentional destruction of the unborn child is professional misconduct. Should a child in utero suffer or lose its life as a side effect of standard medical treatment of the mother, then this is not unethical. Refusal by a doctor to treat a woman with a serious illness because she is pregnant would be grounds for complaint and could be considered to be professional misconduct.[185]

Appendix 5 contains comments from the 1996 Report of the Constitution Review Group.[186] Although the Group discusses constitutional amendments, its conclusion is that Irish legislation should be passed that addresses: (1) definitions of unborn and pregnancy, (2) express protection for medical intervention when appropriate, (3) requirement of medical certification of real and substantial risk to the life of the mother, and (4)

178. *See id.*
179. *See id.*
180. *See* GREEN PAPER ON ABORTION, *supra* note 8, Introduction.
181. *See id.*
182. *See id.* app. 3.
183. *See id.*
184. *See id.* ¶ 4.09.
185. GREEN PAPER ON ABORTION, *supra* note 8, ¶¶ 2.27-.28.
186. *See id.* app. 5.

time limitation to prevent abortion of a viable fetus.[187]

What is most important about the *Green Paper* is that "the vast majority of submissions expressed a wish for a referendum which would seek to achieve an *absolute* prohibition on abortion."[188] The government's Interdepartmental Working Group also received 36,500 signatures on petitions seeking an absolute ban on abortion.[189] In summary, the government acknowledged that "many Irish people regard abortion with abhorrence, whatever the circumstances."[190] The results of the *Green Paper* clearly indicate that protection of the unborn will remain at the forefront of Irish legal, political, medical, religious, and social debate.

V. INFLUENCE OF THE EUROPEAN UNION AND COUNCIL OF EUROPE

As indicated in Part III, Ireland is influenced by the European international bodies of which it is a member and the laws promulgated by their courts. Article 29.4 of Ireland's Constitution provides that EU law is binding in Ireland and supersedes any conflicting provision of the Constitution.[191] However, 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;" and Article 15.2.1 provides that "the sole and exclusive power of making laws for the State is vested in the Oireachtas."[192] More importantly, Ireland's Supreme Court has held in several cases that "the courts cannot give effect to international treaties, or the judgments of international tribunals in the absence of legislation transposing those treaties and judgments into domestic law."[193] Additionally, Ireland's Supreme Court held in *In re Ó Láighléis* that Article 29.1 of Ireland's Constitution refers only to relations between states, not to individual rights.[194]

To understand better these European courts' views on abortion, an examination of cases involving other member states is needed. As a

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187. *See id.*

188. *Id.* ¶ 5.02 (emphasis added).

189. *See id.* ¶ 5.04.

190. GREEN PAPER ON ABORTION, *supra* note 8, ¶ 5.04.

191. *See* Reid, *supra* note 31, at 28; *see also* Klashtorny, *supra* note 9, at 423 (stating that Ireland amended its Constitution after joining the EU for the purpose of making EU law supreme).

192. Diarmuid Rossa Phelan, *The Concept of Social Rights*, 16 DUBLIN U. L.J. 105, 116 (1994). *See* McKee, *supra* note 57, app. at 81 (describing the Irish and European judicial systems). The Oireachtas is the Irish Parliament consisting of the President and two houses. *See id.*

193. Phelan, *supra* note 192, at 116. The cases referred to are *In re Ó Láighléis, Application of Woods, and E. v. E.* dealing with the Eur. Conv. H.R., the Universal Declaration of Human Rights, and a judgment of the ECHR, respectively. *See id.* at nn.37-38.

194. *See id.* at 117.

background, only five of the twenty-four countries in Europe prohibited legalized abortion in 1982.[195] They were Ireland, Belgium, Portugal, Spain, and Malta.[196] Today, Malta remains the only country prohibiting abortion on all grounds.[197] The other four countries have legalized abortion in certain situations. Consequently, two cases have come before the Eur. Comm'n H.R.; however, they did not proceed to the ECHR.[198] Accordingly, no case has been presented to that court other than the Irish *Open Door Counselling* case.[199]

In *Brüggeman and Scheuten v. Federal Republic of Germany*,[200] the abortion issue was presented to the Eur. Comm'n H.R.[201] The question of whether the fetus is protected under Article 2 of the Eur. Conv. H.R. was not addressed by the Eur. Comm'n H.R.; however, the question of a mother's right to privacy and abortion was.[202] The Eur. Comm'n H.R. held that Germany's laws permitting abortion only where the mother's life is in danger, or for physical or mental health or eugenic reasons, did not infringe the mother's right to privacy contained in Article 8 of the Eur. Conv. H.R.[203] The Eur. Comm'n H.R. held that:

> not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother. Article 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother. In this respect the Commission notes that there is not one member State of the Convention which does not, in one way or another, set up legal rules in this matter.[204]

In *Paton v. United Kingdom*,[205] the plaintiff was a husband attempting to restrain his wife from having an abortion by claiming that the legislation allowing the abortion violated the unborn child's right to life under Article 2, as well as interfered with respect for family life provided in Article 8.[206] The Eur. Comm'n H.R. held that the term "everyone" in Article 2 did not include the unborn because the limitations in Article 2 con-

195. *See* RYNNE, *supra* note 1, at 20.
196. *See id.* at 21.
197. *See* GREEN PAPER ON ABORTION, *supra* note 8, app. 3.
198. *See* Whyte, *supra* note 32, at 261; *see also* Hogan *supra* note 87, at 108.
199. *See* Hogan, *supra* note 87, at 108.
200. App. No. 6959/75, 3 Eur. H.R. Rep. 244 (1977).
201. *See* Whyte, *supra* note 32, at 262.
202. *See id.* at 262. *See supra* text accompanying note 92.
203. *See* Whyte, *supra* note 32, at 262.
204. Brüggeman, 3 Eur. H.R. Rep. 244; *see also* Hogan, *supra* note 87, at 106.
205. App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980).
206. *See* Hogan, *supra* note 87, at 106.

cerned persons already born.[207] The Eur. Comm'n H.R. further held that if Article 2 gave the fetus absolute protection, an abortion to save the mother's life would be prohibited, resulting in a higher protection for the fetus than the mother.[208] They reasoned that such an interpretation violates the intent of the Eur. Conv. H.R., especially given that most of the signatories allow abortions when necessary to save the mother's life.[209] The Eur. Comm'n H.R. agreed the fetus did not have "an unqualified right to life" under Article 2; however, no decision was given as to whether the fetus was totally excluded from the Article's scope or whether its rights had to be balanced against the mother's.[210] While the Eur. Comm'n H.R. holdings are clear, it is unknown whether the ECHR would agree with the Eur. Comm'n H.R. legal analyses.

Another Irish case helpful in understanding Eur. Comm'n H.R. and ECHR legal thinking is *Johnston v. Ireland*,[211] submitted prior to Ireland's 1986 divorce referendum.[212] The allegation was that the absence of a provision for divorce in Ireland violated Articles 8, 9 and 12 of the Eur. Conv. H.R.[213] In December 1986, the ECHR held that the right to marry in Article 12 and the right to respect for private and family life in Article 8 "did not oblige a State to provide for the dissolution of family or marriage ties and to permit remarriage."[214] The ECHR in effect left the issue up to Ireland.

More recently, and more disturbing for supporters of the unborn's right to life, is the March 9, 1999 resolution on women's health passed by the European Parliament[215] that supports legalization of abortion across Europe in certain circumstances such as rape and endangerment of the mother's health.[216] The resolution is based on the principle that "it must be the woman herself who takes the final decision."[217] Also supported in

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207. *See id.*

208. *See* Paton, 3 Eur. H.R. Rep. 408; *see also* Hogan, *supra* note 87, at 106-107.

209. *See* Hogan, *supra* note 87, at 107.

210. Whyte, *supra* note 32, at 262. The Eur. Conv. H.R. does not recognize a right to abortion but does permit it in some circumstances. Abortion as a right or as a permitted activity, therefore, constitutes two separate things. *See id.* at n.18.

211. 112 Eur. Ct. H.R. (ser. A) (1986).

212. *See* SHATTER, *supra* note 41, at 383.

213. *See id.*

214. *Id.*

215. *See* European Parliament, Resolution on the report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the state of women's health in the European Community, 1999 O.J. (C 175) 68 [hereinafter Resolution].

216. *See* Arthur Rogers, *European Union Gets Tough on Women's Health*, 353 THE LANCET 992 (1999).

217. Resolution, *supra* note 215, at 70.

the resolution were voluntary abortions carried out in a medically safe way and provisions for psychological and social support.[218] Such a resolution clearly encroaches on the member states' ability to establish public policy for the health, safety and welfare of their citizens.

The above decisions demonstrate that the EU and Council of Europe have become involved in legal issues affecting social policy. What has happened is the spilling over of economic issues into the political and social realms.[219] This spillover is "the process through which problems connected to the completion of the internal market encourage the [EU] to invade the domain of social policy."[220] This process spells danger to supporters of the unborn.

VI. ABORTION IN THE INTERNATIONAL COMMUNITY

A. Abortion Laws Around the World

An examination of abortion laws around the world reveals abortion is allowed for four reasons: "(1) [a] risk to the life of the mother, (2) [f]or 'medical reasons', (3) [f]or medical or social reasons, and (4) [o]n request or on demand."[221] Upon closer examination, it is often difficult to find the difference in legalizing abortion for the last three reasons.[222] If a woman claims she will suffer severe depression if forced to have the baby, an abortion could be allowed for the second and third reasons.[223] Depression or disappointment is often broad enough to cover all kinds of social circumstance resulting in even more blurred distinction between the last three reasons.[224] Disappointment is a major reason for abortion-on-demand and occurs when the gender of the fetus is not that preferred by the mother or family.[225]

According to the Alan Guttmacher Institute, approximately twenty-four percent of the world's population lives in countries where abortion is either forbidden or permitted only when necessary to save the life of the mother.[226] "Most of the Muslim nations of Asia, almost two-thirds of the

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218. *See* Rogers, *supra* note 216, at 992.

219. *See* McKee, *supra* note 57, at 8.

220. McKee, *supra* note 57, at 8 (quoting Stephan Leibfried & Paul Pierson, *Prospects for Social Europe,* 20 POLITICS AND SOCIETY 333, 349 (1992)).

221. RYNNE, *supra* note 1, at 19.

222. *See id.*

223. *See id.* at 19-20.

224. *See id.* at 20.

225. *See id.* Countries like China and India historically favored male children over females.

226. *See* INFORMATION PLUS, ABORTION-AN ETERNAL SOCIAL AND MORAL ISSUE 102-03 (Alison Landes et al. eds., 1994) [hereinafter INFORMATION PLUS]. For more data, see the tables and figures contained in this publication that compare various abortion criterion, e.g., ages, laws, number of births, etc., to specific countries or regions.

countries of Latin America . . . half of the nations of Africa, and Ireland fall into this group."[227] Chile and Ireland are the only two countries with constitutional provisions prohibiting abortion.[228]

There has been a trend over the last two decades to liberalize abortion laws.[229] As of 1990, approximately twenty-three percent of the world's population lives in countries that allow abortion for social reasons, such as level of income or adequate housing.[230] The countries included the United Kingdom, most of the eastern European countries, Japan, and India.[231] About forty percent of the world's population lives in countries that permit abortion-on-demand.[232] These countries include the United States, Canada, France, Turkey, Austria, Sweden, Russia, Tunisia, Singapore, Cuba, and the People's Republic of China.[233] Appendix 3 of the Irish Government's *Green Paper* summarizes the abortion laws of the member states of the EU.[234] A brief summary of abortion law changes in Germany, Spain, Portugal, and Austria follows.

1. Federal Republic of Germany

Prior to the August 31, 1990 unification treaty between the Federal Republic of Germany (formerly West Germany) and the German Democratic Republic (formerly East Germany),[235] separate abortion laws existed in these two former states.[236] The treaty required the unified German Parliament to enact a new abortion law for the new state by December 31, 1992.[237] A Group Bill on abortion was thereafter drafted that held a woman seeking an abortion had to receive professional counseling.[238] Following the counseling, but within the first twelve weeks of the pregnancy, she could decide to abort for any reason.[239] Either a professional

227. *Id.* at 103.

228. *See* O'REILLY, *supra* note 102, at 98.

229. *See* INFORMATION PLUS, *supra* note 226, at 103.

230. *See id.*

231. *See id.*

232. *See id.*

233. *See id.*

234. *See* GREEN PAPER ON ABORTION, *supra* note 8, app. 3. The data used in this appendix came from information in *Abortion Policies: A Global Review*, Vol. I (1992), Vol. II (1993) and Vol. III (1995), updated May 1998 and published by the United Nations, as well as information from the Irish embassies located in the various countries.

235. *See* JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 553-54 (1994).

236. *See* Sabine Klein-Schonnefeld, *Germany*, *in* ABORTION IN THE NEW EUROPE, A COMPARATIVE HANDBOOK 113, 125 (Bill Rolston & Anna Eggert eds., 1994).

237. *See id.*

238. *See id.* at 125-26.

239. *See id.* at 126.

doctor or a hospital then could do the abortion.[240] A second Pregnancy and Family Support Act was also drafted entitling men and women to state-financed counseling regarding contraception, pregnancy and adoption.[241] The bills were passed by Parliament and signed by the President in July 1992.[242] An injunction on the Group Bill abortion law, however, was thereafter sought and obtained from the Constitutional Court until the "substantial legal and constitutional question" could be addressed.[243] The Court announced in May 1993 that the law was unconstitutional, finding the absolute right to life of the unborn came from the Constitution itself and not from penal law.[244] "The guarantee of legal protection can be ensured only by prohibition of abortion in principle, backed up by the state's duty to enforce that principle."[245] Under the Constitutional Court's ruling, professional counseling was mandatory in order to convince the woman to keep the baby,[246] and abortions would be legally permissible only after counseling and when necessary to preserve the life and health of the mother, or when the fetus would be born with grave physical or mental defects.[247]

2. Spain, Portugal and Austria

The Supreme Court of Spain sanctioned abortion for social reasons for the first time in 1991; however, attempts to adopt legislation on these grounds have proved unsuccessful.[248] In Portugal, the people voted narrowly against liberalizing their abortion law to allow for abortion-on-demand up to ten weeks.[249] In Austria, the Austrian Constitutional Court dismissed a complaint alleging that the abortion law violated provisions protecting life under its constitution.[250] The Court held that protecting life did not apply to a fetus.[251]

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240. *See id.*

241. *See* Klein-Schonnefeld, *supra* note 236, at 126.

242. *See id.*

243. *Id.*

244. *See id.* at 130.

245. *Id.*

246. *See* Klein-Schonnefeld, *supra* note 236, at 131. Professional counseling would be given at centers authorized by the state, then the woman would receive a certificate upon fulfillment of all her advice duties. The certificate is required before contacting a physician for performing the abortion. The abortion cannot be paid from statutory health insurance or private medical insurance because, in the Court's opinion, it is illegal to pay for illegal acts. *See id.*

247. *See id.*

248. *See* GREEN PAPER ON ABORTION, *supra* note 8, app. 3.

249. *See id.*

250. *See id.*

251. *See id.*

All member states of the EU legally provide for abortion in order to save the life of the mother.[252] All but the United Kingdom allow abortion in order to preserve the mother's physical or mental health; however, Great Britain limits abortion for these reasons up to twenty-four weeks.[253] In situations involving rape or incest, fetal impairment, economic or social reasons, the member states' legal criterion vary.[254] As stated earlier, the predominance of Catholicism in a country is no guarantee abortion will be illegal. Abortion is allowed in Germany (thirty-three percent Catholic), Switzerland (forty-six percent Catholic), Poland (ninety percent Catholic), Italy (ninety-nine percent Catholic), and Spain (almost exclusively Catholic).[255]

B. Human Rights Declarations Around the World

Worldwide the question of whether the unborn life is a citizen remains debated. In Ireland's Constitution, the right to life is addressed as a personal right.[256] Similar wording has been used in international declarations and in the constitutions of other countries. The European Convention on the Rights of the Child does not address substantive rights but is concerned only with procedural rights.[257] The Eur. Conv. H.R., adopted November 4, 1950, states in Article 2 that "everyone's right to life shall be protected by law."[258] The American Convention on Human Rights, adopted November 22, 1969, states in Article 4 that "every person has the right to have his life respected [and] [t]his right shall be protected by law . . . from the moment of conception."[259] The African Charter on Human and Peoples' Rights, adopted June 26, 1981, states in Article 4 that "every human being shall be entitled to respect for his life . . . ."[260] The issue in all these conventions is defining "everyone," "person" and "human being." It will be up to the courts presiding over these conventions to interpret those definitions as they relate to the unborn's right to life.

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252. *See id.*

253. *See* GREEN PAPER ON ABORTION, *supra* note 8, app. 3.

254. *See id.*

255. *See Europe's Stand on Abortion*, The Associated Press, June 27, 1998, *available in* AP Online.

256. *See* discussion in Part II.A.2.

257. *See* Eugeen Verhellen, European Instruments to Implement Children's Rights 17 (1996) (unpublished manuscript, on file with the Children's Rights Centre, University Gent in Belgium).

258. Human Rights Convention, *supra* note 77, art. 2.

259. American Convention on Human Rights, Nov. 22, 1969, art. 4, O.A.S. Treaty Ser. No. 36 (entered into force July 18, 1978).

260. African Charter on Human and Peoples' Rights, June 26, 1981, art. 4, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986).

VII. INFLUENCE OF THE UNITED NATIONS

Ireland is party to many human rights agreements of the United Nations (U.N.). Compliance with these agreements is closely monitored by the U.N. Where agreements exist to which Ireland is not a party, pressure to participate can be felt from the international community.

A. United Nations Commission on Human Rights

1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights,[261] drafted by the U.N. Commission on Human Rights, proposed in Article 3 that the unborn child be protected by inclusion of the words "from the moment of conception."[262] This proposal was rejected after the U.N. Commission on the Status of Women pointed out that this right to life qualification could not be reconciled with the laws of many states, which provide for abortion in certain circumstances such as to preserve the life of the mother.[263]

2. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted by the U.N. General Assembly on November 20, 1989.[264] Ireland ratified the CRC on September 21, 1992.[265] The CRC changed children being viewed as mere "objects" of the law to "human beings" possessing rights.[266] The rights of children are now human rights "enshrined in positive law."[267] This concept of changing children as objects of law into human beings is precisely what Irish supporters of the unborn want for the unborn. Ireland participated in drafting the CRC as a member of the Western Group.[268]

The CRC does not mention abortion,[269] but it does state that the child needs special protection both *before,* as well as after birth.[270] The drafters

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261. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

262. EDWARD LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS 1 (2d ed. 1996).

263. *See id.*

264. *See* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1990) (entered into force Sept. 2, 1990).

265. *See* GREEN PAPER ON ABORTION, *supra* note 8, ¶ 3.12 & n.10.

266. *See* EUGEEN VERHELLEN, *Introduction* to CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES 7 (1994).

267. *Id.*

268. *See* Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 21 (1998).

269. *See* Susan Kilbourne, Article, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights,* 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 447 (1996).

270. *See* Convention on the Rights of the Child, *supra* note 264, pmbl.

of the CRC were aware of the controversial issue of abortion and could not reach a consensus on whether to define the age of childhood as conception.[271] Therefore, the language was drafted to allow each state to determine its own policy regarding abortion and the rights of the unborn child.[272] Concern has been expressed that the provision in Article 24(2)(f) of a child's right to "family planning education and services" could be interpreted to mean a right to abortion.[273] Again, this type of right, which relates to the unborn, will require interpretation by the courts.

3. International Covenant on Civil and Political Rights[274]

Ireland became party to the International Covenant on Civil and Political Rights on December 8, 1989.[275] In compliance with the instrument, Ireland submitted to the U.N. in 1992 its first report summarizing measures adopted to ensure rights in the Covenant are provided in Ireland.[276] Members of the U.N. Committee on Human Rights raised the issue of abortion in response to the report.[277] The unborn's right to life was to be "constant[ly] consider[ed] until . . . the Committee was in a position to pronounce on the issue."[278] A second report was submitted to the U.N. in 1998, and it noted the government's Interdepartmental Working Group on Abortion[279] and forthcoming *Green Paper.*

B. United Nations Commission on the Elimination of Discrimination Against Women

In June, 1999 the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) met to review Ireland's Combined Second and Third Reports (Report) submitted in compliance with Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[280] The CEDAW[281] was signed by

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271. *See* Nigel Cantwell, *The Origins, Development and Significance of the United Nations Convention on the Rights of the Child, in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 19, 26 (Sharon Detrick ed., 1992).

272. *See* Kilbourne, *supra* note 269, at 448-49.

273. *Id.* at 448.

274. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

275. *See* GREEN PAPER ON ABORTION, *supra* note 8, ¶ 3.12 & n.9.

276. *See id.* ¶ 3.13.

277. *See id.*

278. *Id.*

279. *See id.*

280. *See* U.N. Committee on the Elimination of Discrimination against Women, *Press Release, 440th Meeting, WOM/1142* (June 21, 1999) <http://www.un.org/News/Press/docs/1999/19990621.wom1142.html> [hereinafter *Press Release 1142*].

Ireland on December 22, 1985[282] but not without five reservations.[283] The Report attributed Ireland's significant strides in eliminating discrimination against women over the past twenty-five years to the increased awareness of women's rights, membership and obligations to the EU, and an educated, young population "ready and able to articulate its rights."[284] The Report noted that incorporation of the CEDAW into Irish domestic law has not occurred.[285] The Report noted also a significant influence of religion on family life although religious observance is declining.[286]

More interesting than Ireland's Report were the CEDAW Committee's expert comments. One expert was concerned that the CEDAW was not incorporated into Irish law.[287] She felt Ireland's law should include all international human rights instruments.[288] She was also concerned that all CEDAW provisions were not included in Ireland's Constitution.[289] In particular, she felt Article 41 of Ireland's Constitution was "a bit outdated and promoted stereotypes."[290] Ireland's government representatives were asked about future legislative measures regarding the state's ban on abortion.[291] Another expert urged Ireland's government to expand its family planning services in order to curtail the need for abortion and to also introduce sex education programs in secondary schools.[292] In its concluding comments, the CEDAW Committee felt that a woman's right to reproductive health is "compromised" by the influence of the Church.[293] Because Ireland's reservations to the CEDAW do not include Article 12, the CEDAW Committee recommended implementation of the Article in full.[294] The CEDAW Committee urged the Irish government "to facilitate

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281. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

282. *See* GREEN PAPER ON ABORTION, *supra* note 8, ¶ 3.12 & n.11.

283. *See Report of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, 54th Sess., Supp. No. 38, at 61, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter *Report of the Committee*]; *see also Press Release 1142, supra* note 280 (The CEDAW Committee pointed out that this number of reservations is more than in most countries.).

284. *Press Release 1142, supra* note 280.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See Press Release 1142, supra* note 280.

290. *Id. See* KELLY, *supra* note 24, at v (art. 41 deals with fundamental rights of the family).

291. *See Press Release 1142, supra* note 280.

292. *See Press Release 1143, supra* note 175.

293. *Report of the Committee, supra* note 283, at 62.

294. *See id.* Art. 12 states in part:

> State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis

a national dialogue on women's reproductive rights, including on the restrictive abortion laws."[295]

C. 1994 International Conference on Population and Development

In 1994, the U.N. held an International Conference on Population and Development in Cairo, Egypt.[296] The Programme of Action (Program) created during that conference was approved by 179 countries.[297] "The 1994 conference differed significantly from the efforts of the previous twenty years, which had concentrated on promoting birth control . . . ."[298] It instead promoted an alliance between population and development demands and improving the status of women.[299] Catholic and Islamic states objected to the language in paragraph 8.25 of the Program that could be interpreted "as encouraging abortion as a form of birth control."[300] A compromise was met that reworded the controversial paragraph to state that abortion should not be promoted as a method of family planning.[301] Although the Program does not bind the signatory states,[302] it is another example of efforts to establish an international norm. Without the Catholic and Islamic states objecting to the U.N.'s proposed language, the norm today would be endorsement of abortion as an acceptable method of family planning.

D. United Nations Cairo+5 Special Session

As follow-up to the 1994 conference, a second population conference was held in late June and early July of 1999 at which states reviewed the Program and developed an action plan.[303] The conference report was submitted to the U.N. General Assembly in July 1999.[304]

> of equality of men and women, access to health care service, including those related to family planning.

Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 281.

295. *Report of the Committee*, *supra* note 283, at 63.

296. *See* LAWSON, *supra* note 262, at 1.

297. *See Report of the Ad Hoc Committee of the Whole of the Twenty-first Special Session of the General Assembly*, U.N. GAOR, 21st Special Sess., Agenda Item 8, at 1, U.N. Doc. A/S-21/5/Add.1 (1999) [hereinafter *Ad Hoc Committee*].

298. LAWSON, *supra* note 262, at 1.

299. *See id.*

300. *Id.*

301. *See id.*

302. *See id.* at 2.

303. *See* Concerned Women for America, *21st Special Assembly of the United Nations General Assembly, Cairo+5 Conference* (July 2, 1999) <http://cwfa.org/library/life/1999-07-02_cairo_conf.shtml>.

304. *See Ad Hoc Committee*, *supra* note 297, at 1. *See* Concerned Women for America, *supra* note 303, at n.3 (The report is informally referred to as Cairo+5 because it took place

In its Preamble, the U.N. Report states women's ability to control their own fertility is a cornerstone of population and development-related programs.[305] The Preamble also states that implementation of Program recommendations is the sovereign right of each state, consistent with its national laws, and with full respect for the diverse religious, ethical values and cultures of its people, and "in conformity with universally recognized international human rights."[306] Section II.E.35.(b) provides that governments of developing countries should "include at all levels, as appropriate, of formal and non-formal schooling, education about population and health issues, including sexual and reproductive health issues."[307] Section IV.A.55. invites the World Health Organization to take the lead in developing a common reproductive health program.[308] The Preamble to the Constitution of the World Health Organization defines health "as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[309] This broad definition strongly supports abortion where the mother claims an unwanted pregnancy would threaten her mental and social well being[310] or, in other words, make her *unhealthy.* According to the Encyclopedia of Human Rights, the World Health Organization recognizes abortion as a means of "fertility regulation."[311]

Section IV.C.63.(i) of the U.N. Report goes to the crux of the abortion and family planning services issue. It states:

> [i]n no case should abortion be promoted as a method of family planning. All Governments . . . are urged . . . to reduce the recourse to abortion through expanded and improved family planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion . . . . [A]ny measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process . . . .[312]

Section IV.E.73.(e) furthers this view by stating "those adolescents who become pregnant are at particular risk and will require special support from their families, health-care providers and the community during

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five years after the 1994 Cairo conference.).

305. *See Ad Hoc Committee, supra* note 297, at 2.

306. *Id.*

307. *Id.* at 8.

308. *See id.* at 13.

309. Klashtorny, *supra* note 9, at 434.

310. *See id.*

311. LAWSON, *supra* note 262, at 1.

312. *Ad Hoc Committee, supra* note 297, at 15.

pregnancy, delivery and early childcare."[313] Addressing private organizations and the role they play in providing reproductive health information, Section V.86. of the U.N. Report states they should fully respect "various religions, ethical values and cultural backgrounds of each country's people."[314]

Although most of the world's countries support the intent of the Cairo Program, 130 of the countries at the Cairo+5 conference represented developing countries with strong Catholic and Muslim populations that oppose abortion.[315] When unified at U.N. conferences, these countries are able to exert a powerful influence in support of the unborn.[316] Although Ireland opposes abortion, the government supports many of the Cairo ideals.

On June 30, 1999, Brian Cowen, Ireland's Minister for Health and Children, addressed the 21st Special Session of the U.N. General Assembly.[317] He reported the legislature created eight regional health authorities charged with providing "equitable, accessible and comprehensive family planning service[s]."[318] Mr. Cowen further indicated nongovernmental organizations were working together with these health authorities in providing reproductive health services.[319] He added that a specific plan on women's health was developed, as well as establishment of a Women's Health Council.[320] Concerning adolescent sex education, Mr. Cowen indicated a schools-based program had been developed, which addresses teenage sexual and reproductive health issues.[321] Ireland's Minister specifically pointed out the country's support of the Cairo Program's emphasis on reducing abortion as a method of family planning.[322] He stated it was "of great importance to Ireland, as it clearly is also to many other countries" that the Program recognize that abortion policy and legislation "is a matter for each country to determine for itself."[323] Also noted at the

313. *Id.* at 18.

314. *Id.* at 20.

315. *See* Paul Lewis, *U.N. Meeting Splits Sharply on Limiting Population*, N.Y. TIMES, June 30, 1999, at A9.

316. *See id.*

317. *See* Brian Cowen, Address at the United Nations Special Session of the General Assembly for the Review and Appraisal of the Implementation of the Programme of Action of the International Conference on Population and Development (June 30, 1999) (transcript available at <http://www.undp.org/popin/unpopcom/32ndsess/gass/state/ireland.pdf>).

318. *Id.*

319. *See id.*

320. *See id.*; *see also* Murphy-Lawless & McCarthy, *supra* note 2, at 77 (indicating that the Plan for Women's Health was published in 1997).

321. *See* Cowen, *supra* note 317.

322. *See id.*

323. *Id.*

Special Session was Ireland's support of the U.N. Population Fund (UNFPA) via voluntary contributions, membership on its Executive Board, and commitment of 0.7% of its gross national product to overseas development assistance.[324]

In addition to supporting the U.N. overseas development assistance, Ireland also supports the UNFPA Face to Face campaign that has a goal to increase global awareness of women's rights as human rights and to increase funding for services that allow women and youth to exercise their reproductive rights.[325] A recent UNFPA press release reported that Mary Banotti, a member of the European Parliament from Ireland, was appointed to the UNFPA to serve as its Goodwill Ambassador and Face to Face Campaign Spokesperson for Ireland.[326] Additionally, in a recent Organization for Economic Cooperation and Development report, Ireland's strong support for overseas development assistance was highlighted.[327] More importantly, Ireland was noted for being particularly suited to offer developing countries guidance on family planning services because of its own struggle with reproductive health.[328] It appears Ireland's transition to support of contraception, as well as sex education and reproductive health services, has not gone unnoticed in the international community.

VIII. CONCLUSION

> *"Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment . . . . I hold it that a little rebellion now and then is a good thing." Thomas Jefferson*[329]

Is Ireland's constitutional protection of the unborn in danger? Yes. The Irish Constitution is the supreme law of Ireland. While much debate centers around whether the Constitution is the appropriate mechanism for legalizing abortion, it grants its citizenry their rights; rights which can be changed by the will of the people; rights which have been changed by the

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324. *See id.*

325. *See* United Nations Population Fund, *Press Release, Mary Banotti, MEP, Appointed UNFPA Goodwill Ambassador for Ireland* (Oct. 11, 1999) <http://www.unfpa.org/news/pressroom/1999/banotti.htm>.

326. *See id.*

327. *See id.*

328. *See id.*

329. Ryan P. Farley, Comment, *Ireland and Divorce: Is a Little Rebellion Now and Then a Good Thing?*, 11 EMORY INT'L L. REV. 515 (1997) (quoting 12 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 11).

people as evidenced by the 1972, 1983, 1986 and 1992 referendums.

Ireland is in transition. It is to be admired for refusing to join in the "headlong rush to embrace modernity" as it continues to consider legal methods that must reflect the new mindsets and values of its changing population, as well as those of its traditional population.[330] Traditional religious roots, nevertheless, are slowly being threatened with replacement of international norms espousing rights – women's rights, adolescent rights, rights to privacy, right to travel, right to contraception, right to divorce, and now, right to abortion. The influence of the women's movement on new ways of thinking and behavior resulted in changes in public policy regarding these rights.[331] But rights are interpreted via various forums. Rights espoused in the Irish Constitution are interpreted by the Irish courts. Rights contained in legislation are also interpreted by courts, as evidenced by England's judicial interpretation of The Offenses Against the Person Act of 1861. Rights protected under international conventions and agreements are interpreted by international courts and, in the case of the U.N., are closely monitored for compliance. The right to life of the unborn in Ireland, therefore, is no longer an absolute natural law right. Its existence is dependent on judicial interpretation.

The power of judicial interpretation can be striking. The ruling in *Attorney General v. X* clearly struck the nation of Ireland when it realized this was the first step in allowing an exception to the constitutional provision prohibiting abortion. The fear now is what exception will be next. The sentiment of Ireland's people resounded in the recent *Green Paper* - abortion is abhorred. Yet European and U.N. conventions and agreements suggest that compliance requires Ireland eschew its archaic abhorrence.

Ireland's legislative discourse on abortion may seem to be nothing more than an attempt to "preserve a sense of responsibility and . . . compassion for human frailty;" however, the discourse seeks to answer the question "What is the right way to live?"[332] States accept the generally recognized principles of international law but only as rules of conduct for relationships with other states.[333] The principle of protecting the right to life of the unborn in Ireland is a rule of conduct for relationships between its citizens. This principle holds that the unborn has as equal a right to exist as any other citizen.

The right to life of the unborn is in danger in Ireland. However, danger does not mean the fight to save the unborn cannot be won. As long as the legislature, judiciary, government, and most importantly, the people,

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330. Mary Ann Glendon, *Irish Family Law in Comparative Perspective: Can There be Comparative Family Law?*, 9 DUBLIN U. L.J. 1, 19 (1987).

331. *See* Murphy-Lawless & McCarthy, *supra* note 2, at 75.

332. Glendon, *supra* note 330, at 19.

333. *See* Phelan, *supra* note 192, at 117.

remember their unborn citizens when answering "what is the right way to live?" the mark of society's highest level of civilization will remain inscribed in the isle of Éire.