

Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union

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I. INTRODUCTION

Since gaining its independence from Britain,¹ the Republic of Ireland has effectuated certain policies of the Catholic Church.² Because nearly ninety percent of Ireland's four million citizens are Catholic, one clearly sees how Church pressures influence politics and everyday life in Ireland.³ One example of this influence is reflected in Ireland's policy on abortion: abortion has long been, and continues to be, illegal in Ireland.⁴ Within the last decade, however, a shift in public attitude on abortion has slowly evolved among the Irish people and Irish jurisprudence.⁵

This Article considers recent Irish policy on abortion and outlines the struggle, legal challenges, and attitudinal shifts brought about by the strengthening of the European Union (EU) and its vastly different view of abortion. Part II reviews the history of abortion in Ireland. Part III analyzes Ireland's participation in the European Community and the Community's enormous effect on Ireland's abortion policy. Part IV examines the trilogy of cases that significantly shifted Irish policy regarding the right to information and the right to travel for the purpose of obtaining an abortion. Part V details the legislative activity passed as a result of the trilogy of cases impacting abortion law in Ireland. Part VI examines the most recent notable abortion case and the resulting public reaction. Part VII reviews the latest government attempt to clarify the law. Part VIII criticizes the current law and discusses possible solutions to the present uncertainty. Finally, Part IX concludes that further legislation is needed to clarify the present law.

II. THE ABORTION LAW IN IRELAND

The *Bunreacht nah Eireann* (Constitution of Ireland), adopted in 1937, embodies the deeply ingrained Catholic identity critical to Ireland following its independence from Britain.⁶ The Constitution effectuates

1. The Anglo-Irish Treaty, approved by the Irish legislature, created the Irish Free State for the partitioned island in 1921. See Government of Ireland Act (1920) (Eng.), reprinted in 16 THE STATUTES 518 (3d ed. 1950). Ireland remained part of the British Commonwealth until 1949, when Ireland left the dominion and became a Republic. PETER & FIONA SOMERSET FRY, A HISTORY OF IRELAND 324 (1988).

2. See Christine P. James, *Céad Míle Fáilte? Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996*, 8 DUKE J. COMP. & INT'L L. 175 (1997).

3. See, e.g., *id.*

4. See discussion *infra* Part II.

5. See discussion *infra* Parts V-VI.

6. James, *supra* note 2, at 177 n.1. American-born Eamon de Valera was the primary architect of the Constitution still in effect today; however, his vision only extended as far as a

the principles of the Catholic theologian St. Thomas Aquinas, who believed that the State was a means to instituting God's eternal law on earth and that justice can only be attained through a Catholic morality and framework.⁷ These natural law principles, clearly illustrated in the Preamble to the Constitution,⁸ as well as Articles 40⁹ and 41,¹⁰ support God as the ultimate lawgiver and overtly display the moral, social, and political teachings of Catholicism.¹¹

While the Constitution did not specifically prohibit abortion, many scholars and judges believed Article 40.3 protected the right to life of the unborn.¹² No Irish court decided the issue, but, even without a clear constitutional prohibition, abortion has always been illegal in Ireland both statutorily and at common law.¹³ This prohibition, first drafted in 1803 and later codified as the Offences against the Person Act of 1861, clearly reflected Ireland's stance against abortion.¹⁴ Sections 58 and 59 deemed it a felony punishable by life imprisonment for anyone to procure a self-induced abortion and a misdemeanor for any person to supply any instrument to procure an abortion.¹⁵

Beginning in the 1930s, however, pro-life activists began contemplating a constitutional amendment to memorialize the right to life in

rural, Catholic country, and he did not foresee growth, development, or change in numerous areas. *See id.* at 177.

7. Natalie Klashtorny, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 422 (1996).

8. *See* IR. CONST. pmb. (1937). The preamble begins, "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred." *Id.*

9. *See id.* art. 40. Prior to the Eighth Amendment, Article 40.3 stated:

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. 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.

Id. art. 40.3.

10. *See id.* art. 41. Article 41 explicitly recognizes that the family possesses "inalienable and imprescriptible rights, antecedent and superior to all positive law." *Id.* art. 41.1.1.

11. The line of abortion cases detailed later in this article undermines the long tradition of natural law dominance in Irish jurisprudence. *See* discussion *infra* Parts IV-VI.

12. *See* Kristin E. Carder, *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, 255 (1996); IR. CONST. art. 40.3 (1937).

13. Carder, *supra* note 12, at 255-56.

14. *See* Offences against the Person Act §§ 58-59 (1861), *reprinted in* 7 THE STATUTES 266 (3d ed. 1950) (incorporated into Irish law after independence by Adaptation of Enactments Act, No. 2, pmb. § 14 (1922) (Ir.)) [hereinafter Offences against the Person Act].

15. *Id.*

Ireland.¹⁶ An English decision in 1939, *Rex v. Bourne*, furthered pro-life concern.¹⁷ In *Bourne*, the court instructed the jury to find a physician who performed an abortion not liable under the 1861 Act when the abortion was necessary to keep the woman from becoming a “physical or mental wreck.”¹⁸ Even though the English ruling was not binding on Irish courts, it caused great concern among pro-life activists because Irish courts often follow English precedent, and the Irish statute was identical to the English statute at issue.¹⁹ In addition, Irish pro-life advocates were concerned that any liberalization of English laws meant Irish women could easily obtain an abortion outside Ireland.²⁰

Further concerns emerged during the 1960s and 1970s, when European countries and the United States liberalized their abortion laws.²¹ The liberalization began when England passed the Abortion Act of 1967, allowing women to terminate their pregnancies under certain circumstances.²² In addition, citing Article 40 and natural law (which

16. Keith S. Koegler, *Ireland's Abortion Information Act of 1995*, 29 VAND. J. TRANSNAT'L L. 1117, 1120 (1996).

17. 1 K.B. 687 (Eng. C.A. 1939). See also Paul Ward, *Ireland: Abortion: “X” + “Y” = ?*, 33 U. LOUISVILLE J. FAM. L. 385, 387-88 (1995) (discussing the *Bourne* defense, which holds that abortions performed in good faith for the safety of the woman are not unlawful).

18. *Bourne*, 1 K.B. at 694.

19. Koegler, *supra* note 16, at 1120.

20. *Id.* at 1120-21. During the 1920s and 1930s, numerous Irish women traveled to England to have “backstreet” abortions. *Id.* at 1121. Today, the phrase “going to England” still refers to an Irish woman traveling to England for the purpose of terminating her pregnancy. David Cole, “*Going to England*”: *Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113, 119-20 (1993). The U.K. Office for National Statistics reports that 6673 Irish women traveled to England to terminate their pregnancies in 2001. *Abortion Statistics, Legal Abortions Carried Out Under the 1967 Abortion Act in England and Wales*, U.K. Office for National Statistics, Series AB, no. 28 (2001), available at http://www.statistics.gov.uk/downloads/theme_health/AB28_2001/AB28_2001.pdf.

21. See Cole, *supra* note 20, at 116-17. Abortion laws in Europe vary from Ireland's total prohibition to France's ten-week limit to Spain's twenty-two weeks and to twenty-four weeks in Britain. See *Green Paper on Abortion*, Office of the Taoiseach, App. 3 (1999), available at <http://www.taoiseach.gov.ie/upload/publications/251.rtf> [hereinafter *Green Paper on Abortion*]. For the abortion laws for all EU members and numerous other states, see *id.* app. 3; *Abortion in Law, History, and Religion*, *Childbirth by Choice Trust*, Toronto, Canada, 1995, available at <http://www.cbctrust.com/abortion.html> (last visited Feb. 24, 2003).

22. Abortion Act, 1967 (Eng.), reprinted in 2 THE PUBLIC GENERAL ACTS 2033 (1967) [hereinafter Abortion Act] (permitting abortion if two medical practitioners certify that either the child would be severely handicapped or the pregnancy posed a risk to the health of the mother or to any existing child in her family “greater than if the pregnancy were terminated”). The 1861 Offences against the Person Act remains in effect in Northern Ireland, with life imprisonment possible for anyone performing or attempting an abortion. Offences against the Person Act, *supra* note 14, § 58. However, the Infant Life (Preservation) Act of 1929 was extended to Northern Ireland in 1945, allowing abortions “for the purpose only of preserving the life of the mother,” meaning abortion is permitted if the mother's life is in danger or if there is a serious risk to her physical or mental health. Infant Life (Preservation) Act § 1(1) (1929) (Eng.), reprinted in THE

suggests certain fundamental rights are superior and antecedent to man-made law), Irish courts began protecting personal rights not enumerated in the Constitution.²³ For instance, in *Ryan v. Attorney General*, the Supreme Court of Ireland held the right of bodily integrity was a personal right tacitly contemplated by Article 40.3.1 (although not explicitly contained in the Constitution).²⁴ This marked the first time an Irish Court explicitly recognized the existence of unenumerated personal rights derived from natural law.²⁵

In 1974, *McGee v. Attorney General* reinforced the natural law tradition in Irish jurisprudence and proved particularly important to the development of abortion law in Ireland.²⁶ In *McGee*, the Court ruled against the right to import contraceptives not legally available in Ireland.²⁷ The Court did, however, recognize the right to marital privacy as either an unenumerated personal right guaranteed under Article 40.3 or a familial right under Article 41 of the Constitution.²⁸ The presence of natural law in the decision was clear. Justice Walsh stated, “[in interpreting the Constitution, one has] to determine, where necessary, the rights which are superior or antecedent to positive law.”²⁹ In addition, the Court explicitly stated the recognition of a marital right to privacy did not alter the prohibition on abortion.³⁰

Despite the Court’s attempts to clarify the law on abortion, some feared *McGee* would be a stepping-stone to a *Roe v. Wade*³¹ type

PUBLIC GENERAL ACTS 773 (1928-1929). Doctors still hesitate to perform the procedure for fear of being prosecuted. *See De Brun Challenged over Abortion Guidelines*, IRISH TIMES, Mar. 22, 2002, available at <http://www.ireland.com/newspaper/breaking/2002/0321/breaking94.htm> (last visited Nov. 11, 2002).

23. *See Cole, supra* note 20, at 120.

24. [1965] I.R. 294, 312-13 (Ir. S.C.). The plaintiff unsuccessfully argued the fluoridation of water violated her right of bodily integrity. *See id.* at 331-32.

25. The Court found personal rights result from the “Christian and democratic nature of the State.” *Id.* at 312. Former Chief Justice Liam Hamilton later remarked that the opinion “marked the beginning of a long and tortuous debate on the proper place of Christian moral teaching in Irish legal and political life.” Liam Hamilton, *Matters of Life and Death*, Address to Fordham Univ. School of Law, New York, New York (Mar. 28, 1996), reprinted in 65 FORDHAM L. REV. 543, 545 (1996).

26. [1974] I.R. 284 (Ir. S.C.).

27. *See id.* at 303-05. Section 17 of the Criminal Law Amendment Act, No. 6 (1935) provides, “It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstát Éireann [Ireland] for sale, any contraceptive.” *Id.* at 285.

28. *See id.* at 301-02.

29. *Id.* at 318.

30. *Id.* at 335 (Griffin, J.).

31. 410 U.S. 113 (1973) (holding a state law outlawing all abortions, except for life-saving procedures, without regard for the stage of pregnancy or other interests violated the Due Process Clause of the 14th Amendment to the United States Constitution).

decision, similar to the role *Griswold v. Connecticut*³² played in the United States.³³ In addition, some worried the European Economic Community (EEC) might construe Ireland's abortion laws as an impermissible restriction on a provision of services.³⁴ Therefore, attempting to prevent any liberalization of abortion laws, the Oireachtas (Irish Legislature)³⁵ passed the Health (Family Planning) Act of 1979, which reaffirmed sections 58 and 59 of the Offences against the Person Act of 1861.³⁶

The Act failed to placate pro-life activists' fears and concerns, and, given the internal and external influences, they campaigned for a constitutional amendment recognizing and protecting the right to life of the unborn.³⁷ A constitutional amendment would prevent any court from legalizing abortion based on an unenumerated right to privacy and would make it considerably more difficult for the Legislature to pass a bill legalizing abortion.³⁸ The campaign culminated in a constitutional amendment approved on September 7, 1983, when voters favored the amendment by an overwhelming sixty-six percent.³⁹

The Eighth Amendment, codified as Article 40.3.3, provides, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁴⁰

32. 381 U.S. 479 (1965) (holding a state law forbidding contraceptive use intruded upon the right to marital privacy).

33. See John A. Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 3 BYU L. REV. 371, 380 (1984). Irish courts often look upon decisions of the United States Supreme Court "with the greatest of respect." O'Brien v. Stoutt, [1982] 2 I.L.R.M. 327, 333 (Ir. H. Ct.).

34. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 59 (now art. 49), 298 U.N.T.S. 11, 40 [hereinafter EEC TREATY]. Article 59 (now article 49) of the EEC Treaty provides that "restrictions on the free supply of services within the Community shall be progressively abolished." *Id.*

35. The Oireachtas is comprised of two houses: the lower house, the Dáil Éireann, and the upper house, the Seanad Éireann. IR. CONST. art. 15.1 (1937).

36. See Amy M. Buckley, *The Primacy of Democracy over Natural Law in Irish Abortion Law: An Examination of the C Case*, 9 DUKE J. COMP. & INT'L L. 275, 279 (1998) (citing Health (Family Planning) Act, No. 20 (1979) (Ir.)). Despite the law, there has never been a prosecution for the unlawful performance of an abortion. *Id.* at 279-80.

37. See JAMES KINGSTON & ANTHONY WHELAN WITH IVANA BACIK, *ABORTION AND THE LAW* 4 (Round Hall Sweet & Maxwell 1997).

38. In order for the Legislature to pass such a bill, a majority would have to vote to hold another referendum and then a majority of the voters would have to vote to repeal the amendment. IR. CONST. art. 46(1) (1937). Without the amendment, the Legislature could simply pass a bill legalizing abortion with a majority vote. *Id.*

39. Quinlan, *supra* note 33, at 390.

40. IR. CONST. art. 40.3.3 (1937).

While most viewed this language as an absolute ban on abortion,⁴¹ a small minority believed the Amendment allowed for abortions in limited circumstances.⁴²

III. IRELAND'S PARTICIPATION IN THE EUROPEAN COMMUNITY AND CORRESPONDING INTERNATIONAL OBLIGATIONS

In considering the constitutional and legal options in relation to abortion, it is necessary to take account of Ireland's obligations under international and European Union law and to ascertain whether any of the options would run counter to these obligations. Of particular relevance in this regard are the obligations which the State has assumed in relation to the promotion and protection of human rights, notably the right to life and the right to privacy.⁴³

A. *The European Union*

On January 1, 1958, the Treaty of Rome (EEC Treaty) established the EEC.⁴⁴ The self-executing treaty was designed to promote the free

41. See, e.g., Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 458 (1992).

42. See, e.g., Koegler, *supra* note 16, at 1125-26. The amendment does not recognize an absolute right to life of the fetus, but only requires that such a right be balanced against the right to life of the mother. *Id.* at 1125. Some suggest that where it is impracticable to protect the right to life of the fetus, the state should not do so. *Id.* at 1125-26.

43. *Green Paper on Abortion*, *supra* note 21, § 3.01.

44. EEC TREATY, *supra* note 34. European integration is based on four founding treaties: (1) the Treaty Establishing the European Coal and Steel Community, signed on April 18, 1951; (2) the Treaty Establishing the European Economic Community, (3) the Treaty Establishing the European Atomic Energy Community, signed with the European Economic Community Treaty on March 25, 1957; and the Treaty on European Union, signed on February 7, 1992. See TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY]; TREATY ON EUROPEAN UNION AND FINAL ACT, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter MAASTRICHT TREATY]. These treaties have been amended on numerous occasions, particularly when new Member States have joined. Moreover, there have been significant institutional changes: the Merger Treaty, signed on April 8, 1965, provided a single Commission and a single Council for the three European Communities; the Single European Act, signed on July 1, 1987, provided for the adoptions necessary for the achievement of the Internal Market; and the Treaty of Amsterdam, signed on October 2, 1997, amended and renumbered the EEC and Maastricht Treaties., attempted to harmonize foreign policy and allowed for freer movement of individuals. See TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, O.J. (L152) Spec. Ed. 1 (1965) [hereinafter MERGER TREATY]; SINGLE EUROPEAN ACT, July 1, 1987, O.L.J. (L169) (1987); TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The Treaty of Amsterdam also changed the articles identified by letters to numerical form. See *id.* Lastly, the Treaty of Nice, signed on February 26, 2001, provides for the addition of ten new Member States (i.e., Cyprus,

trade of goods and services between the Member States.⁴⁵ It established four fundamental freedoms supporting and facilitating economic unity: the free movement of workers, services, capital, and products.⁴⁶ Originally comprised of three separate entities,⁴⁷ the Community came under one institution known as the European Union, when the Maastricht Treaty entered into force in 1993.⁴⁸ The Maastricht Treaty amended article 2 of the EEC Treaty to read:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a [now Articles 3 and 4], to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.⁴⁹

In 1973, less than twenty-five years after full independence from the United Kingdom, Ireland sought interdependence by joining the EEC.⁵⁰ Since its inclusion, Ireland has been a strong supporter of the Community.⁵¹ The main reasons behind Ireland's positive attitude

Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, Slovenia, and Poland). See EUROPA, The European Union On-Line, *The EU at a Glance: Treaties*, at http://www.europa.eu.int/abc/treaties_en.htm. The ratification process for this latest treaty is currently underway. See *id.* For an in-depth historical discussion of the European Union, see PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 3-48 (Oxford Univ. Press, 2d ed. 1998). Please note, as a result of the renumbering, throughout this Article the original treaty and article number referenced by the source is cited, followed by the new article number. For example, EEC TREATY, *supra* note 47, art. 5 (now art. 10).

45. See CRAIG & DE BÚRCA, *supra* note 44, at 11.

46. *Id.* at 548.

47. *Id.* at 7-12.

48. MAASTRICHT TREATY, *supra* note 44.

49. *Id.* at 256-57. Please note that the actual language of article 2 has been changed slightly; however, substantively, the article remains the same.

50. See CRAIG & DE BÚRCA, *supra* note 44, at 14-15. Ireland first attempted to join the EEC in 1967, along with Denmark, Norway, and the United Kingdom. *Id.* However, then-President Charles de Gaulle of France, uncomfortable with the close ties between the United States and the United Kingdom, used his veto to block all four applicants. *Id.* His successor, George Pompidou, was not so antagonistic towards the United States, and, in 1973, Ireland joined the EEC with eighty-three percent of Irish voters voting in favor of membership. *Id.*; Ireland, Dep't of Foreign Affairs, *Ireland and the European Union* (Nov. 24, 2002), at <http://www.irlgov.ie/iveagh/eu/facts.html>.

51. See Ireland, Dep't of Foreign Affairs, *supra* note 50. Ireland's political support towards the EU may be waning, as it initially rejected the Treaty of Nice in June 2001. *National Forum on Europe*, IRISH TIMES, Oct. 19, 2001, at 15. However, after eighteen months of intense campaigning by the Prime Minister, backed financially by the EU, the Irish voters finally "got it right" and approved the Treaty of Nice by a sixty-three percent majority in October 2002. Mark

towards the EEC seem to be that membership made it less dependent upon the United Kingdom,⁵² and that Ireland has always been a net recipient of Community financial aid.⁵³ Consequently, Irish ratification of the Maastricht Treaty and the Treaty of Amsterdam resulted in overwhelming majorities.⁵⁴

Membership brings many individual benefits, such as inclusion in the world's largest and most affluent consumer market, increased standard of living, and greater access to a variety of goods and services.⁵⁵ In addition, a unified Europe provides collective benefits to members, such as political stability and prospects of lasting peace.⁵⁶

The EU's success is largely due to the allegiance of its members.⁵⁷ This allegiance is tested, however, when members must relinquish national sovereignty in exchange for the greater community good.⁵⁸ However distressing, the EU compels Member States to transfer certain rights and obligations from their domestic legal systems to the EU, thus permanently limiting their sovereignty.⁵⁹ Occasionally, this transfer

Brennock & Denis Staunton, *Big Yes Vote Clears Way for 10 States to Join EU*, IRISH TIMES, Oct. 21, 2002, at 1.

52. While a majority of Irish trade is still with the United Kingdom, EU membership, along with the government's push toward education and generous tax treatment for foreign business, has helped transfer Ireland's economy from an overwhelmingly agrarian economy to a world leader in industry, particularly the high-tech sector. *See id.*; Patrick Fitzmaurice, Attorney General v. X: *A Lost Opportunity to Examine the Limits of European Integration*, 26 BROOK. J. INT'L L. 1723, 1748-49 (2001); Jessica J. Poyner, *Investing in Ireland: The Enticement of U.S. High-Tech Industry to the Emerald Isle*, 10 TRANSNAT'L LAW. 195, 196-97 (1997).

53. For every IR£ that Ireland contributes to the EU, it receives six back through the Structural and the Common Agricultural Policy. *See* Christa van Wijnbergen, *Ireland and the Ratification of the Maastricht Treaty*, in THE RATIFICATION OF THE MAASTRICHT TREATY: ISSUES, DEBATES AND FUTURE IMPLICATIONS 181, 182 (Finn Laursen & Sophie Vanhoonaeker eds., 1994). In contrast to the United Kingdom, Ireland is also a member of the European Monetary Union and uses the Euro as its currency. Strobe Talbott, *From Prague to Baghdad: NATO at Risk*, 81 FOREIGN AFF. (Eurasian-Transatlantic Architecture Insert) (Nov./Dec. 2002).

54. The Treaty of Amsterdam was the latest successful attempt at amending the Treaty Establishing the European Union prior to the impending Treaty of Nice. *See* CRAIG & DE BÚRCA, *supra* note 44, at 32. The other amendments, which included the Single European Act in 1987 and the Maastricht Treaty in 1992, were both approved by just under seventy percent of Irish voters. Ireland, Dep't of Foreign Affairs, *supra* note 50.

55. Seth Stoffregen, *Abortion and the Freedom to Travel in the European Economic Community: A Perspective on Attorney General v. X*, 28 NEW ENG. L. REV. 543, 546 (1993).

56. *Id.*

57. Carder, *supra* note 12, at 260.

58. *See* Stoffregen, *supra* note 55, at 547. In its areas of competence, the EU has complete authority to legislate, and its acts are binding on all Member States. *See* Case 26/62, N.V. Algemene Transport—en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1 (1963).

59. *See* Stoffregen, *supra* note 55, at 546. For example, when Ireland joined the EEC, it amended its Constitution to provide for supremacy of Community law. J.M. KELLY, THE IRISH CONSTITUTION 152-54 (1980). This article of the Irish Constitution, inserted in 1972, provides:

results in a conflict between issues of national sovereignty and that of conformity to the EU.⁶⁰ The European Court of Justice (ECJ) has the power to resolve such conflicts, often holding national law subordinate to law created through the EEC agreement or subsequent treaties.⁶¹ This power to hold national law subordinate to EC law has had a profound influence on Irish courts in deciding abortion cases.

B. *The European Convention on Human Rights*

In addition to complying with EC law, Ireland must also abide by its international obligations assumed under the European Convention on Human Rights.⁶² The Convention guarantees numerous civil and political rights, including the right to life and respect for private and family life.⁶³ The Convention is significant to any discussion of the law relating to abortion for two reasons. First, the Convention established two international bodies, the European Commission and the European Court of Human Rights, before which complaints of state violations of the

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities or institutions thereof, from having the force of law in the State.

Third Amendment of the Constitution Act (1972) (Ir.). In an attempt to allay fears that the EEC would supercede all sovereign laws, the original EEC Treaty granted numerous concessions to Member States. For instance, the right to restrict imports and/or exports of goods may be "justified on grounds of public morality, public order, public safety, [or for] the protection of human or animal life or health." EEC TREATY, *supra* note 34, art. 36 (now art. 30). Please note that the actual language of article 30 has changed slightly from its predecessor article 36; however, substantively, the article remains the same. In interpreting article 36 (now article 30), the European Court of Justice (ECJ) stated, "[I]t is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory." Case 34/79, *Regina v. Henn & Darby*, 1979 E.C.R. 3795, 3813 (1979). However, the court noted that "arbitrary discrimination or a disguised restriction on trade" is contrary to article 36 (now article 30). *Id.* at 3815. Put simply, Member States are free to determine the level of public morality within their country, but they cannot place stricter burdens on imports than those applied to equivalent domestic goods.

60. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 340 (2d ed. 1995); David O'Connor, *Limiting 'Public Morality' Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L L. 695, 700-13 (1997).

61. See, e.g., Case 6/64, *Costa v. Ente Nazionale per L'Energia Elettrica*, 1964 E.C.R. 585, [1964] C.M.L.R. 425, 593 (1964); Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, 1978 E.C.R. 629 (1978).

62. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*]. Ireland ratified the Convention on February 25, 1953. UNHCR, *Legal Information European Convention for the Protection of Human Rights and Fundamental Freedoms*, available at <http://www.unhcr.md/article/conv.htm>.

63. See *id.* arts. 2-12.

rights protected by the Convention could be claimed.⁶⁴ In the first instance, a complaint could be brought before the Commission.⁶⁵ If the complaint is admissible, the Commission could opine whether there had been a violation of the Convention.⁶⁶ Although the Commission's opinion was not legally binding, its interpretation of the relevant Convention provisions carried considerable weight.⁶⁷ Recently, complaint procedures have been streamlined and a new European Court of Human Rights (ECHR) replaced the Commission and the earlier Court.⁶⁸ The biggest change due to this new system is that decisions of the Court are now legally binding.⁶⁹

Second, the Convention acquires special status in EC law.⁷⁰ The ECJ draws on the Convention as a source of Community rights, a position confirmed by article F(2) (now article 6(2)) of the Maastricht Treaty, which provides a general principle of Community law dictating that the EU shall respect fundamental rights guaranteed by the Convention.⁷¹

It should be stressed that neither the Commission nor the "old" Court decided whether the right to life protected by the Convention extends to a fetus or whether a particular abortion case or law of a member country was compatible with the provisions of the Convention.⁷² However, there have been individual applications to the ECHR concerning the abortion law of a Member State.⁷³ In such cases, the ECHR recognized the high level of protection accorded to the unborn

64. *Id.* arts. 19-32.

65. *Id.* arts. 20-27.

66. *See id.* art. 31.

67. *See id.* arts. 31-32.

68. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT LAW, POLITICS, MORALS TEXT AND MATERIALS 798 (2d ed. 2000).

69. Under article 53 of the Convention, "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." European Convention on Human Rights, *supra* note 62, art. 53. However, unless the Convention is incorporated into Irish law in a certain manner, such decisions do not actually bind Ireland in the strict sense, instead creating only a moral obligation on Ireland. *See* P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 16-18 (3d ed. 1998).

70. *See* CRAIG & DE BÚRCA, *supra* note 44, 303-47.

71. MAASTRICHT TREATY, *supra* note 44, art. F(2) (now art. 6(2)). This obligation is reflected in a new paragraph 1 of article F (now article 6). The paragraph provides that the Union is founded on a number of principles that are common to the Member States, including the principle of respect for human rights and fundamental freedoms. *Id.* art. F(1) (now art. 6(1)).

72. *Green Paper on Abortion*, *supra* note 21, § 3.05.

73. *Id.* § 3.08 ("While the applicants in these cases sought to invoke a number of provisions of the Convention, their main complaints were that a particular abortion or the law relating thereto infringed the right to life of the unborn or the right to respect for their private or family life.").

under Irish law while interpreting the scope of the right to freedom of expression.⁷⁴

It is clear from the cases that, under the Convention, Member States enjoy wide discretion in regulating abortion. However, the limitations to that discretion are not clear. The Commission held:

[A]n abortion carried out at ten weeks in order to avert a risk of injury to the physical or mental health of the pregnant woman did not contravene the Convention. It also held that an abortion carried out at fourteen weeks and authorized by two doctors who agreed that the pregnancy, birth, or care for the child might place the woman in a difficult situation of life fell within the area of discretion left to State Parties in this matter.⁷⁵

On the other hand, the Commission rejected the assertion "that the right to respect for private life requires a State to permit the termination of pregnancy upon request during the first twelve weeks" of pregnancy.⁷⁶

The Commission has not adopted a position on whether the right to life under the Convention extends to the unborn, but has expressed that, if the right extends to the unborn, the right is not absolute.⁷⁷ The Commission stated:

If [the right to life] were held to cover the foetus and its protection . . . were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.⁷⁸

74. See, e.g., *Open Door Counselling & Dublin Well Woman v. Ireland*, App. Nos. 14234/88, 14235/88, 15 Eur. H.R. Rep. 244 (1993). Restrictions on freedom of expression are permitted on specific grounds and conditions. See *European Convention on Human Rights*, *supra* note 62, art. 10(2). Two of the grounds pleaded by the government were the protection of the rights of others (the unborn) and the protection of morals. *Open Door*, 15 Eur. H.R. Rep. at 263. The Court recognized that "the protection afforded under Irish law to the right to life of the unborn is based on profound moral values [as reflected in the 1983 referendum and accepted that the] restriction thus pursued the legitimate aim of the protection of morals" which extends to the protection of the right to life of the unborn in Ireland. *Id.* Thus, it did not think it necessary to decide whether the term "others" in the phrase "the protection of others" extended to the unborn. *Id.*

75. *Green Paper on Abortion*, *supra* note 21, § 3.10. (citing *X v. United Kingdom*, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 252-53 (1980); *H v. Norway*, App. No. 17004/90 (1992), unreported).

76. *Green Paper on Abortion*, *supra* note 21, § 3.10 (citing *Brüggemann & Scheuten v. Fed. Republic of Germany*, App. No. 6959/75, 5 Eur. Comm'n H.R. Dec. & Rep. 103 (1976); 10 Eur. Comm'n H.R. Dec. & Rep. 100 (1977)).

77. See *X Case*, 19 Eur. Comm'n H.R. Dec. & Rep. at 252.

78. *Id.*

C. *Other International Obligations*

Other agreements to which Ireland is party and which are potentially relevant are the International Covenant on Civil and Political Rights,⁷⁹ the Convention on the Rights of the Child,⁸⁰ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁸¹ However, none of these agreements appears to limit the freedom of States to adopt abortion legislation they deem appropriate.⁸²

IV. IRISH CASE LAW: THE TRILOGY OF RECENT CASES

A. *The First Information Case: SPUC v. Open Door*

Following the passage of the Eighth Amendment, pro-life groups sought to prevent Irish women from traveling abroad for the purpose of obtaining an abortion and targeted family-planning clinics that advertised the availability of abortions in Britain.⁸³ In June of 1985, one such group, the Society for the Protection of Unborn Children (SPUC), brought suit against two women's health clinics, Open Door Counselling, Ltd. and Dublin Well Woman Centre, Ltd., alleging a violation of the Eighth Amendment's right to life of the unborn.⁸⁴ The two clinics provided non-directive counseling on options available to pregnant women and referred women who elected to have abortions to clinics in Britain, in some cases arranging travel services.⁸⁵

79. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by Ireland, Dec. 8, 1989).

80. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (1989) (ratified by Ireland, Sept. 28, 1992) [hereinafter Convention on the Rights of the Child]. The Convention leaves open the question of when childhood begins, but recognizes that some legal protection for the child should exist prior to birth. Convention on the Rights of the Child, *supra*, pmbl. Some States made a Declaration giving their understanding of the personal scope of the Convention. For example, the United Kingdom lodged a declaration along with its instrument of ratification stating, "The United Kingdom interprets the Convention as applicable only following a live birth." United Nations Treaty Collection Declarations and Reservations [as of 9 October 2001], available at <http://www.unhchr.ch/html/menu3/b/treaty15asp.htm> (last visited Jan. 12, 2003).

81. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1981) (ratified by Ireland, Dec. 23, 1985). The Convention is concerned with the elimination of discrimination against women and the promotion of equality between the sexes. *Id.* pmbl. It contains several references to procreation and pregnancy and includes an undertaking that women be provided with appropriate services in connection with pregnancy. *See id.* arts. 5, 11(1)(f), 11(2), 12.

82. *Green Paper on Abortion*, *supra* note 21, § 3.12.

83. *See, e.g.*, Society for the Protection of Unborn Children Ireland, Ltd. (SPUC) v. Open Door Counselling, Ltd. & Dublin Wellwoman Centre, Ltd., [1988] I.R. 593 (Ir. H. Ct.).

84. *Id.* at 601-02.

85. *See* Penny Manners, *Can Governmental Policy Trump the Freedom of Speech? Access to Information About Abortion Services in Ireland and the United States*, 20 SUFFOLK TRANSNAT'L L. REV. 289, 293 n.22 (1996).

The High Court held that the clinics' activities resulted in "counselling and assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion."⁸⁶ The court held this violated the Eighth Amendment, as the activity engaged in the destruction of the "fundamental" right to life of the unborn—a right superior to the rights of privacy, association, and freedom of expression.⁸⁷ Therefore, the High Court summarily dismissed the clinics' claims that the counseling provided was protected by the rights of free expression and privacy.⁸⁸

On appeal, the Supreme Court permanently enjoined the clinics from assisting pregnant women "to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics."⁸⁹ In so holding, the Court focused on fundamental rights, judging the right to life of the unborn superior to the freedom of expression.⁹⁰ As the Court found the defendants were "assisting in the ultimate destruction of the life of the unborn," the Court concluded no constitutional right to information exists regarding the availability of the service outside Ireland that, "if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn."⁹¹

The Court refused to refer the case to the ECJ, rejecting the notion that the case implicated questions of EC law.⁹² Chief Justice Finlay stated, "Since no claim is made on behalf of the defendants that [assistance to travel abroad and receive abortion services] is a corollary right to whatever rights such woman may have under the [EEC Treaty], it follows that no question of the interpretation of the Treaty falls to be decided in this case."⁹³

86. *Open Door*, [1988] I.R. at 617.

87. *See id.*

88. *See id.* The Court stated the "qualified right to privacy [and] the rights of association and freedom of expression . . . cannot be invoked to interfere with such a fundamental right as the right to life of the unborn." *Id.*

89. *Id.* at 627.

90. *See id.* at 625.

91. *Id.* at 624-25.

92. *See id.* at 626. For more on a citizen's right to assert claims based on EC law against governments, see GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY, & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 180-81 (West Pub. Co. 1993).

93. *Open Door*, [1988] I.R. at 626. The pleadings only referred to the legality of information provided inside of Ireland. *See id.* If the Court had referred the case to the ECJ, we would have a clearer view of the extent of EC law limits, as well as a better understanding of the article 36 (now article 30) public morality exception.

The clinics then appealed to the European Commission on Human Rights, claiming that the injunction violated the European Convention on Human Rights provisions protecting freedom of expression (article 10),⁹⁴ the right to privacy (article 8),⁹⁵ and the right to equal protection (article 14).⁹⁶ The Commission decided the case solely on the freedom of expression claim.⁹⁷ As the injunction issued against the clinics interfered with the clinics' right to free expression, the Commission queried whether the interference was "prescribed by law," as required by article 10.⁹⁸ A restraint is "prescribed by law" if it is "adequately accessible and reasonably foreseeable."⁹⁹ The Commission concluded the clinics could not have foreseen that Irish law prohibited their actions.¹⁰⁰ Thus, the

94. Article 10 provides:

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

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

European Convention on Human Rights, *supra* note 62, art. 10.

95. Article 8 provides:

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

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

Id. art. 8.

96. *Open Door Counselling, Ltd. & Dublin Well Woman Centre, Ltd. v. Ireland*, App. Nos. 14234/88 & 14235/88, 14 Eur. H.R. Rep. 131, 135 (1991) (Commission Report). Article 14 states, "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention on Human Rights, *supra* note 62, art. 14.

97. *See Open Door*, 14 Eur. H.R. Rep. at 135-38.

98. *Id.* at 136.

99. *See, e.g., Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (1979) (Eur. Ct. H.R.). The purpose of this rule is to enable individuals to regulate their conduct in the light of the foreseeable consequences of a given action. *Id.*

100. *Open Door*, 14 Eur. H.R. Rep. at 137.

injunction was not “prescribed by law” and violated article 10.¹⁰¹ The Commission then referred the case to the ECHR.¹⁰²

In 1992, the ECHR upheld the Commission’s decision, but found the injunction violated article 10 for different reasons than the ones exposed by the Commission.¹⁰³ The ECHR held the injunction was “prescribed by law,” but concluded the restrictions on the dissemination of information were “over broad and disproportionate” in relation to its purpose of protecting morals.¹⁰⁴ Because the restriction on the dissemination of information violated article 10, the ECHR did not decide whether a right to abortion is guaranteed under article 8 or article 14 and has not since considered these issues.¹⁰⁵

B. *The Second Information Case: SPUC v. Grogan*

In *SPUC v. Grogan*, Ireland faced another dilemma involving the Eighth Amendment.¹⁰⁶ Shortly after the Supreme Court ruled on *Open Door*, SPUC sued three student organizations that published information relating to abortion clinics in Britain.¹⁰⁷ SPUC argued this violated the right to life of the unborn, as it had in *Open Door*, and requested a

101. *Id.* at 137-38.

102. *See* *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 9 (1992).

103. *Id.* at 27-30. The Court awarded damages of IRE£25,000 to Dublin Well Woman, and costs and expenses to both corporate applicants. *Id.* at 33.

104. *Id.* at 30. The restriction was deemed over broad because it proposed a “‘perpetual’ restraint on the provision of information . . . regardless of [a woman’s] age or state of health or . . . reasons for seeking counselling on the termination of pregnancy.” *Id.* Having accepted that the restraints pursued a legitimate aim under the Convention, the government argued that the Court should have regard to the article 2 guarantee of the right to life, which they contended extends to the unborn. *Id.* at 28. The Court, however, stated it was not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the right to life, as contained in article 2, encompasses the fetus. *Id.* The only issue it addressed was whether the restrictions on the freedom of the applicants to impart and receive information about abortion facilities outside Ireland was “necessary in a democratic society for the legitimate aim of the protection of morals.” *Id.* While acknowledging that national authorities enjoy a wide margin of discretion in matters of morals, particularly on matters of belief concerning the nature of human life, the Court found the “necessity” test was not satisfied, and therefore held Ireland breached the applicants’ right to freedom of expression under the Convention. *Id.* at 29-30.

105. Koegler, *supra* note 16, at 1130.

106. [1989] 4 I.R. 753 (Ir. H. Ct.), *aff’d in part, rev’d in part*, [1989] 4 I.R. 760 (Ir. S.C.). Initially, the High Court held the SPUC lacked the necessary standing to request the injunction. *See* *SPUC v. Coogan*, [1989] 4 I.R. 734, 737 (Ir. H. Ct.). The Supreme Court overruled. *Id.* at 742. Instead of returning to the High Court to argue *Coogan*, the SPUC expanded the scope of its claim and filed a new complaint. *See* *Grogan*, [1989] 4 I.R. at 753.

107. *Grogan*, [1989] 4 I.R. at 753. The student organizations were the Union of Students in Ireland, the Students’ Union of University College Dublin, and the Students’ Union of Trinity College Dublin. *Id.*

similar injunction.¹⁰⁸ The student groups argued their activities were protected under articles 59 and 60 (now articles 49 and 50) of the EEC Treaty, which guarantee the right to travel between Member States in order to receive services.¹⁰⁹ The students contended that Irish citizens had a right to receive and impart information about services lawful in other Member States because they were citizens of a Member State.¹¹⁰

Rather than rule on the EC law issue, the High Court referred the case to the ECJ pursuant to article 177 (now article 234) of the EEC Treaty.¹¹¹ The High Court declined to grant the injunction in the interim and requested a determination as to the following: (1) whether abortions were “services” within the meaning of article 60 (now article 50) of the EEC Treaty; (2) if so, whether a Member State could prohibit the distribution of information regarding those services; and (3) if not, whether under Community law there was an exception.¹¹²

Before the ECJ decided the case, SPUC appealed to the Irish Supreme Court.¹¹³ The student groups challenged the jurisdiction of the Court on the ground that only a “decision” by the High Court could be appealed.¹¹⁴ The Supreme Court, however, held the High Court made two “decisions”; first, by referring the issue to the ECJ and, second, by refusing to grant the injunction to the SPUC.¹¹⁵ Because an ECJ decision was at least eighteen months away, the delay in issuing the injunction was equivalent to a decision not to grant one.¹¹⁶ The Court added that it was

108. *Id.* The Justice initially ruled that the evidence against the students was hearsay and thus excluded, despite the fact the students widely publicized that they provide abortion information and included it in Student Union guidebooks. *Id.* at 759. However, the SPUC successfully appealed this ruling. *See id.* at 761.

109. *See id.* at 764.

110. *See id.*

111. *Id.* at 757-58; *see* Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4685, 4733. Article 177 (now article 234) provides in relevant part:

The Court of Justice shall be competent to make a preliminary decision concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide. Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

EEC TREATY, *supra* note 34, art. 177 (now art. 234). Please note that the actual language of article 234 has been changed slightly from its predecessor, article 177; however, substantively, the article remains the same.

112. *See Grogan*, 1991 E.C.R. at I-4738-39.

113. *See Grogan*, [1989] 4 I.R. at 760.

114. *Id.* at 762-63.

115. *Id.*

116. *See id.*

not inconsistent both to (1) rule on whether the High Court erred in refusing to grant an injunction and (2) await a ruling by the ECJ on the three questions submitted and, as a result, found it had jurisdiction to hear the appeal.¹¹⁷

The Supreme Court could not reverse the High Court's referral to the ECJ but, in restating its position on the "fundamental" right to life of the unborn, clearly stated its position on the issue.¹¹⁸ The Court held that, where the right sought to be protected is that of a life, there can be no question of a possible or putative right that might exist in EC law as a corollary to the right to travel to procure services.¹¹⁹ Therefore, the Court seemingly implied that, regardless of the ECJ decision, the Irish Supreme Court would decide whether abortion was a service which could be advertised.¹²⁰

Eventually, the SPUC appeal proved unnecessary, as the ECJ went out of its way to avoid deciding the substantive issues of the case. The court did rule abortion constituted a "service" within the meaning of article 60 (now article 50) of the EEC Treaty and, thus, could not be subject to restrictions.¹²¹ The court reasoned that, although abortion was illegal in Ireland, the issue was not the extent to which Ireland found abortion repugnant, but that the Member State providing the service recognizes abortion as a service for which the provider (physician) receives compensation.¹²²

The court traditionally interprets the "service" provision broadly and even noted that it had decided previous cases in a similar manner.¹²³ Recognizing the goal of integrating the Member States into a common economic market, the ECJ rarely excludes a service legally provided in

117. *Id.* at 763.

118. *Id.* at 764-65.

119. *Id.*

120. *See id.* at 768-69. The Court stated, "In the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution and the 3rd Amendment of the Constitution." *Id.*

121. Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4685, 4739.

122. *See id.* The plaintiffs contended abortion was not a service within the meaning of the EEC Treaty because abortion was grossly immoral and repugnant to Irish law, but the Court held that a "[m]edical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 [now article 50] of the Treaty." *Id.* at 4739, 4742.

123. *See id.* at 4739 (citing joined cases 286/82 & 26/83, *Luisi & Carbone v. Ministero del Tesoro*, 1984 E.C.R. 377 (1984)).

one Member State from provisions of the EEC Treaty, thereby risking over-inclusiveness rather than under-inclusiveness.¹²⁴

However, the ECJ successfully avoided the contentious issue by finding the student groups lacked standing to raise a freedom of expression defense because the link between the groups' activities and the abortion clinics were "too tenuous" for the prohibition on the distribution of information to be regarded as a restriction within the meaning of articles 59 and 60 (now articles 49 and 50).¹²⁵ Thus, the EEC Treaty did not cover prohibiting the distribution of abortion service information by student groups and, as such, did not curtail the free movement of services in such a way to hinder the stated goals of the EEC Treaty.¹²⁶ Therefore, article 59 (now article 49), which prohibits countries from restricting the movement of services, did not apply.¹²⁷ By ruling in this manner, the ECJ avoided the moral implications of its decision and allowed the use of a suspect economic justification to substitute for the social issue.

The Court further opined, "it is not contrary to Community law" for Ireland to prohibit groups from distributing information about abortion clinics in Member States where the procedure is legal, as long as the clinics have no involvement in the activity.¹²⁸ The ECJ seems to have based its decision on the deference to Member States to restrict free movement of services "which are justified by reasons of public order, public safety, and public health."¹²⁹ In light of the ECJ ruling, the High Court issued the permanent injunction.¹³⁰

While the decision was a defeat for the student groups, it was a better result than that recommended by the Advocate General.¹³¹ The

124. Carder, *supra* note 12, at 262. For a discussion of the importance of integration and the tools used by the ECJ in influencing Member State courts, see Fitzmaurice, *supra* note 52, at 1737-41.

125. *Grogan*, 1991 E.C.R. at 4740-41.

126. *See id.* at 4741-42; Dena T. Sacco & Alexia Brown, *Regulation of Abortion in the European Community—Society for the Protection of Unborn Children Ireland, Ltd. v. Grogan, Judgment of the European Court of Justice of 4 October 1991 in Case C-159/90 (1991)*, 33 HARV. INT'L L.J. 291 (1992).

127. *Grogan*, 1991 E.C.R. at 4740-41.

128. *Id.*

129. *See* EEC TREATY, *supra* note 34, art. 56 (now art. 46).

130. KINGSTON & WHELAN, *supra* note 37, at 147. Because the ECJ did not find a violation of Community law, it lacked the jurisdiction to refer the case to the European Court of Human Rights. *Grogan*, 1991 E.C.R. at 4741.

131. The Advocate-General is an impartial and independent person who considers all the arguments and issues before making "in open court, reasoned submissions on cases." EEC TREATY, *supra* note 34, art. 166 (now art. 222); *see also* CRAIG & DE BÚRCA, *supra* note 44, at 80, 86.

Advocate General found the prohibition contrary to article 59 (now article 49), but concluded the restriction was justified under the public policy exception of article 56 (now article 46).¹³² The ECJ's opinion, however, suggests a different result for those distributing information with the requisite economic ties to the clinic. In other words, unlike the Advocate General's opinion, the ECJ holding that abortion was a service within the meaning of article 60 (now article 50) left open the possibility that, should a party directly connected to providing abortion become involved, the outcome could be different. The ECJ decision clearly recognizes that Community law supersedes national law, even on highly contentious issues. Irish politicians accepted this outcome, but were less willing to accept the consequences that necessarily followed.

C. *The X Case*

In 1992, a tragic set of events changed the landscape of abortion in Ireland. In perhaps the most controversial case ever heard in the Irish judiciary, the Supreme Court was forced to rule on the relationship between abortion and Article 40.3.3 of the Constitution of Ireland.

In *Attorney General v. X (X Case)*, a fourteen-year old girl (X), allegedly raped and impregnated by her best friend's father, traveled to England with her parents to terminate the pregnancy.¹³³ Attempting to provide proof of paternity, the parents contacted the *gardaí* (Irish police) to see if the aborted fetus could be used for DNA testing.¹³⁴ The police directed the question to the Director of Public Prosecutions, who declared the evidence would be inadmissible.¹³⁵ The Attorney General also requested and received, *ex parte*, a temporary injunction to prevent the girl from having the abortion.¹³⁶ The parents complied with the

132. See Opinion of Mr. Advocate Gen. Van Gerven, 11 June 1991, Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4703, 4732. Article 56 (now article 46) states, "The provisions of this Chapter and the measures taken in pursuance thereof shall not prejudice the applicability of legislative and administrative provisions which lay down special treatment for foreign nationals and which are justified by reasons of public order, public safety and public health." EEC TREATY, *supra* note 34, art. 56 (now art. 46). Please note that the actual language of article 46 has been changed slightly from its predecessor, article 56; however, substantively, the articles remain the same.

133. *Attorney General v. X & Others (X Case)*, [1992] 12 I.L.R.M. 401 (Ir. H. Ct.), *rev'd*, [1992] 12 I.L.R.M. 414 (Ir. S.C.). The girl repeatedly threatened to commit suicide if she were forced to carry the pregnancy to term. See *id.* at 406-07. A sad side to this story is that the man responsible for raping X was later convicted of kidnapping and sexually assaulting a fifteen-year-old girl in 1999. X Case *Man Again Convicted of Sexual Assault*, IRISH TIMES, Mar. 2, 2002, at A1. The fifty-two-year-old taxi driver proclaimed his innocence throughout the trial. *Id.*

134. *X Case*, [1992] 12 I.L.R.M. at 406.

135. *Id.*

136. See *id.* at 406-08. The injunction contained the following orders:

injunction and returned to Ireland, but stated if a permanent injunction were not granted, X would proceed with the abortion.¹³⁷

Before the High Court, X argued that the right to life of the unborn must be subordinate to the right to life of the mother, even if the threat to the mother is self-imposed.¹³⁸ Not persuaded, the High Court issued a permanent injunction prohibiting the girl from traveling to England.¹³⁹ The court reasoned that, although the Irish Legislature failed to legislate on the issue of conflicting rights, the language of Article 40.3.3 of the Constitution was clear that any means of destroying the life of an unborn child was repugnant to Irish law.¹⁴⁰

While acknowledging there was a real risk of X committing suicide, the High Court applied a balancing test and concluded the “risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made.”¹⁴¹ Furthermore, while recognizing the fundamental right to travel to procure services for all EU citizens, the High Court found that a public policy derogation exists which could be invoked by a Member State to prohibit such travel.¹⁴² The court relied on the restrictions imposed by national law, “unequivocally expressed” through a constitutional amendment, requiring the court to vindicate the right to life of the unborn.¹⁴³ Under such circumstances, Community law permitted the court an “area of discretion” to derogate from its Treaty obligations and to impose the restriction on the right to travel.¹⁴⁴

(a) An order restraining the defendants . . . from interfering with the right to life of the unborn as contained in Article 40.3.3 of the Constitution of Ireland on such terms as to this Honourable Court shall seem meet and just. (b) An order restraining the first-named defendant from leaving the jurisdiction . . . [or] from assisting the first defendant to leave the aforesaid jurisdiction for a period of nine months from the date hereof or such other period as may be specified . . . (c) An order restraining the first defendant . . . from procuring or arranging a termination of pregnancy or abortion whether within or without the jurisdiction.

Id. at 408.

137. *Id.* at 406.

138. *Id.* at 410.

139. *See id.* at 414.

140. *See id.* at 409-10.

141. *Id.* at 410.

142. *Id.* at 412-13.

143. *Id.* at 413. While discussing public policy derogation, the High Court relied on the ECJ decision of Case 30/77, *R. v. Bouchereau*, 1977 E.C.R. 1999, and Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337. *Id.* at 412.

144. *Id.* at 413.

The decision sparked overwhelming outrage, as protesters in Dublin demonstrated with signs reading "Rapists 1—Women 0," "Human Rights for Rape Victims," and "Ireland Defends Men's Right to Procreate by Rape."¹⁴⁵ Moreover, a reactionary opinion poll taken on February 23, 1992, showed sixty-six percent of those polled supported modifying the Eighth Amendment to allow abortion under some circumstances.¹⁴⁶

Surprisingly, on February 26, 1992, by a four-to-one majority, the Supreme Court reversed the High Court's decision and discharged the injunctions.¹⁴⁷ In doing so, the Court held that the termination of a pregnancy, and therefore travel to terminate a pregnancy, is permissible if the pregnancy presents a "real and substantial risk" to the mother's life.¹⁴⁸ Chief Justice Finlay stated the proper test is "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution."¹⁴⁹ Based on this assessment, the Court effectively stated that the risk to the life of the unborn is no greater than the risk to the mother's life.¹⁵⁰ Unlike the High Court, the Supreme Court classified the risk of suicide as a qualifying risk to the life of the mother under the Eighth Amendment.¹⁵¹ The Court then found X's threat of suicide to be a real and substantial risk to her life, partly because it is nearly impossible to prevent suicide.¹⁵²

It is worth noting that, even though all five justices agreed an unenumerated fundamental right to travel exists, three of the justices argued that, absent a real and substantial risk to the mother's life, such a right could be restricted in favor of the right to life of the unborn.¹⁵³ An Irish woman could therefore freely travel abroad for legal procedures, if

145. Klashtorny, *supra* note 7, at 428.

146. *See id.*

147. *X Case*, 12 I.L.M.R. at 427.

148. *See id.* at 425.

149. *Id.*

150. *See id.* Justice Hederman, in dissent, sharply disagreed with this conclusion. *Id.* at 433. "Suicide threats can be contained. On the vital matter of the threat to the mother's life there has been a remarkable paucity of evidence. In my opinion the evidence offered would not justify this Court withdrawing from the unborn life the protection which it has enjoyed since the injunction was granted." *Id.* at 446. This can be interpreted as meaning that the judge did not believe the sincerity of X's suicide threats or that the evidence of a psychologist was not of the "most competent medical opinion available." *See id.* at 445-46.

151. *See id.* at 425.

152. *Id.* at 427. Chief Justice Finlay stated, "[I]t is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide." *Id.*

153. *See id.* at 429-30 (Finlay, C.J.), 443 (Hederman, J.), 460-61 (Egan, J.).

not available in Ireland, but could not go abroad, absent showing a real and substantial risk to her life, to have procedures done which are illegal in Ireland. Thus, it appears the case was “decided on the theoretical basis of whether X would be allowed to have an abortion in Ireland (because if not, she did not have the right to travel to obtain one).”¹⁵⁴

Undeniably, the *X Case* permits an Irish woman to legally obtain an abortion abroad if the pregnancy posed a real and substantial risk to her life. Moreover, the threat of suicide might constitute such a risk in the event a woman is forced to carry the pregnancy to term. By ruling as it did, the Court again avoided EC law; however, the decision’s greatest significance may be that it revived the abortion debate and drew attention to the impending vote to ratify the Maastricht Treaty.

V. LEGISLATION SUBSEQUENT TO THE *X CASE*

A. *The Maastricht Treaty*

When the *X Case* litigation began, the Republic of Ireland was in the middle of a country-wide referendum on the Maastricht Treaty, which was designed to promote an economic, monetary, and political union among the European Community.¹⁵⁵ The Irish government, clearly worried about the effect of the ECJ’s ruling in *Grogan*, successfully lobbied drafters for the addition of a protocol, Protocol 17, guaranteeing EC law would not effect Ireland’s pro-life constitutional amendment.¹⁵⁶

One implication of the ECJ decision in *Grogan* was that, had the information regarding the “service” been distributed “on behalf of an economic operator established in another Member State” by groups with a commercial relationship with foreign clinics or by the clinics themselves, a Member State could not prohibit the distribution of information.¹⁵⁷ Protocol 17 attempted to avoid the possibility of Community law overriding Article 40.3.3 should a conflict arise.¹⁵⁸ As a result of the protocol, it appears the ECJ should defer to Irish law when a

154. Buckley, *supra* note 36, at 287. While X was theoretically allowed to terminate her pregnancy in Ireland, X was forced to travel abroad to do so because no Irish practitioner would perform the procedure. *See id.* at 287 n.107.

155. Cole, *supra* note 20, at 134.

156. *Id.* The United Kingdom, France, Denmark, and Portugal have similar protocols issued for fear that their sovereignty was endangered. *See* Sari K.M. Laitinen-Rawana, *Creating a Unified Europe: Maastricht and Beyond*, 28 INT’L LAW. 973, 974 n.5 (1994).

157. Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4685, 4740.

158. *Green Paper on Abortion*, *supra* note 21, § 3.17. It is unclear whether the protocol forbids women from obtaining information regarding abortion and traveling abroad for that purpose or merely protects the law forbidding the distribution of abortion information in Ireland without having an effect on travel.

conflict arises between Community law and the application in Ireland of Article 40.3.3.¹⁵⁹ The end result is that the protocol takes measures relating to Article 40.3.3 out of the Community's jurisdiction.¹⁶⁰ Protocol 17 states, "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."¹⁶¹

Following the *X Case* and the ECHR decision in *Open Door*, then-Taoiseach (Prime Minister) Albert Reynolds feared that public backlash over Protocol 17 would cause Irish voters to reject accession to the Maastricht Treaty.¹⁶² Therefore, the government reversed its position and sought to further amend the Treaty to guarantee Irish citizens the right to travel abroad and receive information about abortion.¹⁶³ However, the other Member States refused to re-open the debate on the protocol, claiming that granting Ireland's request would lead other nations to also demand changes.¹⁶⁴ Thus, the protocol remains in the Maastricht Treaty, and Ireland was forced to settle for a Solemn Declaration by the Member States concerning their intentions in adding Protocol 17.¹⁶⁵ The Declaration states:

[I]t was and is their intention that the Protocol shall not limit freedom to travel between Member States 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.¹⁶⁶

The status of the Solemn Declaration, even though adopted by the EC Foreign Ministers on May 1, 1992, is presently unclear under

159. *Id.* § 3.18.

160. *Id.*

161. See MAASTRICHT TREATY, *supra* note 44. Note that the protocol does not explicitly restrict the power to amend Article 40.3.3. *Green Paper on Abortion*, *supra* note 21, § 3.19. As a result, it is unclear whether further amendments will benefit from the immunity granted by the protocol. *Id.* The protocol simply does not state whether the Article 40.3.3 referred to in the protocol is that which existed at the time the treaty was ratified or whether it could include later amendments. *Id.* Legal certainty seems to require that the Community should be bound only by that version of Article 40.3.3 which existed at the time of ratification. *Id.* On the other hand, it could be argued that the protocol intends to leave these matters entirely to Irish law. *Id.* Under the latter interpretation, any subsequent changes would be covered by the protocol. *Id.*

162. See Jeffrey A. Weinstein, "An Irish Solution to an Irish Problem": *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 194-95 (1993).

163. Buckley, *supra* note 36, at 288.

164. *Id.*

165. *Id.* at 288-89.

166. Declaration of the High Contracting Parties to the Treaty on European Union, May 1, 1992, available at <http://europa.eu.int/abc/obj/treaties/en/entr3.htm>.

Community and international law.¹⁶⁷ The prevailing view is that the Declaration is simply a statement of legislative intent, and, therefore, not legally binding.¹⁶⁸

B. Another Referendum: Constitutional Amendments 13 and 14

In another attempt to ensure that the abortion crisis would not jeopardize ratification of the Maastricht Treaty and the corresponding economic benefits it would provide, the struggling Reynolds government held a three-question referendum on November 25, 1992.¹⁶⁹ Responding to the incompatibility of the Irish law with EC law, and seemingly ensuring the liberalization of abortion laws, the referendum on the first question, approved by 62.3% of voters, added the following to Article 40.3.3: "This subsection shall not limit freedom to travel between the State and another State."¹⁷⁰ The referendum on the second question, approved by 59.8% of voters, modified Article 40.3.3 by including the following: "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."¹⁷¹

The third question proposed to amend Article 40.3.3 reflected the distinction between a mother's life and health that Chief Justice Finlay set out in the *X Case*. It read:

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-destruction.¹⁷²

However, the referendum on this last question, rejected by 65.4% of voters, was defeated.¹⁷³

Thus, the two approved measures effectively guarantee Irish women the right to travel abroad for an abortion and the availability of information regarding lawful abortion abroad. The Irish government supported the proposals and, by doing so, reversed its position in *Open*

167. Buckley, *supra* note 36, at 289.

168. *Id.*; Abigail-Mary E.W. Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 396 (1997).

169. Weinstein, *supra* note 162, at 196-98.

170. Buckley, *supra* note 36, at 289 (citing IR. CONST. art. 40.3.3. (incorporating the Thirteenth Amendment)).

171. *Id.* (citing IR. CONST. art. 40.3.3 (incorporating the Fourteenth Amendment)).

172. *Id.*

173. *Id.* at 290. Pro-choice advocates did not want to eliminate the risk of suicide justification, while pro-life advocates felt the proposal did too little and wanted the Eighth Amendment repealed or strengthened. *Id.*

Door, *Grogan*, and the *X Case*.¹⁷⁴ However, the government attempted to limit the effects of the *X Case* by eliminating suicide as a legitimate justification.¹⁷⁵

On December 3, 1992, the two accepted measures were incorporated into Article 40.3.3 as the Thirteenth and Fourteenth Amendments.¹⁷⁶ The Thirteenth Amendment suggests that the Eighth Amendment could never prohibit a woman from traveling abroad to obtain an abortion, radically departing from the majority view in the *X Case* that such travel was permitted only when the life of the mother was at risk.¹⁷⁷ However, the Fourteenth Amendment phrase "subject to such conditions" suggests that legislation could be enacted to eliminate the right to receive information relating to abortion and reinstate the *Open Door* and *Grogan* decisions.¹⁷⁸ Thus, the issue is not fully settled.

The referenda did ease tensions between Irish and EC law, as the right to travel and information issues appear temporarily settled.¹⁷⁹ Following the referenda, the government announced it would introduce legislation regarding the possibility of abortion in cases of rape, incest, and the risk of suicide; however, no such legislation immediately followed.¹⁸⁰

C. *The Abortion Information Act of 1995*

In March 1995, the Irish Legislature passed a bill providing for freedom of information for services legally available in other states.¹⁸¹ The fact that it took three years after the passage of the Fourteenth Amendment to enact such legislation reflects the strength of Catholicism and an unwillingness to confront the Church on this volatile issue.¹⁸²

Pro-choice groups supported the Bill, while pro-life advocates strenuously claimed it violated the natural law right to life.¹⁸³ Pursuant to

174. Cole, *supra* note 20, at 139-40.

175. *Id.* at 140.

176. Koegler, *supra* note 16, at 1135.

177. *Id.* at 1136.

178. *Id.*

179. Buckley, *supra* note 36, at 290.

180. *Id.* In 2001, the government finally proposed changes in the form of a constitutional amendment. See discussion *infra* Part VII. As detailed later in this Article, the referendum was defeated. See discussion *infra* Part VII.

181. See Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995) (Ir.) [hereinafter Regulation of Information Act]. The Act makes it legal to distribute information on abortion services abroad as long as the information does not promote abortion. *Id.* § 3. It was only with a coalition government that the legislation was able to become law. Koegler, *supra* note 16, at 1136.

182. See Koegler, *supra* note 16, at 1136.

183. See *id.*; Buckley, *supra* note 36, at 290.

Article 26 of the Constitution, which provides that the President may refer any bill to the Supreme Court for a determination of whether the bill is repugnant to any provision of the constitution, then-President Mary Robinson submitted the Regulation of Information Bill to the Irish Supreme Court.¹⁸⁴ Once a bill is submitted to the Supreme Court, Article 26 forbids the President from signing it if the Court concludes the bill jeopardizes any constitutional provisions.¹⁸⁵

The Supreme Court unanimously decided the bill did not violate any constitutional provisions.¹⁸⁶ The Regulation of Information Bill amended the Indecent Advertisements Act of 1889 and the Censorship of Publication Acts of 1929 and 1967 to allow information regarding the termination of pregnancy legally performed outside Ireland to be provided to the general public.¹⁸⁷ The Act delineates how, and under what circumstances, publishers of abortion material and organizations offering pregnancy counseling can disseminate information concerning abortion, including the absolute prohibition of advocating or encouraging abortion in any manner.¹⁸⁸

This decision is significant in many respects. First, it affirms the holding of the *X Case*.¹⁸⁹ Additionally, for the first time, the Court held that amendments to the Constitution that violate natural law are acceptable.¹⁹⁰ Therefore, the Court held the Constitution is not subordinate to natural law.¹⁹¹ This aspect of the ruling cannot be understated, as natural law had been the basis of numerous past opinions, forcing the judiciary to parallel Catholic doctrine.¹⁹² Legislation deemed inconsistent to natural law was always found conflicting with the Constitution.¹⁹³ The Court stated:

184. Buckley, *supra* note 36, at 290; Carder, *supra* note 12, at 268.

185. Carder, *supra* note 12, at 268. It is interesting to compare the Irish referral process to that of the American process, which, lacking a similar procedure, instead sees issues heavily litigated and drawn out over many years until a final conclusion on the constitutionality of legislation becomes clear.

186. See *In re* Article 26 of the Constitution and *In re* the reference to the court of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995, [1995] 2 I.L.R.M. 81, 116 (Ir. S.C.).

187. *Id.* at 86.

188. See *id.* at 87-91.

189. See *id.* at 98-99. The Court affirmed the *X Case* test (abortion is permitted when a real and substantial risk to the mother's life exists). *Id.* Once the test is met, the mother is entitled to information concerning the available options. *Id.*

190. *Id.* at 83.

191. *Id.*

192. O'Connor, *supra* note 60, at 708-09.

193. *Id.* at 709.

These arguments raise the question of the role of the natural law in the development of constitutional jurisprudence It is fundamental to this argument that what is described as 'the natural law' is the fundamental law of this State and as such is antecedent and superior to all positive law, including the Constitution and that it is impermissible for the people to exercise the power of amendment of the Constitution by way of variation, addition or repeal, as permitted by Article 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and if they purport to do so, such amendment would have no effect. The court does not accept this argument.¹⁹⁴

However, the Court offered no substantial justification for its rejection of natural law.¹⁹⁵ As the Court contradicted both precedent and the accepted reading of the Constitution, some commentators believe the Court's rejection of natural law was due to external pressure to bring Ireland into step with EU standards and norms.¹⁹⁶

VI. THE *C* CASE

In the fall of 1997, a thirteen-year-old girl (C), impregnated by rape, was placed into temporary care with the Eastern Health Board (EHB).¹⁹⁷ The girl reportedly wanted to travel to England to terminate her pregnancy.¹⁹⁸

The 1992 amendments established that the Eighth Amendment would not restrict the freedom to travel if the parents decided to take their daughter abroad for an abortion.¹⁹⁹ There was concern, though, that the EHB, standing *in loco parentis*, would need High Court permission before taking the girl to England for the purposes of obtaining an abortion.²⁰⁰ Moreover, seeking a High Court ruling would leave the EHB less exposed to legal challenges from pro-life groups.²⁰¹ The EHB,

194. *In re Article 26*, [1995] 2 I.L.R.M. at 102. The Court pointed to Articles 15.4, 26, 28.2, 34.1, and 35.2 in stating it is clear that the State, the Oireachtas, the executive, and the judiciary are subject to the Constitution. *Id.* at 102-04.

195. See Buckley, *supra* note 36, at 291-92.

196. *Id.*; O'Connor, *supra* note 60, at 709-10.

197. A. & B. v. E. Health Bd., Judge Mary Fahy & C. & the Attorney Gen. (*C Case*), [1998] 1 I.L.R.M. 460, 461 (Ir. H. Ct.). The girl's family were travelers (also referred to as tinkers or knackers). See *id.* Travelers live nomadic lives, living in trailers on the sides of roads or in fields without permission. Children of travelers usually do not attend school and are often left alone for long stretches.

198. *Id.* at 470.

199. See, e.g., *id.* at 477.

200. See, e.g., Paul Cullen, *Girl at Centre of Abortion Controversy to Remain in Care of Health Board*, IRISH TIMES, Nov. 22, 1997, at 6.

201. There was a great concern from pro-life groups that not only would the EHB facilitate an abortion by arranging the girl's travel, but also that EHB (a government agency) would pay for

however, also faced opposition from the girl's parents, who not only wanted to regain custody of their daughter, but also wanted her to carry the pregnancy to term.²⁰²

On November 21, 1997, the Children's Court ordered the girl to remain in the custody of the EHB, which would provide free medical care, including an abortion.²⁰³ The parents immediately filed an appeal to the High Court, and replaced their legal team from legal aid with lawyers paid by a pro-life group.²⁰⁴ A High Court judge stayed the Children's Court's order following the application on behalf of the parents.²⁰⁵

Following three days of *in camera* hearings, High Court Justice Geoghegan rejected the appeal filed by the girl's parents, declaring the girl was free to travel abroad for an abortion.²⁰⁶ The EHB agreed not to take the girl out of the country pending any appeal to the Supreme Court.²⁰⁷ The Supreme Court agreed to hear the appeal, but in the end the parents decided not to appeal the High Court decision.²⁰⁸

The girl then traveled to England, escorted by her EHB guardian, to terminate her pregnancy.²⁰⁹ Furthermore, two law enforcement officials accompanied the entourage and retrieved DNA evidence for prosecution against the rape suspect.²¹⁰

The *C Case* suggests very little evidence is needed to prove a real and substantial risk of suicide. Surprisingly, the parents were not allowed to have their own psychiatrist examine the girl (due to the girl's fragile mental health) and were barred from consulting their own psychiatrist to

the abortion as well. See Christine Newman & Jim Cusack, *Thirteen Year Old Rape Victim Had Abortion in England Yesterday*, IRISH TIMES, Dec. 4, 1997, at 4. The argument is well founded, as the State took a role in the term of pregnancy, counter to Article 40.3.3, which gives "due regard" to the equal right to the life of the unborn.

202. *C Case*, [1998] 1 I.L.R.M. at 470.

203. See Cullen, *supra* note 200.

204. *C Case*, [1998] 1 I.L.R.M. at 470.

205. See *id.* at 462.

206. *Id.* at 468, 479-80. In obiter dicta, the Justice stated the abortion would be legal if performed in Ireland, so C was allowed to travel for the purposes of obtaining something legal in Ireland. See *id.* at 479. He additionally stated the Child Care Act could not authorize travel for an abortion not allowed under Irish law because the right to life is unaffected by the right to travel (a right framed in negative terms). See *id.* at 476-79. Thus, an injunction will still be placed on travel for illegal purposes. *Id.* at 479.

207. Christine Newman, *Rape Victim Free to Have Abortion in England*, IRISH TIMES, Dec. 2, 1997, at 10.

208. *Id.* The reason for the reversal appears to be that the Archbishop of Dublin refused the parents' request to fund the appeal. See Padraig O'Morain, *Archbishop Not to Fund Court Appeal on Abortion*, IRISH TIMES, Dec. 1, 1997, at 1.

209. Newman & Cusack, *supra* note 201.

210. See *id.*

effectively cross-examine the pro-choice psychiatrist who testified in favor of the abortion.²¹¹

Public reaction demonstrated the remarkable attitudinal evolution towards abortion since the passage of the Eighth Amendment. A public opinion poll following the *C Case* indicated that seventy-seven percent of those polled felt abortion facilities should be provided in Ireland in limited circumstances, with fifty-five percent believing the medical profession should provide such facilities.²¹² Additionally, the situations ranged from the liberal view of “for those who need it” (twenty-eight percent), to a “risk to the mother’s health” (fourteen percent), and to a “risk to the life of the mother” (thirty-five percent).²¹³ Almost two-thirds of those polled believed the High Court made the correct decision in the *C Case* by allowing the girl to travel to England for an abortion.²¹⁴ Most surprisingly, only eighteen percent of voters polled believed abortion should not be permitted in any circumstances.²¹⁵ This indicates the substantially liberalized view on abortion since 1983, when the prevalent view was that any abortion was simply intolerable.²¹⁶

VII. THE LATEST REFERENDUM

In 1999, after years of silence and inaction, the government commissioned the “Green Paper on Abortion” to investigate possible improvements to the present uncertainty.²¹⁷ Two years later, the government introduced the Twenty-fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, and announced a referendum would be held in March 2002.²¹⁸

211. *C Case*, [1998] 1 I.L.R.M. at 471. The High Court concluded consultation would not have changed the result, which is a shocking assumption considering the fact that it is not universally accepted that abortion improves the mental health of a depressed teen. Buckley, *supra* note 36, at 302.

212. See Geraldine Kennedy, *77% Say Limited Abortion Right Should Be Provided*, IRISH TIMES, Dec. 11, 1997, at 1.

213. *Id.*

214. *Id.*

215. *Id.*

216. See *Finding for Abortion*, IRISH TIMES, Dec. 11, 1997, at 17.

217. *Green Paper on Abortion*, *supra* note 21. The long-awaited report thoroughly reviewed the history of abortion in Ireland and analyzed possible action to improve the law. *Id.* Note also that a 1996 report of The Constitution Group Review recommended the introduction of legislation to implement the *X Case* judgment and specified under what conditions abortion could be carried out lawfully in Ireland. *Id.* app. 5. The report was rejected by pro-life groups and never acted upon. See KINGSTON & WHELAN, *supra* note 37, at 4; Youth Defence, at <http://www.youthdefence.ie/Doc/worddoc.htm>.

218. See “Speech by the Taoiseach Mr. Bertie Ahern,” IRISH TIMES, Oct. 2, 2001, available at <http://www.ireland.com/newspaper/special/2001/ahernabortion/index.htm> (last visited Mar. 4, 2002). The Bill also made procuring, attempting, aiding, and abetting abortion a criminal offense

The proposed amendment consisted of two subsections to be added immediately following an unchanged Article 40.3.3. The proposal provided that laws concerning abortions could only be amended through referendum, and granted constitutional safeguards to medical practitioners who terminated a pregnancy in order to protect the life of a mother.²¹⁹ The Bill also defined abortion as the “intentional destruction by any means of unborn human life after implantation in the womb of a woman.”²²⁰

Moreover, the Bill stated the definition of abortion excludes:

the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction.²²¹

in Ireland, punishable by a maximum of twelve years imprisonment or a fine or both. Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, § 2(3). Abortion has always been a crime in Ireland; however, there has not been a prosecution since the 1950s. *See* Buckley, *supra* note 36, at 279-80.

219. *See* Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001. Prime Minister Bertie Ahern stated that, in a criminal trial, the onus would be on the prosecution to prove beyond a reasonable doubt that a practitioner’s opinion to abort the fetus lacked “reasonableness.” Letter from the Taoiseach to the Fine Gael leader concerning the abortion issue, IRISH TIMES, Oct. 19, 2001, *available at* <http://www.ireland.com/newspaper/special/2001/abortion/index.htm> (last visited Nov. 22, 2002) [hereinafter Letter from the Taoiseach]. In the event of practitioners disagreeing as to the “reasonableness” of the opinion, it would be highly unlikely for a jury to convict. *Id.*

220. Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, § 1(1). The use of the word “implantation” is a term of art, as emergency forms of contraception, such as the morning-after pill, delay ovulation and delay implantation if taken within seventy-two hours of intercourse. *See* Letter from the Taoiseach, *supra* note 219. The use of this term presumably keeps such forms of contraception legal but is at odds with Catholicism’s stance that life occurs after fertilisation. This clause caused many Catholics to oppose the Bill. *See* sources cited *infra* note 224. The Prime Minister stated that defining pregnancy in accordance with the Catholic Church is “not practicable”; however, he did state that Article 40.3.3 of the Constitution, may in fact protect the unborn at fertilization, but it would be a matter for the courts to decide. *See* Letter from the Taoiseach, *supra* note 219.

221. Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, § 1(2). As a result, under this Amendment, the conditions to performing a legal abortion would include: (1) the abortion must be carried out by a medical practitioner; (2) at a government pre-approved place; (3) the practitioner must form a reasonable opinion that the procedure is necessary to save the life of the mother (meaning a good faith decision while taking into account the life of the unborn); and (4) the practitioner must make and sign a statement on the basis for the opinion formed. *See id.* § 1(2). In addition, to placate conscientious objectors, practitioners are under no obligation to perform the procedure to save the life of the mother. *Id.* § 3.

It is clear under this definition that the “risk of suicide” exception would no longer be a valid reason to seek an abortion.²²²

Despite support for allowing the termination of a pregnancy resulting from rape, the Bill did not include a rape exception. The Prime Minister explained its exclusion by claiming the addition of an exception would create an unworkable situation with unset standards of proof and evidence needed to prove the non-consensual intercourse.²²³

Following an extremely contentious period leading up to the vote, the Irish people went to the polls for the fifth time in twenty years and narrowly rejected the proposed amendment.²²⁴ The “No” vote secured 50.4% of the vote with less than 10,000 votes separating the two sides.²²⁵ Disappointingly, only forty-three percent of the nation’s voting electorate voted, down from sixty-eight percent in the 1992 referendum.²²⁶

The amendment’s rejection means the present constitutional wording and present law remain unchanged. The Irish Legislature can legislate on the issue, but must do so in accordance with the current law, meaning that it could not remove the threat of suicide as grounds for an abortion. Legislation could, however, regulate the circumstances of the exception.²²⁷

The coalition responsible for defeating the proposed amendment consisted of a mix of pro-choice activists who opposed the restrictions to abortion contained in the amendment, together with hard-line pro-life activists, who felt the Bill would lead to a more liberalized regime, and

222. The Prime Minister claimed the risk of suicide exception would lead to an “inevitable” and “unstoppable” slide towards “social abortion” in Ireland. See Letter from the Taoiseach, *supra* note 219.

223. See *id.*

224. *Voters Reject Government Abortion Proposal*, IRISH TIMES, Mar. 7, 2002, available at <http://www.ireland.com/focus/abortion/news/0307/breaking1.htm> (last visited Jan. 10, 2003) [hereinafter *Voters Reject Government Abortion Proposal*]. The five-month period before the vote was for the most part constructive, but also saw politicians accusing each other of intentionally deceiving the public, as well as medical practitioners and church leaders disagreeing on the Bill. See Patsy McGarry & Denis Coghlan, *Confusion a Deliberate Strategy by No Side—Bishop*, IRISH TIMES, Mar. 5, 2002, available at <http://www.ireland.com/newspaper/front/2002/0304/2127539118hmabora.html> (last visited Nov. 22, 2002); Piaras Murphy, *No Vote Will Lead to Abortion on Demand—Ahern*, IRISH TIMES, Mar. 4, 2002, available at <http://www.ireland.com/focus/abortion> (last visited Nov. 22, 2002).

225. *Voters Reject Government Abortion Proposal*, *supra* note 224. As expected, rural communities favored the proposal while city voters opposed the Bill. See *Abortion Amendment Narrowly Defeated*, RTE NEWS, Mar. 7, 2002, available at <http://www.rte.ie/news/2002/0307/abortion.html>.

226. *Voters Reject Government Abortion Proposal*, *supra* note 224.

227. For instance, legislation could mandate the precise requirements for a practitioner’s authorization and could more clearly define the State’s role in abortions for women qualifying under the *C Case*.

opposition political parties who simply wanted to embarrass the government in an election year.²²⁸ With pro-life supporters sharply splintered and even the medical community divided on the issue, many voters remained confused over the effect of the Bill and were undecided going to the polls.²²⁹ The unusual coalition that caused the Bill's demise now makes the task of studying and understanding the implications of the result more difficult.²³⁰ The result will certainly not lead to abortion on demand, but may indicate that the people are unwilling to accept a law which does not contain some exception to a stringent abortion ban.

The Bill's rejection avoids a potential confrontation between the amendment and EC law. Despite the Prime Minister's claim that the legislation did not have any EU content or implications, the legislation's compatibility with the Maastricht Protocol could be questioned. The ECJ has not dealt with a similar issue, and it is unlikely they would have ruled against the amendment, but an ECJ case would cause negative publicity and again bring the issue to international attention.²³¹

228. The pro-lifers who voted "No" ignored a strong appeal from the Catholic Church to garner support for the Bill. See Patsy McGarry, *We Believe It Is Best to Vote "Yes"*, IRISH TIMES, Mar. 4, 2002, available at <http://www.ireland.com/newspaper/2002/0304/4059562559hm9CONNELL.html> (last visited Nov. 22, 2002).

229. The Institute of Obstetrics and Gynaecology urged a "Yes" vote, however, in the days preceding the referendum, twenty-five obstetricians and gynaecologists distanced themselves from the official statement and publicly stated the reforms were inadequate and urged a "No" vote. See Carol Coulter & Mark Hennessy, *Statement by Medical Experts a Late Boost for No Vote*, IRISH TIMES, Mar. 6, 2002, available at www.ireland.com/newspaper/front/2002/0305/4194544986HMABORTONE.html (last visited Nov. 22, 2002).

230. Pro-choice advocates claim the result proves people want a liberalized abortion regime, pro-life advocates claim the result proves people will not tolerate a liberalized regime, and opposition leaders cannot agree on the cause of the result. See Piaras Murphy, *No Campaigns Spilt [sic] over Meaning of Vote*, IRISH TIMES, Mar. 7, 2002, available at <http://www.ireland.com/newspaper/breaking/2002/0307/breaking54.htm> (last visited Nov. 22, 2002). Labour leader Ruairi Quinn and Fine Gael leader Michael Noonan claim the result shows people want the *X Case* decision to stand, with Quinn stating that "the *X Case* stays and women who are suicidal and who are pregnant from an unwanted pregnancy are entitled to have an abortion in this country and we now need to legislate for that." *Id.* MEP, Dana Rosemary Scallon, on the other hand, believes the result was a victory for the unborn, claiming, "It would be very, very wrong for anyone to assert that this No vote was because there was a call for more liberal abortion. If it [the amendment] had been worded in a way that was acceptable to Pro-life people in this country, it would have been passed." *Id.* Quinn went on to contradict himself by saying many pro-lifers voted against the act due to its compromises. *Id.*

231. In addition, in both the Maastricht and Nice negotiations, the issue of a Charter of Fundamental Rights of the EU has been discussed. See Anthony Cowgill & Andrew Cowgill, *THE TREATY OF NICE IN PERSPECTIVE: VOLUME ONE-ANALYSIS* 225 (2001). The Charter is envisioned to give legal recognition to ECHR jurisprudence. See *id.* As the ECHR, in *X Case*, stressed the right to the life of the mother as against that of the unborn child, the passage of this Bill could have led to an interesting dilemma further down the road.

VIII. SUMMARY AND CRITICISM OF THE CURRENT LAW

A. *Irish Abortion Law: 1983 to 1995*

In 1983, Ireland amended its Constitution to unequivocally protect the right to life of the unborn.²³² Efforts to enforce the law and prevent Irish women from procuring an abortion were consistently upheld by the Supreme Court,²³³ but these efforts backfired when public opinion, international norms, and EC law (with the availability of abortions in Member States) prompted Ireland to revisit the issue and revise its laws.²³⁴

By 1992, Irish courts recognized that a mother's right to life is superior to that of the unborn, and, consequently, if the life of a pregnant woman were substantially at risk, she could travel abroad to terminate the pregnancy.²³⁵ Unknowingly, this principle unleashed a plethora of conflict that resulted in the 1995 decision of *In re Article 26*.²³⁶ After its own decisions, advice from the ECHR (*Open Door*) and ECJ (*Grogan*), and public opinion, the Supreme Court had no choice but to permit the right to obtain information regarding abortion services. Considering its recent positive law decision, as well as the ECHR and ECJ opinions, allowing the information was the only logical result.

Although the ECJ did not require Ireland to allow information about services abroad, it did determine that Irish law could potentially conflict with EU principles.²³⁷ The Irish Supreme Court primarily considered the opinion of the ECJ and the holding of the *X Case* in determining the constitutionality of the Regulation of Information Bill.²³⁸ In addition, the ECHR opinion affected the court's willingness to conform to European policies and to acquiesce to the growing uniformity of Europe.²³⁹

The *X Case* provided the bridge by which the Court in *In re Article 26* could overrule previous decisions while appearing to simply expand

232. IR. CONST. art. 40.3.3.

233. See *SPUC v. Open Door Counselling, Ltd. & Dublin Wellwoman Centre, Ltd.*, [1988] I.R. 619 (Ir. S.C.); *SPUC v. Grogan*, [1989] 4 I.R. 760 (Ir. S.C.).

234. See *Attorney-General v. X & Others (X Case)*, [1992] 12 I.L.R.M. 414 (Ir. S.C.); *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. 28 (ser. A) (1992); *Case C-159/90, SPUC v. Grogan*, 1991 E.C.R. I-4685.

235. See *X Case*, [1992] 12 I.L.R.M. at 414.

236. See *In re Article 26 of the Constitution and In re the reference to the court of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*, [1995] 2 I.L.R.M. 81 (Ir. S.C.).

237. See *Grogan*, 1991 E.C.R. at I-4685.

238. Carder, *supra* note 12, at 274.

239. See *Open Door*, 246 Eur. Ct. H.R. at 28.

on previous reasoning.²⁴⁰ In reality, *In re Article 26* was a “radical departure . . . masked by the rationality, timeliness, and ultimate constitutionality of the Information Bill.”²⁴¹

While *Open Door* and *Grogan* strained the relationship between Irish and EC law, the *X Case* greatly increased the tension. Moreover, the case attracted European and international pressure on, and criticism of, the Irish Supreme Court. This meshing of pressure and criticism directly led to the Supreme Court eventually ruling as it did in *In re Article 26*.

B. Irish Law on Abortion: Post-1995 Controversy

The law on abortion remained controversial after 1995.²⁴² Even following the passage of the Regulation of Information Act, many questions involving its clarity and scope of coverage remained. Furthermore, the court in the *C Case* passed on the opportunity to clarify the evidentiary standards needed for an abortion.²⁴³

The Regulation of Information Act purports to resolve the conflicting rights of the mother and the unborn child by protecting the right to life of the unborn within Ireland while at the same time protecting the right to travel abroad for the purpose of obtaining an abortion.²⁴⁴ It also contains numerous safeguards designed neither to promote nor encourage the termination of pregnancies.²⁴⁵

Unfortunately, both the Act and the *C Case* fail to address numerous important issues. For instance, it is unclear whether a pregnant woman who demonstrates a “real and substantial” risk to life to qualify for an abortion is eligible to receive state-funded medical treatment. The Irish medical scheme funds medically necessary procedures when a patient is unable to pay.²⁴⁶ This suggests that indigent women could be eligible to receive state-funded abortions, yet it also counters the clear language of the Eighth Amendment. In addition, the Irish Medical Council (IMC) states that abortion is *never* medically necessary.²⁴⁷ However, there is no

240. Carder, *supra* note 12, at 275.

241. *Id.*

242. See discussion *supra* Parts VI-VII.

243. See discussion *supra* Part VI.

244. Carder, *supra* note 12, at 274.

245. See *In re Article 26* of the Constitution and *In re* the reference to the court of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995, [1995] 2 I.L.R.M. 81, 87-91 (Ir. S.C.).

246. See Department of Health and Children, at <http://www.doh.ie>.

247. See *Green Paper on Abortion*, *supra* note 21, § 2.28. Further, the Minister of Health has discretion in determining how services are funded and provided. Child Care Act, No. 17, § 70 (1991) (Ir.).

reasonable justification for providing funds for a medically necessary abortion for a child while refusing to grant funds for a medically necessary abortion for an indigent person.

In addition, since there is no rape exception in Irish law, the Supreme Court crafted its decision in the *X Case* to allow abortion under existing law under certain circumstances.²⁴⁸ In construing the law as it did, the Court used the “real and substantial risk” standard to counter Ireland’s longstanding link with natural law as well as the plain meaning of the Eighth Amendment.²⁴⁹ The Eighth Amendment gives “due regard” to the equal right of the mother, but as it currently stands, the possibility of self-imposed death takes precedence over certain death for the unborn.²⁵⁰ Acknowledging choice-driven abortions, such as those allowed by the risk of suicide qualification, directly contradicts the spirit of Irish constitutional and common law as well as natural law, the basis of the Irish Constitution.

The objective in both the *X Case* and the *C Case* is to allow abortion under certain circumstances.²⁵¹ The cases do not aim to create abortion on demand, yet, due to the lack of legislation and particularly the lack of a rape exception law, the cases produce an unwanted result: abortion would likely be allowed even if the pregnancy resulted from consensual sex. In having to make decisions around existing law, the courts found suicide to be the most convenient exception.

The High Court’s treatment of parental rights is another troubling aspect of the *C Case*. Articles 41 and 42 of the Irish Constitution provide parents the inalienable right to raise their children.²⁵² Article 42 specifically mentions both religious and moral education of a child as an inalienable right of the parents.²⁵³ This seems to suggest that a parent could prevent a child from obtaining an abortion, even if a substantial risk to the child’s life exists. Yet, the court overruled C’s parental rights and allowed her to seek an abortion.²⁵⁴

Further, the Child Care Act suggests only ill treatment or neglect overrides either Article 41 or 42,²⁵⁵ and while the court did deem the

248. See discussion *supra* Part IV.C.

249. See *id.*

250. See *id.*

251. See discussion *supra* Parts IV.C and VI. The government attempted to recognize this in the latest referendum; however, the failure to include a rape exception and the coalition of hard-line pro-choice and pro-life advocates defeated the measure. See discussion *supra* Part VII.

252. IR. CONST. arts. 41-42.

253. *Id.* art. 42.1.

254. See *A. & B. v. E. Health Bd., Judge Mary Fahy & C. & the Attorney General (C Case)*, [1998] 1 I.L.R.M. 460 (Ir. H. Ct.).

255. See Child Care Act, No. 17, §§ 17-19 (1991) (Ir.).

parents neglectful, the Constitution is unclear whether such a finding deprives parents of every parental right.²⁵⁶ In fact, given Irish sentiment toward abortion, even neglectful parents preventing an abortion are unlikely to qualify for losing parental rights. Considering the importance of parental rights in the Irish Constitution, as well as the certain future instance of this scenario, the Court's disposition of this issue without discussion is most troubling.

It is clear that Irish abortion law developed along somewhat inextricable lines. This manner of lawmaking, as well as the corresponding lack of legislation, resulted in an unclear standard and a confused citizenry. Ill-defined standards resulting from poorly worded referenda, which attempt to appease all sides of the issue, only add to the confusion. Legislation is needed to clarify the law.

C. *The Future*

Into the 1990s, Irish courts insulated Ireland from liberalization of its abortion laws by prohibiting the dissemination of information about abortions and travel to obtain such abortions.²⁵⁷ The ECJ and ECHR, however, both weakened the prohibitions and forced change.²⁵⁸ Moreover, the addition of Protocol 17 to the Maastricht Treaty jeopardized ratification and, at the very least, concerned the government enough that they added the Solemn Declaration.²⁵⁹ Years of litigation finally culminated in the Regulation of Information Act.²⁶⁰ The government failed to deliver legislation to clarify the law and the latest referendum proved the situation remains contentious and unsettled.²⁶¹

While working within the parameters set by the *X Case*, the Irish Legislature must legislate to modify the "real and substantial risk" standard to something more clear and manageable. In the meantime, the IMC should clarify exactly what constitutes a "real and substantial risk."

Any further liberalization of abortion, however, would probably require a referendum. The judiciary has bent the law as far as it is comfortable with and, per the provisions of the Constitution, the

256. See *C Case*, [1998] 1 I.L.R.M. at 460; IR. CONST. arts. 41-42.

257. See *SPUC v. Open Door Counselling, Ltd. & Dublin Wellwoman Centre, Ltd.*, [1988] I.R. 619 (Ir. S.C.); *SPUC v. Grogan*, [1989] 4 I.R. 760 (Ir. S.C.).

258. See *Attorney General v. X & Others (X Case)*, 12 I.L.R.M. [1992] 414 (Ir. S.C.); *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. 28 (ser. A) (1992); *Case C-159/90, SPUC v. Grogan*, 1991 E.C.R. I-4685.

259. See *MAASTRICHT TREATY*, *supra* note 44; discussion *supra* Part V.A.

260. *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995) (Ir.)*.

261. See discussion *supra* Part VII.

Legislature cannot substantially alter the law without a nationwide referendum.²⁶² Abortion proponents may look to international law for further liberalization, but they will be hard-pressed to find assistance. If the past is any indication, relief from the ECJ or ECHR is unlikely. In addition, Protocol 17 presumably removed the matter from EU authority and the EU is unlikely to issue a directive requiring members to harmonize the manner in which they determine public morality exceptions.²⁶³

Thus far, both the ECJ and ECHR have recognized a right to life of the unborn, but have not provided an absolute right to life for the unborn.²⁶⁴ Instead, realizing any harmonization would result in the EU defining morality, both have deferred to the domestic laws of Member States and avoided any overt attempt at harmonizing the law.²⁶⁵ ECHR, ECJ, and Irish Supreme Court decisions have allowed access to information on abortion clinics abroad and have provided the right to travel abroad to obtain an abortion, but abortions on demand remain illegal.²⁶⁶ This standard complies with international law and also tenuously survives internal challenges.

The need for clarification of the law, however, is great and must be addressed. The narrow rejection of the latest referendum, coupled with the corresponding retention of the status quo, simply legitimizes and perpetuates years of uncertainty. The present situation is neither sound nor desirable, as numerous aspects of the law remain uncertain.²⁶⁷ Moreover, one can envision future cases similar to the *X Case* and *C Case*, the consequences of which would be devastating.

Legislation needs to fill the vacuum left by the Supreme Court and to regulate the suicide exception.²⁶⁸ In addition, the status of women qualifying for an abortion under the standards set out in the *X Case*, but unable to travel abroad, needs to be defined. Likewise, the equality of

262. IR. CONST. art. 46.2.

263. See MAASTRICHT TREATY, *supra* note 44.

264. Article 2 of the European Convention of Human Rights guarantees, "Everyone's right to life shall be protected by law." European Convention on Human Rights, *supra* note 62, art. 2(1). The scope of article 2 has caused debate, as "everyone" and "life" are undefined. See *id.*

265. See Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4685; Open Door & Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. 28 (ser. A) (1992).

266. See, e.g., Case C-159/90, SPUC v. Grogan, 1991 E.C.R. I-4685; Open Door & Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. 28; Attorney General v. X & Others (*X Case*), [1992] 12 I.L.R.M. 414 (Ir. S.C.).

267. For instance, the term "unborn" and "abortion" remain undefined under the current law.

268. The Green Paper on Abortion suggests authorization from a committee before receiving clearance to abort as one such measure. See *Green Paper on Abortion*, *supra* note 21, at 7.44.

minors and wards of the court needs to be clarified. It is clear that legislation is needed to deal with the consequences of the 1992 referendum, as well as with the consequences resulting from the *X Case*. Continued government inaction will only cause further destabilization of the system.

IX. CONCLUSION

Ireland is a thriving member of the EU that is increasingly at odds with its past. While it could hardly subsist without the economic benefits bestowed by EU membership, the concomitant social change has fundamentally changed the historic conservatism of this predominantly Catholic country. As Ireland vied for economic stability by joining the EEC in 1973, it failed to recognize this side effect of membership.²⁶⁹ Despite Ireland's attempts to ignore or limit that effect, it has been forced to slowly join the standard of norms developed by a majority of EU Member States.

Ireland operated under the misguided theory that it could separate the economic benefits of EU membership from its social and moral policies. It soon realized, however, that the EU brings an inseparable collection of economic, social, and political values and benefits. This collection forced Ireland to slowly liberalize its abortion laws and accept that its policy, however noble, "permits abortion tourism as a balance between the right to life of the unborn and the realities of modern society."²⁷⁰

While the Irish judiciary initially ignored EC law, it could not avoid the inevitable collision between its laws and those of the EU. Both the ECJ decision in *Grogan* and the ECHR holding in *Open Door* foretold the conclusion that the availability of information and right to travel would eventually prevail. While these rulings did not specifically overrule any Irish laws, they did pressure Ireland to comply with the spirit of the decisions. In addition, the timing of the decisions, after the *X Case* and shortly before the abortion referendum, no doubt impacted the referendum vote.

Ireland is an active and ambitious member of the EU. Clearly, Ireland's participation in the EU and international public opinion played a

269. In 1972, Ireland repealed a constitutional article that recognized the semi-governmental status of the Catholic Church. It recognized, "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." IR. CONST. art. 44.1.2 (repealed 1972). While its repeal was not solely due to Irish accession to the EEC, it was likely a crucial factor.

270. Sterling, *supra* note 168, at 404.

substantial part in Ireland's judicial and legislative liberalization of abortion laws. The EU provided useful guidance for Ireland and precipitated much change, but also realized that public morality was both a politically charged and highly divisive issue that could be better dealt with on a national level.

In liberalizing abortion laws, Ireland distanced itself from its natural law background, marking a radical shift in Irish jurisprudence. This shift cannot be understated. Natural law no longer provides a barrier to further liberalization of abortion laws. However, due to a lack of legislative guidance, the current law stretches and twists the plain meaning of the constitutional language, and the judicial interpretation thereof, regarding abortion. Ireland desperately needs legislation to clearly resolve the discrepancies and inconsistencies created by twenty years of inconsistent change. The present law is unclear, unworkable, and simply unacceptable.