

A., B. & C. V. IRELAND: “EUROPE’S ROE V. WADE”?

by
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In Ireland, abortion is effectively illegal. In 2005, three Irish women who had previously traveled to England for abortions brought suit in the European Court of Human Rights asserting that restrictive and unclear Irish laws violate several provisions of the European Convention on Human Rights. The case was heard before the Grand Chamber of the Court on December 9, 2009 and a decision will be published in 2010.

The European Court of Human Rights has never determined whether the Convention protects the right to life of the unborn or conversely the right to an abortion. The case at hand squarely presents an opportunity for the Court to take a position.

This Note focuses on the Irish and European Court of Human Rights’s abortion law and the impending decision in A., B. & C. v. Ireland. I conclude that—based upon the Court’s own jurisprudence—the European Court of Human Rights is very likely to declare that Ireland’s nearly absolute abortion ban and the resultant effects of Irish law have and continue to violate rights the Court has already deemed protected by the European Convention on Human Rights. The Court will likely embrace one of two possible holdings. First, the Court could find that Ireland’s abortion ban causes undesirable secondary effects such as inadequate post-abortion care, that these effects implicate rights under the Convention, and that Ireland has an unfulfilled positive obligation to mitigate these effects. Alternatively, I suggest that the Court may hold that Ireland’s abortion ban itself violates the personal and family rights of applicants A., B., and C. and women like them. Commentators have referred to this case as “Europe’s Roe v. Wade,” and I believe this to be an accurate if oversimplified statement.

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I. INTRODUCTION

In Ireland, abortion is effectively illegal. The right to fetal life is enshrined in the Irish Constitution and every year, thousands of women seeking abortions cross the Irish Sea to obtain an abortion in neighboring England.¹ In recent years, pro-life advocates in Ireland have

¹ The numbers of women providing Irish addresses who had abortions in the UK range from a low of 3,673 women in 1987 to a high of 6,673 in 2001. Numbers have dropped every year since 2001, and in 2006, 5,042 women reported Irish addresses. Irish Family Planning Association, IFPA Abortion Briefing Paper 4 (Nov. 2007), <http://www.ifpa.ie/eng/content/download/504/3702/file/Abortion%20briefing%20paper%20Nov2007.pdf>. These numbers likely “vastly undercount[]” the actual numbers. *Id.*; see also Jeffrey A. Weinstein, “An Irish Solution to an Irish Problem”: *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 165 n.2 (1993); Safe and Legal (in Ireland) Abortion Rights Campaign, Abortion in Context, http://www.safeandlegalinireland.ie/index.php?option=com_content&view=article&id=12&Itemid=18 (also pointing out that the official numbers are under-inclusive). It has been suggested that the number of women traveling to the UK is dropping because more women are traveling to “other EU states, such as Holland, Spain and Belgium” Press Release, Irish Family Planning Association, IFPA Responds to Latest UK Abortion Stats (May 21, 2009), <http://www.ifpa.ie/eng/Media-Info-Centre/News-Events/2009-News-Events/IFPA-Responds-to-Latest-UK-Abortion-Stats>. One obvious question is: Why don't Irish women simply travel to Northern Ireland? In short, “[t]he [United Kingdom] Abortion Act 1967 does not apply in Northern

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enjoyed a period of peace and calm. With some of the strictest abortion laws in Europe enshrined in the Irish Constitution, landmark Supreme Court decisions affirming their position, and a protocol in the current European Union treaty ensuring no EU interference with the Irish right-to-life provisions, Irish pro-life forces have had little to fear but lethargic public opinion.

However, in 2005 three Irish women who had previously traveled to England for abortions brought suit in the European Court of Human Rights (ECHR) asserting that restrictive and unclear Irish laws violate several provisions of the European Convention on Human Rights ("The Convention").² As a decision-making body of the Council of Europe, the ECHR is not bound by EU law—including the aforementioned protocol—and enforces only the European Convention on Human Rights. This is significant because the decisions of the ECHR are binding upon Ireland, essentially making the ECHR the only court *not* bound by the Irish Constitution *and* able to pronounce binding opinions on the legality of Ireland's—and all of Europe's—abortion laws.³

The ECHR has never determined whether the Convention protects the right to life of the unborn, or conversely, the right to an abortion. The case at hand squarely presents an opportunity for the Court to take a position. The case, *A., B. & C. v. Ireland*, which will be decided far from Irish soil, "may dramatically reshape the legal availability of abortion in Ireland . . . it may even go as far as forcing a new, permissive

Ireland, whose courts . . . find lawful abortions performed on minors or mentally disabled adults . . ." *D v. Ireland*, 43 E.H.R.R. SE16 at 191, 194 (2006).

² Statement of Facts, *A., B. & C. v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (May 2008), available at http://www.eclj.org/PDF/081118_ECLJ_StatementofFacts7May2008.pdf [hereinafter Statement of Facts]. The European Convention on Human Rights is shorthand for the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention]. The text of the Convention is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

³ It is also important that this case is being heard by 17 judges of the Grand Chamber of the Court rather than the usual chamber of seven judges. "In cases which are considered to raise important issues, a chamber may relinquish its jurisdiction to a grand chamber of 17 judges (under Article 30; Rule 72)." PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 54 (2d ed. 2005). This happens in "one of two situations: [W]here a case raises a serious question affecting the interpretation of the Convention (or the protocols); or where a judgment might be inconsistent with earlier jurisprudence." *Id.* (formatting omitted). "Cases decided in the Grand Chamber are binding on all lower chambers and on all member states. A decision in the case will set an official policy on the issue for Europe." Press Release, Alliance Defense Fund, Importance of Europe's 'Roe v. Wade' Case Grows Exponentially with Elevation in Status (July 13, 2009), <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=5004>; see also Editorial, *European Human Rights Court Could be Europe's Roe v. Wade*, CHRISTIAN L.J., July 22, 2009, <http://www.christianlawjournal.com/featured-articles/european-human-rights-court-could-be-europes-roe-v-wade>.

interpretation of the constitutionally enshrined limitation”⁴ A decision by the Court is likely to be delivered in mid to late 2010.

This Note focuses on Irish and ECHR abortion law and the impending decision in *A., B. & C. v. Ireland*. In Section II, this Note reviews the relevant history of abortion in Ireland, including a previous Irish case taken to the ECHR. Section III explores the ECHR’s recent abortion jurisprudence, including cases from Ireland and Poland. After exploring these histories, Section IV explores the pending lawsuit and discusses the possible outcomes of the case. I conclude that—based upon the ECHR’s own jurisprudence—the ECHR is very likely to declare that Ireland’s nearly absolute abortion ban and the resultant effects of Irish law did and continues to violate rights protected by the European Convention on Human Rights. The Court will likely embrace one of two possible holdings. First, the Court could find that Ireland’s abortion ban causes undesirable secondary effects such as inadequate post-abortion care, that these effects implicate rights under the Convention, and that Ireland has an unfulfilled positive obligation to mitigate these effects. Second, this Note suggests that the Court may hold that Ireland’s abortion ban itself violates the personal and family rights of applicants A., B., and C., and women like them.

II. IRELAND’S ABORTION HISTORY

Since at least the Offences Against the Person Act of 1861, it has been unlawful in Ireland both to procure and provide an abortion.⁵ In the late 1970s and early 1980s, a growing fear of the liberalization of abortion policies swept Ireland.⁶ Ireland’s pro-life forces “examined the rhythms in what Americans would call their ‘substantive due process’ jurisprudence . . . and were not happy with what they saw.”⁷ The United Kingdom’s enactment of the Abortion Act of 1967,⁸ which effectively

⁴ Patrick Smyth, *Rights Push in Europe Not Based on Treaty*, IRISH TIMES, Sept. 19, 2009, at 13.

⁵ The English Offences Against the Person Act, 1861 (controlling in Ireland at the time) provided that a woman who “[i]nten[ded] to procure her own Miscarriage . . . [or] whosoever . . . shall unlawfully administer to her . . . shall be guilty of Felony” And those who “supply or procure any Poison or other noxious Thing, or any Instrument . . . knowing that the same is intended . . . to procure the Miscarriage of any Woman . . . shall be guilty of a Misdemeanor” Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 58–59 (Eng.), available at http://www.bailii.org/uk/legis/num_act/1861/ukpga_18610100_en.pdf; DEPARTMENT OF THE TAOISEACH, GREEN PAPER ON ABORTION 16 (1999), available at http://www.taoiseach.ie/attached_files/Pdf%20files/GreenPaperOnAbortion.pdf.

⁶ JENNIFER E. SPRENG, ABORTION AND DIVORCE LAW IN IRELAND 84 (2004).

⁷ *Id.*

⁸ Abortion Act of 1967, c. 87 (Eng.), available at http://www.bailii.org/uk/legis/num_act/1967/ukpga_19670087_en.pdf (allowing abortions when two doctors find that “the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any

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provided abortion on-demand, was a source of concern.⁹ The pro-life forces were also worried “that as a signatory to the European Convention on Human Rights, Ireland might someday be pressured to treat abortion as a human right.”¹⁰ More important at the time, however, were the United States Supreme Court’s rulings in *Griswold v. Connecticut*¹¹ and *Roe v. Wade*.¹² Something similar to the United States’ progression from *Griswold* to *Roe* appeared ominously possible in Ireland considering language contained in the Irish Supreme Court’s own decision in *McGee v. Attorney General*.¹³ *McGee*, like *Griswold*, involved contraceptives and held the restrictions in question to be an unjustified invasion of the couple’s marital privacy.¹⁴ It was noted that Irish law mirrored American law in that neither country’s constitution contained a “black letter rule requiring a Court to conclude that unborn children are, in fact, persons entitled to protection of their right to life.”¹⁵ These looming threats to Ireland’s traditional ban on abortion fueled the movement to enshrine the right to life in the Irish Constitution.¹⁶

existing children of her family, greater than if the pregnancy were terminated; or (b) that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped”).

⁹ See Bryan Mercurio, *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, 11 TUL. J. INT’L & COMP. L. 141, 144–46 (2003); SPRENG, *supra* note 6, at 87 (“Despite requiring two doctors’ opinions, the Abortion Act has degenerated into abortion on demand . . .” and “[a]bortion has become in Britain an almost unfettered individual right”).

¹⁰ SPRENG, *supra* note 6, at 84.

¹¹ 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (finding a right to the use of contraceptives, holding a law to the contrary violated a “right of marital privacy”).

¹² 410 U.S. 113, 153 (1973) (holding that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

¹³ *McGee v. Attorney General*, [1974] I.R. 284, 311, 313 (S.C.) (Ir.) (noting that “the family . . . possess[es] inalienable and imprescriptible rights antecedent and superior to all positive law The Article recognises the special position of woman, meaning the wife, within that unit” Also, “[i]t is a matter exclusively for the husband and wife to decide how many children they wish to have It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire”).

¹⁴ *Id.* During the writing of this Note, my father candidly verified the seriousness of this issue by offering a story involving the confiscation of certain contraband prophylactics at the Dublin Airport in the 1960s. I assured him that I would attempt to work it in.

¹⁵ SPRENG, *supra* note 6, at 86.

¹⁶ Mercurio, *supra* note 9, at 144–46.

A. *Constitutional Amendment (1983)*

In response to these concerns, the Eighth Amendment of the Irish Constitution was enacted on October 7, 1983.¹⁷ The text of the amendment, codified at Article 40.3.3 of the Irish Constitution, reads: “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.”¹⁸ The amendment passed with an overwhelming 66% approval rate, although voter turnout was lower than expected.¹⁹

The amendment was intended to constitutionalize three “principles: (1) that the unborn are recognized as human beings under the law of Ireland; (2) that their right to life, at minimum, is equal to that of their mother’s, which is in turn equal to that of other citizens; and (3) that the state is obliged to take affirmative steps to protect the right to life of the unborn.”²⁰

B. *S.P.U.C. v. Open Door (Irish High Court & Supreme Court) (1986)*²¹

The first major and contentious issue arising under the new amendment was the conflict between the state’s new obligation to take affirmative steps to protect the unborn and the right of family planning agencies to provide information about legal abortions outside Ireland.

Defendants Open Door Counselling and Dublin Wellwoman Centre provided counseling services to pregnant women including information about abortion options and references to abortion services available in Great Britain.²² Plaintiff, the Society for the Protection of Unborn Children, sought “a declaration that the activities of the defendants were unlawful under Article 40.3.3 of the Irish Constitution . . . and an injunction prohibiting such activities.”²³ The defendants argued “that they and their clients had implied or unenumerated rights such as those

¹⁷ Eighth Amendment to the Constitution Act, 1983 (Amendment No. 8/1983) (Ir.), available at <http://www.irishstatutebook.ie/1983/en/act/cam/0008>.

¹⁸ *Id.*; Ir. CONST., art. 40, § 3.3.

¹⁹ Mercurio, *supra* note 9, at 146; Statement of Facts, *supra* note 2, at B.2 (listing 841,233 votes in favor and 416,136 against with 53.67% of the electorate voting); see also John A. Quinlan, Comment, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 BYU L. REV. 371, 384–90 (1984) (discussing the amendment process, the usual turnout in Irish elections, and speculating that fully 15% of voters may have stayed home because they were unsure of how to vote).

²⁰ SPRENG, *supra* note 6, at 88.

²¹ Soc’y for Protection of Unborn Children Ir. Ltd. (SPUC) v. Open Door Counselling Ltd., [1988] I.R. 593 (H. Ct.) (Ir.), *aff’d in part and rev’d in part*, [1989] [1988] I.R. 618 (S.C.) (Ir.) [hereinafter *S.P.U.C. v. Open Door*]. The Irish High Court is one step below the Irish Supreme Court.

²² *Id.* at 600–01 (both defendants admitted that they provided these services).

²³ Weinstein, *supra* note 1, at 174–75.

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found in *McGee* to impart and receive information about abortion services where those services were legal, such as England.”²⁴

The Irish High Court unambiguously agreed with the plaintiff, holding “[t]he qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland.”²⁵ In other words, “[i]f unborn children are human beings, then permitting institutions to advise and make arrangements for others to kill them is clearly problematic.”²⁶ The Court granted the injunction prohibiting counseling services involving the dissemination of information about abortion or how and where to obtain an abortion.²⁷ This reasoning was partially affirmed in 1988 by the Irish Supreme Court, which narrowed the injunction to prevent counselors only “from telling women where to find an abortion clinic or helping them to travel”²⁸ and a perpetual injunction was granted.²⁹

The 1986 ruling forced Open Door Counselling, ironically, to close its doors.³⁰ Abortion rights proponents could no longer openly refer patients to English abortion clinics, however, “Irish pro-choice marchers chanted the phone number for their favored abortion clinic . . . scrawled the number on lady’s toilet stalls throughout Dublin . . . [and] subtly refer[red] women to the phonebook, where—thanks to the European Union—English abortion clinics were listed.”³¹ Soon after its defeat in the Irish Supreme Court, Open Door Counselling filed an action in the ECHR.³² The ECHR case would languish until 1992,³³ a banner year for pro-choice forces.

²⁴ SPRENG, *supra* note 6, at 98.

²⁵ *SPUC*, [1988] I.R. at 617.

²⁶ SPRENG, *supra* note 6, at 101.

²⁷ Weinstein, *supra* note 1, at 176.

²⁸ MICHAEL D. GOLDHABER, *A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 27 (2007). In other words, counselors could answer questions about abortion but were not allowed to encourage abortion or actually help the woman to acquire one.

²⁹ *SPUC*, [1988] I.R. at 29; *see also* Weinstein, *supra* note 1, at 176–77.

³⁰ GOLDHABER, *supra* note 28, at 27.

³¹ *Id.*

³² *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244 (1992) (discussed fully at notes 49–70, *infra*, and accompanying text).

³³ *See* notes 49–70, *infra*, and accompanying text. There were other legal developments (in Irish and international bodies) in the intervening years, however, the important fact for the purposes of this Note is that it took until October 29, 1992 for the ECHR to hand down a decision in the *Open Door Counselling* case.

C. The Attorney General v. X and Others (*Irish Supreme Court*) (1992)³⁴

While the *Open Door Counselling* case wound closer to resolution in the ECHR, another profound controversy made its way through the Irish court system and gripped the Irish public.³⁵ In December 1991, X, a 14 year-old girl who had been sexually abused for a year and a half by the 42 year-old father of her best friend, conceived a child.³⁶ Upon learning of the pregnancy of their daughter, the parents made preparations to go to England to obtain an abortion. Before leaving, they asked the Irish police whether the fetal DNA could be used to prosecute the rapist. The Director for Public Prosecutions indicated that such evidence would be inadmissible and also told the Irish Attorney General's office about the intent of the family to obtain an abortion.³⁷ While already in England, the family heard that the Attorney General had requested—and the Irish High Court had granted—an injunction “restraining the girl and her parents from interfering with the unborn’s right to life.”³⁸ Rather than simply remaining in England (where the High Court’s injunction had no force) and obtaining the abortion, the family voluntarily returned to fight the injunction in the Irish Supreme Court.³⁹

The issue was appealed to the Supreme Court “[i]n the midst of a deafening public outcry,”⁴⁰ which “brought moralists to their knees.”⁴¹ A February 23, 1992 opinion poll showed that 66% of the Irish respondents wanted to permit an abortion in limited circumstances.⁴²

The Irish Supreme Court responded on February 26 with a one-sentence opinion setting aside the injunction and allowing the appeal.⁴³ The majority decision, released March 5, 1992, took a more permissive approach to the Eighth Amendment than had the High Court.

³⁴ The Attorney General v. X and Others, [1992] 1 I.R. 1 (H. Ct.) (Ir.).

³⁵ See Allison M. Clifford, Comment, *Abortion in International Waters off the Coast of Ireland: Avoiding a Collision Between Irish Moral Sovereignty and the European Community*, 14 PACE INT’L L. REV. 385, 406 (2002) (“Ireland was confronted with what has been described as ‘one of the most important constitutional cases to come before an Irish court and . . . one of the most widely debated and analysed cases in Irish legal history.’” (quoting JAMES KINGSTON, ANTHONY WHELAN & IVANA BACIK, *ABORTION AND THE LAW* 6 (1997))); see also GOLDHABER, *supra* note 28, at 30 (“The Irish public became obsessed with the desolate girl.”).

³⁶ SPRENG, *supra* note 6, at 113.

³⁷ *Id.*

³⁸ Maureen C. McBrien, Note, *Ireland: Balancing Traditional Domestic Abortion Law with Modern Reality and International Influence*, 26 SUFFOLK TRANSNAT’L L. REV. 195, 208 (2002).

³⁹ SPRENG, *supra* note 6, at 113.

⁴⁰ *Id.*

⁴¹ McBrien, *supra* note 38, at 208.

⁴² Weinstein, *supra* note 1, at 191 (Weinstein also points out the irony that this figure was almost exactly the proportion of the Irish populace that enacted the Eighth Amendment. *Id.* at 191–92, n.193).

⁴³ *Id.* at 192.

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The High Court had read the Eighth Amendment's command as treating the life of the unborn as equal to the right to life of the mother.⁴⁴ Logically, therefore, "[i]f the mother has an abortion, the unborn child will surely die; there are no other possible outcomes. However, if the mother is denied a legal abortion, it is not certain that she will die."⁴⁵ The Supreme Court concluded the proper test to be, rather, "that 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"⁴⁶ Closely related to this change was the Supreme Court's willingness to view suicide as a risk to the life of the mother sufficient to overcome the right to life of the unborn child. X was held to have "met the [real and substantial risk to the life of the mother] test based on psychological evidence of her suicidal state."⁴⁷ X had the abortion "and the Irish public was relieved."⁴⁸

D. Open Door Counselling v. Ireland (ECHR) (1992)⁴⁹

While the X case played out in Ireland, the ECHR finally addressed the perpetual injunction granted by the Irish Supreme Court in *S.P.U.C. v. Open Door* in 1986.⁵⁰ After the groundbreaking decision and controversy surrounding the X case, the *Open Door Counselling* case was rather mundane. Commentator Michael Goldhaber argues that the issue had arguably already been decided in the Irish court of public opinion, and thus, the ECHR had little difficulty determining that the Irish Supreme Court's perpetual injunction on the distribution of abortion information violated the freedom of expression guaranteed by the Convention.⁵¹

Applicant Open Door complained the injunction violated Article 8 (respect for private and family life), Article 10 (freedom of expression), and Article 14 (discrimination) of the Convention. The Court reached only the freedom of expression argument, finding an examination on Article 8 or Article 14 grounds to be unnecessary.⁵² The ECHR

⁴⁴ Amy M. Buckley, Comment, *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, 286 (1998).

⁴⁵ *Id.* at 301.

⁴⁶ *The Attorney General v. X and Others*, [1992] 1 I.R. 1, 53–54 (H. Ct.) (Ir.).

⁴⁷ Buckley, *supra* note 44, at 287.

⁴⁸ GOLDHABER, *supra* note 28, at 30.

⁴⁹ *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244 (1992).

⁵⁰ *S.P.U.C. v. Open Door Counselling* is discussed fully *supra* notes 21–33 and accompanying text.

⁵¹ GOLDHABER, *supra* note 28, at 30–31. This suggestion has merit, although, it must be pointed out that the vote was 15 to 8 regarding the violation of Article Ten, and there were several written dissents. See *Open Door Counselling*, 15 E.H.R.R. at 270–84. For a well-written summary of this case and analysis of the dissenting opinions, see SPRENG, *supra* note 6, at 107–11.

⁵² *Open Door Counselling*, 15 E.H.R.R. at 268 (1992).

determined “the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals”⁵³ The question of necessity is guided by a proportionality test weighing the restriction against the pressing social need addressed by it.⁵⁴ The Court found that in addition to restricting speech leading to abortions, the injunction restrained speech that did not lead to abortions (where, for example, the woman decided not to obtain an abortion). The Court also found that the injunction restricted information widely available from less reliable sources, restricted expression concerning a procedure entirely legal in England and elsewhere, and found that the restriction had proven ineffective at reducing the number of abortions abroad.⁵⁵ While granting Ireland “a wide margin of appreciation in matters of morals,”⁵⁶ the Court held that it would be an “abdication”⁵⁷ to accept the government’s “largely ineffective,”⁵⁸ “over-broad and disproportionate”⁵⁹ perpetual injunction. The Court held that the restrictions were not necessary in a democratic society and unjustified by the protection of morals. The Court awarded damages, costs, and expenses to the various applicants.

The Court’s decision is important both in understanding Irish abortion history, and in predicting the ECHR’s holding in the *A., B. & C. v. Ireland* case for three reasons. First, the way that the Court dealt with certain procedural issues indicated a willingness to entertain arguments

⁵³ *Id.* at 264. This test is largely mandated by the Convention itself. See Human Rights Convention, *supra* note 2, art. 10.

⁵⁴ *Open Door Counselling*, 15 E.H.R.R. at 266.

⁵⁵ *Id.* at 266–67. I would point out that arguing that the restriction had proven ineffective at reducing the number of abortions abroad is rather unfair to Ireland. This is quite like saying that outlawing marijuana in one state is ineffective because some other nearby states have legalized it and citizens can travel to acquire it. The applicants repeated this assertion at oral argument. Oral Argument, *A., B. & C. v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (Dec. 9, 2009) at 01:01:50 [hereinafter Oral Argument], available at http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20091209-1/en/ (“The large number of women who travel abroad from Ireland significantly undermines the government’s view that the ban is effective.”).

⁵⁶ *Open Door Counselling*, 15 E.H.R.R. at 265. “Margin of appreciation” is a concept roughly meaning “level of deference” and is discussed in greater detail *infra* notes 215–17 and accompanying text.

⁵⁷ *Id.*

⁵⁸ *Id.* at 267. The applicants submitted evidence attempting to show that while the number of women having abortions in England was not dropping, the injunction had negative effects including “[a] lack of adequate preparation of Irish women obtaining abortions; [i]ncreases in delay in obtaining abortions with ensuing increased complication rates; [and p]oor aftercare with a failure to deal adequately with medical complications” *Id.* at 254. This evidence was “not [] disputed by the Government.” *Id.* at 267. I return to this evidence *infra* notes 64–66 and accompanying text.

⁵⁹ *Id.* at 266.

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that have arisen in the *A., B. & C.* case. Second, evidence of the detrimental effects of the injunction appeared highly persuasive to the Court, and the Court's language plainly indicates disapproval of Ireland's abortion restrictions. Finally, the Court did not characterize the state interest justifying restriction of abortion information as protection of life, but as mere regulation of morals.

First, Article 35 of the Convention limits admissibility to matters in which "all domestic remedies have been exhausted . . ." ⁶⁰ The government asserted that Open Door had not raised arguments relating to Article 8 (privacy) and Article 14 (discrimination) in the Irish courts. ⁶¹ While the Court ultimately did not reach these arguments, it is important to note that the Court unanimously held that it had jurisdiction to reach these issues even though they were not raised below. ⁶² It did so by noting that "Open Door would have had no prospect of success in asserting these complaints having regard to the reasoning of the Supreme Court concerning the high level of protection afforded to the right to life of the unborn child under Irish law." ⁶³ In other words, because the Irish courts were bound by the Irish Constitution and unlikely to waver, the ECHR excused Open Door from its obligation to exhaust domestic remedies with regard to those claims. It is reasoning like this that may guide the Grand Chamber's admissibility decision in the *A., B. & C.* case.

Second, in support of its holding, the Court noted that:

the available evidence . . . suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing of customary medical supervision after the abortion has taken place. ⁶⁴

The Court also characterized abortion as "lawful in other Convention countries and [possibly] crucial to a woman's health and well-being." ⁶⁵ The evidence considered suggests that the Court believes that health complications surrounding abortion are a direct result of abortion regulation. The Court's own language suggests that the Court has rejected arguments to the contrary. These and other health effects obviously have argumentative weight with the Court and have squarely been alleged in the *A., B. & C.* case. For example, all three applicants were forced to delay the procedure until they could travel to England. Applicant C alleges that she was forced to postpone her abortion for

⁶⁰ Human Rights Convention, *supra* note 2, art. 35(1).

⁶¹ *Open Door Counselling*, 15 E.H.R.R. at 259.

⁶² *Id.* at 270.

⁶³ *Id.* at 259. *Compare Open Door Counselling with D v. Ireland*, 43 E.H.R.R. SE16 191, 227 (2006) (holding that D had not exhausted her domestic remedies because the Irish Courts had previously expedited consideration of such cases and created an exception in the *X* case); *infra* notes 104–25 and accompanying text.

⁶⁴ *Open Door Counselling*, 15 E.H.R.R. at 267.

⁶⁵ *Id.* at 266.

eight weeks *because* she was not a resident of England. I return to this discussion below.⁶⁶

Finally, commentator Jennifer Spreng points out that “[t]he pivotal section of the court’s analysis was its refusal to acknowledge Ireland’s statement of the aim of the injunction.”⁶⁷ The Court rejected Ireland’s claim that the injunction protected the *right to life* of the unborn, and held that the restriction on expression “pursued the legitimate aim of the protection of *morals* of which the protection in Ireland of the right to life of the unborn is one aspect.”⁶⁸ As discussed above, the question of whether a restriction is necessary in a democratic society is guided by a balancing test weighing the restriction against the pressing social need for it. If the entirety of the Irish Constitution’s protection of the unborn was thus characterized as protection of morals, this would drastically alter any analysis under the Convention because, “the inquiry as to the proportionality of the means to protect morals would be much stricter, while if life were at stake a less perfect fit between means and ends would be justified.”⁶⁹ Later ECHR opinions have studiously avoided explicitly making this characterization, though later ECHR jurisprudence does not seem to grant domestic law the deference that protection of life would otherwise seem to demand. Should the *A., B. & C.* Court reach the merits of the case, the same balancing test will be applied and it is likely that the Court will similarly characterize Ireland’s interest in its abortion regulations as morals. The *Open Door Counselling* Court’s approach purported to pass on the issue of when life begins. But when the Court decided that life was not the question—morals was—it necessarily decided the issue. The implications in *A., B. & C.* are discussed in greater detail below.⁷⁰

E. Constitutional Amendments Redux (1992)

In the wake of public outcry and some measure of public acceptance of the result in the *X* case, and after the holding in *Open Door Counselling v. Ireland* had “set European law at direct odds with Irish law,”⁷¹ the Irish people held a referendum. On the table were three issues. The first proposal—rejected by Irish voters—would have overruled the *X* case by “provid[ing] for lawful abortion[s] where there would otherwise be a real and substantial risk to the mother’s life, *except a risk of suicide.*”⁷² The rejection of this amendment probably reflected agreement that the result reached in the *X* case was correct. The other two proposals “endorsed the

⁶⁶ See *infra* Section IV.C.1.

⁶⁷ SPRENG, *supra* note 6, at 129–30.

⁶⁸ *Open Door Counselling*, 15 E.H.R.R. at 263 (emphasis added).

⁶⁹ SPRENG, *supra* note 6, at 130.

⁷⁰ See discussion of this issue *infra* notes 218–32; see also *infra* note 99.

⁷¹ Weinstein, *supra* note 1, at 168.

⁷² Statement of Facts, *supra* note 2 (emphasis added).

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rights of an Irish woman to learn about abortion overseas and travel abroad to obtain an abortion. In December 1992 these rights became enshrined in the Thirteenth and Fourteenth Amendments to Ireland’s constitution.”⁷³ The referendum, therefore, somewhat liberalized Irish abortion law and simultaneously brought Irish law into compliance with the holding of the ECHR in *Open Door Counselling v. Ireland*.⁷⁴

F. *Treaty on European Union (1992)*

Also in 1992, Ireland debated whether to ratify the Treaty on European Union.⁷⁵ The voters approved the treaty but only after securing a protocol explicitly protecting Ireland’s ban on abortion.⁷⁶ The protocol provides: “Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland.”⁷⁷ The protocol was accompanied by a legal interpretation explicitly protecting freedom of information and freedom to travel.⁷⁸ Obviously, the existence of the protocol removed abortion from the ratification debate and greatly strengthened the pro-ratification argument.

G. *Abortion Referendum Redux (2002)*

In 2002, pro-life forces—perhaps hoping that the 1992 referendum failed only due to its timing (within months of the *X* case)—again attempted to overrule *X*. The proposed 25th Amendment to the Irish Constitution would have resolved much of the legal uncertainty surrounding abortion by allowing abortions only at specific institutions to save the woman’s life *except* based upon a risk of suicide. Only 42.89% of

⁷³ GOLDHABER, *supra* note 28, at 31.

⁷⁴ The principles contained in the constitutional amendments were codified by the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 (Act No. 5/1995) (Ir.) <http://www.irishstatutebook.ie/1995/en/act/pub/0005>.

⁷⁵ Treaty on European Union (Treaty on Maastricht), Feb. 7, 1992, 1992 O.J. (C 191), available at http://eur-lex.europa.eu/en/treaties/dat/11992M/tif/JOC_1992_191__1_EN_0001.pdf.

⁷⁶ McBrien, *supra* note 38, at 198–99 (“Ireland, however, negated these rights when it secretly negotiated and inserted protocol No. 17 into the Maastricht Treaty in 1991, prohibiting EU law from trumping Irish abortion law. As a result, Irish citizens cannot raise EU law as a defense to abortion in Ireland, and European court rulings do not bind Ireland.”).

⁷⁷ Treaty on European Union.

⁷⁸ *Id.* (“[T]he Protocol shall not limit freedom to travel between Member State[s] 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.”).

the electorate voted. The referendum was defeated 50.42% to 49.58%.⁷⁹ Jennifer Spreng suggests that the referendum may have ultimately been defeated by pro-life purists who voted no because the referendum also would have “secured the legality of abortifacients such as the intrauterine device and the morning-after pill”⁸⁰ Spreng also argues that the defeat of this referendum heralded the death of the pro-life movement—now split between those who “were unwilling to support any measure that failed to provide absolute protection to human life from the moment of conception,” and those who held more practical views—as a “bankable political force.”⁸¹ No viewpoint seems to hold a majority, and the inherent volatility of the issue leads to legislative stagnation. To this day, there remain no effective legislative guidelines clarifying the law surrounding abortion in Ireland.⁸²

H. Rejection and Subsequent Ratification of the Treaty of Lisbon (2008–2009)

In 2008, voters in Ireland rejected the Treaty of Lisbon. The treaty represented a major reorganization of the EU. The continuing growth of more centralized European government was seen by some as a threat to Ireland’s abortion laws. These fears contributed somewhat to the

⁷⁹ Safe and Legal (in Ireland) Abortion Rights Campaign, *Abortion in Irish Law*, http://www.safeandlegalinireland.ie/index.php?option=com_content&view=article&id=13&Itemid=19; Irish Family Planning Association, *IFPA Abortion Briefing Paper 3* (Nov. 2007), <http://www.ifpa.ie/eng/content/download/504/3702/file/Abortion%20briefing%20paper%20Nov2007.pdf>.

⁸⁰ SPRENG, *supra* note 6, at 13; *see also* THE REFERENDUM COMMISSION, *INFORMATION BOOKLET: TWENTY-FIFTH AMENDMENT OF THE CONSTITUTION (PROTECTION OF HUMAN LIFE IN PREGNANCY) BILL, 2001 (2002)*, <http://www.refcom.ie/en/Pastreferendums/ProtectionofHumanLifeinPregnancy/InformationBooklet> (“Whether the current criminal law outlaws the morning after pill (and similar devices) is open to question. It is clear that using the morning after pill is not abortion in the criminal sense under the Human Life in Pregnancy Act.”).

⁸¹ *Id.*

⁸² For example, the U.N. Human Rights Committee noted that while Ireland had established a Crisis Pregnancy Agency, progress in Irish abortion laws is slow. The Committee encouraged Ireland to reduce the number of women who resort to illegal abortions or must travel abroad to obtain one. United Nations Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, ¶ 13, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008), *available at* <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/433/49/pdf/G0843349.pdf>; *but see* Joint Written Observations of Third Party Interveners at ¶ 25–26, A, B & C v. Ireland, App. No. 25579/05, Eur. Ct. H.R. (Nov. 14, 2008) [hereinafter *Brief of Pro-Life Interveners*], *available at* <http://www.telladf.org/UserDocs/IrelandBrief.pdf> (“[T]hese principles [have] been codified in precise terms by the Medical Council’s guidelines Ireland’s protection for a mother’s life is not impermissibly imprecise just because they rely to some extent on a doctor’s judgment that the woman’s life is at risk. Medical advice ultimately depends upon the exercise of clinical judgment rather than legislation.”).

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rejection of the treaty.⁸³ While data shows that abortion was a less compelling reason for a no vote than several other issues, abortion was still a concern of many voters.⁸⁴ Attempting to assuage those fears, "the Irish Government secured a legal guarantee that nothing in the Lisbon Treaty . . . affects in any way the scope and applicability of the protection of the right to life . . ."⁸⁵ The government assured voters that "[t]he Treaty carries forward unchanged the terms of the Protocol on Article 40.3.3 of the Irish Constitution (which deals with the right to life of the unborn) introduced by the Treaty on European Union (the Maastricht Treaty). The Solemn Declaration interpreting the Protocol also stands and is authoritative."⁸⁶

To the extent that the abortion issue contributed to the "no" vote in 2008, the Irish people's fears were apparently assuaged. On October 2, 2009, Irish voters returned to the polls and passed the referendum with a convincing 67% voting to ratify the treaty.⁸⁷

I. Conclusions Regarding the History of Abortion in Ireland

This history demonstrates the extensive efforts a majority of the Irish people took to establish and maintain strict and sovereign abortion laws. It also shows that the Irish people—when confronted with more sympathetic challenges to their laws—have somewhat vacillated on the issue. While the Irish people may no longer agree on the appropriate extent of their own abortion laws, they appear to have reached a balance that has gone largely unchanged since 1992. The ECHR will certainly review this history when determining whether any challenged restrictions are in accordance with law and when determining the appropriate level of deference to show Irish law.

This history will likely be insufficient to support a holding supporting a right-to-life position. In fact, the ECHR could see this history as one of stagnation justifying outside action.

⁸³ See MILLWARD BROWN IMS, POST LISBON TREATY REFERENDUM RESEARCH FINDINGS ii, iii (2008), available at http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings_sept08.pdf.

⁸⁴ *Id.* at 14.

⁸⁵ DEP'T OF FOREIGN AFFAIRS [Ir.], WHITE PAPER: AN EXPLANATION OF CHANGES TO THE FUNCTIONING OF THE EUROPEAN UNION MADE BY THE LISBON TREATY 35 (2009), available at <http://www.dfa.ie/uploads/documents/EU%20Division/EU%20Reform%20Treaty/white%20paper%20-%20final%20-%20low%20res%20from%20printers%20-%20020709.pdf>.

⁸⁶ *Id.* at 34–35.

⁸⁷ *Lisbon Treaty Passed with Decisive 67% in Favour*, IRISHTIMES.COM, October 3, 2009, <http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking1.html>.

III. RECENT ECHR ABORTION JURISPRUDENCE

While Irish statutory and common law have progressed little since 1992's *X* decision,⁸⁸ the ECHR has heard multiple abortion suits brought against several nations, including two that appear to lay all the necessary groundwork for a "Europe's '*Roe v. Wade*,'"⁸⁹ or at least a threshold of conduct for the state regulation of abortion in Europe.

The ECHR is the judicial entity of the Council of Europe.⁹⁰ The Council of Europe, established in 1949, was created in "the pursuit of peace based upon justice and international co-operation."⁹¹ Commonly confused with the Court of Justice of the European Union,⁹² the Court of Human Rights focuses on "individuals suing nations for violations of human rights."⁹³ The ECHR is responsible for enforcement of the European Convention on Human Rights.⁹⁴ While the judgments of the Court are "essentially declaratory in nature,"⁹⁵ should Ireland refuse to follow a mandate of the Court, it could be expelled from the Council of Europe.⁹⁶ According to the Department of the Taoiseach,⁹⁷ "the Court's

⁸⁸ See *supra* notes 80–82, discussing the 2002 Abortion Referendum and its stagnating effect upon Irish abortion law. One notable exception in Irish common law is *A. & B. v. E. Health Bd.*, [1998] 1 I.R. 464 (H. Ct.) (Ir.). Known as the "C" case, it involved a 13 year-old girl who was raped and then later became a ward of the state. C sought an abortion in England, and a District Court granted her permission to do so. *Id.* at 469. The High Court considered C's biological parents' challenge to the District Court's grant of permission. The High Court held that C need not leave the country in any event, due to a demonstrable risk of suicide. *Id.* at 480. The High Court also indicated, however, that had the parents insisted, it would have voided the order of the District Court because the Thirteenth Amendment did not give C a positive right to travel for an abortion. *Id.* at 483. Appeal was not taken to the Irish Supreme Court.

⁸⁹ This phrase is borrowed from: Press Release, Alliance Defense Fund, Importance of Europe's '*Roe v. Wade*' Case Grows Exponentially with Elevation in Status (July 13, 2009), <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=5004>.

⁹⁰ GOLDHABER, *supra* note 28, at 1. All member states are parties to the Convention.

⁹¹ Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103, 104.

⁹² GOLDHABER, *supra* note 28, at 2–3. The jurisdiction of the European Court of Justice largely involves suits between the member states of the European Union and is concerned with the law of the European Community. See COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, THE COURT OF JUSTICE, COMPOSITION, JURISDICTION, AND PROCEDURES (2007), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-11/en_cj_comp.pdf.

⁹³ GOLDHABER, *supra* note 28, at 3.

⁹⁴ *Id.* at 1.

⁹⁵ LEACH, *supra* note 3, at 94 (quoting *Assanidze v. Georgia*, Eur. Ct. H.R., App. No. 71503/01, para. 202 (2004)).

⁹⁶ Weinstein *supra* note 1, at 188–89 ("While the Court cannot compel compliance with its rulings, a country that refuses to comply can be expelled from the Convention.").

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interpretation . . . would be binding on Ireland in any case brought against it.”⁹⁸

Article 2 of the Convention provides a “right to life” which has not yet been specifically interpreted by the Court of Human Rights to protect the unborn.⁹⁹ Article 3 prohibits government imposition of “torture or [] inhuman or degrading treatment”¹⁰⁰ Article 8 guarantees “respect for [] private and family life” and provides that this right may not be interfered with “except such as is in accordance with the law and is necessary . . . in the interests of . . . the protection of health or morals, or for the protection of the rights and freedoms of others.”¹⁰¹ Article 10 provides for freedom of expression and is otherwise very similar to Article 8 in form.¹⁰² Finally, Article 14 prohibits discrimination based upon “sex, race, colour, language, religion, political or other opinion, national or

⁹⁷ The Taoiseach is the head of the Irish Government. Department of the Taoiseach, Role of the Taoiseach, http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/About_the_Taoiseach/Role_of_the_Taoiseach/Role_of_the_Taoiseach.html.

⁹⁸ DEPARTMENT OF THE TAOISEACH, GREEN PAPER ON ABORTION 22 (1999), available at http://www.taoiseach.ie/attached_files/Pdf%20files/GreenPaperOnAbortion.pdf; see also LEACH, *supra* note 3, at 94 (“The effect of a judgment in which the Court has found a violation of the Convention is to impose a legal obligation on the respondent state to put an end to the breach and to make reparation for its consequences . . .”).

⁹⁹ Human Rights Convention, *supra* note 2, art. 2. At oral argument, Ireland asserted that “for almost 60 years [the Court] has recognized in its judgments the diversity of traditions and values of the contracting states and more recently when called upon to do so, it has explicitly recognized the right of each contracting state to determine that fetal life is entitled to the protection of Article 2 of the convention.” Oral Argument, *supra* note 55, at 7:29. In *VO v. France*, the ECHR held that “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a ‘living instrument which must be interpreted in the light of present-day conditions.’ . . . [T]here is no European consensus on the scientific and legal definition of the beginning of life.” 40 E.H.R.R. 12, 259, 294 (2005); see also McBrien, *supra* note 38, at 197 (The Court of Human Rights “has yet to define whether the right to life extends to protect the unborn”); LEACH, *supra* note 3, at 201; but see *supra* notes 68–71 (discussing the 1992 *Open Door Counselling v. Ireland* case which avoided this issue by deciding that the real issue was morals); *infra* notes 219–33 and accompanying text. A recurring theme of this Note is that by saying that the states may decide when life begins but then not honoring that decision, the ECHR really *has* decided the issue. It is possible that the ECHR will re-evaluate this issue and determine that while there remains no consensus on the legal definition of the beginning of life, there is, perhaps enough of a consensus that life does not necessarily begin at conception. I suspect the Court will not address this possibility.

¹⁰⁰ Human Rights Convention, *supra* note 2, art. 3.

¹⁰¹ *Id.* art. 8; see also *Tysiac v. Poland*, 45 E.H.R.R. 42 at 947, 962 (2007) (“Everyone has the right to respect for his private . . . life . . .”).

¹⁰² Human Rights Convention, *supra* note 2, art. 10. Recall also the discussion of Article 10 in the case of *Open Door Counselling*, discussed at *supra* notes 49–59.

social origin, association with a national minority, property, birth or other status.”¹⁰³

A. *D v. Ireland (ECHR) (2006)*¹⁰⁴

In June of 2006, the ECHR held on procedural grounds that a woman who traveled to England to obtain an abortion had not exhausted her domestic remedies and, thus, her case was inadmissible. The Court did not reach the merits of her complaint. The exhaustion of domestic remedies is said to be Ireland’s primary defense to suit in *A., B. & C.*,¹⁰⁵ and thus this case requires close attention.

D was a mother of two expecting twins who learned, in her 14th week of pregnancy, that one of her twins had stopped developing weeks earlier. Three weeks later, D (in her 17th week of pregnancy) learned that her second twin had a “severe chromosomal abnormality (Trisomy 18, known as Edward’s Syndrome).”¹⁰⁶ The chromosomal abnormality would almost certainly be fatal to the second twin before or shortly after birth. D was informed by her doctors that she “was not eligible for an abortion in Ireland,” and rather than initiating legal proceedings in Ireland, she traveled to England and obtained an abortion.¹⁰⁷ Upon her return, she attempted to obtain counseling regarding the genetic nature of the abnormality but was unable to obtain such counseling. In addition, D obtained a follow-up procedure related to her abortion in an Irish hospital, but “felt unable to explain to that hospital or to her family doctor that she had had an abortion so she said that she had had a miscarriage.”¹⁰⁸ D separated from her partner, stopped working, and sought counseling.¹⁰⁹

In the ECHR, D argued that her rights under Articles 3, 8, 10, and 14 of the Convention had been violated. Most important for this Note is D’s Article 8 argument. Concerning Article 8, D argued “that there was a disproportionate interference with an intimate and personal aspect of her private and family life and/or a failure to fulfil a positive obligation to protect those Art.8 rights.”¹¹⁰

¹⁰³ Human Rights Convention, *supra* note 2, art. 14.

¹⁰⁴ *D v. Ireland*, 43 E.H.R.R. SE16 at 191 (2006).

¹⁰⁵ Carl O’Brien, *Human Rights Court to Hear Irish Abortion Ban Case*, IRISH TIMES, July 15, 2009 at Front Page, available at <http://www.irishtimes.com/newspaper/frontpage/2009/0715/1224250694946.html> [hereinafter O’Brien, *Human Rights Court*].

¹⁰⁶ *D*, 43 E.H.R.R. SE16 at 191.

¹⁰⁷ *Id.* at 191–92. D was probably so informed by her doctors because fetal impairment does not seem to clearly meet the test outlined by the Supreme Court in the *X* case. Therefore, D likely could not have obtained an abortion in Ireland.

¹⁰⁸ *Id.* at 192.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 212.

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In the ECHR, as a preliminary matter, the Convention requires applicants to have exhausted all domestic remedies. The Court began its analysis by revisiting the policy behind this requirement. This purpose, paraphrased by the Court, is that states should be “dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system.”¹¹¹ This general principle is tempered by the “assumption . . . that there is an effective remedy available in respect of the alleged breach in the domestic system.”¹¹²

Ireland argued “that, as soon as the diagnosis of Trisomy 18 was confirmed, the applicant should have initiated an action in the High Court, pursued if unsuccessful to the Supreme Court”¹¹³ In response, D contended “that any such remedy would have been inadequate in the circumstances.”¹¹⁴

The Court utilizes a two-part test to determine whether domestic remedies were exhausted. First, the Court asks whether the state discharged its burden of showing that the domestic remedy was “‘accessible’, ‘capable of providing redress’ and ‘offered reasonable prospects of success’.”¹¹⁵ The next question is “whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of her to exhaust domestic remedies.”¹¹⁶ In *D v. Ireland*, because D did nothing in the Irish courts, Ireland had only to establish that the domestic courts provided a realistic opportunity for redress.

¹¹¹ *Id.* at 220 (quoting *Selmouni v. France*, 29 E.H.R.R. 403, 434 (2000)). At oral argument in the *A., B. & C.* case, Ireland characterized the objectives of Article 35 as: “To ensure that the facts of individual cases, relevant to those individual cases, are found through judicial procedures and that claims before this court do not have the character of *actio popularis*. . . . There are really 5 specific objectives of these rules. Firstly, they ensure that the court does not become a forum for the conduct of general inquiries into whether aspects of the laws of contracting states are convention compatible. Secondly, it provides the court with a decided and tested factual record and prevents declarations of incompatibility on a mistaken basis. Thirdly, it affords national authorities the opportunity of addressing alleged infringements within their own system. Fourthly, it ensures where domestic law is unclear or capable of development, that domestic courts have an opportunity to pronounce that law. And fifthly, it ensures the more immediate protection of convention rights by ensuring that they are determined where possible in the first instance through the democratic institutions of the contracting states, through their courts.” Oral Argument, *supra* note 55, at 15:29.

¹¹² *D*, 43 E.H.R.R. SE16 at 220. The remedy must also be “sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied.” *Id.* Requisite accessibility and effectiveness includes “reasonable prospects of success.” *Id.*

¹¹³ *Id.* at 213.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 221.

¹¹⁶ *Id.*

Regarding accessibility, the Court found that D could have filed suit in the Irish High Court.¹¹⁷ As such, Irish courts were accessible. Similarly, the ECHR found the Irish courts capable of providing redress and reasonable prospects of success. The Court was persuaded that—had it the opportunity—the Irish Supreme Court could reasonably have read the Irish Constitution to allow an abortion in D’s case because “there is . . . a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the ‘unborn’ suffered from a abnormality incompatible with life.”¹¹⁸ At the least, the Court found that the question was arguable “with sufficient chances of success to allow the initial burden on the Government to be considered satisfied.”¹¹⁹ The Court “appeared to disregard the overall dismal picture of access to abortion in Ireland to come to this conclusion.”¹²⁰ A review of the history of abortion above suggests that only in the most sympathetic circumstances (such as the *X* case) will the Irish courts or Irish people waver from their position on abortion. However, the Court was convinced that had D brought a domestic suit before traveling to England, she may have won.

Next, the Court addressed D’s arguments to determine if she had done everything that could reasonably be expected of her in the domestic courts. D argued that:

[T]here was insufficient time to seek a constitutional remedy due to the imminency of her pregnancy, initiating such litigation would have disclosed her identity and stirred immense national and international attention, thus disrupting her ability to care for her minor children, and it was ‘highly likely’ that High and Supreme Court costs would be awarded against her.¹²¹

The Court found that her argument based upon the imminency of her pregnancy failed because Irish courts had previously made accommodations for abortion cases.¹²² The Court similarly found concerns over maintaining her confidentiality and the economic costs of domestic suit insufficient to “absolve an applicant from making some attempt to take legal proceedings.”¹²³ The Court held that D had not

¹¹⁷ *Id.* In addition, the High Court was not required to provide her with counsel for her suit.

¹¹⁸ *Id.* at 222.

¹¹⁹ *Id.* at 223.

¹²⁰ Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUMAN RIGHTS L. REV. 249, 286 (2008).

¹²¹ *Id.* (citing *D*, 43 E.H.R.R. SE16 at 219).

¹²² *D*, 43 E.H.R.R. SE16 at 224. For example, in *The Attorney General v. X and Others*, discussed *supra* notes 34–48, where the girl became pregnant in December 1991, the Supreme Court stayed the injunction prohibiting X from leaving the country within weeks of the appeal and a full month before releasing its opinion on the merits.

¹²³ *D*, 43 E.H.R.R. SE16 at 225–26.

satisfied her burden, and her case was therefore inadmissible and dismissed without consideration of the merits.

In sum, *D v. Ireland*, which would have been a strong case for further development of Irish Constitutional abortion law, failed because Irish courts never had the opportunity to hear it. But why would they? To be realistic, D faced three choices, none of them particularly attractive. First, D could do what the ECHR would have required of her to exhaust domestic remedies. D could stay in Ireland, spend her travel funds initiating a lawsuit guaranteed to energize public opinion, and patiently wait for an uncertain outcome, all the while carrying one dead fetus and one doomed fetus. Second, D could trust her doctors—who told her that she was ineligible to obtain an abortion in Ireland—and spend her money traveling to England to obtain an immediate abortion. Finally, D could carry the fetuses to term, knowing that neither would survive. The irony of *D v. Ireland* appears to be that D's case failed because—according to the ECHR—had D chosen the first option, her case was strong enough to have had a chance in the domestic courts. While certainly a different circumstance, the Court's reasoning reminds one of Justice Blackmun's response to the mootness argument raised in *Roe v. Wade*. "It truly could be 'capable of repetition, yet evading review.'"¹²⁴

A fourth possibility—seemingly more plausible than requiring D to bring immediate suit—succeeded before the very same section¹²⁵ of the ECHR only a year later. Where D opted to obtain an abortion in England and file a suit for retroactive relief in the ECHR (bypassing domestic courts), the next applicant carried to term and filed a retroactive suit in domestic court, exhausting that system *before* approaching the ECHR. This approach easily satisfied the exhaustion requirement. Perhaps if D had returned from England and similarly filed a retroactive suit in Irish courts her suit could have proceeded in the ECHR.

The Grand Chamber will have to deal with the exhaustion of domestic remedies issue in the A., B. & C. case as well. The Grand Chamber may hold that A., B. & C. should have brought suit in Irish court (as the applicant in the next case did). This would doom the A., B. & C. case at the procedural exhaustion phase. The similarities or differences between the D case and the A., B. & C. case will, perhaps, determine the legality of restrictive abortion laws throughout Europe.

B. *Tysiac v. Poland (ECHR) (2007)*¹²⁶

Recently, the European Court of Human Rights addressed abortion laws in Poland, holding that the Polish Government had violated Article

¹²⁴ 410 U.S. 113, 125 (1973) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)).

¹²⁵ The ECHR is broken into "sections" which hear all cases not referred to the Grand Chamber. *See supra* note 3.

¹²⁶ 45 E.H.R.R. 42 at 947 (2007).

8 (respect for private and family life) of the Convention. In Poland, as in Ireland, abortion is a crime and certainly not a right. Unlike Irish law, Polish law abrogates criminal sanctions in limited circumstances, including where there is a danger to the health of the mother. The ECHR found that because Poland allowed abortions only in certain circumstances, it had an affirmative duty to ensure that women had the opportunity to obtain such abortions when they met the statutory requirements. By failing to provide clear laws detailing the requirements to obtain an abortion and meaningful procedures to contest adverse medical opinions, the Polish government had violated the applicant's rights. Because Irish law also restricts abortion, the ECHR could follow the blueprint laid out by the *Tysiack* case. The Grand Chamber could find that Ireland has not fulfilled its obligations to Irish women who are seeking an abortion or have already had one abroad but are unable to obtain adequate domestic post-abortion care.

The Polish Constitution provides that "The Republic of Poland shall ensure the legal protection of the life of every human being."¹²⁷ The Polish statutory law at the time, however, was not so straightforward. First, Polish law provided that "every human being shall have an inherent right to life from the moment of conception."¹²⁸ Abortion was therefore prohibited except where the "pregnancy endangered the mother's life or health."¹²⁹ Danger to the mother's life or health was required to be certified by a specialist other than the one performing the abortion "in the field of medicine relevant to the woman's condition."¹³⁰ Due to procedural uncertainty, the personal predilections of doctors, and serious questions regarding legality, in practice, abortion in Poland was virtually unavailable, notwithstanding its technical legality.¹³¹

¹²⁷ THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 38, available at <http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>; *Tysiack*, 45 E.H.R.R. 42 at 954.

¹²⁸ *Tysiack*, 45 E.H.R.R. 42 at 954; see also LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 300 (Stanislaw Frankowski & Paul B. Stephan III eds., 1995).

¹²⁹ *Tysiack*, 45 E.H.R.R. 42 at 955.

¹³⁰ *Id.*

¹³¹ See *id.* at 957. The Polish Federation for Women and Family Planning and the Helsinki Foundation for Human Rights pointed out these difficulties:

[I]t often happened in practice in Poland that physicians refused to issue a certificate required for a therapeutic abortion, even where there were genuine grounds for issuing one. It was also often the case that when a woman obtained a certificate, the physicians to whom she went to obtain an abortion questioned its validity and the competence of the physicians who issued it and eventually refused the service, sometimes after the time limits for obtaining a legal abortion set by law had expired. . . . [U]nder Polish law abortion was essentially a criminal offence, in the absence of transparent and clearly defined procedures by which it had to be established that a therapeutic abortion could be performed, was one of the factors deterring physicians from having recourse to this medical procedure. Hence, stakes were set high in favour of negative decisions in respect of therapeutic abortion.

Applicant Tysiac, a resident of Poland who had two children already, suffered from severe myopia and was "medium" disabled for that reason.¹³² Tysiac became pregnant in February 2000 and was examined by three ophthalmologists who concurred that her third pregnancy represented a risk to her eyesight. However, either for legitimate medical reasons or due somehow to the controversy surrounding abortion, Tysiac was unable to secure the required certificate from them. Tysiac sought additional medical advice, and a general practitioner issued the desired certificate noting her previous two pregnancies and "significant pathological changes in her retina."¹³³ Tysiac understood this certificate to mean she could now lawfully obtain an abortion. On April 26, 2000, Tysiac went to a state hospital to obtain the abortion; however, upon a five-minute examination in which the doctor did not consult Tysiac's ophthalmological records, Tysiac was told that she should have a Caesarean section and that her short-sightedness did not suffice to obtain an abortion. Tysiac delivered the child by Caesarean section in November of 2000.¹³⁴ Within months Tysiac's eyesight deteriorated severely and one doctor noted "recent haemorrhages in the retina."¹³⁵ In September 2001, Tysiac was reassessed by a disability panel which found her to be "significantly disabled."¹³⁶ Tysiac exhausted her retroactive domestic legal options in Poland and brought suit in the ECHR.¹³⁷

With regard to Tysiac's Article 8 (private and family life) claim, Tysiac argued that her rights had been violated in two ways. First, she unsuccessfully urged that "her Art.8 rights had been violated . . . substantively, by failing to provide her with a legal abortion . . ." ¹³⁸ Tysiac argued that the difficulties she encountered in her efforts to obtain an abortion were caused by the government and were in violation of Article 8's order that state interference with family and private life must be "in accordance with the law."¹³⁹ She urged that under Polish law—which allowed abortions upon threat to the woman's health—she should have been able to procure a legal abortion.

Second, Tysiac successfully argued that "the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means"¹⁴⁰ violated a positive obligation of Poland to ensure respect for her Article 8 rights. This obligation included the duty of the

Id. at 966–67.

¹³² *Id.* at 951. This "medium" disability is distinguished from the "significant" disability found in note 136, *infra*.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 952.

¹³⁶ *Id.* (further finding that Tysiac required "constant care and assistance in her everyday life").

¹³⁷ *Id.* at 953–54.

¹³⁸ *Id.* at 964.

¹³⁹ *Id.* at 962, 964.

¹⁴⁰ *Id.* at 964.

government to provide procedures for challenging a doctor's adverse decision. The lack of such procedures had, thereby, robbed her of "effective respect for her private life."¹⁴¹ In addition, Tysiac argued that the criminalization of abortion by Poland stigmatized even legal abortions and the doctors who performed them.¹⁴²

The Polish government countered that "pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life."¹⁴³ Rather, the mother's privacy interests become intertwined with the right-to-life of the fetus, as lawfully protected by Polish law. Because Polish law demanded that a specialist issue the certification recommending an abortion, Tysiac's failure to obtain such certification comported with the balance between these interests. The ophthalmologists who examined her recommended a Caesarean section, and that is what happened.¹⁴⁴

The Court declined to reach Tysiac's substantive claim that Article 8 protected the right to an abortion and found the issue "more appropriately examined from the standpoint of the respondent State's above-mentioned positive [procedural] obligations alone."¹⁴⁵ Thus, the Court once again avoided answering the question of when life begins under the Convention, presumably leaving that issue within the margin of appreciation afforded the state.¹⁴⁶

With regard to whether the denied abortion implicated Tysiac's Article 8 rights, the Court held that "legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus."¹⁴⁷ And the Court broadly interpreted Article 8's protections of the private life to include "aspects of an individual's physical and social identity including the right to personal autonomy, [and] personal development . . ."¹⁴⁸ Even more important was the Court's characterization of its inquiry into the responsibilities of the Polish government with regard to the physical rights implicated by pregnancy and abortion:

¹⁴¹ *Id.*

¹⁴² *Id.* at 965.

¹⁴³ *Id.* at 962.

¹⁴⁴ *Id.* at 963.

¹⁴⁵ *Id.* at 969. *See also id.* at 980 (Bonello J., concurring) ("[T]he Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention. . . . [O]nly . . . whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place.").

¹⁴⁶ *See supra* note 99.

¹⁴⁷ *Tysiac*, 45 E.H.R.R. 42 at 969.

¹⁴⁸ *Id.*

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[W]hile the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person’s physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity. The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the state regulations on abortion relate to the traditional balancing of privacy and the public interest, they must—in case of a therapeutic abortion—be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.¹⁴⁹

The Court is saying that state regulation of therapeutic abortion squarely implicates the privacy and physical integrity rights of the woman and that the regulations must be weighed against their own negative secondary effects seemingly without regard to the state interest. In other words, when the state regulates abortion, it must simultaneously secure the physical integrity rights of the mother or the state will be in violation of Article 8.

Therefore, by not addressing Tysiac’s substantive argument, the Court avoided the issue of whether Poland’s interference with abortion was *itself* “necessary in a democratic society.”¹⁵⁰ Instead, it seems to have simply found that Poland’s interference—manifested in this case by third-party interference, Tysiac’s uncertainty, and her inability to secure an abortion when her health was clearly at risk—was not procedurally “in accordance with the law.”¹⁵¹ Another issue avoided was any discussion of the state interest at play, presumably because—the interference not being in accordance with law—it was unnecessary to reach the issue. However, because the state’s interference in this case implicated the physical integrity of the mother-to-be, the Court held that the government’s automatic burden included protecting the woman from the tertiary effects of its own actions.

The most compelling concern of the Court was that the state law must “first and foremost, ensure clarity of the pregnant woman’s legal position.”¹⁵² Poland’s complete lack of guidelines and meaningful review of decisions adverse to the position of the woman obviously failed this test. The Court held that Poland had not upheld its obligation to ensure

¹⁴⁹ *Id.* (citations omitted).

¹⁵⁰ *Id.* at 969.

¹⁵¹ *Id.*

¹⁵² *Id.* at 971 (“The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under . . . the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”).

an effective respect for private life in light of its interference with the physical integrity of women. According to the Court, the positive obligations of the state “may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals”¹⁵³ The Court then laid out procedures which would have satisfied Poland’s burden in the case. These minimum procedures included an independent forum “competent to review the reasons for the measures and the relevant evidence . . . [and] should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. In addition, the competent body should also issue written grounds for its decision.”¹⁵⁴

Broadly read, the state has a responsibility to protect statutory rights in an area protected by Article 2 of the Convention even from private interference. The narrowest reading suggests that where the state has interfered with Article 8’s right to respect for private and family life (by criminalizing abortion), the state must also take on the positive responsibility of minimizing private interference *if* the state chooses to make legal exceptions.¹⁵⁵

The Court found that the lack of such procedures in Poland had “created for [Tysiacy] a situation of prolonged uncertainty [and] [a]s a result, the applicant suffered severe distress and anguish”¹⁵⁶ The Court concluded that Poland had “failed to comply with [its] positive obligations to secure to the applicant the effective respect for her private life”¹⁵⁷ and granted Tysiacy damages.

The decision effectively saddled the Polish government with a positive obligation to ensure that women who believe that they may lawfully obtain a therapeutic abortion are able to meaningfully and in a timely manner contest adverse decisions of their health care providers.

In a vigorous dissent,¹⁵⁸ Judge Borrego Borrego implied that the *Tysiacy* case was a complete departure from previous jurisprudence, the *D*

¹⁵³ *Id.* at 969–70.

¹⁵⁴ *Id.* at 971 (“The procedures in place should . . . ensure that such decisions are timely so as to limit or prevent damage to a woman’s health which might be occasioned by a late abortion. . . . [A]bsence of such . . . procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Art. 8 of the Convention.”).

¹⁵⁵ *Id.* at 970 (“Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention.”). Here, the public authorities are simply doctors who carry out the unwritten policy of the government.

¹⁵⁶ *Id.* at 973.

¹⁵⁷ *Id.* at 974.

¹⁵⁸ *Id.* at 980. For example, Judge Borrego Borrego was appalled that “[t]oday the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.” *Id.* at 984 (Borrego Borrego, J., dissenting).

case¹⁵⁹ in particular. Judge Borrego Borrego noted that *D* also involved a case where there was a risk to the life of the woman, however, where the *D* case had been disposed of on procedural grounds "quite respectful"¹⁶⁰ to Ireland, here the Court ignored the debate in Poland and improperly inserted itself. The dissent suggested that *Tysi*ac was decided the way it was because the deference afforded to the Irish courts to determine issues surrounding abortion in the *D* case was simply not extended to Poland. Here, the same section of the Court ignored the function of the margin of appreciation and delved into the state issue of when life begins and how best to protect it.¹⁶¹ Judge Borrego Borrego wondered why the analysis had shifted so much.

Judge Borrego Borrego concluded that the Court's decision was actually focused on *Tysi*ac's subjective desire to obtain an abortion rather than an objective analysis of how the Polish system had actually functioned. The dissent pointed out that the overwhelming medical consensus was that *Tysi*ac simply did not meet the legal requirement for an abortion.¹⁶² An objective analysis would therefore reveal that *Tysi*ac's health was simply not at risk due to her pregnancy. The judge suggested that the Court had simply shifted from an objective analysis used in *D*, to a subjective analysis which focused on *Tysi*ac's feelings and reached the desired conclusion.¹⁶³

After the decision was handed down, the Polish Government announced that it would appeal the ruling.¹⁶⁴ On August 10, 2007 the Grand Chamber rejected the appeal.¹⁶⁵

The decision surely presents an interesting procedural way to avoid squarely addressing whether the Convention protects prenatal life, provides a substantive right to an abortion, or whether the Convention mandates a balance of these interests similar to the balance revealed by *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁶⁶ Should the Grand Chamber in *A., B. & C. v. Ireland* wish to avoid making

¹⁵⁹ See *supra* notes 104–25 and accompanying text.

¹⁶⁰ *Tysi*ac, 45 E.H.R.R. 42, at 981 (Borrego Borrego, J., dissenting).

¹⁶¹ *Id.* at 981–82. Note that by passing on the substantive questions presented by the case, the Court, once again, does not address the validity of the asserted State interest—protection of life—under the Convention.

¹⁶² *Id.* at 983 (Borrego Borrego, J., dissenting) (noting that in fact, "eight specialists unanimously declared that they had not found any threat or any link between the pregnancy and delivery").

¹⁶³ *Id.* at 984.

¹⁶⁴ Society for the Protection of Unborn Children, News Summary (June 20, 2007), <http://www.spuc.org.uk/news/archive/2007/june/20>.

¹⁶⁵ Press Release, Center for Reproductive Rights, *Tysi*ac v. Poland (European Court of Human Rights) (June 20, 2007), <http://reproductiverights.org/en/press-room/tysi-ac-v-poland-european-court-of-human-rights>.

¹⁶⁶ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (balancing prenatal life with privacy rights by revealing the trimester system and later, viability).

these substantive choices, *Tysiac* could be used to find that Ireland is nonetheless violating the Article 8 rights of the applicants.

IV. *A., B. & C. V. IRELAND*

A poll conducted on February 20, 2008 by the *Irish Times* asked Irish citizens “if they would support a ‘constitutional amendment to prohibit abortion, while allowing the continuation of the existing practice of intervention to save a mother’s life in accordance with Irish medical ethics.’”¹⁶⁷ An overwhelming 67% of respondents said yes, 14% said no, and 19% said they didn’t know or had no opinion.¹⁶⁸ This is up from a similar poll conducted in February 2005, where only 54% responded yes to the same question.¹⁶⁹

The *A., B. & C.* case comes to the ECHR in a period of relative calm in Ireland, and the case does not present the sympathetic facts that have swayed Irish public opinion in the past.

A. *Facts*

The case at issue, *A. B. and C. v. Ireland*, was filed on July 15, 2005 by three residents of Ireland.¹⁷⁰ None of the applicants brought suit in Irish courts. All proceeded directly to the ECHR with their grievances.

The first applicant (A) was indigent and became pregnant unintentionally. She had four young children, all in foster care due to problems surrounding her alcoholism. Prior to this fifth pregnancy she indicated that she had made progress with her alcoholism and was hoping to get her children back. She traveled to England to obtain an abortion. Upon her return to Ireland, “she experienced pain, nausea and bleeding for eight to nine weeks, but was afraid to seek medical advice because of the prohibition on abortion.”¹⁷¹

The second applicant (B) also became pregnant unintentionally; however, she decided to obtain an abortion because doctors advised her that she had a substantial risk that hers “would be an ectopic pregnancy, where the foetus develops outside the uterus.” The second applicant also experienced complications arising from her abortion and felt unable to obtain medical advice in Ireland. However, she was able to return to England for a check-up. The harms alleged were the unnecessary expense, complication, and trauma caused by Ireland’s abortion ban.¹⁷²

¹⁶⁷ Carl O’Brien, *Pro-Life Group Wants Referendum on Abortion*, IRISH TIMES, Feb. 20, 2008, at 7.

¹⁶⁸ *Id.*

¹⁶⁹ Patsy McGarry, *Pro-Life Campaign to Press For New Poll on Abortion*, IRISH TIMES, May 4, 2005, at 3.

¹⁷⁰ Statement of Facts, *supra* note 2.

¹⁷¹ *Id.*

¹⁷² *Id.*

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The third applicant (C) was a cancer patient who was unaware that she was pregnant when she underwent a series of tests related to her cancer treatment. When she became aware of her condition, she sought assurances that her life was not at risk as a result of the pregnancy and that the tests and her cancer would not interfere with her pregnancy. “[U]nable to find a doctor willing to make a determination,” she decided to have an abortion in England. Due to her non-resident status, the third applicant was unable to procure a prompt drug induced abortion. Instead she was forced to wait eight weeks before a surgical abortion could be performed. Like the other two applicants, she also suffered complications upon return to Ireland.¹⁷³

Among other complaints,¹⁷⁴ all three women argued that Irish abortion law violated Article 8 (respect for private and family life) because it:

[W]as not sufficiently clear and precise, since the Constitutional term ‘unborn’ was vague and since the criminal prohibition was open to different interpretations. The fact that it was open to women—provided they had sufficient resources—to travel outside Ireland to have an abortion defeated the aim of the restriction and the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive.¹⁷⁵

The women also argued that Irish law violated Article 14 (discrimination) because it placed excessive burdens on women, especially with regard to the first applicant, because of her indigence.¹⁷⁶

The Court posed four questions to the parties:

1. Have the applicants exhausted domestic remedies as required by Article 35 of the Convention?
2. In the particular circumstances of each applicant’s case, did the national legal position concerning abortion interfere with her rights under Article 8 of the Convention? If so, was the interference provided for by law, did it pursue a legitimate aim and was it proportionate to that aim?

¹⁷³ *Id.*

¹⁷⁴ All three women complained that Ireland “stigmatised and humiliated them and risked damaging their health in breach of Article 3 [torture or inhuman or degrading treatment] of the Convention.” *Id.* I do not address this argument because the ECHR has clearly and unambiguously held that this argument failed in arguably more sympathetic circumstances. *Tysiac v. Poland*, 45 E.H.R.R. 42, 947, 962 (2007). In addition, all three women complained that Ireland “failed to provide them with an effective domestic remedy.” Statement of Facts, *supra* note 2. Finally, the third plaintiff complained that her right to life as provided for by Article 2 was violated. *Id.* I suspect that the court is unlikely to rest its holding on these articles of the Convention and that, as the *Tysiac* Court held, the complaints “are more appropriately examined under Art.8 of the Convention.” *Tysiac*, 45 E.H.R.R. 42 at 962.

¹⁷⁵ Statement of Facts, *supra* note 2.

¹⁷⁶ *Id.*

3. Did any of the applicants suffer discrimination in breach of Article 14 taken together with Article 8?
4. Does any issue arise under Article 2 and/or 3 of the Convention?¹⁷⁷

Because the case is likely to be decided in terms of the first two questions, I have limited the subsequent discussion to those issues. The exhaustion of domestic remedies is the Court's preliminary admissibility question and the question on which the *D* case turned. If the case is admissible, Article 8 of the Convention, providing a right to respect for private and family life, will likely be the primary focus of the Court's decision.¹⁷⁸

B. *The Exhaustion of Domestic Remedies*

Predictably, given Ireland's success in the *D* case only three years ago, "[t]he main plank of [Ireland's] defence [was] that domestic legal remedies have not been exhausted by the women."¹⁷⁹ As discussed above¹⁸⁰ the ECHR requires applicants to have exhausted the domestic legal system before coming to the ECHR.

The applicants argue that they had no chance in domestic courts and that "the lack of any effective remedy at home means they have satisfied the requirement to exhaust domestic legal remedies."¹⁸¹ While "[t]he basis of their complaint is significantly different,"¹⁸² as in *D v. Ireland*, none of the plaintiffs in this case made any attempt to engage the

¹⁷⁷ *Id.*

¹⁷⁸ The Court will probably consider other arguments to be superfluous. In the cases I have reviewed, the ECHR seems to prefer limiting the number of questions it answers. *See, e.g.*, *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244, 268 (1992); *see also supra* note 145 and accompanying text.

¹⁷⁹ O'Brien, *Human Rights Court*, *supra* note 105. At oral argument, Ireland devoted much discussion to Article 35 of the Convention. In particular, Mr. Gallagher (for Ireland) asserted that no lower court had made factual determinations and that the applicant's complaint "bears many of the characteristics of an *actio popularis*." Oral Argument, *supra* note 55, at 9:20. Ms. Kay, for the Applicants, similarly devoted much of her time to the issue. *Id.*

¹⁸⁰ *See* discussion of exhaustion of domestic remedies in *Open Door Counselling v. Ireland*, *supra* notes 61–64 and accompanying text. *See also* discussion of *D. v. Ireland*, *supra* notes 104–25 and accompanying text; discussion of the purposes of Article 35 *supra* note 111.

¹⁸¹ Carl O'Brien, *Irish Women Challenge Ban on Abortion in European Court*, IRISH TIMES, Apr. 21, 2009, at 1.

¹⁸² Press Release, Irish Family Planning Agency, IFPA Responds to Declaration by the European Court of Human Rights on *D. v Ireland* (July 5, 2006), <http://www.ifpa.ie/eng/Media-Info-Centre/News-Events/Older-News-Events/2006-News-Events/IFPA-Responds-to-Declaration-by-the-European-Court-of-Human-Rights-on-D-v-Ireland>. The *A.*, *B.* & *C.* applicants have brought a case that—on its face—does not appear to have the same sympathetic facts as the case presented by *D.*, primarily because *D* attempted to secure an abortion while carrying one dead fetus and one dying fetus.

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domestic legal system. This places them in roughly the same position as D, and the Court will therefore undertake the same two-part analysis. First, the Court will ask whether Irish courts were accessible, capable of providing redress, and offered reasonable prospects of success.¹⁸³ If this threshold is met, the Court will ask “whether, in all the circumstances of the case, [each] applicant did everything that could reasonably be expected of her to exhaust domestic remedies.”¹⁸⁴

Regarding the first question, the ECHR has found Irish courts both capable and incapable of providing redress in Irish abortion cases in the past. In the *Open Door Counselling* case,¹⁸⁵ the ECHR found that Ireland had not satisfied its threshold burden of providing courts reasonably likely to provide redress for a violation of the Convention. Recall that Open Door Counselling had been enjoined from “telling women where to find an abortion clinic or helping them travel.”¹⁸⁶ The Court unanimously held that had Open Door Counselling brought its Article 8 (privacy) and Article 14 (discrimination) claims in Irish courts, it would have had “no prospect of success . . . [considering] the high level of protection afforded to the right to life of the unborn child under Irish law.”¹⁸⁷ The Court held this way even though those grounds were not raised in domestic courts. Of course, that the Court declined to examine the merits of these claims makes this finding essentially dicta. Another potential snag in this analysis is that in that case, Open Door Counselling had in fact brought an even stronger argument in domestic courts: freedom of expression. The ECHR could easily hold that if Open Door Counselling had failed in its freedom of expression argument, it would clearly fail in any other.

In contrast, in the *D* case, the applicant had an arguably strong case to acquire a domestic abortion. In *D*, the applicant’s living fetus had fatal conditions that would not have allowed it to survive outside the womb. Ireland met its threshold burden, largely succeeding on the argument that it would be “disrespectful of the domestic legal order for [the ECHR] to assume what would be a domestic court’s response to a novel question.”¹⁸⁸ Ireland satisfied its threshold burden because D’s case for prospective relief would have been “feasible.”¹⁸⁹ Because it was feasible—even if unlikely—that D would have obtained relief in the Irish courts on the grounds that both of her fetuses were ultimately doomed, the ECHR was bound by Article 35 of the Convention to require the exhaustion of

¹⁸³ D v. Ireland, 43 E.H.R.R. SE16, 191, 221 (2006).

¹⁸⁴ *Id.*

¹⁸⁵ Open Door Counselling v. Ireland, 15 E.H.R.R. 244 (1992); see also *supra* notes 49–70 and accompanying text.

¹⁸⁶ GOLDHABER, *supra* note 28, at 27.

¹⁸⁷ *Open Door Counselling*, 15 E.H.R.R. at 259; see also *supra* notes 61–64 and accompanying text.

¹⁸⁸ *D*, 43 E.H.R.R. SE16 at 214.

¹⁸⁹ *Id.* at 222.

domestic remedies. Essentially, the Court agreed with Ireland. As soon as D found out about the chromosomal abnormality, she should have filed a suit for prospective relief.

Because the *A.*, *B.* & *C.* applicants do not allege facts nearly as sympathetic, it is unlikely the ECHR will believe there is a novel question of Irish law. In contrast to D's chances, had *A.*, *B.*, or *C.* brought a prospective action in Irish court demanding a domestic abortion as the *D* case suggests they should have, it is unlikely any of the women would have had a chance because none have alleged that the abortion was necessary to save their lives or any facts that would tend to shift "the constitutionally enshrined balance between the right to life of the mother and of the foetus"¹⁹⁰ in their favor in Irish courts. The Irish Supreme Court is bound by the Eighth Amendment of the Irish Constitution in the applicants' cases and would likely have been unable or unwilling to grant relief. There is the possibility that the Irish Supreme Court could have drastically amended the criteria established by the *X and Others* case, for example by interpreting the Eighth Amendment to allow an abortion where there is a threat to the health of the woman, but this outcome seems unlikely. Because Irish law so thoroughly protects the right to life of the unborn, *A.*, *B.* or *C.* would have found it difficult—if not impossible—to meet the test articulated by the Irish Supreme Court in the *X* case in order to obtain a lawful abortion in Ireland. As such, if the ECHR again asks whether prospective relief was possible in its determination of admissibility (as in *D*), the ECHR will likely find no domestic remedy was available to *A.*, *B.*, or *C.* before their travel to England.

Similarly, if the ECHR asks whether applicants *A.*, *B.*, or *C.* could have brought a retroactive suit in Irish courts, the analysis changes little.¹⁹¹ Had *A.*, *B.*, or *C.* returned from England and filed actions for

¹⁹⁰ *Id.* See also *supra* notes 118–21 and accompanying text.

¹⁹¹ I make the distinction because, in light of the *Tysiac* case, differentiating between prospective and retroactive relief presents an "out" should the ECHR not wish to fully address the abortion issue in Ireland at this time. The Court may (although I feel it is unlikely) find that—unlike *Tysiac v. Poland*—*A.*, *B.*, and *C.* did not exhaust their domestic remedies with regard to a possible retroactive suit in Irish courts. I think this is unlikely because the *Tysiac* Court seemed to indicate that if there was no prospective remedy available the applicant was not required to engage in a retroactive suit. See *Tysiac v. Poland*, 45 E.H.R.R. 42, 947, 973 (2007) ("The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. It could only, and if the applicant had been successful, have resulted in the court granting damages to cover the irreparable damage to her health which had come to light after the delivery. . . . The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals . . ." (emphasis added)). However, the issue of an available retroactive suit was raised at oral argument by Judge Finlay Geoghegan of Ireland. Oral Argument, *supra* note 55, at 1:11:20. If the Court addresses this possibility, whether Ireland met the threshold

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retroactive damages caused by the uncertainty surrounding Irish law, the Irish courts would similarly have been bound by the Irish Constitution. The Irish courts would likely have determined that the plaintiffs had no right to an abortion, and therefore, uncertainty caused no problem. In addition, Irish courts would likely be more receptive to the argument that it was the abortion itself that led to complications and certainly not the Irish prohibition. Hence, the ECHR will likely find no domestic remedies were available to A., B., or C.

For the reasons just discussed, the ECHR will very likely find that Irish courts do not afford the required "reasonable prospects of success."¹⁹² Where the domestic system "does not offer reasonable prospects of success [the applicant's] failure to use it would not bar admissibility."¹⁹³ As such, the Court will be unlikely to reach the second question.

The second question in the procedural exhaustion analysis is "whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of her to exhaust domestic remedies."¹⁹⁴ In *A., B. & C.*, should the ECHR find that the Irish courts did offer a reasonable opportunity for success—for example in a similar retroactive suit—the particular facts of each applicant in *A., B. & C.* must be examined to determine if the applicants' failure to attempt to obtain domestic relief was reasonable?

In *D*, as an explanation for why no domestic remedies were attempted, the applicant raised arguments based upon her "chances of success, the timing of the proceedings and guarantees of the confidentiality of the applicant's identity."¹⁹⁵ The Court weighed these concerns and found that none of them excused her obligation to exhaust domestic remedies.¹⁹⁶ The answer to the second question in the *D* case was a resounding "no."

In the *A., B. & C.* case—because of the likely resolution of the first question—the Court is less likely to reach the question. But if the Court does find an available domestic remedy, this will likely point unequivocally toward the Court's desire to avoid the merits of the action. It is clear that the applicants could have brought suit in Irish court prior to filing in the ECHR, yet none did. Reasonable arguments that the applicants did what could be reasonably expected of them—for example

showing will depend upon the ECHR's analysis of whether the Irish courts would find the issues moot or would be persuaded by an argument like the one that ultimately succeeded in *Tysiac v. Poland*. Perhaps the ECHR will determine that the Irish courts would be more sympathetic to a retroactive suit such as that brought in the ECHR by *Tysiac* (perhaps even *because of Tysiac*).

¹⁹² *Selmouni v. France*, 29 E.H.R.R. 403, 435 (1999).

¹⁹³ *D*, 43 E.H.R.R. SE16 at 222.

¹⁹⁴ *Id.* at 221.

¹⁹⁵ *Id.* at 226.

¹⁹⁶ *Id.*

based upon the ample support available in an international forum—may have merit, but based upon the Court's flat rejection of similar arguments in the *D* case the Court would not likely find this sufficient to find the applicants' Article 35 burden satisfied.

Finally, bear in mind that the *D* case was heard by a seven-judge section of the ECHR. In light of the ironic result in *D*¹⁹⁷ and the problems with Poland's abortion regime found one year later by the same section of the Court in *Tysiack*, the ECHR may have had second thoughts about the result reached in *D*. For these reasons, the ECHR decision holding the complaint inadmissible on procedural grounds in *D* may be distinguished by the seventeen-judge Grand Chamber decision in *A., B. & C. v. Ireland*. Indeed the presence of the *D* decision may be the primary reason that the issue was referred to the Grand Chamber. Distinguishing *D* may be the Court's mission.

In sum, probably the two most important considerations in the exhaustion of domestic remedies analysis are the enormous difficulties *A.*, *B.*, and *C.* would have in domestic courts and the referral of this case to the Grand Chamber. It would probably be admitted even by Pro-life Intervenors that a plaintiff in *A.*'s, *B.*'s, or *C.*'s position would have a difficult if not impossible case—whether prospective or retroactive—in Irish courts. For that reason, the Court will likely find that Irish courts did not provide the requisite reasonable prospects of success. Also, the Grand Chamber referral (in an elephant-in-the-room manner) suggests the importance of this issue,¹⁹⁸ and I would argue that, unlike in *D*, the Court will be reluctant to dispose of *A., B. & C. v. Ireland* without either determining how the procedural requirements the Court created in *Tysiack* apply to Ireland's more restrictive laws or finally addressing how the Convention applies to abortion.

C. The Merits of the Action

Article 8 guarantees “respect for . . . private and family life” and provides that this right may not be interfered with “except such as is in accordance with the law and is necessary . . . in the interests of . . . the protection of health or morals, or for the protection of the rights and freedoms of others.”¹⁹⁹ In accordance with this command, the first issue that will be addressed on the merits of *A.*, *B.*, and *C.*'s claim is whether Ireland interferes with Article 8 rights and the extent of any interference. This is followed by the countervailing analysis of Ireland's rationale. Finally, this Note concludes with the Court's likely result.

¹⁹⁷ See *supra* note 124 and accompanying text.

¹⁹⁸ See *supra* note 3.

¹⁹⁹ Human Rights Convention, *supra* note 2, at Article 8; see also *Tysiack v. Poland*, 45 E.H.R.R. 42, 947, 962 (“Everyone has the right to respect for his private . . . life . . .” (omissions in original)).

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1. *The Alleged Interference and Injury*

The Court’s previous jurisprudence, combined with nearly unanimous international pressure, seems to point overwhelmingly toward the A., B. & C. Court holding that Irish law substantially interferes with the Article 8 rights of women in Ireland. The trends in ECHR jurisprudence simply cannot be ignored. However, the existence and nature of the interference will still be hotly debated.

There can be little doubt that some international human rights bodies assert that regulation of abortion interferes with the rights of a woman and have increasingly acknowledged harms purported to flow from regulations on abortion. The ECHR has cited such pro-choice material even when not submitted by a party or intervenor. For example, the ECHR has noted as “[r]elevant non-Convention material” an EU report which found that “[a] woman seeking abortion should not be obliged to travel abroad to obtain it, . . . because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence.”²⁰⁰ The Court also cited the observations of the International Covenant on Civil and Political Rights Committee which pointed out its concerns regarding Polish abortion law.²⁰¹ Since the judgment in the *D* case, the same committee has “reiterate[d] its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in [Ireland].”²⁰² The A., B. & C. Court will likely find such material relevant again. It is also notable that the *Tysiack* Court did not cite any material to the contrary other than the arguments of the parties.²⁰³

The Court’s own jurisprudence also acknowledges the relationship between abortion regulation and human rights. For example in *Tysiack*, the Court noted the “chilling effect on doctors”²⁰⁴ caused by the illegality of abortion. This may be particularly important where, as in the case of all three women in A., B. & C., it is alleged that fear prevented the

²⁰⁰ *Tysiack*, 45 E.H.R.R. 42, 959 (quoting E.U. NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, SYNTHESIS REPORT: THE CONCLUSIONS AND RECOMMENDATIONS ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2004, 47–48 (2005), available at http://ec.europa.eu/justice_home/cfr_cdf/doc/synthesis_report_2004_en.pdf).

²⁰¹ *Tysiack*, 45 E.H.R.R. 42 at 957 (“[S]trict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women . . .” See also *id.* at 958 (“The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health.” (citations omitted)).

²⁰² United Nations Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, ¶ 13, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/433/49/pdf/G0843349.pdf>.

²⁰³ Although as Pro-life Intervenor in the present case points out, such material is available. Brief of Pro-Life Intervenor, *supra* note 82, at 9.

²⁰⁴ *Tysiack*, 45 E.H.R.R. 42 at 971.

women from obtaining appropriate medical care in Ireland. Or where, as in the case of applicant C, the woman alleges that she was unable to secure adequate assurances from doctors that her life or that of her fetus was not at risk due to the cancer testing she had undergone. The Court has also noted that the “time factor is of critical importance.”²⁰⁵ There is an obvious trend in the evidence considered persuasive to the Court.

Considering these indicators, it is unsurprising that the *Tysiac* Court unambiguously held that “legislation regulating the interruption of pregnancy touches upon the sphere of private life”²⁰⁶ Private life in particular includes “the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.”²⁰⁷ This reasoning can be easily compared to the U.S. Supreme Court’s landmark abortion decision *Roe v. Wade*.²⁰⁸

The Court’s earlier reasoning in *Open Door Counselling* also acknowledged negative effects stemming from the injunction preventing the dissemination of information. Negative effects such as women not being “sufficiently resourceful” or “not availing [themselves] of customary medical supervision after the abortion has taken place”²⁰⁹ were troubling to the *Open Door Counselling* Court and have been alleged in the A., B. & C. case as well. Applicant A in the current case alleged that her indigence made obtaining an abortion abnormally difficult, and she has raised an Article 14 (discrimination) complaint on that basis. All three women alleged that fears stemming from the criminal sanctions surrounding abortion in Ireland prevented them from seeking suitable post-operative care when they returned to Ireland. The *Open Door Counselling* Court called concerns such as these “legitimate factors to take into consideration in assessing the proportionality of the restriction.”²¹⁰

In sum, the ECHR has already determined that negative effects perceived to flow from the regulation of abortion are indeed a violation of the Convention which must be in accordance with law and necessary in a democratic society. At the same time, the ECHR has repeatedly declined to determine whether prenatal life is protected by Article 2 of the Convention leaving no countervailing Convention check. Therefore,

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 969.

²⁰⁷ *Id.*

²⁰⁸ 410 U.S. 113, 152–53 (1973) (“[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” “This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” The Court went on to lay out some of the detriments that the Texas law would impose, including “[s]pecific and direct harm . . . distressful life and future . . . [p]sychological harm . . . [m]ental and physical health may be taxed . . . [and] distress, for all concerned, associated with the unwanted child. . .”).

²⁰⁹ *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244, 267 (1992).

²¹⁰ *Id.*

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it seems likely that the Grand Chamber will characterize Ireland’s abortion ban as a direct infringement upon rights guaranteed by the Convention.

2. Ireland’s Justification

As a preliminary matter, after finding that Ireland’s abortion ban implicates Article 8 rights (as just discussed) it is possible that—as in *Tysiak*—the Court will simply find that the state is not adequately protecting the physical integrity of the women it effects and thereby avoid dealing directly with the legality of Ireland’s abortion ban. Having found the state interference to have negative physical effects upon Irish women, the Court could simply hold that unless perceived violations—such as Ireland’s failure to adequately deal with the health issues of women who have recently obtained abortions—are remedied, the Convention has been violated and will continue to be violated.

Defending the Irish ban from this type of attack, Pro-Life Intervenors point out that Irish law is certainly not vague in the way that Polish law was.²¹¹ It may be persuasively argued that because the Irish ban is even less permissive than the Polish ban, Irish law is less vague. However, simply arguing that the system performed correctly is unlikely to be persuasive. For example, in *Tysiak* only the dissent was persuaded that Polish law had functioned as required to protect *Tysiak*’s rights under the Convention. This is despite the nearly unanimous medical consensus that *Tysiak* had not met Poland’s statutory requirements to obtain an abortion.²¹²

In *Tysiak* the end result was that the Court found Poland violated *Tysiak*’s Article 8 rights. This was because the state’s interference with her private and family rights—including a significant physical integrity interest—led to a positive obligation to prevent additional or unnecessary private interference with those rights. The effect being that, to the extent that abortion was legal in Poland the state must ensure real access to the procedure. The Court held that Poland had failed to meet this burden. The Court required Poland—if it allowed abortion in certain circumstances but not others—to take positive measures to clarify and protect the position of women seeking abortions.

A similar analysis could easily be conducted in Ireland. In light of the *Tysiak* case, the issue may not be whether A., B., and C. could obtain an abortion but, rather, whether the Irish government has a duty to ensure

²¹¹ Brief of Pro-Life Intervenors, *supra* note 82, at 7. See also Oral Argument, *supra* note 55, at 35:30 (Mr. O’Donnell argued for Ireland that “there is a very clear and bright line rule provided for by Irish law which is neither difficult to understand or to apply. Because it is the same law that has been applied under section 58 of the Offences Against the Person Act, under Article 40.3.3 of the Irish Constitution, and under the legislative provisions of every country which permits a pregnancy to be terminated on [the grounds of threat to the mother’s life]. . . .”).

²¹² See *Tysiak v. Poland*, 45 E.H.R.R. 42, 947, 982 (2007) (Borrego Borrego, J., dissenting); see also *supra* note 162.

that Irish women know exactly what their rights are with regard to abortion, and more importantly, whether the Irish government has met its affirmative obligations to ensure that the Irish health care system corrects any and all of the perceived negative consequences of Ireland's abortion ban. For example, the ECHR could find that Ireland has not sufficiently ensured nonjudgmental medical services for women who have recently obtained an abortion overseas. Medical services for women who have had an abortion overseas are certainly not prohibited by Irish law. Therefore, the ECHR may find that—where Ireland has caused the perceived problem by forcing women to obtain abortions abroad—Ireland has not fulfilled its obligation to prevent private interference with post-abortion medical care.

However, the perceived practical difficulties in meeting this burden caused by the social stigma attached to abortion by Ireland's criminalization may encourage the ECHR to address the legality of the abortion ban itself. If the Court does, it must ask whether Ireland's previously discussed interference²¹³ is "in accordance with the law" and "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."²¹⁴ According to the Court, "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities."²¹⁵

The weight granted the state interest in this proportionality analysis is subject to a concept the ECHR calls margin of appreciation. Margin of appreciation deals with "how much the [C]onvention's decision-making entities should defer to national law-making institutions and therefore how active those entities should be in determining the applicability of the [C]onvention to a particular situation."²¹⁶ In matters of morals, "the national authorities enjoy a wide margin of appreciation . . . [h]owever, this power of appreciation is not unlimited. It is for the Court . . . to supervise whether a restriction is compatible with the Convention."²¹⁷ Certain concerns engender a stricter review. For example, "[s]uspect classifications, such as race and gender, require a greater degree of fit between the distinction made and the aim pursued."²¹⁸

²¹³ *Supra* Section IV.C.1.

²¹⁴ Human Rights Convention, *supra* note 2, art. 8.

²¹⁵ *Tysiac*, 45 E.H.R.R. 42 at 969.

²¹⁶ SPRENG, *supra* note 6, at 109.

²¹⁷ *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244, 265 (1992) (emphasis added).

²¹⁸ Natalie Klashtorny, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 439 (1996).

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As discussed above,²¹⁹ the *Tysiac* Court found that physical integrity questions raised by the abortion issue implicated Article 8. This created a corresponding burden on the Government to show a significant justification. While this burden was not weighed against any state interest in the *Tysiac* case—because the Court simply held that the interference was not in accordance with law—the Court also did not appear to give the Polish government the deference that might have been expected if the Court felt that the interest at issue was the *life* of the unborn rather than simple morality.²²⁰ Should the Court decide to directly confront Irish abortion law in the A., B. & C. case, it seems that the Court will demand a particularly important justification. As such, rather than being granted a wide margin of appreciation, Ireland may have to show “very weighty reasons” to support the ban.²²¹

The result of the proportionality test will, I argue, rest entirely upon the Court’s characterization of Ireland’s interest. The question faced by the Court will be: What is the legitimate aim pursued by Ireland? Is it protection of the right to life of the unborn as Ireland passionately argues?²²² Perhaps the protection of health? Is it, as indicated in *Open Door Counselling*, simply morals? Or perhaps a mix of these considerations?

Once the ECHR determines the nature of the state interest, it must ensure that an appropriate balance has been struck between the State interest and the individual right.²²³ Looking to previous ECHR

²¹⁹ *Supra* notes 147–56.

²²⁰ *Cf. Tysiac*, 45 E.H.R.R. 42 at 981–82 (Borrego Borrego, J., dissenting) (“The Court’s approach with regard to abortion is different in both cases. I should say it is quite respectful in *D v Ireland*: ‘This is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals.’ . . . In the present case, the balance is one of a very different nature . . .” (quoting *D. v. Ireland*, 43 E.H.R.R. SE 16, 222 (2006))).

²²¹ Klashtorny, *supra* note 218, at 439 (quoting Rebecca J. Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U.J. INT’L L. & POL. 645, 686 (1992)).

²²² Oral Argument, *supra* note 55, at 12:43–13:44 (arguing that the applicants had mischaracterized Ireland’s interest, Mr. Gallagher noted that “the only mention of article 2 in the application is in the context of [applicant] C’s life, and there is no mention of the importance of article 2 in the context of the Irish approach, the constitutional approach to this issue and the justifications and legal foundation which derives from article 2. It is asking the Court to approach the assessment, therefore, on a fundamentally flawed basis. On a basis that ignores what the court has stated in *Vo [v. France]* and other cases, and asks the court to leave out of the equation, to leave out of the balance, the matters which Ireland is entitled to include, and which if omitted, will not enable an adequate, a proper assessment of the balance, but one that is fundamentally, legally, flawed.”). Regarding the *VO v. France* case mentioned, see *supra* note 99.

²²³ *Tysiac*, 45 E.H.R.R. 42 at 970 (“In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.”).

jurisprudence, only the *Open Door Counselling* Court has directly characterized the interest in question here. The *D* and *Tysiac* Courts avoided deciding the issue. The *Open Door Counselling* Court held that the “restriction . . . pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect.”²²⁴

In *Open Door Counselling*, the government argued that the injunction was merely a necessary outcome considering the right to *life* in the Irish Constitution.²²⁵ The “very weighty reason” advanced was that Irish law pursues a legitimate and powerful aim, the protection of fetal life. Therefore, the argument goes, Irish laws—the Eighth Amendment of the Irish Constitution in particular—should be given the deference that they would be given if they themselves protected the right to life under Article 2 of the Convention. Based upon the Court’s determination that when life begins is within the power of the state to determine, this seems to be a reasonable argument.²²⁶

In contrast, while Polish law technically allowed abortion where the mother’s health was at risk, Irish law does not. Ireland, therefore, seems to have a stronger case that its legitimate aim is the protection of the life of the fetus from the moment of conception. However, for this argument to be persuasive, the Court must accept this characterization of Ireland’s restrictions as the protection of life, itself guaranteed by the Convention. While the Court has “not ruled out the possibility that in certain circumstances safeguards could be extended to the unborn child,”²²⁷ in *Open Door Counselling*, the Court simply found that answering this question was “not necessary.”²²⁸ Presumably, this is because the Court had already determined morals was the state interest. The *Open Door Counselling* Court, therefore, proceeded as if it had not decided whether protection of fetal life is a legitimate goal in Ireland. Of course, by not deciding and proceeding as if morals was the interest, the Court necessarily did just that. The Court’s reasoning was “depressingly circular.”²²⁹ In the end, the *Open Door Counselling* Court could not “agree

²²⁴ *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244, 263 (1992).

²²⁵ *Id.* at 264.

²²⁶ See *supra* note 99.

²²⁷ *Tysiac*, 45 E.H.R.R. 42 at 967; see also *supra* note 99.

²²⁸ *Open Door Counselling*, 15 E.H.R.R. at 263.

²²⁹ SPRENG, *supra* note 6, at 131. By not addressing the merits of abortion as a right under Article 8 or a right-to-life of the fetus under Article 2, it could be argued that the Court has not resolved these issues. However, imagine a tort action against a federal employee. Imagine that the federal employee asserted immunity but the court decided not to examine the merits of the employee’s immunity claim and proceeded on the tort action. No one would argue that the Court had simply left the immunity decision for later. It seems obvious that while a majority of the ECHR holds a relatively clear opinion on the issue, the Court has gone to great lengths to avoid deciding when life begins under the Convention. Nor does the ECHR accept the member state’s determination. Perhaps this represents a “small-steps” approach to

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that the State’s discretion in the field of the protection of morals is unfettered and unreviewable²³⁰ and in its proportionality analysis the Court held that the perpetual injunction was “over broad and disproportionate.”²³¹

The applicants in A., B. & C. have—naturally—clarified that they do not want the Court to determine whether Article 2 protects prenatal life.²³² Should the A., B. & C. Court decide to interpret the Convention to protect a right to abortion, I believe it will adopt an *Open Door Counselling* style analysis. The protection of morals will simply not be a weighty enough reason to justify the perceived negative effects of Ireland’s abortion ban.²³³

Pro-Life Intervenors in the present case also characterize the abortion ban as a health issue, protecting women from a procedure with “serious and negative effects on women’s physical and emotional health, which negative effects Ireland is diminishing by not allowing the procedure.”²³⁴ They continue: “Especially since Ireland’s maternal mortality rate is second to none, this Court should defer to Ireland’s judgment on how best to protect the health, bodily integrity, and privacy of women.”²³⁵

However, if the ECHR had previously felt that preventing abortion was within the state’s margin of appreciation as a health-related matter (i.e., if a state could legitimately decide that abortion was bad for the health of a mother), the ECHR ruling in *Open Door Counselling* overturning the ban on abortion information also seems incorrect. If a state could legitimately find, for example, that alcohol was a health threat, it would seem within the state’s margin of appreciation with

the issue rather than the “giant leap” that the United States Supreme Court took in *Roe v. Wade*. See also text at *supra* notes 67–70; *supra* note 99.

²³⁰ *Open Door Counselling*, 15 E.H.R.R. at 265.

²³¹ *Id.* at 266.

²³² Oral Argument, *supra* note 55, at 42:37, 58:20 (Ms. Kay—arguing for the applicants—asserted that the “applicants do not, as the government contends, ask this Court to determine when life begins . . .” and “it does not require determining when life begins, that question is not at issue here.”).

²³³ As Ms. Kay pointed out for the applicants at oral argument, *Tysiack v. Poland* clearly indicated that Ireland’s ban implicated Article 8 of the Convention. Article 8 interests

can of course be limited by the state’s legitimate aim, which was recognized under Article 8.2 by this Court in *Open Door* as including giving some weight to the protection of morals when doing this balance. However, the recognition is limited and even in the case of *Open Door* the recognition of the state’s interest in protecting morals was limited even as far as restricting access to information concerning abortion. Here, we’re talking about a much greater risk to the woman’s health and well-being and their lives by restricting provision of actual abortion services within the state.

Oral Argument, *supra* note 55, at 1:37:45.

²³⁴ Brief of Pro-Life Intervenors, *supra* note 82, at 9–10.

²³⁵ *Id.* at 11.

regard to health issues to disallow alcohol advertising, pro-alcohol counseling, and perhaps even alcoholism treatment. But given the Court's relatively clear position regarding the benefits and consequences of abortion bans,²³⁶ arguing that the abortion ban is justified by the health of women—or the unborn—seems doomed to fail.

In sum, Pro-life Intervenors argue that it is "Ireland's sovereign right to determine when life begins and to determine the appropriate protections therein."²³⁷ The ECHR has previously declined to so characterize the state interest at issue.²³⁸ The Court has held, rather, that the interest at issue in abortion cases is merely that of morals.²³⁹ This characterization of state interest was insufficient to overcome Ireland's restrictions on freedom of expression in *Open Door Counselling*, and if the Court follows that reasoning again there may be little limit to the breadth of the Court's decision. If the Court finds that Ireland's abortion ban implicates significant Article 8 rights and is not sufficiently justified by Ireland's interest in the protection of morals, the ECHR might just hold that the ban violates those rights and suggest its own abortion guidelines.²⁴⁰

The only unresolved question appears to be whether the Grand Chamber will determine that the Convention provides a right to an abortion or whether the Court will simply apply *Tysiack* and continue to delineate the positive obligations of states that choose to severely restrict abortion.

V. CONCLUSION

After the *X and Others* case, Ireland has endured nearly 20 years of legal flux surrounding abortion. No method of clearly legislating rules and regulations surrounding abortion held a majority, probably because the abortion issue is so politically volatile. Abortion is a heated and divisive issue politicians have every incentive to avoid.

So, bearing this in mind, what will the Court conclude? The possibilities lie upon a broad spectrum. Assuming the Court reaches the merits, as the Court likely will, on the one hand the Court could weigh Ireland's abortion ban—justified as government regulation of morals—against all the perceived negative consequences of that ban and hold the Eighth Amendment of the Irish Constitution itself to be a violation of women's rights including personal autonomy, physical integrity, and

²³⁶ See *supra* Section IV.C.1.

²³⁷ Brief of Pro-Life Intervenors, *supra* note 82, at 2.

²³⁸ *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244, 264 (1992) ("the Government's argument based on Article 2 of the Convention [Right to life] does not fall to be examined in the present case").

²³⁹ *Id.* at 263–64; see also *supra* notes 67–70.

²⁴⁰ In the *Tysiack* case, the ECHR had little reservation about suggesting exactly what guidelines were needed in Poland. See *supra* note 153 and accompanying text.

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discrimination under the Convention. In the other extreme, the Court could hold that the Irish ban is entirely justified by Ireland’s protection of life, that Irish law is not uncertain, and that any questionable cases may be adequately handled by the Irish courts in the manner of the *X and Others* case. In between lie some more likely scenarios.

My suspicion is that there are two possible outcomes of the A., B. & C. case, each equally likely. First, the opinion could be a scathing assessment of the difficulties women experience attempting to get pre- and post-abortion counseling and care, and an admonition to Ireland to take adequate steps to ensure such difficulties are not experienced by her citizens. This opinion would track coherently the reasoning and result of *Tysiac*. As the *Tysiac* Court did, the opinion would detail the perceived negative effects of Ireland’s abortion ban as complained of by the applicants and would outline the procedures necessary to alleviate those effects. The applicants would be granted damages and costs, and the Irish people would have to determine how to conform Irish law to the opinion—as Ireland has done previously²⁴¹—and prevent similar suits in the future.

Second, the ECHR could hold that the Irish abortion ban is itself a violation of the Convention. I am reluctant to say that this possibility is as likely as the first because such a dramatic step would be risky for the Court. However, I believe that despite its talk of margin of appreciation and deference to the state in determining when life begins, a majority of the ECHR will fail to confront Ireland’s stated interest—the protection of fetal life. Given the ECHR’s consistent holdings that the abortion decision implicates Article 8 and that Irish law obviously impairs this decision, the protection of morals likely will not be a weighty enough interest for Ireland to justify forcing women to travel to England in order to exercise the personal autonomy interests so clearly found by the Court in *Tysiac*. Also, bear in mind that such an opinion would simultaneously vault the ECHR into a new level of prominence and infamy.²⁴² Perhaps a level commensurate with what many might see as the Court’s modern, proactive role as the protector of human rights in an increasingly close-knit European Community.

I suggest that at a bare minimum the ECHR will find that the Irish government should take positive measures to ensure that post-abortion care is fully available in Ireland. As noted previously, whatever the judgment of the ECHR, it would not implement any standard, nor strike down any criticized Irish statute or provision. However, because Ireland has agreed to be bound by the decisions of the Court, non-compliance

²⁴¹ See *supra* note 74.

²⁴² Cf. Oral Argument, *supra* note 55, at 25:00. (Mr. O’Donnell argued for Ireland that “there is no doubt that this application is a significant case, for Ireland obviously. For those who label themselves pro-choice or pro-life certainly, but also, I suggest, for the Court. For its relationship with contracting states, their judicial processes and the principle of subsidiarity.”).

with any restitution order, or a failure to affirmatively address continuing violations of the Convention could result in tremendous political pressure, or even expulsion from the Council of Europe. Given the United States Supreme Court's increasing interest in foreign trends, this case—whatever its outcome—could even have some impact in the United States.²⁴³

A., B. & C. v. Ireland does indeed have all the precedential pieces in place to become Europe's *Roe v. Wade*. The writing is, simply put, on the wall. As long as an abortion ban remains in Ireland, women will bring lawsuits alleging, at a minimum, that the ban's chilling effect endangered their health. If Ireland had done more to assuage these concerns, perhaps things would be different. But if the ECHR does something drastic, it will only be because Ireland appears to have done so little for so long, mired in the indecisive position of being *mostly* pro-life.

²⁴³ See Press Release, Alliance Defense Fund, Pro-Life Organizations File Brief to Defend Ireland Abortion Ban (Nov. 17, 2008), <http://www.alliancedefensefund.org/news/story.aspx?cid=4751> ("This case is not only pivotal to Europe; it's pivotal to America. With greater frequency, the U.S. Supreme Court has considered what other countries are doing when deciding its own cases. This could be the *Roe v. Wade* of Europe, so its importance should not be underestimated.").