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Reforming Irish Abortion Law in the Wake of Tragedy: Looking to Portugal and Germany for Culturally Sensitive Models

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INTRODUCTION

Over the last three decades, abortion has been a lightning rod issue in the political, religious, social, legal, and international arenas in the Emerald Isle. To understand where the Republic of Ireland finds herself today in 2013, it is necessary to revisit her history. In 1921, Ireland was partitioned between the North and South, creating the Republic of Ireland in the South and the state of Northern Ireland in the North. The North has tended to mirror British laws,
though frequently with a long lag time. Despite an appearance of secularism, Northern politics have long been colored by Protestantism, like England herself. However, nationalism and Catholicism have written a different story in the South.

On October 18, 2012, “inhumane laws, lack of guidelines on how to apply the laws that do exist, fear of prosecution on behalf of doctors, medical incompetence, [and] influences of the most conservative wing of the Catholic Church over hospitals” all merged together to end in one of the saddest deaths in modern medicine. The death of Savita Halappanavar, a thirty one-year old married dentist, in an Irish hospital shocked the country. Dying at the Galway University Hospital Intensive Care Unit after being 17 weeks pregnant and found to be miscarrying, her repeated requests for an abortion fell on deaf ears. A team of nurses and doctors repeatedly told the Halappanavars: “Sorry, can’t help you. It’s a Catholic country. Can’t help you. It’s a Catholic Team.” As the clock ticked on, Halappanavar begged for an abortion, which was denied so long as the doctors could confirm a fetal heartbeat. Three painful days later, Halappanavar

3 Id. (explaining that the Northern parliament was subsidiary to the British Parliament, and even in areas of law in which it was independent, it still tended to produce local versions of British laws, particularly in the area of social legislation. Interestingly, Northern Ireland legalized homosexuality in 1982, five years after Britain).
4 Id. at 158.
5 See Kitty Holland, Savita Halappanavar Asked for Termination, Staff Confirm, IRISH TIMES, Jan. 18, 2012. The author is aware that the inquest concerning Savita Halappanavar’s death ruled the tragedy a “medical misadventure” on April 19, 2013. It is not feasible to include the findings of the inquest, as they are not yet completely available, but this will undoubtedly become a major force in determining what the Irish government will now do. For a summary of the inquest findings, please see http://edition.cnn.com/2013/04/19/world/europe/ireland-abortion-controversy-inquest/index.html?c=world. As of the writing of this paper, April 21, 2013, the Halappanavar’s have not expressed any indication that they will be filing a claim with any adjudicative body.
6 See id.
8 Id.
died of septicemia, or blood poisoning.\textsuperscript{9} This story has not been exaggerated or sensationalized. It is the tragic reality of the broken abortion law in Ireland. Halappanavar’s death may be the final flame necessary to light the proverbial tinderbox on the Irish abortion question.

A new law is being developed in the Republic of Ireland to address the pervasive inconsistency and general lack of clarity that has plagued the Irish abortion discourse for as long as it has been in existence. However, it is unlikely that the new law will sufficiently address the health and wellness issues posed by the current law. While a clarification of the existing law is long overdue and extremely necessary, a continuance of the nearly total ban on abortion will still produce discriminatory effects against those who cannot travel to obtain access to services abroad. It is the position of this paper that Ireland would be better advised to adopt a regulatory scheme that combines various elements of the newly reformed Portuguese laws\textsuperscript{10} with the German counseling model.\textsuperscript{11} Such a law, though still impinging on various physical and private liberties of women, would be an appreciable step forward to improving the abortion situation in Ireland while still embodying a basic sense of State disapproval. Part I of this paper will provide a basic overview of the history of Irish abortion laws, which stem from the English statute, the Offences Against the Person Act of 1861,\textsuperscript{12} and is codified

\begin{footnotesize}
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\item \textsuperscript{9} Id.
\item \textsuperscript{11} MYRA MARX FERREE, WILLIAM ANTHONY GAMSON, JÜRGEN GERHARDS & DIETER RUCHT, SHAPING ABORTION DISCOURSE: DEMOCRACY AND THE PUBLIC SPHERE IN GERMANY AND THE UNITED STATES 42 (2002).
\item \textsuperscript{12} See ABORTION AND PROTECTION OF THE HUMAN FETUS 116 (S.J. Frankowski & G.F. Col eds., 1987).
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in the Irish Constitution. It will also briefly touch on the early interactions between Ireland and the European Community, now recognized as the European Union, regarding its domestic abortion issues, as well as the relevant international treaties and bodies to which Ireland is a party. Part II will examine the cases, both domestic and international, that have shaped the Irish abortion dialogue. Finally, Part III will consider where Ireland is likely to head now, in the wake of both the most recent ruling concerning Ireland and abortion from the European Court of Human Rights ("ECHR") and the death of Halappanavar. Part III will propose a merging between the Portuguese ten week model and the German counseling model, with a clear, inescapable emergency provision. Portugal is a realistic model for Ireland as it is also predominantly Catholic and changed its laws through a referendum that was proposed in part as a reaction to antiquated abortion laws that bore a striking similarity to Ireland’s. However, the reality of the situation is that in attempting to strike a balance between a women’s right to a legal abortion and a deeply anti-abortion culture, even such a law as is proposed here does not go far enough in truly protecting and empowering women so as to given them a truly meaningful voice in the abortion dialogue.

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13 **BUNREACHT NA HIÈREANN [CONSTITUTION]** Dec. 29, 1937, art. 40.3.3° (Ir.).
14 See infra p. 27.
16 See Europe’s Abortion Rules, supra note 10.
I. THE DOMESTIC HISTORY OF IRISH ABORTION LAWS AND CONTEXTUALIZING IRELAND’S PARTICIPATION IN THE INTERNATIONAL COMMUNITY

The connection between Ireland and the Catholic Church are legendary. Ireland’s long colonial history prevented the emergence of a strong middle class, particularly in the beginning of the 19th century, and the Catholic Church provided a sense of unity to an otherwise disjointed society. There are a number of ties that bind the Church to Ireland, which while fascinating, are not the subject of this paper. Summarily, by the time the Republic of Ireland was established, Catholicism already had an incredibly strong influence on both law and policy. The vast majority of the country identifies as Roman Catholic. Despite an increasing trend of disillusionment and declining church attendance amongst Irish youth, the Catholic Church still exerts an undeniable pull on social and political life. For many families that lived through the darkest periods of colonial oppression, Catholicism has been the only steady source of comfort and as such has left an indelible mark on Irish society. Under traditional Roman Catholic law, there is still a threat of excommunication for any individual performing an abortion or having an abortion performed on them.

17 ABORTION IN THE NEW EUROPE A COMPARATIVE HANDBOOK, supra note 2, at 158.
18 Id.; see also G. Diane Lee, Comment, Ireland’s Constitutional Protection of the Un-Born: Is It In Danger?, 7 TULSA J. COMP. & INT’L L. 413, 414 (2000) (noting that Ireland derives its values from its strong, traditional Catholicism).
19 ABORTION IN THE NEW EUROPE A COMPARATIVE HANDBOOK, supra note 2, at 114.
20 Id.
21 Id. at 158 (“Even the partial decline of church influence, direct and indirect, in recent years has not totally severed the relationship between Catholic moral teaching and state law and policy.”).
22 See Europe’s Abortion Rules, supra note 10.
Such a strict Catholic stance on the prohibition on abortion contributed to the abortion tourism that has marked Irish abortion history. The phrase “abortion tourism” refers to the long standing practice that has long plagued Ireland and entails Irish women traveling to Britain in order to obtain an abortion. These numbers rise to the many thousands and probably many thousands more who do not report an Irish address. In the last decade of the 20th century, this prompted the Ulster Pregnancy Advisory Association (“UPAA”) to issue an estimate that the number of women participating in this “abortion tourism” is actually one and a half to two times the officially reported numbers.

At its common law roots, abortion was a misdemeanor which was punishable as a crime only once the child had quickened in the womb. From then to 2013, Ireland’s abortion laws have evolved, liberalized, contracted, and ultimately ended in a muddled uncertain limbo.

Up until 1926, Ireland was governed by Great Britain. Upon its inception, Southern Ireland became known as the Irish Free State, and adopted a constitution on December 11, 1922. On December 29, 1937 the Irish Free State adopted a new constitution which declared the “. . . dominion a sovereign, democratic state named Ireland.” Eleven years later, on December 21, 1948, the whole of Ireland was declared a republic and the country officially withdrew from

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23 Abortion in the New Europe A Comparative Handbook, supra note 2, at 159.
24 Id.
27 Id.
28 Id.; see also Lee, supra note 18, at 413 n.10.
the British Commonwealth. However, as to be expected in a fledgling country, Ireland adopted much its constitution from its former colonial power. Among these was the British prohibition on abortion. The British Offenses Against the Person Act of 1861 (Act of 1861) became the basis for the Irish abortion law. Specifically, Section 58 of the Act of 1861 states that:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . .”

This adoption of the Act of 1861 complimented the Catholic overtones that shaped the Constitution. The Irish constitution of 1937 was formed in part on the principle of subsidiarity, a doctrine originally articulated in a 1931 papal encyclical. Furthermore, the Constitution itself is heavily based on the philosophies of the Natural Law theory of Saint Thomas Aquinas, which in turn firmly entrenched the notion of the heteropatriachal family unit within the text that would govern the new State. In the simplest of terms, the Act of 1861 states

29 See WORLD ALMANAC, supra note 26, at 810.
30 Act of 1861, 1861, 24 & 25 Vict., c. 100 (Eng).
31 Id.
32 GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY 255 (2010) (explaining that the principle of subsidiarity holds that the State should not intervene in the affairs of the family and that the State should support an environment in which a traditional family will develop appropriately in accordance with Catholic principles).
33 SEXUALITY IN THE LEGAL ARENA 58 (Didi Herman & Carl Stychin eds., 2000); see also Paul W. Butler & David L. Gregory, A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community, 25 VAND. J. TRANSNAT’L L. 429, 431 (1992) (noting that Saint Thomas Aquinas’ philosophy held that the state was an instrument of a higher law and that justice could only be found when viewed through the prism of Catholic morality).
that “anyone who performs an abortion, including a pregnant woman, can be sentenced to ‘penal servitude for life.’”

The most basic problem with this Act, besides from the medieval attitude towards women, is the consistent theme of “unlawful” abortions, which in turn begs the conclusion that the Act in its inception must have contemplated lawful abortions. In 1938, a British doctor, Dr. Bourne, came to the same conclusion and challenged the Act of 1861 head on. Dr. Bourne was first found guilty under the Act of 1861, but then successfully defended himself by saying that “. . . the 1861 [A]ct, in talking of unlawful abortions, had allowed for, but not defined, lawful abortions.” Subsequently, Bourne argued that he had in fact carried out a lawful abortion, and the judge agreed. Unfortunately, this ruling had absolutely no effect on Ireland, and it would not be until decades later that an eerily parallel situation would begin the process of change for the Irish laws. A few decades later, it was precisely this lack of clarity that prompted England to enact the 1967 Abortion Act, which did not overrule the British Act of 1861, but instead defined parameters in which lawful abortions could be obtained and performed. To date, Ireland has still failed to enact an analogous provision.

The original text of the relevant part of the Irish Constitution concerning personal rights, which is found in Article 40, reads as such:

34 Abortion in the New Europe A Comparative Handbook, supra note 2, at 159.
35 Rex v. Bourne, [1939] 1 K.B. 687 (Eng.) (holding that when Dr. Bourne, who presented himself to the authorities after performing a requested abortion on a 14 year old girl who was raped repeatedly, performed a legal abortion).
36 Abortion in the New Europe A Comparative Handbook, supra note 2, at 160.
37 This also begs the conclusion that the law did not change in response to the effect it had on women, but rather to protect the legalities of the medical profession, which at the time must have been primarily men. Which points to an inherent problem in and of itself that the law changed not to protect the subject of the law, but the enforcers.
[40.3.1] The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

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

There is nothing inherently wrong with the text of this. In fact, there are similar phrases found in declarations issued by the United Nations and many other countries’ constitutions.  

However, much of the Irish population felt that the wording did not create adequate protection for the unborn child, as it was uncertain from this text whether an unborn child qualified as a citizen. This uncertainty fomented enough unrest in right-wing groups to lead to a Constitutional referendum on September 7, 1983, which added a new subsection that guaranteed constitutional protection for the unborn child. In a two to one vote, the Irish people passed the Eighth Amendment to the Constitution of the Republic of Ireland, which is codified as Article 40.3.3° and states that: “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.”

The referendum was also fueled in part by a growing sense of Irish unease as the United States

38 BUNREACHT NA hIÈREANN [CONSTITUTION] Dec. 29, 1937, art. 40.3.3° (Ir.).
40 ABORTION IN THE NEW EUROPE A COMPARATIVE HANDBOOK, supra note 2, at 162; see also THE CASE AGAINST 13 (Mavis Arnold & Peadar Kirby eds., 1982) (discussing that the urge for a referendum grew in part out of what members of the Irish Catholic Doctor’s Guild perceived to be a decline in Irish ethical values).
41 Cohen, supra note 39.
42 ABORTION IN THE NEW EUROPE A COMPARATIVE HANDBOOK, supra note 2, at 163.
43 BUNREACHT NA hIÈREANN [CONSTITUTION] Dec. 29, 1937, art. 40.3.3° (Ir.).
Supreme Court became increasingly liberal in its treatment of a women’s body and sexuality.

In 1974, in *McGee v. Attorney General*, the Irish Supreme Court found a law that prohibited the sale and importation of contraceptives to be unconstitutional, and in doing so relied on a right of privacy regarding marital affairs. Of the five judges on the panel, two of them relied on the United States Supreme Court case *Griswold v. Connecticut*, which articulated a right of privacy to establish that a Connecticut law which prohibited the use of contraceptives to prevent pregnancy is unconstitutional. Following *Griswold*, The Supreme Court of the United States continued on this liberalizing trend. First, with *Eisenstadt v. Baird*, the U.S. Supreme Court established that a law that barred single individuals from obtaining contraception but allowed married couples to do so violated equal protection of the laws. Then, in *Roe v. Wade*, the seminal U.S. abortion case, the Court established that a woman’s right to privacy under the Due Process clause of the U.S. Fourteenth Amendment must be construed to include the right to an abortion. The *McGee* Court’s reliance on *Griswold* sparked fear amongst conservative pro-life advocates that should the occasion arise, the Irish Supreme Court may again rely liberal U.S. precedent.

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45 Id.
46 Id. at 327-28 (Henchy), 335-36 (Griffin); see also, *ABORTION AND PROTECTION OF THE HUMAN FETUS, supra* note 12, at 119.
47 *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a law prohibiting the use of contraceptives to prevent conceptions is unconstitutional on the grounds that the marital right of privacy is older than the Bill of Rights as well as the political system as a whole, and that this law invades this realm of privacy).
50 See *ABORTION AND PROTECTION OF THE HUMAN FETUS, supra* note 12, at 119.
However, this would ultimately become a non-issue when the Eighth Amendment was approved.

In the interim between the *McGee* decision and the passage of the Eighth Amendment, pro-life advocates successfully lobbied to have the Health Family Planning Act of 1979 passed. The Health Family Planning Act reaffirmed Section 58 of the Act of 1861 while adding an additional layer of anti-abortion legislation. Section 10 of the Health Family Planning Act, in its original text provides in relevant part:

Nothing in this Act shall be construed as authorising-(a) the procuring of abortion, (b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of instruments to procure abortion or the supplying of drugs or instruments to procure abortion), or (c) the sale, importation into the State, manufacture, advertising or display of abortifacients.

Between the Health Family Planning Act of 1979 and the Eighth Amendment, Irish abortion law was headed on a one way path towards being one of the most restrictive laws in Europe.

In 1993, a referendum was held concerning the right of Irish women to travel abroad for the purposes of obtaining an abortion. The result of the referendum allowed women to receive information about abortion services abroad, as well as establishing a woman’s right to travel for those services. Two

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52 Health Family Planning Act of 1979, § 10, (Act No. 20/1979) (Ir.).
54 *Id.*
years later, in 1997, a freedom-of-information Bill was approved by the Irish Parliament, which allowed doctors to give counsel to women on abortions as well as provide these women with locations in England in which to obtain them.55 When the Irish Supreme Court reviewed the law, it held that this Bill did not conflict with the Eighth Amendment, and to this day this Bill remains the most liberalized legislation regarding abortion in Ireland.56 At times, the restrictive domestic laws that control Ireland’s abortion issues have influenced Ireland’s international relationships.

The European Community was created by the Treaty of Rome in 1957.57 The main purpose in forming the European Community was to create a common market and foster economic integration.58 On January 1, 1973, Ireland joined the growing number of states in the European Community, opening the door for economic and social growth.59 However, the road to accession was not smooth, and abortion was one of the main speed bumps.

The Maastricht Treaty, which is also known as the Treaty on European Union, “was designed to foster an economic, monetary, and political union among European Community nations.”60 At the time of Ireland’s interest in joining the European Community, and subsequent potential ratification of the Maastricht Treaty, the abortion debate was in full flow.61 Reflecting the elevated manner in which the country held the issue, Ireland insisted on a special protocol to the

56 In Re Article 26, [1995] LEXIS 87, at 30 (Ir. S. Ct.).
58 Id.
59 Id.
60 Klashtorny, supra note 51, at 429.
61 See id.
Maastricht Treaty that would guarantee that membership in the European Community would not impact the Irish Constitutional ban on abortion. The drafters of the Maastricht Treaty conceded, and Protocol 17 of the Maastricht Treaty establishes that nothing in the Treaty would affect Ireland’s domestic abortion law. The Irish government attempted to request a further amendment, but the European Community denied the request, foreseeing other nations raising claims for amendments that would reflect the cultural peculiarities of their respective countries.

However, as Ireland is a current member of the European Union, which the European Community eventually evolved into, the conflict between the Irish law and evolving European and international law has become progressively more pronounced. The Irish abortion law is in direct conflict with regional and international treaties to which Ireland is a party.

Ireland has become an increasingly active member in the international community. Currently, Ireland is party to a number of international human rights treaties and resolutions. Those that are relevant to this discussion are: the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), the International

64 For the purposes of this paper, “Irish government” refers to the government of Ireland in its sovereign capacity and “Irish Government” refers to the government of Ireland as a party to a case.
65 Klashtorny, supra note 51, at 431.

Ireland is also party to numerous Council of Europe Treaties, but those of which are relevant to this paper are the Statute of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This paper will attempt to take into account all critically relevant parts of these treaties, resolutions, as well recent as recent ECHR judgments that affect the Irish abortion question.

The International Covenant on Civil and Political Rights ("ICCPR") was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. It is a multilateral treaty and comprises part of the International Bill of Human Rights. The Human Rights Committee ("HRC") monitors the ICCPR by reviewing mandatory reports on how the rights enumerated in the ICCPR are being implemented. Generally, reports are

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67 *Id.*
68 *Id.*
69 *Id.*
70 *Human Rights Committee-Working Methods, Office of the United Nations High Commissioner for Human Rights*, http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#n3, (last visited April 20, 2013) ("Section II. Considerations of Reports of States parties by the Committee: Once the State party has ratified the Covenant it should submit, one year after the Covenant enters into force, its initial report to the Committee. For periodic reports, it is the Bureau of the Committee, at the end of the session at which the State party report is examined, which decides the number of years after which the State party should present their next report. The general rule (ever since this system was started two years ago) is that State parties should present their periodic report to the Committee every four years. However, the Bureau can add or subtract one year to this four-year period depending on the level of compliance with the Covenant's provisions by the State party [cites to Rules 66 and 70A of the Rules of Procedure of the Human Rights Committee].")
submitted every four years, but the HRC has the discretion to alter this by one year depending on the level of compliance exhibited by the State party.71

The ICCPR was born out of the horrors of World War II.72 After seeing the atrocities perpetrated by governments against individuals, the international community felt that the individual human being needed and deserved international protection.73 The ICCPR protects what are generally recognized as the traditional human rights as derived from sources including the First Ten Amendments to the Constitution of the United States and the French Déclaration des droits de l’homme et du citoyen of ‘1789.74 On December 8, 1989, Ireland ratified the ICCPR, and in doing so, agreed to be bound by it.75

Rights relating to privacy, family, and the home are found in Article 17 of the ICCPR. The text of Article 17 provides that “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference.”76

The ICCPR does not have a court; instead it is monitored by the HRC. Currently, there is only one issue on which Ireland has been found in violation of the ICCPR,
and that is related to the Irish practice of Special Criminal Courts, in which there are numerous special procedures, including but not limited to judges replacing juries. However, it is arguable, particularly if one follows the McGee line of reasoning, that the current abortion law in Ireland is both an arbitrary and unlawful invasion of privacy.

In addition to the original text of the ICCPR, there are also two optional protocols, the first of which “deals with the right of [an] individual to petition to the [Human Rights] Committee, as established under the covenant. States Parties to the Optional Protocol ‘recognise the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.’” The second is not relevant to this discussion; it is related to the abolition of the death penalty. Ireland has ratified the First Optional Protocol, which allows individuals to raise a cause of action under the ICCPR. However, Ireland has ratified it with a reservation: “Ireland does not accept the competence of the [Human Rights] Committee to consider a communication from an individual if the matter has already been considered under another procedure of international investigation or settlement.” While this creates a cause of action for an individual, it also substantially limits this right by forcing the individual to make the HRC the adjudicative body of first resort or otherwise forgo the ability

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78 Edel Hughes, Implementations of the ICCPR: Restrictions and Derogations, (Irish Ctr. for Human Rights, Nat’l Univ. of Ir., Galway) (quoting ICCPR Optional Protocol Art. 1).
79 Id.
to raise that claim to the HRC at all. This is probably not the best international
mechanism an aggrieved party can utilize to improve the abortion situation in
Ireland, and both CEDAW and the ICESCR may provide better options.

Ireland acceded to CEDAW on December 23, 1985, and therefore agreed
to be legally bound by the terms of the treaty. CEDAW entered into force on
September 3, 1981 and represents more than thirty years of efforts by the United
Nations Commission on the Status of Women, which was originally established in
1946 in order to address women’s rights. The Convention establishes an
international bill of rights for women and creates an affirmative duty for all
countries that have ratified or acceded to CEDAW to take “all appropriate
measures, including legislation, to ensure the full development and advancement
of women, for the purpose of guaranteeing them the exercise and enjoyment of
human rights and fundamental freedoms on a basis of equality with men.” The
enforcement mechanism of CEDAW is the Committee on the Elimination of
Discrimination Against Women, which is comprised of 23 experts that are
nominated by their respective governments and elected by the States party to
CEDAW. States that are party to CEDAW are required to submit reports to this
Committee, and must do so at least every four years.

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82 Convention on Rights of the Child Signature, Ratification and Accession: The Process of
84 Id. at art. 3.
85 Id.
86 Id.
discusses these reports with the appropriate government representatives and takes appropriate steps to further implement CEDAW in the country.\textsuperscript{87}

CEDAW has a special focus on women’s reproductive rights. Article 16(1)(e) states that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:  \textit{(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;\textsuperscript{88}}

The original text of CEDAW only applies to states, and as such individuals could not bring suit for violations of CEDAW.\textsuperscript{89} However, under the Optional Protocol, which Ireland has ratified, individuals may file individual complaints with the CEDAW committee.\textsuperscript{90} While this may be a potential avenue available to Irish women, complaints may only be filed with the CEDAW if all domestic remedies have been exhausted and, similar to the ICCPR, the complaint is not or has not been under review by another international investigative body.\textsuperscript{91} As the abortion and family laws in Ireland are supremely unclear, pursuing domestic remedies are

\textsuperscript{87} Id.
\textsuperscript{88} Id. (emphasis added).
\textsuperscript{89} Id. (“Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration”).
\textsuperscript{91} Id. (“Before a complaint is considered, the Committee must determine that all available domestic remedies have been exhausted and the complaint is not, nor has been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement. In addition, a complaint will only be admissible provided the complaint is compatible with the provisions of the Convention; is not an abuse of the right to submit a communication; the claimants’ allegations can be substantiated, and the facts presented occurred after the State party ratified the Protocol. communication; the claimants’ allegations can be substantiated, and the facts presented occurred after the State party ratified the Protocol.”).
an equally muddled option. Therefore, although in theory under the current legal framework Irish women almost certainly do not have the means to exercise the specified right to determine the number and spacing of their children, until the laws are clarified bringing a claim under CEDAW is probably not an effective remedy.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") may be the best treaty option for parties to pursue remedies related to the Irish abortion ban. The implementation of the ICESCR is closely monitored by the Committee on Economic, Social, and Cultural Rights ("Committee"). The Committee is comprised of independent experts that examine reports submitted every five years by States party to ICESCR and then make “concluding observations” on concerns the Committee has regarding those reports. Like the ICCPR and CEDAW, the ICESCR has an optional protocol. Ireland has signed the Optional Protocol subject to ratification, which is a step in a positive direction. In brief, the Optional Protocol provides a mechanism for the Committee to consider complaints on behalf of individuals once all domestic remedies have been exhausted. Now that it has been ratified by over 10 parties, it will enter into force on May 5, 2013. This is particularly exciting for parties negatively affected by the Irish abortion law, as Ireland is almost certainly in

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93 Id.
95 Id. at art. 2-3(1).
96 Id. at art. 18.
violation of several of the articles of the ICESCR. However, because it is subject to the same domestic remedy exhaustion provision as the CEDAW clause, and domestic remedies are unclear for Irish women seeking abortions, this is an uncertain option. But the nature of the ICESCR makes it a preferable alternative to either the CEDAW or the ICCPR mechanisms.

Specifically, Article 12 requires that “States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” According to General Comments of the Committee, this includes the right to control one’s own body, including reproductive rights. Furthermore, by being party to the ICESCR, States agree to “. . . refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information . . .” Article 12.2(a) also provides for an affirmative right to emergency obstetric services. Had Ireland adhered to this provision, Savita Halappanavar may still be alive. The Committee also considered that a major step in improving a woman’s access to an abortion is in removing barriers

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98 Committee on Economic, Social, and Cultural Rights General Comment 14: The Right to Highest Attainable Standard of Health, 22d Sess., para. 8, U.N. Doc. E/CN 12/2000/4 (“The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom . . .”).
99 Id at ¶ 14 (“The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child” [Art. 12.2 (a)] may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.” (Emphasis added)).
that interfere with access to healthcare services. A large problem with the abortion tourism that has characterized much of Ireland’s abortion issues is that not all demographics can afford to travel to England much less pay to obtain the sought abortion, and therefore becomes a major barrier to accessing appropriate health care services. Furthermore, a woman in Halappanavar’s condition is unable to travel, which captures the essence of the problem inherent in Ireland’s laws. By refusing to perform abortions, Ireland is forcing women to travel, violating their affirmative duty under the ICESCR to respect the right to health and provide equal access to healthcare services. This creates a State sponsored policy of discrimination against the poor and severely impaired.

It is clear that Ireland is in violation of the ICESCR, and now with the addition of the Optional Protocol, interested parties may be able to use this as a mechanism for change. Furthermore, under the Optional Protocol, should the Committee receive reliable information that a State that has recognized the competence of the Committee pursuant to Article 11 of the Optional Protocol is in grave or systemic violation of any of the rights accorded by the ICESCR, the Committee may conduct an inquiry of its own volition, and the State which is

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100 Id. at ¶ 21 (“The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.”).

101 Id. at ¶ 34 (“In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs”).

102 Id. at ¶ 34.
being investigated will be expected to comply to the fullest of its abilities.\textsuperscript{103}

However, there is still the problem of enforcement. The problems articulated by the international community even prior to the Optional Protocol are likely to continually plague the ICESCR until an effective enforcement mechanism can be formulated.\textsuperscript{104} Even if a State is found to be in grave or systemic violation of the ICESCR and has not complied with its obligations to address these violations pursuant to a Committee request, it appears the Committee can only request an explanation from the violating State and subsequently urge them to take all appropriate measures to stop the violation.\textsuperscript{105} This is not intended to advocate for a disregarding of the ICESCR, but merely notes that while the ICESCR may be the best of the discussed international treaties for this particular issue, it still may not lead to a change in Ireland’s abortion laws.

II. \textbf{I}RISH \textbf{A}BORTION \textbf{C}ASE \textbf{H}ISTORY: A RETROSPECTIVE ANALYSIS UTILIZING THE DOMESTIC AND INTERNATIONAL CASE LAW THAT COMPRISSES THE IRISH ABORTION DIALOGUE

Before discussing the main cases that have shaped the abortion debate, it is necessary to understand the hierarchy of the Irish legal system. Like U.S. law, Irish law evolved out of the common law tradition.\textsuperscript{106} Subsequently, Irish law is

\textsuperscript{103} Optional Protocol to ICESCR, art. 11; see also \textit{Proceedings under the Inquiry Procedure of the Optional Protocol}, UN \textit{ECONOMIC AND SOCIAL COUNCIL}, http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.49.3.pdf (last visited April 21, 2013) (“Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), Rule 22; also Art 11 of the Optional Protocol”).

\textsuperscript{104} See Joycelyn E. Getgen, Sital Kalantry & Steven Arrigg Koh, \textit{Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR}, (Cornell Law Faculty Working Papers (2009)).

\textsuperscript{105} \textit{Proceedings under the Inquiry Procedure of the Optional Protocol}, supra note 103, at Rule 35.

primarily dependent on precedent.\textsuperscript{107} The system is divided into a civil system and a criminal system.\textsuperscript{108} The hierarchy of the Irish Courts for civil actions is as follows, from lowest to highest: the District Court for, the Circuit Court, and the High Court.\textsuperscript{109} The civil courts can hear claims between individuals, organizations, or the State, while the criminal courts involve prosecutions brought by the State against individuals.\textsuperscript{110} Interestingly, despite its name the Irish Supreme Court is the court of final appeal for both criminal and civil matters.\textsuperscript{111} Both the Irish Supreme Court and the Irish High Court are referred to as the “Superior Courts,” and are governed by a separate set of rules from the Circuit and District Courts.\textsuperscript{112} The cases that follow are by no means an exhaustive list of influential cases, but are intended as a survey of the case history of Irish abortion law.

\textit{Attorney General v. Open Door Counselling Ltd.} became the first case in which the Irish courts would evaluate Article 40.3.3°.\textsuperscript{113} Open Door Counselling was one of two major centers that provided “. . . pregnant women with nondirective counseling and referrals to legal British abortion providers.”\textsuperscript{114} The foremost pro-life advocate group was the Society for the Protection of Unborn Children (“SPUC”).\textsuperscript{115} SPUC viewed Open Door Counselling’s business as a direct threat to unborn children, and sought an injunction on the grounds that

\begin{footnotes}
\item[107] Id.
\item[108] Id.
\item[109] Id.
\item[110] Id.
\item[111] Id.
\item[112] Id.
\item[114] JENNIFER E. SPRENG, ABORTION AND DIVORCE LAW IN IRELAND 98 (2004).
\item[115] Id.
\end{footnotes}
Open Door Counseling was assisting in abortions. SPUC also opposed the Dublin Well Woman Centre, which provided similar information to women. SPUC sought an injunction “prohibiting Open Door Counselling [and the Dublin Well Woman Centre] from informing pregnant women of the location of abortion clinics outside the Republic’s jurisdiction, or assisting these women with travel abroad to abortion clinics.”

SPUC was not being directly targeted, injured, or “tangibly damaged” by Open Door Counselling or the Dublin Well Woman Centre, which raised the initial issue of standing. Although the Irish High Court eventually held that SPUC did have appropriate standing to bring the case, SPUC initially managed to circumvent the issue by “relating” the attorney general. The High Court then found that despite the lack of implementing legislation for the Eighth Amendment, the Court could act to protect the right to life by relying on Norris v. Attorney General, a case from four years earlier that dealt with homosexual rights. Specifically, the High Court found that:

the judicial organ of government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right and, if there is a threat to that right from whatever source, to protect that right from such a threat, if its support is sought.

Open Door Counseling and the Dublin Well Woman Centre relied in part on McGee, claiming that they had an implicit right to impart information about

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116 Lee, supra note 18, at 422.
117 SPRING, supra note 114, at 98.
120 Id. at 103.
abortion services. However, the High Court applied a constitutional hierarchy analysis and held that the actions of Open Door Counselling and the Dublin Well Woman Centre violated Article 40.3.3°. According to the High Court, the right to life for the unborn ranked higher than “[t]he qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information.” Furthermore, these rights were not to 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.”

Defendants Open Door Counselling and Dublin Well Woman Centre then appealed to the Supreme Court, which was unanimously rejected in a judgment delivered on March 16, 1988. In the appeal, Defendants argued in the alternative that this ruling ran afoul of the European Community’s right to travel, to which the Supreme Court responded that the injunction did not prevent travel itself, it merely enjoined Defendants from assisting in the planning or execution of traveling for the purposes of an abortion. The Supreme Court utilized a similar analysis as that of the High Court, finding that the right to disseminate information does not rise “above the right to life in the constitutional hierarchy

122 SPRENG, supra note 114, at 99.
and therefore could not justify overturning the [H]igh [C]ourt’s injunction against defendant’s counseling activities.”

The ruling from the Supreme Court shocked the rest of the western world, prompting one U.S. commentator to complain that, “The zeal of the High Court in fulfillment of its ‘sacred duty’ made it remarkably insensitive to the values of free expression, privacy and personal dignity, values also held sacred in a just society.” This ruling had a twofold impact on Irish abortion laws. First, it severely limited McGee, and second, the Supreme Court, in allowing the Attorney General to have standing, held that any “party who has a\textit{bona fide} concern and interest for the protection of the constitutionally guaranteed right to life of the unborn” can bring a case. This set a precedent for virtually anybody with a “\textit{bona fide} concern,” no matter how distantly related to the woman in question, to have standing to bring a suit. Abortion rights in Ireland at this point were dead.

Undeterred, or perhaps determined, Open Door Counselling and Dublin Well Woman Centre brought their case to the European Commission of Human Rights (“Commission”). Open Door Counselling and Dublin Well Woman Centre alleged that Article 40.3.3° of the Irish Constitution violated Article 10 of the European Convention on Human Rights, which guaranteed freedom of expression. The Commission found that Open Door Counselling’s practices were not expressly prohibited by Article 40.3.3°, and that the restrictions imposed

by the Supreme Court’s ruling were excessive for a democratic society.\textsuperscript{131} In accordance with ECC law, as the parties did not reach a resolution within three months, the case was referred to the ECHR.\textsuperscript{132}

As a preliminary matter, it is necessary to provide an overview of the ECHR. The European Convention on Human Rights ("Convention") is an international treaty that was established by the original Council of Europe and is concerned with the protection of human rights and fundamental freedoms in Europe. All Council of Europe member states are parties to it.\textsuperscript{133} Most importantly, the Convention established the ECHR.\textsuperscript{134} Any individual who alleges a violation of their rights under the Convention may bring a case to this court.\textsuperscript{135} This is one of the most effective European bodies, having the teeth of enforcement power that many other adjudicative bodies, such as the International Court of Justice ("ICJ"), conspicuously lacks.\textsuperscript{136} A judgment of the ECHR creates a legally binding obligation on the state to “put an end to the breach [of the Convention] and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”\textsuperscript{137}

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\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 5-7 (2d ed. 2005).
\textsuperscript{134} Id. at 13.
\textsuperscript{135} Id. at 5.
\textsuperscript{136} Statute of the Council of Europe, art.3 and art. 8, 87 U.N.T.S. 103, E.T.S. 1 (Article 3 refers to the basic obligation that all member states of the Council have to accept the principles of the rule of law for all persons in their jurisdiction regarding human rights and fundamental freedoms, as well as to collaborate in achieving the aims of the Council. Article 8 is the enforcement provision of the Statute, and allows for the suspension of voting rights for any member state found in violation of Article 3. If a member state continues in its noncompliance, the Committee may decide that that member state is no longer a part of the Council, which is perhaps the most serious enforcement provision in any international body.)
\textsuperscript{137} Papamichalopoulos v. Greece, 31 October 1995, 16 EHHR 440, ¶ 34.
When *Open Door Counselling v. Ireland* reached the ECHR, in a somewhat surprising ruling the Court rejected the Commission’s findings, instead holding that the constitutionally guaranteed rights of the unborn was a legitimate government goal and the injunction was designed to achieve this.\(^{138}\) However, the ECHR then analyzed the injunction to determine if it was a proportionate method of achieving that goal.\(^{139}\) The ECHR held that “the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued.”\(^{140}\)

Ultimately, the ECHR found by a vote of fifteen to eight that the Irish Government had violated Article 10 of the Convention.\(^{141}\) Furthermore, the ECHR awarded damages to both Dublin Well Woman and Open Door Counselling with the provision that they must be paid within three months.\(^{142}\) This marked the debut of Irish abortion law into the international consciousness and the beginning of an increasingly intense spotlight on the archaic practices there.

Following *Open Door Counselling, Ltd.*, SPUC moved on to attack the publication “Welfare Guide UCD 988/1989,” which was published by the University College Dublin and contained phone numbers and additional contact

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\(^{140}\) *Open Door Counselling v. Ireland*, 246 Eur. Ct. H.R. 68, ¶ 80 (1992); see also Lee, *supra* note 18, at 424 (stating the ECHR held that the restrictions were disproportionate to the aim sought because the large number of women traveling to Great Britain for abortions were already receiving information on abortion services outside Ireland).  
information for abortion clinics in England in \textit{SPUC v. Grogan}.\footnote{\textit{Society for the Protection of the Unborn Children v. Grogan}, [1989] I.R. 753 (Ir. H. Ct.); see also \textit{SPRENG}, supra note 114, at 102.} At first blush, \textit{Grogan} appears to square with \textit{Attorney General v. Open Door Counselling Ltd}, but the Courts drew such a fine line distinction so as to render it a distinction without a true difference. On remand, the High Court in \textit{Grogan} drew a distinction between providing information and actively assisting women in obtaining abortions abroad.\footnote{\textit{Society for the Protection of the Unborn Children v. Grogan}, [1989] I.R. 753, 6 (Ir. H. Ct.).} To determine the substantive law, the High Court referred three questions to the European Communities Court of Justice ("ECJ") for consideration under Article 177 of the European Economic Community ("EEC") Treaty, which provides that:

\begin{quote}
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
\begin{itemize}
\item[(a)] the interpretation of this Treaty;
\item[(b)] the validity and interpretation of acts of the institutions of the Community and of the ECB;
\item[(c)] the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
\end{itemize}
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.\footnote{Treaty on European Union (EU), Art. 177, 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M.}
\end{quote}

The three questions were posed as follows:

1. Does the organised activity or process of carrying out an abortion or the medical termination of pregnancy come within the
definition of ‘services’ provided for in Article 60 of the Treaty establishing the EEC?

2. In the absence of any measures providing for the approximation of the laws of member states concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a member state prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another member state where abortions are performed?

3. Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Members State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain circumstances in Member State B?146

In the meantime, as an ECJ hearing can be delayed for at least 18 months due to the immense workload of the Court, SPUC appealed directly to the Irish Supreme Court. The Supreme Court, responding to what it perceived to be a “breach of the constitutional guarantee and a refusal of the duty of the courts to enforce that guarantee,” declared in a unanimous opinion that consistent with the Open Door Counselling, Ltd. decision, the actions taken by the college students were unlawful and granted a preliminary injunction.147 The Supreme Court was also quick to note that referring the above questions to the ECJ “. . . does not by its nature affect the parties concerned in the sense that it does not determine any of the issues in the case.”148

When the ECJ finally reached a decision on the issue, it found that abortions were a service within the meaning of Article 60 of the Rome Treaty\textsuperscript{149}, which reads:

\begin{quote}
Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. “Services” shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.\textsuperscript{150}
\end{quote}

Ultimately, the ECJ held that under Article 60, abortion is a service that Irish women have the right to obtain from another member state in which it is legal.\textsuperscript{151} However, the students could not disseminate information because as a party, they had no economic or commercial interest in the abortion clinics abroad and therefore could not invoke the protection of Community law.\textsuperscript{152} Furthermore, the ECJ relied on the margin of appreciation\textsuperscript{153} doctrine traditionally accorded to a

\begin{footnotes}
\item[153] The Margin of Appreciation, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P65_401 (last
\end{footnotes}
Member State to make decisions that fundamentally affect its society on the grounds of public health, public policy, and most importantly, morality.\textsuperscript{154}

The effect of the ECJ ruling did nothing to affirmatively help women, but neither did it set women back any further than they had been. The judgments of both the Irish Supreme Court and the ECJ ensured that abortion tourism would continue, but did not address either the plight of women unable to avail themselves of this practice or the general lack of clarity implicit in the abortion laws. Up until the end of the 20th century, the laws concerning Irish women’s ability to receive abortions continued to foster an elephant in the room situation in which thousands of women would travel to Britain to obtain legal abortions each year. However, in 1991, when Attorney General \textit{v.} X began, the issue was forced into the public consciousness when a fourteen year old girl was raped and impregnated.\textsuperscript{155}


The story that caused a “national and international furore” in Ireland and the world began the evolution in Irish abortion law. In 1989, a forty-one year old father of three began to sexually abuse his daughter’s twelve year old best friend. This is a tragic enough story in itself, but it exploded into the consciousness of Ireland a year and a half later when the girl became pregnant by her rapist. This young girl and her parents were understandably distraught and after careful consideration determined that the girl would travel to Britain to obtain an abortion. In the search for justice, the parents of this young victim enquired of the gardai “whether any particular process was available for testing the foetus so aborted in order to provide proof in any subsequent charge of the paternity of the accused.” The gardai, as perhaps policy dictated, informed the Director of Public Prosecutions of this request, who in turn informed the Attorney General.

The Attorney General then petitioned the High Court and subsequently obtained what may be one of the most surreal injunctions in this history of western law:

[T]he Attorney General obtained interim injunctions in the High Court restraining the girl and her parents from interfering with the right to life of the unborn; restraining the same defendants from leaving the jurisdiction for nine months; and restraining them from

158 Attorney General v. X, [1992] 1 I.R. 1, 7 (Ir. H. Ct.); see also Spreng, supra note 114, at 112.
procuring or arranging an abortion within or outside the jurisdiction.\textsuperscript{163}

The Attorney General successfully halted this young victim from obtaining an abortion, ordering her to stay in Ireland while pregnant with the child of her rapist. It is no wonder that this touched the hearts and conscience of so many and set off a storm of public opinion.

Unsurprisingly, this young victim indicated that she felt suicidal in wake of being unable to obtain an abortion.\textsuperscript{164} Although the High Court took this into account, it ultimately granted the injunction despite this very genuine assertion.

Specifically, Justice Costello addressed the issue by stating that:

\begin{quote}
The risk that the defendant may take her own life if the order preventing the termination of the pregnancy was made much less and of a different order of magnitude than the certainty that the life of the unborn would be terminated if the order was not made, thus having regard to the rights of the mother, the court’s duty to protect the life of the unborn required the making of the order sought.\textsuperscript{165}
\end{quote}

The court went even further and held that although there is a constitutional right to liberty and to travel,\textsuperscript{166} the Court has the ability to restrict that right in the event that an individual is utilizing that right to procure an abortion.\textsuperscript{167} This decision went against both the tradition of abortion tourism and the general interpretation of Irish abortion law and established the principle that Irish women could not

\begin{footnotesize}
\begin{enumerate}
\item See State (K.M.) v. Minister for Foreign Affairs, [1979] I.R. 73, 80-81 (Ir. H. Ct. 1979) (holding for the first time that the right to travel, which is unenumerated in the Irish Constitution, is recognized).
\end{enumerate}
\end{footnotesize}
travel abroad for abortions. It effectively deprived women of all avenues to an abortion.

The High Court’s ruling unleashed a fury of opposing public opinion. 168 Even worse for Ireland’s public image, “international media coverage painted Ireland as backwards and barbarous.” 169 In response to this international outrage, and perhaps indicative of how the Irish government responds to media pressure, the Irish government prevailed upon the family of X to appeal the ruling to the Supreme Court, with the government paying all legal expenses. 170 The Supreme Court reviewed the case and set the tone that characterizes the current understanding of Irish abortion law.

The Supreme Court held that:

[T]he test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother’s right to life. 171

Instead:

the proper test to be applied is 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. . . 172

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168 Smyth, supra note 152, at 12; see also Fintan O’Toole, Let Us Now Bravely Bury The Rome Rule Slogan, IRISH TIMES, Oct. 14, 1994, at 14 (“You’ve been taught lots of things about the South. It’s a bit backward and it’s not quite democratic. Politicians run the show, but the Church of Rome calls the shots. The freedom won at Boyne—the right to think for yourself, the right not to be dominated by a foreign church—doesn’t work down there.”).
169 Lee, supra note 18, at 428; see also Parliamentary Documents of the Dutch Lower House of the States-General (Kamerstukken II) 1991-1992, no. 398 (February 1992) (noting that questions concerning the Attorney General v. X case were raised in the Dutch Parliament).
170 Smyth, supra note 152, at 12.
A four to one majority voted in favor of lifting the injunction.\textsuperscript{173} In an oddly prophetic moment, and perhaps an attempt at amelioration, Chief Justice Finlay took special care to note that no constitutional interpretation was ever intended to be absolute.\textsuperscript{174} This ruling established that the mother had at the very least a right to life equal to that of the unborn child, which was a landmark decision and a substantially progressive step for women’s reproductive rights.

However, despite this momentous decision, there was one gaping flaw in the Supreme Court’s ruling: “The exact standard and proof and the requirements needed to establish a sufficient risk were . . . not clarified in the majority judgment.”\textsuperscript{175} Who is to determine, and to what extent, at which point the life of the mother is sufficiently at risk? Furthermore, although \textit{Attorney General v. X} may have established the right to continue to travel abroad in order to obtain an abortion, it is worth nothing that “there are no statistics available about the numbers of women who cannot travel abroad for abortion because they cannot afford to, do not have the necessary travel permissions, or who lack information about services available outside Ireland.”\textsuperscript{176} Not all women will have the financial resources to travel abroad or to pay for an abortion in Britain, and as a result, the ruling of \textit{Attorney General v. X} severely hampers women that belong to


\textsuperscript{175} See Koffeman, \textit{supra} note 174, at 12.

lower economic classes. It also makes no provision for women in dire situations. A woman bleeding to death will not be able to avail herself of this right to travel. The general lack of clarity that characterizes this decision epitomizes the major problem with the Irish abortion laws, and would become a major issue in what is now considered the seminal Irish case on abortion.

In 2005, three women residing in Ireland, two Irish nationals and one Lithuanian, brought a case to the ECHR, alleging violations of the Convention. A, B, and C v. Ireland is to date the most influential case concerning abortion in Ireland.

Even before the judgment was delivered, the case had obvious importance. As opposed to the traditional seven judge panel that generally hears cases before the ECHR, the case was heard by seventeen judges of the Grand Chamber of the Court. In Ireland, the case was already anticipated to be a legal bombshell. The Irish Times reported that “it may even go as far as forcing a new, permissive interpretation of the constitutionally enshrined limitation . . .” The ECHR made good on this expectation: it addressed the exact issues that made the Attorney General v. X case such a problematic framework and ordered Ireland to

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177 This very issue is raised by the Applicants in the later case, A, B, and C v. Ireland, A, B and C v. Ireland, App. No. 25579/05, [2010] Eur. Ct. H.R. 2032, ¶ 173. (“The restrictive nature of the legal regime in Ireland disproportionately harmed women. There was a medical risk due to a late, and therefore often surgical, abortion and an inevitable reduction in pre- and post-abortion medical support. The financial burden impacted more on poor women and, indirectly, on their families. Women experienced the stigma and psychological burden of doing something abroad which was a serious criminal offence in their own country.”).
178 See supra p. 27.
180 Leach, supra note 134, at 54 (“In cases which are considered to raise important issues, a chamber may relinquish its jurisdiction to a grand chamber of 17 judges”).
formulate a method of bringing its abortion laws into compliance with the Convention.

For the sake of brevity, it is enough to establish that all three plaintiffs traveled to Britain to obtain abortions that they did not believe they could legally obtain in Ireland. The importance of this case lies in the Court’s analysis. Specifically, the ECHR hit the proverbial nail on the head by stating:

The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3°, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman’s life and the reality of its practical implementation.

Ultimately, although the Court concluded that the first two applicants, A and B, did not have a claim for violation of the European Convention on Human Rights, it was the Court’s decision with respect to C that created the first affirmative duty to provide lawful abortions in Ireland in the abortion discussion:

184 A, B and C v. Ireland, App. No. 25579/05, [2010] Eur. Ct. H.R. 2032, ¶ 13-26. Applicant A is a very impoverished woman with a history of depression who became unintentionally pregnant with her fifth child while attempting to regain custody of her children from social care, and felt that she could not handle a fifth child. Subsequently, she travelled to the United Kingdom (“UK”), alone and in total secrecy for an abortion. Applicant B, a single women who became unintentionally pregnant when the “morning after pill” failed, did not feel prepared for a child at this stage in her life and also travelled to the UK for an abortion, despite not being truly financially capable of this and having to enlist the financial assistance of friends to even make travel costs. C’s case was markedly different, as she had been treated for cancer for three years and was in remission when she became unintentionally pregnant but was still receiving several follow-up tests. She could not obtain clear medical advice regarding either the effect of the pregnancy on her own life and health, or as to the effect of the cancer treatment on the foetus. Furthermore, there was a fear that the pregnancy could lead to a recurrence of the cancer, and subsequently travelled to the UK for an abortion.
the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3° of the Constitution.¹⁸⁶

The reaction to the ruling was immediate and polarized. Pro-choice supporters saw the ruling as a condemnation of the ambiguous law and hoped that the Irish government would be moved to make clarifications.¹⁸⁷ Predictably, pro-life advocates were furious.¹⁸⁸ Although the Irish Government relied on the traditional margin of appreciation accorded to states when dealing with issues of morality,¹⁸⁹ the ECHR made it clear that while there is such a margin accorded in this instance and the Court does not presume to alter the national laws regarding abortion; Ireland’s laws do establish a constitutional right to an abortion in at least some circumstances.¹⁹⁰ Subsequently, under this ruling, Ireland has an

¹⁸⁸ A, B and C v. Ireland, App. No. 25579/05, [2010] Eur. Ct. H.R. 2032, ¶ 191. (“It would be inappropriate for this Court to attempt to balance the competing interests where striking that balance domestically has been a long, complex and delicate process, to which a broad margin of appreciation applied and in respect of which there was plainly no consensus in Member States of the Council of Europe.”); see also Attorney General v. Open Door Counselling Ltd., [1987] I.L.R.M. 477, ¶ 68 (Ir. H. Ct.) (The Irish Government has traditionally relied on this argument when confronted with abortion issues, and is quite right in noting that the ECHR generally accords a wide margin of appreciation for morality issues like abortion. “[The Court] It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the ‘necessity’ of a "restriction" or ‘penalty’ intended to meet them.”).
affirmative obligation to ensure that the “the legal framework devised for this purpose . . . be ‘shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.’”

191 Essentially, while Ireland will be afforded a certain amount of discretion on this issue, since Ireland has undertaken to provide abortions in some situations, they must do so in a clear manner. The decision illuminated an already very controversial issue, but in reality the government did nothing to amend its laws.

Furthermore, the Irish government refuses to collect statistical information on the number of abortions that actually occur within Ireland each year, perhaps a tacit acknowledgement of a problem that the government does not want to face.

192 However, in order to implement this decision, the Irish government can no longer rely on such willful ignorance and must address one of the key issues that the Court in A, B and C. v. Ireland noted: the lack of clarity affects not only the women seeking to obtain abortions but also the doctors performing them.

193 As part of the ECHR judgment, Ireland was obligated to submit an Action Report to the Committee of Ministers of the Council of Europe on January 13, 2012. The Action Plan established an expert group, which drew on both legal

and medical expertise to address the ECHR ruling. The committee, which is comprised of members of the obstetrics, psychiatry, general practice, law, and policy fields, as well as members that represent the professional standards for doctors and midwives, is tasked with examining the judgment in order to determine the implications for both women’s health services and the government’s formulation of policy as a whole.

The panel of experts produced a fifty-eight page report that purported to take into account the “constitutional, legal, medical, and ethical considerations involved in the formulation of public policy in this area and the over-riding need for expeditious action.” The Expert Report established four general principles that “should apply to the implementation of the [ECHR] judgment.” The four principles are as follows:

1. The entitlement to have the right to lawful termination of pregnancy ascertained should be established.

2. The State’s constitutional obligations under Article 40.3.3° should be reflected in the options proposed to implement the judgment.

3. Termination of pregnancy should be considered a medical treatment regardless of whether the risk to the life of the woman arises on physical or mental health grounds.


196 See ACTION REPORT A, B, AND C v. IRELAND, supra note 195.

197 REPORT OF THE EXPERT GROUP ON A, B C v. IRELAND, supra note 152, at 5.

198 Id. at 27 (As a point of interest, the Expert Group noted that: “The general principles that should apply to the implementation of the European Court of Human Rights judgment begin with an acknowledgment that there is an existing constitutional right as identified and explained in the X case judgment of the Supreme Court.” At the very least, this may go towards establishing a concrete constitutional right to an abortion in certain circumstances in truth as well as in name).
4. It will always be a matter for the patient to decide if she wishes to proceed with a termination following a decision that it is clinically appropriate medical treatment.\textsuperscript{199}

The report does a fair job of establishing a number of options for implementing these principles and is very progressive in attempting to balance the many competing interests.\textsuperscript{200} Most importantly, the Expert Report established that the State has an affirmative obligation to:

A. Provide effective and accessible procedures to establish a woman’s right to an abortion as well as access to such treatment.

B. Establish criteria or procedures in legislation or otherwise for measuring or determining the risk.

C. Provide precision as to the criteria by which a doctor is to assess that risk.

D. Set up an efficient independent review system where a patient disputes her doctor’s refusal to certify that she is entitled to a lawful abortion or where there is a disagreement between doctors as to whether this treatment is necessary.

E. Address sections 58 and 59 of the \textit{Offences Against the Person Act, 1861}.\textsuperscript{201}

Ireland is under an affirmative duty to meet all five of these obligations, but has yet to achieve any. Had even one been in place for Savita Halappanavar, she may still be alive today.

\textsuperscript{199} \textit{Id}. at 29.

\textsuperscript{200} The exception to the otherwise admirable work by this Expert Group may be in their handling of the conscientious objection, or more commonly known as the conscience clause, found on pages forty two to forty three of the Expert Report. It is still too ambiguous and attempts to punt the issue in part to the professional regulatory bodies.

\textsuperscript{201} \textsc{Report of the Expert Group on A, B C v. Ireland, supra} note 152, at 26.
III. MOVING FORWARD AND LOOKING ABROAD: CAN PORTUGAL AND GERMANY PROVIDE REALISTIC MODELS TO ADDRESS THE FLAWS IN THE IRISH ABORTION LAW THAT CONTRIBUTED TO SAVITA HALAPPANAVAR’S DEATH?

The death of Savita Halappanavar, discussed supra in the Introduction to this paper, should be the final catalyst necessary to effectuate a definitive and clear change to the Irish abortion law. Savita’s story is all the more depressing due to the fact that it was completely unnecessary, absolutely preventable, and could happen to any woman of child bearing age in Ireland.

On October 28, 2012, Halappanavar died on the doctor’s table in the intensive care unit at Galway hospital, in excessive pain and begging for an abortion that could save her life. The situation could not have been entirely unexpected in light of the continued lack of clarification noted by the European Court of Human Rights in A, B, and C v. Ireland. What Ireland was not prepared for was the domestic and international outrage that Halappanavar’s death triggered. As the initial dust blown up over this incident settles, there is a general sentiment of change in the air. The death of this young woman has made it clear that Ireland must change. Had Ireland complied responsibly with the A, B, and C v. Ireland judgment and made a more expeditious attempt to implement the findings of the panel of experts, it is possible that this tragedy would never have occurred. As of April, 21, 2013, there has been no legislation

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202 Holland, supra note 5.
205 Inquest, supra note 5.
or other implementation of the recommended changes. Therefore, it is the position of this paper that Ireland should examine other models of abortion legislation. Specifically, the Portuguese and the German models have elements that may be a good foundation to model a new Irish law on.

Like Ireland, Portugal is a predominantly Catholic society.\textsuperscript{206} Furthermore, like Ireland, Portugal had an abortion law that was unclear and lacked implementing legislation as well as the services necessary to make it an effective law.\textsuperscript{207} Up until 2007, the law included provisions mandating that those who obtained illegal abortions and those that performed them would face the threat of imprisonment.\textsuperscript{208} Abortion was legal if it was the only way to prevent the death or serious mental or physical injury to the mother, if the child would suffer a serious disease or birth defect, or if there was “serious evidence [the pregnancy was a result] of rape.\textsuperscript{209} In all circumstances, except for in the case of birth defects or threat of serious disease, the abortion could not be performed past twelve weeks. In the case of disease, abortions could not be performed past

\begin{itemize}
\item \textsuperscript{207} ABORTION IN THE NEW EUROPE A COMPARATIVE HANDBOOK, supra note 2, at 223 (“[The law’s] implementation was difficult without other steps taken in the health services. . . the law did not clarify the kind of services necessary for its implementation, and was not subject to further regulations that could have made it more concrete.”).
\item \textsuperscript{208} See id. at 222.
\item \textsuperscript{209} Id. at 222; see also ABORTION POLICIES: A GLOBAL REVIEW 42 (Google E-Book, Vol. 3 United Nations Publ’n, 2001) http://books.google.com/books?id=3iNmQIP7S2AC&pg=PA42&lpg=PA42&dq=Law+No.+6+of+1984+portugal+abortion&source=bl&ots=H0fFLVE4-V&sig=xX2dD00XKibq8AFj3AFGJbSc4&hl=en&sa=X&ei=80JzUf2WLKrS1wKo7oDwDw&ved=0CEQQ6AEwAg#v=onepage&q=Law%20No.%206%20of%201984%20portugal%20abortion&f=false. (I could not find the actual text of the law, but these and other reliable sources concur that this is the general essence of the law. Apparently circumstances of rape must be verified by evidence of criminal involvement, which points to an entirely different and disturbing issue).
\end{itemize}
sixteen weeks.\textsuperscript{210} However, due to a conscience clause, owing to the Catholic nature of the country, healthcare professionals could elect to not perform the abortion if they submitted a written declaration.\textsuperscript{211} Also like Ireland, there is no exact information regarding the actual number of abortions performed in Portugal per year, but it is clear that under the original law of 1984 “illegal abortion of unwanted pregnancies [was] still practiced by a significant proportion of Portuguese women.”\textsuperscript{212} Such a restrictive abortion law created a situation almost identical to Ireland, in which many women traveled to Spain in order to obtain abortions.\textsuperscript{213} Portugal ranked alongside of Ireland, Malta, and Poland in having the strictest European abortion laws. All of them were strongly Catholic nations.\textsuperscript{214} Then, in 2000, Portugal found itself the center of international attention when Maria de Ceu Ribeiro, a midwife, was arrested for illegally performing abortions.\textsuperscript{215} When she was found guilty of the numerous charges against her, she was sentenced to eight and a half years in prison.\textsuperscript{216} “The trial quickly became a cause célèbre in Europe where such events smacked of times long ago.”\textsuperscript{217} More importantly, it triggered a domestic movement to change a
law that had clearly outlived its purpose, and the abortion debate in Portugal began.\footnote{218}{Id.}

The similarities between Ireland’s abortion legal history and Portugal’s are striking. However, Portugal did not wait until a Savita Halappanavar occurred; instead the government itself mandated a change in 2007. In 2005, the pro-choice Socialist Party leader, Jose Socrates was elected Prime Minister.\footnote{219}{Manuel, supra note 215, at 7.} True to his platform, Socrates called immediately for a referendum to reform the Law of 1984, citing the “‘signs of change’ in Portuguese society, as well as the ‘persisting drama of illegal abortions.’”\footnote{220}{Id.} The referendum passed, despite a technically lower turnout\footnote{221}{While it is impossible to determine exactly why there was a low voter turnout, at least one media person in Portugal credits this to the phenomenon of the “two Portugals, the Portugal of the elite-politicians, newspapers, and television-and the Portugal of the people. The people are more concerned about unemployment, their salaries, the health system. The real country doesn’t consider the issue of abortion important.” This author is of the opinion that while this may be true, this was probably a simple case of voter apathy. Referendums are special elections and do not generally garner the kind of attention that regular elections do. Elaine Sciolino, Low Turnout Undercuts Portugal Vote on Abortion, N.Y. TIMES, February 7, 2012, http://www.nytimes.com/2007/02/12/world/europe/12portugal.html.} than was necessary to make it binding.\footnote{222}{See Portugal Will Legalise Abortion, supra note 213 (stating that 50% voter turnout is required to make a referendum binding, 40% turned out for this. However, of those who did vote, 59.3% approved of a change to the law).}

Despite the low voter turnout, Prime Minister Socrates stated that “the people spoke in a clear voice.”\footnote{223}{Id.} The changes to the law will allow all women, without restriction, abortion until the 10th week of pregnancy. Although the law must still be approved by parliament, this is a gigantic breakthrough in a country that once ranked amongst the most restrictive abortion laws in Europe. More importantly, it is an approach that could be applied to Ireland.
The process for introducing a constitutional referendum is contained in Article 46 of the Irish Constitution. The Dáil Éireann, or the lower house of the Oireachtas (Irish Parliament), must initiate the proposed change as a Bill which will then proceed to the higher house of the Oireachtas, and in passing both houses, be submitted to the Irish citizens for referendum. This is the only way to have an amendment to the Constitution. The Dáil Éireann is currently controlled by the Fine Gael party, which translates to Family of the Irish, and describes itself as “a party of the progressive center.” In the wake of the public outcry against Savita Halappanavar’s death, which took the form of protests all across Ireland, including one of at least 10,000 people in Dublin, the Irish government has promised to introduce legislation that would clarify when abortions are permissible. However, unlike the change to the Portuguese law, the legislation will only go so far as to allow for abortions if the life, but not the health of the mother is threatened.

This solution is still too unclear. Who is to determine, and to what extent, when the life of the mother is significantly threatened? The law is also supposed to address the legalities for the medical profession, but it appears as that it will continue to emphasize that the life of the unborn child is equal, and in practice

224 Bunreacht na hÉireann [Constitution] Dec. 29, 1937, art. 46° (Ir.).
225 Id.
probably greater, that of the mother.\textsuperscript{229} Perhaps Ireland feels that it cannot introduce so drastic a change as Portugal. However, unless the legislation gives a definitive point or provides specific criteria, it will not be effective in providing access to abortion for Irish women. Even if there are specific criteria, the law still leaves too much room for discretion at the hands of a doctor, who may allow his or her personal feelings regarding the issue to come into play. The only way to guarantee an improvement in the status of Irish abortion law is to set a firm date as in the Portuguese model in addition to establishing an emergency clause that does not have a conscience clause opt-out option. This would be consistent with the ethical policy imposed by the Irish Medical Council’s \textit{Ethical Guidelines}, but by creating a legal provision with an enforcement provision, it would become a reality.\textsuperscript{230} Furthermore, a constitutional referendum is the only way to achieve this change. Not only have the Irish Courts shown themselves to be reluctant to follow the path set by \textit{Roe v. Wade} in the United States, Mary Ann Glendon, one of the leading U.S. scholars of the pro-life movement and the current Learned Hand Professor at the Harvard Law School, successfully points to a major flaw in \textit{Roe v. Wade}: it changed the law, but it changed the law through the courts.\textsuperscript{231} She makes a significant point in arguing that \textit{Roe v. Wade} went too far: “It’s very unhealthy for democracy when the courts--without clear constitutional warrant--

\textsuperscript{229} \textit{Id.; see also} Ashley Parker, \textit{40 Years After Roe v. Wade Thousands March To Oppose Abortion}, N.Y. TIMES, Jan. 25, 2013, http://www.nytimes.com/2013/01/26/us/politics/40-years-after-roe-v-wade-thousands-march-to-oppose-abortion.html?_r=0 (stating that three days after the 40th Anniversary of \textit{Roe v. Wade}, thousands of pro-life advocates marched and demonstrated in front of the Supreme Court building, thus illustrating the still highly controversial nature of the decision).

\textsuperscript{230} \textit{REPORT OF THE EXPERT GROUP ON A, B C V. IRELAND, supra} note 152 at 42 (citing Irish Medical Council: 2009, pg. 16).

deprive citizens of the opportunity to have a say in setting the conditions under which we live, work, and raise our children.”\textsuperscript{232} If there is to be any forward progress for the abortion debate in Ireland, it must come through referendum, or risk the backlash of \textit{Roe v. Wade}.$\textsuperscript{233}$

Savita Halappanavar’s husband’s lawyer stated that one of “the principle motivations through this difficult time has been ‘to make sure nothing like this happens again.’”\textsuperscript{234} However, there is no way that legislation without a definitive number and an additional obligatory emergency clause will achieve this. So long as anybody besides the woman seeking the abortion is afforded substantial discretion, there is not enough protection for Irish women. However, given the strong Catholic ties and the entrenched history of a restrictive abortion law, such a drastic change is likely to shock Irish society, even with so many turning out in support of a new law. In order to mitigate this, in addition to adopting the Portuguese model, Ireland should consider adopting a counseling provision akin to the German abortion model.

Germany allows abortion when it is carried out due to a serious threat to the life or health of the mother, the child’s health can be concluded to be irreparably harmed, if the pregnancy is the result of rape or incest, or the woman is an a state of intolerable distress, as determined by a physician other than the woman’s primary doctor.\textsuperscript{235} The history of German abortion laws more closely

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\textsuperscript{232} Id.
\textsuperscript{233} Id. (asserting that the public’s attitude towards \textit{Roe v. Wade} has changed and that today’s youth are more pro-life than their parents in the 1970s).
\textsuperscript{234} Robertson, \textit{supra} note 228.
\textsuperscript{235} See \textsc{Abortion Policies: A Global Review}, \textit{supra} note 209, at 25.
\end{footnotesize}
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followed the U.S. path than either Ireland or Portugal. The law is modeled after a ruling by a 1993 Constitutional Court ruling.  

The German abortion law provides for a mandatory counseling that is “directed toward preserving the life of the unborn child and [is not] carried out by any person or organization that provided abortions.” Counselors are tested and subsequently certified every two years, and must provide an account, but not the identity of the woman, of each counseling session. A critical problem with the German counseling provision is that it indicates that there is a right course of action, so it is not truly an open dialogue. The counseling is supposed to “be ‘goal oriented’ in protecting the life of the fetus, but ‘outcome-open’ in style, encouraging but not forcing women to continue their pregnancies.” Because a counseling provision should be strictly informative and not intended to be an attempt to direct a course of action, these directives should not be part of the model if Ireland incorporates a counseling provision. A counseling provision, while far from ideal, may ease some of the sting for Irish society. However, any counseling provision must have a neutrality caveat attached to it to ensure the information provided is purely informative as well as responsive to the individual’s particular concerns. In a country as Catholic as Ireland, it is likely that in the absence of such a neutrality law, any counseling provision would

237 FERREE, supra note 11, at 42.
238 Id. at 43.
239 See Telman, supra note 236, at 146.
240 FERREE, supra note 11, at 42.
promote traditional Catholic values, and in doing so run afoul of the same problem as the German law.

If Ireland adopts the German counseling model, Ireland should retain the requirement that each session is recorded, but the woman’s identity is not disclosed. If a content requirement is set so that the counseling must only provide information on options available to the women regarding both terminating the pregnancy and retaining the child, and the reports are reviewed by both a government body and a non-governmental organization, the counseling provision would be a positive addition to the Irish law as proposed here. These reports should be included in the four year reports to CEDAW, and subsequently evaluated by the Committee in order to determine if Ireland is meeting its requirements to allow women to decide freely on the number and spacing of their children.\footnote{See CEDAW, supra note 83.}

A counseling period is necessary in Ireland, at least at the outset, in order to appease conservative Catholics that may feel women are entering into such a monumental decision without proper thought. Although a counseling provision is not indicative of progressive women’s rights and has been criticized for “undercut[ting] any real acknowledgement of self-determination” for women, it is a necessary concession to political realism.\footnote{See Telman, supra note 236, at 146.}

It is also crucial that Ireland feel international pressure to change its laws. While some scholars feel that Ireland responds more robustly to internal, as opposed to external, pressure, if the government were judged on an international
stage, it may goad them into taking more progressive measures.\textsuperscript{243} Ireland had only recently regained any kind of prominence in the collective international consciousness with the emergence of the Celtic Tiger, but its current financial and social difficulties have completely eclipsed that progress.\textsuperscript{244} Ireland cannot afford international shunning, and if abortion rights are not modified in a progressive manner, it may face exactly that.

**CONCLUSION**

In summary, Ireland must, in accordance with its international obligation under \textit{A, B, and C v. Ireland} as well as its promises in response to the death of Savita Halappanavar, liberalize its abortion laws.\textsuperscript{245} Although it is unrealistic to expect Ireland to mimic abortion laws that are entirely on demand, a blending of the Portuguese and German provisions as discussed here may provide a compromise that protects the rights of women while staying faithful to the traditional sense of morality that dominates Irish society. Clarifications must be made for doctors as well, and any new law that is enacted must have an emergency provision that a doctor cannot opt-out of. The current state of the law cannot be allowed to stand. Perhaps in the wake of the tragic death of Savita Halappanavar, Ireland, both the government and its people, can come together to produce the necessary changes that will ensure no woman ever suffers the same fate.

\textsuperscript{243} See Jeffrey A. Weisnstein, \textit{“An Irish Solution to an Irish Problem”: Ireland’s Struggle With Abortion Law}, 10 ARIZ. J. INT’L & COMP. L. 165, 195 (1993) (referring to domestic public outrage over \textit{Attorney General v. X} that resulted in the institutionalized right of women to travel for abortions and governmental fear that the Maastricht treaty may be rejected because of domestic anti-abortion sentiments resulted in a referendum and Protocol 17 to the Maastricht Treaty).

\textsuperscript{244} \textit{The Celtic Tiger}, CBS (Feb. 11, 2009), http://www.cbsnews.com/2100-500164_162-256404.html (referring to the fact that in 2009, Ireland had Europe’s fastest growing economy).

\textsuperscript{245} Jauregui, \textit{supra} note 227.