

4-1-1995

# The Abortion Controversy in the Republic of Ireland and Northern Ireland and Its Potential Effect on Unification

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## Recommended Citation

J. Scott Tiedemann, *The Abortion Controversy in the Republic of Ireland and Northern Ireland and Its Potential Effect on Unification*, 17  
Loy. L.A. Int'l & Comp. L. Rev. 737 (1995).

Available at: <http://digitalcommons.lmu.edu/ilr/vol17/iss3/8>

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# THE ABORTION CONTROVERSY IN THE REPUBLIC OF IRELAND AND NORTHERN IRELAND AND ITS POTENTIAL EFFECT ON UNIFICATION

## I. INTRODUCTION

Events since 1993 have dramatically increased chances for the eventual unification of Ireland.<sup>1</sup> Whether unification ultimately occurs, however, depends on the majority consent of the people of Northern Ireland.<sup>2</sup> Furthermore, certain divisive issues may derail the unification process altogether unless they are defused. Abortion is such an issue.<sup>3</sup>

The abortion issue is attracting substantial attention in Northern Ireland and the Republic of Ireland as both debate the extent to which abortion should be legally available. The debate has strengthened the perception in Northern Ireland, particularly among Protestants, that differences between Northern Ireland and the Republic of Ireland are irreconcilable. Protestants, who comprise the majority of the population in Northern Ireland, are

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1. Three specific events had the greatest impact on the chances for unification. First, on December 19, 1993, Ireland's Taoiseach, Albert Reynolds, and Britain's Prime Minister, John Major, issued the Downing Street Declaration in which they jointly acknowledged that "the most urgent and important issue facing the people of Ireland, North and South, and the British and Irish Governments together is to remove the causes of conflict, to overcome the legacy of history and to heal the divisions which have resulted . . ." John Major & Albert Reynolds, *Ulster Declaration*, DAILY TELEGRAPH, Dec. 16, 1993, at 5.

Second, in 1994, both the Irish Republican Army and its Protestant rival, the Ulster Freedom Fighters, agreed to put down their weapons to facilitate peaceful negotiations about the fate of Northern Ireland. William E. Schmidt, *Cease-Fire In Northern Ireland: The Overview*, N.Y. TIMES, Sept. 1, 1994, at A21.

Finally, and perhaps most importantly, in February 1995, the United Kingdom and the Republic of Ireland reached agreement on the Framework Document, which restored home rule to Northern Ireland and provided for increased involvement by the Republic of Ireland in the governing of Northern Ireland. James F. Clarity, *Britain and Ireland Issue A Plan For Full Talks on Ulster*, N.Y. TIMES, Feb. 23, 1995, at A3.

2. See *infra* notes 53-54 and the accompanying text for a discussion of the agreement between the Republic of Ireland and Britain requiring majority support for unification in Northern Ireland before unification can occur.

3. A recent article in the *Irish Times* suggested, for example, that acceptance of the Framework Document in Northern Ireland would depend in large part upon the abortion issue. Dick Grogan, *Two Main Modes of Thought Among NI Protestants on Framework Document*, IR. TIMES, Feb. 25, 1995, at 6.

aware that unification will relegate them to minority status.<sup>4</sup> The virtual ban on abortion in the Republic of Ireland powerfully symbolizes to Protestants in Northern Ireland the potential loss of rights they will suffer if unification occurs.

David Trimble, a prominent member of Parliament from Northern Ireland, recently voiced his constituents' concerns respecting unification:

A united Ireland could only be achieved through coercion. Why would we want to be part of the most theocratic state this side of Tehran? The health service is run by the Church so women can't get contraception or have abortions. I don't want the ways of a foreign country imposed on me.<sup>5</sup>

To an extent, Trimble correctly asserts that abortion law in the Republic of Ireland is very strict. Although for many years abortion was illegal under any circumstances in the Republic of Ireland,<sup>6</sup> in 1992 the Irish Supreme Court held that abortion is legal in certain limited circumstances.<sup>7</sup> Practically speaking, however, it is still impossible to have an abortion in the Republic

4. According to a recent article in *The Independent*, an English newspaper:

A source of great Unionist insecurity has always been that, while they constituted a majority in Northern Ireland, they were, and are, very much in a minority on the island of Ireland as a whole. This is why the border and the 'constitutional problem' are so important to Unionists: having for years been steeped in majoritarianism, they fear that removing the border would leave them as an impotent minority subject to anti-Protestant discrimination.

David McKittrick, *Unionists Fear Minority Status In A Republic Of 32 Counties*, THE INDEPENDENT, Sept. 2, 1994, at 3. A more sarcastic opinion piece was published in the *Irish Times*:

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 the Boyne - the right to think for yourself, the right not to be dominated by a foreign church - doesn't work down there.

Fintan O'Toole, *Let Us Now Bravely Bury The Rome Rule Slogan*, IR. TIMES, Oct. 14, 1994, at 14.

5. Charlotte O'Sullivan, *The People's Parliament: Should The Two Ireland's Be United*, THE OBSERVER, Oct. 2, 1994, at 24.

6. According to respected Irish historian Joseph Lee, even before the Irish Constitution was amended in 1983 to constitutionalize the right to life of the unborn, abortion was, for all practical purposes, already illegal in Ireland. J.J. LEE, IRELAND: 1912-1985, at 653 (1989). The amendment to the Irish Constitution appeared to cement that notion. Furthermore, according to James Casey, even though the Constitution requires due regard be given to the life of the other, the decisions of the Irish Supreme Court have historically tended to "accord the right to life of the unborn a more fundamental status" than warranted. JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND, at 314 (1987).

7. Attorney General v. X, 1 I.R. 1 (1992).

of Ireland because physicians and nurses are prohibited from performing abortions by their respective ethics codes.<sup>8</sup> No reported lawful abortions have been performed in Ireland since 1992.<sup>9</sup>

To the extent that Trimble asserts that abortion law in Northern Ireland is any less strict than abortion law in the Republic of Ireland, however, he is mistaken. Yet, Trimble's views respecting abortion are widely accepted by people in Northern Ireland.<sup>10</sup> Northern Ireland's abortion laws, in fact, are exceptionally strict. In Northern Ireland, abortion is available pursuant to the Offences Against the Person Act of 1861 ("O.A.P.A.")<sup>11</sup> and the Criminal Justice Act of 1945 ("C.J.A.")<sup>12</sup> Like the Republic of Ireland, it is impossible in practice to obtain a legal abortion in Northern Ireland. Uncertainty as to when abortion is legal under the O.A.P.A. and the C.J.A. has led doctors to refuse to perform abortions in order to protect themselves against possible criminal prosecution.<sup>13</sup> As a result, some judges,<sup>14</sup> members of the medical community,<sup>15</sup> and a small segment of the population<sup>16</sup> support adoption of the 1967 Abortion Act, a more coherent and lenient abortion law that applies to England and Wales.<sup>17</sup>

This Comment explores abortion law in the Republic of Ireland and Northern Ireland and discovers that the laws in both countries are very strict. Nevertheless, Northern Ireland's citizens generally believe that abortion laws in the Republic of Ireland are more restrictive than those in their own country. This Comment suggests that that misconception already has and will continue to

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8. Kate O'Callaghan, *Ireland's Other Troubles*, L.A. TIMES MAG., Jan. 3, 1993, at 22.

9. Geraldine Kennedy, *Two Years On, Consequences of X Case Still Remain Unresolved*, IR. TIMES, June 3, 1994, at 8.

10. O'Sullivan, *supra* note 5, at 24.

11. 24 & 25 Vict., ch. 100, §§ 58-59 (Eng.).

12. Criminal Justice Act, 1945, ch. 15, § 25 (N. Ir.).

13. Suzanne Breen, *Uncertainty of North's Abortion Laws*, IR. TIMES, Nov. 14, 1994, at 13.

14. Northern Health and Social Services Board v. AMNH, (Fam. Div. Jan. 21, 1994)(LEXIS, Nilaw Library, Cases File).

15. *Obstetricians Seek Abortion Law Change*, IR. TIMES, Aug. 23, 1994, at 4.

16. Gerrard McCarthy, *More Support Legalised Abortion- Poll*, PRESS ASSOC. NEWS FILE, available in LEXIS, News Library, Non-US File.

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

negatively impact cultivation of majority support in Northern Ireland for unification.

First, this Comment provides a general background about Irish unification. It explains the status of Northern Ireland within the United Kingdom and also outlines the conditions under which unification can occur pursuant to the Anglo-Irish Agreement<sup>18</sup> of 1985 and the Framework Document of 1995. Second, this Comment compares abortion law in Northern Ireland to abortion law in the Republic of Ireland. Third, it discusses reasons why the abortion issue is potentially an obstacle to unification. Finally, this Comment concludes that abortion law in the Republic of Ireland and Northern Ireland must be harmonized if the abortion issue is to be removed as an obstacle to unification efforts.

## II. BACKGROUND

### A. *Two Irelands*

#### 1. The Republic of Ireland

In 1801, the whole island of Ireland was made part of the United Kingdom of Britain and Ireland.<sup>19</sup> In 1920, however, Ireland was divided into two parts, north and south, by British Parliament at Westminster.<sup>20</sup> The next year, dominion status, similar to that bestowed on Canada, was conferred upon the southern portion of Ireland, which became known as the Irish Free State.<sup>21</sup> Finally, in 1949, the Irish Free State achieved full independence and became the Republic of Ireland.<sup>22</sup> The Repub-

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18. Agreement on Northern Ireland, Nov. 15, 1985, Ir.-U.K., 24 I.L.M. 1582.

19. MAURICE IRVINE, *NORTHERN IRELAND: FAITH AND FACTION* 35 (1991). The United Kingdom involved itself in governing Ireland long before 1801. Ireland was conquered by Oliver Cromwell, for example, in 1641; however, Catholics were restored to power by King James II shortly thereafter. TOM WILSON, *ULSTER: CONFLICT AND CONSENT* 14 (1989). Again, in 1689, Ireland was conquered when Protestant William of Orange defeated Catholic King James II at the Battle of the Boyne. Peter Byrd, *Northern Ireland*, in *POLITICAL ISSUES IN BRITAIN TODAY* 275 (Bill Jones ed. 1989). For the next century, Ireland was governed indirectly by Britain through Anglo-Irish "collaborators". *Id.*

20. LEE, *supra* note 6, at 7.

21. *Id.* at 50.

22. Byrd, *supra* note 19, at 277.

lic of Ireland, in contrast to largely Protestant Northern Ireland, is predominantly Roman Catholic.<sup>23</sup>

Although the Republic of Ireland has not been part of the United Kingdom for approximately forty-five years, it should be noted that some laws passed by British Parliament at Westminster while Ireland was part of the United Kingdom continue to be applicable in the Republic of Ireland. Most importantly, the O.A.P.A., passed in 1861, remains in effect in the Republic of Ireland.<sup>24</sup>

## 2. Northern Ireland

In contrast to the Republic of Ireland, Northern Ireland remains part of the United Kingdom. It consists of the six northernmost counties in Ireland, known collectively as Ulster. Although the demographics of Northern Ireland are somewhat in flux, Protestants represent a significant majority of the population.<sup>25</sup>

Since partition in 1920, Northern Ireland has occupied a peculiar status within the United Kingdom. Between 1920 and 1972, Northern Ireland was ruled directly by the Northern Ireland Parliament at Stormont.<sup>26</sup> Only matters involving the armed forces, external trade, weights and measures, and copyright law were regulated by the Parliament at Westminster in England.<sup>27</sup> During that period, therefore, abortion was regulated by the Northern Ireland Parliament, not the Parliament at Westminster.

In 1972, power was restored to the Parliament at Westminster after sectarian riots between Protestants and Catholics ravaged Northern Ireland.<sup>28</sup> Northern Ireland was subsequently administered by the United Kingdom Government through the Northern

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23. Approximately 92% of the population is Roman Catholic. Richard Conniff, *Ireland On Fast-Forward*, NAT'L GEOGRAPHIC, Sept. 1994, at 24.

24. *Attorney General v. X*, 1 I.R. 1 (1992).

25. Mark Brennock, *The Numbers Game Pushes the Notion of Majority Rule into a Grey Area*, IR. TIMES, Nov. 14, 1992, at 11. Ulster is the historical site of Protestant "plantation". Both King Henry VIII and, later, Queen Elizabeth I had mandated Protestantism as the religion of the realm. DONALD P. DOUMITT, *CONFLICT IN NORTHERN IRELAND* 25 (1985). At the dawn of the seventeenth century, therefore, the English government tried to establish Protestant control of Ireland by confiscating land in Ulster and planting it with English and Scottish Protestants. IRVINE, *supra* note 19, at 2.

26. BRICE DICKSON, *THE LEGAL SYSTEM OF NORTHERN IRELAND* 4 (1993).

27. *Id.*

28. *Id.*

Ireland Office, headed by the Secretary of State for Northern Ireland.<sup>29</sup> Between 1972 and 1995, therefore, abortion was regulated by Parliament at Westminster.

In 1995, however, the Republic of Ireland and the United Kingdom agreed to the Framework Document, which provides that a new parliament will be established in Northern Ireland. The express purpose of reestablishing a democratically elected parliament in Northern Ireland is "to enable elected representative in Northern Ireland to exercise shared administrative and legislative control over all those matters that can be agreed across both communities [Catholic and Protestant] and which can most effectively and appropriately be dealt with at that level."<sup>30</sup> Although the Framework Document is vague as to what powers will be vested in the new Parliament, it does state that the British and Irish governments "strongly favour and will support provision for cross-community consensus in relation to decisions affecting the basic rights, concerns and fundamental interests of both communities . . . ."<sup>31</sup> Hence, it seems likely that abortion in Northern Ireland will be regulated in the future by the new Northern Ireland legislature.

As a result of Northern Ireland's peculiar status within the United Kingdom, there are multiple sources of abortion legislation in Northern Ireland. Legislation regulating abortion passed by British Parliament prior to 1920, like the O.A.P.A., is still applicable in Northern Ireland.<sup>32</sup> Abortion legislation passed between 1920 and 1927 by the Northern Ireland Parliament, like the C.J.A., is also applicable.<sup>33</sup>

### *B. Unification By Majority Consent*

Until 1995, when Irish leaders agreed to relinquish any claims to Northern Ireland, the reunification of Ireland had been an express objective of the Republic of Ireland irrespective of whether the majority in Northern Ireland were amenable to the notion of a united Ireland. Article 2 of the Irish Constitution long described the national territory as consisting of "the whole island

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29. *Id.*

30. Framework Document, Feb. 22, 1995, U.K.-Ir., ¶ 13(a).

31. *Id.* ¶ 22.

32. DICKSON, *supra* note 26, at 49.

33. *Id.*

of Ireland, its islands and the territorial seas.”<sup>34</sup> Article 3, furthermore, expressly reserved the right of the Republic of Ireland to govern the whole island.<sup>35</sup>

In 1985, the Republic of Ireland and the United Kingdom signed an historic treaty, known as the Anglo-Irish Agreement (“A.I.A.”),<sup>36</sup> which established the requisite circumstances for the unification of Ireland. Most importantly, Article 1(a) of the A.I.A. provides that any change in the status of Northern Ireland, meaning unification, can only occur by “consent of a majority of the people of Northern Ireland.”<sup>37</sup> Furthermore, if the majority of people in Northern Ireland “clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective parliaments legislation to give effect to that wish.”<sup>38</sup>

Aside from establishing the legal framework for unification, the A.I.A. also created the basis for cooperation between the United Kingdom and the Republic of Ireland on certain matters affecting Northern Ireland. Article 2 establishes an Intergovernmental Conference to deal with political matters, security, legal matters, and the promotion of cross-border cooperation.<sup>39</sup> Article 2 also gives the Republic of Ireland a voice in the administration of Northern Ireland. Specifically, Article 2(b) provides that “the United Kingdom Government accept that the Irish Government will put forward views and proposals on matters relating to Northern Ireland within the field of activity of the conference . . . .”<sup>40</sup>

Significantly, the A.I.A. also calls for cooperation in the area of criminal law. Article 8 states that, “[t]he Conference shall deal with issues of concern to both countries relating to the criminal law. In particular it shall consider whether there are areas of the

34. IR. CONST. art. 2.

35. Article 3 of the Irish Constitution states:

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.

*Id.* art. 3.

36. Agreement on Northern Ireland, Nov. 15, 1985, Ir.-U.K., 24 I.L.M. 1582.

37. *Id.* at 1583.

38. *Id.*

39. *Id.* at 1583-84.

40. *Id.* at 1584.



criminal law applying in the North and in the South respectively which might with benefit be harmonised."<sup>41</sup> Article 8, therefore, leaves open the possibility that abortion law, an area of criminal law in Northern Ireland and the Republic of Ireland, can be harmonized.

Protestants in Northern Ireland heavily criticized the A.I.A. An opinion poll taken in 1985 indicated that only eight percent of Protestants in Northern Ireland supported the A.I.A.<sup>42</sup> Protestants felt betrayed by the treaty because Great Britain had arguably compromised on the status of Northern Ireland as a permanent part of the United Kingdom.<sup>43</sup> In fact, when Unionist demands for a referendum on the Agreement were denied, all fifteen Unionist members of Parliament resigned.<sup>44</sup> The Reverend Ian Paisley, leader of the Unionists, a party known for its hard-line opposition to unification, and a member of Parliament, told his congregation, "[r]ight now, we hand Mrs. Thatcher over to the devil that she might learn not to blaspheme."<sup>45</sup>

Despite the objections of Unionists in Northern Ireland, the cooperation between Britain and the Republic of Ireland has continued. In December 1993, British Prime Minister John Major and Irish Taoiseach Albert Reynolds issued the joint Ulster Declaration. The Ulster Declaration invited the IRA and militant Unionists to the bargaining table on the condition that they cease their para-military activities.<sup>46</sup>

Both governments reinforced that unification can only occur by majority consent of the people of Northern Ireland. The Declaration states that, "[t]he Prime Minister, on behalf of the British Government, reaffirms that they will uphold the democratic wish of a greater number of people of Northern Ireland on the issue of whether they prefer to support the Union or a sovereign, united Ireland."<sup>47</sup> Furthermore, Mr. Reynolds conceded that "it would be wrong to attempt to impose a united Ireland, in the

41. *Id.* at 1587.

42. WILSON, *supra* note 19, at 8.

43. *Id.*; Brendan O'Leary, *Northern Ireland and The Anglo-Irish Agreement*, in 3 DEVELOPMENTS IN BRITISH POLITICS 269, 271 (Patrick Dunleavy et al. eds, 1990).

44. Byrd, *supra* note 19, at 294.

45. Tyler Marshall, *Rhetoric, Legacy of Strife Mark Ulster's Bible Belt*, L.A. TIMES, Nov. 25, 1985, at A1.

46. Major & Reynolds, *supra* note 1, at 5.

47. *Id.*

absence of the freely given consent of a majority of the people of Northern Ireland . . . .”<sup>48</sup> Importantly, Mr. Reynolds recognized that the Republic of Ireland must demonstrate a willingness to compromise on divisive issues.<sup>49</sup> Mr. Reynolds’ remarks have been interpreted as a thinly veiled reference to the importance of the abortion controversy in the minds of the people of Northern Ireland.<sup>50</sup>

In 1995, as this Comment was about to go to press, the British and Irish governments reached agreement on the Framework Document, which both governments agreed “sets out a realistic and balanced framework for agreement which could be achieved, with flexibility and goodwill on all sides, in comprehensive negotiations with the relevant political parties.”<sup>51</sup> In the Framework Document, the Irish government agreed to “introduce and support proposals for change in the Irish Constitution,” to “fully reflect the principle of consent in Northern Ireland and demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted.”<sup>52</sup> The British Government also restated its commitment to respect the wishes of the majority of people in Northern Ireland to remain part of the United Kingdom or to be unified with the Republic of Ireland.<sup>53</sup>

Like the A.I.A., the Framework Document is devoted, to a large extent, to the establishment of a cross-border political institution where leaders from the Republic of Ireland and Northern Ireland can meet on a regular basis to “discharge or oversee delegated executive harmonising or consultative functions, as appropriate, over a range of matters which the two Governments designate in the first instance in agreement with the parties or which the two administrations, North and South, subsequently agree to designate.”<sup>54</sup> Importantly, the Framework Document suggests that this new institution will work to establish common

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48. *Id.*

49. *Id.*

50. William Tuohy, *Britain, Ireland Agree On Ulster Peace Document*, L.A. TIMES, Dec. 16, 1993, at A1.

51. Framework Document, Feb. 22, 1995, Ir.-U.K., ¶ 8.

52. *Id.* ¶ 21.

53. *Id.* ¶ 9.

54. *Id.* ¶ 25.

policy on various matters, including health and social welfare.<sup>55</sup> Therefore, the Framework Document further opens the door to the possible harmonization of abortion law in Northern Ireland and the Republic of Ireland.

In sum, it has been the consistent stance of the British and Irish governments that unification can only occur if the majority of the people in Northern Ireland consent to it. In the meantime, a framework for discussion of issues and policy coordination between Northern Ireland and the Republic of Ireland has been established pursuant to the A.I.A. and, more recently, the Framework Document.

### III. ABORTION LAW ANALYSIS

#### A. *Abortion Law In Northern Ireland*

Until 1967, abortion was illegal under most circumstances throughout the United Kingdom. Until then, abortion law was supplied by the Offences Against The Person Act of 1861 ("O.A.P.A.")<sup>56</sup> and the Infant Life Protection Act of 1929 ("I.L.P.A.")<sup>57</sup>. In 1967, however, Parliament passed the Abortion Act of 1967 ("A.A.")<sup>58</sup>. Although the A.A. greatly expands the right of women to obtain abortions, it does not apply to Northern Ireland.<sup>59</sup> Presently, the O.A.P.A. and the Criminal Justice (Northern Ireland) Act of 1945 ("C.J.A.")<sup>60</sup> govern the right of women to have abortions in Northern Ireland.

#### 1. The Offences Against The Person Act of 1861

The relevant provisions of the O.A.P.A. for the purposes of this Comment are contained in sections 58 and 59. Section 58 applies both to women who have abortions and to individuals who perform abortions. Section 58 provides:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any

55. *Id.* ¶ 32.

56. 24 & 25 Vict., ch. 100 (Eng.).

57. 19 & 20 Geo. 5, ch. 34 (Eng.).

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

59. *Id.* § 7(3). Abortion law in the United Kingdom, with the noted exception of Northern Ireland, is presently supplied by the O.A.P.A., I.L.P.A., and the A.A.

60. Criminal Justice Act, 1945, ch. 15, § 25 (N. Ir.).

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 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.<sup>61</sup>

Under section 58, therefore, a woman is criminally liable if she intentionally has an unlawful abortion. A person is also criminally liable under section 58 for intentionally performing an unlawful abortion.

Section 59 applies to persons who supply the instruments necessary to perform an abortion. Specifically, section 59 provides:

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.<sup>62</sup>

Similar to Section 58, therefore, a person who supplies the instruments to perform an abortion is guilty of a criminal offense if that person knowingly delivers the instruments to an individual who intends to perform an unlawful abortion.

## 2. The Criminal Justice (Northern Ireland) Act of 1945

The O.A.P.A., by itself, protects the child only as long as the child is still in the mother's womb. This fact gives rise to a peculiar defense. "[A] defence could be made out to a charge of procuring a miscarriage [under the O.A.P.A.] on the ground that the child had already carried, while a defence to a charge of murder or infanticide could rest on the claim that the child was not an independent being."<sup>63</sup>

As a result, the O.A.P.A. was supplemented by the I.L.P.A. in 1929. Although the I.L.P.A. did not apply to Northern

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61. 24 & 25 Vict., ch. 100, § 58 (Eng.).

62. *Id.* § 59.

63. *In re an Application by K (a Minor)*, (Fam. Div. Oct. 14, 1993) (LEXIS, Nilaw Library, Cases File).

Ireland,<sup>64</sup> Northern Ireland's Parliament passed the C.J.A., which is identical to the I.L.P.A., in 1945. Specifically, the C.J.A. was expected to protect children from being killed *at birth* while they were still attached to the umbilical cord but outside of the womb.<sup>65</sup> Therefore, Section 25(1) provides:

Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child then capable of being born alive, by any willful act causes a child to die *before it has an existence independent of its mother*, shall be guilty of a felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life . . .<sup>66</sup>

Thus, under the C.J.A., an abortion is unlawful if the child is capable of being born alive at the time the abortion is to be performed. Furthermore, section 25(2) provides that evidence that a mother was pregnant for a period of twenty-eight weeks or more is *prima facie* evidence that the child was capable of being born alive.<sup>67</sup> The C.J.A. also contains an important exception. Under the C.J.A., an abortion is lawful despite the fact that the child is capable of being born alive as long as the abortion is performed in good faith for the purpose of preserving the mother's life.<sup>68</sup>

Together, the O.A.P.A. and the C.J.A. can create substantial confusion. First, under the O.A.P.A., criminal liability hinges upon whether an abortion is "unlawful." Yet, the O.A.P.A. did not establish what constitutes an unlawful, as opposed to lawful, abortion. Likewise, the C.J.A. creates an exception to criminal liability in cases where an abortion is performed in good faith for the sole purpose of "preserving the life of the mother". But, the C.J.A. does not set forth criteria for determining when an abortion is necessary to preserve the life of the mother.

### 3. The King v. Bourne

In 1938, nearly thirty years before the passage of the Abortion Act of 1967, English physicians operated under a set of laws that were identical to the laws that are presently in effect in Northern

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64. 19 & 20 Geo. 5, ch. 34, § 3(2) (Eng.).

65. *In re an Application by K (a Minor)*, (Fam. Div. Oct. 14, 1993) (LEXIS, Nilaw Library, Cases File).

66. Criminal Justice Act, 1945, ch. 15, § 25(1) (Eng.) (emphasis added).

67. *Id.* § 25(2).

68. *Id.* § 25(1).

Ireland. As a result, the same level of confusion that exists among physicians in Northern Ireland today as a result of inherent ambiguities in the applicable laws also existed among English physicians.

That year, a distinguished English gynecologist and member of the medico-legal council of the Abortion Law Reform Society ("A.L.R.S.") named Dr. Aleck Bourne took it upon himself to challenge the abortion law in England in order to clarify what constituted a legal abortion under the O.A.P.A. and the I.L.P.A.<sup>69</sup> On April 27, 1938, a fellow member of the A.L.R.S. contacted Dr. Bourne about performing an abortion<sup>70</sup> for a fourteen-year-old girl who had been raped by five members of the Royal Horse Guards.<sup>71</sup> Dr. Bourne responded:

I shall be delighted to take her in at St. Mary's and curette her. I have done that before and shall not have the slightest hesitation in doing it again. I have said that the next time I have the opportunity I will write to the Attorney-General and invite him to take action.<sup>72</sup>

Dr. Bourne observed the girl for a week and subsequently performed the abortion at St. Mary's Hospital in London when the girl was seven weeks pregnant.<sup>73</sup> After performing the abortion, Dr. Bourne instructed the police officer who came to prevent the abortion to arrest him.<sup>74</sup> Dr. Bourne was arrested and charged with performing an unlawful abortion under section 58 of the O.A.P.A.<sup>75</sup>

In *Bourne*, the defense argued that the abortion was lawful, and therefore not punishable under the O.A.P.A.<sup>76</sup> Dr. Bourne testified accordingly that "[i]n his opinion the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious as to justify the removal of the pregnancy . . . ."<sup>77</sup> Dr. Bourne further testified that his decision to operate was based

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69. JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW* 49 (1988).

70. *Id.*

71. Valentine Low, *The Rape that Really Changed Our Minds About Abortion*, *EVE. STANDARD*, Feb. 28, 1992, at 20.

72. KEOWN, *supra* note 69, at 49.

73. *Id.*

74. *Id.*

75. *The King v. Bourne*, 1 K.B. 687 (1938).

76. *Id.*

77. *Id.* at 688-89.

mainly on the threat of "mental and nervous" injury to the girl. The substance of his testimony was confirmed by Dr. Rees, another eminent physician.<sup>78</sup>

Judge MacNaghten's instructions to the jury in the *Bourne* case explain what constitutes an unlawful abortion under the O.A.P.A. According to MacNaghten, the O.A.P.A.'s ban on unlawful abortions must be read in light of the I.L.P.A.<sup>79</sup> Thus, MacNaghten told the jury: "the burden rests on the Crown to satisfy you beyond a reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life."<sup>80</sup>

MacNaghten's jury instructions also explain when an abortion is deemed necessary to preserve the life of the mother. The question was particularly important in *Bourne* because the Attorney General argued that the abortion was not necessary to preserve the life of the mother since the pregnancy had only posed a threat of mental injury.<sup>81</sup>

Nevertheless, MacNaghten told the jury that the law did not require that the abortion be performed to save the mother from immediate death. Rather, he told the jury:

if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the pregnancy will be to make the woman a *physical or mental wreck*, the jury are quite entitled to take the view that the doctor who, under the circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.<sup>82</sup>

Dr. Bourne was acquitted.<sup>83</sup>

78. *Id.* at 694.

79. Specifically, MacNaghten told the jury:

In my opinion the word 'unlawfully' is not, in that section [Section 58 of the O.A.P.A.] a meaningless word. I think it imports the meaning expressed by the proviso in s[ection] 1, sub[s]ection] 1, of the Infant Life (Preservation) Act, 1929, and that s[ection] 58 of the Offences Against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso.

*Id.* at 691.

80. *The King v. Bourne*, 1 K.B. at 691

81. *Id.* at 692.

82. *Id.* at 694 (emphasis added).

83. It may be interesting to note that the English public emphatically supported Dr. Bourne. When the verdict was announced in court, ushers were unable to quell the outburst of applause. At the British Medical Association Conference taking place that

The *Bourne* decision is important to this discussion for two reasons. First, MacNaghten's instructions to the jury shed some light on the question as to what constitutes an unlawful abortion under the O.A.P.A. Second, MacNaghten's instructions to the jury carved out an important exception to the prohibition on abortion such that an abortion can lawfully be performed if the pregnancy threatens either physical *or* mental injury to the mother. In fact, it has been argued that the *Bourne* decision permitted an exception to be made in some cases for therapeutic abortion.<sup>84</sup>

Significantly, the *Bourne* decision was a lower court decision from England that was not binding on courts in Northern Ireland.<sup>85</sup> Until 1994, therefore, the questions answered by *Bourne* remained unanswered in Northern Ireland. Professor William Thompson of Queen's University in Belfast has summed up the confusion among Northern Ireland physicians when faced with the question whether to perform an abortion: "Every time you carry out an abortion, you are left wondering whether you are going to get arrested for it."<sup>86</sup>

#### 4. In re an Application by K

In 1993, new life was breathed into *Bourne* and Judge MacNaghten's jury instructions suddenly became relevant to the interpretation of abortion law in Northern Ireland. That year, Justice Sheil held in *In re an Application by K (a Minor)* that "the law in Northern Ireland relating to abortion is to be found in the Offences Against the Person Act 1861, [sections] 58 and 59, and in the charge to the jury of MacNaghten J in *R v Bourne*."<sup>87</sup>

*In re an Application by K* involved a fourteen-year-old girl who became pregnant after she had sex with an unknown individual in a Belfast disco.<sup>88</sup> Her guardian ad litem, the Northern Health and Social Services Board, sought a court order

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day, doctors allegedly stood on their chairs and cheered. Also, crowds cheered Dr. Bourne as he left the court. Low, *supra* note 71, at 20.

84. KEOWN, *supra* note 69, at 52.

85. Courts in England and Northern Ireland operate in separate jurisdictions and thus are not technically bound by each other's decisions. For a discussion of the doctrine of precedent in relation to Northern Ireland, see DICKSON, *supra* note 26, at 66-69.

86. Breen, *supra* note 13, at 13.

87. *In re an Application by K (a Minor)*, (Fam. Div. Oct. 14, 1993) (LEXIS, Nilaw Library, Cases File).

88. *Id.*



permitting the girl to have an abortion.<sup>89</sup> The girl's mother opposed the abortion, although the mother had not seen or talked to the girl in years.

After she was told that she was pregnant, the girl threatened to commit suicide unless she was allowed to have an abortion or to kill her baby if the pregnancy was carried to full term.<sup>90</sup> The girl said to a child psychiatrist who was examining her, "I want rid of it; I will kill myself if it grows."<sup>91</sup> The girl underscored her threats by punching herself in the stomach to induce a miscarriage as well as "inflict[ing] some superficial cuts to her left wrist with a piece of broken mirror glass."<sup>92</sup>

After determining that an abortion was in K's best interest,<sup>93</sup> Justice Sheil held that K could lawfully have an abortion because "to allow the pregnancy to continue to full term would result in her [K] being a physical and mental wreck."<sup>94</sup> Yet, no physicians could be found to perform the abortion even though the court had said that it would be lawful to do so. Justice Sheil stated:

Unfortunately due to what is perceived . . . as uncertainty in the law relating to abortion in Northern Ireland, no surgeon can be found in this jurisdiction who is prepared to carry out the operation. . . . [F]urther I am informed . . . that their attitude will remain the same even in the event of this court declaring the proposed operation to be lawful according to the law in Northern Ireland. . . . It will now be necessary for her to travel to Liverpool tomorrow . . . .<sup>95</sup>

##### 5. Northern Health and Social Services Board

In 1994, Lord Justice MacDermott confirmed Justice Sheil's conclusions regarding abortion law in Northern Ireland in *Northern Health and Social Services Board v. AMNH*.<sup>96</sup> Lord Justice MacDermott stated:

89. *Id.*

90. *Id.*

91. *Id.*

92. *In re an Application by K (a Minor)*, (Fam. Div. Oct. 14, 1993) (LEXIS, Nilaw Library, Cases File).

93. Since K was a minor, the court was required to decide "whether it would be in the interests of her welfare that it [the abortion] should be carried out." *Id.*

94. *Id.*

95. *Id.*

96. *Northern Health and Social Serv. Bd. v. AMNH* (Fam. Div. Jan. 21, 1994)(LEXIS, Nilaw Library, Cases File).

As Sheil J pointed out . . . in Northern Ireland the relevant legislation is the Offences Against The Person Act 1861 and, put shortly, sections 58 and 59 prohibit the doing of acts to procure a miscarriage. Those sections have to read along with section 25(1) of the Criminal Justice (Northern Ireland) Act 1945 . . . .<sup>97</sup>

*Northern Health and Social Services Board* involved a twenty-four year old woman who was "severely mentally handicapped" and who was also in her tenth week of pregnancy as a result of being raped.<sup>98</sup> The Northern Health and Services Board brought an application seeking a declaration that it would be lawful for a medical team to perform an abortion on the young woman.

A psychiatrist who examined the young woman concluded that her "general mental health would be adversely affected by continuing with the present pregnancy [and that] she will experience physical and emotional changes as the pregnancy proceeds. . . . I would have grave doubts as to her ability to cope with such changes."<sup>99</sup> Furthermore, the young woman expressed a desire to "step under a car" if she was not allowed to have an abortion.

Lord Justice MacDermott clarified the test to be applied in abortion cases in Northern Ireland.<sup>100</sup> He communicated some dissatisfaction with the test that permits an abortion to be performed if the pregnancy will cause the woman to be a physical or mental wreck, indicating that it is "lacking in precision."<sup>101</sup> According to MacDermott, the language in the C.J.A. does not require the pregnancy to threaten the mother with immediate death. Rather, he stated that "[l]ife in this context means the physical or mental health and well being of the mother and the doctor's act is lawful where the continuance of the pregnancy would adversely affect the mental or physical health of the mother."<sup>102</sup> Furthermore, "the adverse effect must . . . be a real and serious one and it will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Northern Health and Social Serv. Bd. v. AMNH (Fam. Div. Jan. 21, 1994)*(LEXIS, Nilaw Library, Cases File).

102. *Id.*

grave to warrant terminating the unborn child."<sup>103</sup> Because the pregnancy would adversely affect her mental health, MacDermott held that the young woman could lawfully have an abortion under the O.A.P.A.<sup>104</sup>

Nevertheless, doctors still face substantial uncertainty when deciding whether to perform an abortion. After all, the test remains one of "fact and degree." Furthermore, the two cases decided by Northern Ireland courts that have declared that abortions could lawfully be performed involved a fourteen year old ward of the court<sup>105</sup> and a mentally-handicapped rape victim.<sup>106</sup> Clearly, the vast majority of women seeking abortions will not fall into either of these two cases.

A woman may not simply declare herself a mental wreck and automatically be entitled to receive a legal abortion. As a result, physicians will still be required to make a decision whether the threat to a woman's health is sufficient to warrant an abortion. Therefore, physicians must still worry whether a court will decide that the threat was not serious enough.<sup>107</sup> Such uncertainty led Lord Justice MacDermott to preface his holding in *Northern Health Services* with the comment: "The Abortion Act [of] 1967 may have its faults but it presents a much more coherent and understandable position than that which continues to prevail in this jurisdiction."<sup>108</sup>

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103. *Id.*

104. *Id.*

105. *In re an Application by K (a Minor)*, (Fam. Div. Oct. 14, 1993) (LEXIS, Nilaw Library, Cases File).

106. *Northern Health and Social Serv. Bd. v. AMNH* (Fam. Div. Jan. 21, 1994)(LEXIS, Nilaw library, Cases File).

107. The medical community has responded to limited case law by adopting an extremely cautious approach to making abortion-related decisions. A set of guidelines has been published to help physicians protect themselves from legal liability. First, doctors are urged to be cautious in their attitude toward abortion, especially where no medical emergencies exist. Second, physicians are encouraged to obtain a second opinion from a consultant gynecologist. Third, the guidelines suggest that all abortions should be performed in a government hospital. Finally, the guidelines advise physicians not to charge a fee for performing an abortion. "If these suggestions are followed," the guidelines state, "it is very unlikely that the good faith of a doctor terminating a pregnancy would be questioned or legal action taken against him under the Act." THE NORTHERN IRELAND ABORTION REFORM ASSOC., ABORTION IN NORTHERN IRELAND: THE REPORT OF AN INTERNATIONAL TRIBUNAL 67-68 (1989).

108. *Northern Health and Social Serv. Bd. v. AMNH* (Fam. Div. Jan. 21, 1994)(LEXIS, Nilaw Library, Cases File).

In summary, an abortion is only legal in Northern Ireland if the pregnancy poses a real and serious threat to the physical or mental health of the mother. Because physicians are afraid to perform abortions in Northern Ireland, however, women have to travel to England to receive abortions.

### B. Abortion Law in the Republic of Ireland

#### 1. Pre-1983

As mentioned, the O.A.P.A. continued to apply to the Republic of Ireland, even after partition occurred in 1920; however, the I.L.P.A., passed nine years after partition, did not apply. Thus, what constituted an unlawful abortion in the United Kingdom in light of the *Bourne* decision did not necessarily constitute an unlawful abortion in the Republic of Ireland. Prior to 1983, it was generally thought that the right to life of the unborn was protected pursuant to Article 40.3.1 of the Constitution which provides: "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."<sup>109</sup>

In *McGee v. Attorney General*,<sup>110</sup> the Irish Supreme Court considered for the first time, albeit indirectly, the constitutional right to life with reference to the unborn child. Justice Walsh stated:

Any action on the part of either the husband or the wife of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.<sup>111</sup>

Conservatives in the Republic of Ireland, however, feared that *McGee*, which recognized the constitutional right to privacy in Ireland, had done more to erode the right to life of the unborn than to protect it. Their fears were premised on legal developments in the United States around the same time. In 1965, the United States Supreme Court held that a state statute denying married people access to contraceptives was unconstitutional.<sup>112</sup>

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109. IR. CONST. art 40.3.

110. 1974 I.R. 284.

111. *Id.* at 312.

112. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In 1973, the United States Supreme Court went further and invalidated certain statutory restrictions on abortion.<sup>113</sup> Opponents of abortion in the Republic of Ireland feared that a similar development might take place in Ireland if the right of privacy recognized in *McGee* was developed to invalidate sections 58 and 59 of the O.A.P.A.<sup>114</sup>

## 2. The 1983 Abortion Referendum: Constitutionalizing The Right to Life of The Unborn

The public concern that arose after *McGee* culminated in the abortion referendum of 1983, which sought to expressly constitutionalize the right to life of the unborn and to guarantee that abortion would continue to be illegal under any circumstances. According to J.J. Lee, the abortion referendum was:

not *de facto* about abortion at all. Abortion was already illegal. The vast majority of Irish Catholics were clearly and adamantly opposed to it. There was no likelihood of its introduction in the foreseeable future as a result of public demand. But it was not explicitly prohibited in the constitution. It was therefore possible to envisage that court decisions might effectively legalise it, even in the face of a hostile public opinion.<sup>115</sup>

The referendum passed. As a result, Article 40.3.3 was added to the Irish Constitution. It provides:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.<sup>116</sup>

## 3. Attorney General v. X: The Introduction Of Legalized Abortion

In 1992, *Attorney General v. X*<sup>117</sup> became “the most dramatic—and most celebrated—case in the entire history of Irish Constitutional law.”<sup>118</sup> The case challenged the assumption that

113. See *Roe v. Wade*, 410 U.S. 113 (1973).

114. JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 313 (1987).

115. LEE, *supra* note 6, at 653.

116. IR. CONST. art 40.3.3.

117. 1 I.R. 1 (1992).

118. Gerard Hogan, *Ireland*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD at v, vii (Albert P. Blaustein & Gisbert H. Flanz eds., 1994).

abortion was illegal under any circumstances in the Republic of Ireland.<sup>119</sup>

*Attorney General v. X* involved a fourteen-year-old girl who became pregnant after she was raped by her friend's father in December 1991.<sup>120</sup> The girl was understandably distraught and expressed a desire to throw herself downstairs.<sup>121</sup> Her family decided that it was in her best interest, therefore, to send her to England to receive an abortion.<sup>122</sup> Her parents subsequently informed the police of their plan and also inquired about the feasibility of performing scientific tests on the aborted fetus to determine the identity of the father.<sup>123</sup>

The police next sought a legal opinion from the Director of Public Prosecutions as to whether such evidence would be admissible in court.<sup>124</sup> The Director of Public Prosecution informed the Attorney General of the family's decision to send the girl to England for an abortion.<sup>125</sup> Upon receiving that information, the Attorney General applied and received an interim injunction from the High Court restraining the girl and her parents from leaving Ireland and from arranging for or carrying out an abortion.<sup>126</sup>

The girl and her parents had already traveled to England when the interim order was granted, but they voluntarily returned home.<sup>127</sup> On the journey back to Ireland, the girl told her mother that she had wanted to throw herself under a train when they were in London. The day after arriving home in Ireland, the girl was examined by a "very experienced clinical psychologist".<sup>128</sup> The psychologist concluded that the girl had become emotionally withdrawn and that she coldly expressed a desire to

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119. The case also raised issues concerning the jurisdiction of the Courts to protect the right to life of the unborn when faced with the absence of legislation, the powers of the Attorney General, and the right to travel under European Community law. *Id.* at 10-16. The only issue important to this Comment, however, is the extent to which abortions may legally be performed in the Republic of Ireland.

120. *Attorney General v. X*, 1 I.R. 1 (1992).

121. *Id.* at 6.

122. *Id.* at 1.

123. *Id.*

124. *Id.*

125. *Attorney General v. X*, 1 I.R. 1 (1992).

126. *Id.*

127. *Id.* at 1.

128. *Id.* at 8.

kill herself. According to the psychologist, "in her withdrawn state 'she was capable of such an act, not so much because she is depressed but because she could calculatingly reach the conclusion that death is the best solution.'"<sup>129</sup>

A full hearing on the merits was held in the High Court before Justice Costello. Justice Costello acknowledged that the Eighth Amendment required him to "assess by reference to the evidence the danger to the life of the child and the danger that exists to the life of the mother."<sup>130</sup> He concluded that the risk that the girl would commit suicide was "much less and is of a different order of magnitude than the certainty of the life of the unborn . . . ." <sup>131</sup> Hence, the court issued a permanent order prohibiting the girl from traveling to England to receive an abortion as well as from having an abortion in Ireland.<sup>132</sup>

The family immediately appealed the decision to the Irish Supreme Court.<sup>133</sup> Chief Justice Finlay, writing for the majority, agreed that the Eighth Amendment required the Court to consider the "constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well."<sup>134</sup>

The key was to establish the appropriate test for balancing the interests of the mother and the unborn child. The Attorney General submitted that the test should be whether the pregnancy

129. *Id.*

130. *Attorney General v. X*, 1 I.R. 1, 12 (1992).

131. *Id.*

132. The order stated:

**IT IS ORDERED**

(a) That the defendants their servants or agents or anyone having knowledge of the order be restrained from interfering with the right to life of the unborn as contained in Article 40, s. 3, subs. 3 of the Constitution of Ireland;

(b) that the first defendant be restrained from leaving the jurisdiction of this Honourable Court or the second and third named defendants their servants or agents or anyone having knowledge of the said order from assisting the first defendant to leave aforesaid jurisdiction for a period of nine months from the date hereof;

(c) that the first defendant her servants or agents or anyone having knowledge of the said order be restrained from procuring or arranging a termination of pregnancy or abortion either within or without the jurisdiction of the Honourable Court.

*Id.* at 42.

133. *Id.*

134. *Id.*

poses an inevitable death to the mother.<sup>135</sup> In contrast, the family submitted that the test should be whether the continuation of the life of the unborn child constituted a real and substantial risk to the life of the mother.<sup>136</sup> The Chief Justice determined that the test proposed on behalf of the Attorney General “insufficiently vindicates the mother’s right to life.”<sup>137</sup>

Thus, Chief Justice Finlay stated the test to be applied as follows:

[I]f it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible having regard to the true interpretation of Article 40.3.3 of the Constitution.<sup>138</sup>

Next, the Court had to determine whether the girl had satisfied the test thus set forth. The Court acknowledged that “the only risk put forward . . . to the life of the mother is the risk of self destruction.”<sup>139</sup> Unlike the High Court, the Supreme Court believed “it is common sense that a threat of self-destruction . . . cannot be monitored in that sense and it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide.”<sup>140</sup>

The major difference between abortion laws in the Republic of Ireland and Northern Ireland, therefore, is that in the Republic of Ireland, an abortion can only be lawfully performed if the life of the mother is threatened by the pregnancy. In Northern Ireland, in contrast, the pregnancy need not threaten the life of the mother so long as the pregnancy will likely cause substantial injury to the mother’s physical or mental health.

Despite the fact that abortion is now legal in some instances in the Republic of Ireland, the medical community in the Republic of Ireland, similar to the medical community in Northern Ireland, has proven unwilling to carry out abortions. In fact, no legal abortions have been performed in the three years since *Attorney*

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135. *Attorney General v. X*, 1 I.R. 1, 49 (1992).

136. *Id.* at 48.

137. *Id.* at 53.

138. *Id.* at 54-55.

139. *Id.* at 55.

140. *Attorney General v. X*, 1 I.R. 1, 55.



*General v. X* was decided in 1992.<sup>141</sup> This situation is due in large part to ethical guidelines published by the Medical Council in 1992:

The Medical Council, having consulted with specialists whose medical practice impinges upon this issue and having considered all possible clinical situations (Appendix I) is of the opinion that there is no clinical situation judged on its individual merits where abortion will, as a matter of probability, remove a real and substantial risk to the life of the mother.<sup>142</sup>

Though substantial uncertainty exists as to the meaning, a departure from its principles may leave a doctor open to charges of medical misconduct and liable to be struck off the medical register.<sup>143</sup>

#### IV. THE BASIS FOR OPPOSITION TO UNIFICATION

Thus far, this Comment has discussed the misconception that a disparity exists between abortion laws in Northern Ireland and the Republic of Ireland and has also explained the abortion law in both places. Nevertheless, to understand why the abortion issue is such a large barrier to unification, it is necessary to understand the basis for Protestant opposition to unification. This part of the Comment considers why people in Northern Ireland, the majority of whom are Protestant, oppose unification.

There is substantial debate as to whether the basis of Protestant opposition is religious, nationalistic, or economic.<sup>144</sup> Yet, irrespective of what label is put on it, the single most important source of Protestant opposition to unification is the fact that, if unification takes place, Protestants will lose their majority status. Protestants equate the loss of their majority status with the loss of their culture and the loss of liberty at the hands of the Catholic majority.<sup>145</sup>

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141. Kennedy, *supra* note 9, at 8.

142. *Id.*

143. *Id.*

144. See generally Byrd, *supra* note 19, at 275.

145. The Republic of Ireland is clearly more secular than it has been in the past, but most northern Protestants still believe otherwise. Kevin Cullen, *The Troubles With Ireland*, BOSTON GLOBE, Mar. 20, 1994, at 68. After talking with Protestant pub goers in Belfast, for example, an English journalist concluded that the two most common arguments against unification were the Republic's troubled economy and its restrictions on abortion and contraception. Peter Millar, *Let's Drink To Some Political Realism*, THE TIMES (London), Dec. 5, 1993, available in LEXIS, News Library, Non-US File.

Most Protestants, whether they agree with the extremists like Reverend Paisley or not, resist unification primarily because much legislation in the Republic of Ireland, including abortion law, reflects the overwhelming Catholic character of the Republic of Ireland.<sup>146</sup> A recent study showed that Protestants in Northern Ireland were diverse in many aspects including religious denomination and political affiliation.<sup>147</sup> The study revealed that despite the diversity that characterizes the Protestant community in Northern Ireland, "by far the greatest source of objection identified by 60 percent of our church goers was the all-pervasive influence that the Roman Catholic Church would exert in an all-Ireland state."<sup>148</sup>

Protestants in Northern Ireland are acutely aware of politics in the Republic of Ireland.<sup>149</sup> Few issues in Irish society, furthermore, have attracted the level of attention that the abortion issue

Current opposition to unification is closely connected both in time and in substance to Protestant opposition to 'Home Rule' in the nineteenth and early twentieth centuries. 'Home Rule' meant that Ireland was governed by an Irish Parliament rather than by British Parliament at Westminster. Of course, that meant that Catholics constituted an overwhelming majority in Irish Parliament. The arguments raised by Protestant leaders in opposition to 'Home Rule' are strikingly similar to the arguments that are raised against unification now. Maurice Irvine attributes Protestant opposition to Home Rule, above all else, to Protestant determination to maintain majority status and to Protestant fear of becoming a minority "in what their eyes would be a Roman Catholic state; their values, their property, their welfare, their liberties, even their lives would, they believed, be in jeopardy. IRVINE, *supra* note 19, at 137. The rhetoric of Protestant leadership at the time bolsters Irvine's argument. Reverend Dr. Patterson, for instance, told his congregation in 1913 that "under home rule the Pope would be Ireland's ruler and king, for his word was law." LEE, *supra* note 6, at 9.

Certain issues, furthermore, reinforced Protestant fears. In 1910, for example, a Belfast Catholic named McCann deserted his Protestant wife and took his children with him. This occurred just two years after the Catholic Church reintroduced the *Ne Temere* decree, which provided that if a Roman Catholic wished to marry a non-Catholic, he or she would have to obtain a special dispensation from the bishop, which would only be granted if the non-Catholic party agreed that the children would be raised in the Catholic tradition. IRVINE, *supra* note 19, at 152. The McCann case proved to the Protestant in the street how much influence the Catholic Church would have over their lives if Home Rule were instituted. LEE, *supra* note 6, at 11.

146. WILSON, *supra* note 19, at 208. Some critics now argue that the Protestant perspective is outdated and that the Republic of Ireland is no longer dominated by the Catholic Church to the extent that it was in the past. See, e.g., Terence Brown, *Faith In A Free State*, THE GUARDIAN, May 27, 1994, at 22.

147. Fred Boal et al., *The Protestant mosaic: a majority of minorities, in THE NORTHERN IRELAND QUESTION: MYTH AND REALITY* 99-129 (Patrick J. Roche & Brian Barton eds., 1991).

148. *Id.* at 125.

149. *Northern Ireland: Will It Ever Find Peace*, NAT'L GEOGRAPHIC, Sept. 1994, at 32.

has attracted during the 1980's and 1990's. The controversy over abortion law in the Republic of Ireland, consequently, takes on added importance in the greater context of the unification question.<sup>150</sup> For example, the conservative response of the Irish electorate to the abortion issue during the 1980's communicated to Protestants in Northern Ireland an unwillingness to compromise on fundamental issues on which the two communities disagreed.<sup>151</sup> In addition, the fact that the Attorney General sought and received an injunction to prevent a fourteen-year-old rape victim from traveling to England for an abortion, gave "fresh currency" to Protestant perceptions of Catholic dominance in the Republic of Ireland.<sup>152</sup> Hence, the abortion debate has led the Protestant community in Northern Ireland to question whether the rights of Protestants will be protected in a united Irish state.

Opposition to unification, furthermore, is not unique to the Protestant community. Opposition among Roman Catholics is also becoming increasingly relevant to the unification question. Recent census surveys indicate that the Catholic population in Northern Ireland has grown such that the gap between the Protestant and Catholics in Northern Ireland is substantially smaller than it used to be.<sup>153</sup> It remains questionable, however, whether the Catholic population could attain majority status, particularly in light of statistics that show higher birth rates among Protestants as compared to Catholics.<sup>154</sup> Interestingly, the Catholic community in Northern Ireland is divided on the unification question. "Castle Catholics," as they are mockingly called by Catholic nationalists who support unification,<sup>155</sup> share the concerns of the Protestant

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150. An interesting parallel to the situation in Ireland is presented by the situation in recently-unified Germany. The abortion issue was one of the stumbling blocks in the unification process in Germany. East Germans, consequently, were angered when Germany's highest court overturned a liberal abortion law in 1993. *Abortion Ruling Irks East Germans*, ST. LOUIS DISPATCH, May 29, 1993, at 1B.

151. John Whyte, *Dynamics Of Change In Northern Ireland*, in NORTHERN IRELAND AND THE POLITICS OF RECONCILIATION 103-16 (Dermot Keogh & Michael H. Haltzel eds., 1993).

152. Owen Bowcott, *Rape Victim's Case Stirs Unionist Fears*, THE GUARDIAN, Feb. 20, 1992, at 10.

153. O'Leary, *supra* note 43. See also Owen Bowcott & Stephen Bates, *Reynolds Not Seeking All-Ireland Poll*, THE GUARDIAN, Dec. 6, 1993, at 2.

154. See generally James Anderson & Ian Shuttleworth, *Letter To The Editor, The Numbers Game*, IR. TIMES, Sept. 15, 1994, at 5.

155. David Sharrock, *Media: The Young Controller*, THE GUARDIAN, Nov. 14, 1994, at T14.

majority regarding the domination of the Catholic Church and the loss of rights that would accompany unification. One Catholic woman poignantly remarked that “[i]n Ireland, you hear the Angelus twice a day on TV, divorce and abortion are illegal, and that worries me.”<sup>156</sup> The existence of “Castle Catholics” belies the assumption that if Catholics attain majority status in Northern Ireland sometime in the future that unification will automatically be supported by the majority of the population. Rather, there is a strong possibility that the majority of people in Northern Ireland will still oppose unification on the basis that the Republic of Ireland is dominated by the Roman Catholic Church.<sup>157</sup>

## V. CONCLUSION

The difference between abortion law in Northern Ireland and the Republic of Ireland is a significant obstacle on the path to unification. Clearly, more than the abortion issue stands in the way of unification. But, few issues are as controversial or as important to the citizens of Northern Ireland, Catholics and Protestants, as the abortion issue. Pub-goers and politicians alike point to the restrictiveness of abortion law in the Republic of Ireland when asked to justify their staunch opposition unification.<sup>158</sup>

Therefore, leaders from the United Kingdom and the Republic of Ireland must give due regard to the potency of the abortion issue and realize its potential to effect the unification process. The United Kingdom and the Republic of Ireland have taken significant steps towards establishing permanent peace in the region which can lead to the eventual unification of Ireland. A next important step must be to open dialogue about the abortion issue as a means of demonstrating to the people of Northern Ireland how much Northern Ireland holds in common with the Republic of Ireland on the abortion issue.

Likewise, the unilateral modification of abortion law in either the Republic of Ireland or Northern Ireland should be avoided.

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156. Stephane Barbier, *Patricia, A Catholic Who Understands Unionists Is Happy In Belfast*, AGENCY FRANCE PRESSE, Sept. 13, 1994, available in LEXIS, News Library, Non-US File.

157. In fact, Protestant leadership claims that the overwhelming majority of people in Northern Ireland, Protestant and Catholic, oppose unification. See *Major Gets Commons Support*, IR. TIMES, Dec. 16, 1993, at 11.

158. Millar, *supra* note 145.

If the abortion laws of Northern Ireland are liberalized<sup>159</sup> or, conversely, if abortion law in the Republic of Ireland is made more conservative,<sup>160</sup> such changes will lend credibility to the anti-unification rhetoric of leaders like David Trimble. But, if unilateral change is avoided, the abortion issue presents an opportunity for Northern Ireland and the Republic of Ireland to find common ground if public perception in Northern Ireland can be changed.<sup>161</sup>

Rather than tackle the abortion issue individually, therefore, the respective governments should work together to formulate an answer to the abortion issue in both Northern Ireland and the Republic of Ireland that addresses the concerns of constituents on both sides of the border. Representatives from the Republic of Ireland and Northern Ireland have more in common on the abortion issue than they think.

J. Scott Tiedemann\*

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159. In Northern Ireland, there is small but increasing support for adoption of the 1967 Abortion Act, which makes abortion lawful under a wider set of circumstances. Northern Health and Social Serv. Bd. v. AMNH (Fam. Div. Jan. 21, 1994)(LEXIS, Nilaw Library, Cases File). Recent cases such as *In re an Application by K* and *Northern Health Services* have drawn added attention to the confusion that surrounds Northern Ireland's abortion law and have increased the likelihood that the law will be challenged on the basis that it violates human rights. Gerry Moriarty, *Review of NI's Lethal Force Law Urged*, IR. TIMES, July 2, 1993, at 4.

160. In the Republic of Ireland, a new government was put in place at the end of 1994 under the fledgling leadership of John Bruton. It is widely accepted that the last government dropped the ball on the abortion issue, having failed to introduce any legislation since *Attorney General v. X* and the abortion referendums in 1992, and that the new government has a responsibility to address the issue. It is difficult to tell which direction any changes might take in light of the changing values of the Irish people. Conniff, *supra* note 23, at 12.

161. It is interesting to note that hard-line Protestants and Catholics, often the most unbending proponents of unionism and republicanism respectively, have found common ground in protesting counseling centers in Northern Ireland that provide contraceptives to young people. "We all think that the bottom line is that it's an attempt to bring in abortion by the back door. That's what supporters of Brook [the organization that runs the centers] want, because most of them are pro-abortion." David McKittrick, *Moral Issues Bridge The Religious Divide*, THE INDEPENDENT, Sept. 12, 1991, at 5.

\* I thank my mom, my dad, and my brother for their love and encouragement every step of the way. I also thank my dad for the countless hours he has spent teaching me to write. Finally, I am especially grateful to Erika for all of her love, patience, and support.