Europe in need of a new deal

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ARTICLES

THE EUROPEAN COURT OF HUMAN RIGHTS, THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE RIGHT TO ABORTION: *ROE V. WADE* ON THE OTHER SIDE OF THE ATLANTIC?

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This Article analyzes the legal regulation of abortion within the context of Europe's multilevel system for the protection of fundamental rights. The Article examines the constitutional dynamics and challenges that emerge in the field of abortion law from the overlap between national and supranational norms in Europe, comparing the European multilevel architecture with the United States (U.S.) federal system. To this end, the Article summarizes the main trends in the regulation of

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abortion in the various European Union ("EU") countries, assesses the growing impact of the EU and the European Convention on Human Rights in the field of abortion law, and emphasizes how supranational law generates new pressures and creates several inconsistencies within the domestic legal systems of those states which restrict abortion rights. It then explores how analogous dynamics have historically been at play in the U.S. federal system. Finally, the Article evaluates—in light of the U.S. experience—the potential consequences upon the European abortion regime of the most recent developments in the European Court of Human Rights case law and the entry into force of the EU Charter of Fundamental Rights via the Lisbon reform Treaty.

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I. INTRODUCTION

Abortion laws in Europe and the United States (U.S.) have increasingly converged throughout the last thirty years. In the early

1980s, the refrain among many comparative lawyers was that, among Western countries, the U.S. stood alone in recognizing a broad individual right to the voluntary interruption of pregnancy. Conversely, most European states subjected abortion to stricter regulations or prohibited it *tout court*.[1] Already during the mid-1990s, however, scholars emphasized that the U.S. was retreating from its earlier, very liberal position, by permitting states to restrict a woman's right to an abortion.[2] Simultaneously, European countries were widening the conditions under which women could choose whether to terminate their pregnancies, often under the pressures of the rising supranational laws.[3]

An assessment of the abortion laws on each side of the Atlantic at the end of the 2010s highlights an even clearer pattern of convergence. In the U.S., the federal government[4] and many state legislatures have enacted laws that further constrain a woman's access to an abortion.[5] These measures have gradually pushed back the time period during which a woman can obtain an abortion, from the end of her second trimester to somewhere closer to the end of her first trimester.[6] Moreover, a bill enacted in March 2011 by the state of South Dakota[7]

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[1] *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10–50 (1987). *See also* Marie-Thérèse Meulders-Klein, *Vie privée, vie familiale et droits de l'homme*, 44 REVUE INTERNATIONALE DE DROIT COMPARE 767, 767 (1992).

[2] *See* LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 197 (1990); MARK TUSHNET, ABORTION: CONSTITUTIONAL ISSUES 115 (1996).

[3] *See* David Cole, *"Going to England": Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113, 114–15 (1994); Rick Lawson, *The Irish Abortion Cases: European Limits to National Sovereignty?*, 1 EUR. J. OF HEALTH LAW 167, 167–83 (1994).

[4] *See infra* text accompanying notes 289–94.

[5] *See* Eric Eckholm, *Across Country, Lawmakers Push Abortion Curbs*, N.Y. TIMES, Jan. 22, 2011, at A1.

[6] *See* David Garrow, *Significant Risks:* Gonzales v Carhart *and the Future of Abortion Law*, SUP. CT. REV. 1, 46 (2008) (arguing that in the long run "the hypothesis that federal constitutional protection [of abortion] will eventually recede toward an end-of-the-first-trimester benchmark, after which any legal abortion will require case-by-case medical review and approval, remains the historical best guess as to how the controversy will reach stasis").

[7] *See* H.B. 1217, 86th Sess. (S.D. 2011) ("An Act to establish certain legislative findings pertaining to the decision of a pregnant mother considering termination of her relationship with her child by an abortion, to establish certain procedures to better insure that such decisions are voluntary, uncoerced, and

has introduced a system of mandatory counseling for the first time in the U.S., which is not dissimilar from that in effect in several European states. The bill states that women seeking abortions in South Dakota must first participate in a directed consultation at a pro-life pregnancy center.[8]

Meanwhile, a number of Member States in the European Union ("EU") have liberalized their abortion legislations over the last few years.[9] In addition, the strictest abortion bans have come under the scrutiny of the European supranational courts. In a landmark ruling, *A., B. & C. v. Ireland*,[10] decided in December 2010, the European Court of Human Rights ("ECtHR") found that Ireland, the country in the EU with perhaps the most restrictive prohibition on abortion,[11] had violated the European Convention on Human Rights ("ECHR") by failing to provide accessible and effective procedural mechanisms by which a woman could establish her fundamental right to a lawful abortion when her life was in peril due to her pregnancy.[12] The ruling generated widespread public reaction,[13] and the resulting dialogue on the most appropriate way of complying with the ECtHR's decision played a major role in the ensuing Irish electoral debate.[14]

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informed, and to revise certain causes of action for professional negligence relating to performance of an abortion").

[8] *See* A.G. Sulzberger, *Women Seeking Abortions in South Dakota to Get Anti-Abortion Advice*, N.Y. TIMES, Mar. 23, 2011, at A16 (arguing that the law enacted on March 22, 2011 in South Dakota "makes the state the first [in the U.S.] to require women who are seeking abortions to first attend a consultation").

[9] *See infra* text accompanying notes 25–39.

[10] *A., B. & C. v.* Ireland, App. No. 25579/05, [2010] Eur. Ct. H.R. 2032, *available at* http://www.echr.coe.int.

[11] *See infra* text accompanying notes 102–113.

[12] *See* Convention on the Protection of Human Rights and Fundamental Freedoms, Counc. Eur., Nov. 11, 1950, CETS No. 5 [hereinafter ECHR]; *see also* Carl O'Brien & Harry McGee, *Irish Abortion Laws Breach Human Rights, Court Rules*, IRISH TIMES, Dec. 16, 2010.

[13] *See* Aoife Carr, *Anti Abortion Group Calls for Referendum*, IRISH TIMES, Dec. 17, 2010; Kitty Holland, *Judgment 'A Landmark for Irish Women,'* IRISH TIMES, Dec. 17, 2010.

[14] *See* Paul Cullen & Carl O'Brien, *Abortion Becomes Election Issue After Court Ruling*, IRISH TIMES, Dec. 17, 2010. As the February 25, 2011, election date neared, the debate about the economy and the grave crisis that had hit Ireland took the front lines. The issue of abortion and how to implement the ECtHR ruling was addressed in the manifestos of all political parties and was soon tackled by the new government. On June 16, 2011, the Department of Health released an action plan for

The purpose of this Article is to compare the constitutional dynamics at play in the field of abortion law in the U.S. federal and European multilevel constitutional systems. Other works already deal with the similarities and differences between the U.S. and European approaches to the complex questions raised by abortion.[15] These scholarly assessments, however, usually compare European countries individually with the U.S. When these assessments consider the jurisprudence of supranational jurisdictions (such as the ECtHR or the EU Court of Justice (ECJ)), it is mainly to better explain the internal legal framework of a specific European state.

In this Article, I plan to take into account the European system *as a whole*. The European system, in fact, can be described as a multilevel constitutional architecture in which national, supranational (EU) and international (ECHR) laws intertwine.[16] The pluralist nature of the European constitutional architecture is particularly evident in the field of fundamental rights. Each of the three layers comprising the European structure is endowed with norms and institutions for the protection of human rights that overlap and interact with one another.[17] The dominant perception among European constitutional lawyers is that the European multilevel system is a *sui generis*

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the implementation of the judgment. In this plan, the Government *inter alia* committed to establish an Expert Group by November 2011, which would be charged with making recommendations on how to properly address the matter. Press Release, Dep't of Health, Action Plan Regarding A., B. and C. v. Ireland (Dec. 16, 2010), *available at* http://www.dohc.ie/press/releases/2011/20110616.html?lang=en.

[15] For a comparison of abortion law and politics in the U.S. and a selected number of European countries, see MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW (1979); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1, 1–140 (1999); Machteld Nijsten, Abortion and Constitutional Law: A Comparative European-American Study (unpublished Ph.D. 1990).

[16] On the concept of multi-level constitutionalism, see the works of Ingolf Pernice: *Multilevel Constitutionalism and the Treaty of Amsterdam*, 36 COMMON MARKET L. REV. 703 (1999); *Multilevel Constitutionalism in the European Union*, 27 EUROPEAN L. REV. 511 (2002); *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349 (2009).

[17] On the pluralist European architecture for the protection of fundamental rights, see Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action, in* SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003); Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 EUROPEAN CONST. L. REV. 5 (2009); AIDA TORRES PÉREZ, CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION (2009).

architecture. However, as I have argued elsewhere,[18] the European constitutional system for the protection of fundamental rights can be meaningfully compared with other federal arrangements and can be better understood when compared as such.

Therefore, this Article analyzes the ways in which the complex interactions among national and transnational norms and institutions in Europe affect abortion law by comparing the European multilevel architecture to the U.S. federal system. In particular, the Article claims that, whereas several differences exist in the regulation of abortion among the EU Member States, the growing impact of EU and ECHR law has generated new pressures and challenges in the domestic legal systems that restrict abortion. Consequently, a number of tensions and inconsistencies currently characterize the European abortion regime. As the comparative assessment of the U.S. constitutional experience emphasizes, however, analogous constitutional dynamics have also been at play in the U.S. system because of the interplay between state and federal rules.

Abortion regulations among the states have varied greatly in the U.S. Since the 1970s, the federal judiciary has recognized that the U.S. Constitution protects a woman's right to choose whether to terminate her pregnancy. This recognition established a more consistent framework for the protection of abortion. At the same time, no uniform, federal abortion law exists in the U.S. because the states are relatively autonomous in regulating pregnancy and other family law issues. Using the U.S. experience as a comparative tool, this Article examines whether a similar development is foreseeable in Europe, with the recognition of a transnational minimum standard for the protection of abortion rights, which can be integrated or superseded, but not lowered by domestic rules. Hence, the Article considers the recent decision of the ECtHR in the case *A., B. & C. v. Ireland*, as well as the potential impact of the entry into force of the EU Lisbon Treaty and its binding Charter of Fundamental Rights.

In comparing the peculiar dynamics that characterize the regulation and protection of abortion rights in pluralist, heterarchical constitutional arrangements like the European multilevel architecture

[18] Federico Fabbrini, *The European Multilevel System of Fundamental Rights Protection: A 'Neo-Federalist' Perspective*, JEAN MONNET WORKING PAPER No. 15 (2010), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/10/101501.pdf.

and the U.S. federal system, this Article's aim is primarily analytical.[19] My goal is to underline, from a descriptive point of view, how comparable constitutional challenges arise from the two systems, rather than to advocate, from a prescriptive point of view, the migration of constitutional solutions from one system to the other.[20] The U.S. example is used as a *mirror* to better appreciate the complexities and tensions that are at play in the European framework of abortion laws—not as a *model* that should be imported into the European context.

The Article proceeds as follows Section 1 summarizes EU Member States' abortion laws. Section 2 describes the growing influence that the EU and the ECHR exercise upon domestic abortion laws and highlights the challenges and tensions that emerge from this overlap. Section 3 argues that these inconsistencies are neither unique nor exceptional and explains how comparable dynamics have also been at play in the U.S. federal system. Section 4 analyzes the recent decision of the ECtHR in *A., B. & C. v. Ireland* and evaluates its implication for the protection of abortion rights in Europe. Finally, Section 5 assesses the impact of the entry into force of the Lisbon Treaty and discusses the potential role of the EU Charter of Fundamental Rights in the review of domestic abortion laws.

Before getting started, I believe a final warning is in order: I am aware that when dealing with a controversial topic such as abortion, it is difficult for an author to resist the influence of his or her personal conceptions regarding the serious moral questions at the core of abortion issues. From this point of view, the very fact that I formulate the issue as a "woman's right to an abortion" will reveal my inclination towards a more liberal position, which supports the

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[19] On the concept of constitutional heterarchy as the descriptive model of both the U.S. and the EU constitutional arrangements, see Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 326 (Jeffrey Dunoff & Joel Trachtman eds., 2009).

[20] On the potential of comparative constitutional law in fostering the migration of constitutional models and ideas, see Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 13–16 (Sujit Choudhry ed., 2006).

protection of abortion[21]—a position with which pro-life advocates would certainly disagree. Having revealed my subjective viewpoint on the moral issue presented, I have sought to adopt, throughout my assessment, an analytical stance, which will use a comparative methodology to explore the complex constitutional phenomena characterizing the European abortion regime for what they are, rather than for what they should be.

In the concluding part of the Article, however, I will abandon analytical neutrality and advance what is a normative argument in favor of greater protection for abortion rights at the supranational level in Europe. In a nutshell, I will emphasize how the existence in some EU states of strict criminal bans on abortion, coupled with the possibility for pregnant women to escape the prohibition by travelling to another EU state where abortion is permitted, has discriminatory effects upon well-off and low-income women, raising serious questions of equality. In discussing the future alternative scenarios for the European abortion regime, therefore, I will suggest that the creation of a system of soft pluralism, with stricter review of domestic abortion laws to ensure their conformity with transnational human rights standards, is an advisable option in the EU.

II. STATES' ABORTION LAWS

Abortion law in Europe is quite diversified.[22] A plurality of the EU Member States recognizes, in a more or less liberal fashion, a right—based mostly on statutory law—for a pregnant woman to have an abortion within a certain number of weeks from the inception of pregnancy. In several states, however, abortion is not regarded as a woman's right; rather, it is only permitted under certain conditions and

[21] For a classical liberal argument in favour of a woman's right to choose whether to seek an abortion, see generally RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM (1994).

[22] For an overview of abortion regulation in the EU Member States, see generally Caroline Forder, *Abortion: A Constitutional Problem in European Perspective*, 1 MAASTRICHT J. EUR. & COMP. L. 56 (1994); ALBIN ESER & HANS-GEORG KOCH, ABORTION AND THE LAW: FROM INTERNATIONAL COMPARISON TO LEGAL POLICY (2005). For a summary of abortion legislation in Europe in 2009, see International Planned Parenthood Federation (IPPF), ABORTION LEGISLATION IN EUROPE, INTERNATIONAL PLANNED PARENTHOOD FEDERATION (2009), *available at* http://www.ippfen.org/en/Resources/Publications/Abortion+Legislation+in+Europe.htm.

pursuant to specific procedures, which often include mandated medical advice and counseling sessions. In addition, some EU Member States still have extremely restrictive abortion laws, which criminalize all forms of abortion, except when deemed necessary to save the life or protect the health of the pregnant woman from severe injury.

Criminal bans on abortions appeared in the statute books of European states during the nineteenth century, originally to protect the life of women because, because medical techniques for abortion were then not considered sufficiently reliable to prevent endangering the health of the women.[23] Over time, however, these measures began to serve the purpose of safeguarding a traditional concept of the family and morals.[24] This view largely survived the enactment of post-World War II liberal Constitutions. Since the 1960s, however, social and political pressures to reform criminal bans on abortion began to rise in many countries of Western Europe.[25] Starting with the United Kingdom (U.K.), which legalized abortion in 1967,[26] measures legalizing or decriminalizing abortion were successfully enacted in a few years in Scandinavia, Austria,[27] France,[28] West Germany,[29] Italy,[30] and the Netherlands.[31]

A second wave of reforms then took place between the late 1980s and 1990s in Belgium,[32] and—after the transition to democracy—in Greece[33] and Spain.[34] The collapse of the Soviet block, where

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[23] *See* ESER & KOCH, *supra* note 22, at 19

[24] *Id*. at 31.

[25] *See* Rebecca Cook & Bernard Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 3, 4–7 (2003).

[26] *See infra* text accompanying notes 45–54.

[27] Cf. Bundesgesetzblatt [BGBL], No. 60/1974, von 23 (Austria). The Act, which amended the *Strafgesetzbuch* [Criminal Code] was upheld by the *Verfassungsgerichthof* in its decision of 11 October 1974, VfGH 7400 - JBL 1974.

[28] *See infra* text accompanying notes 64–70.

[29] *See infra* text accompanying notes 83–85.

[30] *See infra* text accompanying notes 55–58.

[31] Joyce Outshoorn, *Policy-Making on Abortion: Arenas, Actors and Arguments in the Netherland, in* ABORTION POLITICS 205, 206 (Dorothy McBride Stetson ed., 2003).

[32] *See* Perrine Humblet et al., *Developments in Abortion Policy in a Context of Illegality: The Belgian Case from 1971 until 1990*, 6 EUR. J. OF PUB. HEALTH 288 (1995).

[33] *See* Nomos (1978: 821) (Greece)

abortion was already lawful, also prompted some of the new democracies of Central and Eastern Europe to enact legislation re-affirming the legality of abortion.[35] In the aftermath of unification, Germany revised its abortion legislation, harmonizing the (more restrictive) Western and (more liberal) Eastern German abortion laws.[36] In the last decade, liberal abortion legislation has been adopted in Portugal[37] and new, more permissive, abortion acts have been passed in France[38] and Spain.[39]

Nevertheless, although there is a general trend toward the gradual liberalization of abortion laws in Europe, opposing pressures exist and merit attention.[40] In the late 1970s and early 1980s, Ireland tightened its anti-abortion regime by reinstating the strict nineteenth century criminal ban on abortion and amending the Constitution to enshrine the fundamental right to life of the unborn.[41] Equally restrictive pulls emerged in some post-Communist countries of Central and Eastern Europe. Especially in Poland where abortion on demand was widely available during the Communist regime, reforms in the 1990s resulted in backward movement, with a substantial prohibition of the voluntary termination of pregnancies.[42]

Despite the differences existing among the various abortion laws in Europe, it is useful to classify the national legislations in four models. Abortion is permitted in the first three legislative models: these models can be placed in a continuum from a more "liberal" to a more "restrictive" one, considering criteria such as the time-limitations during which a woman can have an abortion and the conditions and

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[34] *See* Belén Cambronero-Saiz et al., *Abortion in Democratic Spain*, 15 REPRODUCTIVE HEALTH MATTERS 85, 86 (2007).

[35] *See* Patrick Flood, *Abortion and the Right to Life in Post-Communist Eastern Europe and Russia*, 36 EAST EUROPEAN Q. 191 (2002).

[36] Eva Maleck-Lewy, *Between Self-Determination and State Supervision: Women and the Abortion Law in Post-Unification Germany*, SOCIAL POLITICS 62 (1995).

[37] *See infra* text accompanying notes 71–73.

[38] *See infra* text accompanying notes 67–70.

[39] *See infra* text accompanying notes 74–80.

[40] *See* ESER & KOCH, *supra* note 22, at 18.

[41] JAMES KINGSTON & ANTHONY WHELAN, ABORTION AND THE LAW 4–5 (1997).

[42] *See* Andrzej Kulczycki, *Abortion Policy in Postcommunist Europe: the Conflict in Poland*, 21 POPULATION AND DEV. REV. 471, 471–72 (1995).

procedures that define a woman's right or ability to choose an abortion.[43] A fourth, alternative, model of legislation is represented by those EU Member States that prohibit abortion *tout court*, save in limited, exceptional circumstances. In these systems, the right to life of the unborn is regarded as paramount. As a consequence, women are denied any right to choose whether to terminate their pregnancies.

The U.K. has a fairly liberal legislative model of abortion.[44] The Abortion Act 1967,[45] as amended by the Human Fertilisation and Embryology Act 1990,[46] states that pregnancy can be lawfully terminated up to the 24th week if "the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family."[47] In addition, abortion is always permitted if "the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman,"[48] if "the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated,"[49] or if "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities."[50]

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[43] *Cf.* ESER & KOCH, *supra* note 22, at 42 (arguing that the creation of basic regulatory models "is not dependent on one single differentiating criterion, but rather is based on a multi-factored approach").

[44] Note that the U.K. abortion legislation, however, applies in only Great Britain and not in Northern Ireland. *See* Abortion Act 1967, 15 Eliz. 2, c. 87, § 7 (Eng.).

[45] *Id.*

[46] Human Fertilisation and Embryology Act 1990, 38 Eliz. 2, c. 37 (Eng.).

[47] Abortion Act, § 1(1)(a), as amended by Human Fertilisation and Embryology Act, § 37(1). (Prior to the enactment of the Human Fertilisation and Embryology Act 1990, Abortion Act 1967, § 1(1)(a), allowed abortion, without specifying limits, whenever "the termination of pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy was terminated." As such, the 1990 revisions have disentangled the original 1967 provision, setting a limit at the end of the second trimester for abortion on ground of physical and mental "distress," while allowing abortion with no limits in case of a serious risk to the life of or permanent injury to the health of the pregnant woman).

[48] *Id.* § 1(1)(b).

[49] *Id.* § 1(1)(c).

[50] *Id.* § 1(1)(d).

The consent of two registered medical practitioners is required to perform an abortion,[51] except when terminating the pregnancy is "immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."[52] Nevertheless, in determining whether the continuance of a pregnancy would involve a risk of injury to the health of a woman, doctors may also consider "the pregnant woman's actual or reasonably foreseeable environment."[53] As a consequence, women may obtain elective abortions for a wide variety of social reasons.[54] Otherwise, the law neither sets counseling duties nor imposes waiting periods or parental / spousal consent / notification requirements.

A different model of regulation of the right to abortion is represented by the 1978 Italian legislation,[55] shaped largely on the French *Loi relative à l'interruption volontaire de la grossesse* of 1975,[56] which was, however, recently amended.[57] Abortion is decriminalized and can lawfully be obtained in the first ninety days of pregnancy when "continuance of pregnancy, delivery or maternity would involve a serious risk for the physical and psychological health

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[51] *Id.* § 1(1).

[52] *Id.* § 1(4).

[53] *Id.* § 1(2).

[54] *See* Christina Schlegel, *Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law*, 11 INT'L J. L. POL'Y. & THE FAMILY 36, 51 (1997) (highlighting how "although according to the letter of the law and the intent of the legislator, there is no abortion on demand in England, in fact a woman seeking an abortion 'only' has to find two registered medical practitioners to certify the wide socio-medical grounds that justify abortion").

[55] Legge 22 maggio 1978, n. 194, in G.U. May 22, 1978, n. 140 (It.). In its decision of February 18, 1975 the *Corte Costituzionale* [Constitutional Court] had already declared unconstitutional the provision of the Italian *Codice Penale* [Criminal Code] punishing abortion to the extent to which it did not include an exception for a pregnant woman whose life was in peril. *See* Racc. uff. corte cost. 18 febbraio 1975, n. 27 (It.). For an overview of the Italian abortion law, see generally Lucio Valerio Moscarini, *Aborto. Profili costituzionali e disciplina legislativa*, *in* 1 ENCICLOPEDIA GIURIDICA TRECCANI (1988), ad vocem.

[56] Loi 75–17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75–17 of January 17, 1975, on the voluntary interruption of pregnancy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739. The law was challenged before the *Conseil Constitutionnel* [Constitutional Court], which declared it constitutional in its decision *Conseil Constitutionnel* decision No. 75–17DC, Jan 15, 1975 (Fr.).

[57] *See infra* text accompanying notes 67–73.

[of the woman] in light of her state of health, or her economic, social and family conditions or the circumstances in which conception occurred or in view of the anomalies and malformations of the fetus."[58] After the first trimester, abortion is only permitted when there is a medically certified risk for the life of the pregnant woman or for her physical and psychological health.[59]

Before obtaining an abortion in the first trimester, however, women are required to undergo compulsory non-directive counseling. Social assistants, family planning centers, or the woman's physician must discuss together with the woman any possible alternative solution to abortion and help her to overcome all the problems of a social nature that may push her to seek an abortion.[60] If at the end of the counseling process a woman still wants an abortion, she has the right to receive a document certifying her pregnancy and her desire to terminate it. After a waiting period of seven days, she can obtain an abortion in any hospital or authorized private clinic.[61] Spousal notifications are suggested but not required by the law,[62] and the requirement of parental consent for minor aged girls seeking an abortion can also be lifted thorough a judicial bypass.[63]

France provided a similar regulation in 1975, allowing a woman to seek an abortion within the first ten weeks of pregnancy,[64] after mandatory counseling,[65] and a seven-day waiting period.[66] In 2001, however, a new bill[67] extended the possibility of seeking a termination

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[58] L. n. 194/1978, art. 4 (It.) ("la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica [della donna], in relazione o al suo stato di salute, o alle sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito.").

[59] *Id*. art. 6.

[60] *Id*. art. 5.

[61] *Id*. art. 5.

[62] *Id.* art. 5.

[63] *Id*. art. 12.

[64] CODE DE LA SANTÉ [Health Code], art. 161–1, introduced by Loi 75–17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75–17 of January 17, 1975 on the voluntary interruption of pregnancy], J.O. [OFFICIAL GAZETTE OF FRANCE], January 18, 1975, p. 739 (Fr.).

[65] *Id.* art.161–4.

[66] *Id.* art.161–5.

[67] Loi 2001–588 du 4 juillet 2001 relative à l'interruption volontaire de la grossesse et à la contraception [Law 2001–588 of July 4, 2001 on the voluntary

of pregnancy "in a situation of stress" up to the twelfth week.[68] More importantly, the new bill abolished the mandatory counseling procedure, except for girls underage.[69] Now, counseling is only "systematically suggested, before and after the voluntary interruption of pregnancy."[70] A system akin to the Italian one, instead, has recently been adopted in Portugal.[71] A right to abortion exists "by option of the woman, within the first ten weeks of pregnancy."[72] Women who seek an abortion must undergo mandatory counseling and a three-day mandatory waiting period has also been established.[73]

Spain too has finally recently enacted a new abortion act[74] along the above-mentioned model, with the explicit purpose of reflecting "the consensus of the international community in this field"[75] and "the legislative trend prevailing among [European] states."[76] Contrary to the *Ley organica* 9/1985, which simply stated that abortion "will not

interruption of pregnancy and contraception], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 7, 2001, p. 10823. The law was challenged before the *Conseil Constitutionnel*. *See Conseil Constitutional* decision No. 2001-446 DC, June 27, 2001; *Conseil Constitutionnel* decision No. 2001-449 DC, July 4, 2001 (declaring the law consitutional).

[68] CODE DE LA SANTE [Health Code], art. 2212–1, modified by Loi 2001–588, du 4 juillet 2001 (Fr.) ("dans une de détresse").

[69] *Id*. art. 2212–4, modified by Loi 2001–588, du 4 juillet 2001 (Fr.).

[70] *Id*. ("systématiquement proposé, avant et après l'interruption volontaire de grossesse.").

[71] *See* Lei 16/2007 de 17 de Abril 2007, Exclusão da ilicitude nos casos de interrupção voluntária da gravide [Law 16/2007 of April 17, 2007, Excluding unlawfulness in cases of voluntary interruption of pregnancy],17.4 DIÁRIO da REPÚBLICA [DAILY REPUBLIC] (2007) (Port.).

[72] CODIGO PENAL [Criminal Code], Art. 142(1)(e), modified by Art. 1, Law 16/2007 ("por opção da mulher, nas primeiras 10 semanas de gravidez").

[73] *Id.* art. 142(4)(b).

[74] *See* Ley Organica de salud sexual y reproductive y de la interrucion voluntaria del embarazo [Sexual and Reproductive Health and Abortion Law] (B.O.E. 2010, 55) (Spain). The 2010 Act has been challenged before the *Tribunal Constitucional* [Constitutional Court], which still has to deliver its decision. *See* Julio Lazaro, *El Constitucional admite el recurso del PP contra la ley del aborto* [The Constitution allows the use of PP against abortion law], EL PAIS, (Spain), June 30, 2011, *available at* http://www.elpais.com/articulo/sociedad/Constitucional/admite/recurso/PP/ley/aborto/elpepusoc/20100630elpepusoc_4/Tes.

[75] Sexual and Reproductive Health and Abortion Law, pmbl. I. ("[e]l consenso de la comunidad internacional en esta materia").

[76] *Id.* pmbl. II ("la tendencia normativa imperante en los países [europeos]").

be punishable"[77] if performed with the consent of the woman by a physician at any time for medical reasons, within twelve weeks of pregnancy in the case of rape and up to the twenty-second week in case of fetal impairment, the new *Ley organica* 2/2010 has introduced a right to abortion "at the request of the woman"[78] up to the fourteenth week of pregnancy, after a three-day waiting period and a counseling meeting in which women are informed about the means of social assistance and public support available for mothers.[79] Abortion is then permitted until the twenty-second week on medical grounds and when there are risks of fetal impairment or with no limit if a medical team certifies that the fetus has no reasonable possibility of surviving delivery.[80]

In contrast, Germany has the most restrictive model of abortion regulation among the EU Member States in which abortion is permitted.[81] After unification, an Act was adopted in 1992,[82] which, in order to harmonize the law in force in East Germany[83] (where women had a right to abortion until the twelfth week of pregnancy after mandatory counseling) and in West Germany[84] (where abortion was prohibited save on four enumerated grounds),[85] made first-

[77] CÓDIGO PENAL [Penal Code] art. 417 (Spain), as modified by Ley Organica 9/1985 (B.O.E. 1985, 166) ("no será punible"). The 1985 Act was challenged before the *Tribunal Constitucional* [Constitutional court], which declared it constitutional in its decision in S.T.C. Apr. 11, 1985 (B.O.E. No. 53) (Spain).

[78] Sexual and Reproductive Health and Abortion Law, art. 14 ("a petición de la mujer").

[79] *Id.* art. 17.

[80] *Id.* art. 15.

[81] *See* Maleck-Lewy, *supra* note 36, at 62; *see also* Schlegel, *supra* note 54, at 52.

[82] *See* Schwangeren-und Familienhilfegesetz [Pregnancy and Family Assistance Act], July 27, 1992, BUNDESGESETZBLATT, Teil I [BGBL I] at 1398 (Ger.).

[83] *See* Gesetz über die Unterbrechung der Schwangershaft [Act on Abortion], Mar. 9, 1972, GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK, TEIL I [GDDR I] at 89 (Ger.).

[84] *See* Fünfzehntes Strafrechtsänderungsgesetz [Fifteenth Amendment to the Criminal Law], May 21, 1976, BGBL I at 1213. (Ger.).

[85] *See id.* art. 1(4) (declaring, on the basis of the "indication model" (*Indikationslösung*), that abortion was "*nicht strafbar* [not punishable]" if performed: (1) at any time, on medical grounds, (2) within the first twenty-two weeks, on embryopathic grounds, (3) within the first twelve weeks, on criminal-

trimester abortions lawful after mandatory counseling. Nevertheless, in 1993, the *Bundesverfassungsgericht*, following a 1975 precedent[86] quashing the first West German Abortion Act,[87] declared the 1992 Act unconstitutional,[88] arguing that the State had a duty to protect human life, and that, therefore, legislation ought to express a clear disapproval of abortions.[89]

In reaction to this decision, the German Parliament enacted a new abortion Act in 1995,[90] amending, among other things, the Criminal Code. On the basis of the new law, abortion is unlawful, but may not be punished,[91] if it is performed at the request of the woman, by a medical practitioner, before the end of the twelfth week of pregnancy, after a mandatory counseling session and a three-day waiting period,[92]

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ethical grounds, and (4) within the first twelve weeks, on social grounds). *See* Maleck-Lewy, *supra* note 36, at 67.

[86] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 25, 1975, 39 BVerfGE 1, 1975 (Ger.). This first decision of the *Bundesverfassungsgericht* has been the object of extensive comparative analysis with the abortion decisions of the U.S. Supreme Court. *See* John Gorby & Robert Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551 (1976).

[87] *See* Fünftes Gesetz zur Reform des Strafrechts [5.StrRG] [Fifth Act to Reform the Criminal Law], June 18, 1974, BGBl I at 1297 (Ger.).

[88] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 BVERFGE 203,1993 (Ger.).

[89] *Cf.* Gerald Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995) (offering a comparative analysis of Abortion Law in Germany and the United States).

[90] *See* Schwangeren-und Familienhilfeänderungsgesetz [SFHAndG] [Pregnancy and Family Assistance Act], Aug. 21, 1995, BGBL I at 1050 (Ger.).

[91] A subtle distinction is indeed drawn in German criminal law between the abstract lawfulness of an act and the effective possibility to sanction an act. As such, an act may be lawful and therefore, not punishable, or an act may be unlawful. In the latter case, however, an act might still not be punishable when other compelling reasons push for the lifting of the criminal sanction. The 1992 Act had made first trimester abortion not unlawful, but the *Bundesverfassungsgericht* declared the measure unconstitutional to the extent to which it failed to protect the right to life of the unborn. The 1995 Act, therefore, made abortion simply "not punishable," in order to express a clear disapproval for abortion,. *See* Neuman, *supra* note 89, at 285.

[92] STRAFGESETZBUCH [StGB] [PENAL CODE], Aug. 21, 1995, BGBL I § 218a(1) (Ger.) as amended by SFHAndG, art. 8.

In contrast, abortion is "not unlawful"[93] if performed, at any time, under medical indication to prevent danger to the life of or serious harm to the health of the woman or, within the first twelve weeks of pregnancy, on criminal-ethical grounds, e.g., because the pregnancy was the result of rape.[94]

The mandatory counseling process is a peculiar feature of the 1995 German abortion Act.[95] Following an explicit request by the *Bundesverfassungsgericht*, the law clarifies that the counseling must be pro-life oriented;[96] that is, the counseling must be directed toward encouraging the woman to continue the pregnancy and to open her to the perspective of a life with the child. Social assistants and family planning centers must therefore inform women that the unborn has a right to life and that abortion can only be performed under exceptional circumstances. From this point of view, the regulation of abortion via the instruments of criminal law and the imposition of a directive counseling procedure highlight the German legal system's restrictive attitude toward the voluntary interruption of pregnancy.[97] At the same time, however, the possibility for a woman to obtain an abortion during the first trimester, if she still wishes to do so after the mandatory counseling and three-day waiting period, differentiates the German law from the legislative model of the last group of EU countries—Malta, Poland and Ireland—where abortion is generally always prohibited, with only a few, narrowly tailored exceptions.[98]

Poland swiftly enacted legislation banning elective abortion in 1993, following the collapse of the Communist regime.[99] The new Act permits abortion only if: (1) a physician, other than the one which

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[93] *Id.* § 218a(2) (Ger.) ("nicht Rechtswidrig").

[94] *Id.* § 218a(3) (Ger.).

[95] *See* Nanette Funk, *Abortion Counselling and the 1995 German Abortion Law*, 12 CONN. J. INT'L L. 33, 51 (1997) (discussing the importance of the counseling process in the German abortion regime).

[96] *See* STGB, § 219 (Ger.) as amended by SFHAndG, art. 8.

[97] *See* Funk, *supra* note 95, at 57; *see also* JACKSON & TUSHNET, *supra* note 15 (describing how the German abortion law limits abortions by requiring mandatory counseling).

[98] *See* Eser & Koch, *supra* note 22, at 46 (defining the "prohibition model" approach to abortion); Forder, *supra* note 22, at 85–86 (explaining how the German approach to abortion is less restrictive than the Irish one).

[99] *See* Magdalena Zolkos, *Human Rights and Democracy in the Polish Abortion Debate*, 3 ESSEX HUM. RIGHTS REV. 1–4 (2006).

performs the abortion, certifies that the pregnancy is endangering the mother's life or health; (2) up to viability (i.e., up to the twenty-fourth week), if the fetus is seriously impaired; or (3) up to the twelfth week, if pregnancy resulted from rape.[100] Terminating pregnancy outside these cases may be punished with three years' imprisonment. A legislative attempt in 1996 to reform the law and re-introduce a right to abortion in the first trimester on grounds of material or personal hardship failed. The *Trybunał Konstytcyjny* declared the bill incompatible with the Constitution, interpreting the right to life provision of the Polish Constitution as protecting the unborn.[101]

Of all European countries, Ireland has the most restrictive legislation on abortion.[102] On the basis of the Offences Against the Person Act 1861,[103] the content of which was re-affirmed in the Health (Family Planning) Act 1979,[104] "[e]very woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent . . . to procure the miscarriage . . . shall be liable to be kept in

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[100] Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, Jan. 7, 1993, § 4(a) (an English translation of this provision is available in *Tysiąc v. Poland*, 2007–I Eur. Ct. H.R. ¶ 38). The fact that Poland only permits abortion in these three specific cases differentiates Polish legislation and makes it more restrictive than German legislation, where abortion is not punishable (although it is not lawful) in a wider array of circumstances. *See supra* text accompanying note 91. Still, undoubtedly, the Polish abortion law is more permissive, at least on the books, than the Irish one. *See supra* text accompanying note 99–101.

[101] Trybunał Konstytucyjny [Constitutional Court] May 28, 1997, K 26/96. *But see* the dissenting opinions of Judges Garlicki and Sokolewicza. *See also* Alicia Czerwinski, *Sex, Politics and Religion: the Clash Between Poland and the European Union over Abortion*, 32 DENV. J. INT'L L. & POL'Y 653, 659–60 (2004) (discussing the Polish abortion regime and its tensions with EU law).

[102] *See* Forder, *supra* note 22, at 57. *See also* TUSHNET, *supra* note 2, at 85.

[103] Offences Against the Person Act 1861, 24 & 25 Vict. 236, c. 100 (U.K.). Note that this Act was adopted by the U.K. and applied in Ireland because, until 1922, the U.K. exercised dominion over Ireland. *See* Gerard Hogan, *An Introduction to Irish Public Law*, 1 EUR. PUB. L. 37 (1995).

[104] Health (Family Planning) Act 1979 (Act No. 20/1979), § 10 (Ir.).

penal servitude for life."[105] Contrary to the interpretation of the 1861 Act offered by the English courts,[106] Irish tribunals have traditionally adopted a narrow construction of the provision excluding the lifting of criminal sanctions, even when abortion is carried out to preserve the life or the health of the woman.[107]

In 1983, to prevent a possible recognition of a right to abortion by judicial fiat,[108] an amendment to the Irish Constitution was adopted by popular referendum, which enshrined a right to life of the unborn in Irish fundamental law.[109] According to the Eighth Amendment, codified as Article 40.3.3 of the Irish Constitution, "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."[110] The amendment generated a cluster of litigation. Much of this litigation dealt with the issue of whether the state could prohibit distribution of information on abortion services provided in other EU

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[105] Offences Against the Person Act 1861, §§ 58, 59. The same penalty applies to the doctor performing the abortion. It is a misdemeanor to supply a woman with the poisons or instruments necessary to procure an abortion.

[106] *See* R. v. Bourne, [1939] 1 K.B. 687. In this decision, the King's Bench, per Justice Macnaughten, affirmed that § 58 of the Offences Against the Person Act 1861 "ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck," abortion should be permitted on therapeutic grounds. *Id*. at 693–94.

[107] *See* Soc'y for the Prot. of Unborn Children Ireland Ltd. v. Grogan, [1989] I.R. 753 (Ir.) (where Justice Keane affirmed that "the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted . . . consistently with the Constitution prior to the Eighth Amendment.").

[108] Note that in *McGee v. Attorney General*, [1974] I.R. 284, the Irish Supreme Court had recognized a fundamental right to privacy as either an unenumerated personal right or a familial right. As a result, there was widespread preoccupation that the Irish Supreme Court would follow the path of the U.S. Supreme Court, whose decision recognizing a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), followed from its decision recognizing a right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* TUSHNET, *supra* note 2, at 86. On the U.S. constitutional issues of abortion law, see *infra* Section 3.

[109] *See* John Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 3 B.Y.U. L. REV. 371, 383–90 (1984).

[110] IR. CONST., 1937, art. 40.3.3, as amended by the Eighth Am. (1983).

countries. This litigation involved the ECJ and the ECtHR[111] and eventually led to the adoption of two further constitutional amendments explicitly guaranteeing a right to travel to other states in order to obtain an abortion,[112] as well as a right to provide information about abortion services performed overseas.[113]

The specific consequences of Article 40.3.3 on the prohibition of abortion were addressed in the seminal *X.* case.[114] This case involved a fourteen-year-old female rape victim who became pregnant. The girl wanted an abortion and showed clear signs of suicidal tendencies if she could not obtain one. Her family agreed to bring her to England for the abortion. On the Attorney General's application, however, the Irish High Court issued an injunction prohibiting the girl from leaving Ireland on the basis of the new constitutional provision protecting the life of the unborn. According to the Court, the "risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made."[115]

The decision of the High Court sparked widespread controversy and was quickly overruled by a majority of the Irish Supreme Court. On appeal, Chief Justice Finlay framed a new test to review the lawfulness of an abortion in light of Article 40.3.3 of the Irish Constitution: "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."[116] The Court recognized that suicide could be considered as a real and substantial risk to the life of the woman and therefore concluded that the defendant had a right to obtain an abortion in Ireland.[117] Attempts have been made since the *X*.

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111 *See infra* Section 2.

112 IR. CONST., 1937, art. 40.3.3(2), as amended by the Thirteenth Am. (1992).

113 IR. CONST., 1937, art. 40.3.3(3), as amended by the Fourteenth Am. (1992).

114 *See* Cole, *supra* note 3, at 129–135; Forder, *supra* note 22, at 57–58.

115 Att'y Gen. v. X, [1992] I.L.R.M. 401, 410 (H. Ct.) (Ir.).

116 Att'y Gen. v. X, [1992] 1 I.R. 41, 53–54 (S.C.) (Ir.).

117 *Id*. at 55. Although the opinion of the Irish Supreme Court left some doubts as to whether abortion could be obtained in Ireland in case of real and substantial risk to the woman's life, this possibility was later confirmed by the High Court in *A. and B. v. E. Health Bd.*, [1998] 1 I.L.R.M. 460, 478–79 (H. Ct.) (Ir.).

case to restrict the Supreme Court's interpretation of Article 40.3.3 by enacting new constitutional amendments directed at excluding suicide from the conditions that may justify a therapeutic abortion. All of these attempts, however, have failed in popular referenda.[118]

As a result, the current status of abortion law in Ireland appears to be that, constitutionally, termination of pregnancy is unlawful "unless it meets the conditions laid down by the Supreme Court in the *X.* case."[119] Women have both a constitutional right to travel to seek an abortion overseas and to obtain information about abortion services provided in other EU Member States pursuant to the 1995 Information Act.[120] However, no specific regulation exists on the basis of which a woman can establish her right to obtain a lawful abortion in Ireland on grounds of a real and serious risk to her life, including a risk of suicide.[121] In fact, no lawful abortion is known to have ever been

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[118] The proposed Twelfth Amendment of the Constitution would have allowed abortion only when "necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to real and substantial risk to her life, not being a risk of self-destruction." RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 1992, 195–97 (1992). The proposal was rejected in a popular referendum in November 1992. *Id*.. The proposed Twenty-Fifth Amendment of the Constitution, Protection of Human Life in Pregnancy Bill, 2001 sched. 2 §1(2), *available at* http://www.oireachtas.ie/documents/bills28/bills/2001/4801/b48b01d.pdf, would have allowed abortion only when "necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction." The proposal was rejected in a popular referendum in March 2002. RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 2001, at 113.

[119] DEP'T OF THE TAOISEACH, THE GREEN PAPER ON ABORTION 3 (1999), *available at* http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Publications_for_1999/Green_Paper_on_Abortion.html. This report was prepared at the request of the Irish government to clarify the legal framework of abortion in Irish law.

[120] Regulation of Information (Services Outside the State for Termination of Pregnancy) Act 1995 (Act No. 5/1995) § 3.

The Act makes it legal to distribute information on abortion services abroad as long as the information does not promote abortion. The Irish Supreme Court was asked to decide on the abstract and *a priori* constitutionality of the Act, and it unanimously upheld it. *See In re* Article 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill, [1995] 1 I.R. 1 (S.C.)(Ir.).

[121] *See infra* text accompanying notes 321–337.

carried out in Ireland,[122] effectively making Ireland the EU country in which abortion is most severely restricted.

As the preceding survey clarifies, a variety of regulatory models exists in the EU Member States in the field of abortion law. In all legal systems, however, abortion is permitted at any time, at least on the law in the books, if necessary to save the life of the woman. Almost every country recognizes the right to an abortion on medical health grounds, to varying degrees. Further, a clear trend exists among a majority of states toward the legalization of elective abortion roughly within the first trimester of pregnancy, either upon the simple request of the woman, or upon the request of the woman certified (on wide social grounds) by medical doctors, or after a mandatory counseling period, be it of a neutral or life-oriented kind. Finally, all state abortion laws are subjected to the increasing influence of supranational laws.

III. THE IMPACT OF SUPRANATIONAL LAW ON STATES' ABORTION LAWS

In the last two decades, the legal orders of the EU and the ECHR have steadily increased their involvement in the field of abortion law, and both the ECJ and the ECtHR have reviewed states' abortion legislations with growing frequency.[123] Although the authority to regulate abortion rights remains primarily in the purview of the EU Member States, a series of substantive checks and procedural balances on the exercise of national sovereignty have been developed in this area, mainly by the jurisprudence of the two European supranational courts.[124] Indeed, as David Cole has argued, the interplay between

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[122] *See* IPPF, *supra* note 22, at 39.

[123] *See* Forder, *supra* note 22, at 56 (arguing that "recent developments have shown that abortion also has a transnational character. It is no longer possible for one country to regulate abortion without regard to what is happening elsewhere in Europe. Both the [ECJ] and the [ECtHR] have bared their teeth, and shown that there are certain minimum standards which must be met"). *See also* Lawson, *supra* note 3, at 167. For an assessment of the impact of international human rights law on national abortion legislation *outside* the European context, see generally Cyra Choudhury, *Exporting Subjects: Globalizing Family Law Progress through International Human Rights*, 32 MICH. J. INT'L L. 259 (2011).

[124] *Compare* the open view in Bryan Mercurio, *Abortion In Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, 11 TUL. J. INT'L & COMP. L. 141 (2003), *with* the extremely sovereigntist

European and domestic laws on abortion has now reached such a level of complexity that national "isolationism is impossible, even on an issue as strongly felt as abortion."[125]

In the 1991 *Grogan* case,[126] the ECJ had the opportunity to rule on the abortion issue in the context of a preliminary reference procedure from the Irish High Court.[127] In this case, the Society for the Protection of the Unborn Child (SPUC) had requested an injunction prohibiting the representatives of three student unions from advertising the names and contacts details of overseas abortion providers, arguing that the recently enacted Eighth Amendment to the Irish Constitution banned the publication of any such information.[128] In its preliminary reference, the High Court asked the ECJ whether abortion could be considered a service within the meaning of the European Economic Community (EEC) Treaty (EECT)[129] and, therefore, whether a national ban on information about abortion services overseas was

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view in Diarmuid Rossa Phelan, *Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union*, 55 MOD. L. REV. 670 (1992).

[125] Cole, *supra* note 3, at 115.

[126] Case C-159/90, Soc'y for the Prot. of Unborn Children Ir. Ltd.v. Grogan, 1991 E.C.R. I-4685.

[127] The preliminary reference procedure is the technical mechanism, regulated by art. 267 TFEU (as in effect since 2009) (former EC Treaty art. 234), by which a lower state court can, or a state court of last instance shall, request from the ECJ a judgment on the interpretation of or on the validity of a EU law, which is of relevance in the case pending before it. Consolidated Version of the Treaty on the Functioning of the European Union, art. 267, March 30, 2010, 2010 O.J. (C 83) 164. *See* Jeffrey Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421 (1996); Paul Craig, *The Jurisdiction of the Community Courts Reconsidered, in* THE EUROPEAN COURT OF JUSTICE 177 (Grainne de Búrca & Joseph H.H. Weiler eds., 2001).

[128] Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, [1989] I.R. 753, 758 (H. Ct.). (Ir.). While the Irish High Court referred the question to the ECJ, it stayed the proceedings and did not grant the injunction requested by SPUC barring the student from publishing information about abortion providers. SPUC appealed to the Supreme Court, and the Supreme Court granted a temporary injunction but did not interfere with the High Court's decision to raise a preliminary reference to the ECJ. Rather, the Supreme Court gave the parties leave to apply to the High Court again in order to adjust the injunction in light of the ECJ's decision. Prot. of Unborn Children Ir. Ltd. v. Grogan, [1989] 4 I.R. 760, 765–66 (S.C.) (Ir.).

[129] *Cf.* Cole, *supra* note 3, at 126–127; Mercurio, *supra* note 124, at 156–57.

contrary to EEC law, including the fundamental rights protected by EEC law.[130]

Advocate General (AG) Van Gerven acknowledged that medical termination of pregnancy constituted a service within the meaning of the EECT. Therefore, he devoted most of his opinion to examining whether the Irish prohibition on distributing information about abortion services that are lawfully available in other EU states could be regarded as "consistent with or not incompatible with" the general principles of EU law, including respect for fundamental rights.[131] However, the AG found that the Irish restriction was justified in light of the public interest pursued by the state and of the "high priority" the Irish Constitution attached to the protection of unborn life.[132] In addition, the AG concluded that the ban on information sought by SPUC did not disproportionately infringe upon freedom of information, which is protected as a general principle of EEC law and is thus binding upon the Member States "in an area covered by EEC law."[133]

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[130] *See* Case 29/69, Stauder v. City of Ulm─Sozialamt, 1969 E.C.R. 419, ¶ 7 (affirming that fundamental rights are general principles of EU law). In the absence of a written EU catalog of fundamental rights (which was only recently introduced with the enactment of the EU Charter of Fundamental Rights) the ECJ for long time drew inspiration for its human rights jurisprudence from the common constitutional traditions of the Member States and especially from the ECHR. *See* Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491, ¶ 13; Consolidated Version of the Treaty on European Union, art. 6, Mar. 30, 2010, 2010 O.J. (C 83) 19 [hereinafter EU Treaty]. *See also* José N. Cunha Rodriguez, *The Incorporation of Fundamental Rights in the Community Legal Order*, *in* THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 89, 91 (Miguel Poiares Maduro & Loic Azulai eds., 2010). The ECJ has recognized that both the EU institutions as well as the EU Member States must respect fundamental rights as general principles of EU law when acting within the scope of application of EU law. *See* Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609, ¶ 17–19; Case C-260/89, ERT, 1991 E.C.R. I-2925, ¶ 41. *See also* Zdenek Kühn, *Wachauf and ERT: On the Road from the Centralized to the Decentralized System of Judicial Review*, *in* THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 151 (Miguel Poiares Maduro & Loic Azulai eds., 2010).

[131] Opinion of Advocate General Van Gerven, Case C-159/90, Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685, ¶ 24.

[132] *Id.* ¶ 29.

[133] *Id.* ¶ 31.

The ECJ followed only the very first part of the opinion of the AG, stating that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of the EECT."[134] The ECJ rejected the contention made by SPUC that abortion could not be regarded as a service since it is immoral and stated that it would not "substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally."[135] However, on the controversial question of the compatibility of the Irish ban on the publication of information with EEC law, the ECJ refused to take a position, arguing that the link between the Irish student unions and the U.K. abortion providers was "too tenuous"[136] to trigger the application of EEC law.[137]

The ECJ, therefore, failed to address directly the confrontation between the Irish ban and EU fundamental rights,[138] showing a certain reluctance to deal with the "thorny issue" of abortion.[139] Nevertheless, by stating that a Member State had the power to prohibit student unions from distributing information about abortion clinics that are lawfully operating in another EU state, so long as "the clinics in question have no involvement in the distribution of the said information,"[140] the ECJ "left open the possibility that, should a party directly connected to providing abortion become involved, the outcome could be different."[141] In addition, by concluding that abortion was a service within the meaning of the EECT,[142] the ECJ made clear "that Ireland's treatment of access to abortion was not

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134 *Grogan*, 1991 E.C.R. I-4685, ¶ 21.

135 *Id*. ¶ 20.

136 *Id*. ¶ 24.

137 *See* Lawson, *supra* note 3, 173; Cole, *supra* note 3, 128.

138 *See* Siofra O'Leary, *Freedom of Establishment and Freedom to Provide Services: The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case*, 16 EUR. L. REV. 138, 156 (1992).

139 Catherine Barnard, *An Irish Solution*, 142 NEW L.J. 526 (1992).

140 Grogan, 1991 E.C.R. I-4685, ¶ 32.

141 Mercurio, *supra* note 124, at 160.

142 David O'Connor, *Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L L. 695, 702–03 (1997).

simply a matter of Irish law"[143] but also a matter of concern for EU law.[144]

Ireland understood the pressures arising from the EU legal system on domestic abortion legislation. On the eve of the approval of the Maastricht Treaty in 1992, Ireland obtained from its EU partners the enactment of an additional protocol to the EU Treaty stating that "nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland." [145] Nevertheless, the "special case" approach sought by Ireland produced domestic public outcry,[146] forcing Ireland to retract its position by adding a "negative declaration" to the EU Treaty, restricting the meaning of the Protocol.[147] Consequentially, it seems that the status of EU law vis-à-vis Irish abortion law has not changed very much at all.[148]

The ECtHR has followed a more direct path toward involvement in abortion rights.[149] When the ECHR was adopted in 1950, abortion

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[143] Cole, *supra* note 3, at 129.

[144] *See* Alison Young, *The Charter, Constitution and Human Rights: Is This the Beginning or the End for Human Rights Protections by Community Law?*, 11 EUR. PUB. L. 219, 230 (2005) (arguing that "*Grogan* can be regarded as a triumph for the right of the woman to choose.").

[145] Protocol Annexed to the Treaty on European Union and to the Treaties Establishing the European Communities, Feb. 7, 1992, 1992 O.J. (C 224/130).

[146] Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET L. REV. 17, 48 (1993), (arguing that the negative reaction in Ireland to the additional Protocol negotiated by the Irish government was "exacerbated by the Irish Supreme Court's . . . ruling in [the] *X.* [case]").

[147] Declaration of the High Contracting Parties to the Treaty on European Union, May 1, 1992, *available at* http://europa.eu/abc/treaties/archives/en/entr3.htm, (stating that "the Protocol shall not limit freedom either to travel between Member States or . . . to obtain or make available in Ireland information relating to services lawfully available in Member States."). *See* Chris Hilson, *The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity*, 14 EUR. L. J. 186, 191–92 (2008).

[148] *Cf.* Forder, *supra* note 22, at 64 (arguing that "the Declaration . . . confirms the law as it was after *SPUC v. Grogan* and thus sets the course for a head-on collision between the Irish constitution and Community law.").

[149] *See* Alec Stone Sweet, *Sur la constitutionnalisation de la Convention européenne des droits de l'homme: cinquante ans après son installation, la Cour*

was of course still regarded as a criminal issue in all of the signatory parties. Therefore, it was not the intention of the drafters of the ECHR to codify a substantive limitation on the national powers to regulate abortion.[150] Nevertheless, the ECHR does include a number of provisions—such as the right to life,[151] the right to respect for private and family life,[152] and freedom of information[153]—which, over time, became increasingly relevant in litigation challenging Member States' abortion legislations.[154]

Until the 1990s, the ECtHR did not have the opportunity to decide cases concerning national abortion laws. Prior to the 1998 enactment of the 11th additional Protocol to the ECHR, all individual applications lodged before the ECtHR were first addressed by the European Human Rights Commission (ECommHR).[155] In the few abortion cases raised

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européenne des droits de l'homme conçue comme une cour constitutionnelle [On the Constitutionalization of the European Convention on Human Rights: Fifty years after its Establishment, the European Court of Human Rights is Viewed as a Constitutional Court], 80 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 923 (2009) (describing the increasing importance of the ECHR as an instrument for the protection of fundamental rights in Europe and for the supervision of Member States' conduct).

[150] *See generally* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000) (providing an historical assessment of the origins of the ECHR); *see also Danny Nicol, Original Intent and the European Convention on Human Rights*, PUB. L. 152 (2005).

[151] ECHR art. 2.

[152] ECHR art. 8.

[153] ECHR art. 10.

[154] The ECHR recognizes a detailed catalogue of civil and political rights that Member States can limit only according to the conditions provided by the ECHR itself and subject to the ECtHR's proportionality-based review. *See* Alec Stone Sweet & Jude Matthews, *Proportionality, Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

[155] The institutional machinery of the ECHR has been evolving. Individuals can directly lodge an application before the supervisory bodies of the ECHR, after they have exhausted the domestic avenues of recourse and if they allege to be victims of a violation of fundamental rights by a contracting party. Until the enactment of the 11th additional Protocol to the ECHR, applications were first examined by the ECommHR, which sought to achieve a friendly settlement of the dispute and decided the issue with a decision. Decisions by the ECommHR could then be appealed to the ECtHR. Since the 11th additional Protocol to the ECHR has come into force, instead, the ECommHR has been eliminated and individuals can directly lodge an application before the ECtHR under the conditions provided by

before the Strasbourg institution, the ECommHR adopted a prudent stand:[156] on the one hand, it declared inadmissible the challenges, based on the right-to-life provision of the ECHR,[157] made against some liberal domestic abortion laws (including the 1967 U.K. Abortion Act).[158] On the other hand, it rejected on the merits a challenge against the restrictive 1975 German abortion statute, which was raised on the basis of the right-to-privacy provision of the ECHR.[159]

The first abortion case before the ECtHR arose out of the SPUC controversy in Ireland, which had previously compelled the ECJ to intervene.[160] Pursuant to Article 40.3.3 of the Irish Constitution, the SPUC had obtained an injunction from the Irish High Court,[161] later confirmed by the Supreme Court,[162] which perpetually prohibited two Dublin-based family planning and counseling clinics from providing information concerning the availability of abortion services in the

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Art. 35 ECHR. *See* Antonio Bultrini, *Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell'uomo: Cenni introduttivi* [*The Mechanism of Protection of Fundamental Rights Established by the European Convention on Human Rights: Introduction*], *in* LA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO: PROFILI ED EFFETTI NELL'ORDINAMENTO ITALIANO [THE EUROPEAN CONVENTION ON HUMAN RIGHTS: PROFILES AND EFFECTS ON ITALY] (Bruno Nascimbene ed., 2002) (describing the institutional machinery of the ECHR and its evolution); *see also* CLARE OVEY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, ch. 24 (4th ed. 2006)

156 *See* Lawson, *supra* note 3, at 170.

157 *See* David Harris, *The Right to Life Under the European Convention on Human Rights*, 1 MAASTRICHT J. EUR. & COMP. L. 122., 126–27 (1994).

158 X. v. United Kingdom, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244 (1980) (declaring inadmissible a challenge against the U.K. Abortion Act 1967 based on the claim that Art. 2 ECHR protected the right to life of the fetus). *See also* R.H. v. Norway, App. No. 17004/90, 73 Eur. Comm. H.R. Dec. & Rep. 155(1992) (declaring inadmissible a challenge against the Norwegian legislation on abortion based on the claim that Art. 2 protected the right to life of the fetus).

159 *See* Brüggemann and Scheuten v. Germany, App. No. 5969/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100 (1977) (rejecting on the merits a challenge to the German regulation of abortion established by the 1976 Fünfzehntes Strafrechtsänderungsgesetz based on the claim that Art. 8 ECHR extended to protect the right of privacy of the woman to decide whether to terminate pregnancy).

160 *See* Mercurio, *supra* note 124, at 155–56.

161 SPUC v. Open Door Counselling, [1988] I.R. 593 (H. Ct.) (Ir.).

162 *Id.* at 618.

U.K.[163] Having exhausted their domestic remedies, the two clinics lodged an appeal before the ECHR supervisory bodies, arguing that the Irish ban unduly limited their freedom of expression. The ECommHR declared the case admissible and,[164] in its preliminary report, found that the law violated Article 10 ECHR because the ban was not prescribed by law, since it was not reasonably foreseeable that Article 40.3.3 would have been interpreted as prohibiting the non-directive counseling conducted by the two clinics.[165]

The decision of the ECommHR laid the foundation for the ruling of ECtHR in *Open Door*,[166] which also found a violation of Article 10 ECHR.[167] However, in *Open Door*, the ECtHR did not follow the reasoning of the ECommHR; rather, in a fifteen-to-eight majority opinion, the ECtHR concluded that the national measure under review could not pass judicial scrutiny, even under a more restrictive test.[168] According to the ECtHR, the prohibition barring the two clinics from providing information about abortion services overseas could be regarded as prescribed by law—that is, grounded in the Eighth Amendment to the Irish Constitution—and necessary to pursue the legitimate aim of the Irish State to protect the life of the unborn.[169] But, the "absolute nature"[170] of the "restraint imposed on the applicants from receiving or imparting information was

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[163] Having succeed in obtaining a judicial injunction barring the two Dublin-based counseling clinics, Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd., from circulating information about abortion service providers in the U.K., SPUC started a proceeding against the students associations. This proceeding then lead to the decision of the ECJ in Case C-159/90, *Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan*, 1991 E.C.R. I-4685.

[164] Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, May 15, 1990.

[165] Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 14 Eur. Comm'n H.R. Dec. & Rep. 131 (1991).

[166] Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 246 Eur. Ct. H.R. (ser. A), ¶ 73 (1992) [hereinafter Open Door].

[167] *See* Lawson, *supra* note 3, at 177.

[168] *See* Cole, *supra* note 3, at 135.

[169] Open Door, 246 Eur. Ct. H.R. (ser. A), ¶¶ 60–63.

[170] *Id.* ¶ 73.

disproportionate to the aims pursued"[171] and was thus in violation of the right to freedom of information.[172]

After declaring in *Open Door* that a state's ban on the circulation of information about abortion was contrary to the ECHR's freedom-of-expression clause,[173] the ECtHR was asked to review a number of other national measures directly regulating abortion for their compatibility with the ECHR's right-to-life and right-to-privacy clauses. Whereas the ECtHR has rejected all pro-life claims raised against permissive state abortion laws,[174] it has also "carefully avoided stating whether abortion is protected under the ECHR,"[175] leaving to the contracting parties a margin of appreciation to determine the availability and legal status of abortion.[176] Yet, the ECtHR has squarely affirmed that "legislation regulating abortion falls under the sphere of Article 8 [ECHR] and statutory abortion restrictions may constitute an interference with women's private lives."[177]

In a series of cases challenging national laws on abortion on the basis of Article 2 ECHR, the ECtHR has deferred to domestic legislation,[178] rejecting the argument that the fetus could be regarded

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[171] *Id.* ¶ 80.

[172] The decision of the ECtHR reached an issue that, as mentioned *supra* in the text accompanying note 137, was not addressed by the ECJ in Case C-159/90, *Grogan*, 1991 ECR I-4685. AG Van Gerven, instead, had reached the issue and concluded that the Irish ban on the freedom to provide information about abortion providers overseas did not violate Article 10 ECHR. *See supra* text accompanying note 134.

[173] *See* Cole, *supra* note 3, at 138.

[174] *See* Christina Zampas & Jaime Gher, *Abortion as a Human Rights – International and Regional Standards*, 8 HUM. R. L. REV. 249, 264 (2008).

[175] *Id.* at 276.

[176] On the doctrine of the ECtHR's margin of appreciation, see generally Eva Brems, *The Margin of Appreciation in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240 (1996); Palmina Tanzarella, *Il margine di apprezzamento* [*The Margin of Appreciation*], *in* I DIRITTI IN AZIONE [RIGHTS IN ACTION]14 (Marta Cartabia ed., 2007).

[177] Zampas & Gher, *supra* note 174, at 276.

[178] Art. 2(1) ECHR ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"). *See also* Zampas & Gher, *supra* note 174, at 264–65 (discussing how "each of the abortion laws at issue in these cases were fairly liberal. It is unclear

as a person within the meaning of the ECHR.[179] In *Boso*,[180] the Court upheld the Italian abortion statute, arguing that the domestic legislation struck "a fair balance between, on the one hand, the need to ensure protection of the fetus and, on the other [hand], the woman's interests."[181] In addition, in *Vo*,[182] the ECtHR—while expressing its awareness that it was neither desirable, nor even possible as matters stood, to answer in the abstract the question when life begins and "whether the unborn child is a person for the purposes of Article 2 of the [ECHR]"[183] —concluded that the French law at issue did not violate the right-to-life clause of ECHR.[184]

In *Tysiąc*,[185] however, the ECtHR took the important step of finding a violation of Article 8 ECHR in the operation of the restrictive Polish abortion law.[186] The case involved a Polish woman suffering from a pathological optical disease. Having become pregnant, the woman was informed by several medical practitioners that pregnancy and delivery might cause a serious deterioration in her optical condition. As a consequence, she sought a medical termination of pregnancy on the basis of Polish law, which permits abortion when pregnancy seriously threatens the health of the woman.[187] Nevertheless, the doctors refused to grant the woman the health

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whether the ECtHR would accord similar deference to Member States with more restrictive abortion laws.").

[179] *See* Jakob Pichon, *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights*, 7 GERMAN L. J. 433, 433 (2006); Lorenza Violini & Alessandra Osti, *Le linee di demarcazione della vita umana [The Lines of Demarcation of Human Life]*, *in* I DIRITTI IN AZIONE [RIGHTS IN ACTION] 185, 222 (Marta Cartabia ed., 2007).

[180] Boso v. Italy, App. No. 50490/99, 2002–VII Eur. Ct. H.R.

[181] *Id*. ¶ 1.

[182] Vo v. France, App. No. 53924/00, 2004–VIII Eur. Ct. H.R.

[183] *Id*. ¶ 85.

[184] *See* Evans v. United Kingdom, App. No. 6339/05, 2007 Eur. Ct. H.R. (declining to extend the protection of the right-to-life provision of Article 2 ECHR to embryos).

[185] Tysiąc v. Poland, App. No. 5410/03, 2007–I Eur. Ct. H.R.

[186] *See* Nicolette Priaulx, *Testing the Margin of Appreciation: Therapeutic Abortions, Reproductive 'Rights' and the Intriguing Case of* Tysiąc v. Poland, 15 EUR. J. OF HEALTH L. 361, 361 (2008); Daniel Fenwick, *Recognition of Violation of Women's Human Rights Under the ECHR in the Context of Restrictive Abortion Regimes* (2011) (unpublished Master's thesis), *available at* http://etheses.dur.ac.uk/595.

[187] *See* text accompanying note 110.

certificate necessary to obtain an abortion in public hospitals. The woman was forced to deliver the baby and, as expected, her conditions deteriorated badly, and she became practically blind.[188]

The applicant raised a facial challenge against the Polish abortion law, arguing that the prohibition on voluntary interruption of pregnancy amounted to an interference with her Article 8 ECHR right to respect for private life.[189] The ECtHR, instead, took the view that "the circumstances of the applicant's case and in particular the nature of her complaint [we]re more appropriately examined from the standpoint of the respondent State's . . . positive obligations."[190] According to the ECtHR, Article 8 ECHR establishes not only a negative limit on the power of the state to interfere with the person's physical and psychological integrity, but also "a positive obligation [for the state] to secure to its citizens their right to effective respect for this integrity."[191] In the case at hand, the national authorities had failed to comply with this duty.[192]

As highlighted by the ECtHR, the Polish abortion act did allow for termination of pregnancy on health grounds, an exception that the applicant's condition should certainly have triggered. Nevertheless, the Polish legislation lacked "any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in [the applicant's] case."[193] The absence of a clear, time-sensitive procedure for ascertaining in a fair and independent manner whether a woman had a right to interrupt her pregnancy on health grounds had a "chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case."[194] In the ECtHR's view, "once the legislature decides to allow abortion, it must

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188 *Tysiąc*, 2007–I Eur. Ct. H.R., ¶ 18

189 *See* Jill Marshall, *A Right to Personal Autonomy at the European Court of Human Rights*, E. H. R. L. R. 337, 346 (2008).

190 *Tysiąc*, 2007–I Eur. Ct. H.R., ¶ 108.

191 *Id.* ¶ 107

192 On the concepts of "negative" and "positive" obligations stemming from fundamental rights, see Neuman, *supra* note 89, at 300; David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

193 *Tysiąc*, 2007–I Eur. Ct. H.R., ¶124.

194 *Id.* ¶116.

not structure its legal framework in a way which would limit real possibilities to obtain it."[195]

The decision of the ECtHR in *Tysiąc* is "significant because it confirms that women's right to access legal abortions may not be illusory."[196] At the same time, in stressing the positive duties that states have in adopting all relevant measures to make legal abortion practically available, the ECtHR focused only on the *procedural* aspects of abortion law. The ECtHR followed the same approach in the *D.* case,[197] where it declared the complaint of a woman who could not obtain an abortion in Ireland on grounds of fetal impairments as inadmissible since the applicant had not explored all of the domestic procedural avenues that might have been available to make her claim heard, including a constitutional challenge to the Irish Supreme Court.[198]

From this point of view, the approach of the ECHR judicial branch seems far more prudent than that of the Parliamentary Assembly of the Council of Europe,[199] which has recently, albeit in a non-binding form, expressed its concern that in many of the contracting states "numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services."[200] The Parliamentary Assembly explicitly advocates that "abortion should not be banned within reasonable gestational limits."[201] Rather, *Tysiąc* indicates "the ECtHR's unwillingness to address substantive violations of abortion rights, even when there is a legal basis for abortion, and propensity to rely on procedural violations to remedy the wrong."[202]

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195 *Id.*

196 Zampas & Gher, *supra* note 174, at 279.

197 D. v. Ireland, App. No. 26499/02, 2006 Eur. Ct. H.R. 14.

198 *Id.* ¶102.

199 The Parliamentary Assembly is one of the statutory bodies of the Council of Europe. It is composed of representatives from each of the contracting parties who are elected or appointed by the national parliaments. It exercises advisory functions. *See* Tony Joris & Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?* 15 COLUM. J. EUR. L. 1, 5 (2009).

200 Council of Europe, Access to Safe and Legal Abortion in Europe, Resolution 1607, ¶2 (2008).

201 *Id.* ¶4.

202 Zampas & Gher, *supra* note 174, at 279.

In conclusion, the jurisprudence of the ECJ and the ECtHR highlights the increasing impact of supranational law over states' regulations of abortion.[203] On the one hand, the ECJ—while strategically avoiding a clash with the state authorities on the human rights questions raised by a ban on the circulation of information about abortion[204]—has clearly affirmed that abortion represents a service within the meaning of EU law and is thus subjected to EU supervision.[205] On the other hand, the ECtHR—while falling short of recognizing a right to abortion in the penumbras of the ECHR[206]—has built up a solid jurisprudential framework, which prohibits states from abridging freedom of information about abortion services and requires them to ensure adequate procedural mechanisms to make the right to abortion, where it exists, effective.[207]

From this point of view, a contextual analysis of the national abortion regulations and of the law of the EU and the ECHR illuminates the complex dynamics that arise in the European multilevel constitutional architecture. Although at this point, it appears that there is no direct legal incompatibility between the national laws, especially those dictating a restrictive regulation of abortion, and the principles established by supranational jurisdictions, several tensions and challenges shape the interrelationship between some national legal systems and the normative order established by the EU treaties and the ECHR.[208]

Ireland can still prohibit abortion, as EU law does not prevent it from doing so. Nevertheless, EU law requires abortion to be treated as a service and demands that Irish people be allowed to seek all services, including abortions, overseas and be free to receive information about them. By the same token, Poland can still prohibit abortion save on health grounds, as ECHR law does not prevent it from doing so. Yet if

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[203] *See* Forder, *supra* note 22, at 99 (arguing that "the presence of EEC Law and the ECHR means that it is no longer possible to fossilise certain values within constitutional principles in the hope that these values will be safeguarded against development and change").

[204] *See* Cole, *supra* note 3, at 128; Lawson, *supra* note 3, at 173.

[205] *See* Mercurio, *supra* note 124, at 179; Phelan, *supra* note 124, at 686.

[206] *See* Marshall, *supra* note 189; Zampas & Gher, *supra* note 174, at 265.

[207] *See* Cole, *supra* note 3, 128, at 138; Priaulx, *supra* note 186, at 362.

[208] *See* Czerwinski, *supra* note 101, at 663–64; Mercurio, *supra* note 124, at 150–153.

abortion on health ground is permitted, ECHR law requires Poland to ensure that adequate and effective procedures are in place to this end. To make sense of this complex picture, I suggest employing the concept of inconsistency, as a catch-word that well describes the pressures and frictions emerging from the interplay of distinct bodies of laws pushing in opposite directions.[209]

Until the 1990s, abortion law was exclusively in the purview of national states, with major variations in the choice of regulation pursued by the EU countries. However, also in this field, developments in both the framework of the EU and in the ECHR system have proven that—to quote the famous statement of Koen Lenaerts—"there is simply no nucleus of sovereignty that the Member States can invoke"[210] against the evolution of supranational law.[211] The ECJ and the ECtHR have, step-by-step, developed a series of substantive checks and procedural balances that constrain the freedom of the Member States to deal with abortion as they see fit. This has created a web of complexities and inconsistencies. It is now necessary to investigate whether these dynamics are uniquely European and how such phenomena might prospectively develop in the future.

IV. THE RIGHT TO ABORTION IN THE U.S. CONSTITUTIONAL EXPERIENCE

As the previous section has highlighted, a series of pressures and complex constitutional tensions characterize the field of abortion rights in the European multilevel architecture. However, these inconsistencies are not a peculiarly European phenomenon; rather, analogous issues arise in other constitutional systems that are "premised on regulatory federalism regarding abortion policy."[212] From a comparative point of view, it seems possible to argue, albeit

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[209] *See generally* Fabbrini, *supra* note 18.

[210] Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 220 (1990).

[211] On the impact that the developments of supranational human rights law produces in the legal systems of the EU Member States, see generally MIRIAM AZIZ, THE IMPACT OF EUROPEAN RIGHTS ON NATIONAL LEGAL CULTURES (2004); Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, *in* A EUROPE OF RIGHTS 3 (Helen Keller & Alec Stone Sweet eds., 2008).

[212] Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-*Roe *World*, 51 ST. LOUIS U. L.J. 685, 690 (2007).

with several caveats, that the dynamics arising in the field of abortion law in Europe are not dissimilar from those at play in those federal systems in which different abortion legislations are in force in the various constituent states, and in which a federal court must review the states' regulations on the basis of a transnational law protecting fundamental rights.[213]

As Stephen Gardbaum has convincingly explained, this seems to be particularly the case in the United States of America (U.S.).[214] Whereas in other federal systems, such as Canada or Switzerland, criminal law and, by implication, the regulation of abortion, is a field of federal competence[215] and is thus subjected to a uniform federal legislation, or lack thereof,[216] in the U.S., jurisdiction over criminal law and abortion belongs to the constituent states, albeit under constraints imposed by the federal government.[217] In addition, contrary to other federal countries such as Australia, where criminal law and, by implication, the regulation of abortion, is also within the

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[213] *See* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENTS IN A TRANSNATIONAL ERA 213 (2010) (arguing that in several "federal systems, regulation [of abortion] not only varies substantively but takes place (or not) in quite different ways as between national and subnational levels.").

[214] Gardbaum, *supra* note 212, at 687–90.

[215] Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) § 91(27) (Can.) (attributing to the federal government the competence in the field of criminal law); VERFASSUNGSVERGLEICH [CONSTITUTION] Apr. 18, 1999, SR 101, art. 123 (Switz.). Note that this is also the case also in the two federal countries that are members of the EU, Germany and Austria. *See supra* text accompanying notes 36 and 81–97.

[216] CODE PÉNALE SUISSE [CP] [SWISS CRIMINAL CODE] Dec. 21, 1937, SR 311.0 (1938), art. 199(2), *as amended* by Loi Fédérale, Mar. 23, 2011 (Switz.) (allowing abortion within the first trimester upon request of a woman in a state of distress and at any time if required, upon indication of a medical practitioner, to prevent the threat of a serious harm to the physical integrity or mental distress of the woman). In Canada, on the contrary, there is at present essentially *no* federal legislation on abortion as Criminal Code, R.S.C. 1985, S. 251, C-34 was declared unconstitutional by the Canadian Supreme Court in *R. v. Morgantaler*, [1988] 1 S.C.R. 30 (Can.), on the ground that it violated the principles of liberty codified in Section 7 of the 1982 Canadian Charter of Rights and Freedom and never replaced. In the absence of federal intervention, the attempt by the province of Nova Scotia to enact a criminal ban of abortion was also declared unconstitutional by the Canadian Supreme Court in *R. v. Morgantaler*, [1993] 3 S.C.R. 463 (Can.), on the ground that the competence over criminal law and, by implication, over abortion belongs to the federal government.

[217] *See infra* text accompanying notes 217–220.

competences of the constituent states[218] but is essentially addressed in a uniform manner,[219] the U.S. has historically displayed a wide variation in the way in which the several states have regulated abortion rights.[220]

Therefore, a comparative assessment of the U.S. constitutional experience can illuminate the challenges and developments at play in the field of abortion law in the European system.[221] A number of clarifications, however, are necessary.[222] The comparison between the constitutional dynamics shaping the issue of abortion in the U.S. and Europe neither implies that the two systems neither are identical nor suggests that the two systems will necessarily develop along the same lines. Despite the fact that the EU and the ECHR "have increasingly taken on the features of full-blown constitutional structures,"[223] there are still some significant differences between the European multilevel architecture and the U.S. federal system, and many of these differences are likely to remain for at least the near future.

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[218] *See* AUSTRALIAN CONSTITUTION S 51–52 (detailing the competences of the federal government without enumerating criminal law, which therefore belongs to the states and territories).

[219] *See* Elizabeth Kennedy, *Abortion Laws in Australia*, 9 O&G MAGAZINE 4, 36 (2007) (arguing that a common law defense of necessity precludes punishment for abortion performed on medical grounds and applies in the states of Victoria, New South Wales, and Queensland, while specific health legislation precludes punishment for abortion under medical certification and is in force in Western Australia, Tasmania, South Australia, the Northern Territory and the Australian Capital Territory).

[220] *See infra* text accompanying note 236.

[221] On the advantages of comparing the European system with the U.S. federal architecture, see generally Eric Stein, *Towards a European Foreign Policy?: The European Foreign Affairs System from the Perspective of the United States Constitution*, *in* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, VOLUME 1, BOOK 3, 3 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986); George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994).

[222] On the caveats that are necessary when undertaking a comparison of the EU with the U.S. see Daniel Elazar, *The United States and the European Union: Models for Their Epochs*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 31 (Robert Howse & Kalypso Nicolaidis eds., 2001); ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW (2009).

[223] Gardbaum, *supra* note 212, at 694.

As I have argued elsewhere,[224] the U.S. federal system and the European multilevel architecture share an important structural analogy: they both feature a pluralist constitutional arrangement for the protection of fundamental rights in which rights are simultaneously recognized at the state and federal / supranational levels and adjudicated by a plurality of institutions operating in these multiple layers.[225] Hence, a comparative assessment of how the U.S. constitutional system has dealt with abortion rights issues over time raises useful insights for understanding the current European challenges. In addition, this comparison provides some cautionary tales that help observers appreciate the possible scenarios that might open up in the future in the European multilevel human rights system.[226]

Abortion laws in the U.S. in the early 1960s closely resembled the European laws of the same time. During the nineteenth century, all of the states of the federation had enacted criminal bans on abortion, with the primary aim of protecting the potential mother from the abortionist.[227] By the turn of the century, however, anti-abortion laws had been redrafted with the goal of protecting the fetus rather than protecting the woman and had acquired a "symbolic social curb . . . [of] women's autonomy over their own bodies [and] . . . sexual relations."[228] The standard format of abortion legislation in U.S. states "typically made it a crime for anyone to perform an abortion and also usually made it a crime for a woman to obtain one."[229] Most states only allowed the termination of pregnancy when strictly necessary to save the woman's life.[230]

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[224] *See* Fabbrini, *supra* note 18.

[225] *See* generally PÉREZ, *supra* note 17; Halberstam, *supra* note 19.

[226] *See* Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002).

[227] On the history of abortion law in the U.S., see DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994); N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (2010).

[228] HULL & HOFFER, *supra* note 227, at 47.

[229] TUSHNET, *supra* note 2, at 45.

[230] *See* Edward Veitch & R.R.S. Tracey, *Abortion in the Common Law World*, 22 AM. J. COMP. L. 652, 663 (1974).

By the 1960s, however, pressures had emerged in many states to change restrictive abortion legislations, either by reforming them or by abolishing them.[231] In 1962, the American Law Institute (ALI) published its Model Penal Code, which, in reconsidering the entire system of U.S. criminal law, also offered a model of reform for abortion laws.[232] The Code removed the criminal sanctions for the performance of an abortion when the medical practitioner certifies that "there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse."[233] In the following years, a number of state legislatures amended their codes to incorporate the changes suggested by the ALI.[234] Others adopted even more liberal reforms, allowing abortion on demand up to the first trimester or later.[235]

Because the reform of state laws proceeded unevenly, however, advocates for changes began to mount challenges against restrictive abortion laws before the state judiciary.[236] For instance, in 1969, the California Supreme Court found that the state's act prohibiting abortion, except when necessary to save the woman's life was unconstitutionally vague under the state Constitution.[237] Also the federal judiciary, however, soon became a forum for legal attacks against restrictive state abortion laws. Since the late 1920s, indeed, the U.S. Supreme Court had began interpreting the "due process" clause

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231 *See* TUSHNET, *supra* note 2.

232 *See* Veitch & Tracey, *supra* note 230, at 664.

233 MODEL PENAL CODE § 230.3(2) (1962).

234 *See* Colorado Rev. Stat. § 40–2–50, §40–2–51, § 40–2–52 (1967); North Carolina Gen. Stat. § 14–45.1 (1967); California Health & Safety Code § 25950–54 (1967).

235 *See* New York Penal Law § 125.05.3 (1972) (justifying abortion upon request within 24 weeks from the commencement of pregnancy); Hawaii Rev. Stat. § 453–16(c) (1972) (justifying abortion on demand until viability).

236 *See* GARROW, *supra* note 227.

237 People v. Belous, 71 Cal. 2d 954 (Cal. 1969). On the approach of the California judiciary on the issue of abortion, see *People v. Abarbanel*, 239 Cal. App. 2d 31 (1965) (holding, under the aegis of the pre-1967 legislation, that abortion was not criminal if the doctor performing it believed in good faith that the mother would have committed suicide).

of the Fourteenth Amendment to the U.S. Constitution [238] to "incorporate" parts of the first ten amendments to the U.S. Constitution, commonly referred to as the Bill of Rights.[239] As a result of this transformative jurisprudence, the U.S. Supreme Court mandated states' adherence to and protection of many of the fundamental rights articulated in the Bill of Rights, and plaintiffs were empowered to rely on these rights to challenge states' legislations before the federal judiciary.[240] In the early 1970s, thus, federal district and circuit courts began to embrace claims that restrictive state abortion laws conflicted with the fundamental rights guarantees protected by the U.S. Constitution[241] and most specifically with, the right to privacy which the Supreme Court had recognized in *Griswold v. Connecticut*.[242]

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[238] U.S. CONST. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law."). On the due process clause of the Fourteenth amendment, see JOHN ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY (2003); WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

[239] *See* Gitlow v. New York, 268 U.S. 652 (1925) (holding that the freedom of speech, protected by the First Amendment to the U.S. Constitution from abridgment by Congress, was among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states). A major debate as to whether the Fourteenth Amendment incorporated *all* the Bill of Rights to the U.S. Constitution or only *some* provisions of it developed in the last century. Three different opinions can be identified in this debate. A first doctrine, called the doctrine of selective incorporation (mainly advocated by U.S. Supreme Court Justice Brennan), favored the incorporation in the law of the states (only) of specific rights contained in the federal Bill of Rights. A second position, called the doctrine of total incorporation (mainly advocated by U.S. Supreme Court Justice Black), supported the incorporation of all the federal Bill of Rights in the law of the states. A third doctrine (advocated by U.S. Supreme Court Justice Frankfurter), finally, was essentially against the incorporation of the federal Bill of Rights, except in extraordinary circumstances for reasons of fundamental fairness. On this debate and on the results achieved by the Supreme Court, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

[240] *See* John Paul Stevens, *The Bill of Rights: A Century of Progress, in* THE BILL OF RIGHTS IN THE MODERN STATE 13 (Geoffrey Stone et al. eds., 1992); Michael Zuckert, *Toward a Corrective Federalism: the United States Constitution, Federalism and Rights, in* FEDERALISM AND RIGHTS 75 (Ellis Katz & Alan Tarr eds., 1996).

[241] *See* HULL & HOFFER, *supra* note 227.

[242] Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut law prohibiting the selling of contraceptives even to married couples was in violation of the right to privacy, a right that the Court derived from

Needless to say, the eighteenth century Bill of Rights of the U.S. Constitution—much like the twentieth century fundamental laws of the EU Member States, the ECHR, and the EU treaties—does not contain an explicit, textual protection for the right to an abortion.[243] In the paramount 1973 *Roe v. Wade* decision,[244] however, the U.S. Supreme Court found that the federal Constitution protected an unenumerated right to abortion and that state laws prohibiting abortion were unconstitutional.[245] In *Roe*, the Supreme Court invalidated an old Texas statute, which made abortion a crime in all circumstances.[246] On the same day that the Court delivered its *Roe* judgment, it also struck down, in *Doe v. Bolton*,[247] another more modern abortion statute from Georgia that criminalized abortion except on medical grounds.[248]

Writing for a seven-to-two majority of the Supreme Court, Justice Blackmun stated that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[249] The Court rejected the argument that a woman's right to abortion was absolute; rather, it acknowledged that "some state regulation in areas protected by that right is appropriate."[250] Like the ECtHR,[251] the Court refused to speculate on "the difficult question of when life begins."[252] But it unequivocally stated that the fetus could not be regarded as a person within the meaning of the Fourteenth

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aggregating the penumbras of the Bill of Rights and other amendments to the Constitution).

243 *See* TUSHNET, *supra* note 2.

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

245 The decision of the U.S. Supreme Court in *Roe v. Wade* is the object of detailed assessment in any U.S. constitutional law casebook. *See* GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 530 (13th ed. 1997). For a comparative perspective, *see* also JACKSON & TUSHNET, *supra* note 15; CAPPELLETTI & COHEN, *supra* note 15.

246 TEX. PENAL CODE, arts. 1191–94 (1961), *invalidated by* Roe v. Wade, 410 U.S. 113 (1973).

247 Doe v. Bolton, 410 U.S. 179 (1973).

248 GEORGIA CRIM. CODE, §§ 26–1201–03 (1968), *invalidated by* Doe v. Bolton, 410 U.S. 179 (1973).

249 *Roe*, 410 U.S. 113, at 153.

250 *Id.* at 154.

251 *See supra* text accompanying note 184.

252 *Roe*, 410 U.S. 113, at 159.

Amendment in order to justify restrictive states' anti-abortion statutes.[253]

In light of this constitutional assessment, the Court developed its well-known "trimesters guidelines," clearly dictating the legitimate contours within which a state could regulate abortion:[254]

> (a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[255]

The *Roe* decision generated strong reactions[256] and effectively transformed the issue of abortion into "*the* central legal problem" of contemporary U.S. constitutional law.[257] Attempts were made at the federal level to overrule *Roe* through the enactment of a human life amendment[258] and to limit *Roe*'s impact by prohibiting the financing of abortion through federal funds.[259] The main responses to the decision nevertheless occurred at the state level.[260] Indeed, *Roe*

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[253] *See* Veitch & Tracey, *supra* note 230; DWORKIN, *supra* note 21.

[254] *See* HULL & HOFFER, *supra* note 227, at 176; TUSHNET, *supra* note 2, at 73.

[255] *Roe*, at 164–65.

[256] *Compare* John Hart Ely, *The Wages of the Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing the decision), *with* Laurence Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (defending it). *See also* Richard Fallon, *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611 (2007).

[257] Ann Althouse, *A Response to "If* Roe *Were Overruled,"* 51 ST. LOUIS U. L.J. 761, 761 (2007) (emphasis in original).

[258] *See* Hull & Hoffer, *supra* note 233, at 186 ("within three years [of *Roe*] more than fifty differently worded amendments to ban or cut back on abortion had reached the floor of Congress.").

[259] This was accomplished via the 1976 Hyde Amendment to Title X of the Public Health Service Act, which was systematically re-enacted in successive Health Service appropriations bill and is now codified as Pub. L. No. 111–8, H.R. 1105, Div. F, Title V, Gen. Provisions, § 507(a) (2009).

[260] For an assessment of the federalism issues involved, see Anthony Bellia, *Federalism Doctrines and Abortion Cases*, 51 ST. LOUIS U. L.J. 767 (2007).

"federalized (rather than nationalized) abortion policy, making state legislatures supporting players in abortion policymaking."[261] In many states, "legislatures responded to *Roe* by enacting new restrictions that attempted to reduce the number of abortions without challenging what came to be called *Roe*'s 'central premise'—that the Constitution barred states from making it a criminal offense to have or perform *any* abortion."[262]

Whereas a handful of states enacted statutes that were facially incompatible with *Roe* and thus directly defied the decision of the Supreme Court,[263] other states passed legislation purporting to circumvent the Court's decision by denying public financing for abortion and setting strict conditions under which abortions would be allowed, such as requiring abortions to be performed in hospitals, requiring prior parental and spousal consent, and waiting periods.[264] In a series of decisions in the twenty years following *Roe*, the Supreme Court struck down many such state laws, including: the imposition of spousal consent,[265] mandatory waiting periods,[266] and the requirement that abortions be performed only in hospitals.[267] In *Bigelow v. Virginia*,[268] the Court struck down a Virginia statute, which, much like the Irish ban challenged before the ECJ in *Grogan*,[269] prohibited the advertising of abortion providers in other U.S. states.[270]

At the same time, the Supreme Court upheld state laws imposing women's informed consent,[271] requiring parental notification,[272] and

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[261] Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 PUBLIUS 27, 32 (1990).

[262] TUSHNET, *supra* note 2, at 76.

[263] *See* Veitch & Tracey, *supra* note 230, at 668; Halva-Neubauer, *supra* note 261, at 32.

[264] *See* TUSHNET, *supra* note 2, at 76–78; HULL & HOFFER, *supra* note 227, at 189.

[265] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

[266] *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

[267] *See id.*

[268] Bigelow v. Virginia, 421 U.S. 809 (1975).

[269] *See supra* text accompanying note 128.

[270] *See* Fallon, *supra* note 256, at 628.

[271] *See Danforth*, 428 U.S. at 52. Informed consent requirements are a core component of the relationship between medical doctors and patients and require doctors to disclose and discuss with the patient the patient's diagnosis (if known),

foreclosing both state and federal public funding for elective abortions.[273] In addition, under the influence of newly appointed judges and, possibly, under pressure from states' legislatures, the Court incrementally retracted from *Roe*'s rigid trimester formula.[274] The reasoning of the Court in *Roe* had been criticized, from a liberal perspective, for overemphasizing the role of medical doctors in the decision and failing to address the issue of women's autonomy and equality.[275] In contrast, conservative critics found that *Roe*'s prohibition of any state regulation of abortions during the first and second trimesters represented an unwarranted interference by the federal judicial branch in a matter that should be decided by the state legislature, through the states' democratic processes.[276]

This eventually paved the way for the Court's 1992 decision in *Planned Parenthood v. Casey*.[277] In a plurality opinion jointly written by Justices Kennedy, O'Connor, and Souter, the Supreme Court upheld *Roe*'s core holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[278] However, it rejected *Roe*'s trimester framework,

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the nature and purpose of a proposed treatment or procedure, its risks and benefits, and the alternatives (if available).

[272] *See* Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983).

[273] *See* Maher v. Roe, 432 U.S. 464 (1977) (upholding the constitutionality of a Connecticut statutory provision denying public funding for elective abortions); Harris v. McRae, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment).

[274] *See* HULL & HOFFER, *supra* note 227, at 214; GARROW, *supra* note 227, at 600.

[275] *See* Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Ruth Bader Ginsburg, *Some Thought on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

[276] In the anti-*Roe* rhetoric, there does not seem to be an express Tenth Amendment criticism to the limitation on state authority produced by the Supreme Court decision. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). However, much of the criticisms to the praetorian action of the Supreme Court in *Roe* are inspired by the belief that abortion laws should be addressed by the states' legislative processes, rather than by federal courts. *See* Clarke Forsythe & Stephen Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005).

[277] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[278] *Id.* at 879.

replacing it with the "undue burden" test.[279] Under this test, a state's regulation of abortion would be regarded as "invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[280]

Applying the undue burden test in *Casey*, the Supreme Court upheld a number of provisions in the Pennsylvania law at issue, including the imposition of informed consent and a waiting period for women seeking abortions.[281] However, the Court struck down the spousal notification requirement, arguing that due to the threat of violence that a woman might face if she had to inform her partner of her decision to seek an abortion,[282] the provision represented a substantial obstacle to a woman's right to choose and was comparable, for all practical effects, to a proviso "outlaw[ing] abortion in all cases."[283] Therefore, it has been argued that *Casey* saved *Roe*.[284] At the same time, however, the Court made clear "that state regulations [would] almost invariably pass[] muster,"[285] unless they attempted to bar abortion *tout court*.[286]

Although it has been argued that *Casey* somehow "settled the abortion dispute, both by establishing a majoritarian, split-the-difference standards, and perhaps more importantly, by providing a template that helps states determine what types of abortion regulations can be constitutionally pursued,"[287] the two decades following the decision featured a wide array of activities by both the federal and the

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[279] *See* TUSHNET, *supra* note 2, at 82. On the undue burden test, see also Erin Daly, *Reconsidering Abortion Law: Liberty, Equality and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77 (1995); Earl Maltz, *Abortion, Precedent and the Constitution: A Comment on* Planned Parenthood v. Casey, 68 NOTRE DAME L. REV. 11 (1992).

[280] *Casey*, 505 U.S. at 878.

[281] *Id.* at 879.

[282] *Id*. at 893.

[283] *Id.* at 894.

[284] *See* Ronald Dworkin, Roe *Was Saved*, *in*, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 117 (1996).

[285] HULL & HOFFER, *supra* note 227, at 258.

[286] *See* Brent Weinstein, *The State's Constitutional Power to Regulate Abortion*, 14 J. CONTEMP. LEGAL ISSUES 229 (2005); Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

[287] Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1322 (2009).

state legislatures.[288] In 1994, the U.S. Congress enacted its first piece of legislation in the field of abortion law, making it a federal crime to harass and obstruct lawful providers of abortion.[289] In 2003, Congress enacted a ban on the performance of abortion through the "intact dilate and extraction" technique (referred to by its critics as "partial birth abortion"),[290] an act that—despite the existence of a contrary precedent,[291] federalism concerns,[292] and limited legislative findings[293]—was upheld by the Supreme Court in *Gonzales v. Carhart*.[294]

At the state level, several scholars have emphasized how states were generally uninterested in pushing the boundaries of *Casey*[295] or *Gonzales* by enacting measures that challenged *Roe* outright.[296] Nevertheless, it appears that in the last twenty years many states have enacted increasingly restrictive abortion laws.[297] The latest and most remarkable example is perhaps represented by South Dakota, which recently introduced, for the first time in the U.S., a directive counseling requirement, similar to the German model,[298] which

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[288] *See* HULL & HOFFER, *supra* note 227, at 265.

[289] Freedom of Access to Clinic Entrance Act (FACE), 18 U.S.C. § 248 (1994).

[290] Partial-Birth Abortion Ban Act (PBABA), 18 U.S.C. § 1531 (2003).

[291] *See* Stenberg v. Carhart, 530 U.S. 914 (2000) (declaring a Nebraska statute that prohibited the intact dilate and extraction abortion technique as unconsitutional).

[292] Congress enacted the PBABA pursuant to the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce among the several states). Some criticism has been raised however, as to whether the regulation of the intact dilate and extraction abortion technique represented a permissible exercise of Congress' power under the Commerce Clause. *See generally* Robert Pushaw, *Does Congress Have the Constitutional Power to Prohibit Partial Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005). The U.S. Supreme Court did not address this federalism concern in reviewing the PBABA in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[293] *See* Garrow, *supra* note 6, at 25; Reva Siegel, *supra* note 286, at 1766.

[294] *Gonzales*, 550 U.S. 124, at 162 (upholding the PBABA by affirming that Congress enjoys wide discretion in its fact-finding assessment).

[295] *See* Devins, *supra* note 287, at 1336.

[296] *See* Garrow, *supra* note 6, at 43.

[297] *See* Judith Waxman, *Privacy and Reproductive Rights: Where We've Been and Were We're Going*, 68 MONT. L. REV. 299, 315 (2007) (arguing that "*Casey* has led directly to a growing number of legislative restrictions on abortions."). *See also supra* text accompanying note 5.

[298] *See supra* text accompanying notes 92–98.

obliges women seeking an abortion to consult with pro-life pregnancy centers, even if they seek an abortion during the first trimester of pregnancy.[299] Because of such legislative experimentations, wide variations among the states' approaches to abortion exist today, even though all such legislation must take place within the framework of permissible limitations set by the Supreme Court.[300] The contemporary picture of abortion regulation in the states of the U.S. highlights a "crazy-quilt pattern of the laws—a diversity that resembles the diversity of state law during the 'reform' period of the late 1960s."[301]

On the one hand, a number of states have passed legislation that restricts abortion to the greatest extent permitted by federal law.[302] To this end, together with more traditional provisions imposing parental notification, waiting periods, or informed consent requirements,[303] recent statutory enactments require women to hear about all potential medical complications that could arise from an abortion (even those complications that are irrelevant in their cases),[304] require women to hear ultrasounds of the fetus,[305] and, as mentioned, undergo directive counseling.[306] A series of demanding targeted regulations for abortion providers are also in force in several states.[307] Finally, whereas the

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299 *See supra* text accompanying note 6.

300 *See generally* NARAL Pro-Choice America Foundation, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES (2011), *available at* http://www.prochoiceamerica.org/government-and-you/who-decides.

301 HULL & HOFFER, *supra* note 227, at 265.

302 *See* Devins, *supra* note 287, at 1339.

303 *See* Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1602–1603 (2008).

304 *See* Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 111 (2008).

305 *See* Guttmacher Institute, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

306 *See supra* text accompanying note 8.

307 *See* NARAL Pro-Choice America Foundation, TARGETED REGULATION OF ABORTION PROVIDERS (TRAP), *available at* http://www.prochoiceamerica.org/what-is-choice/fast-facts/issues-trap.html. TRAP measures are laws that single-out the medical practices of doctors who provide abortions and impose requirements on them that are different and more burdensome than those imposed on other medical practices.

unenforceable pre-*Roe* statutory prohibitions of abortion remain on many states' statutory books,[308] some states have enacted so-called trigger laws, which would automatically outlaw abortion if the Supreme Court were to overrule *Roe*.[309]

On the other hand, a number of states have autonomously decided to supersede the federal standard by offering even greater constitutional protection for the right to an abortion than the federal minimum.[310] Following the lead of the California Supreme Court,[311] nine state superior courts have concluded that their state constitutions contained an independent right to abortion.[312] In addition, inferior courts in nine other states have recognized a state constitutional right to abortion or privacy.[313] Finally, broad recognition of the right to abortion without any major statutory limitations is provided in the legislation of many other states with the consequence that, even in the unlikely case that the Supreme Court overrules *Roe*, abortion would be lawful in a plurality of U.S. states.[314]

In conclusion, the assessment of the U.S. constitutional experience in the field of abortion law highlights an evolving pattern. Historically, the competence over criminal law belonged to the several states and by the late 1960s, wide variations existed in the ways in

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[308] *See* Fallon, *supra* note 256, at 255, 614.

[309] *See* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1641–42 (2009).

[310] On the possibility for state constitutions to offer greater fundamental rights protection than the minimum provided by federal law, which is a distinctive feature of the U.S. federal system for the protection of fundamental rights, see William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Stewart Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 707 (1983).

[311] *See* Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779, 796 (Cal. 1981) (holding that the right to "procreative choice" under the California Constitution is "at least as broad as that described in *Roe v. Wade*").

[312] On the expansive interpretation of state constitutions offered by some state courts in the field of abortion law, especially with regard to state funding of abortion, see Janice Steinschneider, *State Constitutions: The New Battlefield for Abortion Rights*, 10 HARV. WOMEN'S L.J. 284, 284–87 (1987); Linda Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 433–34 (1996).

[313] *See* Gardbaum, *supra* note 212, at 687.

[314] *See* Fallon, *supra* note 256, at 614 (noting that "many states formally repealed their old abortion laws after *Roe*, [but] seventeen states currently have laws on their books that would forbid nearly all abortions.").

which each state regulated abortion. The Supreme Court's *Roe v. Wade* decision imposed a unifying standard, recognizing a woman's fundamental right to decide privately whether to carry on a pregnancy and precluding states from criminalizing abortion. Since that decision, however, the Supreme Court has taken a number of retreating steps, recognizing wider room for states to maneuver, albeit within the limits of the *Casey* undue burden test. As a consequence, significant differences remain today in the regulation of abortion in the several U.S. states, but a woman's right to terminate her pregnancy—at least during the first trimester of pregnancy—is solidly grounded in the Supreme Court's interpretation of the U.S. Constitution.[315]

V. RECENT DEVELOPMENTS IN THE PROTECTION OF ABORTION RIGHTS IN EUROPE: THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN *A., B. & C. V. IRELAND*

The dynamics at play in the U.S. constitutional system have produced over time a more consistent framework for the regulation of abortion rights throughout the U.S., while still preserving a degree of diversity among the several states. The U.S. Supreme Court now ensures a minimum federal standard of protection for the right to an abortion: states can supersede this standard and integrate it, but they cannot place undue burdens that would substantially impair a woman's right to an abortion. In light of the U.S. experience, this section addresses the question whether a comparable evolution toward the definition of a supranational standard for the protection of abortion rights can be detected in the most recent transformations taking place in the law in the books and the law in action in the European human rights system. To this end, I focus on a recent decision of the ECtHR: the December 2010 Grand Chamber ruling in *A., B. & C. v. Ireland*.[316]

The case concerned three women, two Irish citizens and a Lithuanian citizen residing in Ireland, who had to travel to England to terminate their pregnancies due to the Irish prohibition on abortion.[317] The first applicant was an unmarried and unemployed woman, who already had four children and sought an abortion for reasons of health

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315 *See* JACKSON, *supra* note 213, at 210, 213; Garrow, *supra* note 6, at 19.

316 A., B. and C. v. Ireland, App. No. 25579/05, [2010] Eur. Ct. H.R. 2032.

317 *Id*. ¶¶ 11–12.

and well-being and out of a concern that an additional pregnancy would make it impossible for her to raise her children.[318] The second applicant had become pregnant unintentionally and had been initially warned that there was a substantial risk of an ectopic pregnancy. By the time she decided to seek an abortion, the risk had been excluded but the woman was willing to terminate her pregnancy out of well-being concerns.[319] The third applicant had become pregnant after a three-year chemotherapeutic treatment for a rare form of cancer. Although the pregnancy seriously threatened a recurrence of the cancer and imperiled her life, the woman was unable to obtain advice from Irish doctors on whether she was entitled to an abortion in Ireland, and she therefore decided to seek an abortion in England out of concern for her life.[320]

All of the applicants complained that the Irish prohibition on abortion restricted their ECHR rights.[321] They maintained that the criminalization of abortion violated Article 3, since it produced stigma and prejudice against women seeking an abortion, which humiliated and degraded their dignity.[322] They also claimed that the prohibition of abortion was contrary to Article 14, which prohibits discrimination, and Article 13, which requires contracting parties to the ECHR to set up effective domestic remedies to vindicate their conventional rights.[323] The third applicant complained that the impossibility of obtaining advice as to the medical implications of a pregnancy for her cancer also amounted to a violation of Article 2, which enshrines the right to life.[324] Finally, all the applicants claimed that the Irish prohibition of abortion represented an undue interference with their right to respect for private life protected by Article 8.[325]

The ECtHR began its opinion by explaining the Irish legal framework on abortion in great detail and reporting the criticisms and proposals for reform that had been discussed both at the national and

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318 *Id*. ¶¶ 13–17.
319 *Id*. ¶¶ 18-21.
320 *Id*. ¶¶ 22-26.
321 *Id.* ¶ 113.
322 *Id*.
323 *Id*.
324 *Id*.
325 *Id*.

international levels.[326] It then addressed the admissibility issue, distinguishing the present case from the *D.* case.[327] As far as the first two petitioners were concerned, the ECtHR stated that they could not be required to pursue and exhaust the domestic avenues of recourse before applying to the ECtHR as it was clear that a domestic complaint alleging a violation of the ECHR due to the impossible nature of obtaining an abortion in Ireland for health and well-being reasons did not have "any prospect of success, going against . . . the history, text and judicial interpretation of Article 40.3.3 of the [Irish] Constitution."[328] As far as the third petitioner was concerned, the ECtHR underlined how the lack of domestic legislation implementing the right to abortion to save the life of the mother was at the core of her complaint and therefore had to be addressed on the merits.

On the substantive issues of the case, the ECtHR summarily rejected the claim of a violation of Article 3 ECHR, arguing that the "facts alleged d[id] not disclose a level of severity falling within the scope" of the contested provision.[329] The Court also rebuffed the third applicant's complaint under Article 2 ECHR because "there was no legal impediment to the third applicant travelling for an abortion abroad."[330] The ECtHR then moved to address the alleged violation of Article 8 ECHR by considering separately the complaint of the first two applicants "that they could not obtain an abortion for health and / or well-being reasons in Ireland,"[331] and later, the complaint of the third petitioner "about the absence of any legislative implementation of Article 40.3.3 of the [Irish] Constitution."[332]

According to the ECtHR, although Article 8 ECHR could not "be interpreted as conferring a right to abortion,"[333] its well-consolidated case law made it clear that "legislation regulating the interruption of

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326 *Id.* ¶¶ 27–112.

327 *See supra* text accompanying notes 197-98.

328 A., B. and C, [2010] Eur. Ct. H.R. 2032, ¶ 147.

329 *Id.* ¶ 164.

330 *Id.* ¶ 158.

331 *Id.* ¶ 167.

332 *Id.* However, the ECtHR did not address the complaints under Articles 13 and 14 ECHR because, according to the Court, its decision based on Article 8 was decisive and rendered consideration of Articles 13 and 14 unnecessary.

333 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 214.

pregnancy touches upon the sphere of the private life of the woman,"[334] protected by Article 8 ECHR.[335] As a consequence:

> [t]he prohibition in Ireland of abortion where sought for reasons of health and / or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8.[336]

Nevertheless, the "difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, require[d] separate determination of the question whether there ha[d] been a breach of Article 8."[337]

The third applicant's case raised an issue that had already been considered by the ECtHR: that is, the existence of a series of *positive* obligations stemming from Article 8 ECHR that require the contracting parties to set-up an effective legal framework at the domestic level to verify whether the conditions for obtaining a lawful abortion had been met.[338] In contrast, the first two applicants' cases raised a novel issue: they presented the ECtHR with the first "opportunity to develop certain general Convention principles on the minimum degree of protection to which a woman seeking an abortion would be entitled"[339] and to expound upon the *negative* obligations that limit the authority of the contracting parties to prohibit voluntary termination of pregnancy.

The ECtHR reached different conclusions in the two scenarios, agreeing unanimously on a violation of Article 8 ECHR with regard to the third applicant but dividing sharply on the complaint of the first two applicants.[340] In the case of the third applicant, the ECtHR, by

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334 *Id.* ¶ 213.

335 *See supra* text accompanying notes 185–92.

336 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 214.

337 *Id.*

338 *See supra* text accompanying notes 185–92.

339 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 193.

340 *See* Diletta Tega, *Corte europea dei diritti: l'aborto tra margine di apprezzamento statale e consenso esterno [European Court of Human Rights: Abortion Between State Margin of Appreciation and External Consensus]*, 2011 QUADERNI COSTITUZIONALI 159 (2011) (providing an early comment on the decision). *See also* Fiona de Londras, *Ireland Is Still in Denial Over Abortion*, THE GUARDIAN, Dec. 16, 2010, at 6; Carl O'Brien, *State Loses Case on Woman's Abortion Right*, IRISH TIMES, Dec. 17, 2010.

drawing heavily on the *Tysiąc* precedent,[341] remarked how Article 8 ECHR "may also impose on a State certain positive obligations"[342] and that these obligations may require "the implementation, where appropriate, of specific measures in an abortion context."[343] The ECtHR underlined how, under the *X*. doctrine of the Irish Supreme Court, abortion could be obtained lawfully in Ireland when there was a real and substantial risk to the life of the mother—as distinct from the health of the mother—and this risk could only be avoided by a termination of the pregnancy.[344] The ECtHR then noted that the case of the third applicant would fit within this category; however, it found that no effective mechanisms existed under domestic law to ensure a right to an abortion in such life-saving situations.[345] The ECtHR noted a variety of factors that revealed the ineffectiveness of Irish domestic law in ensuring that a woman could access an abortion when necessary to save her life.

First, the ECtHR raised "a number of concerns as to the effectiveness of [the medical] consultation procedure as a means of establishing the third applicant's qualification for a lawful abortion in Ireland."[346] The ECtHR emphasized that no legal framework existed "whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved."[347] The ECtHR then remarked how the existence of severe criminal sanctions for unlawful abortions "constitute[s] a significant chilling factor for both women and doctors in the medical consultation process."[348]

Second, the ECtHR underlined how a constitutional complaint was not a satisfactory means of protecting the third applicant's right to respect for her private life. Constitutional courts are not "the appropriate *fora* for the primary determination as to whether a woman

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341 *See supra* text accompanying notes 185–98.

342 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 244.

343 *Id.* ¶ 245.

344 Att'y Gen. v. X, [1992] I.L.R.M. 401 (H. Ct.) (Ir.). *See supra* text accompanying notes 114–15.

345 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 250.

346 *Id.* ¶ 253.

347 *Id.*

348 *Id.* ¶ 254.

qualifies for an abortion which is lawfully available in a State"[349] because "it would be wrong to turn the High Court into a 'licensing authority' for abortions."[350] Furthermore, "it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable."[351]

The ECtHR concluded that Ireland had violated Article 8 ECHR by failing to provide the third applicant, whose life was at risk due to her pregnancy, with adequate procedures by which she could establish her right to a lawful abortion in Ireland. In the ECtHR's view:

> [t]he uncertainty generated by the lack of legislative implementation of Article 40.3.3 [of the Irish Constitution], 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.[352]

The ECtHR found that this amounted to a violation of Article 8 ECHR.

In contrast, in the case of the first two applicants, eleven judges out of seventeen of the ECtHR's Grand Chamber concluded that Ireland had not violated the negative obligations stemming from Article 8 ECHR, which prohibits contracting parties from interfering with the right to respect for private life. The majority of the ECtHR acknowledged that "the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and / or well-being amounted to an interference with their right to respect for their private lives."[353] However, in undertaking the three-tier proportionality test, required by Article 8(2) ECHR to verify whether the interference was "in accordance with the law," pursued a "legitimate aim," and was "necessary in a democratic society,"[354] the ECtHR concluded that the Irish prohibition of abortion did not

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349 *Id.* ¶ 258.
350 *Id.*
351 *Id.* ¶ 259.
352 *Id.* ¶ 264.
353 *Id.* ¶ 216.
354 ECHR, Art. 8(2).

disproportionately interfere with the first and second applicants' right to respect for private life.[355]

On the first issue, whether the interference with Article 8 ECHR was in accordance with the law, the ECtHR simply recalled its *Open Door* ruling.[356] On the second issue, whether the interference pursued a legitimate aim, the ECtHR remarked how under Irish law, the right to life of the unborn was based "on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then."[357] The ECtHR hence affirmed "that the impugned restriction . . . pursued the legitimate aim of the protection of morals."[358] Finally, on the third and most relevant question, whether the interference with Article 8 ECHR was necessary in a democratic society, the ECtHR clarified that in the present case, it had to "examine whether the prohibition of abortion in Ireland for health and / or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other hand, profound moral values of the Irish people."[359] Given "the acute sensitivity of the moral and ethical issues raised by the question of abortion,"[360] however, the ECtHR decided that Ireland enjoyed a "broad margin of appreciation"[361] in determining whether a fair balance was struck between the two conflicting values.[362]

The ECtHR also examined "whether this wide margin of appreciation is narrowed by the existence of a relevant consensus" among the other European states and, significantly, underlined how "a substantial majority of the Contracting States of the Council of Europe . . . allow[] abortion on broader grounds than accorded under Irish

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355 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 242.

356 Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 246 Eur. Ct. H.R. (ser. A), ¶ 73 (1992) (finding the Irish prohibition on abortion in accordance with the law as clearly based in domestic constitutional law). *See supra* text accompanying notes 161–72.

357 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 226.

358 *Id.* ¶ 227.

359 *Id.* ¶ 230.

360 *Id.* ¶ 233.

361 *Id.*

362 *See supra* text accompanying notes 169–72.

law."[363] In the factual part of the decision, the ECtHR had already remarked how:

> Abortion is available on request (according to certain criteria including gestational limits) in some 30 Contracting States. An abortion justified on health grounds is available in some 40 Contracting States and justified on well-being grounds in some 35 such States. Three Contracting States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal and Spain).[364]

Despite the existence of a clear European trend in favor of the legalization of abortion,[365] the majority of the ECtHR denied that "this consensus decisively narrow[ed] the broad margin of appreciation of the State."[366] To justify this conclusion, the ECtHR affirmed that there was no agreement on the "scientific and legal definition of the beginning of life"[367] and that "this consensus [could] not be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention."[368]

Therefore, the ECtHR denied "that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life . . . and as to the consequent protection to be accorded to the right to life of the unborn, exceed[ed] the margin of appreciation accorded in that respect to the Irish State."[369] In addition, the ECtHR mentioned in passing how Irish women still had "the option of lawfully travelling to another State"[370] to seek an abortion and to receive information about abortion services overseas (without considering, however, the discriminatory effects that this possibility has on high-income and low-income women).[371] The ECtHR thus concluded that there had been no violation of Article 8 ECHR as regards the first and second applicants.

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363 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶¶ 234–235.
364 *Id.* ¶ 112.
365 *See supra* Section 1.
366 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 236.
367 *Id.* ¶ 237.
368 *Id.*
369 *Id.* ¶ 241.
370 *Id.* ¶ 239.
371 *See infra* text accompanying note 454–461.

The decision of the majority of the ECtHR prompted a vigorous dissent by six judges. In a joint opinion, the minority disagreed with the majority's finding that Ireland had not violated Article 8 ECHR with regard to the first and second applicants and blamed the majority for:

> [I]nappropriately conflat[ing] . . . the question of the beginning of life (and, as a consequence, the right to life), the States' margin of appreciation in this regard, with the margin of appreciation that States have in weighing the right to life of the fetus against the right to life of the mother or her right to health and well-being.[372]

Rather, the dissenting judges argued that the court should consider two elements when applying the proportionality test.

The first element considered was the existence of a "clear . . . consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion."[373] According to the dissenting judges, the precedents of the ECtHR demonstrated that, whenever a consensus existed, this "decisively narrow[ed] the margin of appreciation" given to the Member States.[374] As the dissent's opinion emphasized:

> [T]his approach is commensurate with the 'harmonising' role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence.[375]

Given the existence of a "strong" consensus in the case at hand,[376] according to the dissenting judges, the decision of the ECtHR to refrain from narrowing the margin of appreciation granted to Ireland out of concern for the profound moral values of the Irish people amounted to a "real and dangerous" disregard of established precedents.[377] Indeed, in the dissent's view, it is only when no European consensus exists that the ECtHR should "refrain[] from playing its harmonising role, preferring not to become the first

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372 *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 2 (JJ. Rozakis, Tulkens, Fura, Hirvelä, Malinverni & Poalelungi, Joint Partly Dissenting).

373 *Id.* ¶ 4.

374 *Id.* ¶ 5.

375 *Id.*

376 *Id.* ¶ 6.

377 *Id.* ¶ 9.

European body to 'legislate' on a matter still undecided at European level."[378] The second element that, according to the dissenting judges, the court should consider when applying the proportionality test was the "striking" [379] severity of "the (rather archaic) law," [380] which punished abortion in Ireland with the sentence of life imprisonment.[381] The dissenting judges concluded that it was "clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants."[382]

In conclusion, the analysis of *A., B. & C. v. Ireland* reveals that the ECtHR has fallen short of bringing Europe along the path set forth by the U.S. Supreme Court in *Roe v. Wade*.[383] The ECtHR found a violation of Article 8 ECHR as far as the third applicant was concerned because Ireland had breached its positive obligations to set up an adequate domestic legal framework by which the petitioner could establish her right to a lawful abortion for life-saving purposes. However, a majority of the ECtHR concluded that the Irish prohibition of abortion on health and well-being grounds did not amount to a disproportionate interference with the first and second applicants' rights to respect for private life. Yet, although the ECtHR has not delivered a decision analogous to *Roe v. Wade*, it is difficult to predict what the consequences of the ruling will be, both for the Member States and the future case law of the ECtHR.[384]

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[378] *Id.* ¶ 5.

[379] *Id.* ¶ 10.

[380] *Id.*

[381] *See supra* text accompanying note 105.

[382] A., B. & C., [2010] Eur. Ct. H.R. 2032 ¶ 11 (JJ. Rozakis, Tulkens, Fura, Hirvelä, Malinverni & Poalelungi, Joint Partly Dissenting).

[383] That the decision of the ECtHR in *A., B. & C.* could result in Europe's *Roe v. Wade* had been discussed as a possible (or even likely) scenario. *See* Shannon Calt, A., B. & C. v. Ireland: *"Europe's* Roe v. Wade*,"* 14 LEWIS & CLARK L. REV. 1189 (2010); Sarah Pentz Bottini, *Europe's Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbours?*, 49 J. CHURCH & ST. 211 (2007).

[384] As for the implication of the decision on the legislation of the contracting parties, see Alessandra Osti, *Corte europea dei diritti: accelerazione della legalizzazione dell'aborto in Irlanda?[European Court of Human Rights: Acceleration of the Legalization of Abortion in Ireland?]*, QUADERNI COSTITUZIONALI 156, 158 (2011) (arguing that, despite its apparently restrictive approach, the decision of the ECtHR could still "accelerate the process of legalization of abortion in Ireland").

Indeed, in May 2011, the Fourth Section of the ECtHR delivered another innovative abortion decision that, widely quoting *A., B. & C. v. Ireland*, marked a further step toward the protection of the right to an abortion at the supranational level in Europe. The case, *R.R. v. Poland*,[385] concerned a Polish woman who, although she was informed since the early days of pregnancy that her fetus might be affected by a serious genetic disease, was not able to obtain the medical test needed to ascertain the impairment of the fetus and eventually delivered a baby affected by the Turner syndrome. In her application to the ECtHR, the woman complained that it was impossible for her to obtain timely prenatal tests because the medical doctors with whom she consulted had intentionally postponed all genetic examinations. Because of these deliberate medical delays, therefore, the woman was unable to obtain an abortion within the time limits provided by the law, which permits termination of pregnancy within the first twenty-four weeks for reasons of fetal impairment.[386]

In its decision, the ECtHR ruled that Poland had violated Article 8 ECHR. By recalling its precedents, the ECtHR remarked that "[w]hile a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be 'shaped in a coherent manner.'"[387] The ECtHR emphasized the "critical importance"[388] of the time factor in a woman's decision to terminate a pregnancy and underlined how it had "not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not."[389] It thus concluded that the Polish authorities had "failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there ha[d] therefore been a breach of Article 8."[390]

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385 R.R. v. Poland, App. No. 27617/04, [2011] Eur. Ct. H.R. 828.

386 *See supra* text accompanying note 100.

387 *R.R. v. Poland*, [2011] Eur. Ct. H.R. 828, ¶ 187 (quoting *A., B. & C.*, [2010] Eur. Ct. H.R. 2032, ¶ 249).

388 *Id.* ¶ 203.

389 *Id.* ¶ 208.

390 *Id.* ¶ 214.

In an unprecedented move, however, the ECtHR also found Poland in violation of Article 3 ECHR, which sets up an absolute prohibition against torture and inhumane and degrading treatments. In the ECtHR's view, "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3."[391] However, the circumstances of the case unequivocally led to the conclusion that this minimum threshold of severity had been passed. The ECtHR noted that the applicant had "tried, repeatedly and with perseverance, through numerous visits to doctors and through her written requests and complaints, to obtain access to genetic tests which would have provided her with information confirming or dispelling her fears; to no avail."[392] In addition, it emphasized how the applicant "was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the fetus could be affected with some malformation."[393]

As the ECtHR explained, however, although the woman "suffered acute anguish . . . [h]er concerns were not properly acknowledged and addressed by the health professionals dealing with her case . . . [who showed no regard for] the temporal aspect of the applicant's predicament."[394] Because of the deliberate delay by the medical doctors, the woman "obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by [the Polish Abortion Act] had already expired."[395] In light of the conduct of the public authorities, the ECtHR expressed its "regret that the applicant was so shabbily treated by the doctors dealing with her case" and concluded that the humiliation suffered by the woman and the impossibility of availing herself of a lawful abortion on fetal impairment grounds amounted to a violation of Article 3.[396]

In the end, the *R.R. v. Poland* decision finding a violation of Article 3 ECHR in the Polish abortion context, suggests that the Grand Chamber ruling in *A., B. & C. v. Ireland* is not an obstacle for further

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391 *Id.* ¶ 148.
392 *Id.* ¶ 153.
393 *Id.* ¶ 159.
394 *Id.*
395 *Id.*
396 *Id.* ¶ 160.

judicial developments and greater supranational protection of the dignity of women in the field of abortion rights. In addition, the *R.R. v. Poland* decision predicts that the complex questions of balancing state sovereignty and women's autonomy will remain a core feature of the ECtHR case law in the years to come.[397] At the same, whether the creation of a more consistent framework for the regulation of abortion rights in Europe remains a possible scenario will also depend on transformations taking place in the EU constitutional system.

VI. THE LISBON TREATY AND THE EU CHARTER OF FUNDAMENTAL RIGHTS: FROM HARD TO SOFT PLURALISM IN THE EUROPEAN ABORTION REGIME?

The Lisbon Treaty, entered into force on December 1, 2009,[398] has significantly reshaped the EU human rights architecture and its connection with the systems for the protection of fundamental rights established at the national and international levels.[399] The Lisbon Treaty rescued most of the substantive and institutional innovations contained in the abandoned 2003 Constitutional Treaty and can therefore be regarded as a momentous reform of the EU constitutional

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[397] *See* Elizabeth Wicks, A., B. & C. v. Ireland*: Abortion Law Under the European Convention on Human Rights*, 11 HUM. RTS. L. REV. 556, 565 (2011) (arguing that *A., B. & C. v. Ireland* "hints at a more interventionist Court in future abortion cases"); *see also* Judith Resnik, *The Production and Reproduction of Constitutional Norms*, 35 N.Y.U. REV. L. & SOC. CHANGE 226, 244 (2011) (arguing that abortion cases are likely to remain a key issue in the docket of the ECtHR and other constitutional courts worldwide in the near future).

[398] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 3, 2007, 2007 O.J. (C 306) 30 [hereinafter Lisbon Treaty]. *See generally* JACQUES ZILLER, IL NUOVO TRATTATO EUROPEO [THE NEW EUROPEAN TREATY] 178 (2007); Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT L. REV. 617 (2008).

[399] *See* Marta Cartabia, *I diritti fondamentali e la cittadinanza dell'Unione* [*Fundamental Rights and Citizenship of the Union*], *in* LE NUOVE ISTITUZIONI EUROPEE: COMMENTO AL TRATTATO DI LISBONA [THE NEW EUROPEAN INSTITUTIONS: REVIEW OF THE TREATY OF LISBON] 81 (Franco Bassanini & Giulia Tiberi eds., 2008); *see also*, Giacomo di Federico, *Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS 15 (Giacomo di Federico ed., 2009) (regarding the impact of the Lisbon Treaty on the protection of fundamental rights in the EU system).

system.[400] Its potential impact on the protection of fundamental rights and on the controversial issue of the right to an abortion needs to be considered. The Lisbon Treaty has provided the legal basis for the accession of the EU to the ECHR, paving the way for external supervision by the ECtHR on the human rights conduct of the EU.[401]

In addition, pursuant to the new Article 6(1) of the EU Treaty (TEU), the Charter of Fundamental Rights (CFR),[402] which was only proclaimed in 2001 by the EU institutions, has now acquired the "same legal value" as the other EU treaties (that is, the formal status of EU constitutional law).[403] The CFR is the first written EU Bill of Rights [404] and was initially conceived as a codification of the fundamental rights recognized by the ECJ. The CFR, however, contains a complete and coherent catalogue of rights that extends well beyond a mere jurisprudential restatement; rather, it features one of the most advanced human rights instruments worldwide.[405] Hence the CFR includes a number of provisions that are relevant to the issue of abortion including, safeguarding a right to life,[406] protecting private

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[400] *See* Bruno de Witte, *Saving the Constitution? The Escape Routes and their Legal Feasibility*, *in* GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 919 (Giuliano Amato et al. eds., 2007).

[401] *See* Alessandra Giannelli, *L'adesione dell'Unione Europea alla CEDU secondo il Trattato di Lisbona* [*The European Union's Accession to the ECHR Under the Treaty of Lisbon*], DIRITTO DELL'UNIONE EUROPEA 684 (2009); Francis Jacobs, *The European Convention on Human Rights: The EU Charter of Fundamental Rights and the European Court of Justice*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN COMPARATIVE PERSPECTIVE 291 (Ingolf Pernice et al. eds., 2006).

[402] Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389 [hereinafter CFR].

[403] *See* Emanuelle Bribosia, *L'avenir de la protection de droits fondamentaux dans l'Unione européenne* [*The Future of the Protection of Fundamental Rights in the European Union*], *in* GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 995 (Giuliano Amato et al. eds., 2007); Julianne Kokott & Christoph Sobotta, *The Charter of Fundamental Rights of the European Union After Lisbon*, EUI WORKING PAPERS – ACADEMY OF EUROPEAN LAW, No. 6 (2010).

[404] Koen Lenaerts & Eddy de Smijter, *A Bill of Rights for the European Union*, 38 COMMON MKT. L. REV. 273 (2001).

[405] *See* Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights at the Core of the European Union*, 37 COMMON MKT. L. REV. 1307 (2000); Marta Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea* [*The Time for Fundamental Rights in the European Union*], *in* I DIRITTI IN AZIONE [RIGHTS IN ACTION] 13 (Marta Cartabia ed., 2007).

[406] CFR, art. 2.

life [407] and recognizing a general principle of equality without discrimination.[408]

The CFR binds all the EU institutions and the Member States when they act within the scope of application of EU law.[409] Since the ECJ had already acknowledged in *Grogan* that abortion constituted a service within the meaning of EU law,[410] it would appear that any national regulation on abortion would fall within the scope of application of EU law and would thus be subject to compliance with the fundamental rights principles contained in the CFR.[411] At the same time, whereas in the early 1990s, in the *Grogan* case, the ECJ was able to get around the Irish domestic ban on information about abortion services on purely economic grounds,[412] it would seem that today, given the binding nature of the CFR, any possible challenge to a national measure restricting abortion would inevitably require the ECJ to consider the human rights issues involved in the case. This clearly shifts the theoretical underpinnings of the ECJ's oversight from an internal market paradigm toward a fundamental rights paradigm.[413]

The potential for the above scenario to take place *in the abstract* seems to be confirmed by the legal safeguards that a few EU Member States have adopted to prevent such a future development.[414] Protocol

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[407] CFR, art. 7.

[408] CFR, art. 21.

[409] *See* Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945 (2002); Alexander Egger, *EU-Fundamental Rights in National Legal Orders: The Obligations of Member States Revisited*, 25 Y.B. OF EUR. L. 515 (2006).

[410] *See supra* text accompanying notes 130–132.

[411] *See* Lawson, *supra* note 3, at 174 (arguing that, in regard to the *Grogan* decision, "it seems inevitable that the ECJ will sooner or later be confronted with the same matter").

[412] *See* Cole, *supra* note 3, at 126–28; Phelan, *supra* note 124, at 686–87.

[413] *See* Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37 (2002); Rick Lawson, *Human Rights: The Best is Yet to Come*, 1 EUR. CONST. L. REV. 27 (2005).

[414] *See* Koen Lenaerts & Eddy de Smijter, *The Charter and the Role of the European Courts*, 8 MAASTRICHT J. EUR. & COMP. L. 90 (2001); Antonio Bultrini, *I rapporti tra Carta dei diritti fondamentali e CEDU dopo Lisbona: una straordinaria occasione di sviluppo per la tutela dei diritti umani in Europa* [*The Relationship between the ECHR and the Charter of Fundamental Rights after Lisbon: An*

No. 30 on the Application of the CFR,[415] which Poland and the U.K. secured from the other EU Member States during the negotiations of the Lisbon Treaty, represents the first piece of evidence in this regard.[416] The Protocol is attached to the EU treaties and has their same legal status. It affirms that the CFR "does not extend the ability of the [ECJ], or any court or tribunal of Poland or of the [U.K.], to find that the laws, regulations or administrative provisions, practices or action of Poland or of the [U.K.] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."[417]

The U.K. and Poland sought the adoption of the Protocol in order to limit the impact of the CFR upon their national legal systems. For the U.K., its support of the Protocol did not stem from a concern for its permissive abortion law, but, rather, out of fear that the social rights provisions of the CFR could destabilize its labor market.[418] In contrast, Poland primarily viewed the Protocol as a legal instrument to shield its restrictive abortion regulation from EU supervision.[419] This is confirmed by the non-binding unilateral declaration No. 61 in which Poland makes further efforts to affirm its position that the CFR "does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."[420]

Extraordinary Opportunity for Developing the Protection of Human Rights in Europe], DIRITTO DELL'UNIONE EUROPEA 700 (2009).

[415] Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2010 O.J. (C 83) 313.

[416] *See* Stefano Amedeo, *Il Protocollo n. 30 sull'applicazione della Carta a Polonia e Regno Unito e la tutela "asimmetrica" dei diritti fondamentali: molti problemi, qualche soluzione* [*Protocol No. 30 on the Application of the Charter to Poland and the United Kingdom and the Protection of "Asymmetric" Fundamental Rights: Many Problems, Some Solutions*], DIRITTO DELL'UNIONE EUROPEA 720 (2009); Catherine Barnard, *The "Opt-Out" for the U.K. and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric Over Reality?*, *in* THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 257, 257–83 (Stefan Griller & Jacques Ziller eds., 2010).

[417] Protocol No. 30, 2010 O.J. (C 83) 314.

[418] *See* Barnard, *supra* note 416, at 270.

[419] *See* Czerwinski, *supra* note 101, at 663.

[420] Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 358.

The redundancy with which the treaties affirm that the CFR does not extend the competences of the EU provides additional evidence of several Member States' concerns when considering a binding CFR; namely, its possible spill-over into the domestic legal systems through the human rights adjudication of both the ECJ and the national courts.[421] This same idea is restated multiple times, including in Article 6(1)(2) TEU, in Article 51(2) of the CFR itself, in the joint non-binding declaration No. 1 of the EU Member States annexed to the EU treaties,[422] and in the unilateral declaration No. 53 by the Czech Republic on the CFR.[423] In light of the *Grogan* case, it is uncertain whether these provisions will effectively prevent the ECJ from ruling on a new abortion case.[424] Still, importantly, the EU treaties contain other *ad hoc* clauses designed to protect specific national abortion laws.[425]

For example, in its 2003 accession agreement to the EU, Malta obtained a special provision, Protocol No. 7, which leaves unaffected "the application in the territory of Malta of national legislation relating to abortion."[426] Moreover, the consolidated version of the EU treaties post-Lisbon has preserved the 1992 Irish protocol (renumbering it as Protocol No. 35),[427] ensuring that "nothing in the [EU treaties] shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."[428] The December 2008 Conclusions adopted by the European Council after the rejection of the Lisbon Treaty in the first Irish referendum of 2008 and paving the way to the second, successful, Irish referendum in 2009,[429] provided an additional

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[421] *See* ZILLER, *supra* note 398, at 170.

[422] Declaration Concerning the Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 337.

[423] Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 355.

[424] Any such ruling, in fact, would not be an extension of the regulatory competences of the EU. *See supra* text accompanying note 396–97.

[425] *See* Curtin, *supra* note 146, at 47; Czerwinski, *supra* note 101, at 654. *See also* Peta-Gaye Miller, *Member State Sovereignty and Women's Reproductive Rights: The European Union Response*, 22 B.C. INT'L & COMP. L. REV. 195 (1999).

[426] Protocol No. 7 on Abortion in Malta, 2003 O.J. (L 236) 947.

[427] *See supra* text accompanying note 145.

[428] Protocol No. 35 on Article 40.3.3 of the Constitution of Ireland, 2010 O.J. (C 83) 321.

[429] *See* John O'Brennan, *Ireland and the Lisbon Treaty: Quo Vadis?*, 176 CEPS POL'Y BRIEF 1, 1–13 (2008) (describing the failure of the first Irish

"guarantee that the provisions of the Irish Constitution in relation to the right to life . . . and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the [CFR]."[430]

Legal scholars debate whether these provisions of the EU treaties can be truly effective.[431] Contrary to the purely *political* declarations, the additional Protocols have the same *legal* value as the EU treaties; however, scholars have argued that, for instance, Protocol No. 30 "is totally useless: it can not prohibit lawyers from requesting the application of the rights codified in the CFR."[432] In addition, if one considers that Protocol No. 30 purportedly only aims to "clarify the application of the [CFR] in relation to the laws and administrative actions of Poland and the [U.K.] and of its justiciability within Poland and the [U.K.],"[433] it would seem that its effect is not to opt-out from the CFR.[434] Rather, Protocol No. 30 "is an exercise in smoke and mirrors," largely motivated for presentational reasons.[435]

At the same time, the concessions granted in the Irish and Maltese abortion protocols, as well as the political reassurances that the European Council made to Ireland after the first unsuccessful referendum on the Lisbon Treaty, reveal a pattern. These concessions reflect a trend to accommodate in the EU treaties "the distrust of several states toward the EU"[436] and its human rights instruments. In this context, it is not easy to imagine that the ECJ will, *in practice*, fully incorporate the fundamental rights guarantees included in the CFR within the legal systems of the Member States, along the lines pursued by the U.S. Supreme Court in its gradual incorporation of the

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referendum to approve the Lisbon Treaty, and the step that Ireland took to take a second, successful referendum).

[430] Presidency Conclusions, Brussels European Council (Dec. 11–12, 2008).

[431] *See* Kokott & Sobotta, *supra* note 403, at 12; Amedeo, *supra* note 416, at 720.

[432] ZILLER, *supra* note 398, at 178.

[433] Protocol No. 30, 2010 O.J. (C 83) 313.

[434] Barnard, *supra* note 416, at 270 (arguing that the Protocol No. 30 contains a genuine opt-out for the U.K. and Poland only insofar as the social rights contained in Title IV of the CFR are concerned.). *See* Art. 1(2) of Protocol No. 30, 2010 O.J. (C 83) 314 (affirming that "for the avoidance of doubt, nothing in Title IV of the Charter creates justifiable rights applicable to Poland or the [U.K.]").

[435] Barnard, *supra* note 419, at 283.

[436] Ziller, *supra* note 401, at 170.

Bill of Rights into the legal systems of the states.[437] Nor is it easy to imagine that the ECJ will inaugurate a review of domestic legislation limiting abortion rights for its compatibility with the transnational human rights standard enshrined in the CFR at any time in the near future.[438]

Still, as Miguel Poiares Maduro has persuasively argued, the CFR has a double constitutional life.[439] On the one hand, the CFR is regarded as "a simple consolidation of the previous fundamental rights *acquis* aimed at guaranteeing regime legitimacy."[440] On the other hand, the CFR can be seen as "a bill of rights of a political community, a constitutional document that is part of a complete political contract among citizens and that therefore legitimises new claims and an increased incorporation at the state level."[441] At the moment, it is impossible to predict which of these two visions will prevail. Yet, the U.S. experience with its Bill of Rights demonstrates that "intentions and outcomes may differ greatly."[442] Nothing precludes the CFR from becoming a powerful federalizing element that sets the minimum human rights standard with which states shall comply "to an extent that the Union can actually function."[443]

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[437] *See* Jochen Frowein, Stephen Schulhofer & Martin Shapiro, *The Protection of Fundamental Rights as a Vehicle of Integration*, *in* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, VOL. 1, BOOK 3, 231 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) (examining whether the process of incorporating the fundamental rights standards contained in the federal Bill of Rights could possibly take place also in the European context); *see also* Koen Lenaerts, *Federalism and Rights in the European Community*, *in* FEDERALISM AND RIGHTS 139 (Ellis Katz & Alan Tarr eds., 1996).

[438] *See* Bruno de Witte, *The Past and the Future Role of the European Court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS 859, 873 (Philip Alston et al. eds., 1999).

[439] Miguel Poiares Maduro, *The Double Constitutional Life of the Charter of Fundamental Rights of the European Union*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 269 (Tamara Hervey & Jeff Kenner eds., 2003).

[440] *Id.* at 269.

[441] *Id.* at 292.

[442] *Id.* at 299 (recalling how the U.S. Bill of Rights was adopted under pressure from those who opposed the federation, but it later constituted one of the most important elements of federal control over the states).

[443] Lawson, *supra* note 416, at 36.

De jure condendo, a similar development may even be advisable in the field of abortion rights on the basis of an equality argument. I do not intend to articulate here a complete normative theory of equality as a justification for protecting the right to abortion in Europe, comparable to the claims made by a number of distinguished U.S. scholars in favor of grounding the central premise of *Roe v. Wade* in the equal protection clause of the Fourteenth amendment of the U.S. Constitution.[444] What I want to briefly suggest, however, is that in the European context too, the regulation of abortion raises a number of equality concerns.[445] In fact, in a multilevel constitutional system, states' bans on abortion can produce discriminatory effects that are hard to accept.

In the previous sections, I explained how a minority of EU Member States, notably Ireland, Poland, and Malta, have enacted extremely restrictive abortion laws, prohibiting women from obtaining an abortion at home except when necessary to save their lives or protect against grave injury their health.[446] At the same time, women residing in these states have a right—protected under EU law, ECHR law, and now often also codified under domestic law—to be informed about abortion providers in other EU countries. In addition, women in these countries have the right to travel abroad if they want to terminate their pregnancies.[447] Women are able to exercise these rights without facing any risk of prosecution or subjection to the severe domestic criminal sanctions against abortion.[448]

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444 *See* Regan, *supra* note 286, at 1569; Ginsburg, *supra* note 286, at 385; Siegel, *supra* note 298, at 1694.

445 *See* RONALD DWORKIN, *What the Constitution Says*, *in* FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 110 (1996) (providing a liberal jurisprudential statement that the right to abortion is linked to a "moral reading" of the constitutional principles of liberty and equality). *But see* Dworkin, *supra* note 22 (grounding the right to procreative autonomy in the constitutional principle of freedom of religion).

446 *See supra* Section 1.

447 *See supra* Section 2.

448 *See* Abigail-Mary Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 385 (1997). For a comparative perspective, see generally Seth Kreimer, *The Law of Choice and the Choice of Law: Abortion, the Right to Travel and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

The possibility for a woman to escape the restrictive domestic abortion bans by going abroad and to avoid prosecution in her home state has shaped the jurisprudence of the European supranational courts.[449] In fact, this go-around is precisely what prompted AG Van Gerven in *Grogan* to conclude that the Irish ban on information about abortion services was not disproportionate.[450] In his opinion, AG Van Gerven clearly affirmed that "a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad" [451] would never be tolerated under EU law. Furthermore, the ECtHR cited the fact that the Irish law granted women the ability to opt-out of the abortion ban by "lawfully travelling to another State"[452] as one of the justifications for its ruling in *A., B. & C. v. Ireland*.[453]

The consequence of all this is that the Irish, Polish and Maltese abortion domestic bans, along with their equivalents, effectively constrain only those women who cannot side-step the national prohibition by travelling to another EU state.[454] In other words, these

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[449] Indeed, it could even be argued that because women theoretically can get out of restrictive bans on abortion by leaving their home countries for the abortion, the European supranational courts are more protective of the Member States' autonomy to ban abortions since, viewed from one perspective, this ban is not absolute.

[450] *See* Opinion of. Advocate Gen. Van Gerven, June 11, 1991, Case C-159/90, Soc'y for the Protection of Unborn Children v. Grogan, [1990] E.C.R. I–4703, 4732, ¶29.

[451] *Id*.

[452] A., B. and C. v. Ireland, [2010] Eur. Ct. H.R. 2032.

[453] *See supra* text accompanying note 371.

[454] *See* Cook & Dickens, *supra* note 24, at 59 (describing the socially discriminatory impact that abortion bans produce). *See also* Eur. Parl. Ass., *Resolution 1607* (Apr. 16, 2008), at § 4, *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1607.htm. (remarking that "a ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion 'tourism' which is costly, and delays the timing of an abortion and results in social inequities"). The discriminatory effects that are produced by an abortion ban have also been highlighted by the report of the EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, CONCLUSIONS AND RECOMMENDATIONS ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES (2005) *available at* http://cridho.cpdr.ucl.ac.be/documents/Download.Rep/Reports2004/En.synth.rep_2004.pdf (stating that "[a] woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country

laws only prohibit abortion to those women who do not possess sufficient private economic resources to leave their countries to terminate a pregnancy. This situation is clearly discriminatory, as the undue burden of an unwanted pregnancy is only imposed on low-income women.[455]

Nevertheless, in its argument before the ECtHR in *A., B. & C. v. Ireland*, the Irish government, while openly acknowledging that in 2007 at least 4,686 women travelled to the U.K. to have an abortion,[456] it still resolutely argued that Ireland's high protection of the unborn child's right to life justified a domestic prohibition on abortion.[457] In the same case, the majority of the ECtHR did not address whether the Irish abortion ban was compatible with the non-discrimination clause of the ECHR. The Grand Chamber majority laconically stated that:

> [Although] it may even be the case . . . that the impugned prohibition on abortion is to a large extent ineffective in protecting the unborn in the sense that a substantial number of women take the option open to them in law of travelling abroad for an abortion not available in Ireland . . . it is not possible to be more conclusive.[458]

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even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information may not do so"). For further data concerning the number of women travelling abroad to seek abortion, see Mark Hennessy, *Money Plays Ever Increasing Role in Decisions of Irish Women to Travel*, THE IRISH TIMES, Dec. 17, 2010; Steve Clements & Roger Ingham, *Improving Knowledge Regarding Abortions Performed on Irish Women in the U.K.*, CRISIS PREGNANCY AGENCY REPORT NO. 19 (2007) *available at* http://www.crisispregnancy.ie/pub/CPA%20Abortion%20Trends%2019.pdf ; ASTRA NETWORK, REPRODUCTIVE AND HEALTH SUPPLIES IN CENTRAL AND EASTERN EUROPE (2009), *available at* http://www.astra.org.pl/PAI%20astra%20report%202009.pdf; U.N. Human Rights Comm., The Third Periodic Report on Ireland, Jul. 30, 2008, §13, CCPR/C/IRL/CO/3 (2008); U.N. Human Rights Comm., The Concluding Observation on Poland, Dec. 2, 2004, § 8 CCPR/CO/82/POL (2004).

[455] For the argument that laws forbidding abortion require women to behave as Samaritans, see Regan, *supra* note 286, at 1569.

[456] *A., B. and C.*, [2010] Eur. Ct. H. R. 2032, ¶ 183.

[457] *Id.* ¶ 185.

[458] *Id.* ¶ 239.

Yet a legal regime that discriminates between women by making abortion possible and lawful only for the women that can financially afford it and making it impossible and unlawful for the poor, conflicts with the principles of equality that should govern any liberal democratic constitutional system.[459] From this point of view, Article 21 of the CFR codifies a general principle of equality in the EU basic laws for the first time and expressly prohibits any discrimination on grounds of property.[460] *De lege ferenda*, therefore, it might be desirable for the ECJ, in cooperation with the national courts, to take the appropriate steps to enforce this fundamental guarantee of the CFR if necessary also by quashing national abortion legislations that discriminately impact low-income women.[461]

Needless to say, because of the previously mentioned legal constraints on the application of the CFR, the scenario I am depicting is not likely to occur in the near future. In any case, a ruling by the ECJ that national bans on abortion violate the CFR would likely raise a loud public reaction, equivalent to that following *Roe v. Wade*: the decision would be welcomed by some and demonized by others. From a purely normative point of view, however, a judicial opinion stating that statutes prohibiting abortion are incompatible with the EU's non-discrimination principle would simply be the acknowledgment that restrictive domestic rules having a disparate impact on rich and poor women can no longer be acceptable in an "ever closer Union."

In conclusion, the entry into force of the Lisbon Treaty represents a potential turning point for the protection of fundamental rights in the

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[459] *See* DWORKIN, *supra* note 448, at 27.

[460] On the principle of equality in the post-CFR EU constitutional system, see Paolo Caretti, *L'uguaglianza: da segno distintivo dello Stato costituzionale a principio generale dell'ordinamento comunitario* [*Equality: From Distinctive Mark of the Constitutional State To General Principle of Community Law*], *in* LO STATO COSTITUZIONALE 513 (Paolo Caretti & Maria Cristina Grisolia eds., 2010); Dimitry Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, JEAN MONNET WORKING PAPER NO. 8 (2010).

[461] On the inescapable role that the judiciary plays in addressing the moral issues involved with abortion and to remedy inequalities, see Susanna Mancini & Michel Rosenfeld, *The Judge as a Moral Arbiter? The Case of Abortion*, *in* CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS (Andras Sajo & Renata Uitz eds., 2011 forthcoming); *see also* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

EU constitutional system. As the CFR, in particular, has acquired binding legal value, the EU will now be endowed with a comprehensive and advanced Bill of rights on the basis of which actions by the supranational institutions and the Member States that fall within the scope of application of EU law may be reviewed.[462] Nevertheless, whether this transformation will have a major impact on the domestic legal systems of the EU countries remains to be seen. Some states have inserted a number of legal caveats and reservations into the EU treaties in order to prevent the ECJ and the national courts from consistently making use of the CFR to review national laws, including abortion laws.[463]

As things stand now, the European abortion regime reflects what may be called a system of "hard pluralism."[464] Despite the existence of a growing consensus among the EU Member States in favor of legalizing abortion, relevant regulatory differences persist among EU countries. The rise of supranational law through the case law of the ECJ and the ECtHR has placed growing constraints upon and new challenges for the regulatory autonomy of the Member States, but has not reached the point of prohibiting states from maintaining restrictive abortion laws. Thus, while the possibility for pregnant women to travel from one state to another to seek termination of pregnancy is solidly grounded in the fabric of both EU and ECHR law, no

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462 *See* Lawson, *supra* note 416, at 36; Cartabia, *supra* note 402, at 103.

463 *See* Barnard, *supra* note 419, at 283; Amedeo, *supra* note 419, at 720.

464 I borrow the terms "hard" and "soft" pluralism from Mark Rosen, *"Hard" or "Soft" Pluralism? Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L. J. 713 (2007), who uses them to describe two alternative visions of federalism in the context of U.S. abortion laws. Note, however, that I use the expressions "hard" and "soft" pluralism differently. To begin with, whereas he describes a system of "hard pluralism" as a federal arrangement (e.g. the one that, in his opinion, would exist in the U.S. if *Roe v. Wade* were overruled) in which any constituent state of the federation can enforce its abortion ban extra-territorially (e.g. prohibiting its citizen from travelling abroad for an abortion), I instead regard "hard pluralism" as the abortion regime currently in force in Europe. Therefore, for my purposes, "hard pluralism" refers to a regime where states can enact abortion ban *but cannot* enforce them extraterritorially because of the constraints of supranational laws. The European arrangement that I describe would be a system of "soft pluralism" in Rosen's terminology. In addition, whereas Rosen advocates for a system of "hard pluralism," I am convinced that "soft pluralism' would be more appropriate in the European multilevel system.

minimum transnational standard for protecting abortion rights is enforced throughout Europe.

Yet, from a normative standpoint, the existence of strict national abortion bans in a multilevel system in which resourceful women can evade the domestic restrictions by travelling to other EU states has discriminatory effects that undermine the principle of equality. In this situation, if the ECJ, in cooperation with national courts and under the CFR, were to review the most restrictive domestic abortion laws, it could foster the establishment of a less discriminatory legal regime. Such a regime may be called a system of "soft pluralism." Under this framework, a woman's right to an elective abortion, at least in the early phase of pregnancy, would be recognized at the supranational level, while states would still be free to integrate (or qualify or supersede, but not impair) this supranational standard to reflect their domestic policy preferences.

Indeed, as the United States' experience with abortion rights shows, the imposition of a uniform transnational standard that does not allow for any local variation is bound to fail in a federal union that is premised upon states maintaining a degree of autonomy.[465] At the same time, a minimum standard across the federal / multilevel architecture to protect a woman's right to choose whether to terminate her pregnancy appears to be a necessary condition to avoid discrimination and to ensure "a single and comprehensive vision of justice" for all members of the polity.[466] Whether the European abortion regime will evolve from a system of hard pluralism to one of soft pluralism, however, depends on the future role of the CFR and "its potential for polity building in the EU."[467]

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[465] *See* Daniel Elazar, *Federalism, Diversity and Rights*, *in* FEDERALISM AND RIGHTS 1 (Ellis Katz & Alan Tarr eds., 1996); Eric Stein, *Uniformity and Diversity in a Divided-Power System: the United States' Experience*, 61 WASH. L. REV. 1081 (1986), now reprinted in THOUGHTS FROM A BRIDGE: A RETROSPECTIVE OF WRITINGS ON NEW EUROPE AND AMERICAN FEDERALISM 309 (2000).

[466] RONALD DWORKIN, LAW'S EMPIRE 134 (1986).

[467] *See* Poiares Maduro, *supra* note 414, at 292. Incidentally, it may be noticed that the considerations developed here with reference to Europe and the discriminatory effects that strict state abortion laws can produce in a federal system can be applied, *ceteris paribus*, to the U.S. For a discussion of these issues in an hypothetical post-*Roe* scenario, see Fallon, *supra* note 255, especially at 647.

VII. CONCLUSION

At the dawn of the second decade of the twenty-first century, abortion and reproductive rights continue to remain extremely controversial topics on both sides of the Atlantic. In early April 2011 in the U.S., conservative opposition toward the allocation of federal funds to abortion providers almost derailed the difficult budget deal reached between Congress and the President and threatened to shut down the federal government.[468] Simultaneously in Europe, major protests accompanied the enactment by the Hungarian nationalist government of the new Constitution, which now includes a provision to protect embryonic and fetal life "from the moment of conception,"[469] a measure that critics describe as contrasting with EU fundamental rights and European constitutional values.[470] At the same time, as Ireland's continuing difficulties in implementing the ECtHR ruling indicate, nothing suggests that the heated constitutional debates over abortion are likely to scale down in the near future.[471]

This Article has analyzed the implications that arise in the field of abortion law from the complex interaction among national and supranational laws in Europe. Section 1 surveyed the main regulatory models that emerge from the states' legislation and practice in the field of abortion law. It underlined the growing trend in favor of the protection of a right to voluntary termination of pregnancy in Europe and the exceptions to this consensus, reflected in the strong disapproval of abortion in the laws of countries such as Ireland, Malta, and Poland. Section 2 examined the rising impact of EU and ECHR law in the field of abortion law and explained how the case law of the ECJ and the ECtHR has incrementally produced a set of substantive checks and procedural balances on the autonomy of the Member States in the regulation of abortion.

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[468] *See* Jennifer Steinhauer, *Late Clash on Abortion Shows Conservatives's Sway*, N.Y. TIMES, April 9, 2011, at A1.

[469] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], art. II.

[470] *See* Joelle Stolz, *La nouvelle Constitution hongroise, jugée réactionnaire, soulève l'inquiétude* [*The New Hungarian Constitution, Considered Reactionary, Raises Concern*], LE MONDE, April 17, 2011.

[471] *See* Mary Minihan, *Cabinet Discussed Possible Changes to Abortion Law*, IRISH TIMES, April 20, 2011.

I have argued that the overlap between domestic and transnational norms in the European multilevel architecture generates new challenges and inconsistencies in the field of abortion law. Section 3, however, made it clear that the constitutional dynamics at play in the European multilevel system are not unique. Indeed, a comparative assessment highlights that a number of tensions have also characterized the U.S. constitutional experience with abortion law. While states' laws differed in the early 1970s, the *Roe v. Wade* decision of the U.S. Supreme Court established a federal constitutional right for women to interrupt their pregnancies. The recognition of a federal minimum standard for the protection of the right to an abortion, however, has not prevented the states from further intervening in the field and, as a result, a plurality of regulatory models are still in place today throughout the U.S.

Whether the recent developments occurring in the European multilevel architecture point toward an analogous evolution is unclear. Section 4 examined the recent Grand Chamber decision of the ECtHR in *A., B. & C. v. Ireland* and explained why the ruling cannot be fully regarded as Europe's equivalent to *Roe v. Wade*. The ECtHR unanimously ruled that Ireland had violated the ECHR for failing to provide an adequate legal framework by which a woman whose life was in peril due to her pregnancy could establish her right to an abortion in Ireland. At the same time, however, a majority of the ECtHR rejected the facial challenge against the Irish abortion ban, recognizing, despite the growing European pro-choice consensus, a margin of appreciation to the ECHR contracting parties in the field of abortion law.

Section 5 assessed the CFR and the alternative scenarios that opened up in the EU constitutional system after the entry into force of the Lisbon Treaty. A number of legal constraints have been placed in EU primary law to prevent the ECJ and the national courts from developing a substantive CFR-based review of Member States' restrictive abortion laws. Yet, as I have argued, from a normative point of view, a CFR-based review of Member States' abortion laws may be the only satisfactory solution to the discrimination resulting from a regime in which resourceful women are able to escape domestic abortion bans by travelling abroad, and poor women are not. Whether the CFR will play the same constitutionalizing role in the EU multilevel architecture that the Bill of Rights has played in the U.S.

federal system is a tantalizing question that only the future will answer.