THE PRIMACY OF DEMOCRACY OVER NATURAL LAW IN IRISH ABORTION LAW: AN EXAMINATION OF THE *C* CASE

I. INTRODUCTION

A line of recent Irish abortion decisions illustrates that natural law is being displaced in Irish jurisprudence by democratic principles. The Preamble of the Irish Constitution captures the Constitution's staunchly Roman Catholic nature when it begins, "[i]n the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred."[1] The Preamble has also been understood to embrace a Catholic natural law philosophy. As a further example of the embodiment of natural law in the Irish Constitution, consider Article 41, which explicitly recognizes that the family possesses "inalienable and imprescriptible rights, antecedent and superior to all positive law."[2] From the adoption of the Irish Constitution in 1937 until recently, the Irish judiciary consistently recognized and upheld the influence of Catholic natural law in interpreting the Constitution.

Some Irish courts, however, have begun to undermine the force and dominance of natural law theory in Irish jurisprudence. Due in large part to the failure of the government to legislate on the highly sensitive issue of abortion, judges have increasingly ignored the mandates of Catholic natural law in favor of outcomes which support the liberalizing trend in Irish political theory and practice. This trend began with the *X* case in 1992.[3] The *X* case considered whether a fourteen-year-old rape victim could have a legal abortion, despite the Eighth Amendment to the Irish Constitution guaranteeing the right to life of the unborn. The justification that the Court cited to allow the young girl to receive an abortion was not viable under Catholic

1. IR. CONST. pmbl.
2. *Id.* art. 41.1.1.
3. Attorney General v. X [1992] 1 I.R. 1 (Ir. S.C.).

natural law. The trend continued and intensified in 1995, when the Supreme Court explicitly held that natural law was neither superior nor antecedent to the Constitution and that the Constitution itself was the supreme source of law in Ireland. The Court also held that the people of Ireland were free to amend the Constitution in a manner contrary to natural law. The Court thereby not only provided a devastating blow to the standing of natural law, but also provided for the primacy of the democratic process in providing the supreme source of law in Ireland.

The *C* case, which is the focus of this Note, continued the trend of disavowing a natural law influence on the Irish Constitution. The *C* case, like the *X* case, involved a young teenage girl, pregnant as a result of rape. Like the *X* case, the court in the *C* case permitted the young girl to have an abortion, but went further in its holding by permitting a state agency to fund and facilitate the young girl's abortion.

This Note begins by examining the facts of the *C* case, and then gives a brief overview of the development of abortion law in Ireland prior to the case. The *C* case is then analyzed with respect to its holdings concerning the status of suicide as a qualifying risk to the life of the mother, the rights of parents of pregnant minors, and the role of the Irish State in allowing, funding, or otherwise facilitating abortions either inside or outside its jurisdiction. The case analysis also includes a brief look at the possible consequences of the *C* case holding. The Note concludes with a brief discussion of the urgent need for legislation in a number of areas relevant to shaping the future of abortion law in Ireland.

II. *C* CASE FACTS

The *C* case involved a horrific set of facts. Miss C, a thirteen-year-old girl, was brutally raped on August 27, 1997, allegedly by a long standing friend of the family, and became pregnant as a result.[4] C, one of twelve children, belonged to the Travelling community.[5] She and her family lived in particularly squalid conditions, even by Traveller standards.[6] The State felt that C's parents did not respond

4. *See* A and B v. Eastern Health Board, Judge Fahy and C, and the Attorney General (notice party) [1998] 1 I.L.R.M. 460, 469 (Ir. H. Ct.) [hereinafter *C case*].

5. *See id.* Irish Travellers are an indigenous minority with a distinctive lifestyle and culture based on a nomadic tradition. *See generally* Pavee Point Travellers' Centre, *Traveller Facts* (visited Oct. 10, 1998) <http://www.iol.ie/~pavee/irish.htm>.

6. *See C case* [1998] 1 I.L.R.M. at 469. A survey in 1994 reported that among Travellers

appropriately to their daughter's rape, and as a result, C was placed in the care of the Eastern Health Board (EHB) with the consent of her parents.[7] C was subsequently placed by the EHB with a foster family. These custody arrangements, made under the authority of an interim care order, were renewed on a weekly basis in district court.[8]

C was distraught over the pregnancy and at all times professed a desire to obtain an abortion.[9] The High Court explained that she "is quite unable to relate to the baby inside her and cannot accept and claims that she will never accept that that baby is really hers."[10]

Early reports stated that C's parents were supportive of the girl's decision to have an abortion.[11] Lawyers for the EHB and C's parents had even reached an agreement to remove C from EHB care to facilitate her traveling to England in order to obtain an abortion.[12] This agreement, however, fell apart on the night of November 18, and C's parents appeared at the district court the next day with prominent anti-abortion campaigners.[13] That morning, C's parents unexpectedly announced that they no longer supported their daughter's wish to terminate her pregnancy.[14] Rumors surfaced that the anti-abortion

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53% had no access to public electricity, 28% had no toilets, 53% had no showers, and 100% had no public phones on site. *See generally* Pavee Point Travellers' Centre, *Traveller Facts: Accomodation and Living Conditions* (visited Oct. 10, 1998) <http://www.iol.ie/~pavee/fsaccom.htm>.

7. *See C case* [1998] 1 I.L.R.M. at 469-70; *see also Chronology of Events*, IR. TIMES, Nov. 24, 1997, at 6. A child may be placed in the care of a health board under the authority of Section 17 of the Child Care Act, No. 17 (1991). In order to grant such an order, the district court judge must be satisfied that there is reasonable cause to believe that any of the circumstances set out in Section 18(1)(a), (b), or (c) is occurring. These circumstances include a child being assaulted, ill-treated, neglected or sexually abused; a child's health, development or welfare having been or being avoidably impaired or neglected or the child's health, development or welfare being likely to be avoidably impaired or neglected. The Section provides that a child may be placed in care for a period not exceeding eight days or where the parents consent for a longer period of time. Such care orders are temporary in nature, although extension of the order may be sought. *See id.* sec. 18(1)(a), (b), & (c).

8. *See Chronology of Events*, *supra* note 7. Renewals of interim care orders may be granted where the district court judge is satisfied that the grounds for an interim care order continue to exist. *See* Child Care Act § 17(2)(b) & cmts.

9. *See C case* [1998] 1 I.L.R.M. 460, 470 (Ir. H. Ct.).

10. *Id.*

11. *See Chronology of Events*, *supra* note 7.

12. *See* Paul Cullen, *New Legal Team Expected for Rape Victim's Parents*, IR. TIMES, Nov. 21, 1997, at 9.

13. *See* Geraldine Kennedy & Paul Cullen, *Attempt to Remove Girl Rape Victim From EHB Care Fails. Parents Accompanied to Court by Anti-Abortion Campaigners*, IR. TIMES, Nov. 20, 1997, at 1.

14. *See id.*; *see also* Paul Cullen, *Youth Group Seen as Cutting Edge of the Anti-Abortion Cause*, IR. TIMES, Nov. 20, 1997, at 9.

groups involved had offered the parents a significant amount of money for the opportunity to use C's situation for publicity.[15] The groups involved strongly denied such rumors, although they did invest a large amount of money to support the legal rights of the parents, who had previously utilized a state-provided attorney.[16] Before discussing the court room developments of the *C* case, it is necessary to take a brief look at the development of abortion law in Ireland prior to the case.

III. ABORTION LAW IN IRELAND

A. The Constitution

The Irish Constitution (*Bunreacht na hÉireann*) embodies the influence of the Catholic philosopher and theologian St. Thomas Aquinas, who believed the State was a means of instituting God's eternal law on earth and that true justice can only be attained within the framework of Catholic morality.[17] The Preamble to the Constitution, as well as sections of Articles 40 and 41, exalt God as the ultimate lawgiver and clearly display the moral, social, and political teachings of the Catholic tradition.[18] The Constitution was written by Eamon de Valera and adopted in 1937, at a time when Catholic identity was critical to the Irish State and the Irish people in the wake of their independence from Protestant Great Britain.[19]

The Constitution contained no explicit prohibition of abortion prior to the adoption of the Eighth Amendment in 1983.[20] Despite this lack of a specific prohibition of abortion, many scholars believe that even prior to the Eighth Amendment the Constitution protected

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15. *Cf.* Cullen, *supra* note 12.

16. *See id.*

17. *See* Paul W. Butler & David L. Gregory, *A Not so Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 446-47 (1992).

18. *See id.* at 445-46; *see also* IR. CONST. arts. 40, 41.

19. Even today over 90% of the population of Ireland is Roman Catholic. *See Ireland*, *in* CIA WORLD FACTBOOK 193 (1994). However, various sources have suggested a decrease in the influence of the Catholic Church in Ireland. *See* Fiachra Gibbons, *Slow Bleed from Rome*, THE GUARDIAN, Aug. 5, 1995, at 21, *available in* LEXIS, News Library, Majpap File; Mary Kenny, *No More Power, No More Glory*, THE INDEPENDENT, Mar. 13, 1997 at 2, *available in* LEXIS, News Library, Majpap File; John Mullin, *Rebel Irish Catholic Bishop Ordains Mother as First Woman Priest: John Mullin on a Bizarre Challenge to Church Hierarchy*, THE GUARDIAN, Sept. 15, 1998, at 9.

20. *See* JAMES KINGSTON ET AL., ABORTION AND THE LAW 2 (1997).

the right to life of the unborn.[21] Several judges agreed with this view in dicta, expressing the opinion that Article 40.3 prohibited abortion.[22] However, no Irish court was called on to actually decide the issue.[23]

B. Criminal Law

Abortion has always been illegal in Ireland, both at common law and under statutory law.[24] The Offenses Against the Person Act of 1861 is the current criminal law statute pertaining to abortion.[25] Section 58 of the Act makes self-induced abortion (or attempted self-induced abortion) a felony punishable by life imprisonment.[26] Section 59 of the Act makes the assistance in an abortion or the supply of an abortifacient a misdemeanor.[27] More recently, the Health (Family Planning) Act of 1979[28] specifically reaffirmed the acceptance by the Oireachtas[29] of Sections 58 and 59 of the Offenses Against the Person Act.[30] However, there has never been a criminal prosecution

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21. The belief was based on the assumption that under a constitution written in the Catholic natural law tradition, the right to life of the unborn was a fundamental right, which although not enumerated in the Constitution was nonetheless protected by the document's protection of fundamental, inalienable personal rights. *See* IR. CONST. art. 40. Many also interpret the terms "person" and "citizen" to include the unborn, since under Catholic theory the unborn is a person worthy of protection from the moment of conception. *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 2274 (1995) [hereinafter CATECHISM].

22. *See* KINGSTON ET AL., *supra* note 20; *see also* Liam Hamilton, *Matters of Life and Death*, 65 FORDHAM L. REV. 543, 549 (1996). Article 40.3, prior to the inclusion of the Eighth Amendment, stated, "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." IR. CONST. art. 40.3.

23. *See* KINGSTON ET AL., *supra* note 20.

24. *See* Kristin E. Carder, *Liberalizing Abortion in Ireland: In re Article 26 and the Passage of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill*, 3 TULSA J. COMP. & INT'L L. 253, 255 (1996).

25. *See* The Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100 (Ir.).

26. *See id.* sec. 58.

27. *See id.* sec. 59.

28. *See* the Health (Family Planning) Act, No. 20 (1979).

29. Oireachtas is the term for the Irish legislature, which is comprised of two houses, the Dáil Éireann and the Seanad Éireann.

30. *See* Hamilton, *supra* note 22, at 550. Section 10 of the Health (Family Planning) Act states, "Nothing in this Act shall be construed as authorising (a) the procuring of abortion (b) the doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offenses Against the Person Act, 1861 (prohibiting the administering of drugs or the use of instruments to procure abortion or the supplying of drugs or instruments to procure abortion) or (c) the sale, importation into the State, manufacture, advertising or display of abortifacients." *Id.* § 10.

in Ireland for the unlawful performing of an abortion.[31]

C. Personal/Fundamental Rights Cases

Irish courts during the 1960s and 1970s, finding a need to render the law concerning individual rights more explicit, began to hand down decisions protecting personal rights that were not specifically enumerated in the Constitution.[32] The justification for these holdings came from the wording of Article 40 as well as from natural law jurisprudence, which suggest that there are certain fundamental rights which are superior and antecedent to any man-made law.

In 1965, the plaintiff in *Ryan v. Attorney General* argued that fluoridation of water violated her right of bodily integrity, a right not explicitly contained in the Constitution.[33] Although the plaintiff lost her case, the Court held that the right of bodily integrity was a personal right tacitly contemplated by Article 40.3.1.[34] Perhaps such an acknowledgment is not shocking from an American perspective, yet the justification that the Court gave for this unenumerated right is unique. This was the first Irish case in which the Court explicitly articulated the view that unenumerated personal rights derived from natural law exist.[35] The Court found that these fundamental personal rights result from the "Christian and democratic nature of the state,"[36] citing a passage from the Papal Encyclical Letter "Peace on Earth" as particular support for the existence of a right to bodily integrity.[37] Chief Justice of the Supreme Court, Liam Hamilton, remarked that this outwardly Catholic opinion marked the beginning of "a long and tortuous debate on the proper place of Christian moral teaching in Irish legal and political life,"[38] a debate that clearly continues today.

The presence of natural law in Irish constitutional jurisprudence continued in the 1974 case of *McGee v. Attorney General*,[39] a case of

31. *See* Paul Ward, *Ireland: Abortion: "X" + "Y" = ?!*, 33 U. LOUISVILLE J. FAM. L. 385, 387 (1995).

32. *See* Seth S. Stoffregen, *Abortion and the Freedom to Travel in the European Economic Community: A Perspective on Attorney General v. X*, 28 NEW ENG. L. REV. 543, 557 (1993).

33. *See* Ryan v. Attorney General [1965] I.R. 294, 308 (Ir. S.C.).

34. *See id*. at 313-14.

35. *See* FRANCIS X. BEYTAGH, CONSTITUTIONALISM IN CONTEMPORARY IRELAND: AN AMERICAN PERSPECTIVE 115 (1997).

36. Ryan v. Attorney General [1965] I.R. at 312.

37. *See id*. at 314.

38. Hamilton, *supra* note 22, at 545.

39. [1974] I.R. 284 (Ir. S.C.).

particular importance in the history of Irish abortion law. *McGee* concerned the right of a woman to import contraceptives not legally available in Ireland.[40] While the Court ruled against the woman, the *McGee* Court was the first to recognize the right to marital privacy as either an unenumerated personal right guaranteed under Article 40.3,[41] or as a familial right under Article 41[42] of the Constitution.[43]

The presence of natural law theory in the *McGee* decision is unmistakable. Justice Walsh stated, "In this country it falls finally upon the judges to interpret the Constitution and in doing so *to determine, where necessary, the rights which are superior or antecedent to positive law*. . . ."[44] He went on to note that the terms of Article 40.3 expressly subordinate the law to justice, and that natural rights need to be interpreted by judges according to the principles of prudence, justice, and charity.[45]

Justices Walsh and Griffin were both careful in their opinions to explain that, although they had recognized the right to marital privacy, abortion remained illegal.[46] Despite these attempts by Walsh and Griffin to clarify the law on abortion, Irish anti-abortion activists feared the *McGee* decision would become the building block for a *Roe v. Wade*[47]-type decision, similar to the role *Griswold v. Connecticut*[48] played in the United States.[49] Such fears led, at least in part, to the campaign to add the Eighth Amendment to the Irish Constitution.[50]

D. The Eighth Amendment

In 1981 the Pro-Life Amendment Campaign, a lay organization, began the campaign for the Eighth Amendment. The campaign

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40. *See id.* at 305.

41. *See id.* at 314-15.

42. *See id.* at 313.

43. *See* KINGSTON ET AL., *supra* note 20.

44. McGee v. Attorney General [1974] I.R. at 318 (emphasis added).

45. *See id.* at 318-19.

46. *See id.* at 305, 335.

47. 410 U.S. 113 (1973) (holding that a state law that makes abortions criminal without regard to the stage of pregnancy violates the due process clause of the Fourteenth Amendment).

48. 381 U.S. 479 (1965) (declaring unconstitutional a state law forbidding the use of contraceptives because it intruded upon the right to marital privacy).

49. *See* GERARD HOGAN & GERRY WHYTE, THE IRISH CONSTITUTION: J. M. KELLY 791 (3d ed. 1994).

50. *See* KINGSTON ET AL., *supra* note 20, at 4.

arose out of fear of a *Roe v. Wade*-like decision in Irish courts.[51] The goal of the campaign was to amend the Constitution to specifically protect the right to life of the unborn.[52] It was thought that not only would the Amendment prevent Irish courts from allowing abortion based on an unenumerated right to privacy, but it would also make it considerably more difficult for the legislature to pass a bill legalizing abortion.[53] In order for the Oireachtas to pass such a bill, they would first have to secure a majority vote in the Oireachtas in favor of holding a referendum, and then convince a majority of voters to repeal the Constitutional amendment—a feat much more difficult to achieve than merely convincing a majority of the members of the Oireachtas to vote in favor of a bill legalizing abortion.[54]

The people of Ireland approved the Eighth Amendment on September 7, 1983, with sixty-seven percent voting in favor of the addition to the Constitution.[55] The wording of the Eighth Amendment, which became Article 40.3.3, stated:

> 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.

While some scholars believed that, given the established position of Catholicism in Irish law, the Eighth Amendment appeared to give the fetal life absolute priority,[56] others read the amendment as allowing abortion in limited circumstances.[57] Those who had campaigned for the Amendment clearly wished to ban all abortions,[58] but their strategy backfired when judges interpreted the Eighth Amendment to allow abortion in certain limited circumstances.

E. *SPUC v. Open Door*

In the first test of the scope of the Eighth Amendment, the Society for the Protection of Unborn Children (SPUC) filed a complaint on June 28, 1985 against two clinics, Open Door Counselling and the

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51. *See id.*

52. *See id.*

53. *See id.*

54. *See* IR. CONST. arts. 46, 47 (describing the amendment and referendum process).

55. *See* Jeffrey A. Weinstein, *"An Irish Solution to an Irish Problem": Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 173 (1993).

56. *See* Butler & Gregory, *supra* note 17, at 458.

57. *See* Keith S. Koegler, *Ireland's Abortion Information Act of 1995*, 29 VAND. J. TRANSNAT'L L. 1117, 1125-26 (1996).

58. *See* Weinstein, *supra* note 55, at 172.

Dublin Well Woman Centre.[59] These two clinics provided non-directive counseling on pregnancy options and referred clients to overseas abortion clinics when clients chose such a course of action.[60] The SPUC sought to enjoin these clinics on the basis that their actions were violating the right to life of the unborn as contained in the Eighth Amendment.[61]

The High Court held that the counseling offered by the clinics violated the Eighth Amendment because it assisted in the destruction of the right to life of the unborn, a right found to be "fundamental," and therefore superior to the rights of privacy, association, and freedom of expression.[62] On this basis the court issued a permanent injunction against the clinics,[63] a ruling that the counseling centers appealed.[64]

The clinics met with little success at the Supreme Court, which affirmed the permanent injunction restraining the defendants from assisting pregnant women "to travel abroad to obtain abortions by referral to a clinic, by the making of their travel arrangements, or by informing them of the identity, location, and method of communication with a specified clinic or clinics."[65] In its decision, the Court focused on fundamental rights, and held that the right to life of the unborn was of a superior order to that of freedom of expression.[66] Justice Finlay, in the leading judgment, stated that "the defendants were assisting in the ultimate destruction of the life of the unborn by abortion."[67] Thus, the Court held there was no constitutional right to information about the availability of a service of abortion outside the state which, "if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn."[68]

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59. *See id*. at 174.

60. *See id.*

61. *See* Attorney General (at the relation of The Society for the Protection of Unborn Children Ireland Ltd.) v. Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. [1988] I.R. 593, 600 (Ir. H. Ct.).

62. *See id.* at 617.

63. *See* Attorney General (at the relation of The Society for the Protection of Unborn Children Ireland Ltd.) v. Open Door Counselling Ltd. and. Dublin Well Woman Centre Ltd. [1988] I.R. 619, 627 (Ir. S.C.).

64. *See id.* at 619.

65. *Id.*

66. *See id*. at 625.

67. *Id*. at 624

68. *Id*. at 625.

F. SPUC Challenges the Student Groups

In 1988, the SPUC sued once again to enforce the terms of the Eighth Amendment, this time on the basis of the *Open Door* decision.[69] In *SPUC v. Coogan*, the SPUC sought to prevent a student union from publishing a booklet containing information about abortion services provided in England.[70] The High Court declined to grant the plaintiff's requested injunction, holding that the SPUC lacked standing to sue to enforce the *Open Door* judgment.[71] The Supreme Court overruled the High Court's decision, holding that the SPUC did have the necessary standing.[72] Instead of returning to the High Court to argue the merits of the *Coogan* case, the SPUC expanded the scope of its effort to ban the dissemination of information on foreign legal abortion and filed a new complaint.[73]

Based on the favorable ruling in *Coogan*, which confirmed that it had the requisite standing, the SPUC filed a complaint and sought an injunction against other student groups[74] in a case which came to be known as *SPUC v. Grogan*.[75] The SPUC sought an injunction to restrain the members of the student unions from distributing certain information relating to abortion services available outside the state.[76]

As before, the SPUC ran into trouble at the High Court, when Justice Carroll referred certain questions to the European Court of Justice (ECJ) for clarification of the relevant European Community (EC) law.[77] The High Court declined to grant an injunction in the interim.[78] However, the Supreme Court again ruled in favor of the SPUC by unanimously granting the injunction sought.[79]

The ECJ, when answering the questions from the High Court, went out of its way to avoid addressing any of the substantive issues involved in the case.[80] The questions concerned the possible interfer-

69. *See* SPUC v. Coogan [1989] I.R. 734, 737 (Ir. H. Ct.).

70. *See* Weinstein, *supra* note 55, at 179.

71. *See* SPUC v. Coogan [1989] I.R. at 737.

72. *See* SPUC v. Coogan [1989] I.R. 734, 742 (Ir. S.C.).

73. *See* Weinstein, *supra* note 55, at 180.

74. *See id.* The student groups sued included the Union of Students of Ireland, the University College Dublin student union, and the Trinity College student union. *See id.*

75. *See* SPUC v. Grogan [1989] I.R. 753, 758 (Ir. H. Ct.).

76. *See* HOGAN & WHYTE, *supra* note 49, at 794.

77. *See* SPUC v. Grogan [1989] I.R at 758.

78. *See id.* at 759.

79. *See* SPUC v. Grogan [1989] I.R. 753, 766 (Ir. S.C.).

80. *See* Case C-159/90, SPUC v. Grogan [1991] 2 CEC, 539; David Cole, *"Going to England": Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV.

ence an injunction might cause with the right to distribute information about legally available services within the Community.[81] The ECJ, however, avoided the real issues by holding that, because the providers of the information were student groups, who had no affiliation with the providers of abortion services, the students were not covered by the European Economic Community (EEC) Treaty.[82]

G. *Attorney General v. X*

In what has been termed the most controversial case ever to come before an Irish court,[83] the Irish judiciary in 1992 was forced for the first time to rule on the relationship between the lawfulness of abortion and Article 40.3.3.[84] The facts of the case were deeply disturbing. A fourteen-year-old school girl, X, was raped by a forty-one-year-old man—the father of one of the girl's school friends.[85] The girl became pregnant as a result of the rape, and together with her parents decided to travel to England for an abortion.[86] The family traveled to England, but before the abortion could take place they were informed by the Garda[87] that the Attorney General had obtained an interim injunction restraining the girl from obtaining an abortion.[88] The family voluntarily returned to Ireland to do battle in the courts.[89]

The High Court granted the permanent injunction sought by the Attorney General, issuing orders restraining the girl and her parents from interfering with the right to life of the unborn, from leaving Ireland for nine months, and from procuring or arranging an abortion within or outside the jurisdiction.[90] While Judge Costello acknowledged that X was suicidal, he held that the risk of suicide was not

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113, 128 (1993-94).

81. *See id*. at 126-27.

82. *See Grogan* [1991] 2 CEC at 539; Dena T. Sacco & Alexia Brown, *Regulation of Abortion in the European Community - Society for the Protection of Unborn Children Ireland Ltd. v. Grogan, Judgment of the European Court of Justice of 4 October 1991 in Case C-159/90 (1991)*, 33 HARV. INT'L L.J. 291, 291 (1992).

83. *See* HOGAN & WHYTE, *supra* note 49, at 796.

84. *See* KINGSTON ET AL., *supra* note 20, at 6.

85. *See id*.

86. *See id*. at 6-7.

87. The term Garda refers to the Irish police force.

88. *See* KINGSTON ET AL., *supra* note 20, at 7. The Attorney General only learned of the situation and ordered an injunction after the family inquired with the Garda whether any of the fetal tissue could be used as evidence in the rape prosecution. *See id*.

89. *See id*.

90. *See* BEYTAGH, *supra* note 35, at 102.

"one of those which may arise in the practice of medicine."[91] He applied the balancing test set forth in the Eighth Amendment and concluded that the risk to the life of the unborn was of a far greater magnitude than the risk to the life of the mother.[92] The High Court also held that infringement of the EC right to travel was permitted in this case based on public policy and that the EC allowed national governments discretion on moral issues.[93]

The reaction to this ruling in Ireland and throughout the world was overwhelming. In Dublin, protestors carried signs that read, among other things, "Ireland Defends Men's Right to Procreate by Rape."[94] An angry editorial expressed that, "[w]here the parents of the raped girl went wrong was to break the unwritten rules of the Irish hypocrisy game by acting in an open and honourable manner."[95] On February 23, 1992, an opinion poll showed that sixty-six percent of Irish people wanted to change the Constitution to permit abortion in limited circumstances.[96] It seems the former moral absolutism of Irish citizens and the judiciary began to fade under the particularly tragic facts of this case. The entire country held its breath waiting for the Supreme Court's ruling on the appeal by the girl's parents.

And the country seemed to breath a collective sigh of relief when, on February 26, the Supreme Court overturned the High Court injunction by a four-to-one majority.[97] The key difference in the reasoning between that of the Supreme Court majority and the High Court was in the classification of suicide as a qualifying medical risk to the life of the mother under the Eighth Amendment.[98] Chief Justice Finlay implicitly held that suicide, in certain situations, qualifies

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91. Attorney General v. X [1992] 1 I.R. 1, 11 (Ir. S.C.). Presumably, the discussion of medical risk was framed around the typical Catholic distinction between direct and indirect abortion. Under Catholic law only indirect abortions are permissible and these typically take place when surgical procedures are performed to save the life of the mother, with the unintentional and indirect result of killing the fetus. *See* JOHN A. HARDON, POCKET CATHOLIC DICTIONARY 4-5 (1985)

92. *See* Attorney General v. X [1992] 1 I.R. at 12.

93. *See* Attorney General v. X [1992] 12 I.L.R.M. 401, 403 (Ir. H. Ct.).

94. Weinstein, *supra* note 55, at 191.

95. *Id*.

96. *See id*. This result came just nine years after 67% of voters had approved the Eighth Amendment giving constitutional protection to right to life of the unborn. *See* Jason Bennetto, *A Catholic Doctor Faces the Demands of Reality; as a Furor Over a 14-year-old Irish Rape Victim Mounts, Jason Bennetto Looks at England as an Abortion Heaven*, THE INDEPENDENT, Feb. 23, 1992, at 2.

97. *See* BEYTAGH, *supra* note 35, at 103.

98. *See* discussion *supra* note 91.

as a risk to the life of the mother.[99] He stated that where there is substantial psychological evidence that the threat of suicide is a very real threat, "it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide."[100] On the basis of this presumption, the risk to the life of the unborn is no greater than the risk to the life of the mother. Finlay stated that the proper test to be used under the Eighth Amendment is that "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3."[101] Here, X met the test based on psychological evidence of her suicidal state.[102]

Justice Hederman dissented, arguing that, for the purpose of justifying an abortion, a risk of self-destruction could not be equated with medical risks to the life of the mother.[103] He opined that what X needed was "loving and sympathetic care and professional counselling and all the protection which State agencies can provide or furnish."[104] He believed, contrary to Finlay, that "[s]uicide threats can be contained,"[105] and that in determining the ruling, the certain death of the fetus should outweigh the uncertain death of X.[106]

It should be noted that three of the five justices were of the opinion that the right to travel could be restricted in favor of the right to life of the unborn. This case therefore was decided on the theoretical basis of whether X would be allowed to have an abortion in Ireland (because if not, she did not have the right to travel to obtain one).[107] Following the *X* case the law in Ireland was that a woman had the right to an abortion where there was a real and substantial risk to her life, but that when such a risk did not exist, the woman did

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99. *See* Attorney General v. X [1992] 1 I.R. 1, 55 (Ir. S.C.).

100. *Id*.

101. *Id*. at 53-54.

102. *See id*. at 54-55.

103. *See id*. at 66-75 (Hederman, J., dissenting)

104. *Id*. at 76

105. *Id*.

106. *See id*.

107. *See* Cole, *supra* note 80, at 133. While the holding of this case was that X was allowed to terminate her pregnancy in Ireland, X nevertheless had to travel to England because no Irish doctors will openly perform abortions. *See* Kate O'Callaghan, *Ireland's Other Troubles; After Centuries of Silence and Fear, the Irish Finally Confront the Reality of Abortion*, L.A. TIMES, Jan. 3, 1993, at 22.

not have a right to travel in order to have the procedure performed.[108] Irish women could only go abroad to have procedures that were legal, if not available, in Ireland.[109]

H. Maastricht

Before the *X* case dramatically changed Irish abortion law and public opinion, the Irish government had lobbied its European partners for the adoption of a protocol to the Maastricht Treaty,[110] which guaranteed Ireland's pro-life constitutional provision would not be affected by European Union law. This effort apparently resulted from the ECJ's ruling in *Grogan*, which held that abortion was a "service" under the Treaty of Rome.[111] The adopted protocol, Protocol No. 17, reads as follows:

> Nothing in the Treaty of the 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.[112]

The *X* case, however, caused the Irish government to completely reverse its previous position on abortion in the Maastricht Treaty.[113] Fearing that Irish voters, in the aftermath of the *X* case, might vote against Ireland's accession to the Maastricht Treaty because of Protocol No. 17, the government decided to seek an amendment to the Protocol that would ensure that EC rights to travel and information would continue to be available to Irish citizens after ratification of the Treaty on European Union.[114]

The other members of the EC refused to reopen the debate on the Protocol (fearing that this would reopen debate on other treaty issues), so the Irish government had to settle for a Solemn Declara-

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108. *See* HOGAN & WHYTE, *supra* note 49, at 803

109. *See* Koegler, *supra* note 57, at 1134.

110. *See* Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty].

111. *See* HOGAN & WHYTE, *supra* note 49, at 795. The Treaty of Rome is the governing document of the European Economic Community. The Treaty guarantees the right to travel between member states in order to receive services. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 60, 298 U.N.T.S. 11, 40 [hereinafter Treaty of Rome]. Therefore, after abortion was classified as a service by the ECJ it was feared that any Irish restrictions on traveling for the purpose of obtaining an abortion might violate European Community law. *See* Koegler, *supra* note 57, at 1144-45.

112. *See* Maastricht Treaty, *supra* note 110, at 362 (Protocol annexed to the treaty on European Union and to the Treaties Establishing the European Communities [Regarding Ireland]).

113. *See* Cole, *supra* note 80, at 134.

114. *See* HOGAN & WHYTE, *supra* note 49, at 803-04.

tion of the intentions of the High Contracting Parties on the matter of the Protocol.[115] The Solemn Declaration stated that for the treaty parties:

> [I]t was and is their intention that the Protocol shall not limit freedom to travel between Member State or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States.[116]

Although adopted by the EC Foreign Ministers on May 1, 1992, the status of the Solemn Declaration is unclear.[117] The prevailing view is that the Declaration is not legally binding. In all likelihood, the Declaration is nothing more than a statement of political intent.[118]

I. The 1992 Referenda

In yet another political attempt to secure support for the Maastricht Treaty, the Irish government held three referenda dealing with abortion law on November 25, 1992. The first referendum, approved by 62.3% of voters, added the following phrase to Article 40.3.3 as the Thirteenth Amendment:[119] "This subsection shall not limit freedom to travel between the State and another state."[120] The second referendum also proposed to modify Article 40.3.3 by including an additional phrase: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."[121] The second referendum was approved by 59.8% of voters and became the Fourteenth Amendment.[122] The third referendum proposed to amend Article 40.3.3 to read, "It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction."[123]

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115. *See id*. at 804.

116. Cole, *supra* note 80, at 134 (quoting Declaration of the High Contracting Parties to the Treaty on European Union, European Community, February 7, 1992).

117. *See* HOGAN & WHYTE, *supra* note 49 at 805.

118. *See id*.

119. *See* Weinstein, *supra* note 55, at 198.

120. IR. CONST. art. 40.3.3 (incorporating Thirteenth Amendment).

121. *Id.* (incorporating Fourteenth Amendment).

122. *See* Weinstein, *supra* note 55, at 198.

123. *Id*.

This third referendum was defeated 34.6% to 65.4%.[124] Neither side of the controversy completely supported the third referendum. Many pro-choice advocates did not wish to eliminate risk of suicide as a ground for permitting abortion, while many pro-life advocates thought the proposed limitation did too little. These pro-life advocates instead wanted either to repeal the Eighth Amendment or substitute more stringent wording.[125]

The 1992 referenda eased tensions between Irish and EC laws,[126] as the outcome seemed to settle issues of rights to travel and to information. Following the vote, Irish politicians promised to introduce legislation concerning permissible abortions in circumstances such as rape, incest, and risk of suicide.[127] However, as of 1998 no such legislation had been produced.

J. 1995 Freedom of Information Bill

In 1995, the Oireachtas passed legislation relating to the Fourteenth Amendment that provided for freedom of information for services legally available in other states.[128] Following passage of the Bill by the Oireachtas, then President Mary Robinson referred the Bill to the Supreme Court for an opinion on the constitutionality of the legislation before signing the Bill into law.[129] The case was argued before the Supreme Court by three sets of counsel: one for the Attorney General who supported the Bill; one for pregnant women who also supported the Bill; and one for the unborn who opposed the Bill.[130] Counsel for the unborn argued the Bill was unconstitutional because it violated the natural law right to life, which was superior and antecedent to the Constitution.[131] In a unanimous decision, the Supreme Court declared on May 12, 1995 that the Bill was constitu-

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124. *See id*.

125. *See* Koegler, *supra* note 57, at 1135.

126. *See* Butler & Gregory, *supra* note 17, at 444.

127. *See* Jill Serjeant, *Legal Abortion On The Way, Despite No Vote*, REUTER LIBRARY REPORT, Nov. 29, 1992, at 1, *available in* LEXIS, News Library, Reuwld file.

128. *See* Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995). The Act makes it legal to distribute information on abortion services abroad so long as the information does not encourage or promote the termination of the pregnancy. *See* Koegler, *supra* note 57, at 1117.

129. *See* In the Matter of Article 26 of the Constitution and in the Matter of the reference to the Court of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill [1995] 2 I.L.R.M. 81 (Ir. S.C.) [hereinafter *Information Bill case*].

130. *See id.*

131. *See id*.

tional.[132]

The decision by the Court was significant in many respects, not the least of which was that the Court affirmed the holding of the *X* case.[133] Counsel for the unborn attacked the validity of the *X* case holding on the basis that it was contrary to natural law and that natural law was superior to the Constitution.[134] Not only did the Court reaffirm the holding of the *X* case, but it held for the first time that the Constitution was not subordinate to natural law and could be changed by the people, even if the change violated a principle of natural law.[135] This was a watershed holding in Irish jurisprudence, since natural law theory had been the foundation of many of the Court's conservative, religion-based opinions in the past.[136] As stated previously, the tradition of natural law jurisprudence in Ireland usually paralleled Catholic doctrine; as a result, legislative proposals inconsistent with the teachings of the Catholic Church were consistently found to conflict with the spirit of the Constitution.[137]

While the Court clearly intended to state unequivocally that natural law was not superior to the Constitution, the Court's basis for so holding has been criticized. To begin with, the Court never properly established the basis for the Constitution as a document free from any natural law influence.[138] While the Court can legitimately state that Irish courts have never recognized the provisions of natural law as superior to the Constitution, this is only because the issue had never been squarely put to a court. Irish courts, however, have unmistakably noted the superiority of natural law, if only in dicta.[139]

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132. *See id*. While some commentators have found significance in the unanimous holding in the face of opposition by the Catholic Church, see, for example, Carder, *supra* note 24, at 274, such a view should be tempered by the fact that a unanimous decision is required in this situation per Article 26.2.2 of the Irish Constitution. *See* IR. CONST. art. 26.2.2.

133. The Court specifically affirmed the test as set out in the *X* case (that abortion is permissible when there is a real and substantial risk to the life of the mother) and went on to say that once that test is met, the mother is entitled to information concerning the available abortion services. *See Information Bill case* [1995] 2 I.L.R.M. at 98.

134. For an explanation of the Church's position on abortion, see CATECHISM, *supra* note 21, ¶ 2270-75 (1995). *See also* HARDON, *supra* note 91.

135. *See Information Bill case* [1995] 2 I.L.R.M. at 83.

136. *See* 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, 708-09 (1997).

137. *See id*. at 709.

138. For examples of such natural law influence, see the Preamble, Article 40, and Article 41 of the Irish Constitution.

139. *See* Gerard Whyte, *Religion and the Irish Constitution*, 30 J. MARSHALL L. REV. 725, 744 (1997).

Moreover, the Constitution itself suggests that it is based in natural law.[140] Thus, how the Court manages to discharge the traditional interpretation of the Constitution remains unclear. As Professor Whyte points out, the Court fails to engage, in any meaningful way, those judicial precedents and constitutional provisions that appear to endorse natural law theory.[141] Some have suggested that this unexplained rejection of natural law is based on a wish of the Court to bring Ireland into line with the requirements of the European Union.[142]

K. Summary of Abortion Law before the *C* Case

Prior to the *C* case, the test for determining when an abortion could lawfully be carried out was contained in the majority judgment in the *X* case.[143] While the *X* case decision held that a threat of suicide can constitute a real and substantial risk to the life of the mother,[144] some have disputed that the issue was actually settled with finality. Justice Walsh, a former Supreme Court Justice, argued that because the Attorney General failed to contest the assertion that a risk of suicide constituted a threat to the life of the mother for the purposes of Article 40.3.3, the Court's acceptance of this point cannot be regarded as conclusive or binding.[145] Therefore, the status of the law with regard to the suicide issue was not clear prior to the *C* case.

The law was also such that if an Irish woman did not meet the test as set forth in the *X* case, her only option was to seek an abortion overseas. Although this was not a positive right, the Thirteenth Amendment specified that women would not be prevented from traveling for such a purpose.[146]

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140. *See* IR. CONST. prmbl., art. 41.1.1.
141. *See id*.
142. *See* O'Connor, *supra* note 136, at 709-10.
143. *See generally* Attorney General v. X [1992] 1 I.R. 1, 41-62 (Ir. S.C.).
144. *See id.* at 55.
145. *See* HOGAN & WHYTE, *supra* note 49, at 807 & n.61.
146. *See* Koegler, *supra* note 57, at 1142; discussion *infra* notes 167-69.

IV. THE *C* CASE IN THE COURTS

A. The District Court[147]

Originally the EHB planned to appear before the district court on November 19, 1997 to advocate giving the parents custody of C.[148] This was on the basis of an agreement between the EHB and the parents that C would be released to her parents so that she would be able to travel to Britain for an abortion.[149] The EHB felt that this would be the easiest way for C to procure an abortion because many in the legal community believed that the EHB, as a state agency, could never assist or fund the termination of a pregnancy.[150]

However, as discussed previously, the agreement fell through the night before the hearing, apparently the result of the parents' decision to join forces with the pro-life groups.[151] Because of this unexpected twist, the EHB received a two-day extension of its care order for C at the November 19 hearing instead of releasing C to her parents as originally planned.[152]

Two days later, on November 21, an eight-hour hearing took place at the district court in proceedings under the Child Care Act,[153] in which the EHB, the parents, and C each had separate legal representation.[154] The proceedings took the form of an EHB application for an interim care order in respect of C.[155]

After hearing evidence, Judge Fahy granted an extension of the interim care order and issued orders pursuant to Section 13(7)(a)(iii)[156] and Section 17(4)[157] of the Child Care Act stating the

147. The proceedings in the district court were held *in camera* and no written opinion has yet been released to the public. Therefore, it should be noted that much of what is known about the district court ruling comes from the High Court opinion. *See generally C case* [1998] 1 I.L.R.M. 460 (Ir. H. Ct.).

148. *See Chronology of Events*, *supra* note 7.

149. *See id*.

150. *See* Kennedy & Cullen, *supra* note 13.

151. *See id*.

152. *See id*.

153. *See Chronology of Events*, *supra* note 7. Per Section 17 of the Child Care Act, the health board may petition the district court for an extension of an interim care order when the grounds on which the original care order was granted still exist. *See* Child Care Act, No. 17, § 17 (1991).

154. *See C case* [1998] 1 I.L.R.M. 460, 460 (Ir. H. Ct.).

155. *See id.* at 470.

156. Section 13(7)(a)(iii) states that when a judge has issued an emergency care order for a child, the judge "may, of his own motion or on the application of any person, give such directions (if any) as he thinks proper with respect to the medical or psychiatric examination, *treat-*

following: that C be allowed to travel to a location where she could have her pregnancy terminated; that C be afforded treatment in the form of termination of her pregnancy; that the EHB be permitted to execute all necessary documents for such treatment; that C receive such further treatment and examination as recommended by her medical advisors; and that the EHB be allowed to make all such arrangements forthwith.[158]

Judge Fahy refused to grant a request by the parents that the order be stayed pending appeal.[159] In an effort to prevent their daughter from terminating her pregnancy before they could lodge an appeal, the parents petitioned the High Court and were granted the requested stay.[160]

B. The High Court

The full appeal hearing before the High Court took place on November 28, 1997. The parents challenged the ruling of the district court on sixteen grounds that were subsequently grouped by presiding Judge Geoghegan into six categories. The six categories were as follows:

1. denial of fair hearing;

2. the term "medical treatment" in the Child Care Act could never be interpreted to include termination of pregnancy;

3. the district court did not have the power to weigh constitutional rights;

4. if "medical treatment" does include termination of pregnancy, the relevant provision of the Child Care Act is unconstitutional;

5. the district court failed to have due regard to the rights and duties of C's parents as required under Section 24 of the Child Care Act and, alternatively, that if she did have due regard then Section 24 is unconstitutional; and

6. because the test as set out in the *X* case was not met, the dis-

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ment or assessment of the child." Child Care Act § 13(7)(a)(iii) (emphasis added).

157. Section 17(4) provides that "[w]here an interim care order is made, the justice may order that any directions given under *subsection (7)* of *section 13* may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications." Child Care Act § 17(4).

158. *See C case* [1998] 1 I.L.R.M. at 467.

159. *See id*. at 471.

160. *See Chronology of Events*, *supra* note 7.

trict court improperly granted the order.[161]

The first category concerned claims that the parents were denied a fair hearing at the district court level.[162] The parents claimed their attorney was unable to do proper justice to their case because he did not know that authority to terminate the pregnancy was being sought until the morning of the hearing.[163] Judge Geoghegan promptly dismissed this argument stating that it was reasonable, based on the evidence, to infer that the parents did in fact know that termination of the pregnancy would be discussed.[164]

The parents also claimed the district court denied them a fair hearing by refusing to make a direction under Section 17(4) of the Child Care Act that C be assessed by a psychiatrist selected by the parents.[165] The High Court quickly dismissed this claim as well, stating that the district court judge had the discretion to refuse such an exam because two psychiatric exams had already taken place and there was evidence that further exams were not in the interest of C's mental health.[166]

The High Court agreed with the parents that the district court erred in failing to grant an adjournment on Friday afternoon until Monday in order for the parents to consult a psychiatrist to challenge the psychiatric evidence before the court.[167] However, Judge Geoghegan explained that allowing such an adjournment would not have made a difference in the granting of the order, and as a discretionary matter he chose not to quash the district court's order on this ground.[168] It is unclear from the written opinion why the judge felt that this would have no possible effect on the order, since C's mental state and the psychiatric evidence thereof was a keystone to the district court decision. The opinion hints that Judge Geoghegan felt the two psychiatrists who testified were trustworthy enough that a cross-examination of their findings, aided by consultation with another psychiatrist, would not have affected the order.[169]

The parents' final argument asserting denial of a fair hearing was

161. *See C case* [1998] 1 I.L.R.M. 460, 468 (Ir. H. Ct.).
162. *See id*. at 471.
163. *See id*.
164. *See id*.
165. *See C case* [1998] 1 I.L.R.M. at 471.
166. *See id*. at 471-72.
167. *See id*. at 472.
168. *See id*.
169. *See id*. at 471-72.

that the district court judge erred in refusing a stay on the order pending appeal.[170] The High Court quickly dismissed this ground, stating simply that the granting of such a stay is a matter of discretion for the district court judge.[171]

The parents' second ground for appeal was that the district court judge erred in holding that the term "medical treatment" in the Child Care Act could include termination of pregnancy.[172] The High Court disagreed that the term "medical treatment" could never include termination of pregnancy, but restricted its holding to the particular facts of this case, finding that termination of pregnancy was a necessary medical treatment under the Child Care Act for C's mental condition.[173]

The High Court cited psychiatric testimony given at the trial court level in support of its position that, in this case, the termination of C's pregnancy was a necessary medical treatment.[174] Dr. Byrne, a well-respected psychiatrist who testified at the district court hearing, stated that C said, "I would kill myself if I had the child" and when asked why replied, "Because it is not my child."[175] Dr. Byrne also testified that he felt C's risk of suicide was "a very significant risk" and that the risk was becoming more immediate as time went on because C was becoming increasingly unable to deny the pregnancy.[176] Dr. Byrne at another point referred to the risk as an "immediate risk."[177] After citing this evidence, the High Court stated that the evidence provided an adequate foundation for finding that termination of pregnancy in this case must constitute 'medical treatment' within any normal definition."[178]

The third ground for appeal involved arguments by the parents that the district court was not qualified to weigh constitutional rights.[179] This category of grounds was quickly discredited by the High Court, which clarified that the only issue a district court could not consider is the validity of any statutory enactments under the

170. *See id*. at 472.
171. *See id*.
172. *See id*.
173. *See id*. at 472-73.
174. *See id*. at 473.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*.
179. *See id*. at 473-74.

Constitution.[180] The court emphasized that district courts must always be conscious of the Constitution and rights under it in all of their decisions.[181]

The court similarly dismissed the fourth ground for appeal that the relevant provisions of the Child Care Act were unconstitutional.[182] There was little discussion of this point.[183]

The fifth ground for appeal advanced by the parents was that the district court judge failed to give proper weight to the concerns of C's parents, as required by Section 24 of the Child Care Act.[184] Judge Geoghegan again disagreed with the parents.[185] He reminded the parents that in relation to the unborn child they were grandparents, and as such had no constitutional rights.[186] Their only constitutional rights were in relation to their daughter.[187] The High Court went on to find that Judge Fahy had given proper weight to the concerns of the parents in relation to their daughter.[188] The High Court stated that Judge Fahy was "entitled to take the view that the parents were neglectful parents and that the child should properly be in temporary care. . . ."[189] The court also cited the fact that Judge Fahy listened to the father's evidence during the hearing, and specifically requested that the mother give evidence as well.[190]

Judge Geoghegan also dismissed the alternative ground for appeal that argued if Judge Fahy had given proper weight to the rights of C's parents under Section 24, then Section 24 was unconstitutional.[191] It appears from the opinion that the claim of unconstitu-

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180. *See id*. at 474.

181. *See id*.

182. *See id*.

183. *See id*. at 474-75.

184. *See id*. at 475. Section 24 of the Child Care Act provides that in any proceeding before a court under the Act in relation to the care and protection of a child, the rights and duties of parents which exist under the Constitution or otherwise will be considered, although the welfare of the child is the first and paramount consideration. *See* Child Care Act, No. 17, § 24 (1991).

185. *See C case* [1998] 1 I.L.R.M. 460, 475 (Ir. H. Ct.).

186. *See id*. Article 42 of the Constitution grants only parents certain inalienable rights in the education and upbringing of their children. Grandparents have no corresponding rights under the Constitution, and they are not given the same reverence under the Constitution as are a child's parents. *See* IR. CONST. art. 42.

187. *See C case* [1998] 1 I.L.R.M. at 475.

188. *See id*.

189. *Id*.

190. *See id*.

191. *See id*.

tionality was based on an argument by the parents that Section 24 was unconstitutional in that it causes the court to ignore the constitutionally-guaranteed right to life of the unborn. Judge Geoghegan dismissed this claim, stating simply that there was nothing in Section 24 that led to such a conclusion.[192]

On the final ground for appeal, the parents challenged the actual findings of Judge Fahy, arguing that the district court judge had failed to meet the requirements of the test set out in the *X* case, and therefore her decision to allow an abortion was invalid.[193] The *X* case held that where there is a real and substantial risk to the life, as distinct from the health, of the mother and that risk can only be avoided by the termination of the mother's pregnancy, then such termination is permissible.[194] The basis for the parents' argument comes from the wording of Judge Fahy's decision where she states, "I am of the opinion that the test as set down in the *X* case has not been met, as I do not believe that the threat of suicide is imminent."[195] However, the High Court considered Judge Fahy's further explanation to mean that she did find the risk of suicide to be "real and substantial."[196] The court determined Judge Fahy's word choice to be "deliberate and intended to correspond with the wording of the test under the *X* case."[197] Nowhere in the *X* case is it required that the danger of suicide be immediate or imminent, so Fahy's words were not found to be dispositive.[198]

Counsel for C had made a counter-argument that even if the requirements of the *X* case had not been met, the district court's order was permissible on the basis of the travel amendment.[199] The High Court addressed this counter-argument in dicta, disagreeing with the notion that C could have been allowed to travel abroad in order to terminate her pregnancy on the authority of the travel amendment alone.[200] Judge Geoghegan clarified that the travel amendment is framed in negative terms and, as a consequence, means only that in-

192. *See id*.

193. *See id*.

194. *See* Attorney General v. X [1992] 1 I.R. 1, 53-54 (Ir. S.C.).

195. *C case* [1998] 1 I.L.R.M. 460, 476 (Ir. H. Ct.).

196. *Id*. at 476-77.

197. *Id*.

198. *See id*. at 476.

199. *See id*. at 477. The travel amendment states that nothing in Article 40.3.3, which guarantees the right to life of the unborn, shall limit freedom to travel between Ireland and another state. *See id*. at 478.

200. *See id*.

junctions will not be placed against traveling for that purpose.[201] Judge Geoghegan did not think that the amendment "was ever intended to give some new substantial right."[202] In his view, a court under the Child Care Act could not authorize travel for an abortion which would not be allowed under Irish law, because the right to life of the unborn is unaffected by the travel amendment.[203] In conclusion, Judge Geoghegan reaffirmed that he had upheld the district court order only because the termination in this case was one which was lawful under the Irish Constitution.[204] That is to say, C was allowed to travel to England for an abortion only because the termination was one which would be legal if performed in Ireland.[205]

Following this adverse ruling, C's parents considered appealing their case to the Supreme Court.[206] However, when it appeared that no funding would be available for such an effort, the parents announced that they would not be seeking an appeal.[207] Shortly thereafter C traveled to England and had her pregnancy terminated.[208]

V. *C* CASE ANALYSIS

There are several aspects of the High Court's decision in the *C* case that warrant further discussion. The risk of suicide as a qualifying risk to the life of the mother will be examined, as will the rights of parents, the role of the State, and the likely consequences of the holding.

A. Suicide as a Qualifying Risk to the Life of the Mother

Acknowledging suicide as a risk to the life of the mother that justifies abortion is at odds with Ireland's tradition of natural law ju-

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201. *See id*.

202. *Id*.

203. *See id*. at 479. The judge was clarifying that while it is permissible to allow a child under the Child Care Act to travel for a medically necessary abortion (because such an abortion is legal under Irish law), it would not be permissible for the Irish courts to authorize the State to fund and facilitate an abortion which would be illegal under Irish law. *See id*.

204. *See id*. at 479-80.

205. While C's abortion therefore theoretically could have been performed in Ireland, C still had to travel to England because Irish doctors will not openly perform abortions. *See* O'Callaghan, *supra* note 107.

206. *See* Padraig O'Morain, *Archbishop Not to Fund Court Appeal on Abortion*, IR. TIMES, Dec. 1, 1997, at 1.

207. *See id*.; Christine Newman, *Laws Sought on Abortion After Parents' Decision to Halt Action*, IR. TIMES, Dec. 2, 1997, at 10.

208. Christine Newman & Jim Cusack, *13-Year-Old Rape Victime had Abortion Yesterday*, IR. TIMES, Dec. 4, 1997, at 4.

risprudence. As mentioned previously, Ireland's natural law tradition draws in large part from the Catholic legal tradition. Under Catholic natural law, direct abortion (meaning an abortion willed either as an end or a means) is forbidden.[209] The *Catechism*[210] declares that from the moment of conception a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.[211] Therefore, only so-called indirect abortion is permissible under Catholic natural law. Indirect abortion "is the foreseen but merely permitted evacuation of a fetus which cannot survive outside the womb."[212] The abortion of the fetus is not the intended or directly willed result, but the side effect of some legitimate procedure. Since the abortion was not the intended result, it is not a moral evil (although surely morally regrettable). Therefore, it is consistent with Catholic natural law to allow abortions that result from actions taken solely for the purpose of saving the life of the mother. In circumstances where the mother's life is at risk, the willed action is taken in order to save the life of the mother, while the resulting death of the fetus is an unintended consequence.

The history surrounding the Eighth Amendment to the Irish Constitution suggests that the wording that was adopted was intended to correspond to the Catholic natural law framework described above.[213] It therefore seems illegitimate that Irish courts would acknowledge a risk of suicide as a qualifying risk to the life of the mother when it is obvious that such a holding conflicts with the intended natural law character of the Amendment.[214] A case in which an abortion is performed due to a risk of suicide is fundamentally dif-

209. *See* HARDON, *supra* note 91.

210. The Catechism is an official statement of Catholic doctrine, approved and sanctioned by the Pope.

211. *See* CATECHISM, *supra* note 21, ¶ 2270.

212. HARDON, *supra* note 91.

213. *See* KINGSTON, ET AL., *supra* note 20, at 4-5.

214. While prima facie it may appear that the 1995 *Information Bill* ruling suggests that the courts do not have to be bound by natural law, the holding in the *Information Bill* case can be limited to the proposition that the people may amend the Constitution in such a way as is contrary to natural law, not that natural law no longer has a place in Irish jurisprudence. In contrast to the Fourteenth Amendment which provided the basis for the Information Bill, the Eighth Amendment was enacted in congruence with natural law—and what the courts have done is to impermissibly extinguish such an influence. Additionally, the fact that in 1992 voters rejected an amendment that would have clarified that a risk of suicide is not a risk to the life of the mother, as contemplated by the Eighth Amendment, does not change the natural law basis of the Amendment. There are numerous reasons why such clarification could have been rejected, and thus a no vote on the 1992 referendum is not conclusive as regards the natural law framework of the Eighth Amendment.

ferent than a typical indirect abortion case. In a typical indirect abortion scenario, a third party takes action necessary to save the mother's life which results in the unintended and unavoidable termination of the life of the fetus. In the case of suicide,[215] a *choice* is made by the *mother*; a choice that leads to the intended and avoidable termination not only of her own life, but also the life of the fetus. So, the case of suicide involves intention, choice, and consent to courses of action that will result in the willed death of two lives. If risk of suicide by itself is allowed to justify an abortion, the courts would be permitting a choice by the mother alone to permit a direct abortion. It is extremely unlikely the Catholic Church or any natural law authorities would agree that suicide could therefore qualify as a risk to the life of the mother, making an otherwise willful and intended abortion a permissible indirect abortion. This is indeed what the dissent in the *X* case tried to explain.[216]

The *X* case's ruling on suicide as a qualifying risk deserves a closer look. The *X* case established that where a risk of suicide was "real and substantial," an abortion would be permitted.[217] Such a test to determine qualifying risk does not fit the wording of, nor the history behind the Eighth Amendment. The Eighth Amendment indicates only that the State will give due regard to the *equal* right to the life of the mother,[218] and as the dissent in the *X* case pointed out, the risks to the two parties in this type of situation are not equivalent.[219] If the mother has an abortion, the unborn child will surely die; there are no other possible outcomes. However, if the mother is denied a legal abortion, it is not certain that she will die.

It also appears from the wording of the Eighth Amendment that to allow an abortion due to a risk to the life of the mother, the risk must be imminent. If an abortion were allowed in cases involving other than imminent risk, then the State would be giving far more than due regard to the equal right to life of the mother. If death of the mother were virtually certain and the fetus could not survive outside the mother's womb, then any effort to save the mother's life that

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215. Suicide by itself would in some cases qualify as a crime under Catholic natural law. While the Church recognizes that suicide is sometimes the unavoidable product of mental disease, if it is the result of willful action, it may be a crime. For a discussion of the Church's position on suicide, see CATECHISM, *supra* note 21, ¶¶ 2280-83.

216. *See generally* Attorney General v. X [1992] 1 I.R. 1, 62-77 (Ir. S.C.) (Hederman, J., dissenting).

217. *See id*. at 53-54.

218. IR. CONST. art. 40.3.3.

219. *See* Attorney General v. X [1992] 1 I.R. at 75-76.

resulted in the termination of the fetus' life would be a case of indirect abortion, which is provided for under Catholic natural law theory.[220]

Even if the court in the *C* case lacked the authority to overrule the holding in the *X* case,[221] it did have the opportunity to clarify the evidentiary standards necessary for establishing a real and substantial risk to the life of the mother caused by the possibility of suicide. In the *C* case, only two psychiatrists testified, both of whom were appointed by parties not opposed to abortion.[222] The parents, however, were not allowed to have their own psychiatrist examine the girl (out of concern for the girl's fragile mental health), and were barred from consulting a psychiatrist of their own in order to effectively cross-examine the psychiatrists who testified in favor of the abortion.[223] The High Court felt that such a consultation would not have changed the outcome of the case. Such reasoning is shocking, since it is not universally accepted that having an abortion improves the mental health of a desolate and despairing teen.[224] What the holding of the *C* case suggests is that very little evidence is needed to prove risk of suicide, and an effective cross-examination of psychiatric experts will not always be possible or permitted. It is unfortunate that the court in the *C* case did not take this opportunity to clarify the evidentiary standards in these types of cases.

Allowing a risk of suicide to provide grounds for abortion is troubling for the additional reason that it can be used to permit abortion in a wide range of circumstances, all of which would be contrary to natural law. If a thirteen-year-old girl were pregnant as a result of consensual sex, had been taken into state care, and then appeared to be suicidal because of the pregnancy, would she be allowed to have a legal abortion under Irish law? The answer is clearly *no*. The young girls, X and C, were pregnant as a result of horrifying circumstances that greatly swayed public opinion in favor of allowing the girls to have abortions. The outcomes of the cases may have been quite different if the girls had not been raped. However, the holding of the *C* case provides that abortion would be permissible, regardless of the

220. *See supra* notes 209-212 and accompanying text.

221. The High Court may not have had the authority to overrule a holding of the Supreme Court, per Article 34.4.6 of the Irish Constitution, which provides that Supreme Court decisions will in all cases be final and conclusive. *See* IR. CONST. art. 34.4.6.

222. *See C case* [1998] 1 I.L.R.M. 460, 471 (Ir. H. Ct.).

223. *See id*.

224. *See* Attorney General v. X [1992] 1 I.R. 1, 62-77 (Ir. S.C.) (Hederman, J., dissenting).

circumstances of the pregnancy, as long as the risk of suicide was real and substantial. This far-reaching consequence was not intended by either the drafters of the Eighth Amendment or the Irish courts in the *X* and *C* cases. What the *X* and *C* cases really seem to aim at is allowing abortion in circumstances where the pregnancy is the result of rape. However, since there is no such rape exception in Irish law,[225] the judiciary was forced to word their decisions to allow abortion around the existing law. In each case the risk of suicide was the most convenient, if illegitimate, way to provide for this exception. If Ireland truly wants to retain a restrictive abortion law, the government will have to specifically eliminate the risk of suicide as a qualifying risk to the life of the mother and provide for a rape exception at law.

B. Parental Rights

Another troubling aspect of the High Court's decision in the *C* case concerns its treatment of parental rights. Under Articles 41 and 42 of the Irish Constitution, parents are guaranteed inalienable rights regarding the rearing of their children.[226] Religious and moral education is specifically mentioned in Article 42 as an inalienable right of parents.[227] Despite such rights, the wishes of C's parents were overruled by the court.[228] While it is true that C's parents were deemed neglectful by the court,[229] it is not obvious from the text of the Constitution that such a finding necessarily deprives parents of every right concerning the upbringing of their children. In particular, it is not clear from the text of the Constitution or the Child Care Act that when, as here, parents are physically or emotionally neglectful they automatically lose their rights to prevent their minor daughter from terminating her pregnancy. The Irish Constitution attaches particular importance to the rights of parents. This case is a serious in-

225. *See generally* IR. CONST. art. 40.3.3.

226. Article 41 "recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The State. . . guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." IR. CONST. art. 41. Under Article 42 "[t]he State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children." IR. CONST. art. 42.

227. *See id*. art. 42.

228. *See C case* [1998] 1 I.L.R.M. 460, 475 (Ir. H. Ct.).

229. *See id*.

fringement of such rights. It is troubling that the court disposes of these rights without discussion.

C. The Role of the State

Once a child is taken into state care, the State has an obligation to act in the best interests of the child.[230] In this case the EHB not only looked after C's physical well-being, but consulted at least one psychiatrist with regard to her mental well-being.[231] Eventually the EHB asked the court to determine whether termination of pregnancy was covered under Section 13 of the Child Care Act, which authorizes the health board to arrange all necessary medical treatment for a child in its care.[232] This was a controversial request, even among some health board members, based on the belief that abortion in such circumstances can never be considered a necessary medical treatment.[233] In addition to the question of whether or not an abortion is medically necessary in such a case, there is also the question of whether or not the State has a special obligation to prevent such an abortion from ever taking place.

Per Article 40.3.3, the State has an affirmative duty to protect and vindicate the right to life of the unborn as far as practicable, giving only "due regard" to the equal right to life of the mother.[234] Given this affirmative duty, it would seem the State could never fund nor facilitate an elective abortion. Even with the enactment of the travel and information amendments, a positive right for the State to participate in or encourage the termination of a pregnancy is never contemplated. The decision of a state agency to seek approval for an abortion, and for the Irish courts to approve such an order, is therefore incongruous with the wording of the Constitution and past precedents.

D. Consequences of the *C* Case Holding

Finally, the consequences of the holding of the *C* case need to be closely examined. As a result of this case it is now unclear who has

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230. *See* Child Care Act, No. 17, Intro. & Gen. Note (1991).

231. *See C case* [1998] 1 I.L.R.M at 470-71.

232. *See id*. at 467.

233. *See* Paul Cullen, *EHB Asked to Affirm Right to Life of the Unborn*, IR. TIMES, Nov. 26, 1997, at 4; Christine Newman, *Laws Sought on Abortion After Parents' Decision to Halt Action*, IR. TIMES, Dec. 2, 1997, at 10; *Connell Criticizes Court's Decision*, IR. TIMES, Nov. 30, 1997, at 8.

234. *See* IR. CONST. art. 40.3.3.

the right to an abortion in Ireland and who is able to receive government funding for such an abortion. The *C* case implies that any pregnant woman (including women whose pregnancies are the result of consensual sex) who is sufficiently suicidal such that there is a "real and substantial" risk to her life may have an abortion. Depending upon how medical necessity is defined under the relevant health care regulations,[235] such a woman may qualify for a state-funded abortion.

It is clear from the *C* case decision that as the law currently stands, any child in the care of a health board who is pregnant and suicidal is entitled to have an abortion funded by the Irish State. This means that even those young girls who are pregnant by consensual sex will have their abortions funded, so long as they are suicidal. What is unclear is what would happen to a young, pregnant, suicidal girl whose parents would not allow her to have an abortion. If the risk is considered "real and substantial" and her parents refuse to let her have an abortion, are these grounds for being put into state care? Certainly if the child's life is considered at risk by an Irish court, it would be grounds for her being put into care, per Section 18(1) of the Child Care Act.[236] Because the *C* case confirmed the *X* case holding that a risk of suicide can be considered a real and substantial risk to the life of the mother, having a child put into care on such grounds is certainly not ruled out. If this is unacceptable to either the Irish people or the Irish government, legislation is needed to change the current judicially created law.

VI. THE NEED FOR LEGISLATION

The major Irish abortion decisions have been somewhat chaotic and the consequences of their holdings unclear due to the shocking lack of legislation on the subject. Ireland would greatly benefit from such long overdue legislation. Specifically, there are several areas of the law, some of which have already been discussed, that need clarification.

As stated previously, allowing suicide to qualify as a risk to the life of the mother goes against Catholic doctrine and natural law, and

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235. *See generally* Department of Health and Children, *Information Guide: Entitlements to Health Services* (visited October 5, 1998) <http://www.doh.ie/consumer/infoguid/entitle.htm>.

236. *See* Child Care Act., No. 17, § 17 (1991). In this situation, it could be argued either that the child was being ill-treated or neglected, or that her health was being or was likely to be avoidably impaired. For a complete list of the causes for a child being put into care under the Child Care Act, see discussion *supra* note 7.

it is contrary to the wording and history of the Eighth Amendment. If Ireland truly wants to allow a suicide exception, the government should hold a referendum and allow the people to vote to change the current wording of the Eighth Amendment explicitly. Additionally, if suicide is approved as a permissible justification for abortion, the government needs to enact relevant evidentiary standards; currently it is unclear what, if any, evidence is necessary to prove that a risk of suicide poses a real and substantial risk to the life of the mother.

Medical guidelines are also needed from the Oireachtas as to what exactly qualifies as a "real and substantial" risk to the life of the mother. The view of the Irish Medical Council that abortion is never a medically necessary treatment needs to be reconciled with the holdings of the Irish courts. While one can assume that anything that would qualify as an indirect abortion under Catholic law would be included, the Oireachtas should enact specific guidelines so as to avoid the judicial law making of the *X* and *C* cases.

As previously mentioned, it seems likely that what the *X* and *C* cases really sought was a rape exception to the right to life of the unborn. It would not be surprising if the public is also interested in establishing such an exception. In fact, following the *X* case the Taoiseach[237] promised to look into legislating on rape and incest exceptions,[238] presumably in response to public opinion favoring such a change. Six years later such legislation has not been adopted, and Irish courts are still struggling to work around this lack of legislation. Hopefully the government can be persuaded by the dangerous precedent of the *C* case to begin legislating on such issues. At the very least, the people of Ireland should be given an opportunity to vote on a constitutional referendum in favor of rape and incest exceptions to Article 40.3.3. Otherwise, Irish courts are likely to continue to work around the constitutional wording in illegitimate ways.

Legislative guidance is also needed regarding the legal rights of children in the care of the State. The most pressing need for legislation is for health board guidelines to determine the proper procedure to follow either if a pregnant child is in board care and there is a real and substantial risk to her life, or if a child in care otherwise wants an abortion. An even more basic issue that needs to be resolved for the health boards to do their work effectively is a definitive answer as to whether or not an abortion can ever be considered a necessary medi-

237. The Taoiseach is the prime minister of Ireland.

238. *See* Serjeant, *supra* note 127.

cal treatment under the Child Care Act. There certainly is not agreement on this issue,[239] and it is up to the legislature to provide clarity. If such guidance is not provided, the door is open for Ireland to begin funding abortions wholesale for children in its care, whenever suicide is threatened. In addition, until the legislature clarifies abortion law for children being cared for under the Child Care Act, the health boards will have no choice but to seek legal assistance anytime the issue arises. The expense, delay, and uncertainty are likely to be detrimental to all parties involved.

Legislation is also needed for children who remain in the care of their parents. It is unclear what will happen in Ireland if there is a case involving a young, pregnant girl whose life is in danger and whose parents will not permit her to have an abortion based on religious or moral beliefs. Despite the holding of the *C* case, it seems the parents would be able to prevent an abortion based on Articles 41 and 42 of the Constitution, which provide parents with inalienable rights in the upbringing of their children. In the *C* case, the parents lost such control over their daughter due to their improper, neglectful behavior. Absent such otherwise neglectful behavior, it appears the protections of Articles 41 and 42 could allow parents to prevent their child from having an abortion, even if there is a real and substantial risk to the child's life. Given this present uncertainty, the legislature should clarify what rules govern such a situation.

Another issue that needs to be clarified is the availability of state funding to travel abroad to receive an abortion. In the *C* case, for the first time, funding to travel and receive an abortion was provided for by the State.[240] It is entirely plausible this could set a precedent of allowing indigent adult women to have the State pay for their medically necessary abortions. While the United States has managed to avoid funding abortions for indigent adult women,[241] such an outcome seems unlikely in Ireland. Ireland has a much more comprehensive social medical scheme, which basically guarantees that medically necessary procedures are funded by the State when a patient is unable to pay.[242] The Health Act of 1970 does, however, give the Minis-

239. *See infra* note 241 and accompanying text; *see also supra* notes 221-224 and accompanying text.

240. *See generally C case* [1998] 1 I.L.R.M. 460 (Ir. H. Ct.).

241. In the United States, indigent adult women are denied Medicaid funding for abortions based on the theory that as adults, these women are responsible for their poverty. That is, because the State feels that it did not cause these adults' poverty it does not have any responsibility to pay for such medical procedures. *See* KINGSTON ET AL., *supra* note 20, at 264-65.

242. *See generally* Department of Health and Children, *supra* note 235.

ter for Health a large amount of discretion in determining how such medical services are provided and administered.[243] It is thus possible that funding for the termination of pregnancies could be excluded, perhaps on the basis of the Eighth Amendment.[244] However, given the *C* case holding, this seems unlikely to happen. Under Ireland's health care scheme, there appears to be no solid justification for providing funding for a medically necessary abortion for a child, while not providing such funding for an indigent woman. They are both essentially in the same position, and because Ireland guarantees the funding of other medically necessary procedures for indigent adult women, there appears to be little reason to think that adult women could not also receive funding in order to travel abroad and terminate their pregnancies.[245] Furthermore, the Department of Health states in its guide to entitlements to health services that, "Persons may be authorised to receive medical treatment which is considered necessary and which is not available in Ireland."[246] The health board must provide authorization for such treatments, but other than the requirement that the health board establish that the medically necessary procedure is not available anywhere in the country, there seems to be no limitation in this section that would prevent abortion from being considered medically necessary. Therefore, as the law now stands, it appears that adult women in Ireland who are unable to pay for a medically necessary abortion may have the State fund such a procedure, even if it involves traveling outside of Ireland. If such a proposition is unpalatable to the Irish people, the legislature should specifically amend the Health Act, and perhaps the Child Care Act, to limit the entitlements to health services.

VII. CONCLUSION

The holding of the *Information Bill* case, together with the trends of the courts up to and including the *C* case, present the people of Ireland with the urgent need to decide the future of abortion law democratically, within a state that is rapidly changing, both in terms of jurisprudence and demographics. Natural law theory can no longer provide the necessary theoretical barrier to the expanding lib-

243. *See* Health Act, No. 1, § 72(1) (1970).

244. *See* IR. CONST. art. 40.3.3.

245. Unless the government chose to exclude such funding on the basis of Article 40.3.3. But, that would also exclude funding of abortions under the Child Care Act, which the *C case* specifically authorized. *See C case* [1998] 1 I.L.R.M at 480.

246. Department of Health and Children, *supra* note 235.

eralization of abortion law in Ireland. Given the holdings of the Irish judiciary leading up to and including the *C* case, only the democratic process can hold back the flood waters. For better or worse, Ireland has lost the strong theoretical tools entrenched in natural law theory and the government must now face sensitive political topics, such as abortion, head-on in order to avoid the anti-democratic process of judicial law-making that has seen its latest realization in the *C* case.

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