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X MARKS THE SPOT WHILE *CASEY* STRIKES OUT: TWO CONTROVERSIAL ABORTION DECISIONS

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I. INTRODUCTION

The issue of abortion rights incites a consummate firestorm of controversy fueled by the passions of those rallying under the opposing banners of "pro-choice" and "pro-life." That controversy is exacerbated by the judicial process when the courts are faced with crucial decisions about the content and scope of a woman's right to choose an abortion over a full-term pregnancy. In 1992, abortion law witnessed the treatment of two critical and divergent cases: *Attorney General v. X*[1] from Ireland and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] from the United States.

The Supreme Court of each nation found it necessary to complicate the jurisprudence of abortion doctrine, obscuring the

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1. ATTORNEY GENERAL v. X AND OTHERS, JUDGMENTS OF THE HIGH COURT AND SUPREME COURT, (S. McDonagh ed., The Incorporated Society of Law Reporting for Ireland March 1992) [hereinafter *X*].

2. Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791 (1992).

nature of abortion laws which had previously been relatively straightforward. Each court manipulated its respective abortion law to reflect its own ambivalence between accommodation to the political and social pressures of each country and the justices' subjective beliefs about abortion. In its own way, each decision represents an unsuitable use of judicial power to impart subjective policy as well as denigrate Supreme Court adherence to *stare decisis*.

In *X*, the Irish Supreme Court considered Irish abortion law in the context of a pregnant girl's attempt to procure an abortion in England. The Court found that although Irish law strictly proscribes the right to abortion in most situations, an exception is possible if a pregnancy presents a real and substantial risk to a pregnant woman's life.[3] The Irish justices held that the pregnant girl in *X* could not be prohibited from procuring an abortion, the justices having made a determination that her life was at such risk, although the girl herself was the risk.[4]

In *Casey*, the United States Supreme Court adjudicated the legality of a series of abortion regulations in Pennsylvania. The plurality opinion upheld four significant regulations which hinder a woman's access to abortion by mandating that a doctor provide a pregnant woman with "anti-abortion" literature prior to abortion, that a woman wait twenty-four hours before an abortion can take place, that a minor obtain parental consent to have an abortion unless such a minor obtains a judicial decree allowing the abortion and that abortion facilities provide detailed reports of their abortion activity to the state.[5] However, the plurality opinion struck down a regulation requiring that pregnant women notify their husbands before procuring abortions.[6]

This article studies and defines abortion law in Ireland after *X* and in the United States after *Casey*. It addresses how these decisions affect Irish and American women's rights, respectively, to secure an abortion. It also scrutinizes the justices' opinions and criticizes the reasoning for their holdings.

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3. *X* at 60, 88, 101.
4. *Id.* at 62, 89, 97, 101.
5. *Casey* at 2832, 2867-72 (plurality opinion) (3-4-2 decision).
6. *Id.* at 2832, 2843-54, 2838-43 (plurality opinion) (3-2-4 decision).

This article argues that both Courts changed their nations' straightforward abortion laws to reach decisions that the courts felt would be more palatable to their respective political constituencies and satisfy their own subjective beliefs. On the one hand, the Irish court declined to abide by the traditionally conservative position denying abortion rights as codified in the Irish Constitution.[7] Rather, motivated by humanitarian concerns for the individual defendant in this situation, the Court pursued a more liberal interpretation of Irish abortion law. The Irish Court, therefore, broadened the law so more women would be eligible to procure abortions. On the other hand, the U.S. Supreme Court vitiated the liberal standard[8] of *Roe v. Wade*.[9] Although, it re-articulated *Roe's* basic holding, the Court left women vulnerable to state intervention which will impinge their abortion rights.

Courts should recognize a woman's right to choice in the matter of abortion because each individual woman should be able to control her own body and life without input or intervention from a moralistic and subjectively-inclined judiciary. Therefore, the Irish Court's liberalizing approach to Irish abortion law in *X* was superior to the American Court's restrictive disposition towards American abortion law in *Casey*.

II. *ATTORNEY GENERAL v. X*

Attorney General v. X involved an Irish girl who, with the help of her parents, attempted to secretly[10] secure an abortion outside of Ireland.[11] However, her efforts to do so were thwarted by the Irish authorities when they learned what the girl planned to do.[12] She and her parents decided to challenge the authorities on this matter in the Irish courts.[13] This case quickly caught the

7. *See infra* note 32.

8. This standard was liberal in that it allowed women to procure abortions relatively free from state intervention. State intervention in abortion activity could only pass constitutional muster if it met the strict scrutiny standard. *See infra* note 219.

9. Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that right to abortion is grounded in constitutional right of privacy). This article considers only one aspect of the *Casey* decision: how *Casey* debased *Roe*.

10. *See infra* note 23.

11. *X* at 9.

12. *Id.* at 9-10.

13. *Id.* at 10.

attention of the Irish (as well as international) media and triggered passions on both sides of the abortion issue, both before and after the Irish Supreme court ruled in the girl's favor.

A. Case Analysis

1. *Facts*

The main party in this case was a fourteen and a half year old girl, X, who had a playmate whom she frequently visited at the playmate's home.[14] Unknown to anyone, the playmate's father had been molesting X since before she had reached her thirteenth birthday.[15] In December 1991, the father had nonconsensual sexual intercourse with her, and consequently she became pregnant.[16] On January 27, 1992, she finally told her parents about the crimes committed against her by her friend's father during the preceding year and a half.[17] Also on that day, X's doctor informed her and her parents that X was pregnant.[18] She "naturally was distraught and upset."[19] X told her mother that when she discovered she was pregnant, she wanted to throw herself down some stairs and kill herself.[20]

The *gardai* (Irish police) were informed of the crimes shortly thereafter[21] and took a full statement after X's doctor confirmed her pregnancy.[22] A short while later, X and her parents decided she should have an abortion and would go to England for that purpose.[23] They told the gardai of their plan and left for England a few days later.[24] While in England, they learned that a court had ordered an injunction against their intended course of action, and they voluntarily returned to Ireland to fight the injunction.[25]

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14. *Id.* at 9.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 10.
20. *Id.*
21. *Id.* at 9.
22. *Id.*
23. *Id.* Due to the close proximity of the two countries, Irish women often go to England to receive secret, legal abortions.
24. *Id.*
25. *Id.* at 10.

On the journey back from England, X told her mother that she "had wanted to throw herself in front of a train when she was in London and that . . . she would rather be dead than continue as she was."[26] On a few other occasions, X expressed similar death wishes.[27]

A clinical psychologist examined X and filed a report on her condition.[28] He found that while X "was cooperative, she was emotionally withdrawn, . . . in a state of shock and had lost touch with her feelings," and that although she did not seem depressed, "she 'coldly expressed a desire to solve matters by ending her life.' "[29] He believed that X was capable of killing herself, "not so much because she is depressed but because "she could calculatingly reach the conclusion that death is the best solution."[30] The doctor concluded that if X were to carry the child, it would be "devastating" to her mental health and "considerable" to her psychological well-being.[31]

2. *Procedural History*

On February 6, 1992, the Attorney General filed a plenary summons against X and her parents requesting an order restraining the defendants from violating rights guaranteed to the unborn under Article 40.3.3 of the Irish Constitution,[32] an injunction restraining X from leaving Ireland for nine months or other period specified by the court, and an order restraining X from obtaining an abortion.[33] The High Court[34] issued a preliminary injunction on the summons, and the defendants subsequently filed an interlocutory appeal with the same court.[35] The parties and the High Court agreed that the hearing on the mo-

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 10-11.
31. *Id.* at 11.
32. The Constitution provides, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its law to defend and vindicate that right." IR. CONST. art. 40, § 3(3).
33. *X* at 8.
34. *Id.* This court is analogous to a United States federal district court.
35. *Id.*

tions be treated as the case on the merits.[36]

a. The High Court's Decision and National Law

The High Court judge believed that the courts must recognize the mother's right to life equally with the fetus's right to life (as required by Article 40.3.3 of the Constitution).[37] Here, however, he found that the mother's life was threatened by the mother herself. He deemed this risk to be of a "different order and magnitude" than the certainty that the fetus would die if an injunction were not granted.[38] Therefore, in this balance, the High Court judge decided an injunction should not be granted.[39] Furthermore, he opined that even though Irish law declares a Constitutional right to personal liberty [including the right to travel],[40] this right cannot be abused "to commit a wrong"[41] (e.g., going abroad to obtain an abortion). He concluded that, in such a case, the courts could prevent a person from doing [such] a wrong even if it means restricting one of that individual's personal rights.[42]

b. The High Court's Decision and European Community (EC) Law[43]

The High Court judge noted that, although EC law must

36. *Id.*

37. *Id.* at 14. *See supra* note 32.

38. *Id. See supra* note 32.

39. *Id.* at 14-15.

40. The Supreme Court Justices never cite the authority for the right to travel in *X*. The right to travel is not expressed in the Irish Constitution, rather it is a common law creation. As a recent Supreme Court case declared, the right to travel is a non-expressed or unenumerated right (stemming from the constitutional right to liberty). Murray v. Ireland, 1991 I.L.R.M. 465 (1991).

41. *Id.* at 15.

42. *Id.*

43. Ireland, being a Member State of the Treaty Establishing the European Economic Community (EEC) has certain responsibilities to the EEC. One of the Treaty's cardinal requirements is that restraints on the freedom to provide services within the EEC are to be abolished. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 59. The European Court of Justice (the judicial branch of the EEC) has decided that abortion is a service. Society for the Protection of Unborn Children v. Grogan, 3 C.M.L.R. 849 (Ir. 1991). However, the Court of Justice has not decided whether abortion may be excluded from the Treaty's requirement that restrictions on services be abolished because of its controversial nature to some Member States. (International law and its effects on the decisions in *X* and on Irish abortion law overall is

normally prevail over Irish law,[44] the EC has made exceptions to this rule. He discussed one important exception: if a Member State's public policy, public security or public health is at risk, it may deviate from EC law in this area in order to prevent that risk.[45] EC law would not likely deny a Member State [Ireland being one] an exemption to an EC decree based on that Member State's particular moral obligation to its citizens [e.g., Ireland protecting the lives of the unborn as required by its Constitution].[46] Thus, the High Court judge concluded that, in this situation, a national law would preempt EC law, and, therefore, an injunction could issue against X leaving Ireland to procure an abortion.[47]

The Irish Supreme Court reversed the High Court's decision. Four of the five Supreme Court justices decided that an injunction should not issue in this case.[48] The sole dissenter would have permitted it.[49]

Additionally, the four justices in the majority agreed that when the right to life (of the fetus) is balanced against the right to travel in this case, the former does not automatically prevail over the latter. In fact, they decided that the right to travel should prevail in this case.[50]

B. Laws Relevant to this Case

Numerous Irish legal and political issues were involved in this case. They were further complicated by international legal and political factors.

1. *Irish Law*

The main Irish law at issue in this case was Article 40.3.3 of the Irish Constitution which provides: "the State acknowledges

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discussed *infra*.)

44. *X* at 15.
45. *Id.* at 16.
46. *Id.* at 18.
47. *Id.* at 19.
48. *Id.* at 62, 89, 97, 101.
49. *Id.* at 83.
50. *Id.* at 64, 94, 97, 102.

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."[51]

Another fundamental law at issue in *X* was the right to travel which all of the justices agree exists in Irish law.[52]

The final "local" law cited in *X* was a 1939, common law case from England, *Rex v. Bourne*.[53] In that case, a fifteen year old girl had been raped and consequently became pregnant.[54] A doctor openly performed an abortion on the victim and was charged with "unlawfully procuring the abortion of the girl" under section 58 of the Offenses Against the Person Act, 1861.[55] The *Bourne* court had decided that in order for the defendant doctor to be proven guilty, the prosecution would have had to unequivocally show that the doctor did not perform this surgery only to save the victim's life.[56] The *Bourne* court had determined that preventing the victim from becoming "a physical and mental wreck" was one of the possible maladies from which the defendant could have spared the victim by performing the abortion.[57] Although this case had come from a jurisdiction other than Ireland, the Irish Supreme Court apparently deemed it sufficiently persuasive precedent to cite it favorably in the *X* decision.

2. *International Law*

International law plays a large part in Ireland's jurisprudence because the Irish government ratified the European Convention on Human Rights[58] and Ireland is a member of the

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51. IR. CONST. art. 40, § 3(3).

52. Gerry Whyte, *Abortion and the Law*, in DOCTRINE AND LIFE 264 (Gerry Whyte et al. eds., 1992) [hereinafter Whyte].

53. Rex v. Bourne, 3 All E.R. 615 (K.B. 1939).

54. *Id.* at 619.

55. *Id.* at 615. Section 58 of the Act provides," Every woman being with child who, with intent to procure her own miscarriage . . . and whosoever, with intent to procure the miscarriage of any woman . . . shall be guilty of felony. " *X* at 100, citing the Offenses Against the Person Act, 1861, ch. 100, § 58 (Eng.).

56. *Bourne* at 616.

57. *Id.* at 619.

58. Once a nation ratifies this Convention, it must abide by the Convention's ex-

EC.[59]

a. The European Convention On Human Rights (ECHR)

The ECHR's provisions define the term "human rights" and establish what ECHR members' duties are with regard to human rights.[60] The ECHR's court, the Court of Human Rights (CHR), determines whether human rights are being violated in specific situations. All Member States of the EC are parties to the ECHR and "there is no doubt that the rights protected by the ECHR are [European Economic Community] human rights."[61]

Among the ECHR's many provisions, three are most relevant to the abortion issue and the *X* case: the right to life,[62] the right to privacy[63] and the prohibition against inhuman and degrading treatment of people.[64] The ECHR also contains some law pertaining to the right to travel: the Fourth Protocol to the ECHR says that one "has the right to leave one's country," but there has been very little case law in this area.[65]

Even if there are no express provisions in the ECHR regarding a particular issue, that issue may still fall within the ECHR's jurisdiction if the CHR determines that one or more of its provisions are underlying aspects of the main issue.[66] For example, although there are no provisions regarding abortion *per se* in the ECHR, abortion may still fall within the ECHR's jurisdiction. The sections of the ECHR discussed above are some of the areas at issue in cases involving abortion.[67] They are relevant to Irish abortion law because an EC Member State's legal decisions re-

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press provisions as well as the decisions of the Court of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Preamble, arts. 1, 45, 53, 213 U.N.T.S. 221 [hereinafter ECHR].

59. Ireland has certain obligations to the EEC by being a member. As a member, it must refrain from jeopardizing the achievements of the Treaty's objectives. EEC TREATY art. 5.

60. ECHR Preamble, arts. 2-18.

61. T. C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 137 (2d ed. 1991) [hereinafter Hartley].

62. ECHR art. 2.

63. ECHR art. 8.

64. ECHR art. 3.

65. Whyte at 264.

66. ECHR arts. 49-50.

67. *See infra* notes 100-107 and accompanying text.

garding issues that deal with human rights could be influenced or altered by the ECHR. Since Ireland is a member of the EC, it must abide by ECHR provisions and decisions if and when the CHR gives a ruling.[68]

b. The Treaty Establishing The European Economic Community (EEC)

The EC was established to ensure the economic and social progress for the Member States[69] "by common action to eliminate the barriers which divide Europe."[70] The Treaty further provides how the EEC's economic and social goals are to be met.[71] Some of the current EC laws which govern Member States are the provisions in the EEC,[72] decisions made by the European Court of Justice (ECJ)[73] and directives issued by the Commission and Council[74] of the EEC.[75] Therefore, since Ireland is a member of the EC, it must abide by the above.

Article 59 of the EEC Treaty prohibits Member States from imposing restrictions on EC citizens who wish to provide services in the EC.[76] Article 60 defines "services."[77] The ECJ decided that performing an abortion is a service within the meaning of Article 60.[78] In *Luisi & Carbone v. Ministero del Tesoro*,[79] the ECJ expanded the parameters of EC law by extending the right to travel to "any national who seeks to cross a border and

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68. Hartley at 137.

69. The Member States to the Treaty are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

70. EEC TREATY Preamble.

71. EEC TREATY arts. 1-248.

72. EEC TREATY art. 5.

73. *See supra* note 43.

74. EEC TREATY art. 4. The Commission and Council are legislative-type branches created by the EEC. EEC TREATY arts. 145, 155.

75. EEC TREATY art. 189.

76. EEC TREATY art. 59.

77. "Services" includes activities of craftsmen, the professions, etc. EEC TREATY art. 60.

78. Society for the Protection of Unborn Children v. Grogan, 62 C.M.L.R. 849 (Ir. 1991).

79. Luisi & Carbone v. Ministero del Tesoro, 3 C.M.L.R. 52 (Italy 1985), cited in James Kingston & Anthony Whelan, *The Protection of the Unborn in Three Legal Orders - Part III*, IRISH LAW TIMES, July 1992 [hereinafter Kingston & Whelan, *Part III*].

has the means to pay for some sort of service."[80] The Council reinforced the ECJ's decision in *Luisi* in Directive 73/148/EEC which requires Member States to abolish restrictions on people traveling to other Member States to obtain services.[81]

Thus, Irish law on abortion, as decided in *X*, seems to be in direct conflict with EC law in this area. Irish women ostensibly cannot be restricted from traveling abroad to procure an abortion under EC law because EC law supersedes national law.[82] However, this apparent conflict between the laws is illusory because Article 56 of the EEC Treaty as well as Article 8 of Directive 73/148 allows a Member State to deviate from the Treaty and Directive, respectively, on grounds of public policy.[83] The Supreme Court did not address this in the *X* decision because it allowed X to travel to England to abort her fetus.[84] Nevertheless, the High Court judge who would not have allowed X to travel to England to secure an abortion, felt that the treaty required him to address this issue.[85]

In addition, new EC law may soon play an important role in the abortion issue. A plan to unite the EC into a federation, with all federal laws (not just economic ones) superseding Member State's laws, is scheduled to become effective as soon as it is ratified by the Member States[86] in EC national referendums.[87] This plan, called the Maastricht Treaty, would create the United States of Europe and was to become operative in January 1993.[88] However, not all of the Member States had adopted it as planned, which made meeting the January 1993 deadline impossible. For example, in June 1992, the Danes voted against it,[89] possibly anticipating problems arising out of Maastricht's main

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80. Kingston & Whelan, *Part III* at 166.

81. *Id.*

82. *Id.*

83. *Id.*

84. *X* at 62, 89, 97, 101.

85. Kingston & Whelan, *Part III* at 166. *X at* 15. *See supra* notes 44, 78 and accompanying text.

86. *See supra* note 69.

87. Matthew C. Vita, *European Nations Meet to Chart Course for Unity*, THE ATLANTA J. & CONST., Dec. 9, 1991, at A1.

88. *Id.*

89. Jonathan Kaufman, *Danish Electorate Rejects Terms of European Community Treaty*, BOSTON GLOBE, June 3, 1992, at 1.

objective of greater economic and new political unity.[90] Ireland, however, voted in favor of the Treaty on June 18, 1992.[91]

However, even had the Maastricht Treaty been adopted as planned, the Member States carved out a special exception to it known as Protocol 17.[92] Protocol 17 provides, "Nothing in the Treaty on European Union or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."[93] The Protocol was enacted to resolve a political dilemma, created by disgruntled conservative as well as liberal factions, facing the Irish government. The conservative parties behind the ratification of Article 40.3.3 were upset with the Supreme Court for its decision in *X*. The Protocol failed to appease their liberal opponents who feared that pregnant women, whose lives were not threatened by their pregnancies, could be restrained from leaving Ireland if the Protocol became operative.[94]

To resolve the political dilemma facing the Irish government, the Member States attached the Solemn Declaration to the Maastricht Treaty on May 1, 1992.[95] The Solemn Declaration states, "that it was and is the intention [of the Member States] that the Protocol shall not limit freedom . . . to travel between Member States. . . ."[96]

C. How *X* and International Law Affects a Woman's Right to Secure an Abortion

In order for Irish women to stay within the confines of the

90. Most Danes fear that accomplishing this objective would result in losing too much of their national sovereignty, being dominated by Germany and losing social programs. *Id.*

91. Joel Havemann, *Europe Treaty Gets Big Boost in Irish Vote*, L. A. Times, June 20, 1992, at A1. As of the time this article was submitted for publication, France and Germany had also approved the Maastricht Treaty. John J. Walte, *French: Yes to Union Treaty*, U.S.A. Today, Sept. 21, 1992, at A1. *Germany Ratifies Maastricht Treaty*, L.A. Times, Dec. 19, 1992, at A4.

92. Whyte at 256-257. The Irish government requested that the exception be included and the other Member States approved it.

93. Kingston & Whelan, *Part III* at 168.

94. Whyte at 257-58.

95. *Id.* at 258.

96. *Id.* at 254, citing the Solemn Declaration to the Maastricht Treaty.

law on abortion in their country, they must grapple with a number of aspects of that law.

First, Irish national law limits abortions only to pregnant women whose lives are at a real and substantial risk if they carry their pregnancies to term.[97] Thus, it seems if a woman's life is not really and substantially at risk, and she tells the authorities that she intends to go abroad to procure an abortion, she could be enjoined from doing so. This is true despite the existence of a fundamental right to travel because the right to travel will usually be subordinate to the right to life (of the unborn fetus).[98] Ironically, since even a pregnant woman's mere verbal threats of suicide suffice to meet the real and substantial risk test, it seems any pregnant woman could easily meet that burden.

The standard is rather amorphous; whether there is a real and substantial risk to the mother's life is a matter of judgment, so there is always room for debate.[99] As a result of the *X* decision, the chances are very good for a pregnant woman to convince the State that her life is at real and substantial risk by the pregnancy, and that she should be allowed to abort.

Second, there are international pressures (the ECHR, EC law and perhaps the Maastricht Treaty) encouraging the Irish authorities to allow women to leave the State and obtain all legal services available in other Member States. These pressures necessarily force Ireland toward a more liberal abortion policy.

The ECHR may play a role "in reconciling Irish abortion laws with supra-national human rights standards."[100] However, where the Commission of the ECHR has dealt with abortion, it has been rather evasive in its decision-making.[101] For example, in one case, the Commission expressly refused to decide whether

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97. Whyte at 259. The other limitation is that the one performing the surgery must have a *bona fide* belief that the mother's life is at stake by continuation of the pregnancy. *Id.* at 260. This is important because "abortion providers" should know their legal responsibilities.

98. Three of the four justices held this belief. *X* at 62, 97, 101.

99. Whyte at 261.

100. James Kingston & Anthony Whelan, *The Protection of the Unborn in Three Legal Orders - Part I*, IRISH LAW TIMES, April 1992, at 94 [hereinafter Kingston & Whelan, *Part I*].

101. *Id.*

an unborn life was covered by the right to life provision.[102] It thus appeared to support abortion rights. But in another case, it "rejected the possibility that [the right to life provision] gave an unqualified right to life to the foetus [*sic*]."[103] Therefore, unless the Commission takes a definitive stance against abortion under the right to life provision, it apparently remains an avenue through which the ECHR may liberalize Irish abortion law. Furthermore, the Commission could become active on the abortion issue under the ECHR's prohibition of inhuman or degrading treatment of people.[104] Forcing a woman to carry a pregnancy to term, which makes her a "physical and mental wreck,"[105] could arguably constitute such proscribed maltreatment.[106] Finally, although the ECHR's "right to leave [one's country]" is relatively weak,[107] it is yet another avenue through which the ECHR can make decisions favoring liberal abortion laws. All of the provisions in the ECHR relevant to the abortion issue may provide such avenues. Although the ECHR's activities regarding abortion may not have been very extensive in the past, there is no indication this "pattern" will continue in the future. Because the ECHR has the support of the EC behind it,[108] any decisions made by the ECHR dealing with abortion will have significance for Irish women.

EC law is tremendously important to Irish women. The majority of the Supreme Court did not address EC law in *X* because it felt that the case could be resolved on national law grounds. However, the High Court justice felt obligated to consider EC law in his decision in *X*.[109] His nationalist approach to EC law in the area of abortion provides good insight into how

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102. *Id.*, citing Bruggeman & Scheuten v. Germany, 10 Eur. Comm'n H.R. Dec. & Rep. 100 (1978).

103. Kingston & Whelan, *Part I* at 94-95, citing Paton v. U.K., 19 Eur. Comm'n H.R. Dec. & Rep. 194 (1980).

104. Kingston & Whelan, *Part I* at 95.

105. *Bourne* at 619.

106. Kingston & Whelan, *Part I* at 95. However, some experts feel that although the ECHR permits abortion, it will not likely lay the ground work for intervention in the area of abortion by the European Court of Justice (ECJ), the court of the EEC. James Kingston & Anthony Whelan, *The Protection of the Unborn in Three Legal Orders - Part II*, IRISH LAW TIMES, May 1992, at 107 [hereinafter Kingston & Whelan, *Part II*].

107. Kingston & Whelan, *Part I* at 95, citing VAN DIJK AND VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 491 (2d ed., 1990).

108. *See supra* note 61 and accompanying text.

109. *See supra* notes 44-47 and accompanying text.

the Supreme Court could have decided *X* had it felt the necessity of using EC law in its holding. Like the High Court justice, the Supreme Court could have decided that X did not meet her burden of proof to be allowed to deviate from the Constitutional law proscribing abortion — even under the (national) real and substantial risk test that the Supreme Court majority alone used. It then could have looked at the fundamental right to travel (to obtain services lawfully available in another Member State) in EC law and decided that Ireland would not be violating that supreme law based on Ireland's moral convictions on the subject of abortion.[110]

Although the Supreme Court did not follow the High Court's approach to abortion rights in *X*, based on current national and international law, Irish women are not completely safe from future interference in their abortion rights. Ireland could, through a successful national referendum,[111] clarify Article 40.3.3 and truly restrict abortion rights to emergencies threatening the mother's life. If that were the case, the Supreme Court would be forced to act as the High Court did in *X*. The Court would be forced to deviate from EC law, because abortion is a subject which Ireland can adjudicate for itself on grounds of (clear) public policy, and prevent pregnant women and girls like X from leaving Ireland to procure abortions.

Finally, future EC law in the form of the Maastricht Treaty, especially Protocol 17[112] and the Solemn Declaration of May 1, 1992[113] could affect Irish abortion rights. If the Treaty is ratified, it could seriously effect Irish abortion law. Not only do fears of anticipated problems with the main objective of the Treaty exist,[114] but there also seems to be a conflict between the two "amendments" to the Maastricht Treaty. Experts feel that Protocol 17 was added to the Treaty in response to the ECJ's decision in *Society for the Protection of Unborn Children v. Grogan* which hinted that abortion clinics from abroad might be able to distribute abortion information in Ireland.[115]

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110. *X* at 18.
111. *See infra* note 263 and accompanying text.
112. *See supra* note 93 and accompanying text.
113. *See supra* note 96 and accompanying text.
114. *See supra* notes 89-90 and accompanying text.
115. Kingston & Whelan, *Part III* at 169. *See* Society for the Protection of Unborn

The Protocol is legally binding[116] and, by itself, might have appeased many Irish conservatives because it would seemingly have prohibited the EC courts from tampering with Ireland's abortion laws. However, the Solemn Declaration, although of questionable authority, cannot be completely dismissed.

On the one hand, for reasons which are unclear, some experts feel that the Solemn Declaration does not have any legal effect.[117] If the Declaration is not in fact legally binding, it probably would not disturb the Irish conservatives who are pacified by the Protocol. They could continue to feel secure because the Declaration would not likely have any impact on EC law[118] (which would thus not effect abortion law in the EC or in Ireland).

On the other hand, for reasons which are equally unclear, some believe that the Declaration is now highly persuasive,[119] which means that it could be strongly considered by EC courts in any abortion case under the Maastricht federalist system. In turn, this could have an impact on abortion law at the national level which would be highly objectionable to Irish conservatives. It remains to be seen which school of experts is correct in its assessment of the Declaration's strength.

How much weight the Declaration carries will not be determined until the entire EC ratifies the Maastricht Treaty. It may prove to have no impact on Irish abortion law as it stands today, or it may liberalize that law tremendously. How the ECJ deals with the Protocol and the Declaration if and when the Maastricht Treaty passes could have a significant impact on Irish women. The ECJ's reputation for being a proponent of maintaining and expanding the EC's legal jurisdiction could result in

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Children v. Grogan, 62 C.M.L.R. 849 (Ir. 1991). Distribution of such material is something that would be highly objectionable to the Irish Supreme Court which expressly rejected the idea that information about the availability of abortions abroad could be provided to pregnant Irish women. Whyte at 255, citing Attorney General v. Open Door Counseling, 1988 I.R. 593 (1988). Information about the availability of abortions abroad is available only through "subversive sources." For example, women write the phone numbers of abortion clinics in bathroom stalls, put stickers bearing abortion numbers on cars, etc. However, it is clear that such activity is illegal.

116. Whyte at 263.

117. *Id.* at 266.

118. *Id.* at 267.

119. Kingston & Whelan, *Part III* at 169.

the liberalization of Ireland's abortion laws[120] — at least on the EC front. However, the conservatives at the national level would certainly put up a tremendous fight before any further liberalization could take place in Ireland.

D. The Irish Supreme Court's Shrewd Approach to the Abortion Issue Caused by Public Pressure

The Republic of Ireland's political and legal traditions are deeply grounded in Catholic dogma.[121] Conservative Catholics were the driving force behind Article 40.3.3 of the Constitution.[122] The Irish people have long been embroiled in the abortion issue. In 1983, in an effort to prevent future challenge by liberals, the conservatives moved to pass a constitutional law to proscribe abortion.[123] The conservatives were successful and thus Article 40.3.3 of the Constitution was adopted via amendment.[124]

After the enactment of Article 40.3.3 in 1983, the international media paid relatively little attention to the abortion issue in Ireland until the *X* controversy began. Much of the international as well as Irish public was outraged by the High Court's decision not allowing X to leave the jurisdiction to procure an abortion.[125] However, many Irish conservatives supported the High Court's decision. Consequently, the Supreme Court maneuvered strategically to appease both sides on the abortion issue in this highly publicized case.

1. *The Opinions of the Irish Supreme Court in* X

Chief Justice Thomas Finlay is conservative[126] but prag-

120. Liberalization of Ireland's abortion laws would result from the ECJ's enforcement of the fundamental right to travel.

121. R. F. Foster, Modern Ireland 520, 544, 567-68, 571, 581, 594 (1988).

122. *Irish Vote Puts Abortion Ban in Charter,* The Wash. Post, Sept. 9, 1983, at A13.

123. *Trying to Slam the Door: a Bitter Debate on a Dubious Abortion Law,* Time, Sept. 19, 1983, at 42.

124. *See supra* note 32.

125. Dennis Duggan, *Abortion Protests Shake Ireland; Court Hears Girl's Appeal,* Newsday, Feb. 26, 1992, at 7. Paul Majendie, *Ireland Under Spotlight over Abortion,* Reuter Lib. Rep., Feb. 24, 1992.

126. The definition of a "conservative" in Ireland does not differ from its American

matic, and he "tried to please the world [in this case]."[127] The substantive part of his decision began with a qualifier — the court should use current "prevailing ideas and concepts"[128] in its Constitutional decision-making.[129] This premise came from dicta of a 1974 decision.[130] Although the legitimacy and strength of this premise was questionable, he did not attempt to inconspicuously hide it in the text. Rather, by having boldly presented this uncertain premise he seemed to indicate that he would be taking certain "liberties" in adjudicating this case.

The Chief Justice used a test which allows for a pregnant woman to abort when "it is established [*sic*] as a matter of probability that there is a real and substantial risk to the life of the mother, which can only be avoided by the termination of her pregnancy[;] such termination is permissible,[131] having regard to the true interpretation of Article 40[.3.3] of the Constitution."[132] This test was presented by the defense counsel based on the precise wording in Article 40.3.3 and the facts in *X*.[133] However, there was no precedential basis for accepting this test as the appropriate standard here. The Chief Justice simply accepted it in accordance with his own concepts of "prudence, justice and charity."[134] The Chief Justice, however, added a hurdle of his own to the "real and substantial" test. He insisted that the risk be to the mother's life, as distinguished from the mother's health,[135] which the defense counsel did not expressly require in his version.[136] It seems that the Chief Justice added this provision so as to assure conservative members of the population that only in very limited and exacting situations could the burden be

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counterpart.

127. Personal interview with Anthony Whelan, Law Professor at Trinity College School of Law, Dublin, Ireland, July 1, 1992. Professor Whelan has written numerous articles in law journals regarding the issue of abortion in Ireland.

128. Apparently this language means current public opinion.

129. *X* at 59-60.

130. *Id.* at 58-59, citing McGee v. Attorney General, 1974 I.R. 284 (1972). Interestingly, he is the only one who introduced the prevailing ideas and concepts theory in the *X* decision. Perhaps this is because the other justices do not feel it is a principle that is appropriate here.

131. *X* at 60.

132. *Id. See supra* note 32.

133. *X* at 54-55.

134. *Id.* at 59. These concepts are along the lines of "prevailing ideas and concepts," which incidentally come from the same dicta in that 1974 case. *See supra* note 130.

135. *X* at 60.

136. *See supra* note 133 and accompanying text.

met.

The Chief Justice's version of the test might have been acceptable with respect to the underlying concepts behind Article 40.3.3 (and even with respect to the conservatives) if it were not for his holding that the risk to X's life was real and substantial and that she should have been allowed to have the abortion.[137] The evidence in the record in support of the defense was that X had told her mother that she wanted to throw herself down some stairs and that she was tempted to throw herself in front of a train.[138] The record did not indicate that X had actually taken any action in preparation to make her suicide "threats" a real possibility. The only other real evidence was the opinion of the psychologist who examined her.[139] He had found that X was in shock, was capable of killing herself and could come to the conclusion that she would be better off dead.[140] The proof presented in her behalf was tenuous at best.

It is difficult to believe that so little probative evidence could meet the real and substantial risk test as laid out by the Chief Justice, but he nevertheless held for X. Why? The only plausible answer was that he felt the need to yield to public pressure which demanded that X be allowed to leave the jurisdiction to obtain an abortion.[141] The Chief Justice tried to establish a vehicle — prevailing ideas and concepts — for legitimating his entire opinion. However, this vehicle could not factually tip the balance in X's favor. The evidence in the case alone should have established that X should be entitled to procure an abortion, yet it was not substantial enough to have done that.

In reality, the law was too harsh on a defendant such as X. That fact outraged the public, and the Chief Justice was apparently swept up by this public sentiment. Perhaps he also felt

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137. *X* at 62.

138. *See supra* notes 20, 26, 29 and accompanying text.

139. *See supra* note 28 and accompanying text.

140. *See supra* notes 29-30 and accompanying text. The doctor stated that it would be devastating to X's *health* and *mental well-being* if she had to carry the pregnancy to term. Such evidence is "expressly banned" by the Chief Justice's version of the test. [emphasis added]. *See supra* note 135 and accompanying text.

141. Although many Irish are devout Catholics who do not believe in abortion, a large segment of the population took a liberal stance, given the facts in this case, and demanded that the Supreme Court overturn the High Court's ruling. *See supra* note 125.

that the Court could do nothing to stop X from having the abortion, regardless of the Court's decision, as the defense counsel seemed to hint at the outset of the proceedings.[142] Maybe he made his decision for all of those reasons or none of them. In any case, the main reasons which are supposed to support judicial decisions are those which have some legal and factual basis. Very little in the Chief Justice's opinion supported his holding that X had met the real and substantial risk burden such that she should have been able to leave Ireland to procure an abortion.

The Chief Justice also declared in *dicta* that the right to travel is normally inferior to the right to life.[143] This concept seemed to be the basis for a subsequent finding that this case did not need to be referred to the European Court of Justice.[144] He felt that it could be decided under Irish law only and thus did not need to be adjudicated under EC law, as provided in Article 177[145] of the EEC.[146] Thus, although the right to travel issue is not relevant to the decision in *X per se*, it is an important aspect of EC law which could bear on future Irish abortion cases.

The Chief Justice was possibly laying "middle ground work" for future decisions. Many people in Ireland still hold a strong unfavorable view toward abortion[147] — such that even other Constitutional rights (let alone EC laws) must yield to the rights of the unborn. The travel dicta was probably meant to keep conservatives from becoming anxious that Article 40.3.3 will become ineffectual in light of *X* and potential changes in EC law. The Chief Justice perhaps assumed that the liberals would be pleased with the decision in X's favor and would not likely be overly disturbed by the travel section in his opinion. Moreover,

142. *See supra* note 23 and accompanying text.

143. *X* at 64.

144. Recall that the European Court of Justice is the judicial branch of the EEC.

145. "Where [questions concerning the interpretation of the EEC, the validity and interpretation of acts of the institutions of the Community, the interpretation of the statutes of bodies established by an act of the Council . . . are] raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." EEC TREATY art. 177.

146. *X* at 68.

147. Paul Majendie, *Most Irish Want Blanket Ban on Abortion Modified - Survey*, REUTER LIB. REP., Mar. 2, 1992.

the travel dicta was possibly also meant as a warning to the EC that, despite this decision, the EC has a formidable legal challenge if it plans to allow the EC right to travel to prevail over national policy.

Justice Niall McCarthy is a "known liberal."[148] He began his argument with the provocative statement that abortion always results in the fetus's death while for the mother, even if she decides not to abort, death is only a probability, not a certainty.[149] Because of this, he believed that it could not be a question of balancing the two lives, otherwise, the fetus would always prevail in the balance.[150] Justice McCarthy explained, however, that the Constitutional protection of the unborn is qualified by the requirement of due regard to the mother's life and is made even less absolute by the provision that the fetal life could only be vindicated as far as practicable.[151]

His opinion, although grounded in the Constitution, may not have been as legitimate as it appeared because Justice McCarthy also subscribed to the test which the defense counsel presented without much legal basis.[152] Justice McCarthy opined that, in paying due regard to the mother's life, when there is a real and substantial risk to her, it may not always be practicable to vindicate the right to life of the unborn.[153] Like the Chief Justice, he gave no reason for using this particular test.

Justice McCarthy felt there was ample evidence showing a real and substantial risk that X would commit suicide and thus could not be stopped from aborting her fetus.[154] This finding was not credible for the same reasons the Chief Justice's findings on this topic were not credible.[155]

Finally, Justice McCarthy made a statement that the mother could not be prevented from leaving Ireland whatever

148. *See supra* note 127.
149. *X* at 88.
150. *Id.* He thereby addressed a legitimate conservative argument.
151. *Id.* at 89. He thereby addressed a legitimate liberal argument.
152. *See supra* note 133 and accompanying text.
153. *X* at 88.
154. *Id.*
155. *See supra* notes 137-40 and accompanying text.

her purpose for so doing.[156] This assertion was based on the reasoning that the State could not enjoin an individual from traveling abroad with the intent to commit an act which may or may not be criminal in that other jurisdiction.[157] Justice McCarthy did not present this assertion in a way that had any bearing on this case. Thus, his position on the right to travel seemed little more than a personal preference for a liberal right to travel policy which substantially weakened his opinion.

Justice O'Flaherty was a surprising member of the majority in *X* because ten years prior he had campaigned for the Irish "pro-life movement!"[158] His opinion was difficult to discern because it contained numerous disconnected ideas: the Eighth Amendment being only one of many provisions in the Constitution;[159] the Constitution being committed to freedom and justice;[160] the Constitution treating the family with particular reverence [such that an injunction if granted would create an unwarranted interference with the authority of the family];[161] the State not being allowed to interfere with the freedom of movement "to this extraordinary degree;"[162] the State looking to the economic needs of mothers so that it must also be concerned with mothers' health, welfare and happiness;[163] and the State having to be positive in such a case.[164] Apparently he was trying to create a smoke screen with all of these ideas to make a decision of "moral conscience." Such a stance was surprising coming from a (former?) staunch pro-life individual. He must have succumbed to the general public sentiment that the mother must prevail in this case.

Justice O'Flaherty applied a different test than the other judges in the majority. His test provided that abortion is permissible in Ireland if it "has the effect of terminating pregnancy *bona fide* undertaken to save the life of the mother. . . ."[165]

156. *X* at 94.
157. *Id.* at 93.
158. *See supra* note 127.
159. *X* at 96.
160. *Id.*
161. *Id.* at 96-97.
162. *Id.* at 97.
163. *Id.* at 96.
164. *Id.* at 97.
165. *Id.* at 96

Justice O'Flaherty also gave no real basis for this test. His version was no clearer than the real and substantial risk test.

He then found that the evidence supported a finding that an abortion should be allowed in this case,[166] but again he offered no reason for reaching that holding. Justice O'Flaherty may have been moved by the facts of this case to hold as he did. It is perfectly understandable that he would want to make his decision in favor of X because her situation was heart-wrenching. However, Justice O'Flaherty's decision should not have rested on predominantly emotional grounds. He should have substantiated his opinions with more judicially valid reasons.

One of Justice O'Flaherty's last comments in this opinion was that the Court should not be allowed to interfere with one's freedom of movement to this extraordinary degree because it is inconsistent with one of the Constitution's basic tenets: "to assure the dignity and freedom of the individual."[167] This was a legitimate stance. It was especially laudable because Justice O'Flaherty is a known conservative and pro-life advocate but nevertheless applied this tenet to the abortion issue.[168]

Justice Egan is "a very old man but new appointee."[169] He may be called the maverick of the group. He used a test which provided that a pregnant woman can terminate her pregnancy if carrying it to term would probably involve a real and substantial risk to the mother, and it is irrelevant if the risk comes from the mother's threats of suicide or from any other cause.[170] It was basically the same test that the Chief Justice and Justice McCarthy used, but this version was more liberal because Justice Egan expressly provided for situations such as X's in the test itself. This supported his conclusion that X met her burden, but this test had the same problems as the other justices' tests — it had no foundation for its existence in this opinion.

Justice Egan also stated in *dicta* that, in balancing Constitutional rights, the right to life [in general] might not always be

166. *Id.* at 97
167. *Id.* IR. CONST. art. 40, § 3(2).
168. *See supra* note 158 and accompanying text.
169. *See supra* note 127.
170. *X* at 101.

paramount to other rights in every case.[171] This *dicta* helped to support his reason for finding for X[172] in this case. He claimed that travel ranks lower than the right to life because there is a difference between leaving a jurisdiction to commit a crime which is not illegal, and removing a fetus from the jurisdiction with the stated intent to terminate the life of that fetus.[173] This was important to him because the court has a duty to "defend and vindicate" the right to life of the fetus, so the right to travel cannot take precedence over that right.[174] This was a reasonable and judicially supportable position. However, it seemed inconsistent with the earlier portion of his opinion, that a defendant like X should be allowed to travel abroad for an abortion. By having been noncommittal here, Justice Egan failed to express a clear position on abortion rights.

Justice Hederman, the sole dissenter, is "very conservative."[175] First, he asserted that in interpreting an article of the Constitution, the Supreme Court must give the words their ordinary meaning with necessary consideration to the other Constitutional Articles.[176] This was a direct attack on the Chief Justice's "prevailing ideas and concepts" approach.[177] Justice Hederman made it clear that his decision would be based solely on a strict interpretation of the Constitution. This was a recognized and legitimate stance (similar to that of Justice Black of the U.S. Supreme Court) — if only he had remained faithful to it.

He asserted that "the right to self-determination" cannot supersede protection of the fetus.[178] This also was a legitimate if not harsh posture. But by having made this assertion, he insinuated that X was seeking to preserve her bodily integrity, rather than her life. Justice Hederman did not openly accuse her of

171. He used an example in which a father killed a man who had raped his daughter. Justice Egan felt that in such a circumstance the girl's bodily integrity prevails over the rapist's life. *Id.* at 102.

172. *Id.* at 101.

173. *Id.* at 102.

174. This is true even though the mother would rarely make such intentions known to the authorities, and it would be difficult for the courts to supervise court orders proscribing mothers from leaving the jurisdiction to obtain an abortion. *Id.*

175. *See supra* note 127.

176. *X* at 78.

177. *See supra* notes 128-30 and accompanying text.

178. *X* at 79.

that, but it is clear that he was hostile to her cause. His position on abortion was clear at this point. He stated that it is a mother's "*duty* to carry out the pregnancy" [emphasis added], and the State must do everything reasonably possible to preserve [fetal] life.[179] He stayed true to that position by saying that the preservation of unborn life is paramount to the mother's right to travel.[180] But by taking such a harsh position, he broke his promise to give the words in the Constitution their ordinary meaning. In taking such an automatically narrow view on abortion, he effectively rejected the express Constitutional provision that due regard should be paid to the mother's life.

Justice Hederman then deviated from his staunch position on abortion by establishing an abortion rights test of his own. His test provided that the evidence necessary to allow an abortion, in order to save the mother's life, "be of such weight and persuasion as to leave open no other conclusion but that . . . continuance of the pregnancy will, to an extremely high degree of probability, cost the mother her life and that any such opinion must be based on the most competent medical opinion available."[181] First, this test has no apparent legal precedent. He claimed that it stems from Article 40.3.3 of the Constitution[182] but did not explain how it stems from that Article. Second, even by having presented this test, he was being untrue to his belief that it is a woman's duty to carry a pregnancy to term. If that was how he really felt, what function would such a test serve? The bottom line would always be that the mother would have to bear the child, according to Justice Hederman's interpretation of the law.

In any event, he found a "remarkable paucity" of evidence to meet this standard.[183] This conclusory finding seemed to be an ends-justifying-the-means apology for his being unfaithful to both the Constitution and his principles.

Justice Hederman concluded that there was no certainty that the mother would die by suicide and that it would "not be

179. *Id.* at 80.
180. *Id.*
181. *Id.* at 82.
182. *Id.*
183. *Id.* at 83.

impossible" to prevent X from committing suicide and save the fetus[184] as X had loving parents and others to support her. How he determined that it would be possible to prevent X from committing suicide is not clear. It simply was not a realistic suggestion.[185]

The law as a result of the Supreme Court's opinions in this case is that a woman seeking an abortion in Ireland must prove that there is probably a real and substantial risk to her life which can only be prevented by the woman having an abortion. If she can meet this burden, she will be free to travel to a jurisdiction where abortion is legal to have the procedure performed.

Although the analysis the majority of the Supreme Court used to reach its conclusion in *X* was questionable, the conclusion was nevertheless correct. Allowing X to abort was implicitly mandated by the fundamental Constitutional provision which requires "[that the state] assure the dignity and freedom of the individual."[186] Giving women the right to control their own bodies and destinies is at least consistent with assuring their dignity and freedom.

III. *PLANNED PARENTHOOD v. CASEY*

Planned Parenthood v. Casey involved a Pennsylvania law in which various provisions attempted to restrict abortion rights further than *Roe* or its progeny seemingly would have allowed. However, claiming to affirm *Roe's* basic holding, the United States Supreme Court upheld all but one of the abortion restrictions in the Pennsylvania law. This decision, in effect, created new law on abortion rights. As with all U.S. Supreme Court cases, the decision in this case was intended to be the definitive word on abortion law in the United States, but this objective has failed.[187]

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184. *Id.*

185. Even if X's parents could keep twenty-four hour care over her to prevent her from killing herself, how could the thousands of other women (or girls) who do not have such supportive loved ones be cared for? How are they to be prevented from committing suicide? Is Justice Hederman prepared to engage the State in twenty-four hour care of such woman (or girls)? If that is the case, he should have proposed a plan for how the State would provide such care.

186. *See supra* note 167.

187. *See infra* note 264.

A. Facts, Procedural History and Holding

In *Casey*, the United States Supreme Court reviewed the constitutionality of five provisions in the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989.[188] The first provision at issue required that a woman seeking an abortion be given "anti-abortion" information[189] before the procedure, that she certify in writing that she is procuring the abortion consensually with the knowledge provided above, and that she wait 24 hours prior to the procedure.[190] The next provision required that a minor obtain the informed consent of one parent before having an abortion, but this provision allowed for a judicial bypass[191] of this requirement.[192] The third provision required that a pregnant woman seeking an abortion provide a signed statement saying that she had informed her husband that she was having the procedure, but this provision contained some exceptions including medical emergencies.[193] The final provision required that abortion facilities provide the state with certain information related to the specific abortions performed in each facility and general abortion statistics about each facility.[194]

Before any of the provisions were to take effect, Planned Parenthood of Southeastern Pennsylvania (consisting of five abortion clinics) and a doctor representing himself and a class of doctors who perform abortions brought suit seeking a declaratory judgment stating the provisions were facially unconstitutional and injunctive relief based thereon.[195] The District Court held for petitioners, claiming that five provisions were unconstitutional and granted permanent injunctive relief from their enforcement.[196] The Court of Appeals affirmed in part and reversed in part, upholding all but the spousal notification requirement.[197] The Supreme Court granted certiorari and heard

188. *Casey* at 2803.
189. *See infra* notes 200-201 and accompanying text.
190. *Casey* at 2803.
191. *See infra* notes 206-208 and accompanying text.
192. *Casey* at 2803.
193. *Id. See infra* notes 213-15 and accompanying text.
194. *Casey* at 2803. *See infra* notes 209-12 and accompanying text.
195. *Casey* at 2803.
196. *Id.*
197. *Id.*

the case on April 22, 1992.[198] In a plurality opinion, it affirmed the Court of Appeals' judgment in its opinion of June 29, 1992.[199]

B. Implications of *Casey* to the American Public

The *Casey* decision resulted in a severe interference with a woman's right to secure an abortion in Pennsylvania. It also discouraged Pennsylvania doctors and abortion facilities, especially public facilities, from providing abortions.

First, Pennsylvania's doctors who perform abortions must now provide their patients seeking abortions with information discouraging them from having the procedure performed.[200] For example, the required information stresses the unpleasant medical aspects of abortion by including unnecessarily graphic details about the procedure itself and risks involved with the procedure.[201] Such extensive "forced knowledge" clearly goes beyond necessary informed consent. Nevertheless, a woman who would rather not know specifically about the details of the abortion procedure will be forcibly exposed to them. She may be dissuaded from undergoing the abortion due to a newly formed aversion of and unnecessarily increased fears of procuring the procedure.

If that information does not dissuade her, perhaps additional information about the fetus itself may change her mind. The doctor must inform the patient of the probable gestational age of the fetus and tell the patient about free brochures the state offers which personalize the fetus.[202] Such knowledge could easily evoke an emotional response from the patient toward the fetus which she might not otherwise have possessed going into the procedure or which she might have fought to overcome. Such new emotions might make the patient decide against having the procedure regardless of whether she can physically, mentally and/or financially afford to take her pregnancy to term.

198. *Id.*
199. *Id.* at 2833.
200. *See infra* notes 201-203 and accompanying text.
201. *Id.* at 2833.
202. *Id.* at 2833-34.

If this knowledge were not enough to discourage the patient from having the abortion, the required information about the availability of possible medical financial aid for the patient, alternatives to abortion and the right to receive child support from the father may further dissuade her from choosing abortion.[203] Knowledge of the availability of these alternatives could give the patient a sense of future financial and emotional security.

If all of the above does not dissuade her, the mandatory twenty-four hour waiting period[204] might finally make her have doubts and change her mind because it allows all of the above information to be processed and embedded in the patient's mind. It also has an impact on the poor and on women who must travel from rural communities to have the procedure. Most of them cannot afford to lose more time to receive abortions because of their meager financial condition or their lengthy commute. Thus, the waiting period can further wear down the patient emotionally and mentally such that she will no longer continue with the procedure. This requirement, as well as those listed above, goes well beyond informed consent.[205]

Next, a non-emancipated minor seeking an abortion in Pennsylvania must obtain the consent of one of her parents before she can have the procedure performed.[206] This requirement can be bypassed only if there is a medical emergency or by judicial decree.[207] A judge may authorize a doctor to perform an abortion on a minor if the judge determines it is in the minor's best interests.[208] Thus, if a Pennsylvania minor does not have a parent's consent to procure an abortion, if her life or health is

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203. *Id.* at 2834.

204. *Id.* at 2833-34. The waiting period smacks of gender bias and is very condescending toward women. Why can Pennsylvania not trust its adult female citizens to make responsible decisions about this medical procedure before entering a hospital? The male citizens of Pennsylvania do not need to wait for a mandatory period of time before undergoing vasectomies or any other medical procedure.

205. Clearly any Pennsylvania woman contemplating an abortion will be forced to undergo a barrage of state-endorsed, anti-abortion propaganda before she can have the procedure performed. She will thus have to prepare herself mentally for that event even before having the abortion and still preserve enough energy to recover from the procedure physically.

206. *Id.* at 2834.

207. *Id.* at 2834-35.

208. *Id.* at 2835.

not in great danger or if a judge does not give authorization for her to have an abortion, she must carry the pregnancy to full term.

Finally, for every abortion a doctor performs in Pennsylvania he or she must provide the state with a report including his or her name, the name of any other doctor(s) involved in the procedure, the county and state where the patient resides, the patient's age, the number of the patient's prior pregnancies and abortions, the type of procedure performed, the weight of the aborted fetus, the gestational age of the fetus, the basis for any medical emergency, and the patient's marital status.[209] Furthermore, a facility where legal abortions take place, whether it is a clinic or hospital, must report how many total abortions it performs at the facility, and how many total abortions the facility performs in each trimester of pregnancy.[210] This report must be filed on a quarterly basis.[211] If the facility received any state funding within the preceding twelve month period before filing the report, the report will be available for public review and copying.[212] Requiring this information would obviously discourage doctors from performing abortions in any remotely public facility out of fear of harassment from anti-abortion groups and individuals. Facilities receiving state funds may have the same concerns. Consequently, this could drastically reduce the number of doctors and facilities willing to perform abortion in public facilities. Those who would suffer most, as a result of the reporting requirement, are the poor women who could not afford to obtain abortions in private clinics or hospitals where most abortion activity would then likely take place.

The only "positive" aspect of the *Casey* decision is that women need not give their husbands notice before having an abortion.[213] Ironically, this barely became law. Had the swing vote on this issue been otherwise in *Casey*, a married woman in Pennsylvania would have had to notify her husband before getting an abortion and sign a statement that she had notified

209. *Id.* at 2835-36.
210. *Id.* at 2837-38.
211. *Id.* at 2838.
212. *Id.*
213. *Id.* at 2803.

him.[214] The exceptions would have been a woman with a medical emergency, her husband not being the father of the fetus, the fetus being the result of an officially reported spousal sexual assault, or the notification potentially resulting in the husband or a third person physically harming the wife.[215]

Abortion provisions similar to those in Pennsylvania are capable of ratification in virtually any other U.S. jurisdiction because of this decision. Therefore, women throughout the nation are at serious risk of similar interference with their rights, and doctors who perform abortions and facilities which provide abortions may be deterred from continuing with their practices. Since *Casey* has substantially diluted *Roe*,[216] Pennsylvania and other jurisdictions may attempt to write even more stringent abortion regulations which would likely pass muster under the *Casey* undue burden test.[217] The *Casey* decision may be the commencement of alarming changes to come in American abortion law.

C. The Plurality's Judicial Dishonesty Used to Appease the Public

The *Casey* plurality opinion was basically decided on three distinct judicial approaches toward *Roe*. One was completely supportive of *Roe*. Another supported an extremely diluted version of it. The last one overruled it.

Not surprisingly, Justice Blackmun completely supported *Roe*[218] and followed its reasoning exactly when deciding *Casey*. He found that, based on the strict scrutiny standard articulated in *Roe*,[219] none of the provisions at issue could pass constitutional muster and thus had to be stricken.[220]

Justice Stevens also basically supported *Roe* in his opinion.

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214. *Id.* at 2836-37.

215. *Id.*

216. *See infra* notes 224-34 and accompanying text.

217. *See infra* note 227 and accompanying text.

218. Justice Blackmun authored the *Roe* opinion.

219. Strict scrutiny is a standard of review which provides that state legislation, attempting to regulate a fundamental right, may be upheld only if it is necessary to promote a compelling state interest. *Roe* at 153-55.

220. *Casey* at 2845-54.

He too found that none of the provisions could pass constitutional muster based on *Roe* or its progeny.[221]

The plurality opinions which decided that the mandatory information and twenty-four hour waiting period, parental consent and data reporting requirements were constitutional were divided into two camps. Justices O'Connor, Kennedy and Souter comprised one group, while the other consisted of Chief Justice Rehnquist and Justices Scalia, White and Thomas. Although the two sides reached the same conclusion, their approaches were remarkably different.[222]

A large segment of the O'Connor group's holding was consumed by the importance of *stare decisis* and institutional integrity.[223] The first words in the O'Connor opinion were, "Liberty finds no refuge in a jurisprudence of doubt."[224] She later stated, "The obligation to follow precedent begins with necessity. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is by definition, indispensable. . . . At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen *so clearly as error that its enforcement was for that very reason doomed.*"[225] [emphasis added]. Justice O'Connor also stated, "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. . . . [T]he legitimacy of the Court must be earned over time. . . . The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible."[226] These statements by themselves could have been very reassuring to those who feared this decision would overturn *Roe*.

However, Justice O'Connor manipulated the language in

221. *Id.* at 2838-43.

222. As for the spousal notification requirement, the group drew completely opposite conclusions. Justice O'Connor's camp struck it down, *id.* at 2830, while Justice Rehnquist's camp upheld it. *Id.* at 2873.

223. *See infra* notes 225-26 and accompanying text.

224. *Casey* at 2803.

225. *Id.* at 2808.

226. *Id.* at 2815-16.

Roe. She and Justices Kennedy and Souter affirmed *Roe's* "essential holding" that a woman has a right "to choose to have an abortion before viability without *undue interference from the state*."[227] [emphasis added]. However, this "undue interference" language was not part of the decision in *Roe*. *Roe* used a strict scrutiny standard to determine whether a state abortion regulation was unconstitutional.[228] Also, Justice O'Connor's opinion put a greater emphasis on state power to restrict abortions after fetal viability than *Roe*[229] and subsequent cases did.[230] Justice O'Connor's group then took the "undue interference" introduction one step further and embedded it in federal abortion law by stating, "[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[231] What happened to *stare decisis* and institutional integrity? How could Justice O'Connor's group speak so eloquently of these concepts and then abruptly abandon them? It seems that these concepts were much more dispensable to this group than they had earlier proclaimed.

This group further decided that the trimester framework was overly rigid and not part of the essential holding of *Roe*.[232] For these reasons, the group rejected the trimester framework.[233] *Roe*'s critics may have thought the trimester framework was not the best system for determining when and how a state could regulate abortions, but was it "so clearly [in] error that its enforcement was for that very reason doomed?"[234] This could only be answered in the negative because the States have relied on and used this framework for twenty years.

With these amendments to *Roe*, Justice O'Connor's group proceeded to determine the validity of the challenged provisions. The group first considered the informed consent and twenty-four hour waiting period requirements and upheld them.[235] In so doing, these three justices overruled *Akron v. Akron Center for*

227. *Id.* at 2804.
228. *See supra* note 219.
229. *Roe* at 163-65 (viability/trimester test).
230. *Casey* at 2817.
231. *Id.* at 2820.
232. *Id.* at 2818.
233. *Id.*
234. *See supra* note 225 and accompanying text.
235. *Casey* at 2822-26.

Reproductive Health[236] which invalidated an ordinance requiring that a patient wanting an abortion be provided with information which would influence her decision so that she would choose to carry the pregnancy to term.[237] *Akron* also invalidated a twenty-four hour waiting period. These three justices overruled *Akron* and an extension of it in *Thornburgh v. American College of Obstetricians and Gynecologists*[238] because of "*Roe's* acknowledgment of an important interest in potential life."[239] Again, where is the clarity in error in *Akron* and *Thornburgh* that their enforcement was for that reason doomed?[240] In truth, there is no such clear error in them.

Moreover, how could these three justices have allowed the state to require that doctors give patients anti-abortion propaganda?[241] Such information clearly has moralistic overtones which stem from Judeo-Christian religious beliefs. The Establishment Clause of the First Amendment[242] to the United States Constitution mandates the separation of church and state in the federal government. This separation also applies to state governments because the Establishment Clause has been extended to the states.[243] Therefore, the state mandating the distribution of such propaganda may be construed as unconstitutional on First Amendment grounds. Justice O'Connor's group failed to address the religious issue at all. Instead, this group determined that the provision passed muster based on the undue burden test.[244] This group found that the requirement of telling a woman of the availability of information about fetal development and state child assistance, information that might make her choose birth over abortion, is reasonable, not a substantial obstacle and not

236. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

237. *Casey* at 2823.

238. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In *Thornburgh*, a number of Pennsylvania abortion regulations were being considered, one of which required that a woman be given written material about the abortion, including information about fetus development. The Court struck it down using the strict scrutiny standard.

239. *Casey* at 2823.

240. *See supra* note 225 and accompanying text.

241. *See supra* notes 201-203 and accompanying text.

242. The Constitution provides, "Congress shall make no law respecting the establishment of religion." U.S. CONST. amend. I.

243. Everson v. Board of Educ., 330 U.S. 1 (1947).

244. *Casey* at 2823-24.

an undue burden.[245] In upholding the twenty-four hour waiting period, this group held that decisions made after "a period of reflection" will be more "informed and deliberate."[246] In upholding these requirements, Justice O'Connor's group was being extremely paternalistic. It was telling the American woman that she cannot be trusted to make intelligent and informed decisions concerning her own body without state supervision and control.

Furthermore, the group stated that "the waiting period is a reasonable measure to implement the State's interest in protecting the *life* of the unborn, a measure that does not amount to an undue burden."[247] [emphasis added]. Simply by referring to the fetus as a "life," Justice O'Connor's group made this decision based on the Christian premise that a fetus is in fact a life — a person.[248] This premise is not universally accepted. Furthermore, it not only violates the First Amendment Establishment Clause but also offends *Roe* which explicitly rejected the concept that a fetus is a person.[249]

In considering the parental consent provision, this group of three justices upheld it in accordance with their interpretation of *Akron I and II, Hodgson* and *Bellotti II*.[250] Justice O'Connor's group stated that it would affirm a parental consent requirement as long as a judicial bypass is available[251] which the Pennsylvania provision expressly allows.

The group also upheld most of the record keeping provision because "it is a vital element of medical research."[252] Nevertheless, the group offered no proof that this information is or can be vital to medical research. It does, however, increase the cost of abortion, which the group admitted, but these justices did not concede that it creates an undue burden.[253]

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245. *Id.*
246. *Id.* at 2825.
247. *Id.*
248. *Roe* at 160-61.
249. *Id.* at 159-61.
250. *Casey* at 2832. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Hodgsen v. Minnesota, 497 U.S. 417 (1990); Bellotti v. Baird, 443 U.S. 622 (1979).
251. *Casey* at 2832.
252. *Id.*
253. *Id.* at 2833.

Chief Justice Rehnquist's group reexamined the "fundamental right" in *Roe* because the "state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain."[254] This group found that "the *Roe* court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce, Meyer, Loving* and *Griswold*[255] and thereby deemed the right to abortion fundamental."[256] This group also focused on the traditional principle of *stare decisis*[257] but opted to comply with that principle on the group's own terms by declaring that the proper standard for determining the constitutionality of abortion regulations is "minimal scrutiny."[258] Based on this standard, Chief Justice Rehnquist's group easily upheld all the provisions at issue.[259]

The sum of the Supreme Court's opinions in this case resulted in new abortion rights law in the United States. States are now free to restrict a woman's right to pre-viability abortions provided that such states do not create an undue interference with that right.

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254. *Id.* at 2854.

255. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the Constitution protects personal decisions about child rearing and education); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that students have a Constitutional right to acquire knowledge); Loving v. Virginia, 388 U.S. 1 (1967) (holding that marriage is a Constitutional right); and Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Constitution protects personal decisions about contraception).

256. *Casey* at 2860.

257. The Chief Justice's group began its argument by using the Black's Law Dictionary definition of stare decisis: "to abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). This group then liberally criticized the O'Connor group's concept of *stare decisis*. *Casey* at 2860-67. Next, it stated, "In our view, authentic principles of stare decisis do not require that any portion of the reasoning in *Roe* be kept intact . . . 'Stare decisis is not . . . a universal, inexorable command,' especially in cases involving interpretation of the Federal Constitution (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J. dissenting)." *Id.* at 2860-61. This statement about *stare decisis* was problematic not only because it was not legally binding but because it conflicted with the definition of *stare decisis* with which the Chief Justice's group began this discussion. By having laid this weak foundation for its opinion, this group needed to present an extremely persuasive argument in the remainder of its opinion to redeem itself intellectually, which it failed to do. The Chief Justice's group overruled *Roe* based on many more dissenting (non-legally binding) opinions, including the dissent in *Roe*. *Casey* at 2867-73.

258. *Id.* at 2867. Minimal scrutiny is the standard of review which requires that a rational relationship between a state regulation and a legitimate state objective exist. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 491 (1955).

259. *Casey* at 2873.

IV. CONCLUSION

The Irish Court's approach to abortion law was superior to the American Court's approach in these cases.

The majority of the Irish Court was responding to change in the public's opinion about abortion. The public felt very deeply that X should be allowed to abort despite Ireland's firm abortion law, for which the conservative majority voted in 1983,[260] the one which specifies that abortions be given only when true risks to the mother's life exist.[261] This risk to the mother's life did not exist in *X*. The facts simply could not support that conclusion. The truth was that it was unfair to force a mere fourteen year old child to bear a child that was the product of a violent crime. The majority of the court tried to make its decision by actually grounding it in the law while, at the same time, responding to the public's perception of equity. Although its analysis was flawed, it tried to fulfill its duty as a public servant while creating an avenue of relief for victims like X. The result of its efforts was to obscure Ireland's previously clear and solid abortion law.

In *Casey*, three U.S. Justices (Justice O'Connor's group) gave lip service to the importance of precedent and to how they were going to keep *Roe* intact. These three Justices were surely aware that the majority of the public thinks favorably of *Roe*.[262] Therefore, they were compelled not to overtly overturn *Roe*, realizing that *Roe* has been an important part of American law for twenty years and could not easily be thwarted. Seemingly those three members of the Court felt that "affirming *Roe's* essential holding" was enough to appease the large numbers of the population which support *Roe*. But then those three justices not only debased the basic structure (the trimester scheme) of *Roe* but eviscerated it by changing the "strict scrutiny" test (when checking the validity of a state abortion regulation) to the "undue burden" test. Under this new, less demanding test, abortion regulations and restrictions will pass muster much more easily than they would have under *Roe's* actual test. This group thus

260. *See supra* note 122.

261. *See supra* note 32.

262. Ronald Brownstein, *The Times Poll; Party Coalition May Be Fracturing Under Bush*, L.A. TIMES, Aug. 16, 1992, at A1.

took away with one hand what it "gave" (i.e., promising to keep *Roe* intact) with the other. The only plausible reason for this troubling decision was the justices' subjective belief that abortion rights should be extremely limited.

Four other justices (Chief Justice Rehnquist's group) sought to overturn *Roe*. Their unfavorable views toward *Roe* were no secret, and they would criticize any other opinion which did not overturn *Roe*. However, they were no more convincing in their arguments than Justice O'Connor's group. They also alleged respect for *stare decisis* yet failed to adhere to it, predominantly basing their decision on dissenting opinions in other cases, including the dissenting opinion in *Roe*.[263] These dissents did not carry any precedential value. Chief Justice Rehnquist's group thereby fulfilled its subjective agenda with respect to abortion.

The combination of the opinions in *Casey* has not clarified *Roe*. If anything, it has made abortion law in the U.S. even more obscure than it was under *Roe's* strict scrutiny standard which had been successfully used by the states for twenty years. The states must now contend with a new, untested standard. Moreover, *Casey* has substantially weakened an American woman's right to privacy in the area of abortion. The final judgment in *Casey* has left American women vulnerable to more state interference in their right to procure abortions, especially as conservative legislators create new barriers to abortion and have them tested by the current Court, the majority of which shares a conservative ideology.

An important lesson that these two cases teach is that highly political or moral cases make ambiguous law. Such judicial decisions keep the issues in the political arena, but ultimately the public returns to the legislature or the courts to clarify such laws.[264]

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263. *See supra* note 257.

264. Ireland has already held a referendum, regarding abortion, in response to the Irish Supreme Court's decision in *X*. The proposed laws purported to liberalize Irish abortion law in a variety of ways. However, the result of the referendum was unclear. Both the conservative and liberal factions of the public claimed victory. Alan Murdoch, *Both Sides Claim Victory in Abortion Vote*, THE INDEPENDENT, Nov. 28, 1992, at 1. In the U.S., courts in Louisiana and Guam questioned what abortion law is in the United States even after the U.S. Supreme Court decided *Casey*. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 113 S. Ct. (1992) (issue

The most remarkable aspects about *X* and *Casey* are their ironic outcomes. On one hand, Ireland is a Catholic country with a Constitution that honors religion and gives the Catholic Church a special position.[265] The Irish Constitution expressly opposes abortion (which is clearly a Catholic position) in all but the most extreme situations. Yet, the Irish Supreme Court decided in *X* to allow an unlikely candidate to procure an abortion. Its conclusion was humanitarian and respectful of this girl's individual liberty and reproductive freedom. The majority of the Irish justices made this controversial decision despite Ireland's Catholic paternalistic nature.

On the other hand, the U.S. Constitution shuns established religion,[266] and "[n]o right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . ."[267] Regardless of these "traditions," the U.S. Supreme Court decided, in *Casey*, that a state can severely restrict a woman's right to terminate a pregnancy. The true reason for the U.S. Supreme Court's upholding the restrictions reviewed in *Casey* stems from its adherence to the Christian belief that a fetus is a "life" (rather than a "potential life" — a non-moralistic, non-religious view of a fetus).[268] The Court thus regulated American morality on the abortion issue under the guise of Constitutional mandate. In deciding *Casey* in this manner, it raised the Constitution to the level of a religious instrument which caused the Constitution to violate itself i.e., the Fourteenth Amendment. Now, women's reproductive rights and freedom can be scrutinized and regulated much more strictly than many other medical procedures — even more serious and life-threatening ones. This is clearly violative

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was whether Guam's total ban on abortion, except in medical emergencies, was facially unconstitutional). Sojourner v. Edwards, 974 F.2d 27 (5th Cir. 1992) (concerned Louisiana Abortion Statute which criminalized abortions except under extremely limited circumstances).

265. The Irish Constitution provides, "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence and shall respect and honor religion. The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens." IR. CONST. art. 44, § 1 (1-2).

266. *See supra* note 242.

267. Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

268. *See supra* notes 247-48 and accompanying text.

of the United States' purported anti-religious establishment and pro-individual liberties position.

Apparently, even a Catholic country like Ireland is progressing in the area of individual liberties by making its anti-abortion law more liberal. The United States, however, is regressing in this area by allowing the states to greatly restrict and interfere with its previously liberal abortion laws. Ironically, the laissez-faire United States could learn a lesson from paternalistic Ireland.