
COMMENTS

REPRODUCTIVE CHOICE IN THE HANDS OF THE STATE: THE RIGHT TO ABORTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN LIGHT OF *A, B & C V. IRELAND*

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I. INTRODUCTION

Between 1980 and 2010, at least 147,912 Irish women traveled outside their own country to gain access to safe and legal abortions.¹ These women were required to travel abroad due to Ireland's prohibition on abortion in all circumstances

1. *Abortion Statistics*, IR. FAMILY PLANNING ASS'N, <http://www.ifpa.ie/eng/Hot-Topics/Abortion/Statistics> (last visited Sept. 2, 2011) (noting that this is an underestimation because some women do not give their Irish addresses in order to maintain confidentiality).

except where there is a real and substantial risk to a woman's life that can only be avoided by terminating the pregnancy.² Irish law effectively forces all women seeking abortions who cannot meet this high burden to travel outside of Ireland to obtain an abortion, regardless of the circumstances.³

When *A, B & C v. Ireland*⁴ came before the European Court of Human Rights ("the Court"), the Court was presented with the question of whether Ireland's abortion laws violate the European Convention on Human Rights ("the Convention") and had the opportunity to declare that Article 8 of the Convention, the right to privacy, guarantees women a fundamental right to abortion. When the Court failed to do so in its December 16, 2010 decision, reactions to the ruling were mixed.⁵ While abortion activists criticized the Court's ruling regarding A and B, many applauded the Court for expanding the right to abortion through its ruling in

2. See *Att'y Gen. v. X*, [1992] 1 I.R. 1, 53-54 (Ir.) (holding that permitting termination of pregnancies in such situations, including the risk of suicide, is consistent with the proper interpretation of the Irish Constitution). *But see* INT'L PLANNED PARENTHOOD FED'N EUR. NETWORK, ABORTION LEGISLATION IN EUROPE 39-40 (2009), available at http://www.ippfen.org/NR/rdonlyres/DB347D31-0159-4C7D-BE5C428623ABCA25/0/Pub_AbortionlegislationinEuropeIPPFEN_Feb2009.pdf (finding that no known abortions have been carried out within the country under any circumstances).

3. See CTR. FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 2 (2009), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_abortionlaws2009_WEB.pdf [hereinafter CTR. FOR REPRODUCTIVE RIGHTS] (highlighting that Ireland does not allow abortions in cases of rape, incest, fetal impairment, or when a woman's health or socioeconomic well-being are at risk).

4. *A v. Ireland (A, B, & C v. Ireland)*, App. No. 25579/05, Eur. Ct. H.R. (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

5. Compare Ruth Fletcher, *The Trouble with A, B & C: Guest Post from Ruth Fletcher*, HUMAN RIGHTS IN IR. (Dec. 24, 2010), <http://www.humanrights.ie/index.php/2010/12/24/the-trouble-with-a-b-c-guest-post-from-ruth-fletcher> (expressing concern over the weight the Court gave to public morals, the lack of consideration it gave to women's health, and its marginalization of European consensus on women's right to abortion), with Stephanie Samuel, *Abortion 'Right' Denied in European 'Roe v. Wade' Case*, CHRISTIAN POST (Dec. 16, 2010, 11:55 AM), <http://www.christianpost.com/news/abortion-right-denied-in-european-roe-v-wade-case-48094> (reporting the Alliance Defense Fund's favorable reaction to the Court's affirmation of a State's right to protect fetal life).

applicant C's case.⁶ Because C's life was at risk, the Court held that Ireland violated the Convention by failing to provide a regulatory framework through which C could establish her qualification for a lawful abortion in Ireland.⁷ While this aspect of the Court's holding is seen as a step forward for abortion rights in Ireland, the Court declined to hold that the Convention provides a fundamental right to abortion and instead declared that Ireland did not violate applicants A and B's rights even though their health and well-being — rights protected as part of the fundamental right to privacy — were at risk.⁸ Because the

6. See, e.g., *European Court Says Abortion Is a Rights Issue*, HUMAN RIGHTS WATCH (Dec. 16, 2010), <http://www.hrw.org/en/news/2010/12/16/ireland-european-court-says-abortion-rights-issue> (calling the Court's ruling a "wake-up call" to Ireland for violating human rights by failing to ensure women's access to abortion when a woman's life is at risk, in which case an abortion is legal under Irish law); see also *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 75 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (finding that the Irish authorities violated Article 8 of the Convention by failing to provide "an accessible and effective procedure" for determining whether the plaintiff qualified for a lawful abortion).

7. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 74-75 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=Ireland&sessionid=79960503&skin=hudoc-en> (criticizing Ireland for failing to implement a "legislative or regulatory regime" enabling women to exercise their right to an abortion when their life is at risk). Notably, when analyzing C's case, the Court considered *Tysi c v. Poland*, a 2007 ruling holding that Poland failed in its obligation to implement a procedural framework that ensures women access to abortion where lawfully permitted in Poland, including where a woman's health is severely at risk. See *Tysi c v. Poland*, App. No. 5410/03, 45 Eur. H.R. Rep. 955, 979-82 (2007) (assessing the right of a Polish woman diagnosed with myopia, a serious eye condition that can lead to blindness, to obtain an abortion when her pregnancy and pending birth were likely to cause the myopia to substantially worsen). The Court in *A, B & C* found that C, who had cancer, had a justifiable fear that her life was at risk because of the pregnancy's effect on her cancer treatment and her inability to either determine the actual risk to her life or procure an abortion in Ireland, due in part to doctors' reluctance to assist her for fear of prosecution because of a lack of legal framework establishing the circumstances in which abortions are permitted within Ireland. . See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 70, 71-72, 73 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

8. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 61, 68 (2010),

Court ruled that Ireland violated C's right to privacy,⁹ this Comment will not focus on the Court's holding regarding C and will only analyze the Court's failure to uphold applicants A and B's right to health and well-being as part of their right to privacy.

Article 8 of the Convention guarantees the right to privacy,¹⁰ which the Court has held to encompass, among other rights, the right to health and well-being.¹¹ The Court's ruling in *A, B & C* examined a woman's right to an abortion in cases where an abortion is necessary to protect a woman's health and well-being, as in the cases of A and B. The Court assessed this right in light of Ireland's aim of protecting "public morals," which, Ireland asserts, includes the protection of fetal life.¹² In *A, B & C*, the Court ruled that Ireland's abortion laws satisfy women's right to health and well-being. The Court found that Ireland successfully balanced competing State and individual interests by granting women the right to travel out of the country to obtain an abortion. Therefore, the Court upheld Ireland's abortion laws despite the laws' failure to recognize an exception when a woman's health is at risk.¹³

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>(concluding that the prohibition in Ireland on abortions sought for reasons of health and well-being does not exceed the State's margin of appreciation).

9. *Id.* at 68.

10. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

11. See *Tysiqc*, 45 Eur. H.R. Rep. at 976-77 (referring to an individual's "physical and psychological integrity" as encompassed within the right to respect for one's private life).

12. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 62, 63 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (indicating that a 1983 referendum leading to the enactment of Article 40.3.3 of the Constitution evidenced that the majority of Irish citizens were against abortion and suggesting that Irish societal views on the issue have not changed since then); see also Referendum Act 1983 (Act No. 14/1983) (Ir.), available at <http://www.irishstatutebook.ie/1983/en/act/pub/0014/print.html>.

13. See discussion *infra* Part II.C (explaining that the Court granted Ireland broad discretion to regulate a woman's access to abortion because the Court

This Comment argues that the Court in *A, B & C* incorrectly assessed the right to health and well-being under Article 8 of the Convention by misapplying the margin of appreciation test used to determine whether a State's restriction on a fundamental right violates the Convention. In doing so, the Court improperly deferred to Ireland's domestic legislation by granting Ireland a broad margin of appreciation — the ability to regulate a fundamental right guaranteed under the Convention. Specifically, this Comment argues that the Court incorrectly assessed Ireland's margin of appreciation to restrict the right to health and well-being by disregarding the sweeping nature of Irish abortion law and its effect on women's health and well-being, and by incorrectly examining European consensus on the issue. By finding that Ireland's restrictive abortion laws successfully balance Ireland's aim of protecting public morals and women's right to health and well-being, the Court in *A, B, & CB, & C* significantly limited women's right to privacy under the Convention.

Part II.A of this Comment explains the meaning and treatment of the right to privacy under Article 8.¹⁴ Part II.B discusses the Court's previous case law relating to abortion rights.¹⁵ Part II.C details the Court's ruling in *A, B, & CB, & C*.¹⁶ Part III.A argues that the Court erred in granting Ireland a broad margin of appreciation by failing to account for the Court's past case law when determining whether Irish abortion laws are "necessary to a democratic society."¹⁷ Part III.B argues that the Court incorrectly examined consensus among European States when determining *A* and *B*'s rights.¹⁸ Part IV.A recommends that the Court adopt a more consistent application of the margin of appreciation.¹⁹ Part IV.B suggests that the Court either find a fundamental right to abortion when women's health and well-being are at risk, or develop a case-by-case analysis that

largely defers to the State when regulations are based on public morals).

14. See discussion *infra* Part II.A.

15. See discussion *infra* Part II.B.

16. See discussion *infra* Part II.C.

17. See discussion *infra* Part III.A.

18. See discussion *infra* Part III.B.

19. See discussion *infra* Part IV.A.

evaluates the specific health risks for each woman.²⁰ Finally, Part IV.C recommends that other States and international bodies exert pressure on Ireland to change its restrictive laws.²¹

II. BACKGROUND

When interpreting Article 8 of the Convention, the Court has noted repeatedly that the right to privacy is a broad right that is an extremely important facet of individual existence.²² However, this right is not absolute, and States may regulate or restrict the right to privacy in specific circumstances, such as in order to maintain a State's conception of public morals. When allowing a State to regulate an individual right, the Court determines how much deference to grant to the State. This level of deference is known as the margin of appreciation.²³ The margin of appreciation the Court grants depends upon various factors, primarily the individual interest at stake, the State's basis for restricting the right, and whether a European consensus exists on the subject.²⁴ Based upon Ireland's aim of protecting public morals, the Court in *A, B & C* granted Ireland a wide margin of appreciation to restrict a woman's right to abortion when her health and well-being are at risk.²⁵ The Court thereby avoided holding Ireland in violation of Article 8 and upheld Ireland's current abortion laws that compel women whose lives are not at risk to leave the country to procure an abortion.

A. THE RIGHT TO PRIVACY UNDER ARTICLE 8 OF THE CONVENTION

The European Convention on Human Rights established the European Court of Human Rights as the Council of Europe's judicial body.²⁶ The Court was designed to protect the

20. See discussion *infra* Part IV.B.

21. See discussion *infra* Part IV.C.

22. See *infra* notes 36-42 and accompanying text.

23. See HOWARD C. YUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1996) (defining the margin of appreciation as "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws").

24. See *infra* notes 56-65 and accompanying text.

25. See *infra* notes 118-21 and accompanying text.

26. See MICHAEL D. GOLDBABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 4 (2007) (explaining that the Court did not begin sitting as a

fundamental human rights that are guaranteed under the Convention, to examine States' compliance with these rights, and to interpret what is encompassed within each of the enumerated fundamental rights.²⁷ If an individual believes a Council of Europe State violated her fundamental rights under the Convention, she may bring a case before the Court only if she has first exhausted domestic remedies or the Court has decided that she would have no prospect of success in the domestic court system.²⁸ All forty-seven contracting Council of Europe States are subject to the Court's jurisdiction and are bound by the Court's rulings.²⁹ Importantly, although the Convention does not explicitly require the Court to follow its past cases, the Court has demonstrated through consistent and extensive citations to previous holdings that its cases do create precedent.³⁰

full-time Court until 1998, and that prior to this, the European Commission on Human Rights also heard cases and could then refer cases to the Court for final judgment).

27. *See id.* at 1 (characterizing the Court as the "Supreme Court of Europe").

28. *See* European Convention, *supra* note 10, art. 26 ("The Commission may only deal with [a petition] after all domestic remedies have been exhausted . . ."); *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 42-45 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (finding that A and B were not required to exhaust all domestic remedies prior to obtaining access to the Court because Ireland's substantial protection of the unborn made the domestic remedies available in Ireland ineffective, leaving A and B with no prospect of success).

29. *See* European Convention, *supra* note 10, arts. 1, 45, 53 (requiring that all contracting States guarantee the rights enumerated in the Convention and agree to be bound by the Court's decisions, noting that the Court's jurisdiction covers all cases interpreting and applying the Convention); *see also* J.G. MERRILLS & A.H. ROBERTSON, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 23-24 (4th ed. 2001) (explaining that in complying with their obligation under Article 1 to ensure their domestic laws conform with the Convention, some States give the treaty direct effect while others implement it through domestic legislation).

30. *See, e.g.,* *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 26 (explaining that the Court follows its precedent "in the interests of legal certainty, foreseeability and equality before the law" and should only depart from its prior judgments with good cause); *see also* *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hu>

1. *Defining and Determining the Right to Privacy Under the Convention*

Article 8 of the Convention, which establishes the right to privacy,³¹ is one of the “Personal Freedoms Articles” in the Convention that guarantee fundamental and personal liberties such as privacy, freedom of speech, religion, and family life.³² Unlike the United States, where the right to privacy is not explicitly granted but is nonetheless a fundamental right under the U.S. Constitution,³³ Article 8(1) of the Convention expressly protects an individual’s right to privacy, stating, “Everyone has the right to respect for his private and family life, his home and his correspondence.”³⁴ In the same way the U.S. Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to encompass privacy, which in turn encompasses many fundamental rights,³⁵ the Court has interpreted Article 8(1)’s guarantee of an individual’s right to privacy to include many aspects of one’s private life. The Court defines privacy as a broad right encompassing, among other privacy interests, personal autonomy,³⁶ physical and psychological integrity,³⁷

doc-en (routinely citing the Court’s prior decisions).

31. See European Convention, *supra* note 10.

32. See Aaron A. Ostrovsky, *What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 HANSE L.R. 47, 50 (2005) (explaining that Articles 8-11 all contain “limitation clauses” that allow States some degree of derogation from the enumerated right in order to protect a public interest).

33. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (holding that the right to privacy exists within the notion of personal liberty guaranteed by the Fourteenth Amendment and that this right encompasses a woman’s freedom to decide whether to terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (declaring that the right to privacy is found within the “penumbras” of the guarantees established in the Bill of Rights, specifically within the First, Third, Fourth, Fifth, and Ninth Amendments).

34. European Convention, *supra* note 10, art. 8(1).

35. See, e.g., *Roe*, 410 U.S. at 153 (woman’s right to terminate her pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (individuals’ right to marry, including an individual of a different race).

36. See, e.g., *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 193 (noting that although the Court has not explicitly established this right in Article 8, it is an important underlying concept of right to privacy).

37. See, e.g., *Tysi c v. Poland*, App. No. 5410/03, 45 Eur. H.R. Rep. 955, 977 (2007) (finding that Poland’s abortion regulations must be assessed against

aspects of an individual's physical and social identity,³⁸ the establishment and development of relationships,³⁹ gender identification,⁴⁰ sexual orientation and sexual life,⁴¹ and the decision to have or not have a child.⁴²

Despite the broad range of privacy rights protected under Article 8(1), these rights are not absolutely guaranteed.⁴³ Article 8(2) allows States to regulate these rights to a certain extent by acting as a "limitation clause." Article 8(2) states:

There shall be no interference by a public authority with the exercise of this right [to privacy] except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of

the State's obligation to respect a woman's physical and psychological integrity).

38. *See, e.g.,* Mikulić v. Croatia, 2002-I Eur. Ct. H.R. 27, ¶¶ 53-55 (holding that a child's right to determine the identity of her father falls under Article 8 because respect for privacy includes allowing people to establish their identity).

39. *See, e.g.,* Burghartz v. Switzerland, 280 Eur. Ct. H.R. (ser. A) at 22, 28 (1994) (maintaining that choice of one's surname implicates Article 8 because the use of a name is a means of linking to family, identifying oneself, and developing professional relationships).

40. *See, e.g.,* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 27 (declaring that transsexuals' right to legal status as their post-operative gender falls within Article 8 because gender is an important aspect of one's personal identity and because there are many detrimental effects to having to maintain legal status as a different gender).

41. *See, e.g.,* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 18 (1981) (articulating that the very existence of laws prohibiting homosexual activity directly affect the right to respect for one's private life). *But see* Laskey, Jaggard and Brown v. United Kingdom, ¶ 36, 1997-I Eur. Ct. H.R. 4 (1997) (finding that sexual activity undoubtedly concerns an intimate aspect of privacy, but that a State may regulate sado-masochistic activity resulting in physical violence in order to protect public health).

42. *See, e.g.,* Dickson v. United Kingdom, App. No. 44362/04, 44 Eur. H.R. Rep. 419, 428 (2007) (holding that a prisoner's access to artificial insemination facilities requires an Article 8 analysis because the right to decide whether to become a parent is encompassed by Article 8's right to privacy).

43. *See* European Convention, *supra* note 10, art. 8(2); *see also* Evans v. United Kingdom, App. No. 6339/05, 43 Eur. H.R. Rep. 409, 429-30 (2006) (describing the balancing test the Court must use to determine when, and to what extent, it is acceptable for a State to infringe on its citizens' privacy rights under Article 8).

others.⁴⁴

Articles 9-11, the other Personal Freedoms Articles, include analogous limitation clauses and allow States to balance the enumerated fundamental right against specified State interests.⁴⁵

Article 8(2), along with the analogous limitation clauses in Articles 9-11, requires the Court to perform a three-prong analysis to determine whether a State has properly regulated the fundamental right. The Court must ask: (1) whether the regulation is in accordance with the State's law; (2) whether the regulation pursues a legitimate aim; and (3) whether the regulation is necessary to a democratic society.⁴⁶ To determine whether the aim is in accordance with the law, the Court requires that a specific law be in place, that individuals have adequate access to the State's law, and that individuals can foresee when the law will be applied.⁴⁷ To be a "legitimate aim" under the second inquiry, the State's aim in enacting the restriction must simply be one listed in Article 8(2) or the comparable clauses in Articles 9-11.⁴⁸

When conducting this three-prong inquiry, the Court generally

44. European Convention, *supra* note 10, art. 8(2).

45. See Ostrovsky, *supra* note 32, at 50 (explaining that the first clauses of Articles 8-11 grant a fundamental right, and the second clauses allow States to limit this right in certain circumstances).

46. See, e.g., *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 62-68 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (applying this analysis to determine whether Ireland's restriction on abortion is a violation of Article 8); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 28-42 (1979) (utilizing this analysis in the context of an Article 10 right to freedom of expression case).

47. See, e.g., *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 30-31 (emphasizing that the Court examines both the common law and State legislation when making its determination).

48. See, e.g., *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 62 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (noting that in an Article 8 inquiry, the three-part test examines whether the State's interference is critical to the pursuit of one of the "legitimate aims" specified in Article 8 of the Convention"); *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 29, 35 (remarking that an Article 10 inquiry will look to whether the State's aim is "legitimate under Article 10(2)").

finds that a State has met the first two requirements without engaging in detailed analysis, and primarily focuses on whether the State has satisfied the third requirement, that the regulation be “necessary to a democratic society,” or the “necessity analysis.”⁴⁹ For a regulation that limits a fundamental right to constitute a “necessity” such that a State may infringe upon that right, the State’s regulation must be proportionate to the aim it is pursuing and must correspond to a “pressing social need.”⁵⁰ When determining whether the law is proportional (whether the State properly balanced the relevant competing interests in each particular case),⁵¹ the Court must first determine the amount of deference it will grant to the State in making this proportionality determination. This amount of deference is known as the margin of appreciation.⁵² The margin of appreciation analysis is similar to the U.S. Supreme Court’s determination of the proper level of scrutiny to apply when deciding if a state law is unconstitutional. Just as the U.S. Supreme Court grants more or less deference to states based upon the nature of the right and the breadth of the law, the European Court considers similar factors when determining an appropriate margin of appreciation.⁵³ The European Court’s narrow margin of appreciation is analogous to the U.S. Supreme Court’s strict scrutiny standard,⁵⁴ while a wide

49. See GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 86 (2007) (highlighting the “necessity” analysis as the “most important and most demanding criterion for whether the limitation of a right was permissible under the Convention”).

50. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22-23 (1976) (explaining that the term “necessary,” although not meaning “indispensable,” is not a flexible term and is more stringent than terms such as “useful” or “reasonable”).

51. See Ostrovsky, *supra* note 32, at 48-49 (observing that the Court’s analysis is premised on the idea that the State is primarily responsible for judging local conditions and balancing State and individual interests).

52. See *id.* at 48 (remarking that the margin of appreciation doctrine aids the Court in determining when it would be appropriate intervene in a State’s regulation of its own citizens).

53. See *id.* at 60-61 (suggesting that both mechanisms balance the importance of protecting core rights against the need for regulatory flexibility within a diverse political environment).

54. See 16B C.J.S. *Constitutional Law* § 1116 (2011) (noting that to survive a strict scrutiny analysis, which is used when the individual interest involved is fundamentally guaranteed by the Constitution, the state must show it has a

margin of appreciation is comparable to the rational basis test.⁵⁵

The Court determines the breadth of a State's margin of appreciation to determine whether or how to regulate a fundamental right in part by balancing the aim of the State against the individual right at stake.⁵⁶ When a State is pursuing the aim of regulating public morals under Article 8(2) or the analogous clauses of Articles 9-11, the Court grants the State considerable deference in how to regulate the fundamental right.⁵⁷ The Court reasons that because there is no uniform conception of morals among Council of Europe States, local governments are in the best position to determine the "necessity" of a restriction enacted to protect such morals.⁵⁸ Therefore, the Court will grant States a wide margin of appreciation to restrict a fundamental right when such a restriction is enacted to protect what the State considers to be public morals.

Importantly, however, the Court does not grant States unlimited discretion to limit rights by invoking the State's protection of public morals.⁵⁹ The normally broad margin of appreciation may be limited by the nature of the specific right involved or the consequences of the restriction on the individual

compelling interest in interfering with the exercise of that right and the interference is necessary to achieve that interest).

55. See *id.* § 1120 (stating that the rational basis standard is used when a state interference involves rights or interests that are not fundamentally guaranteed by the Constitution and merely requires that the interference be used to reasonably achieve a legitimate state interest).

56. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 927 (2005) (stating that the Court also considers the ability of local authorities to better assess subjective norms and the degree of European consensus on a given standard).

57. See, e.g., *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 65 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hu doc-en> (granting Ireland a broad margin of appreciation in its regulation of abortion).

58. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser.A) at 22 (1976) (recognizing the constant evolution of opinions concerning moral issues).

59. See *id.* at 23 (limiting States' discretion to regulate by declaring that the Court, in its supervisory function, makes the final determination as to whether a regulation is consistent with the Convention).

applicant.⁶⁰ For example, in *Open Door and Dublin Well Woman v. Ireland*, the Court found that Ireland's regulations on disseminating information about abortion services outside Ireland, enacted to protect Ireland's public moral of protecting fetal life, deserved particularly careful scrutiny because the information being restricted may be crucial to women's health and well-being.⁶¹ The Court granted the State a narrow margin of appreciation because of the injunction's potential to harm women by delaying their abortions, causing them to obtain false information, or preventing them from receiving any information when accurate information may be crucial to their health.⁶²

Finally, in addition to considering the nature of the State's regulation and the individual interest at stake, the margin of appreciation granted to States is influenced by European consensus as to whether a particular act is protected under the Convention.⁶³ While the Court primarily evaluates whether a consensus exists among Council of Europe States, it also looks beyond Europe and examines other States' laws, treaties, cases before international tribunals, and any international trends toward treating a particular right as being encompassed within one of the fundamental rights enumerated in the Convention.⁶⁴ If the Court finds that there is consensus on the existence of a right, it will narrow the State's margin of appreciation based on the idea that the specific act has become a core right within the

60. See Ostrovsky, *supra* note 32, at 51 (noting that the Court's conception of a "democratic society" requires tolerance that extends beyond deference to individual States).

61. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 30 (1992) (concluding that Ireland's restrictions on information were disproportionate to the aim of protecting public morals).

62. See *id.* at 31.

63. See, e.g., *Evans v. United Kingdom*, App. No. 6339/05, 43 Eur. Ct. H.R. 409, 427 (2006) (affording a wide margin of appreciation to the United Kingdom in regulating the use of embryos created by in vitro fertilization in part because there is no European consensus regarding such regulation).

64. See, e.g., *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 10-22, 29-30, 32 (concluding that the United Kingdom's failure to legally recognize post-operative transsexuals' sexual identity violated Article 8 by considering, in part, the legal recognition of their sexual identity in other the laws of other European States, in international laws, and in international treaties).

Convention.⁶⁵

2. Determining the Margin of Appreciation and Applying the Court's "Necessity" Analysis to the Right to Privacy: Illustrative Cases

The Court has had many opportunities to determine whether a State's regulation of a fundamental privacy interest is "necessary to a democratic society" and does not improperly infringe upon an individual's fundamental rights.⁶⁶ The Court examines the necessity of a State restriction in light of the margin of appreciation it affords to the State to determine the proper balance between State interests and individual rights. The Court determines a State's margin of appreciation to regulate a particular privacy interest based upon the nature of the regulation, the act or right being regulated, and European consensus.

When the Court finds that a privacy right is a particularly important facet of individual existence, the Court grants States a narrow margin of appreciation to restrict that privacy right.⁶⁷ Thus, the State may infringe on such a right only for very substantial reasons.⁶⁸ Even where the Court normally grants States a wide margin of appreciation, the Court will hold that a law is disproportionate to a State's goals, and thus not necessary to a democratic society, if the law goes beyond what is needed to

65. See Ostrovsky, *supra* note 32, at 50-51 (noting that European consensus acts as a "gauge" to determine when an activity has become a fundamental European right).

66. See GOLDBABER, *supra* note 26, at 22-23 (tracing the Court's evolution in privacy jurisprudence from Germany's original conception of protecting human dignity against suppression by a totalitarian regime to more expansive and modern privacy concerns).

67. E.g., *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. at 27-32 (determining that a narrow margin of appreciation applies to the right to privacy regarding the sexual identity of post-operative transsexuals).

68. See MARK W. JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW* 431 (3d ed. 2008) (illustrating that the Court has extended Article 8 protection to group sexual activity, but has upheld State intervention on sado-masochistic sexual activity that results in bleeding and scarring because in such situations the State has a substantial interest in protecting health).

achieve its aim and significantly limits an individual's ability to exercise the fundamental right.⁶⁹ For example, in *Dudgeon v. United Kingdom*, the Court found that a Northern Irish law criminalizing homosexual activity between consenting adult males violated the applicant's right to privacy because the law's blanket prohibition against homosexual activity was disproportionate to Northern Ireland's aim of protecting public morals and thus failed the "necessity" analysis.⁷⁰ Although States have the right to regulate in order to protect public morals, the Court found that Northern Ireland went beyond what the Court considered "necessary," and the State's aim of protecting vulnerable young people from undesirable or harmful pressures did not justify an absolute prohibition against homosexual activity.⁷¹ The Court placed great weight on the existing European consensus that individuals have a right to privacy in sexual activity, particularly focusing on the increased tolerance regarding homosexual activity, and consequently found that because of this consensus, the usually broad margin of appreciation granted to States to determine what is "necessary" to protect public morals should be narrowed.⁷²

The Court similarly used consensus to narrow a State's margin of appreciation in *Goodwin v. United Kingdom*, when the Court held that prohibiting transsexuals from legally switching their gender violated the right to privacy.⁷³ The Court examined European consensus surrounding the issue, noted the Convention's role in protecting this right, and found that due to

69. Cf. Ostrovsky, *supra* note 32, at 51-53 (adding that this proportionality assessment is part of the Court's belief that a "democratic society" requires tolerance and broadmindedness).

70. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981); see GOLDHABER, *supra* note 26, at 38 (proclaiming *Dudgeon's* status as a "historic judgment" that helped clear the way for the Court's "activist agenda").

71. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A.) at 20, 23-24.

72. See Ostrovsky, *supra* note 32, at 52-54 (finding that European consensus indicated that homosexual sexual acts between consenting adults had become a core right within Article 8 and that it was no longer "necessary or appropriate" to prohibit such acts).

73. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 29-30, 32 (holding that although European countries lacked consensus on legal recognition of post-operative transsexuals, the international trend in a recognition satisfied the consensus analysis).

changing social conditions, it has been encompassed within the Convention's fundamental right to privacy.⁷⁴ The Court assessed the "necessity" of the restrictions under this narrow margin of appreciation and considered the detrimental psychological effects the regulations have on transsexuals and the lack of detriment that would occur to the public if transsexuals legally claimed their chosen identity. The Court used these considerations to hold that the law did not fairly balance State interests and individual rights, and thus violated the applicant's Article 8 right to privacy.⁷⁵

As highlighted by *Dudgeon* and *Goodwin*, when assessing a State's ability to impose restrictions on fundamental privacy rights, the Court often narrows a State's margin of appreciation. The Court considers the intimate nature of the right to privacy, the breadth of the regulation and its effect on the individual, and consensus concerning the existence of an individual right to demonstrate that the right has, in fact, become a part of the European legal heritage and a facet of an enumerated fundamental right, such as the right to privacy.⁷⁶ In light of the applicable margin of appreciation, the Court then assesses whether a particular restriction is "necessary to a democratic society" by evaluating whether the State's restriction is proportional, or fairly balances State interests against the individual right, and whether there is a "pressing social need" for the restriction.

B. WOMEN'S RIGHT TO ABORTION UNDER THE CONVENTION

The Court has had several opportunities to examine abortion rights under the Convention, but has neither declared that the right to privacy includes a woman's right to abortion nor that Article 2, which guarantees the right to life,⁷⁷ extends to the

74. See *id.* at 29, 31-32 (announcing that transsexuals' right to personal development and security is no longer so controversial in the European community that the Court must grant deference to States' decision to regulate the right).

75. *Id.* at 27-28, 30.

76. See Shany, *supra* note 56, at 927.

77. See European Convention, *supra* note 10, art. 2(1) ("Everyone's right to life shall be protected by law.").

protection of a fetus.⁷⁸ However, in 1977, the European Commission on Human Rights ("the Commission") announced in *Brüggemann and Scheuten v. Germany*⁷⁹ that pregnancy does touch upon a woman's private life.⁸⁰ The Commission ultimately determined that not every regulation on abortion would violate the right to privacy, but declined to decide whether Article 2 protected the fetus, thus avoiding the need to balance the right to life against a woman's right to health and well-being.⁸¹

In 1980, the Commission confirmed, in *Paton v. United Kingdom*, that the fetus has no absolute right to life, but noted that Article 2 may afford the fetus some protections with certain limitations based upon the woman's rights.⁸² In *Paton*, the Commission further confirmed that a woman's right to have an abortion under the Article 8 privacy rights will take precedence over the father's Article 8 privacy interest in keeping the child because the woman, not the father, is the individual primarily concerned with the pregnancy.⁸³

In 2004, the Court once again avoided determining whether Article 2 protects the fetus in *Vo v. France*, which reiterated that a

78. See JANIS ET AL., *supra* note 68, at 435-36 (discussing several cases in which the Court avoided making either pronouncement).

79. *Brüggemann v. Germany* was decided by the European Commission on Human Rights rather than the Court, as the latter did not begin hearing all cases until 1998. See generally GOLDHABER, *supra* note 26, at 4-6.

80. See *Brüggemann v. Germany*, App. No. 6959/75, 3 Eur. H.R. Rep. 244, 253 (1981) ("[P]regnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus.").

81. See *Brüggemann*, 3 Eur. H.R. Rep. at 253-55 (holding that Germany's protection of fetal life was justified in light of the relatively restrictive policies on abortion of all contracting States at the time the Convention entered into force). But see Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 331 (1991) (noting that in the years since *Brüggemann*, nearly all European countries have liberalized their abortion laws).

82. See *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408, 415-16 (1981) (reasoning that if the fetus had an absolute right to life, the woman's right to life would have lesser value and abortion would be banned in all circumstances).

83. See *id.* at 416-17 (rejecting a husband's contention that his right to privacy was violated after his wife procured an abortion to protect her health).

fetus has no absolute right to life under the Convention and that even if a fetus is afforded some right to life under Article 2, any such right will be limited by the woman's interests.⁸⁴ In *Vo*, as in the earlier cases, the Court deferred to the State's law, deciding that because of a lack of European consensus on the right to life of the fetus, States have a wide margin of appreciation to determine whether Article 2 covers fetal life within their borders.⁸⁵

Finally, in *Tysi c v. Poland*, the last Court decision on abortion rights before *A, B & C*, the Court acknowledged again that pregnancy implicates Article 8's right to privacy, specifically a woman's right to physical and psychological integrity.⁸⁶ The Court did not address the substantive issue of whether there is a fundamental right to abortion under Article 8, but solely addressed Poland's lack of procedural safeguards to ensure women can access abortion if their life or health is at risk, cases in which abortion is lawful in Poland.⁸⁷ In sum, a review of the Court's decisions on cases involving abortion demonstrate that while the Court has maintained that pregnancy does implicate women's Article 8 privacy rights, it has failed to determine that the right to an abortion exists as a fundamental right under Article 8.

While the Court has often been required to determine whether

84. See *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 75, 106-07, 112 (concluding that France's administrative rather than criminal remedies were sufficient where a doctor accidentally ended a woman's pregnancy).

85. See *id.* at 89-90 (implying some emerging consensus exists as to fetal right to life by noting that the fetus and embryo are beginning to receive certain protections as a result of scientific progress).

86. See *Tysi c v. Poland*, App. No. 5410/03, 45 Eur. H.R. Rep. 995, 976-77 (2007) (noting that the State is obligated to ensure that its citizens' right to physical and psychological integrity is respected, but that the Convention does not guarantee a specific level of medical care).

87. *Id.* at 976, 978-82 (remarking that the relevant Polish law, enacted in 1993, prohibits abortion except when two medical authorities certify that a pregnancy, at any stage, threatens a woman's life or health); see also Shannon K. Calt, A., B. & C. v. Ireland: "Europe's *Roe v. Wade*"?, 14 LEWIS & CLARK L. REV. 1189, 1212-13 (2010) (finding that the Court again avoided determining when life begins or what State interest the restriction sought to protect by deciding only that Poland's interference with access to abortion was not in accordance with Polish laws).

States successfully balanced two individual interests — a fetus's Article 2 rights (if any) against a woman's Article 8 rights — the Court only once assessed State abortion restrictions as a protection of public morals prior to *A, B & C*. In *Open Door and Dublin Well Woman v. Ireland*, the Court examined Ireland's injunction against the dissemination of information on abortion services abroad under Article 10, which guarantees freedom of expression, but has a limiting clause that allows States to restrict this right in order to protect public morals similar to that in Article 8.⁸⁸ The Court characterized the issue as an assessment of a State's ability to restrict access to information on abortion on the basis of the public moral of protecting fetal life.⁸⁹ The Court assessed the regulation based upon the above-noted three-part analysis, focusing primarily on the "necessity" of the restriction and affording Ireland a wide margin of appreciation to determine what is "necessary" because of the State's aim of protecting public morals.⁹⁰ In *Open Door*, the Court ruled that Ireland's injunction against disseminating information on procuring abortions outside Ireland violated Article 10.⁹¹ At the time of the ruling, as today, Ireland prohibited abortion unless a woman's life was at risk, but it did not prevent a woman from leaving Ireland to obtain an abortion.⁹² The Court determined that the sweeping injunction was disproportionate to protecting morals,

88. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 11, 20 (1992); see also European Convention, *supra* note 10, art. 10 ("Everyone has the right to freedom of expression . . . The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary . . . for the protection of health or morals . . .").

89. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 27 (1992) ("The restriction . . . pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect.").

90. See *id.* at 25-32 (concluding that Ireland's injunction was disproportionate to the aim of protecting morals and not "necessary to a democratic society").

91. *Id.* at 32.

92. See IR. CONST., 1937, art. 40.3.3, available at http://www.constitution.org/cons/ireland/constitution_ireland-en.htm ("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. This subsection shall not limit freedom to travel between the State and another state.").

even when such morals include the protection of fetal life. The Court came to this conclusion by finding that the injunction prohibited all women from accessing information on safe abortions without accounting for the various reasons women may seek such information or the potential effects the injunction may have on a woman's health.⁹³ Although the Court granted Ireland a wide margin of appreciation to determine if this injunction was "necessary to a democratic society," the Court held that the injunction's blanket ban on information concerning obtaining abortions outside of Ireland exceeded even this wide margin of appreciation.⁹⁴

Although the Court has assessed cases involving abortion, it has yet to find that abortion, even if protected under Article 8, is an important enough facet of a woman's existence to justify a narrow margin of appreciation⁹⁵ — nor did it do so in *A, B & C*.

C. *A, B & C v. IRELAND*

Ireland's strict abortion laws, which have existed since 1861, criminalize abortion and establish a maximum sentence of life imprisonment for women who procure abortions.⁹⁶ In 1983,

93. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 30-32 (1992) (explaining that limitations on information about activities that are legal in other countries require careful scrutiny by the Court to ensure that they conform with the needs of a democratic society). The Court additionally noted that the injunction was ineffective in protecting the "public moral" of protecting fetal life because many Irish women continued to obtain abortions overseas. *Id.* at 31; see also *Abortion Statistics*, *supra* note 1 and accompanying text.

94. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 29, 32 (1992) (asserting that a State's wide margin of appreciation is not unlimited and the Court must supervise whether restrictions are compatible with the Convention).

95. See Natalie Klashtorny, Comment, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 439-40 (1996) (arguing that "unwanted pregnancy, which has the potential to affect every aspect of a woman's life, should be considered sufficiently private for a Court to apply a narrow margin of appreciation," just as the Court has done for sodomy and illegitimacy).

96. See *Offences Against the Person Act, 1861*, 24 & 25 Vict., c. 100, §§ 58-59 (U.K.) (finding any woman who procures an abortion guilty of a felony, imposing a minimum sentence of three-years' imprisonment, and any person assisting a woman in doing so guilty of a misdemeanor).

Ireland enacted Article 40.3.3 of the Constitution, which explicitly grants the fetus a right to life equal to that of the woman's.⁹⁷ In 1992, the Irish Supreme Court's ruling in the highly publicized case, *Attorney General v. X*, interpreted Article 40.3.3 to include an exception to the ban on abortion when there is a substantial risk to the life of the woman, including suicide.⁹⁸ In 1992, the Thirteenth and Fourteenth Amendments to the Irish Constitution passed by two referendums, largely in reaction to the Irish Supreme Court's decisions in *S.P.U.C. v. Open Door Counselling*⁹⁹ (which led to the European Court case, *Open Door*, discussed above) and *Attorney General v. X*.¹⁰⁰ Article 40.3.3 now incorporates these amendments and, in addition to protecting the life of the fetus, expressly states that Irish law does not limit

97. See IR. CONST., 1937, art. 40.3.3, available at http://www.constitution.org/cons/ireland/constitution_ireland-en.htm (promising to protect the fetus's right to life while also considering the "equal right to life of the mother").

98. See *Att'y Gen. v. X*, [1992] 1 I.R. 1, 6-7, 54-55 (Ir.) (finding that a fourteen-year-old rape victim's threat to commit suicide if forced to continue her pregnancy constituted a substantial risk to her life such that Ireland improperly prevented her from traveling abroad to obtain an abortion). The *X* case involved a fourteen-year-old girl who had been raped by her friend's father and became pregnant as a result. *Id.* at 6-7. The Irish Attorney General obtained an injunction requiring *X* to remain in Ireland so that she would be unable to obtain an abortion. *Id.* at 5-6. In finding that Ireland improperly restricted *X*'s ability to obtain an abortion abroad, the Court reinterpreted the text of the Irish Constitution to mean that Irish women may procure abortions if, as a matter of probability, there is a real and substantial risk to the life of the mother, including the risk of suicide, that can only be avoided by an abortion. *Id.* at 52-54.

99. See *Soc'y for Protection of Unborn Children Ir. Ltd. (S.P.U.C.) v. Open Door Counselling Ltd.*, [1988] I.R. 593 (H. Ct.) (Ir.), *aff'd in part and rev'd in part*, [1989] I.R. 618 (S.C.) (Ir.) (enacting the injunction against disseminating information on obtaining abortion services abroad, which led *Open Door* to file an action in the European Court of Human Rights).

100. See *Calt*, *supra* note 87, at 1200-01 (discussing the 1992 referendum that arose after the "public outcry" from the *X* case and the European Court of Human Rights ruling in *Open Door*, which expanded Irish abortion law and brought it into compliance with the Court's holding in *Open Door*); see also Jeffrey A. Weinstein, Comment, "An Irish Solution to an Irish Problem": Ireland's Struggle with Abortion Law, 10 ARIZ. J. INT'L & COMP. L. 165, 198 (1993) (observing that the referendum on the right to travel passed 62.3% to 37.7%, the referendum on access to information passed 59.8% to 40.2%, and a third referendum that would have eliminated the right to abortion when there was a risk of the mother committing suicide was defeated 65.4% to 34.6%).

a woman's freedom to travel or the freedom to distribute information on services available outside Ireland.¹⁰¹ Even with these amendments, Irish law still bans abortion within Ireland unless the woman's life is at risk and has no exceptions for health, rape, or incest.¹⁰² Abortion in Ireland has long been the subject of debate, both in and out of Ireland,¹⁰³ and on July 15, 2005, three Irish women, A, B, and C, brought a case before the Court challenging Irish abortion law.

1. *Background to the Applicants' Claims*

On July 15, 2005, A, B & C, all women who procured abortions in the United Kingdom because of Ireland's abortion ban, brought a case to the Court challenging Irish abortion law as a violation of the women's right to physical and mental health, as guaranteed under Article 8 of the Convention.¹⁰⁴ The first applicant, A, was unmarried, unemployed, and lived in poverty.¹⁰⁵ She had four children, who were all in foster care, and she was a recovering alcoholic.¹⁰⁶ Because she believed having a fifth child would threaten her recovery from alcoholism and her ability to obtain custody of her other children, A traveled to England alone

101. See IR. CONST., 1937, art. 40.3.3, available at http://www.constitution.org/cons/ireland/constitution_ireland-en.htm ("This subsection [on the right to life of the unborn] shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available . . . information relating to services lawfully available in another state.").

102. Cf. *Calt*, *supra* note 87, at 1201-02 (noting the narrow defeat of another referendum in 2002 that would have removed potential suicide as a risk to life, and finding that due to "legislative stagnation," Ireland has "no effective legislative guidelines clarifying the law surrounding abortion").

103. See *Abortion in Ireland: Legal Timeline*, IR. FAMILY PLANNING ASS'N, <http://www.ifpa.ie/eng/Hot-Topics/Abortion/Abortion-in-Ireland-Legal-Timeline> (last visited Sept. 18, 2011) (detailing major controversies and legal developments relating to abortion in Ireland since 1861, some handled at the European rather than the Irish level).

104. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 1-5 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

105. *Id.* at 3.

106. *Id.*

and in secrecy to obtain an abortion.¹⁰⁷ A delayed her abortion for three weeks in order to borrow 650 Euros (approximately \$933 USD) from a moneylender at a high interest rate so she could pay for her abortion care and travel costs.¹⁰⁸ The second applicant, B, traveled to England to obtain an abortion using a friend's credit card to pay for her flights after being told that she would have an ectopic pregnancy.¹⁰⁹ Her trip was delayed because a Dublin counseling center she intended to visit was closed for Christmas, requiring her to wait until it reopened.¹¹⁰ Finally, C, a cancer patient, sought an abortion in England because doctors in Ireland would not tell her how the pregnancy could affect her cancer or how chemotherapy would affect the fetus.¹¹¹ As previously noted, because the Court found that Ireland violated C's right to privacy and applied different standards than it did in the cases of A and B, this Comment will not focus on C,¹¹² and instead focuses only on the Court's holding regarding applicants A and B.

2. *The Parties' Arguments*

The Irish government argued that its restrictions on abortion do not violate Article 8 because the laws pursue the legitimate aim of protecting public morals, specifically the protection of fetal life.¹¹³ The government further argued that Ireland had a wide margin of appreciation because the law required balancing

107. *Id.* at 3-4.

108. *Id.* at 4.

109. *Id.* at 4.

110. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 4 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>

111. *Id.* at 5.

112. *See A v. Ireland*, *supra* note 7 and accompanying text (discussing the Court's ruling that Ireland violated C's right to privacy by failing to provide a proper framework to procure an abortion, despite a legal right to do so, when C had a justifiable fear that the pregnancy put her life at risk).

113. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 51 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (contending initially that Article 8 did not apply to the case because the lack of consensus favoring greater access to abortion among the Council of Europe States indicated that the issue should be handled at the State level).

a delicate and complex public morals issue against the applicants' Article 8 rights.¹¹⁴

In opposition, A and B claimed that Ireland violated their right to privacy because Irish abortion laws did not fall within the bounds of the Article 8(2) three-prong analysis.¹¹⁵ The applicants argued that forcing women to travel abroad for abortions when their health and well-being are at risk was disproportionate to protecting any aim pursued, including public morals, and that Irish law contradicts European consensus permitting abortion to preserve women's health and well-being.¹¹⁶

3. *The Court's Analysis*

Although the Court acknowledged the psychological, physical, and financial burdens that A and B faced by being forced to travel abroad for an abortion, the Court ultimately held that right to travel to obtain an abortion satisfied Article 8's "necessity" analysis.¹¹⁷ In reaching its conclusion, the Court, following prior case law on abortion, found that legislation restricting access to abortion touches upon the private life of a woman, including a woman's physical and psychological integrity, and that Irish laws amounted to an interference with women's private lives.¹¹⁸ The Court, however, examined whether Ireland's failure to have an exception to its abortion ban for women's health and well-being was justified as a fair balance between the applicants' right to privacy and the moral values of the Irish people regarding the

114. *Id.* at 55.

115. *See id.* at 32, 47-49, 75-76 (noting that A and B argued that Ireland additionally violated other provisions of the Convention, such as Articles 3 (inhumane treatment), 13 (effective domestic remedy), and 14 (discrimination), but the Court either dismissed these complaints or found addressing them unnecessary).

116. *See id.* at 47-49 (arguing that Ireland's policies on abortion no longer reflected national public opinion and were in "stark contrast" to more liberal views "for which there was a clear European and international consensus").

117. *See id.* at 36-37, 68 (acknowledging the stigma associated with abortion in Ireland, the financial burden of traveling, especially upon A, who lived in poverty, and that the process would have been considerably less physically burdensome if abortions were available in Ireland).

118. *See id.* at 60-61; *see also* discussion *infra* Part II.B (discussing the Court's major case law pertaining to abortion prior to *A, B & C*).

nature of fetal life.¹¹⁹ Because Ireland's aim was to protect public morals, the Court granted Ireland a wide margin of appreciation to strike such a balance.¹²⁰ The Court refused to narrow the margin of appreciation because it found that no consensus exists on when life begins.¹²¹ The Court did not, however, examine whether a consensus exists concerning a health and well-being exception for States' abortion restrictions. Ultimately, the complications and burdens A and B faced by being forced to travel to exercise their right to privacy were not redressed by the Court.

III. ANALYSIS

The international community has long been concerned with Ireland's sweeping abortion laws that only permit women to have abortions when their lives are substantially at risk. As many feminist legal scholars push for an international right to abortion, a State's ability to infringe on a woman's freedom to make her own reproductive decisions has been scrutinized as a violation of women's fundamental rights, including the right to privacy.¹²² Despite building international pressure to declare a fundamental right to abortion to protect a woman's health and well-being,¹²³ the Court in *A, B & C* failed to establish such a right

119. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 64 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

120. *See id.* at 65 (maintaining that a wide margin of appreciation is "in principle" appropriate given the moral and ethical sensitivity of the issue and the importance of protecting fetal life). *But cf. id.* at 66-67 (affirming that the fetus is not entitled to unlimited protection over the rights of the mother).

121. *See id.* at 65-66 (citing *Vo* to support its ruling that despite consensus among most European States towards permitting abortion on broader grounds than is allowed in Ireland, the lack of European consensus on when life begins warrants granting States a wide margin of appreciation when balancing the rights of the fetus with those of the woman).

122. *See generally* Rebecca Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645 (1992) (arguing that laws limiting reproductive rights reflect the States' desire to control women's behavior in order to uphold women's traditional role in society as mothers and caregivers).

123. *See, e.g., A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 30-31 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=>

by determining that Ireland has a broad margin of appreciation to restrict women's right to privacy in order to protect public morals. The Court found that Ireland's restrictions were "necessary" under Article 8(2), and upheld Ireland's restrictive abortion laws. The Court held that Ireland's blanket restrictions on abortion did not exceed its margin of appreciation to restrict the fundamental right to privacy.

While privacy rights may be limited to some extent by a State, a State may only enact "necessary" regulations in light of the State's margin of appreciation for that particular right. However, in *A, B & C*, the Court misapplied the "necessity" analysis used in its past case law by incorrectly holding that Ireland's abortion laws are proportionate to its aim of protecting public morals. Further, the Court failed to properly consider as a limiting factor the existing European consensus on a woman's right to abortion when her health is at risk when it determined Ireland's margin of appreciation to restrict this right. In failing to use the analysis firmly established in its case law, the Court effectively granted Ireland unlimited discretion to regulate women's right to health and well-being under Article 8(2). *A, B & C* creates dangerous precedent for future cases involving women's access to abortion when their health and well-being are at risk because the case found that sweeping bans based upon protecting public morals will not exceed a State's margin of appreciation to control women's access to abortion.¹²⁴

hudoc-en (quoting Parliamentary Assembly of the Council of Europe Resolution 1607, which affirms women's right to respect for their physical integrity and liberty to control their bodies, and urges States to decriminalize abortion "within reasonable gestational limits"); see also Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 250-52 (2008) (commenting on international instruments and conferences that advocate for women's right to abortion, including the Protocol on the Rights of Women in Africa, the first treaty to explicitly discuss abortion as a human right).

124. But see Sarah Lyall, *European Court Rules Against Irish Abortion Law*, N.Y. TIMES, Dec. 16, 2010, <http://www.nytimes.com/2010/12/17/world/europe/17ireland.html> (suggesting that the ruling is a step forward for abortion rights in Ireland because the Court's holding in *C*'s case will likely force the Irish government to pass legislation specifying when abortion is permissible due to life-threatening circumstances).

A. THE COURT ERRED IN UPHOLDING IRELAND'S ABORTION LAWS
BECAUSE IT FAILED TO ACCOUNT FOR THE LAW'S SWEEPING
INFRINGEMENTS ON WOMEN'S RIGHT TO HEALTH AND WELL-BEING

Although the Convention does not explicitly require the Court to follow precedent, the Court has held that it considers itself bound to follow its prior case law and consistently does so.¹²⁵ Further, the Court consistently employs the same factors to assess a law's proportionality, determine whether State restrictions on fundamental rights exceed their margin of appreciation, and decide what is "necessary to a democratic society." These factors include the breadth of the regulation, the regulation's effect on the individual right it restricts, and European consensus.¹²⁶ To this end, the Court in *A, B & C* failed to adequately account for past case law that found that restrictions analogous to Ireland's sweeping abortion laws were not "necessary" because they were disproportionate to the State's aim and did not properly address a pressing social need.

Although the Court grants States a wide margin of appreciation to regulate public morals, the Court has regularly held that States exceed this wide margin or has narrowed the State's margin when the infringement is especially intrusive upon a particularly important individual right, such as privacy.¹²⁷ Because Irish abortion law puts women's health and well-being at risk by enacting a sweeping ban on abortion, the Court should have narrowed Ireland's margin of appreciation based upon

125. See Alec Stone Sweet, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court 4 (October 2009), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1032&context=alec_stone_sweet (explaining that the Court will only abandon its precedent to correct an earlier error or to reflect social changes).

126. See Shany, *supra* note 56, at 926-27 (noting that the Court is "renowned" in its "extensive application" of the margin of appreciation doctrine, and citing numerous cases in which it has done so).

127. See Hilary Charlesworth et al., *Resolving Conflicting Human Rights Standards in International Law*, 85 AM. SOC'Y INT'L L. PROC. 336, 339 (1991) (reviewing two hundred cases and finding that the Court applies a narrow margin of appreciation when the individual right is particularly important, the infringement on the right is great, the aim of the law is the protection of the judiciary, or consensus exists among the contracting parties).

prior case law and found that the Irish laws did not successfully balance State and individual rights.¹²⁸

1. *A, B & C Failed to Follow its Holding in Open Door to Find that Ireland Exceeded its Margin of Appreciation*

Although the Court in *A, B & C* acknowledged that Ireland's restrictive abortion laws fall within the scope of the right to privacy under Article 8(1),¹²⁹ it failed, in light of the Court's holding in *Open Door*, to properly assess Ireland's ability to restrict the right to privacy under Article 8(2). The Court failed to engage in the proportionality analysis presented in *Open Door*, taking no account of Irish abortion law's absolute prohibition on abortion within the country except where a woman's life is at risk.¹³⁰ In *Open Door*, the Court protected women's access to abortion services by refusing to grant Ireland unfettered discretion to restrict women's access to information on abortion, finding that Ireland exceeded even the broad margin of appreciation granted to regulate public morals.¹³¹ Because *Open Door* is the only other case in which the Court has specifically assessed a State's restriction on women's access to abortion in pursuit of protecting public morals, the Court in *A, B & C* should have employed a similar analysis.¹³² In *Open Door*, the Court

128. See Stijn Smet, *A, B. & C. v. Ireland: Abortion and the Margin of Appreciation*, STRASBOURG OBSERVERS (Dec. 17, 2010), <http://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation> (questioning the Court's use of a broad margin of appreciation in light of its other holdings, particularly regarding the applicants' argument about changing views on abortion in Ireland).

129. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 61 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

130. See *id.* at 60-68 (assessing only the burdens placed on Irish women in traveling to another country to obtain an abortion without considering the consequences of Ireland's laws that, in effect, entirely ban the procedure within Ireland).

131. See Calt, *supra* note 87, at 1198-1200 (intimating that the decision indicated the Court's movement toward finding a fundamental right to abortion because the Court framed the issue as assessing a State's protection of morals rather than a State's protection of the right to life of the unborn, thereby allowing the Court to grant the State much less deference).

132. See *id.* at 1227-30 (predicting, prior to the ruling in *A, B & C*, that if the Court were to find that the Convention protected a right to abortion under

found that the injunction was disproportionate to the State's aim of protecting morals because its absolute restriction on all abortion services information was too broad.¹³³ The Court also found that the injunction posed a substantial risk to women's health by causing delays in procuring abortions and restricting a woman's ability to obtain a safe and legal abortion and subsequent medical services.¹³⁴

Similar to the ban on information at issue in *Open Door*, the Irish laws at issue in *A, B & C* restricted access to abortion within the country that posed risks to women's health. Therefore, it is reasonable to infer that a similar concern for women's health would have extended to *A, B & C* where a woman's access to abortion was once again at stake.¹³⁵ However, the Court in *A, B & C* did not follow *Open Door* and instead granted Ireland a wide margin of appreciation without acknowledging the reality of women's experiences in obtaining access to safe abortions.¹³⁶ For example, in *A, B & C*, A had to borrow money from a moneylender at a high interest rate and B had to borrow a friend's credit card to book her flights in order to leave Ireland to procure an abortion.¹³⁷ In addition to the financial burdens upon both A and B, the applicants faced the social stigma attached to abortion in Ireland because of the restrictive laws as well as the physical ramifications of delaying their abortions because of the need to

Article 8, it would follow *Open Door* by characterizing the State's aim as a protection of morals and likely find that such an aim does not outweigh the negative effects of Ireland's abortion ban).

133. *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 29-32 (1992).

134. *Id.* at 31, 32 (declining, however, to examine whether an Article 8 violation had occurred).

135. See Zampas & Gher, *supra* note 123, at 279 (suggesting, based on the Court's case law, that advocates challenging States' abortion restrictions should focus on the laws' effects on women's health, because even when parties have not done so in the past, the Court has taken such a perspective).

136. But see Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 391-92 (1994) (finding that the Court in *Open Door* similarly did not consider women's experiences when making its decision based upon an Article 10 violation).

137. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 4 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionId=79960503&skin=hudoc-en>.

travel.¹³⁸

The Court in *A, B & C* failed to adequately assess the proportionality of the sweeping restriction as it did in *Open Door*. In *A, B & C*, the Court focused on women's "right" to travel outside the country, but did not fully acknowledge that the ability to travel is not a practical reality for many women who are impoverished, living in rural areas, or who are not citizens of the European Union and thus cannot easily enter another European State to obtain an abortion.¹³⁹ For Irish women unable to travel, Irish abortion laws fail to respect their right to health and well-being because they effectively create an absolute injunction against abortion.¹⁴⁰ As Ruth Fletcher states in her response to the Court's decision, "[A]llowing women to travel abroad [to procure an abortion] is stopping one step short of an absolutist authoritarian enforcement of protection of foetal life."¹⁴¹

Further, the Court failed to sufficiently consider the significant risks to women's physical and mental health created even for those women who are able to travel outside Ireland. In *Open*

138. Cf. *LIKE A SHIP IN THE NIGHT* (Tall Girl Shorts 2006) (documenting the stories of a young Irish painter, a working class Irish mother, and a self-proclaimed Irish country girl as they cope with the shame, silence, and stigma that surrounded their journeys to the United Kingdom to procure abortions).

139. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 67 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (acknowledging only briefly the "serious [psychological and physical] impact" both of these restrictions and the process of traveling for an abortion for A and B); see also HUMAN RIGHTS WATCH, *A STATE OF ISOLATION: ACCESS TO ABORTION FOR WOMEN IN IRELAND 16-40* (2010) (highlighting barriers to traveling to obtain an abortion, including financial constraints, immigration status, the social stigma of abortion and its associated psychological burdens, and the lack of accessible and accurate information about procuring an abortion).

140. See Mary Gilmartin, *Abortion and the Politics of Mobility: Gilmartin on A, B and C*, HUMAN RIGHTS IN IR. (Dec. 23, 2010), <http://www.humanrights.ie/index.php/2010/12/23/abortion-and-the-politics-of-mobility-gilmartin-on-a-b-and-c> (emphasizing that non-European Union citizens living in Ireland may be denied a visa when attempting to re-enter the country after leaving to procure an abortion, thus proving that travel is not a realistic option for all women).

141. Fletcher, *supra* note 5.

Door, the Court accounted for the health risks the injunction created for Irish women by recognizing that the difficulty in obtaining information on procuring safe abortions may cause harmful delays in abortions necessary to protect women's health.¹⁴² The Court additionally noted how the injunction adversely affected women who did not have the proper resources or education to find the necessary information in alternative locations.¹⁴³ However, the Court in *A, B & C* failed to take into account such risks, instead focusing on Ireland's protection of the "profound moral views of the Irish people as to the nature of life . . ."¹⁴⁴ In *Open Door*, the Court considered public morals on the nature of life, but found that they did not outweigh the dangers of a blanket ban on access to information, a ban that does not immediately or certainly place women's health at risk.¹⁴⁵ It should follow that the same public morals regarding the nature of life in *A, B & C* also fail to outweigh a blanket ban on access to abortion. The ban in *A, B & C* has an arguably larger impact on women's health than did the injunction in *Open Door* because it is certain to affect women's health and well-being due to the inevitable delay in procuring abortions and the burdens of being forced to travel.¹⁴⁶ If the Court had more carefully scrutinized the nature of Ireland's "right to travel" and its effect on women as it did with the injunction in *Open Door*, it would have found that Irish law

142. *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 31 (1992).

143. *Id.*

144. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 68 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en>.

145. See *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 29-32 (1992) (holding that limitations on information regarding activities permitted by State authorities, and which in this case may be crucial to a woman's health and well-being, require careful scrutiny to ensure that they conform to a democratic society).

146. See Video, *Hearing – A, B & C v. Ireland in the European Court of Human Rights*, EUR. CT. HUM. RTS. (Dec. 9, 2009), http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?p_url=20091209-1/en/ (arguing that the resulting risk to health and well-being from a ban on abortion is much greater than the resulting risk from lack of access to information, and this risk should therefore create a limited margin of appreciation for the State to restrict abortion when protecting public morals).

violates the Article 8 requirement to respect women's health and well-being.¹⁴⁷ Rather than following *Open Door's* acknowledgement that any delay in procuring an abortion was a result of the injunction's restrictions, the Court in *A, B & C* held that any delay or consequent physical and psychological impact was caused by factors beyond the law.¹⁴⁸

The Court failed to follow *Open Door* and improperly held that the sweeping restriction on abortion in Ireland was proportionate to the aim of protecting public morals because it did not account for the many ways the law significantly impacts women's health and well-being. In departing from *Open Door* and giving insufficient weight to a woman's right to health and well-being, the Court broadened States' ability to regulate this right, consequently limiting women's Article 8 privacy rights. While the decision in *A, B & C* failed to account for the *Open Door* proportionality analysis on the breadth and nature of the restriction, it followed *Open Door* by applying a similarly wide margin of appreciation to regulate public morals.¹⁴⁹ As a result, the Court now has justification to defer to and uphold States' domestic laws restricting women's ability to procure an abortion even when such laws clearly infringe upon a woman's physical and mental health.¹⁵⁰

2. A, B & C Failed to Take Account of the Court's Other Privacy Decisions That Limit a State's Margin of Appreciation to Regulate

147. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 80-81 (2010) (López Guerra, J., concurring), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (expressing concern at the Court's failure to assess the gravity of the dangers to the applicants' health and well-being created by the Irish abortion ban).

148. See *id.* at 37 (suggesting that the delay and subsequent negative impacts were at least partially the result of A's financial situation and B's choice to consult an Irish counseling center prior to traveling abroad).

149. Cf. Thompson, *supra* note 136, at 401 (criticizing the Court's use of a wide margin of appreciation in light of its application of a narrow margin of appreciation to other private rights such as homosexual acts).

150. Cf. *id.* at 401-02 (suggesting that *Open Door's* use of a wide margin of appreciation indicated the Court's willingness to allow States to regulate reproductive choice by characterizing it as a public morality rather than privacy issue).

Privacy Rights

In addition to failing to account for its decision in *Open Door*, the Court in *A, B & C* also departed from case law involving State infringement on other aspects of the right to privacy.¹⁵¹ In *Dudgeon v. United Kingdom*, the Court held that Northern Ireland's law prohibiting all homosexual activity required a narrower margin of appreciation, even when enacted to protect public morals, because sexual activity is an intimate aspect of one's existence.¹⁵² Therefore, the law's blanket ban and its effects on the physical and mental health of the individual made it disproportionate to protecting public morals and not "necessary to a democratic society."¹⁵³ The Court emphasized that even if protecting morals, the absolute proscription of an essentially private activity would require a particularly pressing social need

151. See Klashtorny, *supra* note 95, at 439 (explaining that the Court traditionally grants a narrow margin of appreciation when a matter involves a private rather than a public activity). While this section of the Comment primarily focuses on *Dudgeon* because of its analysis of interests similar to those in *A v. Ireland*, other cases may present an opportunity for comparison, particularly those involving the right to have children. For example, in *Dickson v. United Kingdom*, the Court held that the State's requirement that prisoners requesting access to artificial insemination facilities demonstrate "exceptional" circumstances was such a high burden that it effectively prevented any real balancing of individual and State interests in any given case, and was thus a violation of Article 8. *Dickson v. United Kingdom*, App. No. 44362/04, Eur. Ct. H.R., ¶¶ 72-85 (2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44362/04&sessionId=79959145&skin=hudoc-en>. Although *Dickson* may not be directly applicable because the State's interest was not to protect public morals, it is worth noting that the Court's assessment of the right to decide whether to have a child considered the law's failure to account for individual circumstances. Ireland's broad prohibition on abortion similarly fails to do so by broadly restricting all women from procuring an abortion in the country unless their lives are at risk regardless of individual circumstances. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 80-81 (Lopez Guerra, J., concurring) (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionId=79960503&skin=hudoc-en> (chastising the Court for failing to account for the gravity of the dangers to the applicants' health or well-being).

152. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21, 24 (1981).

153. See *id.* at 18-19, 24 (maintaining that even though the law was rarely enforced, its mere existence created psychological distress that interfered with the applicant's private life).

and particularly serious reasons for State interference.¹⁵⁴

Because both *Dudgeon* and *A, B & C* weighed a State's restriction based upon the protection of public morals against a privacy right, *A, B & C* should have followed *Dudgeon* in finding that the aim of public morals cannot justify blanket restrictions affecting individual health. Although *Dudgeon* failed to define what would be considered an intimate aspect of one's existence beyond sexual activity, the broad range of activities protected under the right to privacy are often deemed sufficiently important to deserve a narrow margin of appreciation.¹⁵⁵ Because the Court in *A, B & C* held that Irish abortion laws infringed upon a fundamental privacy right — the applicants' physical and psychological integrity — the Court should have assessed Ireland's margin of appreciation to infringe upon this right in the same way the Court did in *Dudgeon*.¹⁵⁶

Because the Court in *Dudgeon* refused to uphold a law that affected individuals' health and well-being, the Court in *A, B & C* should have similarly refused to uphold Ireland's abortion laws because they detrimentally affect women's physical and mental health. The Court found in *Dudgeon* that the importance of the right to privacy, the fear of prosecution, and the psychological

154. *Id.* at 21, 24.

155. *See, e.g.,* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 27 (finding that conflicts between a post-operative transsexual's personal and legal gender identities create a serious interference with private life); Dickson v. United Kingdom, App. No. 44362/04, Eur. Ct. H.R., ¶ 78 (2007), <http://cmiskp.echr>.

<http://cmiskp.echr>.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44362/04&sessionid=79959145&skin=hudoc-en (noting that important aspects of an individual's life under Article 8, such as choosing to become a biological parent, generally entail a narrow margin of appreciation).

156. *See* Thompson, *supra* note 136, at 399 (arguing that the Court inconsistently applies the margin of appreciation by varying its emphasis on the State interest in protecting morality); *cf. A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 80 (Lopez Guerra, J., concurring) (2010), <http://cmiskp.echr>.coe.int/tkp197/view.

<http://cmiskp.echr>.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en (taking the position that because important aspects of individual existence normally require a narrow margin of appreciation, the Court should decide on a case-by-case basis whether a woman seeking an abortion for reasons of health and well-being was improperly prohibited from doing so).

pressures the anti-sodomy law created were substantial enough to outweigh Northern Ireland's interest in protecting morals, even if those morals were well-embedded in Northern Irish society.¹⁵⁷ Ireland's criminalization of abortion creates the fear of prosecution that existed in *Dudgeon*, but goes further by endangering women's physical health if they are unable to leave the country to procure an abortion necessary to preserve their physical health or well-being.¹⁵⁸ Further, Irish abortion law creates an added psychological burden because it perpetuates the social stigma surrounding abortion in Ireland.¹⁵⁹

If the Court in *A, B & C* had framed the issue as it did in *Dudgeon* and looked at Ireland's sweeping infringement on an intimate area of one's private life to find that the law was disproportionate and not "necessary to a democratic society," it would have had to narrow Ireland's margin of appreciation in order to stay consistent with its case law.¹⁶⁰ Instead, by failing to apply *Dudgeon* to Irish abortion laws in *A, B & C*, the Court created a precedent that does exactly what *Dudgeon* attempted to prevent by granting States an essentially unchecked ability to enact blanket restrictions on a privacy right when the State's aim is the protection of public morals.¹⁶¹

157. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 18, 23-24 (1981) (finding that the law's mere existence, even though rarely enforced, was an infringement on the applicant's right to be free from government intrusion into his sexual life).

158. See Cook, *supra* note 122, at 705 (propounding the view that restrictive abortion laws can harness State power to require women to complete pregnancies and undertake all the responsibilities of parenthood "at the service of embryonic life").

159. See IR. FAMILY PLANNING ASS'N, THE IRISH JOURNEY 7 (2000), available at <http://safe.hyperlink.ie/files/documents/Irish%20Journey.pdf> (warning that the taboo on reproductive rights contributes to a lack of adequate sexual education programs, difficulty accessing fertility clinics, and detrimental physical and mental effects from the associated shame in having an abortion, such as depression and the risk of suicide).

160. See JANIS, *supra* note 68, at 428 (arguing that *Dudgeon* demonstrates that the Court strictly construes a State's power to protect public morals and that it is not clear what acts, if any, may be regulated on this basis).

161. See Thompson, *supra* note 136, at 402-03 (criticizing the Court's view of access to abortion as one of public morality rather than private life and arguing that this view allows the State to have a wide margin of appreciation to restrict a fundamental right); cf. Cook, *supra* note 122, at 654-55

B. THE COURT IN *A, B & C* IMPROPERLY CONFLATED EUROPEAN
CONSENSUS ON THE RIGHT TO LIFE OF A FETUS WITH EUROPEAN
CONSENSUS ON A WOMAN'S RIGHT TO AN ABORTION WHEN HER
HEALTH AND WELL-BEING ARE AT RISK

When determining the margin of appreciation a State has to regulate a fundamental right under the Convention, the Court often looks to European consensus on the existence of a particular right to determine whether a State should have a broad or narrow margin of appreciation to restrict that right. In *A, B & C*, The Court improperly analyzed consensus on the right to life instead of considering consensus on a woman's right to have an abortion when her health is at risk.¹⁶² By focusing on European consensus on the right to life of the fetus, the Court avoided having to declare that a fundamental right to abortion exists, and also avoided holding Ireland in violation women's right to health and well-being under Article 8 of the Convention.

The Convention was designed to establish fundamental rights among contracting States based upon an evolving notion of what constitutes a fundamental right.¹⁶³ Although the text of the enumerated articles themselves is not changed, the Court's interpretation of what acts are protected under these rights can evolve as European consensus emerges. As a result, the Court will generally only find that a particular individual activity is protected as a fundamental right if consensus exists on

(denouncing States' disregard for protecting women's reproductive health and instead oppressing women by placing their reproductive functions at the service of the State).

162. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 65-66 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (finding that because the rights of the fetus and woman are interconnected, the proper margin of appreciation inquiry is the balance of the rights of the fetus with those of the woman, which itself depends on the lack of European consensus on when life begins); cf. *id.* at 87 (Rozakis, J., Tulkens, J., Fura, J., Hirvelä, J., Malinverni, J., and Poalelungi, J., concurring in part and dissenting in part) (considering this ruling to be a rare instance in the Court's case law when the Court does not narrow the margin of appreciation based upon consensus concerning an individual right).

163. See *infra* notes 63-65 and accompanying text (explaining the Court's use of European consensus to determine when an act has become a fundamental right under the Convention).

protecting the specific activity.¹⁶⁴ The Court does not, however, examine consensus on the State's aim in restricting such behavior, such as for the protection of specific public morals.¹⁶⁵ Therefore, the Court would look at consensus to determine whether an individual's action, or a State's legislation to protect such action, was common practice, not to determine if the State's aim in enacting legislation to restrict an activity was common.¹⁶⁶ For example, in *Dudgeon*, the Court analyzed consensus on State protection of privacy in sexual activity and the increased tolerance for homosexual activity; it did not examine consensus on public morals, Northern Ireland's stated interest, because public morals are typically deemed to be determined by the individual State.¹⁶⁷ Therefore, it is significant that the Court in *A*,

164. See, e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981) (noting that in contrast to the era during which the United Kingdom's law prohibiting homosexual activity was enacted, there is now an increased tolerance of homosexual behavior and a marked liberalization in the relevant domestic law of European States); see also Larry Catá Backer, *Inscribing Judicial Preference Into Our Fundamental Law: On the European Principles of Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA J. COMP. & INT'L L. 327, 352 (2000) (quoting Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1227 (1998)) (explaining that the use of consensus has helped the Court maintain its legitimacy when expanding the scope of the Convention's protections).

165. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 87 (2010) (Rozakis, J., Tulkens, J., Fura, J., Hirvelä, J., Malinverni, J., and Poalelungi, J., concurring in part and dissenting in part), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (noting that even if the moral value of protecting fetal life still exists in Ireland, the Court has never before disregarded European consensus on the core issue of State interference with individual private life).

166. Cf. Laurence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 138 (1993) (observing that the Court discerns whether common human rights protections have emerged among contracting States and that when a majority of States have either expanded a right guaranteed by the Convention or broadened the class of individuals to which it applies, the Court is likely to find consensus and will narrow a State's margin of appreciation to regulate the activity).

167. See Ostrovsky, *supra* note 32, 52-54 (pointing out that while morals are viewed in the context of the individual society, the idea that certain behavior is protected under the Convention is determined by evaluating consensus amongst States).

B & C did not look at consensus on protecting the act that Ireland was restricting (abortion) to determine whether it had come to be considered a fundamental right under the Convention, but instead looked at Ireland's interest in regulating the activity (protecting fetal life).¹⁶⁸

To determine whether consensus exists, the Court primarily uses a comparative analysis of European legislation to see if the majority of European States protect a specific activity in order to uphold a fundamental right enumerated in the Convention.¹⁶⁹ In *Goodwin v. United Kingdom*, the Court looked beyond European consensus, assessing international law and domestic law in other countries, and found an established consensus on transsexuals' right to legally claim their post-operative identity.¹⁷⁰ If the Court finds that European consensus exists regarding the protection of an activity or right, the Court will narrow a State's margin of appreciation to regulate that activity or right, even when the margin of appreciation would normally be broad.¹⁷¹

The consensus on allowing abortion when a woman's health or well-being is at risk is even stronger than in prior cases where the Court has used a consensus to narrow a State's margin of appreciation. In *A, B & C*, the Court itself determined that such a consensus exists by finding that all but three Council of Europe

168. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 65-66 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (deciding that the relevant examination of consensus should be on the question of when life begins).

169. See Backer, *supra* note 164, at 352 (quoting Carozza, *supra* note 164, at 1227) (explaining that this ensures the Court will neither act contrary to most States' interpretations of the Convention nor cause a State that does not conform with the majority to abandon the system believing the judiciary is overstepping its bounds).

170. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 29-30 (finding that an emerging European consensus and an international trend toward legal recognition of the gender identity of post-operative transsexuals overrode the lack of a common European approach to resolving related legal technicalities); see also Helfer, *supra* note 166, at 139 (noting that to establish consensus, the Court generally relies on European domestic legislation, international treaties, regional legislation, expert consensus, and European public consensus).

171. See, e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21, 23-24 (1981) (applying this analysis to the criminalization of sodomy in Northern Ireland).

States have less restrictive laws than Ireland and that the majority of States allow abortion to protect a woman's health and well-being.¹⁷² This consensus is stronger than that in *Goodwin* because it is based on concrete evidence of European consensus rather than a mere international trend. The Court in *Goodwin* did not base its determination of consensus on a review of European legislation, but instead focused on the international trend of legally recognizing transsexuals' identity, even if the specific laws varied in the forms of protection.¹⁷³ Similarly, in *Dudgeon*, the Court found a European consensus on recognizing the existence of homosexual activity, but examined only the laws of the United Kingdom, Wales, and Scotland.¹⁷⁴ Despite the limited geographic scope of the "consensus" found in *Dudgeon*, the Court still identified an increased tolerance toward recognizing homosexual activity. This demonstrates that the Court does not require a comparative analysis of all States' laws or all international bodies' decisions to determine that consensus exists.¹⁷⁵ However, the Court in *A, B & C* did review all Council of Europe States' legislation and recognized that the majority of States allowed abortion on broader grounds than those in Ireland.¹⁷⁶ Therefore, because the Court based previous findings

172. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 32 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (observing that thirty out of the forty-seven contracting States allow abortions on request, approximately forty allow abortions for health reasons, approximately thirty-five for reasons of well-being, and only Andorra, Malta, and San Marino have more restrictive abortion laws than Ireland).

173. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 29-30.

174. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 9-10, 23-24 (1981) (finding that England, Wales, and Scotland liberalized their laws prohibiting homosexual activity in the 1960s and 1970s to allow consenting males to engage in homosexual activity because the activities are within the realm of individual private life).

175. See *id.* at 22, 23-24 (holding that although the Northern Irish view that permitting homosexual activity would be damaging to the society's morals is relevant, it cannot justify criminalizing consensual homosexual conduct in light of European consensus on the subject).

176. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 65-66 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (finding it unnecessary to look further to any international trend on access to abortion for health or well-being because such consensus already existed

of consensus on weaker evidence than present in *A, B & C*, and has granted States a narrow margin of appreciation to regulate private rights based on such evidence, the Court in *A, B & C* should have similarly narrowed Ireland's margin of appreciation. The Court's failure to do so, however, indicates the Court's unwillingness to protect women's access to abortion.¹⁷⁷

Instead of using the existing consensus on women's right to abortion to protect health and well-being as a way to narrow Ireland's margin of appreciation, the Court incorrectly found that the lack of consensus on when fetal life begins was the pertinent issue and allowed Ireland to maintain a broad margin of appreciation.¹⁷⁸ If in *A, B & C* the Court had been assessing women's right to abortion under Article 8 against a State's protection of a fetus under Article 2's right to life, an analysis of consensus on the right to life may have been applicable because the Court would be balancing two individual rights.¹⁷⁹ However, in *A, B & C*, the Court was not balancing two fundamental rights to decide which right carried greater weight, but was instead assessing a State's ability to restrict a fundamental right, the right to privacy, in the name of protecting public morals.¹⁸⁰

among a substantial majority of the Convention's contracting States).

177. Cf. Thompson, *supra* note 136, at 406 (suggesting that the Court's use of the margin of appreciation is discriminatory against women because it has used consensus to find a right to male sexual activity but fails to do so for rights that primarily affect women, such as reproductive rights).

178. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 66 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (citing *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 107-08) (leaving the issue of when life begins within the States' margin of appreciation because of the absence of European consensus on when life begins from either legal or scientific perspectives).

179. See Zampas & Gher, *supra* note 123, at 264-66 (detailing cases in which the Court has held that a fetus does not have an absolute right to life, but has repeatedly avoided deciding whether or not a fetus has more limited protection under Article 2).

180. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 68 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> ("[T]he Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people . . . exceeds the margin of appreciation accorded in that

Therefore, because A's and B's rights were the only individual rights at issue, their rights should have been the only rights considered when evaluating consensus in *A, B & C*. Any protection of fetal life is merely one aspect of the State's interest in protecting public morals under Article 8(2). As a result, the Court should have narrowed Ireland's margin of appreciation to regulate based upon public morals because of the existing consensus on the right to abortion to protect women's health and well-being.¹⁸¹

To reach its holding, the Court inappropriately relied on *Vo v. France*, where the Court analyzed whether the fetus was entitled to a right to life under Article 2 when a woman sued her doctor for unintentional homicide after he mistakenly tried to remove a contraceptive coil and was later required to perform an abortion on her.¹⁸² The Court in *Vo* granted France a wide margin of appreciation to determine whether a fetus is protected under France's unintentional homicide laws because no European consensus existed on when life begins.¹⁸³ However, unlike the Court in *Vo*, the Court in *A, B & C* was not analyzing the right to life under Article 2, but a woman's right to health and well-being under Article 8, and the Court was balancing it against the State's interest in regulating public morals. Therefore, the Court inappropriately relied on *Vo* and should have relied on cases balancing a State's protection of public morals against an individual interest, such as *Open Door*, *Dudgeon*, and *Goodwin*.

As the dissenting judges in *A, B & C* note, this is the first time

respect to the Irish State.”).

181. Cf. Sandra Coliver, *The Right to Necessary Information for Reproductive Health and Choice Under International Law*, 44 AM. U. L. REV. 1279, 1293 (1995) (arguing that the tolerance of abortion among most Council of Europe States was a major factor in *Open Door*, where the Court ruled that Ireland's morality-based restriction on information violated Article 10); Robert Wintemute, *Consensus is the Right Approach for the European Court of Human Rights*, GUARDIAN.CO.UK (Aug. 12, 2010, 8:00 AM), <http://www.guardian.co.uk/law/2010/aug/12/European-court-human-rights-consensus> (finding that “European consensus serves to anchor the [C]ourt in legal, political and social reality” and gives it legitimacy for issuing binding judgments).

182. *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, 75, 93.

183. See *id.* at 109-10 (holding that whether or not Article 2 applied, the plaintiff was afforded appropriate domestic civil remedies for her loss).

the Court has disregarded a European consensus concerning an individual fundamental right, instead grounding its holding solely on a State's ability to regulate based on protecting public morals.¹⁸⁴ Had the Court not improperly conflated the consensus at issue, it would have had to acknowledge European and international consensus on a woman's right to abortion to protect her health and well-being.¹⁸⁵ In failing to find that this consensus narrows the State's margin of appreciation, the Court has departed from a long line of cases in which consensus is often the most important factor in the margin of appreciation analysis.¹⁸⁶ The Court's holding minimizes the use of consensus as a way to narrow a State's margin of appreciation, and it creates precedent that will allow the Court to continue to defer to States' restrictive abortion laws. This creates worrying jurisprudence for future cases on abortion because strong disagreements regarding when life begins means that consensus on the issue is unlikely.¹⁸⁷ Therefore, the Court can continue to hold that States with restrictive abortion laws are not violating women's fundamental rights.

184. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 87 (Rozakis, J., Tulkens, J., Fura, J., Hirvelä, J., Malinverni, J., and Poalelungi, J., concurring in part and dissenting in part) (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (calling the decision a "real and dangerous new departure in the Court's case law" because it indicates that an individual State's moral views can override European consensus).

185. See *Zampas & Gher*, *supra* note 123, at 292-94 (perceiving a movement toward a fundamental right to abortion based on contemporary developments in all major continents).

186. See *Helfer*, *supra* note 166, at 139-40 (noting that the consensus analysis is one of the "primary tools" by which the Court achieves its purpose of protecting individual rights in light of "the common European heritage," and citing many cases where the Court has defined consensus in different terms and sought evidence of it in various sources as part of its margin of appreciation analysis).

187. Cf. *Cook*, *supra* note 122, at 645-50 (discussing the historical tendency to view women's reproductive health issues as a threat to the moral order, resulting in laws and policies that seek to restrict women's access to reproductive health options).

IV. RECOMMENDATIONS

If the Court follows its ruling in *A, B & C*, future cases on States' abortion laws before the Court may result in granting States essentially unchecked power to regulate women's access to abortion as long as the State asserts that its aim is to protect public morals. Further, Irish women will continue to have to leave their country to obtain an abortion regardless of dire circumstances that threaten their health and well-being.

A. THE COURT SHOULD DEVELOP A CONSISTENT APPLICATION OF THE MARGIN OF APPRECIATION IN REGULATING RIGHTS UNDER THE CONVENTION

The Court should develop a consistent application of the margin of appreciation by following its previous holdings on cases involving intimate areas of private life. In previous cases, the Court determined the appropriate margin of appreciation for examining whether the State's aim was "necessary" only after assessing the nature of the regulation, the right involved, and whether European consensus existed.¹⁸⁸ In *A, B & C*, however, the Court failed to apply this analysis, thus creating an inconsistent application of the margin of appreciation.

To ensure that women's fundamental rights are protected under the Convention, the Court should apply the same depth of analysis it has in previous cases so that women's reproductive rights receive as much consideration as other intimate areas of private life. Specifically, the Court should follow its analysis in cases such as *Open Door*, where it examined the true effect that a blanket ban restricting women's access to abortion has on a woman, such as placing her physical and mental health at risk.¹⁸⁹ Further, the Court should follow the case law existing prior to *A, B & C* and consider consensus on protecting the individual right

188. See *Calt*, *supra* note 87, at 1227 (predicting that based on prior case law, the Court would require Ireland to justify its morality-based restrictions on abortion with highly compelling reasons); see also discussion *supra* Part III.A (arguing that the Court failed to properly determine whether Irish abortion laws are "necessary to a democratic society" by failing to properly assess the law's breadth and its effects on Irish women).

189. See discussion *supra* Part III.A.

instead of consensus on the State's aim for restricting this right.¹⁹⁰ Thus, it should consider consensus on women's right to abortion instead of assessing consensus on when life begins.¹⁹¹ Because of the clearly existing consensus on the right to abortion to preserve women's health, the Court should narrow States' margin of appreciation in future cases concerning female reproductive rights to ensure States have less ability to restrict women's access to abortion.

B. THE COURT SHOULD DECLARE THAT ARTICLE 8 PROTECTS A
WOMAN'S ACCESS TO ABORTION WHEN HER HEALTH AND WELL-BEING
ARE AT RISK OR SHOULD ALTERNATIVELY APPLY A CASE-BY-CASE
ANALYSIS

Because of the Convention's evolutive nature, the Court finds that certain activities become components of the normative rights enumerated in the Convention when consensus exists on the issue.¹⁹² However, despite consensus on a woman's right to abortion when her health and well-being are at risk,¹⁹³ the Court has yet to recognize a fundamental right to procure an abortion under the Convention. By failing to declare a fundamental right to abortion in *A, B & C*, the Court has allowed States with restrictive abortion laws to continue to restrict women's

190. See discussion *supra* Part III.B (explaining the Court's prior use of consensus on protecting an individual right, in cases such as *Goodwin v. United Kingdom*, and its departure from this doctrine in *A v. Ireland*).

191. See *id.*; see also Fletcher, *supra* note 5 (charging that the Court's failure to determine that health and well-being invoke a narrow margin of appreciation based upon a lack of consensus on when life begins was a poor piece of legal reasoning because the issues of health and fetal life need to be distinguished).

192. See, e.g., *Norris v. Ireland*, App. No. 10581/83, Eur. Ct. H.R., ¶¶ 46-47 (1988), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ireland%20%7C%2010581/83&sessionid=80732496&skin=hudoc-en> (upholding *Dudgeon* and ruling that based on European consensus on the right to engage in homosexual acts, Ireland's prohibition on such acts violated Article 8).

193. See CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 3, at 2 (demonstrating that most States have less restrictive abortion laws than Ireland, and those that completely ban abortions or, like Ireland, allow them only when a woman's life is at risk, are primarily States in Africa, Asia, and Latin America).

reproductive rights.¹⁹⁴ To be consistent with case law that interprets fundamental rights in light of modern conditions, the Court should find that Article 8 includes a fundamental right to abortion when women's health and well-being are at risk.

If the Court is not willing to declare a fundamental right to abortion, the Court should at least follow Judge Lopez Guerra's suggestion in his concurring opinion and apply the margin of appreciation on a case-by-case basis, taking into account the specific risks to each woman's health when a State has restrictive abortion laws.¹⁹⁵ Although this change does not guarantee all women a fundamental right to abortion, it may present a more realistic solution that allows the Court to respect State sovereignty while ensuring the protection of women's fundamental right to health and well-being.

C. THE INTERNATIONAL COMMUNITY SHOULD EXERT PRESSURE ON IRELAND TO LIBERALIZE ITS RESTRICTIVE ABORTION LAWS

While the Court's ruling in *A, B & C* affects women's right to abortion across Council of Europe States, it specifically affects Irish women because Ireland is one of the few States with such

194. Cf. Cook, *supra* note 122, at 726-27 (arguing that international bodies should hold states responsible for securing women's reproductive rights because such rights involve the fundamental human rights principles of dignity and equality).

195. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 80 (Lopez Guerra, J., concurring) (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (suggesting that the Court examine the degree and gravity of the risk to the woman's health and well-being in each individual case, noting his opinion that the risks faced by A and B were not severe enough to hold Ireland in violation of Article 8). Compare *Dickson v. United Kingdom*, App. No. 44362/04, Eur. Ct. H.R., ¶¶ 72-85 (2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44362/04&sessionid=79959145&skin=hudoc-en> (finding an Article 8 violation where the State did not effectively consider individual requests from prisoners seeking access to artificial insemination facilities), with *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 197 (upholding a blanket prohibition on assisted suicide against an Article 8 challenge because it accounted for individual circumstances by requiring official consent to bring a prosecution and allowing flexibility in imposing penalties).

restrictive abortion laws.¹⁹⁶ The Court's holding in *A, B & C* regarding applicant C¹⁹⁷ has the potential to expand, or at least clarify, when women may legally procure abortions within Ireland.¹⁹⁸ However, the Council of Europe States and the greater international community should exert political pressure on Ireland to reconsider its restrictive abortion laws, through such means as reports from United Nations bodies expressing concern with Ireland's restrictive laws or economic sanctions from the European Union.¹⁹⁹

In addition, based upon the changing views in Ireland concerning the right to abortion, the Irish government should consider passing a constitutional amendment or enacting legislation to allow abortion where there is substantial risk to a woman's health and well-being.²⁰⁰ Political pressure and international critique of Ireland's laws could push Ireland to

196. See *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 32 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=ireland&sessionid=79960503&skin=hudoc-en> (naming Andorra, Malta, and San Marino as the only Council of Europe States prohibiting abortion in all circumstances).

197. See *id.* at 75 (holding that Ireland violated C's right to privacy by failing to enact an effective procedure for women to establish whether they are entitled to a lawful abortion because their lives are at risk).

198. Cf. Rory Fitzgerald, *What the ECHR's Ruling on Abortion Actually Says*, NEWSWHIP (Dec. 16, 2010), <http://newswhip.ie/national-2/what-the-echrs-ruling-on-abortion-actually-says> (explaining that the ruling does not change any substantive law and observing that it is Ireland's decision as to how, or whether, to implement the decision).

199. See, e.g., U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, ¶ 13, U.N. Doc CCPR/C/IRL/CO/3 (July 30, 2008) ("The State party . . . should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk . . . or to abortions abroad . . ."); Bryan Mercurio, *Abortion in Ireland: An Analysis of the Legal Transformation Resulting From Membership in the European Union*, 11 TUL. J. INT'L & COMP. L. 141, 179 (2003) (noting that the economic benefits of EU membership, combined with international public opinion, have already forced Ireland to slowly liberalize its abortion laws).

200. See Máiréad Enright, *A, B & C v. Ireland: Where to Now?*, HUMAN RIGHTS IN IRELAND (Dec. 17, 2010), <http://www.humanrights.ie/index.php/2010/12/17/a-b-c-v-ireland-where-to-now> (suggesting that Ireland could take the proactive steps of either holding a referendum to amend the abortion provisions in its constitution or implementing legislation to remedy the deficiencies identified by the Court).

expand its abortion regulations and better protect women's right to health and well-being.²⁰¹

V. CONCLUSION

The Court in *A, B & C* had the opportunity to declare that the fundamental right to privacy includes a woman's right to abortion and that States may not restrict this right to the extent that it interferes with a woman's right to health and well-being. Although *A, B & C* was touted as potentially being "Europe's *Roe v. Wade*," the Court ultimately produced disappointing results. The Court chose to ignore its prior case law and defer to Ireland's domestic laws despite the substantial infringement on a woman's right to health and well-being. The Court also ignored a clear European consensus on a woman's right to abortion when her health and well-being are at risk. In doing so, the Court has left the door open for States to restrict women's access to abortion as long as they do so in the name of protecting public morals.

201. *See id.* (considering the political ramifications Ireland would likely face if it ignored the Court's ruling regarding *C*, ultimately putting Ireland's membership in the Council of Europe in jeopardy).