Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland

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Do Not Abort the Mission: 
An Analysis of the European Court of Human Rights Case of R.R. v. Poland

BY ELIZABETH J. IRELAND†

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I. Introduction

Abortion. It is a subject combining two issues that should never come up at the dinner table: sex and religion. In countries like the United States, where courts have made definitive decisions regarding women’s abortion rights, the topic generates heated controversy.1 Internationally, the topic draws even greater debate, as abortion policies may differ among bordering states.2 In Europe, women have started traveling from countries with strict domestic abortion laws to other countries where abortions are more widely permitted.3 Pro-choice advocates pushing for less restrictive abortion laws have thus supported the creation of a broader regional consensus on reproductive rights, a result that would provide women with more choices—and eliminate any need for extensive travel.4

This comment specifically considers the role of the European Court of Human Rights (ECtHR) in interpreting and developing international law on reproductive rights. The ECtHR’s decisions have led to significant changes in the international field of abortion through international treaty obligations and domestic

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2 Id.
4 See Danielle Nappi, NOTE: Demokracja and Aborcja: Poland’s New Democracy and the Tyranny of Women’s Human Rights, 26 WOMEN’S RTS. L. REP. 53, 54 (2005) (discussing how pro-choice advocates believe restrictions on abortion discriminate against women who cannot afford to travel for an abortion).
law. This comment demonstrates that even though A., B. and C. v. Ireland was not Europe’s Roe v. Wade, the 2011 case of R.R. v. Poland illustrates how the ECtHR continues to expand the scope of rights available to women in asserting their reproductive freedoms.

Historically, the ECtHR has invoked Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention on Human Rights") primarily in the context of reproductive rights, but cases like R.R. v. Poland have also used Article 3 to grant relief to a woman’s claim concerning reproductive rights. This comment argues that abortion advocates should implement an “Article 3 strategy” when pushing for greater reproductive freedoms. Such a strategy would use legal claims under Article 3 to continue to make progress in the field of international law, forcing domestic laws to change and consequently expanding women’s reproductive rights internationally.

Part I of this comment sets the context for the reproductive rights case of R.R. v. Poland by considering the overall abortion rights debate, domestic abortion law throughout Europe, and abortion laws in Poland, particularly. Next, Part II explains the international legal framework from which abortion advocates can use international treaty obligations and the European Convention on Human Rights to further their arguments. Articles 2, 3, 8, and 13 of the Convention are described in Part III. Then, in Part IV, this comment explores the reproductive rights case recently before the ECtHR, R.R. v. Poland. After summarizing the facts and the

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7 410 U.S. 113 (1973).
9 See id. at 42-51 (discussing several bases for a woman’s rights in relation to abortion).
Court’s analysis, this comment concludes that abortion advocates should employ an “Article 3 strategy” to push for changes in domestic abortion laws throughout Europe.

II. International Reproductive Rights

A. The Debate

Across the world, people are fighting for reproductive freedom, as they have been for years. Both sides of the debate agree that abortion relates to “our treatment of the vulnerable and powerless.” One side believes the unborn child is the class that should be protected; the other side believes the woman should be the protected class.

The strongest advocates of pro-life law and policy are the Vatican and the Roman Catholic Church. The Church has taken the position that abortion is equal to murder. Such a connection “makes it difficult for the modern leaders of the Church to stray from this framework;” modern pro-choice advocates often use religious rhetoric in discussions with those who consider themselves pro-life.

The abortion debate is also motivated by non-religious concerns. Some who oppose abortion focus on the problems it causes with regard to maternal health and other issues like children’s safety. For example, Lord David Alton, a British politician who has written extensively in opposition to abortion,

12 Like Berta E. Hernández, I define reproductive freedom as “the individual’s choice to reproduce or not to reproduce.” Berta E. Hernández, To Bear or not to Bear: Reproductive Freedom as a Human Right, 17 BROOK. J. INT’L L. 309, 309 (1991). Using this definition, the term includes the right both to have and to refrain from having an abortion. Id.

13 Alton, supra note 1, at 14.
14 Id. at 13.
15 Nappi, supra note 4, at 54.
16 Id. at 53.
18 Id.
19 See Alton, supra note 1, at 14 (noting the negative effects of abortion on women, men, and children).
contends that abortion leads to physical and psychological problems for women.\textsuperscript{20} As abortion rates have risen, he notes that "the incidence of child abuse before and after birth has increased, as has the abuse of women;" furthermore, he argues, "men use abortion simply to avoid the responsibilities of fatherhood."\textsuperscript{21}

In contrast, pro-choice advocates focus on abortion as a fundamental human right stemming from a woman’s right to control her own body. These advocates assert that "pregnancy and the decision to either continue or end a pregnancy are private matters" that a woman should be permitted to decide for herself without government intervention.\textsuperscript{22} The pro-choice side of the debate also cites statistics indicating how denial of "legal abortion only pushes the practice underground," which means more women risk death from "an unsanitary, unsafe procedure."\textsuperscript{23} In addition, pro-choice advocates often believe that laws restricting abortion interfere with a woman’s right to travel, specifically to countries "where abortions are legal or to a private clinic."\textsuperscript{24}

\textbf{B. Domestic Abortion Laws}

Although many countries recognize the right to reproductive freedom,\textsuperscript{25} others have yet to recognize abortion and related reproductive rights.\textsuperscript{26} An example of a country that falls

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\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} Nappi, supra note 4, at 54.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} The United States, for example, recognized abortion as part of the right to privacy in \textit{Roe v. Wade}. IRA \textsc{Mark Ellman} et al., \textsc{Family Law: Cases, Text, Problems} 55 (5th ed. 2010). Thirty European states also now provide "abortion on demand" in the first trimester, which means that women can choose to have an abortion without needing to provide a reason. Elizabeth Wicks, A. B. C. v Ireland: \textit{Abortion Law under the European Convention on Human Rights}, 11 \textsc{Hum. Rts. L. Rev.} 556, 557 (2011).
\textsuperscript{26} In some form or another, all but one of the countries that recognize the European Convention of Human Rights also recognize a woman’s right to terminate her pregnancy; the only country that does not recognize such a right is Ireland. See Natalie Klashtorny, Comment, \textit{Ireland’s Abortion Law: An Abuse of International Law}, 10 \textsc{Temp. Int’l & Comp. L.J.} 419, 437 (1996) (describing reproductive rights in Ireland); \textit{see generally Abortion Politics, Women’s Movements, and the Democratic State} (Dorothy McBride Stetson ed., 2001) (particularly detailing how abortion policies have
somewhere in the middle is Poland. Unlike England, a country that grants its citizens the right to an abortion, Poland does not automatically grant women the right to intentionally terminate a pregnancy, though Polish law does permit it in certain circumstances when a woman may choose abortion over giving birth. Presently, Poland is one of three European countries with the strictest abortion laws, comparable only to Ireland and Malta.

C. Poland and Abortion Law

Poland has self-identified as a Catholic nation for over a thousand years, a fact which provides context for abortion advocates' struggle for greater reproductive rights in Poland. Around the time of the Renaissance, for example, Poland believed itself to be "the protective rampart of Christian Europe." Catholicism and Polish identity were interchangeable: "The identification as Polish was [connected] fundamentally to the Catholic confession. The demonstrative Catholic confession of faith became a patriotic duty in public life."

Such a religious mentality continues to affect Poland's laws on abortion today. Research focusing on Poland's abortion laws consistently mentions Catholicism, because the two are so closely


27 See generally Nappi, supra note 4 (explaining abortion law in Poland).
28 See David Cole, supra note 3, at 116 (describing England's more liberal abortion laws and explaining how many people from countries with more conservative abortion laws travel there, a phenomenon termed "going to England").
29 See generally Nappi, supra note 4 (detailing Poland's domestic abortion laws).
30 Alicia Czerwinskii, Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion, 32 DENV. J. INT'L L. & POL'Y 653, 658 (2004); see generally Klashtorny, supra note 26, at 419-30 (describing Irish abortion law).
31 Nappi, supra note 4, at 55.
34 Id. at 203.
linked: the Polish Constitution directly refers to the Vatican, providing that relations between the country and Roman Catholic Church “shall be determined by international treaty concluded with the Holy See, and by statute.” This connection between church and state has influenced the development of abortion laws favoring pro-life policies.

Strict Polish abortion laws developed in the early 1990s, after the fall of communism. Current law, the 1993 Act of Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion, appears less polarized. It allows for abortions in cases such as life-threatening situations, fetal deformation, or pregnancies resulting from rape or incest. Nevertheless, the law does not provide any procedural guidelines for how to grant abortions in such circumstances, and hospitals often refuse to carry out any abortions—a practice which has not been challenged by the government. Czerwinski notes that “[i]n practice[,]... obtaining an abortion even in [legally acceptable]
circumstances is seldom permitted."43 Women often find it difficult even to receive medical tests during pregnancy.44

In 1996, Poland adopted an amendment to its 1993 abortion law.45 The amendment permitted abortions for women in “difficult living conditions” or “precarious personal situations up until the 12th week of pregnancy.”46 Less than a year after the amendment’s adoption, however, it was overruled for its unconstitutionality.47 Even though the Polish Constitution refers to the country’s Catholic roots, the text does not specifically mention the term abortion.48 Nevertheless, Article 38 of the Constitution does state that the country “shall ensure the legal protection of the life of every human being.”49 Pro-life advocates therefore argue that the text indeed offers protection against abortion, although they would prefer the language reflect the definition of a fetus as a human being.50

Pro-choice advocates, on the other hand, seek to sway the debate through Article 47 of the Polish Constitution,51 which addresses citizens’ right to privacy: “everyone shall have the right to the legal protection of his private and family life, of his honour

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43 Czerwinski, supra note 30, at 658.
44 Nappi, supra note 4, at 59. For example, in 1999, Barbara W. became pregnant. Id. As she had previously delivered a child with a debilitating genetic disease, she requested a pre-natal test of the fetus so that she would know if the fetus had genetic deformities. Id. Although the right to genetic testing is a legal right when there is a predisposition for genetic disease, two leaders of one hospital denied her request. Id. Later, W. was able to obtain the testing, but she could no longer legally terminate her pregnancy due to the amount of time that had passed. Id. Although W. and her husband sued the hospital and doctors, “the case was suspended on its first day for collection of more documentation,” and “no further information can be found” about the lawsuit. Id.
45 Nappi, supra note 4, at 58.
46 Id. (quoting U.N. Population Div., DEP’T OF ECON. AND SOC. AFFAIRS, ABORTION POLICY: A GLOBAL REVIEW (2002)).
47 Id.
48 Id. at 56.
50 Id. at 56.
and good reputation to make decisions about his personal life."\textsuperscript{52}

One way pro-choice advocates have used this language to garner support for their side is through scholarly articles such as those published by the Women’s Rights Center.\textsuperscript{53} Pro-choice advocates also use this article of the Polish Constitution in litigation. When Ms. R.R. brought her lawsuit against the state of Poland initially, for example, in \textit{R.R. v. Poland}, she contended that Article 47 gave her a right to decide whether to terminate her pregnancy.\textsuperscript{54}

Today, even though Poland permits abortion only in rare cases, the practice continues. Statistics show that the number of abortions performed in the country has “drastically decreased every year” since the fall of communism, when the country’s strict abortion laws were created.\textsuperscript{55} However, the number of “abortions actually occurring through illegal methods is as high as 200,000 a year.”\textsuperscript{56} Seemingly, therefore, many women have gained access to abortion, even in situations when it is prohibited by domestic law.\textsuperscript{57} The case of \textit{R.R. v. Poland} suggests that more women will continue to seek access to abortion through international treaty obligations when they are unable to do so through their country’s domestic law.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
\item \textit{id.} (citing Konstytucja Rzeczpospolitej Polskiej \textit{[CONSTITUTION]}, art. 47.).
\item \textsc{Women’s Rights Ctr.}, supra note 51.
\item Czerwinski, supra note 30, at 658. The rate of abortion was 108,367 per year in 1989, while only 159 legal abortions were performed in 2002. William Johnston, \textit{Historical Abortion Statistics}, Poland, (Mar. 11, 2012), http://www.johnstonsarchive.net/policy/abortion/ab-poland.html.
\item Accurate abortion data is difficult to find, as many abortions are not reported. Statistics indicating that abortions occur do not delineate how women receive abortions, but presumably some women obtain abortions in Poland through illegal measures while others travel outside of Poland to obtain abortions in other countries. \textit{See generally} Cole, supra note 3 (describing how women travel outside their home countries to obtain abortions).
\item \textit{See infra} Part IV.
\end{enumerate}
\end{footnotesize}
III. International Legal Framework

A. International Treaty Obligations

International treaty obligations may protect a woman’s right to abortion even in countries like Poland, where domestic law does not protect reproductive freedom.\(^\text{59}\) The term “human rights” first entered the realm of international law in 1945 under the United Nations Charter, a universal treaty made by member states.\(^\text{60}\) Since then, human rights have been further developed through treaty bodies such as the Human Rights Committee, the Convention on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child.\(^\text{61}\)

The right to abortion is not directly addressed in international treaties as a fundamental human right.\(^\text{62}\) Instead, it is recognized as part of the fundamental right to privacy. As early as 1948, the Universal Declaration of Human Rights described the right as freedom from “arbitrary interference with his privacy, family, home or correspondence.”\(^\text{63}\) Using similar language, the International Covenant on Civil and Political Rights and the American Convention on Human Rights also specifically refer to a right to privacy.\(^\text{64}\)

Despite the fact that international treaties mention a fundamental right to privacy, some critics do not believe this topic covers the right to an elective abortion.\(^\text{65}\) William Saunders, a

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59 See generally Hernández, supra note 12 (explaining how various treaties interact with reproductive rights).


64 Hernández, supra note 12, at 314.

65 William L. Saunders, Neither by Treaty, Nor by Custom: Through the Doha
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prolific author of articles on bioethics, is one such critic, articulating the belief that reproductive rights are not covered by “hard law,” which is legally binding for domestic courts. He believes that pro-choice advocates are mistaken in their reliance on international treaties, as they do not particularly address women’s right to an abortion. Instead, he argues that pro-choice advocates can use only “soft law,” or law that is not created by all members initially but instead is “a text of persuasive or horatory weight.”

One example of “soft law” is the use of consensus statements. Consensus statements created at the 1994 International Conference on Population and Development and the 1995 Fourth World UN Conference on Women clearly include the right to abortion as a fundamental right. Although these consensus statements are “soft law,” scholars argue that they represent the international community’s view on reproductive freedom as a fundamental right that should be recognized by domestic law. Furthermore, such “soft law” often becomes binding law. An analysis of whether the fundamental right to privacy definitively encompasses the right to abortion is outside

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Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understandings of Human Rights, 9 GEO. J.L. & PUB. POL’Y 67, 75 (2011) (citing Richard G. Wilkins & Jacob Reynolds, Law and Culture: International Law and the Right to Life, 4 AVE MARIA L. REV. 123, 154-57 (2006)) (arguing that pro-choice advocates do not have a basis for reproductive freedoms within these treaties).

66 Id.
67 Id.
68 Roseman & Miller, supra note 62, at 337.
70 Zampas & Gher, supra note 5, at 252.
71 Id. at 253.
72 Wilkins & Reynolds, supra note 65, at 130 (describing how “expectations grow and norms harden . . . . what begins as soft law is transmuted into hard law, so even if there is a dearth of hard law about these reproductive freedoms, hard law may develop soon enough.” (internal quotations omitted)). But see Saunders, supra note 65, at 75 (countering this argument by stating that soft law is not “law at all, but rather a set of documents that at most provide evidence of the norms of international customary law”). Even though institutions like the European Court of Human Rights are referred to as courts, Saunders points out that their decisions are “generally advisory or aspirational and [are] not to be directly relied upon by [national] courts.” Id.
the scope of this comment, but case law pertaining to reproductive rights has come before the European Court of Human Rights. In some of these cases, the ECtHR has used an international treaty to expand the zone of privacy for individuals seeking to make reproductive health decisions.

Sexual rights have also emerged more prolifically in the past five to ten years with increased international interest groups and changes in cultural beliefs. In many cases, these groups' statements have also linked the right to privacy with the right to reproductive freedom.

B. European Convention on Human Rights

European citizens who feel that their fundamental legal rights have been violated have several avenues for redress. Generally, citizens contest laws or remedies directly within their country's legal system through the domestic judicial process. If the citizen's country is a member of the Council of Europe, however, that citizen may also apply to be heard before the

73 See infra Part II.


75 European Convention, supra note 10.

76 Case law like R.R. v. Poland implies that Saunders' thesis is incorrect; pro-choice advocates can rely on the "hard law" of an international treaty in order to advance their positions. See generally, R.R., App No. 27617/04, Eur. Ct. H.R. (using "hard law" to establish reproductive rights under Article 3 of the European Convention).

77 Roseman & Miller, supra note 62, at 341.

78 See generally Hernández, supra note 12, at 329-35 (1991) (describing how various international treaties have linked the right to privacy with reproductive rights). For a description of how the right to privacy and the right to abortion have been linked in the United States, see also IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 55 (5th ed. 2010).

79 See generally PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS (John Wadham ed., 2005) (mentioning alternative options to the Court).

80 The Council of Europe exists as an organization for "intergovernmental and parliamentary co-operation. Geographically, it is now the most extensive European political organization, comprising 41 member states." Andrew Drzemczewski, Fact-finding as Part of Effective Implementation: the Strasbourg Experience, in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY, 115, 115 (Anne F. Bayefsky ed., 2000).
ECtHR. 81 The ECtHR determines whether the Convention on Human Rights has been violated. 82

1. Jurisdiction of the Court

The Council of Europe requires all members to ratify the Convention on Human Rights. 83 As of 2012, all Council of Europe members have ratified it. 84 Poland, for example, ratified the Convention in 1993, two years after joining the Council. 85 However, neither the Council nor the Convention specifically requires Council member states to incorporate the Convention into their domestic law. 86

Although all Council states have ratified the Convention, member noncompliance with ECtHR rulings is still a problem. 87 The Council of Europe has a special department 88 to ensure that

81 LEACH, supra note 79.
82 See Drzemczewski, supra note 80, at 117 (“The procedure of [referring an alleged breach of the European Convention] developed in two stages: before the European Commission and, depending on the case, before the European Court of Human Rights . . . .”).
85 Poland, COUNCIL OF EUR. (2012), http://hub.coe.int/web/coe-portal/country/poland?dynLink=true&layoutId=160&dlgroupId=10226&fromArticleId=.
87 See THOMAS HAMMARBERG, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY 238 (2011), available at http://www.coe.int/t/commissioner/Viewpoints/090831_en.asp (describing how some states may not enforce judgments immediately—or at all).
88 Documents prepared by the Department for the Execution of Court Judgments
ECtHR decisions are executed, but it cannot force states to change their domestic law. Nevertheless, many member states respond favorably to the ECtHR’s decisions. Statistics indicate strong judicial respect for the Court and demonstrate the influence the Court has over its members’ domestic law; domestic law changes frequently as a result of ECtHR opinions.

2. ECtHR Procedure

The European Court of Human Rights is governed by “a number of judges equal to that of member States of the Council of Europe.” Seven judges preside over each case, unless a case is “relinquished” to a grand chamber of seventeen judges. In cases where a nation is a party, a judge representing that nation will be present. The Court also elects the President and Vice-President, who sit on every case as ex officio members. The President has the power to ask other Council of Europe members to submit

can be found at: http://www.coe.int/t/dghl/monitoring/execution/default_en.asp.

89 See HAMMARBERG, supra note 87, at 239-40.


92 Slaughter, supra note 90; see also Agnieszka Mrozik, Poland’s Politics of Abortion, OPEN DEMOCRACY (Dec. 13, 2001), http://www.opendemocracy.net/agnieszka-mrozik/polands-politics-of-abortion (suggesting that Polish law on abortion may become more liberal this coming year, perhaps in response to the ECtHR cases of Tysiac v. Poland and R.R. v. Poland).


94 Id. at 38.

95 LEACH, supra note 79, at 54.

96 Id.

97 Jacobs, supra note 93, at 38.
written comments regarding particular issues and determine the order of the docket.\textsuperscript{98}

The ECtHR employs three procedures to evaluate whether the Convention has been followed.\textsuperscript{99} First, the ECtHR can produce advisory opinions interpreting provisions of the Convention.\textsuperscript{100} The ECtHR rarely issues these opinions, however, in part because they "may not deal with the content or scope of the substantive Convention rights."\textsuperscript{101} The ECtHR can also resolve inter-state cases, where one member state brings a claim against another state.\textsuperscript{102} This self-policing mechanism has been "remarkably under-used," a reflection of "the broader realities of inter-state relations."\textsuperscript{103} The third mechanism used by the ECtHR is the individual application process.\textsuperscript{104} Scholars consider this individual complaint mechanism to be the most authoritative source from the ECtHR, as compared to other mechanisms such as general comments or advisory opinions.\textsuperscript{105}

Individual applications also set the ECtHR apart from other human rights bodies such as the United Nations Committee on the Rights of the Child, an entity that does not grant fact-specific individual decisions.\textsuperscript{106} After evaluating an individual’s case, the ECtHR may declare a violation of the Convention and ask a state to directly compensate an individual.\textsuperscript{107} In this way, both the applicant and the state can be a party to the judicial proceeding.\textsuperscript{108}

\begin{footnotes}
\item[98] Id. at 39.
\item[99] LEACH, supra note 79, at 15-16.
\item[100] Id. at 15.
\item[101] Id.
\item[102] Id. at 16.
\item[103] See id. (discussing why this system has not been used more frequently).
\item[104] Id.
\item[105] Roseman & Miller, supra note 62, at 343 (citing David Weissbrodt, The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law, 31 U. PA. J. INT’L L. 1185, 1190 (2010)).
\item[108] RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 49 (2002) (explaining that in other proceedings, such as those before the Human Rights
The ECtHR can also ask a nation to provide an “effective remedy,” which “often means a change in law.”

According to Michael Goldhaber, a law professor and writer for The American Lawyer, under both approaches, the ECtHR endeavors to shame European nations into compensating the citizen for his or her injuries. This “shaming” power is an effective enforcement mechanism because it provides a direct opportunity for relief when the Convention is violated, most researchers agree that the ECtHR is successful in providing relief.

To make decisions, the ECtHR also employs a consensus model that draws on member states’ interpretations of human rights. To determine whether there is consensus on a particular issue, the ECtHR considers European countries’ “domestic statutes, international treaties and regional legislation,” expert opinion, and the views of the European public. In this way, the ECtHR attempts to include its members in creating policy and enacting social change for Europe.

Even some countries that do not adopt the Convention have incorporated ECtHR opinions into their jurisprudence, indicating that the ECtHR has broader international support. In a “landmark decision finding the death penalty unconstitutional,”

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109 GOLDHABER, supra note 107, at 5.
110 Id.
111 Roseman & Miller, supra note 62, at 343-44 (quoting Fact Sheet No. 7/Rev. 1, Complaints Procedure, OFFICE OF THE UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf (last visited Oct. 26, 2012)) (“Decisions rendered in these quasi-judicial settings are understood to be authoritative judgments for the state in question and also provide guidance for other states.”).
112 GOLDHABER, supra note 107, at 6; see also LEACH, supra note 79, at 6 (noting that “[t]he Convention is considered to be one of the most successful human rights systems in the world, particularly because of its enforcement mechanisms and its membership”). But see Drzenczowski, supra note 80, at 118 (noting that the Court could do more for more systemic violations of human rights).
114 Id. at 139.
115 See id. at 134.
116 Slaughter, supra note 90, at 1109.
the Supreme Court of South Africa cited ECtHR decisions.\textsuperscript{117} Courts in Zimbabwe and Jamaica have also relied on ECtHR case law.\textsuperscript{118} Therefore, \textit{R.R. v. Poland} may provide not only an understanding of international treaties but also an analysis of how countries may adopt lessons from the ECtHR in developing domestic law.

VI. The European Convention on Human Rights

The European Convention is the governing document for Council of Europe human rights cases.\textsuperscript{119} When deciding whether the Convention has been violated, the court first considers the scope of the applicant’s claim and whether the claim contains a protected interest.\textsuperscript{120} Then, the court determines whether the government took appropriate measures to protect this interest.\textsuperscript{121}

This comment analyzes Articles 2, 3, 8, and 13 of the Convention and describes how they have been used in reproductive rights decisions. Part III of this paper then connects the ECtHR’s previous case law pertaining to these Articles to the \textit{R.R. v. Poland} case. Since \textit{R.R. v. Poland} is the first reproductive


\textsuperscript{118} \textit{Id.} (quoting Ncube v. State, 1988 (2) SA 702 (Zim.)); Pratt v. Attorney General for Jamaica, 4 All E.R. 769 (P.C. 1993) (en banc), available at http://eiuj.org/eiuj/files/Pratt%20and%20Morgan%20v.%20Jamaica.pdf, quoted in Slaughter, \textit{supra} note 90, at 1110. While the question remains whether this case law should be followed, it is clear that courts around the world are following ECtHR opinions. \textit{See} Slaughter, \textit{supra} note 90, at 1109-10. In 2003, the Supreme Court of the United States cited international tribunal briefs and a brief from the former United Nations High Commissioner of Human Rights in \textit{Lawrence v. Texas}. Wilkins & Reynolds, \textit{supra} note 65, at 133. The Supreme Court has also relied on international treaties to which it is not a member; in the 2005 \textit{Roper v. Simmons} case, Justice Kennedy cited a United Nations treaty that the United States Senate never ratified in his majority opinion. \textit{Id.} at 132.


\textsuperscript{120} \textit{See} DAVID HARRIS, MICHAEL O’BOYLE & CHRIS WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 302-05 (1995) (explaining how ECtHR case law breaks down Article 8’s first sentence into four segments: private life, family life, home, and correspondence). While some of these segments overlap, the court traditionally analyzes cases in one of these four sections.

\textsuperscript{121} \textit{Id.}
this Comment argues that pro-choice advocates should not only continue to utilize the framework of Article 8, but should also invoke Article 3 when litigating reproductive rights cases.

A. Article 2 of the European Convention on Human Rights

Article 2 of the Convention specifically mentions a person’s “right to life” as “no one should be deprived of his life intentionally.” However, the ECtHR has elected not to decide whether a fetus fits under Article 2’s definition of a “person,” despite the fact a case was brought on that specific issue in 2004. Even though pro-life advocates have argued that a fetus should be considered a person, the ECtHR has decided reproductive rights issues primarily under Article 8.

B. Article 3 of European Convention on Human Rights

Article 3 of the Convention states “no one shall be subjected to..."
torture or to inhuman or degrading treatment or punishment.”\textsuperscript{129} A threshold level of inhuman or degrading treatment must be met for the ECtHR to find an Article 3 violation; this threshold is defined relatively and thus “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”\textsuperscript{130} Although Article 3 does not on its face require that courts find intent to impose liability, the European Court of Human Rights has held on a number of occasions that the Convention requires intent.\textsuperscript{131} Nevertheless, as the ECtHR in Ireland v. UK\textsuperscript{132} held, in essence, “the crucial distinction lies in the degree of suffering caused.”\textsuperscript{133}

Cases where the ECtHR has found “inhuman” treatment violating Article 3 have centered on assaults,\textsuperscript{134} psychological interrogation techniques,\textsuperscript{135} conditions of confinement,\textsuperscript{136} and extradition or deportation.\textsuperscript{137} Although very little case law

\textsuperscript{129} European Convention, supra note 10, art. 3.


\textsuperscript{131} Compare European Convention, supra note 10, art. 3 (stating that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” but not explicitly requiring intent) and Peers v. Greece, 2001-III Eur. Ct. H. R. 275, 297 (“In light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3”), with Dikme v. Turkey, 2000-VIII Eur. Ct. H.R. 223 (holding that intent was required to support finding an Article 3 violation).


\textsuperscript{133} HARRIS, O'BOYLE & WARBRICK, supra note 120, at 62.

\textsuperscript{134} See id. at 62-65 (summarizing ECtHR case law on Article 3 as it pertains to assaults); see e.g., Tomasi v. France, 241 Eur. Ct. H.R (ser. A) (1992) (involving allegations of assault by police officers).

\textsuperscript{135} See HARRIS, O'BOYLE & WARBRICK, supra note 120, at 65-66 (describing ECtHR case law about psychological interrogation techniques); see e.g., Ireland v. UK, 25 Eur. Ct. H.R. (ser. A) (1978).

\textsuperscript{136} See HARRIS, O'BOYLE & WARBRICK, supra note 120, at 66-72 (summarizing ECtHR case law on conditions of detention); see e.g., Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1.

\textsuperscript{137} See HARRIS, O'BOYLE & WARBRICK, supra note 120, at 73-80 (explaining ECtHR case law on inhuman treatment and particularly mentioning extradition and
addresses inhuman punishment, case law does suggest that the same requirements for inhuman treatment apply (such as the extent of the victim’s “physical or mental suffering” and whether a “person of normal sensibilities” of the victim’s “sex, age, health” would be similarly affected); nevertheless, the action in question must be for the purpose of punishing the victim.

In interpreting Article 3’s prohibition of “degrading treatment,” the ECtHR has focused on the level of humiliation suffered by the victim. Specifically, the ECtHR asks whether someone of normal sensibilities, “of the applicant’s sex, age, health, etc[.] . . . would be grossly humiliated in all the circumstances of the case.” Case law on degrading treatment includes instances of detention and racial discrimination. According to scholars Harris, O’Boyle, and Warbrick, whether discrimination against other classes of people falls under Article 3 is less clear. They explain, “Legislation discriminating against illegitimate children and their parents was held in Marckx v. Belgium not to be degrading treatment, contrary to Article 3.” However, since Marckx, “discrimination against children born out of wedlock has been identified as a kind of discrimination given special protection by Article 14, as has sexual discrimination.”

Therefore, “[i]t is arguable that discrimination on any of these grounds, all of which concern personal characteristics, is degrading[,] contrary to Article 3.”

Much of the case law defining “degrading treatment” under Article 3 of the Convention concerns corporal punishment in

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138 HARRIS, O’BOYLE & WARBRICK, supra note 120, at 80.
139 Id.
140 See id.
141 Id. at 81.
142 Id. at 83.
143 Id. at 81.
144 HARRIS, O’BOYLE & WARBRICK, supra note 120, at 83.
146 See HARRIS, O’BOYLE & WARBRICK, supra note 120, at 83.
147 Id.
148 Id.
Although applicants have claimed Article 3 violations of their reproductive freedoms in the past,150 *R.R. v. Poland* is the first Article 3 reproductive freedom claim to succeed.151

**C. Article 8 of the European Convention of Human Rights**

Article 8 of the Convention specifically focuses on "private and family life, home . . . and correspondence."

Although a state primarily has a negative obligation not to interfere in an individual’s life, in 1994, the court stated that there “may in addition be positive obligations inherent in ‘effective’ respect for family life.” Since then, the ECtHR has held that there are in fact positive obligations inherent in Article 8. Furthermore, these obligations may require states to impose “measures . . . in order to secure the enjoyment of an Article 8 right.” To assess whether a positive obligation exists, the ECtHR considers the “fair balance between the general interests of the community and the interests of the individual.”

**1. Case law on Article 8 and Reproductive Freedom**

The majority of the ECtHR’s reproductive freedom decisions rely on Article 8 of the Convention. When considering an applicant’s Article 8 abortion claim(s), the court focuses on Article

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149 Id. at 86.
152 Article 8 reads: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” European Convention, supra note 10, art. 8.
154 See id. at 303 (emphasis added).
155 Id. at 304.
156 LEACH, supra note 79, at 285.
8’s privacy provision, analyzing the facts and circumstances of an individual’s case to determine whether an individual’s “private life” has been disrespected. While the court has not conclusively defined “private life,” it has considered such issues as a person’s right to determine the circumstances of a child’s birth, a person’s mental health, and even a person’s business relationships.

In Brüggemann & Scheuten v. Federal Republic of Germany, the ECtHR extended the Article 8 definition of private life to cover issues of reproductive freedom. In Brüggemann, two women brought an action before the European Commission to contest a West German Federal Constitutional Court decision that made abortion illegal. The women claimed that their right to privacy under Article 8(1) was violated. The ECtHR ultimately upheld the West German Federal Constitutional Court’s ruling. However, the ECtHR also noted that family planning falls within the ambit of Article 8(1), leading the
Center for Reproductive Rights to assert that the court's decision is that "an absolute prohibition on abortion would be an impermissible interference with privacy rights under Article 8." 169

The 2007 decision of Tysiac v. Poland 170 before the European Court of Human Rights also demonstrates how the ECtHR has used Article 8 to define reproductive rights. 171 Ms. Tysiac was a resident of Poland with two children and a medical condition described as "severe myopia." 172 This medical condition meant she was "suffering from a disability of medium severity." 173 After she became pregnant, three medical experts informed her that "the pregnancy and delivery constituted a risk to her eyesight." 174 However, either for legitimate medical reasons or due somehow to the controversy surrounding abortion, Tysiac was unable to secure the required certificate [for an abortion] from [the medical experts]." 175 She then consulted a general practitioner, who gave her the requisite certificate. 176 When Tysiac took the certificate to a state hospital to obtain an abortion, however, she was informed that her short-sightedness did not give her the sufficient medical necessity for an abortion. 177 Tysiac delivered her baby a few months later, and her eyesight significantly deteriorated shortly thereafter. 178

Tysiac brought a claim to the ECtHR, alleging that her rights


173 Id.

174 Id. ¶ 9.


177 Id.

178 Id. at 277-28.
had been violated in two ways. First, she argued that Poland should have provided her with an abortion because under Polish law, abortions were permissible when it threatens a woman’s health. Her second argument focused on the policies and procedures operating in Poland. She argued that “the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means’ violated a positive obligation of Poland to respect her Article 8 rights.”

While Tysiac’s first claim proved unsuccessful, the ECtHR nonetheless still granted her relief under Article 8 of the Convention. The ECtHR held that Poland had not fulfilled its positive obligations to protect Tysiac’s right to effective respect for her private life. Further, the ECtHR stated that Poland’s failure to provide Tysiac with the right to abortion violated her individual privacy rights. Essentially, the court concluded that once a national legislature grants the right to abortion, it may not “structure its legal framework in a way which would limit real possibilities to obtain it.”

Despite Judge Borrego’s strongly-worded dissent, in which he claimed that the court “favours ‘abortion on demand,’” many activists believe the court did not take a strong enough stance on the right to abortion, arguing that the decision dealt merely with Poland’s legal structure. Shannon Calt characterizes the court’s decision as evasive, where “the Court once again avoided answering the question of when life begins under the Convention,  

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179 Calt, supra note 175, at 1211.
180 Id.
181 Id.
182 Id.
183 Id. at 1212-13.
185 Id. at 249; see also Nicolette Priaulx, Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive ‘Rights’ and the Intriguing Case of Tysiac v. Poland, 15 EUR. J. HEALTH L. 361, 362 (2008).
186 Tysiac, 2007-I Eur. Ct. H.R. at 262-66 (Borrego, J., dissenting). Borrego includes emotionally-wrought phrases such as, “I would never have thought that the Convention would go so far, and I find it frightening,” and “the Court is neither a charity institution nor the substitute for a national parliament.” Id. at 262, 266.
187 Id. at 265.
188 See Calt, supra note 175, at 1215-16.
presumably leaving that issue within the margin of appreciation afforded the state.” Nicolette Priaulx, a Senior Lecturer in Law in the United Kingdom agrees, stating that the decision’s legal effect, contrary to the court’s intentions, did not go far enough in “impos[ing] a permissive abortion regime upon Poland—a ‘right to abortion.’” The case thus established states’ positive obligation to respect individuals’ physical integrity, nothing more.

This ruling did, however, set the stage for the next abortion case the ECtHR heard: A., B. and C. v. Ireland. In 2005, three Irish residents, A., B., and C., brought suit before the ECtHR. The women claimed violations of Articles 3 and 8, among other Convention provisions. Each woman faced health complications during their pregnancies that forced them to seek abortions in England. After returning to Ireland, all three suffered health complications. They alleged that these complications were the result of Ireland’s burdensome abortion laws, considered the strictest in the Council of Europe.

As the case progressed, commentators and scholars believed the ECtHR’s ruling could become “Europe’s Roe v. Wade.”

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189 Id. at 1212.
190 Priaulx, supra note 185, at 371.
192 Calt, supra note 175, at 1216.
194 Calt, supra note 175, at 1216-17. A., the first woman, was indigent and suffered from alcoholism. Id. The second woman, B., had a substantial risk of ectopic pregnancy, which is where the fetus would develop outside the uterus. Id. The third applicant, C., had cancer, and she was unable to find anyone who could reassure her that the cancer treatment would not harm the fetus. Id.
195 See id. at 1190 (“In Ireland, abortion is effectively illegal.”).
196 Id. at 1189 (specifically noting various commentators have referred to the case as such); Paolo Ronchi, A, B and C v. Ireland: Europe’s Roe v. Wade Still Has to Wait?, LAW. Q. REV. 365 (2011); Pro-life organizations file brief to defend Ireland abortion ban: ADF attorneys represent Family Research Council in brief filed with European Court of Human Rights, ALLIANCE DEFENSE FUND (Nov. 17, 2008), http://www.alliancealert.org/2008/11/17/pro-life-organizations-file-brief-to-defend-ireland-abortion-ban/; J.C. von Krempach, A Comment on A, B, and C vs. Ireland,
Because of the similarities between the right to privacy conferred by the U.S. Constitution and the Convention, many thought the court would decide that the right to privacy encompassed the right to an abortion. Furthermore, instead of the typical seven-member panel, seventeen judges sat and heard arguments in A., B. and C. v. Ireland, a rare move that frequently signifies a decision’s importance to the ECtHR.

Despite commentators’ predictions, the ECtHR, in an 11-6 vote, held that the three applicants did not have a right to an abortion in Ireland. Specifically, the ECtHR held that “Article 8 cannot, accordingly, be interpreted as conferring a right to abortion.” Although pro-life advocates had initially complained about the court’s decision to hear the case, they declared the decision a victory, arguing that as a result of the ruling, the Convention could no longer be interpreted to “weaken protections afforded to human life guaranteed by a Member State.”

Instead of providing a ceiling, pro-life advocates, like the European Centre for Law and Justice, interpreted the decision as creating “a floor. . . . therefore[,] the Court can only supervise if restrictions prescribed by a State to the protection of human life are not abusive.”

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199 See Ronchi, supra note 198 (noting the similarity between the ECtHR’s decision and Justice Blackmun’s majority opinion in Roe).

200 Calt, supra note 175, at 1191 n.3. Such a decision comes from a body known as the “grand chamber.” Id.

201 See Ronchi, supra note 198.


203 News, Ireland Must Reject European Court’s Abortion Judgment, Says Intervener SPUC, SOSC’Y FOR THE PROT. OF UNBORN CHILDREN (Dec. 16, 2010), http://www.spuc.org.uk/news/releases/2010/december16 (quoting John Smeaton, national director of the Society for Protection of Unborn Children (SPUC), who said, “This case was never about helping women faced with a crisis pregnancy. It was instigated by the international abortion lobby, which has with the ultimate aim of forcing governments across the globe to recognize access to abortion as a legal right.”).


205 Id.
Despite the fact that the court did not find a fundamental right to abortion, the ECtHR did comment on the positive obligations Ireland has to women like Applicant C, who underwent cancer treatment at the time of her pregnancy. The court also deemed Irish abortion practice to be problematic, since the country does not appropriately allow for abortions when women’s lives are in danger—even though the law explicitly protects women in such circumstances. Elizabeth Wicks, who writes on medical law, constitutional law, and human rights, also notes that the ECtHR acknowledged “the emergence of a European consensus that the balance should fall in favour of the woman, at least when her health or well-being is at stake, or at the early stages of the pregnancy.” The recognition of this consensus is perhaps a sign that the ECtHR might one day set abortion policy for all of the Council of Europe nations.

Thus, case law indicates that pro-choice advocates have garnered significant victories using Article 8 of the European Convention, the most commonly cited article in reproductive rights cases. However, use of this article has not yet led the European Court of Human Rights to decide that all Council of Europe members bound by the convention must allow elective abortions for their citizens. Going forward, pro-choice advocates should consider whether stronger cases can be made using other articles of the Convention.

D. Article 13 of European Convention of Human Rights

Article 13 of the Convention addresses the right to an effective national remedy. This Article ensures that states provide some

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\begin{itemize}
\item \footnotesize 208 Wicks, supra note 25, at 565.
\item \footnotesize 209 Id.
\item \footnotesize 210 Article 13 reads: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” European Convention, supra note 10, art. 13.
\end{itemize}
form of remedy when Convention provisions are violated, but it does not require that states provide a particular remedy; instead, it leaves the states discretion in implementing the remedy. Case law for this Article is difficult to summarize because the application of Article 13 depends upon the Articles the applicant cites in his or her complaint. Although applicants have claimed Article 13 violations in other reproductive rights cases such as A., B. and C. v. Ireland and Tysiak v. Poland, the ECtHR did not find an Article 13 violation in those cases.

V. RR v. Poland: newest ECtHR case on reproductive rights

On May 26, 2011, the European Court of Human Rights issued a judgment in the case of R.R. v. the Republic of Poland. The Court held unanimously that 45,000€ should be granted to the Polish citizen who was denied an abortion. The citizen, Ms. R.R., succeeded on a claim that she received insufficient medical treatment, the result of which effectively denied her the right to an abortion under the limited circumstances in which Poland allows elective abortions.

Although not all judges agreed, the Court also held that Poland had violated both Article 3 and Article 8 of the Convention and noted that the state’s procedural safeguards needed to be fixed so that women could access abortion under Polish domestic law. Although the Court did not hold that Poland needed to guarantee all women the right to an abortion, dicta in the opinion indicates

211 HARRIS, O'BOYLE & WARBRICK, supra note 120, at 443-46.
212 Id. at 445.
213 See id. at 461.
216 Id. ¶ 5 (holding). The Court also granted monies for non-pecuniary damage and for costs and expenses. Id.
217 For a summary of Polish abortion law, see supra Part I.B.
219 Id. ¶ 3 (holding).
220 Id. ¶¶ 213-14.
that the Court may be moving toward a more liberal stance on reproductive rights.221

A. Facts

In December 2001, Ms. R.R., a 29 year old woman, visited Dr. S.B. in a hospital. 222 At that time, she learned that she was in the sixth or seventh week of pregnancy.223 In the fourteenth and eighteenth weeks of her pregnancy, Ms. R.R. returned to the hospital for ultrasounds to check on the progress of her pregnancy.224 At the later visit, on February 20, 2002, Ms. R.R. was informed by her doctor that there might be some malformation of the fetus.225 Ms. R.R. indicated that she would be interested in an abortion if the fetus were in fact deformed.226

After her interactions at the first hospital, Ms. R.R. visited a second, public hospital for an ultrasound with Dr. O. 227 She immediately received the results, which indicated that there was a likelihood that the fetus was “suffering from some malformation.”228 Dr. O. recommended that Ms. R.R. undergo a genetic examination at that time, using the technique of amniocentesis.229

Days later, Ms. R.R. visited another clinic for an ultrasound.230 The clinic was private, and Ms. R.R. did not have a referral, so she had to pay for the service.231 Like her three previous ultrasounds, the results of the scan showed that the fetus had an unidentified malformation.232 The doctor recommended genetic testing.233

221 See infra text accompanying notes 229-231.
223 Id.
224 Id. ¶ 9.
225 See id.
226 Id.
227 The exact date of this visit is not in the court opinion but it would be between Feb. 20 and Feb. 28. See id. ¶¶ 11-12.
229 Id.
230 See id. ¶ 13.
231 Id.
232 See id.
233 Id.
After four different ultrasounds, Ms. R.R. visited a specialist in clinical genetics, Professor K. Sz. Professor K. Sz. recommended that Ms. R.R. get a referral for genetic testing from her doctor so that the testing would be paid for by the government at a public hospital. Ms. R.R. asked her first doctor, Dr. S.B., for such a referral. She was refused.

In the first week of March, Ms. R.R. went with her husband to again visit Dr. S.B., demanding “termination of the pregnancy.” Dr. S.B. refused to perform an abortion and informed the couple that they could appeal his decision for review before a panel of hospital doctors. Ms. R.R. chose not to appeal the decision and instead went to another public hospital on March 11. Ms. R.R. again asked for an abortion, but she was turned down. She received a referral for a university hospital, which she visited on March 14.

At her visit on March 14, Ms. R.R. was refused a genetic examination. She was also criticized for considering an abortion. Another ultrasound was performed, as were urine and blood tests. The ultrasound was inconclusive as to the fetal deformation, but Ms. R.R.’s discharge record from March 16 stated that “the foetus was affected with developmental abnormalities.”

Ms. R.R. then approached Professor K. Sz. again, who refused to provide her with the genetic referral. The next day, she approached Dr. K.R. to obtain it. Although the facts are in

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235 See id.
236 See id.
237 Id.
238 Id. ¶ 17.
239 Id.
241 Id. ¶ 20.
242 Id.
243 Id.
244 Id.
245 See id.
247 Id. ¶ 22.
dispute about the exact conversation that they had,\textsuperscript{248} she did not receive a referral from him.\textsuperscript{249} She “again unsuccessfully asked Dr.[.] S.B. for a referral.”\textsuperscript{250} Although the government disputed the fact that Ms. R.R. never got a referral, no referral documentation was submitted to the European Court of Human Rights.\textsuperscript{251}

Regardless of whether Ms. R.R. in fact obtained a referral, she underwent genetic testing on March 26 at twenty-three weeks pregnant.\textsuperscript{252} The hospital told Ms. R.R. that it would take two weeks for her to receive the test results; she received them on April 9.\textsuperscript{253} The results “confirmed that the karyotype indicated the presence of Turner syndrome” and indicated that an abortion should be contemplated “under the provisions of the 1993 law”\textsuperscript{254} and “taken with due regard to the parents’ opinion.”\textsuperscript{255}

After receiving these test results, Ms. R.R. again asked the local public hospital for an abortion.\textsuperscript{256} She was told that it was “too late by then.”\textsuperscript{257} On July 11, Ms. R.R. “gave birth to a baby girl affected with Turner syndrome.”\textsuperscript{258}

Unlike other cases where applicants first came to the ECtHR without seeking legal relief in their own countries,\textsuperscript{259} Ms. R.R. initially sought criminal legal relief in Poland.\textsuperscript{260} When her case was denied, she appealed, and was again denied any relief.\textsuperscript{261} She then filed civil suit against the doctors and hospitals with whom

\textsuperscript{248} See id. (explaining that the government says that he could not refer, and Ms. R.R. says that he told her he would not perform genetic testing because she would then go get an abortion.).
\textsuperscript{249} See id.
\textsuperscript{250} Id. ¶ 23.
\textsuperscript{251} Id. ¶ 24.
\textsuperscript{253} Id. ¶ 33.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id. ¶ 33
\textsuperscript{257} Id.
\textsuperscript{261} Id. ¶¶ 39-42.
she had interacted. Initially, she received relief only for privacy issues, as one of the doctors had “disclosed information relating to . . . [her] health and private life in connection with her pregnancy.” Later, after appeal, Mr. R.R. received relief in the Polish court system for failure to refer for genetic testing and for the breach of her right to make an informed decision about her pregnancy. On July 30, 2004, Ms. R.R. applied to the European Court of Human Rights for further relief.

B. ECtHR Decision

In considering Ms. R.R.’s case, the ECtHR first analyzed whether Poland’s domestic law provides any remedies for violation of the Convention—or whether Ms. R.R. did in fact qualify as a victim unable to obtain sufficient relief in her country. Unlike the case of A., B. and C. v. Ireland, the Court noted that Ms. R.R. had already sought and been denied relief within her home country. However, despite the fact that the Supreme Court of Poland acknowledged that a patient has “a right of access to information relevant to her or his health” and that Ms. R.R. “had suffered distress, anxiety and humiliation,” the ECtHR indicated that a victim’s relief must be considered as a whole. The ECtHR then clarified that the award rendered could not “be regarded as financial redress commensurate with the nature of the damage.”

The ECtHR also noted that Ms. R.R. was raising a complaint about the way that the Polish system operated, instead of

262 Id. ¶ 43.
263 Id.
264 See id. ¶¶ 48-57.
265 Id. ¶ 1.
269 Id. ¶ 102.
270 Id.
271 Id. ¶ 108.
272 See id.
complaining about the law itself, Ms. R.R. was effectively complaining about “the way in which the laws were applied in practice to her case.” Following precedent, the ECtHR did not choose to redefine the “right to life” from Article 2 of the Convention. Instead, the ECtHR considered whether Ms. R.R.’s rights had been violated under Articles 8, 3, and 13. This comment considers Articles 8, 3, and 13 in turn, as did the ECtHR.

1. Article 8

The ECtHR’s analysis of Ms. R.R.’s remedies under Article 8 is not surprising, given previous case law. The ECtHR first acknowledged that reproductive decisions fall under “private life.” Then, the Court explained that such interference in private life must be “justified in terms of the second paragraph [of Article 8],” such that “the interference corresponds to a pressing social need . . . proportionate to one of the legitimate aims pursued by the authorities.” This overview also coincides with existing case law on Article 8.

The R.R. v. Poland court then addressed the issue of positive obligations, deeming Poland to be under the positive obligation to “secure to its citizens their right to effective respect for their physical and psychological integrity,” an obligation which may require state action. The ECtHR followed its discussion of positive obligations with the reminder that States can make the final decision about whether to grant reproductive freedoms, citing A., B. and C. v. Ireland. However, the Court acknowledged that consensus exists “amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation

273 Id. ¶ 116.
274 European Convention, supra note 10, at 6.
276 See supra Part III.iii for discussion of Article 8 case law.
278 Id. ¶ 183.
281 Id.
282 Id. ¶ 186.
resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion.”

Next, the ECtHR applied Article 8 to the circumstances of this particular case. The ECtHR initially specified that this decision was not about whether abortion is a fundamental right, but instead about whether Ms. R.R. could access the rights granted under Polish law. The ECtHR also noted that it was faced with a combination of issues, such as right of access to information and the right to decide about termination of a pregnancy.

The ECtHR followed this initial note with a qualification, however, that the “starting point for the Court’s analysis is the question of an individual’s access to information about her or his health,” not the right to privacy or the right to have an abortion. Despite its qualification, however, the ECtHR next commented that “the effective exercise of this right is often decisive for the possibility of exercising personal autonomy,” implying that the ECtHR recognizes that it cannot fully separate the two rights of access to information and right to reproductive health decisions.

Emphasizing the relevance of the information that Ms. R.R. would have received and the organizational confusion that she faced, the ECtHR then concluded that Poland violated Ms. R.R.’s rights under Article 8. Specifically, the Court concluded that Poland violated its positive obligations to “safeguard the applicant’s right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option.” The ECtHR also highlighted the timing of the case, noting that a span of at least four weeks passed between when the medical suspicions began and the legal time-

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283 Id.
284 Id. ¶ 196.
285 Id. ¶ 188.
287 Id. ¶ 197.
288 Id.
289 Id. ¶ 199.
290 Id. ¶ 198.
291 Id. ¶ 214.
limit for an abortion expired.\textsuperscript{293}

2. Article 3

Unlike other decisions about reproductive rights,\textsuperscript{294} the ECtHR also used Article 3 to grant the petitioner relief. Although this portion of the opinion is short,\textsuperscript{295} the court noted that “ill-treatment requires a minimum level of severity” in order to qualify under Article 3, an inquiry that depends on all the facts and circumstances of the person’s particular case.\textsuperscript{296} The ECtHR reiterated its previous case law in explaining that such treatment does not need to be intentionally humiliating or degrading but instead will be decided based on how the applicant was actually treated.\textsuperscript{297}

Applying the facts of Ms. R.R.’s case to Article 3, then, the ECtHR concluded that the applicant’s suffering reached the minimum threshold of severity, meaning that her Article 3 rights were violated.\textsuperscript{298} The ECtHR did not specify whether the treatment was “inhuman” or “degrading,”\textsuperscript{299} but instead analyzed the specific events that led Ms. R.R. to feel “humiliated.”\textsuperscript{300} Some of the facts that the Court considered in this analysis included the applicant’s feelings: she felt greatly vulnerable and “suffered acute anguish through having to think about how she and her family would be able to ensure the child’s welfare, happiness and appropriate long-term medical care.”\textsuperscript{301} The ECtHR also noted the amount of time that passed between her first ultrasound and the suspicion about the condition (six weeks), and the fact that no

\textsuperscript{293} Id. ¶ 203.
\textsuperscript{294} See supra Part III.B for a discussion of previous ECtHR case law under Article 3.
\textsuperscript{295} The Court’s assessment and analysis in this section is only 15 paragraphs long, in contrast with the Court’s assessment and analysis of Article 8, which is 35 paragraphs long. See R.R., App No. 27617/04, Eur. Ct. H.R., ¶¶ 148-162, 179-214.
\textsuperscript{296} Id. ¶ 148.
\textsuperscript{297} Id. ¶ 151.
\textsuperscript{298} Id. ¶ 161.
\textsuperscript{299} European Convention, supra note 10, at 6. Most commentary divides the provision of Article 3 into these two categories.
\textsuperscript{300} R.R., App No. 27617/04, Eur. Ct. H.R., ¶ 160.
\textsuperscript{301} Id. ¶ 159.
doctor noticed this time lapse. The ECtHR further found that the fact that “the diagnostic services which she requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them” has worsened Ms. R.R.’s suffering.

3. Article 13

The ECtHR concluded its analysis by briefly addressing Ms. R.R.’s claim that her rights under Article 13 were violated. She argued that her rights were breached by a lack of ability to challenge “the advisability of and access to prenatal examinations in a timely manner.” The Court responded to her claim by noting that its Article 8 provisions had already covered her complaints in this regard. Thus, the ECtHR concluded that this case presented no distinct Article 13 issue.

C. Separate Opinions

After deciding that Articles 3 and 8 applied to Ms. R.R.’s claim and dismissing the Article 13 claim, all seven judges agreed with the decision of damages. Two judges nevertheless wrote separately to clarify their beliefs as to which Articles of the Convention had been violated. Although he signed on to the majority’s finding that Article 3 was violated, Judge de Gaetano disagreed with the application of Article 8. He wrote

302 Id.
303 Id. ¶ 160.
304 Id. ¶¶ 215-18.
305 Id. ¶ 215.
307 Following this portion of the opinion, the Court also addressed the issue of damages. Id. ¶¶ 220-25. Ms. R.R. claimed damages for her costs and expenses incurred before the Polish court and before the ECtHR. Id. ¶ 226. These damages included lawyers’ fees, travel costs to meet with various advocates, and telephone bills. See id. ¶¶ 226-37. The Court decided to award Ms. R.R. damages of EUR 15,000 to cover the expenses that she could properly document, since they seemed to be “reasonable as to quantum.” Id. ¶ 233.
308 Id. ¶ 5 (holding).
309 Id. at ¶ 1 (de Gaetano, J., partially dissenting).
310 Judge de Gaetano represents Malta, a country with one of the most conservative abortion policies in Europe. See U.N. POPULATION DIV. DEPT. OF ECON. AND SOC. AFFAIRS, Abortion Policies: A Global Review, at 125-26 (2002) [hereinafter U.N.,
that the analysis of Article 8 only makes it more difficult for the court "in regard to the issue of the determination of the beginning of life and the unborn child’s protection." Citing Brüggemann, de Gaetano argued that the court has clearly concluded that pregnancy does not pertain only to privacy, but also to the unborn child’s life and interests. Therefore, he believed the ECtHR should have decided the case under Article 6, not Article 8.

Judge Bratza, representing the United Kingdom, also wrote a separate opinion. He agreed that the ECtHR properly applied Article 8 but disagreed as to its application of Article 3. The majority’s opinion about Article 3, he wrote, “extend[s] the scope of the Article too far.” Acknowledging that Ms. R.R. was not treated well, he nevertheless thought that she was not subjected to the minimum level of severity necessary to qualify for an Article 3 violation.

D. Analysis of the Court Decision

Despite the recent decision of A., B. & C. v. Ireland, where the ECtHR seemingly foreclosed conversation about the right to abortion and left determinations about its legality to the individual

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314 Id. ¶ 4.
315 Composition of the Court, supra note 310.
317 Id. annex ¶ 5.
318 Id. Judge Bratza did not, however, specify whether reproductive rights issues could ever qualify under Article 3. See id.
states, *R.R. v. Poland* demonstrates that the ECtHR may be willing to reassess its abortion policy. The ECtHR’s discussion of Article 8 mentions the right to abortion along with the right to access information,\(^{319}\) and the court notes the growing number of states that recognize abortion as a fundamental right.\(^{320}\) Moreover, the way that the ECtHR used Article 3 sets this case apart from other decisions on reproductive rights.\(^{321}\) As the ECtHR considers other abortion-related cases, abortion advocates should use Article 3 as a backdrop for their fight in securing women’s reproductive freedom internationally, as discussed in Section 2 below.

1. **Article 8: mentioning the consensus model**

In its discussion of Article 8, the ECtHR did not deviate significantly from recent case law on abortion. The ECtHR initially qualified its Article 8 analysis by stating that it would look only at how the law was applied, instead of considering the validity of the underlying law. Thus, the court chose a more conservative approach with regard to abortion law, consistent with its methodology in *A., B. and C. v. Ireland*.\(^{322}\) The ECtHR also implied that it would not decide countries’ rights to provide abortions solely in such extreme circumstances. Instead, the ECtHR focused specifically on the right to better medical information.\(^{323}\)

\(^{319}\) *Id.* ¶ 199 (“The Court emphasises the relevance of the information which the applicant sought to obtain by way of genetic testing to the decision concerning continuation of her pregnancy.”).

\(^{320}\) *Id.* ¶ 186 (“there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion.”); *see generally Europe’s Abortion Rules*, BBC (Feb. 12, 2007), http://news.bbc.co.uk/2/hi/6235557.stm (detailing domestic abortion law throughout Europe).

\(^{321}\) See supra part III.B for a discussion of previous cases under Article 3.

\(^{322}\) See Ronchi, supra note 198, at 365 (explaining the Court’s analysis in *A., B. and C. v. Ireland*).

\(^{323}\) See *R.R.*, App. No. 27617/04, Eur. Ct. H.R., ¶¶ 197-199 (noting that “[t]he right of access to such information falling within the ambit of the notion of private life can be said to comprise, in the Court’s view, on the one hand, a right to obtain available information on one’s condition” and further detailing this right to access medical information); *see generally* Guest Blogger, *R.R. v. Poland: Health Rights under Art. 8 ECHR*, STRASBOURG OBSERVERS (June 2, 2011), http://strasbourgobservers.com/2011/06/02/r-r-v-poland-health-rights-under-art-8-echr/ (predicting how this decision
Despite its seemingly limited holding, the ECtHR implicitly did more than address access to information in *R.R. v. Poland*. While it did not address the right to abortion specifically, the Court repeatedly referred to the applicant’s right to terminate a pregnancy.\(^{324}\) If the ECtHR had wanted to confine its analysis only to the issue of access to information, it could have left out the language on abortion altogether. Instead, the decision includes statements such as “the foetus’ condition and health constitute an element of the pregnant woman’s health” and “the effective exercise of this right is often decisive for the possibility of exercising personal autonomy.”\(^{325}\) By implying such an element of choice in its analysis, it used language that pro-choice advocates may use in trying to garner more reproductive rights for women; such language also conveys that this case is not only about medical choice but also about the right to choose to have an abortion.

In its opinion, the ECtHR also mentioned that most states in Europe allow elective abortions in their domestic laws.\(^{326}\) Since the ECtHR uses a consensus model of decision-making,\(^{327}\) noting such opinions occur in a “substantial majority” of member states implies that the ECtHR might take a different stance on abortion in the future.\(^{328}\) Again, if the ECtHR wanted to stifle pro-choice advocates from bringing more pro-choice claims in the future, the court could have left this language out altogether or noted that pro-life policies are acceptable within its member states. Choosing to use this language instead implies that the ECtHR might take a more liberal, pro-choice stance in its future analysis.\(^{329}\)

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\(^{324}\) See generally Europe’s Abortion Rules, supra note 320.

\(^{325}\) See supra text accompanying notes 114-116.

\(^{326}\) See generally Europe’s Abortion Rules, supra note 320.


\(^{329}\) Such a liberal stance would be consistent with the role that the European Court
2. Article 3: details about how Ms. R.R. suffered anguish

Unlike previous case law on reproductive rights, the ECtHR also used Article 3 to grant the applicant’s claims. The Court did not indicate whether its decision fell within “inhuman” or “degrading” treatment, though it did note the difference between the two categories. The ECtHR also did not specifically indicate its deviation from previous case law, but writers have noted that the Court’s use of Article 3 is unique. Other Article 3 cases have involved prisoners’ treatment or literal torture situations. Here, the ECtHR almost equated the waiting period for genetic testing and information about fetal deformity with torture.

This unique analysis gives other women the opportunity to argue that they have been essentially “tortured” as they wait for health care decisions. As abortion laws change in various nations and public consensus builds for women’s rights, the opinion might motivate women to argue that they have suffered “anguish” as they have waited to see if the laws will change. In countries where women must wait a specific period of time before they may obtain an abortion, they might also argue that waiting causes them to suffer. These women could cite the portion of the opinion where the Court mentions that “no regard was had to the temporal aspect of the applicant’s predicament.”

Some interest groups have already picked up on this strategy in
avidating for an expanded definition of torture. One Huffington Post article indicates that even though “we rarely hear about ill-treatment by health providers as part of more routine medical practice[,] . . . [t]hat doesn’t mean it’s not happening.” The article cites various reports by Human Rights Watch that highlight such inhuman or degrading health care treatment around the world, particularly in Egypt, Libya, Jordan, Iraq, China, Cambodia, Nicaragua, and India. In addition, in 2011, the organization Stop Torture in Health Care was formed to draw attention to the fact that cruel and inhuman treatment may be done “in the name of health care.” If they have not already, these interest groups should note the ECtHR’s willingness to address the intersection of torture and health care decisions and encourage applicants to use Article 3 as a basis when filing suit for reproductive rights’ issues.

E. Problems with an Article 3 strategy

Using an “Article 3 strategy” may help interest groups push for pro-choice policies throughout Europe. Even if the ECtHR grants such a right, however, domestic laws may not automatically adapt to the specifications of the Court. Although all member states have ratified the Convention, the aftermath of previous Court opinions show how difficult change can be for member states. For example, after the Hirst v. United Kingdom decision regarding prisoners’ voting rights, the United Kingdom failed to implemented reforms consistent with the recommendations of the Court. Even seven years later, after revisiting prisoners’ rights

338 Id.
in Ireland, scholars believe that the United Kingdom is still procrastinating. Even if interest groups follow an “Article 3 strategy,” and the ECtHR adopts their recommendations, some countries may not be willing to change their domestic laws.

A recent report bolsters this opinion by explaining that the ECtHR overreaches in forming domestic law. The report, published by the right-leaning think tank Policy Exchange, suggests that Britain should seriously consider withdrawing from the European Court of Human Rights, or at least work to find a better solution for how British domestic law could interact with the international treaty. Conservative members of Parliament in Britain and recently-elected Tories supported this attempt to “reassert Britain’s sovereignty” over international treaty-creating law, as did other members of the international community. While such opinions seem to be coming out of Britain alone, they nevertheless could influence other states like Ireland and Poland, two of the countries with strict abortion laws. Such influence might hinder progress for pro-choice advocates, even if the ECtHR is willing to conclude that member states should allow elective abortion.

Though interest groups have already picked up on the strategy of linking torture to health care decision, there are other difficulties with such a strategy. Although the ECtHR’s Article 3 analysis seems to set precedent for future cases, the partially dissenting opinion of Judge Nicholas Bratza seems more important, given Bratza’s current leadership position. After this opinion came out, Nicholas Bratza was elected the President of the

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343 Id.


345 Id.


347 See supra Parts I.B-C for more detailed information about Irish and Polish abortion law.
European Court of Human Rights. As the sole judge who disagreed with the idea of treating this case under Article 3, it is hard to imagine that he will permit case law on abortion to shift in the direction of Article 3 alone.

It is also possible that activists who protest torture under Article 3 will not agree with such a strategy from the pro-choice lobby. For example, a 2009 article in the Minnesota Christian Examiner suggests that some who oppose torture will remain true to their pro-life views. Although the article does not specifically reference international law, such a belief system is likely reflected throughout the world and particularly in European countries with strong Catholic traditions. The strategy might bring more attention to how much anguish people suffer when considering abortion, but it might also lead to even more negative publicity from the Catholic pro-life lobby.

F. Implications for Future Cases

Despite the fact that the ECtHR did not grant the universal right to an abortion in A., B. and C. v. Ireland, R.R. v. Poland leaves room for abortion advocates to latch on to recent ECtHR analysis in trying to advance reproductive rights policy. A recent case related to Polish abortion law shows that advocates have done just that.


349 European Convention, supra note 10, at 6.


351 News stories from 2011 also indicate that Polish Catholics are not retreating from a pro-life stance. PRO, a pro-life lobby, attempted to make Polish law even less permissive for women seeking abortions by taking out the exceptions to the law. See Steven Ertelt, Poland Casts First Vote for Bill Banning All Abortions (July 1, 2011), http://www.lifenews.com/2011/07/01/poland-casts-first-vote-for-bill-banning-all-abortions/; see also Dave Bohon, Polish Abortion Ban Defeated; Pro-Life Leaders Optimistic (Sept. 13, 2011), http://thenewamerican.com/world-news/europe/item/8837-polish-abortion-ban-defeated-pro-life-leaders-optimistic (noting that the amendment failed last summer but that pro-life activists are still advancing a strategy to make the abortion law more restrictive).
The case, *P. and S. v. Poland*,\(^{352}\) was submitted by a fourteen year old, Ms. P. and her mother, Ms. S.. The facts state that the young woman had been raped, resulting in pregnancy.\(^{353}\) Like Ms. R.R., Ms. P. requested an abortion in multiple hospitals in different cities throughout Poland.\(^{354}\)

In this case, however, Ms. P. had a legal right to an abortion under Polish law allowing for abortion because there were “strong grounds for believing that the pregnancy was the result of a criminal act, certified by a prosecutor,”\(^{355}\) and Ms. P. had received a certificate confirming this decision from the prosecutor.\(^{356}\) Unlike Ms. R.R., there were a number of articles published in the national press about Ms. P., and she was subject to public harassment from people outside the final hospital she visited, which refused to give her an abortion because “a lot of pressure had been put on the hospital with a view to discouraging it from performing the abortion”\(^{357}\) and “the hospital was receiving numerous e-mails from persons criticising the applicants for having decided to allow the first applicant to have an abortion.”\(^{358}\)

As this comment indicates, most abortion cases focus primarily on Articles 2 and 8 of the Convention, two Articles which Ms. P. and Ms. S. used in their argument. However, in this case, the applicants also brought a claim under Article 3.\(^{359}\) The Court held in favor of the applicant that the Convention had been violated.\(^{360}\)

In the holding that Article 3 had been violated, however, there were four key facts emphasized by the ECtHR. First, the decision


\(^{353}\) *Id.* ¶ 5-8.

\(^{354}\) *Id.* ¶¶ 11-28.

\(^{355}\) *Id.* ¶ 100.

\(^{356}\) *Id.* ¶ 10.

\(^{357}\) *Id.* ¶ 27.

\(^{358}\) *Id.* ¶¶ 27.


\(^{360}\) Press Release, European Court of Human Rights, Teenage Girl Who Was Raped Should Have Been Given Unhindered Access to Abortion (Oct. 2012), http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-4140612-4882633 (click on hyperlink under word “here”) (last visited Nov. 13, 2012). The Court’s judgment is not final until three months after the initial judgment has been released. *Id.*
hinged on the very young age of the applicant – she was only fourteen years old. The second, the ECtHR noted that the domestic law permitted an abortion under these circumstances, as the applicant had received a certificate from the prosecutor. The third critical fact involved Ms. P’s injuries: “the medical certificate issued immediately afterwards confirmed bruises on her body and concluded that physical force had been used to overcome her resistance.” Finally, the applicant was harassed by members of the general public, instead of protected by the public hospital that she had chosen.

None of the critical facts from *P. and S. v. Poland* were at play in *R.R. v. Poland*, so, in the future, it remains to be seen whether the ECtHR will hold that there have been violations of Article 3 in cases with less egregious facts, such as where the applicant is older or has not been raped. Nevertheless, *R.R. v. Poland* indicates that the ECtHR is still considering expanding the scope of women’s rights throughout Europe, even if not through a blanket acceptance of abortion.

Despite its mention of consensus-building throughout Europe, recent ECtHR case law and the continued connection to pro-life groups indicate that an international consensus from the ECtHR will take some time, and pro-choice advocates may have to wait. The battle is not worth surrendering, however, as the ECtHR has decided to expand its case law with the use of Article 3 in *R.R. v. Poland* and *P. and S. v. Poland*, actions that indicate that a more liberal stance on abortion policy in Europe may be on its way.

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361 *P. and S.*, App No. 57375/08, Eur. Ct. H.R., ¶ 161 (stating that “[f]or the Court’s assessment of this complaint it is of a cardinal importance that the first applicant was at the material time only fourteen years old.”). The Court cannot overlook the fact that the medical certificate issued immediately afterwards confirmed bruises on her body and concluded that physical force had been used to overcome her resistance.

362 *Id.* (“The certificate issued by the prosecutor confirmed that her pregnancy had resulted from unlawful intercourse.”)

363 *Id.*

364 *Id.* ¶ 164 (“The authorities not only failed to provide protection to her, having regard to her young age and vulnerability, but further compounded the situation.”)

365 But see Chad M. Gerson, *Development: Toward an International Standard of Abortion Rights: Two Obstacles*, 5 CHI. J. INT’L L. 753, 761 (suggesting the United Nations quickly adopt a uniform strategy, as “avoiding resolution will create greater problems in the future”).

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