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Constitutionalizing Fetal Rights: A Salutary Tale from Ireland

Fiona de Londras

Birmingham Law School, f.delondras@bham.ac.uk

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CONSTITUTIONALIZING FETAL RIGHTS:
A SALUTARY TALE FROM IRELAND

Fiona de Londras

In 1983, Ireland became the first country in the world to constitutionalize fetal rights. The 8th Amendment to the Constitution, passed by a referendum of the People, resulted in constitutional protection for “the right to life of the unborn,” which was deemed “equal” to the right to life of the “mother.” Since then, enshrining fetal rights in constitutions and in legislation has emerged as a key part of anti-abortion campaigning. This Article traces the constitutionalization of fetal rights in Ireland and its implications for law, politics, and women. In so doing, it provides a salutary tale of such an approach. More than thirty years after the 8th Amendment, it has become clear that Ireland now has an abortion law regime that is essentially “unliveable.” Not only that, but it has a body of jurisprudence so deeply determined by a constitutionalized fetal-rights orientation that law, politics, and medical practice are deeply impacted and strikingly constrained. This is notwithstanding the clear hardship women in Ireland experience as a result of constitutionalized fetal rights and the resultant almost-total prohibition on accessing abortion in Ireland. This Article argues that, wherever one stands on the question of whether legal abortion ought to be broadly available in a particular jurisdiction, constitutionalizing fetal rights leaves no meaningful space for judgment at either political or personal levels. Furthermore, constitutionalizing fetal rights can have unforeseen implications across jurisprudence and medical practice, creating a situation in which there is essentially no space for more liberal interpretations that respect women’s reproductive autonomy. While this may be desirable from an ideological perspective for those who hold a firm anti-abortion position, it is distinctively problematic for women and for politics.

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I. INTRODUCTION

In 1983, Ireland became the first country in the world to constitutionalize “fetal rights.”¹ The 8th Amendment to the Irish Constitution, passed by a referendum of the People, resulted in constitutional protection for “the right to life of the unborn,” which was deemed “equal” to the right to life of the “mother.”² Since then, enshrining fetal rights has emerged as a key part of anti-abortion campaigning across the globe. In this respect, attempts to create fetal personhood laws in parts of the United States and the attempt to constitutionalize fetal rights in Wisconsin in 2013 are notable examples.

1. Notably, the 1978 American Convention on Human Rights provides in Art. 4.1 that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.” American Convention of Human Rights, Nov. 22, 1969, 9 I.L.M. 673, 676. However, in 1983, Ireland was the first country to provide constitutional protection to the right to life of the fetus.

2. IR. CONST., 1937, art. 40.3.3.

The constitutions of Hungary,³ the Dominican Republic,⁴ Ecuador,⁵ El Salvador,⁶ Guatemala,⁷ Madagascar,⁸ Paraguay,⁹ and the Philippines¹⁰ now include fetal rights. The new Kenyan Constitution declares, “The life of a person begins at conception,”¹¹ although abortion is not fully prohibited in that jurisdiction.¹² The constitutions of Somalia and Swaziland make express reference to abortion, permitting it only in limited circumstances.¹³ All

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3. THE FUNDAMENTAL LAW OF HUNGARY [Constitution] Apr. 25, 2011, Freedom and Responsibility, art. II (“the life of the foetus shall be protected from the moment of conception”).
 4. CONSTITUCION DE LA REPUBLICA DOMINICA Jan. 26, 2010, title II, ch. I, § I, art. 37 (Dom. Rep.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Luis Francisco Valle Velasco trans., 2011) (“The right to life is inviolable from conception to death.”).
 5. ORGANO DEL GOBIERNO DEL ECUADOR [Constitution] Oct. 20, 2008, title II, ch. 3, § 5, art. 45, *translated in* CONSTITUTION OF THE REPUBLIC OF ECUADOR (Ministerio de Relaciones Ecuador 2008) (“The State shall recognize and guarantee life, including care and protection from the time of conception”).
 6. CONSTITUCION DE LA REPUBLICA DE EL SALVADOR 1983, title 1, art. 1 (“[The State] recognizes as a human person every human being since the moment of conception”), *translated in* CONSTITUTE PROJECT (Marcia W. Coward et al. trans., Oxford Univ. Press 2015), *available at* https://www.constituteproject.org/constitution/EL_Salvador_2003?lang=en.
 7. CONSTITUCION POLITICA DE LA REPUBLICA DE GUATEMALA [Constitution] June 3, 1985; revised 1993, title II, ch. I, art. 3 (Guat.), *translated in* CONSTITUTE PROJECT (Luis Francisco Valle Velasco trans., William S. Hein & Co. 2012), *available at* https://www.constituteproject.org/constitution/Guatemala_1993?lang=en (“The State guarantees and protects the human life from its conception . . .”).
 8. CONSTITUTION DE LA IVEME REPUBLIQUE [Constitution] November 17, 2010, title II, sub-title II, art. 19 (Madag.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., Maria del Carmen Gress trans., 2010) (protecting “the right to the protection of health” for all persons “from their conception . . .”).
 9. CONSTITUCION DE LA REPUBLICA DEL PARAGUAY [Constitution] June 22, 1992, pt. I, title II, ch. I, sec. I, art. 4 (Para.), *translated in* CONSTITUTE PROJECT (Maria del Carmen Gress trans., William S. Hein & Co. 2012), *available at* https://www.constituteproject.org/constitution/Paraguay_2011?lang=en (“The right to life is inherent to the human being. Life is protected, in general, after the time of conception”).
 10. CONST. (1987), art. II, sec. 12 (Phil.) (“The State . . . shall equally protect the life of the mother and the life of the unborn from conception”).
 11. CONSTITUTION, art. 26, sec. 2 (2010) (Kenya).
 12. *Id.* at art. 26, sec. 4 provides: “[a]bortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”
 13. DASTUURKA JAMHUURLYADDA FEDERAALKA SOOMAALIYA [Constitution] June 12, 2012, art. 15, sec. 5 (Som.) (“Abortion is contrary to Shari’ah and is prohibited except in cases of necessity, especially to save the life of the mother.”); CONSTITUTION OF THE KINGDOM OF SWAZILAND July 26, 2005, sec. 15(5) (“Abortion is unlawful but may be allowed on medical and therapeutic grounds . . . where the pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female . . .” or where otherwise provided for by law).

of this is notwithstanding the fact that, in many jurisdictions, fetuses are not considered to have any legal personhood until they are born.¹⁴

This Article traces the constitutionalization of fetal rights in Ireland and its implications for law, politics, and women. In so doing, it provides a salutary tale of such an approach. More than thirty years after the passage of the 8th Amendment, it is clear that Ireland now has an abortion law regime that is essentially “unliveable:” unbearable, unsustainable, and unsuited to the realities of women’s lives. Not only that, but it has a body of jurisprudence so deeply determined by constitutionalized fetal rights that law, politics, and medical practice are deeply impacted and strikingly constrained.¹⁵ Without constitutional change, reform to liberalize abortion law is virtually impossible; politicians struggle to propose imaginative approaches to law reform that might be permitted under the current constitutional law. Even if this were not the case, the constitutional position is so restrictive that meaningful law reform is likely impossible. Furthermore, the constitutional *status quo* means that doctors are constrained in their capacity to do what is considered medically optimal for their patients and instead confine themselves to what they consider to be constitutionally permissible. All of this is notwithstanding the clear hardship women in Ireland experience as a result of constitutionalized fetal rights and the resultant almost-total prohibition on accessing abortion.

This Article argues that constitutionalizing fetal rights in Ireland has left no meaningful space for personal or political judgment about the appropriate ways to make abortion available to women and that, regardless of where one stands on the availability of legal abortion, this is an undesirable outcome. In a system of constitutionalized fetal rights, it is practically im-

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14. See, e.g., *Paton v. British Pregnancy Advisory Serv. Trs.*, [1979] Q.B. 276 (Ir.) (holding that a husband has no enforceable right to prevent his wife from getting an abortion); *Roe v. Wade*, 410 U.S. 113, 157-62 (1973) (holding, in part, that laws banning abortion during the first trimester are unconstitutional); *Christian Lawyers’ Assoc. v. Minister for Health* 1998 (11) BCLR (CC) at 1434 H (S. Afr.) (holding that the Constitution of South Africa does not provide any express or implicit protection for fetal life); *Tremblay v. Daigle*, [1989] S.C.R. 530 (Can.) (holding that a fetus has no legal recognition as a “person” in Canadian law).
15. American scholarship has long foreseen such developments in the passage of various legal provisions throughout the U.S. with “fetal rights” underpinnings (e.g., wrongful death statutes applicable to fetal death). See, e.g., Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 *YALE L.J.* 599 (1986) (arguing that expanding “fetal rights” has far-reaching consequences for women and sets up an adversarial relationship between the fetus and the woman who bears it); Janet Gallagher, *Prenatal Invasions and Interventions: What’s Wrong with Fetal Rights*, 10 *HARV. WOMEN’S L.J.* 9 (1987) (arguing that “fetal rights” results in the loss or restriction of a range of constitutional rights for women).

possible to make successful arguments for a more liberal abortion law. Enshrining a fetal right to life in the Constitution creates a correlative responsibility on the part of the State to protect and vindicate that right; a responsibility that can only be fulfilled through the instrumentalization of the pregnant woman's body. When constitutional rights are restrictively interpreted, as is the case in Ireland, women's constitutional rights are often subordinated in favor of the sole right of the unborn to life or, more accurately, the right to be born.¹⁶ Rather than working to empower pregnant women to make informed reproductive decisions, the State (through government, courts, and a nationalized health service) has marshaled its responsive capacities to protect the fetus's bare right to be born without appropriate regard to its responsibility towards women as constitutional rights bearers and equal citizens.¹⁷ While this may be desirable from an ideological perspective for those who hold a firm anti-abortion position, it is distinctly problematic for women and for politics.

This Article first outlines the current law on abortion in Ireland and then traces the constitutionalization of fetal rights by reference to the various constitutional referenda that have been held on the issue. The implications of that constitutionalization are then considered in respect of the development through litigation of a corpus of fetal rights jurisprudence, the resultant fetocentricity of maternal care in Ireland, and the everyday hardship women in Ireland face due to the status quo. Finally, the Article argues that the current momentum for constitutional change in Ireland should lead to the proposal of an Amendment to the People that would effectively deconstitutionalize fetal rights, positively recognize women's autonomy, and create the space for political judgment to determine the availability of abortion in Ireland.

II. ABORTION IN IRELAND: THE CURRENT LEGAL REGIME

Irish law provides for extremely limited access to abortion. Under Irish law, abortion is legally available only where it is required to save the life of a pregnant woman and, even then, only if the fetus is deemed not yet "viable."¹⁸ Where viability of the fetus is established as a matter of medical

16. See *Baby O. v. Minister for Justice, Equality and Law Reform*, [2002] IESC 44 (Ir.).

17. On the nature and form of an appropriately responsive state, see generally Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008-09) and Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State* 60 EMORY L.J. 251 (2010).

18. IR. CONST., 1937, art. 40.3.3; Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) (Ir.); DEP'T OF HEALTH, IMPLEMENTATION OF THE PROTECTION OF LIFE DURING PREGNANCY ACT 2013: GUIDANCE DOCUMENT FOR HEALTH PROFESSIONALS (2014), available at <http://health.gov.ie/blog/publications/implementation>

judgment, pregnancies can be terminated by an intervention such as early delivery, but not by abortion.¹⁹ The current law takes the form of Article 40.3.3 of the Constitution (the 8th Amendment) and the Protection of Life During Pregnancy Act 2013. Article 40.3.3 provides the constitutional framework for the law regulating abortion in Ireland:

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 provision permits abortion only in very limited circumstances. According to the case *Attorney General v. X*, an abortion is permissible where there is a “real and substantial risk to the life” of the pregnant woman, and that risk can only be averted by termination of the pregnancy by means of abortion.²⁰ Whether that is an absolute statement of the limitations of abortion under the Constitution remains a matter of contention. While the Government takes a conservative approach to the interpretation of Article 40.3.3, considering the *X Case* to absolutely delimit the availability of abortion, scholars and activists have argued that the State’s obligation to protect fetal life extends only “as far as practicable,” so that abortion would also be permissible where there is a fatal fetal abnormality.²¹ While debate as to the permissibility of abortion under such circumstances continues, it is clear that a woman whose pregnancy emerges from rape or incest cannot access an abortion under Irish law unless there is also a real and substantial risk to her life, notwithstanding her right to access abortion under international human rights law in such circumstances.²²

tion-of-the-protection-of-life-during-pregnancy-act-2013-guidance-document-for-health-professionals/ [hereinafter PROTECTION OF LIFE].

19. Doctors in Ireland are under a statutory obligation to “preserve unborn human life as far as practicable.” Thus, where a fetus is viable and the life of the pregnant woman is at real and substantial risk, the pregnancy will be terminated by means of early delivery rather than abortion. Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) §§ 7(1)(a)(ii), 8(1)(a)(ii), 9(1)(a)(ii) (Ir.). See also PROTECTION OF LIFE, *supra* note 18; Fiona de Londras & Laura Graham, *Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate*, 3 IRISH J. LEGAL STUD. 54, 61-62 (2013) (explaining that in Ireland, the term “termination of pregnancy” is used to refer to both abortion and early delivery).
20. *Att’y Gen. v. X*, [1992] I.R. 1 (Ir.), 53-54.
21. See, e.g., *Ruth Fletcher’s Submission to the Oireachtas Joint Committee on Health*, HUMAN RIGHTS IN IRELAND (May 22, 2013), <http://humanrights.ie/criminal-justice/guestpost-ruth-fletchers-submission-to-the-oireachtas-abortion-hearings/>.
22. See Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 249 (2008) (outlining recent

Although Article 40.3.3 was introduced into the Constitution in 1983, there was no statutory provision regulating access to abortion until 2013. Thus, while statutory law criminalized abortion outside of the limited constitutional right discussed above,²³ access to constitutionally permissible abortion was left purely to practice and the medical judgment exercised by doctors, who themselves operated under the “chilling effect” of the criminal law.²⁴ Following the European Court of Human Rights’ decision in *A, B & C v. Ireland*²⁵ and the death of Savita Halappanavar as a result of an infection during a protracted miscarriage in 2012,²⁶ the Protection of Life During Pregnancy Act 2013 was introduced. This Act put extensive barriers in place that affected women’s ability to access abortion, apparently motivated by the belief that the constitutional right to life of the unborn required both criminalization of abortion *and* the imposition of a process that would effectively ensure no woman could “trick” the system into providing her with a constitutionally impermissible abortion. This reflects the deeply limiting effect Article 40.3.3 has on legislative choice. Under the 2013 Act abortion is available in three circumstances only:

1. Two medical practitioners (one of whom must be an obstetrician) have certified that there is a real and substantial risk to the life of a pregnant woman that emanates from a physical illness and which can only be averted by termination of the pregnancy²⁷ and where the fetus is not yet viable. This certification must be done in “good faith,” which is understood as cognizance of the need to preserve fetal life to the extent possible;²⁸ or

developments in international human rights law vis-à-vis women’s ability to access abortion, including a developing right to access abortion in cases of incest, rape and “foetal impairment”); Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014) (recommending that Ireland “[r]evise its legislation on abortion, including its Constitution, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality”).

23. Offences Against the Person Act, 1861, 24 & 25 Vict. (Eng.).

24. *A, B & C v. Ireland*, 53 Eur. Ct. H.R. at 70 (2011) (“[T]he Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act.”).

25. *A, B & C v. Ireland*, 53 Eur. Ct. H.R. at 70 (2011).

26. See Kitty Holland, *Woman Denied a Termination Dies in Hospital*, THE IRISH TIMES (Nov. 14, 2012), <http://www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412>.

27. Protection of Life During Pregnancy Act (Act. No. 35/2013) § 7 (Ir.).

28. *Id.*

2. There is an emergency situation in which a single doctor has certified that there is a real and substantial risk to the life of the pregnant woman that emanates from a physical illness and which can only be averted by termination of the pregnancy,²⁹ and the fetus is not yet viable. This certification must be done in “good faith,” which is understood as cognizance of the need to preserve fetal life to the extent possible;³⁰ or
3. Three doctors (one of whom must be an obstetrician and one of whom must be a psychiatrist) have certified that there is a real and substantial risk to the life of the pregnant woman that emanates from a risk of suicide and which can only be averted by termination of the pregnancy,³¹ and the fetus is not yet viable. This certification must be done in “good faith,” which is understood as cognizance of the need to preserve fetal life to the extent possible.³²

Rather than being expressly outlined in the legislation, the viability element of these tests is implicit and emanates from the constitutional provision that states that “the unborn” and “the mother” have an “equal” right to life.³³ Outside of these three strictly regulated circumstances abortion constitutes the criminal offence of “destruction of unborn human life” under § 22 of the Protection of Life During Pregnancy Act 2013. Section 22 provides:

- (1) It shall be an offence to intentionally destroy unborn human life.
- (2) A person who is guilty of an offence under this section shall be liable on indictment to a fine or imprisonment for a term not exceeding 14 years, or both.
- (3) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.

29. *Id.* § 8.

30. *Id.*

31. *Id.* § 9.

32. *Id.*

33. IR. CONST., 1937, art. 40.3.3; see Fiona de Londras, *Suicide and Abortion: Analysing the Legislative Options in Ireland*, 19 MEDICO-LEGAL J. IR. 4, 5 (2013) (outlining the implicit viability threshold); de Londras and Graham, *supra* note 19, at 60-62 (arguing that there is an implicit viability threshold in Irish abortion law); see also PROTECTION OF LIFE, *supra* note 18, § 1.

Importantly, under § 22, criminalization extends not only to doctors but also to women who purchase abortifacients online and take them in the privacy of their own homes, reportedly a common approach to terminating unwanted pregnancy in Ireland.³⁴ All of this constitutes one of the strictest abortion regimes in Europe: considerations such as rape, incest, risk to health (mental or physical), economic circumstances, even fatal fetal abnormalities that will result either in death *in utero* or a short and painful life for the child if the pregnancy is brought to term, are quite simply irrelevant. Abortion is permitted *only* where the pregnant woman will, almost certainly, die without it.

The criminal law regime does not end there. While women have a constitutional right to travel to access an abortion,³⁵ as well as information on abortion³⁶ (both secured in 1992³⁷), a medical professional based in Ireland cannot refer a pregnant woman to an overseas clinic or make an appointment for her in such a clinic. To do so is a criminal offence under the Regulation of Information (Availability of Services Outside the State for Termination of Pregnancies) Act 1995. Section 8(1) of that Act provides that “it shall not be lawful” for a medic or counselor (or their employees or agents) to “make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the state for the termination of pregnancies.”³⁸

Simply put, the logical extrapolation from the legal status quo is that only a woman who is dying and incapable of traveling has an abortion in Ireland. For everyone else, purchasing and using abortifacients illegally, travelling to another state in order to access an abortion, or simply resigning oneself to the pregnancy are the only options. Although there is no formal border between Northern Ireland (which is part of the United Kingdom) and the Republic of Ireland, the Abortion Act 1967 (the Westminster law) does not apply in Northern Ireland.³⁹ Thus, apart from in exceptional situa-

34. See Carol Ryan, *Abortion by Post*, THE IRISH TIMES, March 15, 2011, <http://www.irishtimes.com/news/health/abortion-by-post-1.573017>.

35. IR. CONST., 1937, art. 40.3.3 (“This subsection shall not limit freedom to travel between the State and another state”).

36. *Id.* (“This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.”).

37. *Id.* These provisions were inserted into to the Constitution by the 13th and 14th Amendments to the Constitution in December 1992. The 1992 referendum is discussed further below.

38. Regulation of Information (Availability of Services Outside the State for Termination of Pregnancies) Act (Act. No. 5/1995) § 8(1) (Ir.).

39. The Abortion Act 1967 was never adopted in Northern Ireland. Thus, abortion remains a criminal offence in that jurisdiction as per the Offences Against the Person Act 1861 and the Criminal Justice Act, 1945, 9 Geo. 6, § 25 (N. Ir). Following the

tions, abortion cannot usually be legally accessed anywhere on the island of Ireland.

III. THE CONSTITUTIONALIZATION OF FETAL RIGHTS IN IRELAND

The current law on abortion in Ireland, outlined above, is clearly framed by Article 40.3.3 of the Constitution. However, that provision is of a relatively recent provenance. When Ireland became a Free State in 1922 and introduced *Bunreacht na hÉireann* (the Constitution of Ireland) in 1937, abortion had been prohibited in Ireland, as in other parts of the United Kingdom, since the promulgation of the Offences Against the Person Act 1861, § 58. This law made it a serious offence—punishable by life imprisonment—to procure a miscarriage:

Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years,—or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.⁴⁰

Although 1937 marked the introduction of a new constitutional order in Ireland, this did not sever all links with the pre-existing laws or repeal the statute book *in toto*.⁴¹ Rather, laws that were not expressly repealed were

decision of *R. v. Bourne* [1939] 1 K.B. 687, 694 (N. Ir.), abortion is permitted in Northern Ireland where a “doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck,” which has been interpreted as permitting abortion where there is a risk that continuing the pregnancy would have a real and serious detrimental impact on the pregnant woman’s health, or where it is required to save the life of the pregnant woman. This position was reaffirmed in *In re. Application by the Soc’y for the Protection of Unborn Children for Judicial Review* [2009] N.I.Q.B. 92.

40. Offences Against the Person Act, 1861, 24 & 25 Vict., § 58 (Eng.).

41. Between the establishment of the Irish Free State and the introduction of the 1937 Constitution, a transitional constitution operated: the Constitution of the Irish Free

automatically carried over, although they were susceptible to being challenged for incompatibility with the Irish Constitution and, if found to be incompatible, struck down.⁴² Thus, from the emergence of the modern Irish State in 1937 until the Protection of Life During Pregnancy Act 2013, abortion was criminally prohibited in Ireland under the Offences Against the Person Act 1861.

The anchoring of the prohibition of abortion in a colonial-era law ought not to be taken to suggest that the criminalization of abortion was or is a colonial yoke from which the Irish polity has struggled to escape. The prohibition of abortion was happily carried into Irish law in 1937 and, indeed, not permitting abortion was closely bound up in the self-identifying Catholicism of the Irish State at the time.⁴³ The strength of that Catholi-

State. It did not include any reference to abortion, but did carry the pre-existing statute book over into the post-partition legal order. On the Free State constitutional order, see, e.g., LEO KOHN, *THE CONSTITUTION OF THE IRISH FREE STATE* (1932). On women's citizenship under the 1922 Constitution, see generally Caitríona Beaumont, *Women, Citizenship and Catholicism in the Irish Free State, 1922-1948*, 6 *WOMEN'S HIST. REV.* 563 (1997).

42. IR. CONST., 1937, art. 50.

43. Although Ireland is a constitutionally secular state, the Preamble to the Constitution (which has not been amended) indicates the religiosity of the state as founded. It provides:

“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Éire,
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
Do hereby adopt, enact, and give to ourselves this Constitution.”

IR. CONST., 1937, pmbl. In addition, the Constitution as originally introduced included the following provision as Article 44.1.2: “The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.” In Article 44.1.3 “[t]he State also recognize[d] the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.” Article 44 was removed in its entirety by the 5th Amendment to the Constitution, approved by referendum in December 1972. On religion and the Irish Constitution, see generally EOIN DALY, *RELIGION, LAW AND THE IRISH STATE: THE CONSTITUTIONAL FRAMEWORK IN CONTEXT* (2012).

cism stood in sharp contradistinction to the Protestantism of “England,” especially in a proximate post-colonial context in which to be Irish was, to a significant extent, to be “not English.”⁴⁴ As considered further in Part VII of this Article, the narrative of abortion as an “un-Irish” phenomenon has continued since then.

Although there are reports that women based in Ireland did access abortion within the jurisdiction,⁴⁵ as a general matter there was no strong organized movement to legalize abortion in the early days of the state. Until the mid- to late-1970s, women in Ireland had little autonomy. This is reflected in the fact that contraception was effectively unavailable, its importation was a criminal offence,⁴⁶ and women who got pregnant outside of marriage frequently found themselves detained in institutions, usually run by the Catholic Church, such as Magdalen Laundaries and “Mother and Baby Homes.”⁴⁷ Women’s autonomy was further restricted in economic and employment terms: there was no equal pay or other employment equality legislation, married women were required to leave state-funded employment,⁴⁸ and the Minister for Industry and Commerce had the power to limit the number of women employed in any industry.⁴⁹ In the area of

44. See Siobhán Mullally, *Debating Reproductive Rights in Ireland* 27 HUM. RTS. Q. 78, at 82-83 (2005); see generally Ruth Fletcher, *Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics*, 28 J.L. & SOC’Y 568 (2001) (arguing that a distinctively “pro-life” identity has been constructed as part of the post-colonial project of developing a distinctive Irishness).

45. See, e.g., Anne O’Connor, *Abortion: Myths and Realities from the Irish Folk Tradition*, in THE ABORTION PAPERS IRELAND 57 (Ailbhe Smyth ed., 1992).

46. This was criminalized under the Criminal Law Amendment Act 1935, which was struck down by the Supreme Court in *McGee v. Att’y Gen.*, [1974] I.R. 284. The availability of contraception was then regulated by the Health (Family Planning) Act 1979, (Act No. 20/1979), available at <http://www.irishstatutebook.ie/1979/en/act/pub/0020/> (discussed below).

47. On the confinement of “deviant” women in Ireland, see, e.g., Una Crowley and Rob Kitchin, *Producing ‘Decent Girls’: Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922-1937)* 15 GENDER, PLACE & CULTURE 355, 368-69 (2008); Brian Titley, *Magdalen Asylums and Moral Regulation in Ireland*, in SCHOOLS AS DANGEROUS PLACES: A HISTORICAL PERSPECTIVE 119 (Anthony Potts & Tom O’Donoghue eds., 2007); see generally James M. Smith, *The Politics of Sexual Knowledge: The Origins of Ireland’s Containment Culture and the Carrigan Report* (1931), 13 J. HIST. OF SEXUALITY 208 (2004).

48. The “marriage bar,” as it was called, only impacted a small number of women, but was part of a broader pattern of economic disenfranchisement of women. On this, see generally Caitríona Beaumont, *Gender, Citizenship and the State in Ireland, 1922-1990*, in IRELAND IN PROXIMITY: HISTORY, GENDER AND SPACE 94 (David Alderson et al. eds., 1999).

49. Conditions of Employment Act 1935, § 16, (Act No. 2/1936), available at <http://www.irishstatutebook.ie/eli/1936/act/2/enacted/en/html>.

family law, divorce was unavailable,⁵⁰ there was practically no provision available for women in the event of marital breakdown,⁵¹ and the Constitution reinforced highly gendered expectations of women as caregivers and mothers.⁵² In other words, Ireland was a deeply conservative country in which Catholicism held a steady grip. Furthermore, politics and the legal and medical professions were dominated by conservative men who were often heavily influenced by senior members of the Catholic Church.⁵³ In this context, political movements for women's empowerment and effective participation struggled to achieve traction in the public square.⁵⁴ Bearing all of this in mind, it hardly seems to have been necessary to campaign for the constitutionalization of fetal rights in order to prevent the possibility of decriminalizing abortion. The introduction of abortion in Ireland simply seemed like an impossibly remote prospect.

Notwithstanding that, domestic and international developments together resulted in the emergence of just such a movement.

A. *The 1983 Referendum and Introduction of the 8th Amendment*

In the early 1970s, the US Supreme Court interpreted the right to privacy as including a right to access abortion in *Roe v. Wade*;⁵⁵ a development that followed an assertion of the right to access contraception in *Griswold v. Connecticut*.⁵⁶ This immediately made anti-abortion campaigners in Ireland anxious that something similar to *Roe* might emerge in Ireland. In Ireland, the constitutional right to privacy had already been developed into a right to access contraception, which allowed the Supreme Court in *McGee v. Attorney General* to strike down the criminalization of importing contra-

50. Divorce was constitutionally prohibited until 1995. It is now permitted, subject to very strict requirements, by virtue of the Constitution. IR. CONST., 1937, art. 41.3.2; Family Law Act 1995 (Act No. 26/1995), available at <http://www.irishstatutebook.ie/1995/en/act/pub/0026/>.

51. See YVONNE GALLIGAN, *Family Law Reform*, in WOMEN AND POLITICS IN CONTEMPORARY IRELAND: FROM THE MARGINS TO THE MAINSTREAM 90 (1998).

52. See Siobhán Mullally, *Equality Guarantees in Irish Constitutional Law: The Myth of Constitutionalism and the "Neutral State"*, in IRELAND'S EVOLVING CONSTITUTION: 1937-1997 147, 162 (Tim Murphy & Patrick Twomey eds., 1998).

53. See generally DIARMUID FERRITER, OCCASIONS OF SIN: SEX AND SOCIETY IN MODERN IRELAND (2009) (outlining the impact of the Catholic Church on societal and sexual relations in Ireland).

54. See generally LINDA CONNOLLY, THE IRISH WOMEN'S MOVEMENT: FROM REVOLUTION TO DEVOLUTION (2003) (outlining the continuing, developing and iterative nature of the Irish women's movement and arguing that there has been continuous feminist activity from the late 19th century to the present day but that it received little political attention up to the 1970s).

55. 410 U.S. 113 (1973).

56. 381 U.S. 479 (1965).

ception.⁵⁷ In that case, Walsh J. expressly endorsed the view that the Constitution was a living, dynamic document that had to develop with society.⁵⁸ Following *McGee*, the Health (Family Planning) Act 1979 was introduced to allow doctors who did not hold a relevant conscientious objection to prescribe contraceptives for “*bona fide* family planning purposes” (generally interpreted as meaning “to married couples”).⁵⁹ The legalization of contraception in Ireland, together with *McGee* and the US Supreme Court’s decision in *Roe*, caused anxiety among anti-abortion campaigners.⁶⁰

At this time—in the early 1980s—Irish politics was enormously volatile. There had been numerous, fragile governments in a small number of years and the country was on the brink of economic and political collapse.⁶¹ It was in this context that the Pro-Life Amendment Campaign (PLAC) was founded, which quickly became “the most powerful campaigning group in recent Irish history.”⁶² This was the perfect situation in which to extract political promises. PLAC managed to secure a commitment for a constitutional referendum on abortion⁶³ following two years during which “[p]rofessional associations, cultural organizations, community associations, women’s groups and political parties were all forced to state their position [on abortion], amid an atmosphere of increasing tension and ‘moral black-

57. [1974] I.R. 284 (Ir.).

58. [1974] I.R. 284, 318-19 (Ir.).

59. “A registered medical practitioner may, for the purposes of this Act, give a prescription or authorisation for a contraceptive to a person if he is satisfied that the person is seeking the contraceptive, *bona fide*, for family planning purposes or for adequate medical reasons and in appropriate circumstances and, where a prescription or authorization of a registered medical practitioner in relation to a contraceptive bears an indication that it is given for the purposes of this Act, it shall be conclusively presumed, for the purposes of this section, that the person named in it is a person who, in the opinion of the practitioner formed at the time of the giving of the prescription or authorisation, sought the contraceptive for the purpose, *bona fide*, of family planning or for adequate medical reasons and in appropriate circumstances.” Health (Family Planning) Act 1979 (Act No. 20/1979), § 4(2), available at <http://www.irishstatutebook.ie/eli/1979/act/20/enacted/en/print>.

60. Ursula Barry, *Abortion in the Republic of Ireland*, 29 FEMINIST REV. 57, 58 (1988).

61. For a short overview, see THOMAS BARTLETT, IRELAND: A HISTORY 527-33 (2010).

62. Barry, *supra* note 60, at 58. On the founding and influence of PLAC, see Fintan O’Toole, *Why Ireland Became the Only Country in the World to Have a Constitutional Ban on Abortion*, Aug. 26 2014, THE IRISH TIMES, <http://www.irishtimes.com/news/politics/why-ireland-became-the-only-country-in-the-democratic-world-to-have-a-constitutional-ban-on-abortion-1.1907610>; see also TOM H HESKETH, THE SECOND PARTITIONING OF IRELAND: THE ABORTION REFERENDUM OF 1983 (1990) (on the emergence and power of PLAC).

63. Article 46 of the Constitution provides that amendment is only permissible by referendum and no popular initiative is permitted. Rather, a referendum must be initiated by government. IR. CONST., 1937, art. 46.

mail.”⁶⁴ Not only that, but PLAC and the Catholic Church had clear influence over the wording that was put to the People; a wording that, as outlined above, constitutionalized fetal rights in Ireland. In late 1983, the 8th Amendment was put before, and approved by, the People.

The 1983 abortion referendum is widely regarded as one of the most brutish and bruising in the history of constitutional referenda in Ireland;⁶⁵ the tone of public debate was intolerant to the extent that an editorial in the *Irish Times* described it as “the second partitioning of Ireland.”⁶⁶ The anti-abortion campaign was astonishingly well-resourced. Furthermore, at that time, the Catholic Church remained a fiercely influential, if not dominant, social and political force, and priests across the country preached for a “Yes” vote.⁶⁷

Although voter turnout was low, a huge majority (66.9%)⁶⁸ of those who voted supported the Amendment, and thus Article 40.3.3, the 8th Amendment to the Constitution, was enacted. This Amendment, which constitutionalized fetal rights, “identified the people of Ireland as protectors of the foetus;”⁶⁹ a position that persists, at the level of rhetoric at least, to this day.

B. *The X Case and the 1992 Referendum*

Barry Gilhealy argues, “[t]he anti-abortionists were able to score with such devastating success in the early 1980s because of the residual strength of tradition in the political culture, despite the rapid social change of the previous two decades.”⁷⁰ That residual traditionalism and conservatism manifested itself in the narrow and highly restrictive interpretation and application of the 8th Amendment: courts prohibited travel for abortion and the provision or receipt of information about abortion, while cultivating a

64. HESKETH, *supra* note 62, at 58.

65. On constitutional referenda in Ireland, see Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* 179 (Xenophon Contiades ed., 2012). On the nature and divisiveness of this referendum, see generally HESKETH, *supra* note 63.

66. Editorial, *The Second Partitioning of Ireland*, Aug. 30, 1983, *THE IRISH TIMES* at 9.

67. Indeed, at the time, the Roman Catholic Church dominated the provision of health care and education in Ireland and, together with medics, “had acquired a moral monopoly of knowledge around sex and ethics.” Barry Gilheany, *The State and the Discursive Construction of Abortion*, in *GENDER, POLITICS AND THE STATE* 58, 72 (Vicky Randall & Georgina Waylen eds., 1998).

68. DEP’T OF THE ENV’T, CMTY. AND LOCAL GOV’T REFERENDUM RESULTS 1937-2015, 38 [hereinafter *REFERENDUM RESULTS*].

69. Fletcher, *supra* note 44, at 575.

70. Gilheany, *supra* note 67, at 72.

massive social stigma and fear on the part of women who wanted to terminate their pregnancy. As the jurisprudence on the 8th Amendment, discussed in Part IV, demonstrates, the right to life of the unborn was elevated to effectively the highest constitutional position; there was no “public language with which to conceptualize the relationship between woman and fetus”⁷¹ beyond that of fetal rights. In this way, the 8th Amendment was remarkably successful in structuring Irish abortion law around a “cultural and official recognition of foetal rights.”⁷²

Anti-abortion activists, such as PLAC, considered the 8th Amendment to have made it impossible for abortion to ever be legally provided for in Ireland; however, developments in the early 1990s challenged that understanding. In 1991, a 14-year-old pregnant rape victim, subsequently known as “X,” and her parents travelled to the UK in order for her to obtain an abortion. Before they had completed the procedure, they contacted the Gardaí [Irish police force] to ask whether DNA evidence from the aborted fetus might be useful as evidence in the prosecution of her rapist. As a result, the Attorney General was informed. The Attorney General instituted proceedings to secure an injunction to prevent the young girl from getting an abortion abroad. He explained his decision by reference to his duty, on behalf of the State, to protect the constitutional rights of the fetus.⁷³ The victim and her parents returned to Ireland for the hearing, and the High Court issued the injunction on the basis of the unborn’s constitutional right to life. The public responded to this decision with massive protests and general public outcry.⁷⁴

Although the electorate had approved Article 40.3.3 by referendum, the baldness of this specific set of facts starkly illustrated just how restrictive that wording could be. It resulted in an outcome that many had not anticipated: the literal confinement of a teenage child who had been raped and then claimed to want to kill herself, all for the purpose of ensuring the fetus would be born alive. So fractious was the atmosphere after the High Court decision that the government reportedly asked the child’s family to appeal and offered to pay all of the costs.⁷⁵ On appeal, the Supreme Court reversed

71. *Id.* at 73.

72. Lisa Smyth, *Feminism and Abortion Politics: Choice, Rights, and Reproductive Freedom*, 25 *WOMEN’S STUD. INT’L. F.* 335, 336-37 (2002).

73. *See Scannal - X-Case*, RTÉ TELEVISION, <http://www.rte.ie/tv/scannal/xcase.html> (last visited Oct. 6, 2015) (“The problem was stark. There was an unborn child with a constitutional right to life. There was nobody to advocate the right of that child to be born other than the Attorney General”).

74. *See Ailbhe Smyth, A Sadistic Farce: Women and Abortion in the Republic of Ireland, 1992*, in *THE ABORTION PAPERS IRELAND*, *supra* note 45, at 7, 12.

75. *Id.*

the decision of the High Court.⁷⁶ In this decision, which is seen as defining the contours of abortion law in Ireland, the Court held that abortion was permissible under Article 40.3.3 where “it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy”⁷⁷ That risk could be a risk of suicide, as well as a risk emanating from physical illness.⁷⁸ X was thus permitted to travel in order to obtain an abortion.

The anti-abortion lobby was deeply displeased with the Court’s interpretation of Article 40.3.3. They argued that this reading of the 8th Amendment was not congruent with what had been intended when the referendum was passed. Where a woman’s life was at risk from a physical illness, treatment that would result in the death of a fetus could be administered—although that was not generally categorized as abortion—and was said to be within the contemplation of Article 40.3.3 from its inception. However, a risk of suicide, as was present in the *X Case*, was seen as qualitatively different. Some argued that suicide was a risk that could be prevented (or avoided) *without* terminating the pregnancy. In other words, they argued that an abortion undertaken where the risk to the pregnant woman’s life was a risk of suicide constituted the deliberate destruction of the fetus, rather than being a “side effect” of treatment as in the case of physical illness. William Binchy, a prominent member of the anti-abortion lobby and then the Regius Professor-elect of Laws at Trinity College Dublin, wrote an article in the *Irish Times* shortly after the Supreme Court decision in which he stated,

The Supreme Court . . . has introduced an abortion regime of wide-ranging dimensions, beyond any effective control or practical limitation In practice, no prosecution of an abortionist will have any real prospect of success if the woman seeking an abortion has threatened suicide.⁷⁹

Shortly thereafter, a campaign to have the Constitution amended took shape.

The original post-*X* proposal emanating from anti-abortion campaigners was that Article 40.3.3 should be amended to expressly prohibit “intentional abortion,” which Binchy said would bring the Constitution “in line

76. *Att’y Gen. v. X*, [1992] I.R. 1 (Ir.).

77. *X Case*, 53-54 [1992] I.R. 1 (Ir.).

78. *X Case*, [1992] I.R. 1 (Ir.).

79. William Binchy, *New Abortion Regime Has No Effective Limits*, *THE IRISH TIMES*, Mar. 6, 1992, at 13.

with the intentions of those who voted for the [8th] Amendment in 1983.”⁸⁰ Under this proposal, a risk of suicide by the woman could not be a basis for constitutionally permissible abortion. Instead of an abortion, Dr. Catherine Bannon claimed that a pregnant woman who expresses suicidal intentions can be admitted to the hospital, voluntarily or involuntarily, “where she can be watched, receive psychiatric therapy and [be] safeguarded against herself.”⁸¹

Unlike in the early 1980s, however, the political parties took control of the situation; wording for three referenda was drafted without consultation with the Catholic Church and with cross-party agreement to reject any wording proposed by the anti-abortion lobby.⁸² Three constitutional changes were proposed to the People: (1) ensure abortion was not available on the basis of suicidal ideation/risk on the part of the pregnant woman, (2) provide for a right to travel, and (3) provide for a right to information. The travel and information rights were approved in the referendum, adding two further clauses to Article 40.3.3, but the proposed 12th Amendment was unsuccessful. That Amendment would have removed the 1983 text and replaced it with the following:

It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.

This proposed Amendment was clearly intended to reverse the Supreme Court’s decision, but the People rejected it (65.35% against, 34.65% in favor),⁸³ and the interpretation of the 8th Amendment set forth in the *X Case* remained in place.

C. The 2002 Referendum

In 2002, the Government put a complex constitutional Amendment on abortion to the People. The proposed 25th Amendment to the Constitution was presented as a package of reforms in the area of so-called “crisis pregnancy” and had four main parts: (1) to ensure that life was protected from the moment of implantation (as opposed to conception), (2) to re-

80. Maol Muire Tynan, *Campaign to Amend the Constitution Launched*, THE IRISH TIMES, Mar. 11, 1992, at 3.

81. *Id.*

82. Gilheany, *supra* note 67, at 74-75.

83. See REFERENDUM RESULTS, *supra* note 68, at 47.

quire the Oireachtas [Parliament] to pass the proposed Protection of Human Life in Pregnancy Act 2002 within 180 days of the referendum, (3) to grant the proposed Act constitutional protection so that, in the future, it could only be amended by referendum of the People, and (4) to permit abortion when it was necessary to prevent loss of the pregnant woman's life *except* when the threat to her life was a risk of suicide (i.e., to undo this element of the *X Case*).⁸⁴

In order to implement this fourth objective, the proposed Protection of Human Life in Pregnancy Act 2002 defined abortion as “the intentional destruction by any means of unborn life after implantation in the womb of a woman.”⁸⁵ To accommodate the constitutional position, § 1(2) of the proposed Act went on to provide that abortion did

not include the carrying out of a medical procedure by a medical practitioner . . . in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the women's life other than by self-destruction.⁸⁶

Abortion, as thus defined, was to remain criminalized.

The proposed 25th Amendment was extraordinary and divisive. Not only did this Amendment intend to enshrine a unique piece of primary legislation in the Constitution, but it also defined constitutional life in terms of implantation rather than conception and proposed to reverse the “risk of suicide” exception to criminalized abortion that came from the *X Case*. This proposal was particularly divisive because it did not have the

84. The proposed amendment would have added the following text to Article 40.3.3:

4° In particular the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act 2002.

5° The provisions of section 2 of Article 46 and sections 1, 3 and 4 of Article 47 of this Constitution shall apply to any Bill passed or deemed to have been passed by both Houses of the Oireachtas containing a proposal to amend the Protection of Human Life in Pregnancy Act, 2002, as they apply to a Bill containing a proposal or proposals for the amendment of this Constitution and any such Bill shall be signed by the President forthwith upon his being satisfied that the Bill has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.

Protection of Human Life in Pregnancy Bill 2001 (referendum failed on Mar. 6, 2002).

85. *Id.* § 1(1).

86. *Id.* § 1(2).

support of all of the main political parties—a situation rather unusual for a proposed constitutional change in Ireland. In fact, only the Government parties (then Fianna Fáil and the Progressive Democrats) supported it, while all other main parties (Fine Gael, Labour, The Green Party, and Sinn Féin) opposed it.⁸⁷ Furthermore, both the anti-abortion groups and the country at large were divided on the issue.⁸⁸ In a startlingly close referendum vote in March 2002, 50.4% of those who turned out voted “no,” while 49.6% voted “yes.”⁸⁹ Thus, the Constitution remained unchanged, and the text today is as was introduced in 1983 (8th Amendment) together with the information and travel Amendments from 1992 (13th and 14th Amendments).

IV. IMPLICATIONS FOR LAW: FETAL RIGHTS JURISPRUDENCE POST-1983

The constitutionalization of fetal rights in Ireland has had significant implications for women’s rights, not least because of the superior courts’ expansive and deeply conservative interpretation of its provisions and their reach. That being said, the judicial approach to Article 40.3.3 outlined below was not inevitable. It is clear that on the plain reading of the text of the 8th Amendment there is space for an interpretation that allows greater reproductive autonomy to women. Such an approach would concentrate on the phrases “with due regard to the equal right to life of the mother” and “as far as practicable” to recognize the qualitative difference between the right to life of the fetus (i.e. the right to be born) and that of the pregnant women (embedded in a range of other constitutional rights). This approach would allow an interpretation that is more responsive to the realities of pregnant women’s lives. Indeed, it might even allow for an expansive and positive interpretation of Article 40.3.3—one that encourages the State to ensure that health-care facilities, child-support structures, welfare infrastructure, education, family law, and economic policies generate circumstances in which unwanted abortion, borne out of socio-economic necessity, might be minimized.⁹⁰

Rather than doing this, however, the Irish courts endorsed an interpretation of the 8th Amendment that reduced a woman from being a rights-bearing individual to a fetus-bearing mother. Such interpretation was

87. For an outline of parties’ positions in the campaign and the campaign in general, see Fiachra Kennedy, *Report - Abortion Referendum 2002*, 17 IRISH POL. STUD. 114 (2002).

88. *Id.*

89. REFERENDUM RESULTS, *supra* note 68, at 71.

90. For discussion on these themes, see, e.g., Justin Murray, *Introduction*, in IN SEARCH OF COMMON GROUND ON ABORTION: FROM CULTURE WAR TO REPRODUCTIVE JUSTICE 3, 3-4 (Justin Murray et al. eds., 2014).

shaped by the form of Article 40.3.3 itself. One of the most striking aspects of the text of Article 40.3.3 is its omission of the word “woman.” Pregnant women are instead described as mothers—reclassified from the moment of conception from “woman” to “mother”—and as a consequence, someone whose rights to autonomy, bodily integrity, agency, and self-determination are subordinated to the rights of the fetus she is carrying.⁹¹

Lisa Smyth notes that such structuring of rights discourse flows from framing access to abortion as a matter of a “right to choose” and the prohibition on abortion as a matter of “fetal rights.”⁹² For Smyth, the claim that the fetus is a rights-bearer means that it “must be constructed as morally equivalent to women,”⁹³ which in turn works itself out in three key claims. First, that the fetus is morally equivalent to a woman *per se* (i.e. is a rights-bearer). Second, that the fetus is morally superior to an “involuntarily pregnant, and implicitly sexually guilty, woman,” in other words the fetus can make a rights claim against the woman’s rights claim. Third, that the right to choose carries less moral weight than the claim of a fetal right to life.⁹⁴ The jurisprudence interpreting Article 40.3.3 bears out the production of these key narratives in Ireland and largely emanates from an aggressive litigation strategy by anti-abortion groups. These groups target access to information and freedom of travel in order to prevent women in Ireland from accessing abortion abroad as well as “at home” in Ireland. They base this strategy on the duty to respect and vindicate the fetal right to life now contained in Article 40.3.3 of the Constitution. Much, although not all, of this jurisprudence was developed prior to the *X Case*, when it was generally considered that the 8th Amendment absolutely prohibited abortion in every circumstance.

A. Travel and Information

In the 1980s and early 1990s, before the internet expanded access to information, women who were contemplating traveling in order to access abortion were limited to acquiring information through various volunteer telephone services run by women in the UK, or by consulting with counselors and doctors at Open Door and Well Woman clinics, primarily located in Dublin.⁹⁵ The non-universal availability of telephones and dependence

91. As Ursula Barry puts it, the 8th Amendment constituted “a radical redefinition of women under the law: Irish women have been recategorised to be equal to that which is *not yet born*.” Barry, *supra* note 60, at 59.

92. See Smyth, *supra* note 72, at 336-37.

93. *Id.* at 337.

94. *Id.*

95. ANN ROSSITER, IRELAND’S HIDDEN DIASPORA: THE ‘ABORTION TRAIL’ AND THE MAKING OF A LONDON-IRISH UNDERGROUND, 1980-2000 93-103 (2009).

on operator exchanges in some parts of the country made reliance on telephone helplines difficult,⁹⁶ and women in rural areas had less access to clinics than those in urban centers. Organizations such as Well Woman and Open Door would provide one-on-one counseling and advice to women who were experiencing what was then called “crisis pregnancy.” Their services included providing information about the availability of abortions in the UK, providing names and locations of clinics, and, if necessary, contacting the clinic on the women’s behalf. The information these services provided about abortion *as an option* was non-directive; the decision lay with the woman herself.⁹⁷ However, and as is clear from the litigation described below, in the eyes of some anti-abortion campaigners, even the mere provision of non-directive information threatened the constitutional right to life of the fetus. They argued that the State was obliged to prevent such access to information in order to properly defend and vindicate fetal rights. Without such information, access to abortion was greatly limited, and they argued that the State was obligated to prevent such information provision in order to properly defend and vindicate fetal rights.

In the late 1980s the Attorney General took a case at the relation of⁹⁸ the Society for the Protection of Unborn Children Ireland (SPUC), seeking an injunction preventing Open Door Counseling and the Well Woman from providing such information on the basis that their activities were unlawful by reference to Article 40.3.3. The High Court issued this injunction and, in doing so, made clear the extensive effects of the 8th Amendment.⁹⁹

In *Attorney General (SPUC) v. Open Door Counselling Ltd. and the Wellwoman Centre Ltd.*, Hamilton P. started his judgment with the words “The right to life of the unborn has always been recognised by Irish law.”¹⁰⁰ This statement officially recognized fetal rights in the common law, further solidifying its protection under the law “as one of the unenumerated personal rights” protected by the Constitution.¹⁰¹ In doing so, Hamilton P.

96. Roddy Flynn, *The Development of Universal Telephone Service in Ireland 1880-1993* (unpublished Art.D. dissertation, Dublin City University), available at http://doras.dcu.ie/18734/1/Roddy_Fynn_20130509140820.pdf (discussing the state of telephone access in Ireland in the 1980s).

97. On the operation of these organizations, see generally ROSSITER, *supra* note 95 (describing the systems of support in Ireland and the United Kingdom for women from Ireland seeking abortions after 1983).

98. That is, *ex relatione*, where the State brings a suit originally requested by a private party with some interest in the matter.

99. See Att’y Gen. *ex rel.* Soc’y for the Protection of Unborn Children Ireland, Ltd. v. Open Door Counselling, Ltd. [1988] I.R. 593.

100. *Open Door Counselling*, [1988] I.R. 593, 597.

101. *Open Door Counselling*, [1988] I.R. at 597. In Irish constitutional law, an unenumerated right is a right that is deemed to have constitutional protection (i.e., to be powerful enough to result in the striking down of legislation found to violate

construed criminal prohibitions on abortion as being statements of a fetal right to life. By doing so, he constructed a pedigree for such a rights claim that far predated the constitutional Amendment of 1983 and, indeed, the judicial pronouncements of such a right from before that Amendment.¹⁰² The defendants argued that the court's holding would effectively extend the criminalization of abortion to the UK, where abortion was lawful when administered under the Abortion Act 1967. In this respect, Hamilton P. stated:

It seems to me that, where there is a breach of or interference with a fundamental and personal and human right, such as the right to life of the unborn, which is acknowledged by the Constitution, and which the courts are under a constitutional obligation to defend and vindicate, it would be scandalous if the legitimacy or criminality of such breach or interference could, in the words of the late Kingsmill-Moore J. in *Mayo-Perrott v. Mayo-Perrott* [1958] I.R. 336 at p. 350 of the report – “be decided by a flight over St George’s Channel”¹⁰³

As a result, the court found that providing information and support to women contemplating abortion “impl[ies] assent to, approval of, and encouragement for the procurement of an abortion if the pregnant woman so wishes and the provisions of the Abortion Act, 1967, are complied with.”¹⁰⁴ Hamilton P. went on to declare that he had “no doubt”¹⁰⁵ that this was unlawful by reference to Article 40.3.3:

[The] right to life of the unborn includes the right to have that right preserved and defended and to be guarded against all threats to its existence before and after birth . . . it lies not in the power of a parent to terminate its existence and . . . any action on the part of any person endangering that life [is] necessarily

it), notwithstanding the fact that it is not expressly protected in the text of the Constitution itself. The doctrine has its origins in *Ryan v. Att’y Gen.*, [1965] I.R. 294.

102. *G. v. An Bord Uchtála*, [1978] I.R. 32, 69 (“Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but *a fortiori* it has the right to life itself and the right to be guarded against threats directed to its existence whether before or after birth.”).

103. *Att’y Gen. ex rel. Soc’y for the Protection of Unborn Children Ireland, Ltd. v. Open Door Counselling Ltd. and the Wellwoman Centre, Ltd.*, [1988] 1 I.R. 593, 610 (Ir.).

104. *Open Door Counselling*, [1988] 1 I.R. at 615.

105. *Open Door Counselling*, [1988] 1 I.R. at 616.

not only an offence against the common good but also against the guaranteed personal rights of the human person in question.¹⁰⁶

Thus, women's rights to information, association, travel, and bodily autonomy were deemed entirely subordinate to the right to life of the fetus. During pregnancy, women were labeled as mothers whose unborn children had constitutional rights protected by the full weight of the law, and lost their individual autonomy through limited rights to exercise equal citizenship and autonomy separate from their fetuses. In spite of the evident extremity of the implications of Hamilton's decision in this case, the Supreme Court unanimously dismissed the appeal against this decision.¹⁰⁷ The appellants argued that the right to receive and communicate information was an unenumerated right, and should be preserved. However, Chief Justice Finlay responded by saying that he was "satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."¹⁰⁸ A hierarchy of rights had been firmly established.

Attorney General (SPUC) v. Open Door Counselling Ltd. and the Wellwoman Centre Ltd. clearly indicated the extent to which the 8th Amendment to the Constitution could impinge women's autonomy with respect to their reproductive decisions. Not only does this Amendment prevent women from acquiring an abortion "at home" in Ireland, but it also constrained their ability to receive information on abortion services available abroad and to travel to receive an abortion. As a result, organizations such as Open Door Counselling and Well Woman were prevented from providing much assistance to women who were in need of information. Some UK-published magazines that were sold in Ireland contained advertisements about abortion services in that jurisdiction. While these remained on sale, attempts by student unions to step into the breach and address the information deficit under which women now suffered were also restrained by the courts. In litigation initiated by SPUC against student union members,¹⁰⁹ the Supreme Court confirmed that the prohibition on the provision of information outlined in *Open Door Counselling* was not limited to instances of one-on-one information provision, but also included the provision of general information in published form.¹¹⁰ According to Chief Justice Finlay, "[i]t is clearly the fact that such information is conveyed to pregnant

106. *Open Door Counselling*, [1988] 1 I.R. at 617.

107. *Open Door Counselling*, [1988] 1 I.R. at 625.

108. *Open Door Counselling*, [1988] 1 I.R. at 625.

109. *Soc'y for the Protection of the Unborn Child v. Grogan*, [1989] I.R. 753.

110. *Grogan*, [1989] I.R. 753.

women, and not the method of communication which creates the unconstitutional illegality, and the judgment of this Court in the *Open Door Counselling* case is not open to any other interpretation.”¹¹¹

As already noted, these decisions were based, to a large extent, on the contention that there was absolutely no right to access an abortion in Ireland. However, as outlined above, *Attorney General v. X* confirmed that the 8th Amendment had not introduced a total abortion prohibition. Rather, there was a limited right to access abortion in Ireland where the life, as opposed to the health, of a pregnant woman was at real and substantial risk that could only be averted by termination of the pregnancy.¹¹² This misinterpretation of the abortion law in Ireland spurred a response from Justice Denham in the Supreme Court appeal in *Society for the Protection of the Unborn Child v. Grogan*,¹¹³ criticizing the decision in *Open Door Counselling*. Denham claimed that the decision in *Open Door Counselling* was flawed because it was based on an incorrect premise as to the meaning of Article 40.3.3.¹¹⁴ This may well have led to an almost unworkable situation in which women who had a constitutional right to access abortion under the test outlined in *X* were entitled to travel and information, but others were not. However, in 1992 the constitutional confirmation of women’s right to travel and to access information, which applied to all women regardless of their inability to access abortion in Ireland, avoided this possibility.

B. Fetal Best Interests

Although it was originally thought that Article 40.3.3 dealt solely with abortion, its wording is clearly capable of broader application. Not only does Article 40.3.3 prohibit the introduction of widely available abortion, but it also establishes an autonomous constitutional right to life of the fetus.¹¹⁵ The reach of that fetal right to life is broad, and it continues to

111. *Grogan*, [1989] I.R. at 764.

112. *Att’y Gen. v. X.*, [1992] 1 I.R. 1.

113. *Soc’y for the Protection of the Unborn Child v. Grogan*, [1997] I.E.S.C. 4.

114. *Grogan*, [1997] I.E.S.C. 4.

115. The Courts have not yet definitely settled the extent to which Article 40.3.3 may be applicable across pregnancy (i.e., not only to decisions as to abortion). Thus, in *Roche v. Roche*, [2009] I.E.S.C. 82 (Ir.), there was division between judges in the Supreme Court on this point with then-Chief Justice Murray holding that the Article can apply across pregnancy, while Justices Denham and Geoghagan found that it applied to abortion only. In *Att’y Gen. v. X.*, [1992] 1 I.R. 1 (Ir.) and *Baby O. v. Minister for Justice, Equality & Law Reform* [2002] I.E.S.C. 53 (Ir.), the Court clearly considered Article 40.3.3 to be concerned with questions of abortion only. For a full discussion, see Máiréad Enright, *Childbirth, Choice and the Courts: The 8th Amendment and More*, HUMAN RIGHTS IN IRELAND, Apr. 21, 2015, available at <http://>

operate even where the right to life of the pregnant woman—expressly recognized in Article 40.3.3—no longer exists, i.e., where the pregnant woman is clinically dead, but a fetal heartbeat remains. As the case *PP v. HSE*¹¹⁶ illustrates, this autonomous fetal right to life can result in “fetal best interests” and “fetal welfare” principles being applied to medical questions concerning the care and treatment of the pregnant woman in a way that may justify the imposition of extreme, dehumanizing, undignified and highly invasive treatment.

PP concerned a young woman who suffered brain stem death when she was 15 weeks pregnant. She was placed in intensive care and, although clinically dead, was supported by mechanical ventilation, very heavy doses of medication, and physiotherapy. The purpose of these interventions was “to facilitate the continuation of maternal organ supportive measures in order to attain fetal viability.”¹¹⁷ This process was likely to take 32 weeks.¹¹⁸ The woman’s father, plaintiff to the suit, sought a court order discontinuing such intervention, which he considered to be unreasonable, experimental, and unethical.¹¹⁹

The medical evidence given to the Court was harrowing. The woman’s body was in a rapidly deteriorating state, her living children were extremely distressed by her appearance, her brain was undertaking a process of liquefaction (i.e., the softening of the brain into a liquid-like material), she had an open wound in her skull from which brain tissue was extruding and where there was evidence of fungal infection, she had cardiovascular instability, and there were numerous other infections plaguing her body. Medical expert testimony stated that given the extremely poor medical condition of the pregnant woman, continuing treatment would “be going from the extraordinary to the grotesque.”¹²⁰ In spite of this, it was clear that withdrawing care would result in the death of the fetus, and the question for the court was whether that was permissible under Article 40.3.3 of the Constitution.

In considering this question, the Court placed great weight on the prospects of survival of the fetus, meaning the prospect of it being born alive

humanrights.ie/uncategorized/wanted-pregnancy-choice-and-the-courts-the-8th-amendment-and-more/.

116. *P.P. v. Health Serv. Exec.*, [2014] I.E.H.C. 622 (H. Ct.) (Ir.) (unreported).

117. *P.P.*, [2014] I.E.H.C. at 2.

118. *See P.P.*, [2014] I.E.H.C. at 5 (reporting the evidence of Dr. Brian Marsh, intensive care medicine consultant). *P.P.*, [2014] I.E.H.C. at 6 (Dr. Peter Boylan stated in court that viability per se was generally accepted at being about 24 weeks gestation, but given the surrounding circumstances of this case, “[h]e believed it should keep going until 32 weeks when the chances of intact survival are much greater.”).

119. *See P.P.*, [2014] I.E.H.C. at 2.

120. *P.P.*, [2014] I.E.H.C. at 9.

without regard to the quality or duration of life that would follow its birth.¹²¹ Considering the extensive medical evidence presented, the Court found that “the prospects for a successful delivery of a live baby in this case are virtually non-existent”¹²² and that “there is no realistic prospect of continuing somatic support leading to the delivery of a live baby.”¹²³ Having made this finding of fact the Court proceeded to consider whether Article 40.3.3 permitted withdrawal of care.

In doing so, the Court focused largely on the “as far as practicable” limitation clause in the constitutional text, and confirmed indications in earlier jurisprudence that the State was not required to do that which was futile, impractical, or ineffective in order to protect the fetal right to life.¹²⁴ The Court held that, while women have a right to dignity in death, “when the mother who dies is bearing an unborn child at the time of her death, the rights of that child, who is living, and whose interests are not necessarily inimical to those [of the woman], must prevail over the feelings of grief and respect for a mother who is no longer living.”¹²⁵ Having established this, the Court went on to establish that “the question that must be addressed is whether even if such measures are continued, there is a realistic prospect that the child will be born alive.”¹²⁶ Drawing on the wardship jurisprudence in Irish courts (i.e. jurisprudence on when a court can take over decision-making powers in respect of a child), the Court held that decisions as to care ought to be made by reference to fetal best interests, bearing in mind that “[g]iven the unborn in this jurisdiction enjoys and has the constitutional guarantee of a right to life, the Court is satisfied that a necessary part of vindicating that right is to enquire about the practicality and utility of continuing life support measures.”¹²⁷ Bearing this in mind, the Court held that “[t]his unfortunate unborn has suffered the dreadful fate of being present in the womb of a mother who has died, and in which the environment is neither safe nor stable”¹²⁸ and “has nothing but distress and death in

121. *See P.P.*, [2014] I.E.H.C. at 15 (citing *S.R. (A Ward of the Court)*, [2012] 1 I.R. 305, 323) (“In determining whether life-saving treatment should be withheld, the paramount and principal consideration must be the best interests of the child. This gives rise to a balancing exercise in which account should be taken of all circumstances, including . . . the longevity and quality of life that the child could expect if he survives.”).

122. *P.P.*, [2014] I.E.H.C. at 10.

123. *P.P.*, [2014] I.E.H.C. at 10-11.

124. *P.P.*, [2014] I.E.H.C. at 12-13 (citing *Att’y Gen. v. X.*, [1992] 1 I.R. 1 (Ir.)).

125. *P.P.*, [2014] I.E.H.C. at 13.

126. *P.P.*, [2014] I.E.H.C. at 14.

127. *P.P.*, [2014] I.E.H.C. at 16.

128. *P.P.*, [2014] I.E.H.C. at 16.

prospect.”¹²⁹ Thus, it was considered to be “in the best interest of the unborn child”¹³⁰ to permit withdrawal of somatic care.

A number of commentators criticized the Health Service Executive for contesting *PP*, claiming that the somatic care in this case could have been withdrawn without litigation.¹³¹ However, both the judgment itself and the medical evidence presented to the Court illustrate the possibility that a brain-dead woman might be maintained by court order in order to ensure the fetus reaches viability so that it can be delivered alive. This only adds to the uncertainty under which medics must operate. The case does not offer clarity on when Article 40.3.3 would require such intervention and when care may be withdrawn, nor does it make clear whether this is something that can be determined only by Courts rather than by medics. As claimed by Dr. Peter Boylan, the lack of guidance as to how the 8th Amendment works in such cases was a material consideration in the decision to both prolong the somatic care and engage in litigation.¹³² It is quite possible that such a situation would arise in similar cases in the future.

The relevance of Article 40.3.3 to such cases is confirmed by the Court’s finding that this provision is not limited in its application to abortion. Rather, “the provision, in its plain and ordinary meaning may also be seen as acknowledging in simple terms the right to life of the unborn which the State, as far as practicable, shall by its laws defend and vindicate.”¹³³ Furthermore, this case makes clear that withdrawing support in cases of this kind is determined solely by reference to whether the fetus will be born alive. In *PP*, the fact that there was no prospect of live birth made maintaining care more than that which was “practicable” by reference to Article 40.3.3. Another set of facts could have led to another finding; what mattered in coming to the conclusion that the care could be withdrawn in *PP* was the Court’s determination of what was in the best interests of the fetus in order to achieve its live birth.

V. IMPLICATIONS FOR MEDICINE: FETOCENTRICITY IN DECISION-MAKING

The potential implications of the finding in *PP* that “fetal best interests” should be taken into account in making decisions as to maternal medi-

129. *P.P.*, [2014] I.E.H.C. at 16.

130. *P.P.*, [2014] I.E.H.C. at 16.

131. For some criticisms of the case by medical professionals and attorneys, see John Drennan & Daniel McConnell, *Right-to-Die Case is One of Horror and Absurdity*, IRISH INDEPENDENT (Dec. 28, 2014), <http://www.independent.ie/irish-news/news/righttodie-case-is-one-of-horror-and-absurdity-30865801.html>.

132. *P.P.*, [2014] I.E.H.C. at 6.

133. *P.P.*, [2014] I.E.H.C. at 13.

cal care are extraordinarily far-reaching. If the fetal right to life takes precedence over a woman's health, autonomy, and bodily integrity (which it does under Article 40.3.3), and if that fetus also has a "best interest" in being born alive, then *PP* may pervade medical decision-making throughout a pregnancy, giving a crystallized legal form to the practice of fetocentric medical care that pregnant women receive in Ireland. This practice is illustrated by cases of "fatal fetal abnormality," i.e., situations where the fetus will almost certainly die *in utero* or very shortly after birth but where there is no "real and substantial" risk to the pregnant woman's life. There is an apparent willingness to override a woman's refusal of consent to postpone the treatment in order to preserve fetal life. Furthermore, there are fresh indications that Article 40.3.3 is being given an extremely wide interpretation in some hospitals, impacting decisions concerning referrals for particular procedures abroad. For example, it has been reported that in one major hospital, referrals abroad for pre-implantation genetic diagnosis¹³⁴ have been stopped¹³⁵—a situation that has clear implications for women's maternal healthcare, reproductive choices, and access to the best available standard of healthcare.

A. *Fatal Fetal Abnormalities*

The term "fatal fetal abnormality" is now used in Ireland to refer to fetuses that suffer from a condition that means they are highly unlikely to be born alive or, if born alive, will almost certainly have a short life and suffer from a serious medical condition.¹³⁶ Pregnant women in Ireland who

134. "Pre-implantation genetic diagnosis (PGD) enables people with an inheritable condition in their family to avoid passing it on to their children. It involves checking the genes and/or chromosomes of embryos created through IVF." *Pre-implantation Genetic Diagnosis (PGD)*, HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY (UK), April 1, 2014, available at <http://www.hfea.gov.uk/preimplantation-genetic-diagnosis.html>.

135. See Paul Cullen, *Crumlin Referrals for Embryo Screening Halted on Legal Advice*, IRISH TIMES (Nov. 24, 2014, 1:00 PM), <http://www.irishtimes.com/news/health/crumlin-referrals-for-embryo-screening-halted-on-legal-advice-1.2012400> (reporting that Our Lady's Children's Hospital in Crumlin, Dublin stopped referring patients abroad for pre-implantation genetic diagnosis after receiving legal advice that the referrals could be unconstitutional).

136. "Fatal fetal abnormality" is not an exact medical term, but has gained popularity in public affairs discussions of such cases. See Protection of Life During Pregnancy Act (Amendment) 2013 (Bill No. 115/2013) (Ir.) (The bill defined the term as "a medical condition suffered by a foetus such that it is incompatible with life outside the womb." That private-members bill, introduced by Clare Daly, Deputy, was eventually defeated); see also Protection of Life During Pregnancy Act (Amendment) 2015 (Bill No. 20/2015) (Ir.) (This private-members bill, introduced by Michael McNamara, Deputy, defined the term as "a medical condition, or medical conditions,

wish to terminate the pregnancy in such circumstances cannot avail themselves of an abortion in Ireland because Article 40.3.3 has been interpreted as allowing an abortion *only* where there is a risk to the life of the pregnant woman. This is notwithstanding the fact that the term “as far as practicable” might reasonably be interpreted as permitting an abortion where there is practically no likelihood of the fetus being born alive.¹³⁷ Indeed, to some extent the availability of an abortion in such circumstances is suggested by the decision in *PP v. HSE*, discussed above. In this case the High Court paid close attention to whether the fetus had any prospect of being born alive when determining whether to allow the withdrawal of somatic care to a clinically dead pregnant woman, which resulted in fetal death. However, the Court in *PP* was careful to limit its decision to its own particular facts, so that no general principle of the permissibility of abortions in such cases can be reasonably deduced.

Neither the government nor the present Attorney General has endorsed these more liberal interpretations, and medics operate on the understanding that abortion is not permissible in Ireland in cases of fatal fetal abnormalities. Thus, in cases where there is little prospect of a baby being born alive or surviving for long after birth, doctors may advise patients of the option to terminate and provide information about abortion, although they can neither provide that abortion in Ireland nor refer them specifically for a termination in the UK.¹³⁸ Rather, pregnant women in these situations must travel for an abortion should they decide to terminate their pregnancy.

Not only does this reflect a remarkably narrow interpretation of the Constitution, but it also imposes severe burdens on women who are already in very difficult positions. First, as previously mentioned, no doctor, nurse, or medical professional in Ireland can arrange a referral for a pregnant woman to go to a hospital or clinic in the UK where an abortion could be performed. Second, women in these situations must carry additional finan-

suffered by a foetus which results in that foetus having no prospect of being born alive.”).

137. *See* *D. v. Ireland*, App. No. 26499/02 Eur. Ct. H.R. (2005) (arguing that because of the lack of a domestic decision, it was possible that an Irish court could find that a fetus incapable of being born alive did not attract the protection of the Constitution and therefore an abortion may have been possible in the applicant’s situation). *See generally* *Roche v. Roche*, [2009] 2 I.R. 321 (S. C.) (discussing whether fertilized but unimplanted embryos have a right to life under the Constitution); Jennifer Schweppe & Eimear Spain, *Interpreting “Life” in the Protection of Life During Pregnancy Act 2013*, 20 MEDICO-LEGAL J. IR. 93 (2014) (describing how the emphasis has shifted from how the courts will interpret “unborn” in a constitutional sense to how the courts will interpret the term “life”).
138. Regulation of Information (Services Outside the State for Termination of Pregnancies) (Act No. 5/1995) (Ir.).

cial and emotional burdens and it is reported that women increasingly have the first part of the procedure undertaken in the UK and then “deliver” the deceased fetus in an Irish hospital.¹³⁹ In spite of this, doctors based in Ireland are left without any options to help their patients in these situations; they can merely inform them that there are hospitals in the UK where they might be able to access abortion and provide care for them on their return. The continued criminalization of abortion under the Protection of Life During Pregnancy Act 2013 means that doctors will not, and cannot, use their medical judgment to determine whether or not a given situation might permit an abortion in Ireland under *PP*. In reality, should a pregnant woman whose fetus is diagnosed as having a fatal abnormality want to access an abortion in Ireland, she would almost certainly have to undertake the financial, emotional, and media burdens of seeking a court order to determine whether she can do so. In such fraught and difficult circumstances, this is almost certain to be too heavy a burden to bear for most women and couples in such situations.

B. Sick, but Not (Yet) Dying

The constitutionalization of fetal rights creates many medical difficulties particularly for women who require medical treatment during their pregnancy. Where women who are pregnant require medical treatment that may result in the death of the fetus but where there is not (yet) a real and substantial risk to life, the “chilling effect”¹⁴⁰ of the criminalization of abortion can operate to determine medical decision-making. This chilling effect has pervaded medical decision-making in Ireland in such a way that fetal life is saved at the expense of the pregnant woman’s health. In some cases, even though termination of the pregnancy would be best for the health of the pregnant woman, current medical practice in Ireland leans toward preserving the pregnancy and risking the woman’s health.¹⁴¹ As Dr. Rhona Mahony, the Master of the National Maternity Hospital, has stated:

From a medical perspective, [Article 40.3.3] creates difficulty in its presumption that the implications of a range of complex medical disorders can be reduced to a matter of individual right.

139. Susan Mitchell, *UK Hospitals Move to Limit Irish Abortions*, SUNDAY BUS. POST, (Aug. 24, 2014), <http://www.businesspost.ie/uk-hospitals-move-to-limit-irish-abortions/>.

140. This phrase was used by the European Court of Human Rights in *A, B & C v. Ireland*, 53 Eur. H.R. Rep. 13 (2011).

141. Marge Berer, *Termination of Pregnancy as Emergency Obstetric Care: The Interpretation of Catholic Health Policy and the Consequences for Pregnant Women*, 21 REPROD. HEALTH MATTERS 9 (2013).

If the legal world explores the balance of rights, the medical world explores the balance of risk . . . The wording of the Eighth Amendment is sufficiently ambiguous that there is a real risk that medical imperative could be hindered by an emphasis on balance of rights rather than survival [of the pregnant woman].¹⁴²

This was starkly illustrated by the death of Savita Halappanavar.

Savita Halappanavar died in a Galway hospital before the enactment of the Protection of Life During Pregnancy Act 2013. Ms. Halappanavar was admitted to hospital while suffering a miscarriage 17 weeks into her pregnancy; there was no prospect of the fetus surviving, although there was a fetal heartbeat at the time. Reports suggest that she requested termination of the pregnancy by means of abortion as soon as the diagnosis became clear. However, because her life was not in “real and substantial danger” at the time, and the fetus still had a heartbeat, this request was denied. This continued over a period of almost three days, during which time the clinical approach was “to *await events*’ and to monitor the fetal heart in case an accelerated delivery might be possible once the fetal heart stopped.”¹⁴³ Due to the delay in treatment, Ms. Halappanavar developed a very serious form of sepsis, a “[s]ystemic illness caused by microbial invasion of normally sterile parts of the body”.¹⁴⁴ The advance of the sepsis was not adequately diagnosed or treated. Although the fetal remains were removed on October 24, the infection worsened and she died on October 28, 2012.

An independent inquiry found that multiple factors were relevant in this case, including the lack of clear clinical and legal guidance. The inquiry, thus

[S]trongly recommend[ed] and advise[d] the clinical professional community, health and social care regulators and the Oireachtas to consider the law including any necessary constitutional change and related administrative, legal and clinical guidelines in relation to the management of inevitable miscarriage in the early second trimester of a pregnancy including with prolonged rup-

142. Rhona Mahony, *Protecting Life in Real Life—An Essay*, MEDICO-LEGAL J. IR. 104, 105 (2014).

143. HEALTH SERV. EXEC., FINAL REPORT: INVESTIGATION OF INCIDENT 50278 FROM TIME OF PATIENT’S SELF REFERRAL TO HOSPITAL ON THE 21ST OF OCTOBER 2012 TO THE PATIENT’S DEATH ON THE 28TH OF OCTOBER, 2012 5 (2013) [hereinafter FINAL REPORT].

144. Andrew Lever & Iain Mackenzie, *Sepsis: Definition, Epidemiology, and Diagnosis*, 335 BRIT. MED. J. 879, 879 (2007).

ture of membranes and where the risk to the mother increases with time from the time that membranes are ruptured including the risk of infection and thereby reduce risk of harm up to and including death.¹⁴⁵

Although some claimed that this case illustrated failures in medical care rather than a difficulty with the 8th Amendment, Enright and de Londras have argued that the constitutional position was relevant in the clinical decisions taken in this case and the death of Savita Halappanavar:

This case was dominated by the sense that even an inevitable miscarriage could not be terminated as long as there was foetal heartbeat on the basis that a real and substantial risk to the life of the pregnant woman must first arise. This interpretation of the Constitution clearly played into both Savita Halappanavar's protracted suffering and her death . . . the reality is that the threshold for access to abortion in Ireland is so high that even a serious illness is likely to be managed along similar lines, regardless of the outcome for the woman.¹⁴⁶

C. Overriding Consent

Although it did not involve abortion *per se*, the decision in *PP v. HSE*, considered above, is entirely congruent with this reading of what happened to Savita Halappanavar. It shows that under the 8th Amendment, doctors may be required to go to great lengths to preserve fetal life without regard for whether this will result in the best medical outcomes for the pregnant woman. The consent of the pregnant woman does not seem to be a key issue in deciding whether to undertake such treatment: Savita Halappanavar expressly requested an abortion, and the patient in *PP* was clinically dead and could neither consent nor refuse to consent to the invasive "treatment" to which her body was subjected. In some cases, the Health Services Executive has attempted to override a pregnant woman's lack of consent by applying for court orders for treatment that were oriented towards maintaining fetal life. The Irish National Consent Policy (i.e., the policy outlining what consent means and how it is to be established in all healthcare interventions) suggests that this might be the appropriate course of action. The Policy provides:

145. FINAL REPORT, *supra* note 143, at 6.

146. Máiréad Enright & Fiona de Londras, "Empty Without and Empty Within": the Unworkability of the Eighth Amendment After Savita Halappanavar and Miss Y, 20 MEDICO-LEGAL J. IR. 85, 85-86 (2014).

The consent of a pregnant woman is required for all health and social care interventions. However, because of the constitutional provisions on the right to life of the “unborn,” there is significant legal uncertainty regarding the extent of a pregnant woman’s right to refuse treatment in circumstances in which the refusal would put the life of a viable foetus at serious risk. In such circumstances, legal advice should be sought as to whether an application to the High Court is necessary.¹⁴⁷

The case of “Miss Y” illustrates a tendency towards overriding the consent of the pregnant woman in order to preserve fetal life. Although the case is subject to strict reporting requirements, the following appears to be clear from the publicly available information. Y entered Ireland, seeking asylum, and discovered shortly after that she was pregnant as a result of a wartime rape in her country of origin.¹⁴⁸ She made it clear that she did not want to proceed with the pregnancy and that, if forced to do so, she would kill herself. For reasons that are not entirely clear, no referral for assessment was made under the Protection of Life During Pregnancy Act 2013 until she was approximately 20 weeks along. Although the assessment revealed that there was a real and substantial risk to her health under § 9 of the Act, the abortion was not carried out because the fetus was viable.

Y protested her inability to access to an abortion by refusing to eat and putting the fetus at risk.¹⁴⁹ In response, the HSE acquired court orders to force Y to consume food and water.¹⁵⁰ Although it appears that Y eventually agreed to eat and drink, the fact that such court orders were sought and granted indicates the extent to which fetal welfare can influence medical treatment. Y’s asylum status makes this case even more disturbing. Y could not easily travel to the UK for an abortion, nor could she work in order to raise the money to afford one. In Ireland, a person who is seeking asylum is not permitted to work,¹⁵¹ and thus she could not earn money to afford such a procedure. Once the pregnancy had progressed further—reportedly to 24 weeks—it was terminated by means of a cesarean section.¹⁵² While no court

147. HEALTH SERV. EXEC., NAT’L CONSENT POL’Y (2014), http://www.hse.ie/eng/about/Who/qualityandpatientsafety/National_Consent_Policy/consentrainerresource/train erfiles/NationalConsentPolicyM2014.pdf.

148. For an overview of what is publicly known about this case, see Kitty Holland, *Timeline of Ms Y Case*, IRISH TIMES (October 4, 2014), <http://www.irishtimes.com/news/social-affairs/timeline-of-ms-y-case-1.1951699>.

149. *Id.*

150. *Id.*

151. Refugee Act 1996 (Act. No. 17/1996) § 9(4)(b) (Ir.), available at <http://www.irish-statutebook.ie/1996/en/act/pub/0017/>.

152. Holland, *supra* note 148.

order was acquired to authorize this invasive procedure, clear questions arise as to Y's capacity to truly consent to such a procedure. She was a young, suicidal woman who had been denied an abortion that she wanted, did not speak much English, was in a highly vulnerable position, had been raped, and was living within Ireland's punitive asylum system. Indeed, so oppressive was her treatment that she is currently suing the State in respect of it.¹⁵³

All of these cases illustrate the fact that the 8th Amendment has resulted in a jurisprudential reclassification of pregnant women as constitutional subjects: once a woman becomes pregnant, medical and legal priority shifts to the fetus, the protection of which, Supreme Court jurisprudence has declared, is in pursuance of the "public interest."¹⁵⁴ In contrast, the protection and vindication of pregnant women's rights is not of interest, or at least not when these rights are in conflict with fetal rights or fetal best interests. This is the jurisprudential and medical consequence of constitutionalizing fetal rights, and it is a state of affairs that causes real hardship for women in Ireland.

VI. IMPLICATIONS FOR WOMEN: THE ILLUSION OF "CHOICE" AND THE REALITY OF HARDSHIP

The cases considered in Parts IV and V demonstrate the pervasiveness of fetal-rights thinking, anchored in constitutionalized fetal rights, in fleshing out the legal and medical implications of Article 40.3.3. While pregnant women's constitutional rights to information and travel have been established by the 13th and 14th Amendments, the State's vindication of constitutionalized fetal rights subjects pregnant women in Ireland to violations of their rights to bodily integrity,¹⁵⁵ freedom from inhuman and degrading

153. Mark Tighe, *Ms Y Issues Nine Abortion Lawsuits*, SUNDAY TIMES (Apr. 12, 2015), <http://www.thesundaytimes.co.uk/sto/homeV2/article1543004.ece>.

154. Soc'y for the Protection of Unborn Children, Ltd. v. Coogan, [1989] I.R. 734 (Ir.) (Walsh J.) (establishing that S.P.U.C. had standing to litigate on behalf of the unborn child due to the public interest in protecting fetal constitutional rights).

155. Protected as an unenumerated right in the Irish Constitution under *Ryan v. Att'y Gen.*, [1965] I.R. 294.

treatment,¹⁵⁶ privacy,¹⁵⁷ access to adequate healthcare,¹⁵⁸ and reproductive autonomy.¹⁵⁹

In order to avoid these violations, many women in Ireland travel abroad to access abortion. Indeed, the availability of abortion in England (under the Abortion Act 1967) and the relative ease of travel between Ireland and the UK, have allowed for the illusion and the language of choice to enter into the Irish abortion debate. The argument maintains that it is not that women in Ireland cannot have abortions; but rather, that women cannot have abortions *in Ireland*. This slight of hand, which contrives to present Irish women as having reproductive autonomy, deliberately elides the fact that women with different socio-economic resources have vastly different capacities to exercise what amounts to a right to be an abortion tourist in Ireland.¹⁶⁰

Travelling for an abortion is not easy: it is time consuming, costly, and often lonely. The practicalities of arranging for an abortion may result in delayed treatment and thus a more expensive and more dangerous abortion. The practical considerations of cost alone are significant. On average, it

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156. IR. CONST., 1937, art. 40.3.4; European Convention on Human Rights, art. 3, Nov. 4, 1950, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, United Nations, Treaty Series, vol. 999, p. 171; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, United Nations, Treaty Series, vol. 1465, p. 85.
157. Recognized as an unenumerated right in *McGee v. Att’y Gen.*, [1974] I.R. 284 (Ir.); European Convention on Human Rights, art. 8, Nov. 4, 1950, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5; International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, United Nations, Treaty Series, vol. 999, p. 171.
158. International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, United Nations, Treaty Series, vol. 993, p. 3. It is unclear whether there is a right to health and healthcare under Irish constitutional law. In *Heeney v. Dublin Co.* [1998] I.E.S.C. 26 (Ir.), the Court held “there is a hierarchy of constitutional rights and at the top of the list is the right to life, followed by the right to health” However, in the later case of *In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004*, [2005] 1 I.R. 105 (Ir.), the Supreme Court refused to recognize a right to health that would create an obligation on the part of the State to provide healthcare without cost.
159. Rep. of the Comm. on the Elimination of Discrimination against Women, 21 Sess., U.N. Doc. 54/38/Rev.1; GAOR, 54th Sess. Supp. No. 38, pt. II 180 (June 1999) (concluding observations on Ireland).
160. Mary Gilmartin & Allen White, *Interrogating Medical Tourism: Ireland, Abortion, and Mobility Rights* 36 SIGNS 275, 277 (2011).

costs a woman in Ireland €1,000 to go to the UK for an abortion.¹⁶¹ Although there are some volunteer organizations that can help women with this expense,¹⁶² the Irish State does not provide any financial assistance or reimburse costs. Moreover, women who already have children may have to arrange childcare while traveling for the procedure, and women with jobs will have to take time off of work. Poor women are particularly disadvantaged in this context. So too are asylum-seeking women who are not entitled to work¹⁶³ and thus have very limited independent resources, and who also must acquire a special travel visa.¹⁶⁴ The visa process alone costs between €120 and €240 and can take up to eight weeks, after which there is no guarantee the visa will be granted.¹⁶⁵ While women are entitled to medical care in Ireland following an abortion abroad, many women experience abortion stigma and do not seek out medical care or support from friends and family.¹⁶⁶

Ireland's proximity to the UK, where abortion is permitted, has allowed the Irish government to continuously avoid addressing abortion rights in Ireland. Despite the close proximity of the two jurisdictions, the distance across the Irish Sea is substantial enough to make it difficult for many Irish women to make the trip. In reality, the "choice" to travel in order to have an abortion is, for many, utterly illusory. Between 1980 and 2013, it was reported that 158,252 women with Irish addresses accessed abortion in England,¹⁶⁷ which leaves one to wonder how many women had no option but to attempt abortion by other means or to continue with an unwanted pregnancy.

161. See also ABORTION SUPPORT NETWORK, <https://www.abortionsupport.org.uk/about-the-women-we-help/> (last visited Nov. 2, 2015).

162. For example, the Abortion Support Network. On the history of Irish women's organizations in London supporting women from Ireland who travel to the UK to access abortion, see, e.g., ROSSITER, *supra* note 95.

163. Refugee Act 1996 (Act. No. 17/1996) § 9(4)(b) (Ir.), available at <http://www.irish-statutebook.ie/1996/en/act/pub/0017/>.

164. IRISH FAMILY PLANNING ASS'N, *Comments of the Irish Family Planning Association (IFPA) in Respect of the Fourth Periodic Review of Ireland Under the International Covenant on Civil and Political Rights (ICCPR)* 7 (2014), available at http://www.ifpa.ie/sites/default/files/documents/submissions/irish_family_planning_association_re_4th_periodic_review_of_ireland.pdf.

165. *Id.* at 7.

166. *Id.* at 10.

167. IRISH FAMILY PLANNING ASS'N, *Abortion in Ireland: Statistics*, <https://www.ifpa.ie/Hot-Topics/Abortion/Statistics> (last visited September 25, 2015).

VII. TOWARDS A REFERENDUM ON THE 8TH AMENDMENT

For most Irish people, and many Irish politicians, the dissonance between the constitutional myth of an abortion-free Ireland and the reality of Irish reproductive choice is stark.¹⁶⁸ High profile cases illustrating the sharpness and pervasiveness of the constitutionalized fetal right to life make that clear. So too does the plight of women and couples who have had to travel to the UK (or further afield) to terminate a pregnancy in the case of fatal fetal abnormality. Desire, perhaps even demand, for change is palpable, with the claims that change is needed concerning pregnancy issues emanating from rape and incest, as well as cases of fatal fetal abnormality.

This has been evident in a succession of opinion polls over recent months. The most recent of these polls suggest that support for some constitutional change concerning abortion is especially strong. According to a Sunday Independent/Millward Brown poll in September 2014, 75% of those surveyed were in favor of holding a referendum to repeal the 8th Amendment and 69% believed abortion should be available in cases of rape.¹⁶⁹ An *Irish Times*/Ipsos MORI poll held in October 2014 largely reproduced this picture, with 68% of those surveyed being in favor of holding a referendum on whether to allow abortion in cases of rape and fatal fetal abnormality.¹⁷⁰ An Amnesty International survey published in July 2015 shows that 67% of those surveyed favored the decriminalization of abortion.¹⁷¹ While such polls do not, of course, indicate that a referendum to change the constitutional status quo would necessarily be successful, they do indicate that there is significant desire for the constitutional provision to be

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168. See, e.g., Fiach Kelly, *Existing Abortion Laws are 'Too Restrictive', Says Leo Varadkar*, THE IRISH TIMES (Dec. 17, 2014, 11:21 AM), <http://www.irishtimes.com/news/politics/existing-abortion-laws-are-too-restrictive-says-leo-varadkar-1.2040072> (reporting on the comments of Minister of Health Leo Varadkar); Fiach Kelly, *Burton Says Abortion Laws Do Not Serve Women Well*, THE IRISH TIMES (Dec. 20, 2014, 1:00 AM), <http://www.irishtimes.com/news/politics/joan-burton-says-abortion-laws-do-not-serve-women-well-1.2044589> (reporting Tánaiste [Deputy Prime Minister] Joan Burton's comments that the current law is ill-suited to the needs of women).
169. MILLWARD BROWN, *National Opinion Poll: September 2014*, 1, 29-30 (Sept. 21, 2014), available at <http://www.millwardbrown.com/docs/default-source/ireland-downloads/opinion-polls/sunday-independent-september-2014-poll.pdf?sfvrsn=2>.
170. Stephen Collins, *Majority of Voters Want Abortion Laws Liberalised*, THE IRISH TIMES (Oct. 13, 2014, 5:34 PM), <http://www.irishtimes.com/news/social-affairs/majority-of-voters-want-abortion-law-liberalised-1.1961142>.
171. AMNESTY INT'L, *New Poll Finds Two-Thirds Majority in Ireland Wants Abortion Decriminalised* (July 8, 2015), <https://www.amnesty.ie/news/new-poll-finds-two-thirds-majority-ireland-want-abortion-decriminalised>.

revisited. There is also significant political momentum, in at least some quarters, towards a referendum.

While some have focused on attempting to bring change through legislation (such as through private members' bills to allow abortion in cases of fatal fetal abnormality¹⁷²), the general political consensus is that any reform whatsoever requires constitutional change. The current coalition government has made it clear that it has no intention of revisiting the question of abortion during its tenure (scheduled to end in 2016),¹⁷³ but two parties—the Labour Party¹⁷⁴ and Sinn Féin¹⁷⁵—have officially voted in favor of constitutional reform, thus making repeal of the 8th Amendment a core element of their party policies for the next general election.

While this level of momentum is notable, its substantive scale ought not to be overstated. The emergent consensus for constitutional change appears to be gathering around making abortion available in the very limited circumstances of pregnancy arising from rape and incest, and in cases of fatal fetal abnormality. What has not yet come fully into public discourse is a demand for constitutional recognition of women's reproductive autonomy as a general matter (i.e., beyond these limited situations). This suggests that the constitutionalization of fetal rights continues to dominate political and popular imagination in respect of reform and, thus, to greatly curtail the possibilities for constitutional change.

The constitutionalization of fetal rights must be grappled with to ensure the success of any constitutional referendum that is designed to recognize women's autonomy. This phenomenon may significantly frame both

172. Thus far, two such bills have been introduced: Protection of Life During Pregnancy Act 2013 (Act No. 35/2013), *available at* <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf>, and the Protection of Life During Pregnancy (Amendment) (Act No. 20/2015), *available at* <http://www.oireachtas.ie/documents/bills28/bills/2015/2015/b2015d.pdf>.

173. *See, e.g.*, Daniel McConnell, *Taoiseach: We Have Been Clear That Abortion is an Issue for the Next Government*, THE IRISH INDEPENDENT (Feb. 11, 2015, 10:43 AM), <http://www.independent.ie/irish-news/politics/taoiseach-we-have-been-clear-that-abortion-is-an-issue-for-the-next-government-30983287.html> (reporting on the statement of Taoiseach [Prime Minister] Enda Kenny).

174. Michael O'Regan, *Labour Delegates Call for Eighth Amendment to be Repealed*, THE IRISH TIMES (Mar. 1, 2015, 7:39 PM), <http://www.irishtimes.com/news/politics/labour-delegates-call-for-eighth-amendment-to-be-repealed-1.2121598>.

175. At their third Árd Eheis [party conference], Sinn Féin voted both to allow abortion in cases of fatal fetal abnormality and repeal the Eighth Amendment. Marie O'Halloran, *Sinn Féin Delegates Support Abortion for Fatal Foetal Abnormalities*, THE IRISH TIMES (Mar. 7, 2015, 8:12 PM), <http://www.irishtimes.com/news/politics/sinn-f%C3%A9in-delegates-support-abortion-for-fatal-foetal-abnormalities-1.2130835>.

the form of the proposed change and the nature of the discourse during the referendum campaign itself.

Referenda are a very particular part of Irish political life; they are rarely proposed without cross-party consensus and they tend to result in an impassioned public debate.¹⁷⁶ That debate is itself framed by constitutional requirements of “balance” in terms of the expenditure of public funds and the allocation of time by public broadcasters when discussing the issues in question.¹⁷⁷ In practice, these legal constraints mean that social issues are often framed as a polarized debate, with little “middle ground” discussion taking place in the “public square.” As mentioned above, the 1983 referendum was preceded by two years of intense lobbying to force associations and institutions to make their position on the question of abortion clear. Although the Roman Catholic Church is unlikely to play as prominent a role in any future referendum campaign as it did in 1983, the anti-abortion lobby remains well-organized and well-resourced. Founded on Catholic ethos, the Iona Institute is a prominent institution that has an extremely high-profile public presence in all debates on social issues. Thus, while it seems unlikely that a future referendum would take on quite the same tone of previous ones, two important trends that were present in those campaigns are likely to inform any forthcoming referendum: the representation of abortion as “un-Irish” and externally imposed, and the language of “fetal rights.”

Abortion has long been represented as utterly alien to Irish morality and the Irish way of life, with fetocentrism and the constitutionalization of fetal rights marking a particular moral position of the Irish people and State. In the campaign leading to the referendum on the 8th Amendment in 1983, this took on a manifestly “anti-English” tone, with abortion being represented as a tool of colonial oppression.¹⁷⁸ One famous poster in the campaign made that representation manifest: it carried the line “The Abortion Mills of England Grind Irish Babies into Blood that Cries Out to Heaven for Vengeance.”¹⁷⁹ Some claimed that any attempt to liberalize

176. See generally de Londras & Morgan, *supra* note 65, at 179-202 (detailing Ireland’s referendum procedure and voters’ involvement in passing amendments).

177. The government may not expend public monies to promote a particular result in a referendum, following the decision of the Supreme Court in *McKenna v. An Taoiseach (No. 2)*, [1995] 2 I.R. 10 (Ir.). Furthermore, television and radio broadcasts must give equal time to “yes” and “no” campaigns in referenda, following *Coughlan v. Broad. Complaints Comm’n & RTÉ*, [2000] 3 I.R. 1 (Ir.).

178. See, e.g., Ruth Fletcher, *Post-colonial Fragments: Representations of Abortion in Irish Law and Politics*, 28 J.L. & SOC’Y 568 (2001); Mullally, *supra* note 44.

179. For an excellent discussion of this poster, see Sophie Cacciaguidi-Fahy, *The Substantive Issue and the Rhetoric of the Abortion Debate in Ireland*, in CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 141, 147 (Anne Wagner et al. eds., 2005).

abortion law in Ireland was at danger of turning Ireland back into a mere province of the United Kingdom.¹⁸⁰

Although the tone had changed by the time of the referendum of 1992, it remained the case that abortion was represented as an external “threat” to Ireland’s particular moral position on fetal life. In this context the suggestion was that EU law might result in Ireland being forced to legalize abortion. To some extent this flowed from the European Court of Justice’s decision in *Grogan*.¹⁸¹ That case, discussed in its domestic legal incarnation above, concerned whether or not abortion was a service as understood within the Treaty of Rome, such that any restrictions on abortion (including travel and information) might be a violation of the Treaty and were thus invalid even if they took constitutional form. The European Court of Justice held that abortion is a service as understood within the Treaty of Rome and therefore the government could not restrict the advertisements and dissemination of information by parties commercially invested in abortion services.¹⁸² This case resulted in a perception of EC law as a threat to the constitutional protection of fetal rights in Ireland.

This became significant in the context of the 1992 referendum, which followed the *X Case*, because at the time the ratification of the Maastricht Treaty was also under consideration. During this time, it emerged that Ireland had negotiated a protocol to the Treaty that made it clear none of its provisions would interfere with Article 40.3.3 of the Constitution.¹⁸³ There was much uncertainty and debate about the legal effect of this protocol, which threatened to derail the effort to secure popular support for ratification of the Maastricht Treaty;¹⁸⁴ indeed, Jennifer Spreng noted that the referendum on the Maastricht Treaty “became a preliminary de facto vote on abortion rights.”¹⁸⁵ Abortion has continued to play a role in EU Treaty referenda ever since, with the concern that the EU might “impose” abortion

180. See, e.g., DESMOND FENNELL, *NICE PEOPLE & REDNECKS: IRELAND IN THE 1980s* (1986).

181. Case No. C-159/90, *Soc’y for the Protection of Unborn Children Ireland, Ltd. v. Grogan*, 1991 E.C.R. 4685.

182. On the failure of this decision to meaningfully consider women’s rights, see Mullally, *supra* note 44, at 91.

183. Treaty on European Union, Protocol 17, Feb. 7, 1992, O.J. (C 325/5).

184. In Ireland, changes to EU Treaties that alter “the essential scope or objectives of the Communities” must be approved by referendum before they can be ratified by the Government. *Crotty v. An Taoiseach*, [1987] I.R. 713, 767 (Ir.). See Gavin Barrett, *Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence*, 5 *EUR. CONST. L. REV.* 32 (2009).

185. JENNIFER E. SPRENG, *ABORTION AND DIVORCE LAW IN IRELAND* 128 (2004).

liberalization. However, there is no evidence that this is likely or even possible.¹⁸⁶

By the 2000s the discourse had shifted somewhat, from virulent anti- and post-colonial sentiment to a deep concern with the extent to which international human rights law might “impose” an obligation to liberalize abortion law on Ireland. In spite of the fact that abortion and access thereto is a matter on which there is extremely limited normative content in international human rights law, and one on which the European Court of Human Rights has not articulated a clear position vis-à-vis either Article 2 (the right to life) or Article 8 (the right to private and family life),¹⁸⁷ the anti-abortion lobby was suspicious and almost hostile toward even minimalist interventions from the international legal order. This is exemplified by the reaction to the European Court of Human Rights decision in *A, B & C v. Ireland*.¹⁸⁸

In that case, the European Court reiterated that it was for the member State to decide the extent to which abortion would be available in the domestic legal system;¹⁸⁹ this was a matter on which the State had such a wide margin of discretion that a strongly held national position against liberal abortion provision could override European consensus as to availability.¹⁹⁰ However, as the Court had previously held,¹⁹¹ where the law *does* allow for

186. For an overview of EU referendum debates in Ireland, including the influence of “the abortion question,” see Jane O’Mahony, *Ireland’s EU Referendum Experience*, 24 IRISH POL. STUD. 429 (2009).

187. For an overview of European Court of Human Rights’ jurisprudence on abortion, see Daniel Fenwick, *The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights*, 12 MED. L. INT’L 249 (2012).

188. *A, B & C v. Ireland*, 53 Eur. H.R. Rep. 13 (2011). For example, in evidence before the Oireachtas [Parliamentary] Joint Committee on Health and Children, William Binchy claimed, “The European Court does not require us to give legislative substance to such an unjust and mistaken decision. What it requires is something quite different: that our law on medical care during pregnancy be transparent and that there be a possibility of review or appeal from medical decisions. It is not the business of the European Court to tell Ireland what choices to make in relation to the protection of mothers and children. To say that the European Court requires us to legislate in accordance with the Supreme Court decision is patently untrue.” William Binchy, *Opening Statement to the Joint Committee on Health and Children*, HOUSES OF THE OIREACHTAS, available at <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/William-Binchy.pdf>. See also David Quinn, *Ireland Continues the Good Fight*, 37 HUM. LIFE REV. 140 (2011).

189. *A, B & C*, 53 Eur. H.R. Rep. at paras. 229-41 (2011).

190. See Fiona de Londras & Kanstantsin Dzehtsiarou, *Grand Chamber of the European Court of Human Rights, A, B and C v. Ireland, Decision of 17 December 2010*, 62 INT’L & COMP. L. Q. 250, 255-57 (2013) (regarding the “trumping” of European consensus by “profound moral values” in Ireland).

191. See *Tysiac v. Poland*, 45 Eur. H.R. Rep. 42 (2007).

abortion, it must be practicable for women within the state to avail themselves of it. As Irish law allowed for abortion where the life of a pregnant woman was subject to a real and substantial risk, the lack of any guidance for medics and women to determine whether abortion was lawfully permissible in any given case was a violation of the Convention.¹⁹²

The domestic reaction to *A, B & C v. Ireland* was strong. The Catholic Church urged the State not to legislate in response to the decision, arguing instead that a new referendum to narrow abortion availability ought to be proposed to the People.¹⁹³ Prominent intellectuals and commentators who subscribe to a Catholic ethos spoke about how international human rights law did not *per se* require the State to provide for abortion,¹⁹⁴ arguing that any demand for liberalization of abortion from international human rights law was in conflict with the ethics and morals of the Irish position.¹⁹⁵ The immediate reaction of the government was to establish an Expert Committee to consider how to respond to *A, B & C*¹⁹⁶ and, ultimately, the Protection of Life During Pregnancy Act 2013 was passed.

The passage of this Act was not without controversy. Debate about whether or not to include a risk of death from suicide—an issue that remained deeply controversial since *X*—was widespread, and the lack of a time limit on life-saving abortion caused consternation in some quarters.¹⁹⁷ One Cabinet Minister ultimately lost her position in government and the party whip by refusing to vote in favor of the legislation.¹⁹⁸ Amidst all of this controversy, the Act itself was represented as the government's response to the Strasbourg Court's judgment, rather than being a mechanism for

192. *A, B & C*, 53 Eur. H.R. Rep. at 13 (2011).

193. See *Submission by the Irish Catholic Bishops' Conference to Oireachtas Joint Committee on Health and Children* (Jan. 4, 2013), available at <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Submission-by-the-Irish-Catholic-Bishops-Conference.pdf>.

194. See Binchy, *supra* note 188.

195. William Binchy, Op-Ed., *UN Committee's View on Abortion Contradicts Core Ethical Value of Human Rights*, THE IRISH TIMES (Aug. 18, 2014), <http://www.irishtimes.com/news/politics/uncommittee-s-view-on-abortion-contradicts-core-ethical-value-of-human-rights-1.1899802>.

196. DEP'T OF HEALTH AND CHILDREN, REPORT OF THE EXPERT GROUP ON THE JUDGMENT IN *A, B, AND C V. IRELAND* (Nov. 2012).

197. Susan Daly, *Lucinda Creighton Says Term Limit on Abortions "The Minimum We Can Offer"*, THE JOURNAL.IE (July 11, 2013, 6:39 PM), <http://www.thejournal.ie/lucinda-creighton-gestational-limit-abortion-debate-989196-Jul2013>.

198. Harry McGee, Marie O'Halloran, Mary Carolan & Michael O'Regan, *Creighton Replaced as Dáil Passes New Abortion Law*, THE IRISH TIMES (July 12, 2013, 11:20 AM), <http://www.irishtimes.com/news/politics/creighton-replaced-as-dail-passes-new-abortion-law-1.1460261>. Regarding the debate on suicide, see de Londras, *supra* note 33; regarding the debate on time-limits, see de Londras & Graham, *supra* note 19.

giving effect to the will of the people as contained in Article 40.3.3 and interpreted by the Supreme Court.¹⁹⁹ The narrative of external imposition continued, even in the context of legislation that had been called for by Irish courts for more than two decades,²⁰⁰ and the content of which was sharply constrained by constitutionalized fetal rights and the Government's interpretation of the restrictions that Article 40.3.3 imposed.

That conservative interpretation and the limited and punitive nature of the 2013 Act, outlined in Part I, reflects the fact that the constitutionalization of fetal rights in 1983 resulted in a dominating discourse surrounding abortion of women's rights in contest with fetal rights. The textual "equality" of the right to life of the fetus and of the pregnant woman was subverted by a jurisprudence in which the State, through the modality of litigation and court order, was constructed as having a responsibility to protect and vindicate fetal rights. State power is used in support of this in order to override women's rights except in the narrowest of circumstances, and whether or not a woman falls into these circumstances is now strictly regulated by legislation. Under that Act—the Protection of Life During Pregnancy Act 2013—the decision as to whether a woman can have an abortion rests entirely with medics;²⁰¹ the views of pregnant women have little, if anything, to do with it. The construction of abortion as a matter of rights, and particularly of fetal rights, has been—and remains—strikingly successful in Ireland.

Even if sufficient momentum can be raised for a constitutional Amendment to be put to the People in a referendum, securing a proposed wording that moves us away from fetal rights as the core animating concern will be a significant challenge. If the Constitution is changed in a way that continues to constitutionalize fetal rights, this runs the risks of perpetuating jurisprudence and practice that cause considerable material harm to women and violations of their rights. In addition, in such circumstances the space for political and personal judgment about abortion, as both a general and an individual matter, would remain severely curtailed.

As outlined above, the 8th Amendment and its aftermath have imposed significant burdens on women in Ireland. Although contraception is widely available and the morning-after pill is generally available throughout the country (albeit it at different price points and after a one-on-one consultation with a pharmacist), women in Ireland do not have full reproductive

199. See Minister of Health James Reilly, Introduction of Protection of Life During Pregnancy Bill 2013, DÁIL DEBATES (Jun. 20, 2013), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013062000009?opendocument>).

200. See *Soc'y for the Protection of the Unborn Child v. Grogan*, [1989] I.R. 734, 770.

201. Protection of Life During Pregnancy Act 2013 (Act No. 35/2013).

autonomy. The extremely limited availability of abortions, combined with the burdens of travelling abroad to access abortion when it is desired, mean that in practice as well as in law women are denied agency in respect of the continuation of a pregnancy. This is true not only of women whose pregnancies emanate from extremely repressive circumstances (such as rape and incest), or where a medical condition means that the fetus will not be born alive or survive for very long if born alive (i.e. cases of fatal fetal abnormality), but for *all* women who experience pregnancy in Ireland.

Furthermore, the 8th Amendment fundamentally shapes the contours and possibilities of medical decision-making beyond the context of abortion *per se*. The newly developed concept of fetal best interests has potentially wide-reaching effects for medical practice, which is already greatly affected by the “two patient” approach that emanates from having to practice medicine not only on a woman but also on a constitutionally-defined rights-bearing fetus. Pregnant women in Ireland are deeply impacted by the 8th Amendment, whether they want to access an abortion or not (although the inability to access abortion is at the heart of that impact). The fetocentricity of obstetric medical practice in Ireland is deeply connected to the presence of Article 40.3.3 in the Constitution. Women who are ill may not receive required medical interventions because of a fear of impermissible interference with fetal life. Women who are dead may be artificially sustained in order to provide a “uterine environment” for fetal development. Women who wish to have an abortion cannot get a referral from a clinician.

Article 40.3.3 is about far more than abortion. Its reach is wide. Its impact is deep. And women exclusively feel its impact. That is the lived experience that any reform of abortion law in Ireland must confront, and in order to do so effectively the discourse of rights must be reoriented in the context of abortion. That is the real impact of constitutionalizing fetal rights.

VIII. CONCLUSION: POSSIBLE CONSTITUTIONAL CHANGE IN IRELAND

It is clear from the above analysis that no meaningful reform of Irish abortion law is possible without constitutional change, but also that the form of constitutional change itself is important. If the question of abortion in Ireland is to be reshaped in a meaningful way, then a movement away from a dominant discourse of fetal rights is necessary. That can only be achieved by replacing constitutionalized fetal rights with a constitutional recognition of women’s autonomy and by opening up political space for the availability of abortion in Ireland to be determined on the basis of politics, policy, and evidence.

For some, the primary aim is the repeal of the 8th Amendment (often advocated together with repeal of the provisions on travel and information), without any replacement in the text of the Constitution itself. Such an approach, while attractive in its simplicity, seems insufficient to clearly and unequivocally “deconstitutionalize” the matter of abortion.²⁰² First, as outlined above, there is a pre-1983 jurisprudence on the right to life of the unborn, which would not be clearly disrupted by the removal of Article 40.3.3. Rather, it is arguable that the unenumerated right to life of the unborn could be resurrected in the event of a simple repeal without replacement. Were that to be the case, then arguments about the need to restrict travel and information—which could be made if the travel and information provisions were also repealed—could be made in a manner that would convince courts. Furthermore, the welfare/best interests of the fetus approach advocated in *PP v. HSE* may well survive such a repeal, with its entire attendant potential for shaping maternal care in Ireland.

It is true, and important to note, that this seems somewhat unlikely. If a referendum to remove the 8th Amendment were approved by a majority of voters, the Supreme Court would almost certainly see in that an intention to remove a constitutional protection for the right to life of the unborn. However, predicting the circumstances in which this unenumerated right might make an appearance in argumentation before the Court is extremely challenging and, should it be successfully argued, the implications may well be wide-ranging. It would therefore seem sensible to suggest that a “mere” repeal may well be insufficient for the purposes of deconstitutionalizing the issue of abortion in Ireland.

Furthermore, a simple repeal would not reorient the discourse of abortion law and regulation in Ireland away from fetal rights. As argued above, the fetocentrism of the discourse of abortion in Ireland is directly related to the constitutionalization of fetal rights. It was through the legal codification of a fetal right to life that the courts and politics have developed an approach to abortion in which protection of the fetus, rather than recognition of women’s autonomy and the value of reproductive justice, has been the primary concern. Thus, reorientation of the discourse away from fetal rights is of fundamental importance. This cannot clearly be achieved through simple repeal, not only because an unenumerated right to life for the fetus may remain within the constitutional *acquis*, but also because the Constitution would remain devoid of an expression of the value of women’s autonomy, independence, and control over reproduction. Thus, repeal and replacement would appear to be more appropriate.

202. See Enright & de Londras, *supra* note 146.

What form, then, might a constitutional Amendment that appropriately considers women's lived experiences, the need to shift away from a fetal rights discourse, and a commitment to reproductive justice take? I argue that a replacement text that expressly endorses a reproductive justice approach, and leaves room for political judgment and contestation is to be preferred. Such a statement should be open, and include a provision recognizing that "the availability of abortion shall not be unlawful." An express endorsement of a reproductive justice approach is desirable for the reasons outlined above and would effectively shift the constitutional discourse away from an almost-exclusive focus on fetal rights. Constitutional recognition of women's right to reproductive autonomy would create space in which the political process can liberate itself from the pre-determination of questions about abortion that Article 40.3.3 currently imposes. Furthermore, this approach would create an imperative for Irish politicians to finally use their judgment to regulate the availability of abortion in Ireland. It may well be that this judgment would result in a limited abortion law regime in Ireland, but even if that were the case, it would be the product of a reasoned political debate in which effective deliberation as to the regulation of abortion in Ireland was engaged.

Although it is argued that Article 40.3.3 reflects "the will of the People," its capacity to creep into all areas of maternal care was not foreseen. In any case, the lived experience of women in Ireland stands in such sharp contrast to the absoluteness of the 8th Amendment that there is a strong democratic argument in favor of revisiting the matter. This is not least because the Irish people have never been presented with a proposed constitutional change that would liberalize the legal regime in a meaningful way. For that constitutional change to be meaningful it must deconstitutionalize fetal rights, recognize women's autonomy, commit the State to reproductive justice, and leave the space for politics to determine the future of Irish abortion law.

The difficult tale of abortion law and fetal rights jurisprudence in Ireland since 1983 demonstrates the risks that come with constitutionalizing fetal rights. However, the greatest challenge has yet to be confronted: to unshackle political imagination from the structure and language that constitutionalized fetal rights have embedded in the Irish legal, political, and medical cultures. The suffocation of such imagination may well transpire to be the greatest hurdle to reform and, for the architects of the 8th Amendment, their greatest achievement. ❀

