

# CONSTITUTIONALIZING FETAL RIGHTS: A SALUTARY TALE FROM IRELAND

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## **I. Introduction**

In 1983, Ireland became the first country in the world to constitutionalize fetal rights.<sup>1</sup> The 8<sup>th</sup> 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”.<sup>2</sup> Since then, enshrining fetal rights in constitutions and in legislation has emerged as a key part of anti-abortion

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<sup>1</sup> Notably, the 1978 American Convention on Human Rights provides, in Article 4.1, that “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception”. However, in 1983 Ireland was the first country to provide constitutional protection to the right to life of the fetus.

<sup>2</sup> Constitution of Ireland (1937), Article 40.3.3.

campaigning. In this respect, attempts to create fetal personhood laws in Colorado and North Dakota in November 2014 and the attempt constitutionalize fetal rights in Wisconsin in 2013 are notable examples. The constitutions of Hungary,<sup>3</sup> the Dominican Republic,<sup>4</sup> Ecuador,<sup>5</sup> El Salvador,<sup>6</sup> Guatemala,<sup>7</sup> Madagascar,<sup>8</sup> Paraguay,<sup>9</sup> and the Philippines<sup>10</sup> now include fetal rights. The new Kenyan constitution declares “The life of a person begins at conception”,<sup>11</sup> although abortion is not fully prohibited in that jurisdiction,<sup>12</sup> and the constitutions of Somalia and Swaziland make express reference to abortion, permitting it only in limited circumstances.<sup>13</sup>

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<sup>3</sup> The Fundamental Law of Hungary (2011), Freedom and Responsibility, Article II (“the life of the foetus shall be protected from the moment of conception”).

<sup>4</sup> Constitution of the Dominican Republic (2010), Title II, Chapter I, Section I, Article 37 (“The right to life is inviolable from conception to death...”).

<sup>5</sup> Constitution of Ecuador (2008; revised 2011), Title II, Chapter 3, Section 5, Article 45 (“...The State shall recognize and guarantee life, including care and protection from the time of conception”).

<sup>6</sup> Constitution of El Salvador (1983; revised 2003), Title 1, Article 1 (amendment introduced in 1999)(“[The State] recognizes as a human person every human being since the moment of conception”).

<sup>7</sup> Constitution of Guatemala (1985; revised 1993), Title II, Chapter I, Article 3 (“The State guarantees and protects the human life from its conception...”).

<sup>8</sup> The Constitution of Madagascar (2010) protects “the right to the protection of health” for all persons “from their conception” in Title II, Sub-Title II, Article 19.

<sup>9</sup> Constitution of Paraguay (1992; revised 2011), Part I, Title II, Chapter I, Section I, Article 4 (“The right to life is inherent to the human person. Its protection is guaranteed, in general, from conception”).

<sup>10</sup> Constitution of the Philippines (1987), Article II(12) (“The State...shall equally protect the life of the mother and the life of the unborn from conception”).

<sup>11</sup> Constitution of Kenya (2010), Article 26(2).

<sup>12</sup> *Id.*, Article 26(4) provides “Abortion 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”.

<sup>13</sup> Constitution of Somalia (2012), Article 15(5) (“Abortion is contrary to Shari'ah and is prohibited except in cases of necessity, especially to save the life of the mother”; Constitution of Swaziland (2005), Article 15(5) (“Abortion is unlawful but may be allowed” on medical and therapeutic grounds (Article 15(5)(a)), “where the pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female” (Article 15(5)(b)), or where otherwise provided for by law (Article 15(5)(c)).

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 8<sup>th</sup> Amendment it has become clear that Ireland now has an abortion law regime that is essentially ‘unliveable’.<sup>14</sup> 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.<sup>15</sup> This is notwithstanding the clear hardship that 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 judgement at either political or personal levels. Rather, the outcome of all arguments for a more liberal abortion law regime is effectively pre-determined in the negative. 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.

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

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<sup>14</sup> This phrase is owed to Ruth Fletcher, *Making Law Liveable: Bringing Feminist Knowledge of Care into the Curriculum*, Revaluing Care Research Network, 25 February 2015. Available online at <http://revaluingcare.net/making-law-liveable-bringing-feminist-knowledge-of-care-into-the-curriculum/> (last accessed 22 March 2015).

<sup>15</sup> Such developments have long been foreseen in American scholarship on the development across the USA of various legal provisions (e.g. wrongful death statutes applicable to fetal death) with ‘fetal rights’ underpinnings. See, for example, Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy and Equal Protection* (1986) 95 YALE LAW JOURNAL 598; Janet Gallagher, *Prenatal Invasions and Interventions: What’s Wrong with Fetal Rights* (1987) 10 HARVARD WOMEN’S LAW JOURNAL 9.

rights jurisprudence, the resultant fetocentricity of maternal care in Ireland, and the everyday hardship the *status quo* causes to pregnant women in Ireland. Finally, the article argues that the current momentum for constitutional change in Ireland should lead to proposing an amendment to the People that would effectively deconstitutionalize fetal rights, positively recognize women's autonomy, and create the space for political judgement 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 once the fetus is deemed not yet 'viable'.<sup>16</sup> Where viability of the fetus is established as a matter of medical judgement, pregnancies can be terminated by early delivery, for example, but not by means of abortion.<sup>17</sup> The law as it stands takes the form of Article 40.3.3 of the Constitution (the 8<sup>th</sup> 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, the introduction of which is discussed in further detail below, permits abortion only in very limited circumstances. According to the case of *Attorney*

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<sup>16</sup> Constitution of Ireland (1937), Article 40.3.3; Protection of Life During Pregnancy Act 2013; Department of Health, *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals* (2014).

<sup>17</sup> 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 pregnancy 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, s.s. 7(1)(a)(ii), 8(1)(a)(ii), 9(1)(a)(ii). See also Department of Health, *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals* (2014); Fiona de Londras & Laura Graham, *Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate* (2013) 3 IRISH JOURNAL OF LEGAL STUDIES 54. In this respect, Ireland is unusual in using the term 'termination of pregnancy' to refer to both abortion and early delivery, whereas other jurisdictions use it to refer to abortion only.

*General v X*,<sup>18</sup> 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. Whether that is an absolute statement of the limitations of abortion under the constitution remains a matter of some contention. While the Government takes a conservative approach to the interpretation of Article 40.3.3 so that it considers 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 be permissible where there is a fatal fetal abnormality.<sup>19</sup> 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.<sup>20</sup>

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 statute criminalized abortion outside of the limited constitutional right,<sup>21</sup> access to constitutionally permissible abortion was left purely to practice and medical judgement exercised by doctors who themselves were operating under the ‘chilling effect’<sup>22</sup> of the criminal law regime. Following the European Court of Human Rights decision in *A, B & C v Ireland*<sup>23</sup> and the death of Savita Halappanavar as a result of

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<sup>18</sup> [1992] 1 I.R. 1.

<sup>19</sup> See, for example, Ruth Fletcher, *Submission to the Oireachtas Joint Committee on Health*, 21 May 2013. Available online at <http://humanrights.ie/criminal-justice/guestpost-ruth-fletchers-submission-to-the-oireachtas-abortion-hearings/> (last accessed: 17 March 2015).

<sup>20</sup> See generally, Christine Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards* (2008) 8 HUMAN RIGHTS LAW REVIEW 249; Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014).

<sup>21</sup> Offences against the Person Act 1861.

<sup>22</sup> This phrase was used in reference to the criminalization of abortion by the European Court of Human Rights: *A, B & C v Ireland* (2011) 53 E.H.R.R. 13, para. 254: “the 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”.

<sup>23</sup> *Ibid.*

sepsis during a protracted miscarriage in a Galway hospital in late 2012,<sup>24</sup> the Protection of Life During Pregnancy Act 2013 was introduced. This Act put in place extensive barriers to women's capacity 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, reflecting the deeply limiting effect of Article 40.3.3 on legislative choice. Under the 2013 Act abortion is available in three circumstances only:

- (a) Two medical practitioners (one of whom is 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 pregnancy<sup>25</sup> 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;<sup>26</sup> or
- (b) 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,<sup>27</sup> 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;<sup>28</sup> or
- (c) 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

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<sup>24</sup> On the death of Savita Halappanavar see Kitty Holland, *Woman Denied a Termination Dies in Hospital*, 14 November 2012, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412> (last accessed 17 March 2015).

<sup>25</sup> Protection of Life During Pregnancy Act 2013, s. 7.

<sup>26</sup> *Id.*

<sup>27</sup> Protection of Life During Pregnancy Act 2013, s. 8.

<sup>28</sup> *Id.*

only be averted by termination of the pregnancy,<sup>29</sup> 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.<sup>30</sup>

The viability element of these tests is implicit, rather than being expressly outlined in the legislation, and emanates from the constitutional provision of an ‘equal’ right to life to ‘the unborn’ and ‘the mother’.<sup>31</sup> Abortion outside of these three, strictly regulated circumstances constitutes the criminal offence of ‘destruction of unborn human life’ under s. 22 of the Protection of Life During Pregnancy Act 2013. Section 22 provides:

22. (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.

Importantly, under s. 22, criminalization extends not only doctors but also women who purchase abortifacients online and take them in the privacy of their own home, reportedly a common approach to unwanted pregnancy in Ireland.<sup>32</sup> All of this constitutes one of the strictest abortion regimes in Europe: 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

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<sup>29</sup> Protection of Life During Pregnancy Act 2013, s. 9.

<sup>30</sup> *Id.*

<sup>31</sup> Article 40.3.3; Fiona de Londras, *Suicide and Abortion: Analysing the Legislative Options in Ireland* (2013) 19(1) MEDICO-LEGAL JOURNAL OF IRELAND 4; Fiona de Londras & Laura Graham, *Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate*, (2013) 3(3) IRISH JOURNAL OF LEGAL STUDIES 54; Department of Health, *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals* (2014).

<sup>32</sup> See Carol Ryan, *Abortion by Post*, 15 March 2011, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/health/abortion-by-post-1.573017> (last accessed 17 March 2015).

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<sup>33</sup> and to information on abortion<sup>34</sup> (both secured only in 1992<sup>35</sup>), a medical professional based in Ireland cannot refer a pregnant woman to a clinic in England, 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”.

Simply put, only a woman who is dying and incapable of travelling has an abortion in Ireland. For everyone else, purchasing abortifacients illegally, travelling to another state in order to access an abortion, or simply resigning oneself to the pregnancy are the only options. This is exacerbated by the fact that, 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.<sup>36</sup>

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<sup>33</sup> Constitution of Ireland (1937), Article 40.3.3 (“This subsection shall not limit freedom to travel between the State and another state”).

<sup>34</sup> *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”).

<sup>35</sup> These provisions were inserted into the Constitution by the 13<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution in December 1992. The 1992 referendum is discussed further below.

<sup>36</sup> 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 (Northern Ireland) 1945 (s. 25). Following the decision of *R v Bourne* [1939] 1 K.B. 687, 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” (at p. 694), which has been interpreted as permitting abortion where there is a risk that continuing the pregnancy would have a real and serious detrimental



### 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 then 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, s. 58. This 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.

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*.<sup>37</sup>

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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 the Matter of an Application by the Society for the Protection of Unborn Children for Judicial Review* [2009] N.I.Q.B. 92.

<sup>37</sup> Between the establishment of the Irish Free State and the introduction of the 1937 a transitional constitution—the Constitution of the Irish Free State—operated. 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, for example, Leo Kohn, *THE CONSTITUTION OF THE IRISH FREE STATE* (1932). On women's citizenship under the 1922 Constitution see Caitriona Beaumont, *Women*,

Rather, laws that were not expressly repealed were automatically carried over, although they were susceptible to being challenged for incompatibility with the Irish Constitution and, if found to be incompatible, to being struck down.<sup>38</sup> 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 1861 Act.

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,<sup>39</sup> the strength of

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*Citizenship and Catholicism in the Irish Free State, 1922-1948* (1997) 6(4) WOMEN'S HISTORY REVIEW 563.

<sup>38</sup> Constitution of Ireland (1937), Article 50.

<sup>39</sup> 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”.

In addition, the Constitution as originally introduced included the following provision as Article 44.1.2: “The State recognises 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”. By Article 44.1.3 “The 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 5<sup>th</sup> Amendment to the Constitution,

which 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’.<sup>40</sup> As considered further in Part VII below, the narrative of abortion as an ‘un-Irish’ phenomenon has continued, in various forms, since then.

Although there are reports that women based in Ireland did access abortion within the jurisdiction,<sup>41</sup> as a general matter there was no strong organized movement for abortion to be legalized in Ireland in the early days of the state. Until the mid- to late-1970s, women in Ireland had little autonomy: contraception was effectively unavailable, and its importation was a criminal offence;<sup>42</sup> abortion was criminalized;<sup>43</sup> women who got pregnant outside of marriage frequently found themselves detained in institutions, usually run by the Catholic Church, such as Magdalen Laundries and ‘Mother and Baby Homes’;<sup>44</sup> there was no equal pay or other employment equality legislation, upon marriage women were required to leave state-funded employment,<sup>45</sup>

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approved by referendum in December 1972. On religion and the Irish Constitution generally see EOIN DALY, *RELIGION, LAW AND THE IRISH STATE: THE CONSTITUTIONAL FRAMEWORK IN CONTEXT* (2012).

<sup>40</sup> See Siobhán Mullally, *Debating Reproductive Rights in Ireland* (2005) 27(1) HUMAN RIGHTS QUARTERLY 78; Ruth Fletcher, *Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics* (2001) 28 JOURNAL OF LAW AND SOCIETY 568.

<sup>41</sup> See, for example, Anne O’Connor, *Abortion: Myths and Realities from Irish Folk Tradition* in AILBHE SMYTH (ED), *THE ABORTION PAPERS IRELAND* (1992), p. 57.

<sup>42</sup> This was criminalized under the Criminal Law Amendment Act 1935, which was struck down by the Supreme Court in *McGee v Attorney General* [1974] I.R. 284. The availability of contraception was then regulated by the Health (Family Planning) Act 1979, discussed below.

<sup>43</sup> Offences against the Person Act 1861.

<sup>44</sup> On the confinement of ‘deviant’ women in Ireland see, for example, Una Crowley and Rob Kitchin, *Producing ‘Decent Girls’: Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922-1937)* (2008) 15(4) GENDER, PLACE & CULTURE: A JOURNAL OF FEMINIST GEOGRAPHY 355, James M. Smith, *The Politics of Sexual Knowledge: The Origins of Ireland’s Containment Culture and the Carrigan Report (1931)* (2004) 13(2) JOURNAL OF THE HISTORY OF SEXUALITY 208, Brian Tittley, *Magdalen Asylums and Moral Regulation in Ireland* in ANTHONY POTTS & TOM O’DONOGHUE, *SCHOOLS AS DANGEROUS PLACES: A HISTORICAL PERSPECTIVE* (2007), at p. 119.

<sup>45</sup> The ‘marriage bar’, as it was called, only impacted on a small number of women, but was part of a broader pattern of economic disenfranchisement of women. On this see Caitriona Beaumont, *Gender, Citizenship and the State in Ireland, 1922-1990* in DAVID ALDERSON, FIONA BECKET, SCOTT BREWSTER & VIRGINIA CROSSMAN, *IRELAND IN PROXIMITY: HISTORY, GENDER AND SPACE* (1999), at p. 95.

and the Minister for Industry and Commerce had the power to limit the number of women employed in any industry;<sup>46</sup> divorce was unavailable;<sup>47</sup> there was practically no provision for women in the event of marital breakdown;<sup>48</sup> and the Constitution reinforced highly gendered expectations of women as caregivers and mothers.<sup>49</sup> Ireland was, in other words, a deeply conservative country in which Catholicism held a steady grip, politics and the professions of law and medicine were dominated by conservative men who themselves were often heavily influenced by senior members of the Catholic Church,<sup>50</sup> and political movements for women's empowerment and effective participation struggled to achieve purchase in the public square.<sup>51</sup> In this context, one would imagine that there would have been little impetus for a movement focused on constitutionalizing fetal rights in Ireland in order to prevent possible decriminalization of abortion; it simply seemed like an impossibly remote prospect.

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

### **The 1983 Referendum and Introduction of the 8<sup>th</sup> Amendment**

In the early 1970s the US Supreme Court interpreted the right to privacy as including a (not very extensive) right to access abortion in *Roe v Wade*;<sup>52</sup> a development that followed an assertion of the right to access contraception in *Griswold v Connecticut*.<sup>53</sup> This immediately made anti-abortion campaigners in Ireland anxious that something

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<sup>46</sup> Conditions of Employment Act 1935, s. 16.

<sup>47</sup> Divorce was constitutionally prohibited until 1995. It now permitted, subject to very strict requirements, by virtue of Article 41.3.2 of the Constitution and the Family Law (Divorce) Act 1995.

<sup>48</sup> See YVONNE GALLIGAN, *WOMEN AND POLITICS IN CONTEMPORARY IRELAND: FROM THE MARGINS TO THE MAINSTREAM* (1998), Chapter 5.

<sup>49</sup> See Siobhán Mullally, *Equality Guarantees in Irish Constitutional Law: The Myth of Constitutionalism and the Neutral State* in TIM MURPHY & PATRICK TWOMEY, *IRELAND'S EVOLVING CONSTITUTION: 1937-1997* (1998).

<sup>50</sup> See generally DIARMUID FERRITER, *OCCASIONS OF SIN: SEX AND SOCIETY IN MODERN IRELAND* (2009).

<sup>51</sup> See generally LINDA CONNOLLY, *THE IRISH WOMEN'S MOVEMENT: FROM REVOLUTION TO DEVOLUTION* (2003).

<sup>52</sup> 410 U.S. 113 (1973).

<sup>53</sup> 381 U.S. 479 (1965).

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 resulted in the criminalization of importing contraception being struck down in the case of *McGee v Attorney General*.<sup>54</sup> In that case, Walsh J. in the Supreme Court had expressly endorsed the view that the constitution was a living, dynamic document that had to develop with society.<sup>55</sup> 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’).<sup>56</sup> The legalization of contraception, together with *McGee* and the US Supreme Court’s decision in *Roe*, caused anxiety among anti-abortion campaigners,<sup>57</sup> notwithstanding the fact that at the time they were concerned, as O’Carroll has written, with abortion in theory rather than in practice.<sup>58</sup>

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, frankly, political collapse.<sup>59</sup> 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”.<sup>60</sup> This was the perfect

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<sup>54</sup> [1974] I.R. 284.

<sup>55</sup> *Id.*, p.p. 318-319.

<sup>56</sup> Health (Family Planning) Act 1979, s. 4(2): “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 authorisation 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”.

<sup>57</sup> Ursula Barry, *Abortion in the Republic of Ireland* (1988) 29 FEMINIST REVIEW 57.

<sup>58</sup> J.P. O’Carroll, *Bishops, Knights—and Pawns? Traditional Thought and the Irish Abortion Referendum Debate of 1983* (1991) 6(1) IRISH POLITICAL STUDIES 53, 54

<sup>59</sup> For a short overview see THOMAS BARTLETT, *IRELAND: A HISTORY* (2010), p.p. 527-533.

<sup>60</sup> Ursula Barry, *Abortion in the Republic of Ireland* (1988) 29 FEMINIST REVIEW 57, 58. On the founding and influence of PLAC see Fintan O’Toole, *Why Ireland Became the Only Country in the*

context in which to extract political promises and, following two years in 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 blackmail’”,<sup>61</sup> PLAC managed to secure a commitment for a constitutional referendum on abortion.<sup>62</sup> Not only that, but the lobby and the Catholic Church had clear influence over the wording to be put to the People; a wording that, as outlined above, constitutionalized fetal rights in Ireland. In late 1983 the 8<sup>th</sup> Amendment was put before the People.

The 1983 abortion referendum is widely regarded as one of the most brutish and bruising in the history of (strangely ferocious) constitutional referenda in Ireland,<sup>63</sup> the tone of public debate was, frankly, intolerably intolerant, to the extent that an editorial in the *Irish Times* described it as “the second partitioning of Ireland”.<sup>64</sup> The anti-abortion campaign was astonishingly well resourced, while the pro-choice side scrambled to fundraise. 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 at churches.<sup>65</sup>

Although the turnout was low, a huge majority (66.9%) of those who voted supported the amendment, and thus Article 40.3.3, the 8<sup>th</sup> Amendment to the Constitution, was

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*World to have a Constitutional Ban on Abortion*, 26 August 2014, THE IRISH TIMES. Available online at <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> (last accessed 17 March 2015); TOM H HESKETH, *THE SECOND PARTITIONING OF IRELAND: THE ABORTION REFERENDUM OF 1983* (1990).

<sup>61</sup> *Id.*, 58.

<sup>62</sup> Article 46 of the Constitution provides that amendment is permissible by referendum only, and no popular initiative is permitted; rather a referendum must be initiated by government.

<sup>63</sup> On constitutional referenda in Ireland see Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in XENEPHON CONTIADES, *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* (2012)

<sup>64</sup> *Editorial*, 30 August 1983, THE IRISH TIMES.

<sup>65</sup> 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 Gilhealy, *The State and the Discursive Construction of Abortion* in VICKY RANDALL & GEORGINA WAYLEN (EDS), *GENDER, POLITICS AND THE STATE* (1998, London & New York: Routledge), 58 at 72.

enacted. This amendment, which constitutionalized fetal rights, “identified the people of Ireland as protectors of the foetus”;<sup>66</sup> a position that persists, at the level of rhetoric at least, to this day.

### **The X Case and the 1992 Referendum**

Barry Gilhealy argues “The 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”.<sup>67</sup> That residual traditionalism and conservatism manifested itself in the narrow and highly restrictive interpretation and application of the 8<sup>th</sup> Amendment in order to prohibit travel for abortion and the provision or receipt of information about abortion, as well as the cultivation of massive social stigma and significant amount of fear for women who were desirous of terminating their pregnancy. As the jurisprudence on the 8<sup>th</sup> Amendment, which is considered in detail in Part IV demonstrates, the right to life of the unborn was elevated to effectively the highest constitutional position, and there was no “public language with which to conceptualise the relationship between woman and foetus”<sup>68</sup> beyond that of fetal rights. In this, the 8<sup>th</sup> Amendment was remarkably successful in structuring Irish abortion law around a “cultural and official recognition of foetal rights”.<sup>69</sup>

However, while anti-abortion activists such as PLAC considered that the 8<sup>th</sup> Amendment had made it impossible for abortion to ever be legally provided for in Ireland, 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

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<sup>66</sup> Ruth Fletcher, *Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics* (2001) 28 JOURNAL OF LAW AND SOCIETY 568, at 575.

<sup>67</sup> Barry Gilhealy, *The State and the Discursive Construction of Abortion* in VICKY RANDALL & GEORGINA WAYLEN (EDS), *GENDER, POLITICS AND THE STATE* (1998, London & New York; Routledge), 58 at 72.

<sup>68</sup> *Id.*, at 73.

<sup>69</sup> Lisa Smyth, *Feminism and Abortion Politics, Choice, Rights, and Reproductive Freedom* (2002) 25(3) WOMEN STUDIES INTERNATIONAL FORUM 335, 336-337.

evidence from the aborted fetus might be useful as evidence in the prosecution of her rapist. This led to the Attorney General being informed and, as the fetus in this case had a constitutional right to life, he instituted proceedings to secure an injunction to prevent the young girl from getting an abortion abroad; a decision he explained by reference to his duty, on behalf of the State, to protect the constitutional rights of the fetus.<sup>70</sup> 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. There followed massive protests and general public outcry.<sup>71</sup>

Although the electorate had approved of Article 40.3.3 by referendum, the baldness of a concrete set of facts starkly illustrated just how restrictive that wording could be, resulting in an outcome that many had not anticipated, i.e. the literal confinement of a teenage child who had been raped and claimed to want to kill herself for the purposes 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,<sup>72</sup> and on appeal the Supreme Court reversed the decision of the High Court.<sup>73</sup> In this decision, which has come to be 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".<sup>74</sup> That risk could take the form of a risk of suicide, as well as a risk emanating from physical illness.<sup>75</sup> X was thus permitted to travel in order to avail of an abortion.

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<sup>70</sup> See the interview with the then-Attorney General, Harry Whelehan, broadcast on *Scannal* (RTÉ), 22 February 2010: "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". See 'Scannal Web Notes' on this broadcast available at <http://www.rte.ie/tv/scannal/xcase.html> (last accessed 17 March 2015).

<sup>71</sup> On the public reaction to the High Court's decision see, for example, Ailbhe Smyth, *A Sadistic Farce: Women and Abortion in the Republic of Ireland, 1992* in Ailbhe Smyth (ed), *THE ABORTION PAPERS IRELAND* (1992), at p. 7.

<sup>72</sup> *Id.*, 12.

<sup>73</sup> *Attorney General v X* [1992] 1 I.R. 1

<sup>74</sup> *Id.*, para 37.

<sup>75</sup> *Id.*, paras 41-45.



The anti-abortion lobby was deeply displeased with the Court's interpretation of Article 40.3.3. This reading of the 8<sup>th</sup> Amendment was not, they argued, 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 may 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 was seen as being qualitatively different. This was a risk, it was argued, from which a woman could be protected *without* the pregnancy being terminated and in relation to which termination would have to take the form of deliberate destruction of the fetus (rather than being a 'side effect' of treatment as in the case of physical illness). Writing in the *Irish Times* shortly after the Supreme Court decision, William Binchy—himself an architect of the 8<sup>th</sup> Amendment and, at the time, the Regius Professor-elect of Laws in Trinity College Dublin—opined “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”.<sup>76</sup> Shortly thereafter a campaign to have the Constitution amended took shape.

The original proposal emanating from anti-abortion campaigners was that Article 40.3.3 be amended to expressly prohibit “intentional abortion”, which Binchy said would bring the Constitution “in line with the intentions of those who voted for the [8<sup>th</sup>] Amendment in 1983”.<sup>77</sup> Under this proposal, a risk of suicide could not be a basis for constitutionally permissible abortion. Rather, Dr Catherine Bannon claimed, a pregnant woman who expressed suicidal intentions could be admitted to hospital (involuntarily, if need be) “where she can be watched, receive psychiatric therapy and [be] safeguarded against herself”.<sup>78</sup>

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<sup>76</sup> William Binchy, *New abortion regime has no effective limits*, 6 March 1992, THE IRISH TIMES, p. 13.

<sup>77</sup> Reported in M.M. Tynan, *Campaign to amend the Constitution launched*, 11 March 1992, THE IRISH TIMES, p. 3.

<sup>78</sup> *Id.*

Unlike in the early 1980s, however, the political parties took control of the situation and wording for three referenda was proposed without consultation with the Catholic Church and with cross-party agreement to reject any wording proposed by the anti-abortion lobby.<sup>79</sup> Three constitutional changes were proposed to the People: to ensure abortion was not available on the basis of suicidal ideation/risk on the part of the pregnant woman, to provide for a right to travel, and to 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 12<sup>th</sup> amendment was unsuccessful. That proposed 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, as the People rejected it (65.35% against, 34.65% in favor), the 8<sup>th</sup> Amendment, as interpreted in the *X Case*, remained in place.

### **The 2002 Referendum**

In 2002 the Government proposed a complex constitutional amendment on abortion. The proposed 25<sup>th</sup> amendment to the Constitution was presented as a package of reforms in the area of 'crisis pregnancy'. The proposed amendment had four main parts: (i) to ensure that life was protected from the moment of implantation (as opposed to conception), (ii) to require the Oireachtas [Parliament] to pass the proposed Protection of Human Life in Pregnancy Act 2002 within 180 days of the referendum, (iii) to grant that proposed Act constitutional protection so that, in future, it could only be amended by referendum of the People, and (iv) to permit abortion where it was necessary to prevent loss of the pregnant woman's life *other than* where the threat to her life was a risk of suicide (i.e. to undo this element of the *X Case*). The

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<sup>79</sup> See Barry Gilhealy, *The State and the Discursive Construction of Abortion* in VICKY RANDALL & GEORGINA WAYLEN (EDS), *GENDER, POLITICS AND THE STATE* (1998), 58 at 74-75.

proposed 25<sup>th</sup> Amendment was, thus, extraordinary (inasmuch as it intended to effectively enshrine a piece of primary legislation in the Constitution which does not have any other similar provision) and divisive (both by defining constitutional life from implantation rather than conception *and* by proposing to reverse the ‘risk of suicide’ element of the *X Case*). The very particularly divisive nature of this proposal was reflected in the fact that, rather unusually for a proposed constitutional change in Ireland, it did not have the support of all of the main political parties. 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. Furthermore, not all anti-abortion groups supported the proposed amendment; rather ‘pro-life’ posters and campaigners were divided. So, too, was the country. In a startlingly close referendum vote in March 2002 50.4% of those who turned out voted ‘no’, while 49.6% voted ‘yes’. Thus, the Constitution remained unchanged, and the text today is as was introduced in 1983 (8<sup>th</sup> Amendment) together with the information and travel amendments from 1992 (13<sup>th</sup> and 14<sup>th</sup> 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 through the superior courts’ expansive and deeply conservative interpretation of its provisions and their reach. Such interpretation is 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’; instead, pregnant women are described as mothers, reclassified from the moment of conception from ‘woman’ to ‘mother’ and, as a consequence, to someone whose rights to autonomy, bodily integrity, agency and self-determination are subordinated to the right to life of the fetus she is carrying.<sup>80</sup> Lisa Smyth notes that such structuring of rights discourse flows from framing access to abortion as a matter of a ‘right to choose’ and prohibition on abortion as a matter of ‘fetal rights’.

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<sup>80</sup> As Ursula Barry puts it, the 8<sup>th</sup> 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*”-Ursula Barry, *Abortion in the Republic of Ireland* (1988) 29 FEMINIST REVIEW 57, 59.

For Smyth, the claim that the fetus is a rights-bearer means that it “must be constructed as morally equivalent to women”,<sup>81</sup> which in turn works itself out in three key claims: 1. That the fetus is morally equivalent to a woman *per se* (i.e. is a rights-bearer), 2. That the fetus is morally superior to an “involuntarily pregnant, and implicitly sexually guilty, woman”, i.e. can make a rights claim against her rights claim, and 3. That the right to choose carries less moral weight than the claim of a fetal right to life.<sup>82</sup> The jurisprudence interpreting Article 40.3.3 bears out the production of these key narratives in Ireland. This jurisprudence largely emanates from an aggressive strategy of litigation by anti-abortion groups, targeting 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, on the basis of 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*, i.e. when it was generally considered that the 8<sup>th</sup> Amendment absolutely prohibited abortion in every circumstance.

### **Travel and Information**

In the 1980s and early 1990s, before the internet allowed for information to be accessed with relative ease, women who were contemplating travelling in order to access abortion were limited to trying to acquire information through the various volunteer telephone services run by women based in the UK<sup>83</sup> (although the non-universal availability of telephones and dependence on operator exchanges in some parts of the country made this difficult<sup>84</sup>) or by consulting with counselors and doctors at Open Door and Well Woman clinics, primarily located in Dublin. These organizations would provide one-on-one counseling and advice to women who were experiencing what was then called ‘crisis pregnancy’, including informing them about the availability of abortion in the UK, names and locations of clinics, and making contact on their behalf should that be desired. The information about abortion *as an*

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<sup>81</sup> Lisa Smyth, *Feminism and Abortion Politics, Choice, Rights and Reproductive Freedom* (2002) 25(3) WOMEN STUDIES INTERNATIONAL FORUM 335, 337.

<sup>82</sup> *Id.*, 337.

<sup>83</sup> On which, see generally, ANN ROSSITER, *THE HIDDEN DIASPORA: THE ABORTION TRAIL AND THE MAKING OF A LONDON-IRISH UNDERGROUND, 1980-2000* (2009).

<sup>84</sup> *Id.*

*option* was non-directive; the decision lay with the woman herself. However, 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. Without such information, women would not be able to access abortion and so, they argued, the state was obliged 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 of the Society for the Protection of Unborn Children Ireland (SPUC), seeking an injunction preventing Open Door Counselling 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 8<sup>th</sup> Amendment.

In *Attorney General (SPUC) v Open Door Counselling Limited and the Wellwoman Centre Ltd*,<sup>85</sup> Hamilton P. started his judgment with the words “The right to life of the unborn has always been recognised by Irish law”,<sup>86</sup> deeming it to have been recognized by common law, statute, and “as one of the unenumerated personal rights”<sup>87</sup> protected by the Constitution, as well as now having express protection under Article 40.3.3. In doing so, Hamilton P. construed criminal prohibitions on abortion as being statements of a fetal right to life, thus constructing 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.<sup>88</sup> Although the defendants argued that holding the provision of (non-directional) information and support to women who wished to explore abortion as an option to be

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<sup>85</sup> [1988] 1 I.R. 593

<sup>86</sup> *Id.*, 597.

<sup>87</sup> *Id.* 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 a strike down of legislation found to violate 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 Attorney General* [1965] I.R. 294.

<sup>88</sup> See *G v An Bord Uchtála* [1980] I.R. 32 *per* Walsh J. (at 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”.

unlawful would be to effectively extend the criminalization of abortion to the UK, where it was lawful when administered under the Abortion Act 1967, the Court was unconvinced. In this respect Hamilton P. held:

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”<sup>89</sup>

Having found that advising, informing and supporting 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”,<sup>90</sup> Hamilton P. went on to declare that he had “no doubt”<sup>91</sup> that this was unlawful by reference to Article 40.3.3. According to Hamilton P:

...[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 not only an offence against the common good but also against the guaranteed personal rights of the human person in question.<sup>92</sup>

Thus, the rights of women to information, association, travel, and bodily autonomy were deemed entirely subordinate to the right to life of the fetus. For the period of a pregnancy, women became constitutional mothers whose unborn children were the bearers of constitutionalized rights that were protected with the full weight of the law,

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<sup>89</sup> [1988] 1 I.R. 593, 610.

<sup>90</sup> *Id.*, 615.

<sup>91</sup> *Id.*, 616.

<sup>92</sup> *Id.*, 617.

in sharp contradistinction to those rights through which she could exercise equal citizenship and autonomy. In spite of the evident extremity of the implications of Hamilton P.'s decision in this case, the Supreme Court unanimously dismissed the appeal against this decision. The appellants argued that the right to receive and impart information was an unenumerated right, but in response Finlay CJ held 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".<sup>93</sup> A hierarchy of rights had been firmly established.

The *Open Door Counselling* case clearly indicated the extent to which the 8<sup>th</sup> Amendment to the Constitution could, and would, impinge women's autonomy in respect of their reproductive decisions. Not only, under this amendment, could women not acquire an abortion 'at home' in Ireland, but their ability to find out about abortion services available abroad was also sharply constrained. Neither could they travel to acquire an abortion. Organizations such as Open Door Counselling and Wellwoman were, thus, prevented from distributing or providing information to women who were left effectively in an information vacuum. While some UK-published magazines that were sold in Ireland contained advertisements about abortion services in that jurisdiction, attempts by students' unions to step into the breach and address the information deficit under which women now suffered were also restrained by the courts. In litigation again initiated by SPUC,<sup>94</sup> 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 governed the provision of general information in published form. According to Finlay C.J. in *SPUC v Grogan*, "It is clearly the fact that such information is conveyed to pregnant 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".<sup>95</sup>

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<sup>93</sup> *Id.*, 625.

<sup>94</sup> *Society for the Protection of the Unborn Child v Grogan* [1989] I.R. 753.

<sup>95</sup> *Id.*, 764.

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 regardless of the circumstances. However, as outlined above, *Attorney General v X* confirmed that the 8<sup>th</sup> Amendment had not introduced quite so total a 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. In a later case, again concerning SPUC and the students unions, Denham J. in the Supreme Court held that the decision in *Open Door Counselling* was flawed, it having been based on an incorrect premise as to the meaning of Article 40.3.3.<sup>96</sup> This may well have led to an almost unworkable situation in which women who did have a constitutional right to access abortion under the test outlined in *X* were entitled to travel and information, but those who did not were not. However, in constitutional referenda held in 1992 this unfeasible eventuality was avoided by the confirmation within the Constitution of a right to travel and a right to access information, which all women would enjoy whether they fell into the category of those constitutionally permitted to access abortion in Ireland or not. Notwithstanding this, important elements of the pre-1992 jurisprudence remain, particularly the categorization of the right to life of the unborn as being a superior right within the hierarchy of constitutional rights to the rights to information and travel that might be said to be enjoyed by a pregnant woman *and* as being recognized, but not created, by the 8<sup>th</sup> Amendment given its provenance as asserted by Hamilton P. in *Open Door Counselling*.

### **Fetal Best Interests**

Although it was originally thought that Article 40.3.3 dealt solely with abortion, its wording is clearly broader than that: not only does it prohibit the introduction of widely-available abortion, but it establishes an autonomous constitutional right to life of the fetus. The reach of that fetal right to life is broad, and it continues to 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 recent case of *PP v HSE*<sup>97</sup> illustrates, this autonomous fetal

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<sup>96</sup> *Society for the Protection of the Unborn Child v Grogan* [1997] IESC 4.

<sup>97</sup> Unreported, High Court, 24 December 2014.



right to life can result in ‘fetal best interests’ and ‘fetal welfare’ principles being applied to questions as to the medical care 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, on 3 December 2014. She was then 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 including a tracheostomy carried out on 17 December 2014, was “to facilitate the continuation of maternal organ supportive measures in order to attain foetal viability”,<sup>98</sup> which was likely to be 32 weeks.<sup>99</sup> The plaintiff, who was the father of this woman, sought a court order discontinuing such intervention, which he considered to be unreasonable, experimental, and unethical. The evidence to the Court, which sat to consider this case in Christmas week of 2014, 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, 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 numerous further infections. One of the medical experts who testified in the case stated that, given the extremely poor medical condition of the pregnant woman, continuing treatment would “be going from the extraordinary to the grotesque”.<sup>100</sup> 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.

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<sup>98</sup> *Id.*, p. 2.

<sup>99</sup> *Id.*, p. 7, reporting the evidence of Dr Brian Marsh (intensive care medicine consultant). In evidence to the Court Dr Peter Boylan noted that viability *per se* was generally accepted at being about 24 weeks gestation, but given the surrounding circumstances of this cases, “[h]e believed it should keep going until 32 weeks when the changes of intact survival are much better” (p.10).

<sup>100</sup> *Id.*, p. 15.

In considering this, the Court placed great weight on the prospects of survival of the fetus, by which was meant the prospect of it being born alive without regard to the quality or duration of life that would follow said birth.<sup>101</sup> In this respect, and having regard to 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”<sup>102</sup> and that “there is no realistic prospect of continuing somatic support leading to the delivery of a live baby”.<sup>103</sup> Having made this finding of fact the Court proceeded to consider whether Article 40.3.3 permitted withdrawal of care in this case.

In doing so, the Court focused to a large degree on the ‘as far as practicable’ limitation clause in the constitutional text and confirmed indications in earlier jurisprudence that this meant the state was not required to do that which was futile, impractical or ineffective in order to protect the fetal right to life.<sup>104</sup> While women had 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 to die with dignity], must prevail over the feelings of grief and respect for a mother who is no longer living”.<sup>105</sup> 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”.<sup>106</sup> Drawing on the jurisprudence of wardship in Irish courts, the Court then held that decisions as to care in this case 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”.<sup>107</sup> Given that, in this case, “[t]his unfortunate unborn has suffered the dreadful fate of being present in the womb

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<sup>101</sup> *Id.*, p. 19.

<sup>102</sup> *Id.*, p.p. 17-18.

<sup>103</sup> *Id.*, p. 18.

<sup>104</sup> *Id.*, p.p. 21-23; citing *Attorney General v X* [1992] 1 I.R. 1, *In re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 I.R. 79.

<sup>105</sup> *Id.*, p. 23.

<sup>106</sup> *Id.*, p. 24.

<sup>107</sup> *Id.*, p. 28.

of a mother who has died, and in which the environment is neither safe nor stable”<sup>108</sup> and “has nothing but distress and death in prospect”<sup>109</sup>, it was considered to be “in the best interest of the unborn child”<sup>110</sup> to permit somatic care to be withdrawn.

Although a number of commentators criticized the Heath Service Executive for having engaged in litigation in *PP*, claiming that the somatic care in this case could have been withdrawn without the need for litigation,<sup>111</sup> both the judgment itself and the medical evidence presented to the Court illustrate that it is quite possible that a woman who was brain dead would be maintained by court order in order to ensure the fetus reaches viability and could be delivered alive. This only adds further to the uncertainty under which medics must operate: when would Article 40.3.3 require such intervention and when could care be withdrawn? Is this now to be determined only by Courts? As claimed by Dr Peter Boylan giving evidence to the Court, 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; a situation that seems likely to repeat itself 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”. Furthermore, this case makes it entirely clear that whether or not to withdraw support in such a case is determined solely by reference to whether the fetus will be born alive; it was the fact that there was no prospect of live birth that 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 was the

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<sup>108</sup> *Id.*, p. 28.

<sup>109</sup> *Id.*, p. 28.

<sup>110</sup> *Id.*, p. 29.

<sup>111</sup> See the views of medics and lawyers in, for example, John Drennan and Daniel McConnell, *Right-to-die case is one of ‘horror and absurdity’*, 28 December 2014, THE IRISH INDEPENDENT. Available online at <http://www.independent.ie/irish-news/news/righttodie-case-is-one-of-horror-and-absurdity-30865801.html> (last accessed 22 March 2015).

Court's determination of what was in the best interests of the fetus in order to achieve its live birth (without regard to the quality or duration of life post-birth).

## **V. Implications for Medicine: Fetocentricity in Decision-Making**

The potential implications of the finding in *PP* that 'foetal best interests' should be taken into account in making decisions as to maternal medical 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 that must be taken into account, *PP* may conceivably 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', situations in which pregnant women require medical treatment that may result in the death of the fetus but where there is not (yet) a real and substantial risk to the pregnant woman's life, and the apparent willingness to override a woman's refusal of consent in order to preserve fetal life. As well as these particular situations, considered further below, there are fresh indications that Article 40.3.3 is being given an extremely wide interpretation in some hospitals, impacting on decisions as to referrals for particular procedures abroad. For example, it has been reported that in one major hospital referrals abroad for pre-implantation genetic diagnosis have been stopped;<sup>112</sup> a situation that has clear implications for women's maternal healthcare, reproductive choices, and access to the best available standard of healthcare.

### **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.<sup>113</sup>

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<sup>112</sup> Paul Cullen, *Crumlin Referrals for Embryo Screening Halted on Legal Advice*, 24 November 2014, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/health/crumlin-referrals-for-embryo-screening-halted-on-legal-advice-1.2012400> (last accessed 23 March 2015).

<sup>113</sup> This not an exact medical term, but has gained currency in public affairs discussions of such cases. In a private members bill introduced by Clare Daly TD (and defeated), it was defined as "a medical condition suffered by a foetus such that it is incompatible with life outside the womb" (Protection of Life During Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2013, s. 1(2)). In a further

Women in Ireland who find themselves pregnant in such circumstances and who wish to terminate the pregnancy rather than continue to term cannot avail of an abortion in Ireland because, following on from the *X Case*, Article 40.3.3 has been interpreted as allowing for 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 of abortion where there is practically no likelihood of the fetus being born alive.<sup>114</sup> Indeed, to some extent the availability of abortion in such circumstances is arguably suggested by the decision in *PP v HSE*, discussed above. However, the Court in *PP* was careful to limit its decision in that case to its own particular facts, so that no general principle of the permissibility of abortions in such cases can be reasonably extracted from it.

However, neither the government nor the present Attorney General have 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 with the patients’ family and friends around to support them, nor refer them specifically for a termination in the UK.<sup>115</sup> Rather, pregnant women in these situations must travel for an abortion should they decide to terminate their pregnancy.

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private members bill, introduced by Michael McNamara TD, it is defined as “a medical condition, or medical conditions, suffered by a foetus which results in that foetus having no prospect of being born alive” (Protection of Life during Pregnancy (Amendment)(Fatal Foetal Abnormalities) Bill 2015, s. 2(1)).

<sup>114</sup> See *D v Ireland*, App. No. 26499/02 at para. 69, in which the Attorney General argued that 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. In addition, the decision in *Roche v Roche* [2009] I.E.S.C. 82 (on whether fertilized but unimplanted embryos have a right to life under the Constitution) may be interpreted as meaning that a fetus that cannot survive after birth does not have a constitutional right to life. See further Jennifer Schweppe & Eimear Spain, *Interpreting ‘Life’ in the Protection of Life During Pregnancy Act 2013* (2014) MEDICO-LEGAL JOURNAL OF IRELAND 93.

<sup>115</sup> Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995.

Not only does this reflect a remarkably narrow interpretation of the Constitution, but it also imposes severe burdens on such women, who are already in very difficult positions. First of all, as already mentioned, no doctor, nurse or medical professional in Ireland can arrange a referral for such a woman to a hospital or clinic in the UK where an abortion could be carried out. Second, women in these situations must carry additional financial and emotional burdens (as all women who travel for abortion do, discussed below), 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.<sup>116</sup> Notwithstanding 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 of abortion in Ireland under *PP*, for example; rather such a case would have to be determined by court order—a step too far for many women and couples in such situations.

### **Sick, but not (yet) Dying**

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, what the European Court of Human Rights has called the ‘chilling effect’<sup>117</sup> of providing treatment that may result in the death of the fetus can operate to determine medical decision-making. In such cases, even though termination of the pregnancy would be best for the health of the pregnant woman, and even though not terminating the pregnancy may contribute towards her health deteriorating, current medical practice in Ireland appears to be such that the pregnancy would not be terminated.<sup>118</sup> This

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<sup>116</sup> Susan Mitchell, *UK Hospitals Move to Limit Irish Abortions*, 24 August 2014, SUNDAY BUSINESS POST.

<sup>117</sup> *A, B & C v Ireland* (2011) 53 E.H.R.R. 13

<sup>118</sup> Marge Berer, *Termination of Pregnancy as Emergency Obstetric Care: The Interpretation of Catholic Health Policy and the Consequences for Pregnant Women* (2013) 21 REPRODUCTIVE HEALTH MATTERS 9.

reflects the great difficulties that the constitutionalization of fetal rights has given rise to for medics in Ireland; as Dr Rhona Mahony, the Master of the National Maternity Hospital has put it:

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. If the legal word 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].<sup>119</sup>

This was especially starkly illustrated by the case, and death, of Savita Halappanavar.

The death of Savita Halappanavar in a Galway hospital took place 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, but 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”.<sup>120</sup> Ms Halappanavar developed a very serious form of sepsis, the advance of which was not adequately diagnosed or treated. Although a diagnosis of septic shock led to fetal remains being removed on October 24th, the infection worsened and she died on October 28, 2012.

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<sup>119</sup> Rhona Mahony, *Protecting Life in Real Life—An Essay* (2014) MEDICO-LEGAL JOURNAL OF IRELAND 104, at 105.

<sup>120</sup> Health Service Executive, *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* (June 2013), p.5.

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

... strongly 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 rupture 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.<sup>121</sup>

Although some claimed that this case illustrated failures in medical care, rather than a difficulty with the 8<sup>th</sup> 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.<sup>122</sup>

### **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: great lengths may be gone to in medical care to preserve fetal life

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<sup>121</sup> *Id.*, p. 6.

<sup>122</sup> Máiréad Enright & Fiona de Londras, 'Empty Without and Empty Within': the Unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y (2014) 20(2) MEDICO-LEGAL JOURNAL OF IRELAND 85, 85-86.



without regard for whether this will result in the best medical outcomes for the pregnant woman. Nor, it appears, is the consent of the pregnant woman to such treatment a key issue: Savita Halappanavar expressly requested an abortion, and the patient in *PP* was clinically dead and could neither consent nor refuse 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 was oriented towards maintaining fetal life.

The case of ‘Miss Y’ illustrates this trend. Although the case is subject to strict reporting requirements, the following appears to be clear from the publicly available information. Y was an asylum seeker who arrived in Ireland and, shortly afterwards, discovered that she was pregnant as a result of a wartime rape in her country of origin. She made it clear to all those with whom she came into contact 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 into the pregnancy. Although the assessment then appears to have proceeded with appropriate speed, and the medical assessment panel found that there was a real and substantial risk to her health under s. 9 of the Act, it was considered that the fetus was viable or close to viability so that an abortion ought not to be carried out. This was notwithstanding the fact that she requested an abortion and did not want to carry the pregnancy to full term.

In protest at the apparent unavailability of abortion in her case, Y went on a food and liquid strike, thus putting fetal health at risk, in response to which the HSE acquired court orders for forced nutrition and hydration. Although, it appears, Y eventually agreed to eat and take hydration, the fact that such court orders were sought and granted indicates the extent to which fetal welfare can influence medical treatment. This is all the more stark in this case as, as an asylum seeker, Y could not easily travel to the UK to acquire an abortion even if she could get the funds together for same (and, as considered below, asylum seekers are not permitted to work and thus cannot earn money in Ireland). Once the pregnancy had progressed further—reportedly to 24 weeks—it was terminated by means of a cesarean section.

While no court order was acquired to authorize this invasive procedure, suggesting that Y consented to it, clear questions arise as to the capacity of 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 to truly consent to such a procedure.

All of these cases illustrate the fact that the 8<sup>th</sup> amendment has resulted in a jurisprudential reclassification of women as constitutional subjects once they become pregnant: at that point medical and legal priority shifts to the fetus, the protection of which, Supreme Court jurisprudence has declared, is in pursuance of the "public interest".<sup>123</sup> In contrast, the protection and vindication of pregnant women's rights seemingly is not, or at least not when they can be said to be in conflict with fetal rights or, indeed, the nascent concept of 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 above demonstrate the pervasiveness of fetal rights thinking, anchored in constitutionalized fetal rights, in the fleshing out of the legal content and implications of Article 40.3.3 and in difficult situations of medical care. While pregnant women's constitutional rights to information and travel have now been established by the 13<sup>th</sup> and 14<sup>th</sup> amendments, pregnant women in Ireland can be subjected to violations of their rights to bodily integrity,<sup>124</sup> freedom from inhuman and degrading treatment,<sup>125</sup> privacy,<sup>126</sup> access to adequate healthcare,<sup>127</sup> and

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<sup>123</sup> *SPUC v Coogan* [1989] I.R. 734 *per* Walsh J. establishing that SPUC had standing to litigate on behalf of the unborn child due to the public interest in protecting fetal constitutional rights.

<sup>124</sup> Protected as an unenumerated right in the Irish Constitution under *Ryan v Attorney General* [1965] I.R. 294.

<sup>125</sup> Constitution of Ireland (1937), Article 40.3.4; European Convention on Human Rights, Article 3; International Covenant on Civil and Political Rights, Article 7; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

reproductive autonomy<sup>128</sup> through the state's vindication of constitutionalized fetal rights.

In order to avoid this, many women in Ireland who wish to access abortion travel, primarily to the UK. Indeed, the availability of abortion in England (under the Abortion Act 1967) and the relative ease of travel between Ireland and the UK due to the common travel area and, now, the abundance of low-fare flights, have allowed for the illusion and the language of choice to enter into the Irish abortion debate. It is not, the argument goes, that women in Ireland cannot have abortions; it is, rather, that women cannot have abortions *in Ireland*. This sleight of hand, which contrives to present Irish women as having reproductive autonomy, deliberately elides the fact that while there may be, what Gilmartin and White term, a constitutional right to be an abortion tourist in Ireland, this “ignores the differentiated politics and mutual constitution of mobility and gender” so that “[w]omen differently located within contemporary Ireland's socioeconomic hierarchies experience this mobility in different ways”.<sup>129</sup>

Travelling for an abortion is not easy: it is time consuming, costly, and often lonely. The practicalities of arranging for an abortion may well result in a woman getting a later, and thus more expensive and more dangerous, abortion. The practical

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<sup>126</sup> Recognized as an unremunerated right in *McGee v Attorney General* [1974] I.R. 284; European Convention on Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 17.

<sup>127</sup> International Covenant on Economic, Social and Cultural Rights, Article 12. It is unclear whether there is a right to health and healthcare under Irish constitutional law. In *Heeney v Dublin Corporation* [1998] I.E.S.C. 26 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” (para. 16). However, in the later case of *In the Matter of Article 26 of the Constitution and the Health (Amendment)(No. 2) Bill 2004* [2005] 1 I.R. 105 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.

<sup>128</sup> *Report of the Committee on the Elimination of Discrimination against Women on its Twenty-First Session*, U.N. GAOR, 54<sup>th</sup> Session., Supp. No. 38, Pt. II, 180, U.N. Doc. 54/38/Rev.1 (1999) (concluding observations on Ireland).

<sup>129</sup> M. Gilmartin & A. White, *Interrogating Medical Tourism: Ireland, Abortion, and Mobility Rights* (2011) 36(1) SIGNS 275, 277.

considerations of cost alone are not insignificant; on average, it costs a woman in Ireland £1,000 to go to the UK for an abortion.<sup>130</sup> Although there are some volunteer organizations that can help women who do not have the capacity to cover this cost themselves,<sup>131</sup> the Irish state does not provide any financial assistance or reimburse costs as it does with many other forms of medical treatment provided abroad because it is not available (at all or in the required time) in Ireland. As well as this, women who already have children may have to arrange childcare, and women with jobs will have to take time off of work. Poor women are, clearly, particularly disadvantaged in this context. So too are asylum seeking women who are not entitled to work, and thus have very limited independent resources, and who also must wait to have a special visa for travel arranged. The visa process alone costs between €120 and €240 and can take up to eight weeks and, of course, a visa can be refused.<sup>132</sup> While women are entitled to after-abortion in Ireland, many women experience abortion stigma and do not seek out medical care or, indeed, support from friends and family.

Much of this, many women must do alone; as already noted, it is a criminal offence to “promote” abortion and arrange a referral to a clinic.

Thus, while the proximity of a jurisdiction in which abortion is available has allowed, to some extent, the Irish government to continuously retreat from addressing abortion availability in a meaningful way within Ireland itself, the distance across the Irish Sea is great indeed for many women in Ireland. In reality, the ‘choice’ to travel in order to have an abortion is, for many, utterly illusory. With this as the context within which a reported 158,252 women with Irish addresses accessed abortion in England between

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<sup>130</sup> See further <https://www.abortionsupport.org.uk/>.

<sup>131</sup> 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., ANN ROSSITER, *THE HIDDEN DIASPORA: THE ABORTION TRAIL AND THE MAKING OF A LONDON-IRISH UNDERGROUND, 1980-2000* (2009).

<sup>132</sup> *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)* (Dublin: IFPA, 2014), p.7 available at: [http://www.ifpa.ie/sites/default/files/documents/submissions/irish\\_family\\_planning\\_association\\_re\\_4th\\_periodic\\_review\\_of\\_ireland.pdf](http://www.ifpa.ie/sites/default/files/documents/submissions/irish_family_planning_association_re_4th_periodic_review_of_ireland.pdf) [last accessed September 24, 2014].

1980 and 2013,<sup>133</sup> one must wonder how many women had no option but to attempt abortion by other means or continue with an unwanted pregnancy.

## VII. Towards a Referendum on the 8<sup>th</sup> 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 a stark one indeed.<sup>134</sup> High profile cases illustrating the sharpness and pervasiveness of the constitutionalized fetal right to life, such as those discussed above, bring that particularly to the fore. 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 a change must come generally coalescing around the issues of pregnancy 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 in the context of 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 8<sup>th</sup> Amendment and 69% believed abortion should be available in cases of rape.<sup>135</sup> 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

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<sup>133</sup> UK Department of Health Statistics of Women from the Republic of Ireland Accessing Abortion Services in England and Wales 1980-2013.

<sup>134</sup> See, for example, the comments of Minister for Health, Leo Varadkar, to the effect that current abortion laws are too restrictive (Fiach Kelly, *Existing Abortion Laws are 'Too Restrictive' says Leo Varadkar*, 17 December 2014, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/politics/existing-abortion-laws-are-too-restrictive-says-leo-varadkar-1.2040072> (last accessed 23 March 2015)), and the comments of Tánaiste [Deputy Prime Minister] Joan Burton, to the effect that the current law is ill-suited to the needs of women (Fiach Kelly, *Joan Burton Says Abortion Laws do not Serve Women Well*, 20 December 2014, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/politics/joan-burton-says-abortion-laws-do-not-serve-women-well-1.2044589> (last accessed 23 March 2015)).

<sup>135</sup> Millward Brown, *National Opinion Poll: September 2014*, p.p. 28-35. Available at <http://www.millwardbrown.com/docs/default-source/ireland-downloads/opinion-polls/sunday-independent-september-2014-poll.pdf?sfvrsn=2> (last accessed 23 March 2015).

whether to allow abortion in cases of rape and fatal fetal abnormality.<sup>136</sup> 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 question of the constitutional provision to be revisited. There is also significant political momentum, in at least some quarters, towards a referendum.

While some have focused on attempting to bring about change through legislation (such as through a private members bills to allow abortion in cases of fatal fetal abnormality<sup>137</sup>), 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),<sup>138</sup> but two parties—the Labour Party<sup>139</sup> and Sinn Féin<sup>140</sup>—have officially voted in favor of constitutional reform, thus making repeal of the 8<sup>th</sup> Amendment a core element of their party policies for the next general election.

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<sup>136</sup> Stephen Collins, *Majority of Voters want Abortion Law Liberalised*, 13 October 2014, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/social-affairs/majority-of-voters-want-abortion-law-liberalised-1.1961142> (last accessed 23 March 2015).

<sup>137</sup> Thus far, two such Bills have been introduced: the Protection of Life During Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2013, introduced by independent TD Clare Daly, and the Protection of Life during Pregnancy (Amendment)(Fatal Foetal Abnormalities) Bill 2015, s. 2(1)), introduced by Labour Party backbencher Michael McNamara TD.

<sup>138</sup> See, for example, the statement of the Taoiseach [Prime Minister] reported in Daniel McConnell, *Taoiseach: We Have Been Clear that Abortion is an Issue for the Next Government*, 11 February 2015, THE IRISH INDEPENDENT. Available at <http://www.independent.ie/irish-news/politics/taoiseach-we-have-been-clear-that-abortion-is-an-issue-for-the-next-government-30983287.html> (last accessed 23 March 2015).

<sup>139</sup> Michael O'Regan, *Labour Delegates Call for Eighth Amendment to be Repealed*, 1 March 2015, THE IRISH TIMES. Available at <http://www.irishtimes.com/news/politics/labour-delegates-call-for-eighth-amendment-to-be-repealed-1.2121598> (last accessed 23 March 2015).

<sup>140</sup> At their 2015 Árd Fheis [party conference], Sinn Féin voted to both allow abortion in cases of fatal fetal abnormality and to repeal the 8<sup>th</sup> Amendment: Marie O'Halloran, *Sinn Féin Delegates Support Abortion for Fatal Fetal Abnormalities*, 7 March 2015, THE IRISH TIMES. Available online at <http://www.irishtimes.com/news/politics/sinn-féin-delegates-support-abortion-for-fatal-foetal-abnormalities-1.2130835> (last accessed 23 March 2015).

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 abortion in very limited circumstances: rape, incest, fatal fetal abnormality, perhaps serious risk to health. What has not yet come fully to the fore of public discourse is a demand for constitutional recognition of women's reproductive autonomy as a general matter (i.e. beyond these limited situations); something that tends to suggest that the illusion of choice may well carry more purchase than it is due, and 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.

For any referendum that results in the constitutional recognition of women's autonomy and their re-classification from 'mother' to 'woman' to succeed, this is a phenomenon that must be grappled with, and one that may significantly frame both the form of the proposed change that is put to the people 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 around their wording, and they tend to result in an impassioned public debate.<sup>141</sup> 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.<sup>142</sup> In practice, these legal constraints mean that discussions as to 'social issues' tend to take place between those representing the more polarized ends of the 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.

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<sup>141</sup> See generally Fiona de Londras & David Gwynn Morgan, *Constitutional Amendment in Ireland*, in XENEPHON CONTIADES, *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* (2012).

<sup>142</sup> 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. Furthermore, television and radio broadcast must give equal time to 'yes' and 'no' campaigns in referenda following *Coughlan v Broadcasting Complaints Commission and RTÉ* [2000] 3 I.R. 1.

Although the Roman Catholic Church is unlikely to play as prominent a role in any such referendum campaign in the future as it did in 1983, the anti-abortion lobby remains well organized and very well resourced, and a prominent institution, the Iona Institute, which is founded on Catholic ethos 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 tone of previous ones, two important trends that were present in those campaigns are likely to inform any forthcoming campaign: 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 8<sup>th</sup> Amendment in 1983, this took on a manifestly ‘anti-English’ tone, with abortion being represented as a tool of colonial oppression.<sup>143</sup> One famous poster in this campaign makes that representation manifest; it carried the line ‘The Abortion Mills of England Grind Irish Babies into Blood that Cries Out to Heaven for Vengeance’, and some claimed that any attempt to liberalize abortion law in Ireland was at danger of turning Ireland back into a mere province of the United Kingdom.<sup>144</sup>

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 representation (and the fear) was that EU law might result in Ireland being forced to legalize abortion. To some extent this flowed from the ways in which the European Court of Justice decision in *Grogan* was represented.<sup>145</sup> This 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 violation

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<sup>143</sup> See Siobhán Mullally, *Debating Reproductive Rights in Ireland* (2005) 27(1) HUMAN RIGHTS QUARTERLY 78; Ruth Fletcher, *Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics* (2001) 28 JOURNAL OF LAW AND SOCIETY 568.

<sup>144</sup> See DESMOND FARRELL, NICE PEOPLE AND REDNECKS: IRELAND IN THE 1980S (1986).

<sup>145</sup> *Society for the Protection of Unborn Children Ireland Ltd. v Grogan*, Case C-159/90, [1991] E.C.R.4685



of the Treaty and 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, thus, that parties who had a profit making (or commercial) connection to the provision of this service could not be impeded in their activities in terms of the distribution of information by means of advertisement.<sup>146</sup> Although Grogan et. al. did not benefit from this (as they were students unions with no profit-making connection to the service in relation to which they were distributing the information and, thus, no claim to do so that could be based in European law), this case resulted in a perception of EC law (as it then was) 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 and 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.<sup>147</sup> Much uncertainty and debate about the legal effect of this protocol then emerged, which threatened to derail the effort to secure popular support for ratification;<sup>148</sup> indeed, Jennifer Spreng has noted that the referendum on the Maastricht Treaty “became a preliminary de facto vote on abortion rights”.<sup>149</sup> Abortion has continued to play a role in EU Treaty referenda since, with the concern that the EU might ‘impose’ abortion liberalization persisting in spite of there being no evidence of this being likely or, even, possible.<sup>150</sup>

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<sup>146</sup> On the failure of this decision to meaningfully consider women’s rights see Siobhán Mullally, *Debating Reproductive Rights in Ireland* (2005) 27(1) HUMAN RIGHTS QUARTERLY 78, 91.

<sup>147</sup> Protocol 17 of the Maastricht Treaty.

<sup>148</sup> In Ireland, changes to EU Treaties that change “the essential scope or objectives of the Communities” under *Crotty v An Taoiseach* [1987] I.R. 713, 767. In practice, ratification of new EU Treaties is now always preceded by a referendum in Ireland. See Gavin Barrett, *Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence* (2009) 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 32.

<sup>149</sup> JENNIFER SPRENG, ABORTION AND DIVORCE LAW IN IRELAND (2004), 128.

<sup>150</sup> For an overview of EU referendum debates, including the influence of ‘the abortion question’, in Ireland see Jane O’Mahony, *Ireland’s EU Referendum Experience* (2009) 24 IRISH POLITICAL STUDIES 429.

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),<sup>151</sup> even minimalist interventions from the international legal order were met with suspicion and near-hostility by the anti-abortion lobby. This is exemplified by the reaction to the European Court of Human Rights decision in *A, B & C v Ireland*.<sup>152</sup>

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;<sup>153</sup> 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.<sup>154</sup> However, as the Court had previously held,<sup>155</sup> where

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<sup>151</sup> For an overview of the ECtHR jurisprudence on abortion see Daniel Fenwick, *The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights* (2012) 12 MEDICAL LAW INTERNATIONAL 249.

<sup>152</sup> *A, B & C v Ireland* (2011) 53 E.H.R.R. 13. 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*, available at <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/William-Binchy.pdf> (last accessed 23 March 2015). See also David Quinn, *Ireland Continues the Good Fight*, (2011) 37 THE HUMAN LIFE REVIEW 140.

<sup>153</sup> *A, B & C v Ireland* (2011) 53 E.H.R.R. 13, paras. 229-241.

<sup>154</sup> On the ‘trumping’ of European consensus by ‘profound moral values’ in Ireland see Fiona de Londras & Kanstantsin Dzehtsiarou, *Grand Chamber of the European Court of Human Rights, A, B and C v Ireland*, (2013) 62 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 250.

<sup>155</sup> *Tysiąc v Poland* (2007) 45 E.H.R.R. 42.

the law *does* allow for abortion, it must be practicable for women within the state to avail 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.

The reaction in 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 provision ought to be proposed to the People.<sup>156</sup> 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,<sup>157</sup> arguing that any demand for liberalization of abortion from international human rights law was in contrast with the ethics and morals of the Irish position.<sup>158</sup> The immediate reaction of the government was to establish an Expert Committee to consider how to respond to *A, B & C*<sup>159</sup> 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 cases, with one Cabinet Minister ultimately losing her position

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<sup>156</sup> See *Submission by the Irish Catholic Bishops' Conference to Oireachtas Joint Committee on Health and Children*, 4 January 2013, available at <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Submission-by-the-Irish-Catholic-Bishops-Conference.pdf> (last accessed 23 March 2015).

<sup>157</sup> See for example William Binchy, *Opening Statement to the Joint Committee on Health and Children*, available at <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/William-Binchy.pdf> (last accessed 23 March 2015).

<sup>158</sup> William Binchy, *UN Committee's View on Abortion Contradicts Core Ethical Value of Human Rights*, 18 August 2014, *The Irish Times*, available online at <http://www.irishtimes.com/news/politics/un-committee-s-view-on-abortion-contradicts-core-ethical-value-of-human-rights-1.1899802?mode=sample&auth-failed=1&pw-origin=http%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fpolitics%2Fun-committee-s-view-on-abortion-contradicts-core-ethical-value-of-human-rights-1.1899802> (last accessed 23 March 2015).

<sup>159</sup> DEPARTMENT OF HEALTH AND CHILDREN, REPORT OF THE EXPERT GROUP ON THE JUDGMENT IN *A, B & C v IRELAND* (2012).

in government and the party whip by refusing to vote in favor of the legislation.<sup>160</sup> Amidst all of this controversy, the Act itself was represented repeatedly as being the government's response to the Strasbourg Court's judgment, rather than being a mechanism for giving effect to the will of the people as contained in Article 40.3.3 and interpreted by the Supreme Court. The narrative of external imposition thus continued, even in respect of legislation that in fact had been called for by Irish courts for more than two decades,<sup>161</sup> and the possibilities of which were 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 insertion of a fetal right to life in the Constitution in 1983 resulted in abortion in Ireland becoming dominated by a discourse of rights in which fetal rights and women's rights were placed in contest with one another. 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 being seized of the responsibility to protect and vindicate fetal rights, which was supported with this state power in order to override women's rights except in the narrowest of circumstances, determination of which is now strictly regulated by legislation and resides entirely with medics;<sup>162</sup> 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, and is an important element in understanding the narrative that presents abortion as 'un-Irish', in the manner considered above.

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

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<sup>160</sup> On the debate on suicide see Fiona de Londras, *Suicide and Abortion: Analysing the Legislative Options in Ireland* (2013) 19(1) MEDICO-LEGAL JOURNAL OF IRELAND 4; on the debate on time-limits see Fiona de Londras & Laura Graham, *Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate* (2013) 3 IRISH JOURNAL OF LEGAL STUDIES 54.

<sup>161</sup> See, for example, *SPUC v Grogan* [1989] I.R. 753, per McCarthy J. at p. 770.

<sup>162</sup> Protection of Life During Pregnancy Act 2013.

fetal rights as the core animating concern will be a significant challenge. However, achieving that is, surely, necessary. There are two reasons for this: first, perpetuating constitutionalized fetal rights will in turn perpetuate a jurisprudence and practice that causes considerable material harm to women and violations of their rights; second, maintaining constitutionalized fetal rights would mean that space for political and personal judgement about abortion, as both a general and an individual matter, would remain severely curtailed. Should either of these situations persist, constitutional change would fail to address adequately the hardships that the 8<sup>th</sup> Amendment has rendered on women in Ireland.

As outlined above, the 8<sup>th</sup> 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 reproductive autonomy. The extremely limited availability of abortion, combined with the financial and other burdens of travelling abroad to access abortion where 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 8<sup>th</sup> 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 deeply 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 thus deeply impacted by the 8<sup>th</sup> 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.

### **IX. 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 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, and that can only be achieved by replacing constitutionalized fetal rights with a constitutional recognition of women’s autonomy and the opening up of 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 8<sup>th</sup> 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.<sup>163</sup> 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 well be made in a manner that would be jurisprudentially convincing. Furthermore,

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<sup>163</sup> On this see also Máiréad Enright & Fiona de Londras, ‘Empty Without and Empty Within’: the Unworkability of the Eighth Amendment after *Savita Halappanavar* and *Miss Y* (2014) 20(2) MEDICO-LEGAL JOURNAL OF IRELAND 85.

the welfare/best interests of the fetus approach advocated in *PP v HSE* and discussed above may well survive such a repeal, with all of its attendant potential for shaping maternal care in Ireland.

It is true, and important to note, that this seems somewhat unlikely; were a majority of those who turned out to vote to support the removal of Article 40.3.3 from the Constitution, the Supreme Court would almost certainly see in that an intention to remove a constitutional protection for the right to life of the unborn as a general matter. 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 seem, thus, sensible to suggest that a ‘mere’ repeal may well be insufficient for the purposes of deconstitutionalizing 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.

What form, then, might a constitutional amendment that appropriately takes 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 judgement 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 effectively shifts the constitutional discourse away from an almost-exclusive focus on fetal rights; rather, it creates space in which the political process can liberate itself from the pre-determination of questions about abortion that Article 40.3.3 currently imposes and, indeed, creates an imperative for Irish politicians to finally use their judgement to regulate abortion provision in Ireland. It may well be, that this judgement 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 in.

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 and, in any case, the lived experience of women in Ireland stands in such sharp contrast to the absoluteness of the 8<sup>th</sup> Amendment that there is a strong democratic argument in favor of revisiting the matter, 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.

This difficult tale of abortion law and fetal rights jurisprudence in Ireland since 1983 starkly 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 8<sup>th</sup> Amendment, their greatest achievement.