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"Pro-Life" Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992

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Abstract

This article asks how Irish abortion law developed to the point of stopping a young pregnant rape victim from travelling abroad to have an abortion in 1992 (*Attorney General v. X.*). The author argues that this case, which ultimately saw the Irish Supreme Court overturn that decision and recognize the young woman's right to abortion, was the last chapter of the fundamentalist narrative of Irish abortion law. The feminist critique of that law needs to consider its particular fundamentalist aspects in order to clarify the obstacles posed to the struggle for Irish women's reproductive freedom. The author argues that a fundamentalist narrative ordered the post-colonial and patriarchal conditions of Irish society so as to call for the legal recognition of an absolute right to life of the "unborn." The Supreme Court's interpretation of the constitutional right to life of the fetus in three cases during the 1980s is evidence that Irish abortion law was constructed through a fundamentalist narrative until that narrative was rejected in the Supreme Court decision in *Attorney General v. X.*

Keywords

Abortion; Ireland--Religion; Freedom of movement; Feminist jurisprudence

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“PRO-LIFE” ABSOLUTES, FEMINIST CHALLENGES: THE FUNDAMENTALIST NARRATIVE OF IRISH ABORTION LAW 1986-1992[©]

BY RUTH FLETCHER*

This article asks how Irish abortion law developed to the point of stopping a young pregnant rape victim from travelling abroad to have an abortion in 1992 (*Attorney General v. X.*). The author argues that this case, which ultimately saw the Irish Supreme Court overturn that decision and recognize the young woman's right to abortion, was the last chapter of the fundamentalist narrative of Irish abortion law. The feminist critique of that law needs to consider its particular fundamentalist aspects in order to clarify the obstacles posed to the struggle for Irish women's reproductive freedom. The author argues that a fundamentalist narrative ordered the post-colonial and patriarchal conditions of Irish society so as to call for the legal recognition of an absolute right to life of the "unborn." The Supreme Court's interpretation of the constitutional right to life of the fetus in three cases during the 1980s is evidence that Irish abortion law was constructed through a fundamentalist narrative until that narrative was rejected in the Supreme Court decision in *Attorney General v. X.*

Cet article s'interroge sur l'évolution de la loi irlandaise sur l'avortement, empêchant une jeune victime d'agression sexuelle de tenter de se faire avorter à l'extérieur de l'Irlande en 1992 (*Attorney General c. X.*). L'auteure soutient que cette décision, qui fut par la suite renversée par la Cour suprême d'Irlande afin de reconnaître le droit à l'avortement à la victime, fut le dernier chapitre du discours fondamentaliste du droit irlandais de l'avortement. La critique féministe de ce droit doit considérer ses aspects fondamentalistes afin de clarifier les obstacles juchés face à la liberté de choix des femmes irlandaises. L'auteure soutient que le discours fondamentaliste est basé sur les conditions post-coloniales et patriarcales de la société irlandaise, requérant dorénavant la reconnaissance juridique d'un droit absolu à la vie pour l'enfant à naître. L'interprétation de la Cour suprême des droits constitutionnels à la vie du foetus, dans trois décisions rendues au cours des années quatre-vingts, témoigne de l'évolution du droit irlandais de l'avortement à travers le discours fondamentaliste, jusqu'à ce que celui-ci ait été rejeté par l'arrêt *Attorney General c. X.*

I. INTRODUCTION 2

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* D.Jur. candidate, Osgoode Hall Law School, York University. An earlier version of this paper formed part of my LL.M. thesis: *Fundamentalism and the Legal Regulation of Abortion in Ireland*, (Osgoode Hall Law School, York University, 1996) [unpublished]. I would particularly like to thank Professor Les Green, who supervised my LL.M. thesis and was a constant support in helping me think through the issues discussed here, and Professors Brenda Cossman and Shelley Gavigan who provided generous feedback and warm encouragement. Thanks also to Janine Brodie, Brettel Dawson, Pat McDermott, Michael McKinnie, the OHLJ Board and reviewers, and those who attended my presentation of an earlier draft of this article, "The Struggle for Abortion Rights in Ireland," at the Seminar Series of the Institute for Feminist Legal Studies, Osgoode Hall Law School, October 1996.

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I. INTRODUCTION

In February 1992, a young Irish woman was stopped by the Irish state from travelling abroad to have an abortion. Pregnant as the result of rape, this fourteen-year-old girl had expressed the desire to kill herself rather than continue with the pregnancy. X, as this young woman became known, decided with her parents that she would travel to England to terminate the pregnancy. In making this decision, X was following in the path of thousands of Irish women who travel to England every year for abortions, there being no provision of abortion services in Ireland.¹ Unlike those thousands of women however, X's intention to terminate her pregnancy became known to the state authorities. On notice that an Irish woman was about to have an abortion, the state, through the attorney general, took immediate steps to prevent the violation of fetal life.² The state justified this action by reference to Article 40(3)(3) of the Irish Constitution which provides: "The State acknowledges the right to life of the "unborn" and, with due regard to

¹ At least five thousand Irish women a year travel to Britain in order to avail themselves of abortion services there. The U.K. Office for National Statistics reported that 4,884 Irish women had abortions in England and Wales in 1996, a slight increase from 4,532 women in 1995: see "Abortion Figures May Not Be Realistic, Says IFPA" *The Irish Times* (4 June 1997), available on the Internet at <http://www.irish-times.com>. Given that Irish women may not give their home addresses when visiting abortion clinics, and that some will travel to other countries, the official figures are generally understood to underrepresent the actual number.

² *The Attorney General v. X and Others*, [1992] 1 I.R. 1 [hereinafter *X*].

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.”³

Suddenly the only thing that was important about X was that she was about to terminate her pregnancy. The fact that X had rejected the pregnancy, the fact that she was pregnant due to rape, and the fact that she would be further violated if forced to carry the pregnancy to term, all became insignificant details in the face of the possibility that an abortion would be performed. The attorney general moved to prevent the procuring of an abortion by seeking an injunction preventing this girl and her parents from leaving the country during the nine months of her pregnancy. On 17 February, the High Court granted the injunction on the grounds that the risk that the young pregnant woman would die if the injunction was granted was lesser than the risk that the “unborn” would die if the injunction was not granted. Nine days later, under extreme public pressure, the Supreme Court overturned the High Court decision and X was permitted to travel to England to terminate her pregnancy. A four to one majority of the Court held that the injunction against X should be lifted since she had a right to an abortion, given that her threat of suicide posed a real and substantial risk to her life.⁴

In this article, I am primarily interested in trying to explain how the Irish legal system could produce such an extreme case. It is problematic enough from a feminist perspective that the Irish state denies women access to abortion services within their own country so that X was unable to have an abortion in Ireland.⁵ But in this instance the state did more than just ignore its responsibility to address the reproductive needs of Irish women: it actively set out to prevent one of its citizens from alleviating her own suffering by stopping her from travelling abroad to get an abortion. I am interested in teasing out the explanation for this particular legal development as a specific aspect of the history of Irish abortion law. Why did the attorney general of a

³ In 1983, the Eighth Amendment was adopted by referendum and Article 40(3)(3) was incorporated into the *Irish Constitution (Bunreacht Na hÉireann)*, 1937. See A. Barron, “This Amendment Could Kill Women” (1984) 7 *Harv. Women’s L.J.* 287; and B. Girvin, “Social Change and Moral Politics: The Irish Constitutional Referendum 1983” (1986) 34 *Pol. Stud.* 61.

⁴ See J. Kingston & A. Whelan, with I. Bacik, *Abortion and the Law* (Dublin: Roundhall Sweet and Maxwell Press, 1997) for a review of Irish abortion law. See also N. Whitty, “Law and the Regulation of Reproduction in Ireland: 1922-1992” (1993) 43 *U.T.L.J.* 851.

⁵ E. Mahon and C. Conlon adopt standard methods of statistical calculation to show that, in 1994, the rate was 5.8 abortions per 1,000 women aged between 15 and 44: see “Legal Abortions Carried Out in England on Women Normally Resident in the Republic of Ireland” in Government of Ireland, Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996), Appendix 21 [hereinafter *Constitution Review Group*].

liberal democratic state perceive himself as legally obliged to seek an injunction stopping X from travelling for an abortion? How did the value of fetal life become legally recognized as a superior value in Irish society? These particular questions need to be answered in accounting for the production of the X case. If we trace the socio-legal process which produced the X case, we will develop a clearer picture of the complexities of Irish abortion law.

Events which have taken place since the X case also indicate that the time is ripe for Irish feminism to assess the various dimensions of abortion law. In November 1997, the High Court denied the parents of a thirteen-year-old girl their request to quash an order given by a lower court that allowed their daughter to travel to England for an abortion under the care of the state.⁶ The young woman, a member of the travelling community,⁷ was pregnant due to rape and had been taken into the care of the state shortly after it was discovered that she had been raped by a friend of the family. Although her parents were initially supportive of her wish to terminate the pregnancy, they changed their minds after members of anti-choice organizations such as Youth Defence approached them. As a result the Eastern Health Board, within whose care the girl had been placed, applied to the District Court to extend the care order under the *Child Care Act 1991*,⁸ so that it could bring C, the young woman in question, abroad to obtain a termination of her pregnancy. When the District Court granted that order, the parents applied to the High Court for judicial review, on several grounds, including that abortion could not constitute a medical treatment under the *Act* given the constitutional right to life of the fetus. Funding for the legal action was organized by anti-choice organizations. The High Court refused to quash the order primarily because Mr. Justice Geoghegan found that an abortion which came within the terms of the X case, as in this instance, was a medical treatment under the *Act*. Plans for an appeal to the Supreme Court were eventually abandoned and C was permitted to travel for an abortion.⁹ In the wake of this case the

⁶ See *A. and B. v. Eastern Health Board, Fahy and C.* (28 November 1997), (H.C.) [unreported], [hereinafter C]: see *The Irish Times* (29 November 1997), available on the Internet at <http://www.irish-times.com>.

⁷ The Irish travelling community, or "travellers," are a distinct ethnic group in Irish society who have historically led a nomadic lifestyle. See further J. Mac Laughlin, *Travellers and Ireland: Whose Country, Whose History?* (Cork: Cork University Press, 1995).

⁸ Acts of the Oireachtas (Ireland) 1991, No. 17.

⁹ C. Newman, "Rape Victim Free to Have Abortion in England" *The Irish Times* (2 December 1997), available on the Internet at <http://www.irish-times.com>.

government has finally begun a process which will hopefully culminate in the introduction of abortion legislation. An interdepartmental working group on abortion has been appointed and is expected to publish a green paper discussion document in the summer of 1998.¹⁰ These developments indicate that Irish abortion law is engaged in a process of change. In this article, I suggest that, in order to comprehend and make the most of that change, we need to relate it to the shifts that have occurred in abortion law since the fetal right to life was constitutionally recognized.

I argue that the *X* case was produced by the Irish legal system's endorsement of a fundamentalist view of the value of fetal life. The courts adopted an absolutist approach to the interpretation of Article 40(3)(3) when it first arose for their consideration, an approach that I suggest led to the High Court decision to grant the injunction in the *X* case. In three cases during the late 1980s¹¹ the Irish superior courts chose to interpret the constitutionally endorsed fetal right to life as if it had absolute value. In finding that the duty to protect the fetal right to life justified limiting the distribution of information about abortion services abroad, the courts interpreted the fetal right to life as if it was a more important interest than women's constitutional rights; as if everyone was obliged to observe this right in the same way despite their different circumstances; and as if the fetal right to life required people to behave in a way that would avoid the possibility, rather than the actuality, of its violation. The adoption of this absolutist interpretation of the fetal right to life was not justified by doctrinal legal rules. It was possible for the courts to have adopted alternative interpretations of the way to accommodate the fetal right to life and women's constitutional rights. Their adoption of an absolutist interpretation therefore requires an explanation, an explanation which I provide in terms of a fundamentalist narrative.

Further evidence of the courts' adoption of a fundamentalist interpretation of the fetal right to life is provided by their decision to

¹⁰ M.M. Tynan, "June Deadline For Drafting of Abortion Green Paper" *The Irish Times* (3 December 1997), available on the Internet at <http://www.irish-times.com>.

¹¹ One dispute concerned the provision of abortion information by pregnancy counselling centres in: *Attorney General (at the Relation of the Society for the Protection of Unborn Children Ireland Ltd.) v. Open Door Counselling Ltd. and Dublin Wellwoman Centre Ltd.*, [1988] I.R. 593 (H.C.), aff'd [1988] I.R. 619 (S.C.) [hereinafter *Open Door*]. The other dispute concerned student unions' provision of abortion information in two cases: *Society for the Protection of Unborn Children (Ireland) Ltd. v. Coogan and Others*, [1989] I.R. 734 (H.C.), rev'd [1989] I.R. 738 (S.C.) [hereinafter *Coogan*]; and *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan and Others*, [1989] I.R. 753 (H.C.), rev'd [1989] I.R. 760 (S.C.) [hereinafter *Grogan*].

permit a fundamentalist group to act as the legal guardian of the public interest in protecting fetal life. The Supreme Court permitted the Society for the Protection of Unborn Children (SPUC) to police the constitutional right to life of the fetus in granting that organization standing to bring an injunction against student unions prohibiting them from distributing abortion information.¹² In so doing the Court conflated the public interest in the protection of fetal life with the private interest of a fundamentalist group that sought to impose their will on all Irish women by stopping them from having abortions. The Court allowed law to become an instrument for achieving fundamentalist goals.

Additionally, the Irish judiciary, with the noteworthy exception of Ms. Justice Carroll¹³ in the High Court, constructed the issue of the fetal right to life in such a way as to deny Irish citizens their rights under European Community (EC)¹⁴ law. The Supreme Court implicitly criticized, but could not overturn, Carroll J.'s decision to refer questions on the issue of the distribution of abortion information to the European Court of Justice (ECJ).¹⁵ The Court interpreted the issue of abortion regulation as a matter of peculiarly Irish national import in order to reject the argument that the injunction against the student unions was not lawful under EC law if there was a right to distribute information about services lawfully provided in other member states. This effort to isolate abortion law from the application of EC law also indicates a fundamentalist concern with preventing international forces from challenging their power to regulate domestic affairs. By adopting an absolutist, isolationist approach and by allowing a fundamentalist group to police a constitutional right, the Irish courts gave legal authority to a fundamentalist view of the value of fetal life.

In order to explain how the courts came to this interpretation of the fetal right to life between 1986 and 1992, I will first clarify the concept of fundamentalism which I use to express the relationship between the legal outcome of these cases and the social context in which they occurred. I adopt the concept of narrative as a means of

¹² *Coogan, supra* note 11.

¹³ The convention in Ireland is to refer to women judges as if they were married women whether or not they actually are married, but Ms. Justice Mella Carroll prefers not to be addressed as a married woman.

¹⁴ Before the 1992 *Treaty on European Union*, 7 February 1992, O.J. 1993, C224/I [hereinafter *Maastricht Treaty*], what is now known as the European Union (EU) was known as the European Community (EC), hence I adopt the latter term in this article.

¹⁵ *Grogan, supra* note 11.

articulating how abortion law became implicated in the fundamentalist story which tells us that the absolute protection of fetal life is necessary in order to combat the threat to Roman Catholicism's power to regulate sexuality and reproduction; a threat that was posed by the law's adoption of a stance at odds with Roman Catholic doctrine in a contraception case.¹⁶ I make use of the concept of ideology in order to show how fundamentalism represents post-colonial and patriarchal Ireland in such a way as to justify its demand for the absolute protection of fetal life; representations which the fundamentalist narrative makes comprehensible by organizing them into a story that we can understand. Once we comprehend how fundamentalism works in Irish society, we can begin to have a clearer understanding of how and why a fundamentalist view of the value of fetal life was translated into law through the process of judicial interpretation in the abortion information cases.

When the fundamentalist narrative assumed legal authority and became a legal narrative as well as a social narrative, the legal conditions were created that would give rise to the *X* case. By providing an absolutist interpretation of the fetal right to life the courts wrote the penultimate chapter of the fundamentalist narrative of Irish abortion law. By bringing "pro-life" absolutism to a climax, and thus exposing the actual consequences of legal endorsement of a fundamentalist narrative for women's lives, the *X* case also brought that legal narrative to a close and stripped fundamentalism of legal authority. The negative public reaction to the High Court decision provoked the Supreme Court to overturn it and abandon its past practice of absolutely protecting the fetal right to life by recognizing a limited right to abortion. The *X* case revealed in concrete terms the implications of having a fundamentalist narrative as the ruling interpretation of Irish abortion law. Once those implications were recognized the Irish people and the Irish courts rejected the fundamentalist narrative as the appropriate interpretation of abortion law, leaving the way open for alternative narratives to assume legal authority. The tragedy was that it took the persecution of a particular young woman to persuade people to reject a legal policy of absolute protection of fetal life. Although pro-choicers and feminists had worked hard through the 1980s to protest the effects of a fundamentalist abortion law, they had not succeeded in getting enough popular support to overturn this law. The triumph of the *X* case is that the fundamentalist interpretation of the value of fetal life was

¹⁶ *McGee v. Attorney General and the Revenue Commissioners*, [1974] I.R. 284 (S.C.) [hereinafter *McGee*].

abandoned by the Supreme Court. In order to make the most of this opportunity it is appropriate that Irish feminism critique the socio-legal process that brought us to this point. Before going on to explain how fundamentalism worked in Irish society to produce an absolutist legal interpretation of the fetal right to life, I will outline the premises of my feminist critique of this process.

II. FEMINIST CRITIQUE

In approaching Irish abortion law from a feminist perspective there are two layers to the problem it poses for Irish women. At a general level, feminism needs to describe and criticize the harm that is done to women through the legal denial of access to abortion, a harm that has normative and empirical implications for women's lives. At a particular level, feminism needs to identify and analyze the different ways in which that legal denial is articulated in order to be able to challenge it. For example, post-*X* abortion law denies Irish women equitable access to abortion by limiting abortion access to an exceptional category of women, those whose lives are in danger. But pre-*X* abortion law denied that any woman could be legally permitted to have an abortion by interpreting the distribution of abortion information as an unjustifiable infringement of the fetal right to life. Therefore, my critique of Irish abortion law between 1986 and 1992 is informed by the general premise that law treats women unjustly and unequally when it denies them access to abortion, and by the particular premise that feminism needs to understand the specific way in which a fundamentalist legal interpretation of the fetal right to life does injustice to women. As this article is chiefly concerned with elaborating on the latter premise, the reasons for a general feminist critique of Irish abortion law require a brief explanation.

Rosalind Petchesky has argued that there are two main reasons why the denial of reproductive freedom, which includes abortion access, is problematic for women.¹⁷ First, the demand for women's

¹⁷ R.P. Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, rev. ed. (Boston: Northeastern University Press, 1990). See also: J. Brodie, S. Gavigan & J. Jenson, *The Politics of Abortion* (Toronto: Oxford University Press, 1992); D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995); M.G. Fried, ed., *From Abortion to Reproductive Freedom: Transforming a Movement* (Boston: South End Press, 1990); L. Shrage, *Moral Dilemmas of Feminism: Prostitution, Adultery, and Abortion* (New York: Routledge, 1994); S. Sheldon, *Beyond Control: Medical Power and Abortion Law* (London: Pluto Press, 1997); and A. Smyth, ed., *The Abortion Papers - Ireland* (Dublin: Attic Press, 1992).

reproductive freedom arises from the argument that the interest in recognizing a person's bodily integrity or bodily self-determination means that women ought to be able to control their bodies and their reproductive capacities. "As long as women's bodies remain the medium for pregnancies, the connection between women's reproductive freedom and control over their bodies represents not only a moral and political claim but also, on some level, a material necessity."¹⁸ A feminism that understands women as socially mediated individuals (*i.e.*, as human beings who are historically determined and socially constructed and who have concrete and particular needs) identifies women's interest in bodily integrity and reproductive freedom as a need that emerges when women's control over their bodies is denied; it does not have absolute status.

Second, the feminist argument for women's reproductive freedom derives from the acknowledgment of women's social position, rather than from their individual interests. Given that women are the most affected by pregnancy under a social division of labour which gives women primary responsibility for child care, women should be the ones who decide whether or not to have children.¹⁹ Therefore, when Irish law robs women of reproductive decisionmaking authority by recognizing a fetal right to life and denying them access to free and safe abortion services in their own country, it has the normative consequences of denying women's bodily integrity and control, and of tying them to the materially and symbolically undervalued social role of motherhood.

The empirical research on Irish women's use of abortion services suggests that the lack of such services in Ireland contributes to Irish women's presentation for abortion later in their pregnancies, and therefore negatively affects women's health.²⁰ The relatively high rate of young single mothers indicates both that Irish women are experiencing difficulty in exercising fertility control, and that young women perceive motherhood as one of the ways open to them of achieving some status in

¹⁸ Petchesky, *supra* note 17 at 5.

¹⁹ See A. Jaggar, "Abortion and a Woman's Right to Decide" in C.C. Gould & M.W. Wartofsky, eds., *Women and Philosophy: Toward a Theory of Liberation* (New York: Putnam, 1976).

²⁰ See C. Conlon, *The Reality of Abortion for Irish Women: An Analysis of the Pregnancy Counselling Service Offered by the Irish Family Planning Association*, (M.A. Thesis, Women's Studies, University College, Dublin, Ireland, 1994) [unpublished]. See also the recently published Department of Health commissioned study: E. Mahon, C. Conlon & L. Dillon, *Women and Crisis Pregnancy* (Dublin: Stationery Office, 1998).

Irish society.²¹ The lack of easily accessible abortion and reproductive services has contributed to this situation. Obviously the *X* case and the *C* case are themselves evidence of the harmful effects of Irish abortion policy on these two particular young women. Both of these women had their terminations delayed by legal procedures concerning the application of Article 40(3)(3), and suffered the intrusion of the media into an intimate and difficult time in their personal lives.²² Pregnancy counselling services in Ireland and in England have repeatedly expressed concern about the lack of support for Irish women, who often travel alone and in secret to England in order to terminate their pregnancies, and who receive little or no after-care following their return to Ireland.²³ Although the legalization of abortion information in 1995²⁴ has lifted the stigma somewhat from those who avail of and those who provide information about abortion services, the fact that Irish women have to travel abroad in order to have an abortion imposes added expense and inconvenience and makes what is already a difficult experience for some women even more cumbersome.²⁵

The feminist struggle for Irish women's reproductive freedom, particularly for access to abortion, arises with the identification and description of a problem for Irish women in the legal regulation of the fetal right to life, the critique of the processes which brought about the problem, and the prescription of how that problem should be resolved.

²¹ See J. Murphy-Lawless, "Fertility, Bodies and Politics: The Irish Case" (1993) 2 *Reproductive Health Materials* 72. In 1992, 12.6 per cent of all single women who gave birth were under twenty years of age, and eighteen per cent of all births were to unmarried women, at 85, footnote 6.

²² The manner in which women's and girls' lives are differentially impacted by such social forces as poverty and racism became obvious when the Irish press adopted a more intrusive approach to *C*'s story. While details of *X*'s domestic circumstances were kept quiet, photographs of *C*'s family caravan were published in daily newspapers. The fact that *C* was a traveller and a member of a poor family rendered her more vulnerable to public scrutiny.

²³ See R. Riddick, *The IFPA Pregnancy Counselling Service: Profile Report - The First 100 Clients* (Dublin: Irish Family Planning Association, 1993). See also S. Burke, *Profile of the First 202 Women to Attend Open Door Counselling July to September* (Dublin: Open Door Counselling, 1983); G. Dean, *Termination of Pregnancy, England 1983: Women from the Republic of Ireland* (Dublin: Medico-Social Research Board, 1984); G. Dean et. al., *Termination of Pregnancy, England 1984: Women from the Republic of Ireland* (Dublin: Medico-Social Research Board, 1985); and C. Francome, *If You Ever Go Across the Sea to England: A Study of 200 Irish Women Travelling to England for Their Abortions* (Enfield, Middlesex: Health Research Centre, 1991).

²⁴ *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995*, Acts of the Oireachtas (Ireland) 1995, No. 8.

²⁵ See T. Caherty, *Choosing to Tell - Women's Accounts of the Experience of Abortion* (M.Phil. Thesis, Women Studies, Trinity College, Dublin, 1993) [unpublished]; and R. Fletcher, "Silences: Irish Women and Abortion" (1995) 50 *Feminist Rev.* 44.

Each of these elements—description, critique, and prescription—has an analytically distinct, if actually intertwined, role to play in this struggle for Irish women’s reproductive freedom. To respond to the call of one does not necessarily entail the denial of the significance of the other. Rather, strategies that are prescribed for the resolution of a particular problem in specific social, historical, and geographical conditions without having adequately described and criticized the evolution of the problem risk missing their mark. I locate my effort to illuminate the legal process by which the *X* case was produced within the enterprise of critique.²⁶ I criticize abortion law in order to unearth the interpretations that inform it as part of the feminist task of evaluating the ways in which law limits pro-choice practice in Ireland. Criticizing the judicial interpretation of the fetal right to life in the abortion information cases means asking what were the norms that led the judges to their legal conclusions. One looks at what the courts said, and sometimes at what they did not say, in order to uncover their understanding of fetal rights and women’s rights, and their interpretation of the relationship between them. Through this process of critique, I clarify the relationship between Irish abortion law and fundamentalist social practice at a particular point in Irish history. Before going on to do this however, I first need to clarify my understanding of fundamentalism and how it works in Irish society.

A. *The Concept of Fundamentalism*

In my view, fundamentalisms are political movements which rely on religion to justify their quest to have the absolute authority of their principles recognized. Fundamentalisms are not simply a sort of religion, since they are characterized more by their particular approach to and use of religion than by the fact of a religious connection. Fundamentalisms may be distinguished from traditional, conservative or orthodox religious movements by their adherence to an absolutist philosophy. This is why the Amish, for example, are not considered to be fundamentalist.²⁷ The Amish observe a traditional, conservative

²⁶ I follow Max Horkheimer, critical social theorist and member of the Institute for Social Research, Frankfurt, in believing that the struggle against human suffering and social injustice is the goal which drives critical theory. See his *Critical Theory: Selected Essays*, trans. M.J. O’Connell et. al. (New York: Continuum Publishing, 1992) c. 6, entitled, “Traditional and Critical Theory.”

²⁷ I take this point from the sociologists of fundamentalisms, M.E. Marty & R.S. Appleby, *The Glory and the Power: The Fundamentalist Challenge to the Modern World* (Boston: Beacon Press, 1992) c.1, entitled, “The Fundamentals of Fundamentalism.”

lifestyle informed by their religious beliefs, but they do not attempt to create a situation where others must observe and live by the Amish creed.

Similarly, it is not enough to say that fundamentalisms are political movements since there are other kinds of political mobilizations of religion that we do not normally consider fundamentalist.²⁸ Revealing the politics of fundamentalisms is an important part of critiquing their effort to remove social issues from the human world to the realm of the divine. But the fact that fundamentalisms are political does not in itself tell us much about the particular nature of fundamentalisms as political movements. The organization Catholics for a Free Choice, for example, uses its interpretation of Roman Catholic teachings to argue for a woman's right to choose.²⁹ Yet they are certainly not described as fundamentalist. I think that absolutism is the defining characteristic of fundamentalisms; it is absolutism that makes political-religious movements fundamentalist rather than merely conservative. The adherence to absolutism provides a general explanation for fundamentalism in allowing us to distinguish it from other sorts of social phenomena.

There are three ways in which fundamentalisms may be absolutist: (1) by insisting that their values have absolute weight in all contexts; (2) by imposing positive rather than negative obligations on others; and (3) by subjecting everyone, even non-believers, to their principles. Fundamentalisms insist that social dilemmas of all kinds should be resolved by public acceptance of their moral values, whatever the particular interests raised. They further insist that everyone, not just members of their own community, should act on their principles rather than simply avoid offending against them.

The extent to which fundamentalisms are overt about using religion as the justification for their stance will depend on the dominance of secularism in the particular society in which a fundamentalism operates. Since fundamentalisms want first and foremost to convince their audience that their values should be observed, they are likely to adopt a mode of argumentation that will resonate with that audience. It is common therefore for fundamentalisms to be strategic in framing their arguments in the

²⁸ See C. Connolly, "Washing Our Linen: One Year of Women Against Fundamentalism" (1991) 37 *Feminist Rev.* 68, where she identifies fundamentalism, at 69, as "the mobilization of religious affiliation for political ends."

²⁹ See, for example, their pamphlet: M.R. Maguire & D.C. Maguire, *Abortion: A Guide to Making Ethical Choices* (Washington: Catholics for a Free Choice, 1983).

language of human rights and science, to name two examples of dominant discourses, in order to gain popular support. Steve Bruce comments with regard to the American New Christian Right:

[T]he virtues of fundamentalism are presented, not as divine injunctions, but as socially functional arrangements. It is also a matter of conceding crucial ground to the pluralism of the modern world by accepting the need to separate religious values and sociomoral positions so that alliances can be formed with advocates of competing social values.³⁰

In the context of abortion, fundamentalist groups tend to rely on scientific discourse in referring to the fetus's genetic makeup, for example, as evidence of its membership in humanity. They will invoke the language of human rights to argue that abortion is unjustifiable because the fetus has a right to life. In this way the reliance on religion may be obscured and one needs to read between the lines in order to find it. Evidence of a reliance on religion usually becomes more obvious when one considers the rationale for the fundamentalist stance that fetal life should never be interfered with. The view that there are never any circumstances in which biological human life can be legitimately ended regards the value of life as its god-given quality. The fact that fundamentalisms use secular discourses is evidence therefore of their emergence from and engagement with a world in which secularism is a potent force.³¹ It merely shows how fundamentalisms are strategic in using secularism against itself. For example, Dr. Mary Lucey, chairperson of SPUC commented during the Pro-Life Amendment Campaign:

We are trying with all our might and power to give protection to every child from the first moment of conception Every new life is a miracle of the Lord of creation To those who say there is nothing there at the moment of conception the answer is that this is not true. There is a new human person whose heart is beating even before the mother knows she is pregnant. To those who say there is nothing only a blob of jelly or a piece of matter from the first moment: there is a separate human being living within the womb, dependent on the mother but not part of her. This can all be medically demonstrated and proven. That being true, is it not obvious that the unborn person has a right to life?³²

³⁰ "Revelations: The Future of the New Christian Right" in L. Kaplan, ed., *Fundamentalism in Comparative Perspective* (Amherst: University of Massachusetts Press, 1992) 38 at 65.

³¹ For an insightful discussion of the ways in which secular concepts such as equality and rights may be used in fundamentalist discourses, see R. Kapur & B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996) c. 4, entitled, "Women, the Hindu Right and Legal Discourse."

³² Cited in T. Hesketh, *The Second Partitioning of Ireland - The Abortion Referendum of 1983* (Dublin: Brandma Books, 1990) at 48.

The term fundamentalism carries such pejorative connotations in popular discourse that the description of a movement as fundamentalist is assumed, too often, to be sufficient in itself as a critique. This situation is problematic for the study of fundamentalisms and their social significance in several ways. When the description of an object of inquiry as “fundamentalist” is enough to condemn that object with little or no explanation, then the use of that description may function to stifle critical analysis of fundamentalisms rather than to encourage it. If there is good reason to criticize a fundamentalism on the grounds of its political and social consequences, then such criticism is ill served by the assumption, rather than the explanation, of a pejorative attitude to fundamentalisms. Without an account of the reasons for criticizing fundamentalisms, the label “fundamentalist” can all too easily become a means to criticize social movements without accounting for or taking responsibility for that criticism. In this way, the use of the term fundamentalism can come to serve as a mask for racism.³³ A movement that may potentially be criticized for its absolutism may be actually criticized on the basis of cultural, racial, or ethnic difference, and the racism of this stance is obscured by claiming the legitimacy of an anti-fundamentalist position. In order for it to be possible to criticize particular movements without reproducing racist stereotypes, we must at least first attempt to clarify the objectives of our critique.

Feminists criticize fundamentalists because the latter’s emphasis on the need for absolute observance of their principles makes them intolerant of moral, political and social views other than their own. This intolerance is particularly problematic given that fundamentalists actively seek public endorsement of their principles. Fundamentalists do not only disagree with viewpoints other than their own, they see the existence of moral diversity as part of the problem and seek to quash it. Feminists criticize this intolerance because it stifles participation in substantive debate on the accommodation of personal and public values, and makes it more difficult for the historically and socially marginalized to be heard. The fundamentalist construction of an ideal community that is homogenous in its adherence to particular cultural values, in this case “pro-life” values, denies the significance of cultural heterogeneity, such as the actual abortion practice of Irish women or the pro-choice politics of Irish groups and individuals, and contributes to its

³³ See S. Harding, “Representing Fundamentalism: The Problem of the Repugnant Cultural Other” (1991) 58 Soc. Res. 373.

marginalization.³⁴ Feminists also criticize fundamentalists for claiming to represent the best interests of their community without addressing the desires or needs of women members of that community on an equal basis. Fundamentalists will publicly advocate and privately adopt practices that have direct effects on women's lives as if the resulting constraints on women were insignificant concerns. Irish society's adherence to "pro-life" values is advocated and celebrated as a means of saving Irish culture from the damage which abortion allegedly does to society and to women without acknowledging the damage that a "pro-life" culture has done.³⁵

Another way in which fundamentalists are problematic from a feminist perspective is in their characterization of social problems. For example, feminists disagree with the fundamentalist representation of sexual promiscuity as the cause of unplanned pregnancies and abortions, and of sexual abstinence as the solution.³⁶ If sexual practice is a positive aspect of human lives, something that is to be cherished and enjoyed, even if it can also be a site of danger and exploitation,³⁷ a general policy of sexual abstinence denies people the opportunity to explore a rich source of potential pleasure and happiness in their lives. It is only if one understands sexual practice as a mechanical function of biological reproduction that it makes sense to deny that sexual practice can play a multiplicity of positive roles in people's lives. A feminism that denies that sex has to be tied to reproduction does not identify sexual promiscuity as a problem in itself, or sexual abstinence as a possible

³⁴ See generally D. Kandiyoti, ed., *Women, Islam and the State* (London: Macmillan, 1991) at 78. See also K.M. Brown, "Fundamentalism and the Control of Women" in J.S. Hawley, ed., *Fundamentalism and Gender* (Oxford: Oxford University Press, 1994) 175.

³⁵ Irish feminism is particularly haunted by the stories of two women who lost their lives as members of a society whose obsessive pro-natalism compromised their ability to deal with their pregnancies. In March 1983, Sheila Hodggers died two days after giving birth to her baby. The baby had died shortly after birth. Hodggers, already a mother of two children, died after being refused treatment for her cancer and after her request for an early induced delivery or caesarean section was denied. The hospital she attended in Drogheda refused her an X-ray, painkillers, and medical treatment because its ethical code would not permit treatment which would damage the fetus: see E. O'Reilly, *Masterminds of the Right* (Dublin: Attic Press, 1992) at 7-9. In January 1984, fifteen-year-old Anne Lovett died giving birth in a Grotto just outside the small town of Granard where she lived. After nine months of trying to conceal her pregnancy, Anne had gone to this secluded spot, a Grotto that celebrates the virgin birth of Christ, to give birth to a baby who died hours before its mother: see N. McCafferty, "The Death of Ann Lovett" in Smyth, ed., *supra* note 17, 99.

³⁶ See F. Ginsburg, "The Body Politic: The Defence of Sexual Restriction by Anti-Abortion Activists" in C.S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (London: Routledge & Kegan Paul, 1984) 173.

³⁷ See further C.S. Vance, "Pleasure and Danger: Toward a Politics of Sexuality" in Vance, ed., *supra* note 36 at 1.

solution. To the extent that unplanned pregnancies are a problem for women, they are a problem because of the lack of socio-economic support for mothers and because of the lack of fertility control. From a feminist perspective, the solutions to these problems are the provision of a range of socio-economic supports for mothers, and of free and safe fertility control methods, as well as education about sex and fertility control. The advocacy of sexual abstinence as the solution to the issue of abortion only serves to stigmatize sexual practice and make it more difficult for young people and sexual minorities in particular to develop healthy and responsible sexual lives.

Revealing the reasons for a critical approach to fundamentalisms also facilitates the task of analyzing the particular nature of fundamentalisms and the social conditions which produce them. This latter task is an important aspect of the study of fundamentalisms because it is by focusing on these types of issues that we come to understand what the presence of fundamentalism has to tell us about the social relations of which it is a part. In this sense, fundamentalism is as much a category of analysis as it is an object of inquiry. Therefore, in arguing that a particular historical period (1986-92) in Irish abortion law should be recognized as being informed by a fundamentalist view of fetal life, my intention is not simply to criticize this development—although that is part of my project—but to draw attention to the features of Irish abortion law and its social context that are brought into focus by the recognition of this fundamentalism. I make the claim that the movement that sought to constitutionalize, and later to enforce, the fetal right to life in Ireland was a fundamentalist movement. I suggest that the identification of this phenomenon as fundamentalist has three principal consequences for our analysis of the socio-legal regulation of abortion in Ireland. It serves to clarify the significance of particular historical changes in Irish abortion law; to distinguish the fundamentalist legal mobilization of Roman Catholicism in the 1980s from a similar nationalist mobilization in the 1920s and 1930s; and to explain the particular relationship between the external social conditions of Irish abortion law and the internal doctrinal dimensions of that law.

It is also worth noting that the relevant literature on fundamentalisms rarely refers to movements in the Republic of Ireland.³⁸ While the dominance of Roman Catholicism in Ireland is

³⁸ A comprehensive survey of the international literature on fundamentalisms revealed that the anti-abortion, or general “pro-family values,” activities of Roman Catholic groups in the Republic of Ireland have not been discussed as an example of fundamentalism. See, for example, the volumes of the Fundamentalist Project, volume 1 of which is: M.E. Marty and R.S. Appleby,

commonly referred to as part of the explanation for the strength of anti-divorce, anti-gay, and anti-abortion activism over the years, it is unusual to find any of these issues studied in the particular terms of fundamentalism.³⁹ By explicitly approaching the issue of abortion and its legal regulation in order to reveal its fundamentalist aspects, I mean to distance myself from the view that Ireland's conservative Catholic status is in itself a sufficient explanation for phenomena such as the policy of absolutist legal protection of fetal life. The presence of fundamentalism in Irish society indicates a moral diversity that is obscured by the assumption of homogeneity in such references to "Catholic Ireland." Fundamentalism, as a particular type of movement that adopts moral absolutes, and as a reaction to trends of secularization and pluralism, points to the need to ask how Catholicism is put to work in Ireland, rather than to assume its force as an explanation of social phenomena. In adopting fundamentalism as an analytical category, I also seek to illustrate that there are a range of moral and social perspectives on abortion in Irish society, even if abortion law does not reflect this diversity. The fundamentalist approach to abortion is one such perspective; the feminist, liberal, socialist, or pluralist approaches that fundamentalism rails against are others. The fundamentalist view of abortion is also to be distinguished from other conservative perspectives that argue against the legalization of abortion as a matter of principle, but which tolerate exceptions to the rule in a manner which an absolutist prioritization of the value of fetal life does not permit. In the aftermath of the *X* case, Irish abortion law has adopted a conservative stance on abortion which recognizes a right to abortion only in circumstances where the pregnant woman's life is in danger. By examining the process by which fundamentalism became the dominant mode of interpretation of Irish abortion law prior to the *X* case, we reveal the particular significance of that interpretation.

III. FUNDAMENTALISM IN IRISH SOCIETY

Having clarified my understanding of fundamentalism, I want to suggest a theoretical framework that allows us to think of fundamentalism as having a particular structure, and to assess the ways

eds., *Fundamentalisms Observed* (Chicago: University of Chicago Press, 1991).

³⁹ Notable exceptions to this rule are: A. Rossiter, "Between the Devil and the Deep Blue Sea": Irish Women, Catholicism and Colonialism" in G. Sahgal & N. Yuval-Davis, eds., *Refusing Holy Orders: Women and Fundamentalism in Britain* (London: Virago, 1992) 69; and Connolly, *supra* note 28.

in which that structure gives meaning to the social relations of which it is a part, while also acknowledging that fundamentalism is marked by the social relations from which it emerges. I draw on Hayden White's concept of narrative⁴⁰ in suggesting that if we understand fundamentalism as a narrative, we can identify it as having a specific form, and account for the ways in which that form gives a series of events particular meaning by organizing them into a story which can be read. In this sense, narrative is both the structure that produces the story and the end product of that structuring process: the story itself. Narrative is a form of discourse in the Foucauldian sense; it is a meaning-producing system. White's particular concern is with the connection between the reading of history and genres of literary figuration. He comments: "In historical discourse, the narrative serves to transform into a story a list of historical events that would otherwise be only a chronicle."⁴¹ Since we come to know historical events through their symbolic representation, narrative as the mode of that symbolic representation produces the meaning of those events by organizing them into a recognizable genre. If we read White's point at an abstract level, as suggesting that the structure of narrative produces the meaning of those elements of the narrative which it arranges, then I see no reason to deny the application of narrative to a political movement that interprets events as it organizes them according to a fundamentalist principle.⁴²

I suggest that the story that a fundamentalist narrative weaves may be identified by the following features: (1) fundamentalism thinks of itself as a "pure," uncompromising form of its religion; (2) fundamentalism regards secularization as a threat to society and reacts against this perceived threat; (3) fundamentalism asserts the absolute authority of its interpretation of religious values; and (4) fundamentalism is threatened by its own culture's tolerance of non-fundamentalist values which it construes as foreign. In the particular context of Irish abortion law, the fundamentalist story plays out as a

⁴⁰ H. White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: John Hopkins University Press, 1987).

⁴¹ *Ibid.* at 43.

⁴² See K. Abrams, "The Narrative and the Normative in Legal Scholarship" in S.S. Heinzelman & Z.B. Wiseman, eds., *Representing Women: Law, Literature and Feminism* (Durham, N.C.: Duke University Press, 1994) 44, for a discussion of some of the ways in which the concept of narrative has been used in feminist legal studies. See also B.S. Jackson, *Law, Fact and Narrative Coherence* (Merseyside, U.K.: Deborah Charles Publications, 1988). Jackson draws on the concept of narrative as understood in Greimasian semiotics to argue that in the legal process of applying law to fact, both law and fact are informed by narratives (law implicitly, fact explicitly) so that the conclusion arrived at is a matter of coherence rather than correspondence to legal truth.

campaign to constitutionalize and legally enforce the absolute value of fetal life. Irish fundamentalism interpreted Roman Catholic doctrine on the value of fetal life to argue that abortion was never justifiable.⁴³ Fundamentalists perceived the Irish legal system's acceptance of the validity of the use of artificial contraception, and the possibility that Ireland might follow the path of other European and North American states in liberalizing access to abortion, as a threat to Roman Catholicism's power to mark national identity. As Emily O' Reilly comments:

The extent to which the McGee decision acted as a rallying cry for catholic lay fundamentalists was noted by SPUC president Dr. Mary Lucey addressing an anti-abortion gathering some time after the 1983 abortion referendum. She said: "... we had thought that Ireland would be different—we had the 1861 Anti-Abortion Act. The vast majority of people did not want abortion. It was anathema to 95 per cent of them who were Catholic and we thought that our Constitution protected the unborn. We also thought that there were not any abortion referral groups here in Dublin. The decision in the McGee case in 1973 and the simultaneous decision in the Roe v. Wade case in North America in the same year brought us to our senses. From that time on we who were interested in unborn human life knew that we must do something."⁴⁴

Roman Catholic fundamentalists responded to this perceived threat by seeking the absolute protection of fetal life. Before going on to show how the meaning of the *X* case is produced through its incorporation into this fundamentalist narrative, I want to outline the aspect of fundamentalism as a theoretical construct that permits us to understand how fundamentalism is informed by the social relations of which it is a part.

Narrative provides a way of thinking through the relationship between the form of fundamentalism that operates in the Irish abortion context and the interpretation it gives to particular events in the legal regulation of abortion. But in order to understand the relationship between Irish Roman Catholic fundamentalism and the social conditions of its existence, we need to articulate the relationship between narrative and ideology. The fundamentalist narrative orders, and thereby interprets, social content in such a way that we recognize that content as fundamentalism. The social content that is narrativized, however, is

⁴³ The fundamentalist representation of Roman Catholic doctrine as never permitting abortion obscures the extent to which Roman Catholic doctrine is and has been informed by a diversity of moral views on abortion. See, for example, Father S. Fagan, "More Heat than Light from Confused Language" *The Irish Times* (15 December 1997), available on the Internet at <http://www.irish-times.com>, who argues that abortion has rarely been publicly discussed in Ireland within the "full context of moral responsibility."

⁴⁴ *Supra* note 35 at 19-20.

ideological. Fundamentalism is ideological in the Althusserian sense that it “represents the imaginary relationship of individuals to their real conditions of existence.”⁴⁵ Fundamentalist ideology works on the conditions of existence in Irish society by representing them so that the subject understands his or her lived relationship with the world in fundamentalist terms. Since “the real conditions of existence” can only be known as they are represented in the subject’s lived relationship with his or her surroundings, these conditions do not operate as any external referent for ideological representations. Thus, while fundamentalism as narrative shows us how fundamentalism makes itself known, fundamentalism as ideology provides us with a theoretical tool for understanding how fundamentalism comes into being as “a system of representations through which people live their relationship to the historical world.”⁴⁶ The process of fundamentalism’s constitution through its relationship with Irish society will become clearer if I point to some of the social material that fundamentalist ideology puts to work in its construction of the need for Irish law to absolutely protect the right to life of the fetus.

Historically, Roman Catholicism has played a key role in social regulation in the Republic of Ireland and a majority of Irish people continue to identify themselves as Roman Catholics and to attend Mass services. The 1990 European Values Survey reported that 97 per cent of those who expressed a denominational affiliation identified themselves as Roman Catholic and that 85 per cent of them attended Mass weekly.⁴⁷ The dominance of Roman Catholicism can be explained as a reaction to the experience of British colonization,⁴⁸ under which the

⁴⁵ L. Althusser, *Lenin and Philosophy, and Other Essays*, trans. B. Brewster (London: New Left Books, 1971) c. 5, entitled, “Ideology and Ideological State Apparatuses” at 153. See further T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991).

⁴⁶ See Michèle Barrett’s discussion of the Althusserian concept of ideology in the context of other Marxian theories of ideology and the poststructuralist (Foucauldian) challenge posed thereto, in his *The Politics of Truth: From Marx to Foucault* (Stanford: Stanford University Press, 1991) at 83.

⁴⁷ M.P. Hornsby-Smith & C.T. Whelan, “Religious and Moral Values” in C.T. Whelan, ed., *Values and Social Change in Ireland* (Dublin: Gill and Macmillan, 1994) 7 at 11. By 1996, the figure for those attending Mass once a week had dropped to 66 per cent of those polled, the moral authority of the Catholic Church having been shaken by a series of clerical sexual abuse cases, and the revelation that Bishop Eamonn Casey had a teenage son living in the U.S., among other scandals: “Poll Shows Church’s Moral Authority in Decline” *The Irish Times* (16 December 1996), available on the Internet at <http://www.irish-times.com>.

⁴⁸ While the English invasion of Ireland began with the arrival of the Anglo-Normans in 1169, military conquest was not achieved by the English until the sixteenth and seventeenth centuries. By 1603 all of Ireland had come under the control of the English Crown. In 1801 Ireland was formally united with Great Britain, becoming part of the United Kingdom of Great Britain and Ireland. In

Irish were persecuted as Roman Catholics and encouraged to convert to Anglicanism. Prior to Roman Catholic emancipation in 1829, Irish Roman Catholics were, among other things, denied the right to vote or to be elected to Parliament, the right to hold property, or to attend school. Until 1922, when the twenty-six counties of the Republic of Ireland achieved independence, and to this day in the six counties of Northern Ireland, the struggle for national self-determination was historically linked to the religious practice of Roman Catholicism.

Between the 1920s and 1960s, the young Irish nation state institutionalized Roman Catholicism as a marker of Irish national identity through such activities as the adoption of a Constitution in 1937 which privileged the role of the Roman Catholic Church and imposed a ban on divorce,⁴⁹ and through its reliance on and support of the Church in its provision of health, welfare, and education services.⁵⁰ Given these factors, the dominance of censorship,⁵¹ and the insularity of Ireland as an island and as a collection of predominantly rural communities, Roman Catholicism continued to function as the principal lens through which Irish people perceived moral and social issues until challenged by the effects of urbanization and industrialization in the 1960s and 1970s. Ireland's becoming a member of the European Economic Community in 1972 and the influence of mass media were also significant factors in the undermining of the role of Roman Catholicism as a force of moral regulation.⁵²

Therefore, Ireland's status as a post-colonial state plays a role in explaining how Roman Catholicism came to be such a strong force of social regulation in Ireland, and provides some of the social material which fundamentalist ideology works with in constructing a system of

1922 the twenty-six counties of the South became the Irish Free State, which would go on to become the Republic of Ireland. The six counties of the North remained a part of what is now known as the United Kingdom of Great Britain and Northern Ireland. In this manner, the mainly agricultural and Catholic South was partitioned from the mainly industrial and Protestant North. For one useful historical account see G.M. MacMillan, *State, Society and Authority in Ireland: The Foundation of the Modern State* (Dublin: Gill and Macmillan, 1993).

⁴⁹ Article 44 of the 1937 Constitution recognized the special place of the Catholic Church in Irish society, and was only removed by referendum in 1972. A constitutional ban on divorce (Article 41(3)(2)) eliminated the option of applying for divorce through a parliamentary bill inherited from English law by the Irish Free State in 1922, and was only amended by referendum in 1995 to allow for divorce in certain circumstances.

⁵⁰ See J. Whyte, "Church, State and Society, 1950-70" in J.J. Lee, ed., *Ireland 1945-70* (Dublin: Gill and Macmillan, 1979) 73; and T. Inglis, *Moral Monopoly: The Catholic Church in Modern Irish Society* (Dublin: Gill and Macmillan, 1987).

⁵¹ See M. Kelly, "Censorship and the Media" in A. Connelly, ed., *Gender and the Law in Ireland* (Dublin: Oak Tree Press, 1993) 185.

⁵² See Hornsby-Smith & Whelan, *supra* note 47.

representations through which Irish subjects understand their relationship with their world. Post-coloniality, as I use it, refers to the effects of the historical experience of colonization on societies that have since gained independence.⁵³ Post-colonial theory⁵⁴ explains how the systems of values and representations that socially legitimated the colonial authority continue to affect the colony even after legal authority has been transferred back to the colony.⁵⁵ The theory contributes the insight that the representation and value systems which hierarchized the relations between colonial ruler and “native”—constructing the former as civilized and developed, and the latter as primitive and underdeveloped—do not simply disappear with the colonized state’s achievement of legal sovereignty. The complex differences and interactions between colonizer and colonized continue to be obscured in a post-colonial context by dominant interpretations of one as the inverse of the other. Post-colonial theory explores the ways in which a society that has formally achieved sovereignty from its former colonizer continues to filter, resist, and appropriate imperialist values and representations of itself, and to figure in the formation of those values and representations.

Irish nationalist ideology intersects with post-coloniality in its constitution of nation and national identity in opposition to the nationalist representation of the British colonizer. Whether one interprets nationalism as the politics of an “imagined community”⁵⁶ or as anti-imperialist struggle, Irish nationalism has historically relied on

⁵³ See L. Gibbons, *Transformations in Irish Culture* (Notre Dame: University of Notre Dame Press, 1996) c. 14, entitled, “Unapproved Roads: Ireland and Post-Colonial Identity” at 174, where he criticizes B. Ashcroft, G. Griffiths & H. Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* (London: Routledge, 1989), for their exclusion of Irish literature from this survey.

⁵⁴ One of the “founding” texts of post-colonial theory is E.W. Said, *Orientalism*, 1st ed. (New York: Vintage Books, 1979). For a critique of Orientalism see A. Ahmad, *In Theory: Classes, Nations, Literatures* (London: Verso, 1992) c. 5, entitled, “Orientalism and After: Ambivalence and Metropolitan Location in the Work of Edward Said.” See also B. Ashcroft, G. Griffiths & H. Tiffin, eds., *The Post-Colonial Studies Reader* (New York: Routledge, 1995). For examples of feminist engagements with post-colonial theory, see R. Sunder Rajan, *Real and Imagined Women: Gender, Culture and Post-Colonialism* (London: Routledge, 1993); and L. Abu-Odeh, “Post-Colonial Feminism and the Veil: Considering the Differences” (1992) 26 *New Eng. L. Rev.* 1527.

⁵⁵ In the case of Ireland, post-colonial theory has been chiefly used in literary and cultural criticism. See D. Lloyd, *Anomalous States: Irish Writing and the Post-Colonial Moment* (Dublin: Lilliput Press, 1993); and D. Kiberd, *Inventing Ireland* (Cambridge, Mass.: Harvard University Press, 1996).

⁵⁶ See B.R. O’G. Anderson, *Imagined Communities: Reflection on the Origin and Spread of Nationalism* (London: Verso, 1983).

religion as a marker of difference in its invocation of the particularity of the Irish nation.⁵⁷ Hence the Irish nation state represented its legal endorsement of Roman Catholic values as a reclamation of something distinctly Irish from its distortion through the British colonial suppression of Catholicism. Fundamentalist ideology, on the other hand, puts post-coloniality to work in its representation of the necessity of the absolute authority of the dominant national religion in order to prevent or combat the nation's self-distortion through secularization. In post-Independence Ireland the role that law played in constructing Irish identity as Catholic was part of a nationalist ideology of Irishness; in the 1980s, in contrast, the engagement with law was part of a fundamentalist ideology of Catholicism. While nationalism emphasized a need to resist a threat from without—from Britain—in its construction of Irish identity, fundamentalism emphasized a need to resist a threat from within—secularization—in its assertion of the Catholicism of Irish identity. Irish fundamentalist ideology mobilized the postcolonial attachment to Roman Catholicism in its representation of the need for the absolute legal protection of fetal life in order to resist the weakening of Roman Catholicism's hold on the regulation of reproduction.

Luke Gibbons notes that what have come to be recognized as traditional Irish values—myths of community, the sanctity of the family, devotion to faith and fatherland—date from the period of the “devotional revolution”⁵⁸ in post-Famine Ireland.⁵⁹ He says:

The “traditionalism” and religious conservatism associated with the west of Ireland, for example, so evident in the results of the abortion and divorce referenda, is a comparatively late development, given that in the early nineteenth century Connacht [the Western Province of Ireland] was the region with the least not the highest, Mass attendance, with figures in some places falling as low as 20 per cent.⁶⁰

In the post-Famine era the centralization of church control was part of a modernizing phenomenon which included the tenant farmers' struggle for ownership of the land they worked, and the revival of cultural as well as political nationalism. Five years before the Famine, in 1840, there was one priest to every 3,500 laity, but by 1900 that figure was one to

⁵⁷ On Irish nationalism, see D.G. Boyce, *Nationalism in Ireland* (London: Croom Helm, 1982).

⁵⁸ See Inglis, *supra* note 50 for an account of the devotional revolution.

⁵⁹ For a history of the Irish Famine in which 1 million died and in the aftermath of which several million more emigrated, see R.D. Edwards & T.D. Williams, eds., *The Great Famine: Studies in Irish History, 1845-52* (Dublin: The Lilliput Press, 1995).

⁶⁰ Gibbons, *supra* note 53, c. 6, entitled, “Coming Out of Hibernation? The Myth of Modernization in Irish Culture” at 86 [hereinafter “Coming Out”].

every 900.⁶¹ When fundamentalism insists on the cultural authenticity of Irish traditional values and on the need for their observance in order to combat social ills, it fails to recognize that those very values were historically produced.

Gibbons argues further that what he calls the conservative social backlash of the 1980s (that is the success of the 1983 “pro-life” amendment and the defeat of the pro-divorce amendment in 1987) is not inconsistent with Ireland’s economic development from the 1960s on because economic progress was constructed in Ireland as a form of cooperation between tradition and modernity rather than as a modern growth away from tradition. The cultural link between capitalist development and social liberalization present in other capitalist liberal democracies was weak in Ireland because capitalism ideologically represented Irish cultural heritage and rural, communal, and familial values as assets for economic development rather than as disadvantages that had to be overcome. For example the promotional material of the Industrial Development Authority, when seeking foreign investment, represented Ireland’s peripheral status as an advantage with literature bearing such slogans as: “Missing the Industrial Revolution was the Best Thing that ever happened to the Irish.” Given the capitalist state’s representation of Ireland’s post-colonial status as a distinct advantage for foreign investors, it is not so difficult to see how, as Gibbons suggests, “the ‘conservative backlash’, or the reversion to traditional values of family, faith and fatherhood, may not be an aberration but may even be a logical extension of the modernization policies pursued by successive governments and development agencies.”⁶² Fundamentalism’s mobilization of the post-colonial attachment to Roman Catholicism in its quest for the absolute protection of fetal life, was consistent with other kinds of state mobilization of post-coloniality, and as such was not perceived as threatening to state control or social order.

The patriarchal organization of Irish society also provides material for fundamentalism to work with in its ideological constitution of the need for the absolute protection of fetal life. The constitutional provisions on the family are one example of the evidence of the patriarchal organization of Irish society. Article 41 of the Irish Constitution, 1937 provides:

⁶¹ Rossiter, *supra* note 39 at 81.

⁶² “Coming Out,” *supra* note 60 at 91-92.

1. 1. The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
1. 2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
2. 1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. 2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
3. 1. The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

The existence of constitutional provisions that idealize the role of women as homemakers, privilege the family based on marriage, and suggest that women who engage in paid labour outside the home are neglectful is, in itself, at least symbolically significant given the status of the Constitution as the primary law and the measure of legislation.

If the courts had chosen to ignore such provisions, however, one could dismiss them as empty promises, but the courts have instead relied on Article 41 to forestall progressive change in family law. For example, in *In the matter of Article 26 of the Constitution and in the matter of The Matrimonial Home Bill 1993*⁶³ the Supreme Court held that the *Bill*, which provided that a beneficial interest would vest in both spouses as joint tenants where either or both spouses were entitled to a legal or beneficial interest in the matrimonial home, was unconstitutional. Although the Court was of the view that the encouragement of joint ownership of the matrimonial home was an important element of the common good conducive to the stability of marriage, it found that the *Bill* did not represent a reasonably proportionate state intervention into the rights of the family. The *Bill* was found unconstitutional in violating Article 41 by constituting a failure on the state's part to protect the authority of the family as it would, in some instances, cancel a joint decision relating to the ownership of the matrimonial home that was "freely" made prior to the legislation. I refer to this example of Irish law's role in the patriarchal organization of familial relations in order to draw attention to the gender relations which fundamentalist ideology could put to work in its quest to absolutize the value of fetal life in Irish society. Given that women's confinement to the domestic sphere was

⁶³ [1994] 1 I.R. 305 (S.C.).

already justified by the idealization of a woman's role as homemaker, by the condoning of wives' material dependency on their husbands, and by the assumption that women's entry into familial relations is free and not socially conditioned, the fundamentalist ideological construction of women as self-sacrificing mothers had rich soil in which to take root.

Fundamentalism seeks to resolve its cultural anxiety about the values which are being cultivated in a particular society by asserting the absolute observance of its religious values as the solution to social problems. When women are construed as responsible for social reproduction, an ideology that represents particular values as socially necessary will have effects on the interpretation of women's social roles.⁶⁴ Since social reproduction encompasses not only the labour of biological reproduction but also the socialization of children, the gendered construction of women as responsible for social reproduction marks them as a focus for fundamentalism's concern about which social values and behaviours are being passed on. Hence, fundamentalist ideology puts gender relations to work by representing the need for the control of women and their bodies in the interests of transmitting particular cultural values. The fundamentalist representation of the absolute value of fetal life operates to assert the importance of particular cultural values to Irish society *and* to tie women to the role of transmitting those values to the next generation by denying women permission to opt out of the role of motherhood.

One of the senses in which fundamentalist ideology is absolutist is because it understands *all* Irish women to be subject to its consequences. Neither the circumstances nor status of any woman justifies an exception to the absolute protection of fetal life. The campaign to stop the provision of information about abortion services abroad demonstrates that anti-abortion fundamentalists were not satisfied with the absence of abortion services within the state in their quest to stop Irish women from having abortions. However, in its effort to deny all Irish women access to abortion, fundamentalism ignores the effects of class relations in Irish society. The economic privilege that accrues to class position allowed, and continues to allow, middle-class women to escape the effects of fundamentalist ideology. The provision of abortion services in Britain has meant that abortion has always been available to those who could fund the trip and the cost of the abortion

⁶⁴ See V. Moghadam, ed., *Identity Politics and Women: Cultural Reassertion and Feminisms in International Perspective* (Boulder: Westview Press, 1994); N. Yuval-Davis & F. Anthias, eds., *Woman-Nation-State* (N.Y.: St. Martin's Press, 1989); and G. Meaney, "Sex and Nation: Women in Irish Culture and Politics" in E. Boland et al., eds., *A Dozen Lips* (Dublin: Attic Press, 1994) 188.

service in a private clinic (approximately \$1,000). And for as long as abortion services have been medically provided in Britain, there have always been Irish women who crossed the Irish Sea to terminate their pregnancies.

Irish sociologist Pauline Jackson⁶⁵ has commented on the fall in numbers of prosecutions for back street abortions in Ireland following the impact in Britain of the *R. v. Bourne*⁶⁶ decision. The liberalization of abortion law in Britain in 1967 made abortion services more widely and easily available.⁶⁷ Class privilege means that all women are not equally subject to the effects of fundamentalist ideology. Thus, fundamentalist ideology has the effect of being discriminatory against poor women because they are less well positioned to avoid the application of the law. This example of the way in which class limits the effects of fundamentalist ideology also provides us with an instance of ideology's attempt to smooth out contradictions in the social conditions with which it engages. Fundamentalism represents all women as equal in their subordination to the value of fetal life. Class, however, does not construe all women equally, since economically privileged women can evade this subordination. Fundamentalism is revealed as ideology when the effects of class clarify that the woman which fundamentalism invokes is a representation, and, as a particular representation of womanhood, it does not accommodate the woman constructed by class.

Fundamentalist ideology is made coherent through its narrativization. To quote White: "Narrative is at once a mode of discourse ... and the product produced by the adoption of this mode of discourse."⁶⁸ Narrative reveals the practices of fundamentalist ideology; it makes it possible for us to recognize fundamentalist ideology at work. Once we recognize the *X* case as the last chapter of a fundamentalist legal narrative, that narrative is revealed in its totality and the pieces of the story begin to fall into place. That the attorney general of a liberal democratic state could take steps to stop a fourteen year old rape victim

⁶⁵ P.C. Jackson, "Outside the Jurisdiction: Irish Women Seeking Abortion" in Smyth, ed., *supra*, note 17, 119. Jackson notes further that with the imposition of travel restrictions during the Second World War, the number of Irish prosecutions for back street abortions rose again.

⁶⁶ [1939] K.B. 687 (Central Criminal Court) [hereinafter *Bourne*]. This case concerned the criminal prosecution of a doctor for an unlawful abortion under s. 58 of the *Offences Against the Person Act, 1861* (U.K.), 24 & 25 Vict., c. 100. Macnaghten J. held that an abortion which was performed in order to prevent the pregnant woman becoming "a physical or mental wreck" was performed in good faith for the purposes of saving her life, and was not unlawful.

⁶⁷ *The Abortion Act 1967* (U.K.), 1967, c. 87.

⁶⁸ *Supra* note 40 at 57.

from travelling abroad for an abortion is not such a difficult decision to understand once we locate it as part of a fundamentalist narrative; likewise the decision of the High Court to grant the injunction. The *X* case reveals the fundamentalist narrative and invokes its closure as public outrage at the High Court decision puts extreme pressure on the Supreme Court, which ultimately decides to lift the injunction. But what are the other chapters of the story? What other legal events in recent Irish history played a role in constructing the fundamentalist narrative of Irish abortion law?

During the 1970s two legal events, in particular, signalled that Roman Catholicism was losing its grasp on the legal regulation of Irish people's moral lives. In 1974, a majority of the Supreme Court held in *McGee*⁶⁹ that the right to marital privacy was one of the unspecified personal rights guaranteed by Article 40(3)(1)⁷⁰ of the Constitution. Therefore, section 17 of the *Criminal Law (Amendment) Act 1935*,⁷¹ which prohibited the importation of contraceptives for personal use, was found unconstitutional because it violated Mrs. McGee's right to marital privacy. This decision was regarded as a significant rebuttal of Roman Catholic doctrine, both in its striking down of the legislative provision thereby accepting the validity of contraceptive use, and in its recognition of a right to privacy, albeit marital privacy. Given that in *Roe v. Wade*⁷² the United States Supreme Court had determined that the unspecified constitutional right to privacy, first recognized in a case concerning contraceptives,⁷³ gave Jane Roe a right to abortion, the *McGee* decision was seen as laying the ground for further liberalization of the legal regulation of reproduction.

The other significant legal event that opened the fundamentalist narrative was the introduction and passing of an Act that legalized the provision and sale of contraception. Although the *Health (Family*

⁶⁹ *Supra* note 16. Mary McGee was a 29-year-old mother of four whose heart condition meant that her life would be endangered by another pregnancy. The case arose after the contraceptives she sought to import were confiscated by the customs authorities under the relevant Act. For a feminist critique of this decision, see L. Flynn, "Missing Mary McGee: The Narration of Woman in Constitutional Adjudication" in Dr. G. Quinn, Dr. A. Ingram & S. Livingstone, eds., *Justice and Legal Theory in Ireland* (Dublin: Oak Tree Press, 1995) 91.

⁷⁰ It provides: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

⁷¹ Acts of the Oireachtas (Ireland) 1935, No. 6.

⁷² 410 U.S. 113 (1973).

⁷³ *Griswold v. Connecticut*, 381 U.S. 479 (1965). Note also a later case that established a right to distribute contraceptives: *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Planning) Act 1979,⁷⁴ introduced by Health Minister Charles Haughey, provided for the sale of contraceptives in very restricted circumstances,⁷⁵ its legitimization of artificial contraception and the practice of reproductive control was significant in itself, and in its rejection of the vigorous opposition mounted against this legislation by conservative Roman Catholic groups. These legal changes were interpreted as representing a threat to the regulatory force of Roman Catholicism in Irish society, particularly in matters of sexuality and reproduction. The fundamentalist response to this perceived threat was to build a campaign for the constitutional endorsement of a fetal right to life.⁷⁶

The Pro-Life Amendment Campaign (PLAC) held its founding conference on 24 January 1981 in Dublin. A glance at the list of organizations represented at the meeting indicates the dominance of a Roman Catholic ethos in the campaign.⁷⁷ On 27 April 1981, PLAC was officially launched and a draft amendment was unveiled at the press conference. The draft constitutional amendment read: "The State recognizes the absolute right to life of every unborn child from conception and accordingly guarantees to respect and protect such right by law." The reference to "the absolute right to life of every unborn child from conception" indicates clearly an adherence to an absolutist interpretation of Roman Catholic doctrine which denounces any direct interference with "god given life," and recognizes conception as the moment when god gives life to the "unborn." The recognition of the fetus as having a right to life from the moment of conception is

⁷⁴ Acts of the Oireachtas (Ireland) 1979, No. 20.

⁷⁵ The *Act* provided that all contraceptives, including condoms and spermicides, would be available only on prescription from a doctor. Before prescribing contraception, the doctor had to ensure that "the person required the contraceptives for the purpose, bona fide, of family planning or for adequate medical reasons and in appropriate circumstances." The *Act* also advocated the promotion of "natural" family planning methods. In justifying the restrictive nature of the *Act*, Haughey used a now infamous phrase: "This Bill seeks to provide an Irish solution to an Irish problem. I have not regarded it as necessary that we should conform to the position obtaining in any other country": see O'Reilly, *supra* note 35 at 51.

⁷⁶ See Hesketh, *supra* note 32; and O'Reilly, *supra* note 35, for detailed accounts of the background and operation of the campaign.

⁷⁷ The following groups attended the conference: Congress of Catholic Secondary School Parents' Association, Irish Catholic Doctors' Guild, Council of Social Concern, Guild of Catholic Nurses, Guild of Catholic Pharmacists, Catholic Young Men's Society, St. Thomas More Society, Responsible Society, Society for the Protection of Unborn Children, Irish Pro-Life Movement, National Association of the Ovulation Method—Ireland, St. Joseph's Young Priest's Society, and the Christian Brothers School Parents' Federation. The Irish Nurses' Organization, Muintir na Tíre, and Pax Christi Christian Life Communities all sent messages of support: see Hesketh, *supra* note 32.

peculiarly Roman Catholic and is not subscribed to by other Christian churches in Ireland. It was the recognition of the particularly Roman Catholic ethos informing PLAC that caused the Irish Protestant Churches to support the Anti-Amendment Campaign (AAC). By June 1982, each of the main Protestant Churches in Ireland—Anglican, Presbyterian, and Methodist—had issued official statements opposing the idea of a “pro-life” amendment being enshrined in the Constitution.

The AAC was officially launched in April 1982. A diverse group of feminists, socialists and liberals, the AAC raised five objections to the idea of a “pro-life” constitutional amendment. These were: (1) the amendment would do nothing to solve the problem of unwanted pregnancies; (2) the amendment allowed for no exceptions even in cases where pregnancy severely threatened a woman’s health, or in cases of rape or incest; (3) the amendment sought to enshrine in the Constitution the teaching of one religious denomination; (4) the amendment would impede further public discussion and possible legislation on abortion; and (5) that at a time of severe unemployment and when one third of the population was living at or below the poverty line, the referendum would be an irresponsible waste of public funds.

A bitter and divisive campaign ensued that ultimately resulted in the following proposed constitutional amendment being put before the people on 7 September 1983: “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.” Fifty-four per cent of the electorate turned out to vote and the amendment was accepted by a majority of 67 per cent to 33 per cent. Hence, Irish Roman Catholic fundamentalists were successful in their campaign to persuade the Irish government and the people that the protection of fetal life merited constitutional endorsement. They were not successful, however, in securing a constitutional amendment which expressed the need for the absolute protection of fetal life, given that Article 40(3)(3) qualified the right to life of the fetus by reference to the equal right to life of the mother, and by the “as far as practicable” limitation. PLAC’s success in having a fetal right to life constitutionally recognized provided another installment in the fundamentalist narrative that began with *McGee* and would end with *X*. One significant element of the narrative is still missing at this point, however, and that element is the absolutist legal enforcement of the fetal right to life. I argue that this element was provided by the Irish courts in three cases when they interpreted Article 40(3)(3) as requiring injunctions against pregnancy counselling centres

and student unions in order to stop them providing women with abortion information.

IV. FUNDAMENTALISM IN IRISH LAW

In order to show that Irish law was informed by fundamentalist premises it is not necessary to point directly to judicial references to fundamentalist values. Even if I wanted to make my argument in this way it would be almost impossible since Irish judges may be generally faulted for the insubstantial explanations they provide for their legal conclusions. Rather, in order to argue that the decisions in the three cases are informed by a fundamentalist abortion narrative, I have to extrapolate from what the judges did say to what they did not; I have to show how fundamentalist assumptions implicitly informed the judicial interpretation of Article 40(3)(3).

I argue that the courts' failure to consider how women's constitutional rights might limit the degree of protection due the fetal right to life is evidence of their absolutism, particularly given that the text of Article 40(3)(3), the usual principle of constitutional interpretation, and the relevance of other legal rules, did not necessitate such an interpretation. The Supreme Court's acceptance that SPUC should be allowed standing to enforce the fetal right to life in the absence of a particular factual case of pregnancy, and despite the fact that private groups whose interests are not directly affected are not generally permitted to seek the enforcement of law against other private groups, is evidence that the court identified the private interests of a fundamentalist group with the public interest in enforcing the law. When the Supreme Court rejected the argument that European Community law was relevant to the determination of the lawfulness of abortion information they departed from their usual willingness to apply EC law. In so doing, they demonstrated a desire to isolate Irish abortion law from the effects of supranational legal regulation and provided further evidence that their interpretation of the fetal life was informed by a fundamentalist narrative.

In the first case, *Open Door*,⁷⁸ the Supreme Court granted the attorney general's request and issued a perpetual injunction against two

⁷⁸ *Supra* note 11.

non-directive pregnancy counselling centres,⁷⁹ preventing them from distributing the names, telephone numbers and addresses of abortion clinics abroad to women seeking their counselling services. The injunction was issued on the grounds that the defendants' distribution of such information amounted to assistance in the destruction of "unborn" life and, as such, was unlawful because it violated the constitutional right to life of the "unborn" as protected by Article 40(3)(3). The Supreme Court injunction was more restrictive than the one issued at the trial level in 1986 by Hamilton P. (President of the High Court) that had, in general terms, prohibited the defendants from counselling or assisting pregnant women to obtain further advice on abortion or to obtain an abortion.

In the second case, *Coogan*,⁸⁰ the Supreme Court overturned the decision of Ms. Justice Carroll in the High Court and granted SPUC standing to seek an injunction preventing an alleged breach of constitutional rights. SPUC sought an injunction against the officers of University College Dublin's Students' Union (UCDSU) in order to stop their publication of abortion information, on the grounds that it amounted to a violation of the right to life of the "unborn." Carroll J. had refused to grant the injunction, holding that SPUC lacked the standing reserved to the attorney general to seek undertakings and injunctions to restrain threatened breaches of the Constitution. In a private capacity and without the cooperation of the attorney general, SPUC was seeking an injunction to prevent UCDSU publishing information about abortion services abroad in their student union guidebooks. However, in the Supreme Court, her decision was overruled on the grounds that any party who had a bona fide concern and interest in the protection of the constitutionally guaranteed right to life of the "unborn" had sufficient standing to invoke the jurisdiction of the courts to take such measures as would defend and vindicate that right. The case was remitted to the High Court to deal with the interlocutory injunctions, at which point the plaintiff, SPUC, decided to seek injunctions against the officers of three students unions: Union of Students in

⁷⁹ To North American lawyers it will seem unusual that the plaintiff's attempt to use the Constitution against private organizations was not questioned. However, the Irish Constitution has been interpreted as conferring a right of action for breach of constitutionally protected rights against persons other than the State and its officials, at least since *The Educational Company of Ireland Ltd. and Another v. Fitzpatrick and Others*, [1961] I.R. 345 (S.C.). Thus, unlike in other jurisdictions, there is no need to establish the involvement of a "state action" in order to claim a violation of constitutional rights: see J.T. Lang, "Private Law Aspects of the Irish Constitution" (1971) 6 Irish Jurist 237.

⁸⁰ *Supra* note 11.

Ireland, Trinity College Dublin Students' Union, and the defendants in the original request for an injunction, UCDSU.

In the third case, *Grogan*,⁸¹ SPUC sought an injunction against the fourteen officers of the three above mentioned student unions and their printer/publisher stopping them from publishing information about abortion services abroad in their student guidebooks. In the High Court, Carroll J. declined to grant the interlocutory injunction sought, on the ground that she first required an interpretation of European Community (EC) law from the European Court of Justice (ECJ) in order to be able to determine the lawfulness of the provision of information about abortion services legally provided abroad. The defendants argued that even if distribution of information about abortion services was not protected by domestic law, it was protected by EC law that took precedence over domestic law. The defendants' argument was based on the claim that the freedom of movement of services between Member States, protected by Articles 59 and 60 of the *Treaty Establishing the European Economic Community (EEC)*,⁸² implied a right to give and receive information about the availability of abortion services lawfully provided outside the state. On appeal, the Supreme Court interpreted Carroll J.'s judgment as two decisions: the decision to refer a point of EC law for interpretation to the ECJ, which it could not alter, and the appealable decision not to grant the injunction. The Supreme Court granted SPUC the injunction on the grounds that SPUC was in full accord with Irish constitutional law in seeking to restrain an activity which the court had declared violated Article 40(3)(3)'s protection of the right to life of the "unborn."⁸³

A. *An Absolute Fetal Right to Life*

In each of these three cases the Irish judiciary, with the exception of Carroll J. in the High Court, interpreted the constitutional right to life of the "unborn" as justifying the constraint of the distribution of abortion information without formally framing their method of

⁸¹ *Supra* note 11.

⁸² 25 March 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*].

⁸³ This injunction was finally lifted in March 1997: see *The Society for the Protection of the Unborn Child v. Grogan and Others*, [1997] No. 317/92 (LEXIS/NEXIS) (S.C.) [hereinafter *Grogan 1997*].

interpreting competing legal claims,⁸⁴ and with little or no substantive consideration of how other constitutionally endorsed interests should be accommodated when enforcing the fetal right to life. In asserting, without substantively reasoning, that the fetal right to life required the relevant injunctions requested by SPUC, the judiciary adopted a fundamentalist interpretation of the value of fetal life.

Article 40(3)(3) requires the state to defend and vindicate the right to life of the “unborn” *as far as practicable* and *with due regard to the equal right to life of the mother*. Therefore, the language of Article 40(3)(3) suggests that a court ought to have regard to other interests in interpreting what it means to vindicate the right to life of the “unborn,” and that the latter right may be qualified by such interests. The fact that Article 40(3)(3) adopts positive rather than negative terminology—it requires the state to act for the protection of fetal life and not merely to refrain from acting against fetal life—ought to increase, rather than decrease, judicial concern for how such state action might be qualified. In other words, because Article 40(3)(3) contemplates that the state might have to do something, rather than to not do something, it envisages that the state has to take responsibility for the changes it makes to the status quo through its positive action, changes which might affect other legal interests. If such an action were to have the effect of offending another constitutional interest, such as women’s rights, then the court might be justified in finding that the action was more than what was practicable in defending the fetal right to life.

Furthermore, other fundamental rights provisions of the Irish Constitution adopt more absolutist language than Article 40(3)(3).⁸⁵ For example, Article 41(1)(1) refers to the “inalienable and imprescriptible rights” of the family, rights that the Supreme Court has held to be restrictable.⁸⁶ If the courts can qualify rights that are framed in such unqualified language, then it is even more difficult to explain how it is consistent as a matter of legal interpretation to construe a right that is framed in qualified language as if it was unqualified.

⁸⁴ James Friedman criticizes the courts for failing to develop an adequate interpretative framework for competing constitutional rights in his, “On the Dangers of Moral Certainty and Sacred Trusts: The Judgments in the SPUC Case and the Issue of Free Speech” (1988) 10 D.U.L.J. 71.

⁸⁵ See *Constitution Review Group*, *supra* note 5 at 215, where the Review Group argues that the constitution’s qualified clauses need an overhaul. They note further that: “there are few rights—however fundamental—which can be regarded as absolute or not subject to qualification.”

⁸⁶ *Murray v. Ireland and the Attorney General*, [1985] I.R. 532 (S.C.). The Supreme Court rejected the claim made by prisoners who were husband and wife and serving life sentences that the absence of conjugal facilities was an infringement of their family rights.

In *Open Door*, *Coogan*, and *Grogan*, the courts did not have regard to the qualifying clauses of Article 40(3)(3) when they considered whether the distribution of abortion information should be restrained as a breach of the fetal right to life. In the High Court, in *Open Door*, Hamilton P. declared, "I do not, in the circumstances of this case, have to have regard to the effect of 'the equal right to life of the mother' on the right to life of the unborn acknowledged by this Article."⁸⁷ On appeal to the Supreme Court, Finlay C.J. said:

It was not part of the facts of this case nor of the submissions of the defendants that the service which they were providing for pregnant women in relation to the obtaining of abortion outside this jurisdiction was in any way confined to, or especially directed towards, the due regard to the equal right of life of the mother mentioned in the subsection of the Constitution which I have already quoted, and this portion of that subsection did not therefore arise for interpretation or decision in this case.⁸⁸

Once the Supreme Court held that there was no need to have "due regard to the equal right to life of the mother," given that there was no particular woman claiming that right before the Court, the two cases that followed also assumed that there was no need to consider Article 40(3)(3)'s reference to the pregnant woman's right to life as a limitation on the fetal right to life. Their conclusion that the absence of a particular woman asserting her right to life before the Court was sufficient to omit consideration of a woman's right altogether was an amazing deduction given the fact that there was no particular fetus before the courts never stopped them from asserting the rights of the "unborn." While the judiciary expressed no hesitation in enforcing the private right of the fetus, they saw no need to even consider how the private right of the woman might limit the interest in protecting fetal life. Interestingly, in the case that eventually lifted the injunction on appeal in March 1997, two of the five Supreme Court judges took the view that the decision not to consider the equal right to life of the mother was an erroneous legal finding.⁸⁹

In failing to consider how the fetal right to life might be qualified by reference to a woman's rights, the courts also disregarded the significance of the factual circumstances of pregnancy for the

⁸⁷ *Open Door*, *supra* note 11 at 617.

⁸⁸ *Ibid.* at 621.

⁸⁹ They were Mrs. Justice Denham, the first woman appointed to the Supreme Court, and Mr. Justice Keane, in *Grogan 1997*, *supra* note 83 at 19, 36 respectively. Chief Justice Hamilton and Justices Barrington and Blayney were of the view that the injunction could not be confirmed on appeal, because the law as it now was (*i.e.*, post-1995 *Act's* legalization of abortion information) did not so require: see *supra* note 24.

interpretation of the legal interests raised. The factual context of pregnancy means that a woman sustains a fetus within her body during pregnancy. Any action taken on behalf of or towards the fetus will necessarily affect the pregnant woman. Any defence of fetal legal interests will necessarily impact on a pregnant woman's interests. If one considers how to defend a fetal right to life in isolation from a woman's right to life, then one fails to acknowledge and take responsibility for the way in which the former is dependent on the latter.

However, rather than exercise caution in the absence of any particular factual case, the courts vindicated the right to life of the "unborn" in broad general terms without adequately considering the possible consequences for actual women. The judges denied a woman's role in pregnancy at the same time as they relied on her to sustain that pregnancy. The fetal right to life is discussed in these cases in general, abstract terms that conceptualize the fetus as an independent rights-bearing entity so that the concrete reality of the fetal position within, and dependence on, the body of the woman is never addressed. In this way the courts obscured the significance of birth as the moment when the fetus emerges from the woman's body, establishes an independent existence, and becomes capable of developing relationships with people other than the pregnant woman.⁹⁰

For example, in *Grogan*, Walsh J. commented:

The destruction of life is not an acceptable method of birth control. The qualification of certain pregnancies as being "unwanted" is likewise a totally unacceptable criterion. The total abandonment of young children or old persons or of those who by reason of infirmity, mental or physical, or those who are unable to look after themselves too often occurs throughout the world. There is clear evidence that they are unwanted by those who abandon them. That would however provide no justification for their elimination.⁹¹

This equation of unwanted pregnancies with abandoned young children or old persons in terms of "those who are unable to look after themselves" fails to acknowledge how the conditions of pregnancy make the fetus distinct. The fetal location within the body of the pregnant woman means that it cannot develop social relationships with other people who could provide for its needs. Concern for the fetus is necessarily mediated through the woman within whom it is nourished. While one might have sympathy with Walsh J.'s protest at the lack of care and respect for those who are unable to look after themselves, the inclusion of the fetus within this category erases the presence of a

⁹⁰ See M.A. Warren, "The Moral Significance of Birth" in H.B. Holmes & L.M. Purdy, eds., *Feminist Perspectives in Medical Ethics* (Bloomington: University of Indiana Press, 1992) 198.

⁹¹ *Grogan*, *supra* note 11 at 767.

woman in pregnancy and mistakenly suggests that fetal interests can be considered in isolation from those of the pregnant woman.

The courts also ignored the “as far as practicable” qualification in Article 40(3)(3) when they interpreted the fetal right to life as justifying the limitation of the distribution of abortion information. They construed the fetal right to life as if it was an unrestricted right to life. In the High Court, in *Open Door*, Hamilton P. commented:

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*, and that it lies not in the power of a parent to terminate its existence and that *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 life in person.⁹²

In failing to consider how the fetal right to life might be qualified, Hamilton P. interpreted this interest as a stronger one than the ordinary right to life. Apart from finding it necessary to assert the right to life of the “unborn” *after* birth, Hamilton P. extended to the fetus rights which persons do not usually have. If a person’s right to life includes a right to be guarded against all threats to his or her existence then that imposes a duty on others to guard that person against such threats. So, on this view, X could be under an obligation to guard Y against a threat to Y’s existence posed by Z, whether or not Z acted on that threat. On this interpretation, a pharmacist could be violating A’s right to life if she gave B drugs to which A was fatally allergic whether or not B gave A those drugs.

Given the sweeping nature of this interpretation one would consider that Hamilton P. would explain why he considered that the fetal right to life should impose such an obligation. But Hamilton P. offered no explanation for why he considered it necessary to impose an obligation on the pregnancy counselling centres not to threaten the existence of the fetus by offering information which a pregnant woman might or might not act upon. Not only did Hamilton P. fail to consider how the right to life of the “unborn” might be qualified, he attributed to it more superior value than a right to life might otherwise have. Thus, the right to life of the “unborn” was attributed absolute value; it was given more weight than other constitutional rights and interpreted as imposing positive obligations without any consideration for the harmful consequences on women of such an interpretation.

In the Supreme Court Finlay C.J. said:

⁹² *Open Door*, *supra* note 11 at 617 [emphasis added].

The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40, s. 3, sub-s. 3 it is a direct destruction of the constitutionally guaranteed right to life of that unborn child.

It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, *if availed of*, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn.⁹³

Again, Finlay C.J. asserts that “it must follow from” the right to life of the “unborn” that there could not be an implied right to abortion information, but does not provide any explanation as to why this must be so. His reference to “if availed of” indicates that a threatened potential, rather than a threatened actual, breach of the fetal right to life is sufficient to warrant the limitation of other constitutional interests when enforcing the fetal right to life.

In *Coogan*, Walsh J. described the student union’s publication of abortion information in their student manuals as “activities designed not merely to evade the constitutional rights but totally to destroy them.”⁹⁴ He also collapsed the distinction between the actual and the potential destruction of fetal life in his interpretation of the distribution of abortion information as an activity designed to destroy a constitutional right. In *Grogan*, Walsh J. said in the Supreme Court: “The very wording of the 8th Amendment of the Constitution forecloses any attempt to argue that life does not exist before birth.”⁹⁵ He assumed, along with the rest of the Court, that the issue in question is the existence of life before birth, rather than the nature of the legal claims which derive from the recognition of a fetal right to life. The judicial interpretation of the fetal right to life as justifying the relevant injunctions was based on the assumption that the existence of a form of human life, in which a right to life was constitutionally vested, conferred an unrestricted right to life.

The assumption that Article 40(3)(3) justifies absolute protection of fetal life fails to take into account the fact that there are circumstances in which a right to life is not construed in law as imposing a positive obligation on others to prevent a violation of that right. As Judith Jarvis Thomson has argued in her application of the “good samaritan” argument to abortion, recognizing a fetal right to life does not mean that it is never justifiable to kill the fetus. Thomson argues

⁹³ *Ibid.* at 625 [emphasis added].

⁹⁴ *Coogan*, *supra* note 11 at 743.

⁹⁵ *Grogan*, *supra* note 11 at 766.

that even if one considers that the fetus is a person, a pregnant woman is not obliged to allow it the use of her body. A pregnant woman's interest in control of her body may justify a denial of the right to life of the fetus.⁹⁶

One of the ways in which Thomson makes her point is by asking her audience to consider the case of a person who woke up one morning to find that her biological system was supporting a famous violinist who would die if "unplugged." She argues that the fact that it would be nice of that person to continue biologically supporting the violinist does not in itself impose an obligation on the person not to unplug herself. In other words, Thomson illustrates the distinction between determining that X ought to do something for Y and determining that Y has a right against X to do it. Thomson claims that "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly."⁹⁷ Her analysis points to the fact that other factors play a role both in determining when it is appropriate to move from a recognition that an interest ought to be protected to actually grounding a right. Within the liberal democratic tradition which informs our Constitution's adherence to fundamental rights, the legal recognition of a right to life is not usually considered as conferring an absolute right to life. The relevant question is not whether the right to life was violated, but whether it was unjustifiably violated.

This position is supported in law by, for example, the recognition that no one is under an obligation to donate body organs where they are needed for the survival of another person, not even a parent to a child. However, the courts interpreted the right to life of the "unborn" as imposing an obligation on any person not to endanger that life through any action. This interpretation of the fetal right to life conflicts with the more general policy in law that recognizes the harm that may be done in imposing a positive obligation to save someone's life. Hence, in *McFall v. Shimp*,⁹⁸ an American court refused to compel a man to undergo a

⁹⁶ J.J. Thomson, "A Defence of Abortion" (1971) 1 Phil. & Pub. Aff. 47.

⁹⁷ *Ibid.* at 57.

⁹⁸ 127 Pitts. Leg. J. 14 (1978) [hereinafter *Shimp*], cited in J. Gallagher, "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights?" (1987) 10 Harv. Women's L.J. 9. See S. Bordo, *Unbearable Weight: Feminism, Western Culture and the Body* (Berkeley: University of California Press, 1993) c. 3, entitled, "Are Mothers Persons? Reproductive Rights and the Politics of Subject-ivity." Bordo contrasts cases like *Shimp* in which "bodily integrity is privileged so highly that judges have consistently refused to force individuals to submit without consent to medical treatment even though the life of another hangs in the balance" with cases of court ordered obstetrical interventions in which "[t]he essence of the pregnant woman, by contrast, is her biological, purely mechanical role in preserving the life of another": at 73, 79.

bone marrow transplant regarded by doctors as his cousin's only chance to survive aplastic anemia. Judge John Flaherty said:

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue For our law to compel the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.⁹⁹

Thus, the fact that the fetus has a right to life does not in itself justify interpreting that right as imposing positive obligations on others without explanation.

As a matter of constitutional law, the courts should have interpreted the fetal right to life not as an isolated legal rule but in relation to the whole Constitution of which it is a part. Other constitutionally endorsed interests, such as women's constitutional rights, should have informed the interpretation of Article 40(3)(3). The courts normally apply the doctrine of harmonious interpretation, a kind of principle of constitutional coherence, when construing constitutional provisions. John Maurice Kelly describes this doctrine thus:

This is the principle that constitutional provisions should not be construed in isolation from all the other parts of the Constitution among which they are embedded, but should be so construed as to harmonise with the other parts. This doctrine is no more than a presumption that the people who enacted the Constitution had a single scale of values, and wished those values to permeate their charter evenly and without internal discordance.¹⁰⁰

Although the Supreme Court has held that where a harmonious interpretation is not possible it may be necessary to hierarchize constitutional rights,¹⁰¹ the first task of the Court is normally to seek a harmonious interpretation. This principle of constitutional interpretation should have guided the courts to contextualize the fetal right to life with regard to other provisions of the Constitution, and to consider what other constitutional provisions meant for its interpretation. However, the courts dismissed or ignored other constitutionally endorsed interests in their interpretation of the fetal right to life as prohibiting the assistance in the destruction of the fetus.

⁹⁹ *Shimp, supra* note 98 at 14-15.

¹⁰⁰ *The Irish Constitution*, 2d ed. (Dublin: Jurist Publishing, 1984) at 299.

¹⁰¹ See *The People (at the Suit of the Director of Public Prosecutions) v. Shaw*, [1982] I.R. 1 (S.C.), where the right to life was held to prevail over the right to liberty.

The constitutional rights of bodily integrity,¹⁰² equality,¹⁰³ privacy,¹⁰⁴ and freedom of expression¹⁰⁵ were all relevant to the issue before the courts. However, these rights were barely mentioned and, when they were, they were subordinated to the fetal right to life without any substantial consideration of why they should be so subordinated. James Friedman has argued that the courts were wrong in *Open Door* to subordinate freedom of expression, protected by Article 40(6)(1), to the right to life of the unborn. He suggests that as freedom of expression is a value fundamental to democracies, it should have been considered as qualifying the fetal right to life. Friedman argues that freedom of expression is a fundamental democratic value in facilitating challenge to the status quo and “a healthy scepticism that we have not yet created the best of all possible worlds.”¹⁰⁶

In *Open Door*, Hamilton P., without providing an explanation for his conclusion, said:

The qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental

¹⁰² In *Ryan v. The Attorney General*, [1965] I.R. 294 at 312, the Supreme Court affirmed Kenny J.'s finding in the High Court that there was a right to bodily integrity, which he held was one of a residue of personal rights contemplated by Article 40(3)(1) which provides: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

¹⁰³ While the Irish Constitution does explicitly recognize a right to equality in Article 40(1), its limitations are obvious: “All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.” Fox and Murphy comment that formulations of abortion as an equality right might not work in an Irish context given that “the equality guarantee in the constitution has suffered from under-use”: see M. Fox & T. Murphy, “Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation” (1992) 19 J. L. & Soc’y 454 at 462.

¹⁰⁴ In *McGee*, *supra* note 16, a right to marital privacy was recognized. In *Norris v. Attorney General*, [1984] I.R. 36, the Supreme Court implicitly accepted that the plaintiff had an individual right to privacy.

¹⁰⁵ Article 40(6)(1) provides: The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

(i) The rights of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

¹⁰⁶ *Supra* note 84 at 78.

right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland.¹⁰⁷

In the Supreme Court Finlay C.J. reiterated the above stating: “I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child.”¹⁰⁸ It is interesting to note that, in a different context, Hamilton P. was much less inclined to play down the significance of the right to privacy. In *Kennedy and Arnold v. Ireland and the Attorney General*, he said:

The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.¹⁰⁹

Feminists are entitled to ask why women’s “dignity and freedom” as individuals in a democratic society did not stop the court from intruding on and interfering with their “communications of a private nature” in the context of abortion information. The explanation is that the courts’ fundamentalist approach meant that they compromised other constitutional interests in order to absolutely protect the fetal right to life. The courts never even got to the point of weighing constitutional concerns against each other. Rather, they dismissed the relevance of any concern other than the right to life of the “unborn.” The extremity of their approach indicates how the processes of judicial interpretation were informed by the fundamentalist abortion narrative at work in Irish society.

The Courts supported their defence of the right to life of the “unborn” despite the absence of a particular fetus in the courtroom by reference to the public interest in the protection of fetal life. They relied on this public interest to justify the order for injunctions prohibiting the distribution of abortion information. For example, in *Coogan*, Walsh J. said, “What is in issue in this case is the defence of the public interest in the preservation of that private right which has been guaranteed by the

¹⁰⁷ *Open Door*, *supra* note 11 at 617.

¹⁰⁸ *Ibid.* at 625.

¹⁰⁹ [1987] I.R. 587 at 593 (S.C.). This case concerned the plaintiffs’ successful claim for damages on the grounds that their constitutional rights had been violated by the unjustified tapping of their telephone conversations pursuant to a warrant issued by the minister of justice.

Constitution.”¹¹⁰ The inability of the fetus to assert independently its private rights contributed to the courts’ recognition of a public interest in protecting the fetal right. But if there is a public interest in fetal life there is also a public interest in women’s life, an interest which also entails protecting women’s health and welfare. As Walsh J. also said in *G. v. An Bord Uchtala and Others*,¹¹¹ the right to life is composed of quality of life interests as well as those of biological existence: “The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation.” However, the courts ignored the possibility that a public interest in women’s lives, health, and welfare might justify the provision of abortion information. When women’s health was raised as a possible justification for not restraining pregnancy counselling services in *Open Door*, Finlay C.J. dismissed it out of hand:

It was strenuously submitted on behalf of the defendants that if they did not provide this counselling service and, in particular, did not provide the identification, name and address of and method of communication with a properly run clinic the probability was that in many or all cases the pregnant woman concerned, who had decided upon the option of abortion, would succeed in obtaining an abortion in England, and *probably in circumstances less advantageous to her health*. No evidence was adduced to support this contention. There are no grounds for inferring it from any of the facts which are agreed as the basis for the trial of the action.

Even if it could be established, however, *it would not be a valid reason* why the Courts should not restrain the activities in which the defendants were engaged ...

I am satisfied, therefore, that it is no answer to the making of an order restraining these defendants’ activities that there may be other persons or the activities of other groups or bodies which will provide the same result as that assisted by these defendants’ activities.¹¹²

At one level, the failure to accommodate women’s health as a relevant interest is further evidence of the claim that women’s rights were absolutely subordinated to the fetal right to life. Even if the evidence before the court did not support an empirical argument that women’s health justified refusing to restrain the defendants’ activities, a normative health-based argument could have. Women’s health is a value to which the Court should properly have had regard, perhaps through reference to the right to bodily integrity, in determining the degree of protection that the fetal right to life merited. But the chief

¹¹⁰ *Coogan*, *supra* note 11 at 743.

¹¹¹ [1980] I.R. 52 (S.C.) at 69. “An Bord Uchtala” means the Adoption Board.

¹¹² *Open Door*, *supra* note 11 at 624 [emphasis added].

justice was of the view that even if harm to women's health as a result of the injunctions could be established it was not a "valid reason" to refuse to restrain the defendants' activities.

At another level, the Supreme Court demonstrated here a lack of concern for the probable effects that their interpretation would have on both the rate of abortion and women's health. Given that women were travelling in the thousands to avail of abortion services abroad, the Court was aware that the injunction was unlikely to do much in stemming the "destruction" of fetal life. The judges also should have been aware that by making it more difficult for women to find out about safe and legal abortion services abroad they were increasing the risk to women's health, since women would be more likely to present for abortion later in their pregnancies,¹¹³ and possibly to less reputable services. In denying that the possible ineffectiveness of the order should constrain their decision, the Court favoured a policy of adhering to a literal interpretation of the fetal right in question over a more purposive approach that would take into account the effects of the order on the legal interests in question. While granting the order allowed the Court to be seen to be protecting fetal life, it actually would have little effect in protecting that life, and would make matters worse by making abortions at a later stage in pregnancy more likely. Their adherence to a literal approach and their desire to be seen to be taking a stand against the distribution of abortion information allowed the Court to erase women's health as a valid concern. In answering, or avoiding, the defendants' argument about women's health with the claim that ineffectiveness of the order was not a justification for refusing it, the Court left women's health out of the constitutional picture.

In *Coogan*, Walsh J. commented:

One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the courts. The life most directly affected in these cases is the unborn life and that is the very one which cannot directly assert this right in court.¹¹⁴

Apart from implying that we should consider the "unborn" as a citizen, Walsh J. was clearly of the view that the pregnant woman is less affected by the provision of abortion information than the fetus. While the implications of a woman's constitutionally endorsed rights of privacy, equality, free expression, and bodily integrity are judicially ignored, no chance is lost to assert other legal rights on behalf of the fetus, such as

¹¹³ See Conlon, *supra* note 20.

¹¹⁴ *Coogan*, *supra* note 11 at 744.

the right of access to the courts, in order to consolidate the constitutional prioritization of fetal life. To the extent that a woman's rights are considered in this jurisprudence, the fetus still assumes centre stage, as this *obiter dicta* of Walsh J. in *Grogan* demonstrates:

When a woman becomes pregnant she acquires rights which cannot be taken from her, namely the right to protect the life of her unborn child and the right to protect her own bodily integrity against any effort to compel her by law or by persuasion to submit herself to an abortion. Such rights also carry obligations the foremost of which is not to endanger or to submit to or bring about the destruction of that unborn life.¹¹⁵

Thus, a pregnant woman's rights and responsibilities are defined by reference to her pregnancy. A pregnant woman is no longer considered as a woman but as a pregnancy. Furthermore, Walsh J. made these comments about the obligations imposed on a woman by pregnancy even though he ostensibly refused to consider how her "equal right to life" qualifies the fetal right to life. He suggested that the pregnant woman is obliged not to endanger the fetus without appreciating that he was commenting on how conflicts of rights between woman and fetus should be resolved. If a pregnant woman cannot do anything that might harm the fetus then effectively her rights are suspended for the duration of the pregnancy. Not only did he implicitly render the woman's equal right to life devoid of substance, he further obliged her not to endanger the fetus. This could severely restrict a woman's freedom during pregnancy as behaviour as ordinary as travelling in a car, for example, could be interpreted as endangering a fetus.

In *Open Door*, Hamilton P. was of the view that the relevant statute law afforded the fetal right to life statutory protection from the date of its conception.¹¹⁶ However, he justified this assumption simply by reference to sections 58 and 59 of the *Offences Against the Person Act 1861*.¹¹⁷ He inferred that since the 1861 statute no longer referred to the woman as being "quick with child," as the 1803 statute¹¹⁸ had, this meant that the protection of the fetus in the womb dates from conception and not from quickening. He failed to take into consideration that the 1861 *Act* could be interpreted as making abortion lawful in certain circumstances, and he failed to explain why conception, as distinct from viability, or birth, should be the relevant criterion for assessing when an abortion was an unlawful abortion. The general failure of the courts to

¹¹⁵ *Grogan*, *supra* note 11 at 767.

¹¹⁶ *Open Door*, *supra* note 11 at 598.

¹¹⁷ *Supra* note 66.

¹¹⁸ (U.K.), 43 Geo. III, c. 58.

clarify their interpretation of the “unborn” when enforcing its right to life, and this particular reference to conception as the point from which protection begins is further evidence of their absolutist approach. The courts interpreted the right to life of the “unborn” as if it could limit other constitutional rights at any stage of pregnancy, a position which could also have implications for the legal use of some forms of contraception.

The judicial failure to entertain the possibility that abortion was lawful in any circumstances should have been avoided by an analysis of the relevant statute law. The relevant statutory provisions on abortion¹¹⁹ are sections 58 and 59 of the *Offences Against the Person Act 1861*, which provide:

58. 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 not be 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 like intent, shall be guilty of felony, and being convicted thereof shall be liable ... to be kept in penal servitude

59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not, with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable ... [to imprisonment for a term not exceeding five years].¹²⁰

Section 10 of the *Health (Family Planning) Act 1979*,¹²¹ provides: “Nothing in this act shall be construed as authorizing (a) the procuring of an abortion, (b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the *Offences Against the Person Act 1861*” As a matter of statutory interpretation, section 58’s prohibition of *unlawful* abortions implies that abortion may be lawful.¹²² As there is no direct Irish authority on the issue, an Irish court would consider a relevant decision of another common law jurisdiction in determining the

¹¹⁹ For a review of the historical development of the criminal prohibition of abortion, see Shelley Gavigan, “The Criminal Sanction as it Relates to Human Reproduction: The Genesis of The Statutory Prohibition of Abortion” (1984) 5 J. Legal Hist. 20. See also J. Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge: Cambridge University Press, 1988).

¹²⁰ *Supra* note 66.

¹²¹ *Supra* note 74.

¹²² See M.J. Findlay, “Criminal Liability for Complicity in Abortions Committed Outside Ireland” (1980) Irish Jurist 88 at 89; and the *Constitution Review Group*, *supra* note 5 at 276.

significance of “unlawfully.” In *Bourne*,¹²³ Macnaghten J. interpreted section 58 as making unlawful those abortions which were not done in good faith for the purpose only of preserving the life of the pregnant woman. He also determined that an abortion performed on the grounds that the pregnancy was likely to make the woman a “physical or mental wreck,” was performed for the purpose of preserving her life. This case concerned the prosecution of a doctor under the 1861 *Act* who had performed an abortion on the fourteen year old survivor of a gang rape. Macnaghten J. was of the opinion that “unlawfully” was not “a meaningless word,”¹²⁴ and thought it imported the meaning expressed in the proviso of section 1(1) of the U.K. *Infant Life (Preservation) Act 1929*,¹²⁵ which provided that “no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.”

If Macnaghten J.’s interpretation of the word unlawfully was dependent on the 1929 *Act*, then this interpretation would probably not be accepted as informing Irish law given that the 1929 *Act* does not form part of Irish law. However, it has been argued that this is not the case, and that, at a minimum, terminations of pregnancy performed in cases of cancer of the uterus and ectopic pregnancy are lawful abortions under the application of the 1861 *Act* in Ireland.¹²⁶ Macnaghten J.’s attribution of importance to the word “unlawfully” in section 58 was independent of the provisions of the 1929 *Act*, and he used the proviso of section 1 of that *Act* because he believed it expressed a meaning that was compatible with section 58, not necessarily definitive of it. Also, as Noel Whitty comments:

This inappropriate reliance on the proviso in the 1929 *Act* resulted from the belief that there was no other legal authority on the meaning of “unlawfully.” In fact, there was textbook and judicial authority available that demonstrated that therapeutic abortion to protect the woman’s life and health was both lawful and common medical practice in England well before 1938.¹²⁷

However, the possibility of abortion being lawful was simply not entertained in the first cases to be litigated on Article 40(3)(3): *Open Door*, *Grogan*, and *Coogan*.

¹²³ *Supra* note 66.

¹²⁴ *Ibid.* at 691.

¹²⁵ (U.K.), 19 & 20 Geo. 5, c. 34.

¹²⁶ See Whitty, *supra* note 4 at 862.

¹²⁷ *Ibid.* at 858.

In its construction of the constitutional right to life of the “unborn” as justifying the restriction of women’s right to access information about abortion services, the Supreme Court assumed that, rather than explained why, fetal life merits this degree of protection. There was no substantive discussion of what it means to vindicate the right to life of the “unborn,” no regard for the context of pregnancy in considering the “as far as practicable” limitation, and no consideration of women’s interests by reference to “the equal right to life of the mother.” The legal consequences of defending a fetal right to life are not as self-evident as the Court appears to have assumed. Determining how to vindicate a right to life in any particular situation requires consideration of the facts and values raised by that situation. Determining how to defend a fetal right to life requires accommodation of the fact of pregnancy and the values of women’s rights to life, equality, and freedom. There is nothing about Article 40(3)(3) which precludes such consideration as the Supreme Court assumed. The failure of the Supreme Court to engage in such consideration is therefore significant. It indicates that doctrinal interpretation cannot be the only explanation for the Court’s ascription of superior value to the fetal right to life. In interpreting Article 40(3)(3) as prohibiting “assistance” in the destruction of the fetus the Court assumed that any potential interference with the fetal right to life was never justified. This degree of prioritization of fetal life over other constitutionally endorsed values indicates a tendency towards absolutism. The fact that the judges understood the issues as requiring the prioritization of the value of fetal life to this extent, without feeling that they had to provide an explanation, suggests that the relevant issues were framed through a fundamentalist abortion narrative.

B. SPUC as the Guardian of the Public Interest in Fetal Life

When the courts permitted SPUC to act in the capacity of the attorney general’s relator, and later to bring an action to prevent the violation of fetal life in its own name, they interpreted the fetal right to life as an abstract value whose enforcement was so significant that it did not require the presence of an actual woman or fetus whose legal interests were being compromised. The appeal courts denied the significance of a concrete factual context of pregnancy for the interpretation of law in order to allow themselves to assert the fetal right to life in the broadest terms possible. Given that appellate courts do not deal with points of fact, but with points of law, they are usually required

to exhibit restraint in limiting their legal findings to the facts of the case before them. However, the Irish courts chose to interpret the fetal right to life in general terms that constrained the distribution of information about abortion services without the benefit of assessing how a particular factual context of pregnancy affects the legal interests raised. In *Open Door*, the defendant pregnancy counselling centres challenged the plaintiff attorney general's standing in the proceedings on the grounds that

the action did not concern any specific pregnant woman and her unborn child and by reason of that fact it was alleged that the Court should in its discretion refuse to grant any relief to the Attorney General because by doing so it might affect the position of the mother of an unborn child who had not been heard.¹²⁸

Generally, as a matter of law, applicants for a particular legal remedy must establish to the satisfaction of the court that they have standing in the matter by reason of their interest in the proceedings.¹²⁹ However, both the High Court and the Supreme Court dismissed this objection, contending that the attorney general was a particularly appropriate person to invoke the court's jurisdiction in this matter.

Furthermore, the courts held that when the attorney general sues with a relator,¹³⁰ in this case SPUC, the relator need have no personal interest in the subject except his or her interest as a member of the public. In the High Court, Hamilton P. commented that if the defendants were acting unlawfully it was

in the public interest and the interest of the common good that they be restrained from so doing ... [and that] the public interests are committed to the care of the Attorney General. He is entitled to sue to restrain the commission of an unlawful act, to protect and vindicate a right acknowledged by the Constitution and to prevent the corruption of public morals.¹³¹

On appeal, Finlay C.J. said:

¹²⁸ *Open Door*, *supra* note 11 at 621-22. Although SPUC had initially issued proceedings against the defendants, they subsequently obtained leave to amend the proceedings which were converted into proceedings in the name of the attorney general at the relation of the Society.

¹²⁹ Under Irish law, the requirement of standing for litigants in cases involving challenges to the validity of statutes on constitutional grounds is more demanding than in cases where a constitutional guarantee is invoked independent of any statutory provision: see *Cahill v. Sutton*, [1980] I.R. 275 (S.C.).

¹³⁰ On the relator procedure see M. Forde, *Constitutional Law of Ireland* (Cork: Mercier Press, 1987) at 65-66.

¹³¹ *Open Door*, *supra* note 11 at 603-04.

If, therefore, the jurisdiction of the courts is invoked by a party who has a *bona fide* concern and interest for the protection of the constitutionally guaranteed right to life of the unborn, the courts, as the judicial organ of government of the State, would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds that no particular pregnant woman who might be affected by the making of an order was represented before the courts.

I am satisfied that the Attorney General, who is the holder of a high constitutional office, is an especially appropriate person to invoke the jurisdiction of the Court in order to vindicate and defend the right to which I have referred.¹³²

These comments are informed by the assumption that all pregnancies are the same, so that the legal interests which they raise will also be the same. By invoking a generalized right to life of the “unborn,” the courts denied the significance of the personal and social particulars of pregnancy. This generalized fetal right to life then allowed the judiciary to interpret almost anyone as an appropriate party to invoke it. The general application of this right meant that the relevant party was not required to have any particular characteristics in order to be able to assert the right before the court. The courts’ need to generalize the fetal right to life in order to find that the attorney general, or SPUC as relator, were appropriate parties to seek its protection, meant that the courts broadened the interpretation of standing requirements,¹³³ and that they downplayed the crucial role of facts in the interpretation of law.

In the second case to arise under Article 40(3)(3), *Coogan*, SPUC took the role of defending the fetal right to life on itself. At this point SPUC, a fundamentalist “pro-life” group, became legally construed as the defender of the generalized fetal right to life. In the High Court, Carroll J. declined to grant the injunction requested on the grounds that the plaintiff lacked the standing reserved to the attorney general to seek undertakings and injunctions to restrain threatened breaches of the Constitution. She said, “[t]he plaintiff has assumed the self-appointed role of policing the Supreme Court judgment [in *Open Door*]. In my opinion, it has no right to seek undertakings from citizens and it is the Attorney General who is the proper party to move in such a case.”¹³⁴ However, the Supreme Court overruled her decision on the grounds that any party who had a *bona fide* concern and interest in the protection of the constitutionally guaranteed right to life of the “unborn” had

¹³² *Ibid.* at 623.

¹³³ See also R. Humphreys & T. O’Dowd, “Locus Standi to Enforce the Constitution: SPUC v. Coogan” (1990) 8 Irish Law Times 14; and H. Delany, “Recent Developments in Locus Standi in Irish Constitutional Law” (1990) 8 Irish Law Times 147.

¹³⁴ *Coogan*, *supra* note 11 at 737.

sufficient standing to invoke the jurisdiction of the courts to take such measures as would defend and vindicate that right. Finlay C.J. gave the judgment with which a majority of the court agreed (Griffin, Walsh and Hederman JJ.; McCarthy J. dissenting). He was of the view that to accept that “only the Attorney General could sue to protect such a constitutional right as that involved in this case ... would, I am satisfied, be a major curtailment of the duty and the power of the courts to defend and uphold the Constitution.”¹³⁵

Finlay C.J. justified this view on the grounds that that there could never be a victim or potential victim who can sue in respect of a violation of the constitutional right to life of the “unborn.” The fact that a fetus whose right to life had been violated could not take an action does not in itself justify allowing SPUC to act to prevent the violation of fetal rights. While the terms of the plaintiff’s articles and memorandum of association were not sufficient in themselves to give standing, Finlay C.J. thought it significant that “there can be no question of the plaintiff being an officious meddlesome intervenient in this matter.”¹³⁶ Clearly, the chief justice’s desire to grant SPUC standing prevented him from identifying the plaintiffs’ efforts at preventing the distribution of abortion information to pregnant women as “meddling” in the affairs of those women. It is doubtful that the women whose search for information about safe and legal abortion services abroad has been made more difficult by the likes of SPUC, or the pregnancy counselling centres or student unions who sought to aid them, would agree with the chief justice. Furthermore, he considered:

The part, however, that the plaintiff has taken in the proceedings to which I have referred [*Open Door*], which were successfully brought to conclusion by the Attorney General at its relation, and the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a *bona fide* concern and interest and accordingly has the necessary legal standing to bring the action.¹³⁷

In his concurring opinion Walsh J. said:

The question in issue in the present case is not one of a public right in the classical sense ... but is a very unique private right and a human right which there is a public interest in preserving *What is in issue in this case is the defence of the public interest in the preservation of that private right* which has been guaranteed by the Constitution.¹³⁸

¹³⁵ *Ibid.* at 742.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* [emphasis added].

¹³⁸ *Ibid.* at 743 [emphasis added].

The general importance of the fetal right to life to the nature of Irish society and the role that SPUC had played in one case in defending that right were sufficient in the eyes of the chief justice and a majority of the Court to grant SPUC standing to enforce the Constitution. By constructing SPUC as guardians of the public interest in fetal life, these judges conflated that public interest with the private interest of a fundamentalist group. Walsh J. commented:

The attitude of the defendants to this case has not been unconcealed. They boldly assert that no one but the Attorney General could seek to prevent them from engaging in the impugned activities and, in the absence of such intervention, *the courts and the citizens* in general must remain powerless to prevent activities designed not merely to evade the constitutional rights but totally to destroy them. Their expressions of indignation at being asked by the plaintiff before being sued to give an undertaking to cease the activities complained of *cannot be seriously accepted*.¹³⁹

Here we can see how Walsh J. interpreted SPUC's intervention in seeking the enforcement of the fetal right to life as an action taken on behalf of the "courts and the citizens." He implied that if SPUC had not initiated this case the public interest would have gone undefended, a situation that he found to be intolerable. SPUC's intentions were presumed to be innocent while the student unions were criticized for daring to assume that SPUC had no right in law to ask them to desist from behaviour which SPUC found offensive. Walsh J. commented further:

In the present case the plaintiff has, in my opinion, shown a genuine interest in the protection of unborn life and it was reasonable on its part to raise the issue as representing the interest of unborn lives. To seek the vindication of the right to life of the unborn is a right which does not rest exclusively with any public authority or office of state and may on occasion even depend solely upon the vigilance of the citizen.¹⁴⁰

While SPUC's role in the proceedings was justified in terms of its "genuine interest" in the protection of "unborn" life, the student unions' genuine interest in serving the needs of pregnant women merited no consideration. The construction of the vindication of the fetal right to life as occasionally depending on the "vigilance of the citizen" suggested that it is justifiable to subject pregnant women to surveillance in the interests of preventing the possible violation of fetal life. In his dissent from the majority of the court McCarthy J. commented:

If, as submitted on behalf of the Society, the whole nature and quality of Irish society is affected by the right, it would appear to be a public right, ordinarily in the province of the Attorney General ...

¹³⁹ *Coogan, supra* 11 at 743 [emphasis added].

¹⁴⁰ *Ibid.* at 747.

In my view, it is the Attorney General, and he alone, who can in such a case validly pursue that claim to protect the right of the unborn to judgment ... In my view, the Society is in no better or worse a position than any other prospective litigant. I confess to a feeling of great unease at the prospect of any person or group of persons, however well intentioned, being held at law competent to maintain an action of this kind without the intervention of the Attorney General, despite his offer of assistance. Of far greater import is the claim by the Society, as a preliminary to such action, to demand and receive an undertaking from a citizen or a group of citizens as to their future conduct. The implications to a free society of such a claim are alarming.¹⁴¹

By constructing the fetal right to life as a general public interest and SPUC as an appropriate defender of that interest, a majority of the Supreme Court judges were content to allow Irish law to be used towards fundamentalist ends.

C. *European Community Law*

The defendants in *Open Door* and in *Grogan* argued that women's access to abortion information was protected by EC law if not by domestic law. The defendants sought to resist the fundamentalist construction of the fetal right to life in the national courts by appealing to the legal protection of women's interests afforded by a supranational legal order. However, with the exception of Carroll J. in the High Court in *Grogan*, the Irish courts denied the relevance of Community law by interpreting the issue before them as a domestic, Irish matter concerning practices within the Irish state. In so doing, they strayed from their more usual policy of following the rule that where EC law applies it takes precedence. Usually the fact that the cases before the courts involved transborder issues would mean that the courts would consider the application of Community law. On the issue of abortion, however, the courts constructed the issues before them in such a way as to isolate Irish domestic law from the effects of EC law's application to Ireland.

In *Open Door*, Hamilton P. was of the view that he did not have to consider the application of the provisions of EC law because the activities of the defendants occurred within the state. He refused to refer a question to the European Court of Justice (ECJ) under Article 177¹⁴² for a preliminary ruling as to whether the defendants had the

¹⁴¹ *Ibid.* at 751.

¹⁴² Article 177 of the *EEC Treaty*, *supra* note 82 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaty; (b) the validity and interpretation of acts of the institutions of the Community; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

right to provide information about services provided in another member state. The defendant pregnancy counselling services argued that such a right derived from the protection of freedom to provide services under Articles 59 and 60 of the European Economic Community (EEC) Treaty.¹⁴³ On appeal the Supreme Court also refused to make a reference for a preliminary ruling. The Court did so on the grounds that what was being restrained was *assistance* to pregnant women to travel abroad. Therefore, the Court was of the view that no question of interpretation of Community law fell to be decided for the purpose of determining the issue between the parties.

In *Grogan*, the Supreme Court overturned Carroll J.'s decision not to grant SPUC an injunction stopping the officers of the student unions from distributing abortion information. Finlay C.J. (with whom Griffin J., Hederman J. and Walsh J. agreed, the latter giving a separate opinion) was of the view that, given that the right sought to be protected was the right to life, there was no question of a possible right that might exist in EC law as a corollary to a right to travel so as to avail of services counterbalancing the necessity for an interlocutory injunction. The judiciary, in its eagerness to promote protection of the right to life of the "unborn," was zealous in asserting the primacy of national law in this context, without acknowledging that the general rule is that where Community law applies, it takes precedence. The chief justice asserted that there is "no question" of a possible right to abortion information under EC law that might limit the application of the fetal right to life, without providing any reasonable explanation as to why this should be so. The assumption is that the right to life of the "unborn" is such an important national concern that any possible right to abortion information under EC law could not limit it. Not only did the Court refuse to weigh this right under EC law against the fetal right to life, it

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

¹⁴³ The founding treaties of what was the EC (and is now the EU) are: the *Treaty Establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140; the *EEC Treaty*, *supra* note 82; and the *Treaty Establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 167. These Treaties have been amended by the *Single European Act*, 1986, 29 June 1997, O.J. L169, and the *Maastricht Treaty*, *supra* note 14.

denied the very existence of such a right.¹⁴⁴ The Court poured scorn on the very idea that rights under EC law could be a relevant concern for the interpretation of Article 40(3)(3) in order to justify its refusal to seek a ruling from the ECJ, the ultimate authority on EC jurisprudence, on the matter. Walsh J. commented:

The decision of this Court in the action brought by the present plaintiff in [*Open Door*] has given an interpretation to the 8th Amendment which is not open to question in any court in this State or in any other state or in any international court. The interpretation of the Constitution of Ireland is within the exclusive competence of the courts of Ireland.¹⁴⁵

Walsh J. neglected to recognize that the very Constitution of which he speaks acknowledges that its provisions should not prevent the application of EC law in the Irish state. In order to allow the State to become a member of the EC and to recognize the force of EC law in Ireland, Article 29(4)(3) was inserted into the Irish Constitution in 1972. It provides:

The State may become a member of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

Given the direct applicability of Community legislation and the authority of the ECJ in interpreting matters of Community law, this Amendment was necessary to avoid contradicting constitutional recognition of the exclusive legislative power of the Oireachtas (Article(15)(2)), the exclusive role of the courts in the administration of justice (Article 34(1)) and the finality of the decisions of the Supreme Court (Article 34(4)(6)). The principle governing interpretation of matters on which Community law and national law conflict is that where Community law is relevant to the determination of proceedings it takes precedence over domestic law. The ECJ has been unequivocal in this position and the

¹⁴⁴ In *Society for the Protection of Unborn Children v. Grogan* [1991] 3 C.M.L.R. 849, the ECJ held that abortion was a service regulated under EC law but that the student unions were not protected by EC law because they were not in an economic relationship with the service providers. As a result, the High Court granted the order issuing a permanent injunction against the student unions: *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan and Others*, [1994] 1 I.R. 46. But on appeal in 1997 the Supreme Court declined to affirm the order on the grounds that the defendants' activities were not necessarily unlawful under the law as it now stood: *Grogan 1997*, *supra* note 83.

¹⁴⁵ *Grogan*, *supra* note 11 at 766.

Irish judiciary also appear to have accepted this view.¹⁴⁶ While derogation from the fundamental principles of Community law—the free movement of goods, persons and services—is permitted on grounds of public interest, such derogation is generally strictly construed and must be necessary and proportionate to an objective which is justified under Community law.

As Madeleine Reid notes, the Irish courts have generally been receptive to Community law: “It is quite clear that Irish jurisprudence at all levels accepts the effect of the amendment [Article 29(4)(3)] as giving Community law, within the sphere of effect which it itself defines, superior force to the provisions of the Constitution.”¹⁴⁷ In *Campus Oil Ltd. v. Minister for Industry and Energy*,¹⁴⁸ the Supreme Court went so far as to suggest that the *Treaty of Rome* was incorporated by reference into the constitutional order and that the *Treaty* may be invoked to qualify the language of the Constitution itself. Walsh J. said that, by virtue of Article 29(4)(3), “the right of appeal to [the Supreme] Court ... must yield to the primacy of article 177 of the *Treaty*. That article, as part of Irish law, qualifies Article 34 of the Constitution in the matter in question,”¹⁴⁹ a view which one commentator has referred to as “plus royaliste que le roi,”¹⁵⁰ given that the European Court has indicated that it regards this question as a procedural matter for the national courts to decide. The denial of the relevance of EC law with regard to the interpretation of Article 40(3)(3) was clearly inconsistent with the courts’ established pattern of welcoming the application of EC law to Irish jurisprudence.

The Supreme Court made a distinction in *Open Door* between “assistance,” as making available the identity and location of, and method of communication with, a specified abortion clinic; and “information,” as knowing about the existence of abortion outside the jurisdiction. Even if the provision of specific information may be

¹⁴⁶ See M. Reid, *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law, 1990) at 9-16.

¹⁴⁷ *Ibid.* at 7.

¹⁴⁸ [1983] I.R. 82 [hereinafter *Campus Oil*]. This case was concerned with the question of whether an appeal lay to the Supreme Court against a decision of the High Court to refer a question of Community law for a preliminary ruling to the European Court of Justice. The Supreme Court ruled that no such appeal did lie as this would run counter to the spirit and purpose of Article 177 of the *Treaty of Rome*.

¹⁴⁹ *Ibid.* at 87.

¹⁵⁰ D. O’Keefe, “Appeals Against an Order to Refer Under Article 177 of the EEC Treaty” (1984) 9 *Eur. L. Rev.* 87 at 97.

construed as assistance in procuring an abortion, the mere fact that it is “assistance” does not stop it from also being “information.” The categorization of the provision of abortion information as assistance should not relieve the courts of the responsibility of also addressing its legal status as information about services legally provided in other states. Legal categories do not have to be interpreted as exclusive. However, the Court’s categorization of the provision of the names, addresses, and phone numbers of abortion clinics, as assistance functioned in order to allow the Court to exclude the question of information from its consideration. The Court made this questionable distinction in order to argue that Community law was not relevant to the issue of assistance within the jurisdiction which, it determined, was before the Court. The judicial eagerness to defend the public interest in fetal life as a national and cultural issue informed their interpretation of the issues so as to exclude EC law from the picture. In so defending, the Irish courts adopted an isolationist-fundamentalist approach to abortion law.

V. CLOSING THE FUNDAMENTALIST NARRATIVE: THE X CASE

In the process of vindicating the constitutional right to life of the “unborn,” the Irish Supreme Court had, by 1992, issued injunctions against pregnancy counselling centres and student unions to stop them from providing pregnant women with abortion information in *Open Door* and *Grogan*. The Court had also declared that a fundamentalist anti-abortion group, SPUC, had standing to seek the prevention of an alleged breach of the fetal right to life in *Coogan*. In making these decisions, the Supreme Court denied the relevance of qualifications on the fetal right to life, women’s constitutional rights, and EC law. Through constitutionalization, the right to life of the “unborn” had been legally recognized as an important interest of Irish society. Now, through the judicial interpretation of Article 40(3)(3), that right had acquired a status that rendered it more important to Irish society than other constitutionally endorsed interests. The fundamentalist representation of the fetal right to life as an absolute interest had been translated into law, given its higher constitutional status, its application to all Irish people without differentiation, and its demand that positive action be taken to enforce the legal protection of fetal life.

In February 1992, state endorsement of the fundamentalist prioritization of fetal life reached a dramatic climax in the *X* case. On the understanding that Irish law required the state to prevent the

destruction of fetal life, the attorney general sought, and the High Court granted, an injunction stopping a young pregnant rape victim from travelling to England to terminate her pregnancy. The *X* case provoked an unprecedented public outcry as thousands took to the streets to protest this victimization of a suicidal fourteen-year-old girl.¹⁵¹ The violation of women's rights through the prioritization of fetal life became tangible for the Irish public as it took shape in Irish law's victimization of a particular young woman. On appeal, the Supreme Court overturned the High Court ruling, holding that Article 40(3)(3)'s recognition of the mother's equal right to life envisaged a right to abortion where the mother's life was at risk. A case that had begun as a challenge to a young woman's right to travel to England for an abortion ended up validating her right to abortion in Ireland.

The *X* case unfolded after *X* and her parents had decided to travel to England in order that *X* terminate her pregnancy. *X*'s parents were anxious that the prosecution of the man responsible for the rape proceed and that, if possible, *X* be spared the trauma of giving evidence. They contacted the Gardaí (police) to ask whether scientific DNA tests performed on the aborted fetus in order to establish biological paternity would be admissible in court. The Gardaí sought a legal opinion in this regard from the director of public prosecutions, and in the process the attorney general was informed of the case. The attorney general then sought and obtained an interim injunction in the High Court restraining the young woman and her parents from interfering with the right to life of the "unborn," restraining them from leaving the jurisdiction for nine months and restraining them from procuring or arranging an abortion within or outside the jurisdiction. On hearing of the injunction, *X* and her parents returned home from England in order to contest the motion for an interlocutory injunction. They did so on the grounds that they had a right to travel from the jurisdiction to do what was lawful elsewhere, that the mother's right to life was itself in peril, and that such injunctions were unprecedented and ought not to have been granted. By consent the motion was treated as the full trial.

¹⁵¹ See *The Irish Times* (22 February 1992), available on the Internet at <http://www.irish-times.com>. During the two weeks between the issuing of the interim injunction by the High Court and the lifting of the interlocutory injunction by the Supreme Court, there were large protests outside Dail Eireann almost everyday. On the Saturday after the High Court issued the permanent interlocutory injunction, ten thousand people marched through Dublin on a pro-choice protest, which was unprecedented in Irish society. Pro-choice groups such as the Dublin Abortion Information Campaign, Repeal the Eighth Amendment Campaign, and the Women's Coalition were involved in the organizing of such events.

Costello J., in the High Court, granted the interlocutory injunction on the grounds that the court had a duty under Article 40(3)(3) to defend and vindicate the right to life of the “unborn.” He was of the view that the risk that the young woman might take her own life if the injunction was granted was of a lesser and different order of magnitude than the otherwise certain death of the “unborn” if the injunction was not granted. The news of the High Court injunction was greeted with consternation on the part of the Irish public and, as protest mounted, the Government responded to the pressure by making the unprecedented move of offering to fund X’s appeal to the Supreme Court. On appeal the Supreme Court (Finlay C.J., McCarthy J., O’Flaherty J. and Egan J.; Hederman J. dissenting) allowed the appeal and discharged the injunctions. The Court held that the true interpretation of Article 40(3)(3) of the Constitution required that termination of pregnancy was permissible only when it was established as a matter of probability that there was a real and substantial risk to the life of the mother if such termination were not effected. To prevent termination except in circumstances where there was a risk of immediate or inevitable death of the mother did not sufficiently vindicate the right to life of the mother. The risks to the life of the mother that should have been considered by the Court included a real and substantial risk of suicide.

Hederman J. dissented on the ground that the evidence in the instant case fell short of the standard required to justify a termination of pregnancy. He felt that it was not established on the basis of medical evidence that there was no other conclusion but that the consequences of the continuance of the pregnancy would to an extremely high degree of probability cost the mother her life. A majority of the Court (Finlay C.J., Hederman J. and Egan J.) also gave the opinion, in *obiter dicta*, that Article 40(3)(3) required the courts, in proper cases and upon the exercise of their discretion, to restrain by injunction the removal of the “unborn” from the jurisdiction. Such restraint was required so that the right to life of the “unborn” might be defended and vindicated, given that the right to travel simpliciter did not take precedence over the right to life.¹⁵² Although I cannot go into a more detailed analysis of the *X*

¹⁵² Following the November 1992 referendum, in the aftermath of the *X* case, these subsections were added to Article 40(3)(3):

This section shall not limit freedom to travel between the State and another state.

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.

case judgment here, I will comment briefly on its significance as the last chapter of the fundamentalist narrative of Irish abortion law.

In the *X* case, we see the courts confronted with a problem of their own making. When faced with the consequences of their interpretation of Article 40(3)(3) on the life of a vulnerable, innocent girl, a majority of the Supreme Court moved, finally, to contain the “right to life of the unborn” by reference to the equal right to life of the mother. Thus the fundamentalist narrative of Irish abortion law came to a close as it revealed itself by producing the *X* case. This last chapter made the narrative comprehensible and thereby invited criticism of “pro-life” fundamentalism as the narrative of Irish abortion law. The reasoning of the High Court judge exposed the implications of the fundamentalist narrative for women, and in so doing created the conditions for the rejection of “pro-life” fundamentalism as the principle around which Irish abortion law should organize. The overruled judgment of Costello J. in the High Court, and the dissenting judgment of Hederman J. in the Supreme Court, merit examination for their illumination of the consequences for pregnant women of the absolutist path established by the courts in *Open Door*, *Coogan*, and *Grogan*.

In granting the injunction which produced the *X* case crisis, Costello J. said in the High Court: “[T]he risk that the defendant may take her own life if an order is made is much less and is of a different order and magnitude than the certainty that the life of the unborn will be terminated if the order is not made.”¹⁵³ In the Supreme Court, Hederman J. referred to the fetus as “an autonomous human being” and to the “mother’s duty to carry out the pregnancy.”¹⁵⁴ He also expressed the view that:

Suicide threats can be contained. The duration of the pregnancy is a matter of months and it should not be impossible to guard the girl against self-destruction and preserve the life of the unborn child at the same time. The choice is between the certain death of the unborn life and a feared substantial danger of death but no degree of certainty of the mother by way of self-destruction.¹⁵⁵

The lengths to which Hederman J. and Costello J. were prepared to go in the name of protecting fetal life is shocking. They were casually indifferent to women’s lives as they claimed that nothing less than the prospect of a pregnant woman’s certain death could justify qualification of the right to life of the “unborn.” The health and welfare of women

See B. Girvin, “Moral Politics and the Irish Abortion Referendum, 1992” (1994) 47 *Parl. Aff.* 203.

¹⁵³ *X*, *supra* note 2 at 12.

¹⁵⁴ *Ibid.* at 72.

¹⁵⁵ *Ibid.* at 76.

were rendered insignificant concerns in the face of the imperative to protect fetal life. For these judges, the physical, emotional, and mental effects of this pregnancy on this woman were of little consequence, since twenty-four-hour supervision would probably stop her from actually killing herself. The idea that women's right to life might actually entitle them to something other than enforced biological existence escaped them. The fact that the woman's twenty-four-hour supervision over a period of months amounts to her involuntary incarceration was also deemed irrelevant. As Attracta Ingram has commented, on this interpretation, Article 40(3)(3)'s assertion of equal rights for both pregnant woman and fetus is a sham since "the right to life of the mother is to physical survival while the right of the foetus is to all the nurture it needs to develop into a fully participating member of the community."¹⁵⁶ When one considers what might have happened had Hederman J.'s opinion found more support in the Supreme Court, the actual decision in the *X* case—that there is a right to abortion where the pregnancy poses a real and substantial risk to the life of the woman—comes as a welcome relief. In rejecting the fundamentalist representation of the value of fetal life, the Supreme Court and the Irish public have opened up the terrain of Irish abortion law to the possibility that other representations of the woman/fetus relationship might claim legal authority.

Thus, the closure of the fundamentalist narrative of Irish abortion law has created the opportunity for Irish feminism to move beyond the negation of fundamentalism to the positive assertion of women's reproductive freedom. The outrage that mobilized change in the *X* case must extend beyond identifying with women whose victimization is extreme, to identifying the wrong that is done to women in denying them reproductive autonomy. The rejection of fundamentalist absolutes is only one step, albeit an important one, in the feminist struggle for the recognition of Irish women's right to reproductive control. Other representations of the woman/fetus relationship that construct women's interest in reproductive self-determination as compromised by a public interest in fetal life must also be refuted. "Pro-life" ideology will never be adequately refuted while women have to endure pain and suffering in order that their entitlement to reproductive autonomy be recognized. The notion that valuing fetal life means subordinating women to pregnancy will continue to justify the denial of access to abortion until women are acknowledged as the

¹⁵⁶ "Home and Away: The Unequal Vista for Irish Women" in Smyth, ed., *supra* note 17, 149 at 154.

mediators of the value ascribed to fetal life. The idea that fetal life must be preserved will continue to function to deny women's equality until women are recognized as having, in their own right, an entitlement to control their reproductive capacities and their bodies. One of the tasks that Irish feminism must take up in the struggle towards these goals is the critique of the socio-legal relations with which it seeks to engage. My effort to critique the process that led to the *X* case, by showing how it might best be understood as part of a fundamentalist narrative, is a contribution towards this struggle.