IMPOSSIBLE FLOODGATES AND UNWORKABLE ANALOGIES IN THE IRISH ABORTION DEBATE

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Abstract

The debate about the introduction and form of abortion legislation in Ireland is rife with floodgate arguments, suggesting (either implicitly or expressly) that the introduction of abortion legislation within current constitutional boundaries would only be a starting point, following which so-called 'abortion on demand' would flow. The recent discussions at the Oireachtas Committee on Health and Children showed little prospect of a break from this pattern. At those hearings, a number of parliamentarians asked repeatedly whether the introduction of limited abortion pursuant to the current constitutional position would result in widely available abortion. Then—as in quite common in Irish abortion discourse—the abortion regime operating under the British Abortion Act 1967 was expressly referred to as an example of a possible 'end point' for Irish abortion law.

In this article we address three of the core legally-grounded 'floodgate' arguments that are made, outlining how these fears are unfounded, disingenuous, and, more particularly, how comparisons to the British abortion regime are unhelpful, by reference to the constitutional position in Ireland. These arguments relate to: the lack of a time limit on the availability of abortion; suicidal ideation; and the possibility of patient-doctor collusion. This paper aims to show that these arguments have no current legal purchase within the Irish context and ought not to be given undue weight in the debates. Rather, the fears and concerns represented by these floodgate arguments are already managed by the very limited constitutional availability of abortion. They ought not, as a result, to bear in any meaningful way on the current process of legislative design which should instead be committed to introducing a clear, workable and effective legislative framework for women in Ireland to exercise their right to access an abortion where they wish to do so in a manner that reflects the constitutional position.

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In this article we address three of the core legally-grounded 'floodgate' arguments that are made, outlining how these fears are unfounded, disingenuous, and, more particularly, how comparisons to the British abortion regime are unhelpful, by reference to the constitutional position in Ireland. These arguments relate to: the lack of a time limit on the availability of abortion; suicidal ideation; and the possibility of patient-doctor collusion. This paper aims to show that these arguments have no current legal purchase within the Irish context and ought not to be given undue weight in the debates. Rather, the fears and concerns represented by these floodgate arguments are already managed by the very limited constitutional availability of abortion. They ought not, as a result, to bear in any meaningful way on the current process of legislative design which should instead be committed to introducing a clear, workable and effective legislative framework for women in Ireland to exercise their right to access an abortion where they wish to do so in a manner that reflects the constitutional position.[3]

Lawyers are no strangers to floodgate arguments, also sometimes known as slippery slope arguments. As a rhetorical tool, floodgate arguments are usually deployed to put in the mind of the decision-maker the potential long-term implications of a decision in place of the merits of the decision based on the case and evidence before her. As Schauer has written, where such arguments are deployed, "the single argumentative claim supported by each of these metaphors, as well as by many others, is that a particular act, seemingly innocuous when taken in isolation, may yet lead to a future

[1] The transcript of the three-day Committee hearing is available at: http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeedatelist?readform&year=2013&code=HE (last accessed 12 April 2013).
[2] The authors note that rather than being a UK-wide statute, this Act is only in force in England, Scotland, and Wales. The provisions of the Act were never extended to Northern Ireland (as stated in s7(3)) and as such we will refer to this Act as the British law on abortion.
[3] Although both authors would support a constitutional change to permit the broader availability of abortion, no such argument is made here; rather this paper concentrates on the process of giving effect to the current constitutional provisions.

host of similar but increasingly pernicious events".[4] Although floodgate arguments do not tend to meet with much success in litigation as a general matter, they may have more purchase in a political context and particularly where the matter at hand is a deeply politicized and difficult one, as abortion is in the Irish context. Here, the decision-makers are politicians, torn—as politicians almost inevitably are—between personal conviction, party discipline and voter sentiment. In such a febrile environment, floodgate arguments may have more prospect of success and they have been much in evidence in the debate on abortion legislation in Ireland so far. By means of example, we can refer to the oral submissions to the Joint Committee on Health and Children in January of this year, where a number of floodgate claims were made.

In her evidence, Professor Patricia Casey stated that legislation "may not open the flood-gates immediately but there will certainly be widespread abortion within a short period of time" and that "there will be a gradual attempt to extend the law".[5] In his evidence Professor William Binchy stated:

> if we change the practice in Irish hospitals so that obstetricians are carrying out abortions on women who have no physical illness whatsoever and on unborn children who have no physical difficulty whatsoever on the basis of suicidal ideation, we very definitely will have changed the principles on which medical practice operates in this country… Any person of a humane disposition feels tremendously for the circumstances of the pregnant woman, and if one feels tremendously for a particular pregnant woman and agrees that one can take an innocent life in circumstances in which there is no medical condition, then I would respectfully say the principles have been changed and the culture will have been changed for the future…. Not tomorrow or the next day but over a period of time that would have an effect on medical practice in this area such that the attitude towards abortion would be transformed. It is reasonable to project that the net effect would be that the actual interpretations of the grounds would change over time.[6]

In similar fashion, in her opening oral statement Caroline Simons from the Pro Life Campaign claimed that if abortion legislation were introduced

> Society would perceive that the right to life of the unborn is not that important and we are not really serious about protecting it…After a time, this would become received wisdom and that would be the end of the culture of life and the beginning of the culture of abortion. If one surrenders the principle of the right to life of the unborn, that sends a message to society which, in turn, produces a cultural change. Then other cultural questions emerge. What other rights will one overwhelm when their subjects are not very important? Some people refer to this as the slippery slope argument. Whatever one calls it, it is certain that ideas such as these have real consequences.[7]

These claims are classical—and in some cases, essentially, express—floodgate

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[4] F. Schauer, "Slippery Slopes" (1985) 99 *Harvard Law Review* 361.
[5] Prof. Patricia Casey, Oral Evidence to Joint Committee on Health and Children, 8 January 2013.
[6] Prof. William Binchy, Oral Evidence to Joint Committee on Health and Children, 9 January 2013.
[7] Caroline Simons, Oral Evidence to Joint Committee on Health and Children, 10 January 2013.

arguments: they are intended to provoke decision-makers (in this case, legislators) into considering possibilities that are either remote or constitutionally impossible in an attempt to influence the outcome of the process. They are also generalised - intended to make legislators think about 'general' implications of introducing any abortion legislation at all. In addition to these more general arguments, anti-abortion advocates also make floodgate arguments that are directed attempts to influence the content of legislation, particularly in relation to time limits, suicidal ideation, and the processes for accessing abortion more generally. In each case, we argue, both the constitutional *status quo* and the comparative experience from other jurisdictions (and especially from Britain) signal the disingenuity of floodgate arguments in the Irish abortion debate. This is particularly so, we argue, where the British experience under the Abortion Act 1967 is represented as both deeply problematic *and* as indicative of the likely outcome from abortion legislation in Ireland.

The Constitutional Position

The 8th Amendment to the Constitution, introduced in the early 1980s, amended Article 40.3.3 of *Bunreacht na hÉireann* in order for it to provide:

> 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.

Although this provision was intended to foreclose any possibility of a right to access an abortion being read into the Constitution in a manner analogous to that done in the United States decision of *Roe v Wade*,[8] the wording was problematic from the start. State papers recently released reveal that a number of successive Attorneys General expressed serious concerns about the ways in which the provision might be interpreted. [9] Although proposed by anti-abortion lobby groups, the literal interpretation of the provision clearly permitted of abortion in at least some circumstances, namely where the life of the woman was at risk. This kind of abortion is consistent with most anti-abortion campaigners' conception of what kinds of interventions ought to be permitted in law, although the term abortion is not usually used to describe these procedures particularly in Catholic thought; rather, these are described as lifesaving interventions. The difference in terminology refers to perceived intention (killing a foetus (abortion) *v* saving the woman (lifesaving intervention)), however such moral distinctions were not clearly expressed in the provision itself, even if they were intended by the proposers and many of those who voted for the provision. As a result, the possibility that Article 40.3.3 might permit of abortion outside of emergency situations (which were primarily contemplated), albeit still in the limited circumstances of there being a threat to the life of the woman, remained real. It was not, however, until the landmark decision in *Attorney General v X* that the full extent of that possibility began to become clear.[10]

X concerned a fourteen year-old girl who had become pregnant as a result of rape. Before travelling to the UK to have an abortion, the girl's parents contacted the police to ask whether DNA evidence from the aborted foetus might be admissible in a trial

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[8] 410 U.S. 113 (1973),

[9] See J. Humphreys, "Abortion text seen as 'time bomb'", *Irish Times,* 28 December 2012.

[10] [1992] 1 IR 1

of her rapist. Following on from this, a sequence of events took place that led to the Attorney General seeking an injunction to prevent her from travelling in order to uphold the right to life of the unborn as expressed in the Constitution. Although the High Court did enjoin X from travelling, the Supreme Court did not; rather the Supreme Court outlined in more detail than had previously been the case the parameters of Article 40.3.3. In this respect, the Court held that as the article protects the right to life of pregnant women and foetuses *equally* there would be some cases where intervention to bring a pregnancy to an end would be constitutionally permissible. These situations were narrowly constrained indeed—as required by the wording of Article 40.3.3—and were limited to circumstances where, as Finlay CJ put it, "it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy".[11] Of particular controversy is the fact that the Court included a risk of suicide as a risk to the life of the mother that could give rise to constitutionally permissible intervention, including abortion. This *dictum* in *Attorney General v X* remains the definitive interpretation of the meaning of the relevant constitutional text; not only has it not been overturned in any subsequent case law but it has been reiteratedthe interpretation has never been overturned by the Court or by the People in a constitutional referendum. This case makes it clear that—limited as it is—there is a space within which abortion is constitutionally permissible in Ireland; it is within that modest space that current legislative activity takes place.

The purpose of this short account is not to provide a comprehensive overview of the constitutional position, which is provided at length elsewhere,[12] but rather to make it clear that all legislating now being undertaken is entirely bounded by this constitutional position. These clear constitutional boundaries ought to be considered the limits of possibility in terms of what legislation can do and, simultaneously, the limits of risk for those who are anxious about the possibility of 'abortion on demand'. Quite simply, any legislation that attempted to introduce abortion in a manner that allowed for broader grounds of abortion than 'real and substantial risk to the mother', or in a manner that does not ensure the instigation of processes intended to maintain the respect for both the pregnant woman and the foetus that Article 40.3.3 makes express, would be constitutionally impermissible and resultantly invalid. It is this that marks the floodgate arguments frequently made in this context as unfounded. A consideration of these floodgate arguments in turn reinforces this.

Time Limits

A recurrent claim made in criticism of the Supreme Court's interpretation of Article 40.3.3 is that the provision does not limit the right to access an abortion by reference to time limits. Based on the lack of an express time limit, the claim is made that the *X Case* interpretation gives Ireland unusually wide abortion availability. This is a classic floodgate argument, intended to suggest that legislating to give effect to the *X Case* would somehow involve Ireland in bringing into law an uncommonly liberal abortion regime, where late term (or 'partial birth') abortions would be constitutionally sanctioned. We dispute this claim on two levels: the first is to say that *even if* life-saving abortion were permitted into late stages of the pregnancy this would not make

[11] Ibid, 53-54.

[12] EDITORS: IF THERE IS AN APPROPRIATE CROSS REFERENCE TO MAKE TO ANOTHER PAPER IN THE SPECIAL ISSUE PLEASE MAE IT HERE; OTHERWISE WE ARE HAPPY TO INSERT A GENERIC REFERENCE TO SCHWEPPE ED, OR TO KELLY

Ireland an outlier among states that permit abortion where the life of the pregnant woman is at stake; the second is to note that the mutual respect outlined in the Constitution clearly prohibits abortion where a foetus is (or may be) viable. As such, this argument is particularly disingenuous.

First, time limits in abortion legislation are almost always applied in relation to abortions that are available relatively widely rather than abortion that is limited by extreme risks to the life of the pregnant woman. The Abortion Act 1967 in Britain, for example, only imposes a twenty four week limit upon those abortions performed under the widest provision of the Act – where 'the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of the pregnant women or any existing children of her family'.[13] The other three narrower grounds – including where there is risk to the life of the pregnant woman[14] - include no such time limit. In most states in which abortion is permitted to save the life of the mother (which is, in fact, the vast majority of the world's countries[15]), abortion is permitted quite late into the pregnancy or, in fact, not subject to any time limit whatsoever. Thus, permitting of life-saving abortion without a time limit would not make Ireland a significant outlier in the international legal landscape.

It is appropriate also to note that the inclusion of a time limit in the restrictive circumstances in which abortion is permissible in Ireland would be intellectually incongruent with an approach grounded in an anti-abortion/pro-life position, as the Irish constitutional position is. Time limits are usually imposed to indicate that there is a stage of foetal development at which the relevant legal system determines that an abortion should be possible only for grave reasons of health and welfare of the pregnant woman but that before that abortion might be more widely available; it might even be 'on demand' as the phrase goes. The Irish system is simply fundamentally different: we do not need a time limit to be imposed on abortion (nor would such a time limit be appropriate or, arguably, constitutionally acceptable) because our constitutional situation deems that there is *never* a stage in foetal development where abortion is acceptable for anything but the most grave reason, i.e. a real and substantial risk to the life of the pregnant woman. Thus analogies to other—more liberal—abortion regimes are unhelpful in this context.

Does this mean that viable foetuses can be aborted in Ireland in these grave circumstances? The clear answer is 'no' and it is to be found in the text of the Constitution itself. Again, in this context the Irish system is not comparable to systems such as those found in the United Kingdom. The reason for this is the constitutional protection for the life of the unborn child, which is given equal esteem to the life of the pregnant woman. Thus, while a pregnant woman who is subject to a real and substantial risk of death that, on the balance of probabilities, can only be averted through termination of the pregnancy has a right to life that permits termination, the unborn child has an equal right to life. The practical implication of

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[13] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1)(a).

[14] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1)(c).

[15] Our consideration of abortion law around the world suggests that life-saving abortion is prohibited only in Chile, El Salvador, Malta, Nicaragua and Vatican City.

this is that where a foetus is viable or on the cusp of viability a woman may have a constitutional right to have her pregnancy brought to an end, but that does not mean that she has a right to an *abortion* understood as a procedure done with the intention of bringing foetal life to an end. Instead, an early delivery would be the means by which we would attempt to give effect to the rights to life of the pregnant woman and of the foetus. Rather than being determined by a time limit, the decision between an abortion and an early delivery is essentially one of medical judgment as to the viability of the foetus. This approach, which arguably provides *greater* protection to the right to life of the unborn than does a time limit, is of course entirely consistent with the anti-abortion tenor of Article 40.3.3 itself.

The foregoing paragraphs make it quite clear that arguments around time limits in Ireland are classic floodgate arguments, intended to detract from the fact that the Constitution already deals with the matter of time. It is the case, of course, that the Constitution and its interpretation by the Supreme Court in *Attorney General v X* does not deal with the question of time limits in a neat, chronological way; there is no clear 24-week limit, for example. Rather it deals with time in a manner that is entirely appropriate to a highly restrictive abortion regime in which abortion is permissible *only* in truly exceptional circumstances where there is *both* a risk to the life of the mother *and* an unviable foetus. These are factual matters to be determined by medical examination and judgement; they are not easily amenable to the neat and simplistic type of test so often preferred by law. To put a time limit in place would, we contend, be entirely inappropriate because whether an abortion is constitutionally permissible in any particular case is, quite simply, determined by the circumstances of that case. In some cases, a foetus at 22 weeks may be viable making early delivery the constitutionally acceptable pathway towards terminating the pregnancy; in other cases the foetus might not be viable, and abortion may be permissible. Talk of time limits belongs in a more liberal abortion regime; it is neither appropriate to nor required in as highly restrictive a regime as Ireland's.

Suicidal Ideation

The availability of abortion under the Constitution in a case where the risk to the life of the pregnant woman is one of suicide is a particularly controversial element of the Irish constitutional landscape. A variety of arguments is made in this respect, but two are of particular relevance in the context of floodgate. The first is that abortion is not a 'cure' for suicidal ideation, and ought therefore never to be considered a mechanism by which the real and substantial threat to the life of the pregnant woman can be averted under the *X Case* test; the second is that suicidal ideation will or may become a 'gateway' for widespread abortion availability in Ireland. In both cases, we contend, these arguments do not provide any legally justifiable basis for omitting suicidal ideation from the legislative scheme when it is clearly and expressly part of the constitutional scheme pursuant to *Attorney General v X*. It was, of course, in the *X Case* that the inclusion of suicidal ideation within Article 40.3.3 was confirmed, but, while perhaps not expressly contemplated at the time that the wording of that provision was introduced, is clearly a risk to the life of a pregnant woman that ought to be included under the terms of the provision. The Constitution makes no distinction between different sources of risk to the life of the mother, although the *X Case* makes it very clear that the risk must be grave indeed—a real and substantial risk the aversion of which can in all likelihood be achieved only through termination of the pregnancy—before it can trigger a constitutional permission to have an abortion.

Based on this there seems to be no basis for distinguishing in legislation between different types of risk to the life of the pregnant woman.[16] Indeed, in other jurisdictions it is quite common to refer simply to risks to the life of a pregnant woman without specifying suicide or to refer to mental health grounds for an abortion, again without specifically referring to suicidal ideation.[17]

The concern in Ireland appears to be that, in some way, suicidality is a different kind of risk to the life of the pregnant woman; one that can be managed without terminating the pregnancy. In this respect the evidence of Professor Patricia Casey to the Oireachtas Committee is of particular interest. Professor Casey claimed that there is no evidence for the claim that abortion reduces the risk of suicide in pregnancy; in fact, she claimed that suicidality in abortion may be linked to a number of other factors (including mental illness or pressure from partners of families to have an unwanted abortion), and that, in all of her years in practice, she had never seen a suicidal pregnant woman for whom abortion was the only treatment. It is not our aim here to claim that Professor Casey is wrong in these claims; indeed, as a consultant psychiatrist she is in a far better position to determine the relationship between suicidality and pregnancy in any particular case than lawyers would be. That said, the claims made in this evidence are floodgate arguments because they are intended to persuade legislators to omit from legislative provision for abortion something that is included in the constitutional scheme based on an attempt to generalise from personal experience. Indeed, it may well be the case that there will be no—or a very rare few—cases of pregnant women who present as suffering from a real and substantial risk to their lives based on suicidality where that risk can only be averted by termination of the pregnancy and where, because the foetus is not viable, that termination would take place by abortion. The frequency with which this might occur is, quite simply, not at issue. What *is* at issue is the continuing mismatch between the constitutional provision (allowing of abortion here) and the legislative vacuum in relation to same. It is quite clear that unless all of the elements of the legal test are fulfilled (i.e. there is a real and substantial risk + in probability it is capable of being averted by termination only + foetus is not viable) no abortion would be constitutionally permissible. General claims as to how frequently such a patient might present to a medical professional or how suitable abortion might be as a 'treatment' for suicidality are quite clearly intended to distort consideration of the core question for legislators, i.e. 'how shall we give effect to the suicide provision in law?' (rather than 'shall we give effect to the suicide provision in law at all?').

A further floodgate argument that is inferred, rather than often expressly made, is that suicidal ideation might be 'faked' by women who wish to acquire an abortion in Ireland. These views are problematic on a number of levels. First, the suggestion that women would pretend to be suicidal and present as suicidal to the medical services in order to acquire an abortion is offensive to women, to people who do experience suicidal ideation, and to medical professionals. Secondly, the claims that suicidal ideation in pregnancy can be managed without a termination ignore the fact that

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[16] See further F de Londras, "Suicide and Abortion: Analysing the Legislative Options in Ireland" (2013) 19(1) *Medico-Legal Journal of Ireland* ___ (forthcoming)

[17] This is the case under the Abortion Act 1967, which, under s1(1)(c) provides for abortion where: 'the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated'. It also provides for abortion in cases of 'injury to the physical or mental health of the pregnant woman' – s1(1)(a) and s1(1)(b).

where, as a matter of medical judgement, it is found that a woman is experiencing suicidal ideation, this will give rise to constitutional permission to terminate the pregnancy *only* where such termination is, on the basis of probability, the only way to avert the risk to the pregnant woman's life. In other words, the very strict and limited structure of the constitutional test continues to operate to limit the availability of abortion in these circumstances.

Thus, the perceived floodgates in relation to suicidal ideation are easily addressed by reference (i) to the general practice in comparative jurisdictions of dealing with suicidal ideation under the same terms as other risks to life in abortion legislation, and (ii) to the strictness of the Irish constitutional test, which treats of all risks to the life of the pregnant woman the same, whether they emanate from suicidality or from a physical illness.

Patient-Doctor Collusion

One of the realities of a medicalised system of determining whether or not a woman has access to an abortion is that, in order for it to operate along the intended lines, medical professionals involved in the administration of the legal regime must act in good faith. In the context of the contemporary debate in Ireland, there are both explicit and implicit suggestions that some anti-abortion advocates are unconvinced that patient-doctor collusion will not take place.

The explicit suggestion relates to the sometimes-made analogy to the involvement of medical professionals in determining whether someone is entitled to access a legal abortion under the Abortion Act 1967, which is considered to be permissive and open to collusion. Yet, under this Act, two doctors must agree in good faith that one of the four legal grounds for abortion applies.[18] This requirement reduces the possibility of patient-doctor collusion as both doctors must be satisfied that an abortion would be legal. There is an exception to the two-doctor rule, however, if a doctor is of the opinion that a termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.[19] This allows doctors to make emergency decisions where there may not be time for consultation with another medical practitioner, yet, given that it only applies where the termination is immediately necessary, the potential for patient-doctor collusion is minimal. As such, this exception is unlikely to create a loophole whereby doctors will decide unanimously to perform an abortion outside of the legal grounds.

In all other non-emergency circumstances, a second doctor's agreement is required. Although the second doctor is not required to meet or examine the pregnant woman, she must be convinced through assessment of the necessary clinical information about the patient's case that one of the legal grounds for abortion applies. Both doctors must then complete a HSA1 form to certify that this is the case.[20] Before the Oireachtas Committee, it was suggested that this process is routinely circumvented by doctors and does not act as a 'safeguard' to ensure that abortion takes place only within the permitted grounds under the Abortion Act 1967.[21] It is correct to say that concern has

[18] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1).
[19] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(4).
[20] A copy of the HSA1 form is available at:
http://www.bpas.org/js/filemanager/files/HSA1%20form.pdf (accessed 12. 02.2013).
[21] Dr Sean O'Domhnaill, when responding to questions from Committee members, said:

been raised that some doctors have been pre-stamping and pre-signing HSA1 forms in order to certify abortions without reviewing the relevant notes,[22] essentially leaving the decision to be made by one doctor. However, where this practice has been uncovered in Britain, there have been threats of criminal sanctions and steps have now been taken to ensure compliance with the law. [23] Moreover, even if this practice exists, it does not necessarily translate to 'abortion on demand' as the first doctor must still have agreed that the legal grounds applied in order to certify the legality of the abortion. Rather it appears that this practice reflects an ever-growing dissatisfaction among the medical profession with the legal requirement for two doctors' signatures, and a belief that individual doctors are fully able to make an accurate and faithful assessment without consulting another doctor.[24] There is also evidence to suggest that rather than a universally permissive approach from doctors in Britain, practice is in fact widely variable. When making an assessment regarding the widest ground for abortion under s1(1)(a) (that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family), doctors must take into account the pregnant woman's 'actual or reasonably foreseeable environment'.[25] This allows the doctor to scrutinise her whole lifestyle, home and relationships 'so that he may decide if she is deserving of relief'.[26] While this does provide for consideration of non-medical factors, a decision to allow an abortion must still be based on the risk or injury of the physical or mental health of the pregnant woman or her children in light of those factors. As such, this does not permit doctors to perform abortions on demand for purely social reasons. However, it does provide scope for doctors to base a decision *not* to give permission for an abortion on non-clinical reasons and prejudice, as rejection is the default position. Thus, a more complete picture of practice in Britain, however, sheds a somewhat different light on this concern about medical professionals circumventing the legislative provisions. Furthermore—as we explore below—it is our view that the particular restrictiveness of the legal test in Ireland is such that comparable practice would not in fact emerge.

> I can quickly tell the committee about my experience in Jersey in 1997 when the abortion Act was extended there. One of my consultant colleagues there had a stack of leaflets at the side of her desk all pre-stamped. All that was required was the name of the patient. We know from investigations in Britain going back as far as 1974 that this has been repeatedly shown to be the case. The *Sunday Telegraph* has done undercover investigations which have also shown this. It is something we need to worry about.

Oral Evidence to Joint Committee on Health and Children, 10 January 2013

[22] http://www.bbc.co.uk/news/health-17474191(accessed 12.02.2013).

[23] In a series of inspections by the Care Quality Commission, evidence was found of this practice being used in fourteen NHS trusts. They have since stopped this practice, and continue to have internal audits and staff training to ensure compliance with the law. More information is available at: http://www.cqc.org.uk/media/findings-termination-pregnancy-inspections-published (accessed 12.02.2013).

[24] Both the British Medical Association and the Royal College of Obstetricians and Gynaecologists consider the two doctor rule to be unnecessary and anachronistic. See more at: http://www.rcog.org.uk/what-we-do/campaigning-and-opinions/briefings-and-qas-/human-fertilisation-and-embryology-bill/brie-1 and Z Kmietowicz, 'Make access to early abortions easier and quicker, say doctors' (2007) *British Medical Journal* 335.

[25] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(2).

[26] S Sheldon, '"Who is the Mother to Make the Judgment?" Constructions of Woman in English Abortion Law' [1993] 1 *Feminist Legal Studies* 3, 18

To expand further on the concerns raised and claims about practitioner behavior relating to abortion legislation, it is important to note that under the Abortion Act 1967 doctors are not under a duty 'to participate in any treatment… to which he has a conscientious objection',[27] except where the treatment is 'necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman'.[28] The case law on conscientious objection has not clarified whether this includes a refusal to certify that a pregnant woman has satisfied the legal grounds for abortion.[29] Nor are doctors under any duty to declare that their reason for refusal is based on conscientious objection. Taken together, this leaves pregnant women in the position where they might be refused an abortion based on conscience grounds but think that they objectively do not satisfy the legal grounds for abortion. While there have been stronger suggestions that doctors are under at least an ethical duty to refer a patient where they conscientiously object,[30] some objecting doctors have been known to 'refuse to refer patients to non-objecting doctors, to refuse to sign abortion-related paperwork, to tell women to take a few weeks to "think about it" before they discuss abortion refusal, or to ask patients to read the Bible'.[31] These refusals signify quite the opposite of patient-doctor collusion and, in fact, cause delays in accessing abortion services,[32] often affecting some of the most vulnerable pregnant women.

Thus, the picture from Britain is decidedly more mixed than many anti-abortion advocates in Ireland suggest. Although there does appear to be some evidence of doctors in Britain taking less seriously than might have been desired the requirements to have consent from two doctors for an abortion, we are not convinced that this is likely to arise to any significant extent in the Irish context. This is primarily because the standard for accessing abortion will be considerably different under the Irish legislation than it is in Britain. Unlike in that jurisdiction, medical professionals in Ireland will have to be convinced—as already noted—that there is a real and substantial risk to the life of the mother that, on the basis of probability, can only be averted through abortion, and that the foetus is not viable. Not only is this a much higher standard than applicable in the case of abortion up to 24-weeks in Britain, but it is also considerably higher than the standard applied for abortions after that period of time. After this limit, the British law still permits abortion not only on the grounds that the continuance of the pregnancy would involve 'risk to the life of the pregnant women greater than if the pregnancy were terminated'[33], but also to prevent grave

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[27] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 4 (1).
[28] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 4 (2).
[29] In *Janaway v Salford AHA* [1989] AC 537 Lord Keith expressly refused to give an opinion on this matter.
[30] *Barr v Matthews* (2000) 52 BMLR 217; GMC, *Good Medical Practice* (2006), available at: http://www.gmc-uk.org/guidance/good_medical_practice/good_clinical_care_decisions_about_access.asp (accessed 12.02.2013).
[31] L Riley and A Furedi, 'Autonomy and the UK's Law on Abortion: Current Problems and Future Prospects', in S Scatler et al (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart, 2009)
[32] Royal College of Obstetricians and Gynaecologists, 'Reasons to do away with two doctor's signatures', available at: http://www.rcog.org.uk/what-we-do/campaigning-and-opinions/briefings-and-qas-/human-fertilisation-and-embryology-bill/brie-1 (accessed 12.02.2013).
[33] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1) (c).

permanent injury to the physical and mental health of the pregnant woman,[34] or if there is a substantial risk that the child would be born seriously handicapped.[35] Under the recommendations of the Expert Group, which are likely to be the starting point in the drafting process in Ireland, three substantive medical tests will have to be satisfied (risk to life; inappropriateness of other course of treatment; unviability of foetus) by at least two medical professionals, neither of whom, it seems likely, will be a GP and both of whom—given the nature of the test—are likely to be operating in a hospital setting where averting procedures (and, indeed, ethics committees) may well be more difficult than is the case in general practices. Thus, this general concern that arises in some quarters about medical practitioners not taking sufficiently seriously their certification role strikes us as one that fails to take into account the considerably different context in which the Irish law would operate when compared with more permissive legal regimes.

The implicit suggestion of doctor-patient collusion arises in relation to suicidal ideation and the demand for a different—by implication more onerous and difficult to satisfy—procedure to be applied in cases where it is claimed that the risk to the life of the pregnant woman arises from the risk of suicide. Although it rarely baldly stated, the demand for such a separated regime implies that women who are not in fact suicidal would be both likely and able to convince doctors to certify that they meet the constitutional threshold for termination of a pregnancy. This is both a more acute manifestation of the general suggestion relating to patient-doctor collusion (that doctors would not apply their clinical judgement with sufficient rigour) and a discomfiting commentary on our socio-political approach to suicidality, implying that it can be 'faked' or that it is 'merely' a mental health difficulty (in relation to which no right to access abortion arises) rather than a real and substantial risk to women's lives (in which case the right to access abortion does arise). The logical end point of both the express and implied suggestions relating to client-patient collusion is that women would (falsely) claim to be suicidal, and medical practitioners would be both willing and able to accept that claim *and* adjudge that a termination of pregnancy would in probability be the only way to avert the risk to the woman's life. In our view, both the realities of medical practice in situations of grave risk to life (which are the relevant comparator situations here, rather than general medical practice) and the extremely limited constitutional test for the availability of abortion in Ireland clearly illustrate the unlikelihood (if not constitutional impossibility) of this perceived floodgate materialising.

A further, and not unrelated, point of relevance here is that further safeguards against collusion could be introduced without compromising or making effectively illusory the right to access abortion, especially in the case of suicidality, by means of the criminal law. Although it appears very likely that ss 58-59 of the Offences against the Person Act 1861 will be repealed in the process of implementing the new abortion legislation (rather than simply amending it to include a defence of undertaking an abortion in line with the new abortion legislation), the fact that abortion will remain *generally* constitutional impermissible (as it now is) suggests that abortion outside of the constitutionally permitted limits will be re-designated a criminal offence. It is in

[34]Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1)(b).
[35] Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), s 1(1)(d).

this way that the Irish government in likely to give effect to its pledge in Article 40.3.3 to "guarantee[] in its laws to protect, and, as far as practicable, by its laws to defend and vindicate" the equal rights to life of pregnant women and the unborn. Should this approach be adopted, it will be important to ensure that Irish law does not recreate the 'chilling effect' of criminalisation that was critiqued by the European Court of Human Rights in *A, B & C v Ireland*. We contend that, because of the terms of Article 40.3.3, re-designating abortion a criminal offence is likely necessary, but the offence ought to be constructed with appropriate defences in place. Certainly it ought to be a defence for a licenced medical professional to claim that she reasonably believed the pregnant woman to be suffering under a real and substantial risk to her life that in probability could only be averted by means of abortion and that the foetus was not viable. This approach, whereby abortion remains *generally* criminalized but subject to permitted exceptions, is not unusual; indeed it is the approach adopted in Britain. In that jurisdiction, the Abortion Act 1967, by creating four legal grounds for abortion, merely provides exceptions to an otherwise criminal act. As in Ireland, the Offences Against the Person Act 1861 makes having or performing an abortion illegal, criminalising both the pregnant woman who has an (unlawful) abortion and the doctor (or other person) who carries out the (unlawful) abortion.[36] The Infant Life (Preservation) Act 1929 further creates an offence of by a 'wilful act' intentionally destroying of the life of a child capable of being born alive,[37] with a women who is 28 weeks being prima facie assumed to be pregnant with a child capable of being born alive.[38] All three offences have a maximum sentence of life imprisonment and doctors may be struck off by the General Medical Council if they are found guilty of any of the three. Rather than Britain having abortion on demand, these offences are still used to punish abortions outside of the legal framework provided by the Abortion Act 1967 - in 2012, a woman was convicted under s58 OAPA for administering herself an 'abortion pill' with the purpose of procuring a miscarriage outside of the Abortion Act.[39] She was sentenced to 8 years imprisonment.

Conclusions

Although, as we have seen, a number of the core floodgate arguments made in relation to drafting abortion legislation in Ireland are specific to particular matters and dismantled by reference to the clear and incredibly restrictive boundaries of the Constitution, there is one overarching floodgate argument that perhaps best explains all of these individual ones: an argument as to culture. We already noted the claim by Professor Binchy and by Caroline Simmons to the Oireachtas Committee that introducing a legislative scheme for abortion will result in a change to the cultural approach to abortion in Ireland. In somewhat more colourful terms, a similar claim was made on *Morning Ireland* by Bishop Leo O'Reilly, who claimed that abortion legislation would usher in a "culture of death" in Ireland and "inevitably lead to the most liberal kind of abortion".[40] Although this is a floodgate argument inasmuch as it is intended to distract decision-makers from the task at hand (giving effect to the current constitutional provision), it is one that is not so easily dismissed as the others

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[36] Offences Against the Person Act 1861, s58
[37] Infant Life (Preservation) Act 1929, s1(1).
[38] Infant Life (Preservation) Act 1929, s1(2).
[39] R v Sarah Catt (unreported, 17 September 2012), sentencing remarks available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sarah-louise-catt-sentencing-remarks-17092012.pdf (accessed 12.02.2012).
[40] Interview on *Morning Ireland* (RTÉ), 7 January 2013.

considered above for it may well be true that, as abortion becomes legally available in Ireland, claims for *more* availability might be made. Indeed, opinion polls (unreliable as these may be as markers of real public sentiment) suggest that this tide is already turning and, as we know, a large number of women leave Ireland for abortions every year; two facts that call into question how anti-abortion Irish society currently is. What this overarching floodgate claim fails to acknowledge, however, is that even if there were such a cultural change this could not result in a legal change without a constitutional amendment, which in turn can only be achieved by means of a referendum of the People.

In order to bring about legal change, then, a cultural change in attitude towards abortion would need to be capable of: (a) attracting sufficient political support to initiate a referendum in the first place; and (b) attracting sufficient popular support to succeed at the ballot box. Neither of these tasks is an easy one and, indeed, abortion referenda are notoriously fraught politico-legal events in Ireland. That said, Ireland's constitutional culture is one in which popular sentiment around an issue that has attracted sufficient political support can, indeed, result in a constitutional change; that is the essence of a referendum system (albeit one without an initiative mechanism). Should such a change arise, it would, quite simply, be part of Irish constitutional evolution as, indeed, the 8th Amendment giving rise to the current abortion regime was. It is not, or at least should not be, an argument against legal change to suggest possible future constitutional change in a country with a referendum based approach to popular constitutional sovereignty. To do so is to undermine in its entirety the structure of constitutional governance in the state and, rather paradoxically, the successful campaign for the 8th Amendment run in the early 1980s. To allow this underlying concern with a possible cultural shift to distort the process of drafting the legislation within the current constitutional framework would be even more egregious particularly since—as we have established—the discrete arguments into which this underlying claim is translated are decisively countered by the inescapable limitations of Article 40.3.3 itself.