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### **A World Without Roe: The Constitutional Future of Unwanted Pregnancy**

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A WORLD WITHOUT *ROE*: THE CONSTITUTIONAL  
FUTURE OF UNWANTED PREGNANCY

JULIE C. SUK\*

ABSTRACT

*With the demise of Roe v. Wade, the survival of abortion access in America will depend on new legal paths. In the same moment that Dobbs v. Jackson Women’s Health Organization has constrained access to abortion in the United States, other constitutional democracies have moved in the opposite direction, expanding access to safe, legal, and free abortions. They have done so without reasoning from Roe’s vision of the private zone of unwanted pregnancy. The development of abortion law outside the United States provides critical insights that can inform future efforts to vindicate the constitutional rights of women facing unwanted pregnancies. This Article maps out the constitutional paths of reproductive justice in a world without Roe.*

*Constitutional democracies around the world that have progressed from banning most abortions to legalizing many of them have embraced the public dimensions of childbearing and childrearing.*

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\* Professor of Law, Fordham University School of Law. Thanks to Kathy Abrams, Richard Albert, Joseph Blocher, Guy-Uriel Charles, Joshua Cohen, Deborah Dinner, Alice Kessler-Harris, Suzanne Kim, Serena Mayeri, Sara McDougall, Melissa Murray, Elizabeth Sepper, Reva Siegel, Sarah Song, Kirsten Swinth, and audiences at the American Society for Legal History 2019 panel on “Sex and Motherhood Reimagined,” law school faculty workshops at Duke, Fordham, Northwestern, and New York Law Schools, the Kadish Lecture at UC Berkeley School of Law, the Comparative Constitutional Law Seminar at the University of Texas School of Law for comments on the much earlier papers that evolved, with their many helpful suggestions and criticisms, into this Article. Collaborating with Sarah Covington to convene the CUNY conference on reproductive rights in the United States and Ireland in May 2019 was extremely generative to this project, especially the opportunity to engage leaders of the movement to repeal the constitutional abortion ban in Ireland, most notably Ailbhe Smyth. I am grateful to Julia Czyzowicz, Varshini Parthasarathy, and Angela Lulu Zhang for providing excellent research assistance.

*Laws protecting abortion access have recently emerged from strong pro-life constitutional baselines in several jurisdictions, including the notable example of Ireland. Rather than constitutionalizing the individual's privacy interest in unwanted pregnancy, many constitutional orders recognize the social and public value of reproducing the community, and the disproportionate role played by people who stay pregnant and raise children in the production of these public goods. Banning abortion effectively coerces people to contribute disproportionate sacrifices to the State, without properly valuing these contributions.*

*This Article shows how this insight from global abortion law norms can be pursued in U.S. constitutional law. The formulation of takings- and Thirteenth Amendment-based challenges to abortion bans would focus on just compensation for the risks, burdens, and sacrifices of compelled motherhood, beyond the enjoining of abortion restrictions. Global experience also points to the importance of incrementally establishing reasonable, expanded definitions of medical necessity exceptions to abortion bans. Such avenues for reestablishing abortion access, as well as public support for pregnancy and parenting, imagine a broader world of reproductive justice than the one defined by Roe.*

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## INTRODUCTION

Can access to abortion survive in a world without *Roe v. Wade*? After the Supreme Court's decision to overrule *Roe* in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> state laws banning nearly all abortions have become enforceable.<sup>2</sup> This Article shows how access to abortion can become safe, legal, and free over time in a world without *Roe*, by drawing on the contrasting logics of abortion protections that have evolved in the world outside the United States.

In the same moment that law has constrained access to abortion in the United States, other constitutional democracies have moved in the opposite direction, expanding access to safe, legal, and free abortions.<sup>3</sup> They have done so without reasoning from *Roe*'s vision of the private nature of unwanted pregnancy.<sup>4</sup> The development of abortion law outside the United States provides critical insights that can inform future efforts to vindicate the constitutional rights of women facing unwanted pregnancies. This Article maps out new paths within existing U.S. law for legal abortion access that can be explored in the wake of *Dobbs*.

The law and politics of abortion around the world are not monolithic, as evidenced by the range of comparative and international law amicus briefs filed in support of each side in *Dobbs* before the Supreme Court.<sup>5</sup> But the countries that permit broad legal access to abortion generally do so without embracing *Roe*'s insistence that pregnancy belongs to a fundamentally private sphere that is immune from governmental intervention.<sup>6</sup>

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1. 142 S. Ct. 2228 (2022).

2. See *infra* Part I.D.

3. See *infra* Part II.

4. See *infra* Part II.

5. See generally Brief of European Legal Scholars as Amici Curiae in Support of Neither Party, *Dobbs v. Jackson Women's Health*, 141 S. Ct. 2619 (2021) (No. 19-1392) (argued Dec. 1, 2021); Brief of 141 International Legal Scholars as Amici Curiae in Support of Petitioners, *Dobbs*, 141 S. Ct. 2619 (No. 19-1391) (argued Dec. 1, 2021); Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents, *Dobbs*, 141 S. Ct. 2619 (No. 19-1391) (argued Dec. 1, 2021); Brief of European Law Professors as Amici Curiae in Support of Respondents, *Dobbs*, 141 S. Ct. 2619 (No. 19-1391) (argued Dec. 1, 2021).

6. See *infra* Part II.

This Article examines how constitutional democracies around the world have progressed from banning most abortions to legalizing many of them at the very same moment that the U.S. Supreme Court has allowed states to ban almost all abortions. While global constitutional norms cannot easily be transplanted to U.S. law, the trajectories of jurisdictions that developed the right to abortion access from strong pro-life baselines could inform the alternatives to *Roe* by which abortion access could be reimagined and reestablished in America. The transnational embrace of the public, rather than private, dimensions of unwanted pregnancy is the generative move worth studying. A full appreciation of the State's interest in pregnancy and parenthood might guide the formulation of new constitutional arguments under the Takings Clause, or, to a lesser extent, the Thirteenth Amendment ban on involuntary servitude, to reinforce the State's constitutional duties to citizens who face unwanted pregnancies. Drawing on emerging legal principles around surrogacy and property interests in one's body, these arguments articulate what the State owes to the people who make future generations possible by bearing the bodily risks, burdens, and sacrifices required to turn unborn life into born citizens, workers, and persons—sometimes unwillingly.

In the world of abortion access without *Roe*, restrictions on abortion are illegitimate, not because they violate privacy or even equal protection of the laws, but because they manifest the government's failure to properly value the shared public benefits of human reproduction.<sup>7</sup> By effectively forcing women to continue unwanted pregnancies to term, abortion bans enable the State to protect unborn life and to spawn its next generation of citizens and workers to the enrichment of society as a whole.<sup>8</sup> The State relies on people who become pregnant to absorb disproportionate risks, burdens, and costs to generate this collective benefit.<sup>9</sup> Unlike other people who are conscripted to defend and enlarge the State and society, pregnant people are generally not compensated for their contributions.<sup>10</sup>

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7. See *infra* Part II.

8. See *infra* Part I.C.

9. See *infra* Part I.C.

10. See *infra* Part I.C.

The idea that the State unjustly extracts this value out of pregnant persons by banning abortions is developed in the abortion jurisprudence of some European courts. Ireland's recent processes of amending its constitutional protection of unborn life to legalize abortion in a range of circumstances are particularly instructive.<sup>11</sup> The abortion liberalization amendment paved the way to additional processes by which the people participated in proposing reform of the Irish constitution's provision protecting mothers, towards gender-equal protections for childrearing work.<sup>12</sup>

Drawing on comparative constitutional law, this Article imagines the world of abortion access after and without *Roe*, exploring takings, the Thirteenth Amendment ban on involuntary servitude, and strategies for reasonable expansion of the life and health exceptions to abortion bans as potential anchors for reproductive justice as a constitutional principle, a constitutional commitment that reaches beyond abortion rights.

Part I charts the evolution of the American constitutional right to abortion, from *Roe* to *Dobbs*. *Roe* grounded the right to abortion in substantive due process privacy rights<sup>13</sup> and was limited in its ability to make abortion access real for the women most vulnerable to the negative consequences of continuing an unwanted pregnancy. Exploiting the weaknesses of *Roe*'s privacy reasoning, *Dobbs* overruled the longstanding constitutional barrier to state laws banning abortion, which became enforceable. Part II examines the constitutional law of abortion access in peer democracies, from the frameworks that emerged in most of Europe since *Roe*, to the transformations in pro-life countries that decriminalized abortion in recent years, such as Ireland, Colombia, Argentina, Mexico, and South Korea.

Part III focuses on two case studies—Germany and Ireland—that demonstrate the common thread in laws liberalizing abortion around the world: the understanding of unwanted pregnancy as a public problem for which the State bears responsibility, rather than a purely private matter as in *Roe*. The German constitutional court twice rejected abortion on demand, contemporaneously with *Roe* and

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11. See *infra* Part III.B.

12. See *infra* Part III.B.

13. See 410 U.S. 113, 153 (1973).



*Casey*, while envisioning the situations in which women's autonomy required abortion access. In Ireland, the constitutional amendment of 2018 paved the way to legislation protecting abortion access, after decades of public engagement of tragic situations of pregnancy. These constitutional democracies have embraced strong State involvement in all stages of pregnancy and parenthood.<sup>14</sup> Ironically, this strong-State approach has made abortion more accessible to poor women than it was in the United States under *Roe*.<sup>15</sup>

Finally, Part IV suggests ways of transposing these insights from the world of legal abortion outside of the United States, identifying the unique opportunities within U.S. law and legal institutions. What would it mean for the State to fully recognize, compensate, and value the risks and sacrifices sustained by women due to unwanted pregnancies? Future challenges to the new near-total abortion bans, including Texas's S.B. 8, could reason from the logic of regulatory takings and/or involuntary servitude under the Thirteenth Amendment. In addition, litigation could seek to define, in a reasonable and empathetic expansion, the "medical emergency" exceptions that have been written into the laws banning abortion.

## I. THE END OF *ROE* AND ITS PRIVACY RATIONALE

### A. *Dobbs* and *Substantive Due Process*

The Supreme Court justified its decision to overrule *Roe v. Wade* on the grounds that "the Constitution makes no reference to abortion."<sup>16</sup> A major weakness of *Roe*, according to Justice Alito writing for the five-Justice majority, was that "the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."<sup>17</sup> The Due Process Clause of the Fourteenth Amendment, on which *Roe* relied, protected "some rights that are not mentioned in the Constitution," but not abortion.<sup>18</sup> The majority regarded *Roe* as "egregiously wrong and deeply

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14. See *infra* Part III.

15. See *infra* Part I.C.

16. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

17. *Id.* at 2245.

18. *Id.* at 2242.

damaging,” “outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed,” and “on a collision course with the Constitution from the day it was decided.”<sup>19</sup> According to the *Dobbs* Court, the Supreme Court’s cases protecting abortion rights, from *Roe* to *Casey*, mistakenly located those rights in the “liberty” guaranteed by the Fourteenth Amendment’s Due Process Clause. However, the majority held that rights that were not explicitly enumerated should only be constitutionally protected if they were “deeply rooted in [our] history and tradition” and “essential to our Nation’s ‘scheme of ordered liberty.’”<sup>20</sup> Drawing on legal sources spanning from thirteenth-century England<sup>21</sup> to the United States in the era of the Fourteenth Amendment’s ratification in the nineteenth century indicating that abortion was criminalized,<sup>22</sup> the Court concluded that the right to abortion was not deeply rooted in our nation’s history and tradition and thus should never have been protected by *Roe*.<sup>23</sup>

The *Dobbs* majority also found *Roe*’s reliance on the “right of personal privacy” inadequate because *Roe* conflated different meanings, from privacy in personal information to personal decision-making about family matters.<sup>24</sup> Ultimately, *Dobbs*’s justification for ending the right to abortion was that *Roe*—the case that established the constitutional right to abortion in the first place— had these “well-known” weaknesses in reasoning.<sup>25</sup> In sum, the *Dobbs* Court characterized *Roe*’s effort to connect abortion to privacy as tenuous and cast doubt on efforts of prior substantive due process cases to connect privacy to the Constitution’s text and history.

### *B. Roe’s Logic of Privacy in the Body and the Family*

*Dobbs*’s skepticism of *Roe*’s privacy rationale must be taken seriously. Indeed, it is *Roe*’s outcome, not its reasoning, that led *Roe*

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19. *Id.* at 2265.

20. *Id.* at 2246 (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 672, 686 (2019)).

21. *See id.* at 2249.

22. *Id.* at 2252-53.

23. *See id.* at 2253.

24. *Id.* at 2267-68.

25. *Id.* at 2266.

*v. Wade* to become a shorthand for the legality of almost all abortions before viability. *Roe* invalidated a Texas law that banned and criminalized abortion in most circumstances.<sup>26</sup> But *Roe*'s reasoning was limited, not only because of its loose nexus with the Fourteenth Amendment's text but also because it decriminalized abortion without supporting access to abortion.

The *Roe* Court concluded that the U.S. Constitution protected a pregnant woman's right to terminate a pregnancy without governmental interference, invoking privacy.<sup>27</sup> "[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution," the Court noted.<sup>28</sup> Prior to the viability of the fetus, the State could not constitutionally regulate the determination, made by a woman and her doctor, to terminate a pregnancy.<sup>29</sup>

Although Justice Blackmun's opinion for the *Roe* Court featured abortion's medical-legal history<sup>30</sup> and mentioned the bodily health hazards of both pregnancy and abortion,<sup>31</sup> some discussions of privacy in *Roe* centered on the personal nature of the childbearing decision, rather than the zone of privacy in the body.<sup>32</sup> The Court located the right to privacy in prior cases<sup>33</sup> involving compelled medical exams in the course of civil litigation,<sup>34</sup> involuntary sterilization,<sup>35</sup> childrearing,<sup>36</sup> the home,<sup>37</sup> marriage,<sup>38</sup> and birth control.<sup>39</sup>

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26. 410 U.S. 113, 117-18, 166 (1973).

27. *See id.* at 153, 163-64, 166.

28. *Id.* at 152.

29. *Id.* at 163.

30. *See id.* at 116-17, 129-47.

31. *See id.* at 148-50.

32. *See id.* at 152-54 ("[I]t is not clear to [the Court] that the claim ... that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated.").

33. *Id.* at 152-53.

34. *See Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 250, 252 (1891) ("To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity.").

35. *See Skinner v. Oklahoma*, 316 U.S. 535, 536-37, 541-42 (1942).

36. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535-36 (1925).

37. *See Olmstead v. United States*, 277 U.S. 438, 474-76, 478 (1928) (Brandeis, J., dissenting).

38. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

39. *See Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965).

In *Eisenstadt v. Baird*, the Supreme Court struck down a statute prohibiting unmarried people from obtaining contraceptives on equal protection grounds and acknowledged that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>40</sup> In *Roe*, Justice Stewart’s concurring opinion more explicitly tied the “personal intimacy” of the abortion right to “the right to send a child to private school” and “the right to teach a foreign language” to one’s child.<sup>41</sup> Parents’ decisions about how to raise a child are, therefore, under constitutional precedents, protected from State intrusion. *Roe* shielded the individual’s decision to have a child at all (or not) from State intrusion as well.

*Roe* influenced subsequent cases involving childbearing and childrearing, as the Court strengthened the proposition that having a child is a personal and privately exercised freedom worthy of protection from State intrusion. In *Cleveland Board of Education v. LaFleur*, Justice Stewart authored the Supreme Court’s opinion in a decision invalidating several public school districts’ policies of requiring any pregnant teacher to go on unpaid maternity leave at least five months prior to the anticipated birth of her baby and until her baby was at least three months old.<sup>42</sup> “[T]here is a right ‘to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child,’” the Court noted.<sup>43</sup> Requiring the pregnant working woman to go on unpaid maternity leave punished the woman for choosing to bear a child, therefore constituting an unwarranted intrusion by the State into this personal choice.<sup>44</sup>

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40. 405 U.S. 438, 440-41, 443, 453 (1972).

41. 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (Conn. 1972)).

42. 414 U.S. 632, 634-35, 647-48 (1974).

43. *Id.* at 640 (quoting *Eisenstadt*, 405 U.S. at 453). For a detailed history of the litigation in light of the history of teachers’ struggles for the right to return to work after childbirth, see generally Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J.L. & FEMINISM 343 (2010). For a discussion of mandatory maternity leave in comparative perspective, see generally Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010).

44. *LaFleur*, 414 U.S. at 640, 647-48.

What ties together these different ideas of personal privacy invoked in *Roe* to protect abortion is the idea of privacy as a negative right to be free from State intervention, not a positive right to State protection or support. Subsequent cases established a broad negative right to enable bodily and family autonomy, but no state support to make this autonomy real, particularly for indigent women whose lives are likely to be severely burdened by an unwanted pregnancy.

In *Harris v. McRae*, Medicaid recipients challenged congressional appropriations legislation, known as the Hyde Amendment, which made federal funds unavailable to reimburse abortions provided to indigent recipients of Medicaid, even when those abortions were medically necessary to prevent long-lasting physical injury to the pregnant woman.<sup>45</sup> Initially, the Hyde Amendment also excluded funding to terminate pregnancies resulting from rape or incest, and it only authorized funding for abortions necessary to save the pregnant woman's life.<sup>46</sup> The Supreme Court upheld the legislative ban on abortion funding without backpedaling *Roe*'s privacy-based right to abortion.<sup>47</sup> "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation," the Court explained.<sup>48</sup> "Indigency falls in the latter category."<sup>49</sup> The Court held that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."<sup>50</sup> It thus became clear that *Roe v. Wade* protected a broad negative right to abortion: it made abortion legal and perhaps safe, but not free.

Likewise, the right to choose to bear a child, championed by the Supreme Court in *Cleveland Board of Education v. LaFleur*, in no

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45. See 448 U.S. 297, 300-03 (1980).

46. See *id.* at 302-03.

47. See *id.* at 316-17, 326-27.

48. *Id.* at 316.

49. *Id.*

50. *Id.* at 317-18.

way entails a constitutional right to state support for childbirth or maternity. The only solution to the unconstitutionality of mandatory unpaid maternity leave in that case was to enjoin the policy and permit the pregnant teachers to teach as long as they chose<sup>51</sup>—not to establish a constitutional right of pregnant teachers to compensation for mandatory maternity leave or otherwise establish a constitutional right to paid maternity leave.

And indeed, the Supreme Court rejected efforts by pregnant women to establish a right to paid maternity leave in public law. In *Geduldig v. Aiello*, litigants who had been pregnant or had recently given birth challenged a state disability benefits scheme that authorized paid leave for every work-disabling condition except for normal pregnancy and childbirth.<sup>52</sup> The Supreme Court upheld the policy over a constitutional challenge alleging that the denial of these paid statutory benefits in the event of a normal pregnancy and childbirth violated the Equal Protection Clause.<sup>53</sup> The decision was authored by Justice Stewart,<sup>54</sup> whose *Roe* concurrence<sup>55</sup> and *LaFleur* majority opinion<sup>56</sup> treated childbearing and childrearing as so intimate and personal as to render state involvement improper.

In the cases involving pregnancy that followed *Roe*, it became clear that the American constitutional right to choose one's reproductive future—whether to terminate or to continue a pregnancy—is negative, not positive. The State has a duty to leave such decisions up to individuals, but it does not have a duty to support either of these choices or to help people achieve the conditions necessary to carrying out either choice. *Roe*'s protection of a negative liberty right to freedom from state interference, rather than the positive liberty right to free actualization, is consistent with the Supreme Court's overall approach to the life, liberty, and property

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51. See 414 U.S. 632, 645-48 (1974).

52. See 417 U.S. 484, 486, 488-89 (1974).

53. *Id.* at 486, 490, 497.

54. *Id.* at 486. Deborah Dinner points out that the majority opinion reflected a concern that the claim for paid maternity leave would pose a threat to the solvency of the California disability insurance program. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 467 (2011). For Dinner, this case and others related to pregnancy discrimination and parental leave reveal ambivalences about sharing and redistributing the costs of reproduction. See *id.* at 417-18, 422.

55. See 410 U.S. 113, 168-70 (Stewart, J., concurring).

56. See 414 U.S. at 639-40, 643, 646-48.



enshrined in the Due Process Clause. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court said that the State did not violate the Constitution when it failed to protect a young boy from severe, violent physical abuse at the hands of his own father, resulting over time in the boy's permanent brain damage.<sup>57</sup> The Fourteenth Amendment guarantee of life, liberty, and property forbids *the State* from itself attacking people's life, liberty, or property, but it does not "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."<sup>58</sup>

### *C. The Limits of Privacy for Reproductive Justice*

Proponents of abortion rights in the legal academy have pointed to the inadequacies of the negative privacy right protected by *Roe*. This Subsection describes the critiques of *Roe* and its privacy logic by leading feminist legal theorists and Black feminists from the standpoint of reproductive justice and shows how similar ideas were invoked without being fully developed in *Roe* and *Casey*.

Robin West has suggested that *Roe*'s negative right to abortion has promoted an antigovernmental stance in matters of childbearing and childrearing. On her account, the right to abortion protected by *Roe v. Wade* is at odds with a capacious feminist understanding of reproductive justice.<sup>59</sup> *Roe*'s negative privacy right keeps the State out of family life, preventing both a robust role for government in childcare and heightened protections against domestic violence.<sup>60</sup>

Critical race feminists, most notably Dorothy Roberts, have argued that the pro-choice focus on the negative right to abortion has eclipsed the broader principles of reproductive justice in which Black women have more at stake:

[C]ritical race feminists advocate a more complicated understanding of reproductive freedom that extends beyond the myopic focus on legalized abortion to encompass a broader

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57. 489 U.S. 189, 191, 193 (1989).

58. *Id.* at 195.

59. See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1422 (2009).

60. *Id.* at 1422.

human right to reproductive self-determination and well-being. Reproductive justice includes the right to *have* a child, under the conditions desired by the one giving birth, the right *not* to have a child and the right to *parent* any children one has in a healthy, safe and supportive environment.<sup>61</sup>

Roberts has argued that the equation of “reproductive rights” and the negative “right to an abortion” primarily reflects the concern of white, middle-class women.<sup>62</sup> By contrast, poor Black women’s choices are “limited not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship.”<sup>63</sup>

Khiara Bridges has noted that the constitutional protection of privacy in the body and family life, while a useful concept for all women, has seldom helped poor women and women of color: “[F]or the marginalized, indigent women who must turn to the state for assistance if they are to achieve healthy pregnancies and infants, privacy is a concept of great significance; indeed, the devastating absence of privacy may be that which distinguishes their experiences with the state from their monied counterparts.”<sup>64</sup>

Bridges draws on the insights of Martha Fineman, who exposed the dynamic by which families become “public” rather than “private” in the American legal order when the father becomes absent; any family headed by an unmarried mother becomes a “public family” subject to the State’s intervention.<sup>65</sup> How does improving the negative right to privacy for all, including the most vulnerable, compare to improving the State’s interventions relative to the “public family,” as responses to the oppressive disparities? To the extent that *Roe* endeavored to keep the government out of pregnancy and parenthood, especially before fetal viability, it also

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61. Dorothy E. Roberts, *Critical Race Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 112, 124 (Robin West & Cynthia Grant Bowman eds., 2019).

62. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 4, 300 (1997).

63. *Id.* at 300.

64. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122 (2016).

65. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 178, 180, 184-85, 189-92 (1995).



erected a barrier to government support for the reproductive lives of poor women, whether they chose to bear or not bear children.

If anything, the privacy framing of reproductive choice entrenched the least generous state response to the overwhelming burdens of pregnancy, especially for poor or unmarried women.<sup>66</sup> The unbearable burdens of unwanted pregnancy did not escape the Supreme Court's notice in *Roe*.<sup>67</sup> Justice Blackmun's opinion for the Court justified the privacy right in part due to the importance of medical privacy, particularly when the pregnancy threatens to cause economic ruin or social stigma:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>68</sup>

Despite insisting that privacy was the solution, these remarks in *Roe* appear aware of the social dimension of the decision to bear a child. The decision is shaped by a woman's relationships, not only with the child's father, but also with a social, economic, and legal order full of other people who may or may not provide the approval, support, or opportunities needed to lead a decent life as a mother. But the *Roe* decision and its progeny continued to insist that reproduction was fundamentally private and that state regulation of it was inappropriate.<sup>69</sup>

Twenty years later, when the Supreme Court reaffirmed *Roe*'s right to terminate a pregnancy before viability in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>70</sup> it acknowledged a

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66. See, e.g., *id.* at 190-92.

67. See 410 U.S. 113, 153 (1973).

68. *Id.*

69. See, e.g., *id.* at 153-54; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69-70 (1976).

70. 505 U.S. 833, 846 (1992).

stronger state interest in reproduction than it had in *Roe*.<sup>71</sup> Instead of saying, as *Roe* appeared to, that all state involvement in the first trimester was unconstitutional, *Casey* permitted the State to attempt to persuade the pregnant woman to continue the pregnancy, in recognition of the state's interest in protecting unborn life.<sup>72</sup> Furthermore, regulations that were efforts to persuade or deter could not impose an undue burden on the woman's choice to terminate a pregnancy.<sup>73</sup>

The joint opinion for the Court by Justices O'Connor, Kennedy, and Souter concluded that women would be unduly burdened by a law requiring spousal notification before an abortion.<sup>74</sup> They justified that conclusion with a substantial discussion of domestic violence data, including spousal abuse.<sup>75</sup> *Casey* also evidenced a heightened awareness of the disproportionate sacrifices women sustain in pregnancy, which affect women's prospects for a decent life:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.<sup>76</sup>

The Court suggested that, by its very nature, pregnancy involves enough risk, forbearance, pain, sacrifice, and suffering that the State cannot insist upon a woman continuing it.<sup>77</sup>

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71. *See id.* at 877. As Mary Ziegler notes, "*Casey* put the costs and benefits of both abortion and laws regulating it at the center of constitutional discourse." MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 119 (2020).

72. *See Casey*, 505 U.S. at 869, 871-73.

73. *See id.* at 876-78.

74. *See id.* at 841, 887-95.

75. *Id.* at 888-94.

76. *Id.* at 852.

77. *See id.*

Justice Blackmun, reprising his remarks in *Roe* about the distressful life and stigma that motherhood could engender, put the point slightly differently in his concurring and dissenting opinion<sup>78</sup>:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State *conscripts* women's bodies *into its service*, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. *The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.*<sup>79</sup>

Justice Blackmun planted an interesting question without taking it up: What if the State did compensate women for their conscripted services, in the same way that the State pays people for jury duty and military service? Would that change the analysis on whether the State could restrict abortion? In invoking gender equality, Justice Blackmun pointed out the equal protection problem in regulating abortion: "This assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."<sup>80</sup>

A question that lurks but is never asked in *Casey*, and even earlier in *LaFleur*, is whether compensation for the sacrifices of motherhood—such as paid maternity leave in *LaFleur*—would remedy the constitutional violation. Justice Blackmun's formulation—"the State conscripts women's bodies"<sup>81</sup>—invites the analogy between motherhood and military conscription.<sup>82</sup> Would restricting

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78. Unlike the Justices in the Joint Opinion, Justice Blackmun would have struck down all of the regulations at issue in *Casey*, including the twenty-four-hour waiting period and the parental notification requirement. *See id.* at 926 (Blackmun, J., concurring in part and dissenting in part).

79. *Id.* at 928 (emphasis added).

80. *Id.*

81. *Id.*

82. This analogy is frequently made. *See generally, e.g.*, THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995).

abortion pose an equal protection problem if the State valued and compensated motherhood comparably to the military service historically performed by men—service which also involves risks to one’s life, pain, suffering, trauma, and sacrifice, sometimes unwanted and coerced—as in the case of the military draft? If an extensive and humane governmental infrastructure of compensation and support for mothers and children existed—analogueous to what veterans and military draftees receive—would the government’s regulation of abortion be less burdensome and reasonably within the range of duties that fully equal citizens of a polity could be expected to bear for the public good of building and expanding a flourishing society across generations?

These questions expand the frame on the distributive injustice of restricting abortion that constitutional litigation attempted to reduce. When the State decides that maternity healthcare, paid maternity leave, pregnant workers’ economic security, or early childcare and education are none of its business, it fails to take responsibility for the children who will be born and raised to constitute its soldiers, workers, and leaders, and unevenly distributes the costs on women, who then shoulder the disproportionate health risks, pain, and labor necessary to produce the State’s next generation of citizens. In prohibiting abortion, the State coerces women’s sacrifices for the social and public good. The State extracts collective benefits from its female citizens without compensating them the way it compensates men who defend the nation’s security through compulsory military service. That extraction is the core of reproductive injustice. In fact, Reva Siegel has questioned whether governments that purport to be pro-life deserve the label when they restrict abortion while doing nothing to help women bring a wanted pregnancy to term.<sup>83</sup>

Justice Blackmun’s suggestion that abortion restrictions conscript women into motherhood without compensation deserves fuller development. Greater attention must be paid to what makes pregnancies unwanted for so many American women. Often, pregnancies are unwanted because social conditions and public policy fail to

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83. See Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 207-09 (2018).

prevent the losses that women absorb by staying pregnant.<sup>84</sup> Part IV will suggest some legal avenues by which this problem can be addressed. Without *Roe*'s privacy-based constitutional right to abortion, new legal paths for reproductive justice will be needed, particularly as new state laws banning or restricting abortion get adopted or go into effect.

#### *D. State Abortion Bans After Dobbs*

Several state laws that ban or restrict abortion are now in effect because of *Roe*'s overruling. The immediate legal effect of the *Dobbs* decision was that lower court orders enjoining Mississippi's fifteen-week abortion ban were reversed, allowing that law to be enforced.<sup>85</sup> Without *Roe*, the only constitutional barrier to any state laws that ban abortion before viability, whether at fifteen weeks or at the detection of a fetal heartbeat (around six weeks), is rational basis review.<sup>86</sup> In Mississippi, the legislature had adopted a law in 2007 to go into effect if *Roe* was overruled that prohibited most abortions from the moment of conception.<sup>87</sup> The Attorney General of Mississippi certified the "trigger law" three days after the Supreme Court's decision in *Dobbs*, announcing that it would likely pass the rational basis review.<sup>88</sup>

While *Dobbs* was pending, Texas passed S.B. 8, which banned abortions upon detection of a fetal heartbeat.<sup>89</sup> Because S.B. 8 imposed no criminal penalties and was enforced by civil lawsuits for damages by any person,<sup>90</sup> abortion providers' efforts to enjoin it through litigation had failed because there were no defendants that were amenable to suit.<sup>91</sup> Therefore, S.B. 8 went into effect because

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84. See, e.g., *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part).

85. See 142 S. Ct. 2228, 2285 (2022).

86. *Id.* at 2283-84.

87. MISS. CODE ANN. § 41-41-45(2) (2022).

88. Kate Royals & Will Stribling, *Fitch Certifies Mississippi's Trigger Law Banning Abortion in Nearly All Cases*, MISS. TODAY (June 27, 2022), <https://mississippitoday.org/2022/06/27/fitch-certifies-mississippi-trigger-law-banning-abortion-in-nearly-all-cases/> [<https://perma.cc/J6XY-VP58>]. Efforts to enjoin the trigger law in litigation have failed as of this writing.

89. S.B. 8, § 3, 87th Leg., Reg. Sess. (Tex. 2021).

90. See *id.*

91. See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (rejecting abortion

its procedural design evaded judicial review under *Roe*. In the absence of *Roe*, S.B. 8's novel enforcement provisions are no longer necessary for its survival, because *Dobbs* holds that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion" through their state legislatures.<sup>92</sup> As a result, Texas's "trigger law," which the legislature adopted in 2021 providing that it would become effective if *Roe* was overruled, went into effect.<sup>93</sup> This law, the Human Life Protection Act, bans abortion from conception to birth and authorizes criminal penalties for first- or second-degree felonies,<sup>94</sup> as well as civil penalties enforceable by the Attorney General of not less than \$100,000 for each violation.<sup>95</sup>

Several states had passed abortion bans similar to the Mississippi law upheld in *Dobbs*, as well as more restrictive fetal heart-beat bans in recent years. Before *Dobbs*, federal courts cited *Roe* to enjoin abortion bans in Georgia,<sup>96</sup> Alabama,<sup>97</sup> Arkansas,<sup>98</sup> Missouri,<sup>99</sup> Kentucky,<sup>100</sup> Mississippi,<sup>101</sup> North Dakota,<sup>102</sup> Ohio,<sup>103</sup>

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providers' application for a stay); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 443 (5th Cir. 2021) (per curiam) (holding that state officials, judges, and court clerks could not be sued to challenge S.B. 8 due to their lack of enforcement authority under the statute), *aff'd*, 142 S. Ct. 522 (2021); *Whole Woman's Health v. Jackson*, 23 F.4th 380, 389 (5th Cir. 2022) (certifying question to Texas Supreme Court as to whether Texas licensing officials are authorized by state law to enforce S.B. 8, which would make them amenable to suit), *mandamus denied*, 142 S. Ct. 701 (2022); *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022) (holding that Texas law does not authorize state officials on the Texas Medical Board to enforce the Texas Heartbeat Act).

92. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

93. H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

94. *Id.* §§ 1-2.

95. *Id.* § 2.

96. *Sistersong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1328 (N.D. Ga. 2020), *appeal filed*.

97. *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1059 (M.D. Ala. 2019).

98. *Edwards v. Beck*, 786 F.3d 1113, 1118-19 (8th Cir. 2015) (per curiam).

99. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 640 (W.D. Mo. 2019), *aff'd*, 1 F.4th 552 (8th Cir. 2021), *cert. denied*, 2021 WL 4509073 (U.S. 2021).

100. *EMW Women's Surgical Ctr. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 9047174, at \*3 (W.D. Ky. Mar. 20, 2019).

101. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

102. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015).

103. *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (granting preliminary injunction).



South Carolina,<sup>104</sup> and Tennessee<sup>105</sup> in lawsuits brought by abortion providers. After *Dobbs*, these state heartbeat bans are enforceable, and “trigger laws” that ban abortion from the moment of conception, except to save the pregnant woman’s life, have come into effect.<sup>106</sup> Without *Roe*, abortion bans that *Roe* made unenforceable are presumed to be valid; in Arizona, a state court recognized the validity of the pre-*Roe* abortion statute upon legal action by the Attorney General.<sup>107</sup>

The Mississippi statute upheld in *Dobbs* made an exception to the fifteen-week abortion ban for “a medical emergency or in the case of a severe fetal abnormality,” and its definition of “medical emergency” was limited to life-threatening physical disorders, illnesses, or injuries.<sup>108</sup> The Texas Human Life Protection Act that took effect after *Dobbs* also makes an exception when

[T]he pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.<sup>109</sup>

The Mississippi trigger law that went into effect after *Dobbs* bans all abortions except those “necessary for the preservation of the mother’s life or where the pregnancy was caused by rape,”<sup>110</sup> with

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104. *Planned Parenthood S. Atl. v. Wilson*, 520 F. Supp. 3d 823, 827 (D.S.C. 2021), *aff’d*, 26 F.4th 600 (4th Cir. 2022).

105. *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 437 (6th Cir. 2021), *vacated*, 18 F.4th 550 (6th Cir. 2021).

106. *See, e.g.*, ARK. CODE ANN. § 5-61-304(a) (2022); KY. REV. STAT. ANN. § 311.772(2)(a), (3)(a), (4) (West 2019); MO. REV. STAT. § 188.017(1), (4)(1) (2022); LA. STAT. ANN. § 40.1061(A)(1), (C), (F)-(G) (2018); 2022 Okla. Sess. Law Serv. ch. 133 § 1-2 (S.B. 1555) (West); S.D. CODIFIED LAWS § 22-17-5.1 (2022); TENN. CODE ANN. § 39-15-213(b), (c)(2), (d) (2022); MISS. CODE ANN. § 41-41-45(2) (2022); H.B. 1280, § 2-3, 87th Leg., Reg. Sess. (Tex. 2021); *see also State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Sept. 24, 2022), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/H4VF-Y5KZ>].

107. *Planned Parenthood Ctr. of Tucson v. Brnovich*, No. C127867, slip op. at 1-3, 6-7 (Ariz. Superior Ct., Pima Cnty. Sept. 22, 2022).

108. Gestational Age Act, MISS. CODE ANN. § 41-41-191(3)(j), (4)(b) (2018).

109. H.B. 1280, § 2, 87th Leg., Reg. Sess. (Tex. 2021).

110. MISS. CODE ANN. § 41-41-45(2) (2022).

the rape exception only applying “if a formal charge of rape has been filed with an appropriate law enforcement official.”<sup>111</sup>

There is a genuine question of whether the Mississippi abortion ban would have been upheld under the rational basis test that the *Dobbs* majority applied if the abortion ban had not included the medical emergency exception. The *Dobbs* majority held that a law regulating abortion “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.”<sup>112</sup> Those legitimate interests include, *inter alia*, “respect for and preservation of prenatal life at all stages of development,” and “the protection of maternal health and safety.”<sup>113</sup> Because the majority does not discuss it, it remains an open question as to how rational basis review would resolve a conflict between protecting prenatal life and protecting maternal health.

Justices Breyer, Sotomayor, and Kagan’s dissenting opinion in *Dobbs* asks:

Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the Fourteenth Amendment’s protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality?<sup>114</sup>

*Dobbs* upheld a statute that had an exception in place to save the pregnant person’s life. The question of whether such an exception for allowable abortions is necessary for an abortion ban to be upheld, and the scope of any such exception consistent with the pregnant person’s enumerated Fourteenth Amendment right to life, remains open.<sup>115</sup> In several countries that did not constitutionalize the right to abortion as *Roe* did in the United States, the process of

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111. *Id.* § 41-41-45(3).

112. 142 S. Ct. 2228, 2284 (2022).

113. *Id.*

114. *Id.* at 2336-37 (Breyer, Sotomayor & Kagan, JJ., dissenting).

115. I address ways in which these medical emergency provisions can be construed and expanded through litigation in Part IV.B.



asking and answering these complex questions in courts, legislatures, citizens' assemblies, and referenda has, over time, paved alternative paths to protecting access to more abortions than currently allowed by the new state abortion bans in the United States.

## II. EMERGING GLOBAL CONSENSUS NORMS ON ABORTION ACCESS

Other democracies' evolutions towards abortion access occurred in the context of their growing appreciation of the complex burdens and risks of pregnancy as well as an acceptance of state responsibility for the social and public dimensions of biological and social reproduction. While many liberal democracies restrict the *negative* right to abortion to a greater extent than *Roe* would allow, they protect a broader *positive* right to abortion than *Roe* required, by ensuring that those justified abortions permitted by law are safe *and free*, as well as decriminalized. This Part provides a brief overview of recent court decisions and legislation expanding abortion access in several countries that previously enforced abortion bans similar to those that have gone into effect in several states after *Dobbs*. It then describes the "indications" approach upon which many European countries have converged.

### *A. Recent Evolutions from Protecting the Unborn to Protecting Abortion Access*

It is particularly striking to observe the regimes of abortion access emerging recently in countries that have strong pro-life histories, such as Ireland.<sup>116</sup> While they fall short of the on-demand abortion that *Roe* prescribed before viability, they make abortions more safe, legal, *and free* than the state abortion bans that have become enforceable after *Dobbs*.<sup>117</sup> The abortion laws of the rest of the world occupy the space between *Roe v. Wade* and current state

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116. See *infra* Part III.B.

117. Compare generally Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31/2018) (Ir.), <https://www.irishstatutebook.ie/eli/2018/act/31/enacted/en/html> [<https://perma.cc/BM2Q-S3B3>], with MISS. CODE ANN. § 41-41-45 (2022), and H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

abortion bans, where most of the popular sentiment also resides.<sup>118</sup> Understanding that space is critical for reimagining a better future for unwanted pregnancy under the U.S. Constitution.

During the same period in recent years when nearly one-third of the states passed “heartbeat” abortion restrictions, several other constitutional democracies have repudiated their prior laws restricting abortion in favor of safe and legal abortion access, even after the detection of fetal cardiac activity. Countries with significant Catholic histories and populations, most notably Ireland, experienced a dramatic sea change from the constitutionally *required penalization* of abortion to protect unborn life,<sup>119</sup> towards the constitutionally *permitted protection* of safe and free abortion on demand in the first trimester.<sup>120</sup> Dialogue among courts adjudicating constitutional norms and legislatures implementing those norms through public policy has paved the way to abortion access that is more responsive to concerns of reproductive and distributive justice than the *Roe-Casey* framework has ever been. As of 2022, Irish law permits and funds more substantial access to abortion than does the law under Texas’s near-total abortion ban or other states’ “heartbeat” statutes that emerged contemporaneously with the transformation of Irish abortion law.<sup>121</sup>

Ireland is not alone in opening up abortion access. Several Latin American countries have also recently seen significant shifts from criminal abortion bans to constitutional abortion access. In February 2022, the Constitutional Court of Colombia held that the criminalization of abortions, including elective abortions, prior to twenty-four weeks of gestation, was unconstitutional.<sup>122</sup> This landmark decision invalidated the criminal abortion statute.<sup>123</sup> While

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118. See, e.g., *infra* Part III.A.

119. See *infra* notes 246-48 and accompanying text.

120. See Health (Regulation of Termination of Pregnancy) Act 2018, § 12 (Act No. 31/2018) (Ir.).

121. See *infra* notes 318-20 and accompanying text.

122. See Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055/22, Comunicado de prensa [C.P.] (vol. 5, pg. 1) (Colom.).

123. *Id.*

the court's judgment leaves open the possibility of governmental regulation of abortion prior to twenty-four weeks without criminalization,<sup>124</sup> the unconstitutionality of criminalization ended the regime under which some women choosing to terminate their pregnancies were still being imprisoned.<sup>125</sup>

In September 2021, the Supreme Court of Mexico unanimously rendered a historic decision invalidating the near-total ban on abortion in the Penal Code of Coahuila.<sup>126</sup> While recognizing that the interest in protecting fetal life increased with the time of gestation, a state's measures to protect the fetus had to be limited, to some degree, by the rights of women and gestating persons to reproductive freedom.<sup>127</sup>

In 2020, the Argentine Parliament ended its longstanding criminalization of almost all abortions by adopting a landmark law establishing the right of "women and persons of other gender identity with the ability to gestate" to choose abortion up to fourteen weeks' gestation, to access abortion care in the health system, to receive post-abortion services in the health system, and to prevent unwanted pregnancies with access to information, sex education, and effective contraceptives.<sup>128</sup> Beyond the fourteen-week line, the new Argentine statute permits abortions if the pregnancy is the result of a criminal violation, or if it endangers the life or whole health of the pregnant person.<sup>129</sup>

These developments grew out of earlier judicial decisions that underscored the constitutional stakes of abortion access without enforcing rights to abortion on demand. In 2006, the Constitutional Court of Colombia ruled that the criminal statute prohibiting abortions in all circumstances violated women's fundamental

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124. *See id.* (vol. 5, pg. 2).

125. *See* Laura Gottesdiener, "Feeling Free": Women Criminalized by Mexico's Abortion Bans Celebrate Ruling, REUTERS (Sept. 9, 2021, 10:12 AM), <https://www.reuters.com/world/americas/feeling-free-women-criminalized-by-mexicos-abortion-bans-celebrate-ruling-2021-09-09/> [<https://perma.cc/6TAS-JAEA>].

126. Acción de inconstitucionalidad, Suprema Corte de Justicia [SCJN], 148/2017, página 160-61 (Mex.).

127. Press Release, Suprema Corte de Justicia, Mexican Supreme Court: Landmark Decisions at the Vanguard for Reproductive Rights Worldwide (Oct. 1, 2021), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6606> [<https://perma.cc/4FCZ-EKCF>].

128. Law No. 27610, Dec. 30, 2020, B.O., art. 2, 4-6 (Arg.).

129. *Id.* art. 4.

rights.<sup>130</sup> Invoking the 1991 constitution and international human rights law, the constitutional court noted that the state's protection of fetal interests imposed a disproportionate burden on women.<sup>131</sup> The legislature, in enacting a criminal law, "cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race."<sup>132</sup> Therefore, abortion could not be criminalized in the following circumstances: (1) when the continuation of the pregnancy presents a risk to the life or physical or mental health of the woman, (2) when there are serious malformations that make the fetus nonviable, and (3) when the pregnancy is the result of rape, incest, unwanted artificial insemination, or unwanted implantation of the fertilized ovule.<sup>133</sup>

While the court entertained the possibility that some abortions could remain criminalized, it held that the legislature could not "require a complete sacrifice of any individual's fundamental right in order to serve the general interests of society or in order to give legal priority to other protected values."<sup>134</sup> While acknowledging a privacy interest, the Constitutional Court of Colombia emphasized the constitutional problem of requiring disproportionate individual sacrifices for the public good.<sup>135</sup>

In 2012, the Supreme Court of Argentina took a step towards abortion liberalization by affirming lower courts' refusal to apply criminal sanctions in the case of an abortion performed on a fifteen-year-old girl who had been raped by her stepfather.<sup>136</sup> The criminal statute prohibiting nearly all abortions made an exception for rape or sexual assault of mentally deficient or insane women, thereby

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130. See *C-355/06*, CORTE CONSTITUCIONAL DE COLOMBIA (May 10, 2006), <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9219> [<https://perma.cc/AC7Q-QVCK>].

131. See *id.*

132. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 75* (2017) (providing excerpted English translation of 2006 Colombian abortion case).

133. See *C-355/06*, *supra* note 130.

134. ESPINOSA & LANDAU, *supra* note 132, at 75.

135. See *id.*

136. *Argentine Court Decriminalises Abortion in Rape Cases*, BBC NEWS (Mar. 14, 2012), <https://www.bbc.com/news/world-latin-america-17360739> [<https://perma.cc/A9G4-SLSJ>].

calling into question the abortion that took place in that case.<sup>137</sup> By reasonably extending the exception to apply to a teenage rape victim, the court created a small space from which larger mobilizations could grow.

The Constitutional Court of Korea has also recently expanded abortion access. The country had criminalized abortion since 1953, and the court was perhaps less motivated by public Christian morality and more motivated by a postwar nation-building and population growth agenda.<sup>138</sup> In 2019, the Constitutional Court of Korea also issued a landmark decision concluding that the criminal abortion statute did not conform to the constitution.<sup>139</sup> The Korean statute had permitted abortions in more circumstances than those at issue in Colombia and Argentina: it authorized abortions up to twenty-four weeks' gestation for pregnancies that resulted from rape, quasi-rape, or incest; where the putative parents suffer from eugenic or genetic disability or disease; where the pregnant woman or spouse suffered from any specified contagious disease; and when maintaining the pregnancy was likely to severely injure the pregnant woman's health.<sup>140</sup>

An abortion provider challenged the statute, asserting the rights of pregnant women to choose abortion for broader reasons derived from the right to determine one's own destiny, particularly in the early weeks of pregnancy.<sup>141</sup> The court majority concluded that the constitutional violation occurred in "compelling a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances."<sup>142</sup> The court determined that the existing criminal prohibitions of abortion would become invalid if the legislature failed to remove the unconstitutional elements by December 31, 2020.<sup>143</sup>

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137. *See id.*

138. *See* Sunhye Kim, Na Young & Yurim Lee, *The Role of Reproductive Justice Movements in Challenging South Korea's Abortion Ban*, 21 HEALTH & HUM. RTS. J. 97, 99 (2019).

139. Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Bal27 1, 1 (S. Kor.), [http://search.court.go.kr/xmlFile/0/010400/2019/pdf/e2017b127\\_2.pdf](http://search.court.go.kr/xmlFile/0/010400/2019/pdf/e2017b127_2.pdf) [<https://perma.cc/N223-ELTJ>] (official English translation).

140. *Id.* at 3-4.

141. *See id.* at 2, 4-5.

142. *Id.* at 26-27.

143. *Id.* at 28.

Legislation was proposed, with pro-choice feminists favoring complete deletion of the criminal abortion statutes and others proposing a statute that tracked the more measured logic of the constitutional court's decision, allowing abortion on demand up to fourteen weeks and then for indicated reasons, including socio-economic reasons, from weeks fourteen to twenty-four. But the National Assembly did not pass legislation before the December 2020 effective date of the court's decision.<sup>144</sup> Thus, consistent with the constitutional court's ruling, the provisions of the criminal code authorizing the criminal punishment of women and abortion providers for performing unauthorized abortions are null and void.<sup>145</sup>

However, there remains doubt as to whether the invalidation of the abortion provision in the criminal code means that all abortions—such as late-term abortions—are legally permitted.<sup>146</sup> The constitutional court ruling did not invalidate the provisions of the Mother and Child Act, which define the indications for legal abortion only up to twenty-four weeks.<sup>147</sup> Before the effective date of the abortion law's invalidation, a doctor was convicted and sentenced to three years' imprisonment for performing a late-term abortion on a woman who was thirty-four weeks pregnant. The Supreme Court of Korea, citing the 2019 constitutional court decision, recognized that the abortion provision of the criminal code was no longer valid and affirmed the lower court's acquittal (on other grounds) under the abortion provision.<sup>148</sup> But the supreme court also declined to permit the appeal of the doctor's criminal conviction for murder.<sup>149</sup> Whereas the state of abortion law in Korea

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144. See Bak Chae-yeong, *Abortion No Longer a Crime, and Debates on the Right to Terminate Pregnancy Have Come to a Halt*, KYUNGHYANG SHINMUN (Dec. 23, 2020, 7:11 PM), [http://english.khan.co.kr/khan\\_art\\_view.html?code=710100&artid=202012231911467](http://english.khan.co.kr/khan_art_view.html?code=710100&artid=202012231911467) [https://perma.cc/P6EV-ZTRA].

145. 2017Hun-Bal27, at 28 (“The legislature shall amend these Provisions as early as possible, by December 31, 2020, at the latest, and if no amendment is made by then, these Provisions will be null and void as of January 1, 2021.”).

146. Kim Arin, *Not Illegal But Not Legal: The Murky Landscape of Abortion in Korea*, KOR. HERALD (July 7, 2022, 10:52 PM), <https://www.koreaherald.com/view.php?ud=20220707000805> [https://perma.cc/Q39F-2VHF].

147. *Id.*; see also 2017Hun-Bal27, at 28 (referring only to the criminal code's self-abortion and doctor provisions).

148. Daebeobwon [S. Ct.], Feb. 25, 2021, 2020Da12108 (S. Kor.), <https://casenote.kr/%EB%8C%80%EB%B2%95%EC%9B%90/2020%EB%8F%8412108> [https://perma.cc/AX2S-A4HH].

149. *Id.*



remains in flux due to the legislature's failure to act within the constitutional court's time limit, the constitutional court's analysis and the supreme court's decision not to disturb a murder conviction for a late-term abortion indicate a compromise between pro-life and pro-choice positions.

Prior to these developments expanding legal abortion access, abortion was criminalized, even in the earliest weeks of pregnancy. However, these jurisdictions have not embraced abortion on demand until viability. Instead, the new laws that protect abortion access resemble those of our peer democracies, where a much stronger state interest in early pregnancy and parenthood is enforced than would be permissible under *Roe* and its progeny.

### *B. The Indications Approach*

The shift from the protection of unborn life to the empowerment of women facing unwanted pregnancy is not a new trajectory. Contemporaneous with the period from *Roe* to *Casey*, European countries with majority Catholic populations, such as France and Italy, or powerful Christian democratic political parties, such as Germany, legalized abortion in a range of circumstances which usually make pregnancies unwanted, often through dialogue between the judicial and legislative branches.

This approach, known as the "indications" model, permits abortion—whether by establishing a right to terminate the pregnancy or by guaranteeing that the termination will not be criminally punished—essentially on demand early in the pregnancy, ranging from eleven to fourteen weeks' gestation. Between early pregnancy and approaching the viability line (anywhere from twenty to twenty-eight weeks), the law imposes procedural hurdles for permitted abortions, requiring doctors to certify the lawful justifications for the abortion. These may include averting a danger to the pregnant woman's physical or mental health in light of her social and economic situation, rape or incest as the cause of pregnancy, or a serious fetal abnormality. Many of these jurisdictions ban abortion after viability, with some jurisdictions explicitly recognizing exceptions for medical emergencies in which the abortion is necessary to overcome a serious threat to the pregnant woman's life. Because

most constitutional democracies comparable to the United States in wealth tend to have universal state-funded healthcare coverage, the legal frameworks that authorize lawful abortions tend to include—in contrast to *Roe v. Wade* and *Harris v. McRae*—the assumption that these lawful abortions will be publicly funded for the woman facing an unwanted pregnancy.

### 1. *Evolution and Expansion of Indications in Europe*

Under the indications model, some jurisdictions involve the State in judging the reasons for the abortion even in the earliest weeks of pregnancy, just as the law permits abortions for many of these same reasons. For example, since 1967, the Abortion Act in Britain provides that a person is not guilty of an offense

when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith ... that the continuance of the pregnancy would involve risk ... of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated.<sup>150</sup>

The statute also permits terminations that are “necessary to ... prevent grave permanent injury to the physical or mental health of the pregnant woman” regardless of the gestational age of the fetus, and also when “there is a substantial risk that if the child were born it would suffer from such physical and mental abnormalities as to be seriously handicapped.”<sup>151</sup>

Most European countries have similar frameworks, with some permitting abortions in the first weeks of pregnancy regardless of the reason, albeit with some procedural requirements, and more countries allowing abortions for health reasons, as the European Court of Human Rights has recognized.<sup>152</sup> For instance, the certification of distress was a requirement for all abortions within the

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150. Abortion Act 1967, ch. 87, § 1(1)(a) (Eng.).

151. *Id.* § 1(1)(b), 1(4).

152. *See A, B & C v. Ireland*, 2010-VI Eur. Ct. H.R. 225-26 (2010).



first trimester under a 1975 French law that liberalized access to abortion<sup>153</sup> and was upheld by the French Constitutional Council.<sup>154</sup>

The distress-certification requirement was removed only recently by the 2014 comprehensive statute on “Real Equality Between Women and Men.”<sup>155</sup> Proponents of abortion rights argued that requiring pregnant women to certify their state of distress was intrusive and paternalistic, even if the State refrained from second-guessing those self-certifications and permitted (and funded) all abortions that followed that process.<sup>156</sup>

Nonetheless, the 2014 reform in France did not remove the State’s intrusions into the woman’s mental and physical state with regard to abortions after the fourteenth week—when the law only authorizes abortions that are medically indicated, rather than voluntary.<sup>157</sup> The French public health code authorizes abortions for medical reasons throughout the pregnancy, as long as two doctors attest that the pregnancy poses a serious danger to the health of the woman, or that there exists a strong probability that the child will be born with a serious condition that is recognized to be incurable.<sup>158</sup>

The National College of French Gynecologists and Obstetricians recognizes “psycho-social” distress as among the dangers to the health of the woman that could rise to the level of seriousness

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153. See Loi no. 75-17 du 17 janvier relative à l’interruption volontaire de la grossesse [Law No. 75-17 of January 17 on Abortion], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 18, 1975, § 1 (“The pregnant woman whose state places her in a situation of distress can request an abortion from the doctor.” (translated by the author)).

154. Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975 (Fr.), <https://www.conseil-constitutionnel.fr/en/decision/1975/7454DC.htm> [<https://perma.cc/3S3V-FXAL>] (official English translation).

155. See Loi no. 2014-873 du 4 août 2014 pour l’égalité réelle entre les femmes et les hommes [Law No. 2014-873 of August 4, 2014 for Real Equality Between Men and Women], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 5, 2014, art. 24.

156. The minister of women’s rights at the time, Najat Vallaud-Velkacem, noted that abolishing the distress-certification requirement would bring the law in conformity with practice, noting that the Council of State had confirmed since 1980 that an actual situation of distress was not a precondition for women to access abortion. See Elvire Camus and Jonathan Parienté, *Suppression de la Notion de Détresse: Pour ou Contre, Quels Arguments?* LEMONDE (Jan. 23, 2014, 8:02 PM), [https://www.lemonde.fr/societe/article/2014/01/22/notion-de-detresse-dans-l-ivg-pour-ou-contre-quels-arguments\\_4352253\\_3224.html](https://www.lemonde.fr/societe/article/2014/01/22/notion-de-detresse-dans-l-ivg-pour-ou-contre-quels-arguments_4352253_3224.html) [<https://perma.cc/S2HL-YXDJ>].

157. See Code de la santé publique [C. santé publique] [Public Health Code] art. L2212-1 (Fr.) (authorizing voluntary abortion on request only until the fourteenth week of pregnancy).

158. Code de la santé publique [C. santé publique] [Public Health Code] art. L2213-1 (Fr.).

justifying an abortion for lawful reasons.<sup>159</sup> In recognition of the social and psychological factors that could justify abortions beyond early pregnancy, a 2001 law established that the interdisciplinary team to which the question of medical indication for abortion is submitted in an individual case must include a specialist in the health risk at issue, an obstetrician, a doctor or midwife chosen by the woman, and a qualified person bound by professional secrecy (which could include a doctor, midwife, psychiatrist, or social worker).<sup>160</sup> Two out of the four members of this interdisciplinary team must approve the medical indication for an abortion to be lawful after the fourteenth week of gestation.<sup>161</sup>

French law protects legal access to abortion regardless of reason for the first fourteen weeks and in a broad range of medical situations to protect the pregnant person's health beyond fourteen weeks. But it does so without a constitutional right to abortion. After *Dobbs*, several members of the French legislature reacted by introducing bills that propose to amend the French constitution to protect the abortion access currently authorized by statute.<sup>162</sup>

The Italian constitutional court struck down a statute in 1975 which had criminalized abortions, including in situations where the danger of the pregnancy to the physical well-being and mental stability of the pregnant woman were verified but fell short of the “necessity” defense to criminal liability.<sup>163</sup> The constitutional court

159. *IMG Psycho-Sociale Position—du CNGOF*, COLLÈGE NATIONAL DES GYNÉCOLOGUES ET OBSTÉTRICIENS FRANÇAIS (Oct. 11, 2019), <http://www.cngof.fr/actualites/677-img-psycho-sociale-position-du-cngof> [<https://perma.cc/RH49-H34E>].

160. Loi no. 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception [Law No. 2011-588 of July 4, 2001 Relating to Voluntary Termination of Pregnancy and Contraception], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 7, 2001, art. 11; Code de la santé publique [C. santé publique] [Public Health Code] art. L2213-1 (Fr.).

161. Code de la santé publique [C. santé publique] [Public Health Code] art. L2213-1 (Fr.).

162. See *Proposition de loi constitutionnelle visant à garantir le droit à l'interruption volontaire de grossesse*, ASSEMBLÉE NATIONALE (June 30, 2022), <https://www.assemblee-nationale.fr/dyn/operdata/PIONANR5L16B0008.html> [<https://perma.cc/W963-VYJE>]; *Proposition de loi constitutionnelle visant à inscrire le droit à l'interruption volontaire de grossesse dans la constitution*, SÉNAT (June 27, 2022), <http://www.senat.fr/leg/pp121-736.html> [<https://perma.cc/HGW3-NURG>].

163. See *Italian Constitutional Court—Decision N. 27/1975: Voluntary Termination of Pregnancy*, *BioDiritto* (Sept. 2, 2019), <https://www.biodiritto.org/Dossier/Lost-found-in-translation/Italian-Constitutional-Court-decision-n.-27-1975-voluntary-termination-of-pregnancy> [<https://perma.cc/4KVR-LQBU>].

reasoned: “There exists no equivalence at this time between the right of someone who is already a person—like the mother—not only to life, but also to good health, and the protection of the embryo, which has yet to become a person.”<sup>164</sup>

The legislature then adopted a new abortion statute in 1978 to implement the constitutional court’s reasoning, which begins with the following preamble: “The State recognizes the right to a willing and responsible procreation, recognizes the social value of motherhood and protects human life from its beginnings.”<sup>165</sup> The statute provides that, within the first ninety days of gestation, abortion is lawful in the presence of a danger to the physical or psychological health of the pregnant woman.<sup>166</sup> The statute directs doctors to consider the woman’s health in light of “her economic, social, and family situation, and the possibility that the child may be born with malformations must also be taken into consideration.”<sup>167</sup> After fetal viability, abortions are only permitted to save the life of the mother, with a requirement that the certifying physician take appropriate action to save the life of the fetus.<sup>168</sup>

## 2. *Indications in the United States Before Roe*

The indications model is not alien to U.S. law. Before *Roe*, the American Law Institute (ALI) included the indications model in its 1962 Model Penal Code.<sup>169</sup> Most of the states that liberalized access to abortion prior to *Roe* adopted the ALI approach.<sup>170</sup> Section 230.3 of the 1962 Model Penal Code proposed that “unjustified” abortion should be a felony, with the degree of punishment to be

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164. Corte cost., 18 febbraio 1975, n.27, Racc. uff. corte cost. 1975, 43, 201 (It.), <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1975&numero=27> [<https://perma.cc/EEH7-LSFR>] (“Ora non esiste equivalenza fra il diritto non solo alla vita ma anche alla salute proprio di chi è già persona, come la madre, e la salvaguardia dell’embrione che persona deve ancora diventare.”) (English translation by author).

165. VITTORIA BARSOTTI, PAOLO G. CAROZZA, MARTA CARTABIA & ANDREA SIMONCINI, *ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT* 125 (2016).

166. *Id.*

167. *Id.*

168. *Id.*

169. MODEL PENAL CODE § 230.3 (AM. L. INST., Proposed Official Draft 1962).

170. See Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, GUTTMACHER POL’Y REV. (Mar. 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> [<https://perma.cc/AD3P-RXR7>].

greater if performed after viability.<sup>171</sup> But it also defined “justifiable” abortion, as follows:

A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.<sup>172</sup>

Only a few states—Hawaii, Alaska, Washington, and New York—permitted more abortions than those indicated by this recommendation.<sup>173</sup>

One commentator noted that “physicians have shown an increased willingness to approve abortion on psychiatric grounds,”<sup>174</sup> and that, under the ALI recommendation,

[t]o the extent that abortion comes increasingly to be viewed as a medical question, to be managed by the medical profession—and given the inclusion of the mother’s “health” (physical and mental) as well as “life” among the excepting criteria in most reform statutes—it is quite possible that broad interpretation could gradually extend legal abortion to cover most (admittedly not all) abortion-seekers.<sup>175</sup>

But *Roe v. Wade* short-circuited this gradual expansion of abortion access through broad construction of the indications model in the United States, by pronouncing a negative constitutional right to abortion on demand before viability.<sup>176</sup>

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171. MODEL PENAL CODE § 230.3(1) (AM. L. INST., Proposed Official Draft 1962).

172. *Id.* § 230.3(2).

173. *See* Gold, *supra* note 170.

174. Edwin M. Schur, *Abortion*, 376 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 138 (1968).

175. *Id.* at 147.

176. *See* Ruth Bader Ginsburg, Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992). Shortly before her nomination to the U.S. Supreme Court, then-Judge Ruth Bader Ginsburg criticized *Roe v. Wade* because “the *Roe* decision left virtually no state with laws fully conforming to the Court’s delineation of abortion regulation still permissible,” despite the fact that “abortion law was in a state of change across the nation,” with “a marked

### III. CONSTITUTIONAL CHANGE RECOGNIZING THE PUBLIC VALUE OF PREGNANCY AND MOTHERHOOD

This Part focuses on two case studies of the transformation of abortion law, from the constitutional protection of unborn life to legal, safe, and free abortions in many of the circumstances of unwanted pregnancy. During the time that spanned between *Roe* and *Casey*, a gradual expansion of abortion access emerged in Germany.<sup>177</sup> During the decades from *Casey* to *Dobbs*, the Irish constitution was amended several times to protect access to abortion. This Part closely examines the German and Irish trajectories.

#### A. German Jurisprudence on the Burdens of Motherhood

Germany's expansion of abortion access was slower than that of peer nations such as France and Italy, largely because its constitutional court firmly rejected first-trimester abortion on demand as an affront to the State's duty to protect life.<sup>178</sup> Yet, in so doing, the German constitutional court articulated a robust conception of the State's positive duties, not only to the unborn fetus but to women facing unwanted pregnancies.<sup>179</sup> That reasoning—in the dicta of the court's abortion decisions—was central to the statutory frameworks adopted by the legislature in dialogue with the constitutional court that opened up abortion access.<sup>180</sup>

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trend in state legislatures 'toward liberalization of abortion statutes.'" *Id.* Earlier in the article, she favorably cited the Irish supreme court's decision in *Attorney General v. X*, [1992] IESC 1 [1992] 1 IR 1 (Ir.), as an instance of effective and collegial judicial opinion-writing "even in the most emotion-laden, politically sensitive case." *Id.* at 1187. For a discussion of *Attorney General v. X*, see *infra* Part III.B.2.

177. See Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 274-87 (1995). See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

178. See Neuman, *supra* note 177, at 275.

179. See *id.*

180. See *id.* at 275-76.

### 1. *The 1975 Rejection of Abortion on Demand*

In 1974, the West German legislature adopted a new law to permit abortions.<sup>181</sup> The law made it legal for women to obtain abortions, essentially on demand, in the first trimester.<sup>182</sup> The constitutional court of West Germany struck down this law, declaring it insufficiently respectful of human life.<sup>183</sup> In the 1975 landmark decision, the West German constitutional court rejected the statutory framework, pointing to the State's constitutional duty to protect human life under Articles 2.2 and 1.1 of the Basic Law.<sup>184</sup> Article 2.2 guarantees the right to life and physical integrity; Article 1.1 declares "human dignity" to be inviolable and imposes a duty of the State to protect it.<sup>185</sup>

By allowing *all* abortions up until the thirteenth week of pregnancy, as though they were purely private decisions immune from state intervention, the constitutional court held that the State had neglected the duty to protect life and dignity.<sup>186</sup> The court acknowledged, however, that in the case of abortion, the duty to protect the unborn life had to be carried out while simultaneously respecting the pregnant woman's constitutional rights. Every person has the right to "free development of her personality" insofar as she does not violate "the rights of others, the constitutional order, [or] the moral law."<sup>187</sup> Therefore, there would be situations where the "[r]ight to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy."<sup>188</sup>

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181. *See id.* at 274, 274 n.5.

182. *See id.* at 274.

183. *See* BVerfGE, 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, May 28, 1993, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528\\_2bvf000290en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvf000290en.html) [<https://perma.cc/HM5T-EWQE>] (official English translation). Further citations are to the English translation. Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551 (1976) [hereinafter *West German Abortion Judgment of 1975*].

184. *See* *West German Abortion Judgment of 1975*, *supra* note 183, at 609.

185. *See id.* at 641.

186. *See id.* at 609.

187. *Id.* at 643.

188. *Id.* at 647.

## 2. "Exactable" Burdens

The constitutional court acknowledged that abortion should be permitted when the burden of a pregnancy on the woman would be too great.<sup>189</sup> But which burdens are "normally" associated with pregnancy, and which go beyond? Abortions necessary to save a pregnant woman's life were clearly permitted.<sup>190</sup> Going further, the court framed the question through the concept of "exactability"<sup>191</sup>: how much can a State burden an individual woman in order to fulfill its own constitutional duty to protect unborn life? Even when there was no risk to the woman's life, the court acknowledged that "the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled with the means of the penal law."<sup>192</sup>

Although recognizing the possibility that such abortions should not be criminally punishable, the court rejected the 1974 statute because it was overinclusive: by allowing abortion simply at the woman's choice, it theoretically authorized additional abortions beyond these "non-exactable" pregnancies.<sup>193</sup> The law could legitimize abortions that were justified by a "reason ... worthy of esteem within the value order of the [German] constitution."<sup>194</sup> A woman suffering from "material distress" or "a grave situation of emotional conflict" could be excused from criminal liability, for instance.<sup>195</sup> Furthermore, the State was obligated "especially in cases of social need—to support her through practical measures of assistance."<sup>196</sup>

## 3. The Legislative Response

After the 1975 decision, the West German legislature drew up a new statute. Taking the constitutional court's concerns seriously,

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189. *See id.* at 647-49.

190. *Id.* at 647-48.

191. *Id.* at 647.

192. *Id.* at 648.

193. *See id.* at 653.

194. *Id.*

195. *See id.*

196. *Id.* at 649.



the new law in 1976<sup>197</sup> recriminalized abortion, except when a doctor separate from the one performing the abortion issued a nonbinding opinion certifying that the pregnancy posed a serious danger to the life or physical or mental health of the pregnant woman, which could not be averted by other means that the woman could reasonably be expected to bear.<sup>198</sup> The statute directed the doctor to consider the “present and future living conditions” of the woman in making this judgment.<sup>199</sup>

In practice, the 1976 law greatly expanded access to abortion<sup>200</sup> while remaining consistent with the constitutional court’s 1975 decision clarifying the State’s duty to protect unborn life.<sup>201</sup> Doctors thus certified abortions upon determining that the physical, psychological, or economic burdens of pregnancy and motherhood would be unreasonably excessive in individual cases. One German commentator observed that “almost every pregnant woman could obtain an indication if she did so with determination.”<sup>202</sup>

Even under a constitutional jurisprudence that emphatically rejected abortion on demand in the first trimester, the regime implemented by the legislature (and not reviewed or struck down by the court) resulted in 146 abortions for every 1,000 live births in 1982.<sup>203</sup> That number is comparable to the United States in 2019, where there were 195 abortions per 1,000 live births under a constitutional jurisprudence that recognized a negative right to abortion on demand before viability.<sup>204</sup>

197. Fünfzehntes Strafrechtsänderungsgesetz vom 18. Mai 1976 [Fifteenth Penal Law Amendment Act of May 18, 1976], May 18, 1976, BUNDESGESETZBLATT, Teil I [BGBl I] at 1213 (Ger.).

198. See Neuman, *supra* note 177, at 275-76.

199. See Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 375 (1986).

200. See *id.* at 380-82.

201. See Neuman, *supra* note 177, at 275 (“The legislature complied with the Court’s decision.”).

202. Eser, *supra* note 199, at 381. In 1977, 37 percent of the medical certifications for abortion were for a “medical” indication (physical or mental), and 57 percent of the certifications were for a “social” indication. *Id.* But by 1982, nearly 77 percent of abortions were certified based on the “social” indication. *Id.*

203. *Id.* at 382.

204. See *CDCs Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm) [<https://perma.cc/S8KZ-CZGL>].



In West Germany, a democratically elected legislature produced a pro-choice abortion law while respecting, rather than defying, the pro-life principles enforced by the countermajoritarian constitutional court. A synthesis of pro-choice and pro-life emerged from a dialogical process of democratic constitutionalism where both institutions tried to pursue the State's legitimate interest and duties with regard to human reproduction.

#### *4. Protecting Unborn Life by Supporting Parents*

After the fall of the Berlin Wall in 1989, German reunification posed a new challenge for the law of abortion. During Communism, East Germany had permitted abortions on demand in the first trimester,<sup>205</sup> whereas West Germany, since 1976, only permitted those indicated by doctors for the reasons specified in the criminal code.<sup>206</sup> In 1992, the reunified German legislature adopted a new law, the Pregnancy and Family Assistance Act,<sup>207</sup> which permitted abortions in the first trimester as long as the pregnant woman self-certified that the pregnancy caused distress to her.<sup>208</sup> In 1993, one year after *Casey*, the constitutional court for the unified Germany struck the new law down,<sup>209</sup> viewing it as essentially abortion on demand. The constitutional court reiterated the reasoning from the 1975 West German constitutional court decision.<sup>210</sup>

But this time, the German constitutional court gave new meaning to the State's duty to protect life by linking it to both Article 6.4 of the Basic Law—guaranteeing mothers the special protection and care of the community—and Article 3.2 of the Basic Law—the

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205. See Neuman, *supra* note 177, at 277.

206. See Fünfzehntes Strafrechtsänderungsgesetz [Fifteenth Penal Law Amendment Act], May 18, 1976, BUNDESGESETZBLATT, Teil I [BGBl I] at 1213 (Ger.).

207. Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act], July 27, 1992, BUNDESGESETZBLATT, Teil I [BGBl I] at 1398 (Ger.).

208. See *id.* at 1402-03, art. 13.

209. See BVerfGE, 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, May 28, 1993, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528\\_2bvf000290en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvf000290en.html) [<https://perma.cc/HM5T-EWQE>] (official English translation) [hereinafter German Abortion Judgment of 1993].

210. See *id.* ¶¶ 149-52, 166-96.

constitutional guarantee of “equal rights for men and women.”<sup>211</sup> The constitutional court wrote,

The state does not satisfy its obligation to protect unborn human life simply by hindering life-threatening attacks by third parties. It must also confront the dangers attached to the existing and foreseeable living conditions of the woman and family which could destroy the woman’s willingness to carry the child to term.<sup>212</sup>

The State had a duty under Article 6.4 to “attend to problems and difficulties, which the mother could encounter during the pregnancy.”<sup>213</sup>

The government could fulfill its constitutional duty to care for mothers by “[v]iewing motherhood and childcare as work, which lies in the interests of the community and is deserving of its recognition.”<sup>214</sup> The court continued:

The care owed to the mother by the community includes an obligation on the part of the state to ensure that a pregnancy is not terminated because of existing material hardship or material hardship expected to occur after the birth. Similarly, if at all possible, disadvantages for the woman in her vocational training or work resulting from a pregnancy ought to be removed. In fulfillment of its obligation to protect unborn human life, the state must attend to problems likely to cause a pregnant woman or mother difficulty, and try, to the extent legally and realistically possible and justifiable, to alleviate or solve those problems.<sup>215</sup>

It is noteworthy that the court also refers to “parents,” not only “mothers.” It recognized that “[p]arents who raise children are performing tasks whose fulfillment lies in the interests of the

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211. *See id.* ¶ 171.

212. *Id.* ¶ 166.

213. *Id.*

214. *Id.*

215. *Id.* ¶ 168.

community as a whole.”<sup>216</sup> In its view, the decision to bear or raise children was not entirely private, as the U.S. Supreme Court suggested in cases such as *Eisenstadt* and *Roe*.<sup>217</sup> It concerned the community and, by extension, the State.<sup>218</sup> Therefore, the duty to protect life meant that “the state is bound to promote a child-friendly society” in all areas of law and public policy, including housing, work and vocational training for mothers, labor law, and other private law areas.<sup>219</sup> The court specifically mentioned a law prohibiting the termination of a lease because of the birth of a child.<sup>220</sup> The duty to protect unborn life also entailed laws “which make it possible or easier for parents to meet their financial obligations following the birth of a child.”<sup>221</sup> This might involve, for instance, paid parental leave, as well as access to consumer loans.<sup>222</sup>

The constitutional court explicitly pointed to the relevance of Article 3.2 of the Basic Law, guaranteeing equal rights between men and women:

The obligations to protect unborn life, marriage and the family and to ensure equal rights for men and women in the workplace compel the state and especially the legislature to lay the right foundations so that family life and work can be made compatible and so that childraising does not lead to disadvantages in the workplace. To achieve this it is necessary for the legislature to invoke legal and practical measures which allow both parents to combine childraising and work as well as to return to work and progress at work after taking a break from work for childraising purposes.<sup>223</sup>

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216. *Id.* ¶ 170.

217. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding the right to “decide whether to bear or beget a child” within the “right of *privacy*” (emphasis added)); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (finding a pregnant woman’s right to “decide whether or not to terminate her pregnancy” within the “right of personal *privacy*” (emphasis added)).

218. *See German Abortion Judgment of 1993*, ¶ 170.

219. *Id.*

220. *Id.*

221. *Id.*

222. *See, e.g., id.*

223. *Id.* ¶ 171 (internal citations omitted).

The constitutional court recognized that the State could protect the unborn by equalizing the burdens between mothers and fathers and by providing childraising benefits and paid childraising breaks.<sup>224</sup>

Put slightly differently, there are many ways that a State can be pro-life, including by investing in a “child-friendly society.” The court recognized the value of childcare and suggested that the State must compensate for it: “Furthermore, the state must ensure that a parent, who gives up work to devote herself or himself to raising a child, be adequately compensated for any resulting financial disadvantages.”<sup>225</sup> It is fascinating to see how a judicial opinion restricting abortion ends up essentially requiring the State to provide paid parental leave for both fathers and mothers. While the court assumed in 1975 that it is reasonable to expect pregnant women to bear the “normal[ ]” burdens of motherhood,<sup>226</sup> by 1993, it acknowledged that even normal motherhood exacts heavy burdens unless the State intervenes to promote a “child-friendly society.”<sup>227</sup>

For all the talk of abortion “on demand,” most women who seek abortion in the United States are trying to avoid the real and often life-altering (if not life-ruining or life-threatening) personal costs of continuing a pregnancy when their life circumstances make those costs too much for them to bear. Many cannot afford to stay pregnant as a financial matter.<sup>228</sup> American women may lack health insurance to cover the costs of prenatal care and childbirth.<sup>229</sup> Because pregnancy often interferes with a woman’s education, work, or ability to care for dependents, staying pregnant also imposes long-term financial costs that women absorb.<sup>230</sup>

224. *Id.*

225. *Id.* ¶ 172.

226. See West German Abortion Judgment of 1975, *supra* note 183, at 647.

227. See German Abortion Judgment of 1993, ¶¶ 166, 170.

228. See M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the US*, BMC WOMEN’S HEALTH (July 5, 2013), <https://bmcmomenshealth.biomedcentral.com/articles/10.1186/1472-6874-13-29> [<https://perma.cc/6QEL-PG4L>].

229. See *id.*

230. *Id.* (finding 40 percent of women have abortions for financial reasons and 29 percent have abortions because they need to focus on their other children); Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112-13 (2005) (finding primary reasons for abortion are that having a child would interfere with a woman’s education, work, or ability to care for dependents and/or that the woman could not afford to have a baby).

Even in the course of rejecting a pro-choice statute that permitted abortion on demand, the German constitutional court articulated two important arguments for supporting a woman's choice to terminate in most of the actual circumstances that motivate women to choose abortion. First, that pregnancy and motherhood are burdens that women sustain to the benefit of society; and second, that if a woman carries a fetus to term, the State has a duty to minimize or compensate the woman's losses in absorbing these costs to society's benefit.<sup>231</sup>

The German constitutional court embraced the public dimension of pregnancy and parenthood. Childbearing and childrearing involve other people, the society, and the State.<sup>232</sup> Whether the State provides maternity healthcare, paid leave, daycare, quality education, or after-school programs is as relevant to any person's decision about whether to bear or beget a child as whether the State allows abortions or funds abortions. The decision is shaped by the relationship of a person to the community and the State and whether the State is fulfilling its responsibilities to the persons who do necessary work to perpetuate the community and to empower the State to further its goals.<sup>233</sup>

Once the court articulated what the constitution required of the state, the legislature responded. When the legislature rewrote the abortion law to comply with the constitutional court's 1993 ruling, it provided that abortions performed in the first twelve weeks, though "unlawful" in the criminal code, would not be criminally punishable.<sup>234</sup> Health insurance would only pay for abortions whose lawfulness could be established.<sup>235</sup> "Lawful" abortions would include those performed for medical reasons, including a serious risk to the pregnant woman's life or health (including mental health and suicide risks), or for embryopathic or criminal reasons.<sup>236</sup>

Because the law since 1976 directed doctors to consider the woman's present and future living conditions in certifying legal

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231. See German Abortion Judgment of 1993, ¶¶ 166-71.

232. See *id.* ¶ 170.

233. See *id.* ¶ 168.

234. See Schwangeren- und Familienhilfeänderungsgesetz [SFHÄndG] [Pregnancy and Family Allowance Act], Aug. 25, 1995, BUNDESGESETZBLATT, Teil I [BGBl I] at 1050 (Ger.).

235. *Id.* at 1053, art. 4.

236. *Id.*

abortions, social insurance continued to pay for all poor women's abortions, even if their "lawfulness" could not be established.<sup>237</sup> But for those with means, health insurance would only cover "lawful" abortions.<sup>238</sup> The new statute in 1995 required pregnant women to talk to a counselor and give reasons for having the abortion before it could be performed.<sup>239</sup> The practical reality, as was the case under the 1976 law, is that women can get certifications for "lawful" abortions as long as they are willing to tell the State why they are getting the abortion.<sup>240</sup> In real life, women seek abortions for one of the reasons indicated in the law.<sup>241</sup> Otherwise, women have the option of "unlawful"—but not punishable—abortion on demand after counseling in the first trimester, albeit unfunded.<sup>242</sup> In reality, over 80 percent of the abortions that take place in Germany are publicly funded.<sup>243</sup>

Furthermore, subsequent legislation expanded paid parental leave for both mothers and fathers, with an eye to policy features designed to encourage fathers to take more leave than they had taken in the past.<sup>244</sup> Both the legislature and the constitutional court acknowledged that fathers' take-up of parental leave directly affects mothers' ability to pursue employment opportunities.<sup>245</sup>

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237. *Id.* at 1054, art. 5. For a more detailed account of debates about and arrangements for public funding of abortions, largely concentrated in state social welfare programs that interpret "need" generously to cover the costs of abortions for women in financial need, see Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 133-34 (2012).

238. See Schwangeren- und Familienhilfeänderungsgesetz [SFHÄndG] [Pregnancy and Family Allowance Act], Aug. 25, 1995, BUNDESGESETZBLATT, Teil I [BGBl I] at 1050, art. 2 (Ger.); see also Christina P. Schlegel, *Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law*, 11 INT'L J.L., POL'Y & FAM. 36, 47 (1997).

239. See Rebouché, *supra* note 237, at 103.

240. Neuman, *supra* note 177, at 284; Rebouché, *supra* note 237, at 131.

241. See Rebouché, *supra* note 237, at 131-32 (listing common reasons patients provided at counseling for abortions in Germany).

242. See Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, 11 FIU L. REV. 149, 154 (2015).

243. See *id.* at 157 (citing MANFRED SPIEKER, *KIRCHE UND ABTREIBUNG IN DEUTSCHLAND: URSACHEN UND VERLAUF EINES KONFLIKTES* 105 (2d ed. 2008)).

244. See Gesetz zur Einführung des Elterngeldes [Parental Allowance and Parental Leave Act], Dec. 5, 2006, BUNDESGESETZBLATT, Teil I [BGBl I], at 2748, art. 1, §§ 1-2 (Ger.); see also Nora Reich, *Predictors of Fathers' Use of Parental Leave in Germany*, 50 POPULATION REV. 1, 2 (2011).

245. BVerfG, 1 BvR 2712/09, ¶ 5, June 6, 2011, [https://www.bundesverfassungsgericht.de/erkr20110606\\_1bvr271209.html](https://www.bundesverfassungsgericht.de/erkr20110606_1bvr271209.html) [<https://perma.cc/Z68D-RKVR>].

### 5. *Insights for the United States*

In sum, the development of German abortion law illustrates (1) that the regulation of abortion is deeply intertwined with the State's orientation towards the full range of reproductive activities, from begetting and bearing a child to birthing and raising one; (2) that the State is responsible for the way socially beneficial reproduction affects the mother's prospects for leading a decent life; and (3) how the State implements these constitutional values is a matter for democratically elected branches, guided by the judicial elaboration of constitutional principles. All three insights are useful for American lawyers, legislators, and policymakers navigating the new legal landscape without *Roe* in the United States. The German abortion story shows that there are human values other than privacy, compatible with the protection of unborn life, that can be deployed to expand abortion access incrementally.

#### *B. The Irish Constitutional Transformation: Tragic Pregnancies and Citizens' Assemblies*

The evolution of Irish abortion law showcases an additional path to constitutional change, one involving dialogue between courts, both supranational and national, the legislature, and the people themselves. In Ireland, the development of pro-choice policy in a predominantly Catholic, pro-life nation occurred through the democratic process of constitutional amendment. Popular mobilization around the public specter of women facing life-threatening pregnancies drove significant changes in constitutional abortion law, including constitutional amendments.

##### *1. The Pro-Life Constitutional Amendment of 1983*

In Ireland, a constitutional duty to protect unborn life was added to the Irish constitution in 1983,<sup>246</sup> largely as pro-life groups attempted to stop the global spread of *Roe v. Wade* and other

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246. For an account of the campaign that led to the adoption of this amendment, see generally TOM HESKETH, *THE SECOND PARTITIONING OF IRELAND? THE ABORTION REFERENDUM OF 1983* (1990).



countries' permissive abortion laws<sup>247</sup> into Irish law.<sup>248</sup> As the pro-life constitutional amendment was being considered and debated, a woman named Sheila Hodggers died of breast cancer, shortly after giving birth to a baby.<sup>249</sup> During her pregnancy, she was denied cancer medications due to their potential harmful effects on the fetus.<sup>250</sup> Doctors refused to deliver the fetus early to allow her to be treated for cancer because such a premature delivery could result in the death of the fetus and thus amount to a criminally punishable abortion.<sup>251</sup> Two days after delivering a baby in March 1983, Hodggers died.<sup>252</sup>

After her death, the language of the proposed pro-life constitutional amendment was changed to acknowledge the right to life of the mother.<sup>253</sup> It read: "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."<sup>254</sup> This version was eventually approved in the referendum that fall and added to the Irish constitution as its Eighth Amendment, codified at Article 40.3.3.

The Irish people approved the Eighth Amendment of the Irish Constitution by 67 percent of the vote in September 1983.<sup>255</sup> In light of Hodggers' highly publicized death in March, it is doubtful as to

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247. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, J.O. 671 (Fr.) (upholding law liberalizing abortion); Abortion Act 1967 ch. 87, § 1 (Eng.); Wet afbreking zwangerschap, 1 mei 1981, S. 1981 (Neth.); ABORTLAG (Svensk författningssamling [SFS] 1974:595) (Swed.); LÖG UM RÁÐGJÖF OG FRÆÐSLU VARÐANDI KYNLÍF OG BARNEIGNIR (1975 nr. 25) (Ice.).

248. In 1974, the Supreme Court of Ireland had cited *Griswold v. Connecticut* to strike down a statute banning contraceptives. See *McGee v. Att'y Gen.* [1973] IESC 2 [1974] IR 284 (Ir.). Anti-abortion groups seem to have feared that favorable citation of *Roe v. Wade* could be next.

249. See LINDSEY EARNER-BYRNE & DIANE URQUHART, *THE IRISH ABORTION JOURNEY, 1920-2018*, at 78-79 (John Arnold et al. eds., 2019); KITTY HOLLAND, *SAVITA: THE TRAGEDY THAT SHOOK A NATION* 95-96 (2013).

250. See HOLLAND, *supra* note 249, at 95-96.

251. See *id.*

252. See *id.* at 95.

253. 341 Dáil Deb. (Apr. 27, 1983) col. 1 (Ir.).

254. Eighth Amendment of the Constitution Act, 1983, § 1 (Ir.), <https://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print> [<https://perma.cc/GFL7-S6S3>].

255. See Brian Girvin, *Social Change and Moral Politics: The Irish Constitutional Referendum 1983*, 34 POL. STUD. 61, 76 (1986).

whether the Eighth Amendment would have passed without the language protecting “the equal right to life of the mother.” While some feminists criticized the proposition that the mother’s right to life should be “equal” to that of an unborn fetus, an unintended consequence of this language is that it created an opening for a path to abortion legalization in Ireland, including the eventual repeal of the Eighth Amendment itself.

## 2. *Expanding the Mother’s Right to Life*

In 1992, the Irish Supreme Court interpreted the “equal right to life” language to permit abortion access for a pregnant girl facing the risk of suicide.<sup>256</sup> In *Attorney General v. X*, a fourteen-year-old girl had been raped by an older man, and her parents intended to travel with her to Britain for an abortion.<sup>257</sup> While Irish law enforcement authorities sought to enjoin them from traveling abroad to obtain an abortion, the Irish Supreme Court ruled that the Irish constitution entitled the girl to a lawful abortion consistent with Irish law because the constitutional clause protecting unborn life also recognized the equal right to life of the mother.<sup>258</sup> The court found that the pregnancy of the fourteen-year-old rape victim posed a danger to her life because the evidence established a credible threat of suicide.<sup>259</sup> The court read Article 40.3.3 as legalizing abortions necessary to save a pregnant person’s life.<sup>260</sup>

Faced with a suicidal fourteen-year-old girl who had been raped, the *X* case shifted public opinion—and the constitutional text—on abortion.<sup>261</sup> Three proposed constitutional amendments about abortion were sent to the people in a referendum shortly thereafter.<sup>262</sup> In December 1992, the people chose to amend Article 40.3.3. with two of these three provisions.<sup>263</sup> These amendments liberalized abortion

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256. See *Att’y Gen. v. X* [1992] IESC 1 [1992] 1 IR 1, ¶¶ 27, 35-45 (Ir.).

257. See *id.* ¶¶ 2-4.

258. See *id.* ¶¶ 4-5, 27, 35-45.

259. See *id.* ¶¶ 40-44.

260. See *id.* ¶ 44.

261. See Ailbhe Smyth, *The ‘X’ Case: Women and Abortion in the Republic of Ireland, 1992*, 1 FEMINIST LEGAL STUD. 163, 163-64 (1993).

262. See EARNER-BYRNE & URQUHART, *supra* note 249, at 86-87.

263. See *A, B & C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, 203 (2010).

by clarifying the legal permissibility of travel abroad by Irish residents and citizens to obtain abortions that would be illegal in Ireland and by protecting the free flow of information about abortions available abroad.<sup>264</sup> Another amendment was proposed that was intended to limit abortions only to situations where the pregnant woman's life—rather than health—was at risk, with language explicitly excluding suicide risks from this exception.<sup>265</sup> That proposed amendment would have been drafted by those who opposed the legal right of the fourteen-year-old rape victim to access an abortion in Ireland. The referendum made clear that the public did not support this extreme pro-life position: 65 percent of the voters rejected the suicide amendment whereas similar percentages approved the other two amendments.<sup>266</sup> In 2002, another referendum was held to revisit the question of whether suicide risk should be excluded from the risks to life justifying legal abortions.<sup>267</sup> The Irish voters rejected that proposed amendment yet again,<sup>268</sup> making it clear that they found serious mental health risks to be compelling as justifications for lawful abortion.

### 3. *European Human Rights Law and the Need for a Workable Framework*

Almost three decades after Hodggers' death, the life-threatening situation of a pregnant cancer patient again nudged Ireland to reform its abortion law in the direction of authorizing the legality of more abortions. In *A, B & C v. Ireland*, the European Court of Human Rights upheld the Irish Eighth Amendment, including the provisions protecting travel and information, and it declined to recognize a privacy-based human right to abortion rights.<sup>269</sup> At the same time, the European court weakened the Irish constitution's

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264. See GOV'T OF IR., DEP'T OF HOUS., PLAN., & LOC. GOV'T, REFERENDUM RESULTS 1937-2019, 48, 50 (2020), <https://www.gov.ie/en/publication/32ea7-1937-2019-referendum-results/> [<https://perma.cc/9XR9-E56A>].

265. See *id.* at 46.

266. See *id.* at 46-51; *A, B & C*, 2010-VI Eur. Ct. H.R. at 203.

267. See EARNER-BYRNE & URQUART, *supra* note 249, at 87; *A, B & C*, 2010-VI Eur. Ct. H.R. at 203-04.

268. See *A, B & C*, 2010-VI Eur. Ct. H.R. at 204.

269. See *id.* at 255-56, 273-74.

abortion ban by ruling that Ireland had failed to adopt a clear legal framework to protect the right to life of the mother when it is threatened by a pregnancy.<sup>270</sup> The cancer patient, Claimant C, became pregnant while undergoing cancer treatment and sought an abortion due to the potentially life-threatening risks of continuing a pregnancy during chemotherapy.<sup>271</sup> *A, B & C v. Ireland* held that Ireland violated the European Convention on Human Rights by not providing a legal framework for determining when a risk to the mother's life warranted a lawful abortion.<sup>272</sup>

Shortly thereafter, a woman died under circumstances where an abortion might have saved her life. Savita Halappanavar was seventeen weeks pregnant, carrying a baby she wanted to have, when she went to a hospital in Galway with back pain.<sup>273</sup> She was having a miscarriage, and although her water broke, her body did not expel or deliver the fetus.<sup>274</sup> Because doctors detected fetal cardiac activity, they feared that removing the fetus would expose them to criminal prosecution, and therefore, they did nothing to accelerate the miscarriage or abort the fetus.<sup>275</sup> Meanwhile, Halappanavar developed sepsis, an infection of the tissue that her body did not expel quickly enough during the miscarriage.<sup>276</sup> The infection caused her to have a heart attack, which killed her at the age of thirty-one.<sup>277</sup>

Halappanavar's death exposed the stark practical reality of banning abortions. Even with a legally recognized exception for risks to the mother's life, the Irish abortion ban caused the deaths of pregnant women by chilling doctors from acting in the face of seemingly unserious health risks that escalated quickly to become life-threatening.<sup>278</sup> By enacting and maintaining this abortion ban, the State bore some responsibility for the loss of these women's lives.<sup>279</sup> Halappanavar's story illustrated how murky the line often

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270. *See id.* at 269-70.

271. *See id.* at 265.

272. *See id.* at 270.

273. *See* HOLLAND, *supra* note 249, at 10, 13.

274. *See id.* at 14-15.

275. *See id.* at 16, 18-19.

276. *See id.* at 21-24.

277. *See id.* at 32-33.

278. *See id.* at 34.

279. *See id.* at 34-36.

was between risks to the mother's life and risks to the mother's physical and mental health. An infection can remain mild or become life-threatening in a very short time span.<sup>280</sup> Doctors must make quick predictions and judgments in rapidly changing medical circumstances without fear of prosecution and punishment for acting in the moment without time to gather all relevant information.

Within a year of Halappanavar's death, the Irish Parliament enacted the Protection of Life During Pregnancy Act of 2013, which implemented the ruling by the European Court of Human Rights.<sup>281</sup> It created a legal framework that clarified when an abortion to save the life of the pregnant woman would be legal.<sup>282</sup> Abortions would not be prosecuted if two doctors agreed that there was a risk of death from physical illness; but in emergency situations, one doctor was authorized to make the decision.<sup>283</sup> In cases of risk to life by suicide, three doctors' assent was required, including a psychiatrist specializing in maternity care and a psychiatrist treating the pregnant woman requesting the abortion.<sup>284</sup>

#### 4. *Engaging the People in Constitutional Change*

Halappanavar's death did more than simply nudge compliance with the European court's decision. Her death occurred in the midst of a pivotal moment of innovation in Irish constitutionalism, a few months after the Irish Parliament had established the Convention on the Constitution<sup>285</sup>—a body consisting of thirty-three politicians and sixty-six randomly selected citizens from electoral lists, representing a spread of age, gender, socioeconomic status, working status, and region.<sup>286</sup> The convention was charged with deliberating on eight topics that were ripe for constitutional reform to make

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280. *See, e.g., id.* at 26-32.

281. Protection of Life During Pregnancy Act 2013 (SI 35/2013), §§ 7-9 (Ir.), <https://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf> [<https://perma.cc/G92J-C2LQ>].

282. *See id.*

283. *See id.* §§ 7-8.

284. *See id.* § 9.

285. 772 Dáil Deb. (July 10, 2010) col. 1 (Ir.).

286. *See id.*; BEHAVIOUR & ATTITUDES, CONSTITUTIONAL CONVENTION—MEMBERS OF THE PUBLIC RECRUITMENT PROCESS, <http://www.constitutionalconvention.ie/Documents/BehaviourAndAttitudes.pdf> [<https://perma.cc/JHC3-RHG2>].

recommendations to Parliament.<sup>287</sup> Several of these topics were issues directly bearing on gender equality: same-sex marriage, the constitutional clause recognizing the role of women in the home, and measures to increase the participation of women in public life and in politics.<sup>288</sup>

Although abortion was not on the agenda in 2012, a discussion of the social value of motherhood was.<sup>289</sup> Questions were raised about the need to change Article 41.2 of the Irish constitution, which recognizes the contributions of women through their work in the home and as mothers. That provision reads as follows:

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° 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.<sup>290</sup>

The convention did not resolve the issue of amending these clauses in 2013, but it did propose a constitutional amendment recognizing marriage equality for same-sex couples.<sup>291</sup> The same-sex marriage amendment was ultimately approved in a 2015 referendum and added to the Irish constitution.<sup>292</sup>

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287. See 772 Dáil Deb. (July 10, 2012) col. 1 (Ir.).

288. *Id.*

289. See CONVENTION ON THE CONST., SECOND REPORT OF THE CONVENTION ON THE CONSTITUTION 4 (May 2013), <https://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=268d9308-c9b7-e211-a5a0-005056a32ee4> [<https://perma.cc/UTJ6-TZW9>] [hereinafter SECOND CONVENTION REPORT].

290. CONSTITUTION OF IRELAND 1937 art. 41.2.

291. See CONVENTION ON THE CONST., THIRD REPORT OF THE CONVENTION ON THE CONSTITUTION 4 (June 2013), <https://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4> [<https://perma.cc/8RHN-7MA5>] [hereinafter THIRD CONVENTION REPORT]. Note that, although the Convention on the Constitution recommended a constitutional amendment guaranteeing gender equality as well, that proposal has not been adopted by the Irish Parliament for a referendum. See SECOND CONVENTION REPORT, *supra* note 289, at 4.

292. Éanna Ó Caollai & Mark Hilliard, *Ireland Becomes First Country to Approve Same-Sex Marriage by Popular Vote*, IRISH TIMES (May 24, 2015, 12:42 PM), <https://www.irishtimes.com/news/politics/marriage-referendum/ireland-becomes-first-country-to-approve-same-sex-marriage-by-popular-vote-1.2223646> [<https://perma.cc/GF4F-QWCM>].



The initial success of the Convention on the Constitution led Parliament to establish a Citizens' Assembly in 2016 to deliberate on the constitution's treatment of abortion and climate change.<sup>293</sup> Composed similarly to the previous Convention on the Constitution and chaired by Justice Mary Laffoy, a former Justice of the Irish Supreme Court, the Citizens' Assembly met over five weekends throughout 2017 to discuss whether the Eighth Amendment—protecting unborn life—should be revised or repealed.<sup>294</sup>

There was an Expert Advisory Group of law professors, political scientists, doctors, and ethicists who distributed papers written by themselves and other experts throughout the nation.<sup>295</sup> Experts were invited to speak on panels to the assembly.<sup>296</sup> Small group discussions centered on whether the Eighth Amendment should simply be repealed or whether the amendment should be replaced.<sup>297</sup> If the latter, one option was to constitutionalize the woman's right to choose an abortion, as in *Roe v. Wade* in the United States.<sup>298</sup> Another option was to authorize the legislature to legislate to protect unborn life and women facing unwanted pregnancies, specifying the conditions and procedures under which pregnancies could be terminated.<sup>299</sup> Ultimately, it was this latter option, not a *Roe*-inspired amendment, that prevailed.<sup>300</sup>

The Citizens' Assembly spent many weekends considering the circumstances under which abortions should be legalized, with debates around whether to distinguish between risks to life and risks to health, serious risks versus ordinary risks, physical health versus mental health, and whether it was meaningful to distinguish between abortions for socioeconomic reasons and abortions without

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293. 918 Dáil Deb. (July 13, 2012) col. 1 (Ir.), <https://www.oireachtas.ie/en/debates/debate/dail/2016-07-13/33/> [<https://perma.cc/RHB7-HA9R>].

294. *Id.*; CITIZENS' ASSEMBLY, FIRST REPORT AND RECOMMENDATIONS OF THE CITIZENS' ASSEMBLY 1, 3, 8 (June 2017), <https://2016-2018.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf> [<https://perma.cc/V9VD-EQX2>] [hereinafter FIRST ASSEMBLY REPORT].

295. *See* FIRST ASSEMBLY REPORT, *supra* note 294, at 50-52.

296. *See id.* at 52.

297. *See id.* at 17-18.

298. *See id.* at 20-21.

299. *See id.* at 20-21, 31.

300. *See id.* at 25, 31.



regard to reasons.<sup>301</sup> The assembly worked on draft ballots for the constitutional amendment referendum.<sup>302</sup> Ultimately, 87 percent of the Citizens' Assembly voted that the Eighth Amendment should not be retained in full, and 57 percent favored replacing it with a provision authorizing the legislature to address termination of pregnancy, including any rights of the unborn and any rights of the pregnant woman.<sup>303</sup>

The Citizens' Assembly heard recordings of interviews of six women whose lives were affected by the Irish abortion ban, including women who had abortions abroad and women who had continued their pregnancies.<sup>304</sup> Two had wanted pregnancies but discovered in the course of the pregnancy that the fetus had abnormalities that would be fatal either in utero or shortly after being born.<sup>305</sup> But the other four had unplanned pregnancies, and their stories illustrated the socioeconomic effects of such situations that could often last a lifetime.<sup>306</sup> Papers presented by the National Women's Council of Ireland,<sup>307</sup> Parents for Choice,<sup>308</sup> and the Coalition to Repeal the Eighth Amendment<sup>309</sup> also included statistics and data about the effects of pregnancy on low-income women and

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301. *See id.* at 32-37.

302. *See id.* at 14-15, 17.

303. *The Eighth Amendment to the Constitution*, CITIZENS' ASSEMBLY, <https://2016-2018.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/> [<https://perma.cc/362J-6HS5>].

304. *See* CITIZENS' ASSEMBLY, PAPERS AND PRESENTATIONS FROM CITIZENS' ASSEMBLY SPEAKERS: FROM MEETINGS NOVEMBER 2016 TO APRIL 2017 548-70, <https://2016-2018.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Appendix-E-Volume-2.pdf> [<https://perma.cc/Q9ZG-AEX2>].

305. *See id.* at 560-66.

306. *Id.* at 548-59, 567-70.

307. *See* NAT'L WOMEN'S COUNCIL OF IR., PAPER OF THE NATIONAL WOMEN'S COUNCIL OF IRELAND DELIVERED TO THE CITIZENS' ASSEMBLY 2 (Mar. 5, 2017), <https://2016-2018.citizensassembly.ie/en/Meetings/NWCI-s-Paper.pdf> [<https://perma.cc/DF5S-LUHA>] (describing poverty-based impacts).

308. *See* PARENTS FOR CHOICE, PAPER OF PARENTS FOR CHOICE DELIVERED TO THE CITIZENS' ASSEMBLY 1 (Mar. 5, 2017), <https://2016-2018.citizensassembly.ie/en/Meetings/Parents-for-Choice-s-Paper.pdf> [<https://perma.cc/D9SH-9DPJ>] (describing lack of support services and cuts to social programs).

309. *See* COAL. TO REPEAL THE EIGHTH AMEND., PAPER OF COALITION TO REPEAL THE EIGHTH AMENDMENT DELIVERED TO THE CITIZENS' ASSEMBLY 3 (Mar. 5, 2017), <https://www.rte.ie/documents/news/coalition-to-repeal-the-eighth-with-cover-page.pdf> [<https://perma.cc/YWB9-XSF4>] (describing impact on women with low incomes).

families and the inadequacy of State support for parenthood. Citing recent cuts to the lone parents allowance in Ireland, Organisation for Economic Co-operation and Development data on childcare costs, inadequate support for families with special-needs children, and maternal mortality in Ireland,<sup>310</sup> the Parents for Choice paper argued, “[t]his country forces us into parenthood and then not only lends no support but actively penalises us when we’re there.”<sup>311</sup>

The assembly also deliberated on what should be included in abortion legislation. Strong majorities favored permitting abortion due to risk to the physical or mental health of the woman (79 percent and 78 percent respectively), as distinct from “real and substantial” or “serious” risks to life only.<sup>312</sup> A strong majority (72 percent) also favored lawful abortions for “[s]ocio-economic reasons.”<sup>313</sup> While there was significant consensus supporting lawful abortion access to avert risks to women’s physical and mental health, and for socioeconomic reasons, less than half (48 percent) recommended lawful termination of pregnancy without restriction up to twelve weeks of gestation age.<sup>314</sup>

Similar to the German constitutional court in decades prior,<sup>315</sup> the Citizens’ Assembly rejected abortion on demand, but they supported lawful abortions for most of the situations that motivated women to seek abortions—when the pregnancy threatens the life, health, and socioeconomic well-being of the pregnant woman. These recommendations shaped the abortion bill that was publicized during the referendum campaign on the amendment to repeal the Eighth Amendment.<sup>316</sup> The referendum succeeded by a vote of 66 percent.<sup>317</sup>

Following the referendum on the constitutional amendment, the Irish Parliament adopted a new statute in 2018.<sup>318</sup> The new law

310. See PARENTS FOR CHOICE, *supra* note 308, at 1-2.

311. *Id.* at 1.

312. FIRST ASSEMBLY REPORT, *supra* note 294, at 32-34.

313. *Id.* at 36.

314. *Id.* at 4, 36.

315. See *supra* Part III.A.

316. See *supra* notes 304-06 and accompanying text.

317. Kimiko de Freytas-Tamura, *Ireland Votes to End Abortion Ban*, in *Rebuke to Catholic Conservatism*, N.Y. TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/world/europe/ireland-abortion-yes.html> [<https://perma.cc/HN6V-FFDQ>].

318. Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31/2018), (Ir.),

permits abortions, upon the choice of the pregnant woman, within the first twelve weeks, as long as a three-day waiting period is observed.<sup>319</sup> Essentially, this is abortion on demand in the first trimester, without restriction as to reasons, with the procedural constraint of a waiting period. Legal abortions are fully covered and free of charge for medical card holders in Ireland's public health insurance scheme.<sup>320</sup> Beyond the twelfth week of pregnancy, the law now permits abortions to save the woman's life or to avert serious health risks—mental and physical—following doctor decision-making procedures similar to those established by the 2013 law.<sup>321</sup>

Within a generation, the constitutional law of abortion in Ireland changed dramatically through the dialogue of courts—both national and supranational—the legislature, citizens' assemblies, and the people through the constitutional amendment process. Pivotal steps from pro-life to pro-choice occurred at moments when the public was confronted with a pregnant woman or girl who was likely to die without an abortion, and some who actually did.<sup>322</sup> Privacy—bodily, familial, or medical—is not what saved abortion access. Growing public concern and sympathy for what happened to these women and girls in private did.

### *5. Abortion's Relationship to Constitutional Gender Equality and the Protection of Care Work*

In Ireland, the democratic and participatory process of constitutional change played an important role in bringing about the constitutional amendment that opened up access to abortion. After abortion was legalized, the national conversation about how to value motherhood while promoting gender equality continued. In 2019, the Irish Parliament authorized a new Citizens' Assembly on gender equality,<sup>323</sup> the themes of which are a direct outgrowth of the public

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<https://www.irishstatutebook.ie/eli/2018/act/31/enacted/en/pdf> [<https://perma.cc/8AQF-8PGW>].

319. *Id.* § 12.

320. *Abortion*, IRISH FAM. PLAN. ASS'N (Mar. 2, 2022), <https://www.ifpa.ie/get-care/abortion/> [<https://perma.cc/HVM6-TKNJ>].

321. *Compare* Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31/2018) §§ 9-10, *with supra* note 278 and accompanying text.

322. *See supra* notes 246-77 and accompanying text.

323. *See* 985 Dáil Deb. (July 11, 2019) col. 4 (Ir.), <https://www.oireachtas.ie/en/debates/>

conception of pregnancy and motherhood that has been so central to developing a more humane approach to abortion access. The new Citizens' Assembly was charged with considering proposals for legislative and/or constitutional change to address remaining barriers to gender equality, such as "dismantl[ing] economic and salary norms that result in gender inequalities," reassessing economic value on "work traditionally held by women," seeking women's "full and effective participation" in leadership and "decision-making in the workplace, politics and public life," recognizing the importance of parental care work, facilitating work-life balance, "examin[ing] the social responsibility of care and women and men's co-responsibility for care, especially within the family," and "structural pay inequalities."<sup>324</sup>

The constitution's Article 41.2, recognizing the contributions of women "within the home" as well as the State's duty to "ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home," was brought back to the agenda as a provision in need of modernization and amendment.<sup>325</sup> In the twenty-first century, the constitutional language referring to women "within the home" seems sexist on its face. As one commentator put it, it is "a quite stunning example of linguistic gender stereotyping and an appeal to a false universal notion of womanhood."<sup>326</sup> It entrenched 1937 assumptions that only women *should* do household work and that only mothers (not fathers) have *duties* in the home that conflict with paid work, as academic commentators have pointed out for decades.<sup>327</sup>

Yet in the abortion context, recognizing the losses, risks to life, and inequalities women sustain because of biological and social

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debate/dail/2019-07-11/31/ [https://perma.cc/R8WJ-CHNE].

324. *About the Citizens' Assembly*, CITIZENS' ASSEMBLY, <https://www.citizensassembly.ie/en/previous-assemblies/2020-2021-citizens-assembly-on-gender-equality/about-the-citizens-assembly/> [https://perma.cc/J3MJ-89NY].

325. CONSTITUTION OF IRELAND 1937, art. 41.2.

326. Alan DP Brady, *Gender and the Irish Constitution: Article 41.2, Symbolism and the Limitation of Courts' Approach to Substantive Gender Inequality*, in *LAW AND GENDER IN MODERN IRELAND: CRITIQUE AND REFORM* 211, 211 (Lynsey Black & Peter Dunne eds., 2019).

327. See *id.* at 212-13 (quoting Alpha Connelly, *The Constitution*, in *GENDER AND THE LAW IN IRELAND* 5 (Alpha Connelly ed., 1993)); Dolores Dooley, *Gendered Citizenship in the Irish Constitution*, in *IRELAND'S EVOLVING CONSTITUTION, 1937-97: COLLECTED ESSAYS* 127-28 (Tim Murphy & Patrick Twomey eds., 1998).

motherhood was central to the constitutional amendment liberalizing abortion.<sup>328</sup> The 2021 Citizens' Assembly on gender equality took up the question of whether and how the constitution should value the care work traditionally performed by mothers without entrenching traditional gender roles.<sup>329</sup> Since its adoption in 1937, Article 41.2 has been embraced by both gender conservatives and feminists.<sup>330</sup> In the 1980s, feminist lawyers argued in divorce cases that women who had not contributed financially to marital property were entitled to a share of the property because of Article 41.2's recognition of the value created by women's work in the home.<sup>331</sup>

The Irish abortion amendment of 2018 must be understood in light of the Citizens' Assembly's deliberations about the women "within the home" clause of the constitution that came before and after the abortion amendment. The abortion amendment of 2018 was part of a larger constitutional transformation about women's contributions to Irish life, both private and public.<sup>332</sup> The 2013 debates about mothers' duties in the home were not about abortion,<sup>333</sup> but the two subjects are causally connected. The report of the Convention on the Constitution noted that 86 percent of child-care is carried out by women,<sup>334</sup> that only 55 percent of women are in employment,<sup>335</sup> and that the absence of childcare prevents women from becoming more active in public affairs.<sup>336</sup> A few years later, 72 percent of the Citizens' Assembly that convened in 2017 supported the legality of abortion for "socio-economic" reasons,<sup>337</sup> understanding

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328. See *supra* notes 298-313 and accompanying text.

329. See *About the Citizens' Assembly*, *supra* note 324.

330. See Dooley, *supra* note 327, at 128.

331. In *L. v. L.*, [1992] 2 IR 77 (Ir.), the Irish Supreme Court declined to interpret Article 41 expansively to support women's economic security in divorce, but Catherine McGuinness, a feminist lawyer who later became an Irish Supreme Court judge, had argued in favor of the expansive reading. See *id.*; Laura Cahillane, *Revisiting Article 41.2*, 40 DUBLIN U. L.J., no. 2, 2017, at 107, 118-19. A decade later, in *T. v. T.*, the Irish Supreme Court upheld a large lump sum payment from a wealthy husband to a wife who had scaled back her career in the context of divorce, with one judge—Susan Denham, the first woman on the Irish Supreme Court—invoking Article 41.2. See [2002] IESC 68 (Ir.) (Denham, J.).

332. See *supra* note 285 and accompanying text.

333. See *supra* notes 285-86 and accompanying text.

334. See SECOND CONVENTION REPORT, *supra* note 289, at 15.

335. *Id.*

336. *Id.* at 25.

337. *The Eighth Amendment to the Constitution*, *supra* note 303.

that having a baby can disrupt gainful employment and lead to unemployment or poverty. The Constitutional Convention that met in 2013 did not send a specific proposal to amend Article 41.2 at the time, but the concerns about the socioeconomic effects of motherhood and the inadequacy of state support returned in constitutional conversations about legalizing abortion.<sup>338</sup>

The abortion referendum of 2018 appears to have catalyzed renewed energy towards amending Article 41.2. Indeed, there were some groups that linked abortion liberalization to reform of Article 41.2. The Stay-At-Home Parents Association of Ireland supported replacing Article 41.2 with gender-neutral language protecting all parents and carers.<sup>339</sup> They explicitly built their case for replacing, rather than repealing, Article 41.2, by connecting their goals to the constitutional reform of abortion: “When we voted yes on May 25th, we were voting not only for the choice to end pregnancies, but also to being supported with the continuation of pregnancies and for parenthood.”<sup>340</sup> This statement reflects a step in the Irish constitutional discourse towards integrating abortion rights into a broader vision of reproductive justice. This vision demands State support for the choice to become a parent, in recognition of the benefits to the State and society that accrue from its citizens shouldering the costs of bearing and raising children. This demand is equal in importance to the negative right to terminate a pregnancy. This focus on the State’s duties to enable its citizens to parent any children they choose to have in a healthy, safe, and supportive environment as duties that are connected to citizens’ rights not to have children recalls the broad reproductive justice framework that critical race feminists have advocated for, going beyond *Roe* and its emphasis on private choice in matters of pregnancy and parenting.<sup>341</sup>

The final report of the 2020-2021 Citizens’ Assembly recommended deleting Article 41.2 and replacing it “with language that is not gender specific and obliges the State to take reasonable measures

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338. *See supra* notes 304-10 and accompanying text.

339. HOUSES OF THE OIREACHTAS, JOINT COMMITTEE ON JUSTICE AND EQUALITY, REPORT ON PRE-LEGISLATIVE SCRUTINY OF THE GENERAL SCHEME OF THE 38TH AMENDMENT OF THE CONSTITUTION (ROLE OF WOMEN) BILL 75 (2018) (Ir.).

340. *Id.* at 76.

341. *See supra* Part I.C.



to support care within the home and wider community.”<sup>342</sup> In July 2022, heeding the recommendations of the Citizens’ Assembly, the Joint Committee on Gender Equality of the Irish Parliament (Oireachtas) issued a report proposing constitutional amendment language for referendum in 2023. The Committee presented several gender-neutral options for expressing the constitutional commitment to supporting care in the home and community for the legislature to consider.<sup>343</sup> It also recommended adding a clause to the Irish constitution guaranteeing gender equality.<sup>344</sup>

Beyond constitutional amendments, the Citizens’ Assembly recommended, by 96.7 percent of the vote, to move over the next decade to a “publicly funded, accessible and regulated model of quality, affordable early years and out of hours childcare,” including by increasing “the State share of GDP spent on childcare, from the current 0.37% of GDP to at least 1% by no later than 2030.”<sup>345</sup> In addition, it recommended an expansion of paid parental leave so as to mirror the policies that were pioneered in Sweden and other Scandinavian countries and adopted by Germany and France following their most recent sex equality constitutional amendments.<sup>346</sup> Specifically, the Citizens’ Assembly recommended that paid leave for parents should “[c]over the first year of a child’s life” and “[b]e non-transferable to encourage sharing of childcare responsibility between parents.”<sup>347</sup>

### 6. *Insights for the United States*

The evolution of the Irish constitutional provisions on abortion and motherhood can shed light on what is at stake in the ongoing conflicts over abortion bans in the United States. In the absence of

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342. CITIZENS’ ASSEMBLY, REPORT OF THE CITIZENS’ ASSEMBLY ON GENDER EQUALITY 12 (June 2021), <https://www.citizensassembly.ie/en/previous-assemblies/2020-2021-citizens-assembly-on-gender-equality/about-the-citizens-assembly/report-of-the-citizens-assembly-on-gender-equality.pdf> [<https://perma.cc/B44E-VF8Z>] [hereinafter REPORT ON GENDER EQUALITY].

343. See HOUSES OF THE OIREACHTAS, JOINT COMMITTEE ON GENDER EQUALITY, INTERIM REPORT ON CONSTITUTIONAL CHANGE 22-24 (2022) (Ir.).

344. *Id.* at 10-11.

345. REPORT ON GENDER EQUALITY, *supra* note 342, at 61, 120.

346. See *id.* at 130; *supra* note 241 and accompanying text; Suk, *supra* note 43, at 24, 29, 35-36.

347. REPORT ON GENDER EQUALITY, *supra* note 342, at 61.



law and policy supporting people who become pregnant and parent the next generation of citizens, prohibiting women from terminating their pregnancies enables the State to profit from the uncompensated work of mothers (through pregnancy, childbirth, and childcare within the home), both because it produces the citizenry and workforce and because it more abstractly protects unborn life.

From this perspective, the prior Irish abortion ban effectively unjustly enriched the State by allowing the State to reap all of the benefits of maternity without compensating women for its costs, with adequate maternity benefits, childcare, employment protections, and other staples of mothers' economic security. Any society that continues to extract maternity from women through abortion restrictions is indebted to women who absorb the costs, risks, and sacrifices of remaining pregnant to produce the benefits of more citizens and workers that accrue to the society.

In the United States, the new abortion bans that have become legal after *Dobbs* force women to carry out unwanted pregnancies without acknowledging the public value of childbearing and without compensating or supporting women for their contributions to society. Awareness of this dimension of abortion bans should shift more public attention towards laws that properly value the sacrifices involved in staying pregnant and becoming a mother.

#### IV. AMERICAN PATHS FORWARD: MOTHERHOOD AS PRIVATE CHOICE OR PUBLIC GOOD?

Although it is easy enough to embrace cynicism and lament the unlikelihood of constitutional amendments expanding abortion access in the United States under existing Article V amendment procedures, U.S. law contains underutilized avenues for redressing the burdens of unwanted pregnancy articulated in *Roe* and *Casey* that deserve closer attention and development in the post-*Dobbs* landscape. This Part sketches out these strategies. The most significant is a takings-based challenge to the new abortion bans. Its theory draws on arguments made by some scholars in favor of challenging abortion bans on Thirteenth Amendment grounds, which I briefly consider in this Part. Finally, beyond these constitutional arguments, I propose arguments that abortion providers

can make, if prosecuted, to expand the exceptions to abortion bans to protect the health and life of the pregnant person.

*A. Building Takings and Thirteenth Amendment Challenges to Abortion Restrictions*

*1. The Takings Challenge*

The idea that motherhood is undervalued and uncompensated is not new to the public policy debates in the United States. From the drive for mothers' pensions during the Progressive Era<sup>348</sup> to the wages for housework movement of the 1970s<sup>349</sup> and the pandemic-era calls for a Marshall Plan for Moms,<sup>350</sup> some American feminists have long demanded public compensation for the collective benefits conferred on society and the nation by women's disproportionate childbearing and childrearing load. When a State bans abortion, it requires the pregnant person to endure a physically demanding bodily change for nine months, and then it imposes legal parenthood on her for the next eighteen years, with legally enforceable responsibilities. A law banning abortion effectively extracts physical and mental labor from women for the benefit of others, often for the collective public good. This extraction resembles a regulatory taking requiring compensation by the State.

The Fifth Amendment provides that private property shall not "be taken for public use without just compensation."<sup>351</sup> Scholars have long grappled with the line between substantive due process (*Roe's* constitutional home for abortion access) and takings.<sup>352</sup> A governmental action that causes property loss can either be a legitimate exercise of the police power or a taking.<sup>353</sup> If the latter, there exists

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348. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 424-79 (Harv. Univ. Press rev. ed. 1995).

349. See SILVIA FEDERICI, *WAGES AGAINST HOUSEWORK* (1st ed. 1975) reprinted in *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* 15-22 (2012).

350. H.R. Res. 121, 117th Cong. (2022); S. Res. 87, 117th Cong. (2022).

351. U.S. CONST. amend. V.

352. See RICHARD ALLEN EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 111 (1985); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 *CORNELL L. REV.* 305, 305 (2012).

353. See Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 *VA. L. REV.* 277, 284 (2001).

a governmental duty of just compensation that is owed to those from whom private property is taken for public use.<sup>354</sup> As Joseph Blocher notes, a regulation registers as a taking when it goes too far, and the determination often focuses on the property interest that is being affected.<sup>355</sup>

To recast abortion bans as regulatory takings, the property interest of the pregnant woman that is affected must be clearly identified.<sup>356</sup> Once the property interest is established, the State's coerced continuation of a woman's unwanted pregnancy would have to be plausibly characterized as a public use.<sup>357</sup> Then, the takings claim would contemplate what would constitute just compensation by the State.<sup>358</sup> To begin, the obvious objection to a takings framework would deny the existence of any private property right associated with pregnancy, and it would perhaps question whether pregnancies, particularly unwanted pregnancies, confer any public benefit so as to constitute a public use when the state compels their continuation.

#### *a. Pregnancy as a Public Good*

The constitutions of many of our peer democracies, including those of Germany, Ireland, France, Italy, South Korea, Mexico, Argentina, and Colombia, either authorize or obligate the State or public policy to protect pregnant women or mothers.<sup>359</sup> Ireland's

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354. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964).

355. In 1922, in *Pennsylvania Coal Co. v. Mahon*, Justice Holmes said that if a regulation goes too far, it is a taking. 260 U.S. 393, 415 (1922). Joseph Blocher observes that the Court's subsequent regulatory takings jurisprudence can be understood through a functional lens, whereby a largely factual inquiry is undertaken to assess the impact of the regulation on the property interests, ultimately focusing on the property interests themselves. See Joseph Blocher, *Bans*, 129 YALE L.J. 308, 337 (2019).

356. See Blocher, *supra* note 355, at 331.

357. See *id.* at 332-33.

358. See *id.* at 311.

359. See Grundgesetz [GG] [Basic Law], § 6.4, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html); CONSTITUTION OF IRELAND 1937 art. 41.2; 1948 CONST. Preamble ¶ 11 (Fr.); Art. 37 CONSTITUZIONE [Const.] (It.); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 36(2) (S. Kor.); Constitución Política de los Estados Unidos Mexicanos [CP], art. 123(B)(XI)(c), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014; Art. 75(23), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 43. For an account of the origins of maternity clauses in European constitutions, see generally Julie Suk, *Gender Equality and the*

clauses about the woman “within the home”<sup>360</sup> and “mothers”<sup>361</sup> are efforts—albeit excessively gendered by twenty-first century standards—to recognize the valuable contributions of pregnancy and motherhood to the public and collective good. The collective benefits include the gestation, birth, and raising of a new generation of citizens and workers, concretely speaking, as well as the State’s ability to protect life, more abstractly, by promoting a culture of life. These textual provisions stand in stark contrast to *Roe*’s vision of childbearing and childrearing as private zones in which the State has no strong interest nor grounds for intervention.

Yet the American states that have adopted near-total bans of abortion have defended their statutes, in legislative history and in litigation, by asserting a public interest in the protection of unborn life, even before fetal viability.<sup>362</sup> In Texas, S.B. 8 empowers everyone to sue an abortion provider who performs an unlawful abortion, in an apparent departure from the typical legal requirement that civil plaintiffs themselves suffer a concrete injury.<sup>363</sup> Underlying this widely distributed enforcement power is the implicit assumption that everyone is injured when these unborn lives are prevented from developing into born persons. The statutory design presumed a strong state interest in the gestation of unborn life that overrides the pregnant woman’s interest in her own health and well-being in the course of her life.

Other constitutional democracies also embrace this public interest in protecting unborn life, but over the decades, they have come to acknowledge that there is a serious constitutional problem with requiring the only class of citizens who are capable of getting and staying pregnant to absorb the full costs and sacrifices necessary to protect the State’s interest in gestating unborn life to produce the next generation of citizens. Yet even under the U.S. Constitution,

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*Protection of Motherhood in Global Constitutionalism*, 12 LAW & ETHICS OF HUM. RTS. 151 (2018).

360. CONSTITUTION OF IRELAND 1937 art. 41.2.1

361. *Id.* art. 41.2.2.

362. The supporters noted, “Enforcing the Texas Heartbeat Act only through civil enforcement by private citizens, not the state, would strengthen citizens’ ability to hold violators accountable for a practice that many Texans find morally objectionable.” See HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS: S.B. 8 (2D READING), 87th Leg., Reg. Sess. at 9 (2021).

363. See generally *id.*

other situations involving the extraction of public benefits from private individuals pose a constitutional problem. The Takings Clause provides the constitutional anchor for such grievances.<sup>364</sup>

Compelled pregnancy and motherhood are no longer due process violations after the overruling of *Roe*, but the extraction of public benefits from pregnant women and mothers can be challenged as an unjust enrichment of the State giving rise to a duty of restitution. Thus reframed, the constitutional problem need not be remedied by an injunction stopping the State from regulating to protect the unborn altogether; sometimes it is appropriate for the State to offer just compensation to the individuals who absorb the disproportionate costs of pursuing a public purpose.

### *b. Property Rights in Pregnancy*

To launch a takings challenge to abortion bans, the private property that is being taken must be identified.<sup>365</sup> The risks, costs, burdens, and sacrifices of continuing an unwanted pregnancy may not, at first glance, seem like a taking of private property. Yet three significant changes that occurred in the legal landscape since *Roe* make it plausible to view the legally compelled continuation of an unwanted pregnancy as a taking of private property: (1) the recognition of property rights in body parts and tissue (including embryos),<sup>366</sup> (2) the enforceability of commercial surrogacy contracts by which a woman is entitled to compensation for the renting of her womb,<sup>367</sup> and (3) changes in parentage law, including Safe Haven laws,<sup>368</sup> that have weakened the presumption, in some cases, that

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364. At least one commentator has suggested that abortion providers could challenge targeted regulation of abortion providers (TRAP) laws, such as those requiring abortion providers to have admitting privileges at surgical hospitals, under a takings theory. See generally Hope Silberstein, Comment, *Taking on TRAP Laws: Protecting Abortion Rights through Property Rights*, 2017 U. CHI. LEGAL F. 737 (2017). Shortly after *Casey* was decided, one scholar suggested that abortion regulations should be approached through a takings theory. See Susan E. Looper-Friedman, "Keep Your Laws Off My Body": *Abortion Regulation and the Takings Clause*, 28 NEW ENG. L. REV. 253, 256 (1995).

365. See *supra* notes 352-53 and accompanying text.

366. See *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 498-99 (Ct. App. 1988).

367. See *infra* notes 379-82 and accompanying text.

368. See *infra* note 383 and accompanying text.

the woman who gives birth to a child is that child's legal mother. These legal developments, taken together, support the characterization of a legally compelled pregnancy as the State's rent-free tenancy in the pregnant person's womb.

*i. Property Rights in Body Parts and Tissue*

This proposition construes the womb as private property. In 1988, a California court of appeal opened up the possibility of treating body parts as private property for the purposes of advancing the common-law claim of conversion.<sup>369</sup> In a case of first impression, Moore, a leukemia patient, asserted a property right in his spleen after he learned that the doctors who removed his spleen subsequently kept it to develop a cell line which aided the production of therapeutic and commercially valuable pharmaceuticals.<sup>370</sup> Moore sued the University of California hospital alleging several causes of action, including conversion and unjust enrichment.<sup>371</sup> One element of conversion is that a plaintiff must establish ownership or a right of possession of the property at the time of the conversion.<sup>372</sup> The appeals court permitted Moore to allege a property right in his own tissues, including his spleen, blood, and the cell line derived from his cells.<sup>373</sup> The court acknowledged the need for "prudence in attributing the qualities of property to human tissue," noting the difference between self-ownership of one's body, on the one hand, and "being the property of another," on the other.<sup>374</sup> The court concluded, "Plaintiff's spleen, which contained certain cells, was something over which plaintiff enjoyed the unrestricted right to use, control and disposition;" and "[t]he essence of a property interest—the ultimate right of control—therefore exists with regard to one's own human body," at least for the purposes of a conversion action.<sup>375</sup> The California Supreme Court pulled the brakes on this theory of private property in one's own human tissue once it was

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369. *See Moore*, 249 Cal. Rptr. at 498-99.

370. *Id.* at 498.

371. *Id.*

372. *Id.* at 503.

373. *Id.*

374. *Id.* at 504.

375. *Id.* at 505-06.



removed from one's body, but allowed the case to proceed for lack of informed consent and lack of fiduciary duty.<sup>376</sup> But *Moore* never settled the question of whether the law might enforce a property right in tissue that remains within one's own body.

Furthermore, courts have inched towards recognizing ownership interests in reproductive material. In *Hecht v. Superior Court*, a California court of appeal was confronted with fifteen vials of sperm which a man had bequeathed to his girlfriend when he took his own life.<sup>377</sup> The decedent's two adult children urged the probate court to order destruction of the sperm, arguing that the girlfriend could not have a possessory interest in the sperm once it left the decedent's body.<sup>378</sup> The California court of appeal, however, reasoned that the man had an ownership interest in his own sperm, and his decision-making authority over that sperm was sufficient to constitute "property" within the meaning of the probate code, allowing it to be bequeathed like property to his girlfriend.<sup>379</sup> Courts have also treated frozen embryos as marital property in the context of divorce,<sup>380</sup> and have enforced contractual agreements about their distribution upon divorce. Dicta in these cases assume a property interest in body parts that remain in one's own living body.<sup>381</sup> Thus, one can characterize the womb as private property. Property rights would include the right to control its use, including excluding use by others. Such right of control has never encompassed the right to injure, destroy, or kill others in the course of controlling and enjoying one's property. But it does entail the right to exclude and/or profit from others' use of the property.

### *ii. Commercial Gestational Surrogacy's Transformation of Legal Motherhood*

The rise of commercial gestational surrogacy in the decades since *Roe* exemplify a person's exercise of property rights over her womb.

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376. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

377. 59 Cal. Rptr. 2d 222, 223-24 (Ct. App. 1996) (unpublished).

378. *Id.*

379. *Id.* at 226.

380. See, e.g., *Bilbao v. Goodwin*, 217 A.3d 977, 988 (Conn. 2019); *Patel v. Patel*, 99 Va. Cir. 11 (2017).

381. See *Bilbao*, 217 A.3d at 991 (dictum); *Patel*, 99 Va. Cir. at 13 (dictum).



In gestational surrogacy arrangements, a person agrees to become pregnant with another's child, and to carry that pregnancy to term, allowing the use of her womb for the period of gestation in exchange for remuneration.<sup>382</sup> The pregnant person is merely the gestational carrier of the unborn life, which transitions from embryo to fetus to infant within her uterus; the gestational carrier is usually not the infant's legal parent after the child is born.<sup>383</sup> Typically, the gestational carrier is not the genetic parent of the child either because the embryo is often formed with the egg donated or purchased from another party.<sup>384</sup> The evolution of reproductive technology and surrogacy law have made it possible, if not normal, that neither the genetic mother (that is, the woman from whom the egg originates) nor the birth mother (that is, the woman who gestates and delivers the baby) becomes the child's legal mother.<sup>385</sup> The unique legal status of the gestational carrier—increasingly common in surrogacy arrangements for childbearing and childrearing—has transformed modern understandings of pregnancy and parenthood. There is nothing conceptually difficult about imagining a pregnant person gestating an infant for the benefit of others in exchange for pay.

### *iii. Legal Parenthood Under Safe Haven Laws*

Even in the absence of surrogacy, where other private individuals or couples are the intended or presumptive legal parents, not the pregnant woman, the "Safe Haven" laws that have been adopted in almost every state since 1999 have also changed the law's approach to the parental rights and responsibilities of a person carrying an unwanted pregnancy to term.<sup>386</sup> Safe Haven laws, at least on paper, reassure the pregnant woman that she does not have to be a legal mother when she delivers the baby. Safe Haven laws separate pregnancy from legal parental responsibilities to the newborn infant and from any liability to the State, so long as the infant is safely

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382. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2301-02 (2016).

383. See *id.* at 2303.

384. *Id.* at 2302.

385. See *id.* at 2305-06.

386. See generally Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

delivered to public authorities, typically at a hospital, police station, or fire station.<sup>387</sup>

Because Safe Haven laws relieve the birth parents of the duties and burdens of legal parenthood, Justice Amy Coney Barrett suggested that abortion bans do not impose forced motherhood in terms of parenting on anyone.<sup>388</sup> Because of Safe Haven laws, abortion bans only imposed the much lesser burden of pregnancy without parenting, which Justice Barrett acknowledged as an “infringement on bodily autonomy,” akin to vaccine mandates.<sup>389</sup> She was correct that Safe Haven laws can terminate a birth mother’s parental rights and responsibilities immediately upon the child’s birth, enabling women facing unwanted pregnancies to carry the pregnancy to term without occupying, intending, or even entertaining the role of legal parent.<sup>390</sup> Because Safe Haven laws effectively terminate the pregnant woman’s parental rights and responsibilities almost immediately upon birth, in the same way that gestational surrogacy arrangements assign legal parenthood to the intended parents rather than to the pregnant and birthing woman, the characterization of every unwanted pregnancy as a tenancy of the womb by the child of another becomes an accurate description of the situation.

### *c. Liability for Nonconsensual Womb Rental*

The Safe Haven laws implicitly and in effect make the State the legal guardian or parent of the embryo/fetus/infant who is occupying the unwilling pregnant woman’s womb. The fetus is being housed for survival, rent free. In the famous property case of *Vincent v. Lake Erie*, the Minnesota Supreme Court recognized that a steamship owner could lawfully moor her ship to another person’s dock without the dockowner’s consent when necessary to

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387. *See id.* at 754-55.

388. Transcript of Oral Argument at 56, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

389. *Id.* at 56-57.

390. For example, Texas’s “Baby Moses” law, which was the first Safe Haven law enacted in the nation in 1999, provides that a court may terminate the parent-child relationship if the parent voluntarily delivers a child younger than thirty days old to an emergency medical services provider, who is to take possession of the child. *See* 1999 Tex. Gen. Laws 3947-50.

survive a storm.<sup>391</sup> But the steamship owner was liable for damage caused to the dock, however necessary.<sup>392</sup> Similarly, it is the State, on behalf of the life-affirming society, that owes rent to the pregnant woman whose womb is being occupied without her consent when abortions are banned. The State's obligation is even more acute in jurisdictions that fail to protect pregnant women from the economic insecurities that come from exposure to pregnancy discrimination and failure to accommodate pregnancy in remunerative employment, or from high rates of maternal mortality which are exacerbated by lack of access to affordable healthcare and/or health insurance.<sup>393</sup> The United States has higher rates of maternal mortality than countries similar in wealth and development,<sup>394</sup> and many of the states that are instituting near-total bans on abortion have some of the highest rates of maternal mortality.<sup>395</sup> Within this landscape, maternal mortality rates are higher for poor women<sup>396</sup> and Black women.<sup>397</sup>

Regarding the pregnancy as a coerced and uncompensated occupation of the pregnant woman to optimize the public interest, one may recall the famous violinist hypothetical in philosopher Judith Jarvis Thomson's seminal 1971 article, *A Defense of Abortion*.<sup>398</sup> There, Thomson famously raised the question of whether a

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391. 124 N.W. 221, 221-22 (Minn. 1910).

392. *Id.* at 222.

393. See Siegel, *supra* note 83, at 216-21.

394. Gianna Melillo, *U.S. Ranks Worst in Maternal Care, Mortality Compared With 10 Other Developed Nations*, AM. J. MANAGED CARE (Dec. 3, 2020), <https://www.ajmc.com/view/us-ranks-worst-in-maternal-care-mortality-compared-with-10-other-developed-nations> [<https://perma.cc/9HFG-3H2B>]; see also J. Phillip Gingrey, *Maternal Mortality: A US Public Health Crisis*, 110 AM. J. PUB. HEALTH 462, 462 (2020).

395. Alabama, Mississippi, Louisiana, Tennessee, Arkansas, Texas, Oklahoma, and South Carolina have the highest risk of maternal death. See Sema Sgaier & Jordan Downey, *What We See in Shameful Trends on U.S. Maternal Health*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/interactive/2021/11/17/opinion/maternal-pregnancy-health.html> [<https://perma.cc/E3UZ-UMSG>]. In Southern states, one in five women of reproductive age live in counties with high risk of death and other poor maternal health outcomes, such as postpartum hemorrhage, preeclampsia, and preterm birth. See *id.*

396. See N. Tanya Nagahawatte & Robert L. Goldenberg, *Poverty, Maternal Health, and Pregnancy Outcomes*, 1136 ANNALS N.Y. ACAD. SCI. 80, 84 (2008).

397. See Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1248 (2020); MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020).

398. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971).

person would be morally obligated to limit her own bodily freedom for nine months in order to save the life of a famous violinist whom she discovered attached to her by medical tubes for life support.<sup>399</sup> The hypothetical assumes, for the sake of argument, that the life that is dependent on the woman's forbearance is an actual person with full rights and capacities, unlike an embryo or fetus whose human rights and capacities are arguably different and ambiguous.<sup>400</sup> Thomson pointed out that "the body that houses the child is the mother's body,"<sup>401</sup> resonating with my suggestion that the pregnant woman facing unwanted pregnancy, who intends not to become a legal mother, is providing rent-free housing to a person who belongs not solely to her but primarily to society at large, and over whom the State is the legal guardian. If the State prevents the pregnant woman from evicting the fetus by way of a safe and legal abortion with the threat of criminal sanctions or civil bounties for either the woman or the abortion provider, the Constitution obligates the State to compensate the pregnant person for the public use of her womb.<sup>402</sup>

## 2. *The Thirteenth Amendment Challenge*

The takings theory is related to another proposal by some constitutional scholars including Andrew Koppelman to challenge abortion restrictions as involuntary servitude in violation of the Thirteenth Amendment.<sup>403</sup> Forced pregnancy and parenthood are involuntary servitude, and if the State, through enacted laws, is forcing these services out of women, it appears to be a straightforward violation of the ban on involuntary servitude.<sup>404</sup> Challenging an abortion ban under a Thirteenth Amendment theory would likely lead to its abolition, whereas a successful takings claim could

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399. *Id.* at 48-49.

400. "I propose, then, that we grant that the fetus is a person from the moment of conception," she wrote, in introducing the hypothetical of the famous violinist. *Id.* at 48.

401. *Id.* at 54.

402. See U.S. CONST. amend. V.

403. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483-84 (1989) [hereinafter Koppelman, *Forced Labor*]; Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1917-18 (2012).

404. Koppelman, *Forced Labor*, *supra* note 403, at 484.

leave the abortion ban intact as long as the State compensated women for the use of their wombs. Thus, a takings theory appears more likely to engender new alliances between pro-life and feminist advocates. In addition, compensation to carry a pregnancy to term would likely weaken the characterization of that pregnancy as slavery or involuntary servitude, which is, by definition, unpaid forced labor. Successful takings claims against abortion restrictions, requiring the State to fully cover the significant expenses of every pregnancy and parenthood, might well lead states to rethink their commitment to banning abortion. Faced with a large number of takings claims demanding just compensation due to the costs imposed on pregnant women by abortion bans, prudent state lawmakers would have to rethink the costs and benefits of these laws. If banning abortion cannot be made unconstitutional, takings litigation can make it financially unsustainable.

*B. Citizen Participation in Defining the Scope of Life and Health Exceptions*

For a woman facing a pregnancy that is unwanted due to the adverse socioeconomic and health effects of the pregnancy, a related strategy for protecting abortion access after *Dobbs* could engage the citizenry about these effects, translating some insights from the Irish evolution of abortion access. Ireland has referenda on constitutional amendments, and its legislature convened citizens' assemblies to weigh in. In the United States, one constitutional referendum at the state level since *Dobbs* suggests that citizen participation in the constitutional amendment process can protect abortion access. Kansas had an August 2022 referendum on a constitutional amendment proposed by the legislature, stating that there was no right to abortion and authorizing the legislature to regulate or ban abortion.<sup>405</sup> By a 60 percent majority, Kansas voters rejected the proposal,<sup>406</sup> effectively leaving intact a 2019 Kansas Supreme Court decision striking down a law banning a second-trimester abortion

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405. See H.C.R. 5003, 2021-2022 Leg., Reg. Sess. (Kan. 2021).

406. See Annie Gowen & Colby Itkowitz, *Kansans Resoundingly Reject Amendment Aimed at Restricting Abortion Rights*, WASH. POST (Aug. 3, 2022, 1:12 AM), <https://www.washingtonpost.com/nation/2022/08/02/kansas-abortion-referendum/> [<https://perma.cc/8UR9-GUJG>].

procedure based on the state constitution's protection of women's personal autonomy.<sup>407</sup> Citizen participation in shaping the law can also emerge in the United States through juror decision-making, as the U.S. Constitution protects constitutional rights to trial by jury in civil and criminal cases.<sup>408</sup>

### *1. Expanding the Life-Saving Exception to the Abortion Ban*

In Ireland, the constitutional framework that protected unborn life and appeared to be a total ban on abortions was transformed not only by lawyers and jurists but also by citizen participation. The legality of at least some abortions in Ireland was established because of referenda and citizens' assemblies focused on the pregnancies that tragically threatened the "equal right to life of the mother."<sup>409</sup> The exception for dangers to a woman's life was expanded to permit abortions when facing the mental health risk of suicide.<sup>410</sup> Ordinary citizens played an important role in the evolution of Irish abortion law; the referenda on the interpretation of these provisions showed that even a nation of pro-life citizens supported the legality of abortion for a teenage girl who had been raped, even if the majority did not support abortion in all imaginable circumstances.<sup>411</sup>

Yet, the nature of mental health risks, including risk of suicide, is such that their diagnosis depends largely on believing the pregnant person's own account of her subjective mental state. Interpreting the threat-to-life exception to abortion bans to include serious mental health risks thus involved deferring to women's subjective experience, which opens the way to valuing that experience and the choices that flow from it. Empathy for women in difficult situations of pregnancy was central to the Irish Citizens' Assembly process that produced the constitutional amendment liberalizing abortion.

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407. Hodes & Nauser, MDs, *P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (per curiam).

408. See U.S. CONST. amend. VI; U.S. CONST. amend. VII.

409. See *supra* note 321 and accompanying text.

410. See *supra* text accompanying notes 264-65.

411. See *supra* text accompanying notes 258-65.



## 2. *Psychosocial Factors in Risks to Physical Health*

Some of the abortion restrictions that have recently been adopted in American states, such as the trigger laws of Texas and Mississippi, have specified that the threat-to-life-and-health exception is limited to threats of serious physical or bodily injury.<sup>412</sup> Even in such states, a humane and reasonable construction of that exception would permit lawful abortions stemming from the pregnant woman's social and economic situation, if litigated well to establish it. Authorizing medically indicated abortions only in the event of danger to physical and bodily health appears highly restrictive on its face, but data suggest that a range of what the French would call "psycho-social" factors have a tangible effect on physical and bodily health.<sup>413</sup>

When women live in poverty, experience food insecurity or housing instability, or are exposed to the occupational hazards that tend to affect low-income jobs, studies show that such conditions take a measurable physical toll, independent of the mental toll, during pregnancy.<sup>414</sup> In light of these physical health effects, which sometimes escalate in severity and seriousness in a matter of minutes, as the Halappanavar case illustrates,<sup>415</sup> physicians implementing the medical emergency exception to any abortion ban would have to evaluate the causal connections between social, economic, and psychological circumstances and the physical dangers of pregnancy.

## 3. *Juries and American Litigation Before Roe*

Furthermore, in addition to recent developments overseas, it is worth learning from the history of criminal prosecution of abortion in the United States in the generation before *Roe*. Commentators have suggested that, even as many state statutes criminalized abortion since the nineteenth century up until 1973 when the

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412. See, e.g., H.B. 1280, § 2, 87th Leg., Reg. Sess. (Tex. 2021); MISS. CODE ANN. § 41-41-45(2) (2022).

413. See Nagahawatte & Goldenberg, *supra* note 396, at 80.

414. See *id.* at 81-84.

415. See *supra* text accompanying notes 270-74.



Court decided *Roe*, prosecutions and jury trials revealed communities' empathy for women facing unwanted pregnancies.<sup>416</sup> From prosecutorial discretion to jury fact-finding, this empathy led to court decisions that preserved some access to abortion even within a legal order that appeared to prohibit it.<sup>417</sup>

In *Aetna Casualty & Surety Co. v. Yeatts*, the Fourth Circuit in 1941 affirmed a district court decision denying a motion for a new trial.<sup>418</sup> In a case of a doctor seeking reimbursement from his medical malpractice insurer for his fatal treatment of a teenage girl, the jury delivered a verdict for the doctor over the insurance company's assertion that Dr. Yeatts was barred from insurance coverage because he was performing a criminal abortion during the alleged malpractice.<sup>419</sup> Although evidence in the record pointed overwhelmingly to the factual conclusion that Dr. Yeatts was indeed performing an abortion that caused the patient's death, the jury found for Dr. Yeatts, concluding that he had not in fact been performing a criminal abortion.<sup>420</sup> The federal judge refused to set aside the jury's verdict and refused to grant a new trial; the appellate court affirmed.<sup>421</sup> Written eighty years ago, the Fourth Circuit decision in *Aetna Casualty & Surety Co. v. Yeatts* continues to be assigned to first-year students of civil procedure as a powerful statement on the fact-finding authority of juries, to which judges must defer.<sup>422</sup>

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416. See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 61-70 (1997) (discussing the "legal loophole" of therapeutic abortions); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 179-87 (1985); see also Schur, *supra* note 174, at 141.

417. See *supra* note 410 and accompanying text.

418. 122 F.2d 350, 355 (4th Cir. 1941).

419. *Id.* at 352; Richard W. Bourne, *Abortion in 1938 and Today: Plus Ça Change, Plus C'est La Même Chose*, 12 S. CAL. REV. L. & WOMEN'S STUD. 225, 228-30 (2003).

420. See *Yeatts*, 122 F.2d at 352, 355. One scholar who grew up in the community where this abortion provider had practiced reviewed the trial record and interviewed several surviving members of the community about the case. See Bourne, *supra* note 419, at 228-47 (summarizing the trial and evidence presented).

421. *Yeatts*, 122 F.2d at 352, 355.

422. It is included in a leading and widely used civil procedure textbook. See JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 110-13 (18th ed. 2018); STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 509 (3d ed. 2008).

#### 4. *Evaluating Threats to Life and Risks of Substantial Impairment*

Thus, juries (and the specters of juries) may well define the scope of the exceptions in abortion bans. Consider the Texas trigger law, which permits abortions on pregnant women facing a risk of death because of life-threatening physical conditions aggravated by pregnancy, or on pregnant women facing a serious risk of substantial impairment of a major bodily function without the abortion.<sup>423</sup> It remains to be seen how data and evidence on maternal mortality, for instance, will be considered in determining which conditions are life-threatening physical conditions aggravated by pregnancy. How great must the risk of death or permanent injury be to constitute a life-threatening condition or a serious risk of substantial impairment?

In federal courts, jury unanimity is required to render a verdict unless the parties stipulate otherwise,<sup>424</sup> whereas in some state courts, a supermajority suffices. In Texas state courts, five-sixths of the jury must agree to render a civil verdict.<sup>425</sup> Available data suggest that a plausible defense of medical necessity to avert a threat to the pregnant woman's health can be mounted in many circumstances that lead women to terminate their pregnancies. One of the reasons most frequently cited for seeking an abortion is inability to afford a baby at that moment, along with interference with a woman's work, education, or ability to care for dependents.<sup>426</sup> A 2005 Guttmacher Institute study found that these reasons were given in roughly 75 percent of all abortions.<sup>427</sup>

Continuing a pregnancy under conditions of socioeconomic stress has detrimental and sometimes fatal effects on the woman's health.<sup>428</sup> In many states, including Texas, the lack of a pregnant worker fairness statute means that employers are not legally obligated to provide reasonable accommodations to pregnant

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423. H.B. 1280, § 2, 87th Leg., Reg. Sess. (Tex. 2021).

424. FED. R. CIV. P. 48.

425. *See, e.g.*, TEX. R. CIV. P. 292(a). Note, however, that verdicts for exemplary damages must be unanimous. *See, e.g.*, TEX. R. CIV. P. 292(b) (applicable to S.B. 8 bounties).

426. *Finer et al.*, *supra* note 230, at 112-13.

427. *Id.* at 110.

428. *Nagahawatte & Goldenberg*, *supra* note 396, at 80.

workers for the performance of their jobs in a manner compatible with their health.<sup>429</sup> If the pregnant worker loses her job due to pregnancy discrimination or the lack of accommodation, leaving her in poverty, studies show that poverty—often causing food insecurity, malnutrition, and reduced access to healthcare—increases the likelihood of pregnancy complications and adverse health outcomes for the mother, including pregnancy-induced hypertension, hemorrhage, infection, preterm labor, gestational diabetes, and anemia.<sup>430</sup> If the pregnant worker continues to perform a job without accommodations compatible with her health, that, too, can increase her risk of pregnancy complications and maternal morbidity.<sup>431</sup>

A 2022 Pew Research Center public opinion poll suggests that the majority of Americans have nuanced, rather than absolute, views on abortion, believing that the law should allow some, but not all imaginable, abortions. Only 19 percent believe that abortion should be legal in all cases without exception, and even fewer (8 percent) believe that abortion should be illegal in all cases with no exceptions; 36 percent believe that abortion should be legal in most, but not all, cases, and 27 percent say that abortion should be illegal in most, but not all cases.<sup>432</sup> This points to a significant majority (63 percent) acknowledging circumstances in which the law should protect access to abortion.<sup>433</sup> A Vox poll from 2015 found that 53 percent of the public said abortion should be legal in all or most cases, and 32 percent said that abortion should be legal “only in cases of rape, abuse, or if the woman’s health is at risk.”<sup>434</sup> Only 16 percent in the Vox poll believed that abortion should be “never legal.”<sup>435</sup>

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429. See Siegel, *supra* note 83, at 219-20, 227.

430. See Nagahawatte & Goldenberg, *supra* note 396, at 81-84.

431. *Accommodations for Pregnant Employees Act (H. 136): Ensuring Pregnant Workers Don't Have to Choose Between Their Job and a Healthy Pregnancy*, NAT'L WOMEN'S L. CTR. (Feb. 22, 2017), <https://nwlc.org/resource/accommodations-for-pregnancy-related-conditions-act-h-136-ensuring-pregnant-workers-dont-have-to-choose-between-their-job-and-a-healthy-pregnancy/> [<https://perma.cc/6BRG-GFWC>].

432. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/> [<https://perma.cc/XS26-PPF9>].

433. *Id.*

434. Tresa Undem, *Why So Many Polls Get American Attitudes About Abortion Wrong*, VOX (Mar. 4-12, 2015), <https://www.vox.com/a/abortion-decision-statistics-opinions/abortion-polling-mistakes> [<https://perma.cc/SP35-RT4Z>].

435. *Id.*; PERRYUNDEM RSCH./COMMC'N, VOX, *TOPLINE RESULTS FROM A SURVEY*, (2015), [https://cdn2.vox-cdn.com/uploads/chorus\\_asset/file/3570070/Vox\\_Poll\\_Toplines\\_\\_2\\_.0.pdf](https://cdn2.vox-cdn.com/uploads/chorus_asset/file/3570070/Vox_Poll_Toplines__2_.0.pdf)

The polling data suggests similarities in the attitudes of most Americans to those of the Irish Citizens' Assembly on the Eighth Amendment.<sup>436</sup> While the majority does not support lawful abortion on demand, a supermajority support the "indications" framework that is the law of most of the jurisdictions where access to abortion is safe, legal, and free.<sup>437</sup> The exceptions in recently enacted state abortion bans in the United States, allowing abortions in medical emergencies, may track this approach through jury fact-finding in civil and criminal trials enforcing abortion bans.<sup>438</sup> In the next frontier of defending abortion providers in criminal prosecutions and/or civil damages lawsuits under new state abortion bans without the shield of *Roe*, a robust, data-driven legal development of the scope of life-and-health exceptions is an important legal opportunity to preserve abortion access in the most compelling cases. The experience of other countries shows that firmly establishing access in the most compelling cases can be a step towards more robust access to abortion in the full range of cases. Litigating this defense in compelling cases thoughtfully and strategically could lay the groundwork for expanding it over time to include all reasonable abortions, including those justified by socioeconomic hardships and physical and mental health consequences of being pregnant under financial stress.

##### *5. Life and Health Risks and Rational-Basis Review Under Dobbs*

*Dobbs* held that laws restricting abortion should be sustained "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests" and recognized legitimate state interests in protecting prenatal life as well as protecting maternal life and health.<sup>439</sup> If the life-and-health exceptions to abortion bans are construed too narrowly in the enforcement of these laws, resulting in higher rates of maternal mortality or

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[<https://perma.cc/8VVC-9WFF>] (showing the topline results from the 2015 *Vox* survey).

436. See *supra* note 252 and accompanying text.

437. See *supra* notes 425-29 and accompanying text.

438. See *supra* note 417 and accompanying text.

439. *Dobbs v. Jackson Women's Health Org.*, 143 S. Ct. 2228, 2284 (2022).

indicators of diminished maternal health in those states, it becomes less plausible that the legislature was reasonable in believing that the abortion ban would serve its legitimate state purpose. In other words, only an abortion ban with a reasonable and humane construction of its life-and-health exception should pass rational basis review.

Litigation is being pursued to expand the exceptions within near-total abortion bans that permit abortions to prevent the pregnant person's death. The Department of Justice invoked the federal Emergency Medical Treatment and Labor Act (EMTALA) to enjoin Idaho's near-total abortion ban that had gone into effect after *Dobbs*, arguing that the federal law preempted the application of the state abortion ban in circumstances where emergency medical treatment was required to protect the life or health of the pregnant person.<sup>440</sup> The district court issued a preliminary injunction, recognizing that the statute requires Medicare-funded hospitals to provide emergency medical care to protect health, including abortions.<sup>441</sup> But it may take more cases involving real people to persuade judges and juries to protect the legality of abortions in order to protect women's health beyond those abortions necessary to prevent imminent death.

## CONCLUSION

Human reproduction—both biological and social—is one process to which women have historically contributed disproportionately compared to men. The joint opinion in *Casey* acknowledged this.<sup>442</sup> Although it takes both a man and a woman to induce pregnancy as a biological matter, only women can get pregnant. Only a pregnant female can turn an unborn fetus into a baby, and this biological process exacts a far higher price on her than anyone else. The deaths of pregnant women in Ireland demonstrated that women do risk their lives and health when they continue a pregnancy

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440. See *United States v. Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at \*1, \*5 (D. Idaho Aug. 24, 2022).

441. See *id.* at \*1-2, \*14-15.

442. See *supra* notes 76-78 and accompanying text.

and give birth.<sup>443</sup> Gestation, childbirth, and lactation also exact an economic price from women because they cannot work to the same extent during this process not only due to the physical toll on women's bodies but also due to discrimination and other social dynamics that reduce pregnant workers' labor power. For these reasons, a woman who continues a pregnancy, wanted or unwanted, bears an unequal burden for a pregnancy that a man has played an equal part in begetting and from which society and the state will benefit. When she gives birth to a live human being, the child is not only her offspring but also a future citizen and contributor to the society's continued economic, social, and political survival and flourishing. The community gains a new living member, but the mother has foregone opportunities for economic security and the development of her personality to do the demanding and dangerous essential work that turns the unborn life into a born, live, and productive person.

The laws of abortion in an increasing number of jurisdictions appreciate the fundamentally social nature of a woman's decision to become a mother. Abortion is not only a decision about one's private parts; it is a decision about how a woman wants her life to go, and whether doing what it takes to turn a fetus into a child, and then to turn a child into a citizen, is going to hamper her from being a full person and citizen in her own right. The State can make a huge difference in what unfolds. If doing what it takes to turn the fetus into a child can actually ruin the woman's health—physical, mental, or economic—an increasing number of constitutional democracies recognize the State's duty to prevent it. Allowing—and funding—abortion is one way that the State can fulfill its responsibility to the woman citizen. But there are additional ways. The State can also ensure that pregnancy and motherhood do not ruin women's lives. The State can prevent mothers from living a life of economic insecurity. It can implement policies reducing maternal mortality, providing maternity care and paid maternity leave, ensuring that pregnant women and mothers are not deprived of economic opportunities, and providing childcare and education. Enabling mothers to live a decent life with economic security inures to the benefit of

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443. *See supra* Part III.B.



the child, both in utero and after birth, as well as to the society to which the child contributes eventually. The State's duties stem from the benefits that society derives from women staying pregnant and becoming mothers.

Abortion bans assume that women's sacrifices, to quote Justice Blackmun in his *Casey* concurrence, are the "natural" status and incidents of motherhood.<sup>444</sup> Abortion access beyond *Roe* will depend on changing public understandings of the social dimensions of pregnancy and motherhood. In *Whole Woman's Health v. Hellerstedt*<sup>445</sup> and *June Medical Services v. Russo*,<sup>446</sup> highly accomplished women lawyers and law professors filed amicus briefs urging the Supreme Court to uphold *Roe v. Wade* and the constitutional right to choose an abortion, arguing that their own abortions at pivotal moments of their educational or professional lives enabled their educational and professional success.<sup>447</sup> Abortions enabled each of them to keep studying, to become lawyers, to become law professors, to become leaders, to become wealthy, and to live the lives that match their talents, skills, and dreams.<sup>448</sup>

These amicus briefs tap into a deep feminist ambivalence about the inequalities women face in society because of pregnancy and motherhood. The impressive careers that abortion helped these women achieve is inspiring; yet a society that allows pregnancy and motherhood to derail women's paths to economic security and independence is troubling. The United States has high rates of maternal mortality relative to its peer wealthy nations and is one of the few countries in the world that does not guarantee accommodations for pregnant workers on the job, paid maternity leave, or universal free or affordable childcare.<sup>449</sup> Millions of women in

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444. See 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part).

445. 136 S. Ct. 2292 (2016).

446. 140 S. Ct. 2103 (2020).

447. Brief of Janice Macavoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae in Support of Petitioners, *Whole Woman's Health v. Cole*, No. 15-274 (5th Cir. 2016); Brief for Michele Coleman Mayes, Claudia Hammerman, Charanya Krishnaswami, and 365 Other Legal Professionals Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae Supporting Petitioners, *June Med. Servs. v. Gee*, Nos. 18-1323 and No. 18-1460 (5th Cir. 2019).

448. See *supra* note 449.

449. See *supra* notes 356-58, 391 and accompanying text.



America are far less privileged than the lawyers and law professors who filed the briefs, and despite *Roe's* respect for their privacy, many American women have had no meaningful access to abortion due to lack of available services and funding.<sup>450</sup>

Permitting abortions in the range of circumstances now permitted by many peer democracies is necessary, but not sufficient, for real reproductive freedom. Permitting but not funding abortions in an even broader range of circumstances, as *Roe* did, is not necessary, sufficient, or helpful. A full and fair valuation of society's gains and women's losses in pregnancy and motherhood is needed.

Experiences of peer constitutional democracies, notably Germany and Ireland, indicate that resolving these issues is not a job for courts alone. In Germany, the legislature rewrote abortion laws by doing as much as it could with the court's pro-choice dicta about the dignity and equality of mothers.<sup>451</sup> Keeping abortion safe and legal in America will require engaging most of the American people, who are ambivalent rather than dogmatic about abortion. They want the law to protect unborn life and save women from pregnancies that make their lives significantly worse, but they feel moral discomfort with abortion on demand. American democracy is in need of new paths by which government can respond to the people's commitment to protecting life without forcing women to bear the brunt of that collective goal. Whether through constitutional litigation that recognizes the public interest in pregnancy and parenthood, jury decision-making in the enforcement of abortion laws, or legislation that funds justified abortions and supports mothers through pregnancy and birth, a world of abortion access is possible without *Roe*, but only if our constitutional democracy embraces a much broader vision of the State's role in making reproductive freedom real.

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450. Dan Keating, Tim Meko & Danielle Rindler, *Abortion Access Is More Difficult for Women in Poverty*, WASH. POST (July 10, 2019), <https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/> [<https://perma.cc/6PKG-48F3>].

451. See *supra* Part III.A.