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Clearly Ambiguous: A Visitor's View of the Irish Abortion Referendum of 2002

STEVEN J. JOHANSEN*

I. INTRODUCTION

Around the middle of February 2002, political posters began appearing on the streets of Ireland in anticipation of the Abortion Referendum¹ election scheduled for March 6. Some of these signs urged support for the Referendum with slogans such as “Protect Women, Save Babies—Vote Yes!” and “Let’s Learn from the Mistakes of Other Countries—Vote Yes!” An outside observer—who was unaware of the details of the upcoming vote, but well aware of the abortion debate in the United States—would consider these signs ambiguous at best. Protecting women sounded like a pro-choice slogan.² Saving babies certainly sounded like pro-life rhetoric. With respect to learning the mistakes of other countries, an outside observer would have to ask: Which countries? Although the signs were ambiguous at best, one poster clarified the Referendum to some extent. It urged voters to: “Vote Pro-life, Vote Yes.”

* Associate Professor, Lewis and Clark Law School; Visiting Legal Writer, University College Cork, Spring, 2002. I wish to thank the many colleagues in Ireland and the United States who supported this effort. In particular, Susan Moloney, Irene Lynch-Fannon, Maeve McDonagh, Dierdre Madden, Darius Whelan, all of UCC, Daryl Wilson and Susan Mandiberg of Lewis and Clark, and Professor Davalene Cooper of New England School of Law. Finally, I wish to thank Katherine H. Johansen for her excellent research support.

1. See generally Twenty-fifth Amendment, Constitution of Ireland (Protection of Human Life in Pregnancy Bill) (2001) (Ir.), <http://www.doh.ie/pdfdocs/propprot.pdf> (last visited Mar. 17, 2003) [hereinafter Referendum].

2. This article attempts to remain neutral as to the merits of the abortion debate. However, terms like “pro-choice” and “pro-life” are of course, value laden rhetoric. Such references to advocates on both sides of the debate are intended to reflect only the terms the advocates use to identify themselves.

In response, the opposition entered the rhetorical battle with signs urging a “No” vote. Within days, seemingly every Irish light standard sported two or three referendum posters. However, the “No” supporters did not clarify the issue any further. Some pro-choice supporters cautioned voters: “Don’t Make Women’s Lives Worth Less—Vote No.” Other posters were even more strident, claiming: “Babies Will Die—Vote No!” To make matters more confusing, some “No” posters were sponsored by the Pro-Life Committee.

If one relied solely on the political posters for information about the Referendum, one would conclude that a “Yes” vote would protect women and the lives of the unborn, while a “No” vote would protect the value of the lives of women and prevent babies from dying. Undoubtedly, many voters found the Referendum puzzling. In addition, it is not surprising that a referendum on abortion would be controversial, especially in Ireland. It is surprising, however, that the Referendum, drafted after a five-year government study, could be attacked as fatally ambiguous by both its opponents and proponents.

This Article examines the merits of those attacks and concludes the Referendum was relatively clear on its face even though the abortion issues remain politically and morally ambiguous. Despite the relative clarity of the Referendum, it remained vulnerable to charges of ambiguity and vagueness for at least three reasons. First, in an apparent effort to reach a compromise, the Referendum included some provisions that appealed to pro-life voters and others that appealed to pro-choice voters. The effort to achieve compromise failed because both camps found reasons to oppose the Referendum. Second, the drafters sought to resolve the legal status of emergency contraception³ but failed to anticipate all the potential constitutional challenges that opponents were likely to raise. This failure substantiated charges that the passage of the Referendum would result in unintended consequences. Finally, the government presented the Referendum to its constituencies when voters were particularly skeptical of the government’s ability to craft an unambiguous referendum on abortion. Public skepticism made it especially difficult to counter charges of ambiguity in the Referendum.

3. Referendum § 1.1.

Part II of this Article reviews the legal context and the recent history of the abortion issue in Ireland. Part III presents the Referendum. Part IV explores the claims that the Referendum was ambiguous. Part V asserts that the political climate in Ireland made it particularly difficult for supporters of the Referendum to counter charges of ambiguity. Part VI concludes the referendum process is an ineffective vehicle for implementing laws fundamentally controversial in nature, especially laws regarding abortion.

II. HISTORY OF THE ABORTION ISSUE IN IRELAND

A. *Prevailing Anti-Abortion Attitude in Ireland*

Historically, Ireland prohibited abortion by statute.⁴ The Offences Against the Person Act made abortion a felony punishable by life in prison.⁵ In addition, the Irish Supreme Court in *McGee v. Attorney General* alluded in dicta that the Constitution also prohibited abortion.⁶ Although the Court recognized the right to marital privacy as an unenumerated right under Article 40.3,⁷ Justice Walsh noted the Court was not recognising a right to abortion. Indeed, he stated that:

[A]ny action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.⁸

While the Court continued to refer to abortion in dicta,⁹ it did not address the issue directly until the 1980s. During this time, anti-abortion activists sought to eliminate the possibility that the Court would create a right to abortion or that the *Oireachtas* (the Irish Parliament) would enact legislation permitting abortion.¹⁰ Eventually, these activists successfully lobbied the *Oireachtas* to submit a voter referendum, which expressly protected the life of

4. Offences Against the Person Act, No. 58 (1861) (Ir.).

5. *Id.*

6. [1974] *McGee v. Attorney Gen.*, I.R. 284, 313 (Ire.).

7. *McGee*, [1974] I.R. at 296-97.

8. *Id.* at 312.

9. *G v. An Bord Uchtála*, [1980] I.R. 32, 69 (Ire.) (Walsh, J.); *Norris v. Attorney Gen.*, [1984] I.R. 36, 103 (Ire.) (McCarthy, J., dissenting).

10. JAMES KINGSTON & ANTHONY WHELAN, *ABORTION AND THE LAW* 4 (1997).

the unborn. In effect, that referendum, which eventually became the Eighth Amendment, amended the Constitution. In September 1983, the voters approved the Eighth Amendment to the Constitution, which became Article 40.3.3.¹¹ From that point on, the Constitution has been at the heart of the abortion debate in Ireland.

To understand Article 40.3.3, one must place it in the context of the Irish Constitution as a whole. The Constitution reflects the social and political fabric that defines Ireland, including its strong historical ties with the Catholic Church and its support for the traditional family. Indeed, the Preamble to the Constitution acknowledges in express language the importance of the Christian religion to Ireland:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.¹²

The Constitution strikes a balance between Ireland's strong ties to the Christian faith and the right of people of all faiths to practice their religion. While there is a separation between church and state, the wall between the two is considerably closer to the church house door in Ireland than it is in the United States. Ireland does not "endow any religion."¹³ In addition, it does not

11. *Id.* at 5.

12. PmbL., Constitution of Ireland, 1937.

13. *Id.* Art. 44.2.2.

discriminate on the basis of “religious profession, belief, or status.”¹⁴ However, the Constitution provides that Ireland “acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.”¹⁵

Furthermore, the Constitution expressly recognises the central role of the family in Irish society:

The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.¹⁶

It is within this context of strong and explicit support for Christian (and implicitly, Catholic) religion and the traditional family unit, that the Irish electorate voted, by nearly a two-to-one margin, to adopt the Eighth Amendment to the Constitution.¹⁷ That Amendment states:

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.¹⁸

On its face, the Eighth Amendment, now incorporated into Article 40.3, establishes a broad, but not unlimited, right to life for the unborn. It also expressly recognises a right to life for the mother. At some point, however, the respective rights of the unborn will conflict with the rights of the mother. Most obviously, those rights conflict when continuing a pregnancy puts the mother’s life at risk. The issue then becomes: At what point does that risk outweigh the right of the unborn? This has been one of three abortion issues that the Irish courts have wrestled with since 1992.

14. *Id.* Art. 44.2.3.

15. *Id.* Art. 44.1.1.

16. *Id.* Art. 41.1

17. KINGSTON & WHELAN, *supra* note 10, at 180 n.1.

18. Art 40.3.3, Constitution of Ireland, 1999.

B. The X Case

Until 1992, the Irish Supreme Court had consistently used the Eighth Amendment to restrain efforts by pro-choice advocates to expand the availability of abortion in Ireland.¹⁹ For example, Irish health clinics were prohibited from providing information about hospitals that perform abortions.²⁰ Similarly, in *Society for the Protection of Unborn Children v. Grogan*, student organizations were prevented from distributing information about different countries that perform abortions.²¹ After *Grogan*, it appeared that the Supreme Court would continue to block all efforts to expand access to abortions. Yet, three years later in the *Attorney General v. X* (the X Case), the Court seemed to take a more liberal stand regarding abortion.²²

The plaintiff in the X Case was a fourteen-year-old girl who had been sexually abused and impregnated by the father of one of her friends.²³ The pregnancy caused great distress for both the plaintiff and her parents. The plaintiff claimed to be suicidal. After much consideration, the plaintiff left Ireland for Great Britain where she planned to have an abortion. The unfortunate ordeal probably would have resulted in a private resolution shortly thereafter had she and her parents been less conscientious. Instead, her parents contacted the Irish police to inquire if they should obtain DNA samples to assist in the prosecution of their daughter's abuser. The police contacted the Attorney General who immediately obtained an injunction against the plaintiff, thereby preventing her from obtaining an abortion and ordering the plaintiff and her parents to return to Ireland for the next nine months. The High Court, and ultimately the Supreme Court reviewed that injunction.

The High Court predictably held that the injunction was valid.²⁴ The court also held the right of the unborn child

19. See generally KINGSTON & WHELAN, *supra* note 10, at 1-36 (providing a thorough review of the historical development of Irish abortion law); Keith S. Kogler, Note, *Ireland's Abortion Information Act of 1995*, 29 VAND. J. TRANSNAT'L L. 1117, 1118-32.

20. See *Soc'y for the Prot. of Unborn Children v. Open Door Counseling Ltd.*, [1988] I.R. 593, 617 (Ire.).

21. *Soc'y for the Prot. of Unborn Children v. Grogan*, [1989] I.R. 753, 764 (Ire.).

22. *Attorney Gen. v. X*, [1992]1 I.R. 1 (Ire.) [hereinafter *The X Case*].

23. *Id.* Her parents were also named plaintiffs, though the relevant portions of the case concerned only the rights of the young woman.

24. *Id.* at 16.

outweighed the plaintiff's right to travel outside of Ireland to obtain an abortion.²⁵ As a result, the plaintiff appealed to the Supreme Court.

In the appeal that included "everything but the kitchen sink," the plaintiff raised twenty-two assignments of error.²⁶ The Supreme Court reduced those claims to four issues, two of which are relevant here. First, the Court balanced the unborn child's right to life against the mother's rights under the Eighth Amendment. The Supreme Court reversed the High Court's decision and held that where there was a "real and substantial risk" to the life of the mother, an abortion was legal in Ireland.²⁷ This effectively resolved the X Case.

Second, the Supreme Court addressed in dicta, whether the Eighth Amendment limited a woman's right to travel to the extent that the State could enjoin a woman from leaving Ireland to have a legal abortion in another jurisdiction. The High Court recognized that the Eighth Amendment protected the right to life of both the unborn child and the mother.²⁸ The High Court, however, held that an abortion would definitely end the life of the unborn child. Conversely, denying an abortion to a mother who is suicidal would not, with the same degree of certainty, end her life. Therefore, the High Court concluded that in the case of a potentially suicidal mother, the unborn child's right to life should prevail.²⁹

The Supreme Court rejected that reasoning. Instead, the Supreme Court reasoned that an abortion will always end the life of the unborn child, and thus, the risk of death could not be the scale used to balance the competing interests. The Supreme Court held that the appropriate test is whether there is a "real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy."³⁰ In cases where there is such a risk, termination is permissible.³¹

In the X Case, the plaintiff made repeated statements suggesting a desire to commit suicide. A psychologist testified that

25. *Id.* at 12–13.

26. *Id.* at 42–45.

27. *Id.* at 55 (Finlay, C.J.).

28. *Id.* at 11.

29. *Id.* at 12.

30. *Id.* at 53–54.

31. *Id.*

those desires presented a very real threat. The Supreme Court found those threats sufficient to establish a “real and substantial risk” to the plaintiff’s life.³² As a result, the question of whether the plaintiff could travel outside of Ireland to have an abortion became moot because the Supreme Court held the plaintiff could have an abortion in Ireland. Strangely, the Court still provided rather detailed dicta regarding that issue. The Court, however, was not particularly clear on how it would rule if the issue of a woman’s right to travel ever came before the Court.

C. Issues Created by the X Case

The issue of travel raised several sub-issues. Should the unenumerated right to travel be balanced against the right to life of the unborn? Should a court issue an injunction that might not be followed? Does European law prohibit such an injunction?

Chief Justice Finlay stated that European law did not prohibit a court from issuing an injunction,³³ even if it would be difficult to enforce.³⁴ However, Finlay did not expressly address the heart of the issue—whether a court could limit a woman’s right to travel to protect the unborn child’s right to life.

Justice Hederman, who dissented in the X Case, opined that a court should not issue an injunction prohibiting travel.³⁵ He reasoned that if a woman violated an injunction, a court could only find her in contempt of court. The court could not restore the life of the unborn.³⁶ Thus, an injunction should not be issued because it would not protect the life of the unborn.³⁷ Furthermore, Justice McCarthy argued the right to travel could not be balanced against the unborn child’s right to life.³⁸ He stated the right to travel cannot be curtailed because of the reason for travelling. In other words, he stated that intent is simply not a basis for restricting the movement of Irish citizens,³⁹ and that even if a person was leaving Ireland for the purpose of committing a criminal act in another jurisdiction, the State could not enjoin that travel. Therefore, the

32. *Id.* at 55.

33. *Id.* at 61.

34. *Id.* at 59.

35. *Id.* at 77 (Hederman, J.).

36. *Id.*

37. *Id.*

38. *Id.* at 84 (McCarthy, J.).

39. *Id.* at 85.

Court could not enjoin the plaintiff from travelling to Britain to have an abortion.⁴⁰

Justice O'Flaherty contended that issuing an injunction would unduly interfere with the authority of the family.⁴¹ He did not base his opinion solely on the constitutional right to travel. He left open the possibility for the *Oireachtas* to enact legislation restricting the right to travel in such situations.⁴² He concluded that in the absence of legislation, however, it was not appropriate for the court to infringe on the plaintiff's freedom of movement.⁴³

In contrast, Justice Egan reasoned the right to travel must give way to the right to life of the unborn child.⁴⁴ While he acknowledged that enforcement of an injunction could be difficult, Justice Egan stated that those difficulties could not outweigh the unborn child's right to life. However, on the specific facts before the Court, he held the injunction was improper because the plaintiff was entitled to an abortion in Ireland, as her threatened suicide created a real and substantial risk to her life.⁴⁵

As to the specific injunction issued in the X Case, the Court held it was not valid.⁴⁶ The broader issue of whether the State could limit the right to travel outside Ireland remained unanswered. The *Oireachtas*, however, did not take long to address that issue.

D. *The Reaction to the X Case*

After the surprising result in the X Case, the *Oireachtas* immediately placed before the voters a set of three proposed Constitutional amendments:

1. It shall be unlawful to terminate the life of the unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.⁴⁷

40. *Id.*

41. *Id.* at 88 (O'Flaherty, J.).

42. *Id.*

43. *Id.*

44. *Id.* at 92 (Egan, J.).

45. *Id.*

46. *See generally id.*

47. KINGSTON & WHELAN, *supra* note 10, at 19.

2. [Article 40.3] shall not limit freedom to travel between the State and another state.⁴⁸

3. [Article 40.3] shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.⁴⁹

The three proposed amendments required the electorate to consider each choice separately. A pro-choice voter (i.e. one that favored a liberalization of Ireland's abortion laws) would vote No, Yes, Yes, respectively. A zealous pro-life advocate, who opposed abortion in any circumstance, would oppose all three amendments. Conversely, a pro-life voter who did not oppose abortion to save the life of the mother, but who sought to exclude abortion where the mother was suicidal, would vote for the first amendment, but likely oppose the latter two. Voters who found themselves in the middle would have to assess each proposed amendment independently of the others.

In the end, despite the potentially confusing array of choices, the electorate spoke quite clearly. The first proposed amendment failed by nearly a two-to-one margin.⁵⁰ The second and third proposed amendments passed by nearly the same margin.⁵¹ By the end of 1992, abortion law seemed more stable. Abortion was legal if necessary to prevent a real and substantial threat to the life of the mother. Suicide constituted such a threat. Furthermore, travel to other jurisdictions to obtain an abortion could not be restricted. Finally, although Article 40.3 did not directly restrict the distribution of information about abortion services available in other states, the *Oireachtas* could establish restrictions on the distribution of information in Ireland. Just what conditions the *Oireachtas* would place on the distribution of information was left unanswered.

In 1995, the *Oireachtas* passed the Abortion Information Act.⁵² This Act established limitations on the distribution of

48. *Id.* at 180.

49. *Id.*

50. *See id.* at 20. The amendment was rejected by 1,079,297 votes to 572,177 votes.

51. *See id.* at 180 n.1. The Thirteenth Amendment of the Constitution was approved by 1,035,308 votes to 624,059, and the Fourteenth Amendment of the Constitution by 992,833 votes to 665,106.

52. Regulation of Information (Services Outside the State for Termination of Pregnancies) Act (1995) (Ir.); *see also* Koegler, *supra* note 19, at 1118-19.

information referenced in the Fourteenth Amendment. It provides that women are entitled to receive information about abortion services. However, that information cannot advocate or promote terminating a pregnancy. The Supreme Court rejected constitutional challenges to the Abortion Information Act from both pro-choice and pro-life advocates,⁵³ both of whom continued to seek change through the *Oireachtas* as well as the courts.

Abortion continued to be a hot button political issue throughout the late 1990s. In fact, the issue threatened to derail Fianna Fail's campaign in 1997.⁵⁴ In response, Fianna Fail's leader, Bertie Ahern, promised to address the issue once he was in government.⁵⁵ Although he did not expressly state how he would address the controversy, he promised his government would prepare a Green Paper on the issue in an effort to establish a consensus.⁵⁶ Ahern suggested the government could pursue various options, including amending the Constitution to address the X Case, pursuing legislation, or combining both through Article 27.⁵⁷ While his pledge was ambiguous, it allowed Ahern to skirt the abortion issue during the campaign that eventually led to his election as *Taoiseach*. Promising to address the abortion issue, however, proved far easier than actually doing so once Ahern was elected.

During the first four years of Ahern's term, he appointed a committee to investigate the abortion issue. In 1999, that committee produced a Green Paper,⁵⁸ in which the government concluded that a referendum proposing a Constitutional amendment was necessary to resolve the abortion issue.⁵⁹ As a

53. *In re* Article 26 of the Constitution & the Regulation of Info. Serv. Outside the State for the Termination of Pregnancies Bill, No. 87 (Ir. S.C. May 12, 1995), available at <http://www.bailii.org/ie/cases/IESC/1995/9.html>.

54. Fianna Fail is Ireland's most popular political party. In 1997, it regained control of the government in 1997 and has remained in power since then.

55. Geraldine Kennedy, *Ahern Pledges Action on X Case Issue*, IR. TIMES, May 17, 1997, at 7 [hereinafter Kennedy, *Ahern Pledges Action*].

56. *Id.*

57. *Id.*

58. INTER-DEPARTMENTAL WORKING GROUP ON ABORTION, GOVERNMENT OF IRELAND, GREEN PAPER ON ABORTION (1999), available at <http://www.taoiseach.gov.ie/upload/publications/251.pdf>; see also Kennedy, *Ahern Pledges Action*, *supra* note 55.

59. See *Taoiseach Paper Set to Open up Abortion Debate*, OBSERVER (Sept. 5, 1999), http://www.guardian.co.uk/Northern_Ireland/Story?0,2763,200376,00.html.

result, the government once again brought the abortion issue before the electorate in 2002.

III. THE ABORTION REFERENDUM OF 2002

The government presented the Referendum, also known as the Protection of Human Life in Pregnancy Act, as an effort to build consensus through a comprehensive approach to the abortion issue.⁶⁰ As a practical matter, the Referendum prohibited abortion except in cases where continuing a pregnancy would result in a “real and substantial risk” to the mother.⁶¹ Suicide did not present such a risk, and thus, the Referendum would have overturned the X Case.⁶² In addition, any intentional destruction of an unborn human life before implantation in the womb was not considered an abortion.⁶³

In producing the Referendum, the government sought the advice of people representing all sides of the abortion issue. As a result, the Referendum protected the lives of women as well as unborn children. Even though the Referendum permitted abortions in limited situations, the Catholic Bishops supported the Referendum.⁶⁴ Furthermore, the Referendum arguably guaranteed the availability of the “morning after” pill in Ireland because it limited the meaning of abortion to ending life after implantation in the womb.⁶⁵ The government considered the Referendum a thoughtful, clear, and carefully crafted resolution of the abortion issue.

Unsurprisingly, not everyone viewed the Referendum in the same light. Opponents quickly attacked the Referendum. Some of those attacks were policy-based.⁶⁶ Pro-choice advocates objected to the elimination of the suicide exception that was

60. See *Government Plans Comprehensive Approach*, IR. TIMES, Oct. 3, 2001, at 6 [hereinafter *Government Plans Comprehensive Approach*].

61. Referendum § 1.2.

62. *Id.*

63. *Id.* at § 1.1.

64. See Patsy McGarry & Mark Brennock, *Bishops Support Abortion Poll Proposal*, IR. TIMES, Dec. 13, 2001, at 1.

65. Carol Coulter, *Legislation Proposed by Government Has Four Main Aims*, IR. TIMES, Feb. 18, 2002, at 6 [hereinafter Coulter, *Four Main Aims*].

66. See Press Release, Ruairi Quinn, Labor Party, *This Referendum Will Be Defeated* (Feb. 7, 2002), at <http://www.labour.ie/press/detail.tmp?sku=20020207121549> (outlining opposition to Referendum).

initially recognized in the X Case.⁶⁷ Others objected to the twelve-year prison sentence for violators.⁶⁸ Pro-life advocates, on the other hand, objected to the Referendum because it failed to protect embryos before implantation in the womb.⁶⁹

The government certainly expected to see those policy-based objections. To build consensus, however, the government had distanced itself and the Referendum from those who held extreme views. Despite the government's effort, opponents asserted the Referendum was fraught with ambiguities that left important questions unanswered and raised the possibility of unintended consequences resulting from its enactment.⁷⁰ Claims of ambiguity garnered further attention when the Council of Catholic Bishops announced the Referendum prohibited the use of the "morning after" pill. The non-partisan Referendum Counsel further clouded the issue when it opined that the Referendum failed to resolve the issue of the "morning after" pill.

By election time, the Referendum debate had shifted from its fundamental merits to its apparent ambiguity.⁷¹ Opponents warned the voters that the passage of the Referendum would result in unintended consequences.⁷² In response, supporters argued opponents were trying to confuse voters with unwarranted charges of ambiguity.⁷³ Certainly the Church's position on the Referendum created uncertainty in the minds of some voters. While many voters undoubtedly cast their votes based on principled views about abortion, a good number of voters probably experienced difficulty sorting out the apparent ambiguities of the Referendum. Opinion polls reflected this confusion. By March 6,

67. Coulter, *Four Main Aims*, *supra* note 65.

68. *Id.*

69. *Abortion Debate Emerges Again to Vanquish Illusion of Consensus*, IR. TIMES, Dec. 1, 2001, at 10; Carol Coulter, *Mother And Child Campaign Opposes Referendum on Basis of Legal Advice*, IR. TIMES, Jan. 28, 2002, at 5; *Why I Cannot Back This Constitutional Amendment Bill; People Should Reject the Government's Latest Constitutional Proposal, Argues Roderick O'Hanlon*, IR. TIMES, Oct. 18, 2001, at 16.

70. See, Ivana Bacik, *Hypocrisy and Fear in Debate on Abortion*, IR. TIMES, Dec. 24, 2001, at 14; Eithne Donnellan, *New Alliance of Pro-Life Groups Describes Referendum as Fundamentally Flawed*, IR. TIMES, Feb. 21, 2002, at 8.

71. See Declan Fahy, *Political Parties 'Confuse' Voters*, IR. TIMES, Feb. 25, 2002, at 6 (noting numerous editorials in regional newspapers on state of confusing debate on Referendum).

72. See *Confusing and Divisive*, IR. TIMES, Feb. 25, 2002, at 13.

73. Patsy McGarry & Dennis Coghlan, *Confusion a Deliberate Tactic by No Side, Says Bishop*, IR. TIMES, Mar. 4, 2002, at 1.

voters were so closely divided that the polls were unable to predict the outcome of the vote.⁷⁴

IV. ANALYZING THE REFERENDUM

Although the government presented the Referendum as a carefully and thoughtfully drafted proposal, opponents quickly found fault. While the popular press discussed the underlying merits of the Referendum during the campaign, much of the debate focused on the structure and the language of the Referendum.⁷⁵ An exploration of these arguments may explain the ultimate defeat of the Referendum.

This section explores the potential ambiguities in the structure and text of the Referendum. First, the structure of the Referendum deviated from traditional amendments because it combined statutory and Constitutional language. In addition, the Referendum required voters to address several related issues with one vote only, creating confusion for voters that supported some provisions and opposed others. Second, the text, particularly the definitions, raised questions of clarity. Although there were some textually ambiguous definitions, opponents ignored those ambiguities. Instead, opponents of the Referendum focused on relatively unambiguous definitions and claimed they were, in fact, fatally ambiguous or vague. Third, the Referendum left important issues unresolved, and ultimately deferred to future governments to resolve those issues. Finally, with respect to the “morning after” pill, the Referendum left open the possibility that its passage would result in unintended consequences, and consequently failed to resolve this critical issue.

A. Ambiguity in Form: The Referendum's Structure

Although the Referendum sought to amend the Constitution, it did not look like a typical amendment in either form or structure. In fact, technically, the voters were not voting on the actual language of the Referendum. Rather, the specific question placed before the voters was:

74. *Yes Voters Hold Narrow Majority but the Electorate Remains Highly Confused*, IR. TIMES, Mar. 1, 2002.

75. This Article relies primarily on Ireland's principle national newspaper, *The Irish Times*, for records of the debate as played out in the popular press. Although Ireland has dozens of regional and local newspapers, *The Irish Times* is the most widely circulated, and easily accessible source for contemporary analysis of the Referendum.

Do you approve of the proposal to amend the Constitution in the undermentioned Bill?

*Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001.*⁷⁶

The Protection of Human Life in Pregnancy Act, if passed, would be the law on abortion. While the text of the act would not be added to the Constitution, it would have the same status as a Constitutional amendment. Before the Referendum, the government had never combined a Constitutional amendment with a statute.⁷⁷

After the government studied the abortion issue for nearly five years, Fianna Fail's leaders became convinced that a traditional Constitutional amendment, similar to the one in 1992, would not adequately address the abortion issue.⁷⁸ A single amendment repealing the suicide exemption, for example, would not resolve the myriad abortion issues such as the status of emergency contraception. Likewise, the Constitution would constrain any effort to resolve those issues solely through legislation. Simply put, the government sought to combine the specificity of statutory language with the force of a Constitutional amendment. As a result, greater specificity in a Constitutional amendment would implicitly restrain judicial activism, and therefore, avoid future cases such as the X Case.

The amendment/statute nature of the Referendum was not, strictly speaking, ambiguous. The potential effect was clear. If the voters approved the Referendum, the government would enact the Protection of Human Life in Pregnancy Act and it would have the force of a Constitutional amendment. While this amendment/statute approach generated little opposition, it did present some challenges.⁷⁹

76. REFERENDUM COMMISSION, USE YOUR VOTE: TWENTY-FIFTH AMENDMENT OF THE CONSTITUTION (PROTECTION OF HUMAN LIFE IN PREGNANCY) BILL 3, available at <http://www.ireland.com/newspaper/special/2002/abortioninfo/index.pdf> (last visited Mar. 11, 2003) [hereinafter USE YOUR VOTE].

77. *Morris v. Minister for the Env't & Local Gov't* (Ir. High Ct. Feb. 1, 2002), available at <http://www.bailii.org/ie/cases/IEHC/2002/5.html>.

78. See *Government Plans Comprehensive Approach*, *supra* note 60, at 6.

79. *But see* *Morris v. Minister for the Env't & Local Gov't* (Ir. High Ct. Feb. 1, 2002), available at <http://www.bailii.org/ie/cases/IEHC/2002/5.html> (holding the challenge of Referendum's constitutionality unsuccessful); Mary Carolan, *High Court Dismisses Students' Challenge to Abortion Referendum*, IR. TIMES, Feb. 2, 2002, at 6.

The government offered the amendment/statute approach to assure voters that the Referendum would provide more certainty than prior amendments. Because many voters were skeptical of entrusting the Supreme Court to implement the details of abortion policy, the government drafted legislation that attempted to resolve many issues relating to abortion, including controversies surrounding the suicide exception, emergency contraception, and the right to travel for the purpose of obtaining an abortion in another country. However, while the language was more specific than Constitutional language, it was not immune from charges of ambiguity or vagueness. In fact, by drafting more specific language, the government provided more details for opponents to attack. Furthermore, the amendment/statute approach shifted the debate from abortion policy to the implementation of that policy.⁸⁰ The sheer number of details addressed in the statute complicated the debate, especially for voters who lacked the technical expertise necessary to fully assess the language of the Referendum and its possible implementation.

The statutory nature of the Referendum also created another problem, namely, logrolling. The Referendum required the voters to cast only one vote that necessarily encompassed several distinct issues.⁸¹ A “Yes” vote would repeal the suicide exception,⁸² exclude the use of emergency contraception from the meaning of abortion,⁸³ give the government the power to designate approved medical facilities where abortions could be performed,⁸⁴ and require doctors to create a written record of their medical opinions regarding risks faced by their patients.⁸⁵ This created a conflict for a voter who, for example, opposed the suicide exception, as well as the “morning after” pill. Likewise, voters who supported the suicide exception and supported access to the “morning after” pill

80. See, e.g., Fergus, O’Ferrall, Editorial, *Health Concerns Raised by the Protection of Human Life in Pregnancy Act*, IR. TIMES, Feb. 4, 2002, <http://www.adelaide.ie/notices/20020204referendum.html> (stating that vagueness of “approved places” threatens emergencies that occur in pregnancies); Carol Coulter, *Emergency Terminations Not Necessary, Says Martin*, IR. TIMES, Feb. 16, 2002, at 6 (responding to Adelaide Hospital Society press release, by asserting referendum poses no threat to emergency health care).

81. Geraldine Kennedy, *Yes or No—You Cannot Pick and Choose*, IR. TIMES, Mar. 5, 2002, at 6 [hereinafter Kennedy, *Yes or No*].

82. Referendum § 1.2.

83. *Id.*

84. *Id.* § 1.3.

85. *Id.*

were faced with voting “Yes” to safeguard the availability of the “morning after” pill at the expense of the suicide exception, or to vote “No” and preserve the suicide exception at the expense of losing access to the “morning after” pill.⁸⁶

In general, legislation often addresses a number of issues and legislators must weigh the overall strengths and weaknesses of proposed legislation before casting their votes. In addition, legislators play a much greater role in the drafting of legislation than the typical voter. Thus, legislators are more familiar with the larger political process, which includes logrolling. While legislators may be comfortable with the realities of political compromise, voters may be a bit more reluctant to support legislation that promotes one of their values at the expense of another.

Even if the language of the Referendum was unquestionably clear, the structure of the Referendum concerned many voters. Since it demanded the consideration of particular details, the Referendum muted the debate over the policy in general. Some provisions supported changes advocated by the pro-choice camp, while other provisions appealed to the pro-life camp. Therefore, while the government tried to promote the Referendum as bringing “certainty to where it was lacking,”⁸⁷ many voters viewed its conflicting provisions as a confusing muddle.

Opponents did not limit their criticism to the structure of the Referendum. As discussed below, they also attacked the specific language of the Referendum and its potential consequences.

B. Ambiguity in Text: The Referendum’s Definitions

1. The definition of “abortion”

a. the intended effect of the definition of “abortion”

The Referendum’s definition of “abortion” attempted to resolve a couple of issues.⁸⁸ First, it attempted to eliminate the

86. See Kennedy, *Yes or No*, *supra* note 81.

87. Bertie Ahern, Statement at Fianna Fail Referendum Press Conference (Apr. 3, 2002), at http://www.fiannafail.ie/archive_article.php4?id=487.

88. The Referendum defines abortion as:

(1) The intentional destruction by any means of unborn human life after implantation in the womb of a woman.

suicide exception, which would overturn the X Case.⁸⁹ Interestingly, this was the only part of the Referendum that all parties agreed was clear on its face. While intense debates on the merits of the suicide exception existed, no one argued this change would have unintended consequences.⁹⁰ In fact, had the government only proposed an amendment that repealed the suicide exception, no one would have made charges of ambiguity. Indeed, considering the change in the political climate in the ten years since that issue was brought before the voters, a proposal limited to repealing the suicide exception may well have passed.

In 1992, a similar referendum was opposed by the pro-life advocates on one side and the pro-choice advocates on the other.⁹¹ Anti-abortion advocates opposed the 1992 Referendum because it "still allowed for abortion in limited circumstances."⁹² Similarly, the Catholic Church refused to support the 1992 Referendum.⁹³ By 2002, however, many anti-abortion advocates had moderated their views and accepted the reality that most Irish people supported abortion in the limited circumstance where it was necessary to save the mother's life. In addition, the Church began to moderate its stringent anti-abortion position.⁹⁴ The Church's new position on the issue should have garnered greater support than in 1992. However, because the government attempted to resolve too many issues connected with the abortion debate, the Referendum, including its definition of "abortion," was subject to an entire campaign focused on charges of ambiguity and unintended consequences.

The second issue raised by the Referendum's definition of "abortion" was whether an unborn life would be protected under the law. According to the Referendum, the definition of

(2) Notwithstanding subsection (1) of this section, abortion does not include carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where the procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction.

Referendum § 1.1, 1.2.

89. See Referendum § 1.2.

90. *Government Plans Comprehensive Approach*, *supra* note 60.

91. KINGSTON & WHELAN, *supra* note 10, at 19.

92. *Id.*

93. See Jeffrey A. Weinstein, Note, "An Irish Solution to an Irish Problem": Ireland's Struggle with Abortion Law, 10 ARIZ. J. INT'L & COMP. L. 165, 197 (1993).

94. See McGarry & Brennock, *supra* note 64.

“abortion” did not include termination of an unborn life before implantation in the womb.⁹⁵ This established a clear and unambiguous starting point with respect to when unborn life was protected. Some doctors, however, argued that this definition of abortion, unlike the definition with which doctors were used to working, contained no *ending* point of “unborn life” short of term.⁹⁶

Medical dictionaries generally define “abortion” as termination of pregnancy before viability.⁹⁷ In the absence of a definition that is based on viability, the Referendum could result in late term abortions, even after viability.⁹⁸ This argument, however, overlooks a couple of points.

First, existing Irish law does not define abortion in terms of viability, end of term, or any other end point. Thus, the Referendum did not add to the uncertainty. In addition, the Referendum did not give the Court any discretion to define the end point. Indeed, the legislature’s failure to resolve this ambiguity may be a legitimate reason to oppose the Referendum. A logical reading of the Referendum, however, suggests the Referendum does resolve the question of whether post-viability abortions are permissible.

Senator Mary Henry, M.D., a pro-choice advocate, implied that the Referendum’s failure to limit abortion to pre-viability situations would permit abortions in post-viability cases,⁹⁹ and therefore, abortions would be permitted in cases where they would have been previously prohibited. This is a very unlikely result. The Referendum generally barred abortion. Thus, an intentional termination of a pregnancy, either before or after viability, was generally prohibited. The only termination of pregnancy permitted under the Referendum had to fall *outside* the definition of abortion. The only terminations of pregnancy that fell outside the definition of abortion were those “necessary to prevent the real and substantial risk of loss of the woman’s life, other than by self-destruction.”¹⁰⁰ A termination of a pregnancy, after viability,

95. Referendum § 1.1.

96. Mary Henry, *Abortion Referendum* (Feb. 2002), at <http://www.senatormaryhenry.ie/abortion/abortion4.htm>.

97. *Id.*

98. *Id.*

99. *See id.*

100. Referendum § 1.1.

would most likely not fall within this exception. If the unborn child is viable, it is difficult to imagine a situation where an abortion would be *necessary* to protect the life of the woman. In that situation, both lives should be protected if possible.

Senator Henry's concern about the lack of an endpoint for abortions also fails to put the Referendum in proper context. The Referendum must be construed with the rest of the Constitution, including the Eighth Amendment. The Eighth Amendment recognises the right to life of an unborn child.¹⁰¹ Thus, the Referendum's exception to the definition of abortion, which sacrifices the right to life of an unborn child in favor of the woman's life in certain circumstances, would have to be narrowly and consistently construed with the rest of Article 40.3. It seems unlikely that a court would construe that exception to permit the death of the unborn child once the unborn child was viable outside the womb.

b. unwarranted criticism outside the scope of the referendum

Critics claimed that the failure of the Referendum to define "unborn life" fully left unresolved issues regarding *in vitro* fertilization,¹⁰² stem cell research, and other developing medical technologies.¹⁰³ Although these criticisms were undoubtedly true, those types of technological advances created legal and moral ambiguities as to how to define "unborn" and life itself. Clearly, those issues were beyond the scope of the Referendum. The Referendum only defined the limits of abortion. It did not address the full scope of the Eighth Amendment, and indeed, it was not meant to address those larger concerns.

Although the Referendum did not resolve all of the issues mentioned above, it does not mean that it was ambiguous or unduly vague as to the issues the Referendum intended to address. Those raising these concerns may correctly argue that the Eighth Amendment's protection of "unborn life" needs to be re-examined due to the scientific advances made during the past twenty years. This, however, highlights only the moral and social ambiguities of the Eighth Amendment with regard to issues beyond abortion. It

101. Art 40.3.3, Constitution of Ireland, 1937.

102. Deirdre Madden, *Referendum on Abortion*, IR. TIMES, Jan. 11, 2002, at 15.

103. Breda O'Brien, *Adelaide Proposals Fail to Protect Human Life*, IR. TIMES, Dec. 29, 2001, at 16.

does not establish that the Referendum created more ambiguities that would have resulted in unintended consequences. Those arguments merely recognise that the meaning of “unborn life” is increasingly uncertain due to technology. Even if the Referendum were enacted, legal issues regarding the Eighth Amendment would remain. The Referendum, while possibly attempting to do too much, was never proffered as the final word on issues relating to the definition of life or the unborn in particular.

2. The definition of “reasonable opinion”

Definitions are commonly used in statutes to provide a specific technical definition for a term of art.¹⁰⁴ Where a term is unambiguous and the intent is to give the term its plain meaning, a definition is unnecessary. Where the drafter has included an intentionally vague¹⁰⁵ or general term, a definition is similarly unnecessary since the meaning of such a term is purposely left to later courts and legislatures to resolve.¹⁰⁶

The Referendum included intentionally vague terms. For instance, section one of the Referendum allows a medical practitioner to end an unborn life where, in the medical practitioner’s “reasonable opinion,” doing so is necessary to prevent a real and substantial threat to a woman’s life.¹⁰⁷ “Reasonable opinion” is an example of a term that is deliberately vague. The drafters recognized that medical diagnosis is not as precise as the law envisions. The reasonableness of a medical opinion will often depend on the specific facts facing the medical practitioner. Trying to provide a more precise definition is both politically and practically very difficult. Thus, the drafters chose an intentionally vague term to allow for unforeseen future situations. Due to the difficulty of anticipating future events, an open-ended definition makes sense.

This inherent vagueness does not, of course, mean that the term “reasonable opinion” is a standard without meaning. Certainly there are opinions that easily fall inside or outside the scope of a “reasonable opinion.” However, the difficulty lies at the margins. For example, imagine a medical opinion that in

104. SUSAN L. BRODY ET AL., *LEGAL DRAFTING* 336 (1994).

105. For the distinction between ambiguous and vague terms, see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 48–51 (1975).

106. *See id.* at 49–50.

107. Referendum § 1.2.

retrospect was clearly wrong, but at the time offered was merely questionable, and thus supportable to some degree. Whether that opinion was "reasonable" would have to be determined through the court process. This was what the drafters intended, and therefore, it was not necessary for the drafters to define "reasonable opinion" any further. Nonetheless, section one of the Referendum defines "reasonable opinion" as a "reasonable opinion formed in good faith which has regard to the need to preserve unborn human life where practicable and of which a written record has been made and signed by the practitioner."¹⁰⁸

This definition did not clarify the inherent vagueness of "reasonable opinion." First, it is circular because it defines reasonable opinion as a reasonable opinion formed in good faith. Second, it is difficult to imagine an opinion, reasonable or not, that was not formed in good faith. A "good faith" opinion must mean an opinion that is actually held. However, this is true of all opinions. One who asserts a proposition that he does not believe is not asserting an opinion at all. He is simply lying. Thus, all opinions must be good faith opinions. Since there is no such thing as a bad faith opinion, this definition does not clarify anything. It merely states the tautology that a "reasonable opinion" must be an opinion and not a lie.

Proponents of the Referendum may argue that by defining "reasonable opinion" as requiring good faith, the Referendum ensures that "reasonable opinion" will be broadly construed, making it difficult for later courts to second guess medical practitioners. This reasoning assumes that "good faith opinion" is a more concrete term than "reasonable opinion." Perhaps this is so. But this just means the drafters should have used "opinion" instead of "reasonable opinion."

Defining "reasonable opinion" as a "good faith opinion" creates another problem. A "reasonable opinion" creates an objective standard—that which a reasonable person in the same position would hold. On the other hand, a "good faith opinion" creates a subjective standard—that which the doctor herself actually believed. By using a subjective term to define an objective standard, the drafters created an internal ambiguity.

Supporters could counter this theory by arguing that the definition was intended to establish that the medical practitioner's

108. Referendum § 1.3.

opinion must be both objectively reasonable and subjectively honest. Such definitions are common in both commercial law and criminal law. That such definitions are common, however, does not make them necessary. As noted above, *all* opinions are subjectively honest, or they are not opinions at all. Thus, a “reasonable opinion” necessarily includes the subjective standard.

The definition of “reasonable belief” was also unnecessarily redundant. In addition to requiring a good faith belief, the definition required the medical practitioner to preserve an unborn human life where practicable.¹⁰⁹ Article 40.3.3, however, already requires the life of the unborn to be balanced against the life of the mother.¹¹⁰ Surely, a “reasonable opinion” must be consistently construed with expressed Constitutional mandates. A medical opinion that ignored the life of the unborn would thus be inherently unreasonable. Thus, the clause did not add clarity to the meaning of “reasonable opinion” and was merely redundant.

3. The definition of “woman”

The Referendum also defined a term that seems incapable of misinterpretation. The Referendum defined “woman” as “a female person.”¹¹¹ It is difficult to imagine anyone interpreting “woman” to mean anything but a female person. That is, after all, the clear, plain meaning of the word.¹¹² As such, the definition was unnecessary.

It is conceivable the drafters wanted to make clear that “woman” also meant *young* females in order to avoid drawing a distinction between girls and adult women. However, in the context of this Referendum, it is unimaginable that anyone would draw such a distinction, which would essentially prohibit abortions for adult women, while permitting abortion for girls. Such a meaning could not be considered seriously. Still, if the drafters wanted to be certain that the term included all females and not just adult females, they could have achieved that precision without defining “woman.” A simpler solution would have been to use “female person” instead of “woman” in the two places where the term is used in section one of the Referendum.

109. *Id.*

110. Art 40.3.3, Constitution of Ireland, 1937.

111. Referendum § 1.3.

112. “Woman: . . . 1. A female human being.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2629 (3rd ed. 1986).

It may seem that quibbling over ineffective definitions is significant only to pointy headed professors living in ivory towers. After all, what harm can a redundant definition have? However, ineffective definitions may potentially cause mischief. When courts interpret positive law, they must give effect to every word. Logic demands that when drafters define terms, they must have a reason for doing so. Thus, the drafters of the Referendum must have intended "a female person" to mean something more precise than "woman." This leaves the courts to determine what that distinction might be. It is difficult to imagine a setting in which the distinction might arise. However, that is the danger that ineffective definitions create. Somewhere down the road, a situation might arise where the meaning of woman is disputed and the definition will create interpretive problems for whoever is called upon to give meaning to the term. Positive law must be drafted in anticipation of unforeseeable future events. Therefore, drafters should strive to avoid unnecessary definitions, like that of "woman."

4. The meaning of "real and substantial risk"

Although the Referendum drafters defined terms like "reasonable belief" and "woman," they left undefined one of the vaguest terms in the Referendum. The Referendum excludes medical procedures necessary "to prevent a *real and substantial risk* of loss of the woman's life" from abortion.¹¹³ Surely what constitutes a "real and substantial risk" is subject to differing interpretations. On one hand, it is surprising that the drafters deferred the resolution of this ambiguity to the courts. On the other hand, since the term was first used in the X Case, the drafter's choice is not so surprising.¹¹⁴ The Supreme Court's repeated use of the term suggests that it carries the weight of a Constitutional term of art.

While the precise meaning of "real and substantial risk" may not be clearly articulated, the Supreme Court limited it. Accordingly, it does not include a risk, no matter how serious, to the *health* of a woman.¹¹⁵ Thus, the risks to a woman who faced severe, but not fatal, medical complications from a continued

113. Referendum § 1.2 (emphasis added).

114. Attorney Gen. v. X, [1992] 1 I.R. 1, 53 (Ire.).

115. See *id.* (emphasis added).

pregnancy, would not fall within the Referendum's exclusion. However, just how "substantial" a risk to the life of a woman must be remains an open question. For example, neither existing case law nor the Referendum clarified whether a woman could have a lawful abortion if her pregnancy accentuated chronic medical problems, which would lead to her premature, but not immediate, death. Nonetheless, there was little opposition to the use of "real and substantial risk" in the Referendum. Overall, there seemed to be general agreement to allow the Court to resolve the inherent vagueness of this term.

C. Ambiguity of Deference: The Details of Place and Manner

In addition to the definition of abortion discussed above, section one of the Referendum also contained the following exclusion:

[A]bortion does not include carrying out of a medical procedure by a *medical practitioner at an approved place* in the course of which or as a result of which unborn human life is ended where the procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction.¹¹⁶

The Referendum defined "approved place" and "medical practitioner":

"[A]pproved place" means a place in the State approved for the time being by order as being suitable for the purposes of this section.

"[M]edical practitioner" means a person permitted by law for the time being to practice as a registered medical practitioner in the State.¹¹⁷

At first blush, these provisions appear not only reasonable, but prudent. The government certainly does not want abortions performed by unqualified practitioners, and state certification is a reasonable way to assure that those performing the "medical procedure" are competent. Likewise, the government has a strong interest in ensuring that these procedures are performed in a safe environment. Nonetheless, opponents viewed this provision as government over-reaching.

116. Referendum § 1.2 (emphasis added).

117. *Id.* § 1.3.

Opponents were concerned that these medical procedures could only be performed at places approved by the State.¹¹⁸ This gave the State the power to limit where these procedures could occur. Opponents feared the State could effectively ban these medical procedures by severely limiting the availability of approved facilities since there were no other standards by which the State approved these facilities. This would place pregnant women facing emergency complications at risk during their pregnancy.¹¹⁹

The State, of course, denied any hidden agenda. It claimed the provision was merely written to ensure that the medical procedures were performed safely. It assured voters that the details of State-approved places would be worked out in due course. Opponents, however, regarded this measure skeptically—a bit like the fox assuring the farmer that it would carefully guard the hen house.

Ahern had repeatedly stated his opposition to abortion in general, and in particular, the X Case.¹²⁰ The Referendum was intended to repeal the X Case. The government's clear anti-abortion position gave support to those who suggested the government could not be trusted to implement fair procedures for approving facilities.

Furthermore, a related provision fueled skepticism of the government's true agenda. The Referendum required that a medical practitioner's "reasonable opinion" be documented in writing.¹²¹ In addition, section 5.2 of the Referendum provided:

An order may make such provision relating to the making, keeping and confirmation of records (including records of opinions) of medical procedures referred to in *section 1* of this Act as may be considered by the member of the Government concerned necessary or appropriate for the purpose of this Act.¹²²

118. See, e.g., Alliance for a No Vote, *Abortion Bill Will Make Ireland an Unsafe Place to be Pregnant* (Dec. 9, 2001), at <http://flag.blackened.net/revolt/issues/choice/anv/press/wessexDEC9.html>.

119. *Id.*

120. Mark Brennock, *Ahern Warns of 'Liberal Abortion Regime'*, IR. TIMES, Feb. 14, 2002, at 8 [hereinafter Brennock, *Liberal Abortion Regime*].

121. Referendum § 1.3.

122. *Id.* § 5.2.

Opponents viewed these provisions as a threat to a woman's right to confidentiality.¹²³ Such threats could potentially expose doctors and women to criminal prosecution.¹²⁴ The government refuted those charges, arguing that the provisions were merely implemented to protect women. In addition, the government claimed the medical records would not be made available to the government.¹²⁵ In essence, the government's position was effectively reduced to a requirement that it be trusted to implement the details fairly.

Adding to the difficulty the government faced on this point was the likelihood that the alleged goal of these provisions could be achieved in the absence of the provisions. First, the Referendum only excluded "medical procedures" from the meaning of abortion.¹²⁶ Thus, the crude methods of back alley abortionists would not fall within the exclusion anyway. More importantly, Ireland already regulated the practice of medicine.¹²⁷ Thus, any unlicensed practitioner who performed a medical procedure would already be subject to sanction.¹²⁸ Therefore, permitting only licensed practitioners to perform the medical procedures was redundant.

Second, allowing medical procedures to be performed only in State-approved facilities was similarly unnecessary to guarantee the safety of women. Again, only licensed medical practitioners could legally perform these procedures. Licensed medical practitioners, by virtue of their license, are subject to sanction if they commit professional misconduct.¹²⁹ Even without required State approval for facilities that perform these specific procedures, a medical practitioner would be required to perform these procedures in a safe environment. The State would retain its authority to ensure the facilities were safe through its existing authority to regulate the medical profession.

It may very well be that the drafters of the Referendum included these provisions to assure anti-abortion advocates that the State would continue to closely regulate abortions in limited

123. Muiris Houston, *Referendum Bill 'Threat to Confidentiality'*, IR. TIMES, Feb. 12, 2002, at 5.

124. *Id.* If convicted, both doctors and patients could face up to twelve years in jail.

125. *Id.*

126. Referendum § 1.1.

127. Medical Practitioners Act § 35 (1978) (Ir.).

128. *See id.* § 45.

129. *See id.* § 45(a).

circumstances, and thus, restrict the availability of abortion in Ireland. If this was the case, their agenda failed, at least in part. Zealous pro-life advocates not only opposed the Referendum, but argued the Referendum was fatally ambiguous. Furthermore, they argued it would increase risks to women and children.¹³⁰

These unnecessary provisions, at the very least, hinted at excessive governmental intrusion into the doctor-patient relationship. As a result, these provisions created greater skepticism among pro-choice voters.¹³¹ By closing one can of worms, the potentially increased availability of abortions, the government opened another, the fear of greater government intrusion into private medical decisions.

D. Ambiguity of Consequences: The "Morning After" Pill

Perhaps the most contentious debate about the Referendum centred on the status of "emergency contraception." "Emergency contraception" is the euphemism for post-coital contraception.¹³² This includes IUDs and the "morning after" pill.¹³³ The legal status of the "morning after" pill in Ireland is somewhat unclear. To the extent that emergency contraception ends the life of the unborn, its use would clearly violate Article 40.3.3 of the Constitution in most circumstances. However, in 2001, the Irish Medicines Board licensed the "morning after" pill, finding that it was not an abortifacient.¹³⁴ This appeared to open the door for its routine availability. However, while Referendum supporters asserted that the Referendum would guarantee the availability of emergency contraception,¹³⁵ opponents argued that it did not resolve constitutional questions about the "morning after" pill.¹³⁶ In fact, the Referendum, while clearly drafted, was not responsive to the realities of those issues. In effect, the Referendum failed to address the problem completely.

To understand the Referendum's potential ambiguity with regard to emergency contraception, the relevant portion of the

130. Donnellan, *supra* note 70, at 8.

131. See Houston, *supra* note 123.

132. Irish Family Planning Association, *Virtual Guide to Contraception*, at <http://www.ifpa.ie/contraception/em.html> (last visited Feb. 19, 2003).

133. *Id.*

134. Allison O'Connor, *Board Approves Use of Morning After Pill*, IR. TIMES, Nov. 14, 2001, at 1.

135. Brian Cowen, *The Referendum Vote: Yes*, IR. TIMES, Feb. 18, 2002, at 18.

136. See, e.g., Tom O'Dowd, *Vote No*, IR. TIMES, Mar. 4, 2002, at 14.

Referendum must be examined. In this Act, “abortion” means the intentional destruction by any means of unborn human life *after implantation* in the womb of a woman.¹³⁷

The government argued this language provided constitutional protection for emergency contraception.¹³⁸ The “morning after” pill, when used properly, works like other birth control pills. It prevents pregnancy by slowing or preventing ovulation.¹³⁹ In some cases, it may prevent a fertilized egg from implanting in the uterus.¹⁴⁰ Thus, by defining abortion as the destruction of unborn human life *after implantation*, the Referendum excluded emergency contraception from the meaning of abortion. Thus, under the express and unambiguous language of the Referendum, the use of the “morning after” pill (and other emergency contraception) would not constitute an abortion. Since the drafters designed the Referendum to establish the limits of permitted abortion, this language seems to clearly resolve the issue: emergency contraception is permitted.

Despite this unambiguous language, opponents nevertheless attacked the Referendum on this point. Specifically, opponents argued the Referendum did not constitutionally guarantee access to the “morning after” pill.¹⁴¹ While the Referendum itself may have permitted the “morning after” pill, it left open the possibility of legal challenges to emergency contraception based upon other constitutional principles.

The possibility of such challenges became quite evident in the midst of the campaign. In February, Catholic Bishops released a statement, that in their view, the Referendum did not address the issue of emergency contraception.¹⁴² The Bishops asserted that the existing Article 40.3.3 protected the life of the unborn because the life of the unborn begins at conception.¹⁴³ While the Referendum excluded emergency contraception from the

137. Referendum § 1.1 (emphasis added).

138. Carol Coulter, *Government Maintains Bill Strikes Balance*, IR. TIMES, Oct. 6, 2001, at 6.

139. Assoc. of Reproductive Health Professionals, *Emergency Contraception: Train the Trainer Slides* (Dec. 17, 2002), at <http://www.arhp.org/healthcareproviders/visitingfacultyprograms/index.cfm?ID=251>.

140. *Id.*

141. Brennock, *Liberal Abortion Regime*, *supra* note 120, at 8.

142. See Mark Brennock, *Rift over Referendum Widened by Bishop's Comments*, IR. TIMES, Feb. 25, 2002, at 1.

143. *Id.*

definition of abortion, it did not define "life of the unborn" in Article 40.3.3. Thus, while the use of the "morning after" pill may not have been a criminal act (i.e. an abortion) under the Referendum, the use of the "morning after" pill could violate the unborn child's right to life under Article 40.3.3. The Bishops' position illustrated the possibility of successful legal challenges to emergency contraception even if voters approved the Referendum.

Although the government tried to downplay its conflict with the Bishops on this issue,¹⁴⁴ the uncertain future of the "morning after" pill hindered its efforts to present the Referendum as an unambiguous resolution of the abortion issue. Those efforts took another blow from the Referendum Commission. The Commission was a non-partisan group¹⁴⁵ that explained the Referendum in as simple and effective terms as possible and promoted public awareness of the Referendum.¹⁴⁶ In the Voters' Brochure that explained the Referendum, the Commission asserted the Referendum would not affect the constitutional status of the "morning after" pill.¹⁴⁷

The Referendum failed to resolve the "morning after" pill issue because it did not even address the issue. At the heart of the "morning after" pill debate lays an important issue: At what point, does the life of the unborn begin? The Referendum drew a bright line marking when unborn life begins for the purposes of abortion. However, Article 40.3.3 protects the life of the unborn generally, and is not limited to protection from abortion. Article 40.3.3 does not provide guidance as to when unborn life begins. Although the Referendum clearly and unambiguously resolved the status of emergency contraception vis-à-vis abortion, it failed to address the underlying ambiguity inherent in Article 40.3.3. Its failure to address this more fundamental and infinitely more controversial problem left the Referendum open to charges of ambiguity and unintended results.

144. *Id.*

145. Referendum Act § 2.3 (1998) (Ir.), available at <http://www.gov.ie/bills28/acts/1998/a198.pdf>.

146. *Id.* § 3.

147. USE YOUR VOTE, *supra* note 76, at 10.

V. HOW SKEPTICISM HELPED DEFEAT THE REFERENDUM

It is a common strategy of those opposed to legislation of any kind to claim that the legislation in question is ambiguous, vague, and incomplete. Surely, no drafter of positive law can possibly anticipate all future events or pass any positive law that is not an amalgam of compromise. This does not mean that the drafter must always concede that the law is so fraught with uncertain consequences as to be untenable.

Typically, legislators can counter the ambiguity argument in one of three ways. First, they can argue the proposed law is not ambiguous or vague. In fact, the meaning is as clear as it can be considering the limitations of language. Second, the vagueness is intentional and that some issues are best left to later resolution through subsequent legislation, regulation, or litigation.¹⁴⁸ Finally, the legislature could address any ambiguity that proves troublesome through an amendment. However, in this case, those rebuttals to the ambiguity argument were not enough to salvage the Referendum.

For example, even though the repeal of the X Case suicide exception was clearly expressed, along with the provision that unborn life was protected only after implantation, a number of events created skepticism among Irish voters. That skepticism proved to be fertile soil in which opponents could plant seeds of doubt through claims of ambiguity.

A. *Skepticism Toward the Courts and the Executive Branch*

The 1983 Amendment was intended to be a strong pro-life amendment.¹⁴⁹ Yet, it opened the door for the Supreme Court to legalize abortion, at least in some circumstances. Advocates on both sides of the issue have consistently attacked the X Case as an example of flawed legal reasoning.¹⁵⁰ Whether or not such criticism was warranted,¹⁵¹ the Court's ruling has created the public perception that the Court was willing to distort clear and unambiguous language to achieve its objective. Many voters may

148. See DICKERSON, *supra* note 105, at 49–50.

149. KINGSTON & WHELAN, *supra* note 10, at 4–5.

150. See, e.g., William Binchy, *Abortion Law Just Part of the Solution*, IR. TIMES, Aug. 17, 2000, at 14.

151. See Fintan O'Toole, *A Judge Puts Government in the Dock*, IR. TIMES, Oct. 21, 2000, at 10 (arguing government inaction and incompetence forces courts to act).

have believed the Court could potentially distort and misinterpret the Referendum.

Admitting that the Referendum could have been intentionally vague also proved problematic. The government, for example, could easily explain that governmental agencies with the expertise to provide proper oversight are in the best position to identify "approved places." The voters, however, have to trust those who will ultimately give meaning to those vague terms before they give their approval. Again, the court system would ultimately resolve any ambiguity. Unfortunately, many voters, who favored stronger limits on abortion, distrusted the Court's willingness to interpret the Referendum narrowly. Simply put, pro-life voters were unwilling to defer the interpretation of vague terms to the Court.

On the other hand, those who favored the liberalization of abortion laws would be less likely to object to a law that gave greater deference to the Court. After all, the widespread perception was that the Court had expanded the availability of abortions in Ireland. Instead, the power the Executive Branch held to restrict abortion made it difficult for pro-choice advocates to approve the Referendum. For example, section 1.3 of the Referendum deferred decisions recognizing "approved places" to the Executive Branch. Pro-choice voters were less likely to trust the government to implement fairly the details left unanswered by the Referendum. Of course, pro-choice voters were already predisposed to oppose the Referendum because it unquestionably sought to limit the availability of abortions by eliminating the suicide exception. Deference to governmental regulation made support from this group of voters even less likely.

B. Attempts to Gain Approval in the Midst of Skepticism

To pass the Referendum, the government had to win the support of the growing number of voters who sought a "middle ground" on the issue.¹⁵² The government needed the support of the voters who believed the Court was partially, but not wholly, correct in the X Case. In other words, the government needed to garner the approval of the voters who viewed abortion as an appropriate choice where the life of a woman is at risk, but who

152. As should be evident, the "middle ground" in Ireland is considerably further toward the "pro-life" end of the spectrum than the "middle ground" of the debate in the United States.

were unwilling to accept suicide as a basis for creating that risk. These voters were also likely to be skeptical of the Court. After all, the X Case led to ten years of political and legal debate, along with constant harping about judicial activism.

In essence, the government was asking voters to limit the authority of the Court by approving a Referendum that left the details to resolution by the same Court. In this context, it was not surprising that voters were reluctant to embrace the government's proposal. Some voters were concerned the Referendum gave too much power to the Court while others were equally concerned that it did not give enough. Even though the text may have been unambiguous, opponents were able to raise effective arguments about the uncertain future interpretation of that text.

Moreover, government assurance that the State would work out the key unresolved details was unlikely to garner many votes. While Fianna Fail remains the most popular political party,¹⁵³ and Bertie Ahern remains personally popular,¹⁵⁴ there is an undercurrent of mistrust among the voters. Nine months before the Referendum, the Irish voters rejected the Nice Treaty referendum despite Ahern's support for it.¹⁵⁵ In addition, Ahern's government has been marred by repeated scandals.¹⁵⁶ While these setbacks do not appear to have damaged Ahern's political popularity, they may have created skepticism among the voters as to the government's ability to deal with the details of the abortion issue.

As a result of the skepticism toward both the judiciary and the government, voters were reluctant to pass a Constitutional amendment that left important substantive details for later resolution. The government, however, had an important ally in overcoming the voter's skepticism. For the first time, the Irish leaders of the Catholic Church supported legislation that

153. Unison.ie, *Election 2002*, at <http://www.unison.ie/features/election2002/index.php> (last visited Feb. 19, 2003). In the general election two months after the Referendum was defeated, Fianna Fail gained eight seats in the *Oireachtas*. It now holds eighty-one of a possible 166 seats and easily put together a coalition government.

154. Mark Brennock, *Ahern Was Fianna Fail Trump Card in Appealing to Electorate*, IR. TIMES, May 20, 2002, at 2.

155. Chris Thornton, *Too Good to Be True?*, TIME EUR., (May 20, 2002), available at www.time.com/time/europe/magazine/article/0,13005,901020520-236999,00.html.

156. *Id.*

permitted limited abortions.¹⁵⁷ Historically, a coalition between Fianna Fail and the Church was an unbeatable force in the political arena.¹⁵⁸ Certainly, on an issue like abortion that speaks to core religious values, the support of the Church carries great influence among many Irish voters. More importantly, the Church, unlike judges and politicians, historically had the trust of Irish voters. Although assurances from politicians about the interpretation of the Referendum could be seen as self-serving, the Church's support would provide the reassurance and trust necessary to gain the support of those voters. That was true historically, but not today.

C. Failure to Gain Approval

In Ireland, the Catholic Church is reeling from a crisis of its own. Charges of wide-spread pedophilia,¹⁵⁹ and the Church's reluctance to address the issue appropriately,¹⁶⁰ have seriously damaged the Church's credibility. This issue goes to the very essence of the laity's trust of church leaders. Until the Church can put its own house in order and regain the trust it has lost, it is unlikely to wield the same political clout it has wielded historically.

The Abortion Referendum came before the Irish voters at a time of widespread skepticism. The voters, who sought a "middle ground" on abortion, had no one to trust to resolve the apparent ambiguities in the Referendum. The Supreme Court's perceived activism created the need for the Referendum in the first place. Surely, the Court could not be trusted to resolve the details of the abortion issue, or to interpret the most general principles expressly stated in the Eighth Amendment. The government was especially vulnerable after years of scandal. Church leaders had lost their moral authority by breaching the trust of their followers. Within this context, it is not surprising that many voters did not want to approve a Constitutional amendment that left both real and perceived ambiguities for later resolution.

157. Fintan O'Toole, *No Longer Yielding to Party or Pulpit, Electorate Not Bashful of Uncertainty*, IR. TIMES, Mar. 8, 2002, at 14.

158. *Id.*

159. See, e.g., Mary Raftery, *Child Abuse: The Church Has Got Off the Hook Too Easily*, IR. TIMES, Feb. 1, 2002, at 14; Medb Ruane, *Abuse Victims Await Spiritual Gesture from the Church*, IR. TIMES, Mar. 22, 2002, at 16.

160. Breda O'Brien, *Silence on Child Abuse Is Bleeding the Church*, IR. TIMES, Mar. 30, 2002, at 14.

If the historical tides were not enough to defeat the Referendum, the government may have sealed its fate by undermining the third rebuttal to charges of ambiguity. The government could not reassure the voters that the Referendum could be revised in the future if it should prove problematic. This was, after all, a Constitutional amendment and any changes would follow the same legislative process. The greatest strength of a Constitutional provision is also its greatest weakness—it is supreme law. Thus, it cannot be eroded through legislative fiat and the legislature cannot respond quickly if unforeseen problems arise.

It is for this reason that Constitutions are drafted in general terms. General terms are flexible and allow a constitution to adapt to contemporary situations. Thus, a Referendum drafted with statute-like specificity could effectively tie the hands of the *Oireachtas* as well as the Court. If changes became necessary, the *Oireachtas* would have to go through the same difficult amendment process as it did with the Referendum.

There is a danger in overstating the impact of skepticism on the Referendum election. The Referendum was only narrowly defeated. In contrast, a similar Referendum was defeated by a two-to-one majority ten years earlier. It is likely that the support of the Church, which did not support the earlier Referendum, changed the views of a good number of voters. Furthermore, despite troubles in the past few years, Ahern and Fianna Fail maintained control of the government in an election held two months after the Abortion Referendum. Nonetheless, charges of ambiguity and uncertainty may well have persuaded enough voters to oppose the Referendum to affect its ultimate outcome.

VI. CONCLUSION

Although the Irish Abortion Referendum of 2002 resulted in defeat, there are lessons to be learned from its failure. Perhaps foremost among these lessons is that swift legal solutions to difficult and divisive social issues are rarely successful. Bertie Ahern wanted to resolve the abortion issue through a constitutional referendum that attempted to placate voters on both sides of the issue. Despite the relative clarity of the text of the Referendum, it was criticized for being ambiguous and vague. While it contained some intentionally vague terms, these terms were not central to the objectives of the Referendum.

If the Referendum was textually clear, why did charges of ambiguity and threats of unforeseen consequences seem to resonate with the voters? Why were supporters unable to effectively rebut these charges? This author suggests three factors that may have led swing voters to ultimately reject the Referendum. These swing voters preferred to accept the vagaries of the status quo rather than risk further unsettling the status of abortion and issues surrounding contraception in Ireland.

First, abortion is a morally ambiguous issue, especially for swing voters. Over the past ten years, many Irish voters have come to accept the X Case holding that abortion should be available where there is a real and substantial risk to the life of the mother. However, this creates a tension with Catholic tenets and most Irish remain loyal to the Church. While many Irish voters may have moderated their anti-abortion views over the past decade, they remained opposed to "abortion on demand." Those voters, who were struggling with their beliefs with respect to their own moral and religious principles, may have been particularly receptive to arguments that the Referendum would lead to uncertain consequences.

Second, while the Referendum was textually clear, its effect was not. Eliminating the suicide exception would have clearly tightened existing abortion law. However, had it passed, it would also have signalled the waning of a strong anti-abortion majority. The 1992 Referendum that would have rowed back the suicide exception was defeated in large part by voters with strong anti-abortion feelings who opposed abortion under any circumstances. Thus, the Referendum created the counter-intuitive paradox in which a more restrictive law would actually reflect a less restrictive attitude among voters.

In addition, the attempt to present the Referendum as a compromise reform failed. On an issue as polarizing as abortion, common ground is difficult to find. With principled advocates on both sides who are reluctant to compromise their views, it seems pointless to find a middle ground. Nevertheless, the Referendum sought such a compromise. Advocates on both sides of the issue had multiple provisions from which to choose. Ahern and supporters attempted to appeal to pro-life voters by eliminating the suicide exception. In addition, they sought to appeal to pro-choice voters by expanding the availability of the "morning after" pill. However, pro-choice voters strongly opposed the elimination of the suicide exception while pro-life voters were reluctant to

expand the availability of contraception. Rather than broadening the appeal of the Referendum among swing voters, the compromising nature of the Referendum alienated voters on both sides of the issue.

The reluctance of voters to accept the compromise reflects a fundamental difference between legislators and voters. Legislators operate in world of compromise. Negotiation, party discipline, and trade-offs are fundamental to the legislative process. Voters, on the other hand, are less comfortable with compromise. This is especially true on issues as intractable as abortion. Thus, while a pro-choice legislator may be willing to give up the suicide exception for broader availability of contraception, a pro-choice voter may be less likely to accept that trade-off. Consequently, the kind of compromise that may have been necessary to get the Referendum through the *Oireachtas*, may have proved problematic to voters.

Finally, the Referendum was presented to the voters in a context of voter skepticism. Many voters distrusted the Supreme Court on the abortion issue. After all, there was a widespread perception that the X Case created the problem in the first place. In addition, the Fianna Fail party and the Catholic Church had credibility problems that extended far beyond the Referendum. This skepticism undermined the supporters' ability to reassure the voters that the Referendum would not result in unintended consequences.

When the Referendum was first presented to the voters, opinion polls showed that a majority of voters supported it. General attitudes towards abortion were unlikely to change as a result of the Referendum debate. Thus, for opponents to succeed in defeating the Referendum, they needed to shift the focus of the debate away from the merits of abortion availability and access to contraception to potentially uncertain consequences. That uncertainty could lead even entrenched voters on both sides of the abortion debate to question the wisdom of the Referendum. Indeed, the Referendum's narrow defeat reveals the success of that campaign strategy.

