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Title

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Permalink

<https://escholarship.org/uc/item/0gn3590j>

Journal

UC Irvine Law Review , 13(4)

ISSN

2327-4514

Author

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Publication Date

2023-11-01

Abortion Access in Religious Nations with Deep Societal Divisions: Lessons the United States Can Take from Abortion Reform in Ireland and South Africa

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In July of 2022, the Supreme Court of the United States overturned decades of precedent by holding that certain substantive rights, including the right to choose to have an abortion in the first trimester of pregnancy, no longer exist. The Court's decision impacted the quality and availability of reproductive care in numerous states across America and forced healthcare providers to prioritize arbitrary, confusing regulations over the health and well-being of pregnant patients. Tensions between liberal and conservative states are rising as state representatives respond to the Supreme Court's decision with overt, sweeping legislation. In order to emerge from this era intact, the United States should look to other nations with similar political and social structures that have successfully modernized their abortion laws. This Note makes three contributions. First, it describes the issues in a post-Dobbs America. Second, the Note explains how both Ireland and South Africa, two religious nations with deep political divisions, were able to revise policy that restricted abortion access and devise policy that protected and expanded abortion access. Third, it proposes a few different strategies that activists and lawmakers in the United States may employ to modernize abortion laws domestically.

* J.D. University of California, Irvine School of Law, Class of 2023. I want to express my thanks to Dean Parrish who believed in, thoughtfully contributed to, and breathed life into this Note, my parents, who were the first to teach me that my voice mattered, and the people whose rebellious spirit and ferocious courage animate the fight for bodily autonomy in modern America.

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INTRODUCTION

Old scars on America's body of law became new wounds this summer when the Supreme Court overturned fifty years of settled law and reversed *Roe v. Wade*.¹ In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that a pregnant person's right to choose an abortion early in their pregnancy is not a constitutionally protected fundamental right.² Following the *Dobbs* ruling, trigger laws implementing abortion bans took immediate effect and, after half a century of providing safe and reliable reproductive care, abortion clinics across the nation closed their doors.³

Challenges in reproductive care are not only restricted to pregnant patients but also to their physicians. Due to novel, muddled policy and looming threats of liability and punishment, many clinicians now abstain from performing surgical abortions, even in cases where the abortion is both medically necessary and permitted by law.⁴ Chemical abortions are similarly difficult to access due to complex legal issues and a limited supply of abortifacients.⁵ Many states now threaten licensed physicians who perform abortions with crushing criminal and civil

1. See *Roe v. Wade*, 410 U.S. 113 (1973).

2. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ____ (2022).

3. See Jen Christensen & Tierney Sneed, *At Least 43 Abortion Clinics Shut in Month After Supreme Court Overturned Roe, Research Says, with More Likely to Close*, CNN (July 28, 2022, 4:50 PM), <https://www.cnn.com/2022/07/28/health/abortion-clinics-shut-guttmacher/index.html> [<https://perma.cc/N5HE-BARN>].

4. See Isabelle Taft, *Can Rape Victims Access Abortion in Mississippi? Doctors, Advocates Say No.*, MISS. TODAY (Sept. 15, 2022), <https://mississippitoday.org/2022/09/15/rape-victims-abortion-access/> [<https://perma.cc/GPJ2-S29T>]; see also Megan Messerly, *In States that Allow Abortion for Rape and Incest, Finding a Doctor May Prove Impossible*, POLITICO (June 27, 2022, 11:15 AM), <https://www.politico.com/news/2022/06/27/abortion-exceptions-doctor-shortage-00042373> [<https://perma.cc/3W7C-WBMU>].

5. See Cynthia Koons, *The Abortion Pill Is Safer Than Tylenol and Almost Impossible to Get*, BLOOMBERG (May 3, 2022, 8:05 AM), <https://www.bloomberg.com/news/features/2022-02-17/abortion-pill-mifepristone-is-safer-than-tylenol-and-almost-impossible-to-get> [<https://perma.cc/252S-ZYTE>].

liability as well as revocation of their licenses to practice.⁶ Physicians are understandably hesitant to risk the penalties, even when death or serious injury might result.⁷

The implications reverberate in other ways too. Conservatives have long suggested that giving states the power to regulate abortion would solve the abortion debate, but in the months since *Roe* was reversed, state bans have caused only chaos and confusion.⁸ Multiple abortion bans are currently enjoined, making the status of abortion in each state even more precarious and uncertain.⁹ And as states with abortion bans fend off lawsuits and injunctions, pregnant people with nonviable or ectopic fetuses, health complications such as cancer or chronic illness, and rape-related trauma must either suffer the consequences of an unsafe pregnancy or spend money they do not have on travel to a proabortion state.¹⁰ Now that abortion access is no longer a constitutionally protected right, safe healthcare is no longer a guarantee or, in some states, even a possibility.¹¹

America could learn from other countries that have liberalized their abortion policies, especially those that share our commitment to liberty and autonomy. The idea that abortion access is an inviolable right, or even a constitutionally protected one, is not unique to the United States; Ireland, South Africa, and other countries have enacted laws protecting abortion access.¹²

This history of reproductive rights¹³ in Ireland and South Africa provides particularly apt insights. In Ireland, after suffering centuries of punishment for basic

6. See Lauren Coleman-Lochner, Carly Wanna & Elaine Chen, *Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions*, BLOOMBERG LAW (July 12, 2022, 7:30 AM), <https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions> [<https://perma.cc/H6D5-VP5B>].

7. *Id.*

8. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 6 (2022) (“And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

9. See Peter Butler & Dan Avery, *Abortion Laws by State: Where Has Abortion Been Banned?*, CNET (Nov. 14, 2022, 9:00 AM), <https://www.cnet.com/health/abortion-laws-in-every-state-where-are-new-state-restrictions/> [<https://perma.cc/3HX4-PNQ7>].

10. See Elizabeth Nolan Brown, *States Can't Ban Out-of-State Travel to Get Abortions, Writes Kavanaugh*, REASON (June 24, 2022, 12:51 PM), <https://reason.com/2022/06/24/states-cant-ban-out-of-state-travel-to-get-abortions-writes-kavanaugh/> [<https://perma.cc/T4SB-EFU4>].

11. See Greer Donley & Jill Wieber Lens, *The Devastating Implications of Overturning Roe Will Go Far Beyond Abortion Patients*, TIME (June 24, 2022, 12:24 PM), <https://time.com/6190782/roe-overturned-pregnancy-complications-miscarriage/> [<https://perma.cc/BU5H-85J5>].

12. For example, in 2018, Ireland passed the Health (Regulation of Termination of Pregnancy) Act 2018. See 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/5783-2CWS>]. Similarly, in South Africa’s revised constitution, there are provisions explicitly protecting reproductive autonomy. See CONST. OF REPUBLIC OF S. AFR. 1996, § 2(12)(a).

13. In her journal article discussing reproductive rights in South African courts, Catherine Albertyn defines reproductive rights as a “range of rights relating to reproduction and reproductive health throughout women’s life cycle, including sex education and contraception, the ability and decision to have (or not have) children, ante-natal and obstetric care and the right to give birth safely, and the reproductive needs and interests of women outside of, and beyond, pregnancy and child-birth.” Catherine Albertyn, *Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts*, UNIV. OXFORD HUM. RTS. HUB J. 87, 90 (2019) (adopting Albertyn’s definition, but applying it to anyone who can get pregnant, including some trans men, nonbinary people, and children).

reproductive care, citizens voted to repeal the constitutional prohibition on abortion. This prohibition was enacted in 1983, shortly after the Supreme Court decided *Roe*.¹⁴ In October of 2019, abortion was officially decriminalized in Northern Ireland, including the prescription, purchase, and consumption of abortifacients.¹⁵ South Africa granted its citizens access to abortion in 1996, when the country legalized abortion by statute and the apartheid regime ended.¹⁶ In 2012, South Africa amended its constitution to explicitly protect reproductive autonomy.¹⁷ This enshrinement dramatically reduced maternal mortality in South Africa and enabled thousands of safe and legal abortions to take place annually.¹⁸

Ireland and South Africa provide helpful comparative insights in that they are not so politically different from the United States. Both nations originated as Christian societies that developed into democratic republics. Both operate on a common-law or hybrid common-law system, and both ratified constitutions that set forth binding law. Most importantly, both prioritize liberty and autonomy.¹⁹ South Africa and Ireland recognized that their legislations would have to catch up to social policy. The United States must do the same.

Given the uncertainty created by the Court's reversal of *Roe*²⁰ and *Casey*,²¹ federal codification of abortion access is the first step toward bringing American laws in line with modern conceptions of freedom and autonomy. A well-crafted statute may eventually provide the necessary groundwork for an amendment to the Constitution, which would be nearly impossible to abrogate once codified.²² The only way through is forward, and in this case, moving forward requires this country to recognize the importance of reproductive freedom. As Justice Ginsburg powerfully stated, “[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal

14. See Aisling Reidy, *Ireland Votes Overwhelmingly to Repeal Abortion Ban*, HUM. RTS. WATCH (May 26, 2018, 1:10 PM), <https://www.hrw.org/news/2018/05/26/ireland-votes-overwhelmingly-repeal-abortion-ban> [https://perma.cc/96K8-SVAX].

15. Amanda Ferguson Belfast, *Abortion Decriminalized in Northern Ireland*, DW (Oct. 21, 2019), <https://learnrgerman.dw.com/en/abortion-decriminalized-in-northern-ireland/a-50890268> [https://perma.cc/MZD2-VYZA].

16. See Choice on Termination of Pregnancy Act 32 of 1996 (S. Afr.).

17. See CONST. OF REPUBLIC OF S. AFR. 1996, § 2(12)(a).

18. *The Impact of Legal Reform of Abortion in South Africa*, WOMEN DELIVER, <https://women-deliver.org/impact-legal-reform-abortion-south-africa/#:~:text=In%20an%20effort%20to%20reduce,first%2012%20weeks%20of%20pregnancy> [https://perma.cc/FJB7-8R6U] (last visited Sept. 13, 2023).

19. See Marci Hoffman, *Ireland - Government*, BRILL, http://dx.doi.org/10.1163/2213-2996_flg_COM_323054 [https://perma.cc/A9KZ-DCV7] (last visited Sept. 13, 2023); see also Marci Hoffman, *South-Africa - Introduction*, BRILL, http://dx.doi.org/10.1163/2213-2996_flg_COM_322843 [https://perma.cc/M3CV-RMMF] (last visited Sept. 13, 2023).

20. See *Roe v. Wade*, 410 U.S. 113 (1973).

21. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

22. See Scott Bomboy, *What Does It Take to Repeal a Constitutional Amendment?*, NAT'L CONST. CTR. (March 28, 2018), <https://constitutioncenter.org/blog/what-does-it-take-to-repeal-a-constitutional-amendment> [https://perma.cc/R8WL-KN5A] (“In simple odds, the chance of any constitutional amendment being repealed would be roughly the same as a person living to 80 years old being struck by lightning during their lifetime. . .”).

citizenship stature.”²³ For the United States, international contemporaries, as well as the twenty-first century, await.

I. AMERICAN ABORTION LAWS AND JURISPRUDENCE

Current American abortion laws and jurisprudence make up a confusing and dangerous landscape that is impossible for citizens to navigate and rife with interstate tension. For nearly fifty years, clear guidelines cabined antiabortion laws in the United States. Limits set upon state legislatures by the Supreme Court definitively and unequivocally prevented undue state interference in a pregnant person’s right to have an abortion before fetal viability.²⁴

Cogent case law engendered clear legislation, which allowed physicians and pregnant people to confidently obtain and provide quality reproductive healthcare. Concurrently, standards of care evolved, and risks associated with abortion decreased. Under this scheme, the lives and safety of pregnant people were as important—if not more important—than the potentiality of life.

Now that the Supreme Court has stripped abortion of its constitutional protection and given the states unchecked power to regulate it, a confusing array of abortion-related legislation has emerged. Between the increased severity of abortion restrictions in certain states and the rapid, haphazard creation and application of antiabortion laws, safe and reliable reproductive care is more elusive than it has been in half a century. Additionally, the tensions between proabortion and antiabortion states are higher than ever, leading to a potential breakdown in interstate cooperation.

A. Abortion Bans: Injury and Death

Abortion is currently banned in thirteen states and severely restricted in five,²⁵ and the risk of injury and death to pregnant people is higher than ever. Researchers predict that limited access to safe abortions will result in a steep increase in the maternal mortality rate, particularly in marginalized communities.²⁶ Stories from pregnant people suffering extreme hardship have become more common as cruel, arbitrary restrictions on reproductive healthcare contribute to mass confusion and roadblock among clinicians. Efforts by liberal states to create safe havens for those seeking an abortion threaten to deepen interstate divides and engender costly litigation.

23. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

24. *See Roe*, 410 U.S. at 163–64.

25. *See* Allison McCann, Amy Schoenfeld Walker, Ava Sasani, Taylor Johnston, Larry Buchanan & Jon Huang, *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Jan. 29, 2023, 1:30 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/88JA-53ZA>].

26. *See* Amanda J Stevenson, Leslie Root & Jane Menken, *The Maternal Mortality Consequences of Losing Abortion Access*, SOCARXIV PAPERS 3 (Jun. 29, 2022) (unpublished manuscript) (available at osf.io/preprints/socarxiv/7g29k [<https://perma.cc/B8Q7-YZGJJ>]) (“After the first year of no abortion occurring, we estimate increased exposure to the risks of pregnancy would cause an increase of 210 maternal deaths per year (24% increase), from 861 to 1071. The increase would be greatest among non-Hispanic Black people, for whom it would be 39%.”).

A team of researchers at the University of Colorado Boulder that annually catalogs maternal mortality rates in the United States analyzed how legal restrictions on abortion will affect the survival rate of pregnant people.²⁷ The study showed that “people who would have chosen abortion, with its very low mortality risk, will be exposed to the much higher risks of carrying pregnancies to term and the risks of remaining pregnant in the U.S. are very high compared to peer countries.”²⁸

Though antiabortion policymakers purport to value life, studies show that the states which impose the most severe abortion bans offer the least maternal and family support, including access to healthcare and financial assistance.²⁹ For example, in Alabama, the child poverty rate is 21.1%; in Louisiana, it is 26.8%; and in Texas, it is 18.9%. Roughly 39% of counties in states restricting abortion access fit the criteria to be considered “maternity care deserts.”³⁰ In such “deserts” there is “limited or no access to maternity health care services, such as an ob/gyn [or a] hospital or birth center with obstetric care or certified midwives.”³¹

Unsettling stories from pregnant people affected by abortion bans and restrictions are increasingly common as clinicians struggle to operate under new, extreme policies. At eighteen weeks pregnant, Elizabeth Weller, a graduate student living in Houston, Texas, suffered a premature rupture of membranes.³² The health risks following a rupture are severe, and Elizabeth requested that her pregnancy be terminated. Under Texas law, clinicians who perform abortions face up to life in prison and a \$100,000 fine.³³ For a week, administrative staff, doctors, and nurses debated Elizabeth’s request; meanwhile, Elizabeth lay in her expensive hospital bed as a lethal infection common to patients with premature membrane ruptures developed in her uterus.³⁴ On day seven, an exhausted Elizabeth returned home. Seven days later (two weeks post-rupture), Elizabeth returned to the hospital and gave birth to a dead fetus.³⁵

In Wisconsin, a woman suffered an incomplete miscarriage and bled steadily for ten days after emergency room personnel refused to remove the remaining fetal

27. The team hypothesized that the maternal mortality rate would increase by 24% overall and 39% among non-Hispanic Black people post-*Dobbs*. See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ____ (2022).

28. Stevenson et al., *supra* note 26, at 3.

29. See Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022, 6:00 AM), <https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes> [<https://perma.cc/AQ5T-T7ER>].

30. Jaqueline Howard, *Maternal and Infant Death Rates Are Higher in States that Ban or Restrict Abortion, Report Says*, CNN HEALTH (Dec. 16, 2022), <https://www.cnn.com/2022/12/14/health/maternal-infant-death-abortion-access/index.html> [<https://perma.cc/9L9H-C4K4>].

31. *Id.*

32. Carrie Feibel, *Because of Texas’ Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), <https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare> [<https://perma.cc/5GHM-2XTF>].

33. Eleanor Klibanoff, *Texas Who Perform Abortions Now Face Up to Life in Prison, \$100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), <https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/> [<https://perma.cc/LR59-DQET>].

34. See Feibel, *supra* note 32.

35. See *id.*

tissue.³⁶ Under Wisconsin law, abortion is banned without exceptions for rape and incest, and performing the procedure is a felony.³⁷

In Ohio, newly pregnant Christina Zielke was passing blood clots the size of golf balls in her parents' bathtub days after learning that her fetus no longer had a heartbeat.³⁸ Though Christina informed emergency room staff in Ohio of the miscarriage and showed them the tests that her OBGYN in Washington, DC, had run to confirm that the fetus was nonviable, her request for an abortion was denied.³⁹ In Ohio, abortion is banned after six weeks, though as of November 2022, the law is enjoined.⁴⁰ Emergency room staff sent Christina home with blood pooling in her shoes. They told Christina to return to the hospital in two days for a repeat hormone test to confirm that Christina was miscarrying. Seven hours later, Christina was dying.⁴¹ When she finally lost consciousness, her family rushed her to the hospital. Only then did Christina receive a lifesaving abortion under general anesthesia.⁴² Traumatized by her experience, Christina left the hospital immediately after the procedure ended.

Yet, it is not only the abortion restrictions themselves that increase health risks but also the chaos and confusion that they cause healthcare providers. As abortion bans take root in hospitals, clinics, and emergency rooms across the country, pregnant people are becoming collateral damage in a battle of lifesaving healthcare versus looming threats of jail time, fines, and license revocation.

Access to and prescription of abortifacients are equally rife with concerns of liability. A collection of clinical organizations, including the American Medical Association and American Pharmacists Association, stated post-*Dobbs* that “[m]any health care professionals, including physicians and pharmacists, are uncertain of their legal liability related to prescribing and/or dispensing these medications regardless of whether they are being used for an abortion or another indication.”⁴³

Most notably, pharmacists are hesitant to stock mifepristone, which, when taken with misoprostol, is widely viewed as “the most effective regimen for the medical management of miscarriage and medication abortions.”⁴⁴ Unfortunately, accessing the drug is a challenge. First, there is no FDA approval of mifepristone

36. Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/> [<https://perma.cc/8FCL-LTJD>].

37. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 37 (2022).

38. See Selena Simmons-Duffin, *Her Miscarriage Left Her Bleeding Profusely. An Ohio ER Sent Her Home to Wait*, NPR (Nov. 15, 2022, 12:01 PM), <https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio> [<https://perma.cc/F23L-K7WV>].

39. See *id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Dispensing Abortifacients Becomes Increasingly Complex for Pharmacists*, U.S. PHARMACIST (Oct. 5, 2022), <https://www.uspharmacist.com/article/dispensing-abortifacients-becomes-increasingly-complex-for-pharmacists> [<https://perma.cc/DE2Z-VWPZ>].

44. Jennifer Gerson, *Label Change for Mifepristone Could Reduce Barriers to Care for Miscarriages, Advocates Say in Petition to FDA*, THE 19TH (Oct. 4, 2022, 7:43 AM), <https://19thnews.org/2022/10/mifepristone-miscarriage-label-change-fda-petition/> [<https://perma.cc/23T4-H6KX>].

explicitly for miscarriage management,⁴⁵ and second, mifepristone's "Risk Evaluation and Mitigation Strategy" restricts clinicians' ability to prescribe the drug.⁴⁶

Legislators in antiabortion states have effectively hobbled physicians and forced them to choose between their own reputation, freedom, and finances or the well-being of pregnant people. With abortion clinics in antiabortion states shutting down, the number of people trained and prepared to perform surgical abortions has diminished.⁴⁷ The frustration, suffering, and helplessness that pregnant people experience when an abortion is delayed or denied is the direct result of legislative pressure on this remaining population.

B. *Interjurisdictional Abortion Wars*

Extreme abortion laws on both sides of the political spectrum are causing increased tension between liberal and conservative states. Since July of 2022, twenty-two states have passed or resurrected laws that severely limit or ban abortion.⁴⁸ Conversely, proabortion states are enacting laws that threaten the sovereignty of other states in a legislative trend that Professors Cohen, Donley, and Rebouché predicted earlier this year: "Some states will pass laws creating civil or criminal liability for out-of-state abortion travel while others will pass laws insulating their providers from out-of-state prosecutions."⁴⁹

California is one proabortion state that has entered the fray. In September of 2022, Governor Newsom signed into law a bill preventing the release of private patient information to out-of-state inquirers, even under subpoena. The bill, also known as AB 2223,⁵⁰ prohibits health care providers from "releasing medical information on an individual seeking abortion care in response to a subpoena or request from out-of-state."⁵¹ The Governor also promulgated AB 2091, a bill

45. Carrie Baker, *U.S. Senators Urge FDA Update to Mifepristone Label for Miscarriage Use: Patients Should Have Access to the Most Effective Medication Available*, MS. MAGAZINE (Feb 3, 2023), <https://msmagazine.com/2023/02/03/abortion-pill-fda-mifepristone-miscarriage> "Last October, the American College of Obstetricians and Gynecologists, the American Medical Association and 47 other organizations representing reproductive healthcare providers, researchers and advocates filed a citizen petition urging the FDA to relabel mifepristone for miscarriage treatment. In early January, the FDA rejected the petition, stating that the drug manufacturers would have to submit an application to change the label."

46. The Risk Evaluation and Mitigation Strategy (REMS) is a set of restrictions around the drug set by the FDA.

47. Allison McCann; Amy S. Walker, *Dozens of clinics have closed or halted abortions since the Supreme Court's decision to overturn Roe v. Wade.*, THE NEW YORK TIMES (June 22, 2023), <https://www.nytimes.com/interactive/2023/06/22/us/abortion-clinics-dobbs-roe-wade.html>

48. McCann et al., *supra* note 25.

49. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2022).

50. H.R. 2223, 2021-2022 Assemb. Sess. (Cal. 2022), <https://legiscan.com/CA/text/AB2223/id/2609184> [<https://perma.cc/KCQ5-GFG4>]. An act to amend Section 27491 of the Government Code and to amend Sections 103005, 123462, 123466, and 123468 of, to add Sections 123467 and 123469 to, and to repeal Section 103000 of, the Health and Safety Code, relating to reproductive health.

51. *Protections for People Who Need Abortion Care and Birth Control*, OFF. OF GOVERNOR GAVIN NEWSOM (Sep. 27, 2022), <https://www.gov.ca.gov/2022/09/27/new-protections-for-people-who-need-abortion-care-and-birth-control/> [<https://perma.cc/KZA6-ENMN>].

prohibiting “law enforcement and California corporations from cooperating with out-of-state entities regarding a lawful abortion in California.” These laws are an open act of defiance against states with criminal and civil abortion bans.

Antiabortion states have yet to challenge safe harbor laws, but due to the hostile climate between pro and antiabortion states, litigation is forthcoming. Indeed, Texas Attorney General, Ken Paxton, told Fox News that Texas prosecutors who refuse to enforce the criminal penalties for abortion are “little dictators” who “operate outside the law” and contribute to the “breakdown of the rule of law . . . and [the] constitutional republic.”⁵² Though the Attorney General directed his anger towards in-state defectors, it is unlikely that out-of-state actors preventing prosecution of Texans seeking abortions will be spared. In Florida, government officials who refuse to prosecute abortion providers face suspension.⁵³

California is not the only state to extend protections to out-of-staters seeking abortions. On June 24, 2022, the governors of Oregon and Washington signed a “Multi-State Commitment to Reproductive Freedom,” authored by Governor Newsom.⁵⁴ The agreement is essentially a commitment to protect out-of-state abortion patients and providers from punishment in their home states. Oregon, Washington, and California agreed to the following: prevention of “judicial and local law enforcement cooperation with out-of-state investigations, inquiries, and arrests;” refusal to cooperate with “non-fugitive extradition of individuals for criminal prosecution for receiving [an abortion];” and removal of “barriers to telehealth for reproductive healthcare services.”⁵⁵

The availability of telemedicine further complicates antiabortion bans. Because abortifacients are readily accessible by mail, a patient from a state without an abortion ban may seek abortion care from a physician in a state with an abortion ban.⁵⁶ Perhaps the opposite might also be true; patients in states with abortion bans

52. Gabrielle Reyes, *‘Little Individual Dictators’: Texas AG Calls Out Prosecutors Who Ignore Abortion Laws*, FOX NEWS (Oct. 29, 2022, 9:00 AM), <https://www.foxnews.com/politics/little-individual-dictators-texas-ag-calls-prosecutors-ignore-abortion-laws> [<https://perma.cc/E2QW-Y6GL>].

53. Patricia Mazzei, *DeSantis Suspends Tampa Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/desantis-tampa-prosecutor-abortion.html> [<https://perma.cc/UFE6-7FVR>].

54. *West Coast States Launch New Multi-State Commitment to Reproductive Freedom, Standing United on Protecting Abortion Access*, OFF. OF GOVERNOR GAVIN NEWSOM (Jun. 24, 2022) <https://www.gov.ca.gov/2022/06/24/west-coast-states-launch-new-multi-state-commitment-to-reproductive-freedom-standing-united-on-protecting-abortion-access/> [<https://perma.cc/DD33-KJK3>] (“The governors of California, Oregon and Washington [on June 24, 2022] issued a Multi-State Commitment to defend access to reproductive health care, including abortion and contraceptives, and committed to protecting patients and doctors against efforts by other states to export their abortion bans to our states.”).

55. GOVERNOR GAVIN NEWSOM, GOVERNOR KATE BROWN & GOVERNOR JAY INSLEE, MULTI-STATE COMMITMENT TO REPRODUCTIVE FREEDOM (2022), https://www.gov.ca.gov/wp-content/uploads/2022/06/Multi-State-Commitment-to-Reproductive-Freedom_Final-1.pdf [<https://perma.cc/43C2-7GRR>].

56. Farah Yousry, *Telemedicine Abortions Just Got More Complicated for Health Providers*, NPR (Sept. 26, 2022, 1:57 PM) <https://www.npr.org/sections/health-shots/2022/09/26/1124360971/telemedicine-abortion-medication-ban> [<https://perma.cc/LBU4-VDDA>] (“Katherine Watson, a law professor and medical ethicist at Northwestern University Feinberg School of Medicine in Chicago, argues that ‘[t]he stakes [of abortion care by telemedicine] are so high [in states that outlaw abortion]. We’re talking about something that’s a protected right in one state and a felony in a sister state. And the map is a patchwork. So [providing abortion care virtually] is an absolutely radical change.’”).

could seek abortion care via telemedicine from doctors in states that allow abortion. Between the safe harbors that Washington, California, and Oregon provide⁵⁷ and the increase in pregnant people seeking abortions and easy access to abortifacients, more “out-of-state abortions” will likely occur, thus expanding the possibility for interstate litigation.

C. Confusion and a Breakdown in the Standard of Care

Many states are embroiled in litigation involving the constitutionality of newly created or recently resurrected abortion bans. In eight states, abortion bans are blocked under temporary injunctions, with the enjoining courts waiting for litigation on the merits to conclude.⁵⁸ Whether these injunctions apply to the entire state, how long they will be in place, and the extent of the protection they confer upon abortion providers is murky. In response to a state judge’s preliminary injunction of Indiana’s abortion ban, the president of Indiana abortion clinic Whole Women’s Health said, “Of course, this landscape of legal back-and-forth leads to disruption in patient care and uncertainty for our staff.”⁵⁹

Even those abortion bans not under injunction cause widespread confusion. With the viability structure gone, states’ latitude in enacting abortion legislation is seemingly infinite. Now, states are free to draft new legislation, revive old legislation, enforce legislation that state courts enjoined while *Roe v. Wade*⁶⁰ governed, or execute some combination thereof. The Supreme Court paved a path for states to pass and/or enforce complicated, arbitrary, and contradictory legislation that, if violated, could cost citizens their freedom, their livelihood, and their reputation.

For example, in Arizona, there are multiple overlapping laws banning or restricting abortion, some of which existed during the Civil War.⁶¹ Each law sets different standards for liability and prosecution, placing Arizona physicians in an impossible position. An Arizona-based abortion care provider filed suit in October of 2022, requesting that the superior court explain which abortion laws, if any, should govern abortion care.

Abortion care providers in other antiabortion states are challenging the constitutionality of certain laws, resulting in temporary injunctions, stays, and all manner of confusing, short-lived court orders. Georgia’s abortion ban is active, but its constitutionality is at question as the government defends challenges from abortion providers.⁶² Until recently, a lower court order enjoined the ban. South Carolina’s highest court unanimously issued a temporary injunction on August 17,

57. *Protections for People*, *supra* note 51; GOVERNOR GAVIN NEWSOM ET AL., *supra* note 55.

58. *Simmons-Duffin*, *supra* note 38.

59. Associated Press, *Indiana Abortion Clinics Reopening After Judge Blocks Ban*, POLITICO (Sept. 23, 2022, 9:21 AM), <https://www.politico.com/news/2022/09/23/indiana-abortion-clinics-reopening-after-judge-blocks-ban-00058548> [<https://perma.cc/HQ8Y-M83F>].

60. *See Roe*, 410 U.S. 113.

61. *Center Lawsuit Seeks to Restore Abortion Access in Arizona by Blocking a Civil War-Era Abortion Ban*, CTR. FOR REPROD. RTS. (Oct. 4, 2022), <https://reproductiverights.org/arizona-lawsuit-civil-war-era-abortion-ban/> [<https://perma.cc/NW2T-M58B>].

62. *Georgia Supreme Court Allows Six-Week Abortion Ban to Again Take Effect*, ACLU (Nov. 23, 2022, 12:00 PM), <https://www.aclu.org/press-releases/georgia-supreme-court-allows-six-week-abortion-ban-again-take-effect> [<https://perma.cc/ZSD2-62P9>].

2022.⁶³ As of November 2022, that injunction is still in place as the merits of the petitioners'⁶⁴ constitutional challenge are litigated.

In Kansas, conservative legislators sought to enforce a 2011 law prohibiting abortion care via telemedicine⁶⁵. In November of 2022, a Kansas state court blocked the law with a preliminary injunction.⁶⁶ Telemedicine allows patients to acquire prescriptions for abortifacients, which can be sent from out of state through the United States Postal Service. What this block means for Kansas-based telehealth providers is unclear. It is also unclear what would happen to a Kansas citizen who ingests an abortifacient and then experiences partial expulsion of fetal tissue and requires medical intervention and abortive care. Whether in-state physicians could legally assist the patient is unclear under current laws.

Constitutional challenges of abortion bans and outdated legislation began in July of 2022 and will not stop any time soon. The amount of time state representatives must dedicate to these lawsuits as well as the litigation costs render defense of abortion bans inefficient and expensive. State judges are dragged into ideological battles and attorneys general are burning tax dollars defending laws that predate the statue of liberty.

II. LESSONS FROM ABROAD: TWO APPROACHES

A. Ireland: From Religion to Reproductive Rights

1. History of Abortion Reform

Ireland is an island in more than just geography; the country's unwavering, anachronistic commitment to an abortion ban enacted in 1861 set it apart from its European contemporaries.⁶⁷ In 1983, an opportunity arose for Irish voters to rebel against increasingly severe policy when Ireland's bicameral parliament, the Oireachtas, issued a referendum proposing the enshrinement of fetal rights in the constitution.⁶⁸ The proposed amendment not only conferred constitutional legitimacy upon

63. *South Carolina Supreme Court Temporarily Blocks Six-Week Abortion Ban*, PLANNED PARENTHOOD (Aug. 17, 2022), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/south-carolina-supreme-court-temporarily-blocks-six-week-abortion-ban> [<https://perma.cc/CAS8-RYZ9>].

64. Plaintiffs are the only two providers in the state that perform abortions: Planned Parenthood South Atlantic and Greenville Women's Clinic. They are represented by Planned Parenthood Federation of America. See *South Carolina Supreme Court Temporarily Blocks Six-Week Abortion Ban*, *supra* note 63.

65. *Kansas Telemedicine Ban Blocked, Allowing Expansion of Medication Abortion Services*, CTR. FOR REPROD. RTS. (Nov. 29, 2022), <https://reproductiverights.org/kansas-telemedicine-ban-medication-abortion/> [<https://perma.cc/SMP6-4DSC>].

66. *Id.*

67. See Sydney Calkin & Monika E. Kaminska, *Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland*, 124 FEMINIST REV. 86, 87 (2020) ("Before Ireland's 2018 referendum and abortion law reforms, Ireland and Poland were commonly pictured as the 'last bastions' of the pro-life movement in Europe. In the last three decades, as Ireland maintained and Poland introduced extremely restrictive abortion laws, they did indeed constitute deviant cases across the European Union. . . .").

68. The amendment stated that "[t]he 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

the abortion ban⁶⁹ but also ensured any challenges to the ban would “only be achieved through another referendum.”⁷⁰ Only 53% of eligible voters participated in the referendum, but two-thirds of those voters supported the amendment.⁷¹

Thirty-nine years later, in 2018, a referendum to repeal the Eighth Amendment passed with a two-thirds vote accompanied by historically high voter turnout of 64.1%.⁷² The results of this tide-turning referendum can be attributed to three factors: grassroots proabortion movements, case law acknowledging the unconstitutional effects of Irish law on vulnerable populations, and international involvement from the United Nations.

Between 1983 and 2018, grassroots efforts sought to destigmatize abortion and educate rural populations on reproductive health and agency. Ireland’s history is deeply rooted in Catholicism. The Eighth Amendment, which placed the rights of the pregnant person on equal footing with the rights of the fetus, aligned neatly with Catholic teachings.⁷³ Indeed, agents of the Catholic church have long maligned abortion and shrouded it in shameful, sinful mystery.

Efforts to mobilize voters and shift the public perception of abortion took shape in central Dublin in 2012, when a small but determined group of Irish voters gathered to devise a strategy to shift the social tides in favor of abortion. The group called their platform the Abortion Rights Campaign (ARC) and aimed to make safe abortions accessible across Ireland. Repeal of the Eighth Amendment was ARC’s central goal.

For years, members of ARC traveled throughout Ireland, hosting “speak outs” where women told their abortion stories, organizing marches, and setting up “information tables” in public areas.⁷⁴ Just five years after ARC’s establishment, forty thousand Irish citizens marched for the campaign.⁷⁵ In 2018, 63% of people in rural areas voted to repeal the Eighth Amendment, reflecting the national average, and

practicable, by its laws to defend and vindicate that right.” CONSTITUTION OF IRELAND 1937 art. 40.3.3 (amended by Eight Amendment of the Constitution Act (Act No. 35/1983) (Ir.).

69. From 1861 to 2018, the Offences Against the Person Act governed abortion in Ireland. The Act prohibited the administration of drugs or use of instruments to obtain an abortion. Under the Act, people who procure or provide abortions would be guilty of a felony and sentenced to “penal servitude for life.” Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 58-59 (Eng.), <https://www.legislation.gov.uk/ukpga/Vict/24-25/100/crossheading/attempts-to-procure-abortion/enacted> [<https://perma.cc/F2MP-7NCR>].

70. Anna Carnegie & Rachel Roth, *From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland*, 21 HEALTH & HUM. RTS. J. 109, 110 (2019) (citing CAELAINN HOGAN, REPUBLIC OF SHAME: STORIES FROM IRELAND’S INSTITUTIONS FOR ‘FALLEN WOMEN’ (2019)).

71. Fiach Kelly, *Poll to Introduce Eighth Amendment in 1983 Had 53.7% Turnout*, IRISH TIMES (May 25, 2018, 8:20 PM), <https://www.irishtimes.com/news/ireland/irish-news/poll-to-introduce-eighth-amendment-in-1983-had-53-7-turnout-1.3508753> [<https://perma.cc/XW9R-EZUA>].

72. In the Referendum of the ElectionGuide on May 25, 2018, there were 2,159,655 votes, 3,367,556 registered voters, and a 64.13% turnout. See Ireland, ELECTIONGUIDE: DEMOCRACY ASSISTANCE & ELECTION NEWS, <https://www.electionguide.org/countries/id/105/> [<https://perma.cc/7L7N-WN7F>] (last visited Sept. 13, 2023).

73. Carnegie & Roth, *supra* note 70.

74. *Id.*

75. *Id.*

the only constituency to vote against the repeal still voted 48% yes.⁷⁶ This dramatic shift in even the most conservative counties showcases the true force of grassroots insurgency and, more specifically, the power of education.

Other groups that engaged voters and sought to change the abortion narrative included Doctors for Choice, a group of physicians who “advocat[e] for comprehensive reproductive health services in Ireland, including the provision of safe and legal abortion for women who choose it,”⁷⁷ and Lawyers for Choice, a group of lawyers who gathered periodically to devise legal arguments challenging the abortion ban and the Eighth Amendment.⁷⁸ The huge turnout in 2018 and the repeal’s landslide victory could not have been achieved without the investment of ARC volunteers and other grassroots interest groups dedicated to abortion reform.

Case law in the 1990s exposed the cruelties of abortion bans, highlighting their inelasticity under dire circumstances. In 1992, the particularly heinous details of *Attorney General v. X* made national news and turned the discussion of reproductive rights from a “women’s issue” to a human rights issue.⁷⁹ In 1991, a man raped and impregnated a fourteen-year-old girl.⁸⁰ For eighteen months, the child suffered various forms of degradation and sexual abuse as her abuser, the father of one of her close friends, took advantage of the child’s shy nature and shame to keep his indiscretions from coming to light.⁸¹ By the time the child found the courage to confide in her parents, she was already nearly seven weeks pregnant.⁸² The girl is identified in court documents as “Miss X” to protect her identity. Miss X’s parents sought to hold her abuser accountable by suing him and presenting fetal tissue to the court to prove paternity.⁸³ When the Attorney General discovered the lawsuit as well as Miss X’s desire to seek an abortion, he requested that the High Court enjoin the girl from traveling outside the country for nine months.⁸⁴

In the proceedings that followed, the High Court discovered, via testimony by Miss X’s psychologist, that Miss X had expressed a desire to commit suicide and had even devised a method through which she would end her life.⁸⁵ In spite of the clear risk to Miss X’s life, the High Court granted the Attorney General’s request for an injunction; Miss X’s parents appealed.⁸⁶ On appeal, the Supreme Court of Ireland set aside the High Court’s injunction and concluded that a pregnant person is constitutionally entitled to an abortion if their pregnancy poses a real and substantial risk to their life.⁸⁷ Before Miss X could obtain an abortion, she miscarried.

76. *Id.*

77. DOCTORS FOR CHOICE IRELAND, <https://doctorsforchoiceireland.com/> [<https://perma.cc/2NVD-B2LG>] (last visited Sept. 13, 2023).

78. Carnegie & Roth, *supra* note 70.

79. *X Case Defined State Law on Abortion: The Proposed Amendment is Intended to Undo the Effects of the X Case*, IRISH TIMES (Feb. 18, 2002, 12:00 AM), <https://www.irishtimes.com/news/x-case-defined-state-law-on-abortion-1.1050769> [<https://perma.cc/M3V8-DVVE>].

80. *See* Attorney General v. X [1992] 1 IR 1 (Ir.).

81. *Id.*

82. *Id.*

83. *Id.* at 4.

84. *Id.* at 5.

85. *Id.* at 86.

86. *Id.* at 5, 7.

87. *See id.* at 21.

The Supreme Court of Ireland's judgment in *X* launched three separate referendums: two were introduced by pro-life activists and did not pass, and one was advanced by proabortion activists and did pass.⁸⁸ The two referendums that did not pass sought to exclude the suicide exception established in *X* from the Eighth Amendment. The referendum that did pass proposed a "limited right to access the information necessary to obtain an abortion abroad."⁸⁹ This right is now enshrined in the constitution as the Fourteenth Amendment and in the civil code as the Access to Information (Services Outside the State for Termination of Pregnancy) Act of 1995. While the Democratic response to *X* as well as the court's judgment itself did not constitute a broad expansion of reproductive rights, it represented a shift away from restrictive covenants and a step towards recognizing the pregnant person's right to life even where that right might conflict with the continued existence of a fetus.

International efforts to pressure Ireland into modernizing their abortion law facilitated a legislative inquiry within the Oireachtas to investigate the true impact of abortion restrictions on Irish citizens. In 2010, the European Court of Human Rights ruled in favor of Plaintiffs A,⁹⁰ B,⁹¹ and C,⁹² each of whom faced or would have faced different forms of devastation should they be forced to carry the fetuses to term.⁹³ The issue presented to the court was whether the restrictions on abortion in Ireland violated Article 8 [of the European Convention on Human Rights].⁹⁴ The

88. FIONA DE LONDRA & MÁIRÉAD ENRIGHT, *REPEALING THE 8TH: REFORMING IRISH ABORTION LAW 3–4* (2018).

89. *Id.* at 5.

90. *A, B and, C v. Ireland*, [2010] 1 DE 1, ¶ 14 ("At the time [she learned she was pregnant] [A] was unmarried, unemployed and living in poverty. She had four young children. The youngest was disabled and all four children were in foster care as a result of problems she had experienced as an alcoholic. She had a history of depression during her first four pregnancies, and was battling depression at the time of her fifth pregnancy. She considered that a further child . . . would jeopardise her health and the successful reunification of her family.").

91. *Id.* at ¶¶ 19–21 ("[B] became pregnant unintentionally. She had taken the 'morning-after pill' and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy. She . . . could not care for a child on her own at that time of her life. She had difficulty meeting the costs of the travel and, not having a credit card, used a friend's credit card to book the flights. On her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic.").

92. *Id.* ¶¶ 22–26 ("Prior to [obtaining an abortion], [C] had undergone. . . chemotherapy for a rare form of cancer. She had asked her doctor before the treatment about the implications of her illness as regards her desire to have children and was advised that . . . [chemotherapy] would be dangerous for the foetus . . . during the first trimester. The cancer went into remission and the applicant unintentionally became pregnant. When she discovered she was pregnant, the applicant consulted her General Practitioner (GP) as well as several medical consultants. She alleged that, as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus. Given the uncertainty about the risks involved, [C] travelled to England for an abortion. She maintained that she wanted a medical abortion (drug-induced miscarriage) as her pregnancy was at an early stage but that she could not find a clinic which would provide this treatment as she was a non-resident and because of the need for follow-up. She therefore alleged she had to wait a further eight weeks until a surgical abortion was possible.").

93. See *supra* notes ¶¶ 18–20.

94. Article 8 of the European Convention on Human Rights is titled "Right to respect for private and family life" and states 1) everyone has the right to respect for his private and family life, his

Court held that a person's access to abortion is related to the right to private life under the Convention because abortion implicates "personal autonomy, sexual life and physical and psychological integrity."⁹⁵ The court further acknowledged that being forced to travel abroad for an abortion was "physically and psychologically arduous for each [Plaintiff] and that the costs of travelling abroad were burdensome."⁹⁶ The court therefore held that the applicants' complaints fell squarely within the scope of Article 8 of the Convention and that the Irish abortion ban did violate the Convention.⁹⁷

The decision in *ABC* gave way to a supranational movement that ultimately pressured Ireland into major constitutional reconstruction. In 2017, the UN flagged Ireland's abortion laws as an issue of concern.⁹⁸ The United Nations Human Rights Committee issued two landmark rulings holding that Ireland's strict ban on abortion subjected women to cruel, inhuman, and degrading treatment.⁹⁹ The Committee recognized that punishing and banning abortion violated international human rights law and instructed Ireland to legalize abortion and create access to abortion care.¹⁰⁰

This instruction catalyzed committee discussion within the Oireachtas regarding the harsh criminal penalties attached to abortion laws.¹⁰¹ After months of evidence-intensive hearings involving national and international experts in abortion care, the Joint Committee on the Eighth Amendment of the Constitution published a report recommending that abortion care should be lawful under certain circumstances. Specifically, abortion should be lawful in clinical settings where the life or the physical or mental health of the woman is at risk, the fetus has a fatal anomaly, or, for the first twelve weeks of pregnancy, the pregnant person simply desires an abortion.

The Committee report led to a referendum, which put the substance of the Eighth Amendment to Irish voters. The referendum asked voters whether the "[p]rovision may be made by law for the regulation of termination of pregnancy." The turnout was massive, with 64.1% of eligible voters turning up to issue their vote. The referendum passed, abrogating the Eighth Amendment. In 2019,

home and his correspondence; and 2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. *See A, B and C v. Ireland*, [2010] 1 DE 1.

95. *Id.* ¶¶ 167–68.

96. *Id.* ¶ 239.

97. *Id.* ¶ 264.

98. Henry McDonald, *UN Repeats Criticism of Ireland's 'Cruel and Inhumane' Abortion Laws*, *GUARDIAN* (Jun. 13, 2017, 7:09 AM), <https://www.theguardian.com/world/2017/jun/13/un-denounces-ireland-abortion-laws-as-cruel-and-inhumane-again> [<https://perma.cc/H2LZ-9AUP>].

99. *Mellet v. Ireland, 2016; Whelan v. Ireland, 2017 (United Nations Human Rights Committee): UN Committee Rules Ireland's Abortion Laws Violate Human Rights*, *CTR. FOR REPROD. RTS.* (Nov. 11, 2013), <https://reproductiverights.org/case/mellet-v-ireland-2016-whelan-v-ireland-2017-united-nations-human-rights-committee/> [<https://perma.cc/595N-52KR>].

100. *Id.*

101. Coleman-Lochner, et. al, *supra* note 6.

Northern Ireland decriminalized abortion altogether,¹⁰² which demonstrated a tectonic shift from the area's heavily conservative policies. In mere decades, the laws in Ireland materially shifted towards progression and social welfare.

2. Lessons Learned

Often religion prevents compromise on issues with a “moral” dimension (e.g., premarital sex, same-sex marriage, and abortion). In the United States, the Catholic church is perhaps the most active opponent of abortion. In September of 2021, Pope Francis publicly stated that “abortion is murder.”¹⁰³ On their website, the United States Conference of Catholic Bishops quell any doubts regarding their stance on abortion:

Given the scientific fact that a human life begins at conception, the only moral norm needed to understand the Church's opposition to abortion is the principle that each and every human life has inherent dignity, and thus must be treated with the respect due to a human person.¹⁰⁴

Local priests also “guide their flock” to uncompromising positions on the abortion issue. For example, the Lafayette Diocese performs an annual “procession of roses,” which involves a solemn procession of children down the church's center aisle, each carrying a rose and each born in a year that *Roe v. Wade* was in effect.¹⁰⁵

The Catholic church's influence is as widespread as its position on abortion is severe. In 2014, the Pew Research Center identified fifty-one million Catholic adults in the United States—one-fifth of the total population.¹⁰⁶ As recently as 2021, more than 75% of Congress was Christian, while 29% was Catholic.¹⁰⁷ Currently, Arkansas state senator Jason Rapert is working with the National Association of Christian Lawmakers to draft legislation that would prohibit crossing state lines to obtain an abortion.¹⁰⁸ Indeed, Christianity has a voice in politics, and it opposes abortion.

102. *Abortion Decriminalised in Northern Ireland*, AMNESTY INT'L UK: ABORTION IN IR. & N. IR., <https://www.amnesty.org.uk/abortion-rights-northern-ireland-timeline> [https://perma.cc/3U5Z-N7DN] (last visited Sept. 13, 2023).

103. Courtney Mares, *Respect Life: Pope Francis' 8 Strongest Statements Against Abortion*, CATH. NEWS AGENCY (Oct. 4, 2021, 12:00 AM), <https://www.catholicnewsagency.com/news/249172/pope-francis-abortion-statements> [https://perma.cc/74BZ-ZAB7].

104. USCCB Committee on Pro-Life Activities, *Respect for Unborn Human Life: The Church's Constant Teaching*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life> [https://perma.cc/X8CA-S6R6] (last visited Sept. 13, 2023).

105. *Procession of Roses, Procession of Love*, ST. ALPHONSUS LIGOURI CATH. CHURCH, <https://zionsvillecatholic.com/news/procession-of-roses-processionof-love> [https://perma.cc/MH4X-4P2Q] (last visited Sept. 13, 2023).

106. *America's Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), <https://www.pewresearch.org/religion/2015/05/12/americas-changing-religious-landscape/> [https://perma.cc/3ESD-PZ7V].

107. Paul V. Fontelo, *Catholics Rise to Prominence in Congress*, ROLL CALL (Jan. 1, 2021, 9:00 AM), <https://rollcall.com/2021/01/01/catholics-rise-prominence-religion-congress/> [https://perma.cc/MKL3-7BVH].

108. THV11 Digital, *Arkansas Lawmaker Wants to Stop Patients from Crossing State Lines for Abortions*, THV11 (July 1, 2022, 12:17 PM), <https://www.thv11.com/article/news/politics/arkansas-lawmaker-ban-patients-state-lines-abortions/91-84e2e5e5-fc38-4759-b02b-e2fef9fc2e34> [https://perma.cc/G579-ZKUY].

Christianity in Ireland runs deep too. The Preamble to the Constitution of Ireland promises an undying allegiance to the Holy Trinity, “from Whom is all authority and to Whom . . . all action both of Men and States must be referred.” In 1936 a national census revealed that 93.6% of the nation were practicing Catholics.¹⁰⁹ As recently as 2019, 82% of all Irish schools were Catholic.¹¹⁰ Ireland is a thoroughly Catholic country—arguably more religious than even the most conservative states in America.¹¹¹ Yet, Irish citizens managed to reconcile their faith with access to reproductive care. The 2018 referendum, which stripped Ireland’s abortion ban of constitutional protection, rejects Catholic teachings that abortion is immoral and prioritizes abortion access over faithful obligation.

What catalyzed the social shift in Ireland could also effect change in the United States. In Ireland, grassroots campaign, ARC made no attempt to hide the ball. In refusing to shy away from the term “abortion,” ARC sought to destigmatize it and shed light on its benefits.¹¹²

In the United States, abortion still carries a heavy stigma. People advocating for abortion access call themselves “pro-choice.” In the United States, abortion is viewed as a moral quandary rather than a clinical procedure.¹¹³ By moving the conversation away from incest and rape, which trigger ethical considerations, and towards medical necessity and safety, advocates may find middle ground with the pro-life supporters.

Other efforts to destigmatize abortion could include townhalls where people who have had an abortion discuss their experience and demystify the procedure and/or pharmaceutical regimen. Abortion providers could also circulate leaflets or social media posts detailing the abortion procedure—and discussing noninvasive options to disprove any myths about the procedure’s risks or lasting effects.

Importantly, abortion should be framed, and taught in schools, as an integral part of modern reproductive care. The morality of abortion implicates traditional, Christian values which people may have difficulty overcoming. However, keeping abortion clean and clinical and unmysterious will help the narrative evolve.

109. *Census 1936 Reports*, CENT. STAT. OFF., <https://www.cso.ie/en/census/censusvolumes1926to1991/historicalreports/census1936reports/> [<https://perma.cc/6VLP-ML3Z>] (last visited Sept. 13, 2023).

110. IRELAND DEPARTMENT OF EDUCATION AND SKILLS, ANNUAL REPORT 2019 (2019) (PAGE 56).

111. *Compare* Chris Price, *Mass Attendance Growing, but Lower Than Before Pandemic*, ARK. CATH. (Feb. 10, 2023), <https://www.arkansas-catholic.org/news/article/7717/Mass-attendance-growing-but-lower-than-before-pandemic> [<https://perma.cc/4H86-KL6C>] (“Catholics make up approximately 4 percent of the state’s population, meaning there are a little more than 120,400 in Arkansas.”), *with* *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, CTR. STAT. OFF., <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rrc/> [<https://perma.cc/J8TC-R68E>] (last visited Sept. 13, 2023) (showing that as recently as 2016, Roman Catholics accounted for 78.3% of the Irish population.).

112. Carnegie & Roth, *supra* note 70.

113. *See* Christina M. Robinson & Ange Cooksey, *The Ethical Dilemma of Abortion*, 3 IND. U. E. J. STUDENT RSCH. 10 (2021) (“[T]he pro-life versus pro-choice dilemma is an imperative one that continues to cause ethical tensions in the United States.”).

B. South Africa: From Deep Divisions to Reform

1. History of Abortion Reform

In 1975, South Africa was under the control of the National Party government.¹¹⁴ The National Party advanced an apartheid regime whereby citizens were separated hierarchically in accordance with their race.¹¹⁵

South Africa experienced tidal shifts in their abortion laws when the apartheid regime ended and a more democratic, representative governing structure took its place. The newly democratic government was compelled by scientific studies demonstrating the deadly effects of abortion restrictions.¹¹⁶ Due to a new regime and powerful social movements, abortion laws in South Africa quickly moved from conservative and outdated to incredibly progressive. Abortion, as well as other reproductive decisions, is now constitutionally protected in South Africa.¹¹⁷

Only after deep divisions were healed could South Africa progress. For decades, South Africans were segregated by race under apartheid. In 1975, during the apartheid regime, South African legislators passed the Abortion and Sterilization Act.¹¹⁸ The Act allowed abortion under only limited circumstances and, much like physicians in the United States,¹¹⁹ physicians in South Africa were suddenly reluctant to perform abortions even under dire circumstances.¹²⁰ Between 1975 and 1996, the quality and frequency of reproductive care in South Africa declined.¹²¹

A major governmental shift occurred in 1994, when a bloodless election replacing President F.W. de Klerk with Nelson Mandela ended apartheid and opened the door to progressive policy. The new regime ended apartheid and with it, racial segregation.¹²²

In 1996, two years after apartheid ended, South Africa officially legalized abortion.¹²³ Parallel amendments to the new constitution reflected the country's desire to promote gender equality and place reproductive decisions in the hands of the people.¹²⁴ In 2008, registered nurses were permitted to train for and provide

114. Sally Guttmacher, Farzana Kapadia, Jim Te Water Naude & Helen de Pinho, *Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act*, 24 INT'L PERSP. ON SEXUAL & REPROD. HEALTH 191, 191 (1998).

115. *Id.*

116. See Mary Favier, Jamie M.S. Greenberg & Marion Stevens, *Safe Abortion in South Africa: "We Have Wonderful Laws but We Don't Have People to Implement Those Laws"*, 143 INT'L J. GYNECOLOGY & OBSTETRICS 38 (2018).

117. See CONST. OF REPUBLIC OF S. AFR. 1996, § 2.

118. Abortion and Sterilization Act 2 of 1975, (RSA GG 4608/1975) (S. W. Afr.).

119. *Id.*

120. Guttmacher et al., *supra* note 114 ("Physicians who performed abortions beyond this criterion took personal and professional risks, since many were prosecuted or fined. [F]inding a trained doctor willing to perform an abortion was [even] more difficult for women of color.")

121. *Id.*

122. Zeb Larson, *South Africa: Twenty-Five Years Since Apartheid*, ORIGINS (Aug. 2019), https://origins.osu.edu/article/south-africa-mandela-apartheid-ramaphosa-zuma-corruption?language_content_entity=en [<https://perma.cc/B5UT-LDHF>].

123. Guttmacher et al., *supra* note 114.

124. See CONST. OF REPUBLIC OF S. AFR. 1996, § 2(12)(2) ("Everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body."); see also *id.* § 2(27)(1) ("Everyone has the right to have access to health care services, including reproductive health care.")

abortions, expanding abortion care across the country and continuing the trend of safe, on-demand abortion access.¹²⁵

In the late 1980s, a subset of women in the American National Congress Women's League organized a women's rights movements advocating for an expansion of reproductive rights in South Africa. By 1996, legislators passed the Choice on Termination of Pregnancy (CTOP) Act, which provides widespread access to safe abortion with some gestational limits.¹²⁶ In addition to the CTOP Act, enshrined in the South African constitution are explicit provisions conferring rights to reproductive health, freedom, and autonomy.¹²⁷ Since 1996, antiabortion activists have launched several challenges to CTOP, alleging a fetus's right to life, but courts have struck these challenges down in light of the constitutional protection of reproductive decisions.¹²⁸

Like Ireland, and unlike the United States, South Africa initially promulgated affirmative restrictions on abortion. In 1975, the legislature enacted a law that severely curtailed access to abortion services.¹²⁹ The law required a pregnant person to obtain permission from a physician, and in some cases a magistrate, before seeking an abortion.¹³⁰ The law prohibited all abortions except in the case of pregnancies that seriously threatened the pregnant person's life or mental health, could cause severe handicap to the child, or resulted from rape, incest, or other unlawful intercourse.¹³¹

Western churches opposed abortion in Africa and engaged in aggressive propaganda decrying abortion and scaring people into submission. Known as NGK or the Dutch Reformed Church (DRC), the most prominent church in South Africa dates back to 1665 and represents 43% of South Africa's white population.¹³² The DRC has been a unified body since 1962.¹³³ Studies show that religion carried great weight in South Africa.¹³⁴

Interestingly, the church's antiabortion position stood in opposition to the government's—at least where Black families were involved. National Party leaders worried that the Black population would soon outpace the white population and render the “governing class” a minority.¹³⁵ Because of this, contraception and

125. Mary Favier et al., *supra* note 116.

126. Choice on Termination of Pregnancy Act of 1996 § 2 (S. Afr.).

127. See CONST. OF REPUBLIC OF S. AFR. 1996, § 2(12)(2) (“[E]veryone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction [and] (b) to security in and control over their body.”).

128. See *Christian Law Ass'n v. Minister of Health II*, [2004] BCLR 1086, at 27 (S. Afr.) (“[T]he fundamental right to individual self-determination lies at the very heart and base of the constitutional right to termination of pregnancy.”).

129. Abortion and Sterilization Act 2 of 1975, (RSA GG 4608/1975) (S. W. Afr.).

130. *Id.* § 6.

131. *Id.* § 3.

132. Susan Rennie Ritner, *The Dutch Reformed Church and Apartheid*, 2 J. CONTEMP. HIST. 17, 17 (1967).

133. See generally *id.*

134. Ritner, *supra* note 132 (“Religion has always been the most powerful formative influence in shaping the values, norms, and institutions of the Afrikaner community. This is reflected in the great prestige and status accorded ministers of [the church].”).

135. Guttmacher et al., *supra* note 114, at 192.

family-planning were actually encouraged in South Africa for Black families.¹³⁶ This did not mean that pregnant Black citizens could obtain an abortion, but the government would most likely punish a white person for obtaining an abortion before they would punish a Black person for the same violation.

The Abortion and Sterilization Act appeared to detrimentally impact reproductive health; in 1993, researchers from the Medical Research Council of South Africa initiated a program through which abortions were monitored.¹³⁷ The resulting data showed that in 1994, roughly 45,000 women were admitted to hospitals for spontaneous abortions or complications of induced abortions, over 12,000 people experienced moderate-to-severe complications resulting from clandestine abortions, and over 400 people died from septic abortions.¹³⁸ In addition to being unsafe, the Abortion and Sterilization Act was also expensive. In 1994, the cost of treating women for incomplete abortions in South Africa was estimated at approximately \$4.5 million USD.¹³⁹

In April 1994, the South African government underwent a major transition when voters elected a government in which “majoritarian power would be confined by an interim constitution.”¹⁴⁰ On December 11, 1996, South Africa enacted the Choice on Termination of Pregnancy Act, permitting pregnant people to request and obtain abortion services during the first twelve weeks of pregnancy and, in certain cases, all the way up to the twentieth week of pregnancy.¹⁴¹ Importantly, this law was passed by South Africa’s first democratically elected parliament—a new regime—and set a precedent for progressive abortion legislation.

South Africa’s Constitution underwent major changes involving abortion, and the timing of those changes aligns with the democratization of South African governance as well as legislative changes. Section 11 of the South African constitution, ratified in 1961, afforded South African citizens the following protections:

- (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.¹⁴²

There was no mention of abortion or reproductive rights. However, in 1996, shortly after the African National Congress took power, a new South African constitution was drafted, and it included the following provisions: “Everyone has the right to bodily and psychological integrity, which includes the right—to make

136. *Id.*

137. Helen Rees, Judy Katzenellenbogen, Rosieda Shabodien, Rachel Jewkes, Sue Fawcus, James McIntyre, Carl Lombard, Hanneke Truter & National Incomplete Abortion Reference Group, *The Epidemiology of Incomplete Abortion in South Africa*, 87 S. AFR. MED. J. 432, 433 (1997).

138. *Id.*

139. *Id.*

140. Tom Lodge, *The South African General Election, April 1994: Results, Analysis and Implications*, 94 AFR. AFF. 471, 471 (1995).

141. Choice on Termination of Pregnancy Act of 1997 (S. Afr.).

142. *See* CONST. OF REPUBLIC OF S. AFR. 1996, § 2(11).

decisions concerning reproduction; to security in and control over their body; and [the right] not to be subjected to medical or scientific experiments without their informed consent.”¹⁴³

2. Lessons Learned

The second issue that is often viewed as an obstacle to widespread abortion access in the United States is the deep national divide over abortion. Abortion is a hot button topic in the United States, and the deepening chasm between pro-life and pro-choice advocates makes compromise impossible, even within individual states.¹⁴⁴

Federal legislation like CTOP, which looks much like the viability structure established in *Roe v. Wade*, may be the best vehicle for abortion access in the United States. As for how to overcome the ideological chasm, a bill like CTOP that addresses the economic benefits of abortion access as well as the reduction in maternal mortality may convince enough legislators to get a majority. In South Africa, progressive legislation under a united government was the first step towards codification and enshrinement of abortion.

III. A PATH FORWARD: FEDERAL LEGISLATION

Currently, laws in the United States restricting abortion lag far behind the more progressive stance that legislation takes in similar nations like Ireland and South Africa. The benefit of looking to similar nations here is the roadmap it provides to progressive legislation in spite of religious, moral, or conservative reservations about abortion itself. To reintroduce widespread, national abortion access and get rid of confusing state-by-state laws, federal codification of abortion is necessary. In both South Africa and Ireland, the protection and/or expansion of abortion access was achieved at least in part through legislation. Grassroots efforts, education, and progressive movements preceded the vote, but the legislation itself was the most important instrument of progress. In the United States, the benefits of federal legislation in the realm of abortion access are already evident.

One approach that might have promise is the Emergency Treatment and Active Labor Act (EMTALA)¹⁴⁵, which permits emergency room physicians to perform an abortion if necessary to preserve the health of the pregnant person, not just to save their life. There are limits to EMTALA’s scope; for EMTALA to apply a pregnant person must (1) go to the hospital’s emergency room,¹⁴⁶ (2) expressly

143. *See id.* § 2(12)(2)(a)–(c).

144. Lisa Lerer & Katie Glueck, *After Dobbs, Republicans Wrestle With What it Means to Be Anti-Abortion*, N.Y. TIMES (Jan. 20, 2023) <https://www.nytimes.com/2023/01/20/us/politics/abortion-republicans-roe-v-wade.html> [https://perma.cc/LD8T-6B6Q] (stating the pro-life agenda pushed by Republican politicians will likely culminate in “a national ban” according to strategists because a nationwide ban “is the most mobilizing statement, the most persuasive.”).

145. Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395.

146. Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395 (defining the hospital’s emergency department broadly to include a hospital’s licensed emergency department, other hospital-owned facilities on the hospital campus, and a hospital’s off-campus provider-based departments that offer emergency-type services, e.g., urgent care centers and labor and delivery centers (clinics which are not part of a hospital or hospital-based are not included)).

seek emergency care, and (3) be experiencing an emergency medical condition.¹⁴⁷ Abortions under the aforementioned circumstances are protected by EMTALA, even, theoretically, in states with abortion bans in place.¹⁴⁸

In July 2022, the Department of Health and Human Services (HHS) issued an official statement that stated abortion laws are preempted by EMTALA, suggesting that where an abortion restriction conflicts with EMTALA, the federal law governs.¹⁴⁹ This sets a standard for other federal laws governing abortion access and ensures that the legislative codification of abortion at the federal level would not be compromised by bans in antiabortion states.

Congress enacted EMTALA in 1986, when Democrats held a majority in both the House and the Senate. In November of 2022, the Democrats controlled the Senate while the House was controlled by a slight Republican majority (221:213).¹⁵⁰ In order for a bill to pass, it must be supported by a simple majority of the House. Then, the bill moves to the Senate where a simple majority passes the bill.¹⁵¹ In light of the current composition of the political body, codification of abortion access will require the support of every Democratic representative as well as five Republican congresspeople.

In July of 2022, forty-seven House Republicans voted to pass the Respect for Marriage Act, which acknowledges and protects the right of same-sex couples to marry.¹⁵² This demonstrates that some Republican representatives are willing to compromise, even when the law might conflict with their religious or moral code. In South Africa, progressive changes in other areas of the law, namely desegregation, preceded abortion reform. The House has momentum in other areas of the law: interracial marriage, same-sex marriage, and contraceptives.¹⁵³ Perhaps this is an indication that abortion reform will follow.

In Ireland, data showing the negative impact of abortion restrictions and supranational pressure initiated legislation that protects abortion access. In South Africa, a movement that took advantage of expanded Democracy in civil rights in a post-apartheid era convinced lawmakers to pass proabortion legislation and even

147. A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—placing the health of the individual (or, with respect to a pregnant person, the health of the pregnant person or the fetus) in serious jeopardy, serious impairment to bodily functions, or severe dysfunction of any bodily organ or part; or with respect to a pregnant person who is having contractions—that there is inadequate time to effect a safe transfer to another hospital before delivery, or that transfer may pose a threat to the health or safety of the pregnant person or the fetus.

148. 42 CFR 489.24(a)(1)(ii) (2011) (“[I]f the hospital admits the individual as an inpatient for further treatment, the hospital’s obligation under [EMTALA] ends. . . .”).

149. Wen W. Shen, CONG. RSRCH. SERV., LSB 10851, EMTALA EMERGENCY ABORTION CARE LITIGATION: OVERVIEW AND INITIAL OBSERVATIONS (PART I OF II) (2022), <https://crs-reports.congress.gov/product/pdf/LSB/LSB10851> [<https://perma.cc/7PNX-BXAB>].

150. Scott Bland & Steve Shepard, 2022 *Elections*, POLITICO (Feb. 3, 2023, 11:58 AM), <https://www.politico.com/2022-election/results/> [<https://perma.cc/74NS-XAKC>].

151. *The Legislative Process: Overview*, CONGRESS.GOV, <https://www.congress.gov/legislative-process> [<https://web.archive.org/web/20230730063809/https://www.congress.gov/legislative-process>] (last visited July 30, 2023).

152. Respect for Marriage Act, H.R. 8404, 117th Cong. (2d Sess. 2022).

153. *See* Right to Contraception Act, H.R. 8373, 117th Cong. (2022) (on July 21, 2022, the Right to Contraception Act passed in the House; the Act awaits majority approval in a Democratic-led Senate).

protect reproductive freedom with a constitutional amendment. A federal standard governing abortion will promote widespread access to reproductive healthcare, but it will also quell intrastate judicial disputes and interstate tensions. Physicians will be guided by clear, unimpeachable guidelines, and they will focus on the quality of their care rather than confusing, state-by-state regulations built on the premise that the health and safety of pregnant people is secondary.

Federal codification of abortion access prior to fetal viability and where the pregnant person's life and/or health is at risk would permit compromise between pro and antiabortion policymakers. The bill might restrict abortion after a certain period of time or prevent repeat abortions. With both sides legislating the issue, the bill could reduce—rather than inflame—tensions.

CONCLUSION

Political tensions and high-stakes litigation are caused not only by deep divisions on the abortion issue but also by the tendency of many American politicians and citizens to vote and legislate on the basis of traditional Christian values. The United States is not the only nation with religiously inclined voters and politicians. Other countries where religion is interwoven with political issues and deep divisions in society exist have made progress to reach workable solutions to abortion issues. Ireland and South Africa are two countries that could provide guidance for how best to move forward in the United States.

