

## 'No. I won't go back'

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# ‘No. I Won’t Go Back’: National Time, Trauma and Legacies of Symphysiotomy in Ireland.

Máiréad Enright.<sup>1</sup>

*land...where time is time past.*

*A palsy of regrets.*

*No. I won’t go back.*

*My roots are brutal:*

Eavan Boland ‘Mise Eire’

Part of the common sense of the contemporary Irish state is the understanding that we are living in new times: that Ireland has decisively emerged from a past in which church and state power were so tightly intertwined as to be indistinguishable from one another. State responses to gendered religious institutional abuse are crucial to this common sense. Governments point to a public reckoning with a twentieth century history of widespread, systemic and long-lasting abuses in Catholic-run institutions, embodied in cases, judicial and other inquiries, and reports. These ‘legacy issues’<sup>2</sup> include the child abuse in religious-run reformatory and industrial schools (Ryan Report, 2009)<sup>3</sup> and in Catholic primary schools (*O’Keeffe v. Ireland*, 2014);<sup>4</sup> church

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<sup>1</sup> This chapter was developed as a paper at the Beatrice Baine Reading Group, UC Berkeley, and as part of the ESRC-funded Public Life of Private Law seminar series. Thanks to colleagues for their comments and questions. Thanks also to Marie O’Connor and Ruadhan Mac Aodhan of Survivors of Symphysiotomy (SOS): this paper draws, in particular, on Marie O’Connor, *Bodily Harm: Symphysiotomy and Pubiotomy in Ireland, 1944-92* (Evertime 2011). and on Marie O’Connor and Ruadhan Mac Aodhan, ‘Survivors of Symphysiotomy to the UN Committee Against Torture’ (2014) 35–40 <<http://cdn.thejournal.ie/media/2014/03/symphysiotomy-submission-to-uncat-10-march-2014.pdf>> accessed 14 August 2016., discussed within.

<sup>2</sup> See e.g. ‘National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21\* - Ireland.’ 6 <[http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/\\$file/National%20Report%20IE%20Cycle%202.pdf](http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-A97JFV1512120-en/$file/National%20Report%20IE%20Cycle%202.pdf)> accessed 14 August 2016. Dáil Deb 17 Jul 2014; Dáil Deb 2 Feb 2016; Dáil Deb 14 Aug 2016.

<sup>3</sup> ‘The Commission to Inquire into Child Abuse’ <<http://childabusecommission.ie/>> accessed 2 August 2016. The Commission was chaired first by Ms. Justice Mary Laffoy and then by Mr. Justice Sean Ryan. See further John Bergin, ‘Dysfunctional Organization? Institutional Abuse of Children in Care in Ireland.’ (2007) 4 *Journal of Management, Spirituality & Religion* 461. Carol Brennan, ‘Trials and Contestations: Ireland’s Ryan Commission’ in Johanna Sköld and Shurlee Swain (eds), *Apologies and the Legacy of Abuse of Children in ‘Care’* (Palgrave Macmillan UK 2015)

officials' failure to protect children from abuse by parish priests, (Ferns Report, 2005<sup>5</sup> and the Murphy Reports on Dublin 2009 and Cloyne 2011<sup>6</sup>) the incarceration of women in Magdalene laundries (McAleese Report, 2013);<sup>7</sup> and the maltreatment of unmarried mothers,<sup>8</sup> the fatal neglect of some babies and the forced adoption of others in religious-run 'mother and baby homes' (Mother and Baby Homes Commission, ongoing).<sup>9</sup> Though these institutions were religious-run, their activities fell within the scope of government responsibility; they reflected the formal and informal<sup>10</sup> outsourcing of particular coercive biopolitical functions to a church eager to discipline citizens' sexual and reproductive lives.<sup>11</sup>

This chapter takes the government response to Survivors of Symphysiotomy as an exemplary 'legacy issue'. Survivors of Symphysiotomy (SOS) is the leading

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<[http://link.springer.com/chapter/10.1057/9781137457554\\_5](http://link.springer.com/chapter/10.1057/9781137457554_5)> accessed 31 July 2016. Fred Powell and others, 'The Irish Charity Myth, Child Abuse and Human Rights: Contextualising the Ryan Report into Care Institutions' (2013) 43 *British Journal of Social Work* 7. Sinead Pembroke, 'The Role of Industrial Schools and Control over Child Welfare in Ireland in the Twentieth Century' (2013) 21 *Irish Journal of Sociology* 52.

<sup>4</sup> Conor O'Mahony, 'State Liability for Abuse in Primary Schools: Systemic Failure and O'Keeffe v. Hickey' (2009) 28 *Irish Educational Studies* 315. James Gallen, 'O'Keeffe v Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 *The Modern Law Review* 151.

<sup>5</sup> Francis Murphy, 'Ferns Report' (2005) <<http://www.lenus.ie/hse/bitstream/10147/560434/2/thefernsreportoctober2005.pdf>> accessed 2 August 2016. The inquiry was chaired by former judge Francis Murphy. *ibid.*

<sup>6</sup> 'Commission of Investigation, Dublin Archdiocese, Catholic Diocese of Cloyne' <<http://www.dacoi.ie/>> accessed 2 August 2016. The inquiries were chaired by former judge Yvonne Murphy.

<sup>7</sup> Martin McAleese, 'Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries' (2013) <<http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013>> accessed 2 August 2016. Glynn, Evelyn, 'Magdalene Matters' in Rebecca Anne Barr, Sarah-Anne Buckley and Laura Kelly (eds), *Engendering Ireland: New Reflections on Modern History and Literature* (Cambridge Scholars Publishing 2015). Miryam Clough, 'Atoning Shame?' (2014) 23 *Feminist Theology* 6. Eva Urban, 'The Condition of Female Laundry Workers in Ireland 1922-1996: A Case of Labour Camps on Trial' [2012] *Études irlandaises* 49. Clara Fischer, 'Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalization of Feminine Transgression in Modern Ireland' (2016) 41 *Signs: Journal of Women in Culture and Society* 821.

<sup>8</sup> Maria Luddy, 'Unmarried Mothers in Ireland, 1880-1973' (2011) 20 *Women's History Review* 109.

<sup>9</sup> Paul Michael Garrett, 'Excavating the Past: Mother and Baby Homes in the Republic of Ireland' [2015] *British Journal of Social Work* bcv116. Paul Michael Garrett, "'Unmarried Mothers' in the Republic of Ireland' [2016] *Journal of Social Work* 1468017316628447.

<sup>10</sup> Sheila Killian, "'For Lack of Accountability": The Logic of the Price in Ireland's Magdalen Laundries' (2015) 43 *Accounting, Organizations and Society* 17, 24.

<sup>11</sup> On the Irish church's role as institutionalized moral disciplinarian see Claire McLoone-Richards, 'Say Nothing! How Pathology within Catholicism Created and Sustained the Institutional Abuse of Children in 20th Century Ireland' (2012) 21 *Child Abuse Review* 394. And Una Crowley and Rob Kitchin, 'Producing "decent Girls": Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922-1937)' (2008) 15 *Gender, Place & Culture* 355

advocacy group for elderly Irish women who were subjected to symphysiotomy;<sup>12</sup> a childbirth operation which cuts or tears the *symphysis pubis*; a ligament at the front of the pelvis. It was revived as an elective surgery in Ireland in the 1940's, when it had long died out as a non-emergency practice elsewhere in the developed world, and was practiced in some places into the 1980's. Symphysiotomy and its aftermath were often intensely painful.<sup>13</sup> Many women report lifelong incontinence, chronic pain and walking difficulties.<sup>14</sup> Others report depression, post-traumatic stress disorder, sexual dysfunction<sup>15</sup> and damage to family life as a result of ongoing disability.<sup>16</sup> Both SOS and the state accept that symphysiotomy's peculiar Irish history cannot be understood apart from its religious dimensions. However, symphysiotomy's defenders present it as a minor operation, independently justifiable in medical terms, rarely wrongful as such. By contrast, SOS construct it as a form of historical religiously-motivated institutionalised obstetric violence, with long-lasting consequences, and directed, like the others mentioned above, at women's sexual and reproductive lives. They argue, and the state has accepted, that doctors generally did not seek women's consent to symphysiotomy.<sup>17</sup> The state had a legal obligation to prevent this treatment,<sup>18</sup> and

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<sup>12</sup> 'SOS Ireland - Survivors of Symphysiotomy' <<http://symphysiotomyireland.com/>> accessed 31 May 2015. The organisation was founded in 2002. It is survivor-led and run on democratic principles. SOS pursues a variety of activities aimed at building solidarity and raising consciousness of the wrongfulness of symphysiotomy among survivors. SOS is often described as one of three patient representative groups; the other two are Patient Focus and Survivors of Symphysiotomy Ltd. These organisations are funded directly by the Health Services Executive (HSE), have a much smaller membership, and tend to adopt policy positions which are antagonistic to those advanced by SOS, suggesting division among survivors where, often, this is not the case. See e.g. 'Symphysiotomy Redress Scheme Criticised' (*RTE.ie*) <<http://www.rte.ie/news/2014/0911/642929-symphysiotomy/>> accessed 31 May 2015. For instance, Patient Focus rejected the UN Human Rights Committee's July 2014 criticism of the government's policy on symphysiotomy Laurence Lee, 'Battling Insensitivity over Symphysiotomy' (*Al Jazeera Blogs*, 19 November 2014) <<http://blogs.aljazeera.com/blog/europe/battling-insensitivity-over-symphysiotomy>> accessed 31 May 2015.(see further infra) They also welcomed the redress scheme discussed infra., when SOS have strongly criticised it for the reasons discussed below. Paul Cullen, 'More than 360 Apply for Symphysiotomy Redress Scheme' *Irish Times* (6 December 2014) <<http://www.irishtimes.com/news/health/more-than-360-apply-for-symphysiotomy-redress-scheme-1.2027914>> accessed 31 May 2015.

<sup>13</sup> O'Connor and Mac Aodhain (n 1) 9.

<sup>14</sup> *ibid* 11–13.

<sup>15</sup> *ibid* 13.

<sup>16</sup> *ibid.*; Irene Jillson, 'Symphysiotomy in Ireland: A Qualitative Study' (Georgetown University 2012) 16–18

<[http://www.patientfocus.ie/site/images/uploads/SYMPHYSIOTOMY\\_IN\\_IRELAND\\_By\\_Irene\\_Jills\\_on\\_PhD.pdf](http://www.patientfocus.ie/site/images/uploads/SYMPHYSIOTOMY_IN_IRELAND_By_Irene_Jills_on_PhD.pdf)> accessed 14 August 2016.

<sup>17</sup> O'Connor and Mac Aodhain (n 1) 9. Yvonne Murphy, 'Independent Review of Issues Relating to Symphysiotomy' (2014) 21 <<http://health.gov.ie/wp-content/uploads/2014/07/Scanned-Murphy-report-redacted-version1.pdf>> accessed 18 August 2016.

now must investigate it and provide appropriate remedies. The state steadfastly refuses to do so. These women aspire, nevertheless, to make themselves heard; to be, in Felman's vibrantly temporal terms, 'actively and sovereignly reborn from a kind of social death into a new life.'<sup>19</sup> 'We might be in our 70s and 80s, but we want the truth. Someone has to say, these operations should never have been done. .... You wouldn't do it to a cow.'<sup>20</sup>

This chapter argues that government responses to SOS are an iteration of an emerging effort to establish and police the boundaries of 'homogenous national time'. The politics of national time underpin and sustain discourses of responsibility for historical abuse. They enable the state to corral certain historicised abuses within a distinct regulatory space, and accordingly to achieve 'closure'; limiting the state's responsibility to investigate those abuses or compensate those who suffered them. The first section of this chapter introduces Irish discourses of homogenous national time. The state imagines its history in linear terms; neatly divided into religious past and secular present. Within this imaginary, injuries such as symphysiotomy become 'legacy issues'; leftovers from a different time. I use the idea of legacy to unsettle national time, exposing it as a precarious assemblage wrought out of multiple contradictory timings. There is no clear line between past and present, with symphysiotomy occupying a natural place on one side or the other. Rather, symphysiotomy is implicated in a contested passage of time. In the chapter's second section, I explore these contestations by drawing out the contrasting histories of symphysiotomy articulated in the government-commissioned *Walsh* report, and in the testimonies of SOS's members. *Walsh* is the official history of symphysiotomy, produced instead of a public inquiry, and the foundation of a subsequent, restrictive, symphysiotomy redress scheme. *Walsh* naturalises the religious dimensions of symphysiotomy, and simultaneously reconstructs it as a legitimate and dignified medical practice. I then locate SOS as irritating the temporal project in *Walsh*;

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<sup>18</sup> *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, CEDAW, UN Doc CEDAW/C/49/D/17/2008 (2011). See further Juan Méndez, *UN Special Rapporteur on Torture: Report on Abuses in Healthcare Settings* UN Doc. A/HRC/22/53 (2013), 6

<sup>19</sup> Shoshana Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust' (2001) 27 *Critical Inquiry* 201, 231.

<sup>20</sup> Anne Cahill, 'My Life Was Ruined by Symphysiotomy' (16 July 2014) <<http://www.irishexaminer.com/analysis/my-life-was-ruined-by-symphysiotomy-275544.html>> accessed 31 May 2015.

drawing out their embodied exposure of its contradictions and exclusions. In the third section, introducing the operations of law, I examine the state's policy of inhibiting women's access to the courts, in favour of enforcing 'closure' through a contractual and bureaucratic state redress scheme based on *Walsh*. Law is doggedly instrumentalised to prevent the transmission of disruptive testimonies and to contain their drag on national time. The state invests remarkable energies in this process. In the final section, I set out the affective stakes for the state of preserving homogenous national time. I turn here to theories of trauma, particularly to Lyotard's idea of the 'double blow', to explain the state's reluctance to engage with symphysiotomy's legacies. I locate the trauma in the unresolved collapse of the state's old relationship with religion as origin of law. Read in this way, national time exceeds political and legal agency. Its threads are also held together by affect surpassing any deliberate settlement. The state's legal manoeuvres then look less like marginal techniques of already-settled national time, than a frantic effort to suppress a foundational failure; a violent incapacity.

### **Ireland, Closure and Homogenous National Time.**

In the last six years, Fine Gael governments have responded to a range of historical institutional abuses. In doing so, they have cast themselves as founders of a new secular national time, on behalf of the national 'we', which can determine the limits of responsibility for the past. The Ireland of the past, they tell us, was an 'evil'<sup>21</sup> 'cruel pitiless'<sup>22</sup> collective which used religious institutions to isolate and contain undesirable subjects.<sup>23</sup> Today's Ireland, however, is a changed secular and more authentically Catholic<sup>24</sup> society; which is no longer 'morally subservient'<sup>25</sup> to

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<sup>21</sup> Susie Donnelly and Tom Inglis, 'The Media and the Catholic Church in Ireland: Reporting Clerical Child Sex Abuse' (2010) 25 *Journal of Contemporary Religion* 1.

<sup>22</sup> 'Taoiseach Enda Kenny's Statement on Magdalene Report' <<http://static.rasset.ie/documents/news/kenny-magdalene-speech.pdf>> accessed 3 August 2016.

<sup>23</sup> Kate Kenny, 'Organizations and Violence: The Child as Abject-Boundary in Ireland's Industrial Schools' (2016) 37 *Organization Studies* 939.

<sup>24</sup> Michael Sutton, 'The Cloyne Report and the Taoiseach's Speech: Towards "Hibernian Catholicism"?' (2012) 101 *Studies: An Irish Quarterly Review* 273, 276.

<sup>25</sup> 'Taoiseach Enda Kenny's Statement on Magdalene Report' (n 22). On apology as allowing us to feel shame and therefore to feel better see Ahmed Sara Ahmed, *The Cultural Politics of Emotion* (Routledge 2013) 101–121.

religious power; which cherishes its women;<sup>26</sup> which acknowledges past exclusions as wrongs<sup>27</sup> and seeks to repair them. The national time imagined here is Walter Benjamin's 'empty time'; filled in with the belief in inevitable national progress.<sup>28</sup> Apologising to women who had been incarcerated in Magdalen Laundries, the Taoiseach, Enda Kenny, said:

Today we live in a very different Ireland with a very different consciousness [*sic*] awareness – an Ireland where we have more empathy insight heart. We do so because at last we are learning those terrible lessons. We do because at last we are giving up our secrets. We do because in naming and addressing the wrong, as is happening today, we are trying to make sure we quarantine such abject behaviour to our past and eradicate it from Ireland's present and Ireland's future.<sup>29</sup>

The appeal to that unitary 'we' invokes homogenous national time:<sup>30</sup> the nation, as Benedict Anderson elaborates, is presented as 'a solid community moving steadily down (or up) history'<sup>31</sup> in the same ways and with the same consequences for all. Homogeneity enables a radical break with the past – there are no important stragglers. The triumphant state 'heralds a new dawn'.<sup>32</sup> There is little attempt to examine the on-going impacts of past abuse,<sup>33</sup> or to consider whether the motivations and systems which enabled that abuse have persisted, despite secularisation and social change.<sup>34</sup> With these distinctions between times firmly established, the state tells us its primary role is to seek 'closure'.<sup>35</sup> 'Closure' here suggests neatly divided time; periods hang together 'like the beads of a rosary'.<sup>36</sup> The culpable past does not leak into the

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<sup>26</sup> Clough (n 7). Una Crowley and Rob Kitchin, 'Producing "decent Girls": Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922–1937)' (2008) 15 *Gender, Place & Culture* 355.

<sup>27</sup> 'Taoiseach Enda Kenny's Statement on Magdalene Report' (n 22).

<sup>28</sup> Walter Benjamin, *Illuminations* (Random House 2015).

<sup>29</sup> 'Taoiseach Enda Kenny's Statement on Magdalene Report' (n 22).

<sup>30</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2006) 25.

<sup>31</sup> *ibid* 26.

<sup>32</sup> 'Taoiseach Enda Kenny's Statement on Magdalene Report' (n 22).

<sup>33</sup> Ronit Lentin, 'Asylum Seekers, Ireland, and the Return of the Repressed' (2016) 24 *Irish Studies Review* 21.

<sup>34</sup> AV Simpson and others, 'Doing Compassion or Doing Discipline? Power Relations and the Magdalene Laundries' (2014) 7 *Journal of Political Power* 253.

<sup>35</sup> Paul Michael Garrett, 'A "Catastrophic, Inept, Self-Serving" Church? Re-Examining Three Reports on Child Abuse in the Republic of Ireland' (2013) 24 *Journal of Progressive Human Services* 43. Kate Kenny, 'Affective Disruption: Walter Benjamin and the "history" of Ireland's Industrial Schools' (2013) 8 *Management & Organizational History* 10.

<sup>36</sup> Benjamin (n 28).

innocent present. As such, 'closure' signifies a limit to responsibility and accountability – an installation of boundaries between the present state, and the wrongdoing of the past; boundaries which are all the more tenuous when we recall that the injuries to be addressed took place within living memory.

As Latour writes, time appears to be a natural resource, passing smoothly under its own irreversible forward momentum.<sup>37</sup> For the government, the time of the nation 'passes as if it were really abolishing the past behind it. They all take themselves for Attila, in whose footsteps no grass grows back.'<sup>38</sup> But the linear upward transition from one period of national time to the next is not smooth or inevitable. There is a clue in the catch-all governmental term for historical institutional abuses; 'legacy issue.' The word 'legacy' is used carelessly without elaboration; the suggestion is of loose ends that remain at the end of a transition from past to present already almost completed. But legacy is both something transmitted or inherited, perhaps unexpectedly, from the past and something to be bequeathed to live on in the future. Legacies do not only signify death or ending, but the task of carrying on and working through.<sup>39</sup> The nation-state can only continue 'its existence one more turn', gain substance and last in time, because subjects take it up again and again, inheriting from previous occasions.<sup>40</sup> As Derrida wrote, inheritance is always a task, '[a]n inheritance is never gathered together, it is never one with itself...One must filter, sift, criticize, one must sort out several different possibilities that inhabit the same injunction.'<sup>41</sup> All legacies are divisible, and we must choose how we interpret them; how to grapple with their divisions. The impossibility of truly homogenous national time becomes apparent when we read it together with this idea of legacy; to borrow again from Latour, '[w]hat passes is not a stable fixture but a whole moving assemblage of disconnected parts'.<sup>42</sup> Moreover, it is inherently heterogeneous, made up of clusters of different – national, historical, local and personal - timings.<sup>43</sup> Time's passing

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<sup>37</sup> Bruno Latour, 'What's the Story?' in Daniel Robichaud and Francois Cooren (eds), *Organization and Organizing: Materiality, Agency and Discourse* (Routledge 2013) 43.

<sup>38</sup> Bruno Latour, *We Have Never Been Modern* (Harvard University Press 2012) 69.

<sup>39</sup> Samir Haddad, *Derrida and the Inheritance of Democracy* (Indiana University Press 2013) 33.

<sup>40</sup> Latour (n 37) 43–44.

<sup>41</sup> Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (Psychology Press 1994) 16.

<sup>42</sup> Latour (n 37) 50.

<sup>43</sup> Susannah Radstone, *The Sexual Politics of Time: Confession, Nostalgia, Memory* (Routledge 2007) 9.

depends on interpretation; the application of official histories, and legal mechanisms that elevate those histories above competitors, and suppress contradictions where necessary. Each cluster of timings is necessarily a locus of alterity and provocation.<sup>44</sup> The stable, coherent passage of homogenous national time requires disentanglement, re-combination and binding together of a multiplicity of inherited threads. The combination could always be otherwise. As such, the construction of homogenous national time raises questions of emphasis, representation,<sup>45</sup> assimilation<sup>46</sup> and memorialisation<sup>47</sup> exceeding any simple 'closure'. As an assemblage, national time is never a fixed arrangement. Rather it is always in process, across multiple sites of struggle.

Even a brief initial consideration of SOS's position discloses them as a complex irritant to homogenous national time. This account from one survivor shows the difficulty of encompassing symphysiotomy even within personal linear time, much less distributing it across a neat timeline with clear divisions between past and present. The time of symphysiotomy is simultaneously the time of memory, of future worry, of permanent wounding, of everyday coping, of foreclosed youth and early motherhood:

I cope with it every day ... you just live with the repercussions, the pain ... [the incontinence] ... I was so sore, I was limping the day I went to see the consultant - some winters, and some summers, it would be bad.... But I'm strong, I'm not going to let it get the better of me. I'm on an anti-depressant ...

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<sup>44</sup> Roger I Simon, *A Pedagogy of Witnessing: Curatorial Practice and the Pursuit of Social Justice* (SUNY Press 2014) 215.

<sup>45</sup> Glynn, Evelyn (n 7) 38. Erin Costello Wecker, 'Reclaiming Magdalenism or Washing Away Sin: Magdalen Laundries and the Rhetorics of Feminine Silence' (2015) 44 *Women's Studies* 264.

<sup>46</sup> Thomas M Allen, *A Republic in Time: Temporality and Social Imagination in Nineteenth-Century America* (Univ of North Carolina Press 2008) 9.

<sup>47</sup> Glynn, Evelyn (n 7) 37. Fintan Walsh, 'Transforming Shame and Testimonial Performance', *Queer Performance and Contemporary Ireland* (Palgrave Macmillan UK 2016) <[http://link.springer.com/chapter/10.1057/9781137534507\\_4](http://link.springer.com/chapter/10.1057/9781137534507_4)> accessed 1 August 2016. Gabriella Calchi-Novati, 'Irish Biopolitics and National (Un)Consciousness: Gerard Mannix Flynn's Public Performances of Inclusion' in Jade Rosina McCutcheon and Barbara Sellers-Young (eds), *Embodied Consciousness* (Palgrave Macmillan UK 2013) <[http://link.springer.com/chapter/10.1057/9781137320056\\_10](http://link.springer.com/chapter/10.1057/9781137320056_10)> accessed 1 August 2016. Kate Antosik-Parsons, 'Suppressed Voices: The Suffering and Silencing of Irish Institutional Abuse Survivors in Áine Phillips's Redress Performances' [2014] *Études irlandaises* 137. Sheila McCormick, 'The Darkest Corner: Documenting Institutional Abuse and Its Consequences at the Abbey Theatre' (2012) 20 *Irish Studies Review* 179. Miriam Haughton, 'From Laundries to Labour Camps: Staging Ireland's "Rule of Silence" in Anu Productions' *Laundry* (2014) 57 *Modern Drama* 65.

....You wouldn't do it to a cow, would you? ... I am still bereaved for that first fortnight in the hospital. I will never get over that ..... You'd see the older women, crippled, in pain all the time, and you'd ask yourself, is that my lot? But you still have to get on with life ...<sup>48</sup>

That symphysiotomy is clearly embodied; visibly anchored and retained in elderly women's failing flesh and bones, contains much of its challenge to homogenous national time. SOS, to borrow from Bradiotti, straddle 'time zones'.<sup>49</sup> Elizabeth Povinelli uses 'carnality' to describe how disciplinary discourses materialise in flesh; these women hold in their aging bodies the signs and marks of past governmental interventions in reproduction. Their injuries are a 'physical mattering forth' of injuries they would attribute to the state.<sup>50</sup> Their flesh, however, is not reducible to what was done to them in the past'; it is somehow unruly.<sup>51</sup> For example, SOS's appeal to an embodied time of birth and reproduction that is presumptively common to all women carries significant political potential.<sup>52</sup> SOS's demands for reparation clearly resonate with contemporary Irish reproductive rights campaigns; particularly around abortion and maternal death, which focus on the continuing co-imbrication of religion and obstetrics in Ireland.<sup>53</sup> That connection might suggest, in Homi Bhabha's language, the possibility a 'time-lag';<sup>54</sup> SOS's appearance threatens to slow down the progress of the nation state, producing a moment of disunity or delay which makes visible the past, impels and projects it, by lending it the quickness of the present. In the process, it reveals the continuities and common gestures that would bind present and past if only they could be encountered in a shared idiom. In its

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<sup>48</sup> O'Connor and Mac Aodhain (n 1) 15.

<sup>49</sup> Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press 2011) 4.

<sup>50</sup> Elizabeth A Povinelli, *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality* (Duke University Press 2006) 7.

<sup>51</sup> *ibid* 30.

<sup>52</sup> See e.g. Kristeva, 'Stabat Mater' in Susan Rubin Suleiman (ed), *The Female Body in Western Culture: Contemporary Perspectives* (Harvard University Press 1986). Early in SOS's campaign, one member insisted that if the Minister for Health, then a woman, 'was in my body even for one day we would have [a political response] the next day'. Eithne Donnellan, 'Group Calls for Cowen to Dismiss Harney' (*The Irish Times*) <<http://www.irishtimes.com/news/group-calls-for-cowen-to-dismiss-harney-1.624128>> accessed 10 April 2017.

<sup>53</sup> See for example Amnesty International, 'She Is Not a Criminal: The Impact of Ireland's Abortion Law' 15 <[https://www.amnesty.org.uk/sites/default/files/she\\_is\\_not\\_a\\_criminal\\_report\\_-\\_embargoed\\_09\\_june.pdf](https://www.amnesty.org.uk/sites/default/files/she_is_not_a_criminal_report_-_embargoed_09_june.pdf)> accessed 18 August 2016. 'How and Where Your Baby Is Born – Who Gets to Decide?' <<http://aimsireland.ie/how-and-where-your-baby-is-born-who-gets-to-decide/>> accessed 20 August 2016.

<sup>54</sup> Homi K Bhabha, *The Location of Culture* (Routledge 2012) 364.

inescapable embodiment, symphysiotomy reveals homogenous national time as something essentially political, precariously assembled, wrought in pain; as something that could be otherwise. 'Closure' requires the state to address and suppress the irritant minor times of symphysiotomy.

### **Walsh; Suppressing Women's Times.**

The state-commissioned Walsh report<sup>55</sup> (*Walsh*), written by a medical historian, has become the definitive official history of symphysiotomy in Ireland from 1944-1987. The state has repeatedly used this report to defend itself against SOS's campaign domestically, and in various international fora.<sup>56</sup> For SOS, symphysiotomy as practiced in Ireland was a human rights abuse, borne of a particular intermeshing of medical practice and religious belief. SOS's campaign depends on an intermeshing of religion and reproductive medicine, so that symphysiotomy is both obstetric violence *and* religious practice. SOS argues that Catholic activist doctors,<sup>57</sup> working in hospitals which pursued a Catholic ethos,<sup>58</sup> revived and developed symphysiotomy in the 1940's in an attempt to adapt medical practice to Catholic reproductive

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<sup>55</sup> Oonagh Walsh, 'Report on Symphysiotomy in Ireland 1944-1984' (2013) <<http://health.gov.ie/wp-content/uploads/2014/07/Final-Final-walsh-Report-on-Symphysiotomy1.pdf>> accessed 14 August 2016.

<sup>56</sup> See e.g. 'Additional Responses Following Ireland's Appearance before the Human Rights Committee, July 14-15 2014' (2014) 11 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAIS%2fIRL%2f17669&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAIS%2fIRL%2f17669&Lang=en)> accessed 14 August 2016. 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21\* - Ireland.' (n 2) 6. 'CEDAW Response to List of Issues prior to Reporting' (4 July 2016) <[http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-ABKLPL165665-en/\\$file/Response%20to%20CEDAW%20LoI%20-%20DRAFT%20FOR%20CONSULTATION.pdf](http://www.upr.ie/Website/UPR/uprweb.nsf/page/DOJL-ABKLPL165665-en/$file/Response%20to%20CEDAW%20LoI%20-%20DRAFT%20FOR%20CONSULTATION.pdf)> accessed 14 August 2016. 'Irish Observations on the Report by the Commissioner for Human Rights, Mr. Nils Muiznieks, on His Visit to Ireland.' <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2965984&SecMode=1&DocId=2399942&Usage=2>> accessed 10 April 2017.

<sup>57</sup> O'Connor and Mac Aodhain (n 1) 31.

<sup>58</sup> Hospitals in Ireland are of three types: public, voluntary public and private. Voluntary public hospitals were originally private, charitable, religious hospitals; Geraldine Robbins and Irvine Lapsley, 'Irish Voluntary Hospitals: An Examination of a Theory of Voluntary Failure' (2008) 18 Accounting, Business & Financial History 61. Although constitutionally independent, voluntary hospitals have been in receipt of various forms of public funding since the 1800's;. The Public Hospitals Act 1933 brought voluntary hospitals under state scrutiny in exchange for increased public funding; see further O'Connor and Mac Aodhain (n 1) 21-22. Today the National Maternity Hospital and the Coombe are voluntary public hospitals, owned and managed by non-profit bodies but funded primarily by the state. Historically the National Maternity Hospital and the Coombe served working class Catholic populations. The National operates under the patronage of the Archbishop of Dublin. Our Lady of Lourdes Drogheda became a public hospital in 1997. From its founding in 1957 until 1997 it was a voluntary public hospital run by the Medical Missionaries of Mary.

imperatives. Observant Catholic women who needed one C-section were considered likely to need several. Doctors were concerned that women in this position would try to avoid future repeat sections and so would use artificial contraception to limit their pregnancies.<sup>59</sup> Artificial contraception was illegal for much of the period in which symphysiotomy was practiced in Ireland, and senior Catholic doctors supported the continuation of this ban. They deliberately deployed symphysiotomy in an attempt to avoid the necessity for the first Caesarean, or for ‘prophylactic’ reasons;<sup>60</sup> to facilitate multiple future vaginal births by permanently widening the pelvis.<sup>61</sup> In subsequent decades, doctors experimented unsuccessfully with symphysiotomy, in an attempt to broaden the range of circumstances in which it could be employed.<sup>62</sup> In so doing, they subjected women to unnecessarily painful and dangerous labour.<sup>63</sup> The Irish elective symphysiotomy, on SOS’s account, was a hybrid practice; only explicable by reference to conservative religious belief and delegitimised by its religious underpinnings.

*Walsh* recuperates symphysiotomy within a universalistic medical narrative, recognisable and transmissible to the present.<sup>64</sup> The report acknowledges symphysiotomy’s religious context, but naturalises the religion of the past as a static feature of the clinical landscape, rather than as a dynamic aspect of medical decision-making. *Walsh* examines symphysiotomy from an ‘historic distance’. While it acknowledges that this distance ‘should not excuse unacceptable behaviour’, it insists that the Irish practice of symphysiotomy can only be assessed according to the accepted standards of the time,<sup>65</sup> and understood within the context of Ireland’s exceptional historical relationship to Catholicism.<sup>66</sup> *Walsh* finds that symphysiotomy as practiced in Ireland was generally a clinically acceptable operation, developed, refined and revised by a small but prominent group of Irish obstetricians, who

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<sup>59</sup> O’Connor and Mac Aodhain (n 1) 30–31. See Master of the National Maternity Hospital, Alex Spain, quoted in Murphy (n 17) 9.

<sup>60</sup> O’Connor and Mac Aodhain (n 1) 8–9.

<sup>61</sup> Walsh (n 55) 59. Murphy (n 17) 27–28.

<sup>62</sup> O’Connor and Mac Aodhain (n 1) 32.

<sup>63</sup> *ibid* 32–33.

<sup>64</sup> Similar criticisms have been made of the McAleese report into state involvement in the Magdalene laundries: that it excludes survivor testimony while giving ample space to perpetrators to justify their actions; See further Glynn, Evelyn (n 7).

<sup>65</sup> Walsh (n 55) 86–87.

<sup>66</sup> *ibid* 74.

vigorously defended it despite external criticism.<sup>67</sup> Doctors did not appreciate the morbidity associated with symphysiotomy by comparison with C-section or did not consider it important to conduct follow-up studies on patients which would have disclosed its long-term effects.<sup>68</sup> They eventually discarded it as new techniques for ‘active management of labour’ were developed.<sup>69</sup> For *Walsh*, failure to obtain women’s consent to symphysiotomy is a side-effect of essentially benign medical paternalism.<sup>70</sup> *Walsh* concludes that the only objectionable symphysiotomies were those performed after Caesarean section because these were clearly non-emergency procedures that did not fit the rationale which proponents of symphysiotomy had established through reputable scientific channels; that of facilitating imminent birth.<sup>71</sup> Other symphysiotomies were justifiable as rare emergency response to specific forms of pelvic difficulty in labour<sup>72</sup> in cases where C-section was considered too dangerous or otherwise unacceptable. On the *Walsh* account, C-sections were considered dangerous or unacceptable in Ireland when they might not have been so considered elsewhere because, for the bulk of the period in which symphysiotomy was practiced in Ireland, hospitals followed a rigid Catholic *ethos*.<sup>73</sup> More importantly, law, following Catholic teaching, forbade contraception, and this law could not be transgressed or made otherwise.<sup>74</sup> This position was cemented by lay people’s ‘willing acceptance’ of legal precept.<sup>75</sup> Women were thus ‘slaves to fertility’;<sup>76</sup> their lives marked by a ‘deep and unquestioning’ acceptance of a ‘startling level’ of external interference.<sup>77</sup> That being the case, women were prone to multiple repeat

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<sup>67</sup> *ibid* 26. Murphy (n 17) 12.

<sup>68</sup> *Walsh* (n 55) 101. Murphy (n 17) 12.

<sup>69</sup> *Walsh* (n 55) 80.

<sup>70</sup> *ibid* 84 and 86–87.

<sup>71</sup> *ibid* 60–61. This is also the view of the Institute of Obstetricians and Gynaecologists; ‘RCPI » *Walsh* Report on Symphysiotomy in Ireland: Statement by the Institute of Obstetricians and Gynaecologists’ <<https://www.rcpi.ie/news/releases/walsh-report-on-symphysiotomy-in-ireland-statement-by-the-institute-of-obstetricians-and-gynaecologists/>> accessed 18 August 2016.

<sup>72</sup> *Walsh* (n 16) 62 and 66–67.

<sup>73</sup> Lindsey Earner-Byrne, ‘Moral Prescription: The Irish Medical Profession, the Roman Catholic Church and the Prohibition of Birth Control in Twentieth-Century Ireland’ in Catherine Cox and Maria Luddy (eds), *Cultures of Care in Irish Medical History, 1750–1970* (Palgrave Macmillan UK 2010) <[http://link.springer.com/chapter/10.1057/9780230304628\\_11](http://link.springer.com/chapter/10.1057/9780230304628_11)> accessed 31 July 2016. Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922–60* (Manchester University Press 2007) 120–145.

<sup>74</sup> *Walsh* (n 55) 19.

<sup>75</sup> *ibid* 83.

<sup>76</sup> *ibid* 20.

<sup>77</sup> *ibid*.

pregnancies<sup>78</sup> which doctors believed rendered C-section unsafe by comparison to symphysiotomy. As the Minister for Health summarised, symphysiotomy was ‘a clinical response to the limitation *imposed* by specifically Catholic religious and ideological circumstances’.<sup>79</sup> Religious influence here is naturalised; presented as general, sweeping and monolithic – religious power is located in an external ‘public apparatus’, ‘a tacit and unchallenged decree’.<sup>80</sup>

*Walsh* presents religion as an impenetrable structure, separable from agency in the past, and outside the scope of present responsibility. However, the *Walsh* account forgets women’s burgeoning resistance to church teaching on birth control,<sup>81</sup> particularly from the 1960’s onwards. *Walsh* also downplays the suggestion that the doctors who developed symphysiotomy were an activist minority. Some doctors assisted their patients in obtaining contraception, or at least did not practice medicine on the basis that women should not choose to obtain it.<sup>82</sup> In addition, most doctors performed C-sections where they used symphysiotomy.<sup>83</sup> I do not mean to suggest here that C-section is inherently superior to symphysiotomy – women continue to protest the non-consensual imposition of C-sections in Ireland today.<sup>84</sup> Rather, I want to suggest that a plurality of responses to the religious status quo was possible. *Walsh*, in avoiding these matters, splits the religion of the past from religious subjects’ agency; things could not have been otherwise. Religion becomes simultaneously medicine’s outside and its past.

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<sup>78</sup> For instance, *Walsh* attributes the practice of the symphysiotomy in the Rotunda hospital with attempts to grapple with the needs of a Catholic population, rather than with direction from senior Catholic doctors; *ibid* 62.

<sup>79</sup> ‘Symphysiotomy Not Barbaric- Reilly’ <<http://www.irishhealth.com/article.html?id=20377>> accessed 14 August 2016. Emphasis mine.

<sup>80</sup> Taoiseach Enda Kenny’s Statement on Magdalene Report’ <<http://static.rasset.ie/documents/news/kenny-magdalene-speech.pdf>> accessed 3 August 2016.

<sup>81</sup> O’Connor and Mac Aodhain (n 1) 41.

<sup>82</sup> Until 1979, under s. 17 of the Criminal Law (Amendment Act) 1935, it was illegal to import or sell contraception, not to prescribe it, use it, or supply it otherwise than for sale. The right of married couples to access contraception was recognized in 1973 in the Supreme Court case of *McGee v. AG* [1974] IR 284. From 1979, under the Health (Family Planning) Act 1979 contraceptives were available on prescription for ‘bona fide family planning purposes’. In the years between *McGee* and the Act, and for many years afterwards, contraception was available from private organisations who supplied contraceptives to thousands of customers in defiance of the law; Chrystel Hug, *The Politics of Sexual Morality in Ireland* (Springer 2016) 91.

<sup>83</sup> O’Connor and Mac Aodhain (n 1) 41.

<sup>84</sup> See eg. *Health Service Executive v. B and Another* [2016] IEHC 605

By contrast with the en fleshed history advanced by SOS, *Walsh* is disembodied. It successfully neutralises religious power by disconnecting it from and subordinating it to medical reason. It locates symphysiotomy in the universal, ahistoricised progressive time of scientific development; as a necessary response to religious circumstances since overcome. *Walsh* is constructed from a range of historical medical literature and hospital statistics.<sup>85</sup> It did not examine personal medical records.<sup>86</sup> It only drew on a small number of survivors' testimony<sup>87</sup> because members of SOS boycotted the interviews. They did this to protest a draft report, published in 2012, which established the report's main conclusions before survivors were consulted.<sup>88</sup> Whether or not this could have been helped, *Walsh*, accordingly, adopts a top-down medical systemic framing of symphysiotomy, in which the operation is understood primarily in terms of management of populations of pregnant women and enhancement of medical knowledge. There is, of course, a rich feminist literature which charts how deference to gynaecological and obstetric reasoning is secured by suppressing and downplaying women's embodied experience of medical interventions.<sup>89</sup> Materials prepared by SOS for submission to the UN Committee Against Torture are littered vivid and immediate memories of symphysiotomy:

The smell of it, the anaesthetic, I couldn't breathe. It was a miracle I was alive. I was left so long in labour, I'd have been alright if they did a [Caesarean] section [in the beginning], it wouldn't have been so bad...I'd like them [the doctors] to go through it, to see how it felt. I didn't want to live.... I can still feel the cold of that labour ward today. They didn't say anything about the

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<sup>85</sup> On the unreliability of official records see e.g. Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations' (2011) 30 *University of Tasmania Law Review* 32.

<sup>86</sup> Walsh explains that hand searching of individual medical records was outside the report's terms of reference, and would have required the permission of individual patients; Walsh (n 55) 8.

<sup>87</sup> *ibid* 74–76.

<sup>88</sup> Michelle Hennessy, 'Symphysiotomy Survivors Reject Magdalene Type Redress Scheme' *TheJournal.ie* (1 August 2013) <<http://www.thejournal.ie/symphysiotomy-1018837-Aug2013/>> accessed 31 May 2015.

<sup>89</sup> Jana Sawicki, *Disciplining Foucault: Feminism, Power, and the Body* (Psychology Press 1991) 76–80. Elizabeth Klaver, *The Body in Medical Culture* (SUNY Press) 212. Julia Kristeva, *Pouvoirs de L'horreur (English)* (Columbia University Press 1982). Women, by turn, are denigrated by association with the body; Jennifer Terry and Jacqueline L Urla, *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture* (Indiana University Press 1995) 13. Adriana Cavarero, *For More Than One Voice: Toward a Philosophy of Vocal Expression* (Stanford University Press 2005) 206.

pelvis, they didn't say anything about the pelvis bone. They left me with half a back...<sup>90</sup>

I fainted with the pain, it was like walking on thorns, the pain and the soreness. I got no help, no, no help whatsoever from them [in hospital] ... [At home], the wound was discharging; there was a terrible smell. I dosed it with Dettol. There was no nurse [to look after me]. I remember, it was the winter, the pain in my back [was so bad], it would be fine thing to be dead, I thought.<sup>91</sup>

The women who experienced this pain have deeply textured memories of the exercise of religious authority. They recall it not as an abstract monolithic generality, but as a direct, intersubjective practice of power,<sup>92</sup> bound up in the practice of medicine and directed at the justifying and legitimating pain.

I normally do a Caesarean section, [the doctor] said, but because you are such a good Catholic, I'll do a symphysiotomy, you're a Catholic family, you'd be expected to have at least ten - if you have a Caesarean, you can only have three. And, as a Catholic, you need to go through the pains of childbirth - if you had a Caesarean, you wouldn't.<sup>93</sup>

[Dr] Feeney came in ... He took off his beige leather gloves and coat - he was after being at Mass ... Feeney was very abrupt. You can have ten children, all normal, he said. Who wants ten children, I said... They did it without my permission ... I was cut from the navel down ... We were Catholics, but my mother's people were Church of Ireland. Protestants would only have three children, at most.<sup>94</sup>

SOS's testimony provoked the state to produce, via *Walsh*, a public memory or official history which attempts to restore past and present to equilibrium, in the

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<sup>90</sup> O'Connor and Mac Aodhain (n 1) 15.

<sup>91</sup> *ibid* 16.

<sup>92</sup> Jillson (n 16) 21.; O'Connor and Mac Aodhain (n 1) 6.

<sup>93</sup> O'Connor and Mac Aodhain (n 1) 26.

<sup>94</sup> *ibid* 6.

process de-authorising women's memories. *Walsh* de-legitimises and displaces ways of knowing about the past which do not fit the state's agenda,<sup>95</sup> in the process denying the economy of violence<sup>96</sup> that underlies the smooth passage of homogenous national time. Just as collective forgetting<sup>97</sup> and destruction of memory<sup>98</sup> enabled the abuse of women and children decades ago, so too women's disruptive stories of that abuse must be muted. This muting continues when women seek an encounter with law.

### **SOS and the Denial of Access to Law.**

In July 2014, SOS made representations to the UN Human Rights Committee, during Ireland's periodic examination under the ICCPR. The Committee found that symphysiotomy, as performed in Ireland, breached women's rights under Article 7 ICCPR in that they were subjected to forced medical experimentation and torture, inhuman and degrading treatment. They were entitled, under Article 2 ICCPR to an investigation of this breach, and to an effective remedy. The Committee recommended that Ireland should re-engage symphysiotomy's legacies:

initiate a prompt, independent and thorough investigation into cases of symphysiotomy, prosecute and punish the perpetrators...and provide the survivors of symphysiotomy with an effective remedy for the damage sustained, including fair and adequate compensation and rehabilitation, on an individualized basis.<sup>99</sup>

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<sup>95</sup> Elizabeth Freeman, *Time Binds: Queer Temporalities, Queer Histories* (Duke University Press 2010) 10.

<sup>96</sup> Peter Osborne, *The Politics of Time: Modernity and Avant-Garde* (Verso 1995) 141.

<sup>97</sup> Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2013) 33 *Legal Studies* 189, 209.

<sup>98</sup> Glynn, Evelyn (n 7) 34.

<sup>99</sup> 'Concluding Observations on the Fourth Periodic Report of Ireland' (2014)

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsieXFSu dRZs%2fX1ZaMqUUOS9yIqPEMRvxx26PpQFtwrk%2bhtvbJ1frkLE%2bCPVCm6lW%2bYjfrz7jxiC9GMVvGkvu2UluUfSqikQb9KMoAoKkgSG>> accessed 14 August 2016. See similarly CEDAW Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland (2017) CEDAW/C/IRL/CO/6-7

In July 2014, following publication of *Walsh*, the state established a non-statutory *ex gratia* redress scheme.<sup>100</sup> The scheme's design drew extensively on *Walsh*.<sup>101</sup> However, it also considered the possibility that women would wish to go to court to contest the *Walsh* narrative – particularly its finding that symphysiotomies performed otherwise than immediately after a C-section were generally acceptable. By early 2014, 150 members of SOS had begun cases in the High Court, and others intended to commence actions.<sup>102</sup> The courts were considered a last resort. SOS campaigned for a collective settlement of their claims with individualised compensation payments between 250,000 and 400,000 euros each,<sup>103</sup> together with an official government statement of wrongdoing.<sup>104</sup> The redress scheme was administered by a retired judge; Maureen Harding-Clarke. However, it was entirely paper-based, centred on production of medical records rather than personal narrative, and provided no opportunity for public reconsideration of the *Walsh* narrative, or individual attention to women's experiences.<sup>105</sup> Neither was any statement of wrongdoing forthcoming from the government. The retired judge, Yvonne Murphy, who designed the scheme, did not cost or explore SOS's proposal, or discuss the demand for further public dialogue. She proceeded on the assumption that the state had two options. The first was to prepare to defend High Court actions, on behalf of hospitals. Assuming 10 women succeeded in court, and a significant number of remaining cases were settled, the state would face expenses relating to costs and damages<sup>106</sup> of 95 million euros.<sup>107</sup>

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<sup>100</sup> In *O'Keeffe v. Ireland* [2014] ECHR 173, the European Court of Human Rights emphasized that *ex gratia* schemes could not in themselves provide an adequate remedy for past violations of human rights.

<sup>101</sup> Sinead O'Carroll, 'U-Turn on Statute of Limitations as Closure Sought for Symphysiotomy Survivors' *TheJournal.ie* (26 November 2013) <<http://www.thejournal.ie/symphysiotomy-3-1193378-Nov2013/>> accessed 31 May 2015. 'Additional Responses Following Ireland's Appearance before the Human Rights Committee, July 14-15 2014' (n 56) 11.

<sup>102</sup> 'Childbirth Medical Negligence | Medical Negligence Claims in Ireland - Part 2' <<http://www.irishmedicalnegligence.ie/news/category/childbirth-medical-negligence/page/2/>> accessed 11 August 2016.

<sup>103</sup> Murphy (n 17) 18.

<sup>104</sup> Dail Debates 26 September 2013. *ibid*.

<sup>105</sup> 'The Surgical Symphysiotomy Ex Gratia Payment Scheme: Terms and Conditions' (2014) 20 <[http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/A8B200BE1D7D9A6880257D89003DDABA/\\$file/Terms%20of%20The%20Surgical%20Symphysiotomy%20Payment%20Scheme%20-%2010%20Nov%202014.pdf](http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/A8B200BE1D7D9A6880257D89003DDABA/$file/Terms%20of%20The%20Surgical%20Symphysiotomy%20Payment%20Scheme%20-%2010%20Nov%202014.pdf)> accessed 19 August 2016.

<sup>106</sup> The State Claims Agency is responsible for managing the defence of cases in respect of which there is no identifiable occurrence based insurer. 'Clinical Indemnity Scheme | State Claims Agency' <<http://stateclaims.ie/about-our-work/clinical-indemnity-scheme/>> accessed 18 August 2016. Most hospitals where symphysiotomies were performed either had very limited insurance, or could not trace their insurers for the relevant periods, so that they would seek to recover awards from the State.*ibid* 31.

The second option was to reduce the number of actions by offering a redress scheme, allowing for much smaller payments than SOS had asked for, with women who had symphysiotomies otherwise than after C-section entitled to between 50,000 and 100,000 euros.<sup>108</sup> This was a significant discount on the amount that many women would be entitled to if successful in court.<sup>109</sup> The cost of such a scheme was estimated at 35 million euros.<sup>110</sup> In the end, the scheme paid out less.<sup>111</sup> SOS members' initially voted to reject the redress scheme, condemning 'paternalistic'<sup>112</sup> government efforts to strip survivors of their legal rights.<sup>113</sup> They described the scheme as an attempt to 'blindfold' women; 'an opaque and close-ended process designed to lure them away from their legal actions'.<sup>114</sup> They perceived similarities in the state's treatment of other institutional abuse survivors.<sup>115</sup> Nevertheless, most members of SOS were among the 563 women who submitted applications for redress, and most who received offers under the scheme accepted them.<sup>116</sup>

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<sup>107</sup> Murphy (n 17) 50.

<sup>108</sup> Connall O Faharta, 'Symphysiotomy Scheme Time Limit "Is Punitive"' (14 November 2014) <<http://www.irishexaminer.com/ireland/symphysiotomy-scheme-time-limit-is-punitive-297771.html>> accessed 31 May 2015. A high burden of proof and difficulty in obtaining medical records have meant that most women have obtained the lower payment of 50,000 euros. In April 2015, it was reported that 50 applicants to the scheme had failed to produce the required records. 'Concern over Symphysiotomy Redress Scheme' (*RTE.ie*) <<http://www.rte.ie/news/2015/0414/694095-concerns-over-symphysiotomy-compensation/>> accessed 18 October 2015. By July this figure had risen to over 100. Paul Cullen, 'Long Wait for Elderly Applicants for Symphysiotomy Compensation' (*The Irish Times*) <<http://www.irishtimes.com/news/health/long-wait-for-elderly-applicants-for-symphysiotomy-compensation-1.2278088>> accessed 18 October 2015. Fiachra O Cionnaith, 'Unknown Files on "Barbaric" Symphysiotomy Op Found' (10 December 2014) <<http://www.irishexaminer.com/ireland/unknown-files-on-barbaric-symphysiotomy-op-found-301787.html>> accessed 31 May 2015.

<sup>109</sup> A successful claimant in a personal injuries case could expect to obtain 275,000 euros in general damages, with the possibility of recovering special damages in an appropriate case. 'Clinical Indemnity Scheme | State Claims Agency' (n 106) 45.

<sup>110</sup> Murphy (n 17) 50.

<sup>111</sup> Symphysiotomy Payment Scheme, 'Progress Reports - Symphysiotomy Payment Scheme.' (*Symphysiotomy Payment Scheme*) <<http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/page/Progress%20Reports-en>> accessed 18 August 2016.

<sup>112</sup> 'Symphysiotomy Survivors Reject Offer' (9 December 2013) <<http://www.irishexaminer.com/ireland/symphysiotomy-survivors-reject-offer-252056.html>> accessed 14 August 2016.

<sup>113</sup> Aoife Barry, "'Time of the Essence" in Symphysiotomy Redress as Three Survivors Die' *The Journal.ie* (26 September 2014) <<http://www.thejournal.ie/symphysiotomy-ireland-redress-1693194-Sep2014/>> accessed 31 May 2015.

<sup>114</sup> 'Government Accused of Trying to Blindfold Survivors of Symphysiotomy' <<http://claredaly.ie/government-accused-of-trying-to-blindfold-survivors-of-symphysiotomy-by-setting-up-an-opaque-and-closed-ended-process/>> accessed 14 August 2016.

<sup>115</sup> 'Survivors of Symphysiotomy Refuse to Enter into a Magdalene Type Redress Scheme' <<http://symphysiotomyireland.com/survivors-wont-enter-into-any-magdalene-type-redress-scheme/>> accessed 14 August 2016.

<sup>116</sup>

Only 28 women were still involved in High Court actions at the close of the redress scheme. A handful of cases have made it to hearing. The first, *Kearney*,<sup>117</sup> successful in the High and Supreme Courts, pre-dates the redress scheme's establishment and is a case of post-Caesarean symphysiotomy. Another ended when the claimant died,<sup>118</sup> a third settled<sup>119</sup> and a fourth, *Farrell*,<sup>120</sup> lost in the High Court and the Court of Appeal in 2016.<sup>121</sup> There are, of course, several problems with symphysiotomy litigation. First, private litigation individualises harm: <sup>122</sup> cases are decided 'on their own facts', in ways which necessarily occlude the structural dimensions of an evolving decades-long medical practice. Second, it is not possible to litigate the issue of consent because, in the decades since symphysiotomies were routinely practiced, memories and records have degraded, and key actors have died.<sup>123</sup> Courts will not attempt to determine what a woman was told at the time of her operation. Third, because the consent question is not tried, symphysiotomy is not framed as violence. Instead it is medical negligence; an insufficiency of skill or care, or an inappropriate professional response to risk.<sup>124</sup> The court will ask whether the plaintiff's doctor's practice accorded with some school of medical thought at the time. Doctors' open discussion of their trial-and-error experimentation in elite journals and forums is treated as sufficient evidence of controlled and well-regulated practice.<sup>125</sup> That international peers, or a majority of Irish colleagues,<sup>126</sup> disapproved of the practice is

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<sup>117</sup> [2012] IESC 43

<sup>118</sup> Sinead O'Carroll, 'Woman in Intensive Care Bringing Case against Hospital over "unwarranted" Symphysiotomy' *TheJournal.ie* (9 June 2014) <<http://www.thejournal.ie/symphysiotomy-high-court-1559459-Jul2014/>> accessed 31 May 2015.

<sup>119</sup> Sinead O'Carroll, "'I Am a Symphysiotomy Survivor. I Am Glad It's All Over'" *TheJournal.ie* (3 February 2015) <<http://www.thejournal.ie/symphysiotomy-court-case-coombe-1917295-Feb2015/>> accessed 31 May 2015.

<sup>120</sup> *Farrell v. Ryan* [2016] IECA 281

<sup>121</sup> *Farrell v. Ryan* [2015] IEHC 275; Mary Carolan, 'Woman Who Had Symphysiotomy Takes Appeal Seen as Test Case' (*The Irish Times*) <<http://www.irishtimes.com/news/crime-and-law/courts/high-court/woman-who-had-symphysiotomy-takes-appeal-seen-as-test-case-1.2608386>> accessed 11 August 2016.

<sup>122</sup> Elizabeth Adjin-Tettey, 'Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses' (2007) 25 Windsor YB Access Just. 95.T Anthony and HM van Rijswijk, 'Can the Common Law Adjudicate Historical Suffering?' [2012] Melbourne University Law Review <<https://opus.lib.uts.edu.au/handle/10453/23348>> accessed 9 April 2017.

<sup>123</sup> See further *Kearney v. McQuillan* [2006] IEHC 186; *Kearney v. McQuillan* [2012] IEHC 127, [62]

<sup>124</sup> *Kearney v. McQuillan* [2010] 3 IR 576 per McMenamin J.

<sup>125</sup> *Farrell v. Ryan* [2015] IEHC 275, [7.9].

<sup>126</sup> *Farrell v. Ryan* [2016] IECA 281 [99].

irrelevant, as long as it was not outright condemned.<sup>127</sup> The old legal position on contraception distinguishes Irish obstetrics from its English equivalent.<sup>128</sup> Majority disagreement with a minority school of thought is evidence of medical pluralism, rather than of defective practice.<sup>129</sup> Finally, doctors' failure to appreciate the morbidity associated with symphysiotomy is not condemned, even where they do not appear to have reflected on or studied previous patients' long-term experiences over the preceding 15 years,<sup>130</sup> or listened to them when they reported pain and incapacity in the immediate aftermath of the operation. At first blush, then, the courts are a space in which symphysiotomy is again framed as a relatively benign medical practice, to be assessed on the same terms as any other.<sup>131</sup> Religious issues are barely noted, if at all, and women's bodily experience is again subordinated to medical knowledge. Symphysiotomy claims are not incommensurable with prevailing legal forms: they are readily enclosed and summed up in known precedent, pre-structured by them.<sup>132</sup> The few decided cases, however, cannot tell us what arguments might have been made if the state's deployment of the redress scheme had been less effective. In addition, these cases' shortcomings do not in themselves legitimate the state's refusal to establish a more expansive public inquiry, as SOS requested. Rather they speak to the limitations of any response to past harm which asks survivors to choose between bureaucratic redress and limited private actions.

Although the courts have been inhospitable to symphysiotomy claims, the state has actively sought to deter symphysiotomy litigation and induce conformity with the aims of the redress scheme. Minister of State Kathleen Lynch observed: 'If someone wants to go to the courts...there is nothing anyone can do about that; clearly, that is the person's choice'.<sup>133</sup> Nevertheless, the government made use of legal devices which radically compressed the time available for decision-making and for resistance. First, the government rejected proposed legislation which would have lifted the

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<sup>127</sup> *Farrell v. Ryan* [2016] IECA 281 [122]

<sup>128</sup> *Farrell v. Ryan* [2016] IECA 281 [57] [108] – [112] and [147]

<sup>129</sup> *Farrell v. Ryan* [2016] IECA 281 [126]

<sup>130</sup> Khaleeli, Homa. "Symphysiotomy – Ireland's Brutal Alternative to Caesareans." *The Guardian*, December 12, 2014. <http://www.theguardian.com/lifeandstyle/2014/dec/12/symphysiotomy-irelands-brutal-alternative-to-caesareans>.

<sup>131</sup> *Farrell v. Ryan* [2016] IECA 281 [159]

<sup>132</sup> Elizabeth Adjin-Tettey, 'Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses' (2007) 25 Windsor YB Access Just. 95.

<sup>133</sup> Oireachtas Health Committee, 16 January 2014

Statute of Limitations in symphysiotomy cases.<sup>134</sup> As a result, women can only succeed in court if they can show that they instituted proceedings within two years of the ‘date of knowledge’ of their injury. Second, as a condition of accepting a payment under the redress scheme participants must waive all other legal claims, against the state and other potentially culpable bodies.<sup>135</sup> Finally, applicants were initially given just 20 days to apply to the scheme. This time limit for application was extended in 27 cases. Consequently, women who were considering litigation could not wait to assess the outcome of test cases before deciding whether to settle for a redress payment.<sup>136</sup> The decision between redress and litigation became too urgent to resist; the threat of litigation was often extinguished. These deployments of law accelerated the upward movement of national time; preventing it from folding back on itself;<sup>137</sup> keeping challenges in their place.

The application of these legal temporal devices both hastened women’s decisions and produced SOS’s claims as always ‘out of time’ for the courts. SOS’s litigants had made a claim to be heard, individually; to unfold their personal narratives within the official time of law; to access a slow, sovereign time of oral exchange and normative deliberation.<sup>138</sup> As we have seen, the few symphysiotomy judgments achieved have abbreviated and limited women’s experience of symphysiotomy, enmeshing them again within totalising medico-legal frames. But the lawsuits, while they were maintained in being, performed a strategic function. The women had successfully suspended their claims within that costly, weighty temporality: insisting on and maintaining litigation in parallel to the state’s proposals. The state, however, by

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<sup>134</sup> Dail Debates, 19 January 2012. ‘Smphysiotomy Bill Passed in Irish Parliament’ (*BBC News*, 17 April 2013) <<http://www.bbc.co.uk/news/world-europe-22181867>> accessed 31 May 2015.; Paul Hyland, ‘Survivors of Symphysiotomy Group to Present Petition ahead of Dáil Decision’ *TheJournal.ie* (5 April 2013) <<http://www.thejournal.ie/symphysiotomy-survivors-group-petition-dail-857007-Apr2013/>> accessed 31 May 2015. In the Court of the Appeal, Peart J. held that the claim in *Farrell v Ryan* [2016] IECA 281 was statute-barred.

<sup>135</sup> “It is seeking to use these women victims themselves as a means of indemnifying the doctors who carried out those barbaric operations and the religious orders that owned the hospitals where they took place.” – Mark Kelly, ICCL ‘Groups Claim Symphysiotomy Payment Scheme Violates Human Rights’ (*Breaking News*, 9 December 2014) <<http://www.breakingnews.ie/ireland/groups-claim-symphysiotomy-payment-scheme-violates-human-rights-653895.html>> accessed 31 May 2015.

<sup>136</sup> O Faharta (n 108).

<sup>137</sup> Susannah Radstone, *The Sexual Politics of Time: Confession, Nostalgia, Memory* (Routledge 2007) 9.

<sup>138</sup> Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 17.

invoking a series of technical legal devices, compelled them to recalibrate to its time, and engage with a different, faster, more ‘efficient’ bureaucratic world.<sup>139</sup>

There is an increasing sense in which Irish governments apply different legal tactics to ‘legacy issues’ than to claims that have their origins in more recent injuries. The ‘legacy issue’ is emerging as a distinct set of governmental practices. Limited investigations, followed by *ex gratia* redress schemes have become the hallmark of this government’s response to ‘legacy issues’. This was the approach taken to the Magdalene women’s claims<sup>140</sup> and to survivors of abuse in residential institutions.<sup>141</sup> Similarly, in addressing ‘legacy issues’ elsewhere, the government has been accused of aggressively discouraging litigation,<sup>142</sup> and of facilitating religious perpetrators in evading their financial responsibilities to people who were abused while under their care.<sup>143</sup> The effect of this emergent regime is that an injury cannot be simultaneously the product of Ireland’s religious past and a cause of action in the new time of the secular present. On its own account, the government is acting in women’s best interests by placing obstacles in the path of litigation.<sup>144</sup> It presents them as litigants made vulnerable by old age,<sup>145</sup> whose advisors have exposed them to stress of court

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<sup>139</sup> Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016) 14.

<sup>140</sup> Redress for Women Resident in Certain Institutions Act, 2015; Mairead Enright, ‘What’s Wrong with the Magdalenes Redress Scheme? – Human Rights in Ireland’ <<http://humanrights.ie/gender-sexuality-and-the-law/whats-wrong-with-the-magdalenes-redress-scheme/>> accessed 16 August 2016. On similarities between the Magdalene and symphysiotomy schemes see Mairead Enright, ‘The Trouble with Redress – Symphysiotomy and Other Failures. – Human Rights in Ireland’ <<http://humanrights.ie/gender-sexuality-and-the-law/the-trouble-with-redress-symphysiotomy-and-other-failures/>> accessed 16 August 2016.

<sup>141</sup> ‘Residential Institutions Redress Board’ <<http://www.rirb.ie/>> accessed 16 August 2016.

<sup>142</sup> ‘Child Sex Abuse Victims Being “Bullied” by State to Drop Redress Claims – Mary Lou McDonald’ (*Independent.ie*) <<http://www.independent.ie/irish-news/politics/child-sex-abuse-victims-being-bullied-by-state-to-drop-redress-claims-mary-lou-mcdonald-34864790.html>> accessed 16 August 2016. On a related issue, see the state’s suppression of testimony from the Ryan Commission; ‘Survivors Outraged at Plan to Seal Abuse Reports for 75 Years’ (*Independent.ie*) <<http://www.independent.ie/irish-news/survivors-outraged-at-plan-to-seal-abuse-reports-for-75-years-31086753.html>> accessed 16 August 2016.

<sup>143</sup> Monday, November 04 and 2013, ‘Lifting the Veil on Orders’ €500m Redress Bill Battle’ (4 November 2013) <<http://www.irishexaminer.com/ireland/lifting-the-veil-on-orders-500m-redress-bill-battle-248355.html>> accessed 16 August 2016. BBC News, ‘Magdalene Laundries: Four Religious Orders Refuse to Pay into Fund’ (*BBC News*) <<http://www.bbc.co.uk/news/world-europe-23325716>> accessed 16 August 2016.

<sup>144</sup> O’Carroll, ‘U-Turn on Statute of Limitations as Closure Sought for Symphysiotomy Survivors’ (n 101). Frances Fitzgerald, ‘Opening Remarks at Ireland’s Appearance before the UN Human Rights Committee on International Convention on Civil and Political Rights’ (15 July 2014) <<http://www.justice.ie/en/JELR/Pages/SP14000193>> accessed 31 May 2015. Murphy (n 17) 48.

<sup>145</sup> ‘Government Announces Details of Symphysiotomy Payment Scheme’ (*Department of Health, Ireland*, 6 November 2014) <<http://health.gov.ie/blog/press-release/symphysiotomy-payment->

appearances and the risk of costs, while exaggerating their chances of success in court.<sup>146</sup> Women are entitled to care and consideration, or at least the public performance of it, but not to contest the terms on which that performance takes place. In 2013, for example, the Minister for Health reported that he had ‘listened closely to the testimony of the women [members of SOS]’ and been ‘moved by them’.<sup>147</sup> Yet, as Matilda Behan, a founder of SOS, noted while reflecting on these encounters: ‘I was with [the Minister for Health] before Christmas and told him my story. [H]e said it was [t]errible. But sure that’s as far as it goes’.<sup>148</sup> Felman, borrowing from Benjamin, might say that the state makes women ‘expressionless’ in the present: those ‘whom violence has treated in their lives as though they were already dead, those who have been made (in life) without expression, without a voice and without a face’.<sup>149</sup> Women’s claims are colonised by law, but not open to the opportunities which law might provide for hearing and contestation.

### **Closure, Affect and the ‘Double Blow’.**

What drives the state’s refusal to allow SOS access to law? Elizabeth Freeman notes that certain affects ‘inhere in shared timings’.<sup>150</sup> The history of the nation, understood as shared time appears as ‘a mirror in which a fragmented, fractious, injured community sees itself as beautiful, coherent, happy.’<sup>151</sup> SOS, by their difficult representations of the past, by their apparent anger and ingratitude, threaten to disfigure the beautiful order which holds the time of the nation together.<sup>152</sup> In order

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scheme/>. O’Carroll, ‘U-Turn on Statute of Limitations as Closure Sought for Symphysiotomy Survivors’ (n 101). ‘Statute of Limitations (Amendment)...: 17 Apr 2013: Dáil Debates’ <<https://www.kildarestreet.com/debates/?id=2013-04-17a>> accessed 14 August 2016.

<sup>145</sup> *ibid.*; Gavin Reilly, ‘Mixed Response from Symphysiotomy Survivors to Lifting Statute of Limitations’ *TheJournal.ie* (17 April 2013) <<http://www.thejournal.ie/symphysiotomy-statute-of-limitations-reaction-873660-Apr2013/>> accessed 31 May 2015.

<sup>146</sup> Reilly (n 145).

<sup>147</sup> O’Carroll, ‘U-Turn on Statute of Limitations as Closure Sought for Symphysiotomy Survivors’ (n 113).

<sup>148</sup> Matilda Behan, a member of SOS quoted at: ‘Politicians “Don”t Even Listen to You’, Says Symphysiotomy Victim’ (*Breaking News*) <<http://www.breakingnews.ie/ireland/politicians-dont-even-listen-to-you-says-symphysiotomy-victim-633299.html>> accessed 31 May 2015.

<sup>149</sup> Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press 2002) 14.

<sup>150</sup> Freeman (n 95) xi.

<sup>151</sup> Costas Douzinas, ‘History Trials: Can Law Decide History?’ (2012) 8 *Annual Review of Law and Social Science* 273. On memory and commonality see Emiliós A Christodoulidis and Scott Veitch, *Lethe’s Law: Justice, Law and Ethics in Reconciliation* (Hart Publishing 2001) 227.

<sup>152</sup> Latour (n 38) 73.

to see itself as beautiful, fractures and injuries must be silenced and forgotten. I want to suggest that the state's response to SOS can be conceptualised as the response of an 'injured' or 'traumatised' community. Before proceeding, I should say that in conceptualising that response as 'traumatised', I do not mean to repeat the state's transferral of women's bodily experiences onto the purportedly homogenous body of the nation.<sup>153</sup> The trauma at play here is not the kind of direct experience of religious violence that survivors of symphysiotomy suffered. Instead, I rely something akin to Ragland-Sullivan's Lacanian conceptualisation of trauma as 'the appearance of a void in being and knowledge': a brush with the 'real'.<sup>154</sup> Trauma here entails, not necessarily a physical wounding, but that some fantasy which enables the cohesion of the nation has been punctured, and an emptiness in meaning – an abyss, a chaos – appears in its place.<sup>155</sup> An 'ego-ideal', which combines an idealised self-image with the values of one's parents is lost.<sup>156</sup> National trauma need not be associated with a single overwhelming rupture, but with a gradual progression of events as in contexts of colonialism or occupation.<sup>157</sup> In the Irish context, this trauma might centre on the devastating failure of the legal and constitutional settlement between church and state power. In one of his 'legacy issue' apologies, the Taoiseach gestured to this trauma:

This is not Rome. Nor is it industrial-school or Magdalene Ireland, where the swish of a soutane smothered conscience and humanity and the swing of a thurible ruled the Irish-Catholic world. This is the 'Republic' of Ireland 2011. A Republic of laws.....of rights and responsibilities....of proper civic order..... Those who have been abused can take some small comfort in knowing that they belong to a nation, to a democracy where humanity, power, rights, responsibility are enshrined and enacted, always.....always.... for their good. Where the law - their law - as citizens of this country, will always supercede canon laws that have neither legitimacy nor place in the affairs of this country.

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<sup>153</sup> For a critical account of Irish traumaculture (focusing especially on the Famine) see Carville, Conor, "Keeping That Wound Green": Irish Studies and Traumaculture' in Shane Alcolbia-Murphy (ed), *What Rough Beasts? Irish and Scottish Studies in the New Millennium* (Cambridge Scholars Publishing 2008).

<sup>154</sup> Ellie Ragland-Sullivan, 'The Psychical Nature of Trauma: Freud's Dora, the Young Homosexual Woman, and the Fort! Da! Paradigm' (2001) 11 *Postmodern Culture* 15 <<http://muse.jhu.edu/journals/pmc/v011/11.2ragland.html>> accessed 17 September 2014. See also Schroder; trauma is simply whatever the subject cannot reincorporate into the symbolic order. Jeanne Lorraine Schroeder, *The Four Lacanian Discourses: Or Turning Law Inside Out* (Routledge 2008) 44.

<sup>155</sup> Ragland-Sullivan (n 154) 15.

<sup>156</sup> Ranjana Khanna, *Dark Continents: Psychoanalysis and Colonialism* (Duke University Press 2003) 84.

<sup>157</sup> David Lloyd, *Irish Times: Temporalities of Modernity* (Field Day Publications 2008) 28.

The promise of law, as Juliet Rogers writes, is that we shall have its love,<sup>158</sup> and through that love a certain freedom.<sup>159</sup> Only those who break that law will be brutalised. The new Irish state was built on an ideal of reconciliation of governmental power to religious precept, which promised to create a well-regulated, virtuous, prosperous and presumptively masculine nation.<sup>160</sup> Its terrible failure was apparent throughout the twentieth century in a quotidian experience of physical violence, shame and sacrificial destruction of lives.<sup>161</sup> Memories of symphysiotomy - with their atmosphere of menacing religious institutional power, uncertainty, uncanny absence of care and sudden violence - instantiate that failure. Desires for a particular kind of shared religious life under law entangled the nation-state in its own traumatic wounding.<sup>162</sup> In intimate and family life, it created direct complicity and experiences of powerlessness between husbands and parents and religious agents of violence.<sup>163</sup> Belief in the good faith of law and religion was daily undone.

In positing this trauma as a route to framing the state's response to symphysiotomy, I am guided by the state's determined suppression of women's efforts to make legal claims around religious power and obstetric violence. Silences, and the mutilations of language, and of law, that accompany them, are the 'cryptic enclaves' left behind by trauma.<sup>164</sup> Trauma is unlike any other loss because it is overwhelming;<sup>165</sup> it utterly

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<sup>158</sup> Juliet Rogers, 'The Pure Subject of Torture: Or, Lynndie England Does Not Exist' (2011) 35 *Australian feminist law journal* 75, 86.

<sup>159</sup> Juliet Rogers, 'Who's Your Daddy - A Question of Sovereignty and the Use of Psychoanalysis' (2007) 11 *Law Text Culture* 151.

<sup>160</sup> See for example Ruth Fletcher, 'Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics' (2001) 28 *Journal of Law and Society* 568; Siobhan Mullally, 'Debating Reproductive Rights in Ireland' (2005) 27 *Human Rights Quarterly* 78; Barry Collins and Patrick Hanafin, 'Mothers, Maidens and the Myth of Origins in the Irish Constitution' (2001) 12 *Law and Critique* 53; Patrick Hanafin, 'Rewriting Desire: The Construction of Sexual Identity in Literary and Legal Discourse in Postcolonial Ireland' (1998) 7 *Social & Legal Studies* 409; Patrick Hanafin, 'Constitutive Fiction: Postcolonial Constitutionalism in Ireland' (2001) 20 *Penn State International Law Review* 339; Lindsey Earner-Byrne, 'The Rape of Mary M.: A Microhistory of Sexual Violence and Moral Redemption in 1920s Ireland' (2015) 24 *Journal of the History of Sexuality* 75; Ailbhe Smyth, 'Paying Our Disrespects to the Bloody States We're In: Women, Violence, Culture, and the State' (1995) 7 *Journal of Women's History* 190.

<sup>161</sup> On religion as requiring that we give ourselves back and up to the other see Jacques Derrida, *Acts of Religion* (Routledge 2013) 71.

<sup>162</sup> Achille Mbembe, 'The Colony: Its Guilty Secret and Its Accursed Share' in Elleke Boehmer and Stephen Morton (eds), *Terror and the Postcolonial* (2015) 34 <<https://books.google.co.uk/books?hl=en&lr=&id=fTykBgAAQBAJ&oi=fnd&pg=PA27&dq=MBEMBE+%22accursed+share%22&ots=aWYY9NbQb5&sig=A5YiLj0xvWujEQQDdH6bONkGLcQ>> accessed 25 July 2016.

<sup>163</sup> For comments from interviews with husbands see Jillson (n 16) 22-24.

<sup>164</sup> Gabriele Schwab, *Haunting Legacies: Violent Histories and Transgenerational Trauma* (Columbia University Press 2010) 4.

objectifies the subject,<sup>166</sup> breaching its shields and barriers.<sup>167</sup> Trauma confounds and numbs the senses,<sup>168</sup> so that it is not ‘fully perceived as it occurs’.<sup>169</sup> Because trauma is not fully perceived, it resists the normal operations of political discourse: we cannot speak of it in the normal scheme of things,<sup>170</sup> and we do not remember it as we remember other losses.

Lyotard’s notion of trauma as a ‘double blow’<sup>171</sup> is instructive in understanding the relationship between trauma and suppression of survivor voices. On this reading, trauma does not make its mark at the time.<sup>172</sup> It is not that it is never seen at all, but that it cannot be absorbed and represented at first; it is not seen ‘in time’. Because the initial trauma is a shock that cannot be registered or experienced it cannot be made the site of this sort of rebuilding.<sup>173</sup> In the absence of this mourning, the nation becomes melancholically attached to the past traumatic injury. Instead of being re-externalised, the trauma is incorporated by silencings which displace its core meaning. Silencing here is more than a withholding of facts, a ‘being silent about’.<sup>174</sup> Ronell captures the destructive agency at play when she writes of ‘the eye that has seen too much and that has blinded itself’.<sup>175</sup> Silencing of aspects of the past, however violent, enables the nation to survive the trauma – self-deception becomes the necessary price of persistence and social unity.<sup>176</sup> Trauma, in this sense, can be said to reconfigure national time. Because it ensures that trauma cannot be communicated as other remembered experiences can, trauma radically disrupts temporal continuity between the present and an aspect of the past.<sup>177</sup> At the same time, trauma is not a simple rupture between past and present because trauma’s effects persist as repetitions in the

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<sup>165</sup> Judith L Herman, *Trauma and Recovery: The Aftermath of Violence--From Domestic Abuse to Political Terror* (Basic Books 2015).

<sup>166</sup> Lloyd (n 157) 23.

<sup>167</sup> Roger Luckhurst, *The Trauma Question* (Routledge 2013) 3.

<sup>168</sup> Lloyd (n 157) 24.

<sup>169</sup> Cathy Caruth, *Trauma: Explorations in Memory* (JHU Press 1995) 6.

<sup>170</sup> Michael S Roth, *Memory, Trauma, and History: Essays on Living with the Past* (Columbia University Press 2013) 92.

<sup>171</sup> Jean François Lyotard, *Heidegger and ‘the Jews’* (U of Minnesota Press 1990) 15.

<sup>172</sup> On past trauma as the essence of our obligation before the law see Lyotard (n 171).

<sup>173</sup> Khanna (n 156) 22.

<sup>174</sup> Schwab (n 164) 11.

<sup>175</sup> Avital Ronell and Anne Dufourmantelle, *Fighting Theory* (University of Illinois Press 2010) 56.. See similarly the idea of ‘psychic splitting’ Schwab (n 164) 21.

<sup>176</sup> Ragland-Sullivan (n 173) 13.

<sup>177</sup> Roth (n 170) xviii.

present; more present fact than past wound.<sup>178</sup> Silencing does not effectively disappear the trauma or sever our attachment to the past. What is silenced, and thus left unencountered, is often ultimately reinscribed and repeated<sup>179</sup> in an effort to recapture a sense of the wholeness taken from us by trauma.<sup>180</sup> Trauma becomes 'indestructible'.<sup>181</sup> It continues to intrude into national life.<sup>182</sup>

The 'double blow' frames the relationship between trauma, silence and repetition. The first blow cannot be registered or mourned. But it may return as a second blow – a symptom which makes the first blow known – forcing 'a breach in the flow of time that the imagination – the faculty that synthesises the heterogeneous – normally ensures'.<sup>183</sup> Some details of the trauma are suddenly made known in breath-taking detail, while others are obscured.<sup>184</sup> On the terms of my argument, SOS's testimony to pain and fear and degradation, and their insistence on the origins of that pain – not in the necessary operations of medicine but in the power afforded to religious agents by an enabling state - is the second blow. Their public claims do not enact a new trauma, but belatedly resurrect an older one. They signal the return of something missed the first time, insinuating past injury into the future. That is why they cannot be allowed to access sites of public meaning-making such as litigation. The second blow, though it does not produce shock, produces affect; it commands 'flight' – an effort to leave the scene.<sup>185</sup> The second blow comes back from the (lost) traumatic first; what happened in the past takes effect in the present. National time then forcefully and obviously appears as otherwise than chronological: 'the present is the past and...the past is always present'.<sup>186</sup> The second blow is almost 'incompatible with time'.<sup>187</sup> It makes national time seem 'a bit monstrous, unformed, confusing, confounding', menacing.<sup>188</sup> This upset in time produces a desire in the state to recoil

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<sup>178</sup> Dorothea Olkowski, *Gilles Deleuze and the Ruin of Representation* (University of California Press 1999) 110.

<sup>179</sup> Roth (n 170) xxvi. Schwab (n 164) 2.

<sup>180</sup> Schwab (n 164) 4. See also Juliet Rogers, 'Beyond the Script of Law' (2009) 18 *Griffith Law Review* 269.

<sup>181</sup> Paul Ricoeur, *Memory, History, Forgetting* (University of Chicago Press 2009) 445.

<sup>182</sup> Freeman (n 95) 8.

<sup>183</sup> Randi Gressgård, *Multicultural Dialogue: Dilemmas, Paradoxes, Conflicts* (Berghahn Books 2013).

<sup>184</sup> Hershini Bhana Young, *Haunting Capital: Memory, Text and the Black Diasporic Body* (UPNE 2006) 91. Juliet Rogers, 'Nostalgia for a Reconciled Future' (2011) 20 *Griffith Law Review* 252.

<sup>185</sup> Lyotard (n 171) 16.

<sup>186</sup> *ibid.*

<sup>187</sup> Gressgård (n 183).

<sup>188</sup> Lyotard (n 171) 17.

from the unknown, but at the same time the desire to reorder it; to resolve the discrepancy between the time of the first blow and that of the second and ‘inscribe them on the line of a single and uniform history’.<sup>189</sup>

The decision to analyse, to write, to historicize is made according to different stakes...but it is taken, in each case, against this formless mass, and in order to lend it form, a place in space, a moment in temporal succession, a quality in the spectrum of qualifications, representation on the scene of the various imaginaries and sentences’.<sup>190</sup>

The second blow signals that something has happened that cannot be managed, but that nevertheless provokes totalising, homogenising responses.<sup>191</sup> The first blow cannot successfully be neutralised or contained; it will always exceed responses to the second blow. And yet every attempt will be made to sacrifice and suppress it; to close the gap that it has opened in homogenous national time. Lyotard would call this process of silencing a *differend*: The state refuses any encounter between the law of the state that might generate a ‘disjuncture of the present with itself’.<sup>192</sup>

This analysis offers some insight into the state’s determination to deny SOS access to litigation in favour of a contained redress scheme. Assessment was on the basis of written statements and medical records. Medical records were always preferred to reports from women’s current doctors, and discrepancies between these and the women’s statements were examined by the scheme’s own medical advisors. Where records were not available, scar and radiology evidence was sought.<sup>193</sup> The scheme acknowledged that records were often not available, and often not reliable even where they could be found. It also acknowledged that scar evidence and radiography were not definitive, particularly where it was sought to prove the degree of seriousness of a woman’s injury.<sup>194</sup> Nevertheless, women were not given an opportunity to be heard orally. Even though the redress scheme’s own evidentiary processes showed the

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<sup>189</sup> *ibid* 16.

<sup>190</sup> *ibid* 17.

<sup>191</sup> Gressgård (n 183).

<sup>192</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2009) 109.

<sup>193</sup> M Harding-Clark, ‘The Surgical Symphysiotomy Ex Gratia Payment Scheme Report’ (19 October 2016) 41 <<http://health.gov.ie/wp-content/uploads/2016/11/The-Surgical-Symphysiotomy-Ex-Gratia-Payment-Scheme-Report.pdf>> accessed 10 April 2017.

<sup>194</sup> See further Midwives for Choice, ‘Review of The Surgical Symphysiotomy Ex Gratia Payment Scheme Report’ <<http://midwivesforchoice.ie/wp-content/uploads/2017/01/MfC-Review-of-Harding-Clark-FINAL.pdf>> accessed 10 April 2017.

incoherence of its mission, what mattered was that the state chose the standard against which women's claims about the past would be measured. In Lyotard's words '[O]ur institutionalised idioms, our verification procedures, our mechanisms for adjudicating truth, [pre-establish] the realities whose truth we then assert'.<sup>195</sup>

SOS are stripped of the right to testify to the harm done to them, or that testimony is stripped of authority.<sup>196</sup> The violence involved in the suppression of the *differend* becomes apparent when Maureen Harding-Clarke, who had administered the redress scheme, produced a report on its operation. The report was adopted by the government; the Minister for Justice called it 'fair' and 'comprehensive'.<sup>197</sup> Several senior doctors welcomed its conclusions. The report largely re-asserts the *Walsh* history. Its particular contribution is to support that history, by denying SOS's authority to contest it. It describes women in language which both undermines their engagement with the scheme and their entitlement to characterise their injuries at all. At best, they are patronised as 'suggestive personalities',<sup>198</sup> 'amenable to ... emotional contagion'<sup>199</sup> and subject to 'acquired group memory',<sup>200</sup> developed through involvement in campaigning organisations;

it is very probable that the combination of a traumatic birth experience and expo<sup>201</sup> sure to other women's stories has created a self convincing confabulation of personal history. Another inference is that the possibility of financial payment has influenced suggestible women and their family members into self- serving adoption and embracing of the experiences described by others or in the media and created psychosomatic conditions.<sup>202</sup>

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<sup>195</sup> Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (NYU Press 1998) 63.

<sup>196</sup> Jean-François Lyotard, *Le Différend* (U of Minnesota Press 1988) 5.

<sup>197</sup> Dail Deb Dec 1 2016.

<sup>198</sup> Harding-Clark (n 192) 97.

<sup>199</sup> *ibid.*

<sup>200</sup> *ibid* 62.

<sup>201</sup> 'Some Mistook Problems for Symphysiotomy - Boylan' [2016] RTE.ie </news/2016/1123/833859-health-symphysiotomy-compensation/> accessed 10 April 2017.

<sup>202</sup> Harding-Clark (n 192) 97.

At worst women are chastised for buying into ‘conspiracy theories’,<sup>203</sup> for ‘unreasonable’ reactions, for their anger and disappointment.<sup>204</sup> Harding-Clarke maintained that 185 applicants to the scheme had not been able to prove they had undergone symphysiotomy.<sup>205</sup> She describes those applicants to the scheme who engaged with campaigners in highly problematic language, suggesting that their applications to the scheme bore similar ‘lurid’ or ‘harrowing’ motifs gleaned from media reports.<sup>206</sup> The report suggests that some prominent campaigners within SOS who ‘have been active in representing themselves as victims in the media’<sup>207</sup> had not undergone symphysiotomies at all. The condemnation of campaigners is underscored by contrast with the report’s account of ideal applicants: happy women concerned with family rather than campaigning, who are spending money on ‘spoiling themselves’, rather than on the amelioration of pain and disability.

I was ultimately glad that most exaggerated accounts were ignored and compassion was applied to these women who perhaps were influenced by others to make the statements. This led to some of the more pleasurable moments as judicial assessor when I read the warm letters and notes from the women who wrote to me after they received their awards to tell me that they were certainly intent on spoiling themselves a little. Several very happy applicants rang to tell me how they were going to spend their money. One lady was buying a special hat. One applicant lifted my heart when she told me that she had never had any money in her savings account. Now she looked at her bank account every morning, for the sheer pleasure of seeing the amount of money in the account in her own name. One delightful applicant invited me to tea at her house and one wrote a poem of appreciation. Most women who wrote, told me that it gave them huge pleasure to be able to help their children or their grandchildren with their awards.<sup>208</sup>

The Harding-Clarke report, written to justify confining SOS members to the redress scheme which silences those injuries, then condemns them for participating in that scheme in certain disobedient or political ways; for refusing to share in the ‘good

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<sup>203</sup> *ibid* 56.

<sup>204</sup> *ibid* 97.

<sup>205</sup> *ibid* 28.

<sup>206</sup> *ibid* 61.

<sup>207</sup> *ibid* 103.

<sup>208</sup> *ibid* 63.

feeling' of the redress scheme.<sup>209</sup> The effect is that the scheme has effectively held women's account of the past at bay as 'unthought knowledge';<sup>210</sup> inaccessible but waiting to be known; a 'record that has yet to be made'.<sup>211</sup> The space of the *differend* is an unstable state, signalled by feeling, 'wherein something which must be able to be put into phrases cannot yet be';<sup>212</sup> which has no place in the prevailing time. SOS are 'stranded with an unprovable reality'.<sup>213</sup>

### **Conclusion: Law, Unease and National Time.**

In the case of symphysiotomy, national time is worked out over women's bodies, through the violent suppression of their temporal knowledge and experience. SOS is, denied the encounter with law demanded and consigned to a slower time of endurance: 'Sometimes I think [the campaign] is dead in the water, then at other times, I think someone should have been made answerable...'<sup>214</sup> That stolid endurance does not imply failure. The radical insight of trauma theory is that the state's violent deployment of law does not necessarily imply a restoration of state sovereignty over that knowledge or its seamless reintegration into the narratives that undergird homogenous national time. SOS's continuing counter-demand for public inquiry is, in Lyotard's terms, a demand for 'anamnesis'; a 'painful process of working through, a work of mourning for attachments and conflicting emotions, loves and terrors associated with [particular] names'.<sup>215</sup> Whereas history aims to tell what happened, anamnesis 'lets itself be led by the unknown that happened then, by what is unpredictable and invisible in the event...The past is not sought in order to be established'.<sup>216</sup> Anamnesis might redeem past injury through paying attention to the

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<sup>209</sup> Sara Ahmed, 'The Politics of Good Feeling.' (2014) 10 *Critical Race & Whiteness Studies*.

<sup>210</sup> Schwab (n 164) 7. See similarly Fiona Barclay, *Writing Postcolonial France: Haunting, Literature, and the Maghreb* (Lexington Books 2011) xxiii.

<sup>211</sup> Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (Routledge 2013) 57.

<sup>212</sup> Jean-François Lyotard, Keith Crome and James Williams, *The Lyotard Reader and Guide* (Columbia University Press 2006) 104.

<sup>213</sup> Avital Ronell, *The Test Drive* (University of Illinois Press 2005) 106.

<sup>214</sup> O'Connor and Mac Aodhain (n 1) 27.

<sup>215</sup> Jean François Lyotard, Brian Massumi and WGJ Niesluchowski, 'Ticket to a New Decor' [1988] *Harper's Magazine* <<http://harpers.org/archive/1988/06/ticket-to-a-new-decor/>> accessed 14 August 2016.

<sup>216</sup> Jean-Francois Lyotard and John Ronan, 'Anamnesis of the Visible 2' [1999] *Qui Parle* 21. See also Gillian Rose's 'inaugurated mourning' Gillian Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge University Press 1996) 75.

exclusions of national time, though it cannot repair it.<sup>217</sup> The state is determined to make law unavailable to this process. This discloses a persistent unease and inadequacy at the core of Irish law's relationship with religion and national time. What holds, or drives law's relationship to national time in contexts such as these is not the ordered steadiness of progress, but the flight away from an unapproachable past.

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<sup>217</sup> Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (John Wiley & Sons 2015).