

"AN IRISH SOLUTION TO AN IRISH PROBLEM": IRELAND'S STRUGGLE WITH ABORTION LAW

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I. INTRODUCTION

When Charles Haughey was Prime Minister of Ireland, he referred to his proposal to lift the ban on the sale of contraceptives by permitting the sale of condoms, but by prescription only, as "an Irish solution to an Irish problem."¹

Since 1985, anti-abortion activists, the Catholic Church, the courts, and the government of Ireland have employed a similarly convoluted approach in attempting to obstruct Irish women's access to abortion services.² By enjoining Open Door Counselling and the Dublin Well-

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1. 312 Dáil Deb. col. 335, Feb. 28, 1979, *cited in* Basil Chubb, *The Politics of the Irish Constitution* 53, 138, n.17 (1991). This "refers to an Irish trait of solving problems by indirection." Dennis Duggan, *Abortion Furor Galvanizes Ireland*, *Newsday*, Feb. 24, 1992, at 8.

The Health (Family Planning) Act, No.20 (1979), required a doctor's prescription for the sale of any contraceptive and a doctor's certification that it was for "bona fide family planning purposes." Section 4(1) of the Health (Family Planning) Act states:

- (a) A person shall not sell contraceptives unless -
- (b)(ii) the person to whom the contraceptives are sold is named in a prescription or authorisation in writing for the contraceptives of a registered medical practitioner and is a person who, in the opinion of the practitioner formed at the time of giving of the prescription or authorisation, sought the contraceptives for the purpose, *bona fide*, of family planning or for adequate medical reasons and in appropriate circumstances

....

Id. at section 4(1).

2. *See infra* Section IV. Abortion has been illegal in Ireland for a very long time. *See infra* notes 31-72 and accompanying text. Nonetheless, throughout history Irish women sought and found ways around the law if they were determined to terminate an unwanted pregnancy. As has been the case throughout history, women the world over have found and will continue to find ways and means of controlling child bearing. *See* Christopher Tietze & Stanley K. Henshaw, *Induced Abortion: A World Review* 11-28 (6th ed. 1986); Stanley K. Henshaw & Evelyn Morrow, *Induced Abortion: A World Review* 10-23 (Supplement 1990). Officially, 4,064 Irish women went to England and Wales for abortions in 1990. This figure does not accurately reflect all Irish

Woman Centre from offering non-directive pregnancy counselling services, including information about the availability of legal abortions in the United Kingdom,³ and also by preventing student organizations from publishing and distributing the same information,⁴ Ireland sought to close the door on Irish women and their options in dealing with unwanted pregnancies.

1992 was a year of turmoil and political chaos in Ireland, and the abortion issue was the fountainhead. Albert Reynolds replaced Charles Haughey as head of Ireland's Fianna Fail⁵ party and formed a coalition government at the beginning of February 1992.⁶ Within a few days the new Prime Minister faced his first crisis in office.⁷ A fourteen-year-old Irish girl, who allegedly was raped by her best friend's father and had become pregnant, was forced to return from England, where she had traveled with her parents to obtain an abortion.⁸ When the Dublin High

abortions in the United Kingdom because many women decline to reveal their true identities and addresses. The true number is probably nearer 7,000. Jason Bennetto, *Irish Priests Help Women Set Up Secret Abortions*, *The Independent*, Feb. 23, 1992, at 1.

3. The Attorney General (at the relation of the Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited and Dublin Well-Woman Centre Limited, 1988 I.R. 593 (Ir. H.Ct.), *aff'd in part, rev'd in part*, 1988 I.R. 619 (Ir. S.C.). The term "relation" as used in the above named case means bringing into association with or connection with. *Black's Law Dictionary* 1289 (6th ed. 1990).

4. Society for the Protection of Unborn Children Ireland Limited v. Diarmuid Coogan, 1989 I.R. 734 (Ir. H.Ct.), *rev'd*, 1989 I.R. 738 (Ir. S.C.) and Society for the Protection of Unborn Children Ireland Limited v. Stephen Grogan, 1989 I.R. 753 (Ir. H.Ct.), *rev'd*, 1989 I.R. 760 (Ir. S.C.), *aff'd, remanded*, 1992 I.L.R.M. 461 (Case C-159/90, E.J.C.), *aff'd* slip op. (Ir. H. Ct. Aug. 7, 1992).

5. The Fianna Fail party (Warriors of Destiny) was founded by famed Irish revolutionary Eamon De Valera in 1926. John A. Murphy, Ireland in the Twentieth Century 68 (1975). The party, which stood for complete separation from Great Britain, has traditionally been closely identified with the Catholic Church and rural area citizens. William Tuohy, *National Agenda; A Sea Change in Ireland; Half the Population is Under 25, and That Spells Trouble for the Old Guard; Traditional Politics, Social Mores and Religion are Being Challenged*, *Los Angeles Times*, Jan. 12, 1993, at 2. The other dominant political party in Ireland is called Fine Gael or the United Ireland Party and was founded in 1933. Murphy, *supra* note 5, at 80.

6. Alan Murdoch, *Reynolds Facing Crisis on Abortion*, *The Independent*, Feb. 14, 1992, at 3.

7. Alan Murdoch, *Rape Victim, 14 Denied Abortion; Uproar and Calls for Resignation of Irish Attorney General Follow Dublin High Court Ruling*, *The Independent*, Feb. 18, 1992, at 1.

8. See *infra* notes 180-85 and accompanying text.

Court enjoined her from leaving the country,⁹ the frightened and suicidal young woman's plight captured the attention of the Irish public, as well as the rest of the world.¹⁰ By the time the Irish Supreme Court overturned the High Court¹¹ and lifted the ban on the girl's travel one week later, two-thirds of the electorate in Ireland favored a change in the 1983 constitutional amendment that had banned virtually all abortions in the country.¹² Proponents and opponents of the strictest abortion law in Europe¹³ forced the government to announce in April that a new referendum on the issue would be held later in the year.¹⁴

Meanwhile, the country debated a national referendum on whether Ireland should ratify the 1992 Treaty on European Union,¹⁵ which would bring Ireland hundreds of millions of dollars in subsidies.¹⁶ In June,¹⁷ voters approved the Treaty which contained a protocol allowing Ireland to retain its ban on abortion.¹⁸

In August, a 1989 case preventing students from distributing information about legal abortion services outside of Ireland finally was

9. See *infra* notes 186-88 and accompanying text.

10. See *infra* notes 189-93 and accompanying text.

11. The High Court is the pivotal court in the Irish judiciary. While Circuit and District Courts are the major trial courts, the High Court is the only court of original jurisdiction in cases challenging legislation. There are fourteen judges who sit on the High Court, one at a time. Appeals from the High Court are heard by the Irish Supreme Court, consisting of five justices who sit en banc. See Paul C. Bartholomew, *The Irish Judiciary* 4-18, App. A at 26 (1971).

12. Jason Bennetto, *A Catholic Doctor Faces the Demands of Reality; As the Furore Over a 14-year-old Irish Rape Victim Mounts, Jason Bennetto Looks at England as an Abortion Haven*, *The Independent*, Feb. 23, 1992, at 2.

13. Tietze & Henshaw, *supra* note 2, at 3.

14. Alan Murdoch, *Irish Abortion Crisis Forces Referendum*, *The Independent*, Apr. 8, 1992, at 3.

15. Treaty Establishing European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247.

16. Ireland's Justice Minister Padraig Flynn said "Maastricht is about 'megabucks' for Ireland." Alan Murdoch, *Europe: The Maastricht Debate: Taoiseach Overrides Abortion Diversion*, *The Independent*, May 18, 1992, at 8.

17. Liam Clarke & Margarett Driscoll, *Ireland's Vote Shakes Anti-Abortion Faithful; Maastricht Treaty*, *Times of London*, June 21, 1992.

18. Protocol Annexed to the Treaty On European Union and to Treaties Establishing the European Communities [Regarding Ireland], Feb. 7, 1992, 31 I.L.M. 362, states: "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."

adjudicated on the merits.¹⁹ The judgment was a resounding defeat for abortion rights proponents.²⁰ In October, in contrast, the European Court of Human Rights ruled in favor of two family planning clinics, overturning a 1988 injunction prohibiting pregnancy options counselling.²¹ The landmark decision in *Open Door Counselling v. Ireland*²² set European law at direct odds with Irish law.

A second national referendum on the right to travel abroad for an abortion, the right to receive information about such legal abortions, and a reconsideration of the wording of Article 40.3.3 of the Irish Constitution, scheduled for November 25, 1992²³ subsequently held even greater importance. At stake were the rights of Irish women and potential conflict between Irish law and European Community law that could jeopardize Ireland's continued presence in the European Community.²⁴

The issues of abortion counselling and the dissemination of information about legal abortion in other countries reawakened the state of social turmoil that divided Ireland in 1983, when a constitutional amendment was passed banning virtually all abortions in Ireland.²⁵ This Note analyzes how this divisive issue threatens not only the health and welfare of Irish women, but also the continued existence of the current government and Ireland's position in the European Community. The Note first examines the early history of abortion law in Ireland, the Constitutional Amendment of 1983, and the major court cases involving the prohibition against providing information about legal abortion services in other countries. These cases include *Attorney General ex rel Society for the Protection of Unborn Children (S.P.U.C.) v. Open Door*

19. *S.P.U.C. v. Gogan*, slip op. (Ir. H.Ct. Aug. 7, 1992).

20. Alan Murdoch, *Fresh Ban on Abortion Information in Ireland*, *The Independent*, Aug. 8, 1992, at 3.

21. *Open Door Counselling Limited and Dublin Well-Woman Centre Limited v. Ireland*, Joined cases 14234/88 and 14235/88, slip op. (Eur. Ct. H.R. Oct. 29, 1992). The jurisdiction of the European Court of Human Rights is discussed *infra* notes 164-68 and accompanying text.

22. *Id.*

23. The referendum was scheduled for December 3, 1992 but was moved up to November 25, due to the collapse of the Reynolds coalition government on November 5. See *infra* notes 226-30 and accompanying text.

24. See *infra* notes 166-68 and accompanying text.

25. See *infra* Section III.

Counselling,²⁶ *S.P.U.C. v. Coogan*,²⁷ *S.P.U.C. v. Grogan*,²⁸ and *Attorney General v. X*,²⁹ the 1992 case of the fourteen-year-old rape victim, whose ordeal attracted worldwide attention to the subsequent European Court of Human Rights' decision in *Open Door Counselling v. Ireland*.³⁰ This Note concludes that perhaps at last, Ireland is taking steps to join the rest of Europe in acknowledging a woman's legal right to terminate an unwanted pregnancy.

II. THE DEVELOPMENT OF ABORTION LAW IN IRELAND

England dominated Irish law from medieval times until the creation of the Irish Free State in 1921.³¹ The Irish Parliament was subject to English royal veto and the British Privy Council maintained authority to amend Irish legislative proposals.³²

At common law, abortion was a misdemeanor.³³ Demonstrating an

26. *The Attorney General (at the relation of The Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited and Dublin Well-Woman Centre Limited*, 1987 I.L.R.M. 477, 1988 I.R. 593 (Ir. H.Ct.), *hearing on costs*, 1987 I.L.R.M. 501 (Ir. H.Ct.), *aff'd in part, rev'd in part*, 1988 2 C.M.L.R. 443, 1988 I.R. 619, 1989 I.L.R.M. 19 (Ir. S.C.) [hereinafter *S.P.U.C. v. Open Door*]. *See infra* notes 73-105 and accompanying text.

27. *Society for the Protection of Unborn Children Ireland Limited v. Diarmuid Coogan and others*, 1989 I.L.R.M. 526, 1989 I.R. 734 (Ir. H.Ct.), *rev'd*, 1990 I.L.R.M. 70, 1989 I.R. 738 (Ir. S.C.) [hereinafter *S.P.U.C. v. Coogan*]. *See infra* notes 106-23 and accompanying text.

28. *Society for the Protection of Unborn Children Ireland Limited v. Stephen Grogan and others*, 1990 1 C.M.L.R. 689, 1989 I.R. 753 (Ir. H.Ct.), *rev'd*, 1990 1 C.M.L.R. 689, 1989 I.R. 760, 1990 I.L.R.M. 350 (Ir. S.C.), *aff'd, remanded*, 1991 3 C.M.L.R. 849, 1992 I.L.R.M. 461 (Case C-159/90, E.J.C.), *aff'd* slip op. (Ir. H.Ct. Aug. 7, 1992) [hereinafter *S.P.U.C. v. Grogan*]. *See infra* notes 124-55 and accompanying text.

29. *Attorney General v. X and others*, 1992 2 C.M.L.R. 289, I.L.R.M. 401 (Ir. S.C.) [hereinafter *Attorney General v. X*]. *See infra* notes 180-203 and accompanying text.

30. *Open Door Counselling Limited and Dublin Well-Woman Centre Limited v. Ireland*, Joined cases 14234/88 and 14235/88, slip op. (Eur. Ct. H.R. Oct. 29, 1992) [hereinafter *Open Door Counselling v. Ireland*]. *See infra* notes 156-79 and accompanying text.

31. James Casey, *Constitutional Law in Ireland* 1 (1987).

32. *Id.*

33. *See S.P.U.C. v. Open Door*, 1988 I.R. 593, 597 (Ir. H.Ct.).

increased intolerance for abortion, an 1803 English statute³⁴ imposed the death penalty for the administration of an abortifacient,³⁵ with the intention of causing a miscarriage. In 1861 the Irish legislature enacted the Offences Against the Person Act.³⁶ Section 58 made attempted self-induced abortion a felony.³⁷ The participation of another in procuring an abortifacient was equally prohibited by Section 59.³⁸

A 1921 treaty between England and Ireland created the Irish Free State.³⁹ The first constitution, the Constitution of Saorstát Éireann,⁴⁰ surviving only fifteen years, had no impact on the existing law against

34. 43 Geo. 3, ch. 58 (1803) cited in Cathleen M. Colvin, Comment, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community*, 15 Fordham Int'l L.J. 476, 491-92 (1991-1992).

35. An abortifacient is a drug or medicine capable of, or used for, producing an abortion. Black's Law Dictionary 7 (6th ed. 1990).

36. Offences Against the Person Act, 24 & 25 Vict., ch. 100 (1861)(Ir.).

37. Section 58 of the Act states:

Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, with or without Hard Labour, and with or without Solitary Confinement.

Offences Against the Person Act, 24 & 25 Vict., ch. 100, § 58 (1861)(Ir.).

38. Section 59 of the Act provides that:

Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any Instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

Offences Against the Person Act, 24 & 25 Vict., ch. 100, § 59 (1861)(Ir.).

39. Casey, *supra* note 31, at 9. The treaty was codified in The Irish Free State (Agreement) Act, 1922, 12 & 13 Geo. 5, ch. 4.

40. *Id.* at 10.

abortion.⁴¹ By the end of 1936 the original text contained twenty-seven Constitutional Amendment Acts, none altering the abortion law.⁴² The current constitution,⁴³ adopted in 1937, does not conflict with the Offences Against the Person Act either,⁴⁴ and the Act remains in effect.⁴⁵

Concern in Ireland regarding the possible legalization of abortion grew when the British Parliament passed the Abortion Act in 1967⁴⁶ without specifically overturning the Offences Against the Person Act. Indeed, as early as 1939 in *Rex v. Bourne*,⁴⁷ British courts found a loophole in the Act.⁴⁸ Anti-abortion groups considered the Offences Against the Person Act an insufficient abortion restriction because the court had recognized the concept of legal abortion.⁴⁹ Tension mounted when the British passed the Abortion Act, allowing the termination of pregnancy within the first twelve weeks if the pregnancy could be injurious to the physical or mental health of the woman or her family, or up to twenty-four weeks in the case of a severely handicapped fetus.⁵⁰

As most of the Western world passed legislation legalizing abortion in the 1970s,⁵¹ Ireland found itself in an increasingly isolated position.⁵²

41. *Id.* at 10-28.

42. *Id.* at 22-28.

43. Ir. Const.

44. Although the 1937 constitution virtually cut all Irish legal ties to Great Britain, it provided that all laws previously in force would continue to be in effect if they were consistent with the Constitution, or until they were repealed or amended by the Irish Parliament. Ir. Const. art. 50.1.

45. See *infra* note 53 and accompanying text.

46. Abortion Act, 1967, ch. 87.

47. *Rex v. Bourne*, (1939) 1 K.B. 687.

48. *Id.* In *Rex v. Bourne*, a doctor, prosecuted under the Offences Against the Person Act for performing an abortion on a fourteen-year-old rape victim, was found not guilty. The court distinguished between an "unlawful abortion," as prohibited by sections 58 and 59 of the Act, and the "lawful abortion" in the case at bar.

49. Glenn Frankel, *Abortion Issue Divides Ireland*, Wash. Post, Jan. 8, 1990, at A18.

50. Abortion Act, 1967, ch. 87.

51. Over the past twenty years a large number of countries have liberalized their abortion laws. These countries include Austria, Burundi, Canada, the People's Republic of China, Cuba, Denmark, Finland, France, Germany, Ghana, Hong Kong, India, Italy, Kuwait, Liberia, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Taiwan, Tunisia, Turkey, the United Kingdom, the United States, Yugoslavia, Zambia, and Zimbabwe. Tietze & Henshaw, *supra* note 2, at 14.

52. See Vicky Randall, *The Politics of Abortion in Ireland* in *The New Politics of Abortion* 68 (Lori Lovenduski & Joyce Outshoorn eds. 1986); Mary Ann Glendon, *Abortion And Divorce In Western Law* 10-62 (1987); Christopher Tietze & Stanley K. Henshaw, *Induced Abortion: A World Review*

In 1979 the Irish legislature affirmed the Offences Against the Person Act by passing the Health (Family Planning) Act.⁵³ Sponsored by future Prime Minister Charles Haughey, then serving as Minister for Health, the Health Act also provided for the sale of several types of contraceptives but only on prescription for adequate medical reasons.⁵⁴

III. THE CONSTITUTIONAL AMENDMENT OF 1983

The anti-abortion organizations of Ireland joined together in January, 1981, under the umbrella of the Pro-Life Amendment Campaign to secure an amendment to the Irish Constitution.⁵⁵ They sought to guarantee the protection of the right to life of fetuses by effectively banning all abortions.⁵⁶ Ireland in 1983 was in the curious position of having very restrictive abortion legislation intact and virtually unchallenged since 1861; yet, it faced a constitutional challenge by fourteen anti-abortion groups calling for a pro-life amendment.⁵⁷ The pro-life lobby had a prospective goal: to prevent any future legalization of abortion in the country either by legislation or by court decision.⁵⁸

The members of the 1981 pro-life founding conference expressed fear that although an Act of Parliament was in force, it could be amended at

11-28 (6th ed. 1986); and Stanley K. Henshaw & Evelyn Morrow, *Induced Abortion: A World Review* 10-23 (Supplement 1990).

53. Health (Family Planning) Act, Pub. Gen. Acts, No.20 (1979). Section 10 of the Act states:

Nothing in this Act shall be construed as authorising-

- (a) the procuring of abortion,
- (b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 . . . or
- (c) the sale, importation into the State, manufacture, advertising or display of abortifacients.

Id. at Section 10.

54. *See supra* note 1 and accompanying text. *See also* Chubb, *supra* note 1, at 53. The contraceptive provision was superseded in 1985 by the Family Planning (Amendment) Act legalizing the sale of contraceptives to anyone over the age of eighteen. J. Whyte, *Recent Developments in Church-state Relations*, in 6 *Seirbhís Phoiblí* 4 (1985), *cited in* Chubb, *id.* at 138.

55. Tom Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* xi (1990).

56. *Id.*

57. *Id.* at 1.

58. *Id.* at 2-3.

any time by the Irish Parliament.⁵⁹ Only specific prohibition in the form of a constitutional amendment could rule out future legislation.⁶⁰ In effect, the pro-life coalition hoped to preempt any pro-choice effort to encourage Irish courts to strike down the Offences Against the Person Act.⁶¹

In 1972 the Chief Justice of the Irish Supreme Court stated that, "[c]onstitutional rights are declared not alone because of bitter memories of the past but no less because of the improbable, but not-to-be-overlooked, perils of the future."⁶² The following year the United States Supreme Court's decision in *Roe v. Wade*,⁶³ extending the right to privacy to the area of abortion, served as a constant reminder to anti-abortion activists of Chief Justice O'Dalaigh's warning.⁶⁴

Proinias de Rossa, head of the Workers Party, led the opposition to the amendment, calling it "ill-considered, unnecessary and sectarian."⁶⁵ Then Senator and current President Mary Robinson described it as "a rubbishy academic exercise."⁶⁶ Nonetheless, on September 7, 1983, the Pro-Life Amendment Campaign accomplished its goal.⁶⁷ The 1983 referendum, approved by 67 per cent of the voters, became the Eighth Amendment to the Irish Constitution by the official title Eighth Amendment of the Constitution Act 1983.⁶⁸ One commentator has suggested that the campaign was "arguably the most momentous episode in modern Ireland during the last 25 years."⁶⁹

The Eighth Amendment of the Constitution Act introduced a new subsection 3 to Article 40.3 stating: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁷⁰ The new amendment gave a

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 2-3.

62. *McMahon v. Attorney General*, 1972 I.R. 69, 111 (Ir. S.C.) cited in John A. Quinlan, Comment, *The Right to Life of the Unborn - An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. Rev. 371. This case involved a successful challenge to provisions of the Electoral Acts of 1923 and 1963 as violating the secret ballot clause of Article 16.1.4 of the Irish Constitution. *Casey*, *supra* note 31, at 97.

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

64. *McMahon v. Attorney General*, 1972 I.R. 69, 111 (Ir. S.C.).

65. *Murdoch*, *supra* note 7.

66. *Hesketh*, *supra* note 55, at 2.

67. *Id.* at xi.

68. *Casey*, *supra* note 31, at 28.

69. *Hesketh*, *supra* note 55, at 2.

70. Ir. Const. art. 40.3.3.

fetus a right to life equal to the woman carrying it.⁷¹ Those opposing the amendment interpreted its effect only as putting the existing law against abortion on a higher constitutional plane.⁷²

IV. CLOSING THE DOOR: THE "GAGGING" OF FAMILY PLANNING COUNSELORS AND THE BAN ON ABORTION INFORMATION IN IRELAND

A. Attorney General ex rel S.P.U.C. v. Open Door Counselling Ltd.

The first legal challenge to the new constitutional amendment arose in *The Attorney General ex rel The Society for the Protection of Unborn Children Ireland Limited v. Open Door Counselling Limited and Dublin Well-Woman Centre Limited*.⁷³ In this case the courts first interpreted the scope of the amendment's effect on the distribution of information about abortion.⁷⁴ This first test of the scope of the Eighth Amendment began with the filing of a complaint on June 28, 1985.⁷⁵ The defendants in the case were two family planning clinics that normally would provide non-directive counselling⁷⁶ on pregnancy options.⁷⁷ In the event that a client wished to consider the option of termination, the clinics would refer the client to a facility in England or Wales where a legal abortion could be performed.⁷⁸ The plaintiff, S.P.U.C.,⁷⁹ sought a declaration that the

71. Alan Murdoch, *Reynolds Facing Crisis on Abortion*, *The Independent*, Feb. 14, 1992, at 3. See *infra* note 86 and accompanying text.

72. Gerard McCormack, *Irish Abortion Case Highlights a Broken Promise*, *The Independent*, Feb. 19, 1992, at 20.

73. *S.P.U.C. v. Open Door*, 1988 I.R. 593 (Ir. H.Ct.), *aff'd in part, rev'd in part*, 1988 I.R. 619 (Ir. S.C.).

74. See James Friedman, *On the Dangers of Moral Certainty and Sacred Trusts*, 10 *Dublin U. L.J.* (1988).

75. *S.P.U.C. v. Open Door*, 1988 I.R. 593, 596 (Ir. H.Ct.).

76. Non-directive counselling in the family planning context offers the full range of options available to a pregnant woman -- motherhood, abortion, and adoption -- without favoring any particular option. Interview with Faye Wattleton, President, Planned Parenthood Federation of America, in Spokane, Wash. (Apr. 17, 1991).

77. *S.P.U.C. v. Open Door*, 1988 I.R. 593 (Ir. H.Ct.).

78. *Id.*

79. The Society for the Protection of Unborn Children is a leading advocate for the Right to Life movement in England and Ireland. It was created in England in 1967 to fight the enactment of the Abortion Act. See *supra* note 46 and accompanying text. The Irish chapter, formed in 1981, was instrumental

activities of the defendants were unlawful under Article 40.3.3 of the Irish Constitution; a declaration that those activities amounted to a conspiracy to corrupt public morals; and an injunction prohibiting such activities.⁸⁰

On December 19, 1986, with the proceedings amended and converted into the name of the Attorney General,⁸¹ the High Court decided first that the plaintiff did have standing to institute, prosecute or maintain the proceedings.⁸²

Citing Irish case law,⁸³ the Court, in addressing the second issue of whether there was an actionable criminal conspiracy, concluded that "the offense of conspiracy to corrupt public morals may be committed even when the agreement between two or more persons is to assist in the

in the passage of the 1983 Constitutional Amendment banning abortion in Ireland. See *supra* notes 55-72 and accompanying text.

80. S.P.U.C. v. Open Door, 1988 I.R. 593 (Ir. H.Ct.). The issues of law raised in S.P.U.C. v. Open Door were: (1) whether the plaintiff has standing to maintain the proceedings; (2) whether the admitted activities of the defendants constitute "(a) [a]n actionable criminal conspiracy to corrupt public morals contrary to common law," or "(b) [a]n actionable conspiracy contrary to Article [40.3.3]" of the Irish Constitution; (3) whether the activities constitute restrainable activity; and (4) whether the plaintiff is entitled to declaratory injunctive relief. *Id.* at 605. If the defendants' activities were to prove to be, in fact, actionable under Irish law, a final issue of law arose: whether the defendants, nevertheless, are entitled to continue their activities by virtue of any provision of European Economic Community law. *Id.*

S.P.U.C. sought an injunction to halt the counselling provided at the family planning clinics, claiming that the counselling activities of Open Door were a conspiracy to corrupt public morals, and were unlawful under the Eighth Amendment. Friedman points out:

To make matters even more perplexing, the High Court returns to its absolute stance on foetal rights near the end of its judgment, yet again noting that the rights of pregnant women are not considered in the case. The oxymoronic quality of this approach seems to have eluded the judges [sic].

Friedman, *supra* note 74, at 76-77.

81. S.P.U.C. v. Open Door, 1988 I.R. 593, 596 (Ir. H.Ct.). The action, instituted by S.P.U.C., was converted into an action by the Attorney General with S.P.U.C. as a relator on September 24, 1986, thus allowing the Attorney General to prosecute the case. *Id.*

82. S.P.U.C. v. Open Door, 1988 I.R. 593, 602-03. "[A]n existing action may, by amendment of the writ and statement of claim and by authority of the Attorney General be converted into an action by the Attorney General with a relator, without prejudice to the proceedings pending in the action." *Id. citing Caldwell v. Paghán Harbour Reclamation Company (1875-76) 2 Ch. D. 221.*

83. *Shaw v. Director of Public Prosecutions*, 1962 A.C. 220 (Conspiracy to corrupt public morals is a common law misdemeanor); *Knüller v. Director of Public Prosecutions*, 1973 A.C. 45 (*Shaw* aff'd).

commission of a lawful act."⁸⁴ Nevertheless, Judge Hamilton declined to grant a declaration for the plaintiff on this issue, finding that "I am not satisfied that there is no risk in my treating conduct as criminal when a jury might consider otherwise."⁸⁵

As to whether defendants' activities constitute a conspiracy under Article 40.3.3, the Court found that the activities amounted to counselling and assisting pregnant women to travel abroad to obtain an abortion or to obtain furtherance on abortion.⁸⁶ The Court subsequently held that such activities were unlawful under Article 40.3.3.⁸⁷ However, the Court found that as the plaintiffs had suffered no damages,⁸⁸ the defendants' activities could not amount to an actionable conspiracy.⁸⁹

The Court concluded on the third issue that the defendants' activities did constitute restrainable activity and awarded injunctive relief.⁹⁰ In affirmatively resolving the fourth issue by granting injunctive and declaratory relief, the Court gave S.P.U.C. its much sought after injunction prohibiting the clinics from counselling or assisting pregnant women within the Court's jurisdiction to obtain further advice on abortion or how to obtain an abortion.⁹¹

Finally, in considering the final issue, the Court rejected the defendants' contention that European Community law entitled them to carry out their activities.⁹² Judge Hamilton determined that European Community law did not apply because the proceedings and defendants' activities were limited to within the State.⁹³

The defendants appealed the High Court's injunction to the Irish

84. S.P.U.C. v. Open Door, 1988 I.R. 593, 613 (Ir. H.Ct.).

85. *Id.* at 614-15.

86. *Id.* at 617.

87. *Id.* Judge Hamilton left no doubt about his position on the issue when he stated:

[T]here can be no doubt but that abortion, which is an interference with and destruction of the right to life of the unborn, is contrary to national policy, public morality, contrary to law, both common and statute law, to the fundamental right of the unborn and contrary to that right to life as acknowledged by the Eighth Amendment to the Constitution.

Id. at 614.

88. *Id.* at 617.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 618.

93. *Id.* Judge Hamilton thus avoided having to deal with the considerably more complex issue of a conflict between Irish and European law.

Supreme Court.⁹⁴ On March 16, 1988, delivering the Supreme Court's judgment,⁹⁵ Chief Justice Finlay granted an injunction ordering that the defendants

be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise.⁹⁶

The opinion dismissed all five of the issues raised by the appellants⁹⁷ and

94. *See supra* note 11. Five issues were brought by the appellants: (1) the Attorney General did not have standing to maintain this action; (2) the finding that the defendants' activities constituted counselling and assisting pregnant women to go abroad for the purpose of having an abortion was not supported by the evidence; (3) the injunction would be ineffective in preventing abortion abroad and was, therefore, not an order which the Court should have issued; (4) the right to receive and impart information was an unenumerated constitutional right; and (5) the Supreme Court was bound by Article 177 of the Treaty of Rome to request a ruling from the European Court of Justice on the issue of whether women residing in Ireland had a right to travel to another Member State for the purpose of seeking an abortion. *S.P.U.C. v. Open Door*, 1988 I.R. 619 (Ir. S.C.).

Article 177 states that:

The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal *shall* refer the matter to the Court of Justice.

Treaty Establishing the European Economic Community, Mar. 25, 1957, art.177, 298 U.N.T.S. 3 (emphasis added).

95. *S.P.U.C. v. Open Door*, 1988 I.R. 619 (Ir. S.C.).

96. *Id.* at 452.

97. *Id.* at 447-51. The only concession made to the appellants consisted of a modest change in the wording of the High Court's declaratory order and

found that the freedom of expression was secondary to the unborn fetus' right to life.⁹⁸

In September 1988, the appellants filed applications with the European Commission of Human Rights, claiming that the Irish Supreme Court judgment violated Articles 8, 10, and 14 of the European Convention of Human Rights.⁹⁹ The Commission agreed, finding that based on the facts of the case, Ireland had violated Article 10(1) of the European Convention of Human Rights and Fundamental Freedoms, and concluding that the injunction was not authorized by law.¹⁰⁰ The Commission stated that the constitutional amendment banning abortion would not prohibit the type of non-directive expression in which the applicants engaged.¹⁰¹ This form of expression was not prohibited by any provision of criminal law, nor was it a civil tort.¹⁰² Additionally, the Commission noted that the constitutional provision addressed only the State, and not private individuals.¹⁰³ Thus, the Commission forwarded the case to the European Court of Human Rights for adjudication.¹⁰⁴

S.P.U.C., however, was not content to just shut down the two clinics. Shortly after the Supreme Court issued its permanent injunction against the family planning clinics, S.P.U.C. accelerated its anti-abortion information campaign against others.¹⁰⁵

restraining order, due to a difference in the interpretation of the word "counselling." The Court made note of the "difference between the interpretation of the word counselling in the criminal law and . . . in the form of non-directive counselling . . . provided by these defendants. . . ." *Id.* at 451-52.

98. Friedman, *supra* note 74, at 84. In response, Ruth Riddick, the director of Open Door Counselling, decided to close her counselling center "for fear of her clients suffering legal repercussions in a climate of cuddly foetus propaganda and moral hysteria . . ." Lesley White, *A Woman With a Cause Fights Off Old Ireland*, Sunday Times, Nov. 1, 1992.

99. Memorial of Open Door Counselling Limited at 8, Open Door Counselling Limited and Dublin Well-Woman Centre Limited v. Ireland, App. Nos. 14234/88 and 14235/88, slip op. (Eur. Ct. H.R. Oct. 29, 1992).

100. Open Door Counselling v. Ireland, slip op. (Eur. Comm'n H.R. Mar. 7, 1991).

101. *Id.* at 11-14.

102. *Id.* at 12-13.

103. *Id.*

104. See *infra* Section V and accompanying text.

105. Colvin, *supra* note 34, at 498.

B. S.P.U.C. v. Coogan

On July 20, 1988, S.P.U.C. inquired if the Attorney General would take action in the courts to prevent the printing, publishing or distributing of a student publication entitled the Welfare Guide UCD (University College Dublin) 1988/1989.¹⁰⁶

When the Attorney General replied that he did not propose taking legal action,¹⁰⁷ S.P.U.C. flexed its newly found muscle and applied to the High Court for an interlocutory¹⁰⁸ injunction restraining the ten named defendants¹⁰⁹ and their servants or agents from printing, publishing, or distributing the student guide.¹¹⁰ S.P.U.C. claimed the guide violated Article 40.3.3 by including information about the identity and location of clinics in England and Wales where abortions are performed.¹¹¹

Judge Carroll of the High Court issued her judgment on September 7, 1988, stating that the issue in the case was not the Supreme Court's judgment in *S.P.U.C. v. Open Door Counselling*, but rather, the right of the plaintiff to an interlocutory injunction.¹¹² The Court noted that "[t]he plaintiff has assumed the self-appointed role of policing the Supreme Court judgment."¹¹³ After warning the involved students that they should "study the judgment carefully, apply it to the contents of the guide and be very clear that if they disregard the judgment they are breaking the law and will have to take the consequences," Judge Carroll declined to grant the plaintiff's application based on a lack of standing.¹¹⁴

S.P.U.C. appealed to the Supreme Court,¹¹⁵ and on July 28, 1989 the five-member panel issued its ruling, allowing the appellant's appeal by a 4-1 vote.¹¹⁶ Holding that S.P.U.C. had standing to sue for an injunction, Chief Justice Finlay wrote that the only issue to be decided

106. S.P.U.C. v. Coogan, 1989 I.L.R.M. 526 (Ir. H.Ct.), *rev'd*, 1990 I.L.R.M. 70 (Ir. S.C.). The student guide contained information about the availability of legal abortion services in the United Kingdom. *Id.*

107. *Id.* at 527.

108. An interlocutory order decides an intervening matter which must be settled in order to enable an adjudication on the merits. Black's Law Dictionary 815 (6th ed. 1990).

109. Named as defendants were eight elected officers of the UCD Students' Union, a printer, and the UCD itself. S.P.U.C. v. Coogan, 1990 I.L.R.M. 70, 71 (Ir. S.C.).

110. S.P.U.C. v. Coogan, 1989 I.L.R.M. 526, 526-27 (Ir. H.Ct.).

111. *Id.*

112. *Id.* at 527.

113. *Id.*

114. *Id.*

115. *Id.*

116. S.P.U.C. v. Coogan, 1990 I.L.R.M. 70, 70-84 (Ir. S.C.).

was whether the exclusive right to seek an injunction in the circumstances of this case was vested in the Attorney General.¹¹⁷ The Court added the Attorney General as a notice party, noting that it would be inappropriate to reach a decision on that issue without giving the Attorney General an opportunity to be heard.¹¹⁸ The Attorney General disclaimed any exclusive right to prosecute cases of this kind.¹¹⁹ Rather, he suggested, and the Court confirmed, that the appropriate test for ascertaining valid standing was "whether the proceedings were instituted by reason of a *bona fide* concern and interest in the actual or threatened constitutional infringement by a person who could establish a proximity to that infringement"¹²⁰

The Chief Justice stated that allowing only the Attorney General to sue to protect constitutional rights would "be a major curtailment of the duty and power of the courts to defend and uphold the Constitution."¹²¹ The Court ultimately ruled that because of the role the plaintiff played in the earlier case, *S.P.U.C. v. Open Door Counselling*,¹²² and because of the importance of the societal right it was trying to protect, S.P.U.C. had legally sufficient standing to sue.¹²³ Rather than pursuing the *Coogan* remand back in the High Court, S.P.U.C. expanded the scope of its effort to ban the dissemination of information pertaining to foreign legal abortion.

C. S.P.U.C. v. Grogan

On September 25, 1989, knowing from *Coogan* that it had standing to do so, S.P.U.C. issued a plenary summons and sought an interlocutory order against another group of students: members of the Union of Students of Ireland, the Students' Union of University College Dublin, and the Students' Union of Trinity College Dublin.¹²⁴ Once again, the defendants were accused of publishing and intending to distribute information about the identity, location, and method of communication with abortion clinics in the United Kingdom, in violation of Article 40.3.3 of the Constitution.¹²⁵

117. *Id.* at 72-73.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 73.

122. *See supra* notes 73-105 and accompanying text.

123. *S.P.U.C. v. Coogan*, 1990 I.L.R.M. 70, 74 (Ir. S.C.).

124. *Society for the Protection of Unborn Children Ireland Limited v. Stephen Grogan*, 1989 I.R. 760, 762 (Ir. S.C.).

125. *Id.* At the hearing of the High Court, the defendants claimed they were

entitled to publish and distribute this information by virtue of European Community law. *Id.* Describing the general role of Community law, Hartley states:

[T]he European Community is based on the consent of the Member States. Underlying the consent is the tacit assumption that all the Member States will play the game according to the same rules. National governments are prepared to accept the rules of Community law which are against their interests, but benefit others, if other Member States are prepared to do the same when the balance of advantage is reversed. . . . It also follows from these premises that Community law must override national law in the event of a conflict: if this were not so, Member States could avoid the application of Community rules disadvantageous to their interests by the simple expedient of passing conflicting legislation.

T.C. Hartley, *The Foundations of European Community Law* 181 (1988).

The defendants argued that pregnant women, under Community law, had a right to receive information about the availability of abortion outside Ireland. *S.P.U.C. v. Grogan*, 1989 I.R. 760 (Ir. S.C.). Under Articles 59 and 60 of the Treaty of Rome, Irish nationals had a right to travel to another Member State to receive medical services lawfully provided there. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 59-60, 298 U.N.T.S. 3. Article 59 states:

Within the framework of the provisions set out below, restrictions on the free supply of services within the community shall be progressively abolished in the course of the transitional period in respect of nationals of Member States of the Community other than that of the person to whom the services are supplied.

The Council, acting by means of a unanimous vote on a proposal of the Commission, may extend the benefit of the provisions of this Chapter to cover services supplied by nationals of any third country who are established within the Community.

Id.

Article 60, addressing the meaning of "services," states:

Services within the meaning of this Treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons.

Services shall include in particular:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) artisan activities; and
- (d) activities of the liberal professions.

Without prejudice to the provisions of the Chapter, relating to

The High Court defined the issue as whether the right to receive information gives rise to a corresponding right to impart information.¹²⁶ Judge Carroll, who had previously questioned S.P.U.C.'s standing¹²⁷ in *S.P.U.C. v. Coogan*,¹²⁸ this time referred the question to the European Court of Justice under Article 177 of the Treaty of Rome¹²⁹ for a preliminary ruling before she decided whether to grant an injunction.¹³⁰ However, as the parties were aware that an opinion by the Court of Justice would probably take eighteen months, S.P.U.C. once again sought intervention from the friendly Supreme Court.

While the defendants challenged the jurisdiction of the Supreme Court on the grounds that Judge Carroll had not made an appealable ruling, S.P.U.C. argued that the High Court had, in fact, made two decisions: a referral to the European Court of Justice and a failure to issue an interlocutory injunction.¹³¹ As in the past, the Supreme Court ruled in favor of S.P.U.C.¹³² Essentially the Court failed to distinguish the

the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

Id.

Correlative to the right to travel for medical services is the right to receive information regarding those services. The students maintained, therefore, that by implication they had a right to impart such information. S.P.U.C. v. Grogan, 1990 1 C.M.L.R. 689, 692-93 (Ir. H.Ct.).

126. S.P.U.C. v. Grogan, 1990 1 C.M.L.R. 689, 692-93 (Ir. H.Ct.). Irish Supreme Court Justice Brian Walsh noted that "[i]n both Irish and American constitutionalism the notion of unenumerated or unspecified natural rights has been accepted." Casey, *supra* note 31, at vii-viii.

127. See *supra* notes 112-114 and accompanying text.

128. S.P.U.C. v. Coogan, 1989 I.L.R.M. 526 (Ir. H.Ct.).

129. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 3. See *supra* note 94.

130. Order of the High Court, Oct. 11, 1989, S.P.U.C. v. Grogan, 1990 1 C.M.L.R. 689, 692 (Ir. H.Ct.). Article 177 of the Treaty provides that any national court may refer prejudgment questions to the Court of Justice to clarify Community law if necessary to render a judgment. Treaty Establishing the European Economic Community, *supra* note 94.

131. *Id.*

132. S.P.U.C. v. Grogan, 1990 1 C.M.L.R. 689, 694-706 (Ir. S.C.). Citing Article 34.4.3 of the Constitution, Chief Justice Finlay declared that the purpose of plaintiff's application for an interlocutory injunction would be lost due to the length of time needed to render a decision. *Id.* at 696. Article 34.4.3 states: "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law." Ir. Const. art. 34.4.3.

activities of the defendants in the present case from those of the defendants in *S.P.U.C. v. Open Door Counselling*.¹³³ "It is clearly the fact that such information is conveyed to pregnant women, and not the method of communication which creates the unconstitutional illegality . . ." ¹³⁴

As for the issue of a potentially adverse ruling from the European Court of Justice, Chief Justice Finlay expressed little concern.¹³⁵ Justice Walsh added in his concurring opinion that any response from the Court of Justice would be considered only in light of Ireland's own constitutional provisions.¹³⁶

The statements made by the Irish Supreme Court go directly against the jurisprudence of the European Court of Justice.¹³⁷ The latter Court stated in 1978 that Community law takes precedence over all national law,

The Chief Justice went on to rule that the "interests of the plaintiff are very clearly affected" by Judge Carroll's ruling, and that "in seeking to reverse that ruling by appeal in this Court the plaintiff is asserting an important constitutional right." *S.P.U.C. v. Grogan*, 1990 1 C.M.L.R. 689, 696-97 (Ir. S.C.). The Court's reference is to the right of due process of law. For any Act of Parliament "to provide an exception or regulation to the constitutional right of appeal from the High Court to the Supreme Court, clear and unambiguous terms would be necessary because of the fundamental nature of that right." *Id.*

133. *S.P.U.C. v. Grogan*, 1990 1 C.M.L.R. 689, 698 (Ir. S.C.). "I reject as unsound the contention that the activity involved in this case . . . can be distinguished from the activity condemned by this Court in *Open Door Counselling* . . ." *Id.*, citing *S.P.U.C. v. Open Door*, 1988 I.R. 619 (Ir. S.C.).

134. *S.P.U.C. v. Grogan*, 1990 1 C.M.L.R. 689, 698 (Ir. S.C.).

135. Chief Justice Finlay stated:

If and when a decision of the European Court of Justice rules that some aspect of European Community law affects the activities of the defendants impugned in this case, the consequence of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered by these courts.

Id. at 699.

136. "In the last analysis only this Court can decide finally what are the effects of the interaction of the Eighth Amendment of the Constitution and the Third Amendment of the Constitution." *Id.* at 703.

137. Concerning the supremacy of European Community law, the Court of Justice held in a case known as *IHG* that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." *IHG* Case 11/70, 1970 E.C.R. 1125, 1134, 1972 1 C.M.L.R. 255, 283, cited in Colvin, *supra* note 34, at 476 n.2, 502, n.170.

including constitutional or fundamental rights.¹³⁸

The European Court of Justice delivered its judgment in *S.P.U.C. v. Grogan* on October 4, 1991,¹³⁹ addressing the three questions referred by the Irish High Court. As to whether medical termination of pregnancy constituted a service within the meaning of Article 60 of the EEC Treaty, the Court answered affirmatively,¹⁴⁰ stating that abortion qualifies as a service under Article 60 because it is a service normally provided by remuneration.¹⁴¹

After finding abortion a service, the Court next considered the second and third questions of whether it is contrary to Community law for a Member State in which abortion is illegal to prohibit students' associations from distributing information about lawful abortion clinics.¹⁴² The Court answered the inquiry by again focusing on Article 59 of the EEC Treaty.

The Court held that the links between the activities of the students' associations and the abortion clinics was "too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty."¹⁴³ Thus, in finding that the students were unable to raise the issue of restriction of services offered in other States, the Court declined to consider the compatibility of the information ban with European Community law.¹⁴⁴

Two implications flowed from the European Court of Justice's decision that the EEC Treaty afforded no remedy to the students. First, Article 62 of the Treaty, which prevents the imposition of any new restrictions on services in place at the creation of the Treaty,¹⁴⁵ would

138. *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, 1978 3 C.M.L.R. 263.

139. *S.P.U.C. v. Grogan*, Case C-159/90, 1991 E.C.R. ___, 1992 3 C.M.L.R. 849, 856.

140. *Id.*

141. *Id.* Additionally, the Court found that abortion fell within the requirement of section (d) of Article 60, which includes activities of the professions, since it is a procedure performed by physicians. *Id.*

142. *Id.*

143. *Id.* at 891. "The Court interpreted Articles 59 and 60 . . . to the effect that . . . the defendant students had no commercial link with the English clinics, that therefore the prohibition resting on the students did not constitute a restriction on the activities of the clinics, that therefore Article 59 was not breached . . ." *Id.* at 850 (emphasis in original).

144. Colvin, *supra* note 34, at 478, 504.

145. Article 62, which speaks directly to an essential issue in this case, states that: "Except where otherwise provided for in this Treaty, Member States shall not introduce any new restrictions on the freedom which has been in fact achieved, in regard to the supply of services, at the date of the entry into force of this Treaty." Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 62, 298 U.N.T.S. 3.

not be applicable. The Court, therefore, did not consider whether the ban on information was a new restriction.¹⁴⁶ Second, the possibility of an appeal to the European Human Rights Convention¹⁴⁷ was precluded because the Court of Justice failed to resolve the conflict between the right of freedom of expression guaranteed by Article 10(1) of the Convention¹⁴⁸ and the Eighth Amendment of the Irish Constitution guaranteeing the right to life of a fetus.¹⁴⁹ In finding that *S.P.U.C. v. Grogan* did not implicate EEC law, the Court lacked jurisdiction to consider an appeal to the Human Rights Convention¹⁵⁰ because only Community law violations are appealable to the Convention.¹⁵¹

In the meantime, *S.P.U.C. v. Grogan* wound its way back to the Irish High Court for adjudication on the merits.¹⁵² *S.P.U.C.* was still

146. *S.P.U.C. v. Grogan*, 1991 3 C.M.L.R. 849, 892.

147. See *infra* notes 159-68 and accompanying text.

148. Article 10 of the Human Rights Convention states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime for the protection of health or morals, for the protection of the . . . rights of others . . .

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art.10, 213 U.N.T.S. 221, 230 (1955).

149. *Ir. Const.* art. 40.3.3.

150. *S.P.U.C. v. Grogan*, 1991 3 C.M.L.R. 849, 892. The Court stated that it has no power to examine the compatibility with the European Convention of Human Rights on national legislation lying outside the scope of Community law. *Id.*

151. The European Court of Justice ensures that European Community law is enforced, irrespective of political considerations; to act as referee between Member States and the Community; and to protect the rights of the individual from infringement. Hartley, *supra* note 125, at 49. The Court has no inherent jurisdiction. Rather, it has only such jurisdiction as is conferred on it by the various Community Treaties. *Id.* at 56. "It is generally recognized that Community law is a separate legal system, distinct from, though closely linked to, both international law and the legal systems of the Member States." *Id.* at 85.

152. The following is a recap of the significant dates in the *S.P.U.C. v. Grogan* proceedings:

Sept. 25, 1989	Plaintiff issues plenary summons;
Oct. 9, 1989	High Court hearing; Court declines to issue

seeking a permanent injunction enjoining the fourteen named student union leaders from distributing information about abortion services available in the United Kingdom.¹⁵³

On August 7, 1992 the High Court issued its ruling, holding that the fourteen students had violated the nearly three-year-old temporary injunction against the dissemination of information on the availability of abortion services outside of Ireland.¹⁵⁴ Following the Court's ruling, Maxine Brady, president of the Union of Students in Ireland, said she and her co-defendants were prepared to go to jail and promised to continue providing the information on United Kingdom pregnancy advisory services.¹⁵⁵

	injunction pending decision by European Court of Justice on whether European Community law is applicable;
Dec. 19, 1989	Supreme Court issues injunction, overruling High Court;
Oct. 4, 1991	European Court of Justice decides that EEC Treaty does not apply to case;
Aug. 7, 1992	High Court rules on the merits.

153. Alan Murdoch, *Students Defend Right to Abortion Information*, *The Independent*, Aug. 7, 1992, at 6. Arguments raised by the defendants included: (1) similar information was readily available elsewhere, such as British telephone books and women's health books sold in Dublin bookstores; (2) travel rights as guaranteed by European Community law could not be separated from the right to receive or give information; and (3) due to the potential for complications, protection of the bodily integrity of women requires that they have access to basic information. *Id.* S.P.U.C. rejected the idea that abortion referral was a "service" under European Community law, because it was not supplied in return for remuneration. *Id.* It further argued that none of the students' rights could balance or exceed the right to life of the unborn child. *Id.* It concluded that the rights to bodily integrity also are not on a par with the right to life of the unborn. *Id.*

154. *Reproductive Freedom News*, Aug. 21, 1992, at 7. In granting a permanent injunction, the Court also passed case papers to the Director of Public Prosecutions for possible criminal contempt proceedings against students who had breached the earlier temporary injunction. Alan Murdoch, *Fresh Ban on Abortion Information in Ireland*, *The Independent*, Aug. 8, 1992, at 3.

155. Murdoch, *supra* note 154.

V. OPEN DOOR COUNSELLING v. IRELAND

The original *S.P.U.C. v. Open Door Counselling*¹⁵⁶ now was scheduled to be adjudicated by the European Court of Human Rights under the caption *Open Door Counselling Limited and Dublin Well-Woman Centre Limited v. Ireland*.¹⁵⁷ A brief examination of the structure of the European Community and its legal institutions may provide some clarity.¹⁵⁸

The European Community is an amalgam of four treaties created to form a united Europe.¹⁵⁹ The major political and legal institutions of the European Community are: (1) the Commission of European Communities, the fourteen-member body that serves as an executive branch in the enforcement of Community law; (2) the Council of the European Communities, made up of one representative from each Member State, that acts as the legislative branch; (3) the European Parliament, consisting of 518 representatives apportioned to Member States, that functions primarily as advisor to the Commission and the Council; and (4) the European Court of Justice which serves the Community as the adjudicator of European Community law.¹⁶⁰

In response to the atrocities of World War II, the Council of Europe¹⁶¹ was created in 1949 with the purpose of authoring a charter for

156. *S.P.U.C. v. Open Door*, 1988 I.R. 593 (Ir. H.Ct.).

157. *Open Door Counselling v. Ireland*, (Eur. Ct. H.R. Oct. 29, 1992).

158. See Gordon L. Weil, *A Handbook on the European Economic Community* (1973); H. Schermers, *Judicial Protection in the European Communities* (3rd ed. 1983); Joseph W.W. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 Wash. L. Rev., 1103 (1986).

159. The first was the April 1951 treaty which formed the European Coal and Steel Community. Treaty of Paris, Apr. 18, 1951 (Bull. EC 2-1978, 22; 2-1981, 13; 3-1981, 87; 5-1981-7). The Treaty of Rome, signed in 1957, created the European Economic Community. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. The third treaty was the Single European Act of 1986. Single European Act, Feb. 28, 1986, O.J. 1987 L169/1; Suppl. 2/86 Bull. EC. Finally, in February 1992, twelve European nations signed the Treaty of European Union at Maastricht, the Netherlands. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter *Maastricht*].

160. See Ralph H. Folsom, *European Community Law* 25-36 (1992).

161. In 1948 numerous political groups advocating a united Europe convened the Congress of Europe at The Hague. P.J.G. Kapteyn & P. Verloren Van Themaat, *Introduction to the Law of the European Communities* 3 (1973). Resolutions calling for political and economic union resulted in the Statute of the Council of Europe signed on May 5, 1949. *Id.*

the protection of fundamental human rights.¹⁶² To carry out its mandate, the Council of Europe created the European Convention on Human Rights.¹⁶³

The European Commission on Human Rights hears complaints from Member States and their citizens, and attempts to settle disputes between parties.¹⁶⁴ If unable to do so, the Commission determines the admissibility of an application to prosecute a matter before the European Court of Human Rights.¹⁶⁵ The decisions of the European Court of Human Rights theoretically are binding on the signatories to the Convention who agreed to abide by the decisions of the Court.¹⁶⁶ While the Court cannot compel compliance with its rulings,¹⁶⁷ a country that

162. The Council of Europe consists of delegates who are government ministers of the Member States. It is the body that takes most EEC legislation and concludes agreements with foreign countries. Hartley, *supra* note 125, at 13-14.

163. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The Convention was signed by twenty-three nations in 1950 and entered into force on September 3, 1953. *Id.* See also P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice in the European Convention on Human Rights* (1990). The European Community attributes prime importance to the fundamental rights derived from the Convention. E.A. Alkema, Comment, *The EC and the European Convention of Human Rights - Immunity and Impunity for the Community?*, 16 Common Mkt. L. Rev. 501-08 (1979). In a joint declaration the Community stated that it will continue to respect such rights to realize Community aims. Common Declaration of the European Parliament, the Council and Commission of the European Community, O.J. 1977 C 103/1.

164. The Commission is an administrative body that receives applications from either a Member State, an individual, a group of individuals, or a non-government organization only after domestic remedies are exhausted. Procedurally, after accepting an application, the Commission ascertains the facts and attempts to mediate a settlement. If it is unsuccessful, a report is prepared which contains a statement of the facts, as well as an opinion as to whether there is a breach of obligation under the Convention. At this point the case may be brought before the European Court of Human Rights either by the Commission or by the concerned State. J.G. Merrills, *The Development of International Law By the European Court of Human Rights* 2-3 (1988).

165. See Russell M. Dallen, *An Overview of European Community Protection of Human Rights, With Some Special References to the U.K.*, 1990 Common Mkt. L. Rev. 761.

166. The European Court of Human Rights was established in 1959 to guarantee enforcement of the terms agreed to by the parties to the European Convention on Human Rights. As a result of the Convention, "individuals can obtain redress for violations of their rights and bring about changes in domestic law and practice . . ." Merrills, *supra* note 164, at 1-2.

167. "[T]he fact that a State is a party to a human rights treaty means that there is a legal yardstick against which its practice can be measured, while

refuses to comply can be expelled from the Convention.¹⁶⁸

On October 29, 1992, the European Court of Human Rights residing in Strasbourg, France ruled by a vote of 15-8 that the Irish Supreme Court's ban on the provision of abortion information violated Article 10(1)¹⁶⁹ of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷⁰ As a result of that ruling, the European Court of Human Rights, an arm of the twenty-six nation Council of Europe, awarded the Dublin Well-Woman Centre £27,964 for loss of income and £111,857 in costs, and Open Door Counselling £77,165 in costs.¹⁷¹ Speaking for the Court, Rolv Ryssdal, the Norwegian president of the Court, stated that "the restraint imposed by imparting information was disproportionate to the aim of protecting the right to life of the unborn as safeguarded in the Irish constitution."¹⁷²

The court paid particular attention to the fact that both plaintiff organizations provided *non-directive* information to their clients.¹⁷³ Ryssdal stated that "[t]here can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended."¹⁷⁴ The judgment also recognized the women's health issue. "The available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of some pregnant women who were now seeking abortions at a later stage due to lack of proper counselling and failure to undergo post-abortion medical supervision."¹⁷⁵

politically the issue of rights will be more prominent than might otherwise be the case." *Id.*

168. The jurisdiction of the Court is accepted by a State making a general declaration that it recognizes the Court's jurisdiction as compulsory. *Id.* at 3. See also John Temple Lang, *The Development of European Community Constitutional Law*, 25 Int'l Law. 455 (1991).

169. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), 213 U.N.T.S. 221, 230. See *supra* note 148.

170. *Ireland Violating Human Rights on Abortion, Court Rules*, Agence France Presse, Oct. 29, 1992. The Court did not consider Ireland's constitutional ban on abortion. *Id.*

171. Tim Jackson & Alan Murdoch, *Dublin Loses Case Over Right to Abortion Advice*, *The Independent*, Oct. 30, 1992, at 4.

172. *Open Door Counselling v. Ireland*, slip op. (Eur. Ct. H.R. Oct. 29, 1992); Chris Ryder, *Irish Advice Ban on Abortion Ruled a Breach of Rights; Women's Groups Welcome Strasbourg Verdict That Injunction Against Information on Ending Pregnancies is 'Over-Broad'*, *Daily Telegraph*, Oct. 30, 1992, at 11.

173. *Id.*

174. *Id.*

175. Geoff Meade, *Court Rules Against Irish Over Abortion*, *Press Association Newsfile*, Oct. 29, 1992.

The court boldly declared that in the moral domain, the state does not possess an absolute discretionary power, insusceptible to control.¹⁷⁶ Furthermore, it added that liberty of expression applies to information or ideas that go against, shock or concern the state, or any section of the population.¹⁷⁷

Open Door Counselling's director, Ruth Riddick,¹⁷⁸ now could reopen her doors. "It has been a long haul. We have been seven years waiting for this. It looks as though we are now back on the road to seeing the restoration of non-direct pregnancy counselling services for Irish women."¹⁷⁹

VI. THE WORLD IS AWAKENED: *ATTORNEY GENERAL v. X*

On January 27, 1992 a fourteen-year-old Irish schoolgirl told her parents that she had been raped in early December by her best friend's father.¹⁸⁰ On February 5, after confirming her pregnancy and notifying the police about the rape, the girl and her family told the police that they intended to travel to England for the purpose of obtaining an abortion.¹⁸¹ They inquired as to the necessity of preserving a tissue sample for an anticipated prosecution of the rapist.¹⁸² After traveling on the 6th, the family received notice on the 7th that anti-abortion Attorney General Harold Whelehan¹⁸³ had requested and obtained a restraining order forbidding the girl from leaving Ireland.¹⁸⁴ They returned immediately. One week later the Attorney General went back to court seeking a permanent injunction.¹⁸⁵

176. *Ireland Violating Human Rights on Abortion, Court Rules*, Agence France Presse, Oct. 29, 1992.

177. *Id.*

178. *See supra* note 98.

179. Ryder, *supra* note 172.

180. *Attorney General v. X and others*, 1992 2 C.M.L.R. 277, 281, I.L.R.M. 401 (Ir. H.Ct.), 1992 2 C.M.L.R. 289, I.L.R.M. 401 (Ir. S.C.) [hereinafter *Attorney General v. X*].

181. *Id.*

182. *Id.*

183. The Irish Attorney General Harold Whelehan was a former counsellor at the Catholic Marriage Advisory Bureau and remains strongly opposed to any legalization of abortion in Ireland. Alan Murdoch, *Resignation Calls Over Irish Abortion Ban*, *The Independent*, Feb. 15, 1992, at 2.

184. *Attorney General v. X*, 1992 2 C.M.L.R. 277, 281, I.L.R.M. 401 (Ir. H.Ct.), 1992 2 C.M.L.R. 289, I.L.R.M. 401 (Ir. S.C.).

185. *Id.* at 283-84.

On February 17, the Dublin High Court, calling the case "painful and distressing," issued a permanent injunction banning the girl's travel for nine months.¹⁸⁶ While referring to rights under the Treaty of Rome¹⁸⁷ to free access to services available legally in other European Community countries, Judge Costello maintained that the Community allowed national governments discretion on moral issues.¹⁸⁸

Demonstrators filled the streets of Dublin the following week, carrying placards bearing slogans such as: "Rapists 1 - Women 0," "Human Rights for Rape Victims," and "Ireland Defends Men's Right to Procreate by Rape."¹⁸⁹ A newspaper editorial on February 18 stated that the criticism of the Attorney General was misplaced.¹⁹⁰ Rather, his devotion to the law

has merely drawn attention to the harsh and reactionary nature of Irish social policy and to the organized hypocrisy that is usually employed to mitigate its more distasteful effects Where the parents of the raped girl went wrong was to break the unwritten rules of the Irish hypocrisy game by acting in an open and honourable manner.¹⁹¹

The front page of *The Irish Times* on the 19th of February displayed a cartoon of Ireland surrounded by barbed wire. Under the drawing a caption read "17 February: Introduction of Internment in Ireland for 14-year-old girls."¹⁹² On the 23rd an opinion poll in Dublin's *Sunday Independent* revealed that 66 per cent of the Irish people want to change the constitution to permit abortion in limited circumstances.¹⁹³

186. *Id.* at 280. In his sixteen-page decision, Judge Declan Costello dismissed reports that the girl was suicidal, commenting that the risk that the victim would kill herself was "much less than the certainty that the unborn child's life would be terminated if the order was not made." *Id.* at 285. See also Alan Murdoch, *Rape Victim, 14, Denied Abortion; Uproar and Calls for Resignation of Irish Attorney General Follow Dublin High Court Ruling*, *The Independent*, Feb. 18, 1992, at 1.

187. See *supra* note 159 and accompanying text.

188. *Attorney General v. X*, 1992 2 C.M.L.R. 277, 286 (Ir. H.Ct.).

189. Murdoch, *supra* note 186.

190. *Ireland's Organised Hypocrisy*, *The Independent*, Feb. 18, 1992, at 16.

191. *Id.*

192. Responding to the cartoon, S.P.U.C. member Dr. Mary Lucey commented: "I don't think the English are as Rabelaisian as the Irish. Here they tell us to 'Spuc off.'" Cal McCrystal, *An Irish Dilemma In and Beyond the Pale; Mary Lucey, Vociferous Anti-Abortionist and Defender of Irish Catholic Values, Believes Courage is the Answer to Unwanted Pregnancies, Violently Inflicted or Not*, *The Independent*, Feb. 23, 1992, at 23.

193. Bennetto, *supra* note 12. Curiously, this figure was almost identical

Finally, on February 24¹⁹⁴ the Irish Supreme Court held closed hearings on an appeal by defendant Ms. X to the High Court's decision.¹⁹⁵ On February 26, Chief Justice Finlay pronounced in a one-sentence opinion that the appeal should be allowed and the High Court decision should be set aside.¹⁹⁶

to the 67% who voted for the 1983 constitutional amendment that guaranteed the "right to life of the unborn." Alan Murdoch, *Rape Victim's Case Softens Irish Attitudes to Abortion*, *The Independent*, Feb. 24, 1992, at 1. The Irish Times compared the country to the Iran of the Ayatollahs and the Romania of Ceausescu and called the case a "descent into cruelty." Dennis Duggan, *Ireland's Playing by the Boys' Rules*, *Newday*, Feb. 23, 1992, at 11. British Pregnancy Advisory Service spokeswoman Tara Kaufman expressed concern that the injunction could result in some women not reporting rape for fear they could be tracked down and punished if they had an abortion. Liz Hunt, *Abortion Network is Guarded Closely*, *The Independent*, Feb. 18, 1992, at 3.

194. On February 20 the family of Ms. X announced they would appeal the High Court ruling after the government informed them that it would pay the family's legal costs and help expedite an early hearing, given the limited time left for an abortion. Alan Murdoch, *Early Court Hearing on Abortion for Rape Victim*, *The Independent*, Feb. 21, 1992, at 2.

195. *Attorney General v. X*, 1992 2 C.M.L.R. 289, 291, I.L.R.M.401 (Ir. S.C.).

196. James F. Clarity, *Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, *N.Y. Times*, Feb. 27, 1992, at A1. An editorial in *The Irish Times* on the 27th proclaimed: "We have had the first shaft of official light in what must rank as one of the darkest fortnights in the history of the state." Dennis Duggan, *Ireland Rejoices, But What's Changed?*, *Newsday*, Feb. 28, 1992, at 15. The editorial continued:

Change is not the order of the day here. But tradition is part of the charm, although some would say exasperation, of the country. The Irish like to speak of "strange happenings" here. This case has certainly been a strange happening when you consider that it was the government that got itself into this pickle when it obtained an injunction forbidding the girl to travel to London and it was the government that offered to pay the \$50,000 it cost to appeal that decision in court.

Id.

Ruth Riddick, director of Open Door Counselling, described the situation, stating that:

[t]here was a spontaneous outpouring of feeling among ordinary people which forced the politicians to reconsider. It was the first time that we said as a people that there are circumstances where abortion is permissible. We didn't whisper it or say it in our private hearts, but we said it out loud.

White, *supra* note 98.

Cabdriver Michael Connolly observed: "The Court did the right thing. I'm

On March 5, 1992 the Irish Supreme Court published a fifty-four-page explanation of its one-sentence decision announced on February 26.¹⁹⁷ The Court's decision outraged anti-abortion groups who considered the ruling a betrayal of the spirit of the 1983 constitutional amendment.¹⁹⁸ Chief Justice Finlay's opinion states:

the test proposed on behalf of the Attorney General, that the life of the unborn child could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.¹⁹⁹

Thus, the Court significantly broadened the circumstances under which a woman in Ireland could receive a legal abortion. The Chief Justice summarized his opinion by stating that:

I therefore conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life - as distinct from the health - of the mother, which can only be avoided by the termination of her pregnancy, that such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution.²⁰⁰

The Irish Supreme Court in *Attorney General v. X* said abortion was legal in Ireland if there was a serious risk to the life of the mother; but at the same time, the rights of the unborn take precedence over the right of a woman to travel between European Community states.²⁰¹ So what is the law in Ireland? Under what circumstances will the courts find a sufficient risk to the life of a woman justifying an abortion? Chief Justice Finlay's opinion indicates that the threat of self-destruction will suffice. However, the standard of proof and the requirements needed to establish a sufficient showing of risk remain unclear. Justice McCarthy's concurring opinion launched a searing attack on Irish politicians for

not sure it's over, though. The government upset the females, and once you get up their backs, look out! It's like standing on the tail of a rattlesnake." Duggan, *supra*.

197. *Attorney General v. X*, 1992 2 C.M.L.R. 289, I.L.R.M. 401 (Ir. S.C.).

198. Carole Craig, *Ireland: A Bitter Campaign Likely for Abortion Referendum*, Inter Press Service, Oct. 7, 1992.

199. *Attorney General v. X*, 1992 2 C.M.L.R. 289, 300, I.L.R.M. 401 (Ir. S.C.).

200. *Id.*

201. *Id.*

giving no practical guidelines on how to reconcile the equal rights to life of the unborn child and the mother:

In the context of the eight years that have passed since the amendment was adopted and the two years since *Grogan's* case, the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the medical profession to do? . . . The amendment, born of public disquiet, historically divisive of our people, guaranteeing in its laws to respect and by its laws to defend the right to life of the unborn, remains bare of legislative direction.²⁰²

A noted Irish scholar and former Member of Parliament Conor Cruise O'Brien described the legal chaos: "Ireland now has the most ambiguous, confused and dangerous abortion law in Europe."²⁰³

VII. POLITICS REIGN SUPREME

A. The Maastricht Treaty

Following the turmoil of the *Attorney General v. X*, Prime Minister Albert Reynolds faced one political crisis after another as his government stumbled toward collapse. After March 5, 1992, when the Supreme Court ruled that abortion was legal in Ireland if there was a serious risk to the life of the mother, the Maastricht Treaty²⁰⁴ achieved greater significance as a focus for the abortion debate.²⁰⁵

202. *Id.* at 325.

203. Conor Cruise O'Brien, *A Constitutional Change Could Get Ireland Out of a Tight Spot on Abortion*, *Times of London*, Apr. 1, 1992.

204. Maastricht, *supra* note 159.

205. Walter Ellis, *Yes or No to the Irish Question?*, *Times of London*, June 16, 1992. During the drafting of the Treaty in 1991, concern was raised to then Prime Minister Charles Haughey that clauses dealing with the equal availability of services throughout the Community could be used as a vehicle for women's rights groups to "Bring in abortion by the back door." *Id.* Haughey responded by having Protocol 17, which protected Irish abortion law by exempting Ireland from any guarantees about a right to travel, or a right to information, included in the Treaty. *Id.* Protocol 17 states: "Nothing in the Treaty on European Union . . . shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland." Maastricht, *supra* note 159.

To anti-abortion activists it appeared that Protocol 17 would not work as planned and needed to be replaced by a more definite prohibition. Ellis, *supra*

On April 6, 1992, Reynolds traveled to Luxembourg in hope of getting the European Community partners to change the anti-abortion protocol by adding a phrase guaranteeing the right to travel and to abortion information.²⁰⁶ After expressing sympathy for Ireland's predicament, an 8-4 majority voted against reopening the Treaty to avoid setting a precedent leading to further requests which could undermine the Treaty.²⁰⁷

Upon his return home, Reynolds announced that a referendum would be held later in the year. He stated that a further amendment to the Constitution was the most likely way of protecting the right of Irish women to travel to other European Community states and to be given information on abortion services outside of Ireland.²⁰⁸ Additionally, he forcefully denied the Catholic Right's assertion that the Maastricht Treaty meant Europe "foisting unrestricted abortion on Ireland."²⁰⁹

As the June 18 vote on the Maastricht Treaty approached, those who favored the treaty argued it would keep Ireland solidly in the European Community.²¹⁰ Since its membership began in 1973 Ireland increased its level of prosperity due to increased trade and Community subsidies to the poorer countries.²¹¹ The government projected that the union would bring Ireland approximately \$10 billion over the next five years.²¹² The Maastricht Treaty was approved by 69 per cent of Irish voters.²¹³ The

note 205. Abortion rights advocates, however, saw the Protocol as a means of denying Irish women the same rights as other Europeans. *Id.* The ironic result was that neither side favored leaving the Irish law intact, and therefore, both sides called for a "no" vote on the Treaty. *Id.* Proponents of the Treaty quoted folk wisdom on Irish national pragmatism: "The Irish farmer believes in leprechauns, but he deals in pigs." James F. Clarity, *Irish Voters Ask, Are We to Be Truly European?*, N.Y. Times, June 18, 1992, at A6.

206. Edward Gorman, *Irish Government Agrees Referendum on Abortion*, Times of London, Apr. 8, 1992. In the wake of the recent Supreme Court ruling, the Reynolds government felt it necessary to propose an addendum to Protocol 17: "This Protocol shall not limit freedom to travel between Member States or to obtain, in Ireland, information relating to services lawfully available in Member States." O'Brien, *supra* note 203.

207. O'Brien, *supra* note 203.

208. Alan Murdoch, *Taoiseach Fends Off Demands for Referendum on Abortion*, The Independent, Apr. 3, 1992, at 3. Reynolds, recalling the polarization of the country in 1983, had been seeking to avoid a new referendum dealing with any aspect of the abortion issue. *Id.*

209. Murdoch, *supra* note 16, at 8.

210. James F. Clarity, *In Irish Debate, a Distinctly Contrary Voice*, N.Y. Times, June 9, 1992, at A15.

211. *Id.*

212. *Europe 'Back On the Rails' as Ireland Endorses Unity*, Chi. Trib., June 21, 1992, at C24.

213. *Id.*

outcome remained in doubt until the very day of the election.²¹⁴

B. The collapse of the Reynolds government and the new referendums.

The Supreme Court's ruling in *Attorney General v. X*²¹⁵ legalized abortion in certain circumstances. In response to anti-abortion groups demanding a constitutional amendment which would ban abortion in *all* circumstances,²¹⁶ and in anticipation that the European Court of Human Rights would issue a ruling at odds with Irish law, Prime Minister Albert Reynolds announced a new referendum.²¹⁷ On December 3, 1992 the people of Ireland would consider once again a constitutional amendment on the issue of abortion.²¹⁸ A three-question referendum would ask voters to consider the right to travel abroad for abortion, the right to receive information about legal abortion services, and lastly, the conditions under which an abortion might be performed legally in Ireland.²¹⁹

214. A poll published by The Irish Times on the day of the election showed 49% in favor, 28% opposed, and 23% undecided. Clarity, *supra* note 205,

215. See *supra* notes 180-203 and accompanying text.

216. Carole Craig, *Ireland: Abortion Debate Heats Up as Referendum Date is Announced*, Inter Press Service, Oct. 16, 1992.

217. James F. Clarity, *Ireland Renews Abortion Debate*, N.Y. Times, Oct. 27, 1992, at A8.

218. *Id.*

219. *Id.* This last question was to be resolved by an addition to the wording of Article 40.3.3 of the Constitution to include:

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

Id.

As noted by another commentator, the government's proposal represented two steps forward from the existing bans, but one step back from the Supreme Court's position:

[t]his position has failed to satisfy almost everybody. The anti-abortion campaign opposes abortion in any circumstances; women's groups oppose the narrowness of the grounds for abortion; and doctors are unhappy with its distinction between "life" and "health." Finally, opposition parties are angry because, they say, the government is trying to be all things to all people.

Debate over the upcoming referendums accelerated immediately after the European Court of Human Rights handed down its decision on October 29.²²⁰ The pro-choice umbrella organization Alliance for Choice launched the Irish Abortion Fundraising Campaign.²²¹ The drive helped assure the passage of the first two referendums.²²² The Campaign, however, adamantly opposed the third question. Those seeking to liberalize the abortion law saw it as "grossly offensive" to women and "profoundly misogynistic and immoral."²²³ Niamh Bhreathnach, the Labor Party's spokesperson on equality, commented: "[t]he government is asking us to be the first country in the world to write into our constitution an assertion that the health of women does not matter. It is hard to conceive of any proposition more offensive."²²⁴

Meanwhile, the Irish bishops of the Roman Catholic Church, a major moral influence in the country, issued a statement calling the referendum wording flawed, but stopped short of telling voters how to vote.²²⁵

As the debate over the referendums boiled, Albert Reynolds found himself embroiled in the most trivial of political fiascos including one which would cause his government to collapse.²²⁶ The crisis originated with Reynolds' statement that his Industry Minister Des O'Malley was "reckless, irresponsible and dishonest" during his testimony to a tribunal investigating Ireland's beef export industry.²²⁷ The dispute simmered for two weeks before O'Malley announced his resignation.²²⁸ When

Joe Joyce, *Irish Proposal on Abortion Pleases No One; Government's Plans Confuse Everyone*, *The Gazette* (Montreal), Oct. 15, 1992, at B4.

220. *Open Door Counselling v. Ireland*, slip op. (Eur. Ct. H.R. Oct. 29, 1992).

221. Gerald McCarthy, *Women Launch Abortion Vote Appeal*, *Press Association Newsfile*, Nov. 3, 1992.

222. *Id.*

223. Clarity, *supra* note 217, at A8.

224. Joyce, *supra* note 219.

225. Paul Majendie, *Irish PM Reynolds Loses Confidence Vote*, *Reuter Library Report*, Nov. 5, 1992. The Church issued a statement saying that a vote in favor of the third referendum would not be sinful because it would head off the possibility of more liberal legislation. Jim Mulvaney, *An Irish Fight Over Abortion Rights*, *Newsday*, Nov. 16, 1992, at 15.

226. Majendie, *supra* note 225.

227. *Id.*

228. "The dispute has caused considerable public confusion and annoyance. People calling in to radio talk shows said that if their children acted like the politicians, they would be spanked and put to bed without supper." James F. Clarity, *Coalition Government Falls Apart in Ireland*, *N.Y. Times*, Nov. 5, 1992, at A18. Reynolds held power in Parliament due to the coalition formed in February, 1992, when the six members of the Progressive Democrats joined the seventy-seven members of his Fianna Fail Party to give him a governing majority. *Id.* However, during the following nine months Reynolds clashed

O'Malley and two other ministers resigned from the cabinet on November 4 the resignations forced a vote of confidence in Parliament the next day. Reynolds lost by a vote of 88-77 forcing a snap general election called for November 25.²²⁹ He was forced to move up the vote on the abortion referendums to coincide with the general election.²³⁰

As election day drew near, a bizarre and unexpected alliance emerged between the most ardent abortion reform proponents and the most vehement opponents to any concession on abortion.²³¹ Pro-choice advocates argued that a "yes" vote on the third referendum would crush the hopes of liberalizing the most rigid abortion law in Europe. Those opposed said that even this extremely "limited concession would open the floodgates to abortion less than 10 years after Ireland voted overwhelmingly in a 1983 referendum enshrining its abhorrence to abortion in any circumstances."²³²

C. Outcome and Aftermath

The people of Ireland voted.²³³ Albert Reynolds lost. Fianna Fail and Fine Gael²³⁴ lost. The Labour Party and its charismatic, young leader Dick Spring won.

Women won. And Ireland won. The first referendum on the right to travel abroad for an abortion passed 62.3% to 37.7%.²³⁵ Voters approved 59.8% to 40.2% the second referendum allowing public dissemination of information on abortion services in other countries.²³⁶ Justice Minister Pdraig Flynn interpreted the third referendum, defeated 34.6% to 65.4%, as a vote "in favour of limited abortions. The new government will have

numerous times with O'Malley over political maneuvers. *Id.*

229. Majendie, *supra* note 225.

230. *Id.*

231. Jill Serjeant, *Ambiguous Abortion Vote Produces Bizarre Alliance*, Reuter Library Report, Nov. 24, 1992.

232. *Id.*

233. Fianna Fail won only 39.1% of the vote, its worst showing since 1927. Fine Gael dropped to 24.5%, its worst performance since 1948. Labour was the big winner, rising from 9.5% to 19.3%. Women were also big victors, winning 20 seats of the 165 contested. This amounted to an increase of 53% from the 13 they held in the old legislature. *Negotiations Start to Form New Government*, Agence France Presse, Nov. 28, 1992; James F. Clarity, *Irishwomen on the March, to Seats in Parliament*, N.Y. Times, Nov. 30, 1992, at A4.

234. Fianna Fail and Fine Gael were the two original political parties when Ireland gained its independence. *See supra* note 5.

235. *Irish Voters Reject Abortion*, Agence France Presse, Nov. 28, 1992.

236. *Id.*

to deal with it as a matter of urgency."²³⁷

At first glance it appeared that the Irish would continue to export their abortion problem to England and Wales, a course of action worthy of the appellation "an Irish solution to an Irish problem."²³⁸ However, immediately following the election politicians pledged to introduce legislation taking into account circumstances such as rape, incest, and risk of suicide as grounds for abortion.²³⁹ In analyzing the election, Conor Cruise O'Brien observed:

Overall, the results of the election and of the referenda suggest that the two most powerful institutions in Ireland the Catholic Church and the Fianna Fail party are in slow but terminal decline. Both are ceasing to be credible. Both are slowly retreating into the West It is only a matter of time, perhaps, before the prohibitions of divorce and of abortion are both removed from the constitution.²⁴⁰

On December 11, 1992, a forty-two-year-old Dublin businessman was ordered to stand trial on nine charges involving the sexual assault of a now fifteen-year-old Irish girl.²⁴¹

It was also recently learned that the same young rape victim never had her pregnancy terminated. She had an unexpected miscarriage following a laboratory test. She has made "remarkable progress" and is expected to recover fully from her ordeal.²⁴²

VIII. CONCLUSION

The events of 1992 illustrate that Ireland remains a country ravaged by conflict throughout its society. Although a fiercely independent nation, Irish voters accepted the Maastricht Treaty on European Union with its goals of political and economic unity. The economic and financial rewards and incentives for a country with a struggling economy were too enticing to overcome.

237. *Id.*

238. *See supra* note 1 and accompanying text.

239. Jill Serjeant, *Legal Abortion on the Way Despite Irish "No" Vote*, Reuter Library Report, Nov. 29, 1992.

240. Conor Cruise O'Brien, *Slow Collapse of the Irish Colossus*, Times of London, Nov. 28, 1992.

241. Chris Parkin, *Man for Trial Over Abortion Row Girl*, Press Association Newsfile, Dec. 11, 1992.

242. Wendy Holden, *Girl in Irish Abortion Row Lost Her Baby*, Daily Telegraph, Nov. 23, 1992, at 1.

On the political seascape, Ireland is exploring uncharted waters following the year-end election. The two dominant political parties throughout the country's history seem to be in major decline; election of the first Labour government appears imminent.

But in Irish society, social reform and welfare are the areas most troubled by confusion and hypocrisy. No issue has caused more social upheaval in Ireland than abortion. 1992 brought pain, shock, turmoil, some relief, and a little hope to the pro-choice women and men of Ireland. It was a year of setback for opponents of choice.

The traumatic ordeal endured by a fourteen-year-old schoolgirl captured the attention of the world. Horror and shock were replaced by relief when the Irish Supreme Court showed a touch of humanity and lifted the lower court's unprecedented injunction prohibiting Ms. X from leaving the country while pregnant. How sweetly ironic that in correcting for the outrageously insensitive action of the Dublin High Court, the Irish Supreme Court was actually forced to find a right to legal abortion in Ireland.

A determination in favor of a right to information and informed choice ended seven years of legal warfare over the legality of providing Irish women with information about abortion services outside of Ireland. Open Door Counselling and the Dublin Well-Woman Centre emerged victorious both in court and at the polls.

The *Grogan* case finally came to rest. Although the High Court ultimately ruled against the students, their vindication came in the November referendum. One hopes that stifling the flow of knowledge and information will no longer be considered a viable means of controlling conduct.

Of course, the real issue concerning the circumstances under which an Irish woman can get a legal abortion remains completely unresolved. Between 1983 and 1992 one third of the Irish electorate changed its position on the legalization of abortion. Yet this issue has immobilized the courts and paralyzed the legislature. One must hope that a newly elected cadre of women will take the lead in Parliament to resolve this issue that rips at the fabric of Irish life. When Ireland finally can own up to the reality of women's and society's need for personal reproductive choice, it may at last succeed in discarding the phrase "an Irish solution to an Irish problem."

